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#### Capital Punishment: Constitutionally Permissible

The Eighth Amendment prohibits "cruel and unusual punishments." These words restrict but do not prohibit the death penalty entirely. Capital punishment is constitutionally permissible if it is not inflicted with wanton cruelty or in a discriminatory or haphazard fashion. ] Pro

Certain methods of execution are seen as inhumane. Drowning pits, crucifixions, pressing boards, disembowelment, boiling, stoning, burning at the stake, drawing and quartering, breaking on the wheel, and beheading are socially unacceptable. Such practices are rejected because of evolving community standards of decency. Hanging was widely used, but an improperly fashioned noose could slowly suffocate the condemned person if the "drop" was too short. But if the drop was too long, the head could be torn from the body. Electric chairs sometimes malfunctioned with gruesome results. Witnesses reported the smell of burning flesh and smoke rising from the head. Recent debates concern lethal injection using the currently favored three-drug protocol.



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Pro

The Fifth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law." The Fourteenth Amendment provides the same protection against state-level deprivations. The authors of these provisions accepted the constitutional legitimacy of capital sentences. Persons can be deprived of their lives as long as they receive due process of law. In short, the death penalty itself is constitutionally permissible. Legal controversy surrounds how it is applied. Death sentences have been upheld and invalidated, depending on relevant circumstances.

History of Law

In 1972, by a 5-4 vote, the Supreme Court appeared to strike down the death penalty itself in Furman v. Georgia. The divided Court, however, stressed the appearance of racial bias or arbitrariness in the application of the death penalty. Thirty-five states subsequently revised their death penalty laws, an apparent reflection of society's endorsement of capital punishment for murder. In 1976, by a 7-2 vote in Gregg v. Georgia, the Supreme Court upheld these modified death-penalty laws. Writing for the Court, Justice Stewart observed that the Eighth Amendment is interpreted with an eye towards contemporary values, drawing its meaning from "the evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles). "Excessive" punishments that inflict unnecessary pain or that are grossly disproportionate to the crime are prohibited. But capital punishment for the crime of murder is an extreme sanction for an extreme crime.

History of Justices

In dissent, Justices Brennan and Marshall reaffirmed their Furman position that the death penalty is always cruel and unusual. Eighteen years later, Justice Blackmun agreed, concluding that "the death penalty experiment has failed" and that he would no longer "tinker with the machinery of death" (Callins v. Collins). With the exception of Brennan, Marshall, and Blackmun, however, other justices have not found the death penalty to be flatly prohibited by the Eighth Amendment.

Capital punishment is constitutionally permissible, but is it "wise" or "sound" public policy? The latter is a separate question. That a practice is constitutionally authorized does not necessarily mean that it should be utilized. Such questions are left to the public and democratically elected representatives. Some common arguments in favor of capital punishment follow.

Pro

The death penalty permanently removes the worst criminals from society. A dead criminal cannot commit additional crimes, either in prison or outside after escape or release. "Lifers" endanger guards and other prisoners. What do they have left to lose? Besides, escape is a non-issue for an executed criminal.

Pro/Con

Retribution is sometimes cited as justification. The criminal suffers in direct proportion to the offense an eye for an eye, a life for a life. Abolitionists maintain that it is absurd to teach respect for life by destroying it. John Stuart Mill, an influential 19th century liberal, disagreed. He said that the criminal justice system inflicts suffering on criminals so they will not inflict suffering on the innocent. Fining a criminal does not show disrespect for property. Imprisoning a criminal does not show disrespect for personal freedom. It follows that executing a murderer does not show disrespect for human life. On the contrary, it underscores our regard for human life by enforcing a rule that he who takes a life shall forfeit his own. The difference between murder and execution, between kidnapping and imprisonment, and between robbery and fines, is that the first is unlawful and undeserved and the second is a deserved punishment for an unlawful act.