
NO DUE PROCESS:

**HOW THE DEATH PENALTY VIOLATES THE
CONSTITUTIONAL RIGHTS OF THE FAMILY MEMBERS
OF DEATH ROW PRISONERS**

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This article argues that the death penalty violates the constitutional rights of the family members of death row prisoners. First, the article establishes that Americans are entitled to a fundamental “right to family,” based on a long history of Supreme Court jurisprudence that has established substantive due process rights such as the right to marry, to use contraceptives, to have children, to make educational decisions for children, and to make decisions about how to configure one’s household. Next, the article contends that the death penalty interferes with the constitutional right to family by harming the prisoner’s family members, whether or not the prisoner is ever executed. Finally, the article examines each of the justifications for the death penalty in the context of the myriad problems associated with it, such as the conviction of innocent people, racial bias, unfairness in the prosecution of death penalty cases, unequal access to attorneys, and the higher costs of capital punishment compared to long-term incarceration. The article concludes by arguing that the problems associated with the death penalty cannot survive a strict scrutiny analysis, especially when alternatives, such as long-term incarceration, can adequately accomplish the death penalty’s purported goals of retribution, deterrence, incapacitation, and restoration of social order.

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I. INTRODUCTION

On May 25, 2001, Shakeerah Hameen stood behind a plexiglass wall at the Delaware Correctional Center and watched prison officials execute her husband, Abdullah Hameen, by lethal injection, as he lay on a stretcher in the position of a crucifix.¹ Abdullah was killed at midnight and buried before the day ended, but Shakeerah was too ill to attend his burial.² After watching the state kill her husband, Shakeerah physically and emotionally fell apart.³ Shakeerah developed an intense migraine headache, and her blood pressure skyrocketed.⁴ She also had diarrhea and a bad asthma attack.⁵ Over the next several days, Shakeerah's condition did not improve.⁶ The asthma turned into a bronchial infection, and the diarrhea persisted.⁷ Her breathing became so labored that her doctor threatened hospitalization.⁸

For three months, Shakeerah was too ill to go to work.⁹ She wavered on the brink of insanity, barely able to function.¹⁰ Although Shakeerah was a devout Muslim, she was too depressed to pray.¹¹ After three months, Shakeerah returned to work, but eventually quit because of her reoccurring health problems.¹² Five years after her husband's execution, the highly-talented and once vital woman still struggles to maintain herself and her family.¹³

Before his father's execution, Abdullah's son, "Little Hameen," attempted suicide by overdosing on drugs.¹⁴ His depression and anger interfered with his personal life, and he refused to go back to school.¹⁵ He started getting into trouble

¹ RACHEL KING, CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES, 105, 113 (2005) [hereinafter King, CAPITAL CONSEQUENCES].

² *Id.* at 116.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 116, 119–20.

¹³ *Id.* at 120.

¹⁴ *Id.* at 105–06.

¹⁵ *Id.* at 117–18.

with the law and, at one point, was charged with stealing.¹⁶ After his father's execution, he attempted suicide again.¹⁷

Unfortunately, the Hameens' story is not unique. The year 1976 marks the beginning of the "modern era" of the death penalty in the United States. In 1972, the Supreme Court struck down all death penalty statutes in the case of *Furman v. Georgia* on the grounds that the way the penalty was administered was so arbitrary and unfair that it violated the Eighth Amendment.¹⁸ As a result of that ruling, all prisoners on death row at that time had their sentences commuted to life in prison.¹⁹ States quickly revised their capital punishment statutes, and in 1976, the Court upheld some of the newly revised statutes in the case of *Gregg v. Georgia*, reinstating the death penalty.²⁰ Since the death penalty's reinstatement in 1976, an estimated 7,320 people have been sentenced to death.²¹ Professor Susan Sharp estimates that each death sentence profoundly affects at least eight other people, either family members or close kin.²² While not all of the condemned prisoners have been, or will be executed,²³ their families still suffer horribly from the process

¹⁶ *Id.* at 95, 101–03, 122.

¹⁷ *Id.* at 117.

¹⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁹ Death Penalty Information Center, Part I: History of the Death Penalty: Constitutionality of the Death Penalty in America: Suspending the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#SuspendingtheDeathPenalty> (last visited Apr. 30, 2007).

²⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²¹ U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT, 2005, at 10 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf>. Of those sentenced to death, as of April, 27, 2007, 1,068 people have been executed. Death Penalty Information Center, Executions by Year, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Apr. 30, 2007). As of January 1, 2007, there are 3,350 people on death row in the United States. Death Penalty Information Center, Death Row Inmates by State and Size of Death Row by Year, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state> (last visited Apr. 30, 2007) (citing NAACP LEGAL DEFENSE FUND, DEATH ROW U.S.A.—WINTER 2007, at 1 (2007), http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2007.pdf). These statistics indicate that not every person that is sentenced to death is actually executed. If you add together the total number of people executed (1,068) with the total number remaining on death row (3,350) and subtract this from the total number sentenced to death (7,320), there are 2,902 people who were sentenced to death but not executed.

²² Telephone Interview with Susan Sharp, Associate Professor of Sociology, University of Oklahoma, in Norman, Okla. (May 2006).

²³ Of the approximately 2,900 people who were sentenced to death but not executed during the modern era, 123 people have been exonerated and released from prison. Death Penalty Information Center, Innocence and the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Apr. 30, 2007). In 229 cases, governors or parole boards commuted sentences to life in prison. Death Penalty Information Center, Clemency, <http://www.deathpenaltyinfo.org/artcle.php?did=126&scid=13> (last visited Apr. 30, 2007).

of a death penalty prosecution.

Many advocates have challenged the constitutionality of the death penalty from the point of view of the condemned person before the Supreme Court, primarily under the Eighth Amendment and the equal protection clause of the Fourteenth Amendment.²⁴ Some commentators have even suggested a substantive due process challenge to the death penalty.²⁵ However, no one has yet challenged the constitutionality of capital punishment from the perspective of the family members who are intimately and tragically affected. This article makes the case that the death penalty violates the constitutional rights of *the family members* of the death row inmates.

Part II of this Article establishes that the family members of death row prisoners have standing to sue based on a long line of Supreme Court cases establishing a fundamental right to marry, to bring up children and establish a home,²⁶ to marry and not have children,²⁷ or to have a sexual relationship without marriage.²⁸ The

The remaining 2,550 people likely had their sentences reversed on appeal and were resentenced to life in prison. This number is supported by the research of Professor James Liebman and colleagues at Columbia University who studied death sentences between 1977 and 1995 and found an overall reversible error rate of 68%. JAMES LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATE IN CAPITAL CASES, 1977–1995*, at i (2000), <http://www2.law.columbia.edu/instructionalservices/liebman/lieman1.pdf>. They identified 2,370 cases that had been reversed due to error as of 1995. *Id.* at ii.

²⁴ See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that arbitrary and capricious application of death penalty statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments); *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (holding that newly drafted death penalty statutes would address the problems identified in *Furman*); *McKleskey v. Kemp*, 481 U.S. 279, 291–92 (1987) (upholding the Georgia death penalty statute against an Equal Protection challenge, despite evidence that blacks were more likely to be sentenced to death than whites); *Miller-El v. Dretke*, 545 U.S. 231, 236–37 (2005) (reversing conviction of a Texas prisoner on Fourteenth Amendment grounds after a prosecutor used 91% of his preemptory challenges to dismiss black jurors).

²⁵ See generally Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process*, 40 HOUS. L. REV. 1359 (2004); Daniel Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329 (2003). See also Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 811–13 (1996) (suggesting substantive due process challenges to the death penalty since Eighth Amendment challenges are failing). These scholars use the right to life as the basis of the challenge, as opposed to the right to liberty that this article suggests. The author would like to acknowledge that her research benefited from all of these scholars, but especially from Daniel Bird's excellent and thoroughly researched article.

²⁶ *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the right to marry, establish a family, and bring up children is well-established).

²⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a Connecticut law prohibiting the distribution of contraceptives to married couples, holding that the Due Process Clause afforded a substantive marital privacy right to the decision whether or not to procreate).

²⁸ *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a Massachusetts law prohibiting

Court has also extended the right to privacy regarding family decisions beyond the nuclear family.²⁹ The substantive due process clauses of the Fifth and Fourteenth Amendments articulate and protect this “right to family.”³⁰ As such, it is subject to the most stringent of all constitutional standards—strict scrutiny.³¹ The death penalty interferes with the right to family by causing irrevocable harm to the family. This harm occurs even if the family member is not executed. Anyone who has a family member charged with a capital crime therefore has standing to claim a violation of his or her due process rights.

Part III illustrates the harm suffered by family members of capital defendants by providing for the reader specific examples of the effect of the death penalty on the defendants’ parents, children, spouses, siblings and extended family. Not only do these family members experience the extreme personal grief that accompanies the loss of a loved one, but also, by labeling a person as worthy of death, the death penalty prosecution stigmatizes death row families and creates a situation in which the families experience shame and isolation from the larger society.

Part IV demonstrates that no compelling state interest justifies the death penalty. Since its implementation, the death penalty has consistently failed to fulfill the policy goals for which it purportedly exists, namely deterrence, retribution, incapacitation, denunciation, and vindication of legal order. The reasons for the death penalty’s failure to achieve these goals are both penological and philosophical.

Part V argues that lesser forms of punishment, such as lengthy prison sentences and life sentences without parole, are not constitutionally suspect. These punishments are more narrowly tailored to accomplish the goal of punishing offenders, without causing tremendous and irreparable harm to the family structure.

Finally, Part VI addresses the practical aspects of a due process challenge to the death penalty brought by family members, including standing issues and how family members can initially bring a claim in court. This section will also address the application of this theory to other types of punishment.

the distribution of contraceptives to single people).

²⁹ *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 501 (1977) (invalidating a statute prohibiting a woman in public housing from living with her adult son and grandchildren because the Due Process Clause protected a family’s right to decide the composition of their family, which need not be limited to a “nuclear family”).

³⁰ *Id.* at 499 (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.’ A host of cases, tracing their lineage to *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, have consistently acknowledged a ‘private realm of family life which the state cannot enter.’ Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”) (citations omitted).

³¹ *See id.*

II. THE CONSTITUTION PROTECTS THE RIGHT TO MARRY, PROCREATE AND
CREATE A FAMILY—IT PROVIDES A PROTECTED “RIGHT TO FAMILY”

The Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived of life, liberty or property without due process of law.³² “Life” and “property” are easily described, but “liberty” is a more amorphous concept. Liberty is more than just freedom from unfair restraint;³³ liberty also protects fundamental aspects of a person’s life, such as the right to marry³⁴ and have children.³⁵

Family relationships are such an integral part of our legal system that family members are allowed to act on behalf of other members of their family in situations where that person cannot, or will not, act on his her own behalf. For example, in *Cruzan v. Missouri Department of Health*, the parents of Nancy Cruzan petitioned to have their daughter, who was in a persistent vegetative state, removed from life support.³⁶ Similarly, family members frequently act as “next friend,” bringing appeals on behalf of death row prisoners who have chosen not to continue their legal battles.³⁷ The courts’ recognition of the “next friend” right shows that families have a legal interest in the welfare of their family members on death row.

The family relationship is a fundamental aspect of our legal system. In a long line of cases, stretching back nearly a century, the Supreme Court has articulated an evolving jurisprudence defining the parameters of the right to family as a liberty interest protected by the substantive due process clause of the Fourteenth and Fifth Amendments.³⁸

³² U.S. CONST. amend. V; U.S. CONST. amend. XIV.

³³ *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

³⁴ *Loving v. Virginia*, 388 U.S. 1 (1967).

³⁵ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

³⁶ *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 265 (1990). Although the Court denied the Cruzan’s petition on substantive grounds, there was never any challenge to their legal standing to act on their daughter’s behalf.

³⁷ Family members often act on behalf of condemned death row prisoners who have chosen to give up their appeals. Courts typically permit family members, or other close associates, to act as “next friend” when there is some evidence that the prisoner is impaired and unable to act on his own behalf. *See, e.g., Dennis v. Budge*, 378 F.3d 880, 888–89 (9th Cir. 2004); *Vargas v. Lambert*, 159 F.3d 1161, 1166–67 (9th Cir. 1998); *Commonwealth v. Haag*, 809 A.2d 271, 278 (Pa. 2002).

³⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (right to abortion); *Cruzan*, 497 U.S. at 278–79 (right to refuse unwanted lifesaving medical treatment); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy and to use contraception); *Rochin v. California*, 342 U.S. 165 (1952) (right to bodily integrity); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to direct the education and upbringing of one’s children); *Meyer v. Nebraska*, 262 U.S. 390

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

Meyer v. Nebraska set out the general parameters of the Fourteenth Amendment's liberty interest.³⁹ *Meyer* struck down a statute that forbade teaching German in public schools on grounds that it violated a parents' liberty interest in planning their children's education.⁴⁰ Ostensibly, a law forbidding foreign language instruction would not appear to implicate constitutional rights. In striking down this law, however, the Court set forth the liberty rights protected by substantive due process, recognizing the rights "to marry, establish a home and bring up children."⁴¹ This seminal case gives standing to family members to challenge laws that implicate family relationships and decisions and establishes the supremacy of the courts to review the states' use of police power in those situations that interfere with the family relationship. In *Meyer*, the parents had standing to sue because of their interest in their children and how they were raised.⁴²

The parents of death row inmates have a similar interest in what happens to their convicted child. The rights of parents to make important decisions regarding their children do not trump the rights of the state in all instances, but the Supreme Court made it clear in *Meyer* that it is the duty of the Court to ensure that legislative action is not "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."⁴³ This article will demonstrate that the death penalty is "arbitrary" and "without reasonable relation" to its purported goals.

A series of child custody cases, beginning with *Stanley v. Illinois*,⁴⁴ explored the parameters of the parent-child relationship. Stanley raised his children from birth with their mother, and there was no question he was their biological father.⁴⁵ However, an Illinois statute presumed him to be an unfit parent because he never married the mother of his children.⁴⁶ Therefore, when the mother died, the state removed the children from his custody without a hearing as to his fitness as a parent.⁴⁷ The Supreme Court reversed the lower court's ruling in favor of the state, holding that the due process clause mandated that Stanley be entitled to a full custody hearing.⁴⁸

Substantive due process protected Stanley's right to have a relationship with his children not only because he was the children's biological father, but also because

(1923) (right to direct the education and upbringing of one's children)).

³⁹ *Meyer*, 262 U.S. 390.

⁴⁰ *Id.* at 403. In another education-related case, the Court upheld the right of parents to educate their child as they choose. *Pierce*, 268 U.S. at 534–35.

⁴¹ *Meyer*, 262 U.S. at 399.

⁴² *Id.* at 400–01.

⁴³ *Id.*

⁴⁴ *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁴⁵ *See id.* at 646, 651.

⁴⁶ *Id.* at 646.

⁴⁷ *Id.* at 646–47.

⁴⁸ *Id.* at 658–59.

Stanley lived with his children and raised them from birth.⁴⁹ Similarly, the strength of the relationship between parents and their children, even if one of the family members is on death row, should deserve substantive due process protection.

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

In the latter part of the 20th century, the cases addressing the “right to family” have evolved largely in the context of expanding privacy rights associated with marriage, procreation, and sexuality. In *Skinner v. Oklahoma*, the Court addressed the constitutionality of a law requiring mandatory sterilization for third-time felony offenders.⁵⁰ In striking down the statute, the Court stated, “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”⁵¹

The Supreme Court addressed the right to marry and the right to enjoy a marital relationship without interference from the state in *Griswold v. Connecticut*.⁵² In a slightly different twist, the Court upheld the right of a married couple *not* to procreate and struck down a law that prohibited a married couple from using contraceptives on the grounds that it unduly burdened marital privacy.⁵³ The Court stated that the guarantees in the Bill of Rights “have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁵⁴ Prohibiting the use of contraceptives, instead of prohibiting the sale or manufacture of them, impeded several fundamental constitutional rights in a manner that had a “maximum destructive impact upon that relationship.”⁵⁵ In describing the marriage relationship, the Court wrote: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.”⁵⁶

The Supreme Court again affirmed the right to marry in *Loving v. Virginia*, where the Court struck down a miscegenation statute that prohibited interracial

⁴⁹ *Id.* at 651–55. In a subsequent case, the Supreme Court upheld a Georgia law that permitted a stepfather to adopt the child of his wife without first obtaining the consent of the natural father when the natural father had had an intermittent relationship with his child, but had never sought to obtain legal custody of his child. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“Best interest of the child” overrode a natural father’s right to block adoption of his child when the child wanted to be adopted by the stepfather and had been living with him and his mother for nine years.)

⁵⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁵¹ *Id.* at 541.

⁵² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵³ *Id.* at 485–86.

⁵⁴ *Id.* at 484.

⁵⁵ *Id.* at 485.

⁵⁶ *Id.* at 486. The right to use contraceptives was extended to non-married people in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

marriages.⁵⁷ The Court stated, “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁵⁸ The fundamental right to marry also supplied the rationale for striking down mandatory leave laws for pregnant women⁵⁹ and a law that required a non-custodial parent, who was under a court order to pay child support, to get court approval before marrying.⁶⁰

The legal and moral sanctity of marriage does not end simply because a person is charged with a capital crime or sentenced to death. A convicted offender may lose his liberty rights to the extent that the state may incarcerate or execute him, but the state may not terminate a marriage relationship because one member of the couple is on death row.⁶¹ The courts, therefore, should grant the spouse of the death row prisoner standing to challenge the constitutionality of the death penalty on the grounds that it interferes with the sanctity of the couple’s family relationship.

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

The Court further articulated the “right to family” in *Moore v. City of East Cleveland, Ohio* when it struck down a housing regulation that limited occupants of a single family dwelling to those persons recognized as members of the immediate family.⁶² The city prosecuted Mrs. Moore for violating a housing ordinance because she lived with her adult son and two grandsons.⁶³ Moore argued that the housing ordinance violated her substantive due process rights to choose her family living arrangement.⁶⁴ The city urged the Court not to expand substantive due process rights, noting that nothing in prior case law “gives grandmothers any fundamental rights with respect to grandsons.”⁶⁵ The Court disagreed with the City’s characterization of endorsing Moore’s living arrangement as an expansion of due process rights, stating that the Constitution already protects the “sanctity of the family” because “the institution of the family is deeply rooted in this Nation’s history and tradition.”⁶⁶ It further articulated, “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁶⁷ The Court reaffirmed the right to family as a cherished cultural value and,

⁵⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁸ *Id.* at 12.

⁵⁹ *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

⁶⁰ *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a Wisconsin statute that required a person paying child support to obtain court approval before marrying).

⁶¹ I know of no instances where a marriage was ended because a person was sent to prison or death row. Indeed, a prisoner has a constitutionally-protected right to marry even after he is incarcerated. *See Turner v. Safley*, 482 U.S. 78, 96 (1987).

⁶² *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1977).

⁶³ *Id.* at 497–98.

⁶⁴ *Id.* at 496–97.

⁶⁵ *Id.* at 500.

⁶⁶ *Id.* at 503.

⁶⁷ *Id.* at 503–04.

specifically noting that families come in many forms, made it clear that this right extended beyond the nuclear family to grandparents and other extended family relationships.⁶⁸

In *Michael H. v. Gerald D.*, the Supreme Court further compared and contrasted the rights of biological family members with the rights of other persons living together as a family.⁶⁹ In *Michael H.*, Gerald D.'s wife, Carole, gave birth to a child, Victoria, fathered by Michael H., with whom Carole had been having an extra-marital relationship.⁷⁰ Although Gerald D. was listed on Victoria's birth certificate as the natural father of the child, later paternity tests revealed that Michael H. was Victoria's father.⁷¹ For several years after Victoria's birth, Carole and Victoria lived at various times with Gerald D. and Michael H., both of whom held the child out to be their daughter.⁷² Eventually, Carole settled down with her husband Gerald and had two other children with him.⁷³

Michael H. sought custody and visitation rights with Victoria, who indisputably was his biological daughter and with whom he had established a parental relationship.⁷⁴ However, under California law, a child born to a married couple, in which the husband is neither impotent nor sterile, is presumed to be the child of the marriage, and only the husband or wife had standing to challenge the legitimacy of the child.⁷⁵

Michael H. argued that the California statute violated his procedural and substantive due process rights to a relationship with his child.⁷⁶ The Court disagreed. In upholding the California statute, the Court looked at the history and tradition of the family as the basis for determining questions of substantive due process.⁷⁷ Writing for a 5-4 majority, Justice Scalia asserted that, while historically the family unit receives protection, no tradition or history exists which protects biological fathers who have children out of wedlock.⁷⁸ In fact, Justice Scalia stated outright "our traditions have protected the marital family . . . against the sort of claim Michael asserts."⁷⁹

In the cases following *Michael H.*, the Supreme Court began placing more

⁶⁸ *Id.* at 504.

⁶⁹ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁷⁰ *Id.* at 113.

⁷¹ *Id.* at 114.

⁷² *Id.* at 114-15.

⁷³ *Id.* at 115.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 116.

⁷⁷ *Id.* at 124-27.

⁷⁸ *Id.* at 124-25. In his dissent, Justice Brennan argued that Scalia's methodology of defining fundamental interest was misguided. He suggested that the "tradition" at issue was that of parenthood, not the "tradition" of raising children in an intact nuclear family. Justice Brennan suggests that had the issue been framed differently, Michael H. would have prevailed. *Id.* at 139, 145-46 (Brennan, J., dissenting).

⁷⁹ *Id.* at 124.

emphasis on the importance of history and legal traditions in cases in which the parties assert substantive due process rights. In *Washington v. Glucksberg*, four physicians and a group of terminally ill patients challenged Washington's ban on assisted suicide on the grounds that the ban violated substantive due process.⁸⁰ In upholding the ban, the Court wrote a lengthy, detailed analysis of the history of laws prohibiting suicide and assisting suicide. The Court articulated that it employs an established method in analyzing substantive due process claims:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest." Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision making," that direct and restrain our exposition of the Due Process Clause.⁸¹

Protection of the relationships of the parents, children, spouses and extended family members of death row prisoners against state interference is "deeply rooted in this Nation's history and tradition."⁸² The parent-child relationship has been "careful[ly] descri[bed]"⁸³ as the "liberty of parents and guardians to direct the upbringing and education of children under their control,"⁸⁴ and to be charged with "[the children's] care, custody and management."⁸⁵ The marriage relationship is

⁸⁰ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁸¹ *Id.* at 720–21 (citations omitted).

⁸² *Id.* at 721. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 507 (1977) (Brennan, J., concurring) (defining family as, "the tradition of the American home that has been a feature of our society since our beginning as a Nation—the 'tradition' in the plurality's words, 'of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children'").

⁸³ *Glucksberg*, 521 U.S. at 720–21.

⁸⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)).

⁸⁵ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). In upholding the right of a biological father who was not wed to the mother of his children to have a hearing before his children could be removed by the state, the Court wrote:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "(r)ights far more precious . . . than property rights." "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

Id. (citations omitted).

considered so important that it is protected by a “zone of privacy,”⁸⁶ which can only be disrupted by the state when there is “a subordinating interest which is compelling.”⁸⁷ Thus, death row family members can meet the *Glucksberg* test, establishing that their relationships with their loved ones on death row are entitled to substantive due process protection.⁸⁸

D. Conclusion

As the above cases illustrate, the right to family, which includes the right to marry, procreate, use contraception, and live with family members, is deeply rooted in our nation’s history and tradition. It is a right that is recognized by all members of the Supreme Court from the most liberal to the most conservative.⁸⁹ The family members of death row prisoners have the right to have a relationship with their family member on death row—be it a spouse, parent or extended family member—because the relationship is deeply rooted in our nation’s history and has been described by the Supreme Court in a series of cases stretching back nearly a century.⁹⁰

⁸⁶ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the marriage relationship is protected by “several fundamental constitutional guarantees”).

⁸⁷ *Id.* at 497.

⁸⁸ *Glucksberg*, 521 U.S. at 720–21.

⁸⁹ See *Griswold*, 381 U.S. at 499 (Goldberg, J., concurring) (“I believe that the right to privacy in the marital relationship is fundamental and basic.”); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (Scalia, J.) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”) (citing *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (Powell, J.)).

⁹⁰ The issue of how to “carefully describe rights” came into play in the recent opinion from the D.C. Circuit Court of Appeals in the case of *Abigail Alliance for Better Access to Developmental Drugs and Washington Legal Foundation v. Von Eschenbacht*, 445 F.3d 470 (D.C. Cir. 2006). In *Abigail Alliance*, the plaintiffs sought access to Phase II experimental cancer drugs on the grounds that the plaintiffs had a substantive due process right to have access to experimental drugs that had not yet been approved for commercial distribution. *Id.* at 472. The District Court dismissed the plaintiffs’ case on a summary judgment motion, but the D.C. Circuit Court reversed. The majority opinion stated that a terminally ill patient has a substantive due process right to access to experimental drugs that could potentially save a patient’s life. *Id.* at 484. The majority described the right as “a right of control over one’s body” that “has deep roots in common law.” *Id.* at 480. The dissent disagreed, stating that there is no “right” to have access to experimental drugs and that under *Glucksberg*, lower courts have no constitutional authority to expand substantive due process rights. *Id.* at 487. This opinion points out a flaw in *Glucksberg*, which is who decides how to define the right at stake. Regardless of the ultimate outcome of *Abigail Alliance*, the issue of who describes the right at stake is not a concern with my theory because the right to pursue family relationships has a long history and is articulated by the courts in many factual scenarios, ranging from educating one’s own children (*Meyer*) to access to birth control (*Griswold* and *Eisenstadt*) to custody decisions (*Michael H.*).

Family relationships constitute the powerful glue that holds together our society. Those relationships are not diminished when one family member no longer lives in the same household as his or her other family members. Children move away to college or join the service, spouses live separately from each other to pursue careers, and grandparents leave their families to travel or live in warmer climes. This physical separation does not affect the status of each one as a family member. Likewise, if someone is physically separated from his or her family because he or she is on death row, that person is still considered a member of the family, and the family still suffers from the loss of that relationship.

When the state chooses to prosecute a defendant under a death penalty statute, that act of prosecution therefore interferes with the constitutionally-protected family relationship between the person on death row and the persons outside of prison. The constitutional challenge I am proposing would be available to any person with a family member on death row. The imposition of any death sentence, regardless of the guilt or innocence of the defendant, irrevocably destroys family life. Because a death sentence impinges on constitutionally-protected family relationships, the government must show a compelling state interest in order to justify the continued use of the death penalty.⁹¹

III. THE DEATH PENALTY INFRINGES UPON THE CONSTITUTIONALLY-PROTECTED RIGHT TO FAMILY

A The Prosecution of Capital Cases Causes Physical and Emotional Trauma to Family Members

In order to determine whether the death penalty survives a substantive due process challenge, several factors must be considered. First, the Constitution must protect the right alleged by the parties. Next, a court must determine if the government interest in infringing upon that right is “narrowly tailored to serve a compelling state interest.”⁹² Because the Supreme Court has held that family rights are worthy of substantive due process protection, this section examines how the death penalty interferes with this constitutionally-protected right in a manner that is not sufficiently narrowly tailored to be constitutional.

Limited scholarship exists on the impact of the death penalty on the families of the accused, but within this literature, there is sufficient research to establish and demonstrate the harm experienced by families with family members on death row.⁹³

⁹¹ See *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring).

⁹² *Glucksberg*, 521 U.S. at 721.

⁹³ See KING, CAPITAL CONSEQUENCES, *supra* note 1 (documenting the experiences of nine families of capital defendants); SUSAN SHARP, HIDDEN VICTIMS: THE EFFECTS OF THE DEATH PENALTY ON FAMILIES OF THE ACCUSED, (Rutgers University Press 2003) (documenting the experiences of fifty-two family members of capital defendants); Elizabeth Beck, Brenda Sims Blackwell, Pamela Blume Leonard, & Michael Mears, *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382 (2002–2003)

There are no firm numbers, but Professor Susan Sharp estimates that every person on death row (3,366 as of July 2006)⁹⁴ has on average eight significant family relationships, including children, spouses, parents, extended family and “fictive kin” (non-family members who are so close to the prisoner that they are, in effect, his family).⁹⁵

The decision to charge a person with a capital crime immediately isolates and condemns the family members of the defendant. The stigma associated with a capital punishment charge causes intense hardship and irrevocably changes family relationships. Psychologist Kathy Norgard, whose son was sentenced to death, describes the experience of having a child on death row as a form of “chronic grief,”⁹⁶ “a psychic wound . . . encased in shame, hopelessness, and isolation from community support.”⁹⁷ She constantly thought about the death penalty,⁹⁸ and when she ventured out in public, whether at the grocery store, church, or community meetings, she wondered if people she encountered supported her child’s execution.⁹⁹ Norgard wrote:

Family members of the condemned are marginalized when their government decrees that the family’s loved one is dispensable and the machinery of the death penalty begins its slow grind toward the goal of execution. The ongoing loving bond between the family members and the condemned becomes invisible to others outside death row.

Family members of the condemned experience repeated nightmares, sleepless nights, difficulty concentrating, impaired short-term memory, hypervigilance, a constant aching grief, and episodes of uncontrollable crying.¹⁰⁰

The harm caused by the death penalty is not limited to the judicial process. The stigma and shame associated with a capital punishment case results in ill treatment by the community at large. One woman said that human feces was left at her

(documenting the experiences of nineteen families of capital defendants); Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims’ Family Members*, 89 JUDICATURE 292, 295 (2006) [hereinafter King, *The Impact of Capital Punishment*]; Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants’ Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U.L. REV. 1119 (1999).

⁹⁴ DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2006: YEAR END REPORT 1 (Dec. 2006), www.deathpenaltyinfo.org/2006YearEnd.pdf (numbers not adjusted to account for convictions of the same person in multiple states).

⁹⁵ Telephone Interview with Susan Sharp, Associate Professor of Sociology, University of Oklahoma, Norman, Okla. (May 2006).

⁹⁶ King, *The Impact of Capital Punishment*, *supra* note 93, at 295.

⁹⁷ KING, CAPITAL CONSEQUENCES, *supra* note 1, at 2.

⁹⁸ *Id.* at 3.

⁹⁹ King, *The Impact of Capital Punishment*, *supra* note 93, at 295.

¹⁰⁰ KING, CAPITAL CONSEQUENCES, *supra* note 1, at 2–3.

doorstep,¹⁰¹ and another's family pets were killed.¹⁰² Some people experienced harassment at work and others at church.¹⁰³ An African American participant in Professor Elizabeth Beck's study of family members of capital defendants stated that "she only felt safe on her side of the tracks" where she lived with other low-income African Americans.¹⁰⁴ The participant acknowledged that she felt fear when she "had to cross the tracks" particularly to attend her son's trial.¹⁰⁵ She stated, "I was scared too about being his mother. Like doomed. You feel like somebody is going to do something to you[.]"¹⁰⁶

In another case, a Texas mother begged prison officials to allow her to hold her son one last time before his execution.¹⁰⁷ The state denied the request until after the execution, when it finally permitted her to hold his "still warm but lifeless" body.¹⁰⁸

Beck and her colleagues found that helplessness was the overriding feeling people experienced during the capital proceedings.¹⁰⁹ They identified three common experiences family members acknowledged while describing this helplessness: "[t]heir inability to ensure that the defendant's story was fully and accurately presented, their inability to address the victim's family,¹¹⁰ and their inability to hire a high-powered lawyer."¹¹¹

Many people lose the support of their friends and community when a family

¹⁰¹ Beck, et al., *supra* note 93, at 399.

¹⁰² SHARP, *supra* note 93, at 29.

¹⁰³ *Id.* at 29, 37, 61, 76 (mother of accused asked to leave her church), Beck, et al., *supra* note 93, at 399 (seven research subjects left their churches because they felt uncomfortable).

¹⁰⁴ Beck, et al., *supra* note 93, at 408.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 173.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ The rules forbidding contact between the victim and defendant's families can create painful rifts that interfere with the healing process. Trial courts often forbid the defendant, and by extension his or her family, from contacting the victim's family during the pendency of the trial. This is to protect the victim's family from harassment by the defendant. Also, even when courts do not order this condition, defendant's attorneys usually advise their clients and client's families not to contact the victim's family members for fear that a negative interaction may harm the defendant's case. These customs prevent defendant's family members from reaching out and apologizing or expressing sympathy to the victim's family. It is extremely awkward for the defendants' families to sit in the courtroom day after day and not be able to reach out to the other family. A victim's rights advocate once told a defendant's father who tried to speak to the victims' family in court to return to his side of the courtroom. *Id.* at 409. In another case, Lois Robison, whose mentally ill son, Larry, killed his next-door neighbors, recalled that the attorneys told her for years not to contact the victims' families. Despite this admonition, after the court reached a verdict in Larry's case, Lois felt compelled to approach the victim's family and tell them how sorry she was about the murders. The victim's family said that they had waited five years to hear that from Robison's family. KING, CAPITAL CONSEQUENCES, *supra* note 1, at 204.

¹¹¹ Beck, et al., *supra* note 93, at 408.

member is on death row. One woman whose brother was on death row said, “[a]ll my friends . . . just abandoned me. They didn’t support me at all during the years, and when I came down for [her brother’s] execution, not one of them showed any support. Not one of them called or came over, NOT ONE!”¹¹² This woman eventually developed high blood pressure, migraine headaches, depression and sleeplessness as a result of her brother’s arrest.¹¹³

In addition to stigma, family members of death row prisoners also experience what Norgard labels “chronic grief.”¹¹⁴ This grief is particularly devastating because so few individuals share the experience of having a family member condemned to death. As Norgard wrote “[p]eople experiencing grief have support groups available to help them. We have none. There are books and articles to read to help people process the grief and understand their experience. . . . Poetry abounds about grief. There is no poetry about the condemned.”¹¹⁵ Other researchers describe the experience of death row family members as a roller coaster ride. One researcher calls this family experience one of “ambiguous loss,” similar to that of the loss felt by families of service personnel who are missing in action or of someone dying of AIDS.¹¹⁶ Researcher Pauline Boss coined the term “frozen sadness” to describe how a person experiences a “cycle of hope and despair” because of the uncertainty of knowing what will happen to the accused.¹¹⁷ Boss notes, “[t]he repetitive nature of this cycle is particularly destructive, in part because of its long-term nature.”¹¹⁸

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

[T]he[] pain [of family members of the accused] is not one of immediate loss. Instead, they experience immediate horror and a long, slow loss. Furthermore, they are frequently treated as if they are also guilty. When asked what they would like people to know, they overwhelmingly indicated that they were victims and yet they were treated as if they had committed the crimes themselves.¹¹⁹

One family member, who has a brother with multiple disabilities on death row, described the experience of death row families:

I see families, who, like us, live with not only the sorrow and pain of what their loved one has done, but with an agony and profound sense of dread as we wait our loved one’s executions. We know down to the last detail how they will be killed; we just don’t know the “when.” We know that we are

¹¹² SHARP, *supra* note 93, at 37 (emphasis in original).

¹¹³ *Id.* at 38.

¹¹⁴ KING, CAPITAL CONSEQUENCES, *supra* note 1, at 2–3.

¹¹⁵ *Id.* at 3.

¹¹⁶ SHARP, *supra* note 93, at 51–52, 163.

¹¹⁷ *Id.* at 163.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 164–65.

powerless to stop it, and we wonder if we will have the strength to bear it. I've heard it said that those who are on death row will die a thousand deaths while waiting for their execution. We know that we will also die a thousand deaths before our loved one is executed. We know that the weight of this punishment will be borne by those of us who will go on living . . . those of us who saw their value and knew that they were not just garbage to be thrown out.¹²⁰

The death penalty destroys the families of both the guilty and the innocent. Consider the story of Sandra.¹²¹ Sandra's brother was convicted of murdering his wife and spent eight years in prison before he was exonerated.¹²² Left without parents or family members able to care for them, his children were placed with a foster family.¹²³ Furthermore, Sandra's brother's imprisonment and death sentence embarrassed and shamed the family.¹²⁴ Sharp describes what it was like for the family to watch as their assets shrunk to nothing: "Prior to the charge, her brother owned a home, cars, and a boat, and so was ineligible for a public defender.¹²⁵ He and his parents spent "most of their savings for retirement" hiring attorneys.¹²⁶ Unfortunately, like many families of capital defendants, Sandra's family lacked the resources to hire highly skilled defense lawyers, so they hired attorneys who "did absolutely nothing" for Sandra's brother.¹²⁷ Once the family had exhausted its resources, Sandra's brother qualified for a public defender.¹²⁸ His new lawyer convinced the appellate court to reverse his conviction, on the grounds of ineffective assistance of counsel.¹²⁹ Although Sandra's brother was eventually acquitted,

his and his family's lives were destroyed. His children were now part of another family. His parents had spent most of their savings for retirement on his attorneys. He was also unable to work steadily. The years on death row had taken a toll, leaving him with emotional problems that interfered with his stability. He has received no compensation from the state for the ordeal that he and his family had undergone.¹³⁰

In addition to the financial strain that Sandra's family suffered, family members of death row defendants often experience extreme health problems related to the stress of the case. One death row prisoner's father experienced sky-rocketing blood pressure while his wife gained sixty pounds, became suicidal, and smoked so much

¹²⁰ *Id.* at 169.

¹²¹ *Id.* at 112–15. Sandra's name has been changed to protect her confidentiality.

¹²² *Id.*

¹²³ *Id.* at 113.

¹²⁴ *Id.* at 112–13.

¹²⁵ *Id.* at 114.

¹²⁶ *Id.* at 115.

¹²⁷ *Id.* at 114.

¹²⁸ *Id.*

¹²⁹ *Id.* at 115.

¹³⁰ *Id.*

that she was hospitalized with lung disease.¹³¹ Another mother became so ill she “needed an organ transplant,” which left her wheelchair bound.¹³² A sibling in another case was disabled by severe depression and anxiety.¹³³ One woman whose brother was on death row “developed asthma, migraine headaches, and bulimia. Her mother has panic attacks, diabetes, asthma, lupus, and depression and has threatened to kill herself if her son is executed.”¹³⁴

Eleven of the participants in Professor Beck’s study suffered from serious depression. One participant described sitting in a room in the back of her house crying for hours.¹³⁵ Another said that “there have been no good days”¹³⁶ since her son’s arrest, only bearable days. Another blamed herself for the death sentence because she had not been able to afford to hire him a good lawyer. She described the experience as feeling like she had been “raped,” feeling “dirty,” “stupid,” and “sub-human.”¹³⁷ Others experienced physical illness, which they associated with the stress of the capital trial process, including problems such as “the inability to control diabetes and high blood pressure, worsened emphysema, diverticulitis, massive heart attacks, and a rapidly spreading cancer.”¹³⁸

Some family members turn to alcohol and drugs to numb the pain. Karen’s cousin, Kevin Stanford, was sentenced to death.¹³⁹ The two were very close, having grown up like brother and sister.¹⁴⁰ Both were subjected to sexual and physical abuse as children.¹⁴¹ A caregiver forced the two young cousins to have sexual contact when they were six years old.¹⁴² The jury that sentenced Kevin to death did not hear the full extent of this abuse.¹⁴³ Karen described Kevin’s sentencing:

My whole family watched the news on TV when Kevin was sentenced to death. I just couldn’t believe it. I thought about all the problems he had in his life and all the things that had never been addressed. But that was too much for me, so whenever I thought about it too much I just kept drinking to blot it out.¹⁴⁴

Besides the trauma and chronic grief experienced by death row family members, many also experience tremendous fear.¹⁴⁵ In Professor Elizabeth Beck’s survey of

¹³¹ *Id.* at 32.

¹³² *Id.*

¹³³ *Id.* at 40.

¹³⁴ *Id.* at 120.

¹³⁵ Beck, et al., *supra* note 93, at 407.

¹³⁶ *Id.*

¹³⁷ *Id.* at 403.

¹³⁸ *Id.* at 407.

¹³⁹ KING, CAPITAL CONSEQUENCES, *supra* note 1, at 167.

¹⁴⁰ *Id.* at 154.

¹⁴¹ *Id.* at 155–58.

¹⁴² *Id.* at 155.

¹⁴³ *Id.* at 167.

¹⁴⁴ *Id.*

¹⁴⁵ Beck, et al., *supra* note 93, at 408.

family members of death row defendants she found that many were afraid of various aspects of the process:

[T]hey feared that the trial was stacked against their loved one, and many assumed that racial prejudice or their social and economic status would negatively impact the trial process and outcome. Eleven family members feared defense attorneys or other members of the defense team. Nine participants feared attorney incompetence. Others feared interactions with defense attorneys because they perceived the attorneys as hurtful and abusive.¹⁴⁶

In light of the possibility that a loved one might receive a death sentence if convicted, some families fear even the prospect of going to trial.¹⁴⁷ This fear is exacerbated by the families' distrust that their loved ones would receive a fair hearing in court, or that the media would fairly portray the case.¹⁴⁸

The threat of a death sentence causes many defendants to plead guilty in exchange for a life sentence, rather than risk the outcome of a trial.¹⁴⁹ This left families feeling frustrated that the real truth about what happened was never explained. For example, in a patricide case, one mother wanted the jury to know what the father had put the son through, but the attorneys, fearing a death sentence, urged him to accept a plea agreement to a life sentence. She had hoped that if the facts came out, it might help other families going through similar situations.¹⁵⁰

The high profile nature of death penalty cases often skews media coverage against defendants. Families fear speaking to the media because they feel that their side of the story is not accurately portrayed.¹⁵¹ Some felt that the sensationalist treatment of their cases may have influenced the outcome of the trials.¹⁵² For example, in one case, the press characterized a single shooting at a birthday celebration as "a birthday massacre."¹⁵³ In another, a woman recounted the media showing a picture following the execution of her loved one that depicted the ambulance driver laughing as he transported the body.¹⁵⁴

B. *The Death Penalty Harms Children*

Of the approximately 3,400 people on death row today,¹⁵⁵ and the more than 1,000¹⁵⁶ executed during the modern era, there is no data available regarding how many have, or had, children. Minor children of death row prisoners are particularly

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 408–09.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 409.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 400.

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See* History of the Death Penalty, *supra* note 19.

¹⁵⁶ *Id.*

vulnerable because they are physically and emotionally dependent on their parent.

There is a growing awareness about how violence negatively affects children.¹⁵⁷ Although there are no studies of the effects of executions on children, one can infer that they are likewise harmful. Beck and her colleagues described the types of harm that children of incarcerated parents experienced: “psychological trauma from parent-child separation; . . . difficulty in establishing healthy relationships; . . . truancy, aggression, and withdrawal; and . . . a decline in their social and financial conditions.”¹⁵⁸ Beck speculates that children with parents on death row likely also experience these problems and “that the specter of a death penalty imposes additional risks for these children.”¹⁵⁹

One particularly poignant case illustrating the effect of the death penalty on a capital defendant’s child is that of Little Hameen, mentioned in the introduction.¹⁶⁰ Little Hameen’s father, Abdullah Hameen (“Hameen”), was executed in Delaware after spending ten years in prison.¹⁶¹ Hameen admitted his role in the crime—a shooting in the course of a drug deal.¹⁶² During his incarceration, however, he behaved as a model prisoner and took advantage of every opportunity to educate and improve himself.¹⁶³ For example, Hameen was an active member of Respect for Life, a peace group that brought together citizens from the community and prisoners to discuss important social issues.¹⁶⁴ He worked with young inmates counseling them to change their lives.¹⁶⁵ Most importantly, Hameen remained an important part of his family offering strength, support and love during their visits and through phone calls and letters.¹⁶⁶

As Hameen’s execution date approached, many, including an employee of the

¹⁵⁷ Over the past decade, the effects of domestic violence on children have been well documented. These effects include posttraumatic stress disorder, increased risk of depression and anxiety, aggressive behavior, and difficulty complying with authority. Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 561–62 (Feb. 2006). Cities and states throughout the country recognized the substantial effects of violence on children and have taken measures to protect children. *Id.* at 557. The City of New York attempted to institute a policy within the Administration for Children’s Services, the city’s child welfare agency, whereby the city would remove to foster care any child residing in a home where domestic violence occurred regardless of whether the children themselves were the subjects of the abuse. *Id.* at 559–61. In further recognition of violence’s significant negative effects on children, only Connecticut, the District of Columbia, and four United States territories do not consider the presence of violence in the home when making child custody decisions. Annette M. Gonzalez & Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L.Q. 197, 198 (Spring 2005).

¹⁵⁸ Beck, et al., *supra* note 93, at 394–95.

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* Part 1; KING, CAPITAL CONSEQUENCES, *supra* note 1, at 95.

¹⁶¹ KING, CAPITAL CONSEQUENCES, *supra* note 1, at 87, 114.

¹⁶² *Id.* at 87, 107.

¹⁶³ *Id.* at 109.

¹⁶⁴ *Id.* at 99.

¹⁶⁵ *Id.* at 109.

¹⁶⁶ *Id.* at 95, 107–08.

parole board, believed that the Governor would commute Hameen's sentence to life in prison because of his extraordinary efforts at rehabilitation.¹⁶⁷ Little Hameen testified at his father's parole hearing, sobbing and begging the board to spare his life.¹⁶⁸ He told the board members how much he relied on his father for advice and support and said that he couldn't live without him.¹⁶⁹ The Board of Pardons rejected Hameen's request for clemency, however, and he was executed in May of 2001.¹⁷⁰

Angry, confused and deeply saddened, Little Hameen's life started unraveling.¹⁷¹ The first year after Hameen's execution, his son stopped working and attempted suicide, again.¹⁷² Within two years of the execution, he was in prison on capital charges.¹⁷³

Under Delaware law, a person who is a victim of a crime, including the survivor of a homicide, is entitled to certain rights and services including victim's advocacy, crisis intervention, and in some cases, compensation.¹⁷⁴ No compensation funds exist for families of the offenders.¹⁷⁵ Children of executed prisoners are not entitled to receive social security as are other children who have lost parents.¹⁷⁶ Likewise, I am unaware of any state that offers services to children of people who have been executed. In the case of Hameen, I often wonder what could have, or should have, been done to help Hameen cope in the aftermath of his father's execution, which might have led him down a different path. It seems to me that society failed him in some way.

A child's emotional trauma does not begin only upon the execution of his or her parent. Most death penalty states "do not allow contact visits" between family members and death row prisoners although they do allow contact visits with prisoners not on death row.¹⁷⁷ One mother described how painful it was to hear her daughter ask to sit on her father's lap, when the family is separated by glass and bars.¹⁷⁸ The mother told Sharp:

Seeing the fear in [the child's] face and knowing that much of the anger she has inside is a result of her shame at having a dad that society finds worthless enough to want to eliminate, despite her love for him. The death penalty is so

¹⁶⁷ *Id.* at 111.

¹⁶⁸ *Id.* at 108.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 114.

¹⁷¹ *Id.* at 117.

¹⁷² *Id.*

¹⁷³ Telephone Interviews with Shakeerah Hameen (May 2003).

¹⁷⁴ About.Crime: Crime/Punishment, Delaware – Crime Victims Rights, http://crime.about.com/od/victims/qt/victims_de.htm (last visited Apr. 30, 2007).

¹⁷⁵ SHARP, *supra* note 93, at 171.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 173.

¹⁷⁸ *Id.* at 152.

cruel and confusing to these children who have parents on the row.¹⁷⁹

Besides the difficulty of maintaining a relationship with a parent on death row, children also experience harassment and threats at school. In one particularly dramatic case, a capital defendant's brother and sister had to quit high school because the principal feared for their lives.¹⁸⁰ Other parents withdrew their children from school because of ongoing painful ridicule.¹⁸¹

In conclusion, because of their dependency on their parents, children of death row prisoners are particularly vulnerable to harm. Like Little Hameen, they may express their rage and frustration in ways that harm both themselves and their community.

C. *The Execution Creates Additional Harm to the Families*

The aftermath of executions often seriously compromises the stability of the entire family. In one family, the mother of the executed man died of heart failure within a year of his execution.¹⁸² The sister developed high blood pressure, migraine headaches and depression.¹⁸³ Another sibling drank alcohol all day long.¹⁸⁴ A niece is unemployed because “[a]ll she wants to do is sleep.”¹⁸⁵

Other family members experienced “suicidal thoughts, functional impairment, chronic sadness, inability to feel pleasure, irritability, and physical symptoms.”¹⁸⁶ For some, the functional disability was complete. One mother “did not open her mail or pay a bill for years. She stated, ‘I lost everything I became a burden on my family.’”¹⁸⁷

Family members also experienced physical symptoms such as, “the inability to control diabetes and high blood pressure, worsened emphysema, diverticulitis, massive heart attacks, and a rapidly spreading cancer.”¹⁸⁸ Darlene Chambers, who witnessed her husband's execution, “beat the glass and screamed in pain,” then collapsed and required hospitalization for shock and exhaustion.¹⁸⁹

While a capital trial process and execution are destructive to entire families, they are especially harmful to mothers of death row defendants. A sister whose brother was executed reported what her mother has suffered since the execution, “She goes to the cemetery . . . for hours. . . . [S]he won't take off her pajamas nor answer her phone. . . . She lives in guilt every day and is beating herself up for it. . . . Her

¹⁷⁹ *Id.*

¹⁸⁰ Beck, et al., *supra* note 93, at 399.

¹⁸¹ SHARP, *supra* note 93, at 123.

¹⁸² *Id.* at 103.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Beck, et al., *supra* note 93, at 406.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 407.

¹⁸⁹ SHARP, *supra* note 93, at 87.

health is failing fast”¹⁹⁰ Another mother suffers from “panic attacks, diabetes, asthma, lupus, and depression . . . [and] has threatened to kill herself if [her son] is executed.”¹⁹¹ Another collapsed after her son’s execution and died of heart failure approximately one year later.¹⁹² One mother was in intensive care when her son was executed because, after her final visit with him, she attempted suicide.¹⁹³ A mother, who had already lost one child, described the depression she felt after her son’s execution as so intense that she couldn’t get out of it.¹⁹⁴ Another mother said, “I am very mad now, I have a short fuse, [my personality] has totally altered.”¹⁹⁵ One daughter said that “the day her brother was executed, she lost both her brother and her mother; her mother was never the same.”¹⁹⁶ One woman died of a heart attack before her son’s execution. Her daughter believed she could not cope with the impending execution.¹⁹⁷ Notably, three participants in Sharp’s survey who had already suffered the death of children from other causes said that their experiences with their convicted sons on death row were the most painful of their losses.¹⁹⁸

In conclusion, family members experience physical and emotional trauma from the execution. The act of a state-sponsored killing is not like a normal death. Families feel particularly isolated and often do not receive support from community institutions, friends and associates that people experience after a loved one has died. As will be discussed below, this extreme state intrusion into family life cannot be justified under our constitution.

IV. THE DEATH PENALTY CANNOT SURVIVE A SUBSTANTIVE DUE PROCESS CHALLENGE BECAUSE IT FAILS TO ACHIEVE ITS STATED PENOLOGICAL OR PHILOSOPHICAL GOALS

A death penalty challenge on substantive due process grounds is not a novel concept. A number of scholars have suggested this approach,¹⁹⁹ and two courts have used it as a basis for declaring the death penalty unconstitutional.²⁰⁰ These

¹⁹⁰ *Id.* at 103.

¹⁹¹ *Id.* at 120.

¹⁹² *Id.* at 36.

¹⁹³ *Id.* at 18.

¹⁹⁴ Beck, et al., *supra* note 93, at 406.

¹⁹⁵ *Id.* at 407.

¹⁹⁶ *Id.* at 405.

¹⁹⁷ *Id.*

¹⁹⁸ Beck, *supra* note 93, at 407.

¹⁹⁹ Bedau, *supra* note 25, at 812; Bentele, *supra* note 25; Bird, *supra* note 25. These scholars use the right to life as the basis of the challenge, as opposed to the right to liberty that this article suggests.

²⁰⁰ *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002), *rev’d*, 313 F.3d 49 (2d Cir. 2002) (“[E]xecution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings.”); *Commonwealth v. O’Neal*, 339 N.E.2d 676 (Mass. 1975) (pre-*Gregg* opinion striking down the Massachusetts death penalty on substantive due process grounds).

commentators and courts have all made the case that the death penalty violates the substantive due process rights of the defendant.²⁰¹ Challenging the death penalty from the perspective of the family members, however, is a novel idea.

Not only is the idea novel, but it also has a strong legal basis. “The ‘touchstone’ of substantive due process analysis is the ‘protection . . . against arbitrary action of government.’”²⁰² Professor Bentele wrote, “[S]ubstantive due process analysis dictates an examination of the government’s objectives in engaging in activities that threaten the life and liberty of its citizens. Only when the government can justify encroachment on individual life and liberty by reference to compelling societal goals does it satisfy due process standards.”²⁰³ A rigorous examination of the modern death penalty shows that the government cannot justify encroachment on the liberty of defendants’ family members.

In analyzing a death penalty claim, one must first take into account that the Supreme Court has repeatedly held that “death is different”²⁰⁴ than other forms of punishment and is therefore held to a higher level of scrutiny than other forms of punishment. After a four-year hiatus on executions following the Supreme Court’s decision in *Furman v. Georgia*,²⁰⁵ the Court held in *Gregg v. Georgia* that death penalty statutes must be narrowly drawn so that the death penalty is not imposed in an arbitrary and capricious manner as it had been in the pre-*Furman* days.²⁰⁶

In its post-*Furman* jurisprudence, the Supreme Court has acknowledged several state interests that may support capital punishment. These interests include deterrence, retribution,²⁰⁷ incapacitation, and denunciation and vindication of legal and moral order.²⁰⁸ Deterrence and retribution are the two most commonly cited

²⁰¹ In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that if a claim is governed by a specific provision of the Constitution, no substantive due process analysis should be undertaken. Because many death penalty claims are grounded in the Eighth Amendment, claimants do not raise substantive due process claims. In this situation, the family members do not have any Eighth Amendment rights since they are not being subjected to punishment themselves. Therefore, an Eighth Amendment challenge would not bar their use of a substantive due process claim.

²⁰² Bentele, *supra* note 25, at 1367–68 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

²⁰³ *Id.* at 1368.

²⁰⁴ *Smith v. Murray*, 477 U.S. 527, 545 n.11 (1986).

²⁰⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁰⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁰⁷ Bird, *supra* note 25, at 1367. *But see* Donald L. Beschle, *What’s Guilt (or Deterrence) Got to Do With it?: The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487 (1997) (discussing how the real function of the death penalty is not to deter crime or to seek retribution, but rather to provide society with a ritualized killing, whose function is to reaffirm social norms).

²⁰⁸ Bedau, *supra* note 25, at 812 (citing *Furman*, 408 U.S. at 331 (Brennan, J., concurring)). At least one commentator has suggested that Justice Scalia accepts vengeance as a rationale for the death penalty. *See* Steven G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 68 (1992). Although the difference between retribution and vengeance may seem to be a difference without a distinction, retribution is understood as

reasons for maintaining the death penalty.²⁰⁹ Even where state statutes or constitutions suggest that retribution is not a valid penological objective, the courts or legislatures of those states consistently read retributive interests into the law.²¹⁰

This section will examine each of the stated purposes of the death penalty—retribution, deterrence, incapacitation, and denunciation and vindication of legal and moral order; this last purpose I categorize as “restoration of societal norms.” Most of the discussion in this section focuses on retributive justice because it is the theory of punishment most central to death penalty discussions.²¹¹ Further, an abundance of legal and philosophical literature discusses retribution theory in the context of the death penalty. For each purpose enumerated above, this article demonstrates that no state interest can justify the encroachment on the liberty of defendants’ family members.

“vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights.” Martha Minnow, *BETWEEN VENGEANCE AND FORGIVENESS*, at 12 (1998). Relying on society, rather than an individual, to mete out retribution is usually a more just process “of denouncing previous wrongs and giving persons their deserts,” but there have been instances of public prosecutions that have abused their authority. *Id.* Even if Justice Scalia’s rationale is true, however, most experts and scholars do not accept vengeance as an appropriate rationale; therefore, I will not discuss it here. See Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 *AM. CRIM. L. REV.* 1151, 1180–82 (2003) (asserting that some justices have incorrectly confused vengeance and retribution in their writings about the death penalty, resulting in a discrediting of the retribution theory as a valid rationale for the death penalty).

²⁰⁹

Deterrence recognizes the state’s “interest in preventing capital crimes by prospective offenders.” Deterrence is utilitarian in its purpose, seeking “social benefits through the use of punishment as a means.” The theory is that “the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.” Repeatedly the Court has recognized deterrence as a valid interest and there is no sign of any abatement of that position.

Retribution recognizes the state’s “interest in seeing that the offender gets his ‘just deserts.’” Retribution is not a utilitarian interest; rather it “is directed at imposing merited harm upon the criminal for his wrong” Retribution is distinct, however, from retaliation and vengeance. “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”

Bird, *supra* note 25, at 1367–68 (footnotes omitted) (alteration in original).

²¹⁰ *Id.*

²¹¹ B. Douglas Robbins, *Resurrection From a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 *U. PA. L. REV.* 1115, 1130 (2001).

A. *The Death Penalty Does Not Accord with the Principles of Retributive Justice*

Many justices, criminologists, philosophers, and lay people believe that retribution is a legitimate rationale for capital punishment. The central notion of retributivism is that criminals deserve punishment, which therefore justifies its infliction.²¹² Immanuel Kant believed that punishment must never be used to “promote some other good for the criminal himself or civil society, but . . . must in all cases be imposed on him *only* on the ground that he has committed a crime.”²¹³ Professor Dan Markel has defined retributive justice as follows: “Retributive justice is . . . to communicate certain ideals to an offender convincingly determined to have breached a legitimate legal norm. The social project of retributive justice possesses a good that has its own internal intelligibility and attractiveness, independent of what consequences follow.”²¹⁴

Punishing offenders may have other benefits, such as deterring others, but this is not a basis for punishment under retributivist theory.²¹⁵ Retributive justice, which had fallen out of favor as a valid penological goal by the mid-1970s, enjoyed a resurgence at the end of the 20th century.²¹⁶ Justice Scalia, joined by Justice Thomas and former Chief Justice Rehnquist, relied on retributivist theory in their dissent in *Morgan v. Illinois*.²¹⁷ Scalia quoted Immanuel Kant, the intellectual father of modern retributivists:²¹⁸

Whoever has committed Murder, must *die* Even if a Civil Society resolved to dissolve itself with the consent of all its members[,] . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds²¹⁹

Even more moderate Justices, like Justice Stewart, believed that, if properly applied, the death penalty served the social purpose of retribution.²²⁰ Markel challenges this notion suggesting that “moral accountability,” “equal liberty,” and

²¹² David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627 (1992).

²¹³ *Id.* (alteration in original).

²¹⁴ Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 411 (2005).

²¹⁵ Robbins, *supra* note 211, at 1116.

²¹⁶ *Id.* at 1117 n.9.

²¹⁷ *Morgan v. Illinois*, 504 U.S. 719, 752 n.6 (1992) (Scalia, J., dissenting).

²¹⁸ Hegel built upon Kant’s philosophy and is also considered one of the “fathers” of retribution theory. “Hegel argues . . . that ‘since life is the full compass of a man’s existence, the punishment [for murder] . . . can consist only in taking away a second life.’” R. George Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533, 561 n.119 (2000) (quoting G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 247 (T.M. Knox trans., 1967)).

²¹⁹ *Morgan*, 504 U.S. at 752 n.6 (quoting IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., 1887) (1796)).

²²⁰ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

“democratic self-defense” are more effective than focusing on “just deserts.”²²¹ Another scholar, Thom Bassett, suggests that the problem of racial bias in the application of the death penalty in light of the *McCleskey v. Kemp* decision “threatens to sever the connection between capital jurisprudence and moral theory.”²²² In *McCleskey*, the Court ruled that statistical evidence of racial discrimination in Georgia was insufficient to raise an equal protection challenge to the death penalty’s administration.²²³ Instead, a defendant must establish intentional discrimination in his or her particular case, a nearly impossible burden to meet.²²⁴ *McCleskey* effectively made it impossible for defendants to raise issues of institutional racial discrimination in death penalty sentencing.²²⁵ According to Bassett, this has resulted in a miscarriage of retributive justice:

The law is a moral enterprise in that it inevitably entails thinking in terms of a discipline that philosophers call ‘moral philosophy,’ ‘moral reasoning,’ or ‘ethics.’ The criminal law in particular is a moral enterprise concerned with the bare minimum standards of socially acceptable behavior.

. . . As such, . . . the death penalty *requires* moral justification. . . . [O]peration of the death penalty as sanctioned in *McCleskey* cannot be morally justified within a retributivist framework.²²⁶

Bassett argues that retributive justice requires three basic tenets: the punishment must be commensurate with what the offender deserves (“commensurate [or just] deserts”), the punishment must be proportionate (ordinal proportionality), and the punishment must accord with the “dignity of man”²²⁷ (cardinal proportionality).²²⁸

The “commensurate deserts” theory treats offenders as “moral actors” who deserve punishment because they deliberately choose their actions.²²⁹ Determining “seriousness” of the crime requires evaluating the harm done by the act and the degree of the actor’s culpability.²³⁰ Another consideration is that, by the time the

²²¹ Markel, *supra* note 214, at 426–27. Markel notes:

On [these three principles], punishment is attractive because it effectuates certain ideals that are widely understood and embraced by citizens of complex liberal democracies such as ours. Conversely, when a liberal democracy fails to create credible institutions of criminal justice, it undermines our commitment to these principles, though not under all circumstances.

Id. at 427.

²²² Thom Bassett, *Risking Cruelty: McCleskey v. Kemp, Retributivism, and Ungrounded Moral Judgment*, 52 SYRACUSE L. REV. 1, 6 (2002).

²²³ *McCleskey v. Kemp*, 481 U.S. 279, 308–09 (1987); Bassett, *supra* note 222, at 16.

²²⁴ Bassett, *supra* note 222, at 7 (citing *McCleskey*, 481 U.S. at 298).

²²⁵ *See id.* at 5.

²²⁶ *Id.* at 6 (quoting David McCord & Sandra K. Lyons, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 AM. CRIM. L. REV. 97, 98–99 (1992)).

²²⁷ *See infra* notes 237–38 and accompanying text.

²²⁸ Bassett, *supra* note 222, at 22.

²²⁹ *Id.* at 18–19.

²³⁰ *Id.* at 21.

state implements the punishment of execution, the person being put to death may be fundamentally different from the person he was when he committed the crime. Some believe that death-row inmates who go through a genuine experience of repentance and remorse may no longer deserve execution.²³¹

Bassett references several philosophers, but primarily refers to Andrew von Hirsch.²³² According to von Hirsch, “punishment is justified if it manifests respect for a person, by expressing social condemnation of his freely chosen but wrongful conduct, and if it satisfied the requirements of cardinal and ordinal proportionality.”²³³ “[C]ardinal proportionality establishes the upper and lower limits of permissible punishment [and] . . . mandate[s] different punishments for different crimes in light of the seriousness of the respective offenses.”²³⁴ Ordinal proportionality requires that “‘persons convicted of crimes of comparable severity should receive punishments of comparable severity’ [I]t follows that punishing one crime more severely than another expresses greater social disapproval of the first crime and is warranted only to the extent that it is more serious.”²³⁵ Therefore, the moral justification of the punishment depends on proportionality between the seriousness of the offense and the seriousness of the punishment.

Scholar Seung Oh Kang has written about the “dignity of man” principle underlying some of the Supreme Court’s Eighth Amendment jurisprudence.²³⁶ He wrote, “A challenged punishment offends the dignity of man principle if it is excessive . . . [and] make[s] no ‘measurable contribution to acceptable goals of punishment,’ or exceed[s] the proportionality of the crime, thereby offering nothing more than unnecessary and wanton infliction of pain and suffering.”²³⁷

Combining these three tenets of deserts, proportionality, and dignity of man, Bassett concludes that “[a] contemplated death sentence is morally impermissible unless and until it is reliably demonstrated . . . that the offender deserves the death sentence.”²³⁸ He calls his proposition “The Condition of Reliable Demonstration of Desert,” which sets forth two principles necessary for imposition of the death penalty: “(1) A contemplated punishment may be inflicted only after its appropriateness is reliably demonstrated; and (2) The more severe a contemplated punishment, the higher the degree of certainty of its appropriateness is required

²³¹ Robbins, *supra* note 211, at 1164.

²³² Bassett, *supra* note 222, at 17–18.

²³³ *Id.* at 18.

²³⁴ *Id.* at 20.

²³⁵ *Id.* at 21–22 (quoting Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”*, 1 CRIM. L.F. 259, 282 (1990)).

²³⁶ Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant’s Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence*, 28 SUFFOLK U. L. REV. 747, 752–53 (1994) (citing *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²³⁷ *Id.*

²³⁸ Bassett, *supra* note 222, at 33.

before it may be imposed.”²³⁹

Not all retributivists support such an egalitarian notion of retribution. For example, Professor Ernest van den Haag²⁴⁰ believes that, if a person deserves the death penalty, then the fact that the punishment is not given to another person does not make it any less deserving of the person who received it:

To put the issue starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others.²⁴¹

Similar to van den Haag, scholar Christopher Meyers argues that a person selected to receive the death penalty on the basis of racial prejudice suffers no moral wrong because he already deserved a death sentence by virtue of his actions.²⁴² Bassett points out, however, that Meyers fails to consider the fact that race distorts the sentencing process so that people who do not deserve the death penalty are sentenced to death.²⁴³

The Court, at least rhetorically, has adopted the Bassett approach of retribution instead of the van den Haag/Meyer view. The *Gregg* Court said, “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”²⁴⁴

A basic concept of criminal responsibility is that as punishment increases in severity, the state must more rigorously demonstrate its justification for the punishment.²⁴⁵ The death penalty is held to a higher standard of scrutiny than other forms of punishment because of its finality.²⁴⁶ As Justice Stewart wrote, “The

²³⁹ *Id.* at 33–34.

²⁴⁰ According to Professor R. George Wright, Ernest van den Haag is the “leading contemporary American advocate of the death penalty who was strongly influenced by the Kantian-Hegelian approach.” Wright, *supra* note 218, at 566. However, according to Laufer and Hsieh, despite his Kantian-style rhetoric, “van den Haag did not fashion himself as a retributivist,” but “found comfort in deterrence theory.” William S. Laufer & Nien-he Hsieh, *Choosing Equal Injustice*, 30 AM. J. CRIM. L. 343, 345 n.15 (2002).

²⁴¹ Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986).

²⁴² Bassett, *supra* note 222, at 13.

²⁴³ *Id.*

²⁴⁴ *Id.* at 12 (citing *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976) (stating that death sentences imposed under sentencing procedures that carried a “substantial risk” of arbitrary or capricious administration of capital punishment are invalid under *Furman*)).

²⁴⁵ Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices’ Positions*, 24 ST. MARY’S L.J. 1, 10 (1992).

²⁴⁶ Likewise, because of the seriousness of killing another person, some believe that death is the only appropriate punishment to murder and that any length of imprisonment, no matter how long, is an inadequate response. See Wright, *supra* note 218, at 561.

penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100-year prison sentence differs from one of only a year or two.”²⁴⁷ As the following argument demonstrates, the current manner in which the death penalty is administered fails to meet the requirements of *Gregg* and fails to meet the requirements necessary for true retributive justice.²⁴⁸

1. Wrongful Convictions of Innocent People Are Too Frequent.

Since *Gregg*, there have been more than 120 innocent people released from death rows.²⁴⁹ Statistics on exonerations indicate that there may be as many as one exoneration for every five to seven executions.²⁵⁰ These high numbers suggest that innocent people have been executed. Indeed, according to one study, over seventy percent of the public believes that innocent people have already been executed—most of whom believe such executions have occurred in Texas.²⁵¹ Frank Zimring, using an actuarial model examining the recent history of exonerations, concluded that the execution of the innocent is “all but inevitable.”²⁵² Studies of executions in the pre-modern era documented twenty-three individuals executed in the past century who may have been innocent.²⁵³ The same researchers argue that the number of wrongful convictions and executions has been underreported.²⁵⁴ Historically, the problem of innocent people being executed has served as a strong motivator for jurisdictions to abandon the death penalty. In 1847, Michigan became the first English-speaking jurisdiction to abolish the death penalty after it

²⁴⁷ *Gregg*, 428 U.S. at 305.

²⁴⁸ J. Michael Echevarría, *Reflections on O.J. and the Gas Chamber*, 32 SAN DIEGO L. REV. 491, 496 (1995) (noting that the likely reason why the prosecution did not seek the death penalty against O.J. Simpson was because he was a popular football hero and the prosecutors feared no jury would impose a death sentence and arguing that this demonstrates the “arbitrary nature of the death penalty when it is sought on retributive grounds”).

²⁴⁹ NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, INNOCENT AND EXECUTED: FOUR CHAPTERS IN THE LIFE OF AMERICA’S DEATH PENALTY, 1 (2006), available at <https://secure.democracyinaction.org/dia/organizationsORG/ncadp/images/InnocentAndExecuted.pdf>.

²⁵⁰ Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1186 (2003).

²⁵¹ Richard C. Dieter, *Innocence and the Crisis in the American Death Penalty*, Death Penalty Information Center (2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149>.

²⁵² Bentele, *supra* note 25, at 1365.

²⁵³ Charles Lanier & James Acker, *Capital Punishment, The Moratorium Movement, and Empirical Questions*, 10 PSYCHOL. PUB. POL’Y & L. 577, 593 (2004) (citing Hugo Adam Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987)).

²⁵⁴ *Id.* (citing Michael Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 6 LAW & CONTEMP. PROBS. 105 (1998)).

was established that an innocent person was hanged.²⁵⁵ It was more than a century later before Canada abolished their death penalties in 1976 under strong suspicion that innocent individuals had been executed.²⁵⁶ The territory of Alaska did away with the death penalty at its statehood convention in 1956.²⁵⁷

No one has yet established conclusively that an innocent person has been executed during the modern era.²⁵⁸ However, at least one innocent man has died in prison before being exonerated. Frank Lee Smith was sentenced to death in Florida for a rape and murder. Although he maintained his innocence, the state of Florida repeatedly denied his requests for DNA testing. Smith ultimately succumbed to cancer while still in prison. Posthumous DNA testing established his innocence, but this did little to help Smith who spent the last years of his life condemned for a crime he had not committed.²⁵⁹

Other sources strongly indicate that innocent people have actually been executed. Sister Helen Prejean, a nun who regularly serves as a spiritual advisor to death row prisoners, authored a compelling book describing her experiences with Dobie Gillis Williams and Joseph O'Dell, two defendants whom she believed to be innocent.²⁶⁰ A June 2006 exposé in the Chicago Tribune suggests that Carlos DeLuna, executed in Texas in 1989, was also probably innocent.²⁶¹ A 2006 report by the National Coalition to Abolish the Death Penalty documents four cases where innocent people were likely executed.²⁶²

Justice Sandra Day O'Connor has suggested that states may be executing innocent people, and Justice Ruth Bader Ginsburg has pointed to inadequate representation as part of the problem: "People who get well represented at trial do not get the death penalty. I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."²⁶³ At a meeting of the Minnesota Women Lawyers, Justice O'Connor also stated, "Perhaps it's time to look at minimum standards for

²⁵⁵ Beschle, *supra* note 207, at 530.

²⁵⁶ Canadian Human Rights Commission, Human Rights in Canada: A Historical Prospective, The Wilbert Coffin Case, *available at* www.chrc-ccdpc.ca/en/timePortals/milestones/70mile.asp (last visited Apr. 30, 2007).

²⁵⁷ Averil Lerman, *The Trial and Hanging of Nelson Charles*, ALASKA JUST. F., Spring 1996, at 1, *available at* http://justice.uaa.alaska.edu/forum/f131sp96/a_nelson.html.

²⁵⁸ See EQUAL JUSTICE USA, REASONABLE DOUBTS: IS THE US EXECUTING INNOCENT PEOPLE?, <http://www.ejusa.org/grip/reasonabledoubt/report.html> (detailing fifteen cases of executed people with strong claims of innocence) (last visited May 30, 2007).

²⁵⁹ Dieter, *supra* note 251.

²⁶⁰ HELEN PREJEAN, THE DEATH OF INNOCENTS 3–144 (Jason Epstein ed., Random House 2004).

²⁶¹ Maurice Possley & Steve Mills, *Did This Man Die... for This Man's Crime?*, CHI. TRIBUNE, June 24, 26–27, 2006 (Investigation Series), *available at* <http://www.chicagotribune.com/news/specials/broadband/chi-tx-htmlstory,0,7935000.htmlstory>.

²⁶² See NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, *supra* note 249.

²⁶³ Dieter, *supra* note 251.

appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”²⁶⁴

The problem of executing innocent people has become so acute that two federal judges have voiced their concerns in written opinions. In striking down the federal death penalty as unconstitutional, U.S. District Court Judge Jed Rakoff wrote in a 2002 opinion:

[T]he Court found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty, a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence.²⁶⁵

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

The experience [of sitting on a capital case] left me with one unavoidable conclusion: that a legal regime relying on the death penalty will inevitably execute innocent people—not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact.²⁶⁶

Convicting and executing the wrong person is not consistent with retributive justice.²⁶⁷ There is no rationale for killing a person who has not committed a crime. It is not just. It is not necessary for incapacitation, and it is not a deterrent.

Besides the cost of executing innocent people, there are other costs at stake in accepting a system that permits execution of the innocent. Patent injustice weakens people’s faith in the criminal justice system and breaks down the fabric of social order.

Nonetheless, any system of criminal justice will inevitably punish the innocent and exceedingly punish the guilty.²⁶⁸ The question is: what degree of error is constitutionally acceptable? The current level of error should not survive a substantive due process challenge because the compelling governmental interests in the death penalty do not outweigh the significant invasion of the fundamental right to family relations it causes.²⁶⁹

²⁶⁴ *O’Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9.

²⁶⁵ *United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002), *rev’d* 313 F.3d 49 (2d Cir. 2002).

²⁶⁶ Dieter, *supra* note 251.

²⁶⁷ “[T]he concern for accuracy in distribution of punishment is fundamentally a retributivist concern that renders the death penalty deeply problematic as an institutional practice[.]” Markel, *supra* note 214, at 463.

²⁶⁸ Laufer & Hsieh, *supra* note 240, at 355.

²⁶⁹ Bentele, *supra* note 25, at 1378 (“When a capital punishment system results, despite full deliberation, in erroneous decisions depriving a person of life, substantive due process

2. The Death Penalty is Not Applied Equitably

Under Supreme Court jurisprudence, the death penalty is to be reserved for the worst of the worst offenders; the reality is that the death penalty is reserved for those who have the worst lawyer and who are least able to defend themselves.²⁷⁰ The common saying, “capital punishment means them [sic] without the capital get the punishment,” is unfortunately true.

The death penalty has, in some sense, become a symbolic punishment. Less than 1% of murders result in a death sentence, but there is no indication that the minority who are actually sentenced to death are the most serious offenders. Professor David McCord examined all death penalty cases in 2004, examining facts about each death-eligible case.²⁷¹ He identified a total of 469 defendants who met the “worst-of-the-worst” standard.²⁷² He found that, of those 469, only thirty percent had been sentenced to death, meaning that the vast majority received a sentence other than death.²⁷³ Moreover, many of the 341 murderers who were spared the death penalty had more serious cases than those who received it.²⁷⁴ In the two most aggravated cases that year—Oklahoma City bomber Terry Nichols and serial killer Charles Cullen—neither man received the death penalty.²⁷⁵ Of the eleven serial killers in the group, only five were sentenced to death.²⁷⁶

Furthermore, the system fails to capture and prosecute all offenders. Many homicides go unprosecuted. The more the system fails to prosecute, the more the burden of the death penalty falls on a select group of people.²⁷⁷

While poor people do not always necessarily receive incompetent counsel, they

demands a showing of compelling countervailing government interests if the system is to be maintained.”).

²⁷⁰ Stephen B. Bright, *Counsel for the Poor: The Death Penalty Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1883 (1994) [hereinafter Bright, *Counsel for the Poor*].

²⁷¹ David McCord, *If Capital Punishment were Subject to Consumer Protection Laws*, 89 JUDICATURE 304, 305 (2006) [hereinafter McCord]. Professor McCord turned this piece into a full-length law review article published as *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797 (2006).

²⁷² McCord, *supra* note 271, at 304 (defining “worst-of-the-worst” as aggravated murders).

²⁷³ *Id.*

²⁷⁴ *Id.* at 305.

²⁷⁵ *Id.*

²⁷⁶ *Id.* Professor David Baldus hypothesizes that the failure of federal and state courts to conduct meaningful proportionality review has resulted in haphazard imposition of the death penalty for mid-range cases. He suggests that in the most aggravated cases, the death penalty is imposed regardless of the race of the victim, but in the mid-range cases, it is imposed more haphazardly and less frequently. Donnelly, *supra* note 245, at 82–83 (citing DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* (1990)).

²⁷⁷ Marvin E. Wolfgang, *We Do Not Deserve to Kill*, 13 T.M. COOLEY L. REV. 977, 986–87 (1996).

often do. Death rows are filled with mentally ill,²⁷⁸ mentally retarded,²⁷⁹ and poor²⁸⁰ inmates. A truly retributive justice philosophy requires just deserts for those who are most blameworthy, not those who are most vulnerable.

The Court in *Gregg* required that death penalty sentencing schemes afford discretion to the sentencing authority. In any discretionary system, there are bound to be unequal results. The standard is that the “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”²⁸¹ The problem is that thirty years after *Gregg*, we have failed to develop a system where discretion does not produce “wholly arbitrary and capricious action.”²⁸² According to some experts, the “death-eligible class today is about as large as it was before *Furman*,” and capital sentencing schemes are as inconsistent as they were pre-*Furman*.²⁸³

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

Retributive justice requires an examination of the system that actually administers the penalty. When that system produces “substantial numbers of cases in which defendants are erroneously convicted . . . or erroneously sentenced to death, the social goal of expressing community condemnation of ‘the worst of the worst’ is no longer served.”²⁸⁴

²⁷⁸ Dan Malone, *Cruel and Inhumane: Executing the Mentally Ill*, AMNESTY INT’L MAG., Fall 2005, available at http://www.amnestyusa.org/magazine/cruel_and_inhumane_executing_the_mentally_ill.html (documenting the prevalence of mentally ill and mentally retarded people on death row); American Civil Liberties Union, *Mental Illness and the Death Penalty in the United States*, Jan. 31, 2005, <http://www.aclu.org/capital/mentalillness/10617pub20050131.html> (estimating that 5–10% of inmates on death row are mentally ill) (last visited May 30, 2007).

²⁷⁹ Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 86 (2003); Elaine Cassel, *Executing the Mentally Ill and the Mentally Retarded: Three Key Recent Cases from Texas and Virginia Show How States Can Evade the Supreme Court’s Death Penalty Rulings*, FINDLAW, January 22, 2006, <http://writ.news.findlaw.com/cassel/20060622.html>.

²⁸⁰ Colleen Bowers, *The Death Penalty Doesn’t Deliver*, JACKSON FREE PRESS, July 12, 2006, (discussing generally discrimination against poor people in the implementation of the death penalty); Lanier & Acker, *supra* note 253, at 581 (discussing documented socio-economic bias in the manner in which the death penalty is implemented in Nebraska). See generally Bright, *Counsel for the Poor*, *supra* note 270.

²⁸¹ *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

²⁸² *Id.*

²⁸³ Stephen P. Garvey, “*As the Gentle Rain From Heaven*”: *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1008 n.68 (1996).

²⁸⁴ Bentele, *supra* note 25, at 1385.

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

The Supreme Court struck down the death penalty in 1972 on the grounds that its administration violated the Eighth Amendment.²⁸⁵ One of the Court's concerns was the role that race played in death sentencing.²⁸⁶ Four years later, the Court upheld newly revised statutes that were supposed to ensure fairness.²⁸⁷ Nonetheless, many believe that the past thirty years have not evidenced greater fairness in administering the death penalty. Racial discrimination persists in all aspects of death penalty prosecution, from the charging decisions made by prosecutors²⁸⁸ to jury selection,²⁸⁹ jury deliberations, and sentencing.²⁹⁰ In many jurisdictions, African-Americans are tried in courtrooms where the judge, prosecutor, defense attorneys, bailiffs, police and jury are all white.²⁹¹ One study revealed that only 1.2% of the district attorneys in death penalty states are black and only 1.2% are Hispanic. The remaining 97.5% are white.²⁹²

Noted death penalty attorney Professor Steven Bright argues that the manner in which the death penalty is practiced in the United States is a direct result of our country's history of slavery, lynching and racial violence.²⁹³ Lynchings were common in the South until 1920, when Congress threatened to pass an anti-lynching law.²⁹⁴ Although trials replaced lynchings, they were often little more than hasty, perfunctory submissions to mob demand. Serena Hargrove quoted Professor Bright: "Responsible officials begged would-be lynchers to 'let the law take its course,' thus tacitly promising that there would be a quick trial and the death penalty . . . [S]uch proceedings 'retained the essence of mob murder, shedding only its outward forms.'"²⁹⁵ Indeed, Charles Black suggests that it simply

²⁸⁵ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

²⁸⁶ *Id.* at 249–53, 365–66.

²⁸⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976)

²⁸⁸ Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 327 (1988) (reporting significant discrepancies in the treatment of potentially capital cases by county); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520–57 (1988) (discussing race and prosecutor's charging decisions); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 775 (1990–91) (prosecutorial decisions based on legal factors and on the race of the victim).

²⁸⁹ See *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

²⁹⁰ Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 443 & n.62 (1995) [hereinafter Bright, *Discrimination, Death and Denial*].

²⁹¹ *Id.* at 436, 437–38.

²⁹² Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817–19 (1998).

²⁹³ See generally Bright, *Discrimination, Death and Denial*, *supra* note 290.

²⁹⁴ *Id.* at 440.

²⁹⁵ Serena Hargrove, *Capital Punishment: 21st Century Lynching*, 6 UDC/DSCL L. REV.

may not be possible to administer capital punishment fairly because of our society's history and the "lingering effects of racial discrimination."²⁹⁶

As discussed earlier, the Supreme Court declined to address the problem of racial discrimination in the infamous Georgia case, *McCleskey v. Kemp*.²⁹⁷ There, the Court reviewed research conducted by Professor David Baldus that found that defendants in Georgia were 4.3 times more likely to receive the death penalty solely because the victim was white rather than black.²⁹⁸ In a narrow 5-4 decision, the Court refused to rely on this statistical evidence as proof of discrimination and ruled that Warren McCleskey would have to produce evidence of intentional discrimination—a nearly insurmountable burden—before he would be entitled to challenge his death sentence on the basis of race.²⁹⁹ The Court's decision thus erected a wall protecting death penalty systems from race-based challenges.³⁰⁰

Interestingly, even Justice Scalia, who voted with the majority in *McCleskey*, believed that racial discrimination existed in that case. In a confidential memo about the *McCleskey* decision revealed after Justice Thurgood Marshall's papers were made public, Justice Scalia wrote, "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this Court, and ineradicable, I cannot honestly say that all I need is more proof."³⁰¹ Justice Scalia is willing to live with a death penalty system that risks killing based on race.

Another study by Professors Samuel Gross and Robert Mauro found that race played a role in seven jurisdictions in addition to Georgia. Examining all homicides reported by the FBI from Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia, the researchers identified a "remarkably stable and consistent pattern of racial discrimination in the imposition of the death penalty in all eight states."³⁰² A 1990 report of the General Accounting Office ("GAO") analyzed all of the then-existing post-*Furman* studies and concluded that race influenced the charging and sentencing decisions in death penalty cases.³⁰³

33 (2001) (quoting Bright, *Discrimination, Death and Denial*, *supra* note 290, at 440)).

²⁹⁶ Donnelly, *supra* note 245, at 50 (citing CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 29-36 (1974)).

²⁹⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987). *See supra* notes 222-26 and accompanying text.

²⁹⁸ *McCleskey*, 481 U.S. at 287. *See also* Scott Howe, *The Futile Quest for a Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2109 (2004).

²⁹⁹ *McCleskey*, 481 U.S. at 292-93, 308-09.

³⁰⁰ Bassett, *supra* note 222, at 5.

³⁰¹ Howe, *supra* note 298, at 2122-23.

³⁰² *See generally* Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

³⁰³ Howe, *supra* note 298, at 2115. The GAO experts noted that "in 82 percent of the

More recent studies have also reported racial bias. A study in New Jersey of 703 formally charged homicide cases found that the odds that a homicide involving a white victim would go to trial were nearly three times greater than homicides with a Hispanic victim and five times greater than homicides with a black victim.³⁰⁴ In some Southern states, the victims are African-American in over 60% of the murders, but 85% of the death cases are those with white victims.³⁰⁵

Professor Baldus has recently published additional studies from Georgia that reached the same conclusions as his original study, as well as a report on all death-eligible defendants prosecuted in Philadelphia between 1983 and 1993, which also found racial bias.³⁰⁶ However, the Philadelphia report differed from the Georgia study in that the primary source of the racial disparities in Philadelphia was from the jury, rather than the prosecutor.³⁰⁷ A study of 502 homicides that occurred between 1993 and 1997 concluded that defendants whose victims were white were 3.5 times more likely to be sentenced to death than defendants whose victims were not white.³⁰⁸ The Pennsylvania Supreme Court has published a more recent study, presented by the Committee on Racial and Gender Bias in the Justice System, which called for a moratorium on the death penalty due to identified racial bias.³⁰⁹

A study of all Maryland cases between 1978 and 1999 found “pronounced bias against killers of white victims, and within the white-victim cases, additional bias against black offenders.”³¹⁰ The New York Capital Defender Office reported widely divergent capital-charging practices—20% of the state’s murders occurred outside New York City, but 65% of death penalty notices were filed outside the city.³¹¹

Preliminary studies of the federal death penalty showed “disproportionate numbers of minority offenders facing federal death penalty charges as well as marked geographical disparities in the capital prosecutions initiated in the several federal districts throughout the country.”³¹² Three quarters of the total convictions

studies, race of the victim was found to influence the likelihood’ that a murderer would receive a death sentence. They also noted that ‘[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques’ and that it ‘held for high, medium, and low quality studies.’ The experts also noted that many of the studies found a race-of-defendant influence, although this factor was not as ‘clear cut’ and that it ‘varie[d] across a number of dimensions.’” *Id.* at 2117 (citing General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990)).

³⁰⁴ *Id.* at 2114.

³⁰⁵ See Bright, *Discrimination, Death and Denial*, *supra* note 290, at 461.

³⁰⁶ Howe, *supra* note 298, at 2117–18.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 2119.

³⁰⁹ FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 219 (March 2003).

³¹⁰ Howe, *supra* note 298, at 2118–19.

³¹¹ Lanier & Acker, *supra* note 253, at 599.

³¹² *Id.* at 599 (citing U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL STUDY (1988–2000)* (2000), <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>).

under 21 U.S.C. § 848, the federal drug kingpin law that provides for the death penalty, were white defendants, but thirty-three out of the first thirty-seven prosecutions brought under the death penalty provisions of the statute were against members of minority groups.³¹³

One scholar speculates that African-Americans benefit from these discriminatory patterns, arguing that, because most homicides are intra-racial, it is black defendants who most often kill black victims.³¹⁴ The fact that death penalty jurisdictions consistently devalue the lives of black victims (by seeking the death penalty against killers of white victims, but not those of black victims) means that black defendants who are most likely to kill black victims are spared the death sentence.³¹⁵ While this argument may hold some truth, it fails to explain the high percentage of convicted black defendants who are sentenced to death for killing white victims, given that the majority of people who kill whites are white.³¹⁶

In some jurisdictions where there is no identified racial bias in death penalty convictions, geography instead plays a role in death sentencing. A study requested by the Nebraska Commission on Law Enforcement and Criminal Justice concluded that there was no significant evidence of racial bias in the treatment of offenders, but it found that wide geographic disparities in charging and plea bargaining practices existed and that victims' socioeconomic status significantly affected charging and sentencing outcomes.³¹⁷ The Joint Legislative Audit and Review Commission of the Virginia Legislative Assembly also found that geography figured more significantly than race in prosecutors' charging decisions: "Prosecutors in urban centers were less likely to seek death against capital-eligible defendants than those in rural areas, notwithstanding factually similar crimes."³¹⁸

In the abstract, studies show capital punishment's pernicious nature, but even more shocking is the significant role racism plays in the courts. For example, the judge and defense attorney referred to William Dobbs, an African-American man in Georgia convicted of the murder of a white man, as "colored" and "colored boy", and the prosecutor called him by his first name.³¹⁹ Two of the jurors admitted to having called Dobbs a "nigger."³²⁰ Dobbs' defense attorney seemed to be his own worst enemy, as the lawyer made his opinion about blacks known throughout the trial.³²¹ The federal district court reviewing the case characterized the attorney's views in this way:

Dobbs' trial attorney was outspoken about his views. He said that many

³¹³ See Bright, *Discrimination, Death and Denial*, *supra* note 290, at 464.

³¹⁴ John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153, 161–62 (1998).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Lanier & Acker, *supra* note 253, at 581.

³¹⁸ *Id.* at 583.

³¹⁹ Bright, *Discrimination, Death and Denial*, *supra* note 290, at 444.

³²⁰ *Id.*

³²¹ *Id.* at 445.

blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because “my granddaddy had slaves.” He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as “black boy jungle.” He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items.³²²

Dobbs was not alone. Bright identified five other Georgia capital cases where the defendants’ own attorneys had used racial slurs.³²³ He also documented a case where the judge called the parents of an African-American defendant “nigger mom and dad.”³²⁴ He noted that, around this same time, CBS fired a commentator who made a racial slur, but the judge experienced no repercussions whatsoever, suggesting that racism in sports announcing will not be tolerated, but racism in capital trials will be.³²⁵

Despite the fact that it is unconstitutional for prosecutors to strike potential jurors from serving on a jury because of their race, the practice is common. A notorious training video made by the Philadelphia District Attorney’s office instructed new prosecutors, in violation of the constitution, not to select young black women or blacks from low income areas for jury duty because “young black women are very bad to have on the jury and blacks from low-income areas are less likely to convict.”³²⁶ The video instructed prosecutors how to hide racial motives in their jury strikes.³²⁷ Similarly, District Attorney Ed Peters of Mississippi publicly announced his policy to “get rid of as many black citizens as possible when exercising his peremptory challenges.”³²⁸ Neither District Attorney experienced any repercussions for this illegal conduct.

In the thirty years since *Gregg*, the courts have not corrected the legacy of discrimination identified in *Furman*. Entrenched racial bias in the application of the death penalty undermines the principles of retributive justice. As scholar Thom Bassett wrote, “If the State relies on aggravating evidence that does not relate directly to the defendant’s personal culpability, the death sentence is unjust compared to the punishment imposed in murder cases involving defendants of equal desert [culpability] who do not receive the death penalty.”³²⁹

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

³²² *Id.*

³²³ *Id.* at 446.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Hargrove, *supra* note 295, at 42.

³²⁷ *Id.*

³²⁸ *Id.* at 43.

³²⁹ Bassett, *supra* note 222, at 30.

Death sentences imposed in the face of a strong and empirically verified risk of racial bias in capital cases are morally inconsistent with retributivism, independently of whether racial discrimination actually entered into any given capital sentencing decision. This is because retributivism forbids exposing defendants to an excessive risk of improper punishment and racial bias creates such a risk in today's capital sentencing regime. Because the *McCleskey* Court sanctions systemic racial discrimination in the imposition of the death penalty, the *McCleskey* decision is morally inconsistent with retributivism.³³⁰

B. The Death Penalty Is Not an Effective Deterrent to Homicide

Whether the death penalty actually deters homicides is a widely-debated subject. Prominent criminologist Ernest van den Haag stated that, "Common sense, lately bolstered by statistics, tells us that the death penalty will deter murder, if anything can. People fear nothing more than death."³³¹ Another scholar suggests that a "common-sense" conclusion is that whether "the death penalty either deters or does not deter are both speculative."³³² Interestingly, 67% of law-enforcement officials "do not believe capital punishment reduces the homicide rate."³³³ In *Ring v. Arizona*, Justice Breyer analyzed several deterrence studies and concluded that "[s]tudies of deterrence are, at most, inconclusive."³³⁴ It seems fair to conclude that no clear evidence shows that abolishing the death penalty has led to an increase in homicides, or conversely, that reinstating it has led to a decrease.³³⁵

Many scholars are emphatic in their assertion that the death penalty is not a deterrent and, if anything, may actually increase homicides. Scholars Charles Lanier and James Acker claim that the overwhelming body of research shows "no credible evidence that capital punishment is a superior deterrent to murder than is life imprisonment."³³⁶ They cite thirteen studies to support this assertion, as well as a study by scholars Ruth Peterson and William Bailey, who reviewed the mass of studies on the death penalty and deterrence.³³⁷ Any studies purporting to show a deterrent effect have been thoroughly discredited in the research community for their "faulty methodologies and failure to stand up under attempted replication."³³⁸ Renowned scholar David Baldus stated, "Although research does not prove conclusively that the death penalty does not deter crime, it provides very strong support for the proposition that if there is any marginal deterrent effect from the

³³⁰ *Id.* at 31–32.

³³¹ Laufer & Hsieh, *supra* note 240, at 345 n.15.

³³² Donnelly, *supra* note 245, at 48.

³³³ Robbins, *supra* note 211, at 1131.

³³⁴ *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (citations omitted).

³³⁵ Donnelly, *supra* note 245, at 24.

³³⁶ Lanier & Acker, *supra* note 253, at 591.

³³⁷ *Id.*

³³⁸ Bentele, *supra* note 25, at 1382. See *id.* at 1382 n.108 for a lengthy analysis of this academic dispute.

death penalty, it is beyond our capacity to measure and document.”³³⁹

One long-time supporter of the deterrence theory is Joanna Shepherd, a criminologist at Duke University, who has spent much of her career researching deterrence theories using econometric models. Although she initially claimed that every execution deterred, on average, three murders,³⁴⁰ she has since revised her findings after conducting a state-by-state analysis of the homicide figures.³⁴¹ She most recently concluded that the deterrent effect of capital punishment is too varied among death penalty jurisdictions to draw uniform conclusions.³⁴² She recalculated the deterrence rate on a state-by-state basis and found that, while in some jurisdictions the death penalty does have a deterrent effect, in others, it does not.³⁴³ Further, in some jurisdictions, the death penalty actually has a brutalizing effect, increasing the number of homicides,³⁴⁴ a phenomenon that other scholars have also observed.³⁴⁵ Some researchers, however, have concluded that capital punishment may deter other crimes such as robbery, burglary, and assault, when executions receive a certain amount of television coverage.³⁴⁶

Another indicator that the death penalty is not a deterrent to murder is the fact that states without the death penalty have consistently had lower homicide rates than states with it. Criminologist Thorsten Sellin first established this in 1967 and 1980, and 1988 study replicated this result.³⁴⁷

In 2000, *The New York Times* reported:

[There are] no crime trends supporting a deterrent effect of capital punishment:

³³⁹ David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Sciences*, 70 IND. L.J. 1033, 1034 (1995) (footnotes omitted).

³⁴⁰ See Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 308 (June 2004).

³⁴¹ Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005).

³⁴² *Id.* at 229–33.

³⁴³ *Id.*

³⁴⁴ *Id.* at 231.

³⁴⁵ Lanier & Acker, *supra* note 253, at 591 (citing W.C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998); W.J. Bowers & G. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980); J. K. Cochran, M.B. Chamlin, & M. Seth, *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107 (1994); E. Thomson, *Deterrence Versus Brutalization: The Case of Arizona*, 1 HOMICIDE STUDIES 110 (1997); Echevarría, *supra* note 248, at 494–95 (citing to studies that show that “empirical data concerning the death penalty's deterrent value shows that the justification is dubious at best”).

³⁴⁶ William C. Bailey & Ruth D. Peterson, *Capital Punishment and Non-Capital Crimes: A Test of Deterrence, General Prevention, and System-Overload Arguments*, 54 ALB. L. REV. 681, 699 (1990).

³⁴⁷ Echevarría, *supra* note 248, at 501–02.

Indeed, 10 of the 12 states without capital punishment have homicide rates below the national average . . . while half the states with the death penalty have homicide rates above the national average . . . [D]uring the last 20 years, the homicide rate in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty.³⁴⁸

In conclusion, there is simply not enough evidence that capital punishment's deterrent effect is a sufficiently compelling state interest to withstand a strict scrutiny challenge. The overwhelming majority of researchers believe that the death penalty does not effectively meet this end, and some even believe that it actually increases the homicide rate. As Justice Breyer concluded, at best, the studies are inconclusive. At worst, the death penalty may accomplish the opposite of what it intends to do.

The public's confidence in the death penalty as a form of deterrence has dropped from a high of 63% in 1983 to 44% in 2000³⁴⁹ and to only 35% in 2004.³⁵⁰ A 1986 poll, however, showed that 73% of those in favor of the death penalty would still be in favor of it even if it were proved that there was no deterrent effect.³⁵¹ Still, public perception of the death penalty's deterrence effect is vitally important because it is likely an indication of whether people are actually deterred by the threat of a death sentence.

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

Superficially, the death penalty appears to be a compelling way for the state to denounce serious crime and vindicate legal and moral order. Professor Mary Sigler points out that in *Gregg*, Justice Stewart stressed the importance of the denunciatory rationale as being "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."³⁵² Further, Stewart quotes Lord Justice Denning: "[I]n order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them."³⁵³

However, a deeper examination of the reality of the death penalty reveals a crumbling infrastructure upon which no solid house can be built. The serious

³⁴⁸ Lanier & Acker, *supra* note 253, at 591 (quoting Raymond Bonner & Ford Fessenden, *States with no Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1).

³⁴⁹ *Id.* at 590. Similarly, a 2001 Gallup poll asked respondents whether the execution of Timothy McVeigh would deter future acts of violence. Only 30% thought that it would, whereas 66% responded that it would not.

³⁵⁰ David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment Without Parole*, GALLUP POLL NEWS SERVICE, June 2, 2004, available at 2004 WLNR 12861752.

³⁵¹ Echevarría, *supra* note 248, at 512–13.

³⁵² Sigler, *supra* note 208, at 1184 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

³⁵³ *Id.* (quoting *Gregg*, 428 U.S. at 184 n.30).

problems surrounding the death penalty's administration undermine its ability to serve as an effective means of denouncing or vindicating crime or of restoring moral order.

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

When Illinois Governor George Ryan declared a moratorium on executions in 2000,³⁵⁴ the tenor of the death penalty debate in this country changed. The impetus for Governor Ryan's unusual move was the revelation of serious problems such as the exoneration of thirteen death row inmates in a state where only twelve had been executed during the modern era.³⁵⁵ Governor Ryan was not an abolitionist, but he did not want to preside over the execution of an innocent person.³⁵⁶ He appointed a highly qualified, bi-partisan commission to study the Illinois system; after two years of serious study, the Commission made eighty-five recommendations, some of which were adopted by the Illinois legislature.³⁵⁷ Significantly, a majority of the Commission also concluded that the only way to ensure that innocent people would not be executed was to eliminate the death penalty.³⁵⁸ Before leaving office, Ryan commuted the death sentences of all but seven people on death row to life in prison,³⁵⁹ after determining that the manner in which the death sentences had been obtained could not guarantee their accuracy or fairness.³⁶⁰

The same year as Ryan's dramatic pronouncement, Professor James Liebman and scholars at Columbia University Law School released a comprehensive study of every death penalty appeal from 1973 to 1995.³⁶¹ The review of literally

³⁵⁴ See Press Release, Illinois Government News Network, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359>.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Lanier & Acker, *supra* note 253, at 579.

Among the recommendations were changes in police practices to help safeguard the reliability of evidence produced during pretrial investigations; the introduction of guidelines and centralized review to help regulate prosecutors' capital-charging decisions; significant restrictions in the range of death penalty eligible murders; periodic training for judges and attorneys in capital cases; and the commitment of substantial additional resources. The Commission also recommended that better data on capital cases be collected

Id.

³⁵⁸ Press Release, Human Rights Watch, Illinois Commission Highlights Death Penalty's Inherent Flaws, (Apr. 17, 2001), <http://hrw.org/english/docs/2002/04/17/usdom3860.htm>.

³⁵⁹ Stephen P. Garvey, *Is it Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1319 n.1 (2004).

³⁶⁰ Markel, *supra* note 214, at 408.

³⁶¹ James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

thousands of cases revealed that 68% of all death penalty cases were reversed due to serious errors at trial, resulting in new trials or new sentencing hearings.³⁶² Upon retrial, 82% of the cases resulted in a sentence less than death, and in 7% of those cases, the defendants were found to be innocent.³⁶³ The three most common reasons for these errors were incompetent defense attorneys, prosecutorial misconduct, and faulty jury instructions.³⁶⁴

A 1998 conference of exonerees held at Northwestern University spurred media investigation into the causes of wrongful conviction, exposing errors such as, “woefully inadequate representation, misconduct by prosecutors and police, and a system that allowed jail-house snitches and paid informants to manufacture evidence that evaporated under closer scrutiny.”³⁶⁵ Faulty forensic science has also contributed to the high incidence of wrongful convictions.³⁶⁶ For example, serious problems in the operation of forensic laboratories have occurred in several jurisdictions, including Oklahoma and Texas.³⁶⁷ The most shocking examples of laboratory dereliction came out of Harris County, Texas, where the laboratory had allegedly been providing false DNA evidence for the last twenty-five years.³⁶⁸ Considering that about 35% of all executions in the United States during the modern era came out of Texas and that the overwhelming majority of Texas executions have come out of Harris County, these lab failures indicate a major failure in the criminal justice system.³⁶⁹ Authorities shut down the lab,³⁷⁰ and the federal government took the highly unusual step of striking all of the results from CODIS, the national DNA database.³⁷¹

Official misconduct is more likely to occur when a defendant is represented by an incompetent or inexperienced lawyer because prosecutors and police may exploit his incompetence or inexperience. For example, Glenn Ford’s “court-

³⁶² *Id.* at 1846–50.

³⁶³ *Id.* at 1852.

³⁶⁴ *Id.* at 1850. *See also* Blackerby, *supra* note 250, at 1187. Other research indicates that many jurors rely on factors wholly unrelated to jury instructions and in many cases make up their minds about the appropriate sentence before the sentence phase of the trial even begins. Lanier & Acker, *supra* note 253, at 597.

³⁶⁵ Dieter, *supra* note 251.

³⁶⁶ Blackerby, *supra* note 250, at 1186.

³⁶⁷ *Id.* at 1187 (Oklahoma); Dieter, *supra* note 251 (Harris County, Texas).

³⁶⁸ Dieter, *supra* note 251.

³⁶⁹ *Id.*

³⁷⁰ Adam Liptak, *Worst crime lab in the country? Or is Houston typical?*, N.Y. TIMES ON THE WEB, March 11, 2003, available at <http://www.truthinjustice.org/suttonDNA.htm>.

³⁷¹ Dieter, *supra* note 251. The Death Penalty Information Center’s report highlights a number of disturbing aspects of the scandal starting with the fact that the head of the DNA lab, James Bolding, was not qualified for the job. *Id.* He had been dismissed from the University of Texas’ Ph.D. program, “failed . . . algebra and geometry in college and . . . never took statistics.” *Id.* Jobs at the lab had been given to graduates without the required degrees. *Id.* “Among those hired to do DNA tests . . . were two workers from the city zoo. One had most recently been cleaning elephant cages. The other had done DNA research, but only on insects.” *Id.* Another employee could not speak English. *Id.*

appointed trial attorney was an oil and gas law specialist who had never tried a criminal case and had never appeared before a jury.³⁷² Taking advantage of the lawyer's lack of experience, the prosecution withheld potentially exculpatory evidence that Mr. Ford's co-defendants had actually committed the felony-murder Ford was accused of.³⁷³ These reports were not discovered until Mr. Ford had competent post-conviction representation.³⁷⁴ Race played a role in the case, too. Mr. Ford, an African American, was convicted by an all-white jury, with all white lawyers and a white judge.³⁷⁵

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

There is no shortage of stories involving scandalous representation provided to indigent defendants on trial for their lives—stories involving sleeping lawyers, intoxicated lawyers, lawyers wholly unfamiliar with death penalty law and procedures, lawyers making racist remarks about their clients, lawyers who ended up disbarred and even incarcerated shortly after representing their clients, and lawyers lacking the experience and resources to mount any semblance of an effective defense.³⁷⁶

Many death row families were seriously disillusioned with the justice system because of the incompetence of their loved ones' attorneys.³⁷⁷ Tragically, many families also used life savings to hire incompetent attorneys, only to learn later that their family member would have fared better with a public defender.³⁷⁸ Some of their family members were represented by attorneys with drinking problems; some of the attorneys had had problems with ethical violations; some were disbarred after representing their family member, and many had no experience whatsoever in trying capital cases.³⁷⁹

Media investigations have affirmed these experiences. A *Chicago Tribune* investigation of the death penalty in Illinois found that "at least 33 death row inmates had been represented at trial by an attorney who has since been disbarred or suspended."³⁸⁰ A similar investigation in Washington by the *Seattle Post-Intelligencer* found that "one-fifth of the 84 people who have faced execution in the past 20 years were represented by lawyers who had been, or were later, disbarred, suspended or arrested."³⁸¹

Not surprisingly, many family members lost faith in the criminal justice system

³⁷² R. Neal Walker, *How the Malfunctioning Death Penalty Challenges the Criminal Justice System*, 89 JUDICATURE 265, 268 (2006).

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ Lanier & Acker, *supra* note 253, at 589 (internal citations omitted).

³⁷⁷ See generally SHARP, *supra* note 93, at 64–84.

³⁷⁸ See *id.*

³⁷⁹ See *id.*

³⁸⁰ Dieter, *supra* note 251.

³⁸¹ *Id.*

due to what they perceived as an unjust process.³⁸² One father, who was retired from the military, describes the moment he lost this faith during his son's trial.³⁸³ One of the witnesses testified that his son "was near the scene of the crime in his Volkswagen—that they had to push it. And we knew it wasn't true because [the victim] was killed in December of 1982 and the car wasn't bought until September of 1983."³⁸⁴ To add insult to injury, the prosecutor further suggested that the family falsified the car records.³⁸⁵ Police chemist Joyce Gilchrist testified that the hair found proved that "[this man's son] was in close and violent contact with the victim."³⁸⁶ Gilchrist was later discredited and fired after revelations that she had falsified evidence for many years and in dozens of cases.³⁸⁷ The jury never learned that absolute identification from hair examination is impossible.³⁸⁸

The problems in the administration of the death penalty have reached such epic proportions that 2,000 organizations and governmental bodies have called for moratoria until those in charge can address these concerns of fairness and justice.³⁸⁹ A system of justice as flawed as capital punishment "teaches its citizens that criminal justice does not necessarily coincide with actual justice. It teaches contempt for the law [and] may impair obedience [to it]."³⁹⁰ It lacks the moral authority to vindicate legal and moral order.³⁹¹

2. The Death Penalty Victimizes Other Non-Family Members Involved in its Implementation

The death penalty harms people other than the families of those sentenced to death. Although there is very little research on secondary victimization, there is evidence that juries, judges,³⁹² prosecutors, defense attorneys, prison personnel,³⁹³

³⁸² SHARP, *supra* note 93, at 117.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 118.

³⁸⁷ See *supra* notes 368–71 and accompanying text regarding Harris County, Texas crime lab.

³⁸⁸ SHARP, *supra* note 93, at 118.

³⁸⁹ Dieter, *supra* note 251.

³⁹⁰ Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 820 (1994).

³⁹¹ See Laufer & Hsieh, *supra* note 240, at 354. According to Laufer and Hsieh, "perceptions of legitimacy are integral to the survival of any social institution." *Id.* Erosion of state authority is a natural consequence of a criminal justice system that tolerates racial discrimination, incompetent defense attorneys, prosecutorial misconduct and faulty jury instructions, all in an effort to implement the death penalty. *Id.*

³⁹² See Henry Leyte-Vidal & Scott J. Silverman, *Living With the Death Penalty*, 89 JUDICATURE 270, 272–73 (2006) (describing judges' experiences in issuing death penalty orders).

³⁹³ See Bob Herbert, *Inside the Death House*, N.Y. TIMES, Oct. 9, 2000, at A21; *All Things Considered: Witness to an Execution* (NPR radio broadcast Oct. 20, 2000) (detailing

and witnesses to an execution may experience prolonged trauma.³⁹⁴ Senior Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit recently noted that “state and federal judges agree that the judicial administration of the death penalty is by far the most difficult, time-consuming, frustrating and critical joint problem that the Tennessee state and federal judiciary have to grapple with on a daily basis.”³⁹⁵ Of course, all players in the system do not share this perspective. Harris County Prosecutor Bill Hawkins recently wrote an article documenting how the death penalty did not take much of a toll on the Texas criminal justice system and concluded: “The truth is that whatever the cost, be it financial, a citizen’s time, or the time and stress on the trial participants, the impact of the death penalty on the criminal justice system is worth the price.”³⁹⁶

A growing body of research establishes that jurors who serve on capital trials suffer a variety of psychological and physical symptoms.

[R]esearchers studying criminal cases have identified “one or more physical and/or psychological symptoms that could be related to jury duty.” These included reoccurring thoughts about the trial that would keep the jurors awake at night or nightmares about the crime and the defendant, stomach pains, nervousness, tension, shaking, headaches, heart palpitations, sexual inhibitions, depression, anorexia, faintness, numbness, chest pain, and hives. . . . Findings showed “jurors whose jury panel rendered a death penalty did sustain greater PTSD [Post-Traumatic Stress Disorder] symptoms than did jurors whose jury panel rendered a life sentence.”³⁹⁷

Steve Presson, a capital attorney in Oklahoma, has represented many capital defendants and has developed close relationships with some over the years. One client, Scott Hain, a juvenile at the time of his crime and his execution, was devastated when he learned that his parents would not witness his death and did not want his remains or his property. He asked Presson to take his ashes to Hawaii and scatter them there; Hain told Presson that “[Presson] had been more of a father figure to him than anyone else in his life.”³⁹⁸ Nine of Presson’s clients have been

the trauma experienced by members of the execution team in Texas); DONALD CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* (Northeastern University Press 1996) (first-hand account of a Mississippi prison warden whose experience with the death penalty turned him into an abolitionist).

³⁹⁴ Lanier & Acker, *supra* note 253, at 603.

³⁹⁵ Michael Hintze, *Tinkering with the Machinery of Death: Capital Punishment’s Toll on the American Judiciary*, 89 JUDICATURE 254, 257 (2006).

³⁹⁶ Bill Hawkins, *Capital Punishment and the Administration of Justice: A Trial Prosecutor’s Perspective*, 89 JUDICATURE 258, 261 (2006).

³⁹⁷ Michael Antonio, *Jurors’ Emotional Reactions to Serving on a Capital Trial*, 89 JUDICATURE 282, 283–84 (2006). While a large majority of jurors reflected negatively upon their experience serving on a capital case, some enjoyed it. Some jurors reported the experience as “quite exciting and really enjoyed it,” “a learning experience,” and “very rewarding, educational.” *Id.* at 284.

³⁹⁸ SHARP, *supra* note 93, at 154.

executed, which has caused him tremendous pain.³⁹⁹ Other attorneys, ministers and pen pals have developed relationships that Sharp describes as “fictive kin.”⁴⁰⁰ These “kin” also suffer when the person with whom they have developed an almost familial bond is executed.⁴⁰¹

Although there have been no studies measuring the effect of executions on the family members of murder victims, there is anecdotal evidence that many murder victims families oppose the death penalty and believe that it harms them.⁴⁰² Victims who oppose capital punishment often lose the status of “victim.” Audrey Lamm and her father Guss Lamm of Oregon requested permission to speak before the parole board seeking clemency for the killer of their mother and wife.⁴⁰³ They filed a lawsuit challenging the board’s denial of clemency, and the Lancaster County District Court ruled that the board’s decision did not violate their constitutional rights because they were acting on behalf of the defendant and therefore were not “victims” under Nebraska’s Victims Bill of Rights.⁴⁰⁴ Felicia Floyd and Chris Kellett opposed the execution of their father, who had murdered their mother and grandmother.⁴⁰⁵ Unlike the Lamms, the Georgia Parole Board permitted Chris and Felicia to testify at their father’s clemency hearing.⁴⁰⁶ However, during questioning, they felt that the members did not consider them to be victims because they were opposing the execution.⁴⁰⁷

Another particularly egregious example of mistreatment of a victim was that of SueZanne Bosler whose father, a Mennonite minister, was murdered in the parsonage where the family lived.⁴⁰⁸ Ms. Bosler herself was attacked and left for dead.⁴⁰⁹ She did not want the court to sentence the killer, James Bernard Campbell, a young black man⁴¹⁰ who was border-line mentally retarded,⁴¹¹ to death; she

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 153–61.

⁴⁰¹ *Id.*

⁴⁰² See generally RACHEL KING, DON’T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (Rutgers University Press 2003) [hereinafter KING, DON’T KILL IN OUR NAMES]. It is my belief, based on a decade of interviewing people who have lost family members to murder, that the capital litigation process harms even those family members who support capital punishment. Repeated court sessions, including new trials or sentencing hearings, often characterize the long and complicated appeals process, which is necessary to ensure accuracy and fairness. These hearings, and the media attention they attract, submit victims to repeated trauma.

⁴⁰³ *Id.* at 207–08.

⁴⁰⁴ *Id.* at 216. The Nebraska Supreme Court later overruled this decision but held that, while the Lamms were victims under the Nebraska constitution, they did not have any legal remedies because the legislature had failed to pass enacting legislation to give the constitutional provision meaning. *Id.* at 216–17.

⁴⁰⁵ *Id.* at 140–42.

⁴⁰⁶ *Id.* at 142.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 138–42.

⁴⁰⁹ *Id.* at 139–40.

⁴¹⁰ *Id.* at 142.

supported a life sentence without the possibility of parole.⁴¹² Twice Ms. Bosler testified for the state at sentencing hearings; an appellate court had reversed Campbell's initial death sentence due to prosecutorial misconduct.⁴¹³

After a decade of litigation, Ms. Bosler grew tired of the state using her in its efforts to execute Campbell while denying her the opportunity to tell the jury that she opposed it.⁴¹⁴ She hired an attorney who advised her of a way that she could legally express her opposition to the death penalty to the jury.⁴¹⁵ When she was testifying, the prosecutor asked her what she did for work as a way to get the jury to know her and she replied that she was a hairdresser and that she traveled around the country working to end the death penalty.⁴¹⁶ The prosecutor and judge were furious with her, and the judge threatened to throw her in jail for contempt of court if she mentioned opposition to the death penalty again.⁴¹⁷ On the third sentencing hearing, ten years after the crime occurred, the jury sentenced Campbell to life.⁴¹⁸ Besides the stress and strain of ten years of litigation on Ms. Bosler, the state also spent untold resources on its unsuccessful attempt to kill Campbell.

Furthermore, the death penalty often opens a rift between family members who support it and those who oppose it, causing additional stress for families.⁴¹⁹ For example, Maria Hines opposed the execution of her brother's killer while her sister-in-law supported it.⁴²⁰ Before the execution, the media turned their disagreement into a major story, pitting them against each other until there were so many bad feelings that it created a rift which has still not healed nearly twenty years later.⁴²¹ Ms. Hines, who had befriended the killer, felt tremendous grief after his execution and deep sadness because of the estrangement with her extended family.⁴²²

Like Ms. Hines, Sue Norton befriended Robert Knighton (known as BK)—the man who had killed her father and stepmother—and spoke publicly against his execution. Her sister supported the execution.⁴²³ Their disagreement became the focus of national media stories. After all his appeals failed, Mrs. Norton witnessed BK's execution, at his request.⁴²⁴ The stress of BK's execution made Mrs. Norton,

⁴¹¹ *Id.* at 145.

⁴¹² *Id.* at 146.

⁴¹³ *Id.* at 148, 153.

⁴¹⁴ *Id.* at 157.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 159.

⁴¹⁹ King, *The Impact of Capital Punishment*, *supra* note 93, at 294.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ See *All Things Considered: Clemency* (National Public Radio broadcast May 27, 2003) (transcript of final clemency hearing for Robert Wesley Knighton on May 20, 2003, at the Oklahoma State Penitentiary in McAlester, Okla.), available at www.soundprints.org/on-air/clemency/.

⁴²⁴ SHARP, *supra* note 93, at 158.

a normally cheerful and optimistic person, stressed and tearful.⁴²⁵ After the execution, she reported,

I am just trying to maintain . . . I bawled all the way home the other day and Gene [her husband] listened to me talk for two hours. He has been so good. I have not been out of the house since. I was supposed to go to the store and do some errands this morning, but did not go. I hate leaving the house alone.⁴²⁶

The fact that she and her sister disagreed with each other compounded Mrs. Norton's stress.⁴²⁷

Johnnie Carter witnessed the execution of Floyd Allen Medlock, the man who killed her granddaughter.⁴²⁸ After Medlock's conviction, Johnnie began corresponding with him.⁴²⁹ Medlock was so remorseful that he wanted to be executed; but Johnnie opposed his execution.⁴³⁰ When he asked her to witness the execution, she agreed.⁴³¹ "It took my breath away," she said of the experience.⁴³² After the execution, the family members who supported the execution were escorted to an area inside the prison for a press conference, but Ms. Carter was told to go "outside into the cold, rainy night."⁴³³

The harm borne by the myriad others involved in the process, especially the victims' family members, causes the death penalty to lose much of its moral authority. The death penalty's negative impact—creating rifts within families, re-traumatizing victims, and traumatizing jurors, judges and prison personnel—outweighs any benefit it inures to society. In the effort to restore moral order, the death penalty creates other moral problems.

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

The cost of capital punishment may not be an appropriate area of discourse in discussions of morality. If capital punishment were working as a deterrent and were applied fairly, the cost of carrying out the punishment should be of little concern. However, given that the death penalty is not adequately serving its social

⁴²⁵ *Id.* at 157–58.

⁴²⁶ *Id.* at 158.

⁴²⁷ Another example of disagreement between family members occurred during the execution of Carla Faye Tucker. Ron Carlson, the brother of one of Tucker's victims, became close to Tucker; at her request, he witnessed her execution as one of her witnesses, while the husband of the victim witnessed the execution for the state. This aspect of the execution became a big news story, which only increased the tension between the two, creating a permanent rift. See KING, DON'T KILL IN OUR NAMES, *supra* note 402, at 57–83.

⁴²⁸ SHARP, *supra* note 93, at 159.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at 159–60.

⁴³² *Id.* at 160.

⁴³³ *Id.*

goals of denouncing violence and vindicating social order,⁴³⁴ the fact that it also costs significantly more than other punishments should be a concern.

Precise figures elude even experts, and the costs vary significantly between jurisdictions, but “several studies have concluded that death penalty systems demand significantly more resources than jurisdictions where life imprisonment is the maximum punishment.”⁴³⁵ The total cost of each execution in North Carolina exceeds \$2 million.⁴³⁶ California taxpayers could save \$90 million a year by abolishing the death penalty.⁴³⁷ The cost of bringing capital cases has nearly bankrupted several county budgets.⁴³⁸

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

Only about half of trials in which a death sentence is sought result in . . . a sentence of death. Even in cases in which death sentences are imposed, later judicial review results in as many as two out of three capital convictions and/or sentences being vacated. The great majority of offenders thus will end up serving lengthy prison sentences, even though huge sums of money were fruitlessly spent pursuing their execution.⁴³⁹

Based on calculations of the Indiana Criminal Law Study Commission, the average death penalty case from trial to execution (assuming ten years of imprisonment)⁴⁴⁰ costs \$667,560, whereas the typical life-without-parole case from trial to death (assuming forty-seven years of imprisonment) where the government never sought the death penalty costs \$551,016.⁴⁴¹ These numbers indicate that life imprisonment, despite costs associated with forty-seven years of imprisonment, costs \$116,544 less than a death case accompanied by a much shorter period of

⁴³⁴ See *infra* Parts IV.A. and IV.B.

⁴³⁵ Lanier & Acker, *supra* note 253, at 587–88 (citing R. M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 573 (J.R. Acker, R.M. Bohm, & C.S. Lanier eds., Carolina Academic Press 2d ed. 2003); P.J. COOK & D.B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* (Terry Sandford Inst. of Pub. Policy 1993); M. Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985); R.L. Spangenberg & E.R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989)).

⁴³⁶ *Id.* at 588 (citing COOK & SLAWSON, *supra* note 435, at 1).

⁴³⁷ *Id.* (citing M. COSTANZO, *JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY* (St. Martin’s Press 1997, at 61).

⁴³⁸ *Id.* (citing Richard C. Dieter, *Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty*, Death Penalty Information Center (2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=385>).

⁴³⁹ *Id.*

⁴⁴⁰ Many death row prisoners are housed for much longer prior to execution.

⁴⁴¹ Brent E. Dickson, *Effects of Capital Punishment on the Justice System*, 89 JUDICATURE 278, 280 (2006).

imprisonment.⁴⁴² The capital punishment figure is even more startling in light of the fact that it does not include expenses incurred in vacating capital convictions (in collateral proceedings, on appeal, or upon federal review) or in remanding cases for further proceedings, both of which are frequent occurrences.⁴⁴³

Whether cost should be a serious consideration in a policy decision that addresses something as important as how to punish murderers is debatable. Yet the assumptions that the death penalty is cheaper than life in prison and that it is an effective deterrent are both erroneous. It is therefore important to consider the true costs of the death penalty when weighing its effectiveness as a punishment.

D. The Death Penalty is not Necessary to Incapacitate Offenders

The fact that executing an offender incapacitates him or her is undisputed. The public has a legitimate interest in ensuring that dangerous people who may kill again are not released from prison and will not pose a danger to any prison guards, fellow prisoners, or others if he happens to escape. However, thirty-seven of the thirty-eight death penalty states have statutes providing for life in prison without the possibility of parole as an alternative to death sentences.⁴⁴⁴ Prisoners are serving longer and longer sentences, and a life sentence means just that.⁴⁴⁵ A person who is sentenced to life in prison instead of a death sentence will almost certainly never be released from prison.⁴⁴⁶

Furthermore, releasing convicted murderers back into the general public does not necessarily pose a threat to society. Recidivism rates among released murderers are extremely low, suggesting that the concern that convicted murderers will kill again may be exaggerated.⁴⁴⁷ Moreover, where courts don't impose the death sentence, they will usually sentence offenders to life imprisonment, which is a sufficient punishment alternative to ensure an offender does not commit further crimes.

Furthermore, researchers estimate that courts impose the death penalty on only

⁴⁴² *Id.*

⁴⁴³ *Id.* at 280 n.8.

⁴⁴⁴ See Death Penalty Information Center, Life Without Parole, <http://www.deathpenaltyinfo.org/article.php?did=555&scid=59> (last visited May 30, 2007).

⁴⁴⁵ MARK MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF 'LIFE': LONG PRISON SENTENCES IN CONTEXT 3-4 (2004), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_meaningoflife.pdf.

⁴⁴⁶ *Id.*

⁴⁴⁷ See *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (citing Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000) (studies finding average repeat murder rate of .002% among murderers whose death sentences were commuted); James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 26 (1989) (Ninety-eight percent of prisoners in study "did not kill again either in prison or in free society.")).

2.2% of offenders arrested for murder.⁴⁴⁸ 21,000 homicides occur each year, while courts only impose 300 death sentences annually and states execute even fewer (fewer than 100 in most years).⁴⁴⁹ The death penalty is available in many of these cases.⁴⁵⁰ Of the estimated 7,320 people sentenced to death since 1976, only 1,068 have been executed.⁴⁵¹ Absent the imposition of mandatory death penalty sentencing, which the Supreme Court has declared unconstitutional,⁴⁵² discrepancies and inconsistencies will remain inherent in death sentencing. However, courts apply the death penalty so infrequently that it is difficult to argue that it is a necessary means of incapacitating murderers.

V. ANY LEGITIMATE CRIMINAL JUSTICE INTERESTS A STATE MAY HAVE IN USING THE DEATH PENALTY ARE NOT SUFFICIENTLY NARROWLY-TAILORED TO SURVIVE A STRICT SCRUTINY ANALYSIS

A substantive due process challenge requires balancing the state's interests against the rights of the individual.⁴⁵³ As established earlier, the right to a family is a protected liberty interest under the substantive due process clause.⁴⁵⁴ Any law that violates a fundamental right must pass a strict scrutiny test, i.e. that the infringement is narrowly-tailored to serve a compelling state interest.⁴⁵⁵ The death penalty does not justify the harm families suffer because the manner in which states practice the death penalty does not comport with their stated criminal justice goals of deterrence, retribution, incapacitation, and restoration of social order.⁴⁵⁶

A. *Deterrence*

The uncertainty surrounding the deterrence debate⁴⁵⁷ suggests that the death penalty cannot pass a strict scrutiny challenge when using deterrence as its rationale. "Too many studies indicate that the homicide rate bears no relation to the existence or non-existence of capital punishment" to support the use of the death

⁴⁴⁸ John Blume et al, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 171 (2004).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ See History of the Death Penalty, *supra* note 19.

⁴⁵² *Woodson v. North Carolina*, 428 U.S. 280, 303–05 (1976). Professor Steven Gey believes that Justice Scalia has endorsed the constitutionality of mandatory death penalty schemes. See Gey, *supra* note 208, at 92. Though the mandatory approach would seem to address the problem of arbitrary and uneven sentencing, the likely outcome would be that, as in the case of mandatory drug sentencing, a mandatory death penalty would increase the importance of the prosecutor's discretion in seeking a death sentence and would still allow unfairness.

⁴⁵³ See *Washington v. Glucksberg*, 521 U.S. 702, 708–19 (1997).

⁴⁵⁴ See *supra* Part II.

⁴⁵⁵ *Glucksberg*, 521 U.S. at 708–19.

⁴⁵⁶ See *supra* Part IV.

⁴⁵⁷ See *supra* Part IV.B.

penalty as a form of deterrence.⁴⁵⁸ Some research indicates that the death penalty may have a brutalizing effect; this strengthens the argument that the death penalty as a deterrent cannot survive a strict scrutiny challenge.⁴⁵⁹

B. Retribution and Restoration of Social Order

Because of its essentially unfair application, the death penalty falls short of meeting the goals of just retribution or restoration of social order.⁴⁶⁰ Wrongful convictions and the inevitable execution of innocent people severely diminish the death penalty's legitimacy.⁴⁶¹ As long as other acceptable forms of punishment are available, the state's legitimate interests in punishing murderers cannot be justified by killing innocent people. Indeed, some scholars believe that the twin requirements of individualized sentencing and eliminating arbitrariness in sentencing are irreconcilable.⁴⁶² Justice Blackmun, skeptical of a possible reconciliation of these twin aims, ultimately spoke out against the death penalty and admitted his belief that, even if the two requirements could be reconciled, the Supreme Court had failed to do so. He wrote:

[E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field⁴⁶³

C. Incapacitation

The strongest policy argument in support of the death penalty is that it is an

⁴⁵⁸ Echevarría, *supra* note 248, at 530.

⁴⁵⁹ *Id.* See also *supra* notes 336–37 and accompanying text.

⁴⁶⁰ See *supra* Part IV.C.1.

⁴⁶¹ See *id.*

⁴⁶² Donnelly, *supra* note 245, at 44–45. According to Donnelly,

Retributive theory requires greater rigor in relating punishment to desert than is possible under the sentencing methods approved by the Supreme Court. The Court is correct that human dignity requires a consideration of mitigating factors and mercy for each individual. This is not a basis, however, for justifying on retributive grounds the death penalty for those executed. The death penalty, as currently administered, is not based on respect for the human dignity of potential victims because it is not carefully related to deterrence. Rather, it is based, as the Supreme Court frequently indicates, on a societal goal of retribution, a goal which either expresses society's desires or reinforces society's values.

Id. (footnotes omitted). See also Gey, *supra* note 208, at 103.

⁴⁶³ Sigler, *supra* note 208, at 1194 (quoting *Callins v. Collins*, 510 U.S. 1141, 1156 (1994) (Blackmun, J., dissenting)).

effective means of incapacitation. However, a strict scrutiny analysis requires a state to use the most narrowly-tailored means to accomplish its goal. Because the state can take less restrictive measures to ensure incapacitation—specifically, lengthy prison terms, including life-without-parole—the state’s justification for exercising the death penalty as a means to incapacitate prisoners is rendered invalid.⁴⁶⁴ Furthermore, in the unlikely event that a person convicted of first-degree murder is released from prison, he or she is unlikely to murder again; a number of studies have established that convicted murderers are less likely to commit further homicides than other criminals.⁴⁶⁵

In conclusion, the death penalty fails to accomplish any of its stated criminal justice goals. To the extent that the death penalty does accomplish any of these “compelling state interests,” a life sentence would accomplish them as well as or better than a death sentence.⁴⁶⁶ “Strict scrutiny requires that state action limiting the exercise of a fundamental right serve a compelling governmental interest and be the least restrictive means to serve that end.”⁴⁶⁷ Because life in prison is a less restrictive alternative than the death penalty, states that choose to practice the death penalty have not “narrowly tailored” its infringement on the “fundamental liberty interests” of family members of capital defendants.⁴⁶⁸

The death penalty falls so far short of accomplishing its stated goals that it arguably fails to survive even rational basis scrutiny. Given the myriad problems inherent in capital punishment, a “perfect (that is to say, irreversible)” punishment is unjustified in light of our “imperfect (that is to say, error-prone) system.”⁴⁶⁹

VI. THE PRACTICAL ASPECTS OF A DUE PROCESS CHALLENGE BASED ON THE RIGHT TO FAMILY

The argument that the death penalty violates the substantive due process right of families of capital defendants raises several questions. Who could bring a

⁴⁶⁴ Donnelly, *supra* note 245, at 13.

⁴⁶⁵ Echevarría, *supra* note 248, at 506–08. “In 1988, Marquart and Sorenson studied . . . Texas death row inmates . . . who were released into general prison population after their sentences were commuted to life. [They found that, o]f the forty-six inmates in the group, not one committed another homicide. The following year, the researchers broadened their study by looking at 558 inmates from twenty-nine states and the District of Columbia whose death sentences had been commuted. Only six (or one percent) committed another murder while incarcerated.” *Id.* at 507 (footnotes omitted). An earlier study showed that “non-homicide offenders were four times as likely to be rearrested [as non-homicide offenders].” *Id.* at 508. See also ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1983, at 2 (1989) (noting 6.6% recidivism rate for released murderers and 31.9% recidivism rate for released burglars).

⁴⁶⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

⁴⁶⁷ Colb, *supra* note 390, at 785–86 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-7 to -12, at 1454–65 (2d ed. 1988)).

⁴⁶⁸ See *Glucksberg*, 521 U.S. at 721.

⁴⁶⁹ See Echevarría, *supra* note 248, at 497.

challenge? How would they bring it? Could the theory be applied to other types of punishment? The following section will address these questions generally.

A. Who Can Bring the Claim?

As established in section II, family members of people on death row have constitutional rights protected by the Due Process Clause. The Supreme Court has already ruled that the Due Process Clause protects certain family relationships, including parent-child (*Meyers* and *Stanley*), spouses (*Griswold*, *Loving*, and *Michael H.*), and grandparents and extended families (*Moore v. City of East Cleveland, Ohio*). Presumably, anyone in the defendant's immediate family (such as spouses, parents or children) or close extended family (such as grandparents, cousins or aunts and uncles) would have standing to bring a suit enjoining the prosecution of a capital case, on the grounds that it interferes with the constitutionally-protected right to family.

Familial due process rights are entirely separate from a defendant's due process rights; a defendant could not raise a familial due process argument at a sentencing hearing. While it is true that this may be unfair to the death row prisoner who has no family members, I can only reiterate that the right I am discussing is for the family members, not for the prisoner.

B. Challenging Other Types of Punishment

The next obvious question is whether a family member should have standing to challenge punishments other than death, such as lengthy prison terms, that would substantially interfere with his or her familial relationship with the defendant. The answer to that question is: it depends. On the one hand, the death penalty is different in kind from every other form of punishment. "In comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."⁴⁷⁰ No other punishment completely and permanently severs the family relationship.⁴⁷¹

Because the death penalty does permanent harm to the family relationship, the state has an obligation to show that this harm is justified by other legitimate purposes. However, the death penalty completely fails to meet its policy goals and consequently fails a strict scrutiny analysis. Therefore, eliminating the death penalty is a more reasonable solution than eliminating prisons altogether.⁴⁷²

It is more difficult to offer a substantive due process challenge to other forms of punishment because "the degree of arbitrariness . . . adequate to render the death penalty 'cruel and unusual punishment' may not be adequate to invalidate lesser

⁴⁷⁰ *Furman v. Georgia*, 408 U.S. 238, 291 (1972).

⁴⁷¹ *See id.* at 290 ("When a man is hung [sic], there is an end to our relations with him.") (quoting Stephen *Capital Punishment*, 69 FRASER'S MAGAZINE 753, 763 (1864)).

⁴⁷² *See Donnelly, supra* note 245, at 53 ("While one would hesitate to abolish prisons . . . , it is nevertheless a significant question whether capital punishment provides any societal benefits which outweigh its unfair administration.").

penalties.”⁴⁷³ Further, one hopes that states draw other forms of punishment more narrowly so that such punishments are not as manifestly unfair as the death penalty. Unfortunately, this is not necessarily the case. Other forms of punishment also severely interfere with the family relationship and may not withstand a strict scrutiny challenge. For example, one may wish to challenge some of the mandatory drug sentences, which are extremely lengthy, keep the offender away from his or her family for many years, and are arguably not necessary to ensure public safety.

C. The State Can Remedy the Harm from the Death Penalty by Providing Services to Death Row Families.

The state could reduce the harm to death row families by providing services like therapy, counseling, and economic assistance similar to those provided to families of murder victims. This would have been helpful to the family of Abdullah Hameen, especially to his son, who might not have ended up in prison had the state given him counseling or vocational assistance. However, this type of assistance is still not enough. Just as no punishment can restore a victim’s family to wholeness, no amount of state assistance can undo the harm the death penalty causes to an executed prisoner’s family.

D. Viability of the Claim

Admittedly, courts may be reluctant to entertain this substantive due process claim as a challenge to the death penalty due to its novelty. However, the rationale is grounded in long-held constitutional principles and thus should be sufficient to give family members standing to bring suit. If a court refuses to entertain the claim, it will likely not be because the claim lacks solid legal footing, but because the court fears the political repercussions of attacking the death penalty in this manner.

VII. CONCLUSION

As the Supreme Court held in *Furman* in 1972, “punishment must be rational.”⁴⁷⁴ In striking down the death penalty, Justice Brennan stated that the manner in which the penalty was applied was so arbitrary, discriminatory, and irrational, that it violated both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.⁴⁷⁵ Assuming *arguendo* that states have legitimate penological interests in using the death penalty, those interests are not sufficient to withstand a strict scrutiny analysis.

⁴⁷³ *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting)).

⁴⁷⁴ *Beschle*, *supra* note 207, at 492 (citing *Furman*, 408 U.S. at 249 (Douglas, J., concurring), at 274 (Brennan, J., concurring), at 310 (Stewart, J., concurring), at 312–13 (White, J., concurring), at 331 (Marshall, J., concurring) (per curiam)).

⁴⁷⁵ *Furman*, 408 U.S. at 257 n.1 (Brennan, J., concurring).

States' use of the death penalty infringes upon the constitutional rights of death row defendants' families. The harm results not only from the execution, but also from the charging and prosecution of the capital case. The right to family is a long-established fundamental right protected by the Fourteenth Amendment to the Constitution. This right to family is "deeply rooted in this Nation's history and tradition"⁴⁷⁶ and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed."⁴⁷⁷

Because of the fundamental nature of this right, the government may not infringe upon it "unless the infringement is narrowly-tailored to serve a compelling state interest."⁴⁷⁸ The death penalty is not narrowly-tailored because it fails to serve the compelling penological interests for which it purportedly exists—to deter crime, to incapacitate offenders, to restore moral order, and to serve as a form of retribution. Lengthy incarceration, including life in prison without parole, more effectively accomplishes these penological goals with less damage to the family relationship.

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

⁴⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

⁴⁷⁷ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

⁴⁷⁸ *Id.* at 721.