# The Road Less Traveled: Abolishing the Death Penalty on Substantive Due Process, Fundamental Right to Life Grounds

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## INTRODUCTION

Kevin M. Barry's *The Death Penalty and the Fundamental Right to Life*[1] lays out an often overlooked argument against the death penalty. Barry posits that the death penalty is unconstitutional, not on Eighth Amendment cruel and unusual punishment grounds, but on a theory of violating the fundamental right to life from substantive due process. As Barry is quick to point out, this lesser-known argument received additional support from the rationale provided in the *Obergefell v. Hodges* decision.[2]

The essence of using substantive due process to combat the death penalty is that (1) the Constitution explicitly guarantees the fundamental

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1. Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545 (2019).

2. *Id.* at 1548–49.

right to life to prisoners,[3] (2) there is no compelling state interest that rises to the strict scrutiny standard to justify executing these prisoners,[4] and (3) the death penalty is not narrowly tailored to serve a compelling state interest.[5] Barry lays out this argument effectively, explains its superiority to the more common abolitionist method of using the Cruel and Unusual Punishment Clause, and addresses potential arguments that are likely to be used against it. These include the argument that recognizing death row inmates' right to life will undermine the right to an abortion.

This Essay primarily focuses not on critiquing the underlying argument, but on the manner in which Barry presents it. He does not play to the strength of the argument, which is its ability to avoid getting bogged down in nuanced discussions only tenuously related to the death penalty. Despite this significant advantage, Barry does just that; he discusses issues such as polling results, race, international law, and religious teachings, which are largely irrelevant to the substantive due process argument for abolishing the death penalty.

## I. HISTORY AND TRADITION

Barry gives too much credence to the opposition's argument that history and tradition preclude the abolition of the death penalty on substantive due process grounds. This is a strategic blunder that works to undermine Barry's position. The superior strategy would be to emphasize how history and tradition do not outweigh constitutional protections. This would effectively remove the argument from consideration without having to engage in a lengthy debate about it. The *Obergefell* case—which is used to great effect elsewhere in the article[6]—could have been implemented here. The case illustrates how just because a specific constitutional interpretation was not recognized in the past, that does not mean it is per se unconstitutional in perpetuity. This *Obergefell* analogy would be bolstered by the fact that the novel constitutional theory proposed by Barry is more grounded in the Constitution than the theory that was implemented in *Obergefell*.

Instead, Barry attempts to counter the history and tradition argument with a detailed retort involving momentum and trajectory. For example, he accurately points out that the history of the death penalty in the United States is "one of successive restriction."[7] This line of reasoning would be

3. *Id.* at 1563.
4. *Id.* at 1564.
5. *Id.* at 1564–65.
6. *Id.* at 1548–49 ("[I]f the Fourteenth Amendment reaches the most intimate associations of our lives [as in *Obergefell*], it ought to reach our lives as well.").
7. *Id.* at 1566.

relevant to an attack on the death penalty under Eighth Amendment cruel and unusual punishment grounds but is not necessary under Barry's substantive due process theory. This is one of the significant benefits of Barry's argument. Namely, it is based on more objective grounds and therefore does not necessitate the subjective task of measuring the trajectory of societal trends and opinions over time. The argument's strength comes from its simplicity: Prisoners clearly have a constitutionally protected fundamental right to life, and there is no compelling state interest to overcome strict scrutiny analysis to hold otherwise. This claim largely circumvents subjective discussions of history and public opinion; it is true regardless of how different people view history and tradition.

Continuing in his largely unnecessary attempt to address the history and tradition argument for the death penalty, Barry turns to an even more trivial aspect. He discusses how the modern death penalty is mostly practiced in the South, which has more of a history of racism than other regions.[8] While true, it is unclear exactly what purpose this guilt-by-association argument serves in promoting his substantive due process theory. The irrelevance can be illustrated by considering an inverse hypothetical. If the death penalty was *least* practiced in the South, this fact would in no way weaken Barry's argument; it is irrelevant either way.[9]

## II. DIGNITY

Barry draws a parallel between the Court's rationale that human dignity was central in the analysis conducted in *Obergefell* to a lack of dignity present in the death penalty.[10] Drawing parallels between denying same-sex couples the right to marry and executing people convicted of capital offenses is somewhat tenuous, but Barry is correct that human dignity is at issue in both. His attempt to support the claim that the death

8. *Id.* at 1566–67.

9. Michael Conklin, *Painting a Deceptive Portrait: A Critical Review of Deadly Justice*, 22 NEW CRIM. L. REV. 223, 228–30 (2019). To illustrate how these nuanced discussions of race can derail the abolitionist agenda, this referenced selection presents strong counterarguments to Barry's claim regarding the death penalty and racism. This includes race-of-victim statistics, jury pool demographics, and that "[i]t would be a very peculiar racist system against blacks that resulted in whites being more likely to receive the death penalty, more likely to be executed after receiving the death penalty, executed at a faster rate, and to have these results more prominent in the South." *Id.* at 230. No doubt Barry could present counterarguments to these counterarguments, but doing so would pull him further away from the winning argument of substantive due process.

10. Barry, *supra* note 1, at 1583.

penalty per se "violates the dignity of condemned prisoners,"[11] however, is lacking. Barry provides four sources to support his claim: foreign law, moral philosophy, religious teaching, and federal and state judicial precedent.

### *A. Foreign Law*

It is true that political leaders in many other countries have passed legislation banning the death penalty (often over the objection of a majority of their citizens).[12] But this does no more to support the claim that the death penalty is undignified than new international legislation reinstating the death penalty would do to rebut the claim.

### *B. Moral Philosophy*

Here, Barry simply selects a few of the many strands of moral philosophy that agree with his position on the dignity of the death penalty, while ignoring the ones that disagree.[13]

### *C. Religious Teaching*

Using the Christian Bible to argue against capital punishment is highly peculiar since the practice is explicitly condoned in the Bible.[14] Barry attempts to turn the Bible into an anti-death penalty text by pointing out that it teaches that humans are created in the image of God[15] and, therefore, they must be treated with dignity.[16] But this is circular reasoning:

The Bible is against the undignified treatment of others.

The death penalty treats others in an undignified manner.

Therefore, the Bible teaches that the death penalty is undignified.

This simply assumes what is trying to be proved: that the death penalty is undignified. It is additionally problematic that Barry never establishes any foundation for why the Bible is authoritative for mandating what is and is not dignified under United States law.

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11. *Id.*

12. AUSTIN SARAT, THE DEATH PENALTY ON THE BALLOT: AMERICAN DEMOCRACY AND THE FATE OF CAPITAL PUNISHMENT xi (2019) (quoting *An Evolving Debate: Do Voters Want to Be Asked What They Think about the Death Penalty?*, ECONOMIST (Feb. 8, 2013), https://www.economist.com/lexingtons-notebook/2013/02/08/an-evolving-debate).

13. Barry, *supra* note 1, at 1584–86.

14. "Whoever sheds the blood of man, by man shall his blood be shed . . . ." *Genesis* 9:6. Furthermore, the law of Moses enumerated multiple capital offenses. *Exodus* 21, 22, 35; *Leviticus* 20, 24; *Deuteronomy* 21–24.

15. Barry, *supra* note 1, at 1586.

16. *Id.*

### *D. Judicial Precedent*

This is clearly the strongest of the four arguments. Some current and former Supreme Court Justices have concluded that "the death penalty per se is incompatible with human dignity under the Eighth amendment."[17] Three state courts have also reached the same conclusion.[18] It is unclear why Barry did not spend more time focusing on this superior argument. The lengthy discussions of moral philosophy, religious teachings, and international law could have been relegated to a cautionary warning on why abolitionists should avoid using them.

The glaring gap in this dignity section is the absence of any counterarguments. One example is the argument that abolishing the death penalty would actually be more undignified than allowing it because abolition denies the worth and dignity of capital offense victims. Advocates for this position could point to Timothy McVeigh to present a powerful illustration: The mindset that McVeigh should be alive and well today while the 168 people, including 19 children, that he murdered remain dead is more undignified than the mindset that he should have been executed.

## III. ARBITRARINESS

Barry presents the common argument that the death penalty is arbitrary, meaning that it is not consistently applied.[19] While the death penalty is certainly arbitrary to an extent,[20] this is far less important than the issue of whether those who do receive it are unfairly punished. The death penalty is either a just punishment for those who receive it or it is not. If the death penalty is a just punishment, then the arbitrariness argument turns into an argument for the increased application of the death penalty.[21] Conversely, if the death penalty is not a just punishment, then pointing out the injustice is a far more effective argument than discussing its arbitrariness.[22] Therefore, for the abolitionist, the arbitrariness

17. *Id.* at 1588.

18. *Id.* at 1589.

19. *Id.* at 1590–91.

20. It is arbitrary in the sense that it is not uniformly applied to all murderers. The punishment is contingent upon whether the crime was committed in a state with the death penalty. Other variables that affect the probabilities of receiving the death penalty include such factors as getting caught, the existence of incriminating evidence, prosecutorial discretion, and quality of representation at trial. But it is not arbitrary in the absolute sense in that it is not doled out at random.

21. Put another way, if the death penalty is a just punishment for the crimes of those who receive it, then the sparsity of its application is no argument for its abolishment, because it is better that some be brought to justice than none.

22. If the death penalty is an unjust punishment, then arguing against it on arbitrariness grounds

argument is at best insignificant and at worst counterproductive.

Furthermore, arbitrariness is an inherent element in the criminal justice system. Two people who commit the same crime under the same circumstances frequently receive vastly different punishments based on variables that include the makeup of the jury, the quality of representation, the jurisdiction where the crime occurred, officer errors in gathering evidence, and strategic decisions such as the defendant taking the stand or accepting a plea. Studies even show that factors as trivial as the weather,[23] how hungry the judge is,[24] and local sports teams' performance[25] affect trial outcomes.

## IV. CONFLATING EXONERATIONS, WRONGFUL CONVICTIONS, AND INNOCENCE

Barry makes the mistake of conflating exonerations, wrongful convictions, and innocence.[26] He starts out by correctly identifying that 165 people have been exonerated from death row since 1973.[27] But he then concludes from this fact that therefore "innocent Americans have been and will continue to be executed . . . ."[28] Barry makes no attempt to provide an example of an innocent person executed, which is likely a wise decision given the results from others' attempts to do so.[29]

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would be like someone arguing against the Holocaust, not because of the unjust nature of the punishment, but because some Jewish people received the punishment while others did not.

23. Anthony Heyes & Soodeh Saberian, *Temperature and Decisions: Evidence from 207,000 Court Cases*, 11 AM. ECON. J. 238, 240 (2019) (finding that a 10°F increase in outdoor temperature reduced favorable outcomes by 6.55%, despite the judgments being made indoors).

24. Kurt Kleiner, *Lunchtime Leniency: Judges' Rulings Are Harsher When They are Hungrier*, SCI. AM. (Sept. 1, 2011), https://www.scientificamerican.com/article/lunchtime-leniency/ [https://perma.cc/N7UP-TCRQ] (finding that judges are significantly more likely to grant a parole request when they are not hungry).

25. Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J. 171, 200 (2018) (finding that an unexpected loss from a prominent team in the state increased length of sentences handed down the following week).

26. While mostly limited to popular-level media accounts by non-lawyers, even Supreme Court justices have made the mistake of conflating wrongful convictions with innocence. In *Kansas v. Marsh*, Justice David Souter correctly identified 110 death row inmates that had been released since 1973. However, he claimed that they were released "upon findings that they were innocent of the crimes charged." Kansas v. Marsh, 584 U.S. 163, 209–10 (2006) (Souter, J., dissenting). Justice Antonin Scalia pointed out that the majority of these "innocent" people were released because of technicalities such as the death of a key witness, double jeopardy, or inadmissible evidence, not because of a finding of factual evidence. *Id.* at 185–202 (Scalia, J., concurring).

27. Barry, *supra* note 1, at 1592–93.

28. *Id.* at 1593.

29. Michael Conklin, *Innocent or Inconclusive? Analyzing Abolitionists' Claims About the Death Penalty*, NEB. L. REV. BULL. (Sept. 4, 2018), https://lawreview.unl.edu/Analyzing-Abolitionists-Claims-About-the-Death-Penalty [https://perma.cc/C4VN-8M3M]. Roger Coleman,

Even if there was a definitive example of an innocent person executed in the modern era, it would not logically follow that the death penalty must therefore be abolished. Substantive due process does not require that a punishment have a flawless record of only punishing the guilty. This is fortunate because such a requirement would render nearly all criminal punishments void.[30] The error of conflating exonerations, wrongful convictions, and innocence is even more problematic because the substantive due process grounds on which Barry opposes the death penalty are not contingent upon an innocent person having been executed.

## V. POLLING

Barry engages in a questionable presentation of death penalty survey results. He uses a Gallup poll question in an attempt to demonstrate that "a slim majority of the public (55%) prefers the death penalty."[31] However, the phrasing of this Gallup poll question, "[a]re you in favor of the death penalty for a person convicted of murder?"[32] is highly prejudicial. It artificially suppresses support for the death penalty.[33] The phrasing implies that an affirmative answer demonstrates support for the death penalty for most—or even all—convicted murderers.[34] In reality, less than one in 700 convicted murderers are executed in the United States.[35] These counterarguments to claims of abolitionist support serve to further illustrate the strength of Barry's substantive due process theory, which, if properly administered, avoids the polling issue altogether.

## VI. ABORTION IMPLICATIONS

Barry anticipates the claim that his substantive due process argument would result in a fundamental right to life for the unborn.[36] While this claim would no doubt be touted by pro-life politicians and pundits and in

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Cameron Todd Willingham, and Ernest Dobbert are frequently presented as examples of innocent people executed. While perhaps wrongfully convicted, the evidence is far from clear on their innocence.

30. Here, abolitionists are right to point out that "death is different" from other punishments. While true, the death penalty is far from the only irreversible punishment. Someone who is found to be innocent after having died in prison is also unable to have his punishment reversed. Even a twenty-year-old who serves ten years and is then released upon being found innocent suffers an irreversible punishment in that he can never be given back his twenties.

31. Barry, *supra* note 1, at 1545.

32. *Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/death-penalty.aspx [https://perma.cc/MDP3-PVNU].

33. Conklin, *supra* note 9, at 224–28.

34. *Id.*

35. *Id.* ("Based on the modern average of 25 annual executions and 18,000 annual murders.").

36. *Id.* at 1599—1603.

conversations by lay-people, it is easily refuted based on a basic understanding of the applicable constitutional principles. The five pages and extensive footnotes Barry dedicates to this argument are largely unnecessary and afford it more respect than it deserves.

The argument that "[i]f the State cannot take the lives of prisoners . . . it must also protect the lives of the unborn"[37] is patently disanalogous at the most basic of levels. The fundamental right to life argument for abolishing the death penalty involves the State taking life. The abortion issue involves the State allowing people the right to choose an abortion. The comparison is further disanalogous in that there is a well-established precedent that inmates have a fundamental right to life. There is far less to suggest a precedent for right to life of a fetus.[38]

Barry of course presents these two arguments, but he then continues to address points that have very little relevance to this abortion issue. For example, continuing his effort to show that his fundamental right to life argument would not lead to banning abortions, he points out how abortions have not decreased as sharply as executions in the United States and that worldwide abortions have increased while executions have decreased.[39] Barry continues to venture beyond the dispositive first two arguments by addressing far less objective issues such as competing dignity interests of the mother and the fetus.[40] This overinclusive strategy acts to imply that the main two arguments are not strong enough on their own—which they are—to overcome the objection, thus undermining their strength.

## CONCLUSION

The strength of arguing against the death penalty on substantive due process right to life grounds is that subjective, nuanced discussions of dignity, racism, and historical trends are largely rendered irrelevant. This is a significant strength of the substantive due process argument, as anyone who has engaged in the largely futile exercise of debating these topics with a pro-death penalty advocate can attest. Another benefit of this argument is that it effectively shifts the burden away from the abolitionist and onto the pro-death penalty advocate. Those opposing the substantive due process argument have the burden of demonstrating a compelling state interest—based on strict scrutiny—for denying the fundamental right to life to death-row inmates. Contrast that with the

37. Barry, *supra* note 1, at 1599.
38. *Id.* at 1601.
39. *Id.*
40. *Id.* at 1601–02.

standard cruel and unusual punishment argument that carries with it the burden of proving that the death penalty is cruel and unusual, which is a highly subjective claim to defend.

Barry references how the substantive due process right to life argument is "the road less traveled . . . [o]n the long road toward abolition . . . ."[41] The future may prove this analogy to the Robert Frost poem even more analogous since taking the road less traveled, says Frost, "has made all the difference."[42] It remains unseen if this holds true for the abolitionist movement as well. But given the track record of the cruel and unusual punishment road and the many advantages of the substantive due process road, Barry's road less traveled is likely the best bet for arriving at the desired destination of abolition.

41. *Id.* at 1546.

42. Robert Frost, *The Road Not Taken*, POETRY FOUND., https://www.poetryfoundation.org/poems/44272/the-road-not-taken [https://perma.cc/FK4A-MDAC].