

The Death Penalty Once More

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People concerned with capital punishment disagree on essentially three questions: (1.) Is it constitutional? (2.) Does the death penalty deter crime more than life imprisonment? (3.) Is the death penalty morally justifiable?

I. IS THE DEATH PENALTY CONSTITUTIONAL?

The fifth amendment, passed in 1791, states that "no person shall be deprived of life, liberty, or property, without due process of law."¹ Thus, with "due process of law," the Constitution authorizes depriving persons "of life, liberty or property." The fourteenth amendment, passed in 1868, applies an identical provision to the states.² The Constitution, then, authorizes the death penalty. It is left to elected bodies to decide whether or not to retain it.³

The eighth amendment, reproducing almost verbatim a passage from the English Bill of Rights of 1689,⁴ prohibits "cruel and unusual pun-

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¹ U.S. CONST. amend. V.

² "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

³ In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court declared that a statutory scheme for imposing the death penalty may be constitutional. "Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." *Id.* at 186-87 (plurality opinion).

⁴ The English Bill of Rights stated that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." *Furman v. Georgia*, 408 U.S. 238, 243 n.3 (1972) (Brennan, J., concurring) (citing 1 W. & M.,

ishments.” This prohibition was not meant to repeal the fifth amendment since the amendments were passed simultaneously.⁵ “Cruel” punishment is not prohibited unless “unusual” as well, that is, new, rare, not legislated, or disproportionate to the crime punished.⁶ Neither the English Bill of Rights, nor the eighth amendment, hitherto has been found inconsistent with capital punishment.⁷

A. *Evolving Standards*

Some commentators argue that, in *Trop v. Dulles*,⁸ the Supreme Court indicated that “evolving standards of decency that mark the progress of a maturing society” allow courts to declare “cruel and unusual,” punishments authorized by the Constitution. However, *Trop* was concerned with expatriation, a punishment that is not specifically authorized by the Constitution. The death penalty is. *Trop* did not suggest that “evolving standards” could de-authorize what the Constitution repeatedly authorizes. Indeed, Chief Justice Warren, writing for the majority in *Trop*, declared that “the death penalty . . . cannot be said to violate the constitutional concept of cruelty.”⁹ Furthermore, the argument based on “evolving standards” is paradoxical: the Constitution would be redundant if current views, enacted by judicial fiat, could supersede what it plainly says. If “standards of decency” currently invented or evolved could, without formal amendment, replace or repeal the standards authorized by the Constitution, the Constitution would be superfluous.

It must be remembered that the Constitution does not force capital punishment on the population but merely authorizes it. Elected bodies are left to decide whether to use the authorization. As for “evolving standards,” how could courts detect them without popular consensus as a guide? Moral revelations accepted by judges, religious leaders, sociologists, or academic elites, but not by the majority of voters, cannot

Sees 2, c., 2; 8 ENGLISH HISTORICAL DOCUMENTS, 1660-1714, at 122 (A. Browning ed. 1953)).

⁵ The fifth amendment and the eighth amendment were both ratified in 1791, and were part of the Bill of Rights, the first ten amendments to the Constitution.

⁶ See, e.g., *Weems v. United States*, 217 U.S. 349 (1910). The framers wanted to prohibit cruel punishments, if unusual. They did not prohibit usual punishments. Decisions that interpret the conjunctive “and unusual,” as a disjunctive “or unusual,” seem less than persuasive.

⁷ In *Gregg v. Georgia*, 428 U.S. 153, 176, 186 (1976), the Court held that capital punishment did not per se violate the eighth amendment.

⁸ 356 U.S. 86, 101 (1958).

⁹ *Id.* at 99.

suffice. The opinions of the most organized, most articulate, or most vocal might receive unjustified deference. Surely the eighth amendment was meant to limit, but was not meant to replace, decisions by the legislative branch, or to enable the judiciary do what the voters won't do.¹⁰ The general consensus on which the courts would have to rely could be registered only by elected bodies. They favor capital punishment. Indeed, at present, more than seventy percent of the voters approve of the death penalty.¹¹ The state legislatures reflect as much. Wherefore, the Supreme Court, albeit reluctantly, rejected abolition of the death penalty by judicial *fiat*.¹² This decision was subsequently qualified by a finding that the death penalty for rape is disproportionate to the crime,¹³ and by rejecting all mandatory capital punishment.¹⁴

B. Caprice

Laws that allowed courts too much latitude to decide, perhaps capriciously, whether to actually impose the death penalty in capital cases also were found unconstitutional.¹⁵ In response, more than two-thirds of the states have modified their death penalty statutes, listing aggravating and mitigating factors, and imposing capital punishment only when the former outweigh the latter.¹⁶ The Supreme Court is satisfied that this procedure meets the constitutional requirements of non-

¹⁰ The courts have sometimes confirmed the obsolescence of non-repealed laws or punishments. But here they are asked to invent it.

¹¹ Two recent surveys indicate that between 72% and 84% of Americans now favor capital punishment. See Andersen, *An Eye for an Eye*, TIME, Jan. 24, 1983, at 28, 28; Sacramento Bee, Feb. 3, 1985, at A25, col. 1.

¹² *Furman v. Georgia*, 408 U.S. 238 (1972); see also *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹³ In *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court concluded that the eighth amendment prohibits punishments that are "'excessive' in relation to the crime committed." I am not sure about this disproportion. However, threatening execution would tempt rapists to murder their victims who, after all, are potential witnesses. By murdering their victims, rapists would increase their chances of escaping execution without adding to their risk. Therefore, I agree with the court's conclusion, though not with its argument.

¹⁴ See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Once more I disagree with the reasoning, at least in part, but welcome the conclusion, since mandatory capital punishment risks jury cancellations.

¹⁵ In *Furman v. Georgia*, 408 U.S. 238, 256-57, 310, 311 (1972), a plurality of the Court concluded that standardless death penalty statutes result in arbitrary and capricious imposition of the penalty, and therefore are cruel and unusual punishment.

¹⁶ See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

capriciousness.¹⁷ However, abolitionists are not.

In *Capital Punishment: The Inevitability of Caprice and Mistake*,¹⁸ Professor Charles Black contends that the death penalty is necessarily imposed capriciously, for irremediable reasons.¹⁹ If he is right, he has proved too much, unless capital punishment is imposed more capriciously now than it was in 1791 or 1868, when the fifth and fourteenth amendments were enacted. He does not contend that it is. Professor Black also stresses that the elements of chance, unavoidable in all penalizations, are least tolerable when capital punishment is involved.²⁰ But the irreducible chanciness inherent in human efforts does not constitutionally require the abolition of capital punishment, unless the framers were less aware of chance and human frailty than Professor Black is. (I shall turn to the moral as distinguished from the legal bearing of chanciness anon.)

C. Discrimination

Sociologists have demonstrated that the death penalty has been distributed in a discriminatory pattern in the past: black or poor defendants were more likely to be executed than equally guilty others. This argues for correction of the distributive process, but not for abolition of the penalty it distributes, unless constitutionally excessive maldistribution ineluctably inheres in the penalty. There is no evidence to that effect. Actually, although we cannot be sure that it has disappeared altogether, discrimination has greatly decreased compared to the past.²¹

However, recently the debate on discrimination has taken a new turn. Statistical studies have found that, *ceteris paribus*, a black man who murders a white has a much greater chance to be executed than he would have had, had his victim been black.²² This discriminates against

¹⁷ *Id.* at 195 (“[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”).

¹⁸ C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981).

¹⁹ *Id.* at 17-18.

²⁰ *Id.* at 38-45.

²¹ Most discrimination occurred in rape cases and was eliminated when the death penalty for rape was declared unconstitutional.

²² For a survey of the statistical literature, see, e.g., Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983). His article is part of a “Symposium on Current Death Penalty Issues” compiled by death penalty opponents.

black *victims* of murder: they are not as fully, or as often, vindicated as are white victims. However, although unjustified per se, discrimination against a class of victims need not, and here does not, amount to discrimination against their victimizers. The pattern discriminates *against* black murderers of whites and *for* black murderers of blacks. One may describe it as discrimination for, or discrimination against, just as one may describe a glass of water as half full or half empty. Discrimination against one group (here, blacks who kill whites) is necessarily discrimination in favor of another (here, blacks who kill blacks).

Most black victims are killed by black murderers, and a disproportionate number of murder victims is black. Wherefore the discrimination in favor of murderers of black victims more than offsets, numerically, any remaining discrimination against other black murderers.²³

D. Comparative Excessiveness

Recently lawyers have argued that the death penalty is unconstitutionally disproportionate if defendants, elsewhere in the state, received lesser sentences for comparable crimes. But the Constitution only requires that penalties be appropriate to the gravity of the crime, not that they cannot exceed penalties imposed elsewhere. Although some states have adopted "comparative excessiveness" reviews, there is no constitutional requirement to do so.²⁴

Unavoidably, different courts, prosecutors, defense lawyers, judges and juries produce different penalties even when crimes seem comparable. Chance plays a great role in human affairs. Some offenders are never caught or convicted, while others are executed; some are punished more than others guilty of worse crimes. Thus, a guilty person, or group of persons, may get away with no punishment, or with a light punishment, while others receive the punishment they deserve. Should we let these others go too, or punish them less severely? Should we abolish the penalty applied unequally or discriminatorily?²⁵

²³ Those who demonstrated the pattern seem to have been under the impression that they had shown discrimination against black murderers. They were wrong. However, the discrimination against black victims is invidious and should be corrected.

²⁴ In *Pulley v. Harris*, 104 S. Ct. 871 (1984), the Court declared that proportionality review was not required for a constitutional death penalty statute.

²⁵ The capriciousness argument is undermined when capriciousness is conceded to be unavoidable. But even when capriciousness is thought reducible, one wonders whether releasing or retrying one guilty defendant, because another equally guilty defendant was not punished as much, would help reduce capriciousness. It does not seem a logical remedy.

The late Justice Douglas suggested an answer to these questions:

A law that . . . said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed [would be wrong]. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.²⁶

Justice Douglas' answer here conflates an imagined discriminatory law with the discriminatory application of a non-discriminatory law. His imagined law would be inconsistent with the "equal protection of the laws" demanded by the fourteenth amendment, and the Court would have to invalidate it *ipso facto*. But discrimination caused by uneven application of non-discriminatory death penalty laws may be remedied by means other than abolition, as long as the discrimination is not intrinsic to the laws.

Consider now, albeit fleetingly, the moral as distinguished from the constitutional bearing of discrimination. Suppose guilty defendants are justly executed, but only if poor, or black and not otherwise. This unequal justice would be morally offensive for what may be called tautological reasons:²⁷ if any punishment for a given crime is just, then a greater or lesser punishment is not. Only one punishment can be just for all persons equally guilty of the same crime.²⁸ Therefore, different punishments for equally guilty persons or group members are unjust: some offenders are punished more than they deserve, or others less.

Still, equality and justice are not the same. "Equal justice" is not a redundant phrase. Rather, we strive for two distinct ideals, justice and equality. Neither can replace the other. We want to have justice and, having it, we want to extend it equally to all. We would not want equal injustice. Yet, sometimes, we must choose between equal injustice and unequal justice. What should we prefer? Unequal justice is justice still, even if only for some, whereas equal injustice is injustice for all. If not every equally guilty person is punished equally, we have unequal justice. It seems preferable to equal injustice — having no guilty person

²⁶ *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring).

²⁷ I shall not consider here the actual psychological motives that power our unending thirst for equality.

²⁸ If courts impose different punishments on different persons, we may not be able to establish in all cases whether the punishment is just, or (it amounts to the same) whether the different persons were equally guilty of the same crime, or whether their crimes were identical in all relevant respects. Thus, we may not be able to tell which of two unequal punishments is just. Both may be, or neither may be. Inequality may not entail more injustice than equality, and equality would entail justice only if we were sure that the punishment meted out was the just punishment.

punished as deserved.²⁹ Since it is never possible to punish equally all equally guilty murderers, we should punish, as they deserve, as many of those we apprehend and convict as possible. Thus, even if the death penalty were inherently discriminatory — which is not the case — but deserved by those who receive it, it would be morally just to impose it on them. If, as I contend, capital punishment is just and not inherently discriminatory, it remains desirable to eliminate inequality in distribution, to apply the penalty to all who deserve it, sparing no racial or economic class. But if a guilty person or group escaped the penalty through our porous system, wherein is this an argument for sparing others?

If one does not believe capital punishment can be just, discrimination becomes a subordinate argument, since one would object to capital punishment even if it were distributed equally to all the guilty. If one does believe that capital punishment for murderers is deserved, discrimination against guilty black murderers and in favor of equally guilty white murderers is wrong, not because blacks receive the deserved punishment, but because whites escape it.

Consider a less emotionally charged analogy. Suppose traffic police ticketed all drivers who violated the rules, except drivers of luxury cars. Should we abolish tickets? Should we decide that the ticketed drivers of nonluxury cars were unjustly punished and ought not to pay their fines? Would they become innocent of the violation they are guilty of because others have not been ticketed? Surely the drivers of luxury cars should not be exempted. But the fact that they were is no reason to exempt drivers of nonluxury cars as well. Laws could never be applied if the escape of one person, or group, were accepted as ground for not punishing another. To do justice is primarily to punish as deserved, and only secondarily to punish equally.

Guilt is personal. No one becomes less guilty or less deserving of punishment because another was punished leniently or not at all. That justice does not catch up with all guilty persons understandably is resented by those caught. But it does not affect their guilt. If some, or all, white and rich murderers escape the death penalty, how does that reduce the guilt of black or poor murderers, or make them less deserving of punishment, or deserving of a lesser punishment?

Some lawyers have insisted that the death penalty is distributed among those guilty of murder as though by a lottery and that the worst

²⁹ Similarly, it is better that only some innocents suffer undeserved punishment than that all suffer it equally.

may escape it.³⁰ They exaggerate, but suppose one grants the point. How do those among the guilty selected for execution by lottery become less deserving of punishment because others escaped it? What is wrong is that these others escaped, not that those among the guilty who were selected by the lottery did not.

Those among the guilty actually punished by a criminal justice system unavoidably are selected by chance, not because we want to so select them, but because the outcome of our efforts largely depends on chance. No murderer is punished unless he is unlucky enough both to be caught and to have convinced a court of his guilt. And courts consider evidence not truth. They find truth only when the evidence establishes it. Thus they may have reasonable doubts about the guilt of an actually guilty person. Although we may strive to make justice as equal as possible, unequal justice will remain our lot in this world. We should not give up justice, or the death penalty, because we cannot extend it as equally to all the guilty as we wish. If we were not to punish one offender because another got away because of caprice or discrimination, we would give up justice for the sake of equality. We would reverse the proper order of priorities.

II. IS THE DEATH PENALTY MORE DETERRENT THAN OTHER PUNISHMENTS?

Whether or not the death penalty deters the crimes it punishes more than alternative penalties — in this case life imprisonment with or without parole — has been widely debated since Isaac Ehrlich broke the abolitionist ranks by finding that from 1933-65 “an additional execution per year . . . may have resulted on the average in seven or eight fewer murders.”³¹ Since his article appeared, a whole cottage industry devoted to refuting his findings has arisen.³² Ehrlich, no slouch, has

³⁰ It would be desirable that all of the worst murderers be sentenced to death. However, since murderers are tried in different courts, this is unlikely. Further, sometimes the testimony of one murderer is needed to convict another, and cannot be obtained except by leniency. Morally, and legally it is enough that those sentenced to death deserve the penalty for their crimes, even if others, who may deserve it as much, or more, were not sentenced to death.

³¹ Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397, 414 (1975).

³² See, e.g., Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975).

been refuting those who refuted him.³³ The result seems inconclusive.³⁴ Statistics have not proved conclusively that the death penalty does or does not deter murder more than other penalties.³⁵ Still, Ehrlich has the merit of being the first to use a sophisticated statistical analysis to tackle the problem, and of defending his analysis, although it showed deterrence. (Ehrlich started as an abolitionist.) His predecessors cannot be accused of mathematical sophistication. Yet the academic community uncritically accepted their abolitionist results. I myself have no contribution to make to the mathematical analyses of deterrent effects. Perhaps this is why I have come to believe that they may becloud the issue, leading us to rely on demonstrable deterrence as though decisive.

Most abolitionists believe that the death penalty does not deter more than other penalties. But most abolitionists would abolish it, even if it did.³⁶ I have discussed this matter with prominent abolitionists such as Charles Black, Henry Schwarzschild, Hugo Adam Bedau, Ramsey Clark, and many others. Each told me that, even if every execution were to deter a hundred murders, he would oppose it. I infer that, to these abolitionist leaders, the life of every murderer is more valuable than the lives of a hundred prospective victims, for these abolitionists would spare the murderer, even if doing so would cost a hundred future victims their lives.

Obviously, deterrence cannot be the decisive issue for these abolitionists. It is not necessarily for me either, since I would be for capital punishment on grounds of justice alone. On the other hand, I should favor the death penalty for murderers, if probably deterrent, or even just possibly deterrent. To me, the life of any innocent victim who might be spared has great value; the life of a convicted murderer does not. This is why I would not take the risk of sacrificing innocents by not executing murderers.

Even though statistical demonstrations are not conclusive, and per-

³³ Ehrlich, *Fear of Deterrence*, 6 J. LEGAL STUD. 293 (1977); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 J. LEGAL STUD. 35 (1977).

³⁴ At present there is no agreement even on whether the short run effects of executions delay or accelerate homicides. See Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. SOC. 139 (1980).

³⁵ As stated in *Gregg v. Georgia*, 428 U.S. 153, 185 (1976), "Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view."

³⁶ Jeffrey Reiman is an honorable exception. See Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115 (1985).

haps cannot be, I believe that capital punishment is likely to deter more than other punishments because people fear death more than anything else. They fear most death deliberately inflicted by law and scheduled by the courts. Whatever people fear most is likely to deter most. Hence, I believe that the threat of the death penalty may deter some murderers who otherwise might not have been deterred. And surely the death penalty is the only penalty that could deter prisoners already serving a life sentence and tempted to kill a guard, or offenders about to be arrested and facing a life sentence. Perhaps they will not be deterred. But they would certainly not be deterred by anything else. We owe all the protection we can give to law enforcers exposed to special risks.

Many murders are "crimes of passion" that, perhaps, cannot be deterred by any threat. Whether or not they can be would depend on the degree of passion; it is unlikely to be always so extreme as to make the person seized by it totally undeterrable. At any rate, offenders sentenced to death ordinarily are guilty of premeditated murder, felony murder, or multiple murders. Some are rape murderers, or hit men, but, to my knowledge, no one convicted of a "crime of passion" is on death row.³⁷ Whatever the motive, some prospective offenders are not deterrable at all, others are easily deterred, and most are in between. Even if only some murders were, or could be, deterred by capital punishment, it would be worthwhile.

Sometimes an anecdote, invented in the 19th Century, is told to suggest that the threat of the death penalty does not deter. Some pickpockets are said to have gone eagerly about their business in a crowd assembled to see one of them hang. We are not told what the level of their activity was, compared to the level in crowds of similar size assembled for different purposes. Thus, the anecdote merely shows that the death penalty does not deter some criminals. This never was contested.

Almost all convicted murderers try to avoid the death penalty by appeals for commutation to life imprisonment. However, a minuscule proportion of convicted murderers prefer execution. It is sometimes argued that they murdered for the sake of being executed, of committing suicide via execution.³⁸ More likely, they prefer execution to life imprisonment. Although shared by few, this preference is not irrational

³⁷ Of about 20,000 homicides committed annually in the United States, fewer than 300 lead to death sentences. Of the nearly 1400 persons on death row, fewer than 20 have been executed annually since the end of the moratorium on executions. At this rate, most death row residents will die of old age.

³⁸ H.L.A. Hart gives some credence to this hypothesis. See H. HART, PUNISHMENT AND RESPONSIBILITY 88 (1968).

per se. It is also possible that these convicts accept the verdict of the court, and feel that they deserve the death penalty for the crimes they committed, although the modern mind finds it hard to imagine such feelings. But not all murderers are ACLU humanists.

Because those sentenced to death tend to sedulously appeal the verdict of the trial courts, executions are correctly said to be costly.³⁹ It is doubtful, however, that they are more costly than life imprisonment. Contrary to widely shared assumptions, life prisoners spend much of their time preparing *habeas corpus* appeals (not to speak of other law suits) just as prisoners condemned to death do.⁴⁰ But even if execution were more costly than life imprisonment, it should not be abandoned if it is just. If unjust, execution should not occur, even if it were cheap and imprisonment costly. But execution probably is less costly than life imprisonment.

III. IS THE DEATH PENALTY MORAL?

A. Miscarriages

Miscarriages of justice are rare, but do occur. Over a long enough time they lead to the execution of some innocents.⁴¹ Does this make irrevocable punishments morally wrong? Hardly. Our government employs trucks. They run over innocent bystanders more frequently than courts sentence innocents to death. We do not give up trucks because the benefits they produce outweigh the harm, including the death of innocents. Many human activities, even quite trivial ones, foreseeably cause wrongful deaths. Courts may cause fewer wrongful deaths than golf. Whether one sees the benefit of doing justice by imposing capital punishment as moral, or as material, or both, it outweighs the loss of innocent lives through miscarriages, which are as unintended as traffic accidents.

³⁹ See, e.g., Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978).

⁴⁰ Often the marginal cost of appeals is erroneously compared to the average cost of imprisonment. See, e.g., Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555.

⁴¹ Life imprisonment avoids the problem of executing innocent persons to some extent. It can be revoked. But the convict also may die in prison before his innocence is discovered.

B. Vengeance

Some abolitionists feel that the motive for the death penalty is an un-Christian and unacceptable desire for vengeance. But though vengeance be the motive, it is not the purpose of the death penalty. Doing justice and deterring crime are the purposes, whatever the motive. Purpose (let alone effect) and motive are not the same.

The Lord is often quoted as saying "Vengeance is mine."⁴² He did not condemn vengeance. He merely reserved it to Himself — and to the government. For, in the same epistle He is also quoted as saying that the ruler is "the minister of God, a revenger, to execute wrath upon him that doeth evil."⁴³ The religious notion of hell indicates that the biblical God favored harsh and everlasting punishment for some.⁴⁴ However, particularly in a secular society, we cannot wait for the day of judgment to see murderers consigned to hell. Our courts must "execute wrath upon him that doeth evil" here and now.

C. Charity and Justice

Today many religious leaders oppose capital punishment. This is surprising, because there is no biblical warrant for their opposition. The Roman Catholic Church and most Protestant denominations traditionally have supported capital punishment. Why have their moral views changed? When sharing secular power, the churches clearly distinguished between justice, including penalization as deserved, a function of the secular power, and charity, which, according to religious doctrine, we should feel for all those who suffer for whatever reasons. Currently, religious leaders seem to conflate justice and charity, to conclude that the death penalty and, perhaps, all punishment, is wrong because uncharitable. Churches no longer share secular power. Perhaps bystanders are more ready to replace justice with charity than are those responsible for governing.

D. Human Dignity

Let me return to the morality of execution. Many abolitionists believe that capital punishment is "degrading to human dignity" and inconsistent with the "sanctity of life." Justice Brennan, concurring in

⁴² *Romans* 12:19.

⁴³ *Id.* 13:4.

⁴⁴ This did not make secular punishment unnecessary: throughout the Old Testament the death penalty is prescribed even for crimes which today seem minor.

Furman, stressed these phrases repeatedly.⁴⁵ He did not explain what he meant.

Why would execution degrade human dignity more than life imprisonment? One may prefer the latter; but it seems at least as degrading as execution. Philosophers, such as Immanuel Kant and G.F.W. Hegel, thought capital punishment indispensable to redeem, or restore, the human dignity of the executed.⁴⁶ Perhaps they were wrong. But they argued their case, whereas no one has explained why capital punishment degrades. Apparently those who argue that it does degrade dignity simply define the death penalty as degrading. If so, degradation (or dehumanization) merely is a disguised synonym for their disapproval. Assertion, reassertion, or definition, do not constitute evidence or argument, nor do they otherwise justify, or even explain, disapproval of capital punishment.

Writers, such as Albert Camus, have suggested that murderers have a miserable time waiting for execution and anticipating it.⁴⁷ I do not doubt that. But punishments are not meant to be pleasant. Other people suffer greatly waiting for the end, in hospitals, under circumstances

⁴⁵ “[T]he Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.” *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). “When we consider why [certain punishments] have been condemned, . . . we realize that the pain involved is not the only reason. The true significance of these punishments [that have been condemned] is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.” *Id.* at 272-73.

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause — that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.

Id. at 274. “Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity.” *Id.* at 290. “In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.” *Id.* at 291.

⁴⁶ G. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans. 1962); I. KANT, *THE PHILOSOPHY OF LAW: METAPHYSICAL PRINCIPLES OF THE SCIENCE OF RIGHT*, pt. II, 194-205 (W. Hastie, B.D. trans. 1887).

⁴⁷ In *Reflections on the Guillotine*, Camus stated that “[t]he parcel [the condemned person] is no longer subject to the laws of chance that hang over the living creature but to mechanical laws that allow him to foresee accurately the day of his beheading. . . . The Greeks, after all, were more humane with their hemlock.” A. CAMUS, *RESISTANCE, REBELLION AND DEATH* 175, 202 (1960).

that, I am afraid, are at least as degrading to their dignity as execution. These sufferers have not deserved their suffering by committing crimes, whereas murderers have. Yet, murderers suffer less on death row, unless their consciences bother them.

E. Lex Talionis

Some writers insist that the suffering the death penalty imposes on murderers exceeds the suffering of their victims. This is hard to determine, but probably true in some cases and not in other cases. However, the comparison is irrelevant. Murderers are punished, as are all offenders, not just for the suffering they caused their victims, but for the harm they do to society by making life insecure, by threatening everyone, and by requiring protective measures. Punishment, ultimately, is a vindication of the moral and legal order of society and not limited by the *Lex Talionis*, meant to limit private retaliation for harms originally regarded as private.

F. Sanctity of Life

We are enjoined by the Declaration of Independence to secure life. How can this best be achieved? The Constitution authorizes us to secure innocent life by taking the life of murderers, so that any one who deliberately wants to take an innocent life will know that he risks forfeiting his own. The framers did not think that taking the life of a murderer is inconsistent with the "sanctity of life" which Justice Brennan champions. He has not indicated why they were wrong.⁴⁸

G. Legalized Murder?

Ever since Cesare Bonesana, Marchese di Beccaria, wrote *Dei Delitti e Delle Pene*,⁴⁹ abolitionists have contended that executing murderers legitimizes murder by doing to the murderer what he did to his victim. Indeed, capital punishment retributes, or pays back the offender. Occasionally we do punish offenders by doing to them what they did to their victims. We may lock away a kidnapper who wrongfully locked away his victim, and we may kill the murderer who wrongfully killed his

⁴⁸ "Sanctity of life" may mean that we should not take, and should punish taking innocent life: "*homo homini res sacra*." In the past this meant that we should take the life of a murderer to secure innocent life, and stress its sacredness. Justice Brennan seems to mean that the life of the murderer should be sacred too — but no argument is given for this premise.

⁴⁹ C. BECCARIA, ON CRIMES AND PUNISHMENTS (H. Paolucci trans. 1963).

victim. To lawfully do to the offender what he unlawfully did to his victim in no way legitimizes his crime. It legitimizes (some) killing, and not murder. An act does not become a crime because of its physical character, which, indeed, it may share with the legal punishment, but because of its social, or, better, antisocial, character — because it is an unlawful act.

H. Severity

Is the death penalty too severe? It stands in a class by itself. But so does murder. Execution is irreparable. So is murder. In contrast, all other crimes and punishments are, at least partly or potentially, reparable. The death penalty thus is congruous with the moral and material gravity of the crime it punishes.⁵⁰

Still, is it repulsive? Torture, however well deserved, now is repulsive to us. But torture is an artifact. Death is not, since nature has placed us all under sentence of death. Capital punishment, in John Stuart Mills' phrase, only "hastens death" — which is what the murderer did to his victim. I find nothing repulsive in hastening the murderer's death, provided it be done in a nontorturous manner. Had he wished to be secure in his life, he could have avoided murder.

To believe that capital punishment is too severe for any act, one must believe that there can be no act horrible enough to deserve death.⁵¹ I find this belief difficult to understand. I should readily impose the death penalty on a Hitler or a Stalin, or on anyone who does what they did, albeit on a smaller scale.

CONCLUSION

The death penalty has become a major issue in public debate. This is somewhat puzzling, because quantitatively it is insignificant. Still, capital punishment has separated the voters as a whole from a small, but influential, abolitionist elite. There are, I believe, two reasons that ex-

⁵⁰ Capital punishment is not inconsistent with *Weems v. United States*, 217 U.S. 349 (1910), which merely held that punishment cannot be excessive, that is, out of proportion to the gravity of the crime. Indeed, if life imprisonment suffices for anything else, it cannot be appropriate for murder.

⁵¹ The notion of deserving is strictly moral, depending exclusively on our sense of justice, unlike the notion of deterrence, which depends on the expected factual consequences of punishment. Whilst deterrence alone would justify most of the punishments we should impose, it may not suffice to justify all those punishments that our sense of justice demands. Wherefore criminal justice must rest on desert as well as deterrence, to be seen as morally justified.

plain the prominence of the issue.

First, I think, there is a genuine ethical issue. Some philosophers believe that the right to life is equally imprescriptible for all, that the murderer has as much right to live as his victim. Others do not push egalitarianism that far. They believe that there is a vital difference, that one's right to live is lost when one intentionally takes an innocent life, that everyone has just the right to one life, his own. If he unlawfully takes that of another he, *eo ipso*, loses his own right to life.

Second, and perhaps as important, the death penalty has symbolic significance. Those who favor it believe that the major remedy for crime is punishment. Those who do not, in the main, believe that the remedy is anything but punishment. They look at the causes of crime and conflate them with compulsions, or with excuses, and refuse to blame. The majority of the people are less sophisticated, but perhaps they have better judgment. They believe that everyone who can understand the nature and effects of his acts is responsible for them, and should be blamed and punished, if he could know that what he did was wrong. Human beings are human because they can be held responsible, as animals cannot be. In that Kantian sense the death penalty is a symbolic affirmation of the humanity of both victim and murderer.