

For the past six weeks our class has been discussing the intricacies and justifications of sentencing, particularly of capital punishment. The death penalty may be the most polarizing criminal justice issue of our time, and its merits continue to warrant heated debate. The “big” questions tend to fall within these parameters: one’s theory of punishment (utilitarian or retributivist); the true cost to society; the effectiveness of capital punishment; which, if any, crimes justify the death penalty; the level of certainty regarding culpability for which convicts are sentenced to death; and the role of race, class, and gender bias pertaining to the death penalty, as compared to that of the American criminal justice system as a whole.

While all of these are worthy and interesting questions, for me the most important, fundamental question is, “how is death different”? This question seems to touch the heart all of the preceding questions, whether they are empirical or ethical. There is no doubt that death imposed by the government, i.e. legalized murder, is different than all other forms of punishment. Most obviously, it is irrevocable. Some may argue that life without parole sentences are essentially quite similar because the convicted individual will never be released from prison. However, for one who is imprisoned, there is always the possibility, albeit mostly a faint one, that their case will be reopened or granted further appeal based on DNA evidence, for example. As technology continues to advance, it is highly probable that forensic improvements will allow innocent convicted offenders to be exonerated. However, if these people were executed prematurely, no recourse would ameliorate their injustice. The most one could hope for in that case is systemic change; however, since this exact scenario has occurred multiple times, this seems unlikely.

For me, beyond its finality, the death penalty remains the ultimate punishment. Many believe that it may be a “better,” more effective form of punishment to force a heinous killer to rot in solitary confinement for the rest of his or her life. However, I believe that state-sanctioned killing of those people whom society views as the “scum of the earth” is a much graver punishment. When the state takes away someone’s freedom through imprisonment, that person presumably retains some degree of mental freedom – freedom to think, to believe, to reflect, to repent. Truly, it is the freedom to exist. However, once one is executed, their consciousness is obliterated, disallowing the opportunity for rehabilitation, and rarely leading to reconciliation. Is this really the way to justice?

This whole debate is reminiscent of a passage from Camus’ existentialist novel, *The Stranger*. In that story, the protagonist is imprisoned for shooting a man on the beach and murdering him. Camus writes of the daily existence of the prisoner and how he adapts to being in prison. The protagonist says, “I’ve often thought that had I been compelled to live in the trunk of a dead tree, with nothing to do but gaze up at the patch of sky just overhead, I’d have got used to it by degrees...There were others worse off than I. I remembered that...in the long run, one gets used to anything.” Hence, I view the state’s obliterating the consciousness and existence of prisoners to be a kind of robbery that goes beyond punishment for crimes committed and translates to a condemnation of that person’s entire character and worth as a human being.

Essentially the only viable justification that I have come across for capital punishment is retributivist in nature. That is, the convicts deserve to pay for the crime(s) they committed (a.k.a. “an eye for an eye.”) While this seems to follow our moral instincts, I believe that the law should remain as rational as possible. Thus, there is no utilitarian reason to execute people, because LWOP is just as effective as removing them from the community and preventing further harm to

the general public. I believe that it is time that the United States join the rest of the world and human rights advocates to abolish the death penalty.

Over the last few weeks, our class has discussed at great lengths the humanity, cruelty, and proportionality of the death penalty. One point that was made this past week stuck with me: is it really more humane of the state to let the prisoner die slowly in jail rather than to kill him instantly? Life without parole is nearly just as much of a death sentence as the death penalty, with arguably a more torturous method of killing.

The notable Supreme Court cases regarding the death penalty and the class discussions revolve around the idea that the “state should only kill prisoners when... X, Y and Z,” and limits the discussion to when the death penalty is constitutional. But doesn't the state kill someone every time it sentences an individual to life without parole? The state may not have instantly killed the individual, but it has sentenced them to prolonged death and taken away the individual's freedom in the meantime.

One student in class made the argument that the affirmative act of killing an individual is what makes the death penalty the crueler than simply life without parole, but this distinction seems arbitrary if not simply false. It is just as much of an affirmative act to lock someone away and throw away the key, as it is to inject someone with poison. The main difference is simply the knowledge of the time of death, not the inevitability of the death itself.

I can't speak for anyone other than myself, but personally, if I had to rot in jail for 40 years or get killed on the spot, I would choose death. It would be an interesting social experiment to me to see how many would share that opinion. But assuming there would be a statistically significant number of people who would

choose death as I would, what really makes the death penalty crueler and more disproportionate than life without parole?

The first week of class, Professor Berman mentioned that the European standard of human rights disallows life without parole because “it is a violation of human rights to extinguish hope.” This standard emphasizes the similarities between the death penalty and life without parole because they both result in the extinguishment of hope.

Based on this standard of human rights, I would argue that any time the death penalty is unconstitutional as cruel and unusual punishment, so too is the arguably more severe punishment of life behind bars without any hope of release. As Professor Berman mentioned in class, when a dog is sick and in pain, his owner puts him down. He euthanizes him. Because euthanizing the dog is the more humane treatment than to let him slowly suffer in pain. Humans are not exempt from this need for mercy. It is crueler, then, to slowly watch someone suffer to death than to put him out of his misery.

One might argue that life without parole truly does not have the hopelessness or finality of death because it leaves open the slight, slight possibility of change in policy or exoneration, but this unrealistic hope of a miracle is not enough to overcome the cruel day-to-day reality that this miracle will likely never come.

Topic: Death Penalty Discretion Lessons

At the beginning of our discussion on discretion, we discussed the attributes of discretion, and the positives and negatives of those attributes. It is clear that there will be some measure of discretion in sentencing because we cannot afford and do not have room to punish anyone who violates any crime ever. Not only is it time-wasting and resource-wasting to punish every crime, but as society evolves, our perceptions of what is “bad” or what is worth sending someone to jail for evolves. In the case of drug use, as society’s perception changes, and as resources remain limited, there might be a decline in prosecution of some laws. Another attribute of discretion is that it allows flexibility, and nuances, because not every detail can be written into law. This allows decisions to be made although they are not explicitly allowed or outlined in the robust laws. On the other hand, discretion also leads to disparity and a difference of sentences received, because giving actors discretion over a wide range of cases leads to too many different options chosen; a lot of the times, these difference reflect improper factors present in the system, such as racial and gender disparity. In *McCleskey*, the study showed that while the defendant’s race does not matter that much, the race of the victim is extremely important in death penalty cases. Further, other studies have shown that while race and gender both play a role in sentencing, that the gender of defendant matters more than the race of the defendant when it comes to applying the death penalty. Some states have tried to respond to these issues by enacting racial justice acts.

First, some of the most important lessons I learned were the roles in every death penalty case. Knowing the “who’s” in each death penalty case is important to finding a solution to the disparity in sentencing. To begin the list, the legislators are the actors who decide whether to authorize the death penalty in their state. They also draft the laws that determines the range of sentence for a particular crime. Along those same lines, there are also sentencing commissions, including a U.S. sentencing commission for federal law, and sentencing commissions by state. These administrative experts are in charge of providing the sentencing guidelines and recommendations to the legislators based on a study of criminal law and sentencing patterns.

Next, closer to the particular crime, there are victims and witnesses. The witnesses can choose what information to provide and whether to provide information at all. Other actors in this process may influence them; as we just saw at the end of last year in Cleveland, a witness, who was 12 at the time he testified that two men murdered another man in 1975, recently recanted his testimony. He was the sole witness in the trial, and had never actually seen anything. He stated that Cleveland police detectives threatened his family if he did not cooperate. Speaking of police, they are next in the line of actors. Police decide who to arrest, and formally and informally make investigative choices. They choose how they bring evidence to prosecutors, they decide which witnesses are worth pursuing in the initial investigation, and they often influence the answers witnesses and potential defendants give during interviews by purporting to offer them something in return.

The prosecutors are those with legal authority to making the charging decision. This, however, is limited to what is available to them, which is determined by the legislature. For instance, the legislatures, and their constituents influence whether the death penalty is available to the prosecutors. There is also the defense attorney, who determines the theory on which they will defend, the witnesses to testify on the defendant’s behalf and, in large part any negotiation for a lesser sentence. One actor that I never thought about having discretion, is the defendant himself. He chooses his victim, importantly the race and gender of the victim, where he commits the crime, and what crime he is committing. It was especially interesting to hear the story where the defendants brought their victims over state lines before killing them.

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Next, there are the pre-sentence investigation officers, who provide a report about the defendant's background before sentencing to highlight any extenuating circumstances, which should lessen the sentence, or other factors showing reason to increase the sentence. The jury then decides whether to convict someone, if they do not believe they deserve the death penalty. The trial judge often gives the sentence, based on information and arguments from the prosecutor and defense attorney, what the victim said, and what jury instructions are given. After the initial trial, the appellate judges will consider the fairness of the sentence, and will ensure proper procedures will follow. These judges, however, are less equipped to look at this case relative to all the other actors we have discussed. It is uncertain if the appellate courts are even helpful in their role, because unless a judge has a bias against or for a particular kind of sentencing or sentence, there is not much more for an appellate judges to add at this point, leaving almost no role in death penalty sentencing. Outside of the courtroom, parole boards weigh in on sentences after the defendant has served time, correction officials can decide whether to award good time or bad time credit based, and probation officers monitor the defendant after prison, determining when the report any wrongdoing.

Finally, actors that I definitely would not have thought of, but which are some of the most headline making as of late, are governors of each state, and the President. They can grant clemency for a particular defendant, and some have declared a moratorium on the death penalty in their state. Recently, a Philadelphia D.A. sued Pennsylvania Governor Wolf over the death penalty moratorium he imposed. Governor Wolf is keeping the inmates on death row, but granting reprieve each time their execution date is set, effectively giving each prisoner life without parole. The D.A. is arguing that the Governor cannot simply grant an indefinite reprieve when there is no question of guilt just because he feels the capital punishment system is unjust.

This leads to the question of whether LWOP is actually any different, better, or worse than the death penalty. Sure, Governor Wolf temporarily spared Terrance Williams' life when he granted him reprieve after he was scheduled to be executed, but now he has only ensured that he will die in prison after sitting alone on death row. It does not seem in this case that there is any question of guilt, so the finality of death and the issue of killing an innocent man is not really an issue here. Governor Wolf seems to be using his morality as his reasoning, and to him the affirmative act of killing someone is more morally wrong than allowing someone to die in prison without the possibility of parole. What is interesting is that he has not commuted all the sentences, but will be granting reprieve as they are scheduled for execution. This means that after he leaves office, if the next governor does not wish to continue this practice, not only can they decline to grant reprieve to any other inmates with dates set for execution, but can also rescind the reprieve given to those who have it now.

Discretion in the death penalty system as it stands now leads to racial and gender disparities, which is evident from data we have discussed in class, and to which SCOTUS and our legislatures have yet to find a workable solution. As they have been passed, laws prohibiting racial/gender discretion in death penalty sentencing have effectively gotten rid of the death penalty, rather than fix any problem, because every single person on death row has claim that racial bias played a role in their sentencing. Through that whole list of actors described above, it is not hard to see how that is the result. I think the idea of the racial/gender justice acts are on the right path. Finding the correct words to use so that the act does not go so far as to eliminate the death penalty (if that is not what the legislature's goal is) is key. It might be necessary to take small steps, ensuring that the most heinous instances of racial or gender bias are caught by these laws, before trying to eradicate an entire system of improper bias.

February 23, 2015

Women on Death Row: Is gender-bias the best explanation for why men significantly outnumber women on death row in the United States?

Women currently account for approximately 2% of the total death row population. How can we explain this statistical anomaly? Why does the United States execute more men than women? One often heard explanation is that our penal system is inherently gender-biased, particularly when it comes to the death penalty. While there may be some truth in this statement, I am not convinced that gender-bias can adequately account for this differential. Instead, I believe there are a variety of other factors (besides gender) that better explain why men outnumber women on death row.

First, women are statistically less likely to commit violent crimes. When it comes to homicides in the US, women only account for 10% of arrests. If 90% of the individuals arrested for murder are men, is it really that surprising that more men receive the death penalty? Scholars in support of the gender-bias theory often argue that although more men are arrested than women, of those individuals arrested, a larger percentage of men are still sent to death row. This can also be explained by factors other than gender.

Women are also less likely to commit murder in combination with another felony. This is incredibly important because when an individual commits a felony (or multiple felonies) in conjunction with murder, prosecutors are more likely to recommend the death penalty. Similarly, many of the women charged and convicted of murder in the US have no criminal history, a significant mitigating factor when it comes to sentencing. Conversely, most of the men currently on death row have an extensive criminal record. Not only are prosecutors more likely to take the death penalty off the table for those individuals with a clean record (with some obvious exceptions), juries are usually less inclined to sentence a defendant with a previously spotless record to death.

This leads to the third factor in my explanation – prosecutors and juries are less likely to see female offenders as inherently dangerous or incapable of rehabilitation. While one could easily

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argue that this can be attributed to a historical characterization of women as the weaker, more innocent sex, I think there is more to it than just gender. Female offenders tend to show more remorse for their actions during trial. Remorse has a significant impact on the jury, whether or not they realize it at the time. Additionally, because many of these women have no prior history, some juries are inclined to believe they simply “snapped” and can be rehabilitated.

Which leads to my final and most significant argument. I believe that there are fewer women on death row due in large part to the identities/characteristics of their victims. Women are more likely to kill partners (14%), spouses (28%), or children (10.4%) than strangers (7.2%). While one might initially be inclined to think that such intimate crimes would result in harsher punishments (more death sentences), it is actually the opposite. When an individual murders a spouse or child, there is usually some explanation (however absurd) for their actions. Whether it was emotional instability, abuse, fear, depression, etc., jurors are more inclined to sympathize with defendants who “snapped” and killed someone close to them. Because we are hardwired to believe that no one could possibly kill their spouse or child unless they were seriously disturbed, juries are more hesitant to sentence those defendants (often women) to death, and instead opt for life in prison.

Conversely, juries often find it very difficult to understand and sympathize with a defendant who kills a stranger or mere acquaintance. Unlike women, men are more likely to kill strangers (25.1%) and acquaintances (54.6%) than their spouses (6.8%) or children (2.2%). Because these men are often unable to offer a “satisfactory” explanation or motivation behind their murders, many jurors believe that the death sentence is appropriate.

In conclusion, although there might be a gender-bias in our penal system, I believe that factors other than gender do a lot to explain why men outnumber women on death row.

During class discussion, Professor Berman briefly mentioned the term “volunteer” in relation to the sentence of a death penalty. While I didn’t realize that there could be such a thing as a “volunteer,” after doing some research, I found that this is type of death row inmate is very common and very interesting. This term has been used to describe death row inmates who either refuse to present mitigating evidence at sentencing phase of their original trial or who decide to forgo any available appeals to their conviction. Since the reinstatement of the death penalty in 1976, there have been 141 volunteers for execution.¹ These volunteers account for over ten percent of all executions.²

In fact, the first execution that took place after the reinstatement was of a volunteer, Gary Gilmore. Gilmore, convicted of two murders in 1976, chose not to pursue federal habeas relief and demanded his own execution. Although both his mother and the American Civil Liberties Union advocated for stays of execution, he was executed on January 17, 1977. When asked by the warden if he had any final words, Gilmore replied, “Let’s do it.”³

When thinking about the basic human nature of self-preservation, the actions taken by the volunteers seem so out of step. But, when looking at the reality of life on

¹ DEATH PENALTY INFORMATION CENTER, *Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers"* (July 23, 2013), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers>

² There have been 1,394 executions in the United States since 1976. DEATH PENALTY INFORMATION CENTER, *Number of Executions by State and Region Since 1976* (Dec. 10, 2014), <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>

³ Williams, *Gilmore Gets His Wish*, NEWSWEEK, Jan. 31, 1977, at 32.

death row, I think it's clear that the volunteers are using their state mandated punishment as an escape—effectively, they are committing suicide by way of the state.

Although some people may argue that it is impossible to commit suicide after you are sentenced to death, this doesn't seem to be the case. With the sizable delay between sentencing and execution, it is often likely that a death row inmate can live his entire life without stepping foot in the execution chamber. “At the current rate...a condemned prisoner only has a one-in-72 chance of being executed each year.”⁴ In fact, in 2014, only 39 inmates were executed, while 31 died of natural causes.⁵ This means that there is a very real probability that if a condemned prisoner did not volunteer for execution, then he would be able to live until his natural death.

Also, by failing to prevent mitigating evidence at the sentencing stage or forgoing appeals, a death row inmate loses out on the chance of his sentence being overturned or converted into a lower sentence. In 2014, 45 condemned inmates were removed from death row as a result of courts overturning sentences or convictions.⁶ While there is a chance that neither a mitigating evidence or an appeal would keep a person from being executed, the intentional refusal to do so is to give up a chance to live.

So, while I think that it is conceptually odd, volunteering for execution is in a way suicide. Volunteering is a way to escape a life stuck in a cage where the threat of death is always present. Maybe this shows that life without parole is even worse than a death sentence?

⁴ *Why So Many Death Row Inmates in America Will Die of Old Age*, THE ECONOMIST (Feb. 3, 2014), <http://www.economist.com/blogs/economist-explains/2014/02/economist-explains-0>

⁵ DEPARTMENT OF JUSTICE, *Capital Punishment, 2013-Statistical Tables*, 2 (2013), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>

⁶ *Id.*

In the last two weeks of this course we have discussed much more than just death penalty doctrines. The class lectures revealed that not only are death penalty doctrines flawed, but so is the entire justice system. The lottery system of justice seems such a ridiculous idea to accept. Discretion and hope are two words necessary to reform, and both need to remain in the system for fairness to prevail. My uncompromising ideals of youth disallow me from accepting an exchange of life without the possibility of parole for the death penalty. I expect and demand more from the justice system.

The current death penalty scheme requires an abundance of discretion. As much as court decisions attempt to limit prejudice and unfair usage of discretion, it will come into any courtroom regardless of its ban. Discretion not only hurts, but also helps defendants. The disproportionate number of females on death row can easily be attributed to the use of discretion in favor of the fairer sex. Demonizing discretion as the source of unfair sentences will only force legislators to invoke more mandatory minimum sentencing schemes. Discretion allows life to be taken into account. A man of minimal intelligence who suffered from life long abuse who unwittingly aided in a murder which he is greatly remorseful of should not be subjected to the same level of punishment as an individual who shot another for no reason and without remorse. Mitigating factors allow the scales of justice to be balanced. Discretion is necessary for justice, but death is not.

The idea of merely switching our current death penalty scheme for life without parole is not a victory for me. Life without the possibility of parole in some ways seems far more inhumane. An individual once convicted and sentenced to life without the possibility of parole has no possibility of hope. They have nothing to push them forward. They have little reason to rehabilitate their lives, or make positive changes. Additionally, if they already have no chance of

release and the death penalty is not an option, what prevents them from reoffending as often as possible while behind bars.

I have faith in the logic of the court system, while it may be a naïve belief, that positive change will come soon. The courts have already made dramatic changes in sentencing schemes for juveniles in the last 10 years. The Supreme Court in *Roper* made death penalty unconstitutional for defendants who committed their offense prior to turning 18 years old. The court then realized how ridiculous it was to automatically lock away juveniles for life without the possibility of parole in *Graham* and *Miller*. While extreme sentences for juveniles still exist, the Supreme Court has shown it is receptive to evidence and reform ideas to improve our justice system. Extending the ideas the Supreme Court has already accepted to adult criminals is only a natural progression as the court had already accepted that life without a possibility of parole is not always appropriate.

I believe the fight to rid our system of the option of life without the possibility of parole should not be as staunch a battle as the fight against the death penalty. The death penalty seems to be ingrained in the criminal justice system of the United States and the world for centuries. Life without the possibility of parole is a more recent development. The Supreme Court is reluctant to make any drastic changes to longstanding traditions, but life without the possibility of parole does not reach that category. The problem with the world and justice is that it is easy to critique, but hard to change. I am not so blinded as to believe that change will be made overnight, but I know that as long as there is injustice, people must fight for change.

Lessons from the Death Penalty

“*No one man should have all that power . . .*” While the American hip hop artist Kanye West certainly has no place in the context of Sentencing and the Law, his emphatic line from his single “Power” always comes to mind when I think of the death penalty scheme. The line does not correlate perfectly, because juries rather than a single judge typically have the power to impose a death sentence verdict¹, yet the simplistic line accurately reflects my general sentiment on the death penalty. With that being said, the biggest point to be taken from the discussion of the death penalty is that its implementation is arbitrary and not affirmatively justified by any punishment theory. Thus, the most appropriate method to deal with the death penalty it is to eliminate it entirely.

The most common argument for the justification of the death penalty is the theory of Retribution. The theory basically reasons that a criminal deserves to suffer in a similar manner as their victim. However, this is an absurd justification. Do we rape rapists? No; and if we did, there would be serious infringements on the guarantees of the 8th amendment. Why should there be any distinction when it comes to the death penalty?² Thus, I would argue that the death penalty is a cruel and unusual form of punishment. America’s history will reveal that people have been executed by means of firing squads, gas chambers, and electric chair electrocutions. All of these, once legal methods, would not be acceptable now. They would be labeled as “torturous” or “cruel.” How are any of these methods indistinguishable from the current method of a lethal

¹ Alabama is a state where a judge may routinely override a jury verdict to impose a death sentence. In fact, Alabama has overridden a jury verdict and imposed the death penalty over one hundred times. See Judge Override. <http://www.eji.org/deathpenalty/override>.

² For a more in depth discussion on why Retribution fails as a justification for the death penalty, see Death and Retribution. <https://www.law.upenn.edu/cf/faculty/cfinkels/workingpapers/death%20and%20retribution.pdf>.

injection especially when 7% of performed lethal injections are botched? The most recent fumbled attempt occurred just last year.³

Moving along, another common argument for the justification of the death penalty is the deterrence rationale. However this rationale emphasizes a dark undertone amidst our society. If 88% of the nations top criminologists report that the death penalty is not important in reducing violent crime⁴, then why as a civilized nation, would we support a forum that extinguishes a human life? The excerpts from Frank Thompson's commentary reiterate the severity of utilizing the death penalty as a punishment for crime. "I know what it is like to execute someone . . . The burden weighs especially heavily on my conscious . . . I also understand . . . repercussions that can come from participating in the execution of prisoners. Living with the nightmares is something that some of us experience."⁵

The Supreme Court ruled and placed a ban on the death penalty once before. Why can't they do this again? The death penalty scheme is arbitrary, cruel, and definitely should not be a staple of the American legal justice system. Until there is some uniform ban placed on the death penalty, any time a governor has the opportunity to commute death sentences, as Kitzhaber had before his leave of office for example, I believe they should do so.

³ <http://www.criminaljusticedegreehub.com/death-penalty-v-the-8th-amendment/>

⁴ *Id.*

⁵ <http://www.statesmanjournal.com/story/opinion/readers/2015/02/17/commute-oregons-death-sentences-life-imprisonment/23565589/>.

Moratoriums on the Death Penalty: Two Different Methods, Same Result?

Recently, Governor Tom Wolf of Pennsylvania announced that he will be placing a moratorium on the imposition of the death sentence across the state of Pennsylvania for the near future. In making this decision, Governor Wolf cited the Constitution (in a manner leaving it up to the imagination of the reader as to whether he was referring to the United States or Pennsylvania Constitution), saying that the Constitution required that the state “take further steps to ensure that defendants have appropriate counsel at every stage of their prosecution, that the sentence is applied fairly and proportionally, and that we eliminate the risk of executing an innocent.”¹ The “reprieve” as Gov. Wolf referred to it was made, according to Gov. Wolf, pursuant to his authority under Article IV, §9 of the Constitution of Pennsylvania.²

Despite Gov. Wolf’s attempt to ground his reasoning and authority to grant the “reprieve” in the Constitution (either Pennsylvania’s or the United States’), the moratorium has led to legal controversy in the state of Pennsylvania. Last week, Philadelphia District Attorney Seth Williams sued Gov. Wolf over the moratorium calling it a “lawless act.”³ According to D.A. Williams, Gov. Wolf has incorrectly used his power under §9 of the Constitution of Pennsylvania by granting an open-ended “reprieve” for those on death row in Pennsylvania when there are no legal questions about their guilt.⁴ Further, D.A. Williams believes that Gov. Wolf’s assertion that anything less than perfection in the institution of the death penalty violates the Constitution’s separation of powers stating, “[t]he Constitution requires due process, not the Governor’s personal standard of absolute perfection; and the task of assuring that criminal judgments meet that correct standard is assigned to the judiciary, not the executive.”⁵

Ultimately, Gov. Wolf may have overplayed his hand when he stated that the constitutionality of Pennsylvania’s death penalty is dependent upon eliminating the risk of ever executing an innocent individual. As discussed by D.A. Williams in his brief, it is difficult to justify requiring perfection in the death penalty process as a matter of due process. Further, if perfection were required by due process, all of the criminal justice system would come to a screeching halt. If Gov. Wolf had instead stuck solely to his statement that the current death penalty system failed to provide appropriate counsel and ensure that the sentence is applied fairly and proportionately, the moratorium may be justified as a violation of due process of either the U.S. or Pennsylvania Constitution. Gov. Wolf, therefore, might be justified in declining to continue to operate the system in its current form because of its unconstitutionality. Rather, in asserting that perfection in the death penalty sentencing system is required for it to meet constitutional standards, it is evident that Gov. Wolf has already decided that the death penalty is unconstitutional because it violates his own moral beliefs. It will be interesting to see what Gov. Wolf will do in relation to the death penalty if the Pennsylvania Supreme Court agrees with D.A. Williams that the current moratorium is unconstitutional.

¹ See Wallace McKelvey, *Gov. Tom Wolf declares moratorium on death penalty in Pa.*, THE PATRIOT-NEWS, February, 13, 2015, 10:34 P.M., http://www.pennlive.com/politics/index.ssf/2015/02/gov_tom_wolf_declares_moratori.html#incart_story_package.

² *Id.*

³ See Steve Esack, *Philly DA sues Wolf over death penalty moratorium*, THE MORNING CALL, February, 18, 2015, 8:29 P.M., <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-philly-da-sues-wolf-death-penalty-20150218-story.html>.

⁴ *Id.*

⁵ Emergency Commonwealth Petition for Extraordinary Relief Under King’s Bench Jurisdiction at 23, *Commonwealth of Penn. v. Williams*, No. __, *filed* February 18, 2015.

In contrast to Gov. Wolf's attempt at justifying a death penalty moratorium on constitutional grounds, former Governor Kitzhaber of Oregon took a much different approach in 2011. Instead of couching his moratorium in constitutional terms, Gov. Kitzhaber was brutally honest that he was imposing the moratorium because of his own moral feelings regarding capital punishment.⁶ The moratorium imposed by Gov. Kitzhaber in 2011 has since been continued by incoming Governor Kate Brown.⁷ While legally Gov. Kitzhaber may not have saved himself, and successor Gov. Brown, any trouble by refusing to veil his reasons for the moratorium in Constitutional terms, his forthright refusal to act on personal moral grounds may ultimately have been more effective because, although he was later removed from office for other reasons, Gov. Kitzhaber was not replaced because of his refusal to enforce the death penalty system. As such, future Governors of Oregon with similar moral beliefs regarding the death penalty can feel some assurance that they will not be removed from office if they refuse to play a part in the system.

⁶ See Governor Kitzhaber Statement on Capital Punishment, November 22, 2011, *available at* <http://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf>.

⁷ See Steve Diapaola, *New Oregon Governor Kate Brown to extend death penalty moratorium*, Feb. 20, 2015, 6:07 P.M., <http://www.reuters.com/article/2015/02/20/us-usa-politics-oregon-idUSKBN0LO2E420150220>.

Dear Legislator,

In light of the publication of the Sunstein article, and as your constituent, I felt compelled to write a brief letter stating a reason why the death penalty should not be supported on deterrence grounds regardless of the reported data cited in the Sunstein article.

In the landmark case of *Furman v. Georgia*, Justice Brennan and Justice White argued that the death penalty statutes, as enacted by Georgia and Texas, constituted cruel and unusual punishment. In support of their argument, the Justices made the compelling point that the death penalty no longer served its purposes and thus constituted cruel and unusual punishment, "The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering." The Justices focused on the infrequent imposition of the punishment to argue that whatever benefits society had inferred from the death penalty, such benefits were rarely being satisfied and thus the sentencing to death only resulted in a harsh arbitrary punishment, "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes... I cannot avoid the conclusion that as the statutes before us are now administered, the death penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."

Even though the Justices' argument focused primarily on the infrequency of the death penalty imposition, I find their argument to apply with equal force when it comes to a substantive rejection of the punishment. One of the primary

objectives of any punishment imposed by the government is to deter people from engaging in the prohibited conduct. The social goal of deterrence was one of the main points discussed in the Sunstein article. The statistics cited in the article indicated that each death sentence and execution deters murders in a range between 4.5 to 18 murders. Much like the article, we can assume that a death sentence does in fact save lives either by deterrence or by incapacitation. However, despite the fact (again assuming the data does reflect reality) that a death sentence would serve the social goal of deterrence through the prevention of potential murders, it still does not provide an argument for preserving the death penalty on deterrence grounds, much less an assertion that it is morally required. As Justice Brennan indicated in his concurrence in the Furman case, the pointless infliction of suffering would constitute excessive punishment. Even if a death sentence would reduce murders through deterrence and incapacitation there are less excessive methods that could accomplish the same goal and thus render executions unjustifiable on deterrence grounds. A sentence of life imprisonment without parole segregates a murderer from society in a similar manner than an execution would. By making sure that a person convicted of murder is permanently separated from society, the life-life tradeoffs discussed in the article become obsolete. Once the social goals of a death sentence or an execution can be just as effectively accomplished by another punishment, the need for a death sentence is extinguished. Given that the concern for human life is one of the most important, if not the most important, concerns and such concern can be properly addressed by other forms of punishment, death

sentences and executions should no longer be allowed unless they can be said to address some societal concern that no other form of punishment can effectively correct. For these reasons, the death penalty cannot be justified on a deterrence basis.

The Agnostic Senator
Sentencing Law – Mini-Paper for February 9, 2015

While supporting the death penalty is a convenient way to show that you're tough on crime and support victims of violence, the statistics that you're basing your beliefs on are not based on irrefutable data. While some studies show that multiple innocent lives are saved for every execution, most studies dispute the actual number saved. Some even argue that the death penalty has the opposite effect: the death penalty dehumanizes us as a society and its existence justifies the taking of human life, endangering lives. Supporters of the death penalty, like Sunstein and Vermeule, would have you believe that if a study could irrefutably show that the death penalty saves innocent lives, it is morally required. Such rhetoric might be reassuring, at least theoretically, to those who support the death penalty, but the fact is that no study will be able to definitely prove such an inherently indefinable effect. And their hypothesis must cut the other way as well: if a study could definitively show that the death penalty costs innocent lives, wouldn't we be morally required to abolish the practice? The point is moot, because a definitive answer the question of death penalty deterrence cannot be answered with current statistical techniques. The most common data used to show the deterrent effect of the death penalty is to show the relationship between number of men executed and the murder rate in a given jurisdiction. Such analysis leaves far too many extraneous factors to influence the number; hence the wide disparity among current researchers in the exact deterrent effect of the death penalty. At the point, any researcher can find data to support their political stance, while none will be able to prove their case beyond a reasonable doubt.

Beyond the fact that the deterrent effect of the death penalty may be a fallacy, or is at the very least hotly disputed by researchers, the death penalty presents a number of other issues. The primary issue the death penalty currently faces, and has faced for most of our country's history, is the arbitrariness in which it is used, allowing for discrimination and bias to play a role in the life and death of the accused. A system that disproportionately sentences minorities to death when similarly situated white men receive sentences of life, with or without the possibility of parole, is a system that cannot be sustained in the long run. Furman addressed this issue, albeit in a contrived and limited way. Six Supreme Court justices agreed in the 1970s that our system of death penalty enforcement lacked the definition that is required to ensure that the decision to execute is not based on arbitrary and capricious factors. In theory, the states that have re-adopted

death penalty statutes base their decision to execute on a variety of “aggravating factors,” so the decision is based on objective facts rather than bias. In practice, this is not the case. The fact of the matter is that minorities are still disproportionately sentenced to die with respect to the total pool of death eligible convicts. The skin color of the accused and the victim still matters to a large degree in this country. Supporting the current death penalty system is supporting a system that violates the Fourteenth Amendment’s equal protection clause, but even more so is morally repugnant once one is familiar with the system’s intricacies.

One theoretical response to the arbitrariness argument is to take any and all discretion away from judge and jury. If you make the death penalty mandatory for a specific set of crimes of violence, the bias that has been inherent in the death penalty system could be eliminated. Notwithstanding the fact that this system would be unconstitutional under the Supreme Court’s death penalty jurisprudence, this could certainly account for and eliminate arbitrariness at the sentencing stage of adjudication. Such a system, though, would not account for all the arbitrariness that inheres in our system of law. The prosecutor still has discretion of whom to charge and whom not to charge, as well as whom to overcharge and undercharge. Governors and President, who have been shown to be overwhelmingly discriminatory in their use of clemency, would still have discretion to commute sentences of those sentenced to death. The only way to truly rid our death penalty system of arbitrariness and discrimination is to eliminate the death penalty altogether.

Dear Legislator Smith,

I am writing with the hope that I can persuade you to alter your position on the death penalty. It is my understanding that you support the death penalty, because some recent research suggests that capital punishment may in fact help save some innocent lives. However, even assuming that the research is correct, for a number of reasons, I believe that abolishing the death penalty remains the morally preferable course of action.

First, the research fails, because it proves too much. If the article is correct, once research has established that one method of punishment is a significant-enough deterrent to save a threshold number of innocent lives, that method of punishment becomes morally obligatory. In this case the research concluded that the death penalty was morally obligatory because it deterred an adequate number of other would-be-killers from murdering innocent people. However, it seems plausible that an even stronger method of punishment, e.g. public flaying, disembowelment, or torture of a criminal's innocent family, would have an even stronger deterrent effect. If so, by the article's own logic, such methods of punishment would also be morally obligatory. Essentially, the article relies on the implicit assumption that a punishment is morally acceptable (and even obligatory) because of the effects that the punishment has. However, if you maintain (as I believe you should) that publicly torturing a criminal's innocent family members would be morally problematic, regardless of the deterrent effect the practice may have, then there is reason to believe that punishments need to be evaluated by some criteria independent of, or in addition to, their deterrent effects. An action's deterrent effect, alone, does not determine whether the action is moral; some actions remain immoral regardless of how strongly they deter other crimes.

Second, in order to conclude that capital punishment is morally obligatory, one must believe that a government is morally responsible for the consequences of both its actions and omissions. Specifically, one must accept that a government is equally culpable for the deaths which it directly causes through its agents and those deaths which occur because the government failed to impose the death penalty. However, there may be good reason to reject this contention.

The article's authors write, at length, in an attempt to differentiate governments from individual human actors. They state that governments are a "special kind of moral agent". The authors argue that governments are special because "unlike individuals, governments always and necessarily face a choice between or among possible policies for regulating third parties." For this reason, the authors maintain that the government is just as much to blame for the deaths which result from its failure to execute guilty criminals and thereby deter other homicides, as it is for any deaths that the government directly causes through its agents.

However, the author's attempt to differentiate governments from individual actors is unconvincing; it is a distinction without a difference. Human actors, too, are always facing a choice between alternatives that effect third parties. A decision to refrain from acting (an omission) can easily be re-construed as a decision to take an alternative action. Because

governments are not different from us in this respect, they are not “special moral agents.” Accordingly, the same rules apply to evaluating the decisions of governments as apply to evaluating the decisions of other groups of moral actors. In this case, the fact that governments ought to be evaluated similarly to other groups is important, because it destroys the authors’ ability to hoodwink the audience into thinking that the government is equally responsible for the deaths caused by a murderer and the deaths caused by the government’s agents in the death chamber. The consequences of a murderer’s unilateral actions are not magically imputed to the government because the government could have made a different policy choice. At the end of the day, the government is directly responsible for the deaths it causes by executing inmates, but not directly responsible for the deaths caused by the unilateral decisions of one of its citizens, acting of his own accord. For this reason, the act/omission distinction remains, and the research’s oversimplified comparison of inmate deaths and potential lives saved remains unconvincing. You should not actively support the killing of inmates, because you are not responsible for the actions of murderers.

Finally, the article fails to account to the harm done to the government’s agents in the course of executing criminals. The National Coalition to Abolish the Death Penalty has found that “[m]any of those involved in executions have reported suffering PTSD-like symptoms such as flashbacks, nightmares and other forms of distress. These symptoms are reported by multiple witnesses such as journalists, executioners, and wardens alike.” The research at issue in the article simply compares the number of people executed to the number of citizens who might otherwise have been killed; it fails to account for the suffering that the executioners, wardens, witnesses, judges, and jurors may endure as a result of their involvement in the death. Others may suffer, too, in immeasurably ways, from the brutalizing effect that living in a society which authorizes its government to kill its citizens. The death penalty has far reaching consequences for those involved in its practice and for those who must live in a society which condones it. The research you are relying on to support your decision to retain capital punishment completely fails to account for these harms and is therefore at best incomplete, but more likely, wholly inadequate.

To conclude, you should vote against retaining the death penalty because: supporting the death penalty for the reasons given in the article is the first step toward a slippery slope which could result in heinous forms of punishment being deemed morally obligatory; the research at issue relies upon a mistake in logic and reaches its conclusions because it wrongly imputes the consequences of a murderer’s actions to the government; and the research is incomplete in its failure to account for the harms that maintaining a system of execution imposes on actors in the system.

I hope you reconsider your position.

Your humble constituent,

Tamas Tabor

Proposal to the Legislator: Proposed Mandatory Death Sentence For the Worst of the Worst

Dear Imaginary Legislator in an imaginary world where mandatory death sentences are constitutional and Professor Berman is now President Berman,

In light of President Berman's recommendation for a mandatory death penalty in specific circumstances and Cass R. Sunstein's very persuasive piece suggesting the moral obligation the state may have to continue the death penalty, I urge you to consider my proposal below.

Individuals serving a life sentence in jail who murder another individual and individuals who murder five or more people shall be sentenced to a mandatory death penalty IF, AND ONLY IF the individual has a net total of three or more aggravating circumstances.

Essentially, I am proposing a very easy math calculation where a trial court takes into account mitigating and aggravating circumstances already promulgated by our legislature. The individual gets a (+1) for every aggravating factor they satisfy, and a (-1) for every mitigating factor they satisfy. The total is then added together, and if the individual has a score of two or more they receive a mandatory death sentence. In the case that an individual has a score of one or less, they will not receive a mandatory death penalty. Keep in mind; however, they may still receive a death penalty if the jury so decides.

Some examples of aggravating factors a court considers include whether the victim was a law enforcement officer, and the offender knew or had reasonable cause to know, whether the offender was convicted of a past offense in which an essential element was the purposeful killing or attempt to kill another, and whether the offense was committed while the offender was under detention. Examples of mitigating factors include consideration of the offender's age, whether the offender induced or facilitated the crime, whether the defendant lacked substantial capacity to appreciate the criminality of the offender's conduct, and the offender's lack of a significant history of prior criminal convictions. These factors have been evaluated by our legislature and

are deemed valuable in evaluating punishment for an offender. These factors should not be ignored when determining a mandatory death sentence.¹

Consider the proposed statute below:

A murder perpetrated while serving a life sentence, and a murder of 5 or more individuals shall be considered murder in the first degree. An offender guilty of murder in the first degree whose aggravating factors less their mitigating factors equals 2 or more shall be punished with death.² For a list of aggravating and mitigating factors see O.R.C. 2929.04.³

During the oral argument of *Brandon Moore v. State of Ohio*, Chief Justice of the Ohio Supreme Court, Maureen O'Connor, expressed her hesitancy with expecting the trial court to do actuarial math in calculating a life expectancy, but surely they can do simple addition and subtraction.

The reason for my proposed protocol is to appease a prevalent philosophy of penology articulated in *Williams v. New York* that “the punishment should fit the offender, and not merely the crime.”⁴ President Berman’s mandatory death penalty scheme ignores the individual and focuses solely on the crime. My proposal maintains consideration of the individual.

Furthermore, Sunstein argues that leading research demonstrates the death penalty creates a deterrent effect. He cites to one study that suggests one execution deters 18 other murders.⁵ While the death penalty will likely be used rarely, it will have a deterrence effect on our citizens, of whom we have a moral obligation to protect.

I hope you will consider my modified version of President Berman’s proposal for a mandatory death sentence. It reflects a true compromise of the trial court’s discretion and allows the trial court to consider the individual systematically.

¹ See O.R.C. 2929.04

² I borrowed language from the statute at issue in *Woodson* to draft my mandatory scheme. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

³ See O.R.C. 2929.04

⁴ *Williams v. New York*, 337 U.S. 241 (1941).

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

Mandatory Death Penalty

If the death penalty is mandatory for murderers who kill more than five people, are the theories that underly the death penalty still served?

The usual justifications given for the death penalty are that it serves as deterrence, saves lives, and works to serve an “eye for an eye” mentality. If the legal system dictates that a person is not eligible for the death penalty unless he/she kills more than five people, then many of those theories are no longer applicable. The death penalty would no longer serve as deterrence from serious crimes like murder, but only as deterrence from that certain number of murders. A potential murderer now has a get-off-death-row-free card as long as he can control himself after that fifth kill.

That same logic dispels the notion that the death penalty saves lives. Instead of saving any number of people, this type of death penalty would only save a certain number of sixth persons because that is where the deterrence lies. If we assume that a criminal actually weighs the costs of a crime he is about to commit, and always considers prison to be an option, then the application of this mandatory death penalty only means a longer amount of time in prison. The criminal does not have to weigh the possibility of the death penalty because he knows that it is no longer an option. Death is not a concern for him.

The death penalty is said to honor innocent lives while at the same time devaluing guilty lives. The “eye for an eye” justification seeks to balance the scales, the person who takes life must have his life taken. It seems that this law would actually devalue innocent life by implying that killing one person is not enough for the state to take lethal action, that the one guilty life is worth at least five innocent ones. This is problematic if the whole point of the death penalty in the first place is to emphasize the worth of innocence and reestablish a balance of “good” and “evil.”

Then, should there also be a discretionary death penalty?

The death penalty is supposed to be enforced for particularly terrible crimes. However, it is not always the number of innocent people killed that makes a crime egregious. It is often the way the murder is carried out and the victim's identity that causes people to view a certain murder as depraved. A solution would be to allow a discretionary death penalty sentence, in addition to the mandatory one, to cover the gaps between sheer number and depravity.

The reasoning behind the mandatory death penalty is to eliminate the discretion/

discrimination present in death penalty sentencing. Therefore, having a separate discretionary death penalty option would re-introduce this discrimination. The only difference between this type of system and the one we have now is that there would be no discretion past five murders. However, discrimination still has room to sneak into cases where there are fewer than five deaths. The discretionary death sentence would only serve to cover the potential gaps in a mandatory system, but would then open that system up to the problems that initially brought it about. Given that there are so few people who would be eligible for the mandatory death sentence anyway, the addition of a discretionary death penalty would, practically speaking, be the only death sentence.

How do we address the competing interests of eliminating discretion while maintaining the goals the death sentence seeks to achieve?

Instead of making the death penalty mandatory for people who have killed more than five people, the death penalty could be discretionary for that number of deaths and only that number of deaths. Though this still leaves room for discretion, and thus discrimination, it still shrinks that possibility by greatly limiting the number of defendants who would be eligible for a death sentence. This system would also ensure that a defendant is not essentially choosing life or death when committing crimes. The defendant knows that if he kills five people he will not receive the death penalty, but the law does not mandate death in such a way that implies five is ok, but six is not.

It would also eliminate some of the arbitrariness concerns. The legislature would determine at what point the crime is egregious enough to allow consideration of the death penalty, but does not draw the line at where it is necessary. Therefore, it is not an arbitrary distinction between life and death, but a, albeit still arbitrary, distinction between life and maybe death.

This is not a perfect solution, certainly, and does not have a solution to every concern. However, it does seek to at least address the concerns with a mandatory sentencing system and strike a balance among the numerous factors that come into play when deciding how to sentence perpetrators of particularly egregious crimes.

Mini-Paper 2: Suggestions to a Legislator Given the Deterrent Effects of the Death Penalty

For the purposes of these suggestions, I begin with the premise that the existence and use of capital punishment does in fact save innocent lives.¹ Scholars have argued that accepting this premise shifts the death penalty from morally acceptable to morally obligatory under both utilitarian and retributive moral frameworks.² However, some truly despicable procedures and laws may save innocent lives, and we are not morally compelled to adopt them simply because of this consequence.³ While the State ought to save innocent lives, it should not endorse the death penalty solely because doing so statistically saves innocent lives. Supporting the death penalty for this reason gives short shrift the value of an individual human life and disregards the importance of culpability when determining punishment.

Ms. Legislator, if you aim to save innocent lives full stop without inquiring into the necessary procedural difficulties inherent in the judicial process, by all means whole-heartedly support the death penalty. However, if you care not just for the end result of saving *en masse* statistical innocent lives, but also for ensuring that those persons the State chooses to kill in a calculated manner are in fact guilty of something then you must pause and realize the bureaucracy of capital punishment is far from simple.

From a utilitarian perspective, if we can kill one person to save five, then we kill that one person. Utilitarianism makes the profound choice of ending a human life simple math. For this reason, the argument that if the death penalty saves innocent lives, then it is morally obligatory makes sense from a utilitarian viewpoint.

From a retributive perspective, the situation is less clear. While preemptively saving lives and dissuading immoral actors from killing others is, on the whole, a good thing, it does not play into the schema of “just deserts” for bad actors. Retributivism is deeply entangled with revenge. However, not just blood-for-blood, emotional revenge, but another simple mathematical calculus: if you kill a person, then (perhaps) you yourself ought to die.

It is from this last didactic oversimplification that the suggestion that the death penalty saves innocent lives and so is morally obligatory does not comport with a retributive moral framework. For the retributivist, it is not the end result that is crucial, but the *correctly applied* end result. That is, the right person must be given the right punishment. Crime and punishment are discrete, independent units in the moral universe of retributivism; the impact of either on the rest of the universe is trivial.

¹ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2005).

² *Id.* at 706–07.

³ For example, ISIS brutal method of executing a Jordanian pilot saved lives. We would not be morally obligated to adopt this method of execution simply because of its positive consequences. *See* <http://www.businessinsider.com/isis-says-it-executed-a-captured-jordanian-pilot-by-burning-him-alive-2015-2>.

In this way, saving innocent lives by imposing or using a certain kind of punishment does not, in and of itself, compel any moral duties upon the retributivist. Sure, if saving lives is a byproduct of doing justice, that is swell, but it ought not be the driving motivation for morally obligatory punishment schemes. The key for the retributivist is the process of identifying correctly the actor who merits the proper punishment. Here, we must engage the biggest problem with suggesting the death penalty is morally obligatory: the process by which it is imposed.

Ms. Legislator, if you accept a utilitarian moral framework, read no further because killing a person regardless of that person's culpability is a fine moral act so long as it saves > 1 person. However, if the prospect of killing a factually innocent person bothers you,⁴ read on.

Properly deciding if a human being deserves to die for her conduct is a tough task.⁵ For a retributivist, the entire enterprise falls to pieces if we cannot determine with some degree of certainty that the bad actor we seek to kill is factually guilty. The linkage between the bad act and the punishment must be firmly established in order for the whole moral project to be sustained: if the actor we kill did not do anything wrong, then we have not done justice, but we have done a grave injustice for which we ourselves might be required to die (certainly there is no doubt we are factually guilty of a heinous act in this scenario).

Thus, the dilemma with a morally obligatory death penalty based on the prospect of saving innocent lives boils down to this: do we care about the person we elect to kill? In other words, assuming we will save five people for every person we kill, does the culpability of the condemned person matter? If we as a society can accept killing innocents to save innocents, then by all means proceed with the death houses. However, if the risk of being systematically hypocritical is too much to bear, then we must start not with the end result, but with the procedures of accomplishing justice.

Killing one innocent to save five innocents may be good practice in times of emergency and war; however, when at peace and with time to reflect, consider, and weigh the options, I believe we ought to be suspicious of arguments that suggest State-sponsored killings are a moral duty.⁶ Conceptually, simple arithmetic may suggest that a course of conduct is morally required; however, in practice, if that course of conduct is bloody, grotesque, and flawed, idealism should give way to reality. Thus, I recommend that you do not support the death penalty solely on the grounds that it saves innocent lives. The risks are too high and the costs too dear.

⁴ See Shirley Jackson, *The Lottery*, THE NEW YORKER, Jun. 26, 1948, at 25, available at <http://www.newyorker.com/magazine/1948/06/26/the-lottery>.

⁵ See *McGautha v. California*, 402 U.S. 183, 205 (1971) (“[T]he facts which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula.”) (internal citations omitted).

⁶ See ADOLF HITLER, MEIN KAMPF 478 (Franz Eher Nachfolger 1930).