

In *Furman v. Georgia* (1972) the U.S. Supreme Court ruled that all death penalty schemes extant at that point were unconstitutional. This forced a moratorium on capital punishment in the United States.

In a concurring opinion, Thurgood Marshall—first African American justice—argued for an even stronger position: capital punishment in any shape or form violates the constitution; i.e., no amount of reform can make it constitutionally acceptable.

The following is a heavily abridged version of Marshall's opinion which we will formalize as a derivation.

Marshall's concurring opinion in *Furman v. Georgia*

It is immediately obvious ...that ... if [capital punishment] violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values.

...

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered seriatim below.

...

The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

... In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.

... In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive ...

Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes [i.e., encouraging guilty pleas and confessions]. ...

I can only conclude, as has virtually everyone else who has looked at the problem, that capital punishment cannot be defended on the basis of any eugenic purposes. ...

When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

There is but one conclusion that can be drawn from all of this—i.e., the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment. ...

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

... the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

... Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.

[You can get the whole verdict, which includes Marshall's opinion, online. Go to the relevant Wikipedia page which will give you a number of links where you can find the whole text.]

Let's see how we could present this as a derivation. This has many premises, so you may want to use subscripts (e.g., Γ_1 , Γ_2) to avoid running out of letters. All the lines must be in sequent form (we want to turn the argument into a formal derivation):

1. Take the very first sentence of Marshall's argument. That's also the first premise of his argument. It amounts to this: if capital punishment is excessive /unnecessary or abhorrent to currently existing moral values, capital

punishment is unconstitutional. Use the keys below to turn this into the first premise:

E: Capital punishment is excessive or unnecessary.

A: Capital punishment is abhorrent to currently existing moral values.

U: Capital punishment violates the Constitution.

2. Let's move to the next block of text. His point: If there are punishments less severe than capital punishment that serve the legislative purpose, then capital punishment would be excessive or unnecessary. This is the second premise. Use the key below to turn this into the second premise:

L: There are punishments less severe than capital punishment that serve the legislative purpose.

3. Marshall now lists six claims such that if any of them is true, it would show that capital punishment is the only punishment that serves the legislative purpose. They are:

*J*₁: Capital punishment is justified for purely retributive reasons.

*J*₂: Capital punishment is justified because it deters future crime.

*J*₃: Capital punishment is justified because it prevents recidivism (repeat offense).

*J*₄: Capital punishment is justified because it encourages guilty pleas and confessions.

*J*₅: Capital punishment is justified for eugenic reasons (i.e., it improves the quality of the gene pool).

*J*₆: Capital punishment is justified because it is cheaper than life imprisonment.

State, as your next premise the relationship between the claims *J*₁ through *J*₆ and *L*. Be careful to consider how the overall argument is supposed to work.

4. He now goes through each of J_1 through J_6 and says that each of them is false. These are further premises. Add them to your derivation.
5. Describe how you can get to a sequent that says that the premises support L . Write the sequent you would reach.

Don't try to write out the derivation in full as it will take too long. Rather, when you think about you will see that the derivation will be very repetitive, and just describe what needs to be repeated to reach what we want. You may appeal to points and derivations we have seen in previous exercises and the like.
6. Continue the derivation to the conclusion that the premises show that capital punishment is unconstitutional.
7. He has now established that capital punishment is unconstitutional. But he has another argument for the same conclusion. That is in the last part of his argument. That argument establishes that capital punishment is unconstitutional because it is morally unacceptable. Turn this part of the argument into a derivation. In addition to any keys from above use the following keys:

K: American citizens are informed of all facts presently available regarding capital punishment.

S: The average American citizen finds capital punishment shocking to his sense of conscience and sense of justice.

Just for your edification, here are the concluding paragraphs of Marshall's opinion:

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of

turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve a major milestone in the long road up from barbarism and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

The Supreme Court reinstated the death penalty in 1976 against Marshall's objections. The U.S. is still a regular in the top five of the annual world rankings of judicial executions. Meanwhile, the most recent count of countries that have abolished the death penalty is 144.