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**The Death Penalty: Attributability, Accountability,  
and the Capacity for Self-Correction**

by

Julia Feron

Honors Thesis

in

Leadership Studies

University of Richmond

Richmond, VA

May 3, 2021

Advisor: Dr. Marilie Coetsee

Abstract

***The Death Penalty: Attributability, Accountability,  
and the Capacity for Self-Correction***

Julia Feron

**Committee Members:** *Dr. Marilie Coetsee, Dr. Thad Williamson, Dr. Terry Price*

My thesis argues that just as the 'insanity' defense makes it appropriate for courts to excuse people from punishments, facts about people's upbringings--and the characters that those upbringings give rise to--may make it appropriate for courts to excuse people from punishments that they may otherwise have been justifiably subject to. When people are arbitrarily subject to bad upbringings that produce bad character traits, and when those character traits then lead them to commit crimes that would otherwise be punishable by death, the death penalty is not appropriate. First, I explore moral responsibility as it relates to character and actions that arise from character. Second, I argue that whether or not we can distinguish between those who are morally responsible for their character and those who are not, we *can* distinguish between them from the standpoint of political philosophy and how they should be held legally accountable for their actions. Finally, I consider the utilitarian objection that the death penalty is needed for its deterrence value. I respond with the claim that a deterrence justification for the death penalty is ineffective for individuals who lack a capacity for self-revision, which includes many individuals on death row.

***The Death Penalty: Attributability, Accountability, and the Capacity for Self-Correction***

Thesis presented

by

*Julia Feron*

This is to certify that the thesis prepared by *Julia Feron* has been approved by her committee as satisfactory completion of the thesis requirement to earn honors in leadership studies.

Approved as to style and content by:



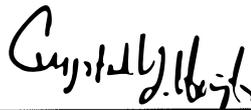
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## Introduction

This past March, Virginia became the first Southern state in the U.S to abolish the death penalty.<sup>1</sup> The legislation passed at a crucial moment in history, among conversations surrounding the Black Lives Matter movement and large scale criminal justice reform. The conversations surrounding the abolishment of the death penalty in Virginia, as well as on a national scale, illuminate a significant issue with capital punishment: arbitrariness. Those arguing in favor of abolishing the death penalty point to the disproportionate number of Black men on death row and cite studies that illuminate the arbitrariness of these numbers.<sup>2</sup> As Michelle Alexander explains in *The New Jim Crow*, “... the Baldus study... found that defendants charged with killing white victims received the death penalty eleven times more often than defendants charged with killing black victims. Georgia prosecutors... sought the death penalty in 70 percent of cases involving black defendants and white victims, but only 19 percent of cases involving white defendants and black victims”.<sup>3</sup>

My thesis will discuss a lesser known aspect of arbitrariness as it pertains to the death penalty: character. Typically, we think of character as something that is non-arbitrary, or under one’s own ‘control’. The thought is that we are responsible for developing our character and subsequently the actions that occur as a result of it. However, character is developed and deeply influenced by the life circumstances of an individual, such as instances of past abuse. In fact, as I

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<sup>1</sup> Evans, W. (2021, March 24). Virginia governor Signs LAW abolishing the death penalty, a 1st in the south. Retrieved April 08, 2021, from <https://www.npr.org/2021/03/24/971866086/virginia-governor-signs-law-abolishing-the-death-penalty-a-1st-in-the-south>.

<sup>2</sup> Ibid. “Opponents of the death penalty cite the high cost, the possibility of executing the innocent and the disproportionate racial impact. Black defendants are more likely to face death sentences, especially when victims are white.”

<sup>3</sup> Cited in Alexander (2010) p. 107: *McCleskey v. Kemp*, 481 U.S. 279, 327 (1989), Brennan, J., dissenting.

describe in more detail in Chapter 2, studies have shown that past instances of abuse significantly increase the likelihood of future criminal activity,<sup>4</sup> and a disproportionate number of inmates on death row have experienced abuse during their childhood or adolescence.<sup>5</sup> It is plausible to assume that the traumatic experiences of abuse during childhood years influenced these individuals' characters, particularly the sorts of character traits that may lead one to commit a capital offense. Moreover, this sort of influence over character is not exclusive to past instances of abuse. Other life circumstances such as educational attainment or experiencing poverty also influence the sort of character an individual develops. As I will explain, whether or not one has these kinds of life experiences is often arbitrary. Individuals do not choose whether or not they will experience physical or sexual abuse during their childhood. I will claim that due to the arbitrariness of these life experiences that influence an individual's character development, crimes committed as a result of certain character traits may require mitigated consequences. I will break down character into two elements: the cognitive and the motivational. As will be explained, either or both of these elements may be deficient based on the influence of arbitrary factors. Ultimately, I will argue that the morally arbitrary attributes that contribute to character render the death penalty a morally impermissible method of punishment.

In order to argue against the death penalty in the manner detailed above, I will reference different theories of punishment. Historically, a major argument for the death penalty has been retributivist in nature and relies on the philosophical concept of 'just deserts' or *lex tallions*.<sup>6</sup> A retributivist theory of punishment has roots in Kantian ethics: some argue that Kant's

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<sup>4</sup> Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences & the Law*, 20(1-2), 191-210. doi:10.1002/bsl.473.

<sup>5</sup> Childhood trauma prevalent among death row inmates. (2015, July 10). Retrieved March 03, 2021, from <https://deathpenaltyinfo.org/news/childhood-trauma-prevalent-among-death-row-inmates>.

<sup>6</sup> Pojman, L. P., & Reiman, J. H. (1998). *The death penalty: For and against*. Lanham, MD: Rowman and Littlefield.

interpretation of the categorical imperative supports the use of the death penalty as a form of punishment.<sup>7</sup> Retributivists are concerned with what a wrongdoer *deserves* based on the wrong inflicted rather than the consequences of that wrong. While the retributivists' focus on just deserts is important, the first chapter of my thesis will argue that people do not necessarily 'deserve' the death penalty as a punishment for certain crimes in the sense that they are - at least potentially - not morally responsible for the criminal acts committed.

One significant contribution of my thesis is showing how we can transcend the larger debate about moral responsibility and free will and instead consider political philosophy as a method of addressing the question of punishment as it pertains to capital punishment. In the second chapter, I argue for using a Rawlsian framework to rise above the debate about moral responsibility and instead focus on analyzing how characteristics that are irrelevant to a person's equal standing as a citizen influence the likelihood of an individual to commit a crime, and the consequences of that for just punishment. I will draw on Sharon Dolvich and Chad Flander's work to illuminate the pitfalls of the retributive approach and argue for a rehabilitative theory of punishment that precludes the use of the death penalty.

Finally, in Chapter 3, I will consider a utilitarian argument in favor of the death penalty, which will be found wanting. Two versions of the utilitarian argument will be presented: one that is compatible with the Rawlsian framework discussed in Chapter 2 and one that offers an entirely different approach that does not take a Rawlsian framework into account. The first, Rawlsian-based version of a utilitarian argument holds that even behind the veil of ignorance

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<sup>7</sup> "The necessity of executing murderers follows from Kant's claim that there is a categorical requirement to impose the (permissible) punishments picked out by the *ius talionis*." Yost, B. S. (2010). Kant's justification of the death penalty reconsidered. *Kantian Review*, 15(2), 1-27. doi:10.1017/s1369415400002417.

individuals would want to keep in mind certain pragmatic considerations such as safety and law and order, and considers the value of deterrence in promoting these ends. However, from behind the veil individuals would also want to ensure that their ability to develop and pursue their conceptions of the good and capacities for a sense of justice are not unduly hindered. Due to the potential for individuals to be perpetrators of crime once the veil is removed (and therefore objects of punishment) and since harsh punishments, like death, prevent someone from recovering from their punishment and continuing to pursue their conception of the good, I argue that they would not be agreed to from behind the veil.

Even if one rejects the Rawlsian framework altogether and opts for a purely utilitarian approach, it remains the case that the deterrence model of punishment is not apt to be effective at attaining its goal of discouraging criminal acts or behavior. This is because for those who do not have a capacity for self-correction, or the ability to recognize undesirable character traits and work to correct them, an impending threat of punishment will not be effective at impelling them to correct their character. In other words, they will not be deterred. Without the capacity for self-correction, one cannot be properly discouraged from undesirable behaviors or criminal activities as one is unable to conceptualize and effectively pursue the changes to character that would be required to avoid punishment. I will argue that for many individuals who end up on death row, their 'meta-' character trait of being able to correct their character may be compromised by the life circumstances they face. As a result, I claim that deterrence value will be ineffective and is an insufficient justification for the death penalty, even by purely utilitarian standards.

I will conclude my thesis by addressing the questions about justice and mercy that arise when considering certain arbitrary influences on people's characters as mitigating factors for punishments. Much of the existing literature surrounding theories of punishment refers to the consideration of difficult life circumstances, like a history of abuse - which may negatively influence character - in the course of deciding punishment as an act of mercy. However, based on the conclusions drawn from my thesis, it would seem that considering such factors - and, in particular, the character deficiencies that they result in - when doling out punishments is a matter of justice. This has important implications for future conversations about punishment, as it points towards a rehabilitative system of punishment as required by justice, rather than as a mere act of mercy on the part of the sentencer.

## Chapter One

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In order to understand how character deficiencies that impact an individual's decision to commit a crime should be understood, it is helpful to consider how mental illness functions in our current criminal justice system. So consider the following case: On February 23rd, 2010 Bruco Eastwood drove to Deer Creek Middle School in Colorado and shot two students resulting in serious injuries.<sup>8</sup> During Eastwood's trial, three psychiatrists took the stand to explain that the defendant was insane, and therefore “not guilty by reason of insanity”. The psychiatrists testified to Eastwood's history of mental illness and explained that despite having been hospitalized and diagnosed with schizophrenia, he did not continue his medication upon his release and went untreated for years.<sup>9</sup> The jury agreed with the “not guilty by reason of insanity” claim and Eastwood was committed to a mental institution.

The insanity defense is defined in §4.01 of the Modern Penal Code and states that a defendant cannot be held responsible for his crime if a mental disease means he “... did not possess a ‘substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law’”.<sup>10</sup> A defendant is ruled not responsible, and therefore not guilty by reason of insanity, if his mental ailment results in him being unable to understand right from wrong or unable to control the impulses he has that result in crimes.

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<sup>8</sup> Roberts, Michael. “Bruco Eastwood found not guilty by reason of insanity in Deer Creek Middle School shooting.” *westword.com*, 6 October 2011, <https://www.westword.com/news/bruco-eastwood-found-not-guilty-by-reason-of-insanity-in-deer-creek-middle-school-shooting-5881974>. Accessed 4 October 2020.

<sup>9</sup> Findlaw. 2020. Findlaw's Colorado Court Of Appeals Case And Opinions.. [online] Available at: <<https://caselaw.findlaw.com/co-court-of-appeals/1716323.html>> [Accessed 4 October 2020].

<sup>10</sup> Ibid.

The jury's decision in Eastwood's case seems right to us. The law recognizes a principle that we intuitively see the plausibility of, which explains why we think that the jury's acceptance of the insanity defense is permissible in Eastwood's case. Society can agree that mental illness can distort someone's ability to determine right from wrong and act in accordance with that determination. We also agree that as a result someone like Eastwood, who suffered from a serious mental illness, does not have complete responsibility for his actions. It is my belief that society's use of the insanity defense can be extended even further to reevaluate how we hold individuals legally culpable for aspects of their character. In particular, I will analyze the underlying justifications of the insanity defense and draw an analogy between the roles of mental illnesses and character in assessing legal accountability. Just as cognitive and motivational deficits caused by mental illness can excuse us from legal culpability, cognitive and motivational deficits resulting in character issues should also mitigate legal responsibility.

In this chapter, I begin by considering this issue from the angle of moral responsibility. I will explore how a character defense might mitigate moral responsibility and I will also discuss the challenges that accompany this conclusion. In the following chapter, I suggest that as a result of these difficulties we should transcend the larger debate surrounding moral responsibility and turn towards political philosophy in order to focus on a framework that does not require difficult questions about moral responsibility to be answered as definitively.

### ***I. The Insanity Defense Comparison***

Inherent in the insanity defense is the recognition that certain diminished capacities mitigate the amount of responsibility one has for their actions. There are two kinds of diminished

capacities that the penal code outlines: cognitive and motivational. The cognitive component refers to the ability of an individual to have more or less accurate judgements about what is right and “appreciate the criminality” of certain actions. For instance, schizophrenia impairs an individual's judgements about reality and what is right or wrong.<sup>11</sup> Schizophrenia also interferes with the motivational component of an individual’s moral responsibility. The motivational component is the ability to act on one’s judgements about what is right, or as it is described in the legal code “to conform conduct”. In the case of schizophrenia, schizophrenics are often unable to control their impulses. It is because an individual with schizophrenia suffers motivational and cognitive deficiencies that we think she has mitigated responsibility for her actions.

The cognitive and motivational elements that play into mental illness also play into character. For the purposes of this thesis I will treat character as the disposition to behave, think, and feel in certain ways, similar to the manner in which Aristotle discusses virtues. More specifically, to have a character trait is to be disposed to think, act and feel in particular patterns in response to particular kinds of circumstances. Much like certain mental health conditions, bad character traits operate either or both by impeding an individual’s ability to tell right from wrong and (/or) impeding her ability to control impulses.<sup>12</sup> To explain this even further, to have ‘bad’ character is, in part, to be disposed to think that there are sufficient reasons for doing things that

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<sup>11</sup> “Psychotic symptoms include altered perceptions (e.g., changes in vision, hearing, smell, touch, and taste), abnormal thinking, and odd behaviors. People with psychotic symptoms may lose a shared sense of reality and experience themselves and the world in a distorted way” Schizophrenia. Retrieved January 30, 2021, from <https://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml>.

<sup>12</sup> Mental illness and character are not exactly alike, and the line between them can sometimes become fuzzy. Some might argue that upcoming hypothetical examples are mental health issues rather than character issues. While there may very well be mental health issues at play in these situations, both issues have similar casual roles. For the purposes of this paper, I will not attempt to draw an exact connection between character and mental illness, but rather point out that character issues can play the same role as mental health issues in terms of how it affects the cognitive and motivational components of moral responsibility. Character relates to both the ability to have decent judgements about what is right and the ability to act on the judgements about what is right.

there are in fact morally overriding reasons not to do. Perhaps one thinks that there is a reason to hurt someone because of something they did, when in fact there are morally overriding reasons not to do so. Additionally or alternatively, to have ‘bad’ character may be to be disposed to not *feel* motivated to do what one has morally overriding reasons to do (even if, perhaps, one recognizes in some abstract sense that one ought to do it). On the other hand, to have ‘good’ character would be, in part, to appreciate the right reasons for doing things and to be motivated to do those things. Thus, having a ‘good’ character involves *acting* on those right reasons. For instance, Shafer-Landau (2012) describes the virtue of generosity and compares the thought processes and motivations of a generous person versus a stingy person.<sup>13</sup> Shafer-Landau points out the different motives that a stingy person has in comparison to a generous one<sup>14</sup>, which lends itself to the cognitive and motivational elements that make up character. The cognitive element is being able to determine that you should do one thing rather than another in a circumstance and appreciate the reasons for doing so. To use Shafer-Landau’s example, a generous person might see a homeless man on the street and recognize that he is in need and that she should offer assistance. Then, the motivational element of character comes into play, which refers to the motivation one has to act on the prior assessment of what is ‘right’ to do. The generous person is motivated to do the ‘right’ thing (as she is able to cognitively recognize and appreciate what the ‘right’ thing is) and offers the homeless man food, whereas a stingy person would not recognise

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<sup>13</sup>Although Shafer-Landau discusses virtues in his piece, he points out the relationship between virtues and character traits which makes his example relevant to this thesis: “A virtue is a character trait”. Shafer-Landau, R. (2012). Ethical Pluralism and Absolute Moral Rules. In *The fundamentals of ethics* (2nd ed.). New York: Oxford University Press.

<sup>14</sup>Ibid. “Consider first... generosity. A generous person will often have different *perceptions* from a stingy person... a generous person has different *thoughts* from those of an ungenerous person... a generous person’s *motives* will differ from those of a stingy person...”.

and/or be motivated by the 'right' reasons and pass by the homeless man without offering any aid.

To better see how these ideas apply to particular cases of wrong-doing, consider two examples. First, for the cognitive component of character consider the example of a parent and his decision to use corporal punishment to discipline his child. The parent was disciplined by his own parents in this way, and therefore grew up in an environment where corporal punishment was accepted as a justifiable consequence for bad behavior. In this case, the parent develops a skewed sense of right and wrong in terms of acceptable forms of punishment and this gives rise to the development of the bad character trait of cruelty. This bad trait of cruelty, issuing from childhood experiences, impairs the cognitive element of the parent's character. Since the parent is unable to make proper judgements due to his character deficiencies, we would hold him less responsible for his actions than if he was able to properly judge right from wrong. Much like the individual with schizophrenia, the parent's moral responsibility is mitigated because of the effect that his bad character traits have on his cognitive ability to rationalize the permissibility of his decisions.

On the motivational side of character, consider an individual who is unable to control certain desires that she has, even if she can understand that the desire is wrong. This would be an instance of an individual whose character lacks the motivational component of moral responsibility. A basic example could be the following: A mother is in a store with her toddler and the toddler becomes upset over a toy he wants. The mother tries to calm her child down, but the child continues to scream and cry. Eventually, because the mother is already dealing with her own hunger and her task of finding food around the store, her emotional resources for resisting

her temptation to yell are depleted and the mother lashes out and shouts at her toddler to be quiet. Rationally, the mother is aware that she should not be raising her voice at her young child who does not know any better, but in her moment of frustration, she cannot resist the urge to silence him by yelling. This illustrates a basic example of how a person may be able to recognize a desire or action as wrong, but be unable to overcome the impulse to do so. In philosophy, this “weakness of will” is referred to as *akrasia*.<sup>15</sup>

Since bad character appears to play a similar causal role in people’s psychology as mental health, and given that we allow people “off the hook” for mental health issues, it seems we should also mitigate responsibility for bad character. The above examples begin to illustrate this: intuitively the mother and father in the last examples have a degree of mitigated responsibility for their actions. However, one might be hesitant to accept that this could also be the case for very serious and heinous ‘bad’ actions, like capital crimes. In order to see why mitigated responsibility may also apply in cases of capital crimes , consider the example of Sarah.

When Sarah was a young girl, she experienced sexual and physical abuse at the hands of her father. The abuse that she experienced during her childhood led her to develop certain ‘bad’ character traits and prevented her from developing other ‘good’ character traits. In particular the abuse resulted in Sarah developing bad character traits, such as aggression and misanthropy. The abuse also hindered Sarah’s development of good character traits, like self-restraint. When she got older her misanthropic nature, aggressiveness, and lack of self-restraint resulted in her inability to overcome her impulse to shoot her boyfriend during an argument. It is obvious that Sarah did something wrong. However, cognitively she was unable to recognize the overriding

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<sup>15</sup> Stroud, S., & Svirsky, L. (2019, September 04). Weakness of Will. Retrieved January 30, 2021, from <https://plato.stanford.edu/entries/weakness-will/>.

reasons that existed not to shoot her boyfriend due to the misanthropy and aggression that led her to believe violence is the only way that she can protect herself. Motivationally, even if she was aware that in the abstract killing someone is wrong, her fear of being harmed again led her to be unable to curb the aggressive defensiveness that caused her to lash out. The character traits that she developed from her experiences with her father's abuse meant that when confronted with a situation where her boyfriend was acting aggressively towards her, her motivational capacities were severely impaired. Sarah's motivational deficiency means that she is unable to refrain from acting on her misanthropic, aggressive impulses. The impairment of Sarah's motivational component of character is similar to a schizophrenic's motivational deficiencies in that both result in the agent experiencing akrasia.

Both mental health issues and character traits act similarly in their ability to impair someone's capacities to control his/her motivations and make good judgments. Therefore, there is a prima facie parity: if you accept the insanity defense, then you should accept some sort of character defense. The insanity defense mitigates an individual's moral responsibility for an act when a mental impairment significantly impacts that individual's cognitive and motivational components. Since we allow this sort of defense for those who suffer from mental illnesses and character plays a similar casual role, then we should also allow a character defense that mitigates a person's responsibility on the basis of bad character.

## **II. Family of Intrinsic Responsibility Objections**

The following section of this paper will seek to address two objections concerning intrinsic responsibility for character that suggest individuals should not have mitigated

responsibility as a result of bad character. The first objection, the Control Objection, addresses the downstream effects of responsibility for certain actions by suggesting that people like Sarah are responsible for actions that flow from their character since they have control over the development of that character. The second objection, the Self-Revision Objection, suggests that individuals like Sarah are responsible for their character because of their capacity to self-revise their character, even if that character was initially formed by influences that they did not have control over.

***The Control Objection:***

Some will object to the argument of the previous section with the assertion that character is something individuals have control over, while mental illnesses are something individuals do not have control over. The idea that we have control over our character makes it seem like we should be responsible for its downstream effects in a way that we are not responsible for the downstream effects of mental illness. In that respect, these critics view character issues like a hypothetical case of drunk driving or general misbehavior: we are responsible for the actions that flow from our character in the same way that a drunk driver is responsible for the actions that flow from his drunkenness. Even if, once drunk, a driver is not *directly* responsible for his actions, he is indirectly responsible for them because of his decision to become drunk.<sup>16</sup> Similarly, even if Sarah would not be *directly* responsible for her actions, given the pre-existence of the character trait of aggression, she is indirectly responsible for them due to her failure to exercise self-discipline in regulating her development of the character trait of aggression in the first place.

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<sup>16</sup> In this hypothetical case of drunk driving we are assuming that addiction/ substance abuse issues are not playing a role in the situation, as that could result in a different assessment.

***The Tracing Objection:***

Consider our hypothetical drunk driver, Alex. Alex is attending a party at a friend's house where he knows he will drink alcohol. However, Alex does not make alternative transportation plans for after the party. With this knowledge, Alex's evening can be broken down into three parts: (1) Alex chooses to drink without planning a sober ride home, (2) due to his drunken state, Alex ends up driving home under the influence, and (3) Alex crashes into another car on the road.

To better understand the way in which Alex is responsible for the car crash, we can refer to Zheng's (2016) and Fischer and Ravizza's (1998) discussion of "tracing cases". Tracing cases refer to scenarios where "... an agent is indirectly responsible for some action because it can be traced back to other actions for which she is directly responsible".<sup>17</sup> The drunk driving example seems to be a tracing case in the sense that part (3), Alex not having control over his actions and crashing into another car, can be traced back to part (1), Alex's free (controlled) decision to get drunk without securing a sober ride home.

Now, let's compare Alex's case of drunk driving to our previous example of Sarah in order to determine whether or not Sarah can be held responsible for killing her boyfriend in the same way Alex can be held responsible for the car crash. In order to do so we can break down Sarah's example into three parts: (1) Sarah fails to exercise self-discipline in regulating her aggression, (2) Sarah fights with her boyfriend under the influence of her aggression, and (3) Sarah kills her boyfriend. Someone advancing the Tracing Objection might argue that Sarah's 'choice' to become aggressive parallels Alex's choice to get drunk without planning alternative

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<sup>17</sup> Zheng, Robin. (2016). *Attributability, Accountability, and Implicit Bias*. 10.1093/acprof:oso/9780198766179.003.0004.

transportation and that Sarah killing her boyfriend acts as Alex's car crash. Part (3), Sarah killing her boyfriend, can be traced back to part (1), Sarah's choice to indulge in her aggressive character. As a result, it may be argued that Sarah is responsible for her actions in the way that Alex is.'

The Tracing Objection assumes that someone's character is 'up to them' in the way that Alex's choice to get drunk without securing a ride home is 'up to him'. However, this is not always the case. For instance, in Sarah's case from earlier her character may not have been 'up to her'. Unlike Alex's choice to get drunk without planning a ride, the abuse Sarah suffered during her formative years was not within her control, and that abuse directly led to her development of bad character traits. Therefore, Sarah is *not* responsible for the character she developed in the way that the drunk driver *is* responsible for his decision to enter a state of drunkenness without having alternative plans. Moreover, the drunk driver, whether through school teachings or commercials that warn against the dangers of drunk driving, was aware that driving under the influence is the wrong thing to do. Even with this knowledge, the drunk driver still made the decision to drink alcohol without planning a sober ride. In Sarah's case, however, her father never taught her to "think before indulging in anger". Thus, just as Sarah's actions are reflective of her character, Sarah's character is also a reflection of something outside of herself.

***The Self-Revision Objection:***

Someone might object that if Sarah is not responsible, then none of us are. I have claimed that Sarah's cognitive and motivational deficiencies which result in her bad character should serve as mitigating factors in terms of her responsibility for her actions. But cognitive and motivational deficiencies that influence character can apply to all of us, which would mean that

we are also entitled to a sort of mitigated responsibility. Philosophical incompatibilists often express this kind of argument as an argument about determinism. According to determinists, all events in our lives, including the choices that we make, are completely determined by prior events. Philosophical incompatibilists hold that insofar as determinism is true - and so insofar as all of our characters (including in particular our cognitive and motivational deficiencies) are determined by forces outside of our own control - we cannot be held morally responsible for our characters or the actions that occur as a result of them.

*Compatibilists* seek to remedy the tension between determinism and moral responsibility. They argue that determinism is compatible with responsibility because and insofar as your actions are the result of causes that reside in you.<sup>18</sup> Gary Watson, for instance, argues that if an action is caused by your own values or reflected in your valuational system, you are responsible for said action.<sup>19</sup> To illustrate, contrast an individual under the influence of hypnotism with an individual who is not. When under the influence of hypnosis, one's actions and choices are dictated by a force that is not connected to one's own basic values. As a result, a compatibilist like Gary Watson would excuse that individual from moral responsibility over actions that occurred under the state of hypnosis. However, ordinary individuals who are not acting under the influence of hypnosis and instead act upon the values that reside within themselves *are* responsible. Since their actions are caused by their own valuational system, compatibilists like Watson consider them responsible for those actions. In terms of the case of the drunk driver, Watson's compatibilist argument would say he is responsible for getting himself into the mental state of drunkenness because he (1) had a desire to have a fun evening unencumbered by having

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<sup>18</sup> McKenna, Michael and D. Justin Coates, "Compatibilism", The Stanford Encyclopedia of Philosophy (Winter 2020 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/win2020/entries/compatibilism/>>.

<sup>19</sup> Watson, Gary (1975). "Free Agency", Journal of Philosophy LXXII.

to make plans and (2) this desire reflects the drunk driver's larger values of a care free lifestyle. The drunk driver made the choice to consume alcohol and subsequently drive a car which reflected his desires and valuational system. Therefore, he can be held morally responsible for the consequences of his drunk driving.

On the surface, Watson's argument seems to vindicate what we generally think about responsibility. However, this argument also seems to imply that Sarah is responsible. It looks as though Sarah's actions are caused by something that in some sense 'resides in her', her values, which in this case are values of aggression. So, if I want to differentiate Sarah from the rest of us, I still need to explain what that difference consists in.

What exactly differentiates Sarah from the rest of us? Charles Taylor gives us another way that we can understand the compatibilist thesis in order to help answer this question: Many of us have the capacity to self-revise our values, and in turn our character, whereas Sarah does not.<sup>20</sup> Self-revision is the ability for an individual to reflect on the values and character traits they possess in order to determine whether or not those character traits are ones that are reflective of their deeper values.<sup>21</sup> Pursuant to this view, what differentiates someone like Sarah from someone like Alex is that Alex has the capacity to self-revise his carefree lifestyle, whereas Sarah does not have the capacity to self-revise her aggressive character trait.

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<sup>20</sup> Taylor, Charles (1976). "Responsibility for Self," in A E, Rorty, ed *The Identities of Persons*. Berkeley: University of California Press.

<sup>21</sup> "In one way or another, all these philosophers seem to be saying that the key to responsibility lies in the fact that responsible agents are those for whom it is not just the case that their actions are within the control of their wills, but also the case that their wills are within the control of their selves in some deeper sense...we may speak of their separate positions as variations of one basic view about responsibility: the deep-self view." Wolf, S. (1988). *Sanity and the metaphysics of responsibility. Responsibility, Character, and the Emotions*. doi:10.1017/cbo9780511625411.003

While Taylor provides us with a good starting point for distinguishing Sarah and Alex, Susan Wolf takes her argument a step beyond Taylor's and argues that while self-revision is necessary for responsibility, it is not sufficient. In order to be responsible for your actions you need to be able to revise your character (to align with your deeper values), but also, more specifically, you must revise your character to reflect the 'right' values so as to *correct* your character.<sup>22</sup> This means you need access to the objectively right reasons: Alex not only needs to be able to self-revise his carefree lifestyle but he must also be able to self-revise his care-free lifestyle in the *correct* direction.

Wolf uses the example of JoJo, the son of an evil dictator, to illustrate the importance of self-correction over mere self-revisability<sup>23</sup>: JoJo is raised and educated by his sadistic father and develops similar values as him. Therefore, when JoJo is an adult he models many of the same evil behaviors that his father did. He commits evil acts as a result of his own desires, which he wants to have. Therefore, it would seem that JoJo is responsible for his actions as they are reflective of his deeper values. Wolf points out the flaw in this interpretation by drawing attention to JoJo's upbringing and the idea that even if JoJo did try to self-revise, he did not have access to the *objectively right* reasons necessary to *self-correct*. So, Wolf introduces the *sane* deep self view, arguing that sanity is the ability to "normatively recognize and appreciate the world for what it is".<sup>24</sup> It is this ability to self-correct in a direction that allows us to see the world for what it actually is that lends us responsibility over our actions, as seeing the world for what it is allows one the possibility to self-revise one's values to the 'correct' ones, also known as self-correction.

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

I will talk about self-correcting as the ability to revise one's character based on an understanding of the moral reasons that exist to act in one way as opposed to another. This results in the development of some character traits over others. In order to have a capacity for self-correction, one must have certain 'meta' cognitive and motivational capacities. In the case of self-correction, the 'meta' cognitive element refers to the understanding of something as the correct moral standard, the recognition of yourself as not reaching that moral standard, and the appreciation of the reasons one should reach it. The 'meta' motivational component of self correction concerns the ability to take those reasons as the motivation to change and speaks to one's ability to direct their emotional energy to close the gap that exists between themselves and the moral standard by working against old conditioned habits.

To see how self-correction functions, contrast Sarah with Sam. Suppose that Sarah and Sam both develop aggressive tendencies as young children, but as they grow Sam's parents provide him with a nurturing atmosphere, send him to counseling, and try to teach him the value of self-discipline. At eighteen, Sam has developed the capacity to self-reflect on his values and revise them in the direction of self-discipline. As a result, whether he chooses to make that change or not, he becomes responsible for later actions because he had the opportunity to make that change. If he kills someone out of aggression, he is responsible due to his capacity to revise and correct his aggressive tendencies.

Sarah is not like Sam, even though initially it might look like Sarah does have the capacity for self-correction. Perhaps she watches what aggression causes her father to do. Then, one might argue, she should be able to recognize that indulging in anger leads to bad things which should encourage her to revise her own aggressive behaviour. However, in Sarah's case

she was not presented with the possibility of incorporating self-correction into her valuational system. Sarah may not have the cognitive element of self-correction (i.e recognizing what self-correction is, how to self-correct, when to self reflect, etc.). Even more specifically, Sarah may not be able to self-correct because she does not have access or the opportunity to recognize the value of self-discipline, and therefore does not have the capacity to self-correct in the direction of self-discipline. Additionally, even if Sarah was able to understand the value of self-discipline in an abstract sense (perhaps she sees students with self-discipline being rewarded at school), she may not be able to see the value of it for *herself*. Even if she sees benefits in some cases (like at school), she is not aware of how she can obtain those benefits within the context of her own life circumstances. Maybe self-discipline seems unattainable or too difficult to acquire which results in a lack of motivational capacity to act on a need for self-correction.

### III. *Family of 'Meta' Objections*

It is clear that if Sarah is not morally responsible, then she should not be held accountable in the same way as someone who was given or has access to the tools for self-revision. However, someone might still object that there is not a significant difference between Sarah and others because incompatibilism is still true generally. In this section, I will argue that for someone who thought this, there is another way to reach an understanding of accountability that mitigates Sarah's responsibility.

Responsibility lies with the capacity to correct one's character, which Sarah does not have, but perhaps I do. That would mean that I am to be held responsible for my actions. But consider the possibility that even if I have the capacity to revise, it is predetermined whether or

not I will use that capacity. If I do not use that capacity and subsequently act poorly, that action is predetermined. Then it would seem that I should not be held responsible for my action, since a predetermined action is outside of my own control. So, it still remains that case that maybe none of us should be held responsible for our actions.

For many this conclusion is troublesome, as accepting the notion that character is out of an individual's control allows people to "get off the hook" for almost anything. If it is true that people should not be held morally responsible for elements outside of their control and character traits, and how they act on them, fall under that category, then anyone with a character issue may be exempt from moral responsibility. Since many people suffer from some sort of character issue, then perhaps no one can be held morally responsible for anything: there may still be no way to distinguish between Sarah's responsibility for her actions and the responsibility that the rest of us have for our actions.

How can we respond to this sort of hard-line incompatibilist position? One way to respond to this worry about consequences is to simply "bite the bullet" and accept that people are never morally responsible for bad behavior. But 'biting the bullet' in this way comes at significant costs, at least apparently, because it conflicts with the intuition that people like Sam should be subject to consequences for their bad character and wrongful actions, and in particular that Sam may seem appropriately subject to different penalties than Sarah. How do we justify doling out consequences for undesirable or harmful actions if no one can be held responsible for those actions? Moreover, can that justification explain why Sarah should be subject to different consequences than Sam?

In order to properly understand how even a hardline incompatibilist might distinguish between Sarah and Sam, let's consider the distinction between moral *blameworthiness* and moral *accountability*.<sup>25</sup> There is some plausibility in saying that someone is not morally *blameworthy* due to factors outside of their control. Recognizing this lack of blameworthiness in certain cases allows us to hold onto another thing that many people find important when deciding issues of moral responsibility, that is, holding people accountable for their actions. An individual can be held accountable for an action, or responsible for rectifying the effects of it, without being blameworthy for said action. As Zheng (2012) explains, although we do not hold a driver morally blameworthy for a car crash that occurs as a result of black ice, we still hold them accountable for the accident in that they must remedy the wrongs that occurred as a result of the accident.<sup>26</sup> It is important that someone be held responsible for the consequences of the accident (financial, medical, etc.) even if we do not hold them morally blameworthy for the accident. More broadly, accountability is important for utilitarian reasons, as it can teach lessons, act as a deterrent, or provide closure for those affected negatively. Practically speaking, accountability is important since it allows society to remedy wrongdoings without making a judgement of moral blameworthiness.

Accountability is important in the manner outlined above regardless of whether or not one agrees with the compatibilist or incompatibilist argument. Accountability offers an avenue for individuals to be held legally accountable for certain actions without holding them morally responsible for character deficiencies outside of their own control. Even if you agree with the

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<sup>25</sup> Zheng, Robin. (2016). *Attributability, Accountability, and Implicit Bias*.  
10.1093/acprof:oso/9780198766179.003.0004.

<sup>26</sup> *Ibid.*

incompatibilist line of reasoning, you can still recognize the role that accountability plays in determining consequences.

Ultimately, accountability is the primary interest of this thesis: I will claim that, regardless of whether we take a compatibilist or incompatibilist position about moral *blameworthiness*, there are certain ways in which it is not appropriate for someone like Sarah to be held *accountable* for the actions that flow from her bad character. Once we focus on accountability rather than moral blameworthiness, the role of the state in assigning consequences for actions becomes especially salient. Unfortunately, the legal code itself does not currently make a strong distinction between moral culpability and legal accountability.

It is clear that the connection between character and moral responsibility brings many valid questions regarding free will and agency to the surface. In order to transcend these broader questions of how character relates to moral responsibility and how much of it is legitimately under our own control, this paper will focus on political philosophy. I am ultimately interested in what the state should do about this problem, that is to say to what degree can the government and legal system hold us accountable for actions that occur as a result of impaired cognitive or motivational deficiencies that influence character. In order to answer this question, the next section of this chapter will look to John Rawls and his social contract theory.

## **Chapter 2**

In the last chapter, we discussed two routes to accountability: one in response to compatibilist arguments, such as Gary Watson's, and the other in response to incompatibilists. In this chapter, I discuss a political philosophy framework for accountability that draws on the theory of John Rawls.<sup>27</sup> From behind Rawls' veil of ignorance we would decide how the government can hold us responsible for crimes we commit. In order for each person to be able to *effectively* pursue her own conception of the good, there must be a degree of safety and order in society. Thus, it is plausible to assume that individuals would consent to some sort of criminal justice system that doles out consequences for those who do not follow rules.<sup>28</sup> In this section, I'll explore what kind of consequences we would agree to from behind the veil of ignorance. After I discuss the Rawlsian framework, I will draw on Sharon Dolovich and Chad Flanders's arguments concerning the moral arbitrariness of temptations for criminal behavior to argue that the death penalty would not be agreed to from behind the veil of ignorance. I will detail various respects in which the proclivity to commit capital crimes is morally arbitrary. Then, I will address a utilitarian objection to the Rawlsian framework as it pertains to the death penalty. Lastly, I will respond to this utilitarian objection in two parts in order to argue in favor of mitigating consequences for individuals with character deficiencies.

### **I. Rawlsian Framework**

Rawls' theory of political philosophy begins by placing members of society behind a hypothetical veil of ignorance. From the "original position" behind the veil, individuals are

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<sup>27</sup> Rawls, J. (1971). *A theory of justice*. Belknap Press/Harvard University Press.

<sup>28</sup> *Ibid.*

unaware of their religious and philosophical worldviews, or conceptions of the good,<sup>29</sup> as well as their positions in society--e.g. their socioeconomic status, gender, race or ethnicity. It is also true that from behind the veil we would not be aware of our philosophical views, particularly whether we have incompatibilist or compatibilist views. From the perspective of a Rawlsian, it would be wrong to make a theory of punishment dependent on a particular view of compatibilism or incompatibilism. Since we are not aware of the position we take on that matter from behind the veil, we would not want punishment to be predicated on a particular interpretation of it.

The reasons Rawls thinks that individuals from behind the veil of ignorance should not know information like this is because he considers those elements of a person's identity to be morally arbitrary attributes, or aspects of an individual that are irrelevant to his or her status as a free and equal citizen.<sup>30</sup> In our capacity as citizens, you and I have equal moral standing, regardless of factors like our socio-economic status, our religion, or our philosophical viewpoints. According to Rawls, hiding these morally arbitrary attributes allows people to make unbiased decisions about what rules they are willing to accept for society. Behind the veil of ignorance, individuals can consent to rules about what the government can and cannot enforce without irrelevant personal biases influencing their decisions. Because the veil of ignorance removes irrelevant personal biases from the decision-making process, Rawls believes that the veil of ignorance represents a fair procedure for deciding what rules we should impose on society.

Behind the veil of ignorance, individuals want to ensure that they will have a basis for developing and maintaining a sense of self-respect, regardless of their place within society once

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<sup>29</sup> Freeman, S. (2019, April 03). Original position. Retrieved February 16, 2021, from <https://plato.stanford.edu/entries/original-position/>.

<sup>30</sup> Ibid.

the veil is removed.<sup>31</sup> Rawls argues that in order to have a basis for self respect, an individual must be able to develop and pursue one's own conception of the good, as well as develop a capacity for a sense of justice, or a capacity to understand and be motivated by fair rules (whatever those turn out to be).<sup>32</sup> He also mentions how certain social and economic foundations are necessary in order for individuals to be able to pursue their conceptions of the good or develop a capacity for a sense of justice. For example, we cannot pursue our conception of the good without a livable wage or if we are not free to practice our religion publicly. As a result, we need a government to ensure economic foundations for self-respect, such as a livable wage, and social foundations for self-respect, such as religious protections.

## II. *Applying Rawls to Punishment*

Although Rawls himself does not discuss how his theory of justice might apply to our criminal justice system, Sharon Dolovich and Chad Flanders both apply Rawls's framework to questions about punishment and the criminal justice system. Dolovich argues that whether or not someone commits a crime is information that would remain unknown from behind the veil.<sup>33</sup> While she does not claim that committing a crime itself is a morally arbitrary attribute, she does conclude that various attributes which can be seen as morally arbitrary may influence a person to commit a crime by placing "strong pressures" or "temptations to offend" on that person.<sup>34</sup> Dolovich specifically uses the example of past instances of abuse in order to show how that

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Dolovich, S. (2004). Legitimate punishment in liberal democracy. *Buffalo Criminal Law Review*, 7(2), 307-442. doi:10.1525/nclr.2004.7.2.307.

<sup>34</sup> Ibid.

‘attribute’ leads to frustration and aggression that may later result in violence against others.<sup>35</sup>

Although Dolovich does not go into the specific details of maltreatment and its effects on crime, it is well documented in literature that experiencing abuse during the formative years of development increases the likelihood of committing a crime later in life.<sup>36</sup> Moreover, whether or not your father abused you as a child is a morally arbitrary attribute, since it is irrelevant to your status as a free and equal citizen in society. Thus, it is also clear how an attribute that is arbitrary from the perspective of our standing as equal citizens, such as child abuse, influences your likelihood of committing a crime. Since morally arbitrary attributes like abuse influence whether or not you will commit a crime, Dolovich asserts that individuals from behind the veil of ignorance we would recognize the possibility that we may be arbitrarily subject to pressures or temptations that lead them to commit crimes. We would therefore take precautions to ensure that the justice system allowed citizens who were subject to such temptations--and who, plausibly, at least sometimes gave in to them--to have a social and economic basis for self-respect. In particular, you would want to ensure that the justice system allows such citizens to develop and pursue a conception of the good, as well as develop a capacity for a sense of justice.<sup>37</sup>

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<sup>35</sup> “... a number of such attributes and personal particulars that could lead their possessors to face strong pressures and temptations to offend, without the moral or other resources necessary always to be able to resist... for example, the experience of having been born and raised in a family in which physical and psychological abuse was commonplace, in which one learned early to express feelings of frustration, resentment, or anger through violence, and lacked instruction or role models presenting a more respectful and mature way of expressing feelings. Surely whether or not one’s childhood experience takes this form is the function of morally arbitrary contingency... one who was raised in such circumstances finding it tempting and even natural when angry or frustrated to resort to violence against others, and also finding it a much greater challenge to resist this inclination than would those with a more fortunate upbringing” (p. 179). Dolovich, S. (2004). Legitimate punishment in liberal democracy. *Buffalo Criminal Law Review*, 7(2), 307-442. doi:10.1525/nclr.2004.7.2.307.

<sup>36</sup> “We find that maltreatment approximately doubles the probability of engaging in many types of crime. Low SES children are both more likely to be mistreated and suffer more damaging effects... Sexual abuse appears to have the largest negative effects... Finally, the probability of engaging in crime increases with the experience of multiple forms of maltreatment as well as the experience of Child Protective Services (CPS) investigation”. Currie, Janet & Tekin, Erdal. (2006). Does Child Abuse Cause Crime? NBER Working Paper No. w12171, Available at SSRN: <https://ssrn.com/abstract=897025>.

<sup>37</sup> Ibid.

Since character is constituted by cognitive and motivational dispositions, Dolovich's arguments that speak in favor of the moral arbitrariness of propensities to commit are, at bottom, arguments about the moral arbitrariness of the certain kinds of development of character. If one accepts Dolovich's reasoning then it is a matter of luck whether you turn out to be Sarah--with her particular character--once the veil of ignorance is removed. Moreover, from behind the veil, you would want to ensure that *if* you ended up being Sarah, you would be able to develop and pursue a conception of the good, as well as develop a capacity for a sense of justice even despite being subject to those temptations.<sup>38</sup>

Flanders builds on Dolovich's discussion of morally arbitrary attributes. While Dolovich focuses largely on the procedure by which individuals behind the veil of ignorance would deliberate about the justice system, Flanders more carefully examines the results that would follow from using that procedure. In particular, Flanders explores Rawls distributive theory of justice in order to apply it to what he refers to as the "current crisis of criminal justice".<sup>39</sup> Flanders argues that Rawls' more conservative statements on punishment are inconsistent with his liberal ideology of distributive justice<sup>40</sup> and that applying Rawls' theory of distributive justice to those who commit crimes (rather than leaving those individuals out of distributive justice entirely) illuminates ways that we can reform our justice system.<sup>41</sup> Besides reminding us that once the veil of ignorance is lifted we could either be the victim of a crime or the object of punishment, Flanders argues that as potential objects of punishment we would want to ensure that the criminal justice system supports rehabilitation, rather than purely retribution, in order to

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

maintain the level of self respect that comes from being able to pursue a conception of the good and developing a capacity for a sense of justice.<sup>42</sup> Making sure that you have the opportunity to pursue a conception of the good is a main goal from behind the veil and a purely retributive system does not preserve the ability to pursue a conception of the good and a capacity for a sense of justice as rehabilitation does. This is due to the fact that a retributive system is not sensitive to the potential of rehabilitation and therefore may support punishments that undermine potential rehabilitation. Harsh punishments of the sort that a retributive system might recommend impact one's ability to recover from said punishment and continue pursuing their conception of the good. A Rawlsian theory of justice thus supports a rehabilitative model of punishment that takes into account the influence of morally arbitrary attributes on an individual when assigning consequences for a crime.

Though theoretically plausible, Dolovich and Flanders' arguments are, as they stand, not sufficiently empirically supported and do not speak specifically to the moral arbitrariness of the attributes that contribute to individuals' committing capital felonies. Individuals who are convicted of capital crimes (crimes punishable by death) are often characterized as evil, depraved, and 'beyond-saving' so understanding how morally arbitrary factors contribute to their characters - i.e. their propensities to commit crimes - is especially important. Thus, in the next section I will detail different morally arbitrary attributes that are characteristic of death row inmates and how they may undermine those individual's characters.

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<sup>42</sup> "... we can see ourselves, from behind the veil as either potential victims of crime or potential objects of punishment... As potential objects of punishment, we should wish to avoid punishment - and the suffering attendant to it- and we should hope that we might instead be objects of reform, so that we can better follow the principles of justice." Flanders, Chad. (2016). *Criminals behind the Veil: Political Philosophy and Punishment*, 31 BYU J. Pub. L. 83.

### III. *Morally Arbitrary Attributes that Undermine Character*

Aristotle, the father of virtue ethics, discusses the development of character when explaining the importance of moral education. Virtue ethicists argue that ‘virtues’, or for our purpose character traits, are developed over time and therefore require the right environment and teachers.<sup>43</sup> Whether or not one is virtuous depends to some degree on moral luck - therefore those who are not lucky enough to grow up in an environment that encourages one to be virtuous do not have the opportunity to develop certain virtues.<sup>44</sup> Aristotle understood the influence that moral luck has on the development of virtues - specifically pertaining to the environment and role models one had access to growing up. In the following subsections, I will discuss four different circumstances of an individual's life that influence the character traits they develop and subsequently the criminal actions that might occur as a result of those traits.

#### A. *Past Instances of Abuse*

Sharon Dolovich discusses past instances of abuse as an example of a morally arbitrary attribute that influences an individual's likelihood of committing a crime.<sup>45</sup> The link between child abuse and violent and/or criminal behavior is well documented in literature<sup>46</sup> and is even clearer when one looks closely at the number of incarcerated individuals that have experienced child abuse, specifically those on death row. Currie & Tekin (2006) have shown that abuse - or

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<sup>43</sup> Shafer-Landau, R. (2012). Virtue Ethics. In *The Fundamentals of Ethics* (2nd ed.). New York: Oxford University Press.

<sup>44</sup> Ibid.

<sup>45</sup> Dolovich, S. (2004). Legitimate punishment in liberal democracy. *Buffalo Criminal Law Review*, 7(2), 307-442. doi:10.1525/nclr.2004.7.2.307

<sup>46</sup> “Extensive work in cognitive development indicates that adverse personal experiences impact the development of cognitive structures through which individuals interpret subsequent experiences (Flavell, Miller, & Miller, 2002). In accordance with this view, maltreated children may develop distinct maladaptive cognitive processes involving distorted beliefs about oneself, others, and their environment, which consolidate over time and shape how they later construe their experiences and respond in social situations (Young, Klosko, & Weishaar, 2003)”. Cuadra, L. E., Jaffe, A. E., Thomas, R., & DiLillo, D. (2014). Child maltreatment and adult criminal behavior: Does criminal thinking explain the association? *Child Abuse & Neglect*, 38(8), 1399-1408. doi:10.1016/j.chiabu.2014.02.005.

“maltreatment” as they refer to it in their writing - doubles the probability that an individual will engage in criminal activity,<sup>47</sup> and the Rochester Youth Development Study likewise found that abuse during childhood or adolescence increases the risk of criminal behavior in adolescence and young adulthood.<sup>48</sup> The American Psychological Association (APA) found that 94% of prison inmates they studied experienced physical abuse, 59% had experienced sexual abuse, and 83% witnessed violence during their adolescent period.<sup>49</sup> More generally, studies like Claussen and Crittenden (1991) and Deblinger et al. (1986) have shown that maltreatment may predispose children to “risky”, “self-destructive”, or “aggressive” behaviors.<sup>50</sup>

While the studies mentioned above are concerned with general criminality, there are also studies that focus on violent crimes worthy of capital offenses. Cunningham and Vigen (2002) state in their piece on death row characteristics that “the presence of pathological family interactions in the histories of capital murderers is consistent with an extensive body of research demonstrating the role of disrupted attachment and disturbed family relationships in the etiology of violence”.<sup>51</sup> According to the U.S Department of Health & Services in their 2018 report, 77.5% of child abuse perpetrators are the parent of the victim<sup>52</sup>, so it is plausible to assume that

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<sup>47</sup> Currie, Janet & Tekin, Erdal. (2006). Does Child Abuse Cause Crime? NBER Working Paper No. w12171, Available at SSRN: <https://ssrn.com/abstract=897025>.

<sup>48</sup> Cuadra, L. E., Jaffe, A. E., Thomas, R., & DiLillo, D. (2014). Child maltreatment and adult criminal behavior: Does criminal thinking explain the association? *Child Abuse & Neglect*, 38(8), 1399-1408. doi:10.1016/j.chiabu.2014.02.005.

<sup>49</sup> National child abuse statistics from NCA. (2021, January 25). Retrieved April 06, 2021, from <https://www.nationalchildrensalliance.org/media-room/national-statistics-on-child-abuse/>.

<sup>50</sup> “Claussen and Crittenden (1991) and Deblinger et al. (1989) document high rates of post-traumatic stress syndrome among children who have been abused, and Widom (1994) suggests that stress during critical periods may have an important impact on the development of aggressive behavior in adolescents”. (p. 5) Currie, Janet & Tekin, Erdal. (2006). Does Child Abuse Cause Crime? NBER Working Paper No. w12171, Available at SSRN: <https://ssrn.com/abstract=897025>.

<sup>51</sup> Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences & the Law*, 20(1-2), 191-210. doi:10.1002/bsl.473.

<sup>52</sup> U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau. “Child Maltreatment 2018.” Accessed April 16, 2021. <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment>.

some of the most traumatic abuse experiences occur inside the home. Childhood abuse is commonly cited as an experience of those on death row. A survey of Texas death row inmates found that 54% of respondents (22 out of 41) experienced abuse during childhood<sup>53</sup>, compared to the national rate for children receiving investigations or alternative responses of 47.8% of children per every 1,000.<sup>54</sup>

The research outlines above allows us to consider how maltreatment adversely affects an individual's cognitive development (Flavell, Miller, & Miller (2002), Young, Klosko, & Weishaar (2003), Cuadra, Jaffe, Thomas, & DiLillo, D. (2014)). This may result in an individual being unable to accurately pinpoint a good external standard for a certain character trait. For instance, an individual who is subject to abuse might grow up in an environment where the most salient examples of adult 'role models' are models of people who abuse others. Clearly, a child in this scenario is not able to properly judge what is 'good' and what is 'bad' (in this case, that an abusive parent is a 'bad' external standard) and therefore has an improper comparison by which to judge himself. Without a proper external standard to judge themselves against, an individual cannot adequately assess whether or not he meets the criteria for a certain trait. Even if there are good external standards or role models are to some extent available in a wider community, the individual may not be able to understand and differentiate what makes someone a 'good' standard because they may not be in a position to see how pro-social behaviors of the possible role models result in beneficial and positive outcomes.

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<sup>53</sup> Childhood trauma prevalent among death row inmates. (2015, July 10). Retrieved March 03, 2021, from <https://deathpenaltyinfo.org/news/childhood-trauma-prevalent-among-death-row-inmates>.

<sup>54</sup> National child abuse statistics from NCA. (2021, January 25). Retrieved April 06, 2021, from <https://www.nationalchildrensalliance.org/media-room/national-statistics-on-child-abuse/>.

The motivational component of character may also be influenced by past instances of abuse. Even if a child can see (whether in the abstract or from a distance) the benefits of prosocial behaviors, past abuse may undermine the motivation to pursue those behaviors by making it seem an unattainable goal *for them*. A child that grew up witnessing and experiencing abuse may not find it worthwhile to refrain from acting on a character trait that they saw exhibited by their abuser(s). Perhaps there is no incentive for them not to continue as they always have or they are afraid that losing a certain character trait will result in harm for them, especially if their abuser(s) never faced negative consequences for their behavior. Or perhaps if one has not had the experience of how beneficial it is to model a ‘good’ external standard of character, they see less reasons for them to personally exhibit ‘good’ character traits. It is also possible that working against old habits proves to be too difficult for some individuals, making it challenging for them to redirect their emotional energy from those old character traits to new, prosocial ones. For example, since Sarah was abused at home, she exhibits aggressive tendencies there as a form of self-defense and protection. So, when she goes to school she exhibits those same aggressive character traits. It may be difficult for her to redirect emotional energy towards halting her aggressive tendencies at school if she continues to find them serving her interests at home. Therefore, even if a past abuse victim does have the cognitive element of character, without the proper motivation to form new habits and not act on old ones, they do not have the motivational element of character.

### ***B. Poverty***

The economic status of the family one is born into is arbitrary. Whether you are born into a wealthy family or a family that lives below the poverty line is irrelevant to your moral standing

as an equal citizen. It is also widely accepted that your family's economic status impacts educational attainment, the healthcare one receives, childcare options for working parents etc. Therefore, understanding how poverty might create specific challenges to character development is important when determining punishments, especially when considered as an arbitrary attribute of one's life.

There is research to suggest that poverty influences a child's development in more ways than one. One example is cognitive development and abilities. Children who live below the poverty level are more likely than other children to develop developmental delays and learning disabilities.<sup>55</sup> Korenman, Miller, & Sjaastad (1995) found that children who experienced long term poverty (family income averaged over thirteen years prior to the assessment) were negatively developmentally affected in a significantly greater way than those who experienced short term poverty.<sup>56</sup> Another study by McLeod & Shanahan (1993) analyzing the impact of poverty on emotional and behavioral outcomes found that children experiencing a family income below the poverty line at the time of the study experienced more "externalizing problems" like hyperactivity, peer conflict, and headstrong behavior.<sup>57</sup> Each of these issues point to the development of certain character traits, such as aggression or stubbornness.

One way in which learning disabilities and developmental delays<sup>58</sup> may impact character is via the cognitive element of character. In particular, they may alter an individual's ability to

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<sup>55</sup> Brooks-Gunn, J., & Duncan, G. (1997). The Effects of Poverty on Children. *The Future of Children*, 7(2), 55-71. doi:10.2307/1602387.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Developmental delays are defined quite generally in existing literature: "A developmental delay refers to a child who has not gained the developmental skills expected of him or her, compared to others of the same age. Delays may occur in the areas of motor function, speech and language, cognitive, play, and social skills". Developmental delay. (n.d.). Retrieved April 16, 2021, from <https://www.ssmhealth.com/cardinal-glennon/developmental-pediatrics/developmental-delay>.

appreciate the ‘right’ reasons for displaying a particular character trait (i.e behaving in a certain way). Individuals who suffer from developmental delays may have inaccurate perceptions of what a ‘good’ character is as well as inaccurate perceptions of whether they themselves meet that standard. If an individual is unable to accurately determine whether or not their behavior is in line with a ‘good’ external standard, then they cannot properly self-revise. Take the earlier example of Sarah. If she is unable to see that her abusive father is not a ‘good’ external standard, then she would not take the steps to self-revise the similar character traits she had developed.

Second and perhaps even more clearly, experiencing poverty, especially for an extended period of time (which studies like the ones above have noted as an important consideration when analyzing the impact of poverty on development), means that the motivational component of character may be compromised. Even if you possess the cognitive element of character development, if you’re focused on your next meal, there is less energy to be spent on refraining from acting on certain desires that stem from your character traits. As character is a disposition to behave and feel in certain ways, it is important to understand that building dispositions requires practice. One must practice constraining their desires to avoid embedding and reinforcing them within their character. However, this is difficult to do when there are competing external pressures. Indeed, peer conflict, noted in the aforementioned studies, is an example of a compromised motivational element of character: as an individual experiencing poverty may not have the motivational capacity to stop themselves from acting on a desire to participate in conflict due to an aggressive character trait, such as headstrong or hyperactive tendencies documented in literature.

### ***C. Educational Attainment***

One possible reason why children who live below the poverty level are more likely than other children to develop learning disabilities and developmental delays may be because of the sub-standard opportunities for education that are available to them. Educational attainment is also independently correlated with crime, and capital crimes specifically. Many inmates on death row lack the formal education that other Americans have. A 2001 study indicated that 52.3% of death row inmates did not complete high school and 12.7% only completed up to 8th grade<sup>59</sup>.

Although people often think of education as meant to simply provide knowledge and critical thinking skills, education also serves as an important contributor of socialization, which, in turn, means that it serves as an important opportunity for children to develop the prosocial dispositions associated with 'good' character. This subsection will focus on education as a provider of space for socialization. Children learn how to get along with other children, how to interact with authority figures, and other skills that offer opportunities for further cognitive, emotional, etc. development. Through this socialization, children are introduced to different standards of character and see which ones are rewarded and which ones are punished. For example, a child who possesses a character trait of impatience might see another child being rewarded in some way for patience, which causes the impatient child to reflect and recognize patience as a 'good' standard of character that is rewarded. This encourages the child to practice patience and potentially develop his own character trait of patience based on a cognitive appreciation of 'good' external standards of character.

As far as the motivational element of character and education, proper schooling with positive teachers and role models allows children to see the benefits of refraining from acting on

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<sup>59</sup> Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences & the Law*, 20(1-2), 191-210. doi:10.1002/bsl.473.

certain character traits (and subsequent desires) as beneficial and desirable. It may be the case that a child is less likely to appreciate the ‘right’ reasons for acting in certain ways due to a lack of experience with ‘good’ external standard of character at home. Education provides a specific opportunity for children to practice devoting emotional energy towards meeting ‘good’ character standards that they may not find in other areas of their life, such as at home.

#### **D. Intellectual Development**

Intellectual development is another characteristic of an individual that is not within their own control. The trajectory and maximum development of an individual’s intellectual capacities is a morally arbitrary attribute. In order for a person to be considered mentally disabled they must meet these three criteria: an Intelligence Quotient (I.Q) score of 70 or below, difficulty coping with the everyday world, and a manifestation of the disability prior to adulthood.<sup>60</sup>

However, this definition of intellectual disabilities fails to take into account that disabilities can manifest in many different ways that may look different than the three criteria mentioned above.

<sup>61</sup> While it is true that disabilities can be indicated through I.Q scores, they are not always predictive of a mental ability<sup>62</sup> as some individuals with I.Q scores above 70 may still have lower levels of cognitive ability or development.<sup>63</sup>

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<sup>60</sup> Intellectual disability and the death penalty. (n.d.). Retrieved March 03, 2021, from <https://www.aclu.org/other/intellectual-disability-and-death-penalty>.

<sup>61</sup> According to the American Association of Intellectual and Developmental Disabilities, the definition of intellectual ability is as follows: “*Intellectual disability* is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 22”. Definition of intellectual disability. (n.d.). Retrieved March 20, 2021, from <https://www.aidd.org/intellectual-disability/definition>.

<sup>62</sup> Ibid.

<sup>63</sup> “This group of people with intellectual disability who have higher IQs constitute about 80% to 90% of all individuals with intellectual disability. (Intellectual disability is used to address the same population of individuals as the term mental retardation [Schalock et al., 2007].)” Snell, M. E., Luckasson, R., Borthwick-Duffy, W. S., Bradley, V., Buntinx, W. H., Coulter, D. L., . . . Yeager, M. H. (2009). Characteristics and needs of people with intellectual disability who have higher iqs. *Intellectual and Developmental Disabilities*, 47(3), 220-233. doi:10.1352/1934-9556-47.3.220.

Studies on intellectual disabilities and moral development have compared individuals with intellectual disabilities' cognitive development with other individuals' cognitive development<sup>64</sup>. These studies have shown that children with intellectual disabilities might not develop through the stages of moral reasoning as fast as other children can and that they may not even reach more advanced levels of moral development.<sup>65</sup> It is clear that cognitive development and moral development are linked. It is also plausible to assume that lower levels of cognitive and moral development may pose challenges for an individual's ability to initially appreciate the 'right' reasons for feeling or behaving in a certain way, and therefore one is less likely to possess the cognitive element of character. It is also possible that individuals with lower levels of cognitive and moral development find it difficult to be motivated by those 'right' reasons, even if they are able to recognize the existence of those reasons. This would result in a missing motivational component of character.

#### **IV. Conclusion**

However we resolve disagreements about moral responsibility, we can at least agree that there are many factors that are likely to contribute to crime that are morally arbitrary in the sense of not being relevant to our moral standing as equal citizens. As discussed above, these include past instances of abuse, poverty, educational attainment, and intellectual ability. Therefore, they

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<sup>64</sup> "Moral reasoning refers to the cognitive and emotional processes occurring within a person when they are attempting to determine whether or not an event is morally "right or wrong"... Regardless of the theoretical view that is adopted, moral development refers to the changes that occur to the structure of moral reasoning with increasing maturity, both as a consequence of social perspective-taking and increasing cognitive ability". (p. 274) Langdon, P. E., Clare, I. C., & Murphy, G. H. (2010). Developing an understanding of the literature relating to the moral development of people with intellectual disabilities. *Developmental Review*, 30(3), 273-293. doi:10.1016/j.dr.2010.01.001.

<sup>65</sup> Ibid.

would not be known characteristics from behind the veil of ignorance. This encourages a rehabilitative model of punishment over a purely punitive model of punishment, as the potential for an individual to be an object of punishment once the veil is lifted requires individuals to ensure a punishment model that preserves people's ability to develop and pursue their conceptions of the good and capacities for justice. It is controversial what rehabilitation might involve. Perhaps it is access to mental health services, community service, or furthering educational opportunities. Regardless, it is evident that the death penalty would not meet any standard of rehabilitation that would be set from behind the veil of ignorance because of the severity of death as a punishment and the lack of potential for recoverability for those subjected to it. In the next chapter, I will consider a totally different argument concerning the capacity for self-correction.

### Chapter 3

#### **I. Utilitarian Objections to Dolovich and Flanders**

Whereas I have so far argued that a Rawlsian should be primarily interested in rehabilitating people who are guilty of criminal offenses, a utilitarian might focus more on deterrence. Utilitarians subscribe to the principle of equal consideration of interests (PEC) which calls for equal weight to be given to all persons' interests affected by one's actions in order to maximize happiness.<sup>66</sup> The PEC holds that one 'unit' of happiness is equal to another singular unit of happiness, no matter where or who the units of happiness come from, and so one gains moral reasons to take an action to the extent that that action promotes maximal happiness.

Policies of deterrence maximize happiness, and so fall in line with utilitarian recommendations, if the interests of individuals who want to be protected from crime outweigh the interests of those who want to be protected from punishment. By serving as a deterrent, punishment would encourage people to be cautious about acting on desires and character traits that may be influenced by the kind of attributes in the previous chapter (i.e the 'morally arbitrary' attributes of past instances of abuse, educational attainment, etc.).<sup>67</sup> More people would be able to better maximize happiness in a society where punishments incentivize good behavior. Rehabilitation might play some role in punishment but full focus on rehabilitation might undermine deterrence by not being harsh enough to discourage certain behaviors. Therefore, a utilitarian might argue that limits on rehabilitation are needed. A utilitarian might argue that punishment encourages people to be more mindful of their character. In particular, the death penalty serves as a deterrent for the most heinous crimes, specifically murder, and encourages

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<sup>66</sup> Singer, P. (2017). Chapter 1: About Ethics. In *Practical ethics*. Cambridge: Cambridge University Press.

<sup>67</sup> Dolovich, S. (2004). Legitimate punishment in liberal democracy. *Buffalo Criminal Law Review*, 7(2), 307-442. doi:10.1525/nclr.2004.7.2.307.

those who may partake in violent and potentially fatal behaviors against others may be deterred by a severe punishment like the death penalty.

Rawls was not a utilitarian, but some utilitarian considerations might also come up behind the veil of ignorance. In the last chapter, I argued against the death penalty on the basis of reasoning that takes place behind the veil of ignorance. However, I focused on the perspective of a person who commits a crime, rather than a victim. Although it is possible that you might be Sarah in society, you could also potentially be Sarah's boyfriend. As Sarah's boyfriend, you would want Sarah to be deterred from killing you in the first place. Consequences are a major potential deterrent, therefore individuals might choose to put them in place from behind the veil of ignorance to ensure that society discourages and attempts to prevent crimes. Again, to the extent that rehabilitation undermines deterrence, this would speak in favor of moving away from rehabilitation and towards a more purely punitive approach. Some of the same concerns that are raised by utilitarians about happiness relate to Rawls' concerns about people's ability to pursue their conceptions of the good. Specifically, from behind the veil of ignorance Rawlsians are concerned with one's interest in being able to pursue their conception of the good in the same way that utilitarians are concerned with one's interest in maximizing happiness.

How far should we lean towards a punitive approach? Rawlsians would not accept a fully utilitarian approach because of the influence that morally arbitrary attributes have on a person's character (and therefore their propensity to commit a crime). As these attributes are not relevant to one's equal moral standing as a citizen, they would not factor into decisions from behind the veil. However, when there is ambiguity about how much of a person's character is due to morally arbitrary attributes, it's possible that reasoners behind the veil of ignorance might begin to

consider the tradeoff between deterrence and rehabilitation, given the benefits on the other side of avoiding being a victim. Someone influenced by utilitarian thinking and considering the veil of ignorance may argue that even though you would not want totally ‘innocent’ people (‘innocent’ including those who committed crimes as a result of morally arbitrary attributes) sentenced to death, erring on the side of punitive punishment in ambiguous cases might be worth it. In particular, this person might argue that the practical problems associated with calculating a person’s mitigated consequences based on the influence of morally arbitrary attributes over the crime they committed is not feasible. It is costly and practically impossible to come up with a necessary formula to determine the influence of morally arbitrary attributes on an individual’s character. On top of that, there is the reality that finding out the information that is needed for completing the relevant calculations would be very invasive, which would lead to personal privacy issues. Given the inevitable ambiguity that follows from this and the benefits of deterrence, individuals behind the veil of ignorance may err on the side of doling out punitive punishments in ambiguous cases even if there’s some chance that morally arbitrary attributes influenced someone’s character.

Even if we err on the side of punitive accountability, we would need to balance the utilitarian considerations expressed above with considerations of harshness and recoverability. Perhaps behind the veil of ignorance we would want punishments for their deterrence value to some extent and so allow some punishments that served that purpose, rather than purely rehabilitative purposes. Nevertheless, we would not want the harshness of a punishment to be so severe that we could not recover from it. This is because such punishments would unduly interfere with people’s ability to pursue a conception of the good and develop a sense of justice,

and these are core things we'd want to protect from behind the veil of ignorance. Pursuing a conception of the good and developing a capacity for a sense of justice create a basis for self-respect that individuals from behind the veil desire. Less harsh punishments, like community service or a fine, are easy to recover from and so - even if they do not actively promote rehabilitation - do not interfere unduly with an individual's ability to pursue their conception of the good or develop their capacity for a sense of justice. However, some harsher punishments imposed for the sake of deterrence may not lend individuals in society the same opportunities. Instead, it negatively impacts an individual's ability to pursue a conception of the good by decreasing the likelihood of recoverability. Recoverability as I discuss it refers to the ability for one to 'bounce back' from a punishment, or more specifically the ability for one to continue pursuing their conception of the good and capacity for a sense of justice after being punished. If someone is unable to recover from a punishment (which is the case with harsher punishments) then they would be concerned about not retaining a basis for self-respect.

There may be debate about what sorts of punishment would qualify as "too harsh". For instance, someone might argue that five extra years of imprisonment for Sarah is permissible, while someone else might find those extra years too harsh. However, the death penalty would certainly qualify as "too harsh", as by definition death implies no recovery. Thus, even a Rawlsian influenced by utilitarian considerations would reject the death penalty. My thesis focuses specifically on the death penalty due to the fact that it is an especially obvious case of harsh punishment.

## II. Limits of Deterrence Value

Potentially there may be some cases that allow a certain level of punishment for deterrence value, but as I've argued - so long as one stays behind the veil of ignorance - punishment would be constrained by recoverability. But what if one completely rejects a Rawlsian framework and favors a straight utilitarian line of thinking? Then maybe there would be a stronger argument for using the death penalty to deter capital crimes. After all, sentencing one person to death only needs to deter one killing in order to be successful on balance and only two to make it worthwhile. However, this argument only works to the extent that one has a capacity for self-correction. Those who have the ability to recognize and revise aspects of their character that are deemed undesirable or problematic are able to respond to deterrents. For example, let us assume that I have the capacity for self-correction. I am aware that stealing is wrong, however I am also aware that if I am caught stealing I could potentially face legal consequences. A legal consequence, say a fine, acts as a deterrent in this case since it encourages me not to partake in stealing. My capacity for self-correction is what allows the deterrent to have a successful effect on me. I am able to recognize that I want to avoid the punishment that would stem from acting on my desires, and so I self-revise. The integration of a desire to avoid punishment and an appreciation of the right reasons for doing so enables me to respond to the deterrent by self-correcting the problematic desire.

Take our previous example of Sam and Sarah: Sam, like myself, is able to reflect on his aggressive tendencies and the desires that stem from them and self-revise this character trait. Specifically, he is able to recognize and appreciate the 'right' reasons for needing to self-revise his aggressive tendencies and self-correct in the direction of less aggressive character traits. However, if I did not have a capacity for self-correction (like Sarah) I may be either unable to

recognize that reacting aggressively towards others is problematic or I can recognize my aggression as problematic but I am unable to resist reacting aggressively. Therefore, even though I know that there are consequences/ punishments for acting aggressively towards a partner or friend, my lack of capacity for self reflection renders me unable to respond to those deterrents.

In the next section, I will argue that the majority of individuals on death row in the United States at this time do not have the capacity for self-correction that is necessary for deterrence to be effective. There is a body of research that catalogs demographic and historical data on death row inmates. As I discussed in the previous chapter, this data reveals that death row inmates face challenges that undermine the initial development of ‘good’ character. Next, I will suggest that those difficulties also undermine death row inmates’ capacity to self-correct ‘bad’ character. For instance, a study on juvenile death row inmates revealed that many of them dealt with neurological dysfunction and psychiatric symptoms as well as histories of physical and sexual abuse which might plausibly undermine their capacities for effective self-correction.<sup>68</sup> I consider this and related information in the next section.

### ***III. The Capacity for Self-Correction and Deterrence***

To the extent that there is a justification for the death penalty, it would be deterrence value. However as discussed in the last section, deterrence is not likely to work for individuals who do not have the capacity for self-correction. In this section, I illustrate how current death row inmates in the United States are not likely to possess a sufficient capacity for self-correction as a result of various challenges that they have faced over the course of their lives. I conclude

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<sup>68</sup> Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences & the Law*, 20(1-2), 191-210. doi:10.1002/bsl.473.

that the death penalty punishment is apt to be ineffective at deterring crimes for the individuals concerned, and as a result does not provide proper justification for executing death row inmates.

I will explore some of the same characteristics that were discussed in the previous chapter: past instances of abuse, educational attainment, and intellectual ability. Other characteristics may also play into death row inmates lacking the capacity for self-correction, however I will focus on these four considerations due to the large bodies of research already available to properly discuss them.

The trait of being able to revise one's character is a 'meta' character trait that has both a cognitive element and the motivational element. It is important to distinguish between character traits and 'meta' character traits at this point. Character traits, as mentioned before, are dispositions to act, think, and feel in certain ways. Examples of character traits are aggression (Sarah's case), selfishness, generosity, and patience. A 'meta' character trait is not a character trait in the same way aggression is as it is not necessarily a 'disposition', however it is composed of a cognitive and motivational elemental that function similarly to the cognitive and motivational elements of character discussed in the first two chapters.

To say that one does not have 'good' character means that the individual does not recognize or appreciate the 'right' reasons for doing something or is not being motivated by the 'right' reasons. To say that one does not have the capacity for self-correction means that the individual does not have *access* to the 'right' reasons for doing something or is not able to gain the motivation necessary to act on the 'right' reasons. So in both cases, it is not just that you are not inclined to see the right reasons or standards, but rather that circumstances may create "tunnel vision", so to speak, which essentially removes the possibility of one being able to see

the ‘right’ reasons. The cognitive element of self-correction requires that one be able to conceptualize a good external standard by which to judge oneself and to recognize whether or not one meets that external standard. To have the motivational element of this meta-character trait, one must have the emotional energy to close the gap between oneself and the external standard once it is found that one does not meet said external standard. For example, say there is a standard for being polite (perhaps it includes saying please and thank you, chewing with your mouth closed, etc.) and I am able to judge myself against that standard. This is the cognitive element of self-correction. If I find that I do not meet the standard of politeness, then I must work to meet that standard, which requires paying attention to how I am acting, fighting against old habits, and perhaps practicing chewing with my mouth closed or reminding myself to say please. Doing these things requires a certain level of emotional energy directed towards them. This is the motivational element of self-correction. Together, both the cognitive and motivational elements allow me to self-correct myself to the desired outcome, in this case politeness. To the extent that one lacks one or both of these elements, one lacks the capacity for self-correction.

#### ***A. Past Instances of Abuse***

The studies on abuse mentioned in the previous chapter show a correlation: they suggest that many death row inmates - who are people who were not in fact deterred by the death penalty - were also people who experienced abuse.<sup>69</sup> We can hypothesize about a more specific causal connection between individuals on death row and past instances of abuse that involves the lack of a capacity for self-correction. As far as the cognitive element of self-correction, there are two factors at play. For one thing, many people look up to their parents as good external standards of

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<sup>69</sup> Childhood trauma prevalent among death row inmates. (2015, July 10). Retrieved March 03, 2021, from <https://deathpenaltyinfo.org/news/childhood-trauma-prevalent-among-death-row-inmates>.

love and kindness. However, an individual who was abused by his parent(s) cannot use them as a “good” external standard for love and kindness. Therefore, he is unable to accurately assess whether or not he lives up to the standard for love and kindness. Without an external standard and the recognition of where one falls short, self-correction is not possible. Not only are individuals unable to develop these ‘good’ character traits initially, but they also lose resources that are necessary in order to recognize the problem with failing to develop those good character traits.

Perhaps an individual who suffered abuse was able to acquire the cognitive element of self-correction; they still may not have the motivational element of self-correction. The motivational element of self-correction, or the emotional energy a person has to act on her assessments of external standards for behavior, can be hindered by experiences of abuse. While the relationship between past instances of abuse and certain character traits is more clear based on the present research, it is plausible to think that maltreatment may affect the development of the ‘meta’ character trait of self-correction, either cognitively or motivationally.

Abuse alters the cognitive and motivational processes of an individual to a degree where the capacity for self-correction may not be developed or acted upon. Since many death row inmates experience abuse, they may lack the capacity for self-correction, whether cognitively, motivationally, or both. Therefore, child abuse is a characteristic of an individual’s life that renders a deterrence justification for the death penalty unjustified, as it hinders an individual’s ability to develop a capacity for self-correction.

### **B. Educational Attainment**

The connection between education and cognitive development detailed in the previous section may also contribute to the development of self-correction. Death row inmates who have little formal education may not have been in a school environment that encouraged conformance with good external standards (through teachers, principals, other students, etc.) or never expressed the importance of evaluating one's own character against those standards. A child who behaves poorly in class is often reprimanded by the teacher or faces some other consequence that teaches them what behaviors are acceptable and which are unacceptable. Then, that child has the opportunity to reflect on the consequence they received and compare their situation to a 'good' external standard that did not receive that consequence. Finally, they recognize the changes they must make (whether to their character or otherwise) in order to avoid that punishment in the future. This represents the cognitive element of self-correction. This example shows how someone without access to a good education might have difficulty self-correcting.

The motivational element of self-correction is influenced by positive feedback from peers or teachers for prosocial behaviors like self-revision. This motivates children to also direct emotional energy towards self-revising less socially desirable behaviors and modeling good external standards. A death row inmate without this educational experience may not have the proper motivation to direct their emotional energy towards self-correction, even if they have the cognitive element of self-correction. Even if they are able to comprehend on an abstract level that self-correction is good, if they do not have experience with the benefits of self-correction (in school or elsewhere) then they may not be properly motivated to direct themselves towards self-correction.

### ***C. Intellectual Ability***

The capacity for self-correction acts as a ‘meta’ character trait that is acquired through the development of moral reasoning and an individual’s progression through the stages of moral development. Without moral reasoning<sup>70</sup>, I am unable to envision what my character should look like (or perhaps I am even unable to comprehend that there is a specific character that I should aspire to). Therefore, as individuals with intellectual disabilities have lower levels of cognitive development and therefore moral reasoning, they may not develop the cognitive element of self-correction.

Studies have also shown that some executed death row inmates had IQ scores that suggest mild retardation<sup>71</sup>. The fact that many individuals on death row have below average IQ scores and show signs of intellectual impairments poses an issue for their capacity for self-correction. As with death row inmates who have experienced abuse or lack education, death row inmates with lower intellectual abilities may not be able to recognize what qualifies as a good external standard. Therefore they do not possess the cognitive element of self-correction. Without the cognitive element of self-correction, an individual cannot know that they should or could be directing emotional energy to revising a certain element of one's character. As many death row inmates with lower intellectual abilities may not have the cognitive element of character and therefore the ability to conceptualize an external model to judge oneself against, they may not have the motivational element of character.

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<sup>70</sup> Moral reasoning as defined by the Stanford Encyclopedia of Philosophy, “... moral reasoning as a species of practical reasoning – that is, as a type of reasoning directed towards deciding what to do and, when successful, issuing in an intention... we may understand issues about what is right or wrong, or virtuous or vicious, as raising moral questions.” Richardson, H. (2018, August 27). Moral reasoning. Retrieved April 12, 2021, from <https://plato.stanford.edu/entries/reasoning-moral/>.

<sup>71</sup> Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences & the Law*, 20(1-2), 191-210. doi:10.1002/bsl.473.

### **Conclusion**

Whether one is an incompatibilist or a compatibilist, a utilitarian or a Rawlsian, one has reason to think that the influence of ‘arbitrary’ factors on the development and capacity to self-correct our characters. The implications of my thesis point towards moving the United States in the direction of a less punitive criminal justice system. While exactly what reforms are necessary to properly incorporate rehabilitation into the U.S criminal justice are outside of the realm of this thesis, the claims made give rise to an important question: Is mitigating punishment on the basis of difficult life circumstances that influence character a matter of justice or of mercy?

Presently, many people argue that considering the difficult life circumstances of an offender in capital cases, which is what my thesis argues for, is an act of mercy on the part of the sentencer. Upon considering the question of whether the death penalty constitutes cruel and unusual punishment in cases where mitigating evidence has been introduced, Supreme Court Justice Antonin Scalia answered no and continued on to say, “I don’t think my Court is authorized to say, oh, it would be a good idea to have every jury be able to consider mitigating evidence and grant mercy...”<sup>72</sup> Here, Scalia directly attributes the consideration of mitigating circumstances as an act of “mercy”. However, is that the proper attitude our judges and criminal justice system more broadly should hold?

In order to answer this question, let’s take a look at Sarah again. Sarah experienced traumatic abuse at the hands of her father which influenced her development of aggressive tendencies that resulted in her killing her boyfriend. Sarah’s case is tried in front of a jury and

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<sup>72</sup> Randall, K. (2002, July 5). US Supreme Court Justice Scalia on capital punishment: "death is no big deal". Retrieved April 16, 2021, from <https://www.wsws.org/en/articles/2002/07/scal-j05.html>.

that jury decides not to take the mitigating evidence of the abuse Sarah suffered into account when deliberating her sentence. Is this a just way of deciding Sarah's punishment? Should integral experiences in Sarah's life be cast aside as an optional consideration for a jury? It is my contention that that would be unjust, particularly because every theory that we have discussed thus far has suggested that it is a matter of justice. Justice is an action that is *required* whereas mercy, by its very definition, is a *voluntary* act on the part of the decision maker. The theories and conclusions described in my thesis do not suggest that consideration of an individual's challenging life circumstances is optional, rather they suggest that considering these elements are *imperative* when implementing a theory of punishment in a just society.

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