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Why Capital Punishment is No Punishment At All

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Abstract
Capital punishment has generated an incredible amount of public debate. Is the practice constitutional? Does it deter crime? Is it humane? Supporters and opponents of capital punishment disagree on all of these issues and many more. There is perhaps only one thing that unites these two camps: the belief that the death penalty is society's most severe punishment. In this Article, I argue that this belief is mistaken. Capital punishment is not at the top of the punishment hierarchy. In fact, it is no punishment at all. My argument builds from a basic conception of punishment endorsed by the Supreme Court: for something to qualify as a punishment, it must be bad, in some way, for the person who is punished. By drawing upon the philosophical literature regarding death, I show that this is not the case. Contrary to our intuitions, the death penalty is not bad, in any way, for a condemned criminal. This conclusion should not be understood to suggest that death is never bad. In most circumstances, death is bad. There are, however, situations in which it is not, and capital punishment, as employed in the United States penal system, is one such situation. By showing that capital punishment is not bad for the condemned criminal, I provide a strong constitutional objection to the practice.
WHY CAPITAL PUNISHMENT IS NO PUNISHMENT AT ALL

JASON IULIANO*

Capital punishment has generated an incredible amount of public debate. Is the practice constitutional? Does it deter crime? Is it humane? Supporters and opponents of capital punishment disagree on all of these issues and many more. There is perhaps only one thing that unites these two camps: the belief that the death penalty is society's most severe punishment.

In this Article, I argue that this belief is mistaken. Capital punishment is not at the top of the punishment hierarchy. In fact, it is no punishment at all. My argument builds from a basic conception of punishment endorsed by the Supreme Court: for something to qualify as a punishment, it must be bad, in some way, for the person who is punished. By drawing upon the philosophical literature regarding death, I show that this is not the case. Contrary to our intuitions, the death penalty is not bad, in any way, for a condemned criminal.

This conclusion should not be understood to suggest that death is never bad. In most circumstances, death is bad. There are, however, situations in which it is not, and capital punishment, as employed in the United States penal system, is one such situation. By showing that capital punishment is not bad for the condemned criminal, I provide a strong constitutional objection to the practice.

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INTRODUCTION

The death penalty is the worst punishment society can inflict upon one of its members. It is the most powerful act of reprobation—the ultimate sign of condemnation for a fellow human. Politicians have declared it. Scholars have affirmed it. Even the United States Supreme Court has held it to be true.

The claim that death is the ultimate sanction has been repeated so frequently that most simply accept it without question. In this Article, however, I ask whether such acceptance is warranted. My investigation leads me to conclude that it is not. In the U.S. criminal justice system, capital punishment is not actually a punishment. As unintuitive as this claim sounds, the Supreme Court's theory of punishment supports this conclusion.

The particular theory endorsed by the Court is known as retribution, and one of its core principles is that, for something to be a punishment, it must be bad, in some way, for the one who is

1. See, e.g., George Ryan, Governor of Ill., Speech at Northwestern University College of Law (Jan. 11, 2003), http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html (calling capital punishment "the most severe sanction").


4. See infra notes 149–51 and accompanying text.
punished. I argue that the death penalty does not actually meet this
criterion. As practiced in the United States, the death penalty is not
bad, in any way, for the executed individual.

My argument obviously raises the question of what it means for
something to be bad. In answering this, I endorse a widely accepted
philosophical theory of harm. Specifically, this theory holds that
there are three types of harms: (1) intrinsic harms, (2) instrumental
harms, and (3) comparative harms. In this Article, I examine each
category and explain why the death penalty does not qualify for any
of them. My arguments are firmly grounded in the philosophical
debate surrounding the badness of death.

The overwhelming majority of philosophers engaged in this debate
believe that, in some circumstances, death is not bad. In this Article,
I argue that the death penalty is one of these circumstances. If I am
correct that the death penalty is not a punishment within the
Supreme Court's theory of retribution, then the practice has no place
in our criminal justice system, and its continued use is
constitutionally problematic. Specifically, it is a violation of the
Eighth Amendment's proportionality requirement.

In Part I of this Article, I discuss the Supreme Court's two legal
justifications for the death penalty—deterrence and retribution. I
begin by reviewing the empirical literature on the deterrent effects of
the death penalty and showing that this rationale lacks sufficient
support to provide a constitutional basis for the punishment. Next, I
examine the Court's theory of retribution. In Part II, I investigate
whether that theory can provide a constitutional justification for the
death penalty. Ultimately, I conclude that it cannot. Because the
death penalty is not bad for the executed individual, it is not a
punishment within the Court's understanding of the term.

I. LEGAL JUSTIFICATIONS FOR THE DEATH PENALTY

Between 1775 and 1974, more than thirteen thousand people were
put to death in the United States. During this period, the Supreme

5. See infra Part I.B. There are additional generally accepted criteria of a lawful
punishment. For instance, only a legitimate authority can impose punishments, and the
way in which a punishment is bad must be a desired effect of the legitimate authority's
sanction. These other criteria, however, are not relevant to the discussion at hand.

6. It is important to emphasize that this is distinct from the claim that death is
never bad for the person who dies.

7. See infra Part I.B.

8. US Executions from 1608–2002: A Demographic Breakdown of the Executed Population,
Court consistently affirmed the constitutionality of the death penalty.\(^9\) At various points, the Justices did suggest that some forms of execution, such as quartering, might be unconstitutional;\(^10\) however, they never found a problem with capital punishment as actually practiced by the states. Indeed, in 1971, the Supreme Court went so far as to hold that states need not establish standards to govern the jury's imposition of the death penalty in capital cases.\(^11\)

Then, in the 1972 case *Furman v. Georgia,*\(^12\) the Supreme Court reversed course, holding that the death penalty, as then applied, violated the Eighth Amendment's ban on cruel and unusual punishment.\(^13\) *Furman* uniquely divided the Court, yielding nine separate opinions. On top of that, not a single Justice who adopted the majority conclusion joined the opinion of any other Justice. This resulted in five separate concurrences and failed to produce a plurality—much less a majority—opinion.

Despite the inability of the Justices to coalesce behind a single opinion, common rationales ran through the concurrences. Specifically, all five of the Justices who sided with the majority concern expressed concerns over the arbitrary and capricious manner in which the death penalty was being imposed.\(^14\) Whereas Justices Brennan and Marshall would have held that the death penalty was irredeemably unconstitutional, Justices Douglas, Stewart, and White concluded only that the death penalty was unconstitutional as currently practiced.\(^5\) Although these three Justices indicated that no

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9. See, e.g., *In re Kemmler*, 136 U.S. 436, 443 (1890) (holding that execution by electric chair is constitutional because it causes an "instantaneous, and therefore painless, death"). The Court further clarified that "the punishment of death is not cruel[] within the meaning of that word as used in the Constitution. [Cruel] implies there [is] something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* at 447; see also *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (holding that execution by firing squad was not cruel and unusual punishment).


12. 408 U.S. 238 (1972) (per curiam).


14. Justice Potter Stewart gave what was perhaps the most colorful analysis, comparing the arbitrary imposition of the death penalty to being struck by lightning. See *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

existing regimes were constitutional, they left open the possibility that the death penalty could be constitutionally implemented.\textsuperscript{16} Over the next few years, state legislators passed statutes that they hoped would alleviate the Court’s concerns regarding arbitrary sentencing practices.\textsuperscript{17} Criminals sentenced to death under these new guidelines filed appeals challenging the constitutionality of their sentences.\textsuperscript{18} Five of these cases—challenges against statutes in Florida, Georgia, Louisiana, North Carolina, and Texas—were consolidated and formed the basis for the landmark 1976 Supreme Court decision, \textit{Gregg v. Georgia}.\textsuperscript{19} In that case, the litigants urged the Court to go beyond \textit{Furman} and definitively hold that the death penalty is per se unconstitutional.\textsuperscript{20}

The Justices declined to take that path. Instead, Justice Stewart, writing for the \textit{Gregg} plurality, held that capital punishment was not, in itself, cruel and unusual.\textsuperscript{21} Capital punishment failed to meet this threshold because it (1) was compatible with “the evolving standards of decency that mark the progress of a maturing society,”\textsuperscript{22} and (2) “accord[ed] with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’”\textsuperscript{23}

As evidence for the claim that society still supported the death penalty, the plurality noted the extensive legislative reaction to \textit{Furman}.\textsuperscript{24} The Justices found it particularly compelling that, in the four years following \textit{Furman}, the U.S. Congress and thirty-five states enacted new laws allowing for the death penalty.\textsuperscript{25}

Turning to the human dignity prong, the Court wrote that in order to satisfy this condition, the death penalty “cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”\textsuperscript{26} In other words, society’s view of the death penalty as a valid form of punishment, by itself, is insufficient to justify its use; the death penalty must also further the goals of the

\begin{footnotes}
16. \textit{Id.}
18. \textit{See, e.g., id.} at 162.
20. \textit{Id.} at 168
23. \textit{Id.; see also id.} at 179–80, 182, 184, 187.
26. \textit{Id.} at 183.
\end{footnotes}
criminal justice system. The Court specifically acknowledged two such goals: deterrence and retribution.\(^{27}\)

A. Deterrence

According to deterrence theory, punishment is justified by its ability to discourage people from committing crimes.\(^{28}\) There are two main types of deterrence. The first—known as specific deterrence—works by punishing a criminal to dissuade him from committing a crime in the future.\(^{29}\) The theory posits that people who are punished for their illegal actions will be less likely to commit additional crimes. For instance, a drunk driver who is arrested and has his license temporarily revoked will be less inclined to drink and drive again. The memory of these negative experiences will act as a strong deterrent against future transgressions. For obvious reasons, the death penalty is a surefire method of specific deterrence. After all, criminals who are executed are incapable of committing any additional crimes.

Specific deterrence, however, is not normally what people are referring to when they speak of the death penalty’s deterrent effects. Instead, they mean general deterrence. Whereas specific deterrence works on the actual criminal, general deterrence focuses on would-be criminals.\(^{30}\) This form of deterrence works by discouraging people who observe how others are punished from committing their own crimes.\(^{31}\) For example, a person who knows that murderers are severely punished will be less likely to kill someone than a person who is not aware that murderers are severely punished.

\(^{27}\) Id. Some lower courts have claimed that the incapacitation of dangerous criminals is another possible justification for capital punishment. See, e.g., Commonwealth v. O’Neal, 339 N.E.2d 676, 685–86 (Mass. 1975); People v. Anderson, 493 P.2d 880, 896 (Cal. 1972). However, I will not explore this justification for two reasons: (1) because the Supreme Court has not endorsed this rationale, and (2) because it is generally accepted that life without parole serves the ends of incapacitation just as well.


\(^{29}\) Deterrence Theory, 1 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 233–34 (Mary Bosworth ed., 2005) [hereinafter Deterrence Theory].

\(^{30}\) Id. at 233.

\(^{31}\) Id.
When the Supreme Court asserted that deterrence was a legitimate basis on which to defend capital punishment, it was primarily concerned with general deterrence. Indeed, the Justices examined the existing literature in an effort to determine whether the death penalty has any general deterrent effects and ultimately found that the literature was "inconclusive." Basing their evaluation of the empirical evidence on a since widely discredited study by Isaac Ehrlich, the Court wrote that "there is no convincing empirical evidence either supporting or refuting" the view that the death penalty functions as a "greater deterrent than lesser penalties."

Since the Court's decision in Gregg, many scholars have analyzed the deterrent effect of the death penalty, and the overwhelming majority of them have concluded that capital punishment does not

32. Gregg, 428 U.S. at 185–86.
33. Id. at 184–85.
35. Gregg, 428 U.S. at 185.
deter crime. Only a small number of economists have found a correlation between the number of executions and the homicide rate. However, these studies have been fiercely criticized and fail to reflect the consensus that has emerged in the academic community.


38. See, e.g., Deterrence Theory, supra note 29, at 236 (“Collectively, the empirical results of the death penalty studies have concluded that the death penalty does not deter murder.”).
In particular, these pro-deterrence studies have been attacked on the grounds that they omit key variables, that they use certain econometric techniques incorrectly, and that minor changes in their regression models produce wildly different findings.  

In a piece published in the *Stanford Law Review*, John Donohue and Justin Wolfers evaluated a study that claimed each execution prevents, on average, eighteen murders and that the margin of error was plus or minus ten (i.e. a ninety-five percent confidence interval between twenty-eight and eight murders). Using the exact same dataset, but with standard adjustments to the regression specifications, Donohue and Wolfers estimated the margin of error to be slightly more than one hundred. This means that, with a very minor tweak, the ninety-five percent confidence interval balloons to a range of 119 lives saved per execution and eighty-two additional lives lost. Although the actual truth almost certainly lies within this interval, this is hardly a finding that should convince legislators to support capital punishment.

Other prominent studies purporting to find a deterrent effect have similar flaws. One such case is the 2003 article by H. Naci Mocan and R. Kaj Gittings that examined 6,143 death sentences between 1977 and 1997. Their analyses showed that each additional execution decreases the number of homicides by five and that each additional commutation increases the number of homicides by five.

Two other scholars who subsequently reviewed Mocan and Gittings’s data found that, after making minor changes to the variables in the regression model, all the deterrent effects disappear. For instance, the simple act of removing Texas from the dataset completely eliminates any observable deterrent effect of the death penalty.

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40. See Donohue & Wolfers, *supra* note 39, at 813–16 (reviewing Dezhbakhsh et al., *supra* note 37).

41. See id. at 834–35.


43. See Mocan & Gittings, *supra* note 37, at 460.

44. See id. at 456.


46. See Berk, *supra* note 39, at 321, 323 (arguing that Mocan and Gittings’s
The deterrent effect also disappears when more accurate execution figures are used in the dataset. In their study, Mocan and Gittings compiled a statistic they called "risk of execution." This variable is the number of executions divided by the number of death sentences six years earlier. Because of the impossibility of dividing by zero, Mocan and Gittings coded years with no death sentences as 0.99. If, however, the authors had used a figure that more closely approximates zero (such as 0.01), they would not have found any deterrent effects. Other minor changes, such as dividing by the number of death sentences two years prior rather than six years prior, also eliminate statistical significance. Ultimately, the fact that these small alterations have such large effects on the estimated deterrent effects suggests that we should be wary of relying upon Mocan and Gittings's conclusions.

Although these pieces have their methodological shortcomings, some studies go well beyond that and exhibit a profound lack of sophistication. One study discussed favorably by several news outlets concluded that every execution saves seventy-four lives. However, the researchers who advanced this claim failed to control for any variables. Instead, they merely charted the number of executions and the number of murders per year between 1979 and 2004 and observed that, in years with more executions there were fewer

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47. Mocan & Gittings, supra note 37, at 459.
48. Id.
49. See Fagan, supra note 39, at 309.
50. See id. (noting that once this substitution is made "deterrence is no longer statistically significant").
51. See id. at 310 (explaining why lagging the variable by two years makes more sense than lagging it by six years).
52. See id. ("The sensitivity of these analyses to alternate specifications undermines the claims by MG of robust deterrence findings.").
54. Farai Chideya, Does Death Penalty Deter Crime?, NAT'L PUB. RADIO (Nov. 20, 2007, 9:00 AM), http://www.npr.org/templates/story/story.php?storyid=16468497 (interviewing Cass Sunstein, who described Adler and Summers's findings as "way out of line compared to [] other studies" and noted that their study does not "control for confounding variables").
murders and vice versa. Given the crudeness of this model, it is easy to understand why other scholars have not found the study credible.

Once the flaws in the pro-deterrence studies are understood, it becomes much harder to accept their conclusions. Thus, we are left with two possibilities. One option is to reserve judgment and maintain that, at least as of yet, there is little or no evidence that the death penalty has a deterrent effect. The other option is to conclude that the death penalty has no deterrent effect. Most criminologists who have considered the matter have adopted this latter position.

A 2008 survey found that eighty-eight percent of leading criminologists believe that, according to the best empirical evidence available, the death penalty does not deter crime. Only 9.2 percent of the survey's respondents think that the death penalty significantly reduces the number of homicides. Further, seventy-five percent of criminologists believe that the death penalty debate is a distraction that prevents the government from enacting real solutions to fight crime.

Despite the overwhelming evidence and general consensus among scholars that the death penalty does not lower the murder rate, most Americans still support capital punishment. In a 2014 Gallup poll, sixty-three percent of adults favored the death penalty for persons convicted of murder, and only thirty-three percent opposed it.

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55. See Adler & Summers, supra note 37 ("There seems to be an obvious negative correlation [between the number of executions and murders] in that when executions increase, murders decrease, and when executions decrease, murders increase.").

56. See, e.g., Michael L. Radelet & Traci L. Lacock, Do Executions Lower Homicide Rates?: The Views of Leading Criminologists, 99 J. CRIM. L. & CRIMINOLOGY 489, 498 (2009) (calling the Adler and Summers study "astonishingly simple"); Chideya, supra note 54 (quoting Cass Sunstein as saying the study is "entitled to very little weight").

57. Even this milder conclusion provides a strong basis on which to reject the death penalty's deterrent value. See Robert A. Pugsley, A Retributivist Argument Against Capital Punishment, 9 HOFSTRA L. REV. 1501, 1509 (1981) (arguing that the burden of proof should be on those who defend capital punishment and that "[o]nly a moral theory which places no or negligible value on individual human life" would permit otherwise).

58. See id.; see also Michael L. Radelet & Ronald L. Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. CRIM. L. & CRIMINOLOGY 1, 7 (1996) (finding that 83.6 percent of criminologists believe that the death penalty does not lower the homicide rate).

59. Radelet & Lacock, supra note 56, at 502; see also Radelet & Akers, supra note 58, at 7 (finding that 86.5 percent of criminologists agree with the statement "abolishing the death penalty [in a particular state] would not have any significant effects on the murder rate [in that state]"). Additionally, "fewer than [ten percent] of the polled experts believe the deterrence effect of the death penalty is stronger than that of long-term imprisonment." Radelet & Lacock, supra note 56, at 503.

60. See Radelet & Lacock, supra note 56, at 502.

result is not an outlier. In fact, surveys have consistently shown that, for nearly all of the past one hundred years, a majority of Americans have supported the death penalty. More interestingly, people claim to hold this view precisely because they believe it prevents murders.

Why is this the case? Why, despite all the evidence to the contrary, do citizens continue to believe that the death penalty deters crime? The answer is simple—confirmation bias. This psychological failure is the human tendency to seek out or interpret information in such a way that it confirms one's existing beliefs. Confirmation bias explains the evaluative process that Americans engage in when they examine whether capital punishment has a deterrent effect.

Americans arrive at the death penalty debate already possessing entrenched sentiments for or against the practice. When presented with a new study, the average person does not evaluate it from an unbiased perspective. Instead, he compares its conclusions with his current beliefs. If the study supports his preferred position, he accords the

62. See, e.g., Peter Moore, Poll Results: The Death Penalty, YOUGov (May 5, 2014, 11:38 AM), https://today.yougov.com/news/2014/05/05/poll-results-death (finding that [sixty-five percent] of Americans support the death penalty); Shrinking Majority of Americans Support Death Penalty, PEW RES. CTR. (Mar. 28, 2014), http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty (finding that fifty-five percent of Americans support the death penalty for persons convicted of murder and only thirty-seven percent were opposed).


64. See, e.g., Tom Kuntz, Killings, Legal and Otherwise, Around the U.S., N.Y. TIMES, Dec. 4, 1994, at E3 ("[Fifty-seven] percent of [New York State registered voters polled] said they thought the death penalty would deter other criminals from killing.").

65. Id.

66. See, e.g., Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 REV. GEN. PSYCHOL. 175, 175 (1998) ("Confirmation bias, as the term is typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."). For an in-depth discussion of the various operational definitions of confirmation bias, see Joshua Klayman, Varieties of Confirmation Bias, 32 PSYCHOL. LEARNING & MOTIVATION 385, 385–87 (1995).

67. See Charles W. Thomas, Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion, 30 VAND. L. REV. 1005, 1029 (1977) ("The lack of an actual deterrent effect [in the research] leads to the conclusion that much of the support for the death penalty is not based upon a reasonable, informed assessment of the best available contemporary evidence. The strong support appears instead to be the consequence of an uninformed and far too generous assessment of the deterrent effect of the death penalty.").

68. See Klayman, supra note 66, at 386–87 (explaining that hypothesis development involves interpreting new data based on an initial belief).
study significant weight; however, if the study reaches a disfavored conclusion, he quickly dismisses it.\textsuperscript{69} This process is the most succinct way to explain the disconnect between the persistent academic conclusion that the death penalty fails to reduce crime and the American public’s conclusion that the death penalty acts as a powerful deterrent. This explanation also has strong empirical support.

In a classic psychology experiment, researchers demonstrated how confirmation bias affects people’s ability to analyze death penalty studies in a neutral manner.\textsuperscript{70} For the experiment, the authors recruited a group of forty-eight Stanford undergraduates, half of whom supported the death penalty and half of whom opposed it.\textsuperscript{71} Each subject was presented with two fictitious death penalty studies—one showing a strong deterrent effect and another showing no deterrent effect—and asked to evaluate the research designs.\textsuperscript{72} As the researchers predicted, the participants perceived the study that supported their views as scientifically valid and perceived the study that contradicted their views as deeply flawed.\textsuperscript{73}

Notably, after reading the two competing studies, the participants did not moderate their views. Instead, they actually expressed more confidence in their original positions; proponents reported that they viewed the death penalty even more favorably and opponents reported that they viewed it even less favorably.\textsuperscript{74} This polarization effect suggests that a more-informed public will not necessarily reach a more-informed conclusion. In fact, providing additional information to the public may actually backfire if people only attend to the studies that confirm their preexisting positions.\textsuperscript{75}

All of this strikes at a much more fundamental problem with the death penalty debate. The simple truth is that, for the average

\begin{footnotesize}
\textsuperscript{69} See, e.g., Silvia Knobloch-Westerwick & Jingbo Meng, \textit{Looking the Other Way: Selective Exposure to Attitude-Consistent and Counterattitudinal Political Information}, 36 \textit{COMM. RES.} 426, 440–45 (2009) (finding that people pay closer attention to information with which they agree).

\textsuperscript{70} See Charles G. Lord et al., \textit{Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence}, 37 \textit{J. PERSONALITY \& SOC. PSYCHOL.} 2098, 2100–06 (1979).

\textsuperscript{71} \textit{Id.} at 2100.

\textsuperscript{72} \textit{Id.} at 2100–01.

\textsuperscript{73} \textit{Id.} at 2101–02.

\textsuperscript{74} \textit{See id.} at 2103–04 (finding that subjects exhibited a high degree of attitude polarization).

\end{footnotesize}
American, the accuracy of these deterrence studies is irrelevant. Certainly, some people claim to support the death penalty solely because they believe it reduces crime. In the 2000 presidential debates, George W. Bush counted himself among this group when he said, “I think the reason to support the death penalty is because it saves other people’s lives . . . . That’s the only reason to be for it.” 76 Likewise, Nobel Laureate Gary Becker wrote, “I support the use of capital punishment for persons convicted of murder because, and only because, I believe it deters murders.” 77

Maybe President Bush and Professor Becker are correct in their assessments of their own views. Perhaps, if they were presented with definitive proof that the death penalty does not reduce crime, they would alter their positions and oppose capital punishment. However, for most Americans, this is not the case. Despite consistently reporting that deterrence is a fundamental—perhaps the most fundamental—reason for supporting the death penalty, 78 most Americans report that they would not change their position if conclusive evidence proved they were wrong about its deterrent effects. 79 This holds true in both directions. Proponents would

78. See, e.g., Timothy J. Flanagan & Edmund F. McGarrell, *Sourcebook of Criminal Justice Statistics—1985* 183 (1986) (indicating that deterrence was the primary justification for capital punishment across many demographics in the United States); Dov Cohen, *Law, Social Policy, and Violence: The Impact of Regional Cultures*, 70 J. PERSONALIT & SOC. PSYCHOL. 961, 970 (1996) (discussing a Media General poll that found that seventy-three percent of respondents reported deterrence as the main justification for the death penalty, while only seventeen percent said the main justification was to punish the offender); Charles W. Thomas & Samuel C. Foster, *A Sociological Perspective on Public Support for Capital Punishment*, 45 AM. J. ORTHOPSCHIATRY, 641, 655 (1975) (concluding that it is “likely that people support severe punishment, capital punishment included, because they view punishment as a problem-solving approach to what they feel are rising rates of crime and increasing probabilities of victimization”); Thomas, *supra* note 67, at 1029 (“The controlled analysis conducted in this study suggests that public support of capital punishment stems largely from the conviction of many citizens that this and other kinds of punishment serve the utilitarian goal of deterrence.”); see also Neil Vidmar, *Retributive and Utilitarian Motives and Other Correlates of Canadian Attitudes Toward the Death Penalty*, 15 CANADIAN PSYCHOLOGIST 337, 345 (1974) (showing that a plurality of Canadians give primary consideration to deterrence when deciding whether to support or oppose the death penalty).
continue to support the death penalty in the absence of a deterrent effect and opponents would continue to oppose the death penalty, even if it lowered the murder rate. Members of the public arrive at the debate with preexisting conclusions, and deterrence studies have little, if any, ability to change their minds.

People's steadfast adherence to their initial positions seems rather surprising. After all, for much of the past fifty years, deterrence was the most cited reason for supporting the death penalty. If people cared that deeply about the deterrent effects, why do they state that they would continue to support the death penalty even if it did not deter any crime?

There seem to be two possibilities. First, people may view deterrence as an important reason for supporting the death penalty but feel that other factors outweigh its absence. Alternatively, deterrence may serve as a post hoc justification for supporting the death penalty, rather than an antecedent reason for doing so.

In his *Harvard Law Review* article, The Secret Ambition of Deterrence, Dan Kahan presents a compelling case for this latter explanation. Specifically, he shows that people use deterrence rhetoric to justify—but not to inform—their stance on the death penalty. As Kahan writes, “Deterrence Doesn’t Matter.” Instead, people form
a belief in the rightness or wrongness of the death penalty based upon their retributivist sentiments. 84

If "[d]eterrence [d]oesn't [m]atter," it seems odd that it drives the death penalty debate. Kahan, however, has a compelling answer to this puzzle. He argues that "[c]itizens resort to deterrence rhetoric in response to norms, principles, and strategic interests that enjoin them to minimize conflict and expressions of disrespect in their face-to-face interactions with those who harbor cultural commitments that differ from their own." 85 In other words, deterrence rhetoric is a method of managing public discourse; it allows people to engage in a civil, orderly discussion about the death penalty without forcing them into the uncomfortable and socially undesirable position of challenging their opponents' moral convictions. 86 Whereas a debate about retribution is necessarily a dispute over the very nature of morality, a debate about deterrence is simply a factual dispute over the empirical data. 87

Since it is far more socially acceptable to accuse someone of being factually mistaken than it is to accuse someone of being morally deficient, deterrence rhetoric continues to dominate the death penalty debate. 88 This situation persists even though the disagreement is really about which moral norms should govern and, more specifically, the degree to which retributivist principles should be adopted.

84. See id. at 418 ("Although prominent on both sides of [the death penalty debate], deterrence arguments don't genuinely explain why most citizens hold the positions they do... . What does are citizens' understandings of how [the death penalty debate] cohere[s] with the more general moral commitments of the social groups that they favor and despise, and what particular resolution[] of [this issue] would express about the status of these groups in American society.").

85. Id. at 418–19.

86. See id. at 435.

87. See id. at 446.

The conventional expressive arguments on the death penalty are pregnant with accusation: if I favor the death penalty because it's essential to vindicating the worth of the victim, then you must be against it because you don't sufficiently appreciate her worth and overvalue the worth of the wrongdoer; if I oppose the death penalty because it is administered in a way that devalues the lives of African Americans, then you must be for it because you are a racist. In contrast, if I claim to be for/against the death penalty because it is/is not the penalty most likely to protect lives—a claim that is abstract enough to fit within essentially all recognizable cultural and ideological commitments—then I can be seen as saying only that you are factually misinformed, rather than morally obtuse, for feeling otherwise.

Id.

88. See id. at 433 ("Stated at a high level of abstraction, the idea that the law should promote security but avoid futility is unlikely to offend any group's deeply held values.").
Many academics have reached this conclusion as to why deterrence plays such an outsized role in the death penalty debate. Legal scholars Neil Vidmar and Phoebe Ellsworth presented a concise restatement of this position when they wrote, "[E]xpressed belief in deterrent efficacy may be seen by proponents as the most socially acceptable justification for favoring the death penalty and thus may be used as a cover for other, less acceptable reasons."  

Other researchers have likewise argued that deterrence rests upon a "statistical/scientific" explanation [that] is perceived as more 'rational,' [and] hence more 'legitimate,'" than unadorned appeals to values. Again, "the belief in deterrence is seen as more 'scientific' or more socially desirable than other reasons; people mention it first because its importance is obvious, not because its importance is real." People make deterrence arguments not because they are persuaded by them, but rather, because the scientific nature of the claim provides a seemingly more rational and socially acceptable foundation from which to espouse their position. It is simply easier to claim that a murderer should be executed because it deters crime than to say, "the bastard deserves it."  

In short, deterrence is not a sound constitutional justification for the death penalty for two reasons. First, the empirical data overwhelmingly suggests that the death penalty does not have a deterrent effect. Second, people's sentiments towards the death penalty are not influenced by the existence of or lack of a deterrent effect. The focus on deterrence obfuscates the true disagreement over the death penalty and, in the process, prevents the public from having an honest discussion about the practice's merits. Ultimately, deterrence cannot serve as a pillar on which to support the death penalty. In the rest of

91. Ellsworth & Ross, supra note 79, at 149.
92. See Stolz, supra note 90, at 176 ("The academic debate over whether the death penalty deters crime provides an aura of rationality, and hence legitimacy, for the legislative process.").
93. Id.
94. Even if the death penalty had a deterrent effect, that, standing alone, would be insufficient to place capital punishment on firm constitutional footing. See Donna H. Lee, Resuscitating Proportionality in Noncapital Criminal Sentencing, 40 ARIZ. ST. L.J. 527, 532 (2008) ("Regardless of how well a particular sentence may deter crime or incapacitate criminals, sentences that bear no retributivist resemblance to the offenses they purport to punish violate Eighth Amendment proportionality.").
this Article, I argue that retribution is likewise incapable of providing a constitutional justification for capital punishment.

B. Retribution

In Gregg v. Georgia, the Supreme Court held that retribution (also known as retributivism) is another justification for the death penalty. Retribution can mean many things. To some, it is synonymous with paying one's debt to society; to others, it means revenge; and yet to others it is simply a shorthand way of describing the method used to deter vigilant justice. In public discourse, people use the term to signify a variety of concepts. Indeed, the philosopher John Cottingham famously advanced nine distinct understandings of retribution.

Despite the public's diverse use of the term, most philosophers have coalesced around a unified conception of retribution—namely that criminals should be punished because, and only because, they deserve it. According to this view, punishment is entirely retrospective. A retributivist looks to the past and assigns a

95. 428 U.S. 153 (1976) (plurality opinion).
96. Id. at 183–84. In recent decisions, several Justices have gone so far as to argue that retribution should be the primary rationale for the death penalty. See Baze v. Rees, 553 U.S. 35, 79–80 (2008) (Stevens, J., concurring) (plurality opinion) (observing that, in the absence of empirical support for the death penalty's deterrent effect, "we are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty"); Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (plurality opinion) (writing that "retribution provides the main justification for capital punishment").
97. Under this conception, the criminal is viewed as having taken unfair advantage of the law-abiding members of society. By enduring a state-imposed punishment, the criminal pays back his debt and restores the status quo that existed prior to the crime. See Herbert Morris, Persons and Punishment, 52 MONIST 475, 477–78 (1968).
98. Gregg, 428 U.S. at 183–84.
99. See id. at 183 (declaring that, in an ordered society, retribution is necessary to inspire confidence in legal processes and discourage reliance on self-help).
100. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949–1953 REPORT, 1953, Cm. 8932, at 17 (U.K.) (observing that "[d]iscussion of the principle of retribution is apt to be confused because the word is not always used in the same sense"); see also Don E. Scheid, Kant's Retributivism, 93 ETHICS 262, 262 (1983) (noting that the term "retributivism" has had diverse meanings over time).
102. See MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 87 (2010) ("Retributivism . . . is the view that punishment is justified by the desert of the offender.").
punishment based solely on the wrongdoer’s immoral actions.\textsuperscript{103} Prospective concerns—such as deterring crimes and satisfying the victim’s desire for revenge—are irrelevant to the retributivist calculus. The Supreme Court has generally endorsed this understanding of retribution.\textsuperscript{104} Therefore, it is worth exploring further.

Imagine that a young man named Gary robs a convenience store in your town.\textsuperscript{105} During the attempted escape, Gary shoots and kills a police officer who was responding to the crime scene. Ultimately, Gary is apprehended by another officer, and at trial, the jury convicts him of felony murder.\textsuperscript{106} Prior to sentencing, Gary inherits a sizable fortune from his uncle. The fortune is so large that we can be sure that he will never commit another crime. Accordingly, state-imposed punishment is not necessary to prevent Gary from engaging in future criminal activity. In other words, specific deterrence cannot justify punishment in this case.

Suppose further that, in the interests of general deterrence, Gary will pretend to be punished. At regular intervals, he will report to prison to be filmed in a jumpsuit in order to give society the impression that he is serving a lengthy prison sentence. In reality, Gary will be living a luxurious life on his own private island and will use his vast fortune to ensure that the ruse is never discovered. In this scenario, the goals of general deterrence are satisfied, and society’s desire for revenge is satisfied. On top of that, the ruse costs the state less than if it had actually imprisoned Gary. With this in mind, is there any reason left to punish Gary?

Most people think so.\textsuperscript{107} They have a strong intuition that fairness demands Gary receive his just deserts and that only by actually

\textsuperscript{103} E.g., Lode Walgrave, Restorative Justice, Self-interest and Responsible Citizenship 59 (2008).
\textsuperscript{105} This example is drawn from Moore, supra note 102, at 99–101.
\textsuperscript{106} For a discussion of the felony murder rule, see Guyora Binder, Making the Best of Felony Murder, 91 B.U. L. Rev. 403, 413 (2011) (defining felony murder as a punishment for some unintended homicides committed during the commission of particular felonies).
\textsuperscript{107} See Moore, supra note 102, at 99 (noting that most people’s initial reaction is an “intuitive judgment” that calls for the punishment of such crimes); Jeffrie G. Murphy, Hatred: A Qualified Defense, in Forgiveness and Mercy 88, 90 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (describing this strong emotional judgment as “retributive hatred”).
imposing punishment can society fulfill this requirement. Under this view, even if no other benefits will follow, the State is morally required to punish Gary for the simple reason that he deserves it. This idea is the central feature of retribution.

Although the above example illustrates this theory of punishment, it will prove helpful to identify specific criteria. In particular, there are three main principles that define retribution:

It is intrinsically morally good—good even in the absence of any other goods—when the State imposes a just punishment on someone who has committed a legal offense.

It is intrinsically morally bad—bad despite any other goods that may follow—to punish an innocent person or to inflict a disproportionate punishment on a guilty person.

A just punishment must be proportional to the severity of the crime committed.

The first principle is a positive claim. It indicates the appropriate actions that should be taken against those who have committed crimes. Specifically, the principle states that it is good, for its own sake, when a criminal is punished. In contrast to the first principle, the second principle presents a negative claim. It outlines what actions must not be done. According to this principle, the State may neither punish innocent people nor punish guilty people more severely than their crimes warrant. This principle holds even if substantial benefits

108. See, e.g., James Rachels, Punishment and Desert, in ETHICS IN PRACTICE 470, 470 (Hugh LaFollette ed., 1997) ("Retributivism—the idea that wrongdoers should be ‘paid back’ for their wicked deeds—fits naturally with many people’s feelings.").

109. See, e.g., Jeffrie G. Murphy, Legal Moralism and Retribution Revisited, 80 PROC. & ADDRESSES AM. PHIL. ASS’N 45, 52 (2006) (defining a retributivist as "a person who believes that the primary justification for punishing a criminal is that the criminal deserves it").


111. Id.

112. See Stanley I. Benn, Punishment, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 30 (Paul Edwards ed., 1967) ("[R]etributivists . . . maintain that the punishment of crime is right in itself, that it is fitting that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment. This, however, is not to justify punishment but, rather, to deny that it needs any justification. . . . Its intrinsic value is appreciated immediately or intuitively."); MOORE, supra note 102, at 87–88 ("[T]he good that punishment achieves is that someone who deserves it gets it. Punishment of the guilty is thus for the retributivist an intrinsic good, not the merely instrumental good that it may be to the utilitarian or rehabilitative theorist.").

113. Walen, supra note 110. See HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 436 (1979) (Positing that a disproportionate punishment is necessarily a punishment without guilt and is, therefore, prohibited); IMMANUEL KANT, THE METAPHYSICS OF
would follow from its violation. For instance, it would be morally impermissible for the State to imprison a man for nineteen years for stealing a loaf of bread, even if it could be shown that doing so would prevent all future robberies. Prospective considerations are not relevant to the retributivist calculus. If a person does not deserve to be punished, he may not, under any circumstances, be punished. Finally, the third principle of retribution helps locate the appropriate sanction for a crime. It achieves this by requiring that punishments be proportional to the crimes committed.

For more than a century, the Supreme Court has upheld all three of these retributivist principles: (1) the guilty must be punished, (2) the innocent must not be punished, and (3) punishments must satisfy the demands of proportionality. For our purposes, the third criterion is the most important. According to the Court, for a punishment to be proportional, it must be equal in severity to the crime that was committed. This means that wrongdoers may only

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114. See Moore, supra note 102, at 87 ("The good that is achieved by punishing, on this view, has nothing to do with future states of affairs, such as the prevention of crime or the maintenance of social cohesion.").

115. See Roberts v. Louisiana, 428 U.S. 325, 358 (1976) (White, J., dissenting) ("It is axiomatic that the major justification for concluding that a given defendant deserves to be punished is that he committed a crime."); Scheid, supra note 100, at 262 (stating that in retributivist theory, "concern for crime control is not morally relevant to the justification of punishment. . . . Whether a person may be punished and, if so, to what extent are questions to be decided solely by reference to one's past legal offense.").

116. Robert S. Gerstein, Capital Punishment—"Cruel and Unusual"?: A Retributivist Response, 85 ETHICS 75, 77 (1974) ("The purpose of punishment is to restore the balance of justice within the community, not further to derange it.").

117. See Rita v. United States, 551 U.S. 338, 347-48 (2007) ("[A] sentence [must] reflect the basic aims of sentencing, namely, (a) 'just punishment' (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation."); United States v. LaBonte, 520 U.S. 751, 779 (1997) (Breyer, J., dissenting) (observing that "the basic goals of punishment" are "deterrence, incapacitation, just deserts, [and] rehabilitation"); Solem v. Helm, 463 U.S. 277, 286 (1983) ("The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century."); Bullington v. Missouri, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) (describing the sentencing phase as an opportunity for the judge to "mete out just deserts").

118. See Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender."); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution
be punished to the degree they deserve.\textsuperscript{119} Or, in the words of the Court, criminals must get their “just deserts.”\textsuperscript{120}

As Justice White wrote, “[T]hose who engage in serious criminal conduct which poses a substantial risk of violence . . . deserve serious punishment.”\textsuperscript{121} By extension, those who engage in minor criminal conduct that poses only a minimal risk of harm deserve lesser punishments.\textsuperscript{122} Although the Court’s formulation provides a general principle, it does not completely clear up the meaning of proportionality.

Fortunately, work in philosophy can point us to a more concrete understanding of the term. Philosophers have identified two basic senses of proportionality: cardinal and ordinal. Cardinal proportionality requires absolute parity between the severity of the crime and the severity of the punishment.\textsuperscript{123} Ordinal proportionality, by contrast, requires only relative parity between the two.\textsuperscript{124} This rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”); Rhodes v. Chapman, 452 U.S. 357, 377 (1981) (Marshall, J., dissenting) (“A society must punish those who transgress its rules. When the offense is severe, the punishment should be of proportionate severity.”).

\textsuperscript{119} See Solem, 463 U.S. at 284 (“The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.”).

\textsuperscript{120} See Enmund v. Florida, 458 U.S. 782, 801 (1982) (opining that a criminal’s punishment must comport with the individual’s participation in and moral responsibility for the crime. “Putting [someone] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”); see also Graham v. Florida, 560 U.S. 48, 50, 68 (2010) (establishing that “defendants who do not kill, [or] intend to kill . . . are categorically less deserving” of harsher penalties than murderers, and juveniles are similarly “less deserving of the most serious forms of punishment” because of their “lessened culpability” (emphasis added)); Atkins, 536 U.S. at 312–13 (emphasizing the need for an individual’s punishment to be tailored to his personal responsibility); Penry v. Lynaugh, 492 U.S. 302, 326 (1989) (discussing whether a mentally retarded individual who had been convicted of murder “deserve[d] to be sentenced to death” or “was not sufficiently culpable to deserve the death penalty”), abrogated by Atkins v. Virginia, 536 U.S. 304 (2002); United States v. Chouteau, 102 U.S. 603, 609 (1880) (“[T]he guilty parties [who committed a series of stupendous frauds] deserve severe punishment.”).

\textsuperscript{121} Lockett v. Ohio, 438 U.S. 586, 626 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court).

\textsuperscript{122} See Graham, 560 U.S. at 50.

\textsuperscript{123} See Andrew von Hirsch, Proportionality in the Philosophy of Punishment, 16 CRIME & JUST. 55, 83 (1992) (“Cardinal proportionality requires that a reasonable proportion be maintained between overall levels of punitiveness and the gravity of the criminal conduct.”).

\textsuperscript{124} See id. at 79 (“Ordinal proportionality is the requirement that penalties be scaled according to the comparative seriousness of crimes.”).
simply means that more severe crimes must be punished more severely and less severe crimes must be punished less severely. It says nothing, however, regarding the appropriate, absolute severity of the punishment. To put it briefly, cardinal proportionality deals with “the scale’s overall magnitude and anchoring points,” and ordinal proportionality deals with “the internal structure of a penalty scale.”125

For much of the past, cardinal proportionality dominated. Some of its most noteworthy incarnations are the Biblical principle of lex talionis126 and Hammurabi’s Code.127 Immanuel Kant, perhaps this position’s most notable defender,128 summarizes it as follows: “[W]hatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”129 In short, lex talionis “requires imposing a harm on a criminal identical to the one he imposed on his victim.”130

Although this doctrine may seem plausible in certain circumstances—indeed, proponents of the death penalty frequently invoke this conception of punishment to justify their claim that murderers should be executed131—its dictates are difficult to apply in many situations and are downright impossible in others. Consider the appropriate punishment for a man who kidnaps a child. Should society kidnap that man’s child? If so, what should be done if he is childless? Or consider a woman who steals twenty dollars. Is justice

125. Id. at 76.
126. CONCISE OXFORD ENGLISH DICTIONARY 820 (Angus Stevenson & Maurice Waite eds., 12th ed. 2011) (defining lex talionis as “the law of retaliation, whereby a punishment resembles the offence committed in kind and degree”); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 825 (Jess Stein & Laurence Urdang eds., 1966) (likewise defining lex talionis as “the principle or law of retaliation that a punishment inflicted should correspond in kind and degree to the offense of the wrongdoer. . . .”).
128. See Benn, supra note 112, at 30 (calling Kant “[t]he most thoroughgoing retributivist[]”).
129. KANT, METAPHYSICS OF MORALS, supra note 113, at 141.
131. See, e.g., IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 139, 141 (John Ladd trans., Hackett Publ’g Co. 1999) (1797) [hereinafter KANT, METAPHYSICAL ELEMENTS] (“If, however, [a person] has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.”).
served simply by taking twenty dollars from her? That outcome seems far too lenient. Nonetheless, a strict conception of *lex talionis* prescribes precisely that punishment.

In light of these deficiencies, some scholars have tried to save the doctrine by altering its precise parity requirement. Kant, for instance, endorsed a version of *lex talionis* that would call for the thief to lose all rights to property, not just the value of what he stole.\(^\text{132}\) Kant believed that, because a thief undermines property rights for everyone, the thief, himself, should be denied property rights.\(^\text{133}\) This modified principle, however, seems far too harsh a punishment for most thefts. After all, in Kant’s own words, such a penalty reduces the thief “to the status of a slave for a certain time, or permanently if the state sees fit.”\(^\text{134}\) Ultimately, such efforts to rework *lex talionis* failed, either because they prescribed punishments that seem patently unreasonable in certain situations, or because they advanced principles that are too imprecise to provide much guidance in selecting punishments for specific crimes.\(^\text{135}\)

Cardinal proportionality may have its problems, but pure ordinal proportionality fares no better. Instead of meting out a punishment that is identical to the crime, an ordinal system begins by circumscribing a set of available punishments. Next, it calls for potential crimes and potential punishments to be ranked by their severity and matched accordingly.\(^\text{136}\) The most severe crime would correspond to the most severe punishment, the second most severe crime would correspond to the second most severe punishment, and so on, all the way down to the point at which the least severe crime corresponds to the least severe punishment.\(^\text{137}\)

\begin{thebibliography}{100}
\bibitem{132} Id. at 139.
\bibitem{133} See KANT, METAPHYSICS OF MORALS, *supra* note 113, at 142 (“Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.”).
\bibitem{134} Id. For other efforts to salvage the doctrine of *lex talionis* see, e.g., Jeremy Waldron, *Lex Talionis*, 34 Ariz. L. Rev. 25, 32–33 (1992) (describing a new understanding of the *lex talionis* principle in which the punishment must be “of the same type” of action as the original offense but need not be “the same act”).
\bibitem{137} Id.
\end{thebibliography}
As intuitive as this approach may seem, ordinal proportionality has a major flaw. By locating the appropriate punishment on a relative scale, the system provides no guidance regarding the absolute severity of the punishment. It only tells us whether a certain crime warrants a more or less severe punishment than another crime, not whether an appropriate punishment for either crime would be life in prison or a ten-dollar fine.

This is a significant problem. Imagine a society that has ranked all crimes and punishments by their severity. So, too, every crime has a matching punishment based on its relative severity. With respect to punishments, this particular society has denoted that the minimum acceptable punishment is twenty years in prison and the maximum acceptable punishment is fifty years in prison. Under this system, petty offenses—such as jaywalking—will result in twenty years in prison. Ordinal proportionality is satisfied, but our sense of justice likely is not. This is the case because ordinal proportionality does not delimit the scope of potential punishments and, therefore, can mandate a punishment that any reasonable person would acknowledge as being disproportionate to the crime committed. For this reason, very few philosophers have defended a strong version of ordinal proportionality.

Instead, most modern retributivist philosophers endorse a mixed account that combines elements of both cardinal and ordinal proportionality. Specifically, they rely on cardinal proportionality to lay out the range of acceptable punishments and to locate several key anchoring points. Then they employ ordinal proportionality to develop the remainder of the penalty scale, analyzing the relative severity of other crimes to locate the appropriate punishments. This approach holds that punishments should be commensurate with, but not necessarily identical to, the crime.

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138. See id. at 202–04.

139. It should be noted that modern versions of cardinal proportionality vary somewhat from the doctrine of *lex talionis*. Whereas *lex talionis* indicates that justice requires a very strong equivalence in both kind and degree between the criminal activity and the mandated punishment, more recent retributivist philosophers emphasize only the “degree” requirement. They generally start from the position that monetary sanctions and imprisonment are the acceptable forms of punishments. This claim precludes the State from imposing a strict “eye for an eye” regime of punishment. Instead, the system may be more closely thought of as requiring equality between the amount of suffering the criminal caused and the amount of suffering he will endure as punishment.


The Supreme Court's decisions most closely adhere to this mixed account of proportionality. Although the Justices have not specified any lower boundary on punishments available to the State, they have relied on the Eighth Amendment to set an upper limit on the severity of punishments. Notably, in \textit{Wilkerson v. Utah}, the Court held that "punishments of torture, such as [drawing and quartering, public dissection, burning alive, and disembowelment] are forbidden by that amendment to the Constitution." According to the Court, the harshest constitutional punishment is the death penalty. As such, it must be reserved for criminals who commit the most heinous crimes (i.e. those involving the taking of another person's life). The Supreme Court has used cardinal proportionality to set a maximum punishment and to endorse the principle that murderers can be killed by the State. Likewise, the Justices have held that sentencing someone to death for a lesser crime would fail the Eighth Amendment's test of proportionality.

The proportionality test, however, goes in two directions. Punishing someone too leniently is, likewise, a severe violation. This conclusion follows from the retributive belief that, not only does society have a right to punish criminals, but criminals, themselves, have a right to be punished. By choosing to punish someone too

\begin{itemize}
  \item\textbf{[A] deserved punishment... does not mean the infliction on the criminal offender of a pain precisely equivalent to that which he has inflicted on his victim; it means rather a 'not undeserved punishment which bears a proportional relationship in a hierarchy of punishments to the harm for which the criminal has been convicted.'); see also Jean Hampton, \textit{The Retributive Idea, in Forgiveness and Mercy} 128, 137 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (arguing for comparability, but not identicalness, between crime and punishment).
  \item 142. \textit{Wilkerson v. Utah}, 99 U.S. 130, 133 (1878).
  \item 143. 99 U.S. 130, 133 (1878).
  \item 144. \textit{Id.} at 136.
  \item 145. \textit{See Gregg v. Georgia}, 428 U.S. 153, 187 (1976) (plurality opinion) ("[W]e must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed."); \textit{see also} \textit{Furman v. Georgia}}, 408 U.S. 238, 286, 304 (1972) (Brennan, J., concurring) ("[R]etribution in this context means that criminals are put to death because they deserve it.").
  \item 146. \textit{See Roper v. Simmons}, 543 U.S. 551, 553 (2005) (plurality opinion) ("Capital punishment must be limited to those offenders... whose extreme culpability makes them 'the most deserving of execution.'" (quoting \textit{Atkins v. Virginia}}, 536 U.S. 304, 319 (2002))).
  \item 147. \textit{See Stanford v. Kentucky}, 492 U.S. 361, 404 (1989) ("A punishment that fails the Eighth Amendment test of proportionality because disproportionate to the offender's blameworthiness by definition is not justly deserved.").
\end{itemize}
leniently, we fail to respect that person's human dignity. Only by handing down a proportionate sanction does society treat that person as a rational being who is responsible for his actions. 149

In the following Part, I argue that the death penalty, as currently imposed, violates the principle of proportionality enshrined in the Eighth Amendment. Drawing upon philosophical theories of harm and death, I show that the death penalty is not nearly as severe as the Court maintains. In fact, as currently practiced, it is not a punishment at all. For this reason, retribution cannot provide a legal justification for the death penalty. In the absence of such a rationale, the Supreme Court has no legal basis on which to uphold the constitutionality of capital punishment.

II. CAPITAL PUNISHMENT IS NOT A PUNISHMENT

The death penalty is the worst possible punishment. 150 This belief is held so widely that the courts have never stopped to consider its truth. It is taken to be so obvious that no justification is necessary. Indeed, on repeated occasions, the Supreme Court has simply proclaimed, without argument, that the death penalty is the “most severe punishment.” 151

If forced to answer why the death penalty merits a place at the top of the punishment hierarchy, what would the Court say? How would the Justices defend their intuition that, “[i]n comparison to all other punishments today ... the deliberate extinguishment of human life by the State is uniquely degrading to human dignity”? 152

Although the Justices do not say much about this issue, it is reasonable to think that they would respond by emphasizing the badness of death. 153 They would likely argue that death is the

149. See KANT, METAPHYSICAL ELEMENTS, supra note 131, at 139.
150. This statement is not to suggest that the death penalty is the worst punishment imaginable. I merely mean that people view the death penalty as the worst possible punishment that society inflicts. See, e.g., Dan Markel, Executing Retributivism: Panetti and the Future of the Eighth Amendment, 103 NW. U. L. REV. 1163, 1175 (2009) (acknowledging the existence of more severe penalties than capital punishment, “such as prolonged inflictions of extreme pain and mental distress imposed upon the defendant leading up to eventual death by torture—or attaching the punishment to the offender’s children, which may effect [sic] a fate worse than death for the offender”).
153. Id. at 287 (“The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in
ultimate punishment because it deprives us of life. Ultimately, life is all we have; without it, we are nothing. Accordingly, death is the greatest loss of all. This is still a bit vague, so it would be useful to specify the precise ways in which something can be bad for us. Taking this step will allow us to see the strongest possible arguments that the Supreme Court could marshal in support of the view that the death penalty is the worst possible punishment.

To start, think of some bad events that have happened in your life so far. Many were probably trivial things like stubbing your toe or getting a paper cut. Perhaps others were more severe, such as losing your wallet or breaking a family heirloom. A few may even have been life changing, such as the death of a parent or spouse. When you really think about it, over the course of your life, you have experienced a wide variety and an incredible quantity of harmful events.

Despite this apparent diversity, philosophers have managed to sort all the potential harms one could experience into three categories. These three categories illustrate the three ways in which any event, the death penalty included, could be bad. First, something can be intrinsically bad for us. Pain is a perfect example of an intrinsic bad; it is something that you work very hard to avoid because of its inherently unpleasant nature. Pain has a direct and observable negative effect on your life. All things equal, you have a very strong preference not to experience it. For this reason, pain is an intrinsic bad.

The second way something can cause harm is by being instrumentally bad for us. Consider, for instance, losing your job. The mere fact that you no longer have to go to work is not bad in itself. Initially, you may even be delighted by the situation. As time goes on, however, bad effects will follow. Without another source of income, your joblessness will lead to poverty and hunger. Because losing your job eventually leads to pain and suffering, it is an instrumental bad.

terms of physical and mental suffering.

155. See KAGAN, supra note 154, at 210.
156. There is philosophical debate over whether events can be intrinsic bads. Some philosophers believe that only experiential states can be intrinsically bad for us; others, however, argue that certain events (such as the occurrence of a headache) are so intimately tied to experiential states that the events themselves are intrinsically bad for us. See, e.g., Dale Dorsey, Headaches, Lives and Value, 21 UTILITAS 36, 37–38 (2009) (arguing that headaches are intrinsically bad). The latter view—that events can be intrinsic bads—allows one to build a stronger case for the badness of the death penalty. Accordingly, I adopt that position for the purposes of this Article.
157. See KAGAN, supra note 155, at 211.
This is not to say that losing your job is always an instrumental bad. Imagine that you are fired from your job. On the following day, you decide to take a walk with your newfound free time. During the walk, you stumble upon a winning lottery ticket that has a payout of one hundred million dollars. It is clear that, in this scenario, losing your job was not instrumentally bad. After all, had you still been working, you would have never stumbled upon the winning lottery ticket.

This nuance illustrates a fundamental distinction between intrinsic bads and instrumental bads. The former are bad by their very nature and should be avoided in their own right. The latter are only bad in virtue of their contingent effects. For this reason, people do not seek to avoid instrumental bads for their own sake, but rather because of the future intrinsic bads that they will bring about.

The third and final way something can harm us is by being comparatively bad. This type of bad is relational. To determine whether a given event is bad, one must compare the state of affairs in a world where the event has occurred with the state of affairs in the closest possible world where the event has not occurred.

Consider the following scenario:

A person (let’s call her Amy) gets into two law schools, Law School A and Law School B. Amy chooses to go to Law School A, which does not have a criminal law clinic. After graduation, she obtains a job as a corporate lawyer. Amy finds her work moderately satisfying and lives a reasonably good life. However, if Amy had chosen to go to Law School B, which does have a criminal law clinic, she would have enrolled in the clinic and discovered that she had a real passion for criminal law. Amy then would have pursued a career at the Department of Justice.

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158. See Roderick M. Chisholm, Objectives and Intrinsic Value, in JENSEITS VAN SEIN UND NICHTSEIN 261, 262 (Rudolf Haller ed., 1972) ("And what do we mean when we say that a state of affairs is intrinsically good, or intrinsically bad—as distinguished from being merely instrumentally good or instrumentally bad? I suggest this: a state of affairs is intrinsically good if it is necessarily good—if it is good in every possible world in which it occurs.").


160. See LUPER, supra note 154, at 7–8 ("Comparativism holds that something is in our interests just when it benefits us or when it would benefit us if it occurred, and that something benefits us just when it makes our lives better than they would have been. Similarly, a thing is against our interests just when it does or would harm us, and it harms us just when it makes our lives worse than they would have been.").

161. This example is adapted from FRED FELDMAN, CONFRONTATIONS WITH THE REAPER 137 (1992).
and eventually become the U.S. Attorney General. The life Amy would have led if she had attended Law School B would have been substantially better than the life she actually did lead.

Amy’s decision to go to Law School A was comparatively bad for her. If she had chosen to go to Law School B, her life would have been unquestionably better. The decision was not bad in an intrinsic or instrumental sense. Keep in mind that she still enjoyed a reasonably good life. Nonetheless, the decision to attend Law School A was comparatively bad for Amy because her life was not as good as it otherwise could have been.

These three categories (intrinsic bads, instrumental bads, and comparative bads) show the three ways in which the death penalty could be bad for the person who is executed. In the following three sections, I will examine each of these possibilities and argue that none of them provide a retributive justification for the death penalty.162

A. Capital Punishment is Not Intrinsically Bad

The most basic argument that one can muster in favor of the badness of the death penalty is simply that it is intrinsically bad—bad in and of itself. Certain forms of the death penalty can be intrinsically bad. Indeed, for much of recorded history, methods of execution were specifically designed to be painful.163 Even more recent forms of the death penalty, such as hanging or lethal gas, are likewise intrinsically bad.164 Today, however, the primary method of
execution in all thirty-five states that sanction the death penalty is lethal injection. Accordingly, since we are concerned with the death penalty as applied in the United States, the question that needs to be examined is whether lethal injection is intrinsically bad.

Every so often a lethal injection goes horribly wrong, and the media presents these rare cases as proof that lethal injection is intrinsically bad. For instance, during a 2014 execution in Ohio, the condemned, Dennis McGuire, experienced “repeated cycles of snorting [and] gurgling . . . , appearing to writhe in pain.” Witnesses reported “[i]t looked and sounded as though he [were] suffocating.” This process continued for twenty-six minutes before McGuire finally went silent and died.

That same year in Oklahoma, Clayton Lockett was executed using an experimental drug protocol. Ten minutes after receiving the first drug, Locket was declared unconscious. The executioners administered the remaining two drugs, but three minutes later, “Lockett began breathing heavily, writhing on the gurney, clenching his teeth and straining to lift his head off the pillow.” He proceeded to speak the words, “Man,” “I’m not,” and “[S]omething’s wrong.” From the time of the first injection, it was forty-three minutes until Lockett died of a heart attack.

immediately and is felt in the arms, shoulders, back, and chest. The sensation is similar to the pain felt by a person during a heart attack, where essentially the heart is being deprived of oxygen.”
As unfortunate as these incidents are, they are quite rare. They also do not address whether a properly administered lethal injection is intrinsically bad. They only show that improperly administered lethal injections can be intrinsically bad.

When a lethal injection is administered correctly, the criminal experiences neither pain nor suffering. This point is so widely accepted that even parties challenging the constitutionality of the death penalty agree that “if administered as intended, [lethal injection] will result in a painless death.” Notably, the overwhelming majority of lethal injections are properly administered. According to a comprehensive study of U.S. executions, this accounts for approximately ninety-three percent of lethal injections.

Although the exact protocols vary among the states, they all begin with the administration of a sedative, such as sodium thiopental, pentobarbital, or midazolam. Historically, most states have used two additional agents designed to paralyze the prisoner—including the diaphragmatic muscles that control breathing—and induce cardiac arrest. The recent trend, however, is to forgo these other drugs and use only a lethal dose of one of the aforementioned sedatives—a process that has been adopted in about half the states.


174. Id.


177. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 120 (2014) (indicating that between 1980 and 2010, about seven percent of lethal injections were botched. Because many of these executions were classified as botched due to relatively minor difficulties, even this figure likely overstates the true number of criminals who suffered intrinsic bads).

178. See id.; see also Austin Sarat et al., Gruesome Spectacles: The Cultural Reception of Botched Executions in America, 1890–1920, 1 BRIT. J. AM. LEGAL STUD. 1, 21 (2012) (categorizing lethal injections as “botched” if any of six criteria are met).

179. For a comprehensive review of each state’s protocols, see State by State Lethal Injection, DEATH PENALTY INFO. CTR., [hereinafter State by State Lethal Injection], http://www.deathpenaltyinfo.org/state-lethal-injection.

180. See Deborah W. Denno, Lethal Injection Chaos Post-Baze, 102 GEO. L.J. 1331, 1333–34 (2014) (“The typical formula...consists of a serial sequence of three drugs: sodium thiopental, a barbiturate anesthetic that brings about deep unconsciousness; pancuronium bromide, a total muscle relaxant that paralyzes all voluntary muscles and causes suffocation; and potassium chloride, a toxin that induces irreversible cardiac arrest.”).

181. See State by State Lethal Injection, supra note 179 (noting that fourteen of the thirty-five states with inmates on death row have adopted a one-drug protocol).
Doctors believe that this method further reduces the opportunity for botched executions and thereby better ensures that the prisoner experiences no pain.\textsuperscript{182} Dr. Mark J. Heath, an anesthesiologist at Columbia University and an expert on lethal injection, stated that he has “not seen a single complaint, not an unhappy warden or family or anybody, from the single-drug barbiturate approach.”\textsuperscript{183}

Minimization of pain is not simply a coincidence; it is a constitutional requirement. The Supreme Court has gone to great lengths to ensure that the death penalty does not cause undue suffering—consistently holding that capital punishment “must not involve the unnecessary and wanton infliction of pain.”\textsuperscript{184} Notably, “the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”\textsuperscript{185}

Because every form of capital punishment has some risk of going wrong and causing pain, this is a necessary concession. Without it, the Court could not hold that the death penalty is constitutional. Nonetheless, it is clear that the Supreme Court believes lethal injection will best minimize suffering, describing it as the “method of execution believed to be the most humane available.”\textsuperscript{186}

\textsuperscript{182} See Denise Grady, Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/science/three-drug-protocol-persists-for-lethal-injections-despite-ease-of-using-one.html?_r=0 (“Physicians have long known that large doses of single drugs—certain sedatives or anesthetics—can take a life painlessly, and with far less distress than the three-drug cocktail causes if the injection is botched.”).

\textsuperscript{183} Id.

\textsuperscript{184} Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion); see Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that a punishment is unconstitutional if it “is nothing more than the purposeless and needless imposition of pain and suffering”).


\textsuperscript{186} Id. at 62. Likewise, a federal district court has observed that “[t]here is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past.” Hill v. Lockhart, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992); see also Ex parte Granviel, 561 S.W.2d 503, 513 (Tex. Crim. App. 1978) (noting that the “Texas Legislature substituted death by lethal injection as a means of execution in lieu of electrocution for the reason it would be a more humane and less spectacular form of execution”). Such praise, of course, does not mean that the death penalty is now beyond reproach. States should continue working to improve the system. As a first measure, better training procedures and more direct physician involvement would help reduce the already low rate of mishandled lethal injections. See Deborah W. Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 FORDHAM L. REV. 49, 77, 91 (2007). An even superior option—and one that would almost completely eliminate the potential for error—is to switch from lethal injection to nitrogen asphyxiation. This latter method has recently gained serious attention and is currently being considered for possible use in Oklahoma. Markus
Even if doctors are wrong about the painlessness of lethal injection, my argument regarding capital punishment's unconstitutionality still survives. This is because, to the extent a properly executed lethal injection causes any pain, it is undeniably minor and brief. The brevity and slightness of the pain preclude the death penalty from being a proportionate punishment for the most severe crimes. In this circumstance, it would still violate the Eighth Amendment's proportionality requirement.

Before concluding, it is worth discussing two medical procedures that provide strong reason to believe any pain caused by the death penalty is both brief and slight. The first is animal euthanasia. This process is very similar to lethal injection—so much so that the same drugs are commonly used in both procedures.  

Many of us likely know from personal experience that euthanizing a beloved pet, although heartbreaking for the owner, is not intrinsically bad for the animal. Indeed, the euphemism “putting your pet to sleep” would not be apt if the procedure caused the animal to suffer. The fact that, each year, so many Americans freely decide to euthanize their companion animals indicates that euthanasia is not an inherently terrible ordeal. Our collective experience in this domain suggests that the death penalty can be administered in a manner that does not cause undue suffering.

The second medical procedure to consider is assisted death.

Physician-assisted suicide is now available to residents of five states: Oregon, Montana, Washington, Vermont, and part of New...
Internationally, voluntary active euthanasia is legal in Belgium, the Netherlands, and Luxembourg. As a society, we would not permit assisted suicide or voluntary euthanasia if we believed that the medications used in the procedure caused significant suffering. Today, seventy percent of Americans support euthanasia. Indeed, opponents of assisted death have advanced many arguments against the practice, but not a single one claims that assisted death should be banned because it causes the individual to experience pain. If we believe that euthanasia is a peaceful, humane exit for our close relatives and pets, there is no reason to believe that lethal injection is a painful event for criminals.

B. Capital Punishment is Not Instrumentally Bad

At first glance, the argument that the death penalty is instrumentally bad for the prisoner because it leads to his death appears quite strong. It seems intuitive that snuffing someone out of existence is bad for that person. When you think more about it, however, this
argument fails to hold up quite so well. How exactly is ceasing to
exist bad for the executed person? After all, that individual won’t be
around to experience his own nonexistence.

Two ancient Greek philosophers, Epicurus and his student
Lucretius, made this observation more than two millennia ago. From
that starting point, they developed three distinct arguments against
the badness of death. These arguments have proven so influential
that they are considered the most formidable challenge ever levied
against the badness of death. They are still the subject of intense
discussion to this day.

In this section, I will review Epicurus and Lucretius’s three
arguments against the badness of death. Before proceeding, it is
important to note that Epicurus and Lucretius were concerned with
proving that death is not bad in any way. I do not, however, rely
upon their arguments to reach that controversial conclusion. Instead, I am only interested in defending the much more modest
and widely accepted view that death is not instrumentally bad.

1. The perception problem

Epicurus presented two arguments against the badness of death.
They are both captured in the following excerpt from Epicurus’s
Letter to Menoeceus:

Make yourself familiar with the belief that death is nothing to
us, since everything good or bad lies in sensation, and death

202. The theory that death is bad for the one who dies is commonly referred to as the
"harm thesis." See LUPER, supra note 154, at 60 ("[The] harm thesis [holds that] death is, at
least sometimes, bad for those who die, and in this sense something that 'harms' them.").
203. See id. (calling Epicurus’s and Lucretius’s arguments the “best” challenge
to the harm thesis).
204. See, e.g., David Furley, Nothing to Us?, in THE NORMS OF NATURE: STUDIES IN
Hellenistic Ethics 75, 75 (Malcolm Schofield & Gisela Striker eds., 1986)
evaluating the Epicurean notion that “death is nothing to us”); Phillip Mitsis,
Epicurus on Death and the Duration of Life, 4 Proc. Bos. Area Colloquium Ancient
Philo. 393, 393 (1988); Stephen E. Rosenbaum, How To Be Dead and Not Care: A
Defense of Epicurus, 23 Am. Phil. Q. 217, 217 (1986) [hereinafter Rosenbaum, How To
Be Dead and Not Care] (defending Epicurus’s view that “one’s death is not bad for
one”); James Warren, Lucretius, Symmetry Arguments, and Fearing Death, 46 PHRONESIS
466, 466, 468 (2001) (examining Lucretius’s symmetry argument).
205. For an argument that Epicurus only intended his arguments to prove death is
not intrinsically bad, see Kai Draper, Epicurus on the Value of Death, in THE METAPHYSICS
206. See, e.g., Fred Feldman, Some Puzzles About the Evil of Death, 100 Phil. Rev. 205,
217–18 (1991) (acknowledging that “death is not intrinsically bad for anyone,” but
criticizing Epicurus for failing to recognize that death can be comparatively bad).
is to be deprived of sensation. . . . So that most fearful of all bad things, death, is nothing to us, since when we are, death is not present, and when death is present, then we are not. So it is nothing to the living and nothing to the dead, since with regard to the former, death is not, and as to the latter, they themselves no longer are. 207

This passage challenges proponents of the badness of death to find (1) a harm caused by death and (2) a time at which a subject is harmed by death. 208 If death, or any other event for that matter, does not possess these two characteristics, then it cannot be bad for us. I will look at each of these challenges in turn, starting with the requirement that death must cause a harm.

By death, Epicurus does not mean the dying process. 209 Indeed, if the dying process is painful, it can be quite bad for the individual. Julius Caesar, who was stabbed twenty-three times, undoubtedly died a painful death. 210 His death, however, is quite distinct from the dying process that led to it. Therefore, despite the terrible pain he felt while alive, Caesar's death need not be painful for him in any way.

Likewise, when Epicurus issued the challenge to identify a harm, he did not intend for us to point to harms incurred by third parties. 211 Epicurus does not argue that a person's death is not bad for others who go on living. 212 Survivors may rightly feel sorrow that a person they cared about has died. In this sense, death can very clearly be bad. Epicurus's challenge, however, specifically requires us to find a harm that affects the person who is dead. There is strong reason to believe that such a harm cannot be found.

207. The translation of this passage is from Furley, supra note 204, at 75.
208. See LUPER, supra note 154, at 67 (“[I]f death harms the individual who dies, there must be a subject who is harmed by death, a clear harm that is received, and a time when that harm is received.”).
209. See Rosenbaum, How To Be Dead and Not Care, supra note 204, at 218 (Epicurus's "conclusion is not about death or dying, but rather it is about being dead. So it does not rule out a person's dying being bad for the person, as painful experience makes obvious it should not."). For an argument that the death penalty as a dying process is not painful, see supra Part II.A.
211. See Rosenbaum, How To Be Dead and Not Care, supra note 204, at 218 (Epicurus's "conclusion does not entail that P's being dead is not bad for others or that P's being dead is not bad in any way in which something might be bad but not for anyone, if there is such a way. So, the argument, if sound, should not inhibit our thinking that a person's being dead is bad in these other ways.").
212. See id.
I will give a brief overview of Epicurus’s argument. He begins by assuming that death is the nonexistence of a person. Next, Epicurus posits that only something that exists can perceive. Conversely, this means that something that does not exist cannot perceive. This is a fairly intuitive premise. Try to think of an entity that does not exist, yet can still perceive. Such an entity does not seem possible. From these two premises, Epicurus shows that death is the absence of perception.

Epicurus is not yet done. He needs one final premise to reach the conclusion he desires. This last premise states that only things that are perceived can cause harm. Epicurus already established that people who are dead cannot perceive anything. From this it follows that the dead cannot be harmed. This leads to the grand conclusion: death does not harm us. The complete argument is set forth in Table 1 below.

<table>
<thead>
<tr>
<th>P1: Death is nonexistence.</th>
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<tr>
<td>P2: What does not exist cannot perceive.</td>
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<tr>
<td>C1: (By P1 and P2) Death is the absence of perception.</td>
</tr>
<tr>
<td>P3: What is not perceived cannot harm us.</td>
</tr>
<tr>
<td>C2: (By C1 and P3) Death cannot harm us.</td>
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</table>

There are two ways to challenge this argument. The first is to deny P1 by arguing that the soul survives death. If the soul does continue on into an afterlife, then the rest of the argument obviously falls apart. In this case, death would not be nonexistence; it would instead be some kind of altered existence. Perhaps, as Plato believed, our souls are immortal and contain our true essence. If this

213. See id. at 217 (discussing Epicurus’s finding that death results in nonexistence, and is, therefore, harmless).
214. See id.
216. In the reconstruction of both Lucretius and Epicurus’s arguments, I follow the philosophical convention of using “P” to denote a premise and “C” to denote a conclusion that follows from other premises. For example, “P1” will refer to the first premise in the argument while “P2” will refer to the second premise.
217. This argument is adapted from WARREN, supra note 215, at 23.
218. See James Warren, Socratic Suicide, 121 J. Hellenic Stud. 91, 92 (discussing the attributes of the Platonic soul).
Platonic account is correct, then we will survive death and can be harmed by posthumous events.\footnote{219} I set aside this possibility and instead endorse the naturalistic view—a theory that holds that the physical world is all that exists.\footnote{220} The naturalistic view is favored among philosophers, many of whom have convincingly argued that people do not survive the death of their bodies.\footnote{221} Even if their theories are wrong and the soul does survive death, my argument could retain its validity. Denying P1 does not prove death is harmful. It only shows that death \textit{might} be harmful. Under this conception of the immortal soul, death could, in fact, be the most pleasurable state we ever experience. Indeed, Plato viewed death as a more desirable state than life.\footnote{222} If he is correct, it seems the State is doing criminals a favor by executing them. Under this non-naturalistic account, capital punishment would certainly fail to satisfy the Eighth Amendment's proportionality requirement.

Given that we are concerned with inflicting punishment upon criminals, we should be fairly confident that the punishment actually is harmful. It would be an unjustly disproportionate punishment if the death penalty sent the condemned to a state of infinite bliss. For these reasons, among others, denying P1 is a nonstarter, and I do not explore this possibility further.

There is, however, another way to argue against Epicurus. One could deny P3. Given the naturalistic views endorsed by most philosophers, it is not surprising that those who have sought to deny

\footnote{219} For further discussion of this Platonic view, see \textit{id.} at 92, 98.
\footnote{220} For a discussion of metaphysical naturalism, see generally, \textsc{Richard Carrier}, \textsc{Sense and Goodness Without God: A Defense of Metaphysical Naturalism} 65–95 (2005).
\footnote{221} \textit{See Michael C. Rea, The World Without Design: The Ontological Consequences of Naturalism} 21 (2002) ("Most contemporary philosophers identify themselves as naturalists, and much recent work in philosophy can be seen as part of a general trend toward conducting philosophical inquiry under the umbrella of naturalistic assumptions."); \textit{see also Joel Feinberg, I The Moral Limits of the Criminal Law: Harm to Others} 79 (1984) (defining death as "the cessation of one's existence, the first moment of a state of nonbeing, which is beyond harm or gain"); Barbara Baum Levenbook, \textit{Harming Someone After His Death}, 94 \textsc{Ethics} 407, 410 (1984) (defining death as "the first moment at which [a person] no longer exists"). \textit{See generally Kagan, supra note 154, at 1–204 (mounting a comprehensive defense of the view that death is one's nonexistence).}
\footnote{222} Plato believes "that the soul is immortal and that when released from the body it can enjoy a better state of being." \textit{Warren, supra note 218, at 92.} Christianity also reaches a similar conclusion. \textit{See id.} ("Both Platonism and Christianity hold out the promise of a better existence after death (in heaven, amongst the Forms), and this makes it seem a good idea not to spend any longer than necessary living a life here on Earth.").
Epicurus's argument have generally focused on this premise.\textsuperscript{223} To deny P3, one must show that not all harms must be perceived. In a now classic paper, the philosopher Thomas Nagel presented several thought experiments to argue that unperceived harms can occur.\textsuperscript{224} Consider the following two scenarios adapted from Nagel's work: \textsuperscript{225}

(1) Sam enjoys his life, loves his work, and thinks he has a great relationship with his wife. Unbeknownst to Sam, however, all his coworkers dislike him and mock him behind his back. Additionally, Sam's wife is cheating on him. Sam never discovers any of this. Instead, he goes through life mistakenly believing that he is loved and respected by all.

(2) Emily is a brilliant heart surgeon with a bright future. One day, on the way home from work, she is in a terrible car accident and suffers an injury that causes severe brain damage. Emily loses all memory of her life before the accident and reverts to an infantile state. Nowadays, she spends her days engaged in the pursuit of communicating with asparagus plants. Emily finds this activity fulfilling and is just as happy as she was prior to the car crash.

Are Sam and Emily harmed? If we agree that they are—as Nagel hopes we will—then we are forced to reject P3. Neither Sam nor Emily ever becomes aware of the "bad" situation. Therefore, if they were harmed, their perceptual experiences had nothing to do with the harm. This would mean that there can be unperceived harms, and P3 would be disproved.

Let's look closer at each of these examples. First, why might one have the intuition that Sam is harmed? If his coworkers and wife never deceived him, Sam's perceptual experiences would have been exactly the same. To Sam, there is no discernible difference between the world in which he lives and a world in which he actually is loved and respected. Does one's intuition of harm have anything to do with Sam's proximity to his betrayers and the likelihood that he will eventually discover the deception? Nagel's critics believe that it does, and they have offered another example to test whether a change in proximity alters the intuition:

\textsuperscript{223} See, e.g., Thomas Nagel, Mortal Questions 4–5 (1979).
\textsuperscript{224} See id.
\textsuperscript{225} For Nagel's thought experiments, see id., which presents both accounts in full.
Dave is a photographer in America. He loves his job and is renowned for capturing beautiful images of desert landscapes. One day, a woman in Italy sees a reprint of one of Dave's photographs. She hates the picture and criticizes it in front of her friends. Her friends laugh and agree that the photographer must be a talentless hack. Dave lives the rest of his life blissfully unaware of this event.226

Unlike Sam, Dave appears not to be harmed. By all accounts, however, Sam and Dave are in very similar situations; both are ridiculed by others but never learn that they are the objects of scorn. The only apparent difference is proximity. Whereas Dave is criticized by people on a different continent, Sam is mocked by people he interacts with on a daily basis. Sam is undoubtedly in a better position to find out about the ridicule, but like Dave, he never does.

Perhaps one might think that this proximity affects Sam in other ways, such as by preventing him from experiencing true love or sincere friendships. This line of thought tries to explain the distinction by holding that the betrayal's consequences harm Sam but the betrayal itself does not. However, if Sam is being harmed by the consequences, then he has perceived some effects of the betrayal. In this thought experiment, perception is still a necessary requirement of being harmed.227 Accordingly, the example fails to undermine Epicurus's premise.

Emily's case presents a more difficult challenge for P3. Her situation differs from Sam's in that she could never recognize that she has been harmed. Whereas Sam could one day find out that his wife and coworkers hate him, Emily is mentally incapable of understanding that a car crash erased her memories and deprived her of a burgeoning career as a heart surgeon.

Epicurus's best response is to argue that our intuitions are wrong—Emily actually is not harmed by the accident.228 All her needs are met, and she is just as happy after the accident as she was before. In one sense, this argument is surely correct. There is nothing inherently bad about being in an infantile state. For instance, no one bemoans the

226. This thought experiment is adapted from John Donnelly, The Misfortunate Dead: A Problem for Materialism, in LANGUAGE, METAPHYSICS, AND DEATH 153, 158–59 (John Donnelly ed., 1994).
227. Frederik Kaufman, Pre-Vital and Post-Mortem Non-Existence, 36 AM. PHIL. Q. 1, 2 (1999) (“Even though the person does not experience the betrayal or deception, evidently the fact that those things could be experienced makes all the difference.”).
228. Other philosophers have argued that the person before the accident and the person after the accident are actually two different people. This position derives from a psychological account of personal identity. Because this defense cannot explain slight variations of the Emily case, I do not explore it here. See, e.g., LUPER, supra note 154, at 90 (discussing and criticizing this position).
fact that a six-month old baby has the mental capacities of an infant. We were all in that state at some point, and we never felt harmed by it.

For my purposes, this modest conclusion that Emily is not harmed in this sense is sufficient. The Epicurean response does leave open the possibility that Emily has incurred other sorts of harms. Most notably, philosophers have claimed that Emily experiences comparative harms.\(^{229}\) That argument holds that Emily is harmed to the extent that she is deprived of living her life as a successful heart surgeon. As I stated at the outset of this section, however, I am only interested in Epicurus’s arguments insofar as they prove death is not an instrumental harm. Therefore, I need not address the comparative responses at this moment. This is not to suggest that the comparative arguments say nothing insightful about the potential badness of the death penalty. They very much do, and I will tackle them in a later section.\(^{230}\) But before doing so, I want to explore two additional arguments against the instrumental badness of the death penalty.

2. The timing puzzle

Epicurus offers another challenge to the badness of death. This second account—known as the timing puzzle—provides a way around the primary objection discussed above (i.e., that unperceived harms do exist). In the timing puzzle, Epicurus grants that Sam and Emily can be harmed even though they never perceive the harms. He then attempts to get around this concession by arguing that their cases are unlike death in one very important way: Sam and Emily still exist, but a person who has died no longer does.

Epicurus writes, “[W]hen we are, death is not come, and, when death is come, we are not. It is nothing, then, either to the living or to the dead, for with the living it is not and the dead exist no longer.”\(^{231}\) Epicurus’s intuition here is that something that does not exist surely cannot be harmed. A more formal restatement of his argument is in Table 2 below.

There are two premises and two ways of countering Epicurus’s argument. First, one could deny that death is nonexistence. For the reasons discussed earlier,\(^{232}\) I do not explore this possibility.

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229. Epicureans, however, would deny that there could ever be comparative harms. See Draper, supra note 205, at 72–75.
230. See infra Part II.C.
232. See supra notes 219–21 and accompanying text.
The second way to refute Epicurus's argument is to show that a person can be harmed by something that occurs when that person does not exist. Restated with respect to death, the challenge here is to identify a time at which death harms the person who has died. There appear to be five possibilities.

1. Death harms the person before he dies.
2. Death harms the person at the moment he dies.
3. Death harms the person after he has died.
4. Death is eternally a harm for the person who dies.
5. Death is a harm for the person who dies, but it is not a harm at any specific time.

I will briefly consider each of these possibilities. First, it seems rather odd to contend that death harms someone before that person dies. To defend this position is to claim that effects can precede their

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If people possess free will, as the law assumes, this is an impossible argument to make.\textsuperscript{235}

There is one objection based on our real-world experiences that is worthy of discussion. People who are alive do fear death. In fact, it is quite common to experience anxiety when thinking about one’s own death. Granted, this anxiety is a harm; however, it is not the same harm that we are interested in. The harm of anxiety does not flow backwards from death itself. Instead, it flows forward from a person’s negative thoughts about her own death. In this case, the cause (bad thoughts about death) actually does precede the effect.

Consider an example. Imagine a person (let’s call her Jen) who is scheduled to have a very painful surgery. Jen knows the surgery will be painful and spends weeks worrying about the suffering she will endure. On the day of the surgery, the doctors discover that Jen does not need the operation after all. Jen is relieved by this turn of events. Nonetheless, she still suffered greatly the past few weeks. But what caused her suffering? Surely, it could not have been the surgery—an event that never occurred. It must have been her thoughts about the surgery. Just as anticipation of the surgery (but not the surgery itself) harmed Jen, anticipation of death (but not death itself) can harm us.

The next possibility is that death can harm us after we die.\textsuperscript{236} Setting aside comparative harms for the moment, this option seems


\textsuperscript{235} Julian Lamont, A Solution to the Puzzle of When Death Harms Its Victims, 76 Australasian J. Phil. 198, 202–05 (1998) (discussing whether death can be an antemortem harm in either deterministic or non-deterministic worlds).

\textsuperscript{236} For defenses of this view, see, for example, Neil Feit, The Time of Death’s Misfortune, 36 Nous 359, 369 (2002); Palle Yourgrau, Kripke’s Moses, in The Metaphysics and Ethics of Death: New Essays 134, 135–47 (James Stacey Taylor ed., 2013); Levenbook, supra note 221, at 407, 410–15. But see LUPER, supra note 154, at 129–34 (criticizing this view and concluding that it “falls short of solving the timing puzzle”).
impossible. After death, a person no longer exists and is therefore not responsive to any events. A dead person can no more benefit from or be harmed by an event than a rock or shoe can. The dead simply lack this capacity.

The third possibility is that a person is harmed at the exact moment of death. Again, this response seems unsatisfying. Passing from the state of being alive to the state of being dead is instantaneous. Since one cannot both be dead and alive, this is necessarily the case. Thus, any harm occurring at the moment of death must also be instantaneous. The concept of an instantaneous harm, however, does not make sense. Even the most fleeting pain must last some amount of time. The fact that the instant of death is without duration precludes the occurrence of any harm at this point.

So far, I have considered the time before death, the moment of death, and the time after death, and each possibility seems lacking. Maybe the problem is that we have been trying to identify a specific time at which death causes harm. Perhaps that is a misguided exercise. Several philosophers have used this as a starting point to develop alternative theories that seek to explain when death harms us.

Fred Feldman is the foremost proponent of the Eternal account—a position holding that death is bad for us at all times. He summarizes this view in the following passage:

It seems clear to me that the answer to the question [of when death is bad] must be "eternally." For when we say that ['] death is bad for [the deceased], we are really expressing a complex fact about the relative values of two possible worlds. If these worlds stand in a certain value relation, then (given that they stand in this relation at any time) they stand in that relation not only when [that person] exists, but at times when [that person] doesn't. If there were a God, and it had been thinking about which world to create, it would have seen prior to creation that [death] would be bad for [the dead].

In this passage, Feldman argues that there is no definite time at which death's harm begins or ends; instead, it is eternally harmful. Feldman's proposal, unfortunately, does not generalize very well to

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237. I take up the issue of comparative harms in the following section. See infra Part II.C.
238. See Warren, supra note 215, at 47 ("[T]here is no person after death and therefore no potential subject for harm.").
239. See Luper, supra note 159, § 4.3 (providing that a person cannot incur harm after death).
240. See Lamont, supra note 235, at 209–12 (arguing that harm occurs at the moment of death).
241. Feldman, supra note 206, at 221.
other kinds of harms. Let's take a very basic, uncontroversial harm: being punched in the stomach. For this incident, the harm occurs when the puncher's fist connects with the punchee's stomach. The pain will undoubtedly last for a while, but—assuming the puncher was not Mike Tyson—the punchee will recover in time. Days later, when the punchee looks back on the incident, he will likely agree that he was harmed when the puncher's fist collided with his stomach. This is a natural account that seems to line up with our everyday experience of harms.

Feldman's view, however, provides a very different answer. It claims that the punchee is eternally harmed by the event.242 The man who was punched is just as harmed by the event when he was two years old as he was at the moment the punch occurred and as he will be on his eightieth birthday. This claim that all harms occur at all times is deeply puzzling and unsatisfactory when applied to our common, everyday experiences.243 Perhaps Feldman's theory is only an account regarding the badness of death and has nothing to say about more mundane harms. If so, one must wonder why death is such an extraordinary case that it alone requires a special theory of harm.

Discussions surrounding the fifth and final possible way in which death may harm someone may provide an answer to this question. This possibility maintains that death harms the person who died, but the harm does not occur at any specific time. Thomas Nagel is the most prominent supporter of this theory.

Nagel builds his argument from the observation that not all harms are the same. Some are experiential, but others are purely relational. Experiential harms are those that are bad in virtue of the sensations one experiences.244 Relational harms, however, "are features of the relations between a person, with spatial and temporal boundaries of the usual sort, and circumstances which may not coincide with him either in space or in time."245 Death, Nagel argues, is one of these "irreducibly relational" harms, and therefore, "the impossibility of locating it within life should not trouble us."246 As opposed to Feldman's account, which states that death harms us at all times, Nagel’s account holds that death harms us, but does so at no definite time. 247

242. See id. at 221 (noting that harm exists before, during, and after existence).
243. See Lamont, supra note 235, at 199–200 (discussing counterexamples that weigh against Feldman's proposal).
244. See id. at 5.
245. Id. at 6.
246. Id. at 6–7.
247. See id. at 4.
At first, Nagel's position is quite appealing. By splitting harms into two distinct categories (experiential and relational), Nagel gets around the problem illustrated in the punching example. Since being punched in the stomach is an experiential harm, it occurs at a specific time—namely the moment fist and stomach meet.

Despite solving this particular problem, Nagel's theory fails to provide a sound explain for other common harms. For example, think back to Emily's case and the issue of whether she was harmed by the car accident. According to Nagel, Emily was harmed, but the harm was purely relational. It is relational because Emily is not aware of the brain damage she suffered, and she is just as content after the accident as before. Therefore, under Nagel's view, Emily's harm occurred at no definite time. This conclusion, however, is quite strange. If one accepts that Emily was harmed, then it seems she was necessarily harmed at the time of the accident. After all, the accident was the direct cause of Emily's condition. It is at odds with our everyday experience to hold that the accident harmed Emily at no particular time.

After reviewing arguments for these five possible times at which death can be a harm, I believe that none provide a satisfying response to Epicurus's timing puzzle. Next, I rely on Lucretius's symmetry argument to provide further support for the claim that the death penalty is not instrumentally bad.

3. The symmetry argument

Lucretius's symmetry argument is so named because it posits a symmetry between past and future nonexistence. Lucretius summarizes his argument in the following passage from De Rerum Natura:

Look back at the eternity that passed before we were born, and mark how utterly it counts to us as nothing. This is a mirror that Nature holds up to us, in which we may see the time that shall be after we are dead.

In this excerpt, Lucretius draws an analogy between the time before we were born (pre-vital nonexistence) and the time after we die (posthumous nonexistence). He maintains that both periods of time are the same in all important respects. In a later passage, Lucretius emphasizes the common intuition that there is nothing bad about the fact that we did not exist before we were born. From

248. See Lamont, supra note 235, at 208–09 (exploring possible ways to save Nagel's account and ultimately rejecting them).
250. See id.
these two points, Lucretius argues that there is nothing bad about the
fact that we will not exist after we die.

This is a bold claim, but it is not yet the end of Lucretius’s argument. He
is not content to prove just that death is not bad for us; he has the
more ambitious goal of showing that we should not fear death. To
complete this argument, Lucretius advances one more premise: it is
irrational to fear things that are not bad for us.251 If it is irrational to
fear things that are not bad for us, and death is not bad for us, then it
follows that it is irrational to fear death.252 Table 3 presents a more
formal reconstruction of Lucretius’s symmetry argument.

Table 3: Lucretius’s Symmetry Argument

<table>
<thead>
<tr>
<th>PI:</th>
<th>Our pre-vital nonexistence is not bad for us.</th>
</tr>
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| P2: | Our posthumous nonexistence is like our pre-vital
     nonexistence in all relevant respects. |
| P3: | If two things are alike in all relevant respects, and one of them
     is not bad for us, then the second is not bad for us, either. |
| Cl: (By P1, P2, P3) | Therefore, our posthumous nonexistence (i.e. death) is not bad for us. |
| P4: | If something is not bad for us, then it is irrational to fear it. |
| C2: (By C1 and P4) | Therefore, the fear of death is irrational.253 |

Many philosophers throughout history have found the symmetry
argument compelling.254 Notably, in Tusculans, Cicero offered a

251. See id.
252. Importantly, Lucretius is not arguing that, because we do not presently fear pre-vital nonexistence, we should not presently fear posthumous nonexistence. Although some philosophers have interpreted the argument in this manner, such a reading misunderstands Lucretius’s claim. See Stephen E. Rosenbaum, The Symmetry Argument: Lucretius Against the Fear of Death, 50 PHIL. & PHENOMENOLOGICAL RES. 353, 359 (1989) [hereinafter Rosenbaum, The Symmetry Argument] (arguing “that Lucretius’s symmetry argument may justifiably be taken to be about present attitudes, not simply past and future attitudes”). If Lucretius were making this argument, he would be committed to defending the broader view that, because we no longer fear a particular event that happened to us in the past (e.g., a tooth extraction), we also should not fear future instances of that same event (e.g., a tooth extraction scheduled for tomorrow). This is a belief Lucretius clearly did not hold. See LUPER, supra note 154, at 61–62.
253. This presentation of Lucretius’s symmetry argument is taken from LUPER, supra note 154, at 61–62.
254. See Rosenbaum, The Symmetry Argument, supra note 252, at 354 (noting that the symmetry argument “has appealed to very different thinkers throughout Western history... [including] Pseudo-Plato, Cicero, Seneca, Plutarch,
similar view when he wrote, "Just as nothing was of concern to us before birth, so too nothing will be of concern to us after death." While discussing the foolishness of believing in an immortal soul, Pliny the Elder also endorsed a version of the symmetry argument:

Everyone, from their last day will be in the same state as before their first and there will be no more sensation of body or soul than there was before birth. But how much easier and more sure for everyone to believe in himself, taking as an example of the tranquility to come what was undergone before birth?

Seneca, likewise, adopted a variant of the argument:

 Doesn't the person who wept because he had not been alive a thousand years ago seem to you an utter fool? Equally foolish is he who weeps because he will not be alive in a thousand years' time. These two are the same: you will not be, nor were you. Neither time belongs to you.

Insofar as it shows death is not instrumentally bad for the one who dies, Lucretius's symmetry argument is very strong. Two of the premises (P3 and P4) are unobjectionable and have never been the subject of serious criticism. Therefore, if one is to deny Lucretius's conclusion, it must be done by refuting either P1 or P2. Despite having the option, few scholars have taken the first path and argued that our pre-vital nonexistence actually is bad for us. Instead, contemporary philosophers who attack the symmetry argument generally do so by challenging P2. Importantly, these counterarguments only seek to disprove Lucretius's conclusion by showing that death is comparatively bad. Philosophers widely

Montaigne, Hume, and Schopenhauer").

255. Warren, supra note 215, at 69 (quoting and translating Cicero, Tusculans § 1.91).
256. Id. at 70 (quoting and translating Pliny the Elder, Naturalis Historia § 7.188).
257. Id. (quoting and translating Seneca, Epistulae Morales ad Lucilium § 77.11).
258. See id. at 76-105 (discussing potential criticisms of the symmetry argument); Kaufman, supra note 227, at 5 (coming to reject the symmetry argument, one "is thus forced to think either that pre-vital nonexistence could be bad too, or defend an asymmetry between the two periods of nonexistence that would legitimize our very different attitudes toward them").
259. See Warren, supra note 215, at 94-96 (noting Joseph Raz's argument that being born later is also a deprivation of time spent alive, but that "no one thinks being born later is a bad").
261. Most philosophers who argue against Epicurus and Lucretius do so by appealing to comparativism. See, e.g., Feldman, supra note 161, at 139 ("The evil of death is a matter of deprivation; it is bad for a person when it deprives him or her of intrinsic value; if he or she would have been better off if it had not happened."); Nagel, supra note 223, at 1 ("If death is an evil at all, it cannot be because of its
accept that the symmetry argument proves death is not instrumentally bad. This single, uncontroversial point is the basis for my reliance upon Lucretius’s argument. Nonetheless, I will briefly discuss some modern counterarguments because they lead into the question of whether the death penalty is comparatively bad.

There are two main objections to P2. The first holds that our pre-vital nonexistence is substantively different than our posthumous nonexistence because birth is a fixed point, but death is indeterminate. In other words, it is impossible for someone to have been born at an earlier time than the one at which he was actually born, but it is possible for someone to have died at a later time. Because of this asymmetry between birth and death, we can never be deprived of pre-vital time, but we can be deprived of posthumous time. Thomas Nagel, the philosopher who developed this counterargument, explains it in the following passage:

It is true that both the time before a man’s birth and the time after his death are times when he does not exist. But the time after his death is time of which his death deprives him. It is time in which, had he not died then, he would be alive. . . . But we cannot say that the time prior to a man’s birth is time in which he would have lived had he been born not then but earlier. For aside from the brief margin permitted by premature labor, he could not have been born earlier: anyone born substantially earlier than he was would have been someone else. Therefore the time prior to his birth is not time in which his subsequent birth prevents him from living. His birth, when it occurs, does not entail the loss to him of any life whatever.  

Most philosophers who have considered Nagel’s objection argue that he is mistaken. They maintain that it is possible for an individual to have been born at an earlier time, and, therefore, someone can be deprived of life by being born at a later time. It is


263. See Anthony L. Brueckner & John Martin Fischer, Why Is Death Bad?, in THE METAPHYSICS OF DEATH 219, 222 (John Martin Fischer ed., 1993) (arguing that because both periods are experiential blanks, the prenatal nonexistence is a deprivation like death); Feldman, supra note 206, at 221–25 (arguing that late birth is just a great misfortune as premature death); Rosenbaum, The Symmetry Argument, supra note 252, at 362–63 (concluding that “Nagel is incorrect in thinking that a person might exist longer but could not logically exist earlier”).

264. See Rosenbaum, The Symmetry Argument, supra note 252, at 360 (“The time before a person’s birth is a time of which his not having been born earlier deprives him. It is a time in which, had he not been born as late as he was, he would be alive. 
not worth further exploring this argument because, in a later work, Nagel himself came to agree with his critics. However, the argument is notable because it attempted to refute Lucretius by appealing to the comparative badness of death.

The second principle objection to Lucretius’s symmetry argument was developed by Derek Parfit. Parfit argues that we have an evolutionarily ingrained temporal bias towards the future. This bias causes us to view future pains with fear and past pains with indifference. Therefore, even though pre-vital nonexistence and posthumous nonexistence may be objectively symmetrical, they are subjectively asymmetrical. To illustrate this claim, Parfit presents the case of the hospital patient:

I am in some hospital, to have some kind of surgery. . . . [B]ecause the operation is so painful, patients are now afterwards made to forget it. Some drug removes their memories of the last few hours. I have just woken up. . . . I ask my nurse if it has been decided when my operation is to be . . . . She can tell me only that the following is true. I may be the patient who had his operation yesterday. In that case, my operation was the longest ever performed, lasting ten hours. I may instead be the patient who is to have a short operation later today. It is either true that I did suffer for ten hours, or true that I shall suffer for one hour.

I ask the nurse to find out which is true. While she is away, it is clear to me which I prefer to be true. If I learn that the first is true, I shall be greatly relieved.

If the patient’s preference is correct, then it is clear that when pleasure or pain takes place matters to us. Specifically, we prefer pleasure to be in our future and pain to be in our past. Parfit observes that the symmetry argument can only be correct if we are temporally indifferent to pleasures and pains, and, since we are temporally biased, Lucretius must be wrong. Parfit’s intuition does

Therefore any delay in being born entails the loss of some life that its beneficiary would have led had he been born earlier.”.

265. See THOMAS NAGEL, THE VIEW FROM NOWHERE 38–41 (1986) (equating a person’s essence with his brain, an object that conceptually could have existed at an earlier time).

266. DEREK PARFIT, REASONS AND PERSONS 175, 177 (1984).

267. Id. at 175 (“[W]e are biased towards the future. Because we have this bias, the bare knowledge that we once suffered may not now disturb us. But our equanimity does not show that our past suffering was not bad. The same could be true of our past non-existence.”).

268. Id. at 165–66.

269. Id. at 174–75.
strike me as correct.\textsuperscript{270} The hospital case provides a compelling reason to think that death can be a type of harm—specifically a comparative harm. An important thing to emphasize, however, is that the example only shows that death can be a comparative harm, not that it necessarily is one. In the next section, I take up the question of whether capital punishment is comparatively bad for the person who is executed.

\textbf{C. Capital Punishment is Not Comparatively Bad}

An event that is comparatively bad is not bad \textit{simpliciter}.\textsuperscript{271} Instead, it is only bad in relation to another possible event.\textsuperscript{272} Recall the example I discussed earlier that involved Amy and her choice of which law school to attend. In the hypothetical, Amy selected Law School A, a path that led to an enjoyable, if unremarkable, life. When this choice is viewed alone, one cannot say whether attending Law School A was a comparatively bad decision for Amy. To answer that question, one has to determine what would have happened to Amy in the closest possible world in which she did not attend Law School A.\textsuperscript{273}

In this scenario, the closest possible world is quite clear. Amy would have attended Law School B, enjoyed a better life, and become a high-profile government attorney. With this knowledge in hand, we can conclude that attending Law School A was comparatively bad for Amy. Even though she led a good life, she would have been better off enrolling in Law School B, and for this reason, she was comparatively harmed. Keep in mind that, for Amy, her decision was not perceptibly bad or perceptibly deficient in any way. Nonetheless, her decision was comparatively bad for her.

The philosopher Steven Luper offers a more formal definition, writing that something is comparatively bad for us "just when it does or would harm us, and it harms us just when it makes our lives worse than they would have been."\textsuperscript{274}

We can construct a simple formula to capture this definition. Let $CV_E$ be the comparative value of event $E$'s occurrence. This is the value that we need to determine to figure out if an event is comparatively good or comparatively bad. When $CV_E$ is positive, the

\begin{itemize}
  \item \textsuperscript{270} For an argument against Parfit, see Mitsis, \textit{supra} note 204, at 303.
  \item \textsuperscript{271} For a defense of the view that death is a comparative harm, see Feldman, \textit{supra} note 161, at 138–42; Luper, \textit{supra} note 154, at 92–98 (discussing comparativism).
  \item \textsuperscript{272} See Luper, \textit{supra} note 154, at 97–100 (using thought experiments to illustrate comparative harm).
  \item \textsuperscript{273} For discussion of the closeness of possible worlds, see David Lewis, \textit{On the Plurality of Worlds} 20–26 (2001).
  \item \textsuperscript{274} Luper, \textit{supra} note 154, at 7–8.
\end{itemize}
event is a comparative good, but when \( CV_E \) is negative, the event is a comparative bad. To calculate this, we need to identify the intrinsic value of the world in which event \( E \) does occur and subtract from that the intrinsic value of the closest possible world in which event \( E \) does not occur.\(^{275}\) The two intrinsic values can be represented as \( IV_E \) and \( IV_{-E} \), respectively. We know that \( IV_E \) is equal to the benefits \( (B_E) \) minus the harms \( (H_E) \) in the world in which event \( E \) occurs.\(^{276}\) Likewise, \( IV_{-E} \) is equal to the benefits \( (B_{-E}) \) minus the harms \( (H_{-E}) \) in the closest possible world in which event \( E \) does not occur.

From these facts, we can construct the formula below:

\[
CV_E = (B_E - H_E) - (B_{-E} - H_{-E})
\]

And that can be further simplified:

\[
CV_E = IV_E - IV_{-E}
\]

In sum, this equation shows that the comparative value of \( E \) equals the difference between the intrinsic value of the world in which \( E \) occurs and the intrinsic value of the closest possible world in which \( E \) does not occur. If \( CV_E \) is positive (i.e., \( IV_E > IV_{-E} \)), then \( E \) is comparatively good for the subject. However, if \( CV_E \) is negative (i.e., \( IV_E < IV_{-E} \)), then \( E \) is comparatively bad for the subject.

Ultimately, we are concerned with the death penalty. To evaluate whether that punishment is a comparative harm for the person who is executed, the formula requires us to determine two things: (1) the intrinsic value of the world in which the death penalty (event \( E \)) occurs and (2) the intrinsic value of the closest possible world in which the death penalty does not occur.\(^{277}\) The first number \( (IV_E) \) is very easy to pinpoint. Since death is one’s nonexistence, there are no intrinsic benefits or harms that can occur; therefore, we know that \( IV_{-E} \) is zero. Plugging that into the formula yields the following result:

\[
CV_E = 0 - IV_{-E}
\]

Subbing in zero makes it clear that everything hinges on \( IV_{-E} \). If \( IV_{-E} \) is positive, the death penalty is a comparative bad, and if \( IV_{-E} \) is negative, the death penalty is a comparative good. To calculate \( IV_{-E} \), first we need to determine what would have happened in the closest possible world in which the condemned individual was not sentenced to death. Fortunately, this is a fairly easy matter. In the closest possible world, the person would still have committed the same

\(^{275}\) Id. at 98.

\(^{276}\) Id.

\(^{277}\) BEN BRADLEY, WELL-BEING AND DEATH 74 (2009) ("[D]eath is bad for the person who dies at all and only those times when the person would have been living well, or living a life worth living, had she not died when she did.").
crimes and would still have been convicted by the same jury of his peers. The only difference is that the criminal would have been sentenced to life without parole instead of to death. With this in mind, the final step is to evaluate whether, all things considered, a life in prison yields more intrinsic benefits than intrinsic harms.

Some philosophers would argue that such a life, on the whole, is necessarily a good life. They subscribe to the belief that death is always comparatively bad for the one who dies and argue that life itself is so valuable that harms can never outweigh the benefits of experiencing the world. Thomas Nagel is a defender of that view:

"It is good simply to be alive, even if one is undergoing terrible experiences. The situation is roughly this: here are elements which, if added to one's experience, make life better; there are other elements which, if added to one's experience, make life worse. But what remains when these are set aside is not merely neutral: it is emphatically positive. Therefore life is worth living even when the bad elements of experience are plentiful, and the good ones too meager to outweigh the bad ones on their own. The additional positive weight is supplied by experience itself, rather than by any of its contents."

There is a certain appeal to this idea that our sensory experiences are intrinsically valuable. Indeed, life does seem inherently good. However, Nagel goes too far. Contrary to his expansive claim, some lives just are not worth living. There are extreme scenarios to which death is far preferable. For instance, if given the choice between going to sleep and never waking up again or being waterboarded for ten years straight after which time you will be fed to Bengali tigers, I venture that nearly everyone would select the first option. People would make this choice because being waterboarded and eaten by tigers is comparatively bad relative to dying immediately and painlessly.

There is, of course, a very wide spectrum on which quality of life can fall, and people will undoubtedly have differing opinions on the precise point where a life superior to an immediate, painless death lies. But, I will argue that life in prison rests on the comparatively

278. See Rosenbaum, Concepts of Value, supra note 162, at 149 (observing that some philosophers subscribe to Aristotle's view that death is always worse than life).
279. NAGEL, supra note 223, at 2.
280. Id.
281. Most philosophers agree. See, e.g., Kaufman, supra note 227, at 1 ("Death need not be a deprivation, however; hence death need not be an evil. The deprivation account is not committed to thinking that death is necessarily an evil. It all depends upon what would have happened had one not died when one did.").
bad side. John Stuart Mill had it correct years ago when he considered the issue:

What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope...? 282

1. Life without parole means life without parole

There is a common misperception that life without parole ("LWOP") does not actually mean life without parole. The majority of Americans believe that criminals who receive this sentence will, at some point, be released.283 This is consistent with Americans’ broader belief that most life sentences are of relatively short duration.284 As Georgia Supreme Court Judge Charles Weltner stated, “Everybody believes that a person sentenced to life for murder will be walking the streets in seven years.”285 Judge Weltner’s statement is an exaggeration, but only slightly so.

A survey of Indiana residents largely found that over one quarter of them believed that people sentenced to life would be free within ten years, and more than sixty percent placed that figure at fewer than twenty years.286 At the time of the survey, a criminal sentenced to life

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285. Id.
in Indiana would face up to sixty years in prison and would not become parole eligible until after thirty years.\textsuperscript{287} A mere nine percent of survey respondents correctly stated that the criminal would be in prison for at least thirty years.\textsuperscript{288}

The Supreme Court itself claims that LWOP is not as definite as its name implies because the executive can always grant a pardon.\textsuperscript{289} In theory, the Court is right; clemency is possible. In practice, however, it simply does not happen.\textsuperscript{290} As one report observed, "[I]n the last three decades[,] presidents and governors have virtually stopped granting clemency. For those serving LWOP, clemency is the only road out of prison—but it has been virtually shut down by the U.S. presidents and state governors that govern its traffic."\textsuperscript{291} In today's climate, it is politically risky for presidents and governors to pardon any criminals, much less those who have been convicted of violent crimes and sentenced to life without parole.\textsuperscript{292} This is reflected in the sheer infrequency with which clemency is granted. Criminals sentenced to LWOP are in a hopeless situation. Between 1988 and 2010, only one federal inmate serving life was pardoned.\textsuperscript{293} As one

\textbf{Support}, 39 AM. \textsc{Behavioral Scientist} 500, 507 (1996) (finding that over twenty-five percent of Indiana respondents believed that someone with a life sentence would only serve ten years or less).

\textsuperscript{287} \textit{Id.} at 511 n.8.

\textsuperscript{288} \textit{Id.}

\textsuperscript{289} Harmelin \textit{v.} Michigan, 501 U.S. 957, 996 (1991) ("[T]here remain the possibilities of retroactive legislative reduction and executive clemency."); Furman \textit{v.} Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) ("A prisoner [serving life] remains a member of the human family. . . . His punishment is not irrevocable."). \textit{But see} Graham \textit{v.} Florida, 560 U.S. 48, 69–70 (2010) ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences" insofar as they "alter[] the offender’s life by a forfeiture that is irrevocable . . . except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.").

\textsuperscript{290} Molly M. Gill, \textit{Clemency for Lifers: The Only Road Out Is the Road Not Taken}, 23 \textsc{Fed. Sent’g Rep.} 21, 21 (2010).

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} \textit{See id.} at 23 ("For most governors, granting clemency to lifers—and particularly to those serving [life without parole]—remains too risky, especially if the person was violent or is a habitual offender."). When discussing life without parole, politicians treat clemency as a non-option. \textit{See}, e.g., Mario M. Cuomo, \textit{New York State Shouldn’t Kill People}, \textsc{N.Y. Times} (June 17, 1989), http://www.nytimes.com/1989/06/17/opinion/new-york-state-shouldnt-kill-people.html (discussing life without parole, then New York Governor Mario Cuomo said there are "no ‘minimums’ or ‘maximums.’ No time off for good behavior. No chance of release by a parole board, ever. \textit{Not even the possibility of clemency.} It is, in practical effect, a sentence of death in incarceration") (emphasis added).

\textsuperscript{293} \textit{See} Gill, \textit{supra} note 290, at 22. The prospects are no better for criminals
prisoner lamented, "[M]y hope to someday be released is like hoping to be one of the first people to live on Mars."\(^{294}\)

Due, in no small part, to politicians' need to appear tough on crime, the number of prisoners serving LWOP has been growing rapidly. In 1992, that statistic stood at twelve thousand.\(^{295}\) By 2003, it had swelled to more than thirty-three thousand.\(^{296}\) In 2012, a mere nine years later, nearly fifty thousand people were serving life without parole.\(^{297}\) This figure dwarfs the number of people who have been executed since Gregg v. Georgia reinstated the death penalty. Between 1976 and 2015, just over fourteen hundred convicts have been put to death—fewer than three percent of the number of inmates currently serving LWOP.

The reality is that life imprisonment laws are strictly enforced.\(^{298}\) If the court sentences someone to LWOP, that person will never be released on parole.\(^{300}\) There is not a single example in the entire United States in which that has happened.\(^{301}\) Just like those fourteen convicted under state law. Take California, for example. Since 1978, more than 2,500 criminals were sentenced to life without parole, and not even one had his sentence commuted. See Robert Johnson & Sandra McGunigall-Smith, Life Without Parole, America's Other Death Penalty, 88 PRISON J. 328, 332 (2008).


299. This, however, was not always the case. See, e.g., Adam Liptak, To More Inmates, Life Term Means Dying Behind Bars, N.Y. TIMES (Oct. 2, 2005), at 1 (observing that “[j]ust a few decades ago, a life sentence was often a misnomer, a way to suggest harsh punishment but deliver only 10 to 20 years”).

300. This is a sobering fact for anyone who receives this punishment. As one prisoner wrote, "What those of us serving life without the possibility of parole... need to come to terms with is it's not just a term of art; it's an accurate, literal description of our sentence, a sentence that doesn’t contain within it even the possibility of parole." Kenneth E. Hartman, The Five Stages of Life Without the Possibility of Parole, in TOO CRUEL, NOT UNUSUAL ENOUGH 145, 147 (Kenneth E. Hartman ed., 2013).

301. See The Truth About Life Without Parole: Condemned to Die in Prison, Am. C.L. UNION N. CAL., https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison (“No one sentenced to life without parole has ever been released on parole, in California or in any other state.”); see also SCOTT E. SUNDBY, A
hundred individuals who were executed, each of the fifty thousand people currently serving life without parole will die in prison.302

2. Why life without parole is worse than death

If you were given the choice between life in prison with no possibility of parole and the death penalty, which would you choose? Chances are, you would unhesitatingly pick life without parole. But would you ultimately regret this decision? Five years into your sentence, would you see death as a welcome release from the daily torments of a maximum-security prison? Ten years in, would you beg death to save you from the mental anguish of another stay in solitary confinement? Twenty years later, would you look back and realize that capital punishment actually was the better, more humane option?

From an outsider’s vantage point, it may seem hard to make an informed decision. For most of us, prison is a foreign place. We would not know what to expect if sentenced to spend one week there, much less the remainder of our lives. There is perhaps only one way to really understand the grim reality, and that is by looking at the experiences of those who are serving life sentences.

The maximum-security prisons that house lifers303 are rather harsh facilities. One LWOP inmate who has already served more than thirty years behind bars wrote that these prisons “are bad in

_LIFE AND DEATH DECISION: A JURY WEIGHTS THE DEATH PENALTY_ 38 (2005) (“Although more than 2,500 inmates have been given sentences of life without parole since 1978 in California, no one has ever had a life sentence commuted to a lesser sentence.”).

302. _NELLIS, supra_ note 283, at 1 (“The reality is that a life without parole sentence means that the individual will die in prison.”). In theory, a prisoner could have his life without parole (“LWOP”) sentence commuted. _See, e.g.,_ Monique Garcia, _Debra Lynn Gindorf Case: Mom’s Life Sentence Is Cut, CHI. TRIB._ (May 2, 2009), http://articles.chicagotribune.com/2009-05-02/news/0905010363_1_postpartum-depression-post-release-mental-health (discussing the commutation of a life sentence for a woman who killed her children while suffering from postpartum depression). Commutation, however, is extremely rare. _See_ Dieter, _supra_ note 284, at 119. As Edward Carnes, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, noted, “[L]ife without parole in Alabama means just that—no parole, no commutation, no way out until the day you die, period.” _Id_; _see also_ Peter Applebome, _Bill to Repeal Death Penalty in Connecticut Goes to Malloy, N.Y. TIMES_, Apr. 12, 2012, at A21, A24 (quoting Governor Dannel P. Malloy of Connecticut who, upon signing a bill that replaced the death penalty with LWOP said, “Going forward, we will have a system that allows us to put these people away for life, in living conditions none of us would want to experience. Let’s throw away the key and have them spend the rest of their natural lives in jail.”).

303. The term “lifer” generally refers to those inmates who are serving life sentences of any sort. In this Article, however, I use the term to denote only those inmates who are serving life without parole.
ways the average citizen cannot really comprehend. Violence, both from other prisoners and at the hands of guards, is rampant. Sexual assault is commonplace, tolerated[] and built right into the macho culture of prison.  

For many, the loneliness and isolation is overwhelming. Prior relationships fade away. Friends stop taking calls. Relatives stop visiting. Those outside prison pretend you are dead, and those inside are just waiting for it to be so. Despite being surrounded by others, you are truly alone. As one lifer wrote,  

"Prison is coldness. No one in prison really cares about you, not like those at home do. It's a chilling feeling to realize that no one's life here would be significantly changed if I were to die tomorrow. Loneliness breeds and thrives in the belly of the monster known as prison. It strikes constantly and insidiously[,] and it never goes away.”  

As bad as this aspect is, many lifers have said that the worst part of prison is the complete lack of freedom. An inmate who has already served fifteen years summed it up as follows: “There’s no more doing what you want, no waking up in your own bed at home. There’s no anything, just four walls staring back at you and a stranger sleeping either below you or above. Your existence is as a number, a bed space.” And frequent lockdowns ensure that prisoners get to know

305. AM. C.L. UNION, UNITED STATES’ COMPLIANCE WITH THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 67 (2014), https://www.aclu.org/files/assets/aclu_cat_shadow_report_2014_v2.pdf (“In interviews with the ACLU, prisoners reported feelings of unremitting hopelessness, loneliness, anxiety, depression, fear, isolation from family and their community, and suicidal thoughts.”).  
307. Diane Hamill Metzger, Life in a Microwave, in Crime and Punishment: Inside Views 138, 139 (Robert Johnson & Hans Toch eds., 2000); see Johnson & McGunigall-Smith, supra note 293, at 338 (quoting one lifer as saying that the worst part is knowing you will never again experience love. “Nobody to grab hold of me and hug me. I mean real love. I’ll never feel that emotion again.”).  
308. See Ernest Patrick, Meaning of ‘Life’ in Prison, in Crime and Punishment: Inside Views 141, 141 (Robert Johnson & Hans Toch eds., 2000) (“For the prisoners, the loss of freedom is devastating. Everything they have taken for granted is gone. They have no control over their lives, no choices.”); Johnson & McGunigall-Smith, supra note 293, at 338 (“The thing I miss most . . . is the right to choose. I no longer have any choice—when I shower, where I go, what I do.”).  
309. Charlie Praphatananda, Just a Matter of Time, in Too Cruel, Not Unusual
their bed spaces very well.\textsuperscript{310} For many of the inmates, such as those housed in solitary confinement for prolonged periods of time, even this picture is too rosy.\textsuperscript{311}

One lifer, William Blake, who has been in solitary confinement for more than twenty-five straight years described his experience as a

\begin{quote}
[twenty-three]-hour a day lockdown in a cell smaller than some closets I’ve seen, with one hour allotted to “recreation” consisting of placement in a concrete enclosed yard by oneself or, in some prisons, a cage made of steel bars. There is nothing in a [solitary housing unit] yard but air: no TV, no balls to bounce, no games to play, no other inmates, nothing.\textsuperscript{312}
\end{quote}

Blake’s sentence ensures he will die in prison and his indefinite detention in solitary confinement ensures he will experience the most agonizing, protracted death the State can constitutionally impose. Given this, it should not be surprising that Blake wishes he were dead already:

\begin{quote}
What nobody knew or suspected back then, not even I, [was that] on [the] very day [I was sentenced,] I would begin suffering a punishment that I am convinced beyond all doubt is far worse than any death sentence could possibly have been. . . . Though it is true that I’ve never died and so [I] don’t know exactly what the experience would entail, for the life of me I cannot fathom how dying any death could be harder or more terrible than living through all that I have been forced to endure. . . .

Had I known in 1987 that I would spend the next quarter-century in solitary confinement, I would have certainly killed myself. If I took a month to die and spent every minute of it in severe pain, it seems to me that on a balance that fate would still be far easier to endure than the last twenty-five years have been. If I try to imagine what kind of
\end{quote}

\textsuperscript{310} See Hartman, supra note 304, at 71 (“Prisoners spend most of their time under some form of lockdown, which translates into no out-of-cell time for weeks to months save the occasional shower. Food is atrocious, recreation is sparse to nonexistent, and opportunities to participate in meaningful programs are rare, at best.”); Jessica Pishko, The End to Race-Based Lockdowns in California Prisons, PAC. STANDARD (Nov. 19, 2014), http://www.psmag.com/politics-and-law/end-race-based-lockdowns-california-prisons-94497 (writing that some lockdowns have lasted more than one thousand days).


death, even a slow one, would be worse than twenty-five years in the box—and I have tried to imagine it—I can come up with nothing. Set me afire, pummel and bludgeon me, cut me to bits, stab me, shoot me, do what you will in the worst of ways, but none of it could come close to making me feel things as cumulatively horrifying as what I've experienced through my years in solitary... Solitary confinement for the length of time that I have endured it, even apart from the inhuman conditions that I have too often been made to endure it in, is torture of a terrible kind; and anyone who doesn't think so surely knows not what to think.

Even for criminals who never set foot in solitary, prison life is not much better. Knowing you will never again be free from the prison walls is intensely dehumanizing. It induces a hopelessness so profound that those of us on the outside can scarcely even imagine it. As one lifer poetically put it, each morning starts "a fresh day of utter despair, lived over and over for an entire lifetime." As another wrote, "I awaken with a feeling of dread. A day in prison offers nothing to look forward to. It is an existence of endless repetition, restriction, and regimentation... Prison is sameness, day after day, week after week, year after year. It is total confinement of body and spirit and total separation from everything real and important." How could they not feel this way? Every moment, they are forced to grapple with the pointlessness of their continued existence.

[As hard as it is for man to come to terms with meaninglessness and infinity, it is impossible to adjust to infinite meaninglessness. I can think of no better way to describe the intent of a life without parole sentence. It is an exile from meaning and purpose, and from hope. Inevitably, as

313.  Id.
314.  WILLIAM TALLACK, PENOLOGICAL AND PREVENTIVE PRINCIPLES 151 (1889) ("The criminal who is sentenced for a very long, but definite, term of incarceration, even if for fifteen or twenty years, has at least a powerfully alleviating influence in the prospect afforded by the hope of ultimate restoration to the friendships and pleasures of free life. Whereas perpetual imprisonment is accompanied by the darkness of despair...").
316.  Metzger, supra note 307, at 138, 140; see Joseph A. Badagliacca, Too Cruel, Not Unusual Enough, in TOO CRUEL, NOT UNUSUAL ENOUGH 57, 61 (Kenneth E. Hartman ed., 2013) ("It's all just a relentless cycle, like that movie 'Groundhog Day' where Bill Murray's character wakes up to the same day over and over and over.").
317.  Dole, supra note 306, at 123 ("Life without the possibility of parole means constant contemplation of a wasted life, and continual despair as to your inability to accomplish anything significant with your remaining years.").
the years roll by, bitterness begins to overtake even the strongest of men, fueled by this banishing from all that is human.318

The State does nothing to mitigate this meaninglessness. Although many prisoners have the ability to enroll in courses for college credit or to pursue other rehabilitative activities, most lifers do not have this option.319 As the Supreme Court noted, "[D]efendants serving [LWOP] sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates."320 Even when lifers are not categorically denied access to these services, they are often put at the bottom of the list—only given a chance to partake if there is sufficient funding to give everyone else an opportunity first.321 Frequently, that chance never comes.

All of this, combined with indefinite detention, instills in prisoners a sense of helplessness and hopelessness that, in many, causes severe depression, chronic anxiety, despair, and suicidal fantasies.322 Lifers are driven to madness.323 For these reasons, it is not surprising that lifers view their punishment as a slow, torturous death sentence that is far worse than the traditional death penalty.324 As one lifer


321. See AMNESTY INT’L & HUM. RTS. WATCH, supra note 319, at 68-71; Robin Ledbetter, Laying Roots, in TOO CRUEL, NOT UNUSUAL ENOUGH 13, 20-21 (Kenneth E. Hartman ed., 2013) ("Because of the length of my sentence, I’m not permitted to take college classes. I am blocked from partaking in other programs because of my sentence. I am only good now for scrubbing down the institution and maintaining its polished floors. I am only good now to shovel out slop in the chow hall and empty the trash. They want me to sweep, mop, and window wash this jail for at least the next thirty-eight years, and I am supposed to choose life over death?").


324. Correctional officers who have observed the horrible conditions of LWOP echo this sentiment. See Johnson & McGunigall-Smith, supra note 293, at 340 (quoting one correctional officer as saying, "I think [LWOP is] harder to face than the death penalty in
reported, the experience is "akin to being dead, without the one benefit of not having to suffer any more." Another added that it really is "a painstakingly slow death row."

Lest one think that a few improvements to the prison system could make LWOP more palatable than death, we need only look at William Tallack's research on Swedish prisons in the late 1800s. As he wrote, It would perhaps be impossible to find any prisons conducted with more mildness and mercy, than those of Sweden... [Nevertheless,] convicts whose original sentences of death had been commuted to life-imprisonment, who had already suffered upwards of twenty years' incarceration, and whose applications for liberation had repeatedly been refused [asked,] "Why did you spare us from the infliction of death, only to keep us here in association with the vilest criminals? You have buried us alive. The King's clemency to us is no real mercy. On the contrary, it is the severest aggravation of our punishment, to compel us to drag out our lives, without a ray of the hope of mercy."

This preference for death is neither idle speculation nor a fleeting desire held only during a prisoner's darkest moment. For many death-row inmates, the choice between life and death is very real. When a condemned's mandatory appeals are exhausted, he must decide whether to give up and accept execution or to mount a series of optional appeals that, in a best case scenario, would convert his sentence to life without parole. Those who are confronted with this choice frequently opt for death. They do so because they view life without parole as a far worse fate. To them, death "seems way

the sense that they know they are going to live the rest of their life in this kind of an environment. They are not going to get out and be able to be with their families and loved ones again. I think that's a little harder—they just go on day after day wondering when they are going to die. It's a sorry situation to be in for that long.").

325. AM. C.L. UNION, supra note 305, at 68.
327. TALLACK, supra note 314, at 154–55.
328. Id.
330. Execution of "Volunteers" Raises Questions About the Purpose of Death Penalty, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-volunteers-raises-questions-about-purpose-death-penalty ("About [twelve percent] of those who have been executed since the death penalty was reinstated in 1976 have voluntarily waived appeals that would likely have delayed their execution.").
331. Id. ("For many of these inmates, the prospect of remaining in prison for life is worse than the death penalty."); see Robinson, supra note 329 (discussing the
more real and promising than living a[] LWOP sentence."\textsuperscript{332} Simply put, execution provides "an escape from punishment"\textsuperscript{333}—an escape from the torment that is life without parole. As Joseph Badagliacca, a lifer who is on his seventeenth year in prison, wrote:

There are many times when I genuinely envy those to whom the court just flat out said, "We are going to kill you." Those guys, at least, have a shorter wait for the inevitable; a set date to die. I wonder if they look at my \textit{Deathbed} and say, "Thank God the court didn't do \textit{that} to me," or maybe not. To each his own cross to bear, they say. But at least the tubes used on those guys kill them as quickly and humanely as killing someone can be. I thought \textit{any} death penalty was not allowed to be torture. I see I was wrong.\textsuperscript{334}

Unfortunately, for the thousands sentenced to LWOP, execution is not an option. Instead, a lifer's tortured existence only comes to an end when he dies a natural death.

Let us go back to the equation that motivated this whole discussion of life without parole: $V_E = -IV_{-E}$. Recall that the goal was to determine an appropriate valuation for $IV_{-E}$ (the intrinsic value of a life spent serving LWOP). The inmates enduring this sentence have given us good reason to think that $IV_{-E}$ must be negative. These prisoners have painted a picture so dire that a positive valuation seems quite unlikely. The lifers themselves state that death is far preferable to their current existence.\textsuperscript{335} If we believe their assessment is accurate, then the comparative value of the death penalty ($CV_k$) must be positive. From this, it follows that capital punishment, as practiced in the United States, is not comparatively bad for the person who is executed.

\textsuperscript{332} Jackson, supra note 294, at 118.
\textsuperscript{333} Robinson, supra note 329. After years on death row, many prisoners optimistically await execution. As one such inmate reports,

I'm looking forward to this. The situation I'm in now is horrible. To me, I can't think of anything worse than this . . . to me, in my situation that I am in right now, this is the worst it could possibly be so it's a relief to know that I'm not going to be here no more . . . the next journey has got to be better than this one.

\textsuperscript{334} Badagliacca, supra note 316, at 61–62.

\textsuperscript{335} See id.; see also Tallack, supra note 314, at 154–55; Jackson, supra note 294, at 118; Johnson & McGunigall-Smith, supra note 293, at 334; Robinson, supra note 329.
In the previous three sections, I have shown that capital punishment is not bad in any identifiable way for the condemned. This line of argument indicates that capital punishment is not actually a punishment within the Supreme Court's understanding of the term. Moreover, because capital punishment is imposed only for the most severe crimes, it is clearly not, in any reasonable sense, a punishment that fits the crime. Accordingly, its continued use is a clear violation of the Eighth Amendment's proportionality requirement.

CONCLUSION

The Supreme Court has provided two justifications for the death penalty: deterrence and retribution. In this Article, I have argued that neither rationale can withstand scrutiny. The empirical literature conclusively demonstrates that capital punishment does not deter crime. The philosophical literature convincingly illustrates that the death penalty, as practiced in the United States, does not qualify as a retributive punishment. This conclusion follows because the Supreme Court's theory of retribution requires punishments to be bad, in some way, for the one who is punished; but the death penalty is not bad, in any way, for the one who dies. Specifically, the death penalty is neither intrinsically bad, nor instrumentally bad, nor comparatively bad. Simply put, capital punishment is no punishment at all, and therefore, its current use is a violation of the proportionality requirement embedded in the Eighth Amendment.