# Deciding Death: Capital Punishment in America

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American comedian Dan Miller once said that "the death penalty is becoming a way of life in this country." With more than 1,400 executions and over 150 death row exonerations since 1973, it's hard to disagree with him[1]. As more and more people are exonerated from death row each year, it is important to once again question the constitutional validity of the death penalty. It is becoming increasingly clearer that the death penalty, especially implemented as a deterrent, is becoming obsolete. Not only is it obsolete, but without an absolute guarantee of guilt, regrettably cruel as well. In this paper, I will argue that the United States government lacks the legitimate authority to execute criminals via capital punishment due to the arbitrary influence of race in capital sentencing. For the purposes of this paper, I will assume that the death penalty is morally permissible and that the Eighth Amendment does not, on its own, rule out capital punishment. The focus of my paper will be that, in light of the Fourteenth Amendment, the state fails to respect the equal status of African-Americans in capital sentencing and that this failure compromises the state's legitimacy in implementing capital punishment, thereby making capital punishment unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

## The Death Penalty in American History

The use of the death penalty in America goes all the way back to the shores of Plymouth Rock. For the pilgrims who first settled the United States, hangings were a public spectacle and the death penalty was applied to such misdemeanor crimes as stealing grapes and trading with Native Americans. Few early colonists, Quakers excluded, opposed the death penalty and fewer

[1] PDF - Death Penalty Information Center. (n.d.). Retrieved November 16, 2016, from http://www.deathpenaltyinfo.org/documents/FactSheet.pdf

still objected to the ways it was administered, which at that time would primarily have been hanging. Early support for abolition of the death penalty has roots in French and British political philosophy, however, young America was slow to pick up on the idea. In 1778, Thomas Jefferson proposed a bill to limit Virginia's use of the death penalty to cases of treason and murder, which failed by a single vote[2]. As the colonies grew into states, Jefferson's idea became more and more popular. While the Constitution does not say much about the death penalty, the 5th Amendment states that "no person shall be deprived of life, liberty, or property without due process of law," and the 8th Amendment includes a clause which prohibits the use of "cruel and unusual punishment[3]." These two clauses have been relied on by the Supreme Court in its development of capital punishment jurisprudence. However, one important amendment, the 14th Amendment, has historically been ignored by the Court when ruling on cases.

## Supreme Court and the Death Penalty

The Supreme Court has taken on the constitutional question of the death penalty in several landmark cases. The first significant decision the Court made regarding capital punishment was in the 1972 case *Furman v. Georgia*. Furman was convicted of felony murder and sentenced to death after burglarizing a home and killing an occupant by tripping and accidentally discharging his firearm. Furman appealed his sentence, and the Court issued a ruling on Furman's case, as well as *Jackson v. Georgia* and *Branch v. Texas,* involving the application of the death penalty for cases of rape and murder, respectively. The 5-4 ruling in favor of Furman resulted in a nationwide de facto moratorium on the death penalty and over

[2] PDF - Death Penalty Information Center.
[3] U.S. Const. Amend. V and VIII

200 pages of concurring and dissenting opinions on the issue of capital punishment. Justices Brennan and Marshall opposed the death penalty on moral grounds, and therefore oppose it in all cases. Their concurring justices cited the arbitrary and racially biased nature in which capital punishment was implemented in these three cases. The justices made it clear in their opinions that their ruling applied only to these cases and was a result of the arbitrary and capricious manner in which the death sentences were applied to these three defendants. Though the Court's ruling only applied to these specific cases and not to the death sentence as a whole, this case ushered in a complete overhaul of state sentencing procedures to help reduce the arbitrariness in the use of the death sentence[4]. The Court gave the states broad statutory discretion over the way they implemented death penalty reform, and the states have been responsible for much of the evolution of capital punishment seen in America following *Furman*.

Just four years later, the Court once again took on a case out of Georgia regarding capital punishment, only this time the petitioner claimed that the death penalty *always* violated the Eighth and Fourteenth Amendments. In a 7-2 decision in *Gregg v. Georgia* (1976), the Court held that the death penalty is not "cruel and unusual punishment" in all cases and that when certain precautions are taken, it is a just form of punishment, particularly for cases in which the defendant deliberately killed another[5]. In the aftermath of *Furman,* Georgia's legislature followed the rest of the states and amended its death penalty statute to help limit the arbitrary and capricious use of the death penalty by requiring: the trial and sentencing phases to be held separately, a comparison of each death sentence to similar cases, and specific jury findings

[4] *Furman v. Georgia*. 408 U.S. 238 (1972)
[5] *Gregg v. Georgia*. 428 U.S. 153 (1976)

regarding both the severity of the crime and the defendant's own nature, including any aggravating and mitigating circumstances. Unsurprisingly, the two dissenters in this case were Brennan and Marshall. The other 7 justices agreed with the Georgia legislature that the careful and judicious use of the death penalty can serve as a crime deterrent and an appropriate form of social retribution[6].

Ten years passed before the Supreme Court again took on the issue of race and capital punishment. In 1986, Warren McCleskey, an African-American man, was sentenced to death in Georgia after being convicted of armed robbery and murder. McCleskey and his attorneys presented a statistical study, known as the Baldus study, which showed that the use of the death penalty in the United States was often arbitrarily based on the races of the defendant and the victim. This was the first widespread study conducted on the influence of race in capital sentencing. The study found that an African-American man was more than twice as likely to be sentenced to death for killing a white man than a white man whose victim was African-American. McCleskey's attorneys asked the Court to consider whether the Baldus study proved the presence of racial bias in capital cases, violating the Eighth and Fourteenth Amendments.

Despite the statistical evidence, the Supreme Court, in *McCleskey v. Kemp*, ruled that the study did not specifically apply to McCleskey's case or demonstrate that his sentence was a direct result of racial bias, making his death sentence constitutional[7]. Though the majority chose to ignore the potential link between race and the death penalty and the validity of McCleskey's 14th Amendment claim, four of the five justices believed the Baldus study clearly

[6] *Gregg v. Georgia*. 428 U.S. 153 (1976)
[7] *McCleskey v. Kemp*. 481 U.S. (1987)

showed there were racial disparities in the administration of the death penalty. These disparities are in part due to the broad discretion state laws still allow juries and prosecutors regarding the administration of the death penalty and are heavily rooted in America's racist past.

Despite the Court's ruling in *Gregg* and *McCleskey*, many Americans, even today, continue to oppose the death penalty. In a poll conducted last year, the Pew Research Center, a non-partisan research group, reported that support for the death penalty has dropped to 49%, the lowest in the poll's 17-year history[8]. More than two-thirds of the world's nations have completely abolished the death penalty. America stands with China, Iran, North Korea, and Yemen as the five countries in which the majority of all known executions in the world take place. In the U.S., Amnesty International reports that more than half of Americans (61%) prefer life with or without parole to the death penalty for capital crimes. Since the year 2000, death sentences in America have dropped from over 300 to less than a hundred in 2011. Though there are several reasons for this change, racial bias, the risk of executing an innocent, and moral opposition are three of the most prominent.

## Racial Bias and the Death Penalty

During times of slavery, state criminal codes explicitly authorized harsher punishments for slaves and emancipated African-Americans than for whites. Moreover, state laws called for more stringent punishments in crimes committed against whites than in crimes committed against blacks. Even after the Civil War and the passage of the 14th Amendment, juries and

[8] B. Oliphant, "Support for death penalty lowest in more than four decades," Pew Research Center, September 29, 2016)

prosecutors tolerated crimes committed against African-Americans, so much so, that many often went unpunished or resulted in extremely lenient punishments, particularly if the accused was white. At the same time, citizens of both Southern and Northern states began taking the law into their own hands. In place of holding trials for black defendants, lynch mobs would instead drag people from their homes and execute them in public hangings. As times changed and with the Court's ruling in *Gregg*, more lawful convictions and sentencings followed by a swift execution were "...substituted for the more unseemly lynchings, with the same practical effect.[9]"

After the Court's ruling in *McCleskey*, more and more research was done on the link between the death penalty and race. These studies, like the Baldus study, found that while African-Americans make up only about 12% of America's general population, they make up roughly 40% of the inmates on death row[10]. Since 1976, for murders with one killer and one victim, in 297 cases where the defendant was black and the victim white, the defendant was executed, compared to only 31 where the defendant was white and the victim black[11].

Proponents of the death penalty, on the other hand, argue that there are legitimate and reasonable explanations for the racial disparities seen in sentencing. One of their main arguments is that between 92 and 97 percent of homicides in the United State are *intra*-racial, cases of whites killing whites or blacks killing blacks. Proponents argue that in most cases of black on black homicide, the defendant and the victim are acquainted, while homicides in

[9] Acker, James R., Richard M. Bohm & Charles S. Lanier. *America's Experiment with Capital Punishment.* (Carolina Academic Press, 2003), pp. 386-387
[10] Ross, Michael. "Is the Death Penalty Racist?" *Human Rights*, summer 1994. American Bar Association.
[11] Death Penalty Information Center.

which the defendant is black and the victim is white are committed by a multiple-offender or during a felony, both of which are considered aggravating circumstances by the Supreme Court. While juries must take these aggravating circumstances into account, the argument goes, sociological studies often do not[12].

The NAACP, ACLU, and the Death Penalty Information Center have all conducted extensive research into this very issue. While it is true that much of the murders that occur in the U.S. *are* intra-racial, these organizations have shown that underlying bias is frequently present in capital cases. The ACLU reports that 98% of the prosecutors in the 38 states that allow the death penalty are white, and these prosecutors are given a broad degree of discretion in deciding which cases become capital. Studies across the U.S. have also found that juries in capital cases are far more likely to issue a death sentence when the defendant is black[13]. See Appendix A for more information. Though these biases may be implicit and unintentional, they cause serious harm to the African-American community. I will return to a discussion of this harm after addressing one of the most prominent arguments in favor of the death penalty: deterrence.

## Deterrence and the Death Penalty

One of the major arguments proponents of the death penalty use is deterrence. They argue that the death penalty stands as a wall to deter future offenders from committing heinous acts. Professor Isaac Ehrlich, perhaps one of the leading proponents of the death penalty, published an article in the 1960s in which he asserted that for each execution, 8

[12] Rothman, Stanley and Stephen Powers. "Execution by Quota?" *Public Interest* 116 Summer 1994, pp. 4-5.
[13] "Race and the Death Penalty."

innocent lives are saved. Though Ehrlich himself concedes that his study may be skewed by the absence of certain variable and does not prove capital punishment to be the most effective deterrent for violent crime, support for his ideas grew and blossomed into a political ideology adopted by many legislators, mayors, governors, and judges who wanted to appear tough on crime [14].

In the past decade, dozens of studies on deterrence have been conducted, which estimate that the lives saved by the deterrent power of the death penalty ranges between 3 and 25. Another statistical example of the deterrent effect is the drop in murder rates. Between 1968-1976, during the moratorium era of the U.S., murder rates in states such as Georgia, Texas, and Florida were almost double what they were between 1995 and 2002, when the death penalty was legitimized and reinstated.

First-hand accounts of the deterrent power have been presented which seem to support the logical intuition about deterrence. For example, Sen. Diane Feinstein recalled her sentencing of a woman convicted of robbery in the first degree. The woman had carried an unloaded gun into a grocery store to commit the robbery and when Sen. Feinstein asked the woman why the gun was unloaded, she responded: “So I would not panic, shoot somebody, and get the death penalty.” Another first-hand example of deterrence can be found in Kansas’s decision to reinstate the death penalty for first-degree murder in 1935 after repeat criminals

[14] Ehrlich, Isaac. (1975) “The Deterrent Effect of Capital Punishment: A Question of Life and Death.” *The American Economic Review,* Vol. 65, No. 3, pp. 397-417.

admitted to choosing Kansas as opposed to surrounding states because Kansas did not have the death penalty.

This seems like convincing evidence that the deterrent power of the death penalty outweighs any moral concerns about the death penalty. However, the information behind deterrence can often be misleading, and many experts in the fields of psychology and criminology question the deterrent nature of the death penalty.

Amnesty International, in a 2009 survey, reported that 88% of criminologists in the U.S. do not believe that the death penalty deters crime. Furthermore, according to the Death Penalty Information Center, murder rates are actually *lower* in states without the death penalty than in states that still use the death penalty.

Dr. Jonathan Groner, an associate professor of surgery at Ohio State University College of Medicine and Public Health who researches the deterrent effect of capital punishment, explains that most murders committed in the U.S. are crimes of passion. Such crimes are committed in circumstances of extreme emotion, intense excitement, and thoughtlessness. While these crimes are being committed, the criminal is not able to weigh the consequences of his or her actions. Consider the example of a heated argument between spouses. One spouse becomes extremely angry and bashes the other over the head with a cast iron skillet. The skillet-wielding spouse does not stop in the middle of a rage-filled fit to consider whether or not the death penalty may be implemented at sentencing. While mere anger, however intense, does not excuse the actions of the murderous spouse, it serves to illuminate the fact that a criminal's thought-process is not always as farsighted as death penalty proponents would like

to believe[15]. Furthermore, those who commit these so-called "crimes of passion" are often extremely unlikely to become repeat offenders.

## Capital Punishment and the 14th Amendment

With strong empirical evidence of racial bias in capital sentencing, it appears that the U.S. government is not making good on the promises of equality and due process made in the Fourteenth Amendment. Michael Cholbi argues that these disparities cause rationally-based expectations of unequal treatment in African-Americans and harms them as a class. In his article, "Race, Capital Punishment, and the Cost of Murder," Cholbi gives two main arguments for a moratorium on the death penalty, the first focusing on the race of the defendant, and the second on the race of the victim in capital cases.

Cholbi begins with the Principle of Legality, which can be summarized as such: an individual may be held legally accountable for violating a law only if the law was fixed, clear, made public, and established prior to the violation, allowing individuals to rationally determine the costs of violating said law[16]. He also refers to the Principle of Equal Status, which states that legal practices which provide different individuals with different expectations about the likely costs of committing a crime cannot provide individuals with equal legal status if these differences are explained by an arbitrary factor, i.e., race, instead of by desert[17].

Due to the empirical evidence of unequal treatment in capital cases, Cholbi argues that African-Americans can be said to face a "different schedule of costs than other citizens," with

[15] Death Penalty Information Center.
[16] Cholbi, M. "Race, Capital Punishment, and the Cost of Murder." Philosophical Studies 127 (2):255-282 (2005) (Pg. 262)
[17] Cholbi, M. (Pg. 263)

respect to the crime of murder. This difference in the cost of murder, which can only be set by the criminal justice system, is due to race, an arbitrary factor in determining desert. in other words, African-Americans can reasonably expect to face harsher punishment for murder due to their race. African-Americans are justified in their expectation of paying a higher price for murder than others because the courts treat black defendants more harshly than white defendants in capital cases; hence, African-Americans do not enjoy equal status relative to the crime committed. The justice system's treatment of black defendants violates the Principle of Legality and the Principle of Equal Status, as well as the Fourteenth Amendment. Note that Cholbi's argument focuses on the costs of murder in a racially discriminatory system and the effects this has on the expectations of African-Americans as a class. Even if individual African-Americans do not suffer the discrimination directly, the class as a whole faces an unfair choice with respect to murder[18]. Due to this and the severity of the harm faced by African-Americans were they to commit murder, the administration of the death penalty fails to treat African-Americans with equal status and violates the Due Process clause of the Fourteenth Amendment[19]. For this reason, Cholbi believes that an immediate moratorium on the death penalty is at least temporarily justified.

Cholbi argues that the influence of the race of the victim in capital cases is also cause for a moratorium on capital punishment. In this argument, he again begins with the Principles of Legality and Equal Status and then refers to the empirical evidence showing that murderers of African-Americans are treated much more leniently than murderers of whites. In fact, the ACLU

[18] Chobi, M. (Pg. 266-7)
[19] Cholbi, M. (Pg. 264)

reports that while only about half of all murder victims in the U.S. are white, roughly 80% of all capital cases involve white victims. African-Americans can thus rationally expect that the cost of their being murdered is different than that of other potential victims. This difference is again due to race, an arbitrary factor when considering the seriousness of a crime. Because black citizens can reasonably expect the state to treat their murders less harshly than the murder of white citizens, black Americans do not fully enjoy equal protection under the law[20]. Again, note that Cholbi focuses his argument on the effect on African-Americans as a class and not on individual victims of murder. African-Americans are treated unjustly because the justice system, in the sentencing of capital crimes, treats the lives of African-Americans as less valuable than the lives of whites, effectively creating a market for murder in which there is greater incentive to kill African-Americans, violating the Equal Protection clause of the Fourteenth Amendment[21].

In short, Cholbi's argument shows that the U.S. government is not living up to the promises it made in the Fourteenth Amendment: to treat citizens as equal under the law. African-Americans as a class are affected by this unequal treatment because members of the class can rationally expect to be treated differently than their white peers. This argument, paired with Tommie Shelby's argument in "Dark Ghettos: Injustice, Dissent, and Reform," will show that, due to the state's failure to treat citizens as equals in capital sentencing, the state has lost the legitimate authority to punish disobedience via the death penalty. While Shelby points his argument toward the state's treatment of the ghetto poor, I believe that his views can be applied to capital punishment in the sense that, while the state has not lost the right to

[20] Cholbi, M. (Pg. 269)
[21] Cholbi, M. (Pg. 268-9)

enforce laws against murder, it *has* lost the right to punish citizens via the death penalty because it fails to equally punish and equally protect citizens in its administration of capital punishment.

Shelby explains that a state may lose its moral authority to coerce, and therefore to punish citizens, when its legitimacy is compromised, i.e., when it fails to treat citizens equally, fairly, or impartially under the law. For Shelby, a state does not either have or not have legitimate authority, but may be judged based on degrees of legitimacy. In the case of capital punishment, the state has failed to treat African-Americans as equal citizens and continues to unfairly favor white defendants and white victims in capital sentencing.

Shelby further distinguishes a state's legitimate authority—the right to demand obedience and punish disobedience to its laws—from the state's enforcement legitimacy. He explains that a state whose legitimate authority is compromised may still have the right to enforce laws that prohibit serious wrongs, i.e. rape and murder[22]. In this sense, the government has not necessarily lost the right to punish murderers, for murder is a serious wrong that causes serious harm to its victims. It has, however, lost the right to punish murderers by death because, as we saw with Cholbi, the unjust background conditions in capital sentencing deny African-Americans legal status. This inequality, paired with the irreversibility of capital punishment, has compromised the state's legitimate authority to punish disobedience via the death penalty.

[22] Shelby, Tommie. "Dark Ghettos: Injustice, Dissent, and Reform." *The Belknap Press of Harvard University Press*. 2016. (Pg. 232)

Shelby does concede that under just social conditions, crime violates the Rawlsian notion of reciprocity and that punishment is a justified response to such violations. He further agrees that punishment can play an essential role in crime prevention and add stability to society. Shelby does not, however, believe that the moral idea of reciprocity should be used to determine *how much* punishment a criminal deserves[23]. In this sense, even though background conditions are unjust, an African-American who commits murder should still be punished, for the state has not lost its enforcement legitimacy with respect to murder and murder *does* violate reciprocity. Reciprocity, however, does not dictate that the murderer necessarily ought to be sentenced to death, especially since the background conditions for capital punishment are not just.

The idea of reciprocity has been used by the Supreme Court in interpreting the Excessive Punishment clause of the Eighth Amendment regarding proportionality in capital sentencing. In *Coker v. Georgia*, the Court held that a punishment is "excessive" when it is "grossly out of proportion to the severity of the crime[24]." In this case, the Court held that because rape does not deprive the victim of life, it would be disproportional to the crime to sentence a rapist to death. The notion of proportionality further demands that similar crimes ought to have similar consequences, giving citizens equal expectations regarding the consequences of committing certain crimes. This is where the Court erred in deciding *McCleskey*: it failed to apply this notion of proportionality to the racial disparities found in capital sentencing. Empirical evidence shows that, as Cholbi explained, black defendants and

[23] Shelby, Tommie. (Pg. 235)
[24] *Coker v. Georgia* 433 US 584 (1977)

victims can reasonably expect to be treated differently than their white counterparts in capital cases. This arbitrariness in capital punishment violates reciprocity and compromises the state's legitimate authority to administer the death penalty.

Even with the reforms that followed *Furman*, race continues to play a major role in the sentencing of capital cases. This injustice disproportionately affects African-Americans and gives them a status unequal to that of their white peers as both defendants and victims of capital crimes. As Cholbi points out, this inequality gives African-Americans reasonably different expectations regarding the costs of murder and harms the class as a whole, and more importantly, violates their 14th Amendment Due Process and Equal Protection rights. Regarding capital punishment, unjust background conditions and the capriciousness in sentencing have compromised the state's legal and moral authority to execute its citizens. Given the irreversibility of execution, the state's compromised legitimacy, and the harm African-Americans face, the state does not, at this time, have the legitimate authority to administer the death penalty. A nationwide moratorium on the death penalty is, therefore, required to ensure that the state does not participate in any further unjust killings via capital punishment until such a time that race no longer plays a part in capital sentencing.

Appendix A

## Defendant-victim racial combinations

| | White Victim | | Black Victim | | Latino/a Victim | | Asian Victim | | Native American Victim | |
|---|---|---|---|---|---|---|---|---|---|---|
| White Defendant | 740 | 51.50% | 20 | 1.39% | 17 | 1.18% | 6 | 0.42% | 0 | 0% |
| Black Defendant | 282 | 19.62% | 167 | 11.62% | 20 | 1.39% | 15 | 1.04% | 0 | 0% |
| Latino/a Defendant | 51 | 3.55% | 3 | 0.21% | 57 | 3.97% | 2 | 0.14% | 0 | 0% |
| Asian Defendant | 2 | 0.14% | 0 | 0% | 0 | 0% | 5 | 0.35% | 0 | 0% |
| Native Amer. Def. | 14 | .97% | 0 | 0% | 0 | 0% | 0 | 0% | 2 | 0.14% |
| TOTAL: | 1089 | 75.78% | 190 | 13.22% | 94 | 6.54% | 28 | 1.95% | 2 | 0.14% |

Note: In addition, there were 34 defendants executed for the murders of multiple victims of different races. Of those, 18 defendants were white, 10 black and 6 Latino. (2.37%)

*Source: Death Row USA: A quarterly report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc.; Deborah Fins, Esq. Consultant to the Criminal Justice Project NAACP Legal Defense and Educational Fund, Inc. (July, 2017) Figures represent defendant-victim racial combinations in death penalty cases since reinstatement.*

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