TIME FOR REFORM, NOT ABOLITION: BALANCING JUSTICE AND MORALITY THROUGH AMENDMENT OF THE FEDERAL DEATH PENALTY

MADISON STEINKAMP*

I. INTRODUCTION

In 1987, President Ronald Reagan addressed Congress, saying it was "scandalous and intolerable" that federal law did not provide for an enforceable death penalty.[1] Ten years prior, following a brief moratorium on its application, the death penalty had been ruled constitutional.[2] While thirty-five states had already reinstated the death penalty at the state level and constitutionally executed ninety-three prisoners since 1976, Congress had not yet enacted the rational, objective standards necessary for applying the death penalty constitutionally.[3] In the year following his speech to Congress, President Reagan successfully

* *Juris Doctor* Candidate, May 2025, St. Thomas University Benjamin L. Crump College of Law; B.B.A. Marketing, 2022, Stetson University. I extend my heartfelt thanks to my parents for their unwavering support and to my sister for continually providing me opportunities to challenge every word she says. Sincere appreciation goes to the St. Thomas Law Review for this invaluable opportunity and the support and guidance provided during this process.

[1] *See* Ronald Reagan, President of the U.S., Message to the Congress Transmitting Proposed Criminal Justice Reform Legislation (Oct. 16, 1987) (transcript available in the National Archives) (introducing the Criminal Justice Reform Act of 1987, supporting inclusion of provisions reinstating the federal death penalty); *see also* Criminal Justice Reform Act of 1987, H.R. 3777, 100th Cong. (as introduced, Dec. 16, 1987) (amending the federal criminal code to establish criteria for imposition of the death penalty for federal crimes, enacted as part of Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181).

[2] *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) ("The Court holds that imposition and carrying out the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."); *see also* Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (holding death penalty constitutional as the law provided sufficient clarity, and objectivity in defining which defendants could be eligible for capital punishment, and gave juries sufficient discretion in choosing whether to apply it).

[3] *See Capital Punishment 1987*, U.S. DEP'T OF JUST. (Bureau of Just. Stat. Bulletin, Washington, D.C.), Sept. 13, 1988, at 1 ("Eight States executed [twenty-five] prisoners during 1987, bringing the total number of executions to [ninety-three] since 1976, the year that the U.S. Supreme Court reinstated the death penalty."); *see also Death Penalty*, GALE, https://www.gale.com/open-access/death-penalty (last visited Mar. 9, 2024) ("From 1972 to 1976, thirty-five [U.S.] states revised their death penalty laws.").

signed the federal death penalty into law through the Anti-Drug Abuse Act of 1988.[4]

Although the federal death penalty is an eligible punishment for over forty capital offenses, there is restraint in usage, as only sixteen executions have occurred since the reinstatement of the federal death penalty in 1988, making up just one percent of all executions in the United States since 1972.[5] However, this restraint of use should not be seen as evidence of a lack of need for the death penalty. The death penalty is imposed in few cases, all of which constitute crimes that profoundly shock the conscience and threaten society to the highest degrees.[6] As such, it would once again be "scandalous and intolerable" if the proposed Federal Death Penalty Prohibition Act is passed without revision, completely abolishing the federal death penalty.[7]

This Comment aims to return the federal death penalty to a punishment reserved for crimes that threaten the existence of the United States, while managing moral and ethical changes in society.[8] Part II provides a brief background on the history of the federal death penalty in the United States and introduces the Federal Death Penalty Prohibition Act.[9] Part III discusses the Federal Death Penalty Prohibition Act's failure to recognize the crucial role of the death

---

[4] *See* Anti-Drug Abuse Act of 1988 (consisting of ten titles, intending to prevent the manufacturing, distribution, and use of illegal drugs; creating an enforceable federal death penalty for murders committed by those involved in certain drug trafficking activities, effectively reinstating the death penalty as a punishment at the federal level); *see also Expansion of the Federal Death Penalty*, CAP. PUNISHMENT IN CONTEXT, https://capitalpunishmentincontext.org/issues/expansion (last visited Mar. 9, 2024) ("[T]he Anti-Drug Abuse Act of 1988 [authorized] the death penalty for persons convicted of homicide carried out as a part of a 'continuing criminal enterprise.'").

[5] *See* 18 U.S.C. §§ 3591–99 (1994) (providing for the imposition of the death penalty in federal courts; delineating requirements for sentencing of the death penalty, including for which offenses, necessary conditions, and mitigating and aggravating factors considered); *see also* Hannah Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 CORNELL L. REV. 1689, 1692 (2022) ("Federal executions make up a vanishingly small number–only 16 out of 1540, or barely 1%–of overall executions in the United States since 1972, and they make up a very small percentage of capital prosecutions in the United States since 1972.").

[6] *See Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty (last visited Mar. 9, 2024) (showing executions under the federal death penalty involve serious crimes with aggravating factors); *see also List of Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Mar. 9, 2024) (showing prisoners on federal death row for serious crimes with aggravating factors).

[7] *See* Reagan, *supra* note 1 (addressing Congress urging the reinstatement of the federal death penalty); *see also* Federal Death Penalty Prohibition Act, S. 2299, 118th Cong. (as introduced, July 13, 2023) ("Notwithstanding any other provision of law, no person may be sentenced to death or put to death on or after the date of enactment of this Act for any violation of Federal law."); *see also* Federal Death Penalty Prohibition Act, H.R. 4633, 118th Cong. (as introduced, July 13, 2023) (mirroring identical bill to S. 2299 simultaneously filed in the House of Representatives).

[8] *See infra* Part IV.

[9] *See infra* Part II, A–B; *see also* S. 2299, § 2 (prohibiting the imposition of the death penalty for any violation of federal law and resentencing those sentenced before the date of enactment).

penalty in justice, deterrence, and public safety, and addresses moral and ethical arguments for abolition.[10]

Moreover, Part IV proposes a novel solution for reformation of the current federal death penalty.[11] The solution advocates for a nuanced approach that lessens the applicability of the death penalty to a smaller subset of crimes, and increases procedural safeguards.[12] Finally, Part V concludes that the death penalty must be preserved in federal law as punishment for crimes that threaten the existence of the United States of America, but requires amendment to be imposed in a way that considers the moral and ethical opinions of the modern society.[13]

II. BACKGROUND

A. BRIEF HISTORY OF THE FEDERAL DEATH PENALTY

While the death penalty is not expressly mentioned in the Constitution or its amendments, it has been an integral and implied part of the American government system since the nation's founding.[14] The Fifth Amendment ensures that no person shall be held to answer a crime or be deprived of life without due process of law.[15] This establishes a fundamental principle of the death penalty, allowing deprivation of life so long as fairness is exercised in legal proceedings.[16] Additionally, the Eighth Amendment, which prohibits cruel and unusual punishment, does not explicitly forbid the death penalty.[17] This omission is

---

[10] *See infra* Part III, A–C.
[11] *See infra* Part IV.
[12] *See infra* Part IV.
[13] *See infra* Part V.
[14] *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 360 (1999) ("When establishing the Union in 1787, the Framers appear to have given little attention to the death penalty. This is unsurprising. Death as a penalty for serious felonies was common in the eighteenth century, and the Constitution simply assumes, without ever stating expressly, that capital punishment will be imposed."); *see also* Freedman, *supra* note 5, at 1697–98 (showing that between 1770 and 1830, an estimated 35,000 people were sentenced to death in England and Wales, as England was governed by what is known as the Bloody Code, in which more than 220 criminal offenses carried the death penalty).
[15] *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law . . . ."); *see also* Little, *supra* note 14, at 360 ("[T]he Fifth Amendment explicitly assumes that there will be 'capital' crimes and suggests that persons may be deprived of 'life,' if such is accomplished with due process of law.").
[16] *See* U.S. CONST. amend. V (requiring due process of law in any proceeding that denies a citizen life, liberty, or property); *see also* Freedman, *supra* note 5, at 1695 n.20 ("The Fifth Amendment, for example, implies the existence of capital punishment without explicitly mentioning it.").
[17] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) ("The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category.").

notable because the founders had the opportunity to explicitly prohibit such a punishment but chose not to do so, allowing its continued application.[18]

As early America developed, states began enacting criminal codes tailored to their specific interests.[19] The federal government only asserted criminal jurisdiction in crimes that directly involved a unique federal interest.[20] This led to a historical trend of the federal government rarely prosecuting criminal cases unless they presented a substantial threat to the nation's interests as a whole.[21] As a result, the infrequent exercise of federal jurisdiction resulted in even rarer impositions of the federal death penalty.[22] The Crimes Act of 1790 was enacted by Congress as a response to this trend and established the death penalty as punishment for crimes that threatened the nation as a whole.[23] These crimes

---

[18] *See* 5B M.J. *Criminal Procedure* § 80 (2023) (interpreting that the Eighth and Fourteenth Amendments allow the sentence of death so long as it is not wantonly and freakishly imposed, minimizes risk of arbitrary and capricious action, and is guided by clear and objective standards in a rationally reviewable process); *see also Thompson*, 487 U.S. at 821 (reasoning that the founders left drawing the lines of cruel and unusual punishment to future generations of judges to be guided by evolving standards of decency).

[19] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1995) ("The federal government's assumption of a limited role in maintaining everyday law and order left primary jurisdiction over criminal matters with the states. That seemed natural enough because crime was a matter of principally local interest and impact."); *see also* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1274–75 (1985) ("Under the formulations of the Framers, the interests of the federal government were not thought to require the creation of a distinctive federal law. . . . [W]hile local law was identifiable with the range of concerns that the Framers indicated would remain 'internal' to the states.").

[20] *See* United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812) ("[O]ur Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within [the federal courts'] implied powers."); *see also* CONG. RSCH. SERV., R43023, CONGRESSIONAL AUTHORITY TO ENACT CRIMINAL LAW: AN EXAMINATION OF SELECTED RECENT CASES, 1 (2013) ("Although the Constitution grants Congress extensive legislative powers, it vests Congress with explicit authority to enact criminal law in only three places.").

[21] *See* Freedman, *supra* note 5, at 1705–06 ("[T]he federal government rarely prosecuted criminal cases in general and carried out even fewer executions. When the federal government did impose the ultimate penalty, it did so for crimes that threatened the young country's sovereign interests. . . ."); *see also* Richard Smith, *Interpreting the Constitution from Inside the Jury Box: Affecting Interstate Commerce as an Element of the Crime*, 55 WASH. & LEE L. REV. 615, 640–41 (1998) ("The [Crimes Act of 1790] established federal prohibitions against a small set of activities that affected purely federal interests . . . . The bill also reached crimes arguably not exclusively related to purely federal interests . . . only when they took place in a geographic area exclusively within the jurisdiction of the federal government.").

[22] *See* John Cunningham, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 943 (1998) ("[A]ctual federal death sentences do not have a significantly extensive historical background; the number of verdicts, and subsequent executions, at the federal level are exceedingly outnumbered by those handed down in the states."); *see also* Brickey, *supra* note 19, at 1139 ("Narrowly drawn federal crimes were tailored to provide protections in matters of direct federal interest or matters that the states were powerless to address . . . .").

[23] *See* Crimes Act of 1790, Ch. 9, §§ 1-10, 1 Stat. 112, 119 (1790) (enumerating the criminal acts that would be subject to capital punishment under the Act); *see also* Julianna Meely, *Federal Execution Protocols: Lessons Learned in Grammar and Reverse Federalism*, 24 RICH. PUB. INT. L. REV. 137, 141 (2021) ("The first known federal execution was carried out in 1790 under the Crimes

included treason, willful murder within federal jurisdiction, counterfeiting, and piracy.[24]

Today, the federal death penalty is a sentencing option in federal offenses of espionage, treason, drug trafficking, and various circumstances of murder.[25] A federal death penalty prosecution has three requirements.[26] First, the defendant must be charged with a crime for which the death penalty is a legally authorized sentence.[27] Second, the defendant intended or had a high degree of culpability in the commission of the crime.[28] Third, one or more aggravating factors specified in the statutory list must be present.[29]

These statutory requirements have been refined by United States Supreme Court rulings on cases dealing with the constitutionality of the modern death penalty in a variety of situations.[30] The modern death penalty era began with

---

Act of 1790, which was passed by the First United States Congress governing federal executions for 150 years.").

[24] *See* Brickey, *supra* note 19, at 1138 ("[T]he Crimes Act of 1790 punished murder and other crimes committed in a fort or other place controlled by the federal government, crimes committed outside the jurisdiction of any state, forgery of United States certificates . . . perjury in federal court, treason, piracy, and committing acts of violence against an ambassador."); *see also* Crimes Act of 1790, §§ 1–10 (enacting the punishment of death for crimes committed against the United States, including treason, murder and piracy).

[25] *See* 18 U.S.C. § 3591 (2024) (codifying a federal death penalty for a number of criminal offenses including espionage, drug trafficking, and various circumstances); *see also* U.S. DEP'T OF JUST., *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (2001), https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm [hereinafter *The Federal Death Penalty System*] (explaining the legal rules and administrative procedures governing federal death penalty cases).

[26] *See The Federal Death Penalty System*, *supra* note 25 ("[A] defendant is eligible for a capital sentence [if]: (1) [the] death penalty is a legally authorized sanction, (2) the defendant intended or had a high degree of culpability with respect to the death . . . and (3) one or more aggravating factors specified . . . are present . . . ."); *see also* § 3591 (listing death sentencing requirements for most federal crimes); *see also* 21 U.S.C. § 848(e)–(r) (2024)(listing death sentencing requirements for drug-related capital offenses).

[27] *See* § 848(e)(1)(A)–(B) (listing drug related crimes which can be punished through a death sentence); *see also* § 3591 (listing crimes which can be punished through a death sentence).

[28] *See The Federal Death Penalty System*, *supra* note 25 ("To recommend a sentence of death, the jury must determine that the defendant had the requisite culpability with respect to the victim's death, and must unanimously agree that the aggravating factor or factors it has found sufficiently outweigh any mitigating factors to justify a capital sentence."); *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'").

[29] *See The Federal Death Penalty System*, *supra* note 25 ("The statutory aggravating factors include . . . the commission of a killing in the course of another serious offense . . . a prior criminal history involving serious violent offenses, the commission of a killing after substantial planning and premeditation, killing multiple victims, or endangering the lives of other persons . . . in committing the crime."); *see also* 18 U.S.C. § 3592(2024) (listing mitigating and aggravating factors to be considered in determining whether a sentence of death is justified); *see also* § 848(e)–(r) (listing mitigating and aggravating factors to be considered in determining whether a sentence of death is justified, specific to drug related crimes).

[30] *See* Freedman, *supra* note 5, at 1725 ("What is commonly considered the modern era of the death penalty started in 1972, when the Supreme Court announced in *Furman v. Georgia* that all then-

the five-to-four decision of *Furman v. Georgia*, where the Supreme Court ruled the then used non-uniform application of the death penalty was unconstitutional, as the arbitrary decision-making application of the death penalty equated to cruel and unusual punishment.[31] This ruling resulted in thirty-seven states re-writing their death penalty statutes to include sentencing schemes that created new procedures and guidelines for application of the death penalty, including a bifurcated trial, consideration of aggravating and mitigating circumstances, and mandatory appellate review.[32] In 1976, the Court ruled that these guidelines were a constitutional application of the death penalty, as they gave juries clear and objective standards that would produce "non-discriminatory application" and discretion.[33]

Following the reinstatement of the death penalty in the modern era, the Supreme Court has continuously heard cases concerning the constitutionality of the death penalty, refining and expanding its parameters over time.[34] The Court

existing death penalty statutes were unconstitutional."); *see also Furman*, 408 U.S. at 239–40 ("The court holds that imposition and carrying out the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

[31] *See* John Blume et al., *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. 183, 184 (2016) ("[T]he death penalty was imposed in only a fraction of cases in which it was legally available and the Justices could divine no rational basis explaining why some offenders were sentenced to death while others were spared . . . . [A]ll state systems of capital punishment allowed for arbitrary and capricious imposition . . . ."); *see also Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death . . . so wantonly and so freakishly imposed.").

[32] *See Gregg*, 428 U.S. at 195 ("[T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance . . . . [B]est met by . . . a bifurcated proceeding . . . . "); *see also* Carol Steiker & Jordan Steiker, *Abolishing the American Death Penalty: The Court of Public Opinion Versus the U.S. Supreme Court*, 51 VAL. U.L. REV. 579, 595 (2017) ("In [Gregg], the Court explained that the Eighth Amendment prohibition of 'cruel and unusual punishments' requires consideration of whether a challenged practice violates 'the evolving standards of decency that mark the progress of a maturing society.' [T]hirty-five states and the federal government had enacted new death penalty statutes since 1972.").

[33] *See Gregg*, 428 U.S. at 197–98 ("These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence . . . . As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'") (quoting Coley v. State, 231 Ga. 612, 615 (1974)); *see also* Blume, *supra* note 31, at 185 ("[M]ost guided discretion schemes included bifurcated trial . . . statutory aggravating circumstances limiting eligibility for capital punishment, permitting consideration of mitigating circumstances, and mandatory appellate review (including proportionality review). By 1976, the new laws made their way back to the U.S. Supreme Court. The Court upheld the guided discretion statutes . . . .").

[34] *See* Marie A. MacCune, *Forget Me Not: Exploring American Death Penalty Jurisprudence and Dementia in Light of Madison v. Alabama*, 54 SUFFOLK U.L. REV. 131, 136 (2021) ("[T]he Court must interpret the Eighth Amendment under an 'evolving standard of decency' analysis . . . . [A] two-part test involving both objective and subjective indicia. First, the Court determines whether a societal consensus on the issue exists . . . . Second, the Court decid[es] whether execution serves a given theory of punishment."); *see also* CHARLES DOYLE, CONG. RSCH. SERV., R42095, *Federal Capital Offenses: An Overview of Substantive and Procedural Law*, 2 (2023) ("The Federal Death

has further limited the applicability of the death penalty based on facts, related to the defendant's circumstances and the specific crimes committed, where imposition would be unconstitutional.[35] The Court has also delineated steps and analyses that must be conducted in order to safeguard justice and fairness in the death penalty's procedural law.[36]

The federal death penalty was reintroduced in the post-*Furman* modern era through the Anti-Drug Abuse Act of 1988.[37] The Act was a result of Congress's efforts to prevent the manufacturing, distribution, and use of illegal drugs during America's "War on Drugs."[38] Subsequently, in 1994, President Clinton signed

Penalty Act reflects the constitutional boundaries identified in Furman and subsequent related Supreme Court decisions.").

[35] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding the imposition of the death penalty for rape crime is a cruel and unusual punishment in violation of the Eighth Amendment); *see also* Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (holding the death penalty is an unconstitutional cruel and unusual punishment unless for a crime where the victim's life was taken, or intended to be taken, or a crime against the state); *see also* Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (holding the Eighth Amendment prohibits imposition the death penalty on a prisoner who is insane); *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding the Eighth Amendment prohibits the imposition of the death penalty on those who are mentally retarded); *see also Roper*, 543 U.S. at 578 (2005) (holding the Eighth Amendments forbids imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed).

[36] *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (holding the Eighth Amendment requires allowing consideration of mitigating factors or any aspect of defendant's character or record that would offer a basis for a sentencing less than death); *see also* Jones v. United States, 526 U.S. 227, 252 (1999) (holding that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt); *see also* Solem v. Helm, 463 U.S. 277, 292 (1983) (holding a court's proportionality analysis to determine if the death penalty is a proportional punishment for the crime committed should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions); *see also* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (holding the Eighth Amendment does not require strict proportionality between crime and sentence, forbids only extreme sentences grossly disproportionate to the crime); *see also* Glossip v. Gross, 576 U.S. 863, 877 (2015) (holding a prisoner challenging an execution method must establish a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives).

[37] *See* Little, *supra* note 14, at 349 ("From 1972, when the Supreme Court declared fully discretionary death penalty statutes unconstitutional in Furman v. Georgia, until 1988, when Congress enacted statutory procedures for imposing the death penalty for certain violations of the Continuing Criminal Enterprise ('CCE') statute, no constitutional federal death penalty provisions were on the books."); *see also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4387–88 (1988) (amending the federal criminal code to establish criteria for imposition of the death penalty for federal crimes involving killings occurring related to drug importation, manufacturing, or distribution).

[38] *See* Christopher Q. Cutler, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U.L. REV. 1189, 1200–01 (2000) ("By 1988, the phrase 'the War on Drugs' had become an often repeated phrase in American vernacular. One of the most visible results of [Congress'] effort is the 'Drug Kingpin Act,' codified as 21 U.S.C. 848, creating a federal death penalty for certain crimes associated with the drug trade."); *see also* Corinne Carey, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs*, 46 BUFFALO L. REV 281, 290–91 (1998) ("The Anti-drug Abuse Act of 1988 is the seminal piece of federal legislation addressing the widespread use of

the Federal Death Penalty Act into law, extending the applicability of the federal death penalty to over forty offenses.[39] The Act also set forth relevant procedural framework, including eligibility factors, mitigating and aggravating factors, and standards for determining imposition.[40]

Since the federal death penalty's reinstatement in 1988, seventy-nine defendants have been sentenced to death and sixteen have been executed.[41] Of these executions, thirteen occurred between 2020 and 2021, following a seventeen-year-long break.[42] During this break, methods of execution were repeatedly challenged in court.[43] Although the scheduling of executions was not prohibited, there is a general norm in place to not schedule an execution until all post-conviction litigation has been conducted.[44] Consequently, the ongoing

---

drugs and the problems associated with drug use—crime, violence, and poverty . . . . To that end, the Act provided for the imposition of the death penalty for certain drug-related killings . . . .").

[39] *See* Cutler, *supra* note 38, at 1209 ("Congress enacted this sweepingly broad measure for two purposes: to expand the number of crimes that potentially could be punished by death, and to provide a new federal system for the imposition of the death penalty."); *see also* Joanmarie Ilaria Davoli, *Playing Politics with Executions: Abuse of Executive Discretion*, 30 GEO. MASON U. CIV. RTS. L.J. 307, 323 (2020) ("Under [Clinton's] administration, Congress passed the Federal Death Penalty Act of 1994, which greatly expanded the number of eligible offenses and expanded capital punishment to crimes that traditionally were left to state law.").

[40] *See* J. Richard Broughton, *Anatomy of Justice: An Honest Conversation on the Criminal Justice System in 2017: Essay: The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U.L. REV. 1611, 1619 (2018) ("The [Federal Death Penalty Act], enacted in 1994, sets forth the relevant procedural framework for federal death penalty cases. It includes eligibility factors, relevant lists of aggravators and mitigators, the standard for determining whether a death sentence can be imposed, and various other provisions that govern federal capital litigation."); *see also* 18 U.S.C. §§ 3591–99 (listing the capital sentencing procedures for most federal crimes and applicable crimes).

[41] *See Background on the Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/background-on-the-federal-death-penalty (last visited Mar. 9, 2024) ("Between the reinstatement of the federal death penalty in 1988 and 2021, [seventy-nine] defendants have been sentenced to death, of whom [sixteen] have been executed."); *see also* Freedman, *supra* note 5, at 1692 (emphasizing that most individuals under a federal death sentence do not face execution by showing federal executions comprise barely 1% of total executions in the United States since 1972, this underscores the rarity of the penalty, distinct from the sentence itself).

[42] *See* Lee Kovarsky, *The Trump Executions*, 100 TEX L. REV 621, 630 (2022) ("After the 2003 execution, the federal death chamber remained unused for seventeen years."); *see also* Freedman, *supra* note 5, at 1691 ("The thirteen executions that took place between July 2020 and January 2021 were . . . more than during the administrations of all one-term presidents except Chester Arthur and Benjamin Harrison in the 1800s . . . .").

[43] *See* Kovarsky, *supra* note 42, at 631–32 ("Specifically, the [Bureau of Prisons] had been struggling to secure an adequate supply of sodium thiopental, the anesthetic agent that . . . [the federal government] . . . used in three-drug execution sequences. The [Bureau of Prisons] needed time to secure a supply of usable chemical compound, or to revise the protocols."); *see also* Hill v. McDonough, 547 U.S. 573, 583–84 (2006) (holding that a defendant's challenge to the method of execution might be eligible for a stay of execution to allow him to pursue his suit but stay of execution is not available as a matter of right, and must be sensitive to the State's interest in enforcing its criminal judgments).

[44] *See* Kovarsky, *supra* note 42, at 630–31 ("There is a general norm against setting execution dates while post-conviction litigation remains pending, and post-conviction litigation over federal sentences–which takes place under 28 U.S.C. § 2255–takes a long time."); *see also* DOYLE, *supra* note

objections to methods of execution prevented the continuance of scheduling executions.[45]

On July 1, 2021, the Department of Justice issued an official moratorium on federal executions.[46] In the issuance, the Attorney General stated the moratorium would allow the Department of Justice time to review new death penalty policies and procedures that were adopted in 2019.[47] Since the issuance of the moratorium, no defendants have been sentenced to death in the federal criminal system; however, the Department of Justice has sought to uphold death sentences in ongoing appeals.[48]

34, at 38 ("Once all opportunities for appeal and collateral review have been exhausted, a defendant sentenced to death is executed pursuant to the laws of the state where the sentence was imposed, or if necessary, pursuant to the laws of a state designated by the court . . . .").

[45] *See* Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1175 (2019) ("Over the last decade, however, jurisdictions have had more trouble obtaining various drugs in the sequence . . . . Attempts to change execution protocols have precipitated considerable litigation . . . ."); *see also Glossip*, 576 U.S. at 878 (2015) (challenging the order of drug administration after an execution took over forty minutes and the inmate awoke after receiving a drug to render him unconscious during execution).

[46] *See* Press Release, Merrick B. Garland, U.S. ATT'Y GENERAL, *Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions; Orders Review of Policies and Procedures* (July 1, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review [hereinafter *Garland Press Release*] (imposing a moratorium on federal executions while a review of the Justice Department's policies and procedures is pending); *see also* Press Release, Senator Dick Durbin, *Durbin, Pressley Reintroduce Bill To End Federal Death Penalty* (July 13, 2023), https://www.durbin.senate.gov/newsroom/press-releases/durbin-pressley-reintroduce-bill-to-end-federal-death-penalty [hereinafter *Durbin Press Release*] ("The comment letter also urged Attorney General Garland to keep in place the current moratorium on federal executions, which began on July 1, 2021, and to take the further steps of withdrawing all pending death notices and authorizing no new death notices.").

[47] *See Garland Press Release*, *supra* note 46 ("In the last two years, the department made a series of changes to capital case policies and procedures . . . . That included adopting a new protocol for administering lethal injections . . . . Attorney General Garland's memorandum directs the Deputy Attorney General to lead a multi-pronged review of these recent policy changes . . . ."); *see also* Noam Biale et al., *The Discriminatory Purpose of the 1994 Crime Bill*, 16 HARV. L. & POL'Y REV. 115, 155 (2021) ("Attorney General Merrick B. Garland has announced a moratorium on the federal death penalty pending a study of its fairness and efficacy.").

[48] *See* Mary Whitfill Roeloffs, *41st Execution Under Biden: President Pledged End Of Death Penalty But Has Made Little Progress On Issue*, FORBES (July 21, 2023, 11:00 AM), https://www.forbes.com/sites/maryroeloffs/2023/07/21/41st-execution-under-biden-president-pledged-end-of-death-penalty-but-has-made-little-progress-on-issue ("While no defendants have been sentenced to death since the start of the Biden administration, the Department of Justice has sought to uphold death sentences in previously prosecuted cases . . . ."); *see also* Cristina Rodríguez, *The Supreme Court 2020 Term: Foreword: Regime Change*, 135 HARV. L. REV. 1, 45 (2021) ("Although it is seeking reinstatement of the death penalty against the Boston Marathon bomber, DOJ has also announced a moratorium on executions pending a review of policies and procedures.").

B. SENATE BILL 2299: THE FEDERAL DEATH PENALTY PROHIBITION ACT

Senate Bill 2299, also known as the Federal Death Penalty Prohibition Act, was introduced into the Senate on July 13, 2023.[49] The Act seeks to prohibit the imposition of the federal death penalty, including both sentencing and executions, for any violation of federal law.[50] If enacted, the Act requires the resentencing of individuals previously sentenced to death in accordance with this prohibition.[51]

The legislation was first introduced in 2019 in response to an announcement by the U.S. Department of Justice that it would resume the use of the death penalty.[52] Although the bill has not progressed beyond referral to subcommittees in both the Senate and House of Representatives since its introduction, it has gained more co-sponsors in each re-introduction.[53]

III. DISCUSSION

A. JUSTICE AND VICTIMS' RIGHTS

The notion that the imposition of the death penalty will provide closure for survivors of homicide[54] is an overstated and simplistic belief.[55] Closure for

---

[49] *See* S. 2299, 118th Cong. (2023) (introducing a bill to prohibit the imposition of the death penalty for any violation of Federal law, and for other purposes); *see also* H.R. 4633, 118th Cong.(2023) (mirroring identical bill to S. 2299 simultaneously filed in the House of Representatives).

[50] *See* S. 2299 ("Notwithstanding any other provision of law, no person may be sentenced to death or put to death on or after the date of enactment of this Act for any violation of Federal law."); *see also* H.R. 4633 (mirroring identical bill to S. 2299 simultaneously filed in the House of Representatives).

[51] *See* S. 2299 ("Notwithstanding any other provision of law, any person sentenced to death before the date of enactment of this Act for any violation of Federal law shall be resentenced."); *see also* H.R. 4633, 118TH CONG. (introducing identical bill to S.2299 simultaneously in H.R.).

[52] *See Durbin Press Release*, *supra* note 46 ("The legislation was originally introduced by Durbin and Pressley in July 2019 following the U.S. Department of Justice's announcement that it would resume the use of the death penalty."); *see also* S. 2299 (introducing a bill to prohibit the imposition of the death penalty for any violation of federal law, and for other purposes).

[53] *See* S. 2299 (including twenty co-sponsors of the bill); *see also* H.R. 4633 (including sixty co-sponsors of the bill); *see also Durbin Press Release*, *supra* note 46 ("Along with Durbin, the [Federal Death Penalty Prohibition Act of 2023] is cosponsored by Senators . . . . Along with Congresswoman Pressley, the [Federal Death Penalty Prohibition Act of 2023] is cosponsored by Representative . . . . The [Federal Death Penalty Prohibition Act of 2023] is endorsed by 415 organizations.").

[54] *See* Marilyn Peterson & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381 (2007) [hereinafter Peterson, *The Ultimate Penal Sanction*] (defining survivors of homicide as family members and close friends impacted by the loss of the homicide victim); *see also* Marilyn Peterson et al., *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 91 MARQ. L. REV. 1, 4 (2012) [hereinafter Peterson, *Assessing the Impact*] ("Homicide bereavement is marked by long-lasting and penetrating upheaval in the lives of victim survivors. Current prevalence estimates project 15% of young adults are survivors of homicide . . . .").

[55] *See* Peterson, *The Ultimate Penal Sanction*, *supra* note 54, at 399 ("[S]ociety's portrayal of the death penalty as providing closure, and the belief that closure is a realistic and desirable goal for

survivors is not a guarantee of the imposition of the death penalty.[56] Grief is a very personal and individualized emotion; one person finding closure in the imposition of the death penalty does not mean every person will.[57] However, maintaining the death penalty maintains the opportunity for all victims' survivors to have the opportunity to try and find closure in the execution versus never being given that chance.[58]

Historically, a murder was avenged for by the victim's family, often resulting in a blood feud—a vendetta lasting for generations.[59] As societies settled and developed into civilizations of law and order, these conflicts were resolved

homicide survivors may be simplistic."); *see also* Jody Madeira, *"Why Rebottle the Genie?": Capitalizing on Closure in Death Penalty Proceedings*, 85 IND. L.J. 1477, 1481 (2010) ("It is unduly simplistic to regard closure merely as an individual's attempts to heal, or as a solely therapeutic concept. Closure is a process, not a destination, a recursive series of adjustments that involves both intrapersonal and interpersonal communicative aspects.").

[56] *See* Madeira, *supra* note 55, at 1494–97 (noting responses from survivors of the Oklahoma City bombing murdered describe various interpretations of closure, including some never attaining closure or believing closure is not attainable, with others noting closure was relief that came with knowing McVeigh would never harm again and the death penalty was closure to that chapter of their life); *see also* Peterson, *Assessing the Impact*, *supra* note 54, at 22 ("[T]hese studies . . . uniformly conclude that the likelihood of closure, and by extension an increased sense of control, is highly variable and colored by the appeals process, expectations about the murderer's comments, and feelings of revenge.").

[57] *See* Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 239 (2002) ("[I]ndividual requirements for 'closure' are so personal that it would be difficult to conceive of any generalized remedy that could be properly tailored to this purpose."); *see also* Madeira, *supra* note 55, at 1484 ("Scholars, then, regard closure as an emotional state . . . . These descriptions of closure as an emotional state imply that those seeking closure can comport themselves in a variety of manners, ranging from restrained therapeutic grieving to intense, primal feelings of rage or vengeance.").

[58] *See* Kanwar, *supra* note 57, at 239–40 ("Because the 'felt' harms of victimization are so individual and subjective, the victims' satisfaction cannot be determined in advance by ready-made legal procedures, but can only be achieved by expressing individual desires and inserting these into the process."); *see also* Peterson, *The Ultimate Penal Sanction*, *supra* note 54, at 398 ("There is little enough we can do to ease the pain of grieving survivors, but hanging murderers would help . . . . By seeking the death penalty for willful murderers, society can offer these families a measure of comfort and assure them that their loss is taken seriously.") (quoting Jeff Jacoby, *Willful Murderers Deserve Death, Not Compassion*, BOSTON GLOBE, at A27 (Dec. 12, 1996)) (internal quotation marks and emphasis omitted)).

[59] *See* Eric Schlosser, *A Grief Like No Other*, THE ATL., Sept. 1997 https://www.nvcap.org/docs/9709_Grief_Like_No_Other.pdf ("In many societies throughout history a murder was avenged by the victim's family. If the killer's family offered resistance, the result was a blood feud—a vendetta—that might last for generations."); *see also* Patrick Fahey, Payne v. Tennessee*: An Eye for An Eye and Then Some*, 25 CONN. L. REV. 205, 208 fn.14 (1992) ("[T]here was no state to make or enforce laws, and satisfaction of 'justice' was left entirely to individuals or their families. Even when states emerged, redress of grievances was still left to the individual or her family.").

more peaceably.[60] As American cities developed, so did the justice system.[61] Subsequently, police forces, prosecutor's offices, and departments of corrections were created, thereby transferring the power to enforce justice from the citizen to the professional.[62] While blood feuds are no longer the norm, the justice system has maintained the death penalty, reinforcing it as a powerful symbol of closure and retribution for the families of victims.[63]

In the aftermath of a homicide, studies have found a correlation between the feelings of incompleteness experienced by the victim's relatives due to the absence of the victim from their lives and a feeling of incompleteness of justice.[64] This justice can only be attained by holding those guilty accountable and

---

[60] *See* Douglas Sylvester, *Interdisciplinary Perspectives on Restorative Justice: Myth in Restorative Justice History,* UTAH L. REV. 471, 496 (2003) ("The change from vengeful retaliation to composition was part of a natural historical process. As tribes settled down, reaction to injury or loss became less severe. Compensation or composition served to mitigate blood feuds . . . ." (quoting STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME (2d ed. 1970) (internal quotation marks omitted)); *see also* Kanwar, *supra* note 57, at 224 ("Family feuds evolved into systems of communal justice, where disputing sides would be pressed into settlement by the community at large. Under Anglo-Saxon law, a system developed where a murderer was compelled to pay a compensatory fine to the victim's family.").

[61] *See* Kanwar, *supra* note 57, at 224 ("The American colonies imported their traditions from English common law and repeated the same general pattern as the earlier Anglo-Norman systems, shifting from private to public prosecutions as the governments of the colonies became more organized."); *see also* Robert Weisberg, *Crime and Law: An American Tragedy, The Collapse of American Criminal Justice*, 125 HARV. L. REV. 1425, 1428 (2012) ("[O]ur major cities absorbed waves of immigration of ethnic groups from Europe and yet somehow developed both a general municipal polity and a concomitant criminal justice system . . . .").

[62] *See* Edward Rubin et al., *Criminal Justice Through Management: From Police, Prosecutors, Courts, and Prisons to a Modern Administrative Agency*, 100 OR. L. REV. 261, 265 (2022) ("Prosecution for crimes remained a private matter in many cases until the eighteenth century, when it was gradually assigned to public officials . . . . Prisons were established in the nineteenth century in reaction to the excessive and erratic imposition of the death penalty and the newly developed aversion to torture . . . ."); *see also* Kanwar, *supra* note 57, at 224–25 ("[T]he power to enforce the law shifted from ordinary citizens to professionals in an organized juridical field . . . . While modes of private vengeance still existed in organized vigilante movements, including lynching, and in the ritualized violence of duels, these were emphatically extra-legal forms relegated to the margins of society.").

[63] *See* Sylvester, *supra* note 60, at 519 ("[T]he mere existence of the numerous physical punishments, including many barbaric forms of execution, are clear examples that much of what took place in these criminal justice systems was not intended to restore balance but rather to punish deviants and restore order within a community."); *see also* Kanwar, *supra* note 57, at 229–30 ("'[T]he public's attitudes toward issues of punishment are driven more by symbolic concerns about values than by instrumental concerns such as the actual reduction of crime,' . . . support for the death penalty is 'rooted in the symbolism of society's willingness to provide the ultimate punishment for the most serious crimes.'").

[64] *See* Jody Lynn Madeira, *Killing McVeigh: The Death Penalty and the Myth of Closure* 122 (N.Y.U. Press, 2012) ("In the aftermath of murder, the murdered victim's absence and the incompleteness of relatives' lives is linked to the absence and incompleteness of justice."); *see also* Thomas Roberts, *Theorizing a Restorative Response to Homicide*, 58 HARV. C.R.-C.L. L. REV. 789, 808 (2023) ("Survivor reactions linger for years, can be hard to treat, and include difficulty finding meaning, distress that does not decrease over time, and a dramatically increased risk of developing Post-Traumatic Stress Disorder, or PTSD.").

carrying out an appropriate sentence.[65] One mother, previously against the imposition of the death penalty, found satisfaction of justice in the death sentence of her son's murderer as she was "gratified by what the jury seemed to say: that what was done to my son appalled them–appalled them enough to warrant the strongest response legally available."[66]

The imposition of the death penalty further provides finality to both the homicide survivors and the justice system.[67] The alternative ultimate penal sentence to the death penalty is a life sentence without the possibility of parole.[68] However, this punishment raises concerns about long-term certainty.[69] Such concerns are shared by the relatives of some of the victims. For instance, Fred Romano's sister, Dawn Garvin, was one of Steven Howard Oken's three murder victims whom was beaten, tortured, and mutilated to death.[70] Romano fears that

---

[65] *See* Madeira, *supra* note 64, at 122–23 ("While a trial may acknowledge a victim as victim, the affirmation of victimhood and the accomplishment of justice is only effected by declaring perpetrators accountable and determining and carrying out an appropriate sentence."); *see also* W. JAMES BOOTH, COMMUNITIES OF MEMORY: ON WITNESS, IDENTITY, AND JUSTICE 123 (Cornell U., 2006) ("The trial is one form of resistance to this [fear of forgetting the crime], seeking the victory of the memory of justice over the becoming of time and the will to forget, seeking, in that sense, the 'rule of law.'"); *see also* Gregory Kane, *To Murder Victims' Families, Executing Killers Is Justice*, BALT. SUN (Feb. 5, 2003), https://www.baltimoresun.com/maryland/bal-md.kane05feb05-column.html ("'Revenge would be going out and killing one of [the murderer's] family members,' Vicki Romano said. 'The death penalty isn't revenge. It's the law.'").

[66] *See* Peterson, *The Ultimate Penal Sanction*, *supra* note 54, at 399 ("I discovered that my dismay mingled with a tremendous satisfaction . . . that what was done to my son appalled them–appalled them enough to warrant the strongest response legally available."); *see also* Madeira, *supra* note 55, at 1498 ("And when I walked down the steps I could feel. . . something being lifted from me. And I felt lighter and I felt relief.").

[67] *See* Rory Little, *Why A Federal Death Penalty Moratorium*?, 33 CONN. L. REV. 781, 793 (2001) ("A moratorium [on the death penalty] will have real, negative effects on some. Interests of finality, victims desiring closure, and our democratically chosen and designed system of criminal justice, all suffer . . . ."); *see also* Peterson, *The Ultimate Penal Sanction*, *supra* note 54, at 398–399 ("Another survivor claimed, '[i]f they're dead, they can't commit more crimes. I want a finality, I'm tired of hearings and court proceedings. I want him out of my life, and I really see only one way to do that.'").

[68] *See* Peterson, *Assessing the Impact*, *supra* note 54, at 5–6 ("[T]here are thirty-three states with the death penalty and seventeen states and the District of Columbia without the death penalty. All states that use the death penalty also use [life without parole] as an alternate sentence. [S]tates without the death penalty use [life without parole] as their ultimate sentence."); *see also* Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J. L. & SOC. POL'Y 173, 178 (2020) (noting that life without the possibility of parole became an attractive alternative to states during the *Furman*-moratorium on the death penalty).

[69] *See* Miao, *supra* note 68, at 188 ("'I personally think [life without the possibility of parole] is also a cruel and unusual punishment by itself . . . . We should first oppose the death penalty and then address issues with [life without the possibility of parole].'"); *see also* Ross Klienstuber et al., *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19.3 U. PA. J.L. & SOC. CHANGE 185, 201–02 (2016) ("[A]bolitionists need to stop advocating for [life without the possibility of parole] and recognize that [life without the possibility of parole] is simply another form of the death penalty that should also be abolished.").

[70] *See* Kane, *supra* note 65 ("[Fred] remembers the man who murdered his sister and two other women–Patricia Antoinette Hirt and Lori Elizabeth Ward–and how he has waited for [fifteen] years

ten years from now proponents of lighter sentences will argue that a sentencing of life without parole is too harsh and "a bunch of murderers [will be] walking the streets."[71] This fear is heightened when examining laws and changes to current life imprisonment statutes.[72]

Minnesota, for example, abolished the death penalty in 1911, imposing life sentences without the possibility of parole as the alternative ultimate penal sanction.[73] However, since that time, Minnesota has continued to enact new life imprisonment statutes, now requiring just a thirty-year minimum before parole eligibility.[74] While statutes enacted do provide life without the possibility of parole for premediated first-degree murder, survivors are wary that future arguments will support lessening the ability to sentence a defendant to life with no possibility of parole.[75]

In this context, the death penalty becomes more than a punitive measure; it becomes a safeguard and a guarantee that the most heinous crimes will not be

---

for one Steven Howard Oken to, in the younger Romano's words, 'meet his maker.'"); *see also* Oken v. State, 612 A.2d 258, 260 (Md App. Ct. 1992) (affirming death sentence for Oken for the murder of Dawn Garvin).

[71] Kane, *supra* note 65 ("'My problem with it is that [ten] years from now some other idiot will come along and say life without parole is too harsh,' Fred Romano said. 'Then they'll pass a bill granting them parole and then we'll have a bunch of murderers walking the streets.'"); *see also* Michael Radelet, *Religion's Role in the Administration of the Death Penalty: The Role of Organized Religions in Changing Death Penalty Debates*, 9 WM. & MARY BILL OF RTS. J. 201, 204 n.20 (2000) ("A 1998 Florida poll revealed 63% support for the death penalty, but 'just 50% of those polled would support the death penalty if life without parole were a certainty.'").

[72] *See* Isabel Grant, *Rethinking the Sentencing Regime for Murder*, 39 OSGOODE HALL L.J. 655, 682 (2001) ("However, 'life without parole' does not necessarily mean life without parole. North Dakota, for example, allows an accused sentenced to life without parole to apply for parole after thirty years of imprisonment."); *see also* Clare Heine, *Hope for People Serving Life Without Parole in North Carolina: The Prison Resources Repurposing Act*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 1, 2 (2021) (commenting on the proposed extension of North Carolina's Prison Resources Repurposing Act to extend parole eligibility to those serving life sentences).

[73] *See* Peterson Armour, *Assessing the Impact*, *supra* note 54, at 10 ("Minnesota abolished the death penalty in 1911 based on arguments that innocent people were being executed and criminals were going free because juries were reluctant to impose the death penalty . . . . There have been more than a dozen attempts to have the death penalty reinstated, all of which have failed . . . ."); *see also* John Bessler, *The "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement*, 22 WM. MITCHELL L. REV. 577, 582 (1996) (detailing the history leading to the abolition of the death penalty in Minnesota, noting newspapers publishing descriptions of hangings ultimately led to the abolition of the death penalty in 1911).

[74] *See* Peterson, *Assessing the Impact*, *supra* note 54, at 10 ("A number of new laws and enhancements to the life imprisonment statutes, however, have been enacted . . . . In 1989, the legislature set a thirty-year minimum and added life without parole for certain crimes."); *see also* Jackson v. State, 883 N.W.2d 272, 282 (Minn. 2016) (holding a conviction of first-degree premeditated murder requires a sentence of life imprisonment with the possibility of release after a minimum of thirty years served).

[75] *See* Marc Mauer et al., *The Meaning of Life: The Case for Abolishing Life Sentences* 4–5 (2018) ("The widespread use of life imprisonment also fundamentally violates legal and human rights norms concerning the scale of punishment . . . . It is long past time to join the rest of the democratic world by scaling down the excessive nature of punishment that has become the hallmark of mass incarceration."); *see also* Grant, *supra* note 72, at 684 ("One can see legislative attempts in these states to have it both ways, labeling a sentence as life without parole, and yet providing for parole.").

met with uncertain sentences or future legal revisions.[76] The death penalty represents a commitment to the enduring protection of society and justice, reinforcing the crucial role it plays in the pursuit of justice and victims' rights.[77]

B. DETERRENCE AND SOCIETY'S SAFETY

In 1976, when reinstating the constitutionality of the death penalty in *Gregg v. Georgia*, the Supreme Court recognized the role of the death penalty in serving the crucial social purpose of deterrence.[78] The need and desire for stability in an ordered society governed by law demands the imposition of deserved punishment, preventing lawlessness from taking over.[79]

Studies from various viewpoints have attempted to compare the death penalty and life in prison without the possibility of parole as more successful than the other in deterring future crime.[80] However, these studies face inherent challenges in reliability, as they cannot be conducted in isolation from the dynamic variables and societal changes that constantly influence outcomes, and the

---

[76] *See* Marah McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 561 n.174 (2016) ("It is similarly impossible to achieve full justice when a prisoner sentenced to fifty years in prison dies in prison after two years or when a prisoner sentenced to prison escapes before he can be confined."); *see also* James Acker, *Be Careful What You Ask For: Lessons From New York's Recent Experience With Capital Punishment*, 32 VT. L. REV. 683, 730 (2008) ("Other witnesses, however, disputed the claim that [life without the possibility of parole] was an adequate substitute for capital punishment. Some lacked confidence that such sentences could guarantee that offenders in fact would never be released from prison, and some stressed that justice would not be served by . . . life imprisonment.").

[77] *See* Madeira, *supra* note 55, at 1479–80 ("[C]losure encompasses . . . the desire to vindicate the victim through the criminal justice system by attaining a guilty verdict. This verdict not only marks the end of legal proceedings and imposes accountability, but also confirms the victim's intrinsic worth and human dignity and demonstrates the tragedy of loss . . . . "); *see also* Kane, *supra* note 65 (quoting survivors who believe that the application of the death penalty is simply the application of the law and not an act of revenge on behalf of the victim).

[78] *See Gregg*, 428 U.S. at 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."); *see also* Acker, *supra* note 76, at 702 ("When the Supreme Court gave its blessing to general deterrence as a justification for capital punishment in 1976, this argument was the one advanced most prominently and forcefully by death penalty proponents nationwide.").

[79] *See* Gregg, 428 U.S. at 183 ("[The death penalty] is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."); *see also* Freedman, *supra* note 5, at 1721 ("From another perspective, however, the federal death penalty was meted out . . . as a means of establishing and securing federal sovereignty without a court system willing to hand down rapid and harsh justice, lynching would have almost certainly filled the void and exacerbated the lawlessness that defined the period.").

[80] *See* Maimon Schwarzschild, *Retribution, Deterrence, and the Death Penalty: A Response to Hugo Bedau*, 21 CRIM. JUST. ETHICS 9, 10 (2002) ("Controversy about the claim that long-term imprisonment is sufficient is partly empirical . . . . Some statistical studies suggest that executions afford little or no extra deterrence over life imprisonment. Other studies suggest they do."); *see also Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164, 169 (1975) (discussing statistical analysis of the death penalty depends on explicit and implicit assumption and technically complex objections by the opposition undermine the results, resulting in Chief Justice Burger's characterization of an "empirical stalemate").

inability to create an exact laboratory-like setting hinders the possibility of a reliable comparison.[81]

Despite studies showing both punishments as more successful than the other, death remains the ultimate punishment, greater than loss of liberty.[82] The fear of loss of life has deterred crimes as evidenced by statements from incarcerated individuals.[83] Interviews with currently convicted individuals reveal that the possibility of receiving the death penalty influenced the manner and location of their crimes.[84]

Even if the death penalty has lower rates of deterrence than life without the possibility of parole, neither will be a total deterrent, especially in regard to crimes of passion.[85] Furthermore, the death penalty's ability to deter crimes is not the only factor being considered in arguments for or against abolition.[86]

---

[81] *See* Schwarzschild, *supra* note 80, at 10 ("In, fact, proving that execution deters murder more than life imprisonment, or proving that it does not, may be practically impossible. There are too many variables and laboratory conditions do not exist . . . conditions in which variables other than the death penalty are in any way constant."); *see also Gregg*, 428 U.S. at 185 ("Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties . . . there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect.")

[82] *See* Peter Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J INT'L L. 287, 318 (1996) ("Whether or not the death penalty deters crime is perhaps the most controversial and highly debated topic in the field of criminal justice. Countless studies have been conducted, each claiming to finally establish the truth, at least until the next study comes along and disproves its predecessors."); *see also* James Reams et al., *Death Penalty Considered, Part 2: Making the Case for the Deterrence Effect of Capital Punishment*, 52 N.H.B.J. 18, 18 (2011) ("The death penalty also serves the goal of general deterrence. In recent years, increasingly sophisticated economic models have been developed to study the deterrent effect . . . . The studies are hotly debated in the academic world. As of now, there is no universally accepted conclusion to this debate.").

[83] *See* Acker, *supra* note 76, at 707 ("'Death is the ultimate threat . . . the ultimate punishment. There are things that we would not do out of fear of dying that we might otherwise do out of fear of loss of liberty.'"); *see also* Charles Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter*, 2 J.L. ECON. & POL'Y 51, 102 (2007) ("The great majority of all murderers fear death and, at least plausibly, are deterred by it.").

[84] *See* United States v. Corchado-Aguirre, No. CR 15-0393 JB, 2015 U.S. Dist. LEXIS 176621, at *66 (NM Dist. Ct. Aug. 31, 2015) ("[C]onvicted bank robber, Matthews James Griffin . . . stated, during a deposition, that he was trying to merely maim the guard and not to kill him, because he would have received the death penalty if he had killed the guard."); *see also* Acker, *supra* note 76, at 707 ("One convict told him that 'the reason . . . I did kill in DC and I didn't kill in Maryland and Virginia, was because I couldn't handle what they had waiting for me there, I couldn't handle the death penalty.'").

[85] *See Gregg*, 428 U.S. at 185 (1976) (noting that some studies suggest the death penalty may not function as a significantly greater deterrent compared to other penalties, particularly in instances of crimes of passion, where the threat of death has little or no deterrent effect due to the instantaneous nature of the decisions); *see also* W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 899 fn.22 (2009) ("I do not discuss the impacts my argument has on deterrence, in part because of my skepticism that criminal penalties can deter second degree crimes of passion . . . .").

[86] *See* Schwarzschild, *supra* note 80, at 9 (noting Bedau's argument against the death penalty is most centered on the idea that punishment is only justified when it deters crimes, dismissing theories of social and moral justice, and public welfare and safety); *see also* Acker, *supra* note 76, at 707

Weighed in the totality of the goals of penal sanctions, the death penalty should be maintained.[87]

It remains that death is the ultimate deterrent; individuals have limits of what they are willing to do out of fear of dying.[88] The fear of loss of liberty, however permanent it claims to be, will never surmount to the loss of one's life.[89] Society, acting through juries, has dictated when the death penalty is necessary based on the crime exceeding the bounds of a "civilized society."[90] A crime not deserving of the death penalty will not be sentenced to such by society.[91]

(discussing death as the ultimate deterrent, including interviews with incarcerated individuals showing death penalty influenced type or location of crime).

[87] *See* Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1288 ("[T]he most compelling justification for a system of punishment is the fact that individuals settling on a basic structure for society according to principles of mutual advantage would consent to that system as a way of policing the basic terms of their agreement."); *see also* Freedman, *supra* note 5, at 1729 ("The Court has identified four valid penological justifications for punishment: retribution, deterrence, incapacitation, and rehabilitation. If a capital sentence does not serve those objectives with respect to a class of offenders, the sentence is disproportionate."); *see also* Donald Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33. U.C. DAVIS L. REV. 155, 183 (1999) ("[T]here is evidence that public support for capital punishment does not ultimately rest on criminological goals or fear of crime. [P]eople do support it on instrumental grounds (i.e., deterrence, retributive goals, and concern about crime) . . . [and] symbolic.").

[88] *See* Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 965–66 (1985) ("Even though statistical demonstrations are not conclusive . . . I believe that capital punishment is likely to deter more than other punishments because people fear death more than anything else . . . . Whatever people fear most is likely to deter most."); *see also* Acker, *supra* note 76, at 707 (noting that decisions are made out of fear of dying and death).

[89] *See* People v. Love, 56 Cal. 2d 720, 752 (Ca. 1961) ("'If there is any validity to the theory that the purpose of legally adjudicated punishment is to deter the commission of crime, it must follow that death . . . which is the extreme penalty and is so generally considered, is the most effective deterrent.'"); *see also* Miao, *supra* note 68, at 188–89 (advocating that life without the possibility of parole should be abolished as another form of the death penalty).

[90] *See* John Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 281 n.650 (2009) (internal quotations omitted) ("For a punishment to achieve its objective, it is only necessary that the harm that it inflicts outweighs the benefit that derives from the crime . . . ."); *see also* Monica Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Just Deserts*, 26 SOC. JUST. RSCH. 61, 63 n.1 (2013) ("[P]unishment should be considered a moral phenomenon: while crime violates the moral order in society, punishment serves an expressive role of reaffirming social bonds and defining the boundaries of social groups."); *see also* Doug Janicik, *Allowing Victims' Families to View Executions: The Eighth Amendment and Society's Justifications for Punishment*, 61 OHIO ST. L.J. 935, 974 (2000) ("[T]he act of punishment must still be the 'deserved response of the community to a member who has acted unjustly . . . .'").

[91] *See* DOYLE, *supra* note 34, at 4 ("Imposition of the death penalty as punishment for a particular crime will be considered cruel and unusual when it is contrary to the 'evolving standards of decency that mark the progress of maturing society.' Those standards find expression in . . . jury performance . . . ."); *see also* Williams v. State, 273 S.W.3d 200, 236 (Tx. Crim. Ap. 2008) (Meyers, J., dissenting) ("The jury, representing society, has been given the option to not give a defendant the death penalty.").

C. MORAL AND ETHICAL CONSIDERATIONS

Arguments for life imprisonment without the possibility of parole often arise when weighing the moral and ethical considerations of the death penalty.[92] Seen as a punishment that preserves life, this sentence seems to end the eye for an eye mentality of society.[93] However, a paradox arises when a life sentence seems, as some scholars would argue, to be a punishment just as painful as the death penalty.[94] A life sentence is a slow deprivation of life that targets the spirit and mentality of the incarcerated; some even calling this "a fate worse than death."[95] While a slower death, a human life is still saved.[96] Nevertheless, concerns about the certainty of life imprisonment, as discussed above, remain and maintain the need for the death penalty.[97]

---

[92] *See* Miao, *supra* note 68, at 177 ("[T]he controversy as to whether [life without parole] is an appropriate alternative to the death penalty can be viewed as a recent episode of a more general history of conflicting penological ideals and moral values."); *see also* Shiv Persaud, *Eternal Law: The Underpinnings of Dharma and Karma in the Justice System*, 13 RICH. PUB. INT. L. REV. 49, 58 (2019) ("[T]he debatable question remains whether society is justified in taking the life of another thereby invoking a moral dilemma.").

[93] *See* Acker, *supra* note 76, at 691 ("Senator Pedro Espada, Jr. warned that 'this eye for an eye kind of mentality will some day result in people . . . proposing raping the rapist for having raped, abusing the children of pedophiles for their crimes, torching the arsonist.'"); *see also* Gerber, *supra* note 90, at 63 ("[W]hile retribution seems to relate to the repayment of wrongful acts, retribution also captures a rather unstructured range of different non-instrumental aspects of punishment, including concerns about justice, proportionality, morality, social cohesion, deservingness and the retaliation of wrongdoing.").

[94] *See* Pope Francis, *Address to the Delegates of the International Association of Penal Law* (Oct. 23, 2014), http://www.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html ("A life sentence [without parole] is just a death penalty in disguise."); *see also* Jason Iuliano, *Why Capital Punishment is No Punishment At All*, 64 AM. U. L. REV. 1377, 1436–37 (2015) (internal quotations omitted) ("I try to imagine what kind of death, even a slow one, would be worse than twenty-five years in the box–and I have tried to imagine it–I can come up with nothing.").

[95] *See* Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html ("Many respondents said that life in prison for one so young would be a fate worse than death . . . ."); *see also* Miao, *supra* note 68, at 181 ("[L]ife imprisonment is not a real substitute for capital punishment; rather, it is a [form] of capital punishment. Whole-life terms inflict prolonged injury 'upon the spiritual and mental powers, extended over many years . . . by slow operation . . . .'").

[96] *See* Klienstuber, *supra* note 69, at 188 (internal quotations omitted) ("I would prefer death over [life without parole] because life in here is . . . a long and slow death that will eat at your soul and your mind until you die. Think of it like a Band-Aid . . . pull it off quickly, with one pull."); *see also* Julian Wright, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 566 (1990) ("Life-without-parole is employed effectively as a prosecutorial weapon against murder, and potentially saves . . . the lives of convicted murderers who would otherwise languish on death row as well as the innocent victims of paroled murderers who may kill again.").

[97] *See* Kane, *supra* note 65 (noting survivors' concerns that in future years, abolitionists will attempt to end life without the possibility of parole and no permanent punishment will be provided); *see also* Heine, *supra* note 72, at 2 (commenting on proposed extension of North Carolina's Prison Resources Repurposing Act to extend parole eligibility to those serving life sentences).

Furthermore, the death penalty does carry the risk of miscarriages of justice when the executed individual is innocent.[98] However, a broken system does not need to be thrown out, it needs to be repaired.[99] While some official investigations report that no innocents have been executed by the death penalty, independent researchers have found multiple accounts of executed individuals being found innocent after death.[100] This is a miscarriage of justice.[101] The Innocence Project has attributed mistaken identifications by eyewitnesses or victims to eighty-four percent of their DNA exonerations.[102] These are errors that can be addressed through changes to both criminal investigations and death penalty procedural law.[103]

---

[98] *See* Rocha v. Thaler, 619 F.3d 387, 402 (5th Cir. 2010) ("The 'miscarriage of justice' exception applies where a petitioner is 'actually innocent' of either the offense giving rise to his conviction or 'actually innocent' of the death penalty."); *see also* Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 866 (2008) ("Anyone who has ever . . . had the sublime pleasure of dealing with the IRS or INS knows that the government can make mistakes, because people can make mistakes. Even when our government is deciding life or death, it can make mistakes.").

[99] *See* Hugo Adam Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 79 (1987) ("Every time a guilty person is convicted of murder but not sentenced to death and executed, society runs the risk that such a person may kill again, or commit other crimes–against a fellow inmate, a prison visitor, a prison employee, or even the general public."); *see also* Klienstuber, *supra* note 69, at 193 ("[I]f the death penalty is abolished in order to save money . . . then the odds of innocent defendants ever being released will decline dramatically. ([E]liminating or reducing the very appeals designed to uncover miscarriages of justice would actually increase the risk of sentencing innocent persons to 'semantically disguised sentences of death.'") (citation omitted).

[100] *See* Bedau, *supra* note 99, at 24–25 (showing the American Prison Congress announced opening investigations into every reported case of unjust conviction and would try to discover if the death penalty has ever been inflicted upon an innocent man, concluding that there were no such cases, despite receiving almost no responses from questioned prisons and ignoring Kentucky prison response of two possible innocent executions); *see also* Mello, *supra* note 98, at 866 ("In a study published in 1996, Radelet and Bedau identified '[sixty-eight] cases of death row inmates later released because of doubts about their guilt.'").

[101] *See* Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547, 548 (1997) ("Whatever the flaws in their work, it is impossible to deny its central point–that innocent people have been convicted and imprisoned or executed. Even their critics do not assert that no miscarriages have occurred."); *see also* Mello, *supra* note 98, at 867 ("Executing the wrong person–executing a person for another person's crimes–comes perilously close to simple murder. The American public will not tolerate murder done in their name by their government. The American public are not murderers.").

[102] *See* Mello, *supra* note 98, at 868 ("Mistaken identifications by eyewitnesses or victims . . . contributed to 84 percent of the convictions overturned by the Innocence Project's DNA exonerations."); *see also* David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 114 (2000) ("In the vast majority of cases in which innocent people are exonerated, people from outside the criminal justice system–private attorneys, law professors, journalists, even students–conduct the investigations that proves inmates' innocence and push for their exoneration.").

[103] *See* Horan, *supra* note 102, at 189 ("Even if every state and the federal government were to abolish the death penalty, endemic problems and inevitably fallible human judgments within the criminal justice system would still lead many innocent people to be convicted of crimes carrying less than the penalty of death."); *see also* Al Gore, Presidential Candidate, *Presidential Debate with George W. Bush in St. Louis, MO*, (Oct. 17, 2000) ("I think that [the death penalty] has to be

Furthermore, studies have shown that if the death penalty is abolished, the money and time saved from death penalty appeals would not trickle down to those serving life in prison.[104] Incarcerated individuals that would have received the death penalty, and instead receive a life sentence, would have a substantially more difficult time accessing the courts.[105] Advocates for abolition claim that the elimination of the death penalty would result in increased public and legislative support to improving procedural laws related to life sentences. However, there are very few instances where states have provided the specialized services often available to inmates facing the death penalty to those serving life sentences, even after such states abolished the death penalty.[106]

IV. SOLUTION

A. LESSENING CASES OF APPLICABILITY

In President Reagan's address to Congress, he labeled it "scandalous and intolerable that Federal law now provides no enforceable death penalty," and highlighted instances of crime when the federal death penalty was most necessary.[107] These crimes seemed to embody two larger sets of crime that should be

---

administered not only fairly, with attention to things like DNA evidence . . . . If the wrong guy is put to death . . . [n]ot only has an innocent person been executed but the real perpetrator of the crime has not been held accountable for it . . . .").

[104] *See* Klienstuber, *supra* note 69, at 194 ("The Maryland Commission on Capital Punishment looked at [if attorneys would focus on innocence of life sentence inmates if the death penalty was abolished] and concluded that 'the procedural protections . . . that are the cause of the exorbitant cost of [capital] cases' would not trickle down to life cases . . . ."); *see also* Diana N. Huffman, *To Act or Not To Act: Will New York's Defeated Death Penalty Be Resurrected?*, 35 FORDHAM URB. L.J. 1139, 1176 (2008) ("Colorado recently voted on a bill to abolish the death penalty and allocate the money saved from capital prosecution and trials to investigate unsolved murder cases.").

[105] *See* Cary Aspinwall, *Life-without-parole sentences are exploding. But America's legal defense system hasn't kept pace.*, NBC NEWS (May 22, 2021, 6:00 AM), https://www.nbcnews.com/news/us-news/life-without-parole-sentences-are-exploding-america-s-legal-defense-n1268122 ("'The sentencing stakes are so high and often irreversible.' People facing life have far fewer chances to appeal than those facing capital punishment, and their cases draw far less scrutiny, [Pamela Metzger] said."); *see also* Klienstuber, *supra* note 69, at 194 ("[A]ccess to federal habeas corpus relief, the ability to obtain state-funded transcripts or attorneys, and the ability to pay for post-conviction court proceedings is severely limited for most prisoners. Prisoners under formal sentences of death . . . 'have greater access to the courts than other prisoners, including those . . . serving virtual death sentences.'").

[106] *See* Klienstuber, *supra* note 69, at 194 ("[S]ince New York abolished capital punishment: There has been no revision of the statutes to provide for specialized services in life without parole cases. Nor has broader right to counsel emerged or a more extensive right to appeal. And no greater procedural protections have been articulated . . . ."); *see also* Aspinwall, *supra* note 105 ("[A]s life without parole displaces capital punishment, the country's patchwork system of public defense hasn't kept up. [T]here's a continuing dispute over whether the standards for death penalty defense apply if prosecutors seek life without parole instead.").

[107] *See* Reagan, *supra* note 1 ("It is scandalous and intolerable that Federal law now provides no enforceable death penalty . . . . The bill would correct these omissions and others by establishing an enforceable capital sanction for aggravated crimes of murder, espionage, and treason."); *see also* S.1970, 100th Cong. (1987), *supra* note 1 (introducing the Criminal Justice Reform Act during

punishable by death: (1) crimes where the preparator has no further punishment available; and (2) crimes that threaten the sovereign interests of the United States of America.[108]

In regards to punishing crimes that threaten the sovereign interests of the United States of America, these are crimes that the federal criminal power was first utilized for, and embody what the federal death penalty should return to.[109] American society has always agreed that the ultimate crimes necessary of the death penalty are crimes against the United States.[110] Although suicide bombers and so-called "martyrs" may not be dissuaded by the prospect of the death penalty, given their willingness to embrace death as part of their heinous acts of terrorism, society still deems it necessary to assert its condemnation of these acts of terrorism through the death penalty.[111] This firm stance not only serves as a symbolic denouncement of terrorism but also has the potential to discourage potential terrorists from embracing such a destructive path, thereby acting as a deterrent to those considering involvement in such heinous acts.[112]

President's Reagan's address to Congress which provided for the imposition of the federal death penalty post-*Furman* ruling).

[108] *See* Reagan, *supra* note 1 ("[F]or terrorists who slaughter defenseless American hostages, for drug traffickers who engage in cold-blooded murder of our law enforcement officers, for prisoners already serving life terms who murder guards or other inmates, or for traitors who jeopardize the security of millions . . . ."); *see also* S.1970 (providing imposition of the death penalty for: murder committed by prisoners; kidnappings and hostage takings resulting death; attempts to kill the President resulting in injury or close death to President; murder for hire or to aid in racketeering; international terrorism where the killing is first degree murder; and engaging in criminal enterprises resulting in death).

[109] *See* Freedman, *supra* note 5, at 1705–06 ("When the federal government did impose the ultimate penalty, it did so for crimes that threatened the young country's sovereign interests—piracy, assaults on the mail system, murder on the high seas. The first federal legislation that authorized the death penalty, the Crimes Act of 1790, illustrates this point."); *see also The Federal Death Penalty*, TALKING FEDS, 15:00 (Oct. 25, 2019), https://www.talkingfeds.com/transcripts/2019/10/25/the-federal-death-penalty (discussing need to maintain federal death penalty today for nation-wide uniformity of punishment for crimes of large-scale violence and have a significant impact on the country as a whole).

[110] *See* Norman Greene et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187, 191 (2001) ("We can, and do, take people from countries all over the world who have committed crimes against United States interests or against United States citizens, and bring them to the United States for trial . . . . [W]e claim the right to execute such people once we have brought them here . . . ."); *see also* Freedman, *supra* note 5, at 1705–06 (noting the early federal government rarely prosecuted criminal cases unless a criminal threatened the existence and future of the country).

[111] *See* Thomas McDonnell, *The Death Penalty–An Obstacle to the "War Against Terrorism"?*, 37 VAND. J. TRANSNAT'L 353, 423 (2004) ("Even if suicide bombers may not be generally deterred, those responsible for the September 11 attacks warrant the death penalty: 'The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.'"); *see also* Acker, *supra* note 76, at 694 ("[P]ublic hearings grappled with the propriety of using capital punishment against specific individuals and in extreme cases that embodied the 'worst of the worst' category of killing . . . . [M]ost notably Timothy McVeigh, who was convicted and subsequently executed for . . . the bombing of the . . . Federal Building in Oklahoma City . . . and Osama bin Laden . . . .").

[112] *See* Reams, *supra* note 82, at 18 ("For some capital defendants the specific deterrence rationale is particularly appropriate. [T]errorists, who have pledged to continue to kill, need to be prevented

Furthermore, in addition to lessening the applicability of the federal death penalty, changes also need to be made to how the death penalty sentences are carried out to better serve the goals of punishment.[113] This includes not allowing witnesses to the execution, beyond the inmate's family, if desired.[114] Survivors and media witnessing the execution does not serve the goals of punishment and violates human dignity.[115] Additionally, executions should not be carried out if the incarcerated is medically declared incompetent or insane to the point where they cannot remember or form the culpable mental state they had at the time of the crime, even if this impairment was not present or diagnosed during sentencing.[116]

---

from killing again and holding them in prison endangers the guards that work there."); *see also* Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996) (enacting the death penalty for stated purpose of deterring acts of terrorism and providing justice for victims); *see also* DOYLE, *supra* note 34, at 34 ("[T]reason and espionage differ by nature from murder or rape. Society punishes murder or rape as an offense against an individual whom it is obligated to protect. Society punishes treason or espionage as an offense against all those whom it is obligated to protect.").

[113] *See* Graham v. Florida, 560 U.S. 48, 71 (2010) (identifying the goals of punishment as retribution, deterrence, incapacitation, and rehabilitation); *see also* William Peterson, *Voices of the Victims: Capital Punishment and A Declaration of Life*, 27 REV. LITIG. 769, 779–80 (2008) ("Defenses of capital punishment rest primarily on two philosophies: consequentialism, which punishes because of the benefits from doing so, and retributivism, which punishes because the immorality of the crime demands it, independent of any consequences."); *see also* Michael L. Goodwin, *An Eyeful For An Eye-An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585, 605 (1997) ("As a prison regulation infringing upon a prisoner's constitutional and state-created rights, the right-to-view laws must be reasonably related to legitimate penological goals.").

[114] *See* Janicik, *supra* note 90, at 973 ("[T]he practice of allowing a victim's family to view the execution has only satisfied the thirst for revenge, and there is no reaffirmation of our community's sense of justice; if anything, witnessing the execution distorts the 'repair' of societal values that retribution is supposed to accomplish."); *see also* Kanwar, *supra* note 57, at 240 ("[I]ndividual vengeance is the 'desire to punish a criminal because the individual gains satisfaction' . . . when she is allowed to view an execution . . . . [I]ndividualization of victims' experience of the process (e.g., 'right to view' statutes) . . . takes the focus off blameworthiness . . . .").

[115] *See* Janicik, *supra* note 90, at 944 ("It is human nature to want to die with dignity and peace. Allowing victims' families to watch the execution, as they anxiously await the prisoner's death, is degrading and disturbing to the prisoner and prevents a peaceful and dignified death."); *see also* Goodwin, *supra* note 113, at 600–01 ("Forcing an individual to involuntarily share death with unwelcome onlookers violates the basic elements of human dignity . . . . An unnecessary or excessive punishment is unconstitutionally cruel if a less severe punishment achieves the same goals. Death clearly achieves the same result with or without the presence of the victim's family.").

[116] *See* Rebecca Woodman, *Wesley Purkey's Execution Should Shock America's Conscience*, AM. CONST. SOC'Y EXPERT F. (July 23, 2020), https://www.acslaw.org/expertforum/wesley-purkeys-execution-should-shock-americas-conscience/ ("Wesley Purkey, a 68-year-old man so impaired by Alzheimer's disease, schizophrenia, and brain damage that he believed he was being killed in a conspiracy of retaliation for complaining about prison conditions . . . . [Purkey had no] rational understanding that the government planned to kill him for a crime he committed . . . ."); *see also* Panetti v. Quarterman, 551 U.S. 930, 959 (2007) (clarifying ruling in *Ford v. Wainwright*, 477 U.S. 399 (1986), holding a prisoner's awareness of the State's rationale for their execution is insufficient to demonstrate competency for execution; instead, in order to be competent, a prisoner must also have a reasonable understanding of the State's rationale behind the punishment).

These proposed changes to the federal death penalty will also lessen the procedural length of the carrying out a death penalty sentence, as they would result in less applicability and fewer appeals in the court system, enhancing the deterrent effect of the death penalty.[117] By providing the death penalty as a potential punishment for fewer crimes and implementing stricter guidelines, certainty of death will systematically increase, making the death penalty a greater deterrent due to the real sentence of death, instead of the current death sentence of life with the possibility of death.[118]

B. RETROACTIVE APPLICABILITY TO CURRENT SENTENCES

Following reform to crimes punished by the death penalty, those sentenced for crimes no longer punishable by death should be retroactively resentenced to life without the possibility of parole.[119] This resentencing will further decrease costs of maintaining the death penalty, as reduction of applicable crimes will remove a number of inmates from federal death row.[120] Further, resentencing

---

[117] *See* Jeffery O. Usman, *The Twenty-First Century Death Penalty and Paths Forward*, 37 MISS. C. L. REV. 80, 101–02 (2019) ("'[S]ystemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into . . . life in prison, with the remote possibility of death.' That . . . does not make for the death penalty being a particularly effective deterrent."); *see also* Lyle C. May & Julia Udell, *The Uncertainty of De Facto Moratoria and Persistence of Death Row Phenomenon*, UNIV. OXFORD FAC. OF L. BLOGS (Jan. 26, 2022), https://blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2022/01/uncertainty-de-facto-moratoria ("As a result, for many on death row, the threat of execution is not presently imminent . . . . Life in prison with an ever-looming possibility of execution is the most extreme form of punishment—one that has driven some to drop their appeals in acts of state-assisted suicide.").

[118] *See* Usman, *supra* note 117, at 102 ("'[C]ertainty and immediacy of punishment are more crucial elements of effective deterrence than its severity.' Certainty and immediacy are undeniably lacking in the current approach to capital punishment."); *see also* Barr v. Purkey, 140 S. Ct. 2594, 2595–96 (2020) (Breyer, J., dissenting) (identifying legal defects in the administration of the death penalty, undermining the goals of punishment for the death penalty, specifically deterrence and retribution, but also affecting proper procedure and lack of reliability).

[119] *See* State v. Santiago, 318 Conn. 1, 139–40 (2015) (holding that continuing to execute those sentenced to death prior to death penalty abolition constitutes cruel and unusual punishment as the goals of punishment can no longer be met as the death penalty is no longer a punishment for the crimes and is not a viable deterrent); *see also* Peterson, *Assessing the Impact*, *supra* note 54, at 389 (noting that states without a death penalty use life in prison without the possibility of parole as the ultimate penal sanction, with the exception of Alaska).

[120] *See* James Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 315 (2011) ("The [California Death Penalty] commission estimated that commuting the sentence of everyone currently on death row [in California] to life in prison without parole would save the state over $125 million annually."); *see also* Ronnie Stephens, *The Cost of Federal Executions in Trump's Last Year: A Lingering Burden*, INTERROGATING JUST. (Feb. 11, 2021), https://interrogatingjustice.org/death-sentences/the-cost-of-federal-executions-trump/ (finding that the federal Bureau of Prisons generally does not release all financial information around executions, but maintaining an average federal prisoner costs about $37,500 per year and maintaining a death row prisoner costs about $60,000 plus additional appeal and execution costs); *see also List of Federal Death Row Prisoners*, *supra* note 6 (listing all current federal death row inmates and sentenced crimes).

would lessen the possibility of irreversible miscarriages of justice.[121] Arguments on loss of justice from survivors should be recognized but ultimately, the use of the death penalty is being weighed in the totality of the circumstances.[122]

V. CONCLUSION

"[I]f administered swiftly and justly, capital punishment is a deterrent against future violence and will save other innocent lives."[123] Recognizing that the federal death penalty needs to be preserved for the most heinous of crimes that threaten the United States of America, reformation is necessary to lessen crime applicability and strengthen procedural laws.[124] This will systematically increase the federal death penalty's deterrent effect and lower the cost of maintaining the death penalty.[125] The federal death penalty system is broken, but abolition through the Federal Death Penalty Prohibition Act is not the solution.[126]

---

[121] *See* Mello, *supra* note 98, at 867 (discussing the miscarriages of justice of an innocent person being convicted and executed coming close to murder, which cannot be tolerated); *see also* Ben Coate et al., *Miscarriages of Justice: Eye of the Beholder*, 7 J. INST. JUST. & INT'L STUD. 104, 104 (2007) ("One reason for the reexamination of the death penalty is the demonstrated fallibility of the criminal justice system, coupled with a reluctance to tolerate a miscarriage of justice in assessing an irreversible penalty: 'death is different.'").

[122] *See* Liebman, *supra* note 120, at 317 ("The loved ones of homicide victims and others disagree on what psychological 'closure' means, and whether executions provide it. But whatever else closure means, it surely includes knowing the final result, one way or another."); *see also* Freedman, *supra* note 5, at 1729 (discussing that the Supreme Court found the death penalty as a proportionate punishment for crimes when it serves the objectives of: retribution, deterrence, incapacitation, and rehabilitation).

[123] GEORGE W. BUSH, A CHARGE TO KEEP 147 (William Morrow & Co., Inc., 1999) ("I support the death penalty because I believe, if administered swiftly and justly, capital punishment is deterrent against violence and will save other innocent lives."); *see also* Jones v. Chappell, 31 F. Supp. 3d 1050, 1063 (C.D. CAL. 2014) (holding that California's execution of a death sentence was deprived of any deterrent or retributive effect due to its extraordinary delays preceding executions).

[124] *See The Federal Death Penalty*, *supra* note 109, at 16:34 (discussing the need to maintain federal death penalty today for nation-wide uniformity of punishment for crimes that have large scale violence and have a significant impact on the country as a whole); *see also supra* Part IV.A.

[125] *See* Usman, *supra* note 117, at 101–02 (noting that delay of execution to those sentenced to death penalty has systematically resentenced them to life with the possibility of death, lacking deterrence power); *see also* Stephens, *supra* note 120 (comparing the cost of maintaining an average federal prisoner, $37,500 per year, to the cost of maintaining a death row prisoner, $60,000 per year).

[126] *See* S. 2299, 118th Cong. (2023) (introducing a bill to prohibit the imposition of the death penalty for any violation of Federal law, and for other purposes, and resentencing all sentenced to death); *see also* James Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L. J. 315, 317–18 (2002) ("Assuming that the job of the death penalty is to identify offenders for whom the law prescribes death as a punishment and to carry out the sanction with the swiftness and sureness needed to deter and express revulsion for those offenses . . . [t]he current system is broken.").