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EVOLVING STANDARDS OF DECENCY:  
THE INTERSECTION OF DEATH PENALTY THEORY AND SUPREME COURT  
JURISPRUDENCE

By Rachel S. Sullivan

An Independent Study Thesis  
submitted to the Department of Political Science  
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Advisor: Mark Weaver

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## Introduction

The American criminal justice system is heavily influenced by racist and classist attitudes, relies on punishment rather than rehabilitation, and has done little to reduce the commission of crimes. One of the most defective aspects of this justice system is the death penalty, a punishment which is still imposed in the United States despite the fact that only five Western nations continue to apply it.<sup>1</sup> As I find the death penalty to be an immoral, ineffective punishment, I believe that it should be eradicated in the United States. In order to argue for the abolition of the death penalty, it is necessary to examine the political theory which defends or critiques the punishment. These theories include both philosophical arguments examining the death penalty in terms of justice and deterrence, and context-dependent analyses which evaluate punishment based upon its actual practice.

Although these theories provide a basis for critiquing and reexamining the American death penalty, the Supreme Court of the United States determines whether punishments are constitutional based upon the Eighth Amendment, and therefore eradicating the use of the death penalty in the United States will be decided by the Court. In this thesis, I will evaluate the major theories underpinning the American death penalty, and then analyze their intersections with Supreme Court jurisprudence in order to determine the Court's theoretical view of capital punishment and whether it is consistent. By revealing this theoretical framework, I will be able to determine which theories may be dispositive in a Supreme Court ruling abolishing capital punishment in all circumstances.

The first chapter of this thesis discusses theories based upon the role of capital punishment in establishing justice. In this chapter, I will discuss the theories of Immanuel Kant

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<sup>1</sup> David M. O'Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties*, 7th ed. (New York: W.W. Norton & Company, 2008), 1172.

and G.W.F. Hegel, who argue that adherence to the *lex talionis*, or the principle that punishment should be proportionate to crimes, establishes retributive justice. Moving from Kant and Hegel to contemporary theorists, Ernest Van Den Haag asserts that while the execution of the innocent is unjust, it is necessary in order to deter future criminal acts.<sup>2</sup> In response to Van Den Haag, Jeffrey H. Reiman argues that while the death penalty establishes retributive justice, it should be abolished in order to ensure the civilization and maturation of modern states.<sup>3</sup> In the second chapter, I will discuss theories based on deterrence. Ernest Van Den Haag maintains that even though the death penalty does not deter potential criminals, it should still be applied because it may possibly save the lives of murder victims.<sup>4</sup> Responding to Van Den Haag, John P. Conrad asserts that the threat of execution can only deter individuals who rationally consider whether to commit crimes, and because most crimes are based upon impulse and passion, the death penalty is not an effective deterrent.<sup>5</sup> The theories discussed in these two chapters rely upon philosophical arguments rather than examining the practice of capital punishment in context.

In the third chapter, I will evaluate theories which analyze punishment based upon context. Friedrich Nietzsche purports that punishment functions as a tool of society's revenge, and that society gains pleasure in witnessing others be punished. Further, Nietzsche states that punishment has not served one consistent purpose over time, but rather has evolved to further a variety of goals.<sup>6</sup> Michel Foucault evaluates punishment in terms of its practice in context, employing historical analysis in order to critique norms of punishment. In terms of capital

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<sup>2</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969).

<sup>3</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985).

<sup>4</sup> Van Den Haag, "On Deterrence and the Death Penalty."

<sup>5</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983).

<sup>6</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000).

punishment, Foucault argues against not only the death penalty, but all definitive sentences.<sup>7</sup> William E. Connolly draws from both Nietzsche and Foucault, arguing that American punishment provides a legal avenue for society to seek revenge upon outsiders, particularly poor and African-American individuals.<sup>8</sup> In the fourth chapter, I will discuss five influential Supreme Court cases, and determine which theories they accept or reject. In *Furman v. Georgia* (1972), the Court ruled that applying the death penalty in a capricious manner constitutes cruel and unusual punishment, while in *Gregg v. Georgia* (1976), the Court determined that the imposition of the death penalty does not violate the Eighth Amendment.<sup>9</sup> In *McCleskey v. Kemp* (1987), the Court ruled that the imposition of the death penalty under Georgia legislation is constitutional despite evidence of racial discrimination in its application.<sup>10</sup> Finally, the Court narrowed the application of the death penalty in *Ford v. Wainwright* (1986) and *Atkins v. Virginia* (2002), holding that the death penalty cannot be applied to the insane or to the intellectually disabled, respectively.<sup>11</sup> By discussing the intersections between these cases and the major theories underpinning the American death penalty, I will be able to determine the Supreme Court's theoretical view of capital punishment and discuss its implications for abolishing the American death penalty.

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<sup>7</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000).

<sup>8</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995).

<sup>9</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>10</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>11</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), *Atkins v. Virginia*, 536 U.S. 304 (2002).

## Chapter I: Theories of Justice

Many theorists base their support of or opposition to the death penalty upon their own conceptions of justice. Before discussing modern theorists' writings on whether capital punishment is just, it is necessary to examine Immanuel Kant's and G.W.F. Hegel's philosophy on justice and punishment. As Alan Brudner, Ernest Van Den Haag, and John P. Conrad interpret their writings, both Kant and Hegel establish a concept of retributive punishment based upon the *lex talionis*, asserting that criminals should be subjected to punishment in proportion to their crimes. Brudner also examines Kant's and Hegel's contrasting views on pardoning criminals, which he believes are based upon the philosophers' conceptions of human dignity. Steven S. Schwarzschild's argument that Kant's basic philosophy is at odds with his acceptance of capital punishment is ultimately invalid, but distinguishes the correct understanding of Kant's views on punishment while identifying some of his basic philosophical beliefs. Turning to modern theorists, Van Den Haag states that while executing innocent people is unjust, it is necessary in order to ensure that potential victims' lives are saved through deterrence. Both Conrad and Jeffrey H. Reiman write in response to Van Den Haag; while Conrad states that the death penalty is unjust in itself, Reiman argues that the death penalty accomplishes retributive justice, but should be abolished to further society. Ultimately, none of these theorists consider the potential revenge and racism that may drive societies that accept the death penalty. I believe that these theories, which will be explored in the third chapter of this thesis, are crucial to understanding American society's continual imposition of the death penalty.

Modern theorists' perceptions of justice and capital punishment are shaped by the Enlightenment philosophy of both Immanuel Kant and G.W.F. Hegel. Writing in his essay "Retributivism and the Death Penalty," Alan Brudner defines Kant and Hegel as retributivists, as

do both Ernest Van Den Haag and John P. Conrad in *The Death Penalty: A Debate*. According to Brudner, the retributive theory emerged in opposition to the utilitarian conception of punishment, in which “the criminal is sacrificed, or used as a means, to the welfare of the majority,” and the state imposes punishment upon an individual in order to warn society against wrongdoing.<sup>12</sup> As its principal aim is deterrence, the utilitarian theory may therefore justify punishment of the innocent and preventative punishment.<sup>13</sup><sup>14</sup> In contrast, retributivists such as Kant and Hegel view punishment as a moral good which is intended to “annul wrong and thereby vindicate right” rather than deter, protect, or reform.<sup>15</sup> In opposition to the utilitarian concept of inflicting punishment as a means to an end, Kant and Hegel believed that the principal aim of punishment should be justice.<sup>16</sup> According to Conrad, Kant’s retributive concept of justice is based on the *lex talionis*, which dictates that criminals should be punished with the same actions they inflicted upon their victims.<sup>17</sup>

Brudner, Conrad, and Van Den Haag assert that the Kantian and Hegelian concept of retributive punishment accomplishes justice by reaffirming both the immorality of crime and the human dignity of the criminal. Although punishment cannot undo the criminal’s actions, Brudner states that Hegel believed that punishment “annuls wrong by demonstrating the non-being of the criminal principle.”<sup>18</sup> This criminal principle is an individual’s claim to arbitrary and unlimited freedom, and crime upsets society’s moral order by alleging that this principle is valid.<sup>19</sup> By

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<sup>12</sup> Alan Brudner, “Retributivism and the Death Penalty,” *The University of Toronto Law Journal* 30.4 (1980): 341.

<sup>13</sup> Ibid.

<sup>14</sup> Van Den Haag’s theories of justice and deterrence both seem to be based upon the utilitarian conception of punishment.

<sup>15</sup> Brudner, “Retributivism and the Death Penalty,” 341.

<sup>16</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 79.

<sup>17</sup> Ibid, 22.

<sup>18</sup> Brudner, “Retributivism and the Death Penalty,” 346.

<sup>19</sup> Ibid.



punishing the criminal, the state asserts that the criminal principle is invalid, “‘negating’ the criminal’s ‘negation of the law.’”<sup>20</sup>

In addition to affirming the immorality of criminal acts, retributive punishment also preserves the human dignity of the criminal. In Van Den Haag’s view, Kant and Hegel believed that the criminal has both the moral duty and the right to submit to punishment. It is only through this punishment that the criminal’s human dignity is repaired.<sup>22</sup> Kant believed that capital punishment must be imposed upon murderers, as to refrain from executing a murderer would “deny him his human dignity as a rational and responsible person.”<sup>23</sup> Brudner also interprets retributive punishment in this way, saying that because the criminal violates his own rights as well as those of others by “asserting a right to unlimited freedom,” his own rational will and dignity are restored through punishment.<sup>24</sup>

Kant and Hegel’s retributive theories of punishment imply that only the responsible, rational offender should be subjected to punishment for his crimes. Brudner states that “retributivism accounts for the connection between punishment and desert.”<sup>25</sup> Thus, punishment will not be inflicted upon the innocent, nor will it be imposed upon those who have no awareness or conception of the immorality of their crime. Conrad maintains that the right of the criminal to be punished does not extend to children or to the insane, but rather is reserved for the rational

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<sup>20</sup> Alan Brudner, “Retributivism and the Death Penalty,” *The University of Toronto Law Journal* 30.4 (1980): 346.

<sup>21</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 41.

<sup>22</sup> *Ibid.*, 276.

<sup>23</sup> *Ibid.*

<sup>24</sup> Brudner, “Retributivism and the Death Penalty,” 347.

<sup>25</sup> *Ibid.*

individual who is capable of choice.<sup>26</sup> In Brudner's view, retributive punishment is only imposed upon those with the *mens rea*, or criminal intent, to commit injustice.<sup>27</sup>

The retributive theory of punishment espoused by Kant and Hegel asserts that murderers must be executed in order to accomplish justice, but does not advocate for exact adherence to the *lex talionis* principle. Brudner states that the retributive theory necessarily indicates capital punishment for first-degree murder in order to confirm the *lex talionis*.<sup>28</sup> According to Brudner, Hegel maintained that the criminal must be punished "in accordance with the principle laid down by his deed" in order to respect his human self-determination.<sup>29</sup> Further, Conrad quotes Kant, who held that murderers must be executed, writing, "there is no equality between the crime and the retribution unless the criminal is judicially condemned and put to death."<sup>30</sup> Therefore, the retributive theory of punishment implies that the criminal who takes another individual's life must be put to death himself.

However, both Brudner and Conrad conclude that Kant and Hegel did not support enforcing the *lex talionis* to the degree of subjecting criminals to exact reciprocal punishments, such as raping rapists or torturing torturers.<sup>31</sup> In fact, Hegel rejected strict adherence to the *lex talionis*, saying "in crime, as that which is characterized at bottom by the infinite aspect of the deed, the purely external, specific character vanishes."<sup>32</sup> In other words, Kant and Hegel believed that retributive punishment is determined by the moral significance of the crime rather than the

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<sup>26</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 40.

<sup>27</sup> Alan Brudner, "Retributivism and the Death Penalty," *The University of Toronto Law Journal* 30.4 (1980): 347.

<sup>28</sup> *Ibid*, 350.

<sup>29</sup> *Ibid*, 348.

<sup>30</sup> Van Den Haag and Conrad, *The Death Penalty: A Debate*, 22.

<sup>31</sup> *Ibid*, 38.

<sup>32</sup> Brudner, "Retributivism and the Death Penalty," 350.

qualitative and quantitative characteristics of the crime itself.<sup>33</sup> The criminal's right must be infringed in "equal weight" to the rights he infringed when committing his crime, meaning that the most severe penalties are reserved for the worst crimes.<sup>34</sup>

In his interpretation of Kant and Hegel's retributive conceptions of justice and capital punishment, Brudner analyzes both philosophers' perspective on the sovereign's right to punish criminals. Brudner quotes Kant in *The Metaphysical Elements of Justice*, in which the philosopher wrote that the sovereign "can make use of the right to pardon only in connection with crimes committed against himself." Kant stated that for the sovereign to pardon a criminal who had injured another citizen would "constitute the greatest injustice toward his subjects."<sup>35</sup> Therefore, Kant believed that the right to pardon can only be justly exercised in cases of treason; otherwise, punishment must be imposed in order to preserve justice.<sup>36</sup> Hegel also believed that the right to pardon is the sole power of the sovereign, but asserted that it could be justly exercised for any crime without annulling the law. Brudner quotes Hegel, who stated that to pardon is to "actualize Spirit's power of making undone what has been done and wiping out a crime by forgiving and forgetting it."<sup>37</sup>

Brudner argues that Kant and Hegel differ in their opinions on the justice of pardoning criminals due to their contrasting conceptions of human dignity. For Kant, the individual's dignity derives from his connection with the rest of the human species. His individual will is constantly in conflict with this shared human dignity, and he must strive to stifle this self-interested aspect of his personality. Therefore, in Kant's view, pardoning a criminal would

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<sup>33</sup> Alan Brudner, "Retributivism and the Death Penalty," *The University of Toronto Law Journal* 30.4 (1980): 350.

<sup>34</sup> *Ibid.*, 351.

<sup>35</sup> *Ibid.*, 352.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

“leave standing the claim of selfishness to validity and thus... leave justice unsatisfied.”<sup>38</sup> In contrast, Hegel believed that dignity derives from a divine, transcendent “Spirit” to whom the human individual is subordinate. This “Spirit” allows itself to be negated when the individual commits a crime, only to demonstrate its sovereignty through punishment when the individual’s self-interested will is denied.<sup>39</sup> In Brudner’s interpretation of Hegel, pardoning criminals rather than punishing them establishes the sovereignty of the “Spirit” even more clearly. Mercy can accomplish justice by negating the individual’s selfishness, “robbing evil of its power of being and so accomplishing man’s dignity beyond threat of subversion.”<sup>40</sup>

Steven S. Schwarzschild details his conception of Kantian capital punishment in his essay “Kantianism on the Death Penalty (and Related Social Problems).” Schwarzschild contrasts six of Kant’s general philosophical principles with the philosopher’s theory on the death penalty and concludes that Kant’s ethical principles “should have made him a radical opponent of capital punishment.”<sup>41</sup> First, Schwarzschild contends that Kant’s belief that an individual should never be used as a means to an end is at odds with his support of the death penalty. In Schwarzschild’s view, imposing capital punishment necessarily implies using a human life as a tool to deter future crime.<sup>42</sup> Second, Schwarzschild argues that Kant’s belief that persons are “holy” and should be treated with dignity and respect rather than as objects should have led him to oppose the death penalty. Schwarzschild cites Beccaria, who maintained that executing an individual denies his humanity.<sup>43</sup> Third, Schwarzschild examines Kant’s belief that we should judge

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<sup>38</sup> Alan Brudner, “Retributivism and the Death Penalty,” *The University of Toronto Law Journal* 30.4 (1980): 353.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Steven S. Schwarzschild, “Kantianism on the Death Penalty (and Related Social Problems),” *Archives for Philosophy of Law and Social Philosophy* 71.3 (1985): 347.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid, 348.

ourselves harshly while judging others leniently, “for what the ethical and theoretical principles were that underlay the actions of others we have no access to; we can judge only their observable actions.”<sup>44</sup> In Schwarzschild’s view, this principle is divergent with support of capital punishment, as it implies that the state should not execute criminals due to its inability to perceive their motives.

Schwarzschild also argues that Kant’s belief in the “impenetrable privacy of personal morality” also indicates that he should have opposed the death penalty. Kant asserted that while the law can determine people’s actions, whether they act “according to the law,” it has no awareness of their beliefs and motives, whether they act “because of the law.”<sup>45</sup> In Schwarzschild’s view, this belief directly conflicts with Kant’s assertion that the murderer should be punished “proportionate to [his] inward evil,” because the state is unaware of the criminal’s inner self and is therefore unable to exact punishment.<sup>46</sup> Fifth, Schwarzschild states that Kant’s belief that the positive law is only an “approximation” of rational morality should make him an opponent of the death penalty, as he cannot advocate for executing individuals on mere approximations.<sup>47</sup> Lastly, Schwarzschild argues that Kant’s belief that an individual cannot “bind himself by contract to the kind of dependency through which he ceases to be a person” should have led the philosopher to oppose the death penalty. In Schwarzschild’s view, Kant’s concept of retributive justice contradicts his belief that individuals cannot consent to the loss of their own humanity.<sup>48</sup>

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<sup>44</sup> Steven S. Schwarzschild, “Kantianism on the Death Penalty (and Related Social Problems),” *Archives for Philosophy of Law and Social Philosophy* 71.3 (1985): 348.

<sup>45</sup> *Ibid.*, 349.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

After examining what he views as the logical inconsistencies within Kant's theory of capital punishment, Schwarzschild argues that these apparent inconsistencies can be explained by Kant's concept of transcendentalism. Schwarzschild states that when approaching a certain science or law, Kant first observed that the law existed, then examined the rational, logical implications that produced the law.<sup>49</sup> As all states imposed capital punishment during Kant's time, Schwarzschild argues that its universal existence gave the punishment *a priori* validity. Therefore, Kant did not question the morality of the death penalty, but instead examined "its rational presuppositions."<sup>50</sup>

In my view, Brudner, Van Den Haag, and Conrad all interpret Kant's and Hegel's conceptions of retributive punishment clearly and accurately. It is essential to understand the basic concept of retributive punishment before examining modern theorists' perspectives of justice and capital punishment. Indeed, both Conrad and Jeffrey H. Reiman use Kantian and Hegelian philosophy to elucidate their own theories of the death penalty and justice. Further, I believe that Van Den Haag draws his theories of justice and retribution from the utilitarian conception of punishment, though he does not mention this in his writing. Brudner's analysis of Kant's and Hegel's contrasting theories on the justice of pardoning criminals is also an important distinction which clarifies other theorists' usage of their philosophy. Schwarzschild's argument that Kant's basic philosophical beliefs diverge from his support of the death penalty seems valid on its face, but after further examination, it is clear that Schwarzschild fundamentally misunderstands Kant's conception of retributive punishment. Though Kant did assert that an individual should not be used as the means to an end, he argued this in opposition to unnecessarily harsh utilitarian punishment, which was conceived to accomplish deterrence, while

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<sup>49</sup> Steven S. Schwarzschild, "Kantianism on the Death Penalty (and Related Social Problems)," *Archives for Philosophy of Law and Social Philosophy* 71.3 (1985): 349.

<sup>50</sup> *Ibid*, 350.

remaining supportive of proportional retributive punishment. Further, Kant's belief in the dignity of persons actually corresponds with his support of retributive punishment, as he maintained that punishment restores and honors the dignity of the individual. Schwarzschild seems to have examined Kant's philosophical principles out of their respective contexts.

Ernest Van Den Haag was one of the most ardent proponents of the death penalty during the late twentieth century. Van Den Haag addresses many critics' argument that the death penalty is an unjust form of punishment in his article "Deterrence and the Death Penalty." Critics claim that the death penalty is an unjust punishment both because it is sometimes imposed upon the innocent and because it is disproportionately inflicted upon the guilty poor. However, Van Den Haag purports that these arguments prove only that the death penalty is applied unjustly, not that the punishment itself is unjust. Further, he maintains that these critics' arguments are only relevant if "doing justice" by punishing only those who are guilty equally is a purpose of punishment. However, if one believes that this concept of "doing justice" is a purpose of punishment, one can defend any punishment, even capital punishment, if it effectively accomplishes this justice.<sup>51</sup>

Critics of the death penalty therefore make a fundamentally flawed argument when labelling the death penalty as unjust and simultaneously rejecting not only "the merits... of specific arguments based on justice" but also "doing justice" as a purpose of punishment.<sup>52</sup> Van Den Haag summarizes his argument, saying, "If justice is not a purpose of penalties, injustice cannot be an objection to the death penalty, or to any other; if it is, justice cannot be ruled out as an argument for any penalty."<sup>53</sup> In his view, one cannot claim that the death penalty is unjust

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<sup>51</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969): 141.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

because it is sometimes imposed upon the innocent and applied unequally while simultaneously arguing that punishing the guilty equally is not a valid purpose of punishment.

Van Den Haag also argues that while the death penalty may be applied unjustly, it is its distribution that is unjust rather than the punishment itself. He states that “It is not the penalty... which is unjust when inflicted on the innocent, but its imposition on the innocent.”<sup>54</sup> This unjust application of capital punishment typically stems from the trial process, where poor defendants cannot afford to pay for adequate representation and so are likelier to be sentenced to death. However, Van Den Haag maintains that as capital punishment has a permanence that other punishments lack, trials that end with a death sentence are more likely to be fair, meaning that the death penalty is “probably less often unjustly inflicted.”<sup>55</sup> When considering imposing the death penalty, the difficulty is not that the punishment is more unjust than others, but that “it is always irrevocable.” According to Van Den Haag, all penalties are irreversible, even prison sentences, but the death penalty “is irrevocable as well” due to its permanence.<sup>56</sup> Therefore, when the death penalty is inflicted upon an innocent victim, an “irrevocable injustice” has been committed.<sup>57</sup>

However, in Van Den Haag’s view, this injustice is permissible and justifiable. Van Den Haag maintains that to do justice, one often must choose the least unjust of two injustices, saying “however one defines justice, to support it cannot mean less than to favor the least injustice.”<sup>58</sup> As both “the death of innocents because of judicial error” and “the death of innocents by murder” are unjust, one must determine which punishment effectively minimizes this loss of

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<sup>54</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 142.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.



innocent life by its deterrent effects.<sup>59</sup> In his view, as the imposition of capital punishment would greatly reduce the number of innocent victims murdered, whereas the imposition of the death penalty upon innocents only affects a small percentage of defendants, this loss of innocent life can be justified because “fewer are lost than would be lost without it.”<sup>60</sup> Van Den Haag then states that the death penalty can only be critiqued on grounds of injustice if its deterrence “is valued less than the harm it will cause if inflicted upon innocent people.”<sup>61</sup> Therefore, to further his argument that the death penalty accomplishes justice, Van Den Haag turns to deterrence, as critics cannot prove the death penalty to be unjust unless “the added usefulness (deterrence) expected from irrevocability is thought less important than the added harm.”<sup>62</sup> He must demonstrate that the death penalty deters enough crimes to justify the “irrevocable injustice” of sentencing innocent people to death.

I find two major flaws in Van Den Haag’s argument which indicate that he does not effectively prove that the death penalty accomplishes justice. First, his assertion that “doing justice” is ensuring that only the guilty are punished and that the equally guilty are punished equally ignores other conceptions of justice. Justice is an essentially contested concept, meaning that different theorists define it in different ways, and Van Den Haag overlooks the possibility that critics who believe that capital punishment is unjust may define justice differently. Those who oppose the death penalty because it is unjust may view the act of taking a human life as unjust on its face, beyond merely condemning its unequal application. Second, Van Den Haag’s argument that doing justice necessarily entails “favoring the least injustice” may ensure that less

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<sup>59</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 142.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

innocent lives are spared, but still justifies sentencing innocent defendants to death.<sup>63</sup> If criminals are spared the death penalty and other criminals are thus motivated to commit murder, the fault is with these criminals, but if the state imposes the death penalty upon innocent citizens, no matter how few, the fault is with the state. Further, Van Den Haag's assertion that the death penalty accomplishes deterrence rests upon tenuous statistics and flawed logic, meaning that imposing the death penalty may not actually "favor the least injustice."

In "Justice, Civilization, and the Death Penalty: Answering van den Haag," Jeffrey H. Reiman critiques Van Den Haag's argument that the death penalty establishes justice and therefore should be imposed. Reiman admits that the death penalty is a just punishment for murder, but maintains that it should not be implemented because "abolition of the death penalty is part of the civilizing mission of modern states."<sup>64</sup> Therefore, Reiman opposes the death penalty not because he believes it to be unjust, but because he believes it is immoral. He begins his argument by stating that society "does not regard killing per se as wrong:" killing in self-defense or in war is morally permissible, and the death of innocents in accidents is tolerated.<sup>65</sup> Reiman's argument responds to Van Den Haag's assumptions that some crimes deserve capital punishment, and that at some point, the death penalty should be imposed upon the guilty if enough innocent lives are saved. Therefore, his rejection of the death penalty is made while accepting these assumptions as true.<sup>66</sup>

In Reiman's view, the death penalty accomplishes retributive justice. This justice is expressed in the principle of *lex talionis*, and asserts that "the offender should be *paid back* with

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<sup>63</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969): 142.

<sup>64</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 115.

<sup>65</sup> *Ibid*, 117.

<sup>66</sup> *Ibid*, 119.

suffering he deserves because of the evil he has done.”<sup>67</sup> This suffering should either be equal to the crime committed, or should be proportional, imposing society’s harshest punishments for the most egregious crimes.<sup>68</sup> As retribution is perceived as a base desire to exact revenge, one must prove that the punishment serves a purpose beyond the gratification of the victim in order to show that *lex talionis* is just. To do so, Reiman constructs his “retributivist principle” using the “Hegelian” and “Kantian” approaches, which indicates the reason behind the suffering imposed upon criminals.<sup>69</sup>

Reiman’s “Hegelian” approach rests upon “a common moral inspiration: the equality of persons.”<sup>70</sup> People in society are “equally sovereign individuals,” and the offender upsets the equality of persons by asserting an illegitimate sovereignty over his victim by committing a crime.<sup>71</sup> To restore the equality of persons and assert his own sovereignty, the victim may justly impose punishment upon the offender, “[rectifying] the indignity he has suffered by restoring [the offender] to equality.”<sup>72</sup> Even if the victim refuses to exact punishment and instead chooses to forgive the offender, the equality of persons is still restored because it is the victim’s right to punish or not punish the offender.<sup>73</sup>

Reiman’s “Kantian” approach rests upon the rational nature of individuals. When a rational individual commits a crime, he implicitly consents to being punished in the same manner as his crime because he accepts responsibility for his own actions.<sup>74</sup> This conception of *lex talionis* authorizes victims to exact punishment upon their offenders, but does not compel them

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<sup>67</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 119.

<sup>68</sup> *Ibid.*, 120.

<sup>69</sup> *Ibid.*, 121.

<sup>70</sup> *Ibid.*, 122.

<sup>71</sup> *Ibid.*, 123.

<sup>72</sup> *Ibid.*, 122.

<sup>73</sup> *Ibid.*, 123.

<sup>74</sup> *Ibid.*

to, as such a duty would imply retributivism against positive and neutral acts as well as negative ones.<sup>75</sup> Reiman states that his “Hegelian” and “Kantian” approaches together create his “retributivist principle:” the conclusion that “an offender deserves and his victim has the right to impose suffering on the offender equal to that which he imposed on the victim.”<sup>76</sup> Because the equality and rationality of persons implies moral desert, the death penalty is just according to *lex talionis*.

After arguing that the *lex talionis* is just, Reiman turns to the question of whether retributive justice should be exercised. Exact adherence to the principle would “allow criminals, even the most barbaric of them, to dictate our punishing behavior” by imposing equal punishment upon rapists and torturers, something society deems immoral. Reiman asserts that *lex talionis* can be followed and justice accomplished in these situations by refusing to exact an equal punishment while choosing to impose a slightly less severe penalty.<sup>77</sup> Therefore, a range of just punishments exists. The upper limit of this spectrum is “the point after which more punishment is unjust to the offender,” and the lower limit is “the point after which less punishment is unjust to the victim.”<sup>78</sup> By exacting “the closest morally acceptable approximation to the *lex talionis*” in situations in which retribution is immoral, both the equality of persons and the rationality of individuals is affirmed and retributive justice may still be accomplished.<sup>79</sup>

These alternative punishments must not trivialize the severity of the original crime; Reiman

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<sup>75</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 124.

<sup>76</sup> *Ibid.*, 125.

<sup>77</sup> *Ibid.*, 128.

<sup>78</sup> *Ibid.*, 128.

<sup>79</sup> *Ibid.*

asserts that a sentence of life in prison without parole is a just alternative to the death penalty, as those given this sentence are traditionally regarded as “civilly dead.”<sup>80</sup>

Therefore, to prove that the death penalty should not be applied even though it accomplishes retributive justice, Reiman must argue that it is immoral and should be replaced by a less severe but still just punishment. In order to make this argument, Reiman compares the societal effects of imposing the death penalty on offenders with those of imposing torture, a punishment which society views as inexcusable even when justly deserved.<sup>81</sup> Torture and other punishments have been deemed immoral due to the progress of civilization and a subsequent increase in empathy with others.<sup>82</sup> Reiman points to Nietzsche’s observation that “pain did not hurt as much as it does today.” From Nietzsche’s statement, Reiman draws the conclusion that refusing to inflict overtly painful punishments “both signals the level of our civilization *and, by our example, continues the work of civilizing.*”<sup>83</sup> Reiman’s theory that the growth of civilization causes a reduction in painful punishments builds upon Emile Durkheim’s “Two Laws of Penal Evolution.”<sup>84</sup> Durkheim’s laws collectively claim that reducing painful punishment correlates with movements both towards more advanced society and less absolutist government.<sup>85</sup>

Reiman then argues that abolishing painful punishments, specifically the death penalty, serves the advancement and growth of civilization. Reducing painful punishment when it is justly deserved is not an injustice, as “refraining to do what is just is not doing what is unjust.”<sup>86</sup> Therefore, as long as reducing such punishment does not mean that “*our lives are thereby made*

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<sup>80</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 130.

<sup>81</sup> *Ibid.*, 135.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, 136.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 137.

<sup>86</sup> *Ibid.*, 139.

*more dangerous,*” doing so is permissible and even necessary to advance civilization.<sup>87</sup> Reiman accepts the argument that the death penalty should be applied if it accomplishes deterrence, but he argues that it does not. Having maintained that refraining from using torture as a punishment furthers civilization, Reiman indicates the similarities between torture and capital punishment to prove that this punishment should also be abolished. Execution, like torture, inflicts “intense psychological pain” on the offender. This pain is exacerbated by the fact that a death by execution is inflicted by other humans and is foreseen by its victim.<sup>88</sup> Further, as both execution and torture involve “totally subjugating a person to the power of others,” Reiman claims that inflicting such punishments implicates the immorality of the society that imposes them.<sup>89</sup> As refraining from torturing offenders advances civilization, and because torture and execution share significant similarities, abolishing the death penalty is therefore “part of the civilizing mission of modern states.”<sup>90</sup>

I find Reiman’s argument that the death penalty accomplishes retributive justice but should not be imposed because it is immoral and does not further civilization to be very convincing. As Reiman defines justice as the *lex talionis*, it is clear that imposing the death penalty furthers this retributive justice. Further, Reiman’s comparisons of the death penalty and torture are effective in demonstrating that both punishments are antithetical to the civilization of states. However, defining justice in a different manner would effectively challenge Reiman’s argument. If justice is defined to also consider social, economic, and racial barriers, one could argue that the death penalty is neither moral nor just. Arguments that consider these barriers and inequalities within society will be considered in the third chapter of this thesis.

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<sup>87</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 138.

<sup>88</sup> *Ibid*, 140.

<sup>89</sup> *Ibid*, 141.

<sup>90</sup> *Ibid*, 142.

In *The Death Penalty: A Debate*, John P. Conrad briefly describes his conception of justice as it relates to capital punishment while responding to Van Den Haag's arguments in support of the death penalty. Essentially, Conrad believes that needlessly taking the life of another individual is morally wrong. Conrad bases his theory of justice upon his interpretation of a Kantian theory, namely, "the position that *human beings must never be treated as means to someone else's end.*"<sup>91</sup> He admits that Kant did not articulate this theory to criticize capital punishment, but uses this principle to guide his own argument. Conrad states that he does not question "the right of a person to kill in self-defense" or "the duty of the soldier to fight and kill in defense of his country or in a just war."<sup>92</sup> Killing in self-defense is necessary in order to protect oneself and one's property, and soldiers may justifiably kill in battle in order to protect their country or defend its values.

However, Conrad believes that killing "even the odious criminals... in cold blood" is morally wrong.<sup>93</sup> He views both murders committed by criminals and executions imposed by the state as unjust because both are unnecessary and indicative of a lack of human sympathy. Therefore, the state cannot teach its citizens that murder is immoral while simultaneously "killing [criminals] in cold blood."<sup>94</sup> Conrad maintains that he would support sentencing convicted murderers to life imprisonment, but would never endorse executing them even if it meant saving future victims of murder, saying "killing people is wrong, and the state may not engage in wrongful acts."<sup>95</sup>

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<sup>91</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 74.

<sup>92</sup> *Ibid.*, 80.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, 74.

Conrad also views the potential execution of the wrongly convicted as unjust. Though Van Den Haag is willing to accept the execution of these innocent individuals in order to further “the killing of authentic murderers,” Conrad views these executions in particular as “injustices of the worst kind.”<sup>96</sup> Refusing to impose the death penalty and instead sentencing those convicted of murder to life imprisonment would avoid this injustice, as life sentences “can be corrected with a pardon” if the court later finds the imprisoned to be innocent.<sup>97</sup> Conversely, when the death penalty is imposed upon an innocent individual, a posthumous pardon is meaningless and “the ultimate injustice” has been committed.<sup>98</sup> Therefore, Conrad states that the most compelling reason why the death penalty should be abolished is to avoid executing innocent individuals, saying that because “the prevention of injustice is the business of every good citizen,” abolishing capital punishment will assuredly mean the prevention of the greatest injustice.<sup>99</sup>

Unlike Van Den Haag, Reiman, and interpretations of Kantian and Hegelian theory, Conrad views unnecessary killing as unjust in and of itself. This is a simplistic argument, but one which I believe is more convincing than Van Den Haag’s assertion that imposing the death penalty is just even when it executes innocent individuals. By teaching its citizens that needless killing is unjust while at the same time executing those convicted of murder, including those who may actually be innocent, the state seems hypocritical. However, while Conrad’s basic theory that the needless killing of another individual is unjust appeals to my own morals and conception of justice, it is not easily accessible to many, particularly those driven by bias and revenge. Reiman’s acknowledgement that the death penalty establishes retributive justice, but should be abolished in order to further a civilized society may be more convincing, while theoretical

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<sup>96</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 60.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.



critiques of the death penalty based upon race and class discrimination address important concrete considerations.

## Chapter II: Theories of Deterrence

In addition to defending or critiquing the death penalty based upon their personal conceptions of justice, most modern theorists also evaluate whether the death penalty accomplishes deterrence. Deterrence is the use of punishment as a threat to those considering criminal acts, and is the main focus of the utilitarian conception of punishment opposed by Kant and Hegel. Statistics demonstrate that the American death penalty does not establish deterrence, a fact which is acknowledged by Ernest Van Den Haag, Jeffrey H. Reiman, and John P. Conrad. Van Den Haag's theory of deterrence is based upon the principle that the more an individual fears a punishment, the likelier he is to obey the law and refrain from criminal acts. Though Van Den Haag briefly admits that the death penalty has never been statistically proven to deter potential murderers, he asserts that the state should continue to impose capital punishment in order to save as many murder potential victims as possible. Both Reiman and Conrad adamantly oppose the death penalty, and critique Van Den Haag's theory of deterrence in their writings, similarly concluding that the death penalty should be abolished because it does not accomplish deterrence. This theoretical discussion seems somewhat unnecessary due to the statistics that incontrovertibly demonstrate that the death penalty does not accomplish deterrence, but it is important to examine as many theorists base their writings upon it. Both the theories of justice discussed in the previous chapter and the theories of deterrence discussed here are, in my view, secondary to the factors of revenge and racism which will be discussed in the third chapter of this thesis.

As well as arguing that the death penalty is a just form of punishment, Van Den Haag also asserts that the death penalty accomplishes deterrence. In the article "On Deterrence and the Death Penalty," Van Den Haag argues that capital punishment effectively deters criminal acts.

He makes a nearly identical argument for deterrence in *The Death Penalty: A Debate*. He begins his argument by stating that the death penalty can accomplish neither rehabilitation nor protection. Sentencing criminals to death has no rehabilitative effect on them, and a sentence of life in prison would protect society as effectively as imposing the death penalty. Instead, Van Den Haag believes that the death penalty cannot be justified “unless “doing justice” or “detering others” are among our penal aims.”<sup>100</sup> Supporters of the death penalty must only prove that one of these purposes is validly accomplished, but critics must disprove both in order to persuasively argue against the death penalty. After addressing the death penalty’s ability to perform justice, Van Den Haag turns to the issue of deterrence.

Van Den Haag maintains that deterrence does not depend on some theoretical concept of rationality, but on “the likelihood and on the regularity... of human responses to danger; and further on the possibility of reinforcing internal controls by vicarious external experiences.”<sup>101</sup> He delineates his theory of human responsiveness to danger, saying that humans will refrain from certain dangerous activities due to fear and the risk of injury even if they have “no direct experience” with those particular injuries or feared situations.<sup>102</sup> Humans do not “consciously weigh... expected pleasure or possible pain” when refraining from dangerous activities, but instead abstain from these behaviors “because one literally does not conceive of the action one refrains from.”<sup>103</sup> Van Den Haag then extends this theory of human responsiveness to danger to man-made punishments inflicted by governments, arguing that these punishments “deter those

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<sup>100</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 142.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, 143.

<sup>103</sup> Ibid.

who have not violated the law for the same reasons... as do natural dangers.”<sup>104</sup> The punishments imposed by governments provide an additional restraint to engaging in dangerous activities; because these punishments are man-made, citizens tend to assign an internal morality to actions the government prohibits. Thus, governments motivate citizens to behave lawfully by threatening and inflicting punishment, “constantly reinforcing... conscience” by imposing “external authority on recalcitrants.”<sup>105</sup>

However, only certain individuals are deterred by the threat of the death penalty. Van Den Haag asserts that some individuals do not respond appropriately to the external threat of government punishment. Those who are self-destructive and those who are “incapable of responding to threats, or even of grasping them” cannot be deterred even if government punishments are made more severe or more widely applied.<sup>106</sup> A third group of individuals “might respond to more certain or more severe penalties” such as the death penalty.<sup>107</sup> While the threat of punishment “[is] not likely to deter habitual offenders... [or those] intoxicated by their own passions,” it will “help deter people from *becoming* habitual offenders.”<sup>108</sup> Therefore, the threat of the death penalty will effectively deter rational individuals who have not yet committed murder.<sup>109</sup> Van Den Haag argues that deciding whether to increase punishment depends upon three different factors. These factors are first, the societal importance of the law prohibiting the

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<sup>104</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 143.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 63.

<sup>109</sup> Ibid, 99.

crime, second, the size and likely reaction of the group the punishment will apply to, and third, the reaction to and ease of enforcing the harsher penalty.<sup>110</sup>

Van Den Haag turns then to the arguments of Lester Pearson, the former Prime Minister of Canada and an ardent critic of the death penalty. Pearson contended that the death penalty fails to have a deterrent effect in cases of “slums, ghettos, and personality disorders,” an argument which Van Den Haag then rebuts by explaining that none of these three conditions is causally linked to crime.<sup>111</sup> In regards to slums, Van Den Haag admits that the disadvantages of poverty “may lead to ambition, frustration, resentment, and, if insufficiently restrained, to crime,” but argues that crime is not actually caused by this poverty, as most impoverished people are not criminals, and crimes are also committed by the rich.<sup>112</sup> Thus, the elimination of poverty will not lead to the end of crime as, in the words of Aristotle, “the greatest crimes are committed not for the sake of basic necessities but for superfluities.”<sup>113</sup> Turning to ghettos, Van Den Haag maintains that there is no link between ethnic separation and crime, noting that crime is high in some ghettos and low in others. Lastly, Van Den Haag states that personality disorders and mental illnesses are not necessary or sufficient conditions for committing crimes, except in cases a clinical diagnosis proves otherwise. Further, the likelihood of occurrence of mental illnesses in prisons does not exceed the likelihood of occurrence in wider society.<sup>114</sup>

Arguments like Pearson’s, Van Den Haag states, are attempts to eliminate the causes of crime and, in doing so, eliminate the effects, rather than mitigating the effects of crime by

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<sup>110</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 99.

<sup>111</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 144.

<sup>112</sup> *Ibid.*, 143.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

punishing criminals.<sup>115</sup> In Van Den Haag's view, instituting certain punishments for crimes will reliably reduce the crime rate, as whether an individual chooses to commit a crime depends on "whether the desire for it, or for whatever is to be secured by it, is stronger than the desire to avoid the costs involved."<sup>116</sup> When considering both desire and cost, "neither is intrinsically more causal than the other."<sup>117</sup> If one has the desire to commit a crime, the cost will determine their action, and if one recognizes the cost of a certain crime, their desire to commit it will shift accordingly. Therefore, the crime rate can be manipulated by the government decreasing or increasing either the desire or the cost. As the government cannot easily change individuals' desire to commit crimes, crime is more effectively reduced by increasing costs, by instituting harsher punishments such as the death penalty. Van Den Haag notes that the United States government's policy on crime has been skewed towards affecting "the conditions producing the inclination to" committing crimes; this ineffective attention to desires while ignoring costs may have led to a high crime rate.<sup>118</sup>

Having established that state-imposed costs such as the death penalty have a deterrent effect on crime, Van Den Haag turns to the question of whether the death penalty deters more than alternative punishments, "such as life imprisonment or any lengthy term of imprisonment."<sup>119</sup> He references a study which showed that the homicide rate in similar areas with and without the death penalty does not vary, and that the homicide rate in a single area does not vary significantly before and after the death penalty is abolished. This study indicates a lack of evidence for deterrence, meaning "that deterrence has not demonstrated statistically -- not that

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<sup>115</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969): 144.

<sup>116</sup> *Ibid.*, 145.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 64.

non-deterrence has been.”<sup>120</sup> Van Den Haag then outlined several reasons why the study had failed to show deterrence, concluding “not to demonstrate presence of the effect is not the same as to demonstrate its absence.”<sup>121</sup>

Therefore, because statistics do not reliably demonstrate whether the death penalty establishes deterrence, two possible outcomes exist. First, if the death penalty is imposed but achieves no deterrence, “the life of a convicted murderer has been expended in vain,” signifying a net loss in lives.<sup>122</sup> Second, if the death penalty is imposed and successfully deters homicide, both the lives of potential future murderers and those of their victims are saved, indicating a net gain in lives. Therefore, imposing the death penalty implies risking something “certain” -- the death or life of convicted murders -- to safeguard something “uncertain” -- the death or life of future murder victims.<sup>123</sup> Van Den Haag maintains that there must be more proof that the death penalty establishes deterrence than for the deterring effect of other, less severe punishments, largely because of the irrevocability of capital punishment. As it is more crucial to save the lives of victims than to save the lives of murderers, critics of the death penalty must prove that the irrevocability of capital punishment does not affect deterrence. Supporters of death penalty thus have the lesser burden of proving “that there is no more uncertainty about [the death penalty] than about greater severity in general.”<sup>124</sup>

Van Den Haag concludes his discussion of deterrence by maintaining that proponents of the death penalty can easily meet this burden. He contends that the death penalty deters because it is more severe than other punishments. Van Den Haag states that while penalties such as life in

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<sup>120</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 145.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid, 146.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

prison are certainly harsh, they cannot meet the severity of the death penalty, as “the death penalty does not just threaten to make life unpleasant -- it threatens to take life altogether.”<sup>125</sup>

Reiterating his statistical analysis, he maintains that while studies have found no positive deterrence between the death penalty and homicide rates, they also have not found negative deterrence.<sup>126</sup> He also argues that critics of the death penalty only oppose the penalty because “executions are more subjected to social control than murder,” an argument that Van Den Haag believes to be flawed because it is true of all punishments and does not provide an adequate reason for abolishing capital punishment.<sup>127</sup>

However, even if a link between the death penalty and deterrence cannot be conclusively proven, Van Den Haag maintains that the death penalty should still be implemented. Uncertainty over whether the death penalty establishes deterrence entails choosing between “the certainty of the convicted murderer’s death by execution and the likelihood of the survival of future victims of other murderers on the one hand, and on the other his certain survival and the likelihood of the death of new victims.”<sup>128</sup> In Van Den Haag’s mind, it is moral to choose to apply the death penalty and refuse to risk the lives of potential murder victims to save those of convicted criminals. Van Den Haag never absolutely proves that the death penalty accomplishes deterrence, but is content to “risk the possible ineffectiveness of executions” because it will lead to a net gain in lives saved.<sup>129</sup>

I find Van Den Haag’s argument linking the death penalty to deterrence to be inconclusive and flawed for several reasons. First, I disagree with Van Den Haag’s argument that

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<sup>125</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 68.

<sup>126</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 146.

<sup>127</sup> Ibid.

<sup>128</sup> Van Den Haag and Conrad, *The Death Penalty: A Debate*, 69.

<sup>129</sup> Van Den Haag, “On Deterrence and the Death Penalty,” 146.



eliminating crime is more easily accomplished by punishing criminals than by mitigating its causes. Van Den Haag quotes Aristotle in contending that it is the desire for “superfluities” rather than the lack of basic necessities that leads individuals to commit crimes, essentially stating that there is no link between poverty and crime. However, the eradication of poverty would certainly reduce a great number of crimes committed for the sake of basic necessities, while leaving “the greatest crimes” unaffected.

Second, the statistics Van Den Haag relies upon to argue that the death penalty establishes deterrence actually point to the opposite conclusion. The study he cited found no change in the crime rate in similar areas with and without the death penalty, and also found no change in the crime rate in one area before and after the death penalty had been abolished.<sup>130</sup> The unaffected crime rate in both sections of the study proves that, at least for that set of data, the death penalty had no deterrent effect upon potential murderers. Therefore, Van Den Haag’s argument that the death penalty establishes deterrence rests only upon his own dicta.

Finally, in stating “I’d rather execute a man convicted of having murdered others than to put the lives of innocents at risk,” Van Den Haag completely ignores the possibility that the convicted man may be innocent as well. Though he produces a long and complicated argument, Van Den Haag ultimately fails to prove deterrence, and resolves this failing by weighing the lives of convicted murderers and potential murder victims. Keeping in mind the societal bias against convicted criminals, which is discussed by William E. Connolly and other theorists, it is unsurprising that Van Den Haag chooses to risk their lives.

In “Justice, Civilization, and the Death Penalty: Answering van den Haag,” Jeffrey Reiman argues that though the death penalty does accomplish retributive justice, it should not be

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<sup>130</sup> Ernest Van Den Haag, “On Deterrence and the Death Penalty,” *Journal of Criminal Law and Criminology* 60.2 (1969): 145.

imposed because it is immoral and because abolishing it advances civilization. However, he concedes that if that capital punishment has a greater deterrent effect than life in prison, this would indicate that “we had not reached a level of civilization at which we could protect ourselves without imposing this horrible fate on murderers.”<sup>131</sup> Though the death penalty is immoral, it must be imposed if it deters murder in order to protect society. Statistical evidence does not indicate that the death penalty deters more than life imprisonment, but Van Den Haag argues that the death penalty should still be imposed because “the higher the cost of something, the fewer people will choose it,” meaning that at least some potential murderers will be deterred by the death penalty.<sup>132</sup> Reiman attempts to disprove Van Den Haag’s “common sense” argument, contending that the death penalty does not deter potential murderers theoretically as well as statistically.

Reiman presents four separate arguments to refute Van Den Haag’s claims. First, Reiman states that the fact that the death penalty is more feared than life imprisonment does not necessarily imply that it has a greater deterrent effect. Though one may fear the death penalty more than life in prison, Reiman asserts that there is no action that the death penalty would deter than an equal likelihood of life imprisonment would not deter as well.<sup>133</sup> In his argument, Van Den Haag implicitly assumes that murderers have a greater likelihood of being sentenced to death than sentenced to life in prison, but if the likelihood of both punishments is equal, both deter equally.<sup>134</sup> Second, because about 700 suspected felons are killed by police every year, and because the number of privately owned guns in America exceeds the number of American households, Reiman argues that “anyone contemplating committing a crime *already* faces a

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<sup>131</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 142.

<sup>132</sup> *Ibid*, 143.

<sup>133</sup> *Ibid*, 145.

<sup>134</sup> *Ibid*.

substantial risk of ending up dead as a result.”<sup>135</sup> Therefore, an individual who is not deterred by the possibility of being killed while committing murder is unlikely to be further deterred by the risk of death after being apprehended and convicted.<sup>136</sup>

Third, Reiman argues that refusing to implement the death penalty may actually have a deterrent effect. Refusing to impose capital punishment, even when it is justly deserved, “also teaches a lesson about the wrongfulness of murder.”<sup>137</sup> Reiman states that this theory may explain the lack of statistical evidence for the death penalty deterring murderers, without denying that that some potential murderers will be deterred by its implementation. He argues that even if the death penalty deters some murderers, these numbers will be “balanced out by the weakening of the deterrent effect of not executing, such that no net reduction in murders will result.”<sup>138</sup>

Reiman also argues that this theory invalidates Van Den Haag’s argument that the death penalty should be imposed regardless of its deterrent effects, as it is better to risk the lives of murderers than those of innocent potential victims. If refusing to impose capital punishment deters potential murderers, then inflicting it also risks innocent lives; therefore, “the only reasonable course of action is to refrain from imposing... a horrible fate.”<sup>139</sup> Fourth, Reiman attempts to invalidate Van Den Haag’s argument that the death penalty deters because it is more feared than life imprisonment. Van Den Haag defends this assertion by stating that many on death row attempt to commute their sentences to life in prison; Reiman states that this logic implies that individuals sentenced to death-by-torture would undoubtedly attempt to commute their sentences to execution. Therefore, the logical conclusion of Van Den Haag’s theory is that murders should be

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<sup>135</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 145.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid, 146.

<sup>139</sup> Ibid.

sentenced to death-by-torture to maximize deterrence.<sup>140</sup> Reiman concludes that because there is no conclusive evidence that inflicting the death penalty will protect society, the punishment should be abolished in order to advance civilization.

I find most of Reiman's theoretical arguments that the death penalty does not deter potential murderers unconvincing and flawed. He first asserts that, from a theoretical standpoint, potential criminals are equally deterred by an equal likelihood of either being sentenced to death or to life in prison. Both punishments essentially deprive individuals of their existence as autonomous human beings; because of this crucial similarity, I believe that this particular argument has merit. However, Reiman's theory that potential murderers already risk death due to the number of privately owned guns in America presupposes that these criminals carefully weigh this possibility before committing crimes. His argument that abolishing the death penalty may actually accomplish deterrence also presumes that potential murderers rely on moral considerations. Lastly, Reiman's assertion that Van Den Haag's theories necessitate implementing death-by-torture to deter additional crimes is dubious and illogical. Indeed, Reiman's and other theorists' arguments concerning deterrence seem wholly unnecessary, as statistics demonstrate that there is no clear link between imposing capital punishment and crime rates. Reiman also ignores the possibility that perhaps the death penalty does not deter potential murderers due to the immense societal pressures placed upon those in a certain race or class. This theory will be explored in the third chapter of this thesis.

John Conrad also critiques Van Den Haag's common sense theory of deterrence in *The Death Penalty: A Debate*, making arguments similar to Reiman's. Conrad states that he agrees with Van Den Haag on three points. First, "the incapacitation of murderers will not reduce the

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<sup>140</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 147.

murder rate;” instead, the death penalty must deter future offenders to accomplish this goal.<sup>141</sup> Second, there is no empirical proof that the death penalty deters potential murderers, and third, the death penalty is a unique punishment because of its severity and finality, as it can only be imposed once.<sup>142</sup> Conrad then presents three responses to Van Den Haag’s assertion that the death penalty accomplishes deterrence because, according to common sense, “if the consequences of our actions are particularly unpleasant, we will be moved to refrain from engaging in them.”<sup>143</sup> First, Conrad argues that “common sense is the wisdom of the common man” rather than the criminal, who is driven instead by impulses, passions, and frustrations.<sup>144</sup> The potential murderer does not rationally consider the risks and consequences of his actions, and is therefore undeterred by the threat of capital punishment.<sup>145</sup> Conrad asserts that the “rational criminal man” Van Den Haag describes “seldom commits murder” if he exists at all. Further, if this rational criminal does commit murder, he will do so in a way that is “impossible for the police to detect.”<sup>146</sup>

Second, the fact that many individuals sentenced to death often attempt to commute their sentences to life imprisonment does not imply that execution deters more effectively than life imprisonment. In Conrad’s view, when an individual is considering committing murder, he does not refrain from this act based upon whether he is likelier to be sentenced to life imprisonment or to death. Instead, potential murderers “will prefer not to be suspected, not to be arrested, not to be tried, and not to be sentenced to anything.”<sup>147</sup> Further, those on death row, “no matter how

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<sup>141</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 70-71.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid, 71.

<sup>144</sup> Ibid, 73.

<sup>145</sup> Ibid, 72.

<sup>146</sup> Ibid, 84.

<sup>147</sup> Ibid, 73.

irrational they may be” will attempt to slightly improve their circumstances by commuting their sentences to life imprisonment.<sup>148</sup> This does not imply that the death penalty deters potential murderers, but only that those already sentenced to death fear capital punishment more than life imprisonment.

Third, in the same manner as Reiman, Conrad asserts that when Van Den Haag’s common sense argument is taken to its logical conclusion, it implies torture to accomplish further deterrence. He states that if one accepts Van Den Haag’s argument that killing a murderer can be justified “if we can suppose that 500 innocent victims may thus be spared,” then torturing this murderer is also justified “to accomplish the same end.”<sup>149</sup> Conrad then articulates several “absurd” examples of the acts of torture that might deter more potential murderers than the death penalty, wondering if “death on the rack... with a preliminary disembowelment” might save twice as many murder victims.<sup>150</sup> He states that these ludicrous examples demonstrate the risks of using human life as a means to accomplishing the death penalty’s end, deterrence. To conclude his critique of Van Den Haag’s theory, Conrad reiterates that capital punishment does not achieve deterrence firstly because there is no statistical evidence that capital punishment actually deters potential murderers, and secondly because even if it did so, society must implement “even more grievous forms of punishment in the interest of public safety.”<sup>151</sup>

For the most part, I find Conrad’s arguments in response to Van Den Haag’s theory of deterrence convincing. Conrad logically explains that the death penalty does not necessarily deter potential murderers because those sentenced to death fear the punishment more than life imprisonment. Further, although I do not believe that Van Den Haag would advocate for torture

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<sup>148</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 73.

<sup>149</sup> Ibid, 74.

<sup>150</sup> Ibid, 74.

<sup>151</sup> Ibid, 75.

in order to deter an increased number of murders, Conrad is logical in his explanation that if the chief aim of punishment is deterrence, then even torture must be implemented to deter as many criminals as possible. Though he may exaggerate in stating that the mind of the potential murderer is a “dark recess of abnormal psychology” unilluminated by common sense, Conrad identifies the flaws in Van Den Haag’s assumption that potential criminals will rationally examine the possibility of being sentenced to death when considering committing murder.<sup>152</sup> Conrad’s assertion that potential murderers are instead driven by their passions and frustrations is an idea that is espoused and expanded upon by Connolly, Nietzsche, and Foucault in the third chapter of this thesis.

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<sup>152</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 73.

### Chapter III: Reframing Death Penalty Theory

Immanuel Kant, G.W.F. Hegel, and their contemporary counterpart Ernest Van Den Haag evaluated the death penalty in terms of retributive justice and deterrence. As discussed in Chapters I and II of this thesis, analyses of capital punishment based upon these concepts often fail to consider issues of power, revenge, and discrimination. These abstract, philosophical arguments do not account for the many inconsistencies within the application of the American death penalty, the greatest of which is the fact that it fails to accomplish its purported purposes of deterrence and justice. Friedrich Nietzsche, Michel Foucault, and William Connolly are three theorists who reframe the debate on capital punishment in terms of these issues, yielding a more nuanced conception both of punishment generally and of the death penalty. These theorists reject the concept of autonomous, responsible individuals which Kant and Hegel depend on because this assumption ignores context.

Nietzsche argues that punishment originated as a tool to preserve the conscience, and explains that the relationship between a creditor and a debtor created a vengeance-driven punishment that today is practiced by governments against unlawful citizens.<sup>153</sup> He also argues that individuals gain pleasure through punishment, and asserts that punishment has not served one consistent purpose throughout history. Foucault does not present a universal theory of punishment, but instead explains his method for evaluating punishment and analyzes punishment as it is practiced. He argues that punishment is a mechanism of power used to create subjects, and that it must be evaluated in terms of its historical context.<sup>154</sup> Connolly uses both Nietzsche's and Foucault's theoretical frameworks to craft his own theory of punishment, namely, that

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<sup>153</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 40.

<sup>154</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225.



punishment exists as a tool for the privileged to exact revenge upon and discriminate against the less powerful.<sup>155</sup>

It is worth noting that both Ernest Van Den Haag and Jeffrey H. Reiman consider the Foucauldian question “What is the practice of punishment?” and briefly examine racial discrimination and capital punishment. Though Van Den Haag admits that the majority of those sentenced to death are poor or black, he denies that this is due to any discrimination in the application of capital punishment. He states that “unusual” punishments “may discriminate against those to whom [they] are applied in an entirely capricious or in a systematically biased manner,” but argues that capital punishment is no longer applied capriciously or discriminatorily because of the many opportunities to appeal sentences.<sup>156</sup> Further, Van Den Haag alleges that any discrimination in the application of the death penalty does not necessitate its abolition, as discrimination “is a characteristic not of the penalty but of its distribution to offenders.”<sup>157</sup> He argues that although the majority of those sentenced to death are poor, and a disproportionate number are black, this is because “the poor and black are more tempted to commit crimes, and that a greater proportion of them do.”<sup>158</sup> By acknowledging that capital punishment is disproportionately applied to the poor and black, but accepting this discrimination because their status results in their committing more crimes, Van Den Haag demonstrates that he is blind to central features of the practice of the death penalty in the United States.

When analyzing the *lex talionis*, Reiman also considers the discrimination he detects in the application of capital punishment. As the *lex talionis* principle states that offenders should be subjected to the harms they are responsible for imposing on their victims, Reiman argues that the

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<sup>155</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 42.

<sup>156</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 205.

<sup>157</sup> *Ibid*, 206.

<sup>158</sup> *Ibid*, 207.

principle implies that the offender must be fully responsible for his crime, both psychologically and socially.<sup>159</sup> As some individuals commit crimes as a result of the unjust social circumstances they suffer, Reiman argues that those who benefit from these circumstances share responsibility for these crimes.<sup>160</sup> He states that because impoverishment and other unjust social conditions can be remedied, American society “[has] no right to exact the full cost of murders from our murderers until we have done everything possible to rectify the conditions that produce their crimes.”<sup>161</sup> However, Reiman acknowledges that his audience may not accept the inequality he discusses, and therefore continues his analysis of the *lex talionis* under the assumption that those sentenced to death are fully responsible for their crimes.<sup>162</sup>

In contrast to these philosophical discussions of the death penalty, Friedrich Nietzsche argues that punishment originated as a mechanism to preserve conscience, and that it evolved according to the historical relationship between a creditor and a debtor. Further, humans gain pleasure from inflicting or witnessing punishment. Nietzsche also asserts that punishment has not served a single purpose throughout history, but instead has consistently been manipulated to serve different power structures. Nietzsche outlines his theory of punishment in *On the Genealogy of Morality* while examining the origin of “bad conscience,” or guilt. He states that man’s responsibility has become “his dominant instinct” and that this instinct is his conscience.<sup>163</sup> In order to preserve conscience, and therefore, lawfulness, society exacts punishments upon the unlawful, creating “a memory... with dreadful methods.”<sup>164</sup> When harsh

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<sup>159</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 131.

<sup>160</sup> *Ibid.*, 131.

<sup>161</sup> *Ibid.*, 132.

<sup>162</sup> *Ibid.*, 133.

<sup>163</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 37.

<sup>164</sup> *Ibid.*, 38.

or extreme punishments are implemented, the individual's conscience is reinforced by these reminders.<sup>165</sup> Therefore, in Nietzsche's view, punishment functions as a tool that creates responsible, conscientious subjects.

Nietzsche contends that the punishment which reinforces conscience emerged from the relationship between a creditor and a debtor. Punishment, he states, did not evolve according to theories of "freedom or lack of freedom of the will," but instead originated as retribution.<sup>166</sup> Offenders are punished due to society's anger and desire for vengeance; the idea that the criminal can atone for his crimes by suffering an equivalent injury.<sup>167</sup> This "equivalence between injury and pain" stems from the contractual agreement between a creditor and a debtor.<sup>168</sup> According to this agreement, a debtor borrows from a creditor and promises to repay the creditor at a specified time. If the debtor fails to repay the borrowed sum, "the creditor could inflict all kinds of dishonour and torture on the body of the debtor."<sup>169</sup> In the past, creditors were legally allowed to personally punish their debtors, while today, the creditor and debtor relationship is echoed in the relationship between a government and its demos.

As a creditor, a government grants its demos certain benefits, while the demos are expected to behave lawfully in return. Nietzsche argues that the criminal is a debtor who "not only fails to repay the benefits and advances granted to him, but also actually assaults the creditor."<sup>170</sup> Through punishment, the lawbreaker is reminded of the importance of the societal benefits he has rejected by his crimes. According to Nietzsche, this punishment is "a copy... of

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<sup>165</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 39.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid, 40.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid, 41.

<sup>170</sup> Ibid, 46.

normal behavior towards a hated, disarmed enemy who has been defeated,” functioning as a legalized act of anger and vengeance in the same manner as the punishment the creditor inflicts on the debtor.<sup>171</sup> However, as a society becomes more powerful, criminals are no longer subjected to the anger of the public, nor are they exiled.<sup>172</sup> Instead, because they are no longer as “dangerous and destabilizing for the survival of the whole,” lawbreakers are shielded from the anger of the injured party while compensating for their crimes with equivalent punishments.<sup>173</sup> Therefore, as a community gains influence and confidence, “its penal law becomes more lenient,” while a reduction in power will result in more severe punishments.<sup>174</sup>

The equivalence between injury and pain that guides Nietzsche’s theory of punishment satisfies both the creditor and the government because, as he argues, individuals gain pleasure from punishing others or from witnessing their punishment. The creditor and the government are compensated with “the pleasure of having the right to exercise power over the powerless without a thought.”<sup>175</sup> This “pleasure in its highest form” stems not only from the exercise of power, but also from the knowledge that the creditor suffers intense pain.<sup>176</sup> Members of the public experience this enjoyment whether they, as creditors, implement the punishment, or whether they observe their debtors being punished by the government.<sup>177</sup> Therefore, Nietzsche posits that the moral virtues of debt, conscience, and duty “all began with a thorough and prolonged bloodletting.”<sup>178</sup> In order to justify this impulse for vengeance, individuals view it as a natural

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<sup>171</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 47.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid, 41.

<sup>176</sup> Ibid, 42.

<sup>177</sup> Ibid, 41.

<sup>178</sup> Ibid.

human tendency.<sup>179</sup> However, Nietzsche asserts that justice can never be accomplished through this punishment stemming from anger and revenge, stating, “the *last* territory to be conquered by the spirit of justice is that of reactive sentiment!”<sup>180</sup> An established legal code makes possible a move in the direction of impersonal, objective justice by making punishment the duty of the state rather than the injured party, but cannot fully accomplish objective justice.<sup>181</sup>

After explaining his theory of punishment, Nietzsche maintains that punishment has not served a single purpose throughout history, but instead has been shifted and manipulated to serve a variety of purposes. The purpose of punishment at its origins and its modern application are entirely separate, as “anything in existence, having somehow come about, is continually interpreted anew, requisitioned anew, transformed and redirected to a new purpose by a power superior to it.”<sup>182</sup> Further, punishment did not evolve for the purpose of punishing; instead, the purpose emerges from the practice.<sup>183</sup> Therefore, the many shifts and changes in punishment do not represent a linear progress towards a defined goal, but instead are “mutually independent processes of subjugation” exercised as power directed at a vast array of different individuals and groups.<sup>184</sup> Finally, the procedure of punishment is not tailored to fit one official purpose, but instead can be utilized and adapted to a variety of purposes.<sup>185</sup>

Though Nietzsche does not specifically mention the death penalty in his discussion of punishment, it is clear that executing a criminal represents a debtor paying the ultimate price to a governing creditor. Further, it is impossible to separate the legal purpose of punishment from the

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<sup>179</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 42.

<sup>180</sup> *Ibid.*, 49.

<sup>181</sup> *Ibid.*, 50.

<sup>182</sup> *Ibid.*, 51.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*, 53.

race and class discrimination inherent in the application of capital punishment, which indicates American society's desire to exercise their vengeance upon these less powerful groups. I believe that Nietzsche's theory of punishment can be applied to begin to explain why the United States government continues to practice capital punishment despite its inconsistencies, discrimination, injustice, and lack of deterrence. Both Michel Foucault and William Connolly use Nietzsche's theories in their analyses of capital punishment. Connolly draws from Nietzsche's assertion that humans seek revenge through punishment, and Foucault expands Nietzsche's theory that punishment has no single purpose and instead functions as a tool of power.

Michel Foucault's theory of power shapes his conception of punishment. Foucault views the dominant forms of power utilized by the modern state as a complex network of forces that produces subjects. Punishment, therefore, is a manifestation of "general forces in society that reflect the dominant forms of social and political power;" it is a tool of power used to create subjects obedient to the requisites of the state.<sup>186</sup> Unlike Kant, Hegel, and Van Den Haag, who discuss capital punishment in abstract, theoretical terms, Foucault does not articulate a single central theory of punishment. Instead, he examines "*practices*" in order to answer the question "*how* does one punish?"<sup>187</sup> In order to do this, Foucault utilizes a historical approach to examine how governments exercise power through punishment. According to Foucault, one must demonstrate the inherent problems within "falsely self-evident" punishment by exploring its connections with "a multiplicity of historical processes."<sup>188</sup> For Foucault, punishment serves a variety of purposes and moral principles that shift over historical periods and across societies, a

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<sup>186</sup> Hugo Adam Bedau and Erin Kelly, "Punishment", *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.)

<sup>187</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225, 224.

<sup>188</sup> *Ibid*, 225.

clear continuation of Nietzsche's theory of the shifting purposes of punishment. These historical shifts must be examined in order to understand the modern purpose and method of punishment.

In this method of analysis, Foucault considers which individuals receive punishment, and which do not, and also how punishment is implemented. In accordance with his theory of resistance to create space for individual freedom, Foucault believes that punishment as an institution can be challenged and transformed.<sup>189</sup> When discussing capital punishment specifically, Foucault objects to "any justification of the practice of punishment," believing that the practice of punishment is not driven by the rational pursuit of justice, but instead by the desire to exert power over and subordinate others.<sup>190</sup> Therefore, Foucault rejects not only the death penalty, but any form of indefinite punishment, asserting that abolishing the death penalty while leaving life sentences intact "merely shifts but otherwise leaves unaltered the nature and locus of the power wielded over criminals by society."<sup>191</sup> However, in his critique Foucault does not offer his conception of alternative punishments or a program to abolish the death penalty. He believes that critique is not necessarily programmatic, but instead serves as "a challenge to what is."<sup>192</sup> Therefore, in my reading of Foucault, he intends for others to employ his methods and critique to take action to challenge norms of punishment.

Foucault uses this historical, context-driven method of analyzing punishment in *Discipline and Punish: The Birth of the Prison*. In "Generalized Punishment," Foucault discusses eighteenth-century reforms of punishment. During this time period, reformers determined that "instead of taking revenge, criminal justice should simply punish," and supported a departure

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<sup>189</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 73-131.

<sup>190</sup> Hugo Adam Bedau and Erin Kelly, "Punishment", *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.)

<sup>191</sup> Ibid.

<sup>192</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 236.

from overtly harsh and violent forms of punishment.<sup>193</sup> However, this reform was not conceived due to a “new respect for the humanity of the condemned,” but instead was developed “as a tendency towards a more finely tuned justice,” to punish more effectively and to utilize the power to punish as a more efficient mechanism of control.<sup>194</sup> Foucault writes that these reforms were a “rearrangement of the power to punish” to make it more effective, influential, and universal, “[inserting] the power to punish more deeply into the social body.”<sup>195</sup> Advances in technology and the embrace of capitalism drove “the shift from a criminality of blood to a criminality of fraud,” meaning a shift from criminalizing isolated acts of violence to criminalizing thefts of property, which resulted in stricter surveillance and guaranteed punishments for crimes that had previously been ignored.<sup>196</sup> Punishment was divided into two classifications of crimes: the “illegality of property,” crimes of theft and violence for which the lower classes were harshly policed and punished, and the “illegality of rights,” crimes of economic manipulation and fraud for which the bourgeoisie were able to evade punishment.<sup>197</sup> The image of the criminal as a violent, depraved monster also emerged at this time, coupled with preventative tactics to deter potential future criminals.<sup>198</sup>

In “The Gentle Way in Punishment,” Foucault analyzes reforms in punishment that resulted in imprisonment as a generalized punishment for all crimes. He states that the shift from retributive punishments and forced labor as punishment to imprisonment came about in order to mitigate the capricious power of the sovereign. Imprisonment made the criminal “the property of society” rather than that of the sovereign, enabling him to serve a “purely moral, but much more

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<sup>193</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 74.

<sup>194</sup> *Ibid.*, 77-78.

<sup>195</sup> *Ibid.*, 80, 82.

<sup>196</sup> *Ibid.*, 77.

<sup>197</sup> *Ibid.*, 87.

<sup>198</sup> *Ibid.*, 101-102.



real utility” as a deterrent to potential future criminals.<sup>199</sup> Foucault distinguishes retributive punishment and imprisonment in terms of “the relation [the punishment] establishes with the body and with the soul,” analyzing how each punishment controls individuals by subjecting them to power.<sup>200</sup> While the mechanism of retributive punishment was to exact justice by implementing a representation of the offender’s crime, the point of impact of imprisonment was both the body and the soul of the criminal.<sup>201</sup> Imprisonment constantly subjected the criminal to structured authority in order to render him an obedient subject, while simultaneously “forming obedient individuals” in society by the criminal’s example.<sup>202</sup> By detailing and analyzing the history of the reform of punishment, Foucault provides both context and method for a modern analysis of punishment generally and capital punishment specifically.

Foucault also uses this historical method of analyzing punishment to examine the state’s power of death in *The History of Sexuality*. According to Michael Meranze and Adam Thurschwell, Foucault analyzes the shift from “an overtly juridical to an increasingly bio-political” state, charting the negative or positive power the state exercised over the lives of the demos.<sup>203</sup> In the historical sovereign state, the ruler possessed the power to take the lives of his citizens, whether “at the scaffold or on the battlefield.”<sup>204</sup> However, this was a negative power, as the sovereign could take away the lives of his subjects, but was unable to improve them.<sup>205</sup> In contrast, the modern bio-political state exercises the positive power to enhance the lives of the demos. Therefore, capital punishment is justified by the argument that it “serves the preservation

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<sup>199</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 109.

<sup>200</sup> Ibid, 117, 127.

<sup>201</sup> Ibid, 128.

<sup>202</sup> Ibid, 129.

<sup>203</sup> Michael Meranze, “Michel Foucault, the Death Penalty and the Crisis of Historical Understanding,” *Historical Reflections* 29.2 (2003): 200.

<sup>204</sup> Ibid, 202.

<sup>205</sup> Ibid.

of life itself.” eliminating criminal individuals is necessary to ensure the wellbeing of the general population.<sup>206</sup> Foucault argues that the racist and classist characterization of criminals as irredeemable monsters “[allows] violence to be leveled in the name of security without undermining” the productive, bio-political state.<sup>207</sup> Although the state no longer wields absolute power, Foucault argues that through the continued application of capital punishment, not to mention conscription for military service and police killings, it still possesses the sovereign power to kill its citizens.<sup>208</sup> Thus, in my reading of Foucault, the death penalty has historically operated as and continues to be a transformative tool of the state’s power, justified today by racist and classist impulses.

Foucault also uses this method of analysis to discuss capital punishment as a manifestation of power in three essays: “Pompidou’s Two Deaths,” “The Proper Use of Criminals,” and “Against Replacement Penalties.” In “Pompidou’s Two Deaths,” Foucault analyzes the sentencing and execution of Buffet and Bontemps, incarcerated men who committed two murders in an escape attempt. Buffet and Bontemps were sentenced to death; when President Pompidou refused their appeal, they were subsequently executed.<sup>209</sup> Though the majority of French citizens at the time supported capital punishment, Foucault argues that Pompidou did not refuse Buffet’s and Bontemps’ appeal out of “faithfulness to the nation’s majority impulse.”<sup>210</sup> Instead, Pompidou was exercising his power, demonstrating that he was “a tough, uncompromising man...” unafraid to adopt “the most violent and reactionary

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<sup>206</sup> Michael Meranze, “Michel Foucault, the Death Penalty and the Crisis of Historical Understanding,” *Historical Reflections* 29.2 (2003): 203.

<sup>207</sup> Ibid, 205.

<sup>208</sup> Adam Thurschwell, “Ethical Exception: Capital Punishment in the Figure of Sovereignty,” *South Atlantic Quarterly* 107.3 (2008): 581.

<sup>209</sup> Michel Foucault, “Pompidou’s Two Deaths,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 418.

<sup>210</sup> Ibid, 420.

elements.”<sup>211</sup> Thus, Pompidou was not motivated by responsiveness to the demos, but was instead demonstrating his willingness to authorize the most terrible punishment by refusing to pardon Buffet and Bontemps. In my reading of Foucault, Pompidou was unconsciously taking pleasure in subordinating others and creating obedient subjects in taking this action.

Foucault further expands upon the desire to impose capital punishment as a tool of power in “The Proper Use of Criminals.” In this essay, he argues that the French penitentiary system punishes criminals rather than crimes. The criminal becomes the subject of public passion and vitriol; it is he “for whom the penalty and oblivion will be demanded.”<sup>212</sup> To impose punishment, the justice system also considers the supposed nature of the criminal rather than the crimes he is convicted of. Foucault states that the criminal’s perceived character will determine whether the justice system “understands and excuses him” or acts with severity, imposing a death sentence.<sup>213</sup> To illustrate this, Foucault distinguishes between two cases, one in which a man was accused of brutally murdering a young girl, and another in which business owners’ negligence in producing talcum powder resulted in the deaths of several children. Society, Foucault asserts, views the negligent business owners as “unscrupulous manufacturers, greedy or cynical businessmen, or incompetent engineers,” but they are never coded as “criminals” and therefore, never sentenced to death.<sup>214</sup> Conversely, though the conviction of the accused murderer rested on dubious evidence, he was viewed as “fundamentally a “criminal,” essentially a “danger,” and naturally a monster:” in other words, he was a man so morally depraved that he had to be

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<sup>211</sup> Michel Foucault, “Pompidou’s Two Deaths,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 420.

<sup>212</sup> Michel Foucault, “The Proper Use of Criminals,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 432.

<sup>213</sup> *Ibid*, 433.

<sup>214</sup> *Ibid*.

sentenced to death.<sup>215</sup> In effect, the “modern... principle that one must judge not crimes but criminals” preserves capital punishment because it allows the penitentiary system to continue manipulating power in order to subjugate those they label irredeemable.<sup>216</sup> Therefore, Foucault sees capital punishment as a tool of power which reflects and furthers inequality and class discrimination in French society.

In “Against Replacement Penalties,” Foucault details his analysis of the injustice of irreversible punishments. Emphasizing the role of capital punishment as a manifestation of power, Foucault maintains that throughout history, the death penalty has endured as a form of sovereign power that represented “the exercise of a right of life and death over individuals.”<sup>217</sup> Though it would be simple to abolish the death penalty in order to conform with other civilized nations or to avoid executing innocents, it would be much more difficult to do so based on the principle that the state lacks the authority to take citizens’ lives.<sup>218</sup> In order to abolish capital punishment while also causing the “beginning of a new political reflection,” the state’s “right to kill” must be abolished as well, creating freedom by clearly “defining the relations of individual freedom and the death of individuals.”<sup>219</sup>

However, Foucault maintains that imposing sentences of life in prison in lieu of capital punishment does little to destroy the state’s subjugation of citizens through punishment and “the right to kill.” Foucault argues that the penal system has historically divided criminals into two categories: those who can be rehabilitated through prison sentences, and those who are

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<sup>215</sup> Michel Foucault, “The Proper Use of Criminals,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 433.

<sup>216</sup> Ibid.

<sup>217</sup> Michel Foucault, “Against Replacement Penalties,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 459.

<sup>218</sup> Ibid, 459-460.

<sup>219</sup> Ibid, 460.

irredeemable “even if... punished indefinitely” and must be sentenced to death.<sup>220</sup> The penal system therefore assumes that the latter category of criminals must be sentenced to death, a definitive punishment.<sup>221</sup> Foucault recognizes that a sentence of life in prison is also essentially definitive. He predicts that even after the death penalty is abolished, debate will continue over whether to impose the second definitive sentence of life in prison, critiquing a penal system which “asserts that it is for the purpose of correction but maintains that certain individuals cannot be corrected, ever, ...because they are, in sum, intrinsically dangerous.”<sup>222</sup> Foucault states that if a society continues to impose the definitive sentence of life in prison, it “maintains, in one form or another, the category of individuals to be definitively eliminated” rather than continually questioning its own penal system and reforming it to prevent abuses of power.<sup>223</sup> The greater danger, Foucault maintains, is a society which “gives oneself the illusion of solving the most difficult problems” by keeping open “the trapdoor through which the “incorrigible” will disappear.”<sup>224</sup> If a society abolishes capital punishment but substitutes life sentences, the society continues to view criminals as irredeemable monsters, and therefore this norm of punishment has not been questioned or resisted. Instead, Foucault believes that a society should analyze and reconstruct its norms of punishment.

I find that Foucault’s historical, context-driven method of analyzing is useful for several reasons. First, rather than accepting a single conception of punishment or of justice, as Hegel, Kant, and Van Den Haag do, Foucault’s method necessitates an examination of context to determine how punishment functions as a practice in a given time and place. Foucault discusses

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<sup>220</sup> Michel Foucault, “Against Replacement Penalties,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 459-460.

<sup>221</sup> Ibid, 460.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid, 461.

<sup>224</sup> Ibid.

the practice of punishment and its implications rather than espousing abstract philosophical theories. Second, Foucault's constant questioning of the function and purpose of punishment, as well as his analysis of power and resistance, offers a method in which capital punishment may be criticized, threatened, transformed, or abolished. Though I find Foucault's refusal to articulate a single theory of punishment frustrating, I find his method helpful in organizing my own thoughts on punishment. In order to analyze the way in which the United States government creates and controls subjects through punishment as a form of power, I believe that questions of racial and class inequality must be examined, as well as a discussion of what I perceive to be an unforgiving and retribution-driven legal system. American capital punishment accomplishes neither justice nor deterrence, yet it continues to be implemented, and a Foucauldian analysis would begin to discern its actual purposes, as well as effective modes of resistance. William E. Connolly also applies Foucault's method of analyzing punishment to create his own account of the death penalty, examining issues of racial bias and revenge.

In "The Desire to Punish," an essay within *The Ethos of Pluralization*, William E. Connolly responds to the perspectives of Foucault and Girard in order to build his own theory of society's will to punish criminal acts. Though Connolly does not specifically address capital punishment in his discussion, his analysis of punishment is applicable to the death penalty. Connolly's analysis provides an interpretation of why American society accepts and endorses capital punishment. This reason, Connolly argues, is the deep drive for revenge salient within and between all social classes. In this argument, Connolly clearly draws from Nietzsche's theory that individuals exact punishment for vengeance and enjoy witnessing the punishment of others. He begins this discussion by stating that the five purported purposes of punishment, which are protection, deterrence, responsibility, justice, and rehabilitation, "do not mesh well together," as

“the underlying conceptions grounding each are contestable.”<sup>225</sup> Despite these inconsistencies, American society clings to the desire to exact revenge against both criminals and disadvantaged communities of color, “whose conditions of existence disturb the practices of fairness, neutrality, impartiality, and responsibility said to govern everyone.”<sup>226</sup> Some even seek revenge against the world itself, and use an already underprivileged group, such as African-American males, as a “paradigmatic substitute.” Therefore, punishment in the American criminal justice system provides a legal avenue for individuals to seek revenge against threatening agents.<sup>227</sup>

This drive to punish in order to seek revenge classifies individuals as either responsible agents or irredeemable monsters, but ignores the pathways of desire that run between and through these two categories. Of these “abstract categories of people,” one is “a responsible offender who deserves what he gets,” while the other is “a dangerous monster who must be destroyed or interned permanently.”<sup>228</sup> In reality, these two categories are ambiguous, often blurring into one another, but this ambiguity must be preserved and concealed in order to maintain them.<sup>229</sup> By assigning the potential targets of punishment to one or the other of these categories, society disregards the effect desire has on punishment and the drive to revenge. Connolly cautions that “no single model of causality... [can] negotiate this terrain,” but states that once individuals are aware of the effects of their desire, they are then “enabled and inspired to modify the shape of desire” to create a more just and balanced system of punishment.<sup>230</sup>

Connolly describes Girard’s theory of desire, then incorporates his own interpretation of desire, creating a new analysis that is applicable to the American drive to punish. Girard

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<sup>225</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 41-42.

<sup>226</sup> Ibid, 42.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid, 45, 47.

<sup>229</sup> Ibid, 45.

<sup>230</sup> Ibid, 50.

describes desire as “a triangular relation between a fractured subject, a model, and an object already desired by the model,” in which the subject desires the object in part because the model, his rival, possesses it.<sup>231</sup> The subject does not simply desire the object, but instead craves the “fullness of being” that the model seems to possess. However, because even the model cannot truly realize this wholeness, the subject’s “uncertainty and incompleteness” is left unresolved, and “desire keeps moving.”<sup>232</sup> In Girard’s view, this pathway of desire inevitably leads to rivalries, as “models eventually feel threatened by the privileged status they receive, and by the intense desire of disciples to attain the objects they prize the most.”<sup>233</sup> In order to explain this chaotic pattern of desire and violence, society designates scapegoats, who are held responsible for “the deceits, revenge, and violence built into escalating rivalries of desire.”<sup>234</sup> This discussion of scapegoats can be connected to Foucault’s analysis of criminals labelled irredeemable monsters.

However, Connolly critiques Girard’s theory of desire because it disregards certain important considerations which enable individuals to move past the cycle of rivalry and revenge. By incorporating these considerations, Connolly articulates a new account of desire which helps to explain society’s desire to punish. Connolly states that Girard’s perspective is flawed because he fails to consider different types or intensities of desire, which create a “dimension of mobility and uncertainty in the element of desire;” these different types and intensities depend on the model who possesses the object.<sup>235</sup> One reason that the subject desires a certain object is because a particular model possesses it, and therefore the subject cannot achieve his desire and possess the object without removing a reason for his desire. If the subject can recognize that achieving

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<sup>231</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 52.

<sup>232</sup> Ibid, 52-53.

<sup>233</sup> Ibid, 53.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid, 54.



his desire and taking the place of the model would remove a source of the desire itself, he is then able to revise and resist his own desires.<sup>236</sup>

Connolly identifies another weakness in Girard's theory as his failure to acknowledge the "collectivities" inherent in desire. Citing Wendy Brown, Connolly explains that the lifestyle of the middle class is upheld as a model of desire which "depoliticizes constituencies in subordinate class positions."<sup>237</sup> Disadvantaged individuals, especially people of color, simultaneously desire and resent this white, middle-class ideal, which defines them "as a racially marked constituency whose demands foreclose otherwise viable possibilities."<sup>238</sup> This perspective may incite these individuals to engage in criminal behavior, allowing them to possess a type of freedom which allows them to resist and therefore transcend their circumstances.<sup>239</sup> The white elites who judge and sentence these young men of color are motivated by their own desire to punish this disadvantaged class, meaning that "the prison as site of correction is overlaid by the prison as site of revenge."<sup>240</sup>

Connolly examines how this new theory of desire applies to the drive to punish and seek revenge. When the disadvantaged subjects of desire are unable to achieve the false wholeness that the model appears to possess, their resulting resentment "can grow into a subterranean will to revenge... aimed at any constituency whose way of being calls the naturalness or superiority of your identity into question."<sup>241</sup> The traditional American image of responsible, rational middle-class individuals is perpetuated by defining these identities as natural and whole while

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<sup>236</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 55.

<sup>237</sup> Ibid, 56.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid, 59.

<sup>240</sup> Ibid, 60.

<sup>241</sup> Ibid, 63.

simultaneously stifling conduct that undermines this ideal.<sup>242</sup> Perpetuating this model leads to the categorization of people convicted of crimes, defining them as “either responsible agents deserving punishment or unstable beings,” thereby implicitly permitting revenge.<sup>243</sup> Society overlooks disadvantaged communities to preserve this “appearance of integrity and cleanliness,” failing to address and rectify this “sacrifice of entire constituencies to stabilize uncertain cultural practices.”<sup>244</sup> Thus, it is not only these underprivileged communities that seek revenge against the white middle-class model, but the white middle-class that exacts revenge on these less powerful groups to retain their “culturally congealed identities.”<sup>245</sup>

Connolly then explores the pathway society might take to destroy these arbitrary categories and class distinctions, creating a more just and proportionate system of punishment. Individuals must first acknowledge that they “are not sovereign agents who will the codes of desire that circulates through us” in order to leave behind these distinct categories, sacrificing “the appearance of equivalence to work on the call to revenge within the desire to punish.”<sup>246</sup> Once individuals are aware of the pathway of their desire, they are then better able to identify their own flawed perspectives and desires and work to change them, engaging in “micropolitics of action on the self.”<sup>247</sup> Individuals must “work on specific contingencies” in themselves, which allows them to respond to “the crucial role of contingency in identity and desire.”<sup>248</sup> This new awareness “opens up new possibilities of ethical responsiveness to difference,” creating a system

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<sup>242</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 63.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid, 64.

<sup>245</sup> Ibid, 66.

<sup>246</sup> Ibid, 65.

<sup>247</sup> Ibid, 68.

<sup>248</sup> Ibid, 69.

of punishment that is more fair and balanced.<sup>249</sup> Therefore, by examining and becoming aware of our biases, we are able to resist them and implement punishment in a more just manner.

In my view, Connolly's analysis of punishment, revenge, and desire necessarily leads to abolishing the death penalty, or at least narrowing it substantially. If criminals are driven to commit violent acts due to the identity forced upon them by white middle-class society, and by their desire to possess the apparent fullness that this class is perceived to hold, they cannot be held fully responsible for their actions and thus should not be subject to the highest form of punishment. Further, since those who exact death sentences against them are inevitably affected by their own desire to exact revenge against a nonconforming class, they cannot impose sentences justly or logically. However, Connolly's proposed method to rectify this system of punishment is flawed. The white middle class exacting these punishments against communities of color benefits from their identity as a model in society. Even if these individuals were to recognize their own flawed desires, they have no motivation save morality to change their behavior. Therefore, though Connolly's analysis of desire and punishment sufficiently explains American acceptance of capital punishment and clearly articulates a reason to abolish it, eliminating the death penalty would be difficult to accomplish through the "work by the self on the self" that Connolly advocates.

In my view, the true purpose of the inconsistent American death penalty is neither deterrence nor retribution, but the revenge, vengeance, and discrimination that both Nietzsche and Connolly describe. If the American death penalty is to be abolished and a more just penal system created, it must be analyzed, criticized, and resisted according to the framework of the theories discussed in this chapter. The fourth chapter of this thesis will briefly discuss seven pivotal death penalty cases in terms of both their constitutional holdings and the theoretical

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<sup>249</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 69.

structure of their arguments in order to determine which theories the Supreme Court of the United States accepts, and which they deny.

## Chapter IV: Supreme Court Jurisprudence

In the first three chapters of this thesis, I have outlined the most influential theories surrounding the American death penalty. However, it is not theorists who determine whether capital punishment will continue to be applied, but the rulings of the Supreme Court of the United States. Therefore, in this chapter, I will analyze five influential death penalty cases and determine what, if any, theories the Court has accepted or rejected in its capital punishment jurisprudence. These cases are *Furman v. Georgia* (1972), *Gregg v. Georgia* (1978), *McCleskey v. Kemp* (1987), *Ford v. Wainwright* (1986), and *Atkins v. Virginia* (2002). I will examine these particular cases because they all demonstrate points at which the Court examined the constitutionality of the death penalty in specific instances. Therefore, these cases will reveal points at which the Court analyzed and critiqued the death penalty, which would facilitate the use of political theory. I selected these five cases because they provide a summarization of the Court's contemporary analysis of the death penalty, while reflecting almost all of the theories I discussed in the first three chapters. When analyzing these cases, I will first detail the facts of the case, then discuss the majority opinion and any relevant concurrences and dissents. I will then analyze the Court's substantive assessment of the death penalty, connecting this argument with theories from the first three chapters. This will enable me to determine, in the conclusion of this thesis, what the Supreme Court's theoretical view of the death penalty is, whether it is consistent, and whether it may lead to completely abolishing capital punishment, either by gradual reform or constitutional ruling, in the future.

In *Furman v. Georgia* (1972), the Court examined both the unequal application of the American death penalty under the due process and equal protection clauses of the Fourteenth Amendment, and also the constitutionality of capital punishment on its face. The case involved

three African-American men who were convicted of separate crimes in state courts and sentenced to death in trials by jury. William Furman was convicted of murder in Georgia, while Lucious Jackson and Elmer Branch were convicted of rape in Georgia and Texas, respectively.<sup>250</sup> After the cases were unsuccessfully appealed in state supreme courts, the Supreme Court of the United States granted cert, meaning that it agreed to review the cases, and consolidated the three cases.<sup>251</sup> In a 5-4 decision, the Court reversed the decisions of the lower courts and remanded the cases for further proceedings, holding that the imposition of the death penalty in the three cases constituted cruel and unusual punishment violative of the Eighth and Fourteenth Amendments. The Court issued a brief *per curiam* opinion followed by separate concurrences authored by Justices Douglas, Brennan, Stewart, White, and Marshall, while Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist wrote dissents.<sup>252</sup> The *Furman* decision induced a ten-year moratorium on capital punishment in the United States, and caused several states to adopt legislation requiring juries to consider aggravating and mitigating factors when imposing death sentences.<sup>253</sup>

The five justices in the majority could not come to a consensus in their arguments on the unconstitutionality of capital punishment. While Justices Douglas, Stewart, and White argue that capital punishment is unconstitutional in this specific case, because arbitrary sentencing violates the due process and equal protection clauses of the Fourteenth Amendment, Justices Brennan and Marshall maintain that the death penalty is unconstitutional on its face “due to its severity,

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<sup>250</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 238.

<sup>251</sup> David M. O’Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties*, 7th ed. (New York: W.W. Norton & Company, 2008), 1168.

<sup>252</sup> *Furman*, 238.

<sup>253</sup> O’Brien, *Constitutional Law and Politics*, 1169.

finality, excessiveness, and denial of human dignity.”<sup>254</sup> The concurrences by Justices Douglas and Brennan use arguments similar to specific theories discussed in the first three chapters of this thesis. Justice Douglas’ concurrence posits that the death penalty is unconstitutional because it is unequally applied to the underprivileged, particularly African-Americans, and therefore violates the Fourteenth Amendment.<sup>255</sup> Douglas’ concurrence thus uses arguments similar to Connolly’s analysis of punishment, which states that punishment is used as a tool to persecute outsiders, specifically those who are impoverished and black.<sup>256</sup> Justice Brennan’s concurrence maintains that the death penalty is unconstitutional in all circumstances because it violates human dignity.<sup>257</sup> His arguments are similar to the Foucauldian theory that the death penalty is a tool of power used to eliminate unwanted members of society.<sup>258</sup><sup>259</sup> Additionally, both Douglas and Brennan rely upon jurisprudence from *Trop v. Dulles* (1958), which is theoretically similar to Reiman’s theory that abolishing the death penalty is necessary to serve the advancement of civilization.<sup>260</sup>

In his concurrence, Justice Douglas argues that the death penalty is violative of both the cruel and unusual punishment clause of the Eighth Amendment as applied to the states through the due process and equal protection clauses of the Fourteenth Amendment because it is discriminatorily applied to African-American defendants.<sup>261</sup> Douglas both cites *Louisiana ex rel.*

*Francis v. Resweber* (1947) and briefly discusses the history of the Fourteenth Amendment to

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<sup>254</sup> David M. O’Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties*, 7th ed. (New York: W.W. Norton & Company, 2008), 1169.

<sup>255</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 238.

<sup>256</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 42.

<sup>257</sup> *Furman*, 238.

<sup>258</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 74.

<sup>259</sup> Michel Foucault, “Against Replacement Penalties,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 460.

<sup>260</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 136.

<sup>261</sup> *Furman*, 240.

establish that the amendment's protection of "privileges or immunities of citizens" prohibits cruel and unusual punishment.<sup>262</sup> He then cites *Trop v. Dulles* (1958), in which the Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," meaning that both the viewpoints of society and the practice of punishment in context may shape the Court's surmisation of what punishments are cruel and unusual.<sup>263</sup> Therefore, Douglas states that despite the supposed validity of a law prescribing capital punishment, the application of the law may be unconstitutional. This unconstitutional application could arise if the defendant was sentenced based upon "his race, religion, social position, or class" or if the sentencing procedures "[gave] room for the play of such prejudices."<sup>264</sup>

Douglas then details the origin and implications of the American proscription against cruel and unusual punishment by examining the English Bill of Rights. He states that the history of this clause indicates that it is cruel and unusual to apply punishment "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular," while simultaneously refusing to apply the same punishment generally to all members of society.<sup>265</sup> Further, the authors of the Eighth Amendment demonstrated their "desire for equality" in punishment when proscribing cruel and unusual punishment.<sup>266</sup> Thus, because the Eighth Amendment prohibits unequal and discriminatory punishment, Douglas asserts that the application of the American death penalty is unconstitutional because impoverished, African-American defendants are disproportionately sentenced to death.<sup>267</sup> Although the prohibition

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<sup>262</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 241.

<sup>263</sup> *Ibid*, 242.

<sup>264</sup> *Ibid*.

<sup>265</sup> *Ibid*, 245.

<sup>266</sup> *Ibid*, 255.

<sup>267</sup> *Ibid*, 249.



against cruel and unusual punishment requires legislation that is “evenhanded, nonselective, and nonarbitrary,” these laws are still applied discriminatorily due to the unregulated discretion of judges and juries in sentencing.<sup>268</sup> Justice Douglas maintains that the selective application of the death penalty “feeds prejudices against the accused if he is poor or despised” while protecting those who are white and affluent, and concludes that the Georgia and Texas statutes under which Furman, Jackson, and Branch were sentenced are unconstitutional in practice.<sup>269</sup> However, he does not evaluate the constitutionality of the death penalty generally.<sup>270</sup>

In arguing that the application of the American death penalty is unconstitutional because it targets impoverished minorities, particularly African-Americans, Douglas makes an argument that aligns with Connolly’s analysis of punishment. Connolly asserts that punishment is driven by prejudice and is exacted in order to get revenge against disliked minorities. He states that this practice of punishment classifies white, affluent Americans as responsible, rational individuals and implicitly allows them to exact revenge on the disadvantaged and black defendants “whose way of being calls the naturalness or superiority of [their] identity into question.”<sup>271</sup> By acknowledging the racial and class prejudice inherent in American capital punishment, Justice Douglas makes an argument analogous to Connolly, as both conclude that the judges and juries responsible for sentencing view African-Americans as dangerous outsiders who must be eliminated.<sup>272</sup> However, while Connolly believes that this view of punishment will allow individuals to become aware of their desires and establish a more just system of punishment, Douglas merely concludes that certain laws are unconstitutional if applied in a discriminatory

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<sup>268</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 256, 254.

<sup>269</sup> *Ibid*, 255, 257.

<sup>270</sup> *Ibid*, 257.

<sup>271</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 63.

<sup>272</sup> *Ibid*, 45, 47.

manner.<sup>273</sup> In terms of other theories, Douglas' use of a quotation from *Trop* makes a similar argument to Reiman, who stated that abolishing painful punishments such as the death penalty allows society to mature and progress.<sup>274</sup> By citing historical examples and evaluating the application of the death penalty rather than focusing on the punishment abstractly, Douglas also analyzes the death penalty in the manner of Foucault, who believes that punishment must be evaluated in terms of its practice and historical context.<sup>275</sup>

Unlike Justice Douglas, Justice Brennan argues that the death penalty is facially unconstitutional in his concurrence. He maintains that punishments which do not comport with human dignity are cruel and unusual, and then asserts that the death penalty is cruel and unusual because it violates human dignity.<sup>276</sup> Brennan begins his concurrence by examining the history of the Eighth Amendment in order to determine the scope of the prohibition against cruel and unusual punishment.<sup>277</sup> This historical analysis shows that the framers established this clause in order to check the power of the legislature, which would otherwise “have had the unfettered power to prescribe punishments for crimes.”<sup>278</sup> Though the framers originally intended to ban torture as a punishment, Brennan states that they meant for the clause to evolve, proscribing other punishments considered cruel and unusual in the future.<sup>279</sup> He supports this assertion by citing *Weems v. United States* (1910), in which the Court determined that the cruel and unusual

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<sup>273</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 69.

<sup>274</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 139.

<sup>275</sup> Michel Foucault, “Questions of Method,” in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225.

<sup>276</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 238.

<sup>277</sup> *Ibid*, 258.

<sup>278</sup> *Ibid*, 263.

<sup>279</sup> *Ibid*, 264.

punishment clause should shift with society to forbid punishments beyond those considered cruel and unusual at its conception.<sup>280</sup>

Brennan then details four principles which he believes are inherent in the cruel and unusual punishment clause. If a punishment infringes these principles, then it violates the clause and is unconstitutional; under this test, capital punishment is cruel and unusual.<sup>281</sup> The first principle is that the cruel and unusual punishment clause bans punishments which are so severe that they “[do] not comport with human dignity.”<sup>282</sup> The clause recognizes “even the vilest criminals” as dignified members of the human community, and punishments which “treat members of the human race as nonhumans, as objects to be toyed with and discarded” are cruel and unusual.<sup>283</sup> Capital punishment violates this principle because it is unusually severe “in its pain, in its finality, and in its enormity.”<sup>284</sup> Further, Brennan maintains that the state denies a defendant’s humanity when imposing capital punishment; in contrast with an individual in prison, who retains some constitutional rights and “remains a member of the human family,” the executed person is unable to appeal his sentence and redeem himself because of the definitiveness of death. In effect, as the Court stated in *Witherspoon v. Illinois* (1968), the individual sentenced to death is no longer “fit for this world.”<sup>285</sup>

The second principle inherent in the cruel and unusual punishment clause is that the state may not arbitrarily inflict a severe punishment upon some individuals while refusing to impose it in all circumstances.<sup>286</sup> Brennan states that the death penalty violates this principle due to its infrequent application, as it is only inflicted “in a trivial number of the cases in which it is legally

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<sup>280</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 266.

<sup>281</sup> *Ibid*, 286.

<sup>282</sup> *Ibid*, 270.

<sup>283</sup> *Ibid*, 273.

<sup>284</sup> *Ibid*, 287.

<sup>285</sup> *Ibid*, 290.

<sup>286</sup> *Ibid*, 274.

available.”<sup>287</sup> The third principle is that a punishment must be acceptable to contemporary society. If society disapproves of a punishment, then that punishment likely does not respect human dignity.<sup>288</sup> Brennan asserts that contemporary society rejects the death penalty and therefore violates this principle. This rejection, he argues, is evident both in the decline in and rarity of the infliction of capital punishment and in the moral discomfort with executing members of a society which values “the dignity of the individual” above all else.<sup>289</sup> In fact, Brennan posits, it is possible that capital punishment only continues to be tolerated by society because it is imposed so infrequently.<sup>290</sup>

The final principle inherent in the cruel and unusual punishment clause is that a penalty must not be excessive, as a punishment which inflicts unnecessary suffering certainly does not respect human dignity.<sup>291</sup> Brennan states that if a less severe punishment could meet the same penal purposes, the punishment is excessive and therefore cruel and unusual.<sup>292</sup> The death penalty violates this principle because it does not accomplish deterrence and because a less severe penalty would satisfy the desire for retributive justice. In terms of deterrence, Brennan cites statistics which demonstrate that the death penalty does not deter future criminals, and states that even if the punishment could deter, it would only deter “those who think rationally about the commission of capital crimes.”<sup>293</sup> At this point, Brennan critiques abstract theories of deterrence, stating that he seeks to analyze “the practice of punishing criminals by death as it exists in the United States today.”<sup>294</sup> In terms of retribution, Brennan argues that society’s desire

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<sup>287</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 293.

<sup>288</sup> *Ibid*, 277.

<sup>289</sup> *Ibid*, 296, 299.

<sup>290</sup> *Ibid*, 300.

<sup>291</sup> *Ibid*, 279.

<sup>292</sup> *Ibid*, 280.

<sup>293</sup> *Ibid*, 301.

<sup>294</sup> *Ibid*, 301-302.

for this form of justice can be met with imprisonment, as “the overwhelming number of criminals who commit capital crimes go to prison” rather than being executed.<sup>295</sup> Therefore, because the death penalty violates all four principles implicit in the cruel and unusual punishment clause of the Eighth Amendment, Brennan concludes that the punishment is unconstitutional in all circumstances.<sup>296</sup>

In his concurrence, Brennan makes several arguments that align with the theories discussed in the first three chapters of this thesis. First, his assertion that a punishment is cruel and unusual if it does not comport with human dignity is similar to Foucault’s analysis of the death penalty, which sees the punishment as a means of definitively eliminating outsiders from society. According to Foucault, the state views some defendants as irredeemable monsters who cannot be rehabilitated “even if... punished indefinitely” and therefore removes them from society by executing them.<sup>297</sup> By asserting that the death penalty is cruel and unusual because it does not respect human dignity, I find that Brennan makes a Foucauldian argument. Like Foucault, who views the death penalty as a definitive punishment for the “incorrigible,” Brennan believes that capital punishment is severe due to its finality and because it eliminates those who are “not fit for this world.”<sup>298</sup> However, unlike Brennan, who believes that life imprisonment respects an individual’s human dignity, Foucault maintains that all definitive punishments, including life imprisonment, “maintain... the category of individuals to be definitively eliminated” by removing outsiders from society.<sup>299</sup> In addition to his Foucauldian view of the finality of capital punishment, Brennan also employs Foucauldian methods when discussing

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<sup>295</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 304-305.

<sup>296</sup> *Ibid*, 286.

<sup>297</sup> Michel Foucault, “Against Replacement Penalties,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 459-460.

<sup>298</sup> *Furman*, 290.

<sup>299</sup> Foucault, “Against Replacement Penalties,” 461.

deterrence. Rather than presenting abstract theories about the potential deterrent effect of the capital punishment, Brennan analyzes the practice of the contemporary death penalty, and therefore uses Foucault's context-driven method of examining punishment.<sup>300</sup>

Brennan's argument that punishment should evolve to fit society's standards is similar to Reiman's theory that abolishing the death penalty enables society to improve and mature. According to Brennan, the third principle inherent in the cruel and unusual punishment clause is that punishment should shift in order to be acceptable to contemporary society. This argument aligns with Reiman's theory that painful punishments like the death penalty should be abolished in order to enable the maturation and civilization of society.<sup>301</sup> Finally, in asserting that capital punishment could only deter individuals who rationally determine whether to commit crimes, Brennan makes an argument similar to Conrad's theory of deterrence, which states that "common sense is the wisdom of the common man" rather than the irrational individual who commits violent crimes.<sup>302</sup>

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist rely upon past jurisprudence and the historical role of the Court in their dissents rather than utilizing theoretical analyses. In his dissent, Chief Justice Burger states that since the enactment of the Eighth Amendment, "not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment."<sup>303</sup> Further, all four dissenters maintain that the Court oversteps its constitutional boundaries by interfering with capital punishment, a power which should be left to the legislative branch and to the states. Both Powell and Rehnquist write that the

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<sup>300</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225, 224.

<sup>301</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 139.

<sup>302</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 133.

<sup>303</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 380.

Court must exercise “judicial self-restraint” when evaluating the death penalty.<sup>304</sup> However, in his dissent, Powell briefly “justifies capital punishment on a theory of society’s retribution,” in a manner which is similar to Kant and Hegel’s theories of retributive justice.<sup>305306</sup> In my view, Powell’s dissent also demonstrates the validity of Nietzsche’s discussion of punishment as a mechanism for revenge.<sup>307</sup>

Justice Powell briefly discusses the role of retributive justice in his dissent, analyzing past jurisprudence to determine that the Court does not reject retribution as a goal of capital punishment. Powell states that although contemporary critics view retribution as immoral, the Court has “acknowledged the existence of a retributive element in criminal sanctions and has never... found it impermissible.”<sup>308</sup> He cites Justice Marshall’s plurality opinion in *Powell v. Texas* (1968), in which Marshall argued that the Constitution does not require punishment to serve merely rehabilitative or therapeutic purposes.<sup>309</sup> Further, Powell maintains that retribution as a goal of punishment has widespread public support because it reflects society’s revulsion for violent criminal acts. He quotes Justice Denning, a British High Court Judge who argued that “some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not,” and concludes that society naturally demands retributive justice when violent crimes are committed.<sup>310</sup>

Powell’s discussion of retribution as a purpose of capital punishment aligns with Kant and Hegel’s theories of retributive justice. Kant and Hegel believed that punishment is

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<sup>304</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 467.

<sup>305</sup> David M. O’Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties*, 7th ed. (New York: W.W. Norton & Company, 2008), 1169.

<sup>306</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 22.

<sup>307</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 42.

<sup>308</sup> *Furman*, 452.

<sup>309</sup> *Ibid*,

<sup>310</sup> *Ibid*, 453-454.

principally intended to “annul wrong and thereby vindicate right” rather than to deter or to reform.<sup>311</sup> This conception of punishment is based upon the *lex talionis*, the principle that criminals should be punished in equal measure to the crimes they committed.<sup>312</sup> By asserting that retributive justice is a constitutional purpose of the death penalty, Powell echoes Kantian and Hegelian theories of punishment. The argument that the desire for retribution is a natural human reaction to violent crimes seems to affirm the validity of Nietzsche’s analysis of punishment as an instrument for exacting revenge. Nietzsche writes that members of society enjoy observing the state punishing criminals because this experience gives them “the pleasure of having the right to exercise power over the powerless.”<sup>313</sup> Powell accepts this ruthless desire for revenge as an acceptable goal of capital punishment, and even argues that it is a natural human emotion; Nietzsche maintains that this justification is often used to defend retributive punishment.<sup>314</sup> In my view, Powell’s discussion of the constitutionality and validity of retribution demonstrates that he is susceptible to the desire to punish that Nietzsche describes and Connolly later draws from.

After *Furman*, several states adopted new legislation in order to ensure that the death penalty would not be applied in a capricious or discriminatory manner.<sup>315</sup> Georgia, Texas, and twenty-three other states enacted laws requiring juries to consider aggravating and mitigating circumstances in sentencing, finding at least one aggravating factor beyond a reasonable doubt

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<sup>311</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 79.

<sup>312</sup> *Ibid.*, 22.

<sup>313</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 41.

<sup>314</sup> *Ibid.*, 42.

<sup>315</sup> David M. O’Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties*, 7th ed. (New York: W.W. Norton & Company, 2008), 1169.



before imposing a death sentence.<sup>316</sup> Georgia's new laws also required a bifurcated trial, in which guilt or innocence is decided in the first stage and a sentence is determined in the second stage of the trial.<sup>317</sup> *Gregg v. Georgia* (1976), the second case I will examine, deals with these new sentencing procedures. Under the Georgia legislation, Gregg was convicted of two counts of armed robbery and two counts of murder in a Georgia state court, and was sentenced to death in the second stage of a bifurcated trial by jury. On appeal, the Georgia Supreme Court affirmed the convictions and sentence, and the Supreme Court of the United States granted cert.<sup>318</sup> In a 7-2 decision, the Court affirmed the decision of the lower court, finding that the imposition of the death penalty, both under the new Georgia legislation and in general, does not violate the proscription against cruel and unusual punishment under the Eighth and Fourteenth Amendments.<sup>319</sup> Justice Stewart authored the opinion of the Court, which Justices Stevens and Powell joined. Justice White wrote a concurrence, which was joined by Chief Justice Burger and Justice Rehnquist, and Justice Blackmun also wrote a concurrence. Justices Brennan and Marshall both wrote dissents.

The opinion of the Court, written by Justice Stewart, uses several arguments which intersect with the theories discussed in the first three chapters of this thesis, accepting some and rejecting others. Justice Stewart argues that the death penalty does not constitute cruel and unusual punishment, both in general and in the present case.<sup>320</sup> Stewart examines the "evolving standards of decency" surrounding the death penalty, but unlike Reiman, who states that capital punishment should be abolished in accordance with the maturation of society, Stewart finds that

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<sup>316</sup> David M. O'Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties*, 7th ed. (New York: W.W. Norton & Company, 2008), 1169.

<sup>317</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), 162-166.

<sup>318</sup> *Ibid*, 161.

<sup>319</sup> *Ibid*, 163.

<sup>320</sup> *Ibid*, 168.

modern legislative support for capital punishment permits its application.<sup>321</sup> He also rejects the Foucauldian argument that punishment should respect the dignity of the individual, maintaining that the state is not required to impose the least severe penalty possible.<sup>322</sup> His discussion of retribution as a natural human desire seems to affirm Nietzsche's discussion of punishment as a tool of revenge, while his dismissal of statistics demonstrating capital punishment's lack of deterrent effects is similar to Van Den Haag's reasoning.<sup>323</sup> Finally, Stewart's argument that capital punishment is an extreme penalty suitable for the most extreme crimes corresponds with Kant and Hegel's adherence to the *lex talionis*.<sup>324</sup> Justice Brennan also makes many arguments which align with theory in his dissent, but as it is thematically similar to his concurrence in *Furman*, I will not discuss his arguments further.<sup>325</sup>

In the opinion of the Court, Justice Stewart addresses the petitioner's argument that the death penalty, in all circumstances, constitutes cruel and unusual punishment.<sup>326</sup> He determines that it does not, and begins by examining the history of the proscription against cruel and unusual punishment within the Eighth Amendment. Although the principle was originally intended to prevent the use of torture, Stewart cites *Weems v. United States* (1910), in which the Court held that the Eighth Amendment should be "interpreted in a flexible and dynamic manner" to extend to punishments society finds unacceptable in the future.<sup>327</sup> Thus, Stewart examines contemporary viewpoints of the death penalty, looking at "objective indicia that reflect the public attitude

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<sup>321</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 136.

<sup>322</sup> *Ibid*, 174.

<sup>323</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969): 145

<sup>324</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 22.

<sup>325</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), 227.

<sup>326</sup> *Ibid*, 168.

<sup>327</sup> *Ibid*, 171.

toward a given sanction.”<sup>328</sup> Noting that both the framers and the authors of the Fourteenth Amendment accepted capital punishment, Stewart argues that “a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.”<sup>329</sup> This approval for the death penalty is clear both because a majority of states have enacted legislation that provides for the imposition of the death penalty, and because the jury, “a significant and reliable objective index of contemporary values,” is now heavily involved with sentencing.<sup>330</sup> Stewart’s assessment of the shifting standards of decency inherent in the Eighth Amendment leads him to conclude that the death penalty is still acceptable to contemporary society.

Stewart next considers the argument that punishment should accord with the “dignity of man,” citing *Trop v. Dulles* and stating that punishment must not be excessive or severe in order to conform with the Eighth Amendment.<sup>331</sup> Instead of discussing how the death penalty impacts human dignity, though, he maintains that because capital punishment is “selected by a democratically elected legislature against the constitutional measure,” the legislature is not required to select the least severe penalty possible for a particular crime.<sup>332</sup> The legislature, Stewart asserts, is constitutionally prescribed to sentence criminals and represents the preferences of the demos, and is therefore given discretion in determining whether to impose capital punishment. Turning to retribution and deterrence, Stewart maintains that retribution is a constitutional purpose of punishment, as it is “an expression of society’s moral outrage at particularly offensive conduct,” and is acceptable because the objective state, rather than individual citizens seeking vindication, is responsible for punishment.<sup>333</sup> Although statistics do

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<sup>328</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), 173.

<sup>329</sup> *Ibid*, 179-180.

<sup>330</sup> *Ibid*, 181.

<sup>331</sup> *Ibid*, 173.

<sup>332</sup> *Ibid*, 175-176.

<sup>333</sup> *Ibid*, 183.

not demonstrate a link between capital punishment and deterrence, Stewart contends that this evidence is inconclusive, and states that the death penalty is an effective deterrent for some potential murderers, such as those who “carefully contemplate” whether to commit a crime.<sup>334</sup> Finally, Stewart argues that the death penalty is not disproportionate when applied to the crime of murder, as “it is an extreme sanction, suitable to the most extreme of crimes.”<sup>335</sup> Therefore, Stewart concludes, the death penalty does not violate the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments.

The arguments Stewart uses in the opinion of the Court are analogous to many theories presented in the first three chapters of this thesis. Stewart’s discussion of the evolving standards implicit in the Eighth Amendment intersects with Reiman’s theory that overtly painful punishments should be abolished as “part of the civilizing mission of modern states.”<sup>336</sup> However, while Reiman argues that the death penalty should be abolished because it demonstrates society’s immorality, Stewart justifies the imposition of capital punishment through this analysis, arguing that the new legislation regulating sentencing demonstrates society’s acceptance of the penalty. Stewart also discusses the Foucauldian argument that punishment should respect human dignity; Foucault purports that punishment is a tool of power used to eliminate those society regards as irredeemable, and analyzes punishment by examining its context and practice.<sup>337</sup> To Foucault, this practice of punishment implies that capital punishment, and all other definitive penalties, should be abolished, but Stewart dismisses this analysis, failing to discuss the severity of the practice of punishment in context and instead

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<sup>334</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), 185-186.

<sup>335</sup> *Ibid*, 187.

<sup>336</sup> Jeffrey H. Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy & Public Affairs* 14.2 (1985): 142.

<sup>337</sup> Michel Foucault, “Against Replacement Penalties,” in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 461.

justifying the death penalty by noting the constitutional power of the legislative branch. When discussing retribution, Stewart expresses the vengeful view of punishment that Nietzsche analyzes, assuming that the desire for revenge is a natural human emotion.<sup>338</sup> While Stewart states that retribution as a purpose of punishment is acceptable because the unbiased state is responsible for imposing penalties, Nietzsche argues that society still experiences vengeful pleasure from witnessing their creditors being punished by the state.<sup>339</sup>

When discussing deterrence, Stewart maintains that the death penalty effectively deters potential murderers despite an abundance of statistical evidence to the contrary. This argument is similar to Van Den Haag's discussion of deterrence, in which the theorist dismisses statistical evidence and continually maintains that the death penalty potentially has some deterrent effect due to its severity.<sup>340</sup> Van Den Haag does not discuss the possible deterrent effect of capital punishment for the rational criminal individual as Stewart does, but both ignore statistical evidence and advocate for the imposition of the death penalty based upon abstract theory. Stewart's argument that the death penalty is a proportionately severe punishment for the severe crime of murder aligns with Kant and Hegel's *lex talionis* principle. Like Kant and Hegel, Stewart does not advocate for exact adherence to the *lex talionis*, but maintains that the criminal who takes another's life must be put to death himself.<sup>341</sup> Throughout the opinion of the Court, Stewart accepts theoretical arguments similar to those of Kant, Hegel, and Van Den Haag, while rejecting the context-dependent analyses of Foucault and Nietzsche.

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<sup>338</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 42.

<sup>339</sup> *Ibid*, 41.

<sup>340</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 68.

<sup>341</sup> *Ibid*, 22.

In *McCleskey v. Kemp* (1987), the Court considered whether evidence of racial discrimination in Georgia's capital punishment sentencing indicated a violation of the Eighth and Fourteenth Amendments. Warren McCleskey, a black man, was convicted of murdering a white police officer during an armed robbery by a Georgia state court. During the second stage of a bifurcated trial, the jury found that two aggravating circumstances existed beyond a reasonable doubt, and sentenced McCleskey to death.<sup>342</sup> On appeal, the Supreme Court of Georgia affirmed the decision of the lower court, and the Supreme Court of the United States granted cert.<sup>343</sup> McCleskey used a statistical study known as the Baldus study to argue that the imposition of the death penalty in this case constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments because it was imposed in a racially discriminatory manner. The Baldus study demonstrates a "disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant," showing that black defendants charged with killing white victims were most likely to receive death sentences.<sup>344</sup> In a 5-4 decision, the Court ruled that the imposition of the death penalty in this case did not violate the Eighth and Fourteenth Amendments. Justice Powell wrote the majority opinion, which Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined. Justices Brennan, Blackmun, and Stevens all wrote dissents, while Justice Marshall joined Brennan's and Blackmun's dissents.

Both Justice Powell's argument in the majority opinion and Justice Brennan's dissent intersect with theories discussed in the first three chapters of this thesis. Powell argues that the imposition of capital punishment under Georgia legislation violates neither the Fourteenth Amendment equal protection clause nor the Eighth Amendment prohibition against cruel and

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<sup>342</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987), 285.

<sup>343</sup> *Ibid*, 291.

<sup>344</sup> *Ibid*, 286.

unusual punishment. He states that though the Baldus study may demonstrate discriminatory effects, there is no evidence to show that the Georgia legislature acted with discriminatory purpose when enacting its capital punishment statute. Further, he maintains that the discretion given juries when considering sentencing is constitutionally permissible and does not result in capricious or arbitrary application of the death penalty. By dismissing the discriminatory practice of capital punishment and focusing instead on the theoretical functionality of the Georgia capital punishment statutes, Powell ignores the Foucauldian examination of the practice of punishment and rejects analyses like Connolly's, who states that punishment is used as a tool of revenge against outsiders, particularly African-Americans.<sup>345</sup> In his dissent, Justice Brennan uses both the findings in the Baldus study and the discriminatory history of punishment in Georgia to argue that both the imposition of the death penalty in this case and the Georgia capital punishment statute violates the Eighth and Fourteenth Amendments. Brennan's argument analyzes punishment in a Foucauldian manner by examining both the history and the practice of punishment, and his discussion of the impact of race on punishment echoes Connolly's examination of punishment as a tool of racism and revenge.<sup>346</sup>

In the majority opinion, Powell argues that the Georgia capital punishment statute which sentenced McCleskey violates neither the equal protection clause of the Fourteenth Amendment nor the prohibition against cruel and unusual punishment in the Eighth Amendment.<sup>347</sup> In terms of McCleskey's Fourteenth Amendment claim, Powell cites *Whitus v. Georgia* (1967) and *Wayte v. United States* (1985), in which the Court held that a defendant with an equal protection claim must prove "the existence of purposeful discrimination" and that this purposeful discrimination

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<sup>345</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 42.

<sup>346</sup> *Ibid.*

<sup>347</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987), 291-292.

“had a discriminatory effect” on him.<sup>348</sup> Therefore, Powell maintains, in order to prevail on his equal protection claim, McCleskey must prove that the jury and judge who sentenced him to death acted with discriminatory intent.<sup>349</sup> However, Powell believes that the statistics from the Baldus study are insufficient to prove discriminatory purpose. He states that because decisionmakers in sentencing are given broad discretion to make judgements, the Court “demands exceptionally clear proof before... [inferring] that the discretion has been abused;” the Baldus study does not provide this clear proof.<sup>350</sup> Further, Powell argues that the Georgia legislature did not act with discriminatory intent in enacting the capital punishment statute, as the Baldus study demonstrated a discriminatory effect, not a discriminatory purpose. Proving the existence of a discriminatory purpose would “imply that the... state legislature selected or reaffirmed a particular course action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects” on black defendants, and Powell contends that there is no evidence to suggest that this situation occurred.<sup>351</sup>

Powell also rejects McCleskey’s claim that the Baldus study shows that the Georgia capital punishment legislation violates the prohibition against cruel and unusual punishment in the Eighth Amendment. He examines the “evolving standards of decency” which govern the application of the Eighth Amendment, and maintains that the legislature’s enactment of statutes providing for the imposition of capital punishment, as well as the jury’s willingness to impose such a sentence, indicates that the penalty is acceptable to contemporary society.<sup>352</sup> Citing *Furman*, Powell states that a sentencing body’s discretion should be limited when determining

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<sup>348</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987), 292-293.

<sup>349</sup> *Ibid.*

<sup>350</sup> *Ibid.*, 297.

<sup>351</sup> *Ibid.*, 298.

<sup>352</sup> *Ibid.*, 300.



whether to apply capital punishment in order to prevent “arbitrary and capricious action.”<sup>353</sup> The Georgia sentencing procedures appropriately limit the discretion of judges and juries, focusing on “the particularized nature of the crime and the particularized characteristics of the individual defendant” before imposing a punishment.<sup>354</sup> Powell admits that the Baldus study demonstrates “some risk of racial prejudice influencing a jury's decision in a criminal case,” but argues that this risk does not rise to constitutionally unacceptable levels.<sup>355</sup> Noting that state legislatures have endeavored to eliminate racial prejudice from sentencing procedures, Powell asserts that the “inherent lack of predictability” of individual jurors’ morals and decisions does not imply discriminatory sentencing, and concludes that racial discrepancies in sentencing are merely “an inevitable part of our criminal justice system.”<sup>356</sup>

As Powell’s argument dismisses the context of the practice of punishment and rejects the possibility for racial discrimination in sentencing, his views are antithetical to Foucault’s and Connolly’s analyses of punishment. Foucault rejected the abstract, theoretical discussion of punishment, and instead examined the practice of punishment in order to answer the question, “*how does one punish?*”<sup>357</sup> In his argument, Justice Powell dismisses the Baldus study because it does not clearly demonstrate a discriminatory purpose, ignoring the statistics that indicate that the practice of punishment is discriminatory. Therefore, by focusing on the provisions of the Georgia capital punishment statute rather than the statistical study which demonstrates its practical context, Powell rejects Foucauldian methods of examining punishment. By accepting the inevitability of racial discrepancies in the American criminal justice system, Powell also

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<sup>353</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987), 303.

<sup>354</sup> *Ibid*, 308.

<sup>355</sup> *Ibid*, 308-309.

<sup>356</sup> *Ibid*, 311, 312.

<sup>357</sup> Michel Foucault, “Questions of Method,” in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225, 224.

makes an argument contrary to Connolly's view of punishment. Connolly wrote that those with the power to impose punishment seek revenge against threatening agents, specifically young, African-American males.<sup>358</sup> Instead of recognizing the avenues for judges and juries to exact this revenge through sentencing, Powell argues that this broad discretion will not lead to racial discrimination. The findings of the Baldus study demonstrates that the discretion given judges and juries has already had discriminatory effects, but Powell ignores this context.

Justice Brennan begins his dissent by stating that the death penalty is, in all circumstances, cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>359</sup> However, he maintains that even if he did not hold this belief, McCleskey's death sentence was imposed in violation of the Eighth and Fourteenth Amendments.<sup>360</sup> Brennan cites *Furman*, in which the Court held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."<sup>361</sup> Therefore, defendants challenging their death sentences have been required to show a substantial risk of discrimination rather than conclusively prove that "impermissible considerations have actually infected sentencing decisions."<sup>362</sup> Brennan asserts that the discriminatory effects of the Georgia capital punishment statute reveal a risk of racial discrimination that is "intolerable by any imaginable standard."<sup>363</sup> This discrimination is especially egregious due to the finality of capital punishment.<sup>364</sup> Brennan then details the history of racial discrimination and punishment in Georgia, demonstrating that until the 20th century, the criminal justice system "expressly differentiated between crimes committed by and against

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<sup>358</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 42.

<sup>359</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987), 320.

<sup>360</sup> *Ibid*, 320.

<sup>361</sup> *Ibid*, 322.

<sup>362</sup> *Ibid*, 324.

<sup>363</sup> *Ibid*, 324-325.

<sup>364</sup> *Ibid*, 328.

blacks and whites.”<sup>365</sup> This historical demonstration, Brennan contends, continues to impact the implication of capital punishment in the present.<sup>366</sup>

In direct contrast to Powell’s argument in the majority opinion, Brennan argues that the discretion given prosecutors, judges, and jurors under the Georgia capital punishment statute allows for racial discrimination in sentencing. Under the statute’s provisions, jurors are not given a list of aggravating and mitigating factors, nor are they given a standard to balance them against one another.<sup>367</sup> Therefore, the capital punishment statute creates opportunities for racial bias, “however subtle and unconscious,” to influence whether defendants are sentenced to life in prison or to death.<sup>368</sup> The purpose of discretion in sentencing, Brennan maintains, allows juries to each defendant as a “unique human being,” but allowing race to play a role in sentencing decisions “[assesses] the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess.”<sup>369</sup> Brennan asserts that the validity of the Baldus study lies in the fact that it is “not speculative or theoretical... [but] empirical,” and states that discretion in the Georgia statute has resulted this racial discrimination.<sup>370</sup> He concludes that despite the state’s many endeavors to eliminate racial discrimination in its justice system, America has not “completely escaped the grip of a historical legacy spanning centuries,” and that the Georgia capital punishment statutes is cruel and unusual due to its discriminatory effects.<sup>371</sup>

In his dissent, Brennan examines punishment in a manner which aligns with both Connolly’s and Foucault’s analyses of punishment. Brennan’s discussion of the subtle effects of racial discrimination on punishment makes his argument comparable to Connolly’s analysis of

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<sup>365</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987), 329.

<sup>366</sup> *Ibid.*, 332.

<sup>367</sup> *Ibid.*, 333-334.

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*, 336.

<sup>370</sup> *Ibid.*, 338.

<sup>371</sup> *Ibid.*, 341.

punishment as a tool of revenge against African-American defendants. Connolly writes that punishment provides a legal avenue for individuals to seek revenge against threatening agents, particularly African-Americans.<sup>372</sup> In arguing that the discretion given judges and juries in allows subtle racist attitudes to influence sentencing, Brennan makes an argument that is analogous to Connolly's. Unlike Connolly, however, Brennan does not discuss the socioeconomic circumstances which cause young, African-American males to resist the white, middle-class ideal by engaging in criminal behavior, an analysis essential to understanding Connolly's strategies for creating a more just system of punishment.<sup>373</sup> Brennan also analyzes punishment in a Foucauldian manner by rejecting the theoretical arguments of the majority and focusing on the empirical, context-dependent Baldus study, which reveals discrimination in the practice of punishment. Foucault emphasized the importance of examining the history of punishment to understand the contemporary practice of punishment, and utilized this method in *Discipline and Punish* when discussing the shifts in the purpose of punishment in France.<sup>374</sup> Brennan thus uses Foucauldian methods in detailing the history of punishment in Georgia, and examining how it has affected the discriminatory practice of punishment in the present case.

After the *Furman* decision, the Court ruled to narrow the application of the death penalty in several cases. One such case is *Ford v. Wainwright* (1986), in which the Court examined the constitutionality of executing the insane. Alvin Ford was convicted of murder and sentenced to death by a Florida state court in 1974. In 1982, his mental health began to deteriorate, and a panel of psychologists appointed by the Governor of Florida concluded that he suffered from a mental disorder resembling paranoid schizophrenia, though he did understand the nature and

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<sup>372</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 42.

<sup>373</sup> *Ibid.*, 59.

<sup>374</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 74.

effects of the death penalty.<sup>375</sup> When the Governor signed a death warrant for Ford in 1984, his attorneys subsequently appealed to the United States District Court for the Southern District of Florida, seeking an evidentiary hearing to evaluate Ford's sanity. The District Court denied the request for the hearing, and the Eleventh Circuit Court affirmed this decision.<sup>376</sup> The Supreme Court of the United States granted cert, and, in a 5-4 decision, ruled that the Eighth Amendment prohibits the execution of the insane.<sup>377</sup> Justice Marshall authored the majority opinion, which Justices Brennan, Blackmun, Powell, and Stevens joined. Justice Powell wrote a concurrence, while Justice O'Connor wrote an opinion concurring in part and dissenting in part, which Justice White joined. Justice Rehnquist wrote a dissent, which Chief Justice Burger joined.

Justice Marshall's argument in the majority opinion aligns with theories discussed in the first three chapters of this thesis, while Justice Rehnquist's dissent is divergent with Foucauldian theory. Marshall utilizes both a historical analysis of punishment and an assessment of contemporary values to argue that the Eighth Amendment prohibits the execution of the insane. He also maintains that the provisions of the Florida procedure for evaluating a defendant's competency violate the Eighth Amendment because under the procedure, the ultimate decision rests with the executive and the prisoner is unable to submit relevant information. Marshall therefore uses Foucauldian methods when examining the history of executing the insane and when evaluating the practice of punishment under Florida legislation.<sup>378</sup> He also utilizes Reiman's theory that excessively severe punishments should be abolished for the advancement of society, and Kant and Hegel's theory that retributive punishment serves no purpose when

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<sup>375</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), 402.

<sup>376</sup> *Ibid*, 404.

<sup>377</sup> *Ibid*, 405.

<sup>378</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225, 224.

imposed upon the insane.<sup>379</sup><sup>380</sup> In his dissent, Justice Rehnquist argues that the Florida competency procedure is constitutional because it is in keeping with the historical precedent that the majority cites. This argument uses historical analysis in a flawed manner, utilizing one historical tradition to justify modern punishment without analyzing and connecting the two. Therefore, Rehnquist's dissent is divergent from Foucault's method of historical analysis.<sup>381</sup> Further, Rehnquist's assertion that the executive has the right to determine death sentences rejects Foucault's criticism of the modern state's power to kill its citizens.<sup>382</sup>

In the majority opinion, Marshall begins by examining the meaning of the Eighth Amendment, asserting that the proscription against cruel and unusual punishment extends to "both the procedural and the substantive" aspects of punishment.<sup>383</sup> The Court has recognized that the ban on cruel and unusual punishment evolves along with the views of society, and therefore "takes into account evidence of contemporary values" before deeming a punishment unconstitutional.<sup>384</sup> Marshall then begins a brief historical analysis on the legal view of executing the insane, stating that "the practice consistently has been branded "savage and inhuman.""<sup>385</sup> Both the English common law and the early American justice system refused to apply the death penalty to the insane, and this rejection extends to contemporary views of punishment, as no state sanctions the execution of the insane.<sup>386</sup> Marshall then notes historical and contemporary criticisms of this practice of punishment; one essential criticism states that executing the insane

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<sup>379</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 139.

<sup>380</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 40.

<sup>381</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225.

<sup>382</sup> Adam Thurschwell, "Ethical Exception: Capital Punishment in the Figure of Sovereignty," *South Atlantic Quarterly* 107.3 (2008): 581.

<sup>383</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), 405.

<sup>384</sup> *Ibid.*, 406.

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*, 407-408.

serves no retributive purpose, as the insane “has no comprehension of why he has been singled out and stripped of his fundamental right to life.”<sup>387</sup> Therefore, Marshall concludes that the execution of the insane violates the Eighth Amendment’s ban on cruel and unusual punishment, both “to protect the condemned from fear and pain without comfort of understanding,” and “to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”

Marshall then evaluates the constitutionality of Florida’s procedure for evaluating competency, ultimately deeming it unconstitutional. He maintains that Ford was entitled to an evidentiary hearing to determine his competency, and points to several aspects of the Florida competency laws he views as violative of the Eighth Amendment.<sup>388</sup> First, Marshall takes issue with the procedure’s “failure to include the prisoner in the truth-seeking process.”<sup>389</sup> The procedure does not allow any evidence relevant to the competency evaluation to be submitted by the prisoner or his counsel; Marshall posits that this makes the procedure inadequate.<sup>390</sup> Second, Marshall criticizes the procedure’s “denial of any opportunity to challenge or impeach the state-appointed psychiatrists’ opinions.”<sup>391</sup> This aspect of the procedure means that each expert’s evaluations are accepted as fact, rather than being questioned and challenged to eliminate bias.<sup>392</sup> Third, Marshall critiques “the State’s placement of the decision wholly within the executive branch.” Under the Florida legislation, the Governor both appoints the psychologists who perform the evaluation and makes the ultimate decision whether to execute the prisoner. Further, “his subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing,” meaning that he lacks neutrality and holds an

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<sup>387</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), 409.

<sup>388</sup> *Ibid.*, 410.

<sup>389</sup> *Ibid.*, 413.

<sup>390</sup> *Ibid.*, 414.

<sup>391</sup> *Ibid.*, 415.

<sup>392</sup> *Ibid.*

unbalanced amount of power.<sup>393</sup> Due to the defects in the Florida competency procedure, Marshall deems it unconstitutional.<sup>394</sup>

In terms of theoretical arguments, Marshall's arguments in the majority opinion align with Foucauldian methods of evaluating punishment. Foucault maintained that one must demonstrate the flaws within "falsely-self evident" punishment by illustrating its connection with "a multiplicity of historical practices."<sup>395</sup> By tracing the historical view of executing the insane and connecting it with contemporary critiques, Marshall utilizes a Foucauldian analysis. Though Marshall's examination of the long-standing rejection of executing the insane affirms a norm of punishment rather than rejecting it, I believe that his historical analysis is in keeping with Foucault's methods. Marshall also uses Foucault's method of analyzing the practices of punishment when critiquing several aspects of the Florida sentencing procedures, as he indicates the potential injustices and abuses of power inherent in the law.<sup>396</sup> When discussing the evolution of the Eighth Amendment along with society's standards, Marshall also makes an argument similar to Reiman's theory. Reiman states that especially severe punishments, such as the death penalty, should be abolished in order to further civilization.<sup>397</sup> Though Marshall does not argue for the complete abolition of the death penalty, he maintains that execution of the insane is unconstitutional partially because society views it as an inhumane punishment. Finally, Marshall's assertion that executing the insane does not serve any retributive purpose aligns with Kant and Hegel's theory of retributive justice. As Conrad interprets their theory, Kant and Hegel

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<sup>393</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), 416.

<sup>394</sup> *Ibid*, 418.

<sup>395</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225.

<sup>396</sup> *Ibid*, 225, 224.

<sup>397</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 138.



believed that retributive justice should not be imposed upon the insane, as these individuals do not understand the immorality of their crimes and are incapable of rational choice.<sup>398</sup>

In Justice Rehnquist's dissent, he critiques Marshall's argument in the majority opinion, arguing that both the execution of the insane and Florida's competency procedures do not violate the Eighth Amendment. He states that Marshall's historical analysis and examination of the contemporary rejection of executing the insane is erroneous. According to Rehnquist, Florida's competency laws are "fully consistent with the "common-law heritage" and current practice on which the Court purports to rely."<sup>399</sup> Rehnquist examines one aspect of history, stating that "at common law it was the executive who passed upon the sanity of the condemned;" therefore, in making the Governor the final arbiter of a prisoner's competency, Florida's procedure adheres to historical tradition.<sup>400</sup> Further, as contemporary state statutes often leave the final determination of insanity to the executive, the "evolving standards of decency" inherent in the Eighth Amendment actually imply that Florida's procedure is constitutional.<sup>401</sup> Therefore, Rehnquist asserts that Florida's competency procedures are constitutional, because in giving the executive the power to determine competency, they are "faithful to both traditional and modern practice."<sup>402</sup> Rehnquist also speculates that granting prisoners the right to a competency hearing could allow them to advance false insanity claims, and argues that the majority opinion seeks to "[create] a constitutional right that no State seeks to violate."<sup>403</sup>

By citing historical precedent to rebut Marshall's argument, Justice Rehnquist appears to analyze punishment in a Foucauldian manner. However, as Foucault maintained that the

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<sup>398</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 40.

<sup>399</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), 431.

<sup>400</sup> *Ibid*, 431.

<sup>401</sup> *Ibid*, 432.

<sup>402</sup> *Ibid*, 433.

<sup>403</sup> *Ibid*, 435.

historical analysis of punishment demonstrates the connection between contemporary punishment and “a multiplicity of historical practices,” Rehnquist’s method is not Foucauldian.<sup>404</sup> Instead of examining the connections between historical and modern penalties in order to challenge and reexamine norms of punishment, Rehnquist cites an isolated historical tradition to justify an accepted mode of punishment. As Rehnquist maintains that the executive should be the arbiter of competency while ignoring the possibilities for injustice inherent within Florida’s competency procedures, he also ignores the practice of punishment, another point of difference with Foucault’s context-dependent method of analysis. Further, by asserting that the executive should possess the power to determine competency, and therefore the power to control and take the lives of its citizens, Rehnquist presents an argument contradictory to Foucauldian analysis. Foucault criticizes the sovereign’s power to kill his citizens in the modern bio-political state, and therefore would certainly contest Rehnquist’s defense of this executive power.<sup>405</sup>

Another case in which the Court narrowed the application of the death penalty is *Atkins v. Virginia* (2002), when it ruled that the execution of the intellectually disabled violates the Eighth Amendment and is therefore unconstitutional. Daryl Atkins was convicted of abduction, armed robbery, and murder, and was sentenced to death in a Virginia state court after a jury found two aggravating factors during the penalty phase of the bifurcated trial.<sup>406</sup> During the penalty phase, a forensic psychologist testifying for the defense concluded that Atkins was “mildly mentally retarded” based upon a series of interviews and a standard intelligence test.<sup>407</sup> On appeal, the Virginia Supreme Court affirmed the imposition of the death penalty, and the Supreme Court of

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<sup>404</sup> Michel Foucault, “Questions of Method,” in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225.

<sup>405</sup> Adam Thurschwell, “Ethical Exception: Capital Punishment in the Figure of Sovereignty,” *South Atlantic Quarterly* 107.3 (2008): 581.

<sup>406</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002), 307.

<sup>407</sup> *Ibid.*, 308.

the United States granted cert.<sup>408</sup> In a 6-3 decision, the Court ruled that the execution of the intellectually disabled is unconstitutional. Justice Stevens wrote the majority opinion, which Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist wrote a dissent, which Justices Scalia and Thomas joined, and Scalia also wrote a dissent, which Rehnquist and Thomas joined.

Both Justice Stevens' argument in the majority opinion and Justice Scalia's dissent use reasoning that intersects with the theories discussed in the first three chapters of this thesis. Stevens asserts that the execution of the intellectually disabled violates the ban on cruel and unusual punishment in the Eighth Amendment, both due to the national consensus against it and because it does not serve the penological purposes of retribution and deterrence. He thus uses an argument similar to Reiman's theory that excessively severe punishments should be reduced to serve the advancement of civilization, and also utilizes Foucauldian methods when discussing the practice of the execution of individuals with intellectual disabilities.<sup>409</sup> When discussing retribution and deterrence, Stevens makes arguments similar to Kant and Hegel's theory of retributive justice, which states that only the rational, responsible individual should be subjected to retributive punishment, and to Conrad's discussion of deterrence, which asserts that only the rational criminal will be deterred by capital punishment.<sup>410</sup> In his dissent, Scalia argues that the imposition of the death penalty upon the intellectually disabled is constitutional because there is no true national consensus against it. Scalia appears to use Foucauldian methods when examining the history of the execution of intellectually disabled individuals, but does not use this

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<sup>408</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002), 310.

<sup>409</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 139.

<sup>410</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 40.

historical context to challenge accepted norms of punishment, as Foucault advocated.<sup>411</sup> When maintaining that executing intellectually disabled individuals accomplishes deterrence, Scalia also uses arguments similar to Van Den Haag's theories.

In the majority opinion, Justice Stevens begins by discussing the “evolving standards of decency” inherent in the Eighth Amendment. He cites *Weems v. United States* (1910), in which the Court ruled that the Eighth Amendment prohibits “excessive” sanctions, meaning that penalties for crimes should be proportionate to these offenses.<sup>412</sup> In order to evaluate the modern consensus on the execution of the intellectually disabled, Stevens examines contemporary legislation, which he views as the “clearest and most reliable objective evidence” of contemporary values.<sup>413</sup> Stevens begins by examining the ruling in *Penry v. Lynaugh* (1989), in which the Court affirmed the constitutionality of executing mentally disabled individuals. In that case, the Court determined that no national consensus against the execution of the intellectually disabled existed, and therefore imposing capital punishment upon these individuals was consistent with “evolving standards of decency.”<sup>414</sup> However, since that decision, 18 states enacted legislation specifically prohibiting the execution of the intellectually disabled.<sup>415</sup> Stevens contends that these new laws represent a “[consistent] direction of change.”<sup>416</sup> Further, each state legislature voted overwhelmingly to enact the laws, and even in states which still allow the execution of the intellectually disabled, the practice is uncommon, as only 5 such executions have occurred since *Penry*.<sup>417</sup> Stewart thus asserts that this national consensus demonstrates that

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<sup>411</sup> Michel Foucault, “Questions of Method,” in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225.

<sup>412</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002), 311.

<sup>413</sup> *Ibid.*, 311.

<sup>414</sup> *Ibid.*, 313.

<sup>415</sup> *Ibid.*, 314.

<sup>416</sup> *Ibid.*, 315.

<sup>417</sup> *Ibid.*, 316.

“society views mentally retarded offenders as categorically less culpable than the average criminal.”<sup>418</sup>

Stevens then discusses the relationship between the execution of the intellectually disabled and the penological purposes of retribution and deterrence, concluding that these purposes are not met. According to the Court’s ruling in *Gregg*, capital punishment must serve the purposes of retribution and deterrence in order to be deemed constitutional.<sup>419</sup> In terms of retribution, the execution of the intellectually disabled individual does not serve this purpose because of this individual’s limited responsibility for his crime. Stewart states that society’s consensus against the execution of intellectually disabled individuals “reflects widespread judgement about the relative culpability of mentally retarded offenders;” though these individuals can typically differentiate between right and wrong, their ability to engage in logical reasoning and to control their impulses is limited.<sup>420</sup> In order to ensure that “only the most deserving of execution are put to death,” the intellectually disabled should not be subjected to capital punishment.<sup>421</sup> In terms of deterrence, Stewart echoes the Court’s previous jurisprudence in maintaining that only those individuals whose crimes are premeditated and deliberated are deterred by the threat of capital punishment. As intellectually disabled individuals are cognitively limited, they are unlikely to be able to “process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”<sup>422</sup> Therefore, due to the national consensus of state legislatures and because executing the intellectually disabled does not serve either retribution or deterrence, Stevens concludes that the imposition of the death penalty upon these individuals is unconstitutional.

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<sup>418</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002), 316.

<sup>419</sup> *Ibid*, 319.

<sup>420</sup> *Ibid*, 317-318.

<sup>421</sup> *Ibid*, 319.

<sup>422</sup> *Ibid*, 320.

In the majority opinion, Stevens uses many arguments which align with the theories discussed in the first three chapters of this thesis. In arguing that the national consensus against the execution of the intellectually disabled necessitates the abolition of this penalty, Stevens makes an argument analogous to Reiman's theory. Reiman argued that excessively severe punishments should be abolished as "part of the civilizing mission of modern states," and by asserting that the imposition of punishment should shift with society's values, Stevens makes a similar argument, though he does not advocate for the abolition of capital punishment in all circumstances as Reiman does.<sup>423</sup> When discussing the new legislation reflecting a national consensus against the execution of the intellectually disabled, Stewart analyzes punishment in a Foucauldian manner by examining the practice of punishment, especially when indicating the reluctance of any state to impose this penalty.<sup>424</sup> Stewart's assertion that executing the intellectually disabled does not serve retributive purposes because these individuals are not culpable for their crimes is similar to Kant and Hegel's argument that retributive punishment should only be applied to rational individuals who can comprehend the gravity of their actions.<sup>425</sup> Finally, Stewart's argument that executing the intellectually disabled will not deter potential criminals aligns with Conrad's theory that only those who rationally consider the consequences of their crimes will be deterred by the threat of capital punishment.<sup>426</sup>

Justice Scalia structures his dissent as a direct response to Justice Steven's arguments in the majority opinion. Therefore, he turns first to the "evolving standards of decency" inherent in the Eighth Amendment, concluding that there is actually no national consensus against execution

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<sup>423</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 142.

<sup>424</sup> Michel Foucault, "Questions of Method," in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225, 224.

<sup>425</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 40.

<sup>426</sup> *Ibid*, 73.

of intellectually disabled individuals. He examines the national attitude regarding the execution of the intellectually disabled at the time of the ratification of the Eighth Amendment, stating that “only the severely or profoundly mentally retarded... enjoyed any special status under the law at that time.”<sup>427</sup> Scalia then critiques Stewart’s discussion of a “national consensus” against the execution of the intellectually disabled, stating that the 18 states which recently adopted legislation banning the practice make up less than half of the 38 states that permit capital punishment.<sup>428</sup> Further, the legislation that Stewart bases his argument on is “still in its infancy,” meaning that these states cannot yet discern the long term functioning of their new laws.<sup>429</sup> Scalia also rejects Stewart’s assertion that the infrequency with which intellectually disabled people are executed implies a “national consensus.”<sup>430</sup> He posits that the true reasons why states impose this penalty so infrequently is that the intellectually disabled “comprise a tiny fraction of society” and that intellectual disability is a mitigating factor used during sentencing.<sup>431</sup> Therefore, Scalia asserts that the execution of the intellectually disabled is rejected “neither by the moral sentiments originally enshrined in the Eighth Amendment... nor even by the current moral sentiments of the American people.”<sup>432</sup>

Scalia then addresses the majority’s arguments regarding retribution and deterrence. In terms of retribution, he argues that “deservedness of the most severe retribution” depends upon the depravity of a criminal act in addition to the criminal’s mental capacity.<sup>433</sup> He states that the fact that some juries continue to impose capital punishment upon intellectually disabled individuals reveals that “society’s moral outrage sometimes demands execution of retarded

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<sup>427</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002), 340.

<sup>428</sup> *Ibid*, 342.

<sup>429</sup> *Ibid*, 344.

<sup>430</sup> *Ibid*, 346.

<sup>431</sup> *Ibid*, 347.

<sup>432</sup> *Ibid*, 348.

<sup>433</sup> *Ibid*, 350.

offenders.”<sup>434</sup> In terms of deterrence, Scalia asserts that the majority’s argument does not state that all individuals with intellectual disabilities are undeterred by the threat of execution. Instead, these individuals are simply less likely to be deterred. Therefore, Scalia maintains that “the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class.”<sup>435</sup> If some intellectually disabled individuals can still be deterred by the threat of the death penalty, it should be applied to these individuals. Scalia concludes his dissent by critiquing the Court’s recent narrowing of the application of capital punishment, stating that these exceptions to the penalty’s application “[did not exist] when the Eighth Amendment was adopted,” nor are they “supported by current moral consensus.”<sup>436</sup>

Justice Scalia’s dissent intersects with several of the theories discussed in the first three chapters of this thesis. In diminishing the significance of the 18 states which enacted legislation banning execution of the intellectually disabled while ignoring the fact that 12 other states had completely proscribed capital punishment, Scalia rejects Foucauldian methods of analyzing punishment, which emphasize a context-dependent analysis. Foucault’s method of analyzing punishment necessitates the examination of “*practices*,” and Scalia dismisses the practice of capital punishment applied to the intellectually disabled when he ignores the reluctance of all states to continue executing these individuals.<sup>437</sup> Though Scalia examines historical perspectives on executing intellectually disabled individuals, he does not use this historical analysis to critique “falsely self-evident” norms of punishment as Foucault did.<sup>438</sup> In fact, Scalia endorses the continuation of accepted norms of punishment when critiquing the Court’s narrowing of the

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<sup>434</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002), 351.

<sup>435</sup> *Ibid*, 352.

<sup>436</sup> *Ibid*, 353.

<sup>437</sup> Michel Foucault, “Questions of Method,” in *Power*, ed. James D. Fabion (New York: The New Press, 2000), 225, 224.

<sup>438</sup> *Ibid*, 225.



application of the death penalty. When discussing deterrence, Scalia uses a justification similar to Van Den Haag's theory. Van Den Haag theorized that the death penalty accomplishes deterrence, and stated that even if it does not, society should "risk the possible ineffectiveness of executions" because it will lead to a net gain in lives saved.<sup>439</sup> Similarly, Scalia endorses the execution of the intellectually disabled while relying on a tenuous assumption that some individuals may be deterred by this threat. Lastly, Scalia's assertion that "society's moral outrage" requires the execution of some intellectually disabled individuals seems to demonstrate the validity of Nietzsche's analysis of punishment as a tool of revenge.<sup>440</sup> After analyzing which theories the Supreme Court accepts, and which they reject, I will now be able to determine the Court's theoretical view of the death penalty, and its implications for the future of capital punishment in the United States.

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<sup>439</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969): 146.

<sup>440</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 42.

## Conclusion

In this thesis, I have outlined the major theories underpinning capital punishment in the United States and explored their connections with significant Supreme Court jurisprudence. Therefore, I am now able to discern the Supreme Court's theoretical view of the death penalty and its potential impact on the future of capital punishment in the United States. The theories which critique or defend capital punishment in the United States can be divided into two discernable groups. First, theorists like Kant, Hegel, and Van Den Haag, who examine capital punishment in terms of retribution and deterrence, utilize philosophical, context-independent theories. Second, theorists like Nietzsche, Foucault, and Connolly analyze the death penalty in terms of its practice, exploring the purpose of punishment as a tool of revenge and racism, and challenging accepted norms of punishment. Significant Supreme Court jurisprudence on capital punishment mirrors this division; justices who support capital punishment typically utilize the theories in the first group, while justices who critique capital punishment typically use the methods of the second group. If the use of the death penalty in the United States is eradicated, it will occur in one of two ways. Either the Supreme Court will narrow the application of the penalty until it is no longer imposed, or the Court will rule the punishment unconstitutional in all circumstances. I believe that the second circumstance must occur in order to enable our society to challenge norms of punishment, and that to do so, context-dependent analyses of punishment must be employed.

In the first two chapters of this thesis, I examined context-independent, theoretical defenses and critiques of the death penalty, which evaluate capital punishment in terms of retributive justice and deterrence. Kant and Hegel's theories of justice posit that offenders should be punished according to the *lex talionis*, or the principle that criminals should be penalized in

proportion to the severity of their crimes. The *lex talionis* implies that murderers should be executed for their crimes if they are capable of rational choice.<sup>441</sup> Reiman concedes that adherence to the *lex talionis* and the use of capital punishment accomplishes retributive punishment, but argues that especially severe punishments, including the death penalty, should be abolished for the advancement and maturation of society.<sup>442</sup> Although statistics demonstrate that the death penalty does not accomplish deterrence, Van Den Haag maintains that the death penalty should be applied to convicted criminals in order to potentially save the lives of future murder victims.<sup>443</sup> Conrad responds to this argument by asserting that only rational individuals will be deterred by the threat of capital punishment, and as criminals are typically driven by impulses and passions, the death penalty has no deterrent effect.<sup>444</sup> These arguments typically evaluate the death penalty from a purely theoretical standpoint, dismissing or ignoring details about the practice of punishment. Therefore, arguments using these theories are often unable to effectively critique the American death penalty.

In contrast, the analyses of punishment discussed in the third chapter are based upon the practice of punishment in context. These analyses, articulated by Nietzsche, Foucault, and Connolly, are often based upon historical views on punishment, and seek to reevaluate punishment by revealing its inconsistencies and unjust purposes. Nietzsche traces the purpose of punishment beginning with the relationship between the creditor and debtor, and asserts that

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<sup>441</sup> Alan Brudner, "Retributivism and the Death Penalty," *The University of Toronto Law Journal* 30.4 (1980): 346.

<sup>442</sup> Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14.2 (1985): 115.

<sup>443</sup> Ernest Van Den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60.2 (1969): 146.

<sup>444</sup> Ernest Van Den Haag and John Phillips Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), 72.

punishment functions as a tool of revenge which individuals gain pleasure from witnessing.<sup>445</sup>

Foucault's method of analyzing punishment examines the historical purposes of punishment and the practice of modern punishment. He uses this context-dependent analysis to critique the use of any definitive penalties, including capital punishment and life sentences.<sup>446</sup> Connolly incorporates Nietzsche's and Foucault's conceptions of punishment to argue that punishment is a tool of revenge used by white, middle-class individuals against the impoverished African-Americans whose existence calls into question their superior identities.<sup>447</sup> These analyses provide more effective critiques of the death penalty because they focus on the ways in which punishment is applied and used to accomplish a variety of purposes.

Recent Supreme Court jurisprudence concerning capital punishment has followed a trend of questioning the constitutionality of the punishment in general or narrowing the penalty's application. In *Furman v. Georgia* (1972), the Court examined both the arbitrary imposition of capital punishment and the constitutionality of the death penalty on its face, while in *Gregg v. Georgia* (1976), the Court ruled that the imposition of the death penalty, both in a bifurcated trial and in general, does not violate the Eighth Amendment.<sup>448</sup> In *McCleskey v. Kemp* (1987), the Court evaluated the death penalty's constitutionality amidst evidence of racial discrimination in its application, and ultimately ruled that the imposition of capital punishment in this case is constitutional.<sup>449</sup> In *Ford v. Wainwright* (1986), *Atkins v. Virginia* (2002), and several other cases not discussed in this thesis, the Court narrowed the application of the death penalty, ruling that it

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<sup>445</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2000), 46.

<sup>446</sup> Michel Foucault, "Against Replacement Penalties," in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 461.

<sup>447</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 63.

<sup>448</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>449</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

cannot be applied to the insane or to the intellectually disabled.<sup>450</sup> The opinions, concurrences, and dissents in these cases utilize several theoretical arguments. In general, opinions affirming the constitutionality of the death penalty utilize philosophical theories while rejecting context-dependent analyses, while opinions positing that the application of the death penalty is unconstitutional, either in a particular situation or on its face, rely upon context-dependent analyses and the contemporary practice of punishment.

In the cases I analyzed, opinions affirming the constitutionality of the death penalty accepted philosophical theories while rejected context-dependent analyses. Both Justice Powell's dissent in *Furman* and Justice Stewart's majority opinion in *Gregg* argue that the death penalty is an extreme punishment suitable for the most extreme crimes, and therefore adhere to Kant and Hegel's theory of the *lex talionis*. Powell's and Stewart's arguments in these two cases also demonstrate the validity of Nietzsche's theory of punishment as a tool of vengeance, as both justices assert that the desire for revenge through punishment is a natural human tendency. Stewart's arguments in *Gregg* and Justice Scalia's dissent in *Atkins* are similar to Van Den Haag's theory of deterrence, as both justices dismiss evidence demonstrating that the death penalty fails to accomplish deterrence and advocate for the imposition of the penalty because it could potentially deter future criminals. Justice Powell's argument in the majority opinion of *McCleskey* asserts that the provisions of the Georgia capital punishment legislation is constitutional while ignoring the racially discriminatory practice of that legislation, meaning that he rejects both Connolly's theory of punishment as a tool of racism and revenge and Foucault's method of analyzing the practice of punishment rather than relying upon theories. Both Justice

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<sup>450</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986), *Atkins v. Virginia*, 536 U.S. 304 (2002).

Rehnquist's dissent in *Ford* and Scalia's dissent in *Atkins* use historical examples to justify the imposition of capital punishment, but both justices fail to connect these examples with contemporary practices and do not use this analysis to challenge norms of punishment, meaning that they reject Foucauldian analysis. Lastly, Rehnquist's dissent in *Ford* maintains that the executive should be the final arbiter of competency, and therefore possesses the power to take the lives of citizens, in direct contrast with Foucault's critique of the state's sovereign power over the lives of its citizens.

Conversely, opinions critiquing the application of the death penalty in certain scenarios rely mainly upon context-dependent analyses of punishment. All of these opinions assert that the Eighth Amendment must be evaluated according to "evolving standards of decency," aligning with Reiman's theory that excessively painful punishments should be abolished to advance the civilization and maturation of society. Justice Marshall and Justice Stevens make similar theoretical arguments in the majority opinions of *Ford* and *Atkins*, maintaining that the death penalty should not be applied to the insane or the intellectually disabled because these individuals do not engage in rational thought when committing crimes. These arguments are similar to Kant and Hegel's theories of retributive justice, in which both theorists maintained that retributive punishment should not be applied to those who are unable to engage in rational thought and thus are not wholly responsible for their crimes. Justice Douglas' concurrence in *Furman* and Justice Brennan's dissent in *McCleskey* both evaluate the discriminatory implication of the death penalty in a way similar to Connolly's analysis of punishment. Further, Brennan's dissent in *McCleskey*, Marshall's argument in *Ford*, and Stevens' argument in *Atkins* all use Foucauldian methods by examining both the history and the contemporary practice of punishment. Only Justice Brennan's concurrence in *Furman* maintains that capital punishment is

unconstitutional in all circumstances, and Brennan utilizes Foucauldian methods in this concurrence. Brennan argues that the death penalty is cruel and unusual punishment because it does not comport with human dignity, an assertion which aligns with Foucault's analysis of punishment. Foucault states that some criminals are viewed as irredeemable monsters who cannot be rehabilitated unless sentenced to death or to life in prison; in arguing that the practice of punishment should respect the dignity of the individual, I find that Brennan makes a Foucauldian argument.

Therefore, because Supreme Court decisions narrowing capital punishment or arguing for its complete abolition use context-dependent analyses, I find that these analyses are crucial to eliminating the death penalty in the United States. After examining Supreme Court jurisprudence on the death penalty, I believe that the American death penalty can be abolished in one of two ways: either by gradually narrowing the punishment until it is no longer applied, or by ruling that the punishment is cruel and unusual punishment violative of the Eighth Amendment in all circumstances. Given the theoretical framework of the Supreme Court's previous death penalty jurisprudence, I believe that the second scenario is more likely to lead to a more just system of punishment. If the Supreme Court ever makes such a ruling, I believe that Foucauldian, context-dependent methods of analysis will be crucial in this decision. Such a ruling might rely upon Foucault's critique of the sovereign state's power to take away the lives of its citizens, and his assertion that capital punishment essentially deprives individuals of their humanity, portraying them as monsters who can never be redeemed or brought back into society.<sup>451</sup> A Supreme Court decision abolishing capital punishment based upon these theories is likely to provoke the reevaluation of all norms of American punishment, whereas a decision narrowing the death

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<sup>451</sup> Michel Foucault, "Against Replacement Penalties," in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 461.

penalty based upon the general will leaves the remainder of the system of punishment intact.

Though a ruling of this type is not the only way to eradicate capital punishment in the United States, it may lead to the creation of a more just system of American punishment.

However, eliminating the death penalty while leaving the rest of America's system of punishment intact will do little to challenge norms of punishment and establish a more just system. Foucault asserts that abolishing the death penalty while continuing to sentence offenders to life in prison "maintains, in one form or another, the category of individuals to be definitively eliminated."<sup>452</sup> I believe that the practice of sentencing individuals to definitive sentences, whether execution or life in prison, should be reevaluated both because it gives the state total control over an individual's life and because it treats individuals convicted of crimes as disposable and irredeemable. Further, I argue that the circumstances which produce criminal behavior should be addressed and rectified in order to make American punishment more just. Despite the Court's ruling in *McCleskey*, capital punishment is still applied most frequently to individuals convicted of murdering white victims, revealing that racially discriminatory attitudes continue to influence the American justice system. Connolly argues that white elites define minorities, especially African-Americans, as "a racially marked constituency whose demands foreclose otherwise viable possibilities," which may cause these individuals to engage in criminal behavior to resist and transcend their circumstances.<sup>453</sup> Therefore, the state could eliminate some criminal activity and refrain from applying punishment by seeking to affect the discriminatory attitudes and social circumstances which lead minorities to commit crimes. Abolishing the American death penalty is the first step towards a more just system of punishment, but I find that a thorough reevaluation of the entire system is necessary. In his

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<sup>452</sup> Michel Foucault, "Against Replacement Penalties," in *Power*, ed. James D. Faubion (New York: The New Press, 2000), 461.

<sup>453</sup> William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995), 56.



concurrence in *Furman*, Justice Brennan cites *Weems v. United States* (1910), in which the Court held that abolishing capital punishment could lead to “hope... for the reformation of the criminal.”<sup>454</sup> Eliminating the death penalty and continuing to reevaluate norms of punishment using context-dependent theory could reduce the state’s sovereign power to end the lives of its citizens and produce a justice system that reforms rather than penalizes.

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<sup>454</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), 306.

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