Winter 1-1-2009

On Appeal: Reviewing the Case Against the Death Penalty

Dawinder S. Sidhu

University of New Mexico - School of Law

Follow this and additional works at: https://digitalrepository.unm.edu/law_facultyscholarship

Part of the Law Commons

Recommended Citation
Available at: https://digitalrepository.unm.edu/law_facultyscholarship/276
ON APPEAL: REVIEWING THE CASE AGAINST THE DEATH PENALTY

Dawinder S. Sidhu*

I. INTRODUCTION ................................................................................................. 454

II. FACTUAL BACKGROUND .................................................................................. 457
   A. The British System ......................................................................................... 457
   B. The Early American System ........................................................................... 458
   C. Modern Legal Developments ......................................................................... 460

III. CATEGORIES OF ASSESSMENT ........................................................................ 462

IV. TANGENTIAL CLAIMS ....................................................................................... 462
   A. The Death Penalty Is Barbarous .................................................................... 463
      1. Methods of Execution ................................................................................. 463
      2. Challenges to the Barbarity Argument ....................................................... 465
   B. The Costs of the Death Penalty ....................................................................... 466
      1. Correcting a Misconception ........................................................................ 466
      2. The Significance of Cost ............................................................................ 468
   C. The Popularity of the Death Penalty ............................................................... 469
      1. Public Support in the United States ............................................................ 469
      2. American Juries ........................................................................................ 470
      3. Global Movement Towards Abolition ....................................................... 472
      4. Assessing the Two Arguments from Popularity ......................................... 473

V. INSUFFICIENT CLAIMS ...................................................................................... 475
   A. The Death Penalty Is Imposed Arbitrarily ....................................................... 475
      1. Cruel and Unusual Punishment .................................................................... 475
      2. Racial Bias ................................................................................................ 476
      3. Inequalities in Representation Due to Wealth ............................................ 479
      4. Rate of Imposition ...................................................................................... 480
      5. Arbitrary Judgment .................................................................................... 482
   B. The Death Penalty Kills the Innocent ............................................................. 484
      1. Errors in Judgment ...................................................................................... 484
      2. Assessing the Evidence .............................................................................. 485
      3. The Potential Future Killing of the Innocent ............................................. 487
   C. The Death Penalty Is Not a Deterrent ............................................................ 489
      1. The Public Purpose of Capital Punishment ............................................... 489
      2. Objections to the Claim of Public Purpose ............................................... 490

VI. THE FUNDAMENTAL CLAIM ............................................................................. 492
   A. The Death Penalty Is Unjust Retribution ....................................................... 493
      1. Deserving to Die ......................................................................................... 493
      2. Death as an Acceptable Form of Punishment ............................................ 493
I. INTRODUCTION

From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

* Justice William J. Brennan, Jr.

---

* J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. I am grateful to D. Robert Worley, Charles Bingman, and Benjamin Ginsberg of The Johns Hopkins University for providing helpful comments on earlier drafts; Amit Singh Au- lakh for his research assistance; the staff of the West Virginia Law Review, especially T. Matthew Lockhart, for their work on this Article; and my parents for their continued guidance, encouragement, and love. The views expressed herein, and any errors, are solely my own.

1 Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (internal citations omitted) (emphasis added).
There is perhaps no more divisive and significant issue in the United States than that of capital punishment. The debate over the death penalty is of vital import and intrigue because it involves death, the termination of an individual’s known existence. Not only does the death penalty involve death, but more properly, it involves the deliberate taking of life. It is precisely because the death penalty involves the willful extermination of human life that the debate must be thoroughly examined. This article attempts to add this needed clarity by evaluating the various arguments against the death penalty.

We, as citizens of this nation, who are expressly or tacitly agreeing to the practice of capital punishment, must ensure that with the death penalty, the virtue of justice is being upheld and, most significant of all, the death of criminals is just. If the death penalty is being employed by the state and this practice is unjust, the death of thousands of criminals in this country serves as a permanent disgrace to the integrity of this nation, and also represents an extensive degradation of the virtue of justice.

In every society, citizens must decide how to punish criminals, uphold the virtue of justice, and preserve the security of the community. In doing so, the members of society must ask themselves how they will punish those who carry out the most abhorrent of crimes. The American response to such a question is that death is an acceptable punishment for the most severe crimes.

American participants in this debate utilize varying standards by which to assess the merits of capital punishment. For some, such as the fiscally-minded, the issue of cost may be a sufficient standard by which to determine if they support or are against the death penalty. Others may exclusively rely on another claim, such as the deterrent effect or the barbaric fashion in which the death penalty is sometimes administered. Participants may derive their support for or against this practice by drawing from several, if not all, of the existing claims.

See generally Toni M. Fine, Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment, 30 COLUM. HUM. RTS. L. REV. 421, 421 (1999) ("Capital punishment is one of the most divisive and impassioned human rights issues in the United States and throughout the world.").

See generally Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601, 1622 (1986) ("[C]apital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence[].").


See discussion of cost infra Section IV.B.

See discussion of methods of execution and deterrence infra Sections IV.A, V.C.

Indeed, the ACLU is said to object to capital punishment on multiple grounds: moral, practical, as well as constitutional. Hugu Adam Bedau, The Case Against the Death Penalty, CAPITAL PUNISHMENT PROJECT, AMERICAN CIVIL LIBERTIES UNION, Dec. 31, 1997, available at
Hugo Adam Bedau, in a work published by the American Civil Liberties Union entitled "The Case Against the Death Penalty," presents eight angles by which the death penalty may be analyzed—the costs of the death penalty relative to incarceration, the barbarity of the practice, its public support, its increasing rejection by the global community, whether it is unfair, whether it punishes the innocent, whether it is a deterrent, and finally, whether it is unjust retribution. Bedau argues that each of these angles leads to the same conclusion: capital punishment should be abolished.

This Article will examine each of the eight arguments presented by Bedau. Of the eight arguments, four claims—cost, barbarity, public support, and the global trend of abolition—are significant to our discussion only because participants in the debate currently use them to buttress their support for or against this practice. Yet, I contend that, when properly examined, these arguments are of little merit, if any at all. More specifically, they are largely irrelevant to the appropriate and final standard of assessing the death penalty: is it just.

The next three claims—the deterrent effect, the killing of the innocent, and the arbitrariness of the death penalty—are intriguing and important. These arguments, if found to be true, could drastically alter the course of the national debate over capital punishment. However, an honest appraisal of each of these three claims can, at best, yield inconclusive results. In other words, compelling cases can be made on both sides of these three arguments. As a result, it would be premature and inappropriate, at this stage of our understanding, to premise one’s support for or against capital punishment on one of these arguments.

This Article finds that the previous seven arguments, by themselves or in concert, provide for an incomplete analysis of capital punishment in America. If anything, these arguments are tangential or supplementary to the more pressing concern: the justness of the death penalty. A comprehensive, perhaps sufficient, analysis of the death penalty must ascertain whether this practice is ever just. According to this Article, whether capital punishment should be employed in the United States depends entirely on the moral viewpoints and value-based judgments of its citizens. The current state and future of the practice thus rests on whether capital punishment is compatible with the citizens’ own subjective moral beliefs. Accordingly, this Article offers my individual perspective regarding the morality of executing criminals for abhorrent crimes—death is not an acceptable form of punishment because it dehumanizes the criminal and thereby degrades his liberty.

Even if one subscribes to the view that capital punishment is unjust, one should additionally resolve how to enforce an equally damning punishment for crimes, such as murder, which obviously differ in quality and severity. The


8 Id.
purpose of this Article is to answer the threshold question of whether the death penalty may be supported by the eight arguments described in Bedau’s seminal piece.

II. FACTUAL BACKGROUND

Before embarking on such an inquiry, it would be useful to recount the history of the death penalty in the United States in order to better appreciate the current state of capital punishment in this nation. Whether and under what circumstances capital punishment is consistent with the law is a question that has been informed by British common law. Therefore, this background will begin with an introduction as to how capital punishment historically operated in Britain. It will then summarize how America, mindful of the British tradition, struggled with this question from its founding to the present day. It should be noted that this account is by no means exhaustive, but is offered as a brief chronology to provide context for the following discussion of capital punishment in this nation.

A. The British System

The British have had the most direct influence on the formulation of American law. With the exception of forty years of rule under William the Conqueror, the British generally accepted the use of the death penalty for many centuries before the inception of the United States. For example, it is thought that under the rule of King Henry VIII, over 72,000 individuals were executed under his command. While these numbers alone are impressive, what is of greater significance is the means by which these individuals were executed. Strangling, boiling one alive, and burning one alive were some of the ways in which criminals were executed during this time. Moreover, the crimes for which one could be executed were quite high in number, and often trivial by today’s standards. In the 1700s, there were 222 capital

---


10 See Jeffrey M. Banks, Student Article, In re Stanford: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?, 48 S.D. L. Rev. 327, 338 (2003) (“Although capital punishment had been practiced in England since 450 B.C.E., the conquest of England by William the Conqueror and his ascension to the throne in 1066 A.D. brought an end to capital punishment in England.”).

11 George Lawyer, Should the Grand Jury System be Abolished?, 15 YALE L.J. 178, 179 (1906) (observing that “72,000 persons suffered death by hanging during [his] reign, in most cases for trivial offenses.”).

crimes, including cutting down a tree and counterfeiting stamps, in addition to an expected or standard list of severe crimes such as murder, rape, and treason.\textsuperscript{13}

Despite the seemingly gross or excessive use of the death penalty in Britain, two of the most important historical British documents expressed concern regarding the imposition of the death penalty. First, Chapter Fourteen of the Magna Carta states, "[a] free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood . . . ."\textsuperscript{14} Additionally, the English Bill of Rights, written in 1689, declares, "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."\textsuperscript{15}

B. The Early American System

British notions of justice clearly influenced the American view of capital punishment. Indeed, the Eighth Amendment's prohibition against "cruel and unusual punishment" can be traced to the Magna Carta and the English Bill of Rights.\textsuperscript{16}

Even before the enactment of the U.S. Constitution, the American colonies sought—perhaps even more aggressively than the British—to limit the category of capital crimes and to ensure that the means of execution would not be especially gruesome. Whereas 222 capital offenses were recognized under King Henry VIII's reign, only fifteen crimes were considered capital offenses under the Capital Laws of New England.\textsuperscript{17} Similarly, the Massachusetts Bay Colony identified fourteen such offenses.\textsuperscript{18} Over a century later, in 1780, "the Commonwealth of Massachusetts recognized only seven capital crimes . . . ."\textsuperscript{19} The


\textsuperscript{14} Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CAL. L. REV. 839, 845-46 (1969) (discussing Chapter 14 of the Magna Carta).


\textsuperscript{16} See Trop v. Dulles, 356 U.S. 86, 99-100 (1958) ("The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta.").

\textsuperscript{17} According to Reggio, the fifteen capital crimes were: "pre-meditated murder, sodomy, witchcraft, adultery, idolatry, blasphemy, assault in anger, rape, statutory rape, kidnapping, perjury in a capital trial, rebellion, manslaughter, poisoning and bestiality." Reggio, supra note 12, at 3.


\textsuperscript{19} The Death Penalty in America 7 (Hugo Adam Bedau ed., 1982). The seven capital crimes were: "murder, sodomy, burglary, [anal intercourse between men or women or sex between man and beast], arson, rape, and treason." Id.
death penalty suffered another major blow with the legislative limitation of federal capital crimes. Congress, in 1897, reduced the number of federal capital crimes, leading the way for several states to completely abolish the death penalty.

With respect to the means by which individuals could be put to death, an example of a method that is no longer tolerated is public executions. Normally, thousands of onlookers would congregate to view a public execution, creating a ruckus, an almost riot-like atmosphere. As a result of the public spectacle public executions generated, several states enacted laws abolishing these types of executions.\textsuperscript{20} (Quite ironically, opponents of the death penalty actually favored public executions because they were thought to display the horror and cruelty of capital punishment.\textsuperscript{21})

Limits on the number of capital crimes and the methods of execution were reflections of the same underlying concern—that death and certain methods of execution were not commensurate with the punishable offense. This concern was ultimately codified by the Supreme Court when it declared, in 1910, that the Eighth Amendment’s protection against cruel and unusual punishments is grounded in the “precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.”\textsuperscript{22}

In addition to the number of capital crimes and methods of execution, the ways in which a death sentence could be reached were also reformed by the Americans to allow more flexibility or discretion by the finder of fact:

In 1846, only three states had discretionary death penalties. Between the Civil War and the beginning of the twentieth century, twenty jurisdictions moved from mandatory to discretionary capital punishment. From the beginning of the twentieth century to World War II, eighteen states moved to discretionary capital punishment. Between 1949 and 1963, the last seven capital punishment jurisdictions made the move.\textsuperscript{23}

By 1917, twelve states abolished the death penalty, however this progress in the abolitionist movement was partial and temporary, as several of these states reinstated the death penalty decades later.\textsuperscript{24} Moreover, in the early

\begin{itemize}
\item \textsuperscript{20} "Rhode Island (1833), Pennsylvania (1834), New York (1835), Massachusetts (1835), and New Jersey (1835)." Reggio, supra note 12, at 6.
\item \textsuperscript{21} See id.
\item \textsuperscript{22} Weems v. United States, 217 U.S. 349, 367 (1910).
\item \textsuperscript{23} Jeffrey L. Kirchmeier, Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States, 73 U. COLO. L. REV. 1, 14 n.78 (2002) (internal citations omitted).
\item \textsuperscript{24} See Christopher Q. Cutler, Death Resurrected: The Reimplementation of the Federal Death Penalty, 23 U. SEATTLE L. REV. 1189, 1195 n.39 (2000) (“By 1917 twelve states had abandoned the death penalty, but four of these reinstated capital punishment during World War One and others later.”).
\end{itemize}
twentieth century other means of execution were being tested, often in a failing and regrettable manner. The death penalty was being protested, yet these efforts were unsuccessful, as political leaders often defended the status quo or even suggested that capital punishment be used for a larger set of crimes.

C. Modern Legal Developments

In more recent years, capital punishment has also undergone a roller-coaster ride, again with the arc ultimately bending towards abolition. For example, in Furman v. Georgia, the Supreme Court ruled in 1972 that the death penalty was "cruel and unusual," thus violating the Eighth and Fourteenth Amendments of the Constitution. As a result, the death penalty was effectively terminated in thirty-eight states that had allowed it and in the federal system. The Court's principal concern was that the death penalty was being administered in an arbitrary fashion.

Many states responded to the decision by tailoring their own laws to satisfy the concerns expressed by the Furman Court. For example, several states instituted discretionary devices that would help guide the jury as to the circumstances under which they should return a death sentence. The discretionary system hoped to rid the jury of any discrimination or bias. By contrast, some states responded to Furman by eliminating discretion and imposing mandatory death sentences for certain crimes. Yet, in Woodson v. North Carolina, the Court ruled the mandatory sentencing system did not sufficiently address the

---

25 Eva Dugan, the first female to be executed, had her head ripped off from her body during a botched hanging in Arizona. See Arizona Department of Corrections, Executed Inmates: Crime File Extracts, http://www.azcorrections.gov/DeathRow/Data6.htm#DUGAN (last visited October 18, 2008).


28 Id. (Douglas, J., concurring) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").


30 See Symposium, Capital Jury: Death-is-Different Jurisprudence and the Role of the Capital Jury, 2 OHIO ST. J. CRIM. L. 117, 125 (2004) (some "states responded to Furman by devising schemes of 'informed' or 'channeled' discretion. These states read Furman as attacking not discretionary death sentencing per se but rather the absence of legal guidelines informing judge or jury of what standards to consult when making the judgment call between life and death.").

concerns articulated in *Furman*, as a mandatory system did not guard against a jury relying upon impermissible motives.\(^{32}\)

While *Furman* appeared to signal the Court’s discomfort with capital punishment, subsequent decisions did not reveal a consistent abolitionist theme. In *Gregg v. Georgia*, the Court moved away from abolition, finding that “the punishment of death does not invariably violate the Constitution.”\(^{33}\) Thus, executions again resumed. But, after *Gregg*, the Court began to cut away at the edges of capital punishment in incremental ways. In *Coker v. Georgia*, for example, the Court held that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”\(^{34}\) Also, in *Ford v. Wainwright*, the Court concluded that the Eighth Amendment forbids the state from executing the mentally insane—those “whose mental illness prevents him from comprehending the reasons for the penalty or its implications.”\(^{35}\)

In 1987, the Court was compelled to address the intersection of capital punishment and race. The Court rejected a claim that a state’s capital punishment procedures ran afoul of the Equal Protection Clause of the Fourteenth Amendment, reasoning that a study “indicat[ing] that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty”\(^{36}\) by itself was “clearly insufficient to support an inference that any of the decisionmakers in [the defendant’s particular] case acted with discriminatory purpose.”\(^{37}\)

More recently, the Court in 2002 held that the execution of mentally retarded persons constituted “cruel and unusual punishment” in violation of the Eighth Amendment, thus reversing a previous decision that found such executions to be consistent with the Constitution.\(^{38}\) In 2005, the Court concluded that it was impermissible “under the Eighth and Fourteenth Amendments to the Constitution . . . to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime,” again reversing a prior decision that held the opposite.\(^{39}\) In 2008, the Court upheld the lethal injection procedure used by thirty states\(^{40}\) and, in a separate decision, concluded that capital pu-


\(^{33}\) 428 U.S. 153 (1976); *Case Against the Death Penalty*, supra note 7.

\(^{34}\) *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).


\(^{37}\) *Id.* at 297.


nishment could not be imposed for the rape of a child where the crime did not result nor was intended to result in death.41

III. CATEGORIES OF ASSESSMENT

With some knowledge of how the death penalty has evolved in the United States, it is now appropriate to turn to an assessment of the eight arguments provided by Bedau. I contend that these eight arguments properly fit into three separate categories: tangential claims, insufficient claims, and fundamental claims.

The first of these, the tangential, are largely irrelevant to the more pressing concerns surrounding capital punishment. Even if these claims were true, they would not contribute significantly to the more important considerations of the appropriateness of death as a form of punishment. However, since they are often used to defend a particular stance on this issue, and are advanced by Bedau himself, it would be of some value to examine these claims and expose their minimal worth to the discussion as a whole.

Next, the insufficient, are either those claims that contain credible arguments on both sides and thereby have yet to be conclusively proven. As will be demonstrated, these inconclusive claims do in fact have strong arguments on both ends of the spectrum. Thus, since these claims cannot be conclusively proven for one side, they fail to contain the intellectual momentum necessary to sustain a completely convincing argument for or against the death penalty.

Lastly, the fundamental claim, which is of the most significance to our discussion, best answers the issue of whether the death penalty is a proper form of punishment in the United States. In other words, this claim is essential and cannot be overlooked or ignored if one wishes to fashion a complete and accurate assessment of whether capital punishment is an instrument of or disgrace to the American concept of justice.

IV. TANGENTIAL CLAIMS

In this Section, I will address four claims—barbarity, cost, public support, and the global trend of abolition—which I contend are irrelevant to determining whether capital punishment is an appropriate form of punishment in the United States though they continue to be invoked in the national capital punishment debate.

A. The Death Penalty Is Barbarous

1. Methods of Execution

The first of Bedau’s arguments is that the death penalty is barbarous, meaning that the five generally used methods of execution—hanging, firing squad, electrocution, gas chamber, and lethal injection—are troublesome in that they can be quite gruesome.\(^\text{42}\)

Hangings, for example, can be easily botched. If the drop is too short, death to the individual will come slowly and painfully by way of strangulation. A drop that is too long will result in the individual’s head being ripped off from the rest of the body.\(^\text{43}\)

Firing squads defy any assurance that the condemned is put to death in a relatively painless fashion. “The hood placed over the condemned’s head may mask facial expressions of pain. The thick straps may hold back pain-induced movements. No one knows how painful a firing squad death actually is.”\(^\text{44}\)

Electrocutions are perhaps one of the most visibly disturbing means of execution, as the pain of the victim is apparent to observers. With this method, electrodes are fastened to the inmate’s body, after which jolts of electricity are applied to the electrodes.\(^\text{45}\) The inmate’s body jolts with the fluctuating voltage, with smoke often rising from the head, and the smell of burning flesh may pervade the chamber.\(^\text{46}\) Bedau recounts a 1983 episode in which a witness details the execution of a man who finally died after receiving electric shocks to his head and arms for fourteen minutes.\(^\text{47}\)

Bedau cites the gas chamber as another barbaric means of execution. This method is administered by releasing a lethal gas (which generally is created by mixing cyanide and sulfuric acid) in a sealed room containing only the inmate. Execution by way of gas chamber is essentially asphyxiation by suffocation or strangulation, with the inmate suffering from symptoms such as seizures,

\(^{42}\) See Baze, 128 S.Ct. at 1526-28 (providing a historical overview of the use of different methods of execution in the United States).

\(^{43}\) Case Against the Death Penalty, supra note 7.


\(^{46}\) See Deborah W. Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 OHIO ST. L.J. 63, 137-38, tab. 8 (2002).

\(^{47}\) Case Against the Death Penalty, supra note 7 (citing Glass v. Louisiana, 471 U.S. 1080 (1985)).
incontinence, and vomiting.\textsuperscript{48} The pain is said to equal that of a massive heart attack.\textsuperscript{49}

The method used to execute Oklahoma City bomber Timothy McVeigh, lethal injection, is also troublesome.\textsuperscript{50} Death by lethal injection may also be slow and agonizing, as its effectiveness relies on an accurate administration of a specific dosage of the lethal substance, or “cocktail.” Failure to administer the correct dosage “can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own asphyxiation.”\textsuperscript{51} As with the gas chamber, such prolonged strangulation can be difficult to witness.

Perhaps, more than the actual physical pain that an execution may inflict on the inmate is the psychological trauma that an inmate may endure during the lengthy process leading up to the execution.\textsuperscript{52} For example, a California Supreme Court opinion noted that, “the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”\textsuperscript{53}

The psychological damage of the death penalty can affect individuals other than the inmate. For example, a former executions supervisor who witnessed many executions reflected:

If [the condemned prisoner] was some awful monster deemed worthy of extermination, why did I feel so bad about it, I wondered. It has been said that men on death row are inhuman,
cold-blooded killers. But as I stood and watched a grieving mother leave her son for the last time, I questioned how the sordid business of executions was supposed to be the great equalizer . . . . The 'last mile' seemed an eternity, every step a painful reminder of what waited at the end of the walk. Where was the cold-blooded murderer, I wondered, as we approached the door to the last-night cell. I had looked for that man before . . . and I still had not found him—I saw, in my grasp, only a frightened child. Minutes after the execution and before heading for the conference room, and a waiting press corps, I... shook my head. 'No more. I don't want to do this anymore.'

It is evident that the existing methods of executions are problematic. None can boast with any reliable degree of certainty that unreasonable pain will not be inflicted on the inmate in question. The question becomes, so what?

2. Challenges to the Barbarity Argument

In my estimation, that the death penalty may be painful, slow, or agonizing is an assault on the methods of execution, not the death penalty itself. In other words, the issue is not with the state willfully exterminating human life per se, but with the way in which executions are taking place.

Bedau's discussion of the methods of execution graphically suggests that, at this time, "it appears there is no method available that guarantees an immediate and painless death." Yet, one day, we might very well invent a swift and painless way to kill another human being. At the point when we have this technological advance, the argument from barbarity disappears, leaving the more pressing and substantive issue of whether individuals should be executed at all still unanswered and unresolved.

One cannot simply, by using the argument of barbarity, claim that the death penalty should be abolished. The only logical conclusion one can derive from citing the flaws of the methods of execution is that the death penalty should not be administered until technology arrives at the point where we may execute individuals in an "immediate and painless" fashion. Even with our imperfect methods of execution, the Supreme Court has admitted that it "has never invalidated a State's chosen procedure for carrying out a sentence of death."


55 See Baze v. Rees, 128 S.Ct. 1520, 1529 (2008) ("[T]here must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.")

as the infliction of cruel and unusual punishment." The Court has accepted that pain is a necessary component of execution—"[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish . . . that [it] qualifies as cruel and unusual."58

Moreover, one may still argue that an individual who kills and rapes "deserves to die" independent of the universe of methods currently accessible by the state. If one deserves to die, one should be put to death using the best available means, even if it is an unfortunately agonizing process. At least the American system is without genuine torture or inhumane practices, such as stoning or boiling one to death; these five means of execution are the "best" we have, and once a more effective and painless means is found, it likely will be utilized.

In short, the claim that the death penalty is barbarous is unconvincing as a substantive matter because technology may advance and the more pressing issue is whether the death penalty should be utilized in the first place. The barbarity argument may support a moratorium on capital punishment until a better means of execution can be found. However, this support may be undermined by the contention that these inmates still deserve to die, and as such, they must be put to death with the best means available.

B. The Costs of the Death Penalty

1. Correcting a Misconception

A second tangential claim implicates the widely held belief that executing an inmate costs less than keeping him in prison for life. Conventional wisdom would have people think that if an inmate is executed, we will be "saving" on the money we would have spent to incarcerate the inmate during his remaining years. Some, including American lawmakers, have held such a common sense notion; thus, this belief has developed into an actual argument for capital punishment.59

Despite its common sense appeal, studies have upset the notion that executing an individual saves the State a significant amount of money and, to the contrary, have found that capital cases actually cost more than sending an inmate away for life.60 As one study put it succinctly, "the death penalty is not

57 Id. at 1530 (emphasis added).
58 Id. at 1531.
60 See, e.g., id. ("[R]epeated research, notably in high-volume capital sentencing states like California, Texas, and Florida, shows that the cost of each execution exceeds the cost of life imprisonment two- to three-fold, for example, averaging $2.3 million in Texas compared to $750,000 for forty years of life imprisonment.").
now, nor has it ever been, a more economical alternative to life imprisonment.”61 Consider the following statistics from various studies mentioned by Bedau:

- “A 1982 study showed that were the death penalty to be reintroduced in New York, the cost of the capital trial alone would be more than double the cost of a life term in prison.”62

- “In Maryland, a comparison of capital trial costs with and without the death penalty for the years 1979-1984 concluded that a death penalty case costs ‘approximately 42 percent more than a case resulting in a non-death sentence.’”63

- “Florida, with one of the nation’s most populous death rows, has estimated that the true cost of each execution is approximately $3.2 million, or approximately six times the cost of a life-imprisonment sentence.”64

Aside from the examples given by Bedau, there are other credible studies that suggest the death penalty is more costly than life imprisonment:

- “The extra cost per execution of prosecuting a case capitally is more than $2.16 million.”65

- “A 1991 study of the Texas criminal justice system estimated the cost of appealing capital murder at $2,316,655 . . . . In contrast, the cost of housing a prisoner in a Texas maximum security prison single cell for 40 years is estimated at $750,000.”66

- “Florida calculated that each execution there costs some $3.18 million. If incarceration is estimated to cost $17,000/year . . . , a

---

62 Case Against the Death Penalty, supra note 7 (citing N.Y. STATE DEFENDERS ASSN., CAPITAL LOSSES (1982)).
63 Id. (quoting U.S. GOVT. ACCOUNTING OFFICE, LIMITED DATA AVAILABLE ON COSTS OF DEATH SENTENCES 50 (1989)).
comparable statistic for life in prison of 40 years would be $680,000."

The assumption that the death penalty saves the taxpayer money is at best disputed and at worst incorrect. It is important to note the reason why the costs of capital punishment are higher than that of incarceration: "[a] murder trial normally takes much longer when the death penalty is at issue than when it is not. Litigation costs—including the time of judges, prosecutors, public defenders, and court reporters, and the high costs of briefs—are mostly borne by the taxpayer."

2. The Significance of Cost

The issue of cost is important to address simply because American lawmakers have considered it in assessing whether to support the death penalty. There is intuitive appeal in believing that capital punishment saves taxpayers money and therefore it is somewhat understandable for some Americans to advocate the use of capital punishment on this basis.

In my view, that the death penalty is more costly than incarceration should not, as Bedau has done, be put forth as an argument against the death penalty. No matter how financially favorable a punishment option may be, one would hope that other, substantive factors would be of more value to the decisionmakers and constituents of this nation, especially when one considers that death is potentially involved. For life to hang in the balance and be weighed against dollars and cents seems quite inappropriate for a civilized, modern society such as ours. The burden capital punishment imposes on the wallets of the taxpayers is surely trivial in comparison to the burden this punishment should place on the lives of those affected and on the collective conscience of all Americans. And, even if the death penalty were a relatively inexpensive practice, one would also hope that the costs to the dignity of man and the institution of justice would far outweigh these fiscal benefits, if any.

Moreover, as a practical matter, if one day the litigation costs in capital cases are reduced such that execution becomes more fiscally beneficial than imprisonment for life, an argument based on cost evaporates. Accordingly, at most, considerations of cost would call for a moratorium until executions are more cost-effective. But, as previously noted, money should not determine whether a man lives or dies.

68 Case Against the Death Penalty, supra note 7.
C. The Popularity of the Death Penalty

1. Public Support in the United States

In addressing the public support of the death penalty in the United States, Bedau attempts to discredit another widely held assumption, namely that Americans overwhelmingly approve of capital punishment.69 As with the election of public officials, the support of the people provides a mandate, or the authority to exercise legitimate power and influence over the populace. As a result, the allegedly large public support for capital punishment seems to justify the government’s continued use of it.

According to Bedau, however, there is no true mandate with respect to capital punishment as Americans do not generally approve of the death penalty.70 Bedau relies on a survey that indicates American support for the death penalty decreases as other alternatives to capital punishment are presented to the respondents.71 For example, only 56% of those surveyed support the death penalty “if the alternative is punishment with no parole eligibility until 25 years in prison.”72 Such support dwindles to 49% “if the alternative is no parole under any conditions.”73 Finally, only 41% of those surveyed would continue to favor capital punishment “if the alternative is no parole plus restitution.”74 For Bedau, these numbers indicate the public support for, and thus the government’s authority to implement, the death penalty is wavering and certainly not overwhelming.

Despite Bedau’s findings, the execution of McVeigh suggests public support for the death penalty in the United States is strong depending on the circumstances. A Gallup poll found that 80% of Americans supported the execution of McVeigh.75 This convincing majority was not derived from specific segments of the American population, but represents a wide range of Americans—the large support “appears to be the consensus of all major groups in society, including men, women, whites, nonwhites, ‘liberals’ and ‘conservatives.’”76 As an additional blow to Bedau’s findings, the Gallup poll determined that a mere “16% of Americans oppose[d] the execution.”77

69 Id. ("The media commonly report that the American public overwhelmingly supports the death penalty.").
70 See id.
71 See id.
72 Id.
74 Id.
76 Id.
77 Id.
The Gallup survey not only places in doubt Bedau's conclusion that the death penalty is not strongly supported in the United States, but also undermines the notion that such support is diminishing over time. Gallup has been conducting public opinion polls of American support of the death penalty since 1937 and the highest level of public support since then was in 1994, when 80% of Americans were in support. In 2001, exactly 80% of Americans were in support of the execution of McVeigh.

To be sure, one must point out that there are two separate yet related questions being juxtaposed here. The first is whether the death penalty should be supported in general, which Bedau addresses directly. The Gallup poll, in contrast, deals centrally and exclusively with the execution of one specific individual, namely the man responsible for the one of the greatest acts of terrorism on American soil and the killing of one hundred sixty-eight innocent people, including children. Even with this distinction in mind, however, the Gallup figures would still counter Bedau's claim that there is diminishing support for the death penalty. How can one believe or assert that there is a widespread and growing movement away from this practice when eight out of ten Americans were in favor of executing McVeigh?

Perhaps the resounding support of the execution of McVeigh indicates how appalled the American people were at the specific act committed by McVeigh. That is, perhaps the crime itself was so heinous that support for this particular execution was understandably high. It is possible that the severity of the crime outweighed any revulsion the general public may have towards the punishment of death. It is also possible, however, that capital punishment is strongly supported in the United States, and becomes even stronger when the crime is of more serious degradation to American society. For example, public opinion favoring capital punishment may overwhelmingly increase if the question is whether individuals responsible for the September 11, 2001 terrorist attacks are to be executed.

2. American Juries

Polls and general suppositions about public views are one thing; however, the behavior of the public when actually confronted with capital cases is quite another. In this respect, the operation of juries may provide helpful insight into the state of public support for capital punishment. Indeed, it may be said that the jury is an essential bridge between public values and the law, between contemporary standards and universal virtues. Thus, the way in which a jury acts may be a direct indication of the prevailing social attitudes.

78 Id.
79 See id.
80 See id.
It has been duly noted that, "from the outset, jurors reacted unfavorably" towards returning a mandatory death sentence. As a result, some states replaced mandatory sentencing with discretionary sentencing in capital cases. It would be a mistake, however, to assume that the move from a mandatory to discretionary system reflects the juries', and therefore the public's, disgust with capital punishment. At most, this may be said of some of the jurors and some of the public. As former Chief Justice Rehnquist noted, "[o]ne segment of . . . society was totally opposed to capital punishment, and was apparently willing to accept the substitution of discretionary imposition of that penalty for its mandatory imposition as a halfway house on the road to total abolition."

The movement from a mandatory to discretionary system of sentencing may, however, reflect the will of another segment of the population, which wanted to see a criminal receive some punishment rather than none at all. Again, Chief Justice Rehnquist observed:

Another segment was equally unhappy with the operation of the mandatory system, but for an entirely different reason. [T]his second segment of society was unhappy with the operation of the mandatory system, not because of the death sentences imposed under it, but because people obviously guilty of criminal offenses were not being convicted under it. Change to a discretionary system was accepted by these persons not because they thought mandatory imposition of the death penalty was cruel and unusual, but because they thought that if jurors were permitted to return a sentence other than death upon the conviction of a capital crime, fewer guilty defendants would be acquitted. . . . And at least some of those who would have been acquitted under the mandatory system would be subjected to at least some punishment under the discretionary system, rather than escaping altogether a penalty for the crime of which they were guilty. . . . While those States may be presumed to have preferred their prior systems reposing sentencing discretion in juries or judges, they indisputably preferred mandatory capital punishment to no capital punishment at all.

In other words, the movement away from mandatory sentencing was not the result of the fact that all jurors (and therefore the public at large) viewed capital punishment with a prevailing social attitude that the practice was harsh, cruel, or unusual—some preferred a discretionary structure in which a guilty

82 Id. at 291-92.
83 Id. at 311 (Rehnquist, J., dissenting).
84 Id. at 311-13 (Rehnquist, J., dissenting) (internal citations omitted) (emphasis added).
individual could be sentenced to something rather than have been altogether acquitted. The significance of the historical trend away from mandatory to discretionary sentencing cannot conclusively express a general social attitude for or against the death penalty, even though some may be tempted to articulate the existence of such an expression.\footnote{See id.}

In short, "[t]here are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned."\footnote{Furman v. Georgia, 408 U.S. 238, 385 (1972) (Burger, J., dissenting).} There is great flexibility in what conclusions one can reach from the findings reported by Bedau, those recently presented by Gallup, and the historical development of capital punishment. Even with the large window of opportunity for reasonable determinations, Bedau focuses only on one. His conclusion that the death penalty is not as widely supported as once thought is shaky nonetheless.

3. Global Movement Towards Abolition

In addition to his attempt to discredit the contention that the death penalty has overwhelming public support in the United States, Bedau also argues that the international community is moving away from the death penalty.\footnote{See Case Against the Death Penalty, supra note 7 ("The unmistakable worldwide trend is toward the complete abolition of capital punishment.").} In essence, Bedau attempts to demonstrate that the United States, in its continued use of capital punishment, is failing to recognize what many other countries have already found: the death penalty is simply inhumane and inappropriate in today's world.\footnote{See id. ("Americans ought to be embarrassed to find themselves linked with the governments of such nations in retaining execution as a method of crime control.").} The global trend towards abolition, the argument goes, is one that the United States should eventually embrace and extend.\footnote{See id.}

In order to buttress his claim that there is a global trend towards abolition, Bedau offers the following examples:

- "Today, either by law or in practice, all of Western Europe has abolished the death penalty."\footnote{Id.}

- "In Great Britain, it was abolished (except for cases of treason) in 1971; France abolished it in 1981. Canada abolished it in 1976."\footnote{Id.}
"The United Nations General Assembly affirmed in a formal resolution that throughout the world, it is desirable to 'progressively restrict the number of offenses for which the death penalty might be imposed, with a view to the desirability of abolishing this punishment.'"  

"More than half of all nations have abolished it either by law or in practice."  

The execution of McVeigh evidences the widening gap between the United States and the rest of the developed world at least in terms of ideals, policy, and respect. As noted previously, 80% of Americans surveyed favored the execution of McVeigh. However, across the Atlantic, the execution of McVeigh, even though his crime was heinous, was viewed as barbaric, inhumane, and wrong.

Perhaps the European reaction or attitude was the result of the fact that they did not experience the pain and trauma of the bombing carried out by McVeigh—the Europeans are outside looking in; they are detached and virtually unaffected by the bombing. Americans, on the other hand, might be more sensitive to the event in Oklahoma City because they, as a nation, experienced it first-hand.

Perhaps Europeans just don't believe that a man should be executed at all, even a man whose crime was extremely severe. That is, the European reaction might suggest that they do not believe there is a threshold beyond which the death penalty is necessary or at least more acceptable.

These two possibilities are just that—possibilities. Nevertheless, the European view of the McVeigh execution suggests that the Europeans do not share America's support for the execution of this domestic killer, arguably leaving the United States even further distant on the global spectrum of values and traditions. Where does that leave us?

4. Assessing the Two Arguments from Popularity

I conclude that Bedau's popularity claims against the death penalty must be set aside as irrelevant. With regards to the public support of the death penalty in the United States, I concede that public opinion is important in a democracy. But Bedau's contention that American support for the death penalty is not as high as it's been thought to be may be disputed, for example, by the Gallup poll numbers regarding the execution of McVeigh. Eight out of ten Amer-

---

92 Id.
93 Id.
95 See supra note 75.
icans supported his execution, which cuts against Bedau's argument with respect to domestic support for the death penalty.\textsuperscript{96} That Gallup found support for the death penalty to be the highest in recent years demonstrates that there is not, as Bedau suggests, a clear American movement towards abolition.

Moreover, the American tradition of capital punishment does not conclusively indicate a social revulsion or disgust with this practice. The juries, which again reflect contemporary social standards and public attitudes, could have been hesitant to return death sentences for a number of reasons. Such hesitation led, in part, to discretionary sentencing systems, which would allow an inmate to receive some punishment, rather than none at all.\textsuperscript{97} To assert that the switch towards a discretionary system indicated an overarching social attitude against capital punishment is to fail to take into account the segment of the American population that wanted to see criminals receive some punishment for crimes of which they were guilty. Thus, neither polls nor a fair reading of our historical legal treatment of the death penalty suggest that this practice is one that is indisputably revolting to the people.

Statistics and history aside, one may nevertheless ask, 'even if capital punishment were an immensely popular practice, or even if it were the opposite, that only a limited minority of Americans favored capital punishment, should it have any tangible effect on the operation of the practice?' That is, should the scoreboard of public opinion dictate or even influence the ways in which criminals are punished?

Granted, in a democracy, the voice of the people does matter, at least in principle.\textsuperscript{98} Yet, the point here is that popularity, by itself, does not determine what is right in the first instance. Slavery in American history is an ideal example of how public opinion should not serve as a determining factor of what policies and procedures a government should adopt. Slavery is a practice that is inherently unjust, yet at one point in this nation's history, was an accepted and widespread activity.\textsuperscript{99} This example is of critical significance because it is an American one; slavery proves how, even in a democracy, the opinions of the people may not be consistent with what corresponds with a just society.\textsuperscript{100} Thus, with the death penalty, our concern with public support should be very slim, as popularity by itself detracts from the more important question of whether death is an appropriate form of punishment. As the Supreme Court recently

\textsuperscript{96} See id.
\textsuperscript{98} See, e.g., Nicholas Stephanopoulos, Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail, 23 J.L. & Pol. 331, 342 (2007) (the "essence" of democracy "is the translation of the popular will into public policy").
\textsuperscript{99} See, e.g., John Paul Truskett, The Death Penalty, International Law, and Human Rights, 11 Tulsa J. Comp. & Int'l L. 557, 598 (2004) ("[S]lavery was legal and widely accepted until opposed on moral grounds following a fierce struggle against popular sentiment.").
\textsuperscript{100} See id.
noted, "[c]onsensus is not dispositive."101 As a result, regardless of whether capital punishment is popular, we should pay little interest to public opinion to such an issue that implicates the life and liberty of inmates.

In sum, Bedau commits two unfortunate errors in addressing the popularity of capital punishment: first, he is overconfident in his suggestion that the death penalty is not popular. Even worse, he elevates public support to an actual argument worthy of serious attention. In treating popularity as a substantive argument, he legitimizes the category of public support.

With respect to the international community's movement towards abolition, if one were against the death penalty, the global trend would be encouraging. The fact that other nations have abolished the death penalty is definitely assuring to abolitionists. However, this trend, by itself, does not mean the United States must or even should follow suit. The United States is under no legal or moral obligation to end or even reevaluate a legal practice simply because other nations, with their own customs, traditions, and circumstances, are doing away with capital punishment. There is nothing inherently wrong or perverse about holding on to values that may not be globally embraced or shared, or in joining other nations simply because it would be more diplomatic to do so. No country should change their practices or policies simply because a global scoreboard is tilting towards one side or another. This argument has no intrinsic merit and should be disregarded as irrelevant.

V. INSUFFICIENT CLAIMS

The previous four claims were categorized together because even if they were correct, they should be regarded as irrelevant to the question of whether death is an appropriate punishment in the United States. However, the next three claims—that the death penalty is arbitrarily imposed, that the death penalty kills the innocent, and that the death penalty is not a successful deterrent—would be of significance if they were found to be true. Yet, as will be shown, there is colorable evidence on both sides of these arguments. Thus, they are insufficient to serve as claims in support of abolishing capital punishment.

A. The Death Penalty Is Imposed Arbitrarily

1. Cruel and Unusual Punishment

Of the eight arguments presented by Bedau, perhaps none has been more vetted in the academic and legal communities than that of arbitrariness.

101 Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008); Baze v. Rees, 128 S.Ct. 1520, 1533 (2008) ("consensus is probative but not conclusive with respect to" whether a method of execution is constitutionally permissible); see also Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion) ("[T]he Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.")
This argument amounts to the suggestion that death sentences are not handed down in an evenhanded fashion, with racial minorities and those from low socio-economic backgrounds most susceptible to the haphazard imposition of death sentences.\textsuperscript{102} This contention is quite serious, in that it entails the implication that jurors are not conducting their affairs in a fair and impartial fashion, and that racism still pervades the criminal justice system. Put another way, this contention also attacks the fundamental basis of the judicial system: the notion that each person, regardless of race or economic status, is afforded equal justice under the law.\textsuperscript{103} Moreover, the notion that minorities are disproportionately represented on death row and that those of the least advantaged classes cannot, at times, retain an adequate legal defense, necessarily begs the question of whether justice is rendered fairly in this nation. If certain members of the population are not provided a fair shot during a trial for a capital crime, then capital punishment is a “cruel and unusual” punishment in violation of the Eighth Amendment and thus should not remain as a form of punishment.\textsuperscript{104}

2. Racial Bias

One facet of the argument that capital punishment is imposed arbitrarily is that racial minorities, including and especially African-Americans, are disproportionately represented on death row in comparison with their percentage of the general population. The evidence for such a contention seems overwhelmingly strong:

- Bedau himself sites a study conducted by the Bureau of Justice Statistics that found, “since the revival of the death penalty in the mid-1970s, about half of those on death row at any given time have been black.”\textsuperscript{105}

- Indeed, as Bedau writes, “Of the 3,200 prisoners on death row in 1996, 40% were black.”\textsuperscript{106} Yet, according to recent census

\textsuperscript{102} See Case Against the Death Penalty, supra note 7 (“[T]here has been substantial evidence to show that courts have been arbitrary, racially biased, and unfair in the way in which they have sentenced some persons to prison but others to death.”).

\textsuperscript{103} See id. (“[W]hen discretion is used, as it always has been, to mark for death the poor, the friendless, the uneducated, the members of racial minorities, and the despised, then discretion becomes injustice.”).

\textsuperscript{104} See, e.g., Furman v. Georgia, 408 U.S. 238, 305 (1972) (asking whether the operation of capital punishment was cruel and unusual because “there is a strong probability that it is inflicted arbitrarily”).

\textsuperscript{105} Case Against the Death Penalty, supra note 7 (citing Death Row USA, BUREAU OF JUSTICE STATISTICS, 1995).

\textsuperscript{106} Id.
data, African-Americans comprise only 12.9% of the general American population.\textsuperscript{107}

- In Southern states where racial tension is ostensibly higher than in other regions of the country, the figures can be even more disturbing. Modern civil rights leader Reverend Jesse Jackson in a speech decrying the racial bias in death sentencing states, "African Americans make up 25 percent of Alabama's population, yet of Alabama's 117 death row inmates, 43 percent are black."\textsuperscript{108}

- According to Stephen Nathanson, "the highest probability of a death sentence was found to occur in those cases where the killer was black and the victim white. The lowest probability of execution was found where the victim was black and the killer white."\textsuperscript{109}

- The Supreme Court wrote, "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."\textsuperscript{110}

These figures are quite staggering. They indicate that the percentage of African-Americans on death row is significantly higher than the percentage of African-Americans in the general population. They clearly suggest that there is a great disproportion of African-Americans on death row. These numbers provide support for the contention that racism continues to infect the administration of capital punishment and the criminal justice system more generally.

The notion that African-Americans are being discriminated against by the criminal justice system in capital cases led former President William J. Clinton to request a Department of Justice ("DOJ") study to determine whether, and if so to what extent, there is any racial bias in federal death penalty cases.\textsuperscript{111} According to the DOJ, despite the fact that "[t]he proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population . . . the cause of this disproportion is not racial or ethnic


\textsuperscript{109} STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 54 (Rowman & Littlefield, 1987) [hereinafter EYE FOR AN EYE].


bias, but the representation of minorities in the pool of potential federal capital cases." In other words, the reason why there is such a large discrepancy in the amount of minorities on death row compared to their percentage of the general population is that they are simply more involved in capital crimes as compared to other segments of the population. Put in other words:

This is not the result of any form of bias, but reflects the normal factors that affect the division of federal and state prosecutorial responsibility: the nature of the offenses subject to federal jurisdiction, the demographics of crime in areas where that jurisdiction is exercised, the respective capacities of federal and state law enforcement authorities, and the cooperative arrangements and divisions of responsibility that federal and state authorities develop in light of these considerations.

The DOJ study goes on to state that there are a number of structural devices in a capital case that are designed to ensure that racial discrimination does not taint the proceedings. These safeguards include a case review by senior attorneys and the Attorney General. "[Of] the cases considered by the Attorney General, the Attorney General approved seeking the death penalty for 38% of White defendants, 25% of Black defendants, and 20% of Hispanic defendants."

In addition, juries may also be screened and challenged. If a juror is thought to harbor bias against the defendant, the attorneys may request the suspect juror to be excluded from the jury. Also, each juror, if he recommends a death sentence, must sign a certificate indicating that:

[C]onsideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, col-

113 See id.
114 Id.
115 Id.
116 Id.
117 The Attorney General ultimately decided to seek the death penalty for 27% of the White defendants (44 out of 166), 17% of the Black defendants (71 out of 408), and 9% of the Hispanic defendants (32 out of 350). Id.
118 Id.
119 Id.
or, religious beliefs, national origin, or sex of the defendant or any victim may be.\footnote{120}

This information, taken together, suggests that the "problem" with respect to discrimination is not a death sentence, or any form of punishment for that matter. Rather the "problem" lies with the inability of the criminal justice system to properly ensure the existing safeguards are working or that additional safeguards may be necessary.\footnote{121} The discussion, in regards to the potential of racism tainting the administration of justice, should not be that capital punishment is administered unfairly, but rather that the safeguards eliminating racist jurors or poor attorneys are insufficient and should be improved.\footnote{122}

If anything, the argument regarding racial discrimination would support a moratorium on capital punishment until these safeguards are improved. One may contend that the protections cannot be strengthened to the point that discrimination will not taint a capital proceeding. However, this argument would indict all criminal cases, not just those involving capital crimes. It would be impractical to suspend the entire criminal side of the federal judiciary, or one aspect of it, on this basis.

3. Inequalities in Representation Due to Wealth

Another prong of the claim that capital punishment is imposed arbitrarily is that many on death row or who are on trial for capital crimes cannot secure adequate legal representation. According to one study, "approximately 90 percent of those on death row could not afford to hire a lawyer when they were tried."\footnote{123} Some less advantaged defendants lack the financial ability to hire adequate legal representation and are often given a poor defense by court appointed attorneys. In contrast, the rich, due to their financial position, are able to retain, as Justice William O. Douglas wrote, "the most respected and most resourceful legal talent in the Nation."\footnote{124} This disparity compels some to ask whether the death penalty can be considered "fair" if the indigent are poorly represented and the rich have the best legal defense money can buy. Echoing this sentiment, Justice Douglas wrote, "[o]ne searches our chronicles in vain for the execution of any member of the affluent strata in this society."\footnote{125}

\footnote{120 Id. (quoting 18 U.S.C. § 3593(f) (2000)).}
\footnote{121 See id.}
\footnote{122 See California v. Brown, 479 U.S. 538, 541 (1987) ("death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion") (citation omitted).}
\footnote{123 Case Against the Death Penalty, supra note 7 (quoting Tabak, in Loyola of Los Angeles Law Review (1984)).}
\footnote{124 Furman v. Georgia, 408 U.S. 238, 256 (1972) (Douglas, J., concurring).}
\footnote{125 Id. at 251-52 (Douglas, J., concurring)}
Federal law with respect to capital punishment requires each defendant to be appointed two lawyers, one of whom "shall be learned in the law applicable to capital cases." Clearly, and with the previous analysis concerning discrimination, there are institutional safeguards that are expressly designed to ensure that each defendant is afforded adequate legal representation. If a poorly trained attorney represents a defendant, the problem is not with the statute or with the punishment itself, but with the failure of the state to properly enforce this safeguard. As a result, more steps should be taken to guard against the ability of incompetent attorneys to represent individuals in capital cases.

This problem can occur with any criminal case, not just capital cases. Thus, the inadequate representation of indigent individuals does not show that there is something inherently inappropriate with or perverse about capital punishment in particular. Thus, this facet, like the racial bias factor, cannot convincingly serve as an argument against capital punishment.

With respect to the wealthy, it is not unfair or unjust for the wealthy to be able to procure excellent attorneys. A hallmark of the American judicial system is the ability of individuals to retain an attorney of their choosing, or even to represent themselves. What may be described as unfair or unjust, however, is if a poor man was to receive inadequate representation, a lawyer whose merit falls below an acceptable level of training or ability. A statutory safeguard exists to ensure this floor is satisfied in all capital cases, a protection that should be rigorously adhered to and enforced.

4. Rate of Imposition

Aside from the previous two contentions that the death penalty is administered unfairly to minorities (who are subject to racism) or to the indigent (who cannot afford adequate legal representation), there is an additional facet of the argument that capital punishment is arbitrarily imposed. This third prong is a more general claim that the death penalty is, as Justice Brennan opined, a "lottery system" in which "the punishment of death is inflicted in a trivial number of the cases in which it is legally available." The contention that the death penalty is administered in a trivial fashion resulted from the fact that the death penalty was not imposed "with any great frequency." Bedau himself notes

126 DOJ Study, supra note 112 (citing 18 U.S.C. § 3005 (2000)).
128 See DOJ Study, supra note 112.
129 Furman, 408 U.S. at 293 (Brennan, J., concurring).
that, "[o]f all those convicted on a charge of criminal homicide, only 3 per-
cent—about 1 in 33—are eventually sentenced to death."\(^{131}\)

The suggestion that death sentences are imposed in a rare amount of
cases does not necessarily reflect arbitrariness. Instead, it may reflect "informed
selectivity"\(^{132}\) on the part of the juries. That is, one cannot so easily assume that
a statistical overview of the imposition of capital cases means that juries are
randomly handing down death sentences; rather, such statistical evidence can
also be read to indicate that juries are, as Chief Justice Burger proposes, "increa-
singly meticulous in their imposition of the penalty."\(^{133}\) Such careful administra-
tion of justice is precisely what we should want and expect of our jurors.

That the death penalty is being thought of as an arbitrary punishment is
a direct assault on the juries of this nation, who have been entrusted with the
solemn duty to render justice. This sentiment was expressed by Chief Justice
Burger, who noted that, "[i]t seems remarkable to me that with our basic trust in
lay jurors as the keystone in our system of criminal justice, it should now be
suggested that we take the most sensitive and important of all decisions away
from them."\(^{134}\)

Moreover, as former Chief Justice Rehnquist noted, a generally low rate
of imposition of capital punishment is irrelevant—what matters is whether indi-
vidual defendants in particular were actually guilty of a capital crime.\(^{135}\) Indeed,
Ernest van den Haag, an advocate of capital punishment, espouses the belief that
each criminal should be punished based on his own actual desert. Therefore, for
van den Haag, the rate of imposition is of little value and importance because
those who are sentenced to death still deserve to die:

Justice requires punishing the guilty—as many of the guilty as
possible, even if only some can be punished—and sparing the
innocent—as many of the innocent as possible, even if not all
are spared. It would surely be wrong to treat everybody with
equal injustice in preference to meting out justice at least to
some. . . . [If] the death penalty is morally just, however discri-
minatorily applied to only some of the guilty, it does remain just in each case in which it is applied.\textsuperscript{136}

Stephen Nathanson, an abolitionist, characterizes van den Haag’s point in the following manner: “justice of individual punishments depends on individual guilt alone and not on whether punishments are equally distributed among the class of guilty people.”\textsuperscript{137} A hypothetical can clarify the position furthered by van den Haag:

A driver is caught speeding, ticketed, and required to pay a fine. Although we know that the percentage of speeders who are actually punished is extremely small, we would probably regard it as a joke if the driver protested that he was being treated unjustly or if someone argued that no one should be fined for speeding unless all speeders were fined.\textsuperscript{138}

What can be made of the apparent tension between viewing capital punishment in terms of how it is as applied across racial- or class-lines and viewing it in terms of how it is applied to particular individuals?

5. Arbitrary Judgment

Common sense appears to be on the side of Chief Justice Rehnquist and van den Haag: the rate of imposition says nothing about the guilt of those who have been caught or convicted. It would seem ridiculous to argue to a police officer that it is unjust for me to be pulled over for driving above the speed limit, a crime I am guilty of, even though other speeders were not caught. If this is correct, then we cannot rule the death penalty to be arbitrary because, “unequal justice is justice still.”\textsuperscript{139}

Yet, Nathanson offers a critical distinction that may shake the foundation of van den Haag’s claim:

For [van den Haag], the arbitrariness arises when we try to determine who among those who deserve to die will actually be executed. This is what I want to call the argument from arbitrary imposition. . . . [H]owever, he completely neglects the ar-

\textsuperscript{136} \textit{Eye for an Eye}, supra note 109, at 50 (emphasis in original).
\textsuperscript{137} \textit{Id}.
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}. at 51 (quoting Ernest van den Haag, \textit{In Defense of the Death Penalty: A Legal-Practical-Moral Analysis}, 14 CRIM. L. BULL. (1978)).
argument from *arbitrary judgment*. According to this argument, the determination of who deserves to die is itself arbitrary.\(^{140}\)

In other words, van den Haag’s argument is faulty according to Nathanson because the universe of those who are thought to deserve to die is selectively and arbitrarily decided.\(^{141}\) Continuing the speeding ticket analogy may help clarify Nathanson’s contention. For Nathanson, the arbitrariness argument loses merit if it is true that all who drive down a certain highway will be detected for speed and if their speed is above that of the law, they will be pulled over and summarily ticketed, even though other equally guilty speeders may not be pulled over. Nathanson concedes this is a legitimate means by which to administer tickets. Yet, the injustice arises when only a certain segment of drivers is considered for speeding violations, and the determination of who is in this universe is arbitrary. In other words, if the entire road of drivers is in the class of those who are considered for speeding, the system is not arbitrary; however, if the class is limited, and the limitation is arbitrary, say only to blue cars or red cards, the system is fundamentally unjust and therefore should be abolished.

Nathanson’s argument suggests that the defendants who are disproportionately targeted for capital crimes are minorities and the indigent. But, to the extent that the argument from arbitrary judgment has any legs, it does not serve as an indictment of the punishment in question, namely death. In contrast, it serves to expose the failure of institutional safeguards described by the DOJ and their need to be improved or followed with greater care. That is, the focus should be on the practice of pulling over blue or red cars only, not the ticket.

In short, the inability of the system to purge itself of discrimination and inadequate attorneys has no bearing on the validity of death as a form of punishment. Thus, Bedau and others would be hard-pressed to argue that this seemingly general perversion of the criminal justice system can be used as an argument against a specific form of punishment.

To be sure, the potential presence of discrimination and inadequate defense is important, and should be addressed by those in the political and legal communities. That said, those concerned with the administration of justice in a fair and impartial manner should be more concerned in eradicating the system of such deficiencies in general, not attempting to eliminate one form of punishment in particular.

---

\(^{140}\) *Id.* (emphases added).

\(^{141}\) *See id.*
B. The Death Penalty Kills the Innocent

1. Errors in Judgment

Perhaps the most intriguing argument of late is that innocent citizens are wrongly executed under the death penalty. The administration of justice, as with any human endeavor, is subject to error. As such, some are concerned that there are bound to be innocent people who are wrongly convicted of capital crimes. The problem with the death penalty, the argument goes, is not just that there are innocent people convicted of capital crimes, such errors can occur in all cases; the crux of the abolitionists’ argument is that the death penalty is irrevocable, there is no way for an innocent man, if found to be innocent after his erroneous conviction, to be set free.142

According to Bedau, “a large body of evidence from the 1980s and 1990s shows that innocent people are often convicted of crimes—including capital crimes—and that some have been executed.”143 Bedau further states that, “[s]ince 1900, in this country, there have been on the average more than four cases each year in which an entirely innocent person was convicted of murder.”144

Bedau provides several examples that would lead one to believe that the death penalty should no longer be imposed due to the fact that the innocent can be wrongly executed.145 These examples display how there can be errors in various phases of a capital case, including shoddy police work and other imperfections in the legal process.

- “In Mississippi, in 1990, Sabrina Butler was sentenced to death for killing her baby boy. She claimed the child died after attempts at resuscitation failed. On technical grounds her conviction was reversed in 1992. At retrial, she was acquitted when a neighbor corroborated Butler’s explanation of the child’s cause of death and the physician who performed the autopsy admitted his work had not been thorough.146

- “In Alabama, Walter McMillian was convicted of murdering a white woman in 1988. Despite the jury’s recommendation of a life sentence, the judge sentenced him to death. The sole evidence leading the police to arrest McMillian was testimony of

142 See Case Against the Death Penalty, supra note 7 (“Unlike all other criminal punishments, the death penalty is uniquely irrevocable.”).
143 Id.
144 Id.
145 See id.
146 Id.
an ex-convict seeking favor with the prosecution. A dozen alibi witnesses (all African Americans, like McMillian) testified on McMillian’s behalf, to no avail. On appeal, after tireless efforts by his attorney Bryan Stevenson, McMillian’s conviction was reversed by the Alabama Court of Appeals. Stevenson unco-vered prosecutorial suppression of exculpatory evidence and perjury by prosecution witnesses, and the new district attorney joined the defense in seeking dismissal of the charges.147

* "In 1985, in Maryland, Kirk Bloodsworth was sentenced to death for rape and murder, despite the testimony of alibi witnesses. In 1986 his conviction was reversed on grounds of withheld evidence pointing to another suspect; he was retried, re-convicted, and sentenced to life in prison. In 1993, newly available DNA evidence proved he was not the rapist-killer, and he was released after the prosecution dismissed the case. A year later he was awarded $300,000 for wrongful punishment.”148

In addition to these three examples of innocent individuals who were saved from execution, Bedau also offers an example of a case in which an innocent man was ostensibly executed:

In 1990, Jesse Tafero was executed in Florida. He had been convicted in 1976 along with his wife, Sonia Jacobs, for murdering a state trooper. In 1981 Jacobs’[s] death sentence was reduced on appeal to life imprisonment, and 11 years later her conviction was vacated by a federal court. The evidence on which Tafero and Jacobs had been convicted and sentenced was identical; it consisted mainly of the perjured testimony of an ex-convict who turned state’s witness in order to avoid a death sentence. Had Tafero been alive in 1992, he no doubt would have been released along with Jacobs. Tafero’s death is probably the clearest case in recent years of the execution of an innocent person.149

2. Assessing the Evidence

The implication of these examples is that the death penalty kills innocent individuals. The first three examples give the impression that, if it were not
for a veritable miracle, whether it was an appeal or DNA evidence, an innocent individual would have been executed.

The last example sadly shows that Jesse Tafero did not have a miracle to save him; yet Bedau assumes that Tafero would have received the same exact fate as his wife, Sonia Jacobs. Bedau’s example is at best speculative—there is no way of knowing that the treatment of the two would have been the same. What’s more, there are circumstances indicating that their situations were not identical and would not have led to the same legal result. For example, why wasn’t Tafero’s sentence also reduced if Jacobs’s was? In addition, if Jacobs’s sentence was minimized in 1981, why didn’t Tafero also request a similar appeal in the following nine years leading up to his execution, particularly since the body of evidence leading to their conviction was identical? These questions are not explained by Bedau, and thus, the example provided does not support the conclusion that Tafero’s case is a clear example of an innocent man being executed. He had nine years to appeal and attempt to receive a fate other than death. It seems that if this man was innocent and the evidence was identical to that of his wife’s case, he would have been able to appeal in the nine years in between the sentence reduction of Jacobs and his own execution. Regrettably, this is the only example Bedau had to offer in his contention that the death penalty kills the innocent, an example that is questionable and does not clearly indicate that an innocent man was executed.

In a study conducted by Bedau and Michael Radelet, twenty-three cases of innocent men being put to death were identified. When carefully analyzed, however, none of these twenty-three cases demonstrate that an innocent man was wrongly executed.

First, the Bedau-Radelet study had methodological flaws. An analysis of the study published in Stanford Law Review found that, in twelve cases, Bedau and Radelet “consistently presented incomplete and misleading accounts of the evidence.” Second, of the remaining cases, a study by Dudley Sharp found that, “there is, in fact, no proof that those 11 executed were innocent.” Commenting on the Bedau-Radelet study, Michigan Court of Appeals Judge Stephen Markman noted, “[t]his study—the most thorough and painstaking analysis ever on the subject [of the death penalty killing the innocent]—fails to prove that a single such mistake has occurred in the United States during the twentieth century.” Further, the National Review wrote of the study, “in each

150 See id.
151 See id.
155 Id.
of the [twenty-three] cases, where there is a record to review, there are eyewit-
nesses, confessions, physical evidence, and circumstantial evidence in support 
of the defendant’s guilt.”

From this information, we can reasonably conclude that innocent indi-
viduals have been wrongly convicted of capital crimes. As such, there have 
been innocent individuals on death row. However, there is no conclusive evi-
dence showing that one of these innocent individuals has been executed. In 
other words, the errors in the criminal justice system pertaining only to capital 
cases have not extended beyond conviction to death. In short, while some might 
agree with Justice Brennan that, “[p]erhaps the bleakest fact of all is that the 
death penalty is imposed not only in a freakish and discriminatory manner, but 
also in some cases upon defendants who are actually innocent,” no innocent 
men have been shown to have been executed.

3. The Potential Future Killing of the Innocent

Even though Bedau, as of yet, has failed to come forward with suffi-
cient evidence indicating that an innocent man has been executed, one may rea-
onably assert that it is just a matter of time before an innocent man is executed. 
Since it is somewhat likely that an innocent man might be executed, the argu-
ment continues, the death penalty should be abolished.

This sentiment is quite popular amongst jurists, social commentators, 
and historical figures. For example, famed French statesman Marquis de La-
fayette once said, “I shall ask for the abolition of the death penalty until I have 
the infallibility of human judgment demonstrated to me.”

Others contend nonetheless that the death of the innocent is permissi-
ble. Van den Haag states that the guilty must be punished because they de-
serve their punishment; that an innocent man may be executed does not alter the 
fact that the guilty still deserve a certain punishment. In other words, if a man 
is wrongly pulled over and ticketed for speeding, this mistake has no bearing on 
the rightful ticketing of an individual who actually was speeding. Van den Haag 
writes, “[t]he guilty do not become innocent or less deserving of punishment 
because others escaped it.”

---

157 See Sharp, supra note 154.
158 William J. Brennan, Jr., Foreward: Neither Victims nor Executioners, 8 NOTRE DAME J.L. 
ETHICS & PUB. POL’Y 1, 4 (1994).
159 Case Against the Death Penalty, supra note 7 (citing Lucas Recueil des debats . . . (1831) 
160 See, e.g., Ernest van den Haag, In Defense of the Death Penalty: A Legal-Practical-Moral 
Analysis, 14 CRIM. L. BULL. 51 (1978) [hereinafter In Defense of the Death Penalty].
161 See id.
162 Id. at 56.
This interesting claim provokes the question, is the death of the innocent worth it? The answer for van den Haag seemingly is “yes.” He asserts that, “[m]ost human activities—medicine, manufacturing, automobile and air traffic, sports, not to speak of wars and revolutions—cause the death of innocent bystanders. Nevertheless, if the advantages sufficiently outweigh the disadvantages, human activities, including those of the penal system with all its punishments, are morally justified.”

Obviously, for van den Haag, the advantages of executing a guilty offender outweigh the wrongful death of an innocent individual.

Yet, abolitionists can assert that a fundamental problem with van den Haag’s argument is that the death penalty is irrevocable. While a person who was wrongfully pulled over can drive away afterwards, a man executed has his liberty arrested forever. The injustice to those wrongly pulled over or incarcerated at least has the chance of being rectified. There is an opportunity for the wrong to be righted. This opportunity is eliminated by an execution, as the individual is put to death.

Nathanson notes that society must decide if there are goals or objectives that would outweigh other goals. In other words, America must decide if the protection of the innocent from wrongful executions is a goal of greater importance than administering just desserts, giving a capital offender the death that he deserves:

[W]e must sometimes sacrifice the goal of giving people what they deserve in order to satisfy other goals of greater importance. So, even if one concedes that murderers deserve to die, one need not grant that the government ought to execute them. This is because executing them may conflict with other important goals or ideals. . . . The question we must answer, then, is whether there are significant legal or moral goals and ideals which conflict with the imposition of the death penalty.

The American criminal system’s response to this query aligns with the response of van den Haag: administering justice to the guilty is of more value to society than the protection of the innocent. The notion that the dessert of the

163 Id. at 57.
164 See Judge Jay D. Blitzman, Gault’s Promise, 9 BARRY L. REV. 67, 73 (2007) (Noting that, in contrast to capital punishment, some colonialists believed that “[p]rolonged stays in [penitentiary] institutions would provide for punishment and the opportunity for rehabilitation through religious penitence.”).
165 EYE FOR AN EYE, supra note 109, at 44.
166 See Richard H. Fallon, Jr., The Core of An Uneasy Case for Judicial Review, 121 HARV. L. REV. 1693, 1708 (2008) (“Although most of us think it worse to convict one innocent defendant than to let three or five or perhaps nine guilty persons go free, we do not structure the criminal process on the assumption that it would be better to let thousands escape accountability than to risk ever punishing a single innocent.”).
guilty exists independently of the wrongful conviction of the innocent has prevailed in this nation’s criminal process. Thus, while the innocent should not be executed and while it would be a significant error in justice if an innocent man was executed, the American criminal system has yet to embrace the popular notion that the punishment of the guilty should be in any way altered by prosecutorial or judicial mistakes. Bedau’s information fails to rebut this fact. More specifically, he has not overcome van den Haag’s contention that the mistaken execution of the innocent, if it happens, affects the dessert of the guilty.

C. The Death Penalty Is Not a Deterrent

1. The Public Purpose of Capital Punishment

As noted in Furman, a “significant argument [in the debate over capital punishment] is that the threat of death prevents the commission of capital crimes because it deters potential criminals.” Indeed, one of the most used arguments in regards of capital punishment has to do with whether it is an effective deterrent. As the argument goes, capital punishment deters potential criminals “who would not be deterred by the threat of imprisonment.”

The suggestion that capital punishment is an effective deterrent implies that this form of punishment serves an important public service: it is an effective combatant against crime, thus serving the welfare of society. “Capital punishment,” van den Haag writes, “is warranted if it achieves its purpose: [d]oing justice and deterring crime.” The question, then, is whether capital punishment is an effective deterrent and to what extent, if any, it is more of an effective deterrent than imprisonment.

As an intuitive matter, it seems quite obvious that death provides a greater deterrent effect than other forms of punishment. Van den Haag himself notes:

Our penal system rests on the proposition that more severe penalties are more deterrent than less severe penalties. ... [P]eople learn to avoid natural dangers the more likely these are to be injurious and the more severe the likely injuries. ... Thus, if it is true that the more severe the penalty the greater the deter-

---

167 See id.
168 See Case Against the Death Penalty, supra note 7.
169 Furman v. Georgia, 408 U.S. 238, 301 (1972) (Brennan, J., concurring).
170 See Case Against the Death Penalty, supra note 7 (“The argument most often cited in support of capital punishment is that the threat of executions deters capital crimes more effectively than imprisonment. This claim is plausible, but the facts do not support it. The death penalty fails as a deterrent[.]”).
171 Id.
rent effect, then the most severe penalty—the death penalty—would have the greatest deterrent effect.173

Also, van den Haag points out that executing a criminal helps to save prison inmates and guards: “I cannot see the moral or utilitarian reasons for giving permanent immunity to homicidal life prisoners, thereby endangering the other prisoners and the guards, and in effect preferring the life prisoners to their victims.”174 In not executing a criminal who has already been shown to have been guilty of a heinous crime, the State is endangering the lives of other individuals, albeit only members of the prison community.

2. Objections to the Claim of Public Purpose

While common sense appears to be on the side of van den Haag, statistical evidence and other arguments offered by abolitionists are quite convincing in their own right. First, as previously discussed, the death penalty is imposed in a limited number of cases in all cases in which it is legally available. The infrequent imposition of the sentence diminishes its deterrent effect, as one should not be fearful of a punishment that is so rarely invoked. As Justice White noted:

[A] major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. . . . [S]eldom-enforced laws become ineffective measures for controlling human conduct, and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.175

Second, as Bedau correctly points out, “[t]he threat of even the severest punishment will not discourage those who expect to escape detection and arrest. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended.”176 A criminal, especially a murderer, may not be particularly mindful of his eventual punishment during the commission of a crime, whether the punishment is imprisonment, solitary confinement, or death. One may even go so far as to suggest that some individuals may not be aware of the punishments governing certain crimes, including murder and rape. For example, as van den

173 Id. at 59-60.
174 Id. at 60.
175 Furman, 408 U.S. at 312 (White, J., concurring).
176 Bedau, supra note 7.
Haag conceded, "[p]erhaps it is true, however, that many murders are irrational 'acts of passion' that cannot be deterred by the threat of the death penalty."\(^\text{177}\)

In response to the contention that capital punishment saves the lives of inmates and prison guards, empirical data shows that the threat to these members of our prisons is greater in states with capital punishment statutes:

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition states than they do in death-penalty states. Between 1992 and 1995, 176 inmates were murdered by other prisoners; the vast majority (84%) were killed in death penalty jurisdictions. During the same period about 2% of all assaults on prison staff were committed by inmates in abolition jurisdictions. Evidently, the threat of the death penalty does not even exert an incremental deterrent effect over the threat of a lesser punishment in the abolitionist states.\(^\text{178}\)

In preventing a criminal from carrying out further crimes, Justice Brennan suggests the answer lies not with execution but with "effective administration of the State's pardon and parole laws [that] can delay or deny [an inmate's] release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined."\(^\text{179}\)

The more significant claim offered by supporters of capital punishment is that the death penalty is more of a deterrent than imprisonment; thus, it is of more social utility than incarceration.\(^\text{180}\) Several studies directly counter this claim:

- "The murder rate in the U.S. in 1992 was 9.3 murders per 100,000 population. 16 States had a murder rate higher than the national average. Of those 16 all but one, the sixteenth, was a death penalty State."\(^\text{181}\)

- Death-penalty states as a group do not have lower rates of criminal homicide than non-death-penalty states. During the early 1970's death-penalty states averaged an annual rate of 7.9

\(^{177}\) Van den Haag, supra note 160, at 62.


\(^{179}\) Furman v. Georgia, 408 U.S. 238, 300-01 (1972) (Brennan, J., concurring).

\(^{180}\) See, e.g., Dezhbakhsh et al., Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 AM. L. & ECON. REV. 344 (Fall 2003).

criminal homicides per 100,000 population; abolitionist states averaged a rate of 5.1.\textsuperscript{182}

These numbers oppose the conventional wisdom that death serves as a more effective deterrent than imprisonment. The intuitive argument that the more severe punishment carries the greatest deterrent effect does not mesh with the evidence that states with death penalty statutes have, in fact, greater rates of murder.

One must ask, then, is it truly worth it to execute a criminal if the social benefits are so minimal, if existent at all? The evidence above should lead to the suggestion that use of the death penalty would "be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. . . . [Moreover], [a] penalty with such negligible returns to the State would be patently excessive[.]."\textsuperscript{183} Members of the Supreme Court have themselves acknowledged that "there is no convincing empirical evidence either supporting or refuting th[e] view" that capital punishment is a significantly greater deterrent than other penalties.\textsuperscript{184}

If it seems unlikely that capital punishment advances the good of the public, we can now turn to our final, remaining concern: do some people deserve to die anyway? That is, even if there are "marginal contributions" to the greater good of society, should capital punishment still be used because the guilty nevertheless deserve to die? This question, which will be explored in our next section, addresses the sentiment of van den Haag, who wrote even if capital punishment was not an effective deterrent "capital punishment for murder would remain just. . . . For murder is not a trifling offense."\textsuperscript{185}

VI. THE FUNDAMENTAL CLAIM

The previous seven arguments discussed so far—that the death penalty is barbarous, that it costs less than the alternatives, that it does not have the support of the American people, that it is internationally condemned, that it is administered in an arbitrary fashion, that it kills the innocent, and that it is not a deterrent—have not been relevant or compelling. If one were to rely solely on the merits of these previous seven claims, there still may not be a firm basis to abolish the death penalty because the possibility remains that a person convicted of a capital crime deserves to die. That is, it is argued that even with the previous seven items considered, the death penalty still remains just. In order to

\textsuperscript{182} Bedau, \textit{supra} note 7 (citing Bowers and Pierce, "Deterrence or Brutalization," in Crime & Delinquency (1980)).

\textsuperscript{183} \textit{Furman}, 408 U.S. at 312 (White, J., concurring).


\textsuperscript{185} Van de Haag, \textit{supra} note 160, at 67.
address this final issue, this article will explore the remaining claim presented by Bedau: that the death penalty is unjustified retribution.

A. The Death Penalty Is Unjust Retribution

1. Deserving to Die

Whether death is a just punishment can be reframed as the following inquiry: whether a person—regardless of the means of execution, cost, internal or international popularity, rate of imposition, and deterrent effect—deserves to die. The justness of capital punishment thus turns on exclusively on the question of whether it is deserved.

Under any reasonable conception of the good, just, or legal, it is safe to assume that a capital crime, such as premeditated murder, would be considered wrong, unjust, and illegal. It is highly unlikely that a modern conception of what is permissible in a civilized society can tolerate offenses such as premeditated murder. Those who are for or against the death penalty thus should be able to agree on the basic question that certain conduct, such as premeditated murder, "differs in quality from other crimes and deserves, therefore, a punishment that differs in quality from other punishments." 186

If one is to contend that death is an inappropriate punishment, then one should also offer an alternative punishment which must differ in quality from punishments for trivial offenses. Herein lies perhaps the greatest difficulty in the abolitionist camp, namely their consistent inability to recommend a punishment that differs in severity and quality from other punishments, yet is not death itself.

Before abolitionists can arrive at the point at which they may propose penal alternatives other than death, they must first argue successfully that a person, who admittedly commits a virtually universally abhorrent offense, does not deserve death. As van den Haag noted, "[t]hose rejecting the death penalty have the burden of showing that no crime deserves capital punishment—a burden which they have not so far been willing to bear." 187 In other words, assuming there is a set of absolute wrongful offenses, abolitionists must demonstrate that death would be an inappropriate punishment even for that set of crimes. It is this threshold question with which I am concerned here.

2. Death as an Acceptable Form of Punishment

In meeting this significant burden, abolitionists must counter the arguments presented by those who believe there is a class of individuals who truly deserve to die. First is a theoretical argument which states that if a man commits a capital crime such as first-degree murder, he is committing an act so ab-

186 Id.
187 Id.
horrent that the criminal not only forfeits his freedom in society, but he also forfeits his right to life altogether: “[w]hen death is imposed as a deliberate punishment by one’s fellow men, it signifies a complete severing of human solidarity. The convict is rejected by human society, found unworthy of sharing life with it.”188 This argument denies the contention that each individual has a right to serve his natural term; carrying out a capital crime is, in essence, one’s forfeiture of the ability to live in society and live at all.189 Quite simply, “if the victim died, the murderer does not deserve to live.”190

Second, as noted above, capital crimes differ in quality and severity from other crimes.191 As a result, the punishment should also differ in quality and severity. Currently, death is the only punishment that can be said to differ in quality and severity from other acceptable forms of punishment.

Before proceeding, one should clarify a contention that has appeared many times in rhetoric and the views of the public—that the punishment must “fit the crime.” This phrase does not mean that each crime deserves the exact same act to be inflicted on the criminal by the State, as abolitionists would have many believe so the claim can be distorted and easily shot down. Bedau himself offers two arguments against the distorted contention that each crime must be reciprocated against the criminal, what he calls the “Paradox of Just Desserts.” According to Bedau, the “Paradox of Just Desserts” is false, obviously, because “[i]t would require us to rape rapists, torture torturers, and inflict other horrible and degrading punishments on offenders.”192 Bedau further explains the notion that the punishment “fits the crime”

[W]ould require us to betray traitors and kill multiple murderers again and again—punishments that are, of course, impossible to inflict. Since we cannot reasonably aim to punish all crimes according to this principle, it is arbitrary to invoke it as a requirement of justice in the punishment of murder.193

188 Id. at 65.
189 See, e.g., Furman v. Georgia, 408 U.S. 238, 316 (1972) (“Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death.”) (Marshall, J., concurring); id. at 306 ( “The penalty of death differs from all other forms of criminal punishment [because] . . . [i]t is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”) (Stewart, J., concurring).
190 Van de Haag, supra note 160, at 167.
191 See Roper v. Simmons, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).
192 Case Against the Death Penalty, supra note 7.
193 Id.
The phrase the punishment "fits the crime," more properly means that death fits capital crimes simply because, like the crime, death differs in quality and severity from other forms of punishment.

3. What Is Punishment?

While on one side there are two arguments contending that there is a class of individuals who legitimately deserve to die and should be executed (i.e., someone who commits a capital crime severs his relationship with society and liberty, and death differs in quality and severity from other forms of punishment), I contend that execution is not an appropriate punishment, even if one believes a given criminal deserves to die.

First, in response to the contention that a person convicted of a capital crime forfeits his right to life, I offer an intuitive argument. More specifically, punishment traditionally has involved either or both of two factors:

1) punishment proper, meaning some sort of duty or toll to be exacted on the criminal himself (e.g., hanging, torture, caning, or placing an individual in the stocks). With this form of punishment, actual physical and/or psychological harm is inflicted on the criminal. The punishment includes the administering of harm itself; and,

2) exile from society, meaning a physical removal of the offender from society, so that he may not exact any future crimes on other members of society (e.g., imprisonment, deportation, or banishment). With this form of punishment, the penalty is the actual isolation from society, with the length of the isolation varying with the severity of the crime.

One may properly view capital punishment, the death of an individual, as a combination of both the first and second factors, with the criminal first being exiled (on death row) and eventually punished properly (through execution).

Aside from the death penalty, America’s current penal system has matured to the point where the first factor is not generally permissible. These forms of punishment are often viewed as especially barbaric, humiliating, and surely "cruel and unusual" by today’s standards. However, capital punishment remains an acceptable form of punishment even though it involves attributes of the anachronistic first element, namely the exaction of some retribution by the state.

How can the existence of the death penalty be reconciled with other forms of punishment that are based only on the second aspect of punishment? Based on an intuitive assessment of the factors of punishment, one should arrive at the conclusion that the second factor should remain the only factor by which we should actively punish our criminals. What a man deserves, then, is not death, but only punishments within the second factor, namely a length of exile.
Under this line of thinking, as Justice Brennan argued, "[a]n individual in prison does not lose 'the right to have rights.' A prisoner remains a member of the human family" even though he is no longer a member of society.\textsuperscript{194}

It follows that an individual that commits a crime forfeits his right to live in society. He thereby may be incarcerated. But it does not follow that, through the crime, he has forfeited his future liberty altogether and thereby may be executed. He deserves punishment, he deserves incarceration, and he deserves the ill will of the society that is banishing him, yet he does not deserve a crime to be imposed on his own self. Least of which, no human being deserves death; while a criminal acted wrongly and has taken life, the State cannot also act in such a manner. This is not only a matter of consistency, as other forms of punishment based on the first factor generally are impermissible, but also of prevailing American values and conceptions of what is permissible, as the universe of punishments have filtered out those based on the first element. As a result, we are left with the forms of punishment that may fall within the second category only.

4. Limits on Punishment

The likely response to this argument is "Since capital crimes differ in quality and severity, the punishment must also differ in quality and severity." Yet, what about the possibility that the "severity of punishment has its limits—imposed by both justice and our common human dignity"?\textsuperscript{195}

In regards to human dignity, Justice Brennan suggested four criteria for determining what constitutes a "cruel and unusual" punishment. One of these criteria was that "a punishment must not by its severity be degrading to human dignity."\textsuperscript{196} The death penalty, according to Justice Brennan, degrades human dignity because "[it] cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment."\textsuperscript{197} Again, with the minimal benefits (the trivial or even nonexistent deterrent effect), some may agree that it is unusually severe to execute a criminal.

The degradation of human dignity includes, "by its very nature, a denial of the executed person's humanity."\textsuperscript{198} As stated before, execution eliminates the ability of the inmate to enjoy any and all rights, not just the ability to live and function in society. The extension of the elimination of rights—from just negating the right to be in society to negating all rights—is unjust, as the person's entire being is extinguished. Moreover, the "the deliberate extinguish-
ment of human life by the State is uniquely degrading to human dignity." The word "deliberate" has been emphasized to indicate that what is unusually degrading about capital punishment is that it is a premeditated, calculated exaction of harm on the individual. To be sure, premeditated murder on the part of an individual is abhorrent and degrading to humanity; there is no greater threat to civic virtue than one man ending the life of another with forethought. However, when the State—an institution designed primarily to organize the functions of society, through regulations, sanctions, and the availability of opportunities—also engages in a deliberate ending of an individual's life, one may arrive at the conclusion that the State is also threatening the value of society and of liberty itself.

Supporters of the death penalty would offer a quick reply—specifically, that death at the hands of the State differs from death at the hands of another individual. For example, if an individual beats another in a dispute and a policeman beats a citizen who is being unruly, only the latter can be considered permissible and legal, even though the underlying act of beating is the same. Thus, many, including van den Haag, assert that the death penalty is afforded protection from the slings and arrows of abolitionists by this same argument: murder at the hands of the State is not unjust, it is a permissible and legal act, just as the beating of an unruly citizen by a police officer would be.

Supporters of the death penalty acknowledge and recite the universal social revulsion towards murder (death committed by a member of a community). They are unwilling to concede, however, that deliberate murder in all instances (including death committed by the State) is also revolting and degrading to human dignity. That is, the same quality that makes death committed by a citizen unjust, severe, and dehumanizing is also the same quality that makes death committed by the state unjust, severe, and dehumanizing. The legal compartmentalization of the two acts does not alter its underlying quality.

---

199 Id. at 291 (emphases added).
200 See Taylor v. Crawford, 487 F.3d 1072, 1081 (8th Cir. 2007) ("The infliction of capital punishment is itself a deliberate act, deliberately administered for a penal purpose.") (citing Wilson v. Seiter, 501 U.S. 294, 300 (1991)).
201 See, e.g., Howard Bromberg, Pope John Paul II, Vatican II, and Capital Punishment, 6 AVE MARIA L. REV. 109, 111 (2007) (characterizing capital punishment as "'legal' executions").
202 An argument can be made that death by the hands of the State is more dehumanizing than death by a fellow citizen, because of the slow dehumanization of years on death row, the final countdown of last days and hours—could not, or at least would not, be shown on television. . . . What TV cannot show is the process that defines an execution: the years of vegetating somewhere between life and death; the deliberate stripping away of every shred of the condemned's identity; the humiliation of innocent family visitors subjected to body-cavity searches in the final days. The real horror of capital punishment, then, is not in the final moment of wriggling or gagging or gurgling, but in the time before, the time when a human being must brush his teeth, pull on his pants, watch TV, all the while knowing he is soon to die.
Supporters are able, in a heartbeat, to speak of the revulsion of murder and its unique status as being the one crime that differs in terms of quality and severity. They then continue to argue that because of the status of murder, it should be assigned a crime that also differs in terms of quality and severity. Yet how can supporters advocate a punishment that carries the same defective qualities that make the crime itself so abhorrent and unjust? Is there not a subtle hypocrisy or ignorance being exhibited by supporters?

To write this simply, the supporters state, “Due to the x (the quality, severity, and socially degrading nature) of y (death exacted by a citizen), the murderer deserves z (death exacted by the state).” Yet, what supporters are failing to recognize or admit is that x (the quality, severity, and socially degrading nature) is also included in z. Who administers y or z should not and does not deflect from the fact that x exists in both. The quality of x will always exist irrespective of the administering party or the legal status of the administering authority.

Therefore, the degradation to human dignity arises from the inability of the State to recognize that the degrading nature of death is not extended to the murderer himself. Not only does the murderer lose his right to function in society and enjoy all future liberties, he also fails to be recognized and protected as an entity that is being dehumanized (properly, the negation of one’s humanity) by a State-administered execution. Similarly, Justice Brennan wrote, in light of capital punishment’s questionable effectiveness as a deterrent, “it is certainly doubtful that the infliction of death by the State does, in fact, strengthen the community’s moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values.”

As noted above, justice should involve only the second of the two elements of punishment, namely the removal from society, not the infliction of harm on the individual, let alone the infliction of a life-ending execution. Justice of infliction is retribution, vengeance, or retaliation; the only purposes of exacting such retribution would be to deter other criminals (such as with the stockade or hanging), or to actually punish the criminal himself for his wrongdoing (such as cutting off the hands of a burglar or slapping the hands of a loudmouth student). Both of these justifications are not sufficient to justify retribution. For, as previously discussed, the deterrent effect of capital punishment is highly questionable. And, the United States has, with exception to


204 Furman v. Georgia, 408 U.S. 238, 303 (1972) (Brennan, J., concurring).

205 See supra Section IV.C.
capital punishment, moved on from the abusive, torturous, and humiliating practices of inflicting some harm on its own citizens.

With these specific thoughts considered, I do not find the practice of capital punishment to be consistent with what is just, even though the practice does enjoy legal protection and may be favored by those who are subject to its prospective administration. But what is just has, and always will, remain separate from what is legal and popular. What is just should not contain the dehumanization of an individual, both with the deprivation of that individual’s future liberties and with the infliction of harm on his person.

I thus return to the question that began this inquiry, is it possible that "severity of punishment has its limits—imposed by both justice and our common human dignity?"\textsuperscript{206} Based on this discussion of justice and human dignity, I find capital punishment to be both degrading and unjust. Thus, this Article suggests that there should indeed be a limit on punishments. The use of death as an instrument of punishment, as I see it, falls beyond the universe of what should be considered an appropriate means to render justice in contemporary American society.

VII. CONCLUDING REMARKS

A. What of McVeigh, Hitler, or Bin Laden?

This Article makes two conclusions—first that the content of the Eighth Amendment will be provided by the moral judgments of the courts and the people. In other words, the constitutionality and morality of the practice may well be the same question. Second, based on my own conception of morality, there should be limits on the forms of punishment. That this Article contends that there should be a limit on forms of punishments—due to considerations of justice and the dehumanization of individuals by way of executions—means that the death penalty should not be utilized at all, even in extreme cases. Therefore, individuals such as Timothy McVeigh, Adolf Hitler, and Osama bin Laden, should not be subject to capital punishment, even though their particular offenses are absolutely heinous.

To draw some theoretical distinction between a crime that deserves incarceration and a crime that is so heinous that it deserves capital punishment is subject to three errors. First, what possible line could be drawn? To decide on a particular number of deaths or to employ any standard would be arbitrary. Second, the use of a line would trivialize and undermine the deaths of those whose murderers fell below the standard. Third, any and all executions still are unjust, as the State should not degrade the institution of justice and dehumanize an individual who, although he or she has no respect for other human life, is still a living person. Simply put, all murders are heinous, all are completely unac-

\textsuperscript{206} Case Against the Death Penalty, supra note 7.
ceptable, and deserve the greatest punishment of the land; however, death as punishment is inappropriate.

B. An Acceptable Alternative

Also, while this Article has arrived at the conclusion that the death penalty is an inappropriate form of punishment, I have not offered an acceptable alternative that would appease those who believe capital offenders deserve a punishment that differs in its quality and severity. This is a burden that, admittedly, I am unable to meet.

Before offering an acceptable alternative, one first has to reasonably show that the death penalty should be rejected. One must arrive at step one before moving on to step two. The scope of this particular Article is limited to the first step. It would be premature to offer alternative solutions to the need for a suitable capital punishment without thoroughly trying to argue that an alternative is required at all.

One need not concede that the present use of capital punishment should continue due to the absence of an acceptable alternative. That is, an unjust practice such as capital punishment should not continue because an equally severe, yet just, punishment has not been found. One might venture to say that no penalty can be found that can ever match the quality and severity of an execution; this may be true. Yet, again, an unjust practice should not continue to exist despite the nonexistence of an equally pleasing, just alternative.

C. Retribution and Rehabilitation

This Article argues that retribution—the exaction of harm on the criminal—should no longer be considered permissible as a justification of certain forms of punishment. Yet, what about rehabilitation?

Incarceration presents the inmate with the opportunity to think about, understand, and appreciate the gravity of his crime. More important than an inmate realizing the severity of his conduct is the ability of the inmate to alter his life as a result, to atone for his wrongdoing and subsequently adopt a new view of himself and his purpose.

Some, even those who harbor vengeful feelings towards a murderer or rapist, believe that an execution is "too easy." In that, it grants the inmate an easy way out, he does not have to suffer through prison or face up to the new realities of his life. An execution should not be thought of as "too easy," but rather, incarceration should be more humanely perceived as a way for the inmate to recognize the magnitude of his actions and the damage he has done to

---

207 See Kennedy v. Louisiana, 128 S.Ct. 2641, 2665 (2008) ("In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.").
families and communities. As a result, the inmate may improve himself, while still confined and isolated from the society that is rightfully exiling him.

This opportunity should not be cut short by an execution, as it may take considerable time for an inmate to realize what he has done. This rehabilitation might never occur. Yet the success or significance of incarceration does not lie in the guarantee of this rehabilitation, but in the opportunity of it. The most we, as a society, can do is offer such an opportunity with the hopes that an inmate may properly come to terms with his actions.

D. Morality

The notion that we should impose a limit on forms of punishment is essentially a moral argument. The morality, and thus the intellectual force, of this Article is based on my conception of the good and what is just. That the only seemingly compelling argument is one that deals with justice and humanity should indicate that the only instrument that may effectively and rationally abolish the death penalty is the American set of values derived from the public's own aggregate conception of what is just and appropriate.

In short, a change in the state of this nation's morality will serve as the only way to minimize, stop, or even expand, the use of capital punishment. A State, the constituents and their representatives, only deserve what their own sense of morality affords them. Consistent with this understanding of capital punishment in this nation, the Supreme Court in 2008 affirmed the view that "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."208

The first seven arguments have been shown to be largely irrelevant or simply inconclusive. After reviewing these seven claims that exist in the death penalty debate, I finally conclude that the death penalty is unjustified retribution. This is the only claim that can effectively shift the intellectual paradigms of the participants in the debate. The continued use of the death penalty in the United States can only be determined and influenced by the collective conscience of the members of this nation. As stated at the outset of this Article, it is "this essentially moral conflict" regarding what is just and degrading, "that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime."209

208 Id. at 2649 (quoting *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting)) (emphasis added).
209 *Furman*, 408 U.S. at 296.