Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty

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For my parents,
Marion and Reba Foley

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CHAPTER 1

The Supreme Court and the Punishment Dilemma

> But all punishment is mischief: all punishment in itself is evil.
>
> Jeremy Bentham, *The Principles of Morals and Legislation*

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose on criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.
>
> Justice Potter Stewart, *Furman v. Georgia*

> Men are not hang'd for stealing Horses, but that Horses may not be stolen.
>
> George Savile

GENERAL BACKGROUND

The Supreme Court began to scrutinize the constitutionality of the death penalty in 1878 in *Wilkerson v. Utah*.[1] In *Wilkerson,* the Justices unanimously held that death by firing squad did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. It would be another twelve years before the Court would hear a second capital case, *In re Kemmler*.[2] The Court, in *Kemmler,* and again unanimously, held that the use of the electric chair was constitutional.

The Court's decisions in these cases came as little or no surprise, in part because society in general had no moral or legal scruples about capital punishment. However, in the 1960s people would challenge that general truth. Indeed, in some polls in the 1960s, more Americans found the death penalty immoral, if not unconstitutional.[3] Then, in a shocking and unpredictable 1972 Court case, *Furman v. Georgia*,[4] the Supreme Court, in a 5–4 vote, held that the death penalty, as then administered, violated the Eighth Amendment's cruel and unusual punishment clause, not because the death penalty in and of itself was unconstitutional, but because there were no clear, coherent, and consistent methods for imposing the death penalty on a person convicted of a capital crime. People convicted of a capital offense received different sentences, one of which could be the death penalty. In other words, the methods used to distinguish between those guilty capital defendants who deserved the death penalty and those who did not were inconsistent and haphazard. In short, no clear and coherent method existed that guaranteed capital defendants "equal justice under law."[5] Stated constitutionally, because no consistent and coherent criteria existed that guided juries and judges in their deliberations on the "just" punishment, capital defendants were denied, under the Fourteenth Amendment, their fundamental constitutional rights of "due process of law" or the "equal protection of the laws."[6]

From 1878 to 1972, the Supreme Court deferred consistently and willingly to states' rights concerning both criminal justice and the death penalty. For most of those years, the prevailing view of the Court was that the language of the Fifth and Eighth Amendments constitutionally sanctioned capital punishment clearly and unambiguously. There was little opposition to the death penalty and, at times, no opposition at all among the justices. A literal reading of the Fifth Amendment, after all, states, directly and seemingly unambiguously, that "[n]o person shall be held to answer for a capital . . . crime," "be twice put in jeopardy of life," or "be deprived of life . . . without due process of law." Why, one could ask, would the Fifth Amendment refer explicitly to the conditions that must be met for a life to be taken if it was not constitutional to take it? And if life can be taken, assuming due process of law standards have been met, how can people argue that the death penalty is unconstitutional? No interpretation of the Bill of Rights can make a case that the Eighth Amendment nullifies the Fifth Amendment's conditions for depriving a person of his or her life.[7] Nonetheless, the major assault on the death penalty historically has been based on the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[8] Is the death penalty unconstitutional because it is cruel and unusual? Two points must be noted in this context.

First, the federal government and the individual state governments have the constitutional right to use the death penalty if they so desire. There is no constitutional requirement that states must use the death

penalty. Currently, thirty-eight states, the federal government, and the military have provisions for the use of the death penalty.

Second, there are no specific constitutional limitations on when the death penalty can be employed. For example, the death penalty has been used as a punishment for murder, rape, treason, sodomy, arson and theft, among others. Pennsylvania was the first state to abolish the death penalty (in 1789) for all criminal offenses except first-degree murder. The Supreme Court has now placed limits on the use of the death penalty. For example, mandatory death sentences (i.e., an automatic sentence of death for murder)[9] and a sentence of death for rape[10] have been declared unconstitutional. But these are recent limitations—not limitations specifically defined as cruel and unusual punishments. Changes in the Supreme Court's scrutiny of the use of the death penalty began when the Court started to apply the Bill of Rights to the states based on the concept of *selective incorporation.* Although scholarly debate on the meaning, legitimacy, and scope of selective incorporation remains divided, there is no question but that the practice of selective incorporation has become entrenched in the Court's philosophy regarding the limits of state power as it affects citizens' rights as guaranteed by the Bill of Rights.

The selective incorporation doctrine has been defined as "the process by which certain of the guarantees expressed in the *Bill of Rights* become applicable to the states through the ***Fourteenth Amendment. . . .*** Under the selective incorporation approach, select guarantees in the Bill of Rights and their related case law are applied to the states."[11] In their book on the Bill of Rights, Ellen Alderman and Caroline Kennedy explain the doctrine as follows:

> So it was not until the Thirteenth, Fourteenth, and Fifteenth amendments were enacted, after the Civil War, that the federal Constitution began to protect individuals against the states. The Fourteenth Amendment has been the principle means by which this protection has been accomplished. It reads, in part, "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law." The Supreme Court has interpreted this guarantee of liberty to embrace the fundamental liberties in the Bill of Rights, meaning that state governments must observe and protect them to the same extent as the federal government. In legal parlance, this process is called incorporation. The amendments in the Bill of Rights are said to be incorporated against the states through the due process clause of the Fourteenth Amendment. There has been an ongoing debate on the Supreme Court about the scope of incorporation, and whether the entire Bill of Rights, or only some of its guarantees, should be incorporated against the states.[12]

The importance of the selective incorporation doctrine as it applies to criminal justice issues cannot be overstated. Accordingly, a brief explanation of selective incorporation and how it has affected constitutional interpretation of criminal rights is necessary.

Originally, the guarantees of the Bill of Rights applied only to the federal government's limits over individual liberty. The language of the First Amendment offers the clearest statement about such limits. The first five words of that Amendment are, "Congress shall make no law."[13] The constitutional guarantees of the first eight amendments can be read as limited to "Congress." For example, the First Amendment prohibited Congress from "abridging the freedom of speech," not individual states; the Fourth Amendment prohibited Congress from passing laws that would permit the federal government to randomly conduct "unreasonable searches and seizures," not individual states; the Eighth Amendment prohibited Congress from imposing "cruel and unusual punishments," not individual states. Thus, states were not precluded from abridging the freedoms guaranteed to the individual against the federal government. Many states had their own guarantees safeguarding individual rights, but individuals did not have the same securities against their respective state governments as they did against the federal government. The Fourteenth Amendment would change that reality.

Section 1 of the Fourteenth Amendment established the means by which the Supreme Court would selectively apply (selective incorporation) the individual guarantees of the Bill of Rights to the separate states. The first sentence of that section reinforces the federal nature of constitutional democracy in the United States, namely, U.S. citizens "are citizens of the United States and of the State wherein they reside."[14] The second sentence of that section suggests that the rights guaranteed to the people by the Bill of Rights against the federal government apply to state governments as well. That sentence reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[15] One clause in that sentence is particularly relevant to criminal justice issues, namely, states cannot "deprive any person of life, liberty, or property, without due process of law." That clause extends the Fifth Amendment guarantee individuals have against the federal government to state governments. Stated alternatively, that clause "incorporates" a Fifth Amendment right into a right against both state and federal governments. States can no longer *legitimately*, that is, *constitutionally,* deny any citizen life, liberty, or property, without due process of law.[16] However, that states must guarantee "due process of law" to all persons strongly suggests that some, if not all, liberties and securities of the Bill of Rights now applies to the states as well. Constitutional debate about what the framers of the Fourteenth Amendment intended remains contentious. But the practice of "selective incorporation," despite ongoing scholarly debate, has become a mainstay of constitutional decision making. The impact of selective incorporation has

been significant and substantive. Many of the following cases demonstrate how the Fourteenth Amendment, and the doctrine of selective incorporation, has transformed criminal justice law. One highly significant case illustrates the idea of selective incorporation.

States, as noted, had the right to define their criminal laws, including, among other things, defendant rights. One such right that is now taken for granted is the Sixth Amendment right to counsel. Prior to 1963, with few exceptions,[17] states were not required to appoint counsel in criminal trials to defendants who could not afford counsel.[18] Without counsel, however, defendants were at a distinct disadvantage not only as to the outcome of a case but also in terms of knowing their constitutional rights. In 1963 the Supreme Court held, unanimously, in *Gideon v. Wainwright*,[19] that all defendants charged with serious felonies had to be represented by counsel, and that if the defendant could not afford counsel, the state had to appoint counsel. As a result of *Gideon*, a defendant's Sixth Amendment right to legal representation now applies, by incorporation, to the states. Since *Gideon,* the right to counsel has been expanded to include the right to counsel at all stages of police interrogation. Without the Fourteenth Amendment and the Supreme Court's interpretation of it few, if any, of the Bill of Rights would apply against the states.[20]

Most, but not all, of the rights guaranteed by the Bill of Rights have been "incorporated" to apply against the states.[21] Specifically we will see Supreme Court Justices trying to walk a thin line between the rights of the states to define their criminal law and the Supreme Court's responsibility to assure all people their constitutional rights as guaranteed by the Bill of Rights. Capital punishment constitutes one of those states' rights that the Supreme Court must address both in terms of a person's fundamental rights (for our purpose, more specifically, the Eighth Amendment's prohibition against cruel and unusual punishment) and the rights of states to define not only what constitutes a crime but also to determine what they maintain constitutes an appropriate punishment.

Literal interpretations of the Fifth and Eighth Amendments, along with "selective incorporation," constitute key factors in the adjudication of most of the cases examined throughout this book. There is, however, another element that plays out in Supreme Court death penalty decisions, namely, arguments about what justifies punishment in general and the death penalty in particular. Those justifying arguments will direct the Justices' thinking as they apply the Constitution to criminal laws and punishments. It is therefore necessary to examine briefly those justifications.

Jeremy Bentham's oft-quoted remark that "all punishment in itself is evil" identifies the philosophical concern with punishment as primarily one of justification. More specifically, Bentham claims that punishment, "if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[22] Any punishment, including

something as seemingly innocuous as a one-hour detention, requires justification because punishment is pain and no one has a right to inflict pain on another person without some fairly substantial moral justification. The two major justifications for punishment in general and the death penalty in particular are reflected in the opening quotes from Justice Potter Stewart and George Savile. Justice Stewart's statement that opens this chapter reflects a *retributive* justification for punishment. Retributive theory holds that people are punished because they have broken a law. George Savile's statement that follows Stewart's reflects a *deterrent* justification for punishment. Deterrence theory holds that people are punished to deter further criminal conduct. Since retributivism and deterrence are at the heart of many of the Supreme Court Justices' ruminations on the justifications of punishment in constitutional adjudication on the death penalty, it is necessary to understand these distinct philosophical justifications for punishment.

The retributive justification for punishment claims, overall, that punishment is justified because the guilty must pay for their crime, their wrongdoing. If someone commits a crime or a moral outrage, that person, from a retributivist's perspective, must be punished or morally disparaged. In addition, the punishment must fit the crime. A retributivist, for example, could argue that the death penalty (the punishment) fits first-degree murder (the crime). Retributivists, in general, maintain that punishment balances the scales of justice or that punishment rights a wrong. The public attitude, for example, that "criminals get what they deserve," is retributive in nature. A retributive philosophy looks to the past to determine a person's (criminal's) "just desert." It is a *nonconsequential* philosophy in that what occurs as a result of punishment is secondary in determining and meting out punishment. For example, if someone has stolen $5,000, a retributivist could justify a $5,000 fine in addition to an amount calculated to offset any additional advantages that resulted from that theft. Federal laws, for example, permit the federal government to seize property that has been purchased as a result of money acquired through illegal drug sales. In other words, for retributivism, people cannot gain from their wrongdoing. Laws that prohibit convicted criminals from making money from a book they write about their crimes are retributive in nature. Criminals are not to gain from their wrongdoing.[23] Retributivists, in short, are not *directly* interested in consequences such as deterrence. If a retributive punishment results in a lower crime rate, that is a fortuitous result, a bonus. But "benefits" or "beneficial consequences" of punishment in classical retributivism do not count in support of the justification of punishment.

Retributivism, then, holds that punishments are evaluated independent from any consequences, good or bad, that the punishment brings into existence. Criminal acts, in classical retributivism, must be punished to

maintain a moral and social equilibrium in society. This general justification for punishment, then, seeks *primarily* to restore social order, not to *deter* future criminal acts. As noted previously, most punishments will have some deterrent effect. But even if punishment does not deter, society, from a retributivist viewpoint, still has an obligation to punish criminal wrongdoing. Lying before a grand jury, for example, from a retributivist perspective, constitutes an act of wrongdoing that should be prosecuted because a legal wrong has been committed. For society to show respect for its laws, it must punish people who break those laws. The punishment itself is based on what has been done, not on what will happen later as a result of punishment. Retributivists, then, in general, look to the past to determine what punishment, if any, is *deserved*.

Deterrence theory holds that punishment is justified only if it serves some greater social purpose, function, or goal. Punishments, on this view, to be morally justified, must achieve some desirable social end. Deterrence theory is a *consequential* philosophy in that punishments must deter criminal conduct or that punishment is illegitimate. Consequentialism, as the name implies, holds that actions are judged in terms of the consequences, good and bad, that the act brings into existence. From a consequential point of view, for example, an act of wrongdoing (e.g., prostitution) may not need to be prosecuted or punished if the consequences of the wrongdoing were either indefinable or socially beneficial. In short, deterrence theory, in contrast to retributive theory, looks to the future to determine what punishment, if any, is *necessary*.[24]

A brief but useful differentiation between retributive and deterrent justifications for punishment is offered by Immanuel Kant, one of the most formidable moral philosophers and retributivists in the history of philosophy. Kant describes the difference as follows:

> Punishment in general is physical evil accruing from moral evil. It is either deterrent or else retributive. Punishments are deterrent if their sole purpose is to prevent an evil from arising; they are retributive when they are imposed because an evil has been done. Punishments are, therefore, a means of preventing an evil [deterrent] or of punishing it [retributive]. Those imposed by government are always deterrent. They are meant to deter the sinner himself or to deter others by making an example of him. But the punishments imposed by a being who is guided by moral standards are retributive.[25]

With these very general lines of distinction drawn, what, more specifically, defines retributive and deterrent justifications for punishment?

Retributivism is not, as some have argued, necessarily associated with the notions of revenge and vengeance.[26] Susan Jacoby, for example, misrepresents retributivism as follows: "Advocates of draconian punishment for crime invariably prefer 'retribution'—a word that affords the comfort of euphemism although it is virtually synonymous with 'revenge.'"[27]

Revenge may be indeed the best way to get even, but retributivists are not justifying punishment because they think that there is a need to get even. Punishment is justified under a retributive view because a wrong has been done, and a moral society cannot stand idly by while wrongs are being committed. David Lyons makes the following relevant observation: "Retributive theories of punishment maintain that retributive attitudes can be translated responsibly into practice. They do not celebrate vengeance or call for blind, unreflective revenge. They call for justice—the justice of treating people as they *deserve* to be treated by virtue of their conduct and the attitudes that conduct represents."[28] Even Kant, the quintessential retributivist, eschews revenge, vengeance, and hate as legitimate elements in punishment. For Kant, the only person entitled to seek vengeance is the "Supreme Moral Lawgiver,"[29] namely, God. Kant makes his position rather clear in the following reflection: "Thus it is a moral duty not only to refrain from returning vengeful hatred for the hostility of others, but also to refrain from summoning the Judge of the World to vengeance. This is partly so because man is so saddled with guilt of his own that he is much in need of pardon, but it is especially so because *no* punishment, from whomever it might be, may be inflicted in *hate*."[30]

For the retributivist, punishment is right in itself, regardless of what the consequences (the deterrent perspective) are, including the consequences of "getting even." Indeed, what may sound somewhat paradoxical, punishment of wrongdoing is justified even if it leads to an increase in crime. For example, there have been isolated cases of murder committed specifically because the death penalty existed. John Kaplan tells the story of a baby-sitter who killed the children left in her care because she wanted to commit suicide but, for religious reasons, was unable to. By killing the children, she reasoned, the state would take her life, something she was religiously prohibited from doing. Logic aside, this example may be better used to indicate that no punishment will ever be completely effective, whether effective be defined in terms of retributive or deterrent theory.[31] Although these cases are rare, they still occurred because the murderer sought or embraced the death penalty. Now politically and legally society may well want to reject the death penalty if its presence increases the possibility for murder. From the retributive perspective, however, the death penalty remains morally defensible despite any increase in murders.

The retributive theory stresses the relationship between punishment and desert. That is, no one should be punished who is not culpably guilty; people should be punished only if they are guilty *and* deserve it. Thus, a criminal may be guilty of wrongdoing, but a punishment may not be deserved. For example, people who simply do not, or cannot, understand what it is they have done should not be punished. For good or for ill, people are not punished if they are impaired mentally (e.g., do not or cannot understand what it is they have done). A nine-year-old, one can argue,

should not be punished formally (i.e., an adult prison or the death penalty) for having committed murder on the basis that nine-year-old children do not comprehend the nature and meaning of the act they have committed. Of course, one can argue that nine-year-old children in certain situations should be punished. My point is less controversial, namely, there are conditions—mental, physical, or otherwise—that render a person blameless, although the act itself is criminal. From a retributive point of view, punishment cannot be inflicted on people who, for whatever reason, cannot understand their criminal wrongdoing. Society simply cannot punish people who do not deserve it. Or, to make the same point, a person who has been punished must be one who *deserved* to be punished; otherwise, that person has been done an egregious injustice.

Furthermore, the retributivist maintains that there is a duty to punish the guilty. A criminal should not go free. Why? First, an illegal act has been committed, and, to show society's respect for law, punishment is required. If people are not punished for their wrongdoing, law becomes a mockery, a joke. Second, criminals who are not punished for their wrongdoing are denied their autonomy and individual worth as human beings. Retributivism upholds the moral worth and dignity of all human beings.[32] Not to punish wrongdoers, to place them in a rehabilitation program or to claim that they were not responsible for their actions but were instead victims of their environment, is to deny them their autonomy, moral worth, and human dignity. One brief example can illuminate what at times sounds positively bizarre.

I do not think that anyone, in reality, would insist on punishment as a means to maintain their autonomy, moral worth, and human dignity. But, in theory, is it possible that someone would ever claim that they want or demand to be punished? In Henrik Stangerup's *The Man Who Wanted to Be Guilty*,[33] the main character, Torbin, commits a particularly brutal act: he murders his wife. Once taken into custody, Torbin is taken away to undergo "retraining." His son has been taken to a "social center" in part to forget his past but also to adjust to life without parents. Torbin has been told that there never was a wife and a son. All traces of his wife's and his son's existence have been removed from their former apartment. Her blood can no longer be found dried on the floors and walls. Pictures that would prove that there was once a family have been destroyed. It is time for Torbin to start a new life as if there had never been an old one. In Stangerup's fictional society, there is no such thing as guilt and punishment for wrongdoing. At one point in a session with his therapist Torbin tries desperately to tell her that he has committed murder and that he and he alone is responsible for it. The following conversation ensues:

"I'm guilty of a *murder.*"

Now she [the therapist] looked at him angrily.