Crafting a Victim-Focused Approach to America’s Death Penalty

A philosophy of retributive justice has ruled America’s penal process for decades. Capital punishment is at the apex of this system: an eye-for-eye mentality in its purest form. The death penalty places the lives of society’s most heinous criminals – its convicted killers – under the control of America’s government. In executing select murderers, we inflict upon them the greatest possible punishment for their crimes, exacting vengeance on behalf of their victims. Though noble in its cause, however, the death penalty fails to account for families of slain victims that would be better served by alternate means of punishment. Every family has the right to pursue justice on its own grounds, rejecting the moral, legal, and emotional complications that invariably follow a death sentence. Capital punishment exists primarily as a retributive sanction, making it imperative that it caters to the needs of the very victims suffering from loss. States that enact the death penalty should therefore leverage the governor’s clemency powers to lower the severity of death sentences for cases in which victims’ families directly oppose a death penalty conviction.

Over recent decades, America’s justice system has institutionalized the death penalty on a national scale, executing the most egregious of our country’s offenders. In 1972, the Supreme Court’s verdict in Furman vs Georgia established capital punishment as a clear violation of the Eighth and Fourteenth Amendments, demanding reform of the penalty across the nation.¹ Four years later, new state statutes ostensibly addressed the past system’s flaws. Legislators modified the penalty to reflect the severity of the crime committed; only a small subset of offenses (almost exclusively homicides) qualified for death row, with juries deciding to invoke the sanction on

case-by-case bases. In light of these changes, the Court overturned the Furman decision, ruling in Gregg vs Georgia that capital punishment had become a more granular method of bringing justice to the convicted. With this decision as a precursor, 31 states now uphold death penalty statutes. Over 3,200 men and women are under a death sentence, and our government has executed more than 1,300 citizens since that 1976 verdict. Death sentencing has grown and flourished under the approval of our nation’s highest policy experts.

Over 40 years of data and case studies since the Gregg decision have illuminated the death penalty’s niche role as an agent of retribution in our justice system. Any punishment our nation enacts classically serves the joint roles of incapacitation, rehabilitation, deterrence, and retribution. The death penalty’s continued penological value in our system therefore lies in its ability to better serve these roles than do alternative punishment methods. The most commonly cited of these alternatives is the practice of life sentences without parole, a policy that segregates offenders from society and restricts opportunities for their reintegration. Relative to this standard, the death penalty either fails or performs no better in its ability to rehabilitate offenders, incapacitate murderers, and deter would-be criminals; it has historically proven valuable only in its ability to exact vengeance for the deaths of murder victims.

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The death penalty certainly incapacitates death row prisoners, but this is a function shared by all methods of punishment for murder in our nation. To incapacitate a criminal requires only that the individual be forcibly restricted from committing future offenses. In ending an offenders’ life, and through the confinement leading up to execution, the death penalty precludes the possibility of future crime. The alternative of life imprisonment, however, accomplishes an identical goal. Both policies enforce the criminal’s permanent isolation from civil society, mitigating his or her ability to offend again. There is no distinguishable benefit to the death penalty in this regard.

Capital punishment, furthermore, inherently undermines the rehabilitative component of penological theory. An ideal method of punishment aims to reform offenders, directly addressing their proclivity for crime. The finality of an execution, by definition, fails to rehabilitate or diagnose criminals in this manner. Having placed an offender on death row, the court concerns itself not with addressing the behavior of the criminal but on expediting his execution. These inmates are isolated from prison programs and spend as many as 23 hours per day in a solitary cell until the determined date of their death.5 Our system expends little effort in addressing the needs of those it deems worthy of execution.

The death penalty also fails in its third penological goal, deterrence, due to inconsistent sentencing and an inordinately lengthy timeframe of implementation. This is certainly counterintuitive; such a severe punishment would seem to be a more powerful curtailer of criminal behavior than mere imprisonment. It is enticing to think that would-be murderers would rather avoid crime than gamble their own lives. A punishment is only an effective deterrent,

however, insofar as it is regularly levied against offenders and is seen as an immediate threat for potential criminals. The death penalty, by contrast, is exceedingly rare; only 1 in 33 convicted murderers will find themselves on death row.\(^6\) For a potential murderer, the likelihood of execution is minute enough to be a non-factor in the decision to commit crime. Due process of law, moreover, guarantees death row inmates the ability to appeal, stretching the time between conviction and execution to an average of 12 years.\(^7\) At the time of the crime, offenders can frequently expect to face no immediate punishment, instead spending years awaiting their fates. The inherent detachment of capital punishment from the criminal is reflected in the fact that death-penalty states have on average significantly higher rates of criminal homicide than non-death-penalty states.\(^8\) These results conform with countless studies supporting the conclusion of The National Research Council: capital punishment has no distinguishable deterrent effect on murder rates.\(^9\) There are simply too few offenders directly privy to its ramifications.

The death penalty’s continued use, by extension, rests almost exclusively on the retributive aspect of penology: its ability to provide satisfaction and closure for the families of murder victims. Underlying the 16,000 annual homicide victims in our nation are another 6 to 10

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family members (“co-victims”) left reeling by the crime. These are individuals who justifiably desire and deserve justice for their loved one’s death. Capital punishment, as a solution, is unique in its ability to directly subject a criminal to the very offense he or she committed. For families of slain victims, an eye-for-eye punishment seems the most obvious method of justice. The past cannot be changed, but the state can certainly levy the ultimate sentence against a killer, justifying the punishment as an extension of the family’s need for closure.

The retributive pursuit of the death penalty is grounded in the assumption that execution will satisfy co-victims; in practice, however, families can oppose the death penalty for reasons ranging from morality to judicial expedition. To say that all families of victims support the vengefulness of the death penalty would be a gross generalization. Perhaps the simplest objection to capital punishment is that it is ethically questionable to kill someone, especially as punishment for committing a similar action. Moral qualms about the penalty and the fact that the United States is one of the few developed countries to practice it have spurred the creation of such groups as Murder Victims’ Families for Human Rights (MVFHR). The MVFHR and its many sister organizations represent hundreds of co-victims who consider the practice of executions to be a clear violation of human dignity. Other hesitations arise from the finality of the penalty; if the guilt of the offender is in question, execution precludes that possibility of that individual’s later being exonerated and released into society. Execution is an irreversible policy that demands certainty in its implementation, an ultimatum that many co-victims struggle to accept.

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Yet other co-victims, on more practical grounds, object to the unceasing and stressful rounds of trials and appeals that precede an offender’s actual execution. In most death penalty states, a death row conviction subjects the offender to an automatic appeal process (an attempt to guarantee due process of law). After the weeks and months required to exhaust this initial appeal, inmates have the discretion to pursue federal and state appeals in light of juror misconduct, new evidence, and other case-related factors. These secondary appeals can take years, especially when chained together.\(^{12}\) Years of re-visitations and re-considerations of the murder would present any co-victim with undue stress and pain; this is true whether or not they are called upon to participate in the appeals. Few would blame a co-victim for favoring the expedited judicial process of a life sentence; the faster the case is concluded, the faster the co-victim can focus on coping with grief and moving on.

The death penalty cannot fulfill its retributive function in our justice system unless it anticipates the natural diversity of preferences among co-victims. The primarily rationale in its favor, retribution, demands that the practice genuinely facilitate the well-being of those for whom it seeks to enact justice. In the case of the death penalty, it is the family and loved ones of the victim who are served by the mentality of vengeance and punishment. A system of capital punishment that fails to consider those it aims to heal thereby undermines its own premise. For the death penalty to be effective, it must act on behalf of co-victims and pursue closure by every family’s individual standards.

The cases of co-victims such as the Farah family in Florida, however, demonstrate that our penal culture fails to anticipate and serve victims who oppose capital punishment. In 2013,

20-year-old Shelby Farah was shot and fatally wounded by James Rhodes during a robbery attempt. The senseless shooting devastated Shelby’s parents and family, who immediately began taking steps to honor Shelby’s life and begin the lengthy healing process. The Farah family recognized that no single action could bring Shelby back, and instead hoped to move forward with their lives in her memory. The trial process in Duval County, Florida, however, made this impossible. Prosecutors immediately began seeking the death penalty for Rhodes, proceeding with the prosecution despite continued objections from the Farah family. For the Farah’s, the execution process (sparked against their will) brought with it a whirlwind of new suffering and pain. They did not want their daughter’s legacy to be stained by another man’s death. They did not believe in answering killing with more killing. They did not agree to the years of trials and appeals that only rehash painful memories of their daughter and their loss. As Shelby’s mother publicly writes, “we can’t start to heal and move beyond the legal process, which never seems to end.” In overriding the wishes of families like the Farah’s, the court system undermines its very goals of healing and closure; Shelby Farah’s family faces years of perpetual stress in pursuit of James Rhodes’ death.

The plight of the Farah family is far from unique; co-victims in homicide cases regularly derive little satisfaction from the practice of the death penalty and its necessary appeals. In 2012, researchers at the University of Minnesota interviewed 20 families of crime victims in Texas, a primary death penalty state, and 20 more families in Minnesota, which instead offers life without parole. They found that families in Minnesota were able to move on sooner; because their loved


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ones’ killers were sentenced to life without parole, they weren’t re-traumatized in the multiple appeals that precede an execution. These results have been replicated in numerous national studies with a universal theme: closure does not come from a single action. Over 20% of co-victims find that the execution brings them no healing or closure at all. An effective justice system presents a more robust retributive solution for those 1 in 5 co-victims who are scarred, not healed, by the death penalty.

Any improvements on our death penalty procedures must address the method through which co-victim voices are stifled: an inefficient and rarely implemented system of clemency in death penalty states. Though co-victims are permitted to testify in court through a policy of Victim Impact Evidence (VIE), they are not permitted to inform the jury of their preferred sentence; this enables jurors to objectively determine a penalty in each case. If the offender is sentenced to death, however, co-victims have few options other than to apply to the state’s governor for a commutation of sentence. State petitions for commutation are filed through a given governor's office or a given state's department of paroles and pardons. Each state’s governor, as the primary executive power, has significant discretion in each case to reduce the death penalty to a simple life sentence. In some jurisdictions, the governor’s decision is entirely discretionary, while in others a review board or advisory group must concur with the governor’s


decision. In either case, the governor has historically proven to hold the dominant voice in these debates.\textsuperscript{19} Despite this nearly unilateral power, however, there has only been an average of one death sentence commutation in 20 years for each state that practices the policy.\textsuperscript{20} The rarity of commutation means that co-victim families have no practical power to reverse court decisions, even those that may ultimately be detrimental to their well-being. In most of these states, moreover, the governor does not accept a request for commutation until after the appeals in a given case have concluded. The co-victims would have already suffered through multiple years of trauma by this point, invalidating the very purpose of the request for change.

In order to better address the needs of co-victims, state governors should immediately act on post-conviction commutation requests from victims’ families in all death penalty cases. The current commutation process unnecessarily complicates and obfuscates the means by which co-victims can contact a given state’s office of pardons. In the spirit of creating a transparent process that heals victims (as capital punishment purports to do), state governments should promptly inform all co-victims in death penalty verdicts of their right to override the sentence. The crux of this solution is that co-victims can request a commutation prior to the lengthy appeals process; no co-victim should suffer through the appellate structure against his or her will. Having provided co-victims with the necessary paperwork to file a request, the state’s pardon office and governor should concurrently be prepared to demote the given offender to a sentence of life without parole. The commutation request from co-victims must represent a unanimous


consensus by all whom the state recognizes as the immediate nuclear family of the victim; this ensures that commutations occur only in compelling cases in which the co-victims are unified in opposition to the penalty. If there are no family members who meet this criteria for a given murder victim, the process of capital punishment will proceed as it does under our current system. All co-victims deserve the right to determine their futures through a standardized policy of transparency and expedience.

The death penalty, though controversial, is an integral component of our criminal justice system whose continued implementation has been consistently supported by our nation’s courts. The widespread adoption of the penalty, however, masks its shortcomings as a penological method. Relative to the practice of life sentencing, capital punishment has proven unconvincing in its ability to incapacitate, deter, and rehabilitate criminals. It is in the interest of our criminal justice system, then, to ensure that the policy thoroughly fulfills its retributive purpose. A system in which the state alone determines the fate of a criminal, however, is absurd given its goals of serving the needs of specific victims. Instead, it is imperative that the families of slain victims drive the retributive function of the penalty. As a matter of more effective public policy, co-victims in all death penalty states must be able directly override the implementation of capital punishment immediately following the conviction. To prevent their voices from being heard is a grave judicial injustice that precludes innocent and grieving citizens from making decisions about their own health and the legacy of their loved ones.
Works Cited


