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# THE DEATH PENALTY AND THE WAY WE THINK NOW

R. George Wright\*

## I. INTRODUCTION

The death penalty is a matter of continuing fascination. Critics of the death penalty in contemporary American jurisprudence have claimed the inevitability of caprice and mistake<sup>1</sup> and have pointed to racial and other biases in the imposition of the death penalty.<sup>2</sup> Currently, the death penalty in principle seems acceptable to the Supreme Court<sup>3</sup> and to the general populace.<sup>4</sup>

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1. See generally CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981).

2. See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 (1998); John H. Blume et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771 (1998); John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153 (1998) (from a special issue on the ABA's proposed moratorium on the death penalty).

3. See, e.g., Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 84 (1997) (noting that the Supreme Court has sought, for more than two decades, to focus on narrower procedural issues of implementation or, at most, on the constitutionality of the death penalty as applied to particular classes of defendant, rather than to re-examine the basic constitutionality of the death penalty itself).

4. See, e.g., William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 78-81 (1994) (citing apparently broad popular acceptance of the death penalty, but arguing that "there is now solid evidence that the 'prevailing wisdom' of 'strong,' 'deep-seated' public support for the death penalty is mistaken," given the general public's preference for a range of alternative sentencing possibilities). For discussion, see Nancy Levit, *Expediting Death: Repressive Tol-*

The death penalty remains, however, controversial in many respects.<sup>5</sup>

This Article focuses on the questions that are most central to the basic moral justifiability of the death penalty in a society like our own. We will thus assume, heroically,<sup>6</sup> that the judicial process of deciding to impose the death penalty could somehow be made morally sound. Our concern will instead be for basic principle, rather than process. If the death penalty process were flawless, could the death penalty itself, under our social circumstances,<sup>7</sup> be morally objectionable?

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*erance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 70-72 (1990).

5. See, e.g., Walter Berns et al., *The Death Penalty: A Philosophical and Theological Perspective*, 30 J. MARSHALL L. REV. 463 (1997) (illustrating contrasting perspectives among the seven contributing panelists).

6. For critique of various aspects of the administration of the death penalty, see Stephen B. Bright, *Glimpses at a Dream Yet to Be Realized*, 22 CHAMPION 12 (1998) (discussing common inadequacies in the legal representation of capital defendants); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997) (documenting the actual operation of various means of execution in the context of the cruel and unusual punishment clause); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670 (1986) (discussing racial and other biases in the actual operation of the death penalty system, as distinct from the idealized version defended by many death penalty supporters); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2594-95 (1996) (stating that post-*Furman* rejection of sole reliance on either standards or discretion "has proven to be disastrous"). For a passionate debate over the Supreme Court's current jurisprudential tests, compare *Callins v. Collins*, 510 U.S. 1141 (1994) (Scalia, J., concurring in denial of certiorari); with *id.* at 1143, 1145 (Blackmun, J., dissenting from denial of certiorari and announcing "[f]rom this day forward, I no longer shall tinker with the machinery of death").

7. Among our relevant social circumstances, we shall assume, is an enormous economic surplus available for discretionary use, beyond mere subsistence. Thus we shall assume that criminal punishments other than death are not prohibitively expensive. We shall also assume the availability of advanced communication and other sorts of technologies in our discussion of the varieties of solitary confinement as alternatives to the death penalty. Finally, we shall assume that even if the death penalty is a better criminal deterrent than the best alternative punishments, the death penalty is not so dramatically superior in this respect as to make a crucial moral difference.

Whether the death penalty is a better criminal deterrent at all remains open to question. See, e.g., Greenberg, *supra* note 6, at 1675-80. For basic philosophical discussion of some deterrence issues, see MICHAEL DAVIS,

Ultimately, we will conclude that the death penalty is, under our social circumstances, not morally justifiable, even in principle. It is not difficult to build an argument that, on its own terms, concludes that we should reject the death penalty. The tricky part lies in accommodating the ways of thinking of an era that is losing its common understanding of the meaning of making a moral claim in the first place.<sup>8</sup> We could not, for example, simply announce that we have today intuitively grasped the unchanging Platonic form of justice, and that it is incompatible with the death penalty.<sup>9</sup> Such an argument would, to put it mildly, lack contemporary appeal.

Many of us are growing skeptical that claims about justice or morality can be genuinely true or false. If our culture consistently minimized the reality of moral claims in general, it would be difficult to morally rule out the death penalty in all cases. After all, a howling mob may, for example, actually gain more sheer utility from watching an execution than the convict, and anyone else, lose from the

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JUSTICE IN THE SHADOW OF DEATH: RETHINKING CAPITAL AND LESSER PUNISHMENTS chs. 1-2 (1996). In any event, most academics and citizens do not seem disposed to defend or reject the death penalty primarily over deterrence issues. Compare David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 538 (1991) (citing Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 965 (1985) (defending the death penalty "on grounds of justice alone")), with Henry Schwarzschild, *Reflections on Capital Punishment*, 25 ISRAEL L. REV. 505, 507 (1991) (rejecting the death penalty on moral grounds and noting that even if the death penalty "were demonstrably a uniquely effective deterrent to crime . . . the moral issue would not be differently resolved"). If the death penalty, as distinct from any other penalty, were actually somehow necessary to literally save the world, our minds might well change. However, we shall not assume this state of affairs to be among our current social circumstances.

8. For discussion of current metaethical controversies and uncertainties, see ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990); J. L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977); NICHOLAS RESCHER, *OBJECTIVITY: THE OBLIGATIONS OF IMPERSONAL REASON* (1997); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, 101 PHIL. REV. 115 (1992).

9. Cf. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 25 n.121 (noting that "[p]latonic forms' are no longer credibly sought" because "their content or accuracy cannot be tested") (citing Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978)).

punishment.<sup>10</sup> Sheer physical pleasure, as might be derived from watching an execution, is closer to being self-justifying than any sort of principled opposition to the death penalty. In a consistently morally skeptical world, it would be hard to rule out the death penalty.

Contemporary defenses of the death penalty, however, remain more ambitious than mere skeptical appeals to attitudes, group preferences, or to a balance of gratifications and frustrations. In particular, defenses of the death penalty typically assume that a criminal defendant can be genuinely responsible or blameworthy for his or her actions, and therefore, genuinely deserves a particular penalty<sup>11</sup> with

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10. This is, of course, a rather tricky sort of calculation, and is subject to all sorts of qualifications. For a vivid and reasonably plausible literary case, see VICTOR HUGO, *THE HUNCHBACK OF NOTRE DAME* 224-33 (Walter J. Cobb & Phyllis La Farge trans., Penguin Signet Classic ed. 1965) (describing the public legal punishment of Quasimodo).

11. While focusing on what the offender deserves does not thereby commit one to the death penalty, the most important defenses of the death penalty rely upon the idea of desert. Focusing on desert is typically crucial to the broad and popular family of retributive theories of punishment. For discussions of retributivism, see generally ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1993) (arguing just deserts as the most plausible theory of punishment); Max Atkinson, *Interpreting Retributive Claims*, 85 *ETHICS* 80, 83-84 (1974) (discussing desert of an evil return as one of three forms of retributivism); John G. Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238, 239 (1979) (arguing that desert theory is only one of nine distinct versions of retributivism); David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1623 (1992) (calling retributivism the "leading philosophical justification of the institution of criminal punishment"); Stephen P. Garvey, *"As the Gentle Rain From Heaven": Mercy in Capital Sentencing*, 81 *CORNELL L. REV.* 989, 1012 (1996) ("Retributivism holds that punishment is justified when it is deserved."); Jean Hampton, *Retribution and the Liberal State*, 5 *J. CONTEMP. LEGAL ISSUES* 117, 124 (1994) (citing three forms of retributivism, in all of which desert plays a crucial role); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1659 (1992) (developing an "expressive" theory of retribution); Jeremy Waldron, *Lex Talionis*, 34 *ARIZ. L. REV.* 25 (1992) (discussing punishment as relevantly similar to or matching the character of the offense). For commentary on Hampton and on the work of Jeffrie Murphy, see Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 *MICH. L. REV.* 1448 (1990). For commentary on von Hirsch in particular, see STEPHEN NATHANSON, *AN EYE FOR AN EYE?: THE MORALITY OF PUNISHING BY DEATH* 75-77 (1987); David M. Adams, *Fitting Punishment to Crime*, 15 *L. & PHIL.* 407 (1996); Barry Pollack, Note, *Deserts and Death: Limits on Maximum Punishment*, 44 *RUTGERS L. REV.* 985, 987 (1992) (adopting von Hirsch's des-

the uniquely appropriate penalty of death in some cases. There is no indication that when contemporary defenders of the death penalty speak of deserving a certain punishment, they skeptically refer only to attitudes, to mere group preferences, or to moral desert only as some sort of social construct that depends completely on our collective choice of goals in having a system of punishment.<sup>12</sup> There is thus not yet much of a morally skeptical, “beyond good and evil” flavor to the contemporary death penalty debate.

Instead, defenders of the death penalty continue to refer to moral desert as something real, and not infinitely subject to public manipulation.<sup>13</sup> The death penalty is still thought to be “really” morally right. Whatever inroads one form or another of moral skepticism have elsewhere made, they have yet to influence the basic normative debate over the death penalty. This may be merely a matter of the gradualism of the triumph of moral skepticism. At least as likely, however, is the possibility that in the context of the death penalty, no variety of moral skepticism is particularly appealing. Skepticism may seem less than fully satisfying when we must react to murder, genocide, or rape, or when we consider executing a particular person.

In any event, the contemporary death penalty debate clearly encourages non-skeptical basic moral argument. I will present below what I intend to be the least controversial argument that is still able to rule out the death penalty as a matter of moral principle. The idea

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ert framework). On retribution and capital punishment in particular, see, for example, Robert S. Gerstein, *Capital Punishment—“Cruel and Unusual”?: A Retributivist Response*, 85 ETHICS 75 (1974); Christopher Adams Thorn, Note, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199 (1983). For broader discussion of theories of punishment in general, see, for example, MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 88 (1997) (arguing that retributivism holds “that the moral desert of an offender is a *sufficient* reason to punish him or her”) (emphasis in original); THEORIES OF PUNISHMENT (Stanley E. Grupp ed., 1971); Paul Campos, *The Paradox of Punishment*, 1992 WIS. L. REV. 1931, 1931, 1935 (distinguishing between retributivist theories and consequentialist or utilitarian theories and raising the possibility that genuinely reciprocal punishment for unjust suffering might require not only just, but also unjust, suffering in return); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1 (1996) (emphasizing an approach to punishment as a communicative act).

12. See *infra* Part III.A.

13. See *infra* Part III.A.

thus is to steer between unnecessarily ambitious or otherwise controversial moral claims, and moral claims that are more broadly acceptable but that do not rule out the death penalty.

To briefly anticipate some of the arguments below, I hint at three significant points. First, by way of a “softening up” operation, I raise the possibility that the demands of moral desert, even for the worst murderers, may be as well satisfied by some forms of life imprisonment and solitary confinement as by the death penalty. In particular, once I expand the understanding of the range of possible life sentences and the nature of solitary confinement, the logical appropriateness of such sentences becomes evident. We can come to appreciate that such sentences may even amount to more severe punishments, in the degree and duration of pain and suffering intended and imposed, than the penalty of death. Thinking that punishments other than death must be less appropriate reflects a failure of the social imagination.

Second, even if we were to concede that in some cases, death is more deserved than any alternative sentence, the case for the death penalty would not thereby be made. Desert is often an important moral consideration, but it can and should be overridden in all contemporary death penalty cases by other moral considerations. We need not argue that the death penalty is ever undeserved, unfair, unjust, or violative of the defendant’s moral rights. We should not, by analogy, award a prize to the admittedly deserving winner of a race if the prize itself turns out to be needed to somehow prevent serious harm to another person—even to the loser of the race. The moral overridability of desert can involve punishment as well as reward, even though we ordinarily try to closely link sentencing to moral desert.

Third, and relatedly, we are committed to sketch one or more moral considerations, that operates in every case to limit the role of desert, such that it is never morally appropriate to impose the death penalty under contemporary circumstances. Since this is a “positive” element of the case against the death penalty, and because it will be useful to bear these positive considerations in mind, I will take up this task first. Importantly, I will focus on a number of common natural capacities shared by every person, no matter how evil, which

comprises the mens rea or state of mind required for conviction of any serious crime.

In particular, I will argue that deliberate murders require capacities such as sheer consciousness, a distinctive self-consciousness, a continuing personal identity, and perhaps even a standard sort of freedom of will by the defendant. These capacities are familiar and widely shared. I argue, however, that these capacities, embodied in unique, incomparable, and irreplaceable form in every rightly convicted defendant, are incomparably and irreplaceably valuable capacities, however wrongfully they may have been used. They are valuable not merely because of their unique embodiment and relation to the person, but because they are deeply, permanently, and inescapably mysterious in basic ways, entirely unlike anything else in the natural order.<sup>14</sup> Preservation of these unique values, I argue, overrides even the assumed desert or fairness of death, at least as long as other not substantially less appropriate punishments are available.

## II. MENS REA AS DEEP MYSTERY: SOME POSITIVE IMPLICATIONS OF THE CAPACITY FOR LEGAL GUILT

The death penalty might be thought appropriate for a broad or narrow range of crimes.<sup>15</sup> Respectable opinion, however, imposes a

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14. It is perhaps possible to argue that life itself is as deeply and inescapably mysterious as, say, the existence and nature of consciousness. We need not take a stand on this claim. In any event, it would be paradoxical, if not self-defeating, for the death penalty advocate to argue that because the lives of both the victim and the murderer were mysterious and deeply valuable, the life of the murderer should be extinguished as well. Of course, the hint of paradox is never far from the general claim that murderers in particular should be subject to execution. See, for example, the remarks of Judge Alex Kozinski in Alex Kozinski & Stephen Bright, *The Modern View of Capital Punishment*, 34 AM. CRIM. L. REV. 1353, 1355 (1997) (oral debate format). Judge Kozinski urges that "it is entirely appropriate for society to deem some acts so evil, to be so demeaning of human life, that we can say the perpetrator has forfeited his own life by committing them." *Id.* Precisely how a trial, conviction, and execution alchemically transforms the evil and demeaning act of an intentional killing by a presumably evil defendant into the opposite has never been fully explained. Nor, for that matter, has the language of "forfeiture" been explained in this context.

15. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (holding the death penalty inappropriate for rape of an adult woman); *Weems v. United States*, 217 U.S. 349, 371 (1910) (barring the death penalty for the crime of



state of mind requirement on eligibility for the death penalty.<sup>16</sup> Let us focus, merely for convenience, on the crime of murder. Surely, most contemporary death penalty cases are associated with one form or another of the crime of murder.<sup>17</sup> Whether it is constitutionally required or not,<sup>18</sup> the death sentence for murder clearly requires proof beyond a reasonable doubt<sup>19</sup> of a distinctive state of mind.<sup>20</sup>

The precise formulation of the mens rea required for a death sentence in a murder case varies slightly among jurisdictions. Those variations, however, and even the different kinds of murder convictions, are inconsequential for our purposes. Generally, premeditation or deliberation is held minimally necessary for first-degree murder, and consequently for the death penalty.<sup>21</sup> Premeditation has been

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robbery).

16. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137, 152-58 (1987) (holding that major participation in a felony combined with reckless indifference to human life satisfies the culpability requirement); *Enmund v. Florida*, 458 U.S. 782, 790-91 (1982) (requiring actors in a felony murder to have culpable mental states).

17. *See, e.g.*, *Coker*, 433 U.S. at 593-97 (discussing the historical context of the death penalty).

18. *See, e.g.*, *Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987); *see also Tison*, 481 U.S. at 156-57 (holding *mens rea* required by "common law and modern criminal codes").

19. *See, e.g.*, *Davis v. United States*, 160 U.S. 469, 484 (1895) (requiring proof beyond a reasonable doubt of required mental state in murder prosecution).

20. *See, e.g.*, authorities cited *supra* note 16.

21. *See, e.g.*, *People v. Cortez*, 18 Cal. 4th 1223, 1232, 960 P.2d 537, 542, 77 Cal. Rptr. 2d 733, 738 (1998) (defining premeditated and deliberate murder as murder in the first degree); *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998) (distinguishing premeditation as the essential difference between first and second-degree murder); *State v. Rousan*, 961 S.W.2d 831, 851-52 (Mo.) (en banc) (distinguishing unimpassioned premeditation or deliberation as the difference between first and second-degree murder), *cert. denied*, 524 U.S. 961 (1998); *State v. Owen*, 503 S.E.2d 426, 431 (N.C. Ct. App. 1998) (requiring malice for second-degree murder, but not premeditation and deliberation); *Commonwealth v. Brown*, 711 A.2d 444, 449 (Pa. 1998) (distinguishing deliberate and premeditated intent as required for first-degree murder); *Commonwealth v. Thomas*, 717 A.2d 468, 474 (Pa. 1998) (same); *Commonwealth v. Wayne*, 720 A.2d 456, 460 (Pa. 1998) (same); *Pender v. Angelone*, 514 S.E.2d 756, 757 (Va. 1999) (finding premeditation or a specific intent to kill as the element distinguishing first from second-degree murder). *But cf.* *State v. Lee*, 501 S.E.2d 334, 344 (N.C. 1998) (stating that the absence of premeditated or deliberate intent to kill is irrelevant to the particular offense of first-degree murder

held to require something akin to the thinking out of the prohibited act beforehand,<sup>22</sup> or, alternatively, something like the mental process of reflection,<sup>23</sup> weighing,<sup>24</sup> reasoning,<sup>25</sup> planning,<sup>26</sup> or consideration.<sup>27</sup> Premeditation, however, does not require extended brooding or prolonged reflection.<sup>28</sup> The required mental state of premeditation thus does not require any particular length of time,<sup>29</sup> and may even be nearly instantaneous.<sup>30</sup>

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by torture); *Stuckey v. Trent*, 505 S.E.2d 417, 421 (W. Va. 1998) (distinguishing three categories of first-degree murder, including murder by poisoning, lying in wait, imprisonment, or starvation; murder in the course of arson, rape, robbery, burglary, or the attempt thereof; and any deliberate and premeditated killing). Of course, the underlying felonies for felony murder may well have their own mens rea requirements. It is difficult to imagine any just conviction for felony murder of one incapable of conscious and free decision-making at the time of the offense.

22. See, e.g., *State v. Jones*, 467 S.E.2d 233, 234 (N.C. 1996) ("Premeditation means that the act was thought out beforehand for some length of time . . ."); *State v. Saleem*, 977 P.2d 921, 925 (Kan. 1999) (defining premeditation as thinking the matter over beforehand).

23. See *State v. Finch*, 975 P.2d 967, 992 (Wash. 1999) (en banc).

24. See *id.*

25. See *id.*; see also *State v. Burkins*, 973 P.2d 15, 22 (Wash. Ct. App. 1999).

26. See *State v. Warren*, 592 N.W.2d 440, 451 (Minn. 1999).

27. See *id.* The idea of malice aforethought is, of course, encountered frequently. See, e.g., *People v. Hart*, 20 Cal. 4th 546, 608, 976 P.2d 683, 721, 85 Cal. Rptr. 2d 132, 170 (1999) (linking deliberation and premeditation with malice aforethought); *Commonwealth v. Maldonado*, 709 N.E.2d 809, 813 (Mass. 1999).

28. See *State v. Knese*, 985 S.W.2d 759, 769 (Mo. 1999) (en banc), *cert. denied*, 119 S. Ct. 1814 (1999).

29. See *People v. Bolin*, 18 Cal. 4th 297, 332, 956 P.2d 374, 398, 75 Cal. Rptr. 2d 412, 436 (1998) (establishing test as one of extent, not duration), *cert. denied*, 119 S. Ct. 1146 (1999); *State v. Rousan*, 961 S.W.2d 831, 841 (Mo. 1998) (en banc) (indicating that some amount of time, however short, is required for deliberate reflection), *cert. denied*, 524 U.S. 961 (1998); *State v. Cintron*, 513 S.E.2d 794, 798 (N.C. Ct. App. 1999) (same).

30. See *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998) (stating that a virtually instantaneous formulation of a plan may suffice); *Thomas v. State*, 967 P.2d 1111, 1123 (Nev. 1998) (validating instantaneous premeditation), *cert. denied*, 68 U.S.L.W. 3224 (U.S. Oct. 4, 1999); *Commonwealth v. Hung Tan Vo*, 693 N.E.2d 1374, 1380 (Mass. 1998) (defining deliberate premeditation as excluding any action performed without thinking about and then deciding to do the action in question).

Deliberation is often distinguished only hazily, if at all, from premeditation.<sup>31</sup> Sometimes, deliberation is said to involve a particular form of premeditation.<sup>32</sup> In other cases, premeditation is said to involve deliberation.<sup>33</sup> Deliberation may also be described in colorful, if not rigorously empirical or otherwise precise terms.<sup>34</sup> But the precise definitions of deliberation and premeditation, however crucial in some death penalty cases, are a matter of indifference for our purposes. Any recognizable definition, and in turn any standard state of mind requirement for the death penalty, will suffice to make my point.

The point can be expressed in this way: to be minimally eligible for the death penalty, even the most villainous defendant's state of mind must be something that is literally astonishing in nature and inextricably linked to a general kind of mental capacity that is, in all of its diverse specific manifestations, of irreplaceable, indispensable, and ultimately overriding moral value.

However I characterize the criminal mens rea that will suffice for the death penalty to apply, some sort of mental consciousness, genuine self-awareness, and mental reasoning process, however evil the substantive choice, are inescapably required. This sort of

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31. See, e.g., *Bolin*, 18 Cal. 4th at 332, 956 P.2d at 398, 75 Cal. Rptr. 2d at 436 (seeking to distinguish, while linking, premeditation and deliberation); *State v. Thomas*, 514 S.E.2d 486, 505-06 (N.C. 1999) (seeking to distinguish among intent, malice, premeditation, and deliberation); *Commonwealth v. Wayne*, 720 A.2d 456, 465 (Pa. 1998) (treating premeditation and deliberation as separate elements, but failing to define the difference), *cert. denied*, 68 U.S.L.W. 3224 (U.S. Oct. 4, 1999).

32. See *Maldonado*, 709 N.E.2d at 813 (referring to deliberate premeditation); *Hung Tan Vo*, 693 N.E.2d at 1380 (same); *Rousan*, 961 S.W.2d at 841 (defining deliberation as unimpassioned premeditation).

33. See *State v. Finch*, 975 P.2d 967, 991-92 (Wash. 1999) (en banc), *cert. denied*, 68 U.S.L.W. 3232 (U.S. Oct. 4, 1999); *State v. Burkins*, 973 P.2d 15, 22 (Wash. Ct. App. 1999) (defining premeditation as "the deliberate formation of and reflection upon the intent to take a human life").

34. See, e.g., *State v. Jones*, 467 S.E.2d 233, 234 (N.C. 1996) (stating that "[d]eliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation") (quoting *State v. Conner*, 440 S.E.2d 826, 835-36 (N.C. 1994)). On one reading, deliberation is compatible with hot-bloodedness, as long as the hot-bloodedness bespeaks legally insufficient provocation.

consciousness is, in some sense, both widely shared and the most familiar sort of experience.<sup>35</sup> The intimate familiarity of consciousness unfortunately desensitizes its astonishing and deep mysteriousness.<sup>36</sup>

The same point may be made in any of a variety of terms, whether we refer to consciousness,<sup>37</sup> conscious reasoning,<sup>38</sup> decisionmaking and choice,<sup>39</sup> the continuity of the person,<sup>40</sup> inner life,<sup>41</sup> conscious experience,<sup>42</sup> subjectivity,<sup>43</sup> the mind,<sup>44</sup> mental states,<sup>45</sup> or

35. See, e.g., Steven Pinker, *Silicon Souls*, TIMES (London), Jan. 31, 1999, at 6, available in 1999 WL 7901308 (“[O]ur ‘own’ consciousness, the most obvious thing there is, may be for ever beyond our conceptual grasp.”).

36. See, e.g., DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 22 (1991) (“Consciousness stands alone today as a topic that often leaves even the most sophisticated thinkers tongue-tied and confused. And . . . there are many who insist—and hope—that there will never be a demystification of consciousness.”). As Professor Dennett reminds us, we should bear in mind the distinction between two important but separate issues: is it possible to successfully demystify consciousness, and if so, would that demystification ultimately lead to a society and the sorts of personal relationships that would be desirable? See *id.* at 22-25.

37. See, e.g., COLIN MCGINN, THE MYSTERIOUS FLAME 5 (1999) (“[T]he bond between the mind and the brain is a deep mystery. Moreover, it is an ultimate mystery, a mystery that human intelligence will never unravel.”). McGinn, however, views this unresolvability as philosophically uninteresting, in that he believes it to be merely an artifact of insuperable human cognitive limitations. See *id.* at 70. The idea that people are simply ill-equipped to understand consciousness can hardly be ruled out, but is no less dogmatic than any other highly speculative hypothesis. And there may remain a sense of paradox, as opposed to naturalness, associated with the outcome that people may be able to understand every interesting natural phenomenon except for consciousness.

38. See, e.g., DAVID HODGSON, THE MIND MATTERS: CONSCIOUSNESS AND CHOICE IN A QUANTUM WORLD 426 (1991). Quantum effects are often speculatively cited as potentially involved in conscious choice and free will. See David Hodgson, *Nonlocality, Local Indeterminism, and Consciousness*, 9 RATIO 1, 1 (1996); ROGER PENROSE, THE EMPEROR’S NEW MIND: CONCERNING COMPUTERS, MINDS, AND THE LAWS OF PHYSICS (1989).

39. See HODGSON, *supra* note 38, at 426.

40. See *id.*

41. See, e.g., MICHAEL LOCKWOOD, MIND, BRAIN AND THE QUANTUM 1 (1989); see also DAVID J. CHALMERS, THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY xi (1996) (referring to “a subjective inner life”).

42. See, e.g., David J. Chalmers, *The Puzzle of Conscious Experience* (last modified June 1999) <<http://ling.ucsc.edu/~chalmers/papers/puzzle.html>> (referring to “conscious experience”); THOMAS NAGEL, MORTAL QUESTIONS 166

conscious intelligence.<sup>46</sup> Whatever the precise focus, the deep and evidently permanent mystery remains.

One leading contemporary writer puts the matter in these terms: Consciousness is the biggest mystery. It may be the largest outstanding obstacle in our quest for a scientific understanding of the universe. . . . It still seems utterly mysterious that the causation of behavior should be accompanied by a subjective inner life. . . . How could a physical system such as a brain also be an *experiencer*? Why should there be *something it is like* to be such a system? Present-day scientific theories hardly touch the really difficult questions about consciousness. We do not just lack a detailed theory; we are entirely in the dark about how consciousness fits into the natural order.<sup>47</sup>

Or the matter may be put this way: "The very idea of consciousness materializing, of subjectivity being realized in the activity of a physical organism, is puzzling. The rich phenomenology of the conscious stream and complex neural phenomena appear to belong to two different orders: the subjective and the objective."<sup>48</sup> Or, more simply, "[t]he mystery is how. . . the construction of brains, of complicated collections of purely physical particles, gives rise to something apparently non-physical: thoughts, feelings, dreams, images and intentions."<sup>49</sup>

(1979) (same).

43. See, e.g., THOMAS NAGEL, THE VIEW FROM NOWHERE 7, 15 (1986).

44. See, e.g., *id.* at 16.

45. See, e.g., NAGEL, *supra* note 42, at 167.

46. See, e.g., PAUL M. CHURCHLAND, MATTER AND CONSCIOUSNESS 1 (rev. ed. 1998).

47. CHALMERS, *supra* note 41, at xi (emphasis in original). This is not to suggest that there is no mystery associated with ordinary physical objects, such as electrons, lumps of coal, or brains. Although we understand atoms or brains and brain activity much better today than we did a hundred years ago, it would be much more controversial to say that we understand mind itself or the nature of consciousness in a similarly progressive way. For the view that matter and mind are roughly equally mysterious, see Galen Strawson, *Little Gray Cells*, N.Y. TIMES, July 11, 1999, § 7, at 13 (reviewing COLIN MCGINN, THE MYSTERIOUS FLAME (1999)).

48. OWEN FLANAGAN, CONSCIOUSNESS RECONSIDERED xi (1992).

49. KEITH WARD, GOD, CHANCE & NECESSITY 147 (1996). Professor Ward, in fact, concludes that "[c]onsciousness is . . . a mystery that biology can

None of this suggests that we cannot make dramatic progress in understanding the many dimensions of consciousness. Consciousness may be thought of as perhaps conferring survival advantages,<sup>50</sup> as an “emergent property” of brain function,<sup>51</sup> as only scientifically axiomatic and not explainable,<sup>52</sup> or as analogous to some favored

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never solve . . .” *Id.*

50. See, e.g., JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 107 (1992) (“Consciousness gives us much greater powers of discrimination than [we would otherwise] have.”). *But cf.* GALEN STRAWSON, *FREEDOM AND BELIEF* 146 (1986) (noting the possibility of non-conscious behaviors, including randomization, that make prediction difficult). More broadly, Searle argues that consciousness is not genuinely separate from the relevant physical systems, and only “seems mysterious because we do not know how the system of neurophysiology/consciousness works, and an adequate knowledge of how it works would remove the mystery.” SEARLE, *supra*, at 102. *But cf.* MCGINN, *supra* note 37, at 81-82; RICHARD SWINBURNE, *THE EXISTENCE OF GOD* 173 (1979) (“[T]here are no scientific laws correlating the bodily and the mental, only correlations of too limited a scope to constitute laws.”). More broadly, see RICHARD SWINBURNE, *THE EVOLUTION OF THE SOUL* (rev. ed. 1997). Whether consciousness confers any significant survival advantages, and is in those terms therefore explainable, is entirely beside the point. The nature of consciousness itself remains utterly mysterious. Consider a very loose analogy. If people had natural teleportation powers, such that they could hurl predators aside, or if people could mentally generate protective force fields impenetrable by predators, they could easily account for the persistence of these traits through their survival value. However, an account of their survival value would not begin to explain how they can teleport objects or mentally generate force fields. The adaptiveness of these capacities explains their propagation, but hardly their nature, or how they operate.

51. Again, if the subjective mental phenomena were an emergent property of fully understood electrons, that would hardly dissolve the mystery of consciousness.

52. See, e.g., David J. Chalmers, *Facing Up to the Problem of Consciousness* (last modified June 1999) <<http://ling.ucsc.edu/~chalmers/papers/facing.html>> (taking conscious experience as itself fundamental). It is fair, and perhaps necessary, to take one or a few entities as explanatorily fundamental, and therefore themselves not subject to explanation. In this way, an ancient geometer might take the idea of an infinitesimal point as fundamental. People should be reluctant, however, to take what looks like the hardest, deepest, and most fascinating problem, and simply turn the phenomenon into an axiom. People should give up only on pseudo-problems, not problems apparently beyond our capacities. Or if they do give up on the apparently unsolvable, they should not reclassify it as neither solvable nor unsolvable, but as axiomatic. It is true, of course, that people do not criticize cosmologists for their inability to explain why there is something rather than nothing. But that is because the problem of existence-at-all is at least hard, or an interdisciplinary problem, not

model of a sophisticated technical apparatus or of information processing.<sup>53</sup> None of these perspectives, however valuable, cogently addresses or diminishes what is genuinely mysterious about consciousness. Nor is there any clear reason to believe that future scientific progress along various fronts will fundamentally change this state of affairs.<sup>54</sup>

Consciousness, it seems fair to say, is thus shared by every candidate eligible for the death penalty, and is both intimately familiar and deeply—apparently intractably—mysterious. But it must be admitted that not every puzzling phenomenon carries moral weight. That we cannot figure something out does not mean that it is morally valuable. It is unclear, for example, how a moving particle can seem to do without trajectories, or can exist in a mysterious “blur” or superposition of quantum possibilities that then resolves itself into a single state of affairs.<sup>55</sup> We do not, however, attach much moral weight to every particle that can exhibit this behavior. We would not grieve over the loss of a photon. Admittedly, mystery alone does not bestow moral weight.

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because it is an ill-formulated or muddled pseudo-problem.

53. It is currently attractive to account for even some of the mind's deepest mysteries through analogy to computers and computer software. For a skeptical view, see NAGEL, *supra* note 43, at 16 (“[C]urrent attempts to understand the mind by analogy with man-made computers . . . will be recognized as a gigantic waste of time.”). For perspective, see ANTHONY KENNY, *THE METAPHYSICS OF MIND* 107 (1989) (“We humans are always inclined to explain things we only imperfectly understand in terms of the most advanced technology of the age we live in.”).

54. See LOCKWOOD, *supra* note 41, at 1 (“One must avoid the mistake of thinking that this is simply a matter of scientists not yet knowing enough about how the brain functions, in physico-chemical terms. For it seems clear that more knowledge of the same general kind that neuroscience currently offers could not—in principle could not—shed any further light on the fundamental problem that consciousness raises.”). Of course, one important further mystery is whether consciousness somehow survives death. It is certainly possible to argue that consciousness survives death in some way, so that consciousness in its known form is all that is lost by execution. No position need be taken on this issue, as it would seem that any official state reliance on an afterlife would raise serious establishment clause problems.

55. For a discussion of these and other issues, see NICK HERBERT, *QUANTUM REALITY: BEYOND THE NEW PHYSICS* (1985); R. George Wright, *Should the Law Reflect the World?: Lessons For Legal Theory From Quantum Mechanics*, 18 FLA. ST. U. L. REV. 855 (1990) (exploring the linkage between quantum mechanics and contemporary legal theory).

Consciousness, however, is not just deeply mysterious. It is largely constitutive of who we are, as distinctive individuals and as moral persons in general. It is crucial to all what we do that is of any moral status. Without it, we are amoral complex robots. Further, the mystery of consciousness contains the even deeper mystery of self-consciousness. Our consciousness is, in part, a consciousness of our own subjective inner life.<sup>56</sup> Consciousness can exist without self-consciousness;<sup>57</sup> it is self-consciousness that actually deepens the mystery, and links the mystery directly to our very identity and to our continuing, existing personhood and moral personality.

Consider the subtle distinctions drawn by the philosopher Galen Strawson. Strawson observes that when we refer to genuine self-consciousness, we do not refer merely to "consciousness of something that is in fact oneself."<sup>58</sup> A dog observing its paw or a kitten chasing its tail may meet the latter definition, but Strawson calls this mere "mental reflexivity"<sup>59</sup> as opposed to genuine self-consciousness.<sup>60</sup> The kitten, according to Strawson, is conscious of something that is—belongs to, or is part of—itself, but is supposedly not conscious of the fact that what it is conscious of is in fact itself.<sup>61</sup> The kitten in some limited way apprehends what is in fact itself, but does not appreciate that which it apprehends is indeed itself.<sup>62</sup>

Strawson concludes that persons, in contrast—presumably including death row inmates—have this deeper capacity for genuine self-consciousness.<sup>63</sup> And from here, the level of mystery deepens yet again. Strawson argues that it is this capacity for

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56. See, e.g., LOCKWOOD, *supra* note 41, at 1 (commenting on the extraordinary capacity of the brain to sustain an "innerlife").

57. See, e.g., STRAWSON, *supra* note 50, at 146-47.

58. *Id.* at 146.

59. *Id.*

60. See *id.* at 146-47.

61. See *id.* at 146.

62. See *id.* Holding other animals to lower or no moral standards implies essentially nothing about how benevolently any species of animal must be treated, or how much the continued existence of a species is worth. See also TOM REGAN, ANIMAL RIGHTS AND HUMAN OBLIGATIONS (2d ed. 1989) (discussing the ethics of human treatment of non-human animals); PETER SINGER, ANIMAL LIBERATION (1977) (discussing the tyranny of human over non-human animals).

63. See STRAWSON, *supra* note 50, at 147.



self-consciousness that is central to the claim, however ultimately sound or mistaken, that we are capable of acting as free agents, by means of free and responsible deliberation and choice, or free will.<sup>64</sup>

More broadly, the mystery of consciousness may be linked to the deeply mysterious and often quite highly valued capacity for freedom of the will. As one contemporary philosopher has put it: "brain-type arrangements of elementary particles *do* give rise to some rather extraordinary phenomena, most notably, *conscious experience*; thus it doesn't seem to me at all implausible to suppose that they give rise to undetermined and appropriately non-random [i.e., freely-willed] decisions."<sup>65</sup>

Obviously, the existence and nature of free will are philosophically controversial.<sup>66</sup> But this does not mean that every question associated with free will must be equally controversial. We may, for example, posit a view of what life and society would eventually be like if we believed free will not to exist.<sup>67</sup> And as a practical matter, we are apparently still willing to ascribe free will to most persons accused of serious crimes, including murders.<sup>68</sup> A criminal defendant

64. See *id.*; see also ROBERT KANE, *THE SIGNIFICANCE OF FREE WILL* 148 (1996) ("[H]ow can thoughts, sensations, perceptions, or any other conscious events—including efforts of will and choices—be at the same time physical processes of the brain? This is a problem whether you are a compatibilist or incompatibilist [on free will and determinism] or whether you think brain processes are determined or not."); TED HONDERICH, *HOW FREE ARE YOU?: THE DETERMINISM PROBLEM* 19 ("The question of the mind-brain connection is about the best and hardest one in the philosophy of mind. . . . It is also one question at the centre of determinism and freedom.").

65. Mark Balaguer, *Libertarianism As a Scientifically Respectable View*, 93 *PHIL. STUD.* 189, 203 (1999).

66. See, e.g., RICHARD DOUBLE, *THE NON-REALITY OF FREE WILL* (1991); TED HONDERICH, *A THEORY OF DETERMINISM: THE MIND, NEUROSCIENCE, AND LIFE-HOPES* (1988); KANE, *supra* note 64; PETER VAN INWAGEN, *AN ESSAY ON FREE WILL* (1986).

67. See, e.g., STRAWSON, *supra* note 50, at 219 n.22.

68. See, e.g., John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 *STAN. L. REV.* 1011, 1025 (1993) ("The criminal law depends on a belief in free will."); Joseph D. Grano, *Ascertaining the Truth*, 77 *CORNELL L. REV.* 1061, 1063 (1992) ("[C]riminal law is premised on a foundation of individual free will and responsibility."); Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 *U. PA. L. REV.* 615, 615 (1988) ("[T]he general presumption in the criminal law is that behavior is a consequence of free will."); Meir Dan-Cohen, *Responsibility and the Bounda-*

who does not establish insanity, duress, or other relevant excuse or mitigating factor will be credited with the capacity for free will.<sup>69</sup> Whatever philosophic doubts we may have about free will do not extend to murder defendants who cannot show an individualized impairment.<sup>70</sup>

But the free will we recognize in all convicted capital defendants is not just deeply mysterious and deeply personal, but of immense moral value. Pico della Mirandola eloquently argued in this regard that the nature of all other creatures is externally defined and imposed,<sup>71</sup> but by virtue of free will, human nature is not thus limited and imposed, and may be shaped by persons themselves.<sup>72</sup> Persons are thus, because of their free will, uniquely able to transcend their nature and their subjection to nature. Persons may retain this capacity even if they exercise that capacity in the most reprehensible way.

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*ries of the Self*, 105 HARV. L. REV. 959, 1003 (1992) (discussing mens rea and criminal excuses as approaching the Kantian model of unencumbered rational free will); Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts On Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193, 196-98 (1997); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1109 (1985). The leading death penalty theorist, Immanuel Kant, stated that “[t]he human will is an *arbitrium liberum* in that it is not determined by stimuli, but the animal will is an *arbitrium brutum* and not *liberum* because it can be determined *per stimulus*.” IMMANUEL KANT, LECTURES ON ETHICS 28 (Louis Infield trans., Torchbook ed., Harper & Row 1963) (1930).

69. See sources cited *supra* note 68 and accompanying text.

70. Consider Professor Herbert Packer’s view that the criminal justice system in this respect exhibits more short-term pragmatic appeal than deep logical consistency or fairness: “[T]he law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.” HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968). Ultimately, we trust that any legal system that insists on morally blaming and stigmatizing convicted defendants, including capital defendants, while no longer believing in the existence of the logical requisites of just that sort of blame and stigma, will prove unstable. Ultimately, the idea of holding persons blameworthy because it is merely pragmatically convenient to do so will not suffice. Either we will re-embrace a serious version of free will and moral responsibility, or we will embrace a more thorough pragmatism and drop the pretense of blaming defendants. The eventual fate of capital punishment, interestingly, is uncertain under either alternative.

71. See GIOVANNI PICO DELLA MIRANDOLA, *ORATION ON THE DIGNITY OF MAN* 7 (A. Robert Caponigri trans., 1956).

72. See *id.*

Things might have been otherwise, in imagination if not in reality. Free will may be an illusion. We may be, or at least might have been, "marionettes moved by the causes at the other ends of the strings."<sup>73</sup> Of course, if we are puppets, we are unusually complex puppets, whose behavior is sometimes quite difficult to predict. Our "software" is immensely sophisticated.<sup>74</sup> But a complex puppet is still nothing more than a puppet. The fact that much of our programming is inconspicuous and under our skin, rather than in a separate centralized mainframe, is of no deep philosophical significance. Hand puppets are no more interesting, and ultimately no more valuable, than marionettes.<sup>75</sup>

The possession of genuine free will, as is currently assumed in the case of every defendant condemned to death, is of dramatic moral significance.<sup>76</sup> The moral significance of having free will may be even greater than previously suggested. It may well be that there can be no genuine morality at all, involving moral praise, blame, and genuine moral responsibility, as opposed to a manipulative system of incentives for favored and disfavored behavior, in the absence of free will.<sup>77</sup> Free will may ultimately be necessary for genuine creativity, genuine self-worth, genuine individuality, and other crucial

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73. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 310 (1981).

74. *See id.*

75. *See id.*

76. The dispute between compatibilism and incompatibilism need not be reached, however. Compatibilism comes in many versions, but accepting those versions that recognize genuine freedom of the will does not necessarily conflict with holding that such freedom of the will is compatible with causal determinism. *See, e.g.,* Richard Foley, *Compatibilism*, 87 *MIND* 421 (1978); Alison McIntyre, *Compatibilists Could Have Done Otherwise: Responsibility and Negative Agency*, 103 *PHIL. REV.* 453 (1994); Michael S. Moore, *Causation and the Excuses*, 73 *CAL. L. REV.* 1091, 1129-32 (1985); Stephen J. Morse, *Brain and Blame*, 84 *GEO. L.J.* 527 (1996). Compatibilism is intended to avoid some of the apparent incoherencies of the non-deterministic, libertarian position in a largely causal world, but in practice it may be no easier to coherently state a genuinely compatibilist view than a purely libertarian view. There is a tendency for some compatibilists to resolve theoretical tensions by maintaining the terminology of free will, while abandoning genuine free will in substance. Nevertheless, libertarians and genuine compatibilists both ordinarily attribute valuable free will to rightly convicted capital defendants.

77. *See, e.g.,* STRAWSON, *supra* note 50, at 219 n.22; PETER VAN INWAGEN, *METAPHYSICS* 198 (1993); R. GEORGE WRIGHT, *DOES THE LAW MORALLY BIND THE POOR?* 90-101 (1996).

dimensions of human experience.<sup>78</sup> Free will may be crucial to any real sense in which a person can make a real moral difference. The very capacity for free will, as distinct from freely choosing to act rightly, may even be, according to some, of cosmic significance.<sup>79</sup>

The immense moral value and status of consciousness, self-consciousness, and the sort of free will attributed to convicted capital defendants have long been appreciated outside the death penalty context. Aristotle, for example, attaches enormous significance to the capacity to reason, or to initiate chains of reasoned thought.<sup>80</sup> In fact, the highest form of such activity, which Aristotle calls contemplation, is thought as literally divine.<sup>81</sup> As one commentator explains, “[s]ince intuitive reason is in man and God is intuitive reason there is a divine element in man . . . .”<sup>82</sup> This element is thought to be genuinely divine, and not divine only by some loose analogy.<sup>83</sup> This capacity is present in all persons.<sup>84</sup> Elsewhere, Aristotle argues

78. See RICHARD DOUBLE, *METAPHILOSOPHY AND FREE WILL* 160 (1996) (discussing ROBERT KANE, *THE SIGNIFICANCE OF FREE WILL* (1996)). It is useful to insert the qualifier of “genuine” in this context, in an attempt to forestall the practice of abandoning the substance of a concept while retaining the familiar label, and bestowing the label on some radically watered-down phenomenon. In some extremely loose sense, one might “blame” or “hold responsible” a complex mechanical robot for some unattractive activity.

79. The existence and immense value of free will is a crucial response to the claim that a benevolent and omnipotent God would not permit as much suffering as actually observed. See, e.g., Alvin Plantinga, *God, Evil, and the Metaphysics of Freedom*, in *THE EVIDENTIAL ARGUMENT FROM EVIL* 69, 85 (Daniel Howard-Snyder ed., 1996). For our purposes, it is worth noting that a sort of “rubber-room” freedom, in which one is free to choose only from among harmless or benevolent, as opposed to both benevolent and criminal acts, would be less serious, less dignified, and less valuable. This is, of course, not to suggest that a society should not do all it reasonably and morally can to reduce the incidence of homicides, consistent with properly valuing free will. This would be one proper application of free will.

80. See ARISTOTLE, *NICOMACHEAN ETHICS* Book I, 1098a1-6, at 16-17 (Martin Oswald trans., Macmillan Publishing Co. 1962).

81. See *id.* at Book X, 1177b28-1178a3, at 330-31.

82. J.O. URMSON, *ARISTOTLE’S ETHICS* 122 (1988).

83. See *id.* (“[T]here is in us a divine element, not something resembling it.”); see also A.E. TAYLOR, *ARISTOTLE* 99 (rev. ed., 1955) (1919); SARAH BROADIE, *ETHICS WITH ARISTOTLE* 415 (1991).

84. See URMSON, *supra* note 82, at 122 (“Because the divine is not spatially located it is able to be present in all men.”). This is not to suggest that Aristotle was an egalitarian. One must keep in mind that the *mens rea* required of a

in addition that “[m]ind is then of one kind in virtue of its becoming everything . . . .”<sup>85</sup> This also suggests the immense moral status of mind in action.

Aristotle, of course, is not alone in his valuation of the free and deliberative self-consciousness.<sup>86</sup> Aristotle himself drew upon

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capital defendant is, in a real sense, genuinely remarkable. It is possible to argue that it is the same shared divine element that is in all of us, and that this homogeneous divine element in some fashion survives the execution of the defendant. Under this approach, executing a convicted criminal would, in this respect, be no great loss. The law, however, does not rely on an afterlife of the soul. Nor does the law treat persons, or convicted criminals, as merely fungible mutual substitutes, or as merely participating jointly in a single shared mind. Especially in death penalty cases, the law is sensitive to the distinctive individuality of the person and to the uniqueness of personal circumstance. *See, e.g.,* Jones v. United States, 119 S. Ct. 2090, 2097 n.4 (1999); Buchanan v. Angelone, 522 U.S. 269, 275-79 (1998); Romano v. Oklahoma, 512 U.S. 1, 6-7 (1994); McCleskey v. Kemp, 481 U.S. 279, 304-06 (1987). Nor would a criminal defendant be allowed to offer an excuse that denies the unique, individual value of the victim in the case. *See Jones*, 19 S. Ct. at 2105-2108. The prosecution or the defense is not generally permitted to argue that the survival of any person compensates for or negates the death of another. *Cf.* David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. REV. 645, 669-73 (1999) (discussing what prosecutors may introduce into evidence and how to counter a defendant’s mitigating factors).

It may be that it is morally better to save many persons than to save few, or that one innocent person should die rather than let an entire civilization perish. None of this, however, establishes that the value of the capacity for conscious and deliberate free choice is fungible, replaceable, commensurable, or less than unique. If the consciousness of individual victims are non-fungible—and we seem to believe so—the individual consciousness of their murderers are equally so. Indeed, we even treat inanimate artworks as uniquely valuable, irreplaceable, and non-fungible in this sense. If a vandal destroys a Renoir, we do not conclude that the loss is only modest, on the grounds that there are plenty of other pieces of valuable art still in existence, or that there are other Renoirs. Both a murder and an execution involve the loss, in the same sense, of an irreplaceable world. One cannot justify either an unauthorized or state-authorized intentional killing on the grounds that many different kinds of conscious, free persons remain alive.

85. ARISTOTLE, ON THE SOUL 430a14-16, at 171 (W.S. Hett trans., rev. ed. 1957). Admittedly, this observation may refer more directly to the mind in general, as opposed to the unique minds of unique individuals. The logic of the plasticity and creativity of mind applies clearly, and occasionally spectacularly, to each individual mind.

86. This essay takes no position on the moral status of animals who lack self-consciousness or the capacity to deliberate freely. There are, of course, strong, separate, and independent reasons for not killing such animals or sub-

Plato's dramatic claim that "the soul of every man [and woman] does possess the power of learning the truth and the organ to see it with."<sup>87</sup> Following Aristotle closely, Augustine later argues that "the soul of a beast is nobler than that . . . which only exists without living or understanding. Again, that which includes existence, life, and understanding, such as the rational mind of man, is nobler still."<sup>88</sup>

For Thomas Aquinas, following Aristotle, that all persons have dignity, or non-dependent worth,<sup>89</sup> stems not only from our existence at the level of stars or planets, and plants and lions, but as well as from our unique ability to exercise rational choice in action.<sup>90</sup> We grasp this intrinsic worth in every person's being.<sup>91</sup> Later, Pascal similarly observes that "[a]ll bodies, the firmament, the stars, the earth and its kingdoms are not worth the least of minds, for it knows them all and itself too, while bodies know nothing."<sup>92</sup> This tradition continues through the great Humanists,<sup>93</sup> and on up to the present day.<sup>94</sup>

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jecting them to pain and suffering. *See, e.g.*, TOM REGAN & PETER SINGER, *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* (2d ed. 1989); PETER SINGER, *ANIMAL LIBERATION* (1977); *see also* authorities cited *supra* note 62.

87. PLATO, *THE REPUBLIC* Book VIII, at 232 (Francis M. Cornford trans., 1941) (1974) (making this statement in the context of the Allegory of the Cave).

88. ST. AUGUSTINE, *THE PROBLEM OF FREE CHOICE* Book II, 6.13, at 91 (Dom Mark Pontifex trans., 1955). For the disclaimer regarding the status of animals in general, *see supra* note 86.

89. *See* JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 179 (Oxford Univ. Press 1998).

90. *See id.*

91. *See id.* at 180.

92. PASCAL, *PENSÉES* 125 (A.J. Krailsheimer trans., 1966).

93. *See, e.g.*, WILLIAM SHAKESPEARE, *HAMLET* 1604, *reprinted in* THE COMPLETE WORKS 750 (Stanley Wells et al. eds., Oxford Univ. Press 1986) ("[W]hat a piece of work is a man! How noble in reason, how infinite in faculty . . . in apprehension how like a god . . ."); *see also* MIRANDOLA, *supra* note 71, at 7. For an illuminating contrast, *see* FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* 59 (Constance Garnett trans., 1981) (1866) ("[B]esides, what value has the life of that sickly, stupid, ill-natured old woman in the balance of existence? No more than the life of a louse, of a black-beetle, less in fact because the old woman is doing harm. She is wearing out the lives of others . . . . Of course she does not deserve to live, remarked the officer . . .").

94. Professor Jonathan Glover quotes George Orwell with the remarkable dictum: "[O]ne mind less, one world less." JONATHAN GLOVER, *CAUSING DEATH AND SAVING LIVES* 228 (1977). In particular, we note how Orwell's

### III. THE CENTRAL ARGUMENTS FOR THE DEATH PENALTY

#### A. *Past and Present Thomistic Natural Law Theory*

The great theorists of human dignity or the value of conscious mind have not doubted the death penalty's moral status. Thomas Aquinas, for example, forthrightly endorses the death penalty under broad circumstances. Aquinas argues along the following lines:

Now every individual person is compared to the whole community, as part to whole. Therefore if a man is dangerous and infectious to the [other members], on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since a little leaven corrupted the whole lump.<sup>95</sup>

Aquinas explains that:

By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and he falls into the slavish state of the beasts, to be disposed of according as he is useful to others. . . . Hence, although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast. For a bad man is worse than a beast, and is more harmful. . . .<sup>96</sup>

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formulation undercuts any sense that either the life of a murder victim, or the life of a murder defendant, is somehow fungible or subject to replacement by any life equally as good. For further appreciation of the unique, irreplaceable value of each human personality, see FINNIS, *supra* note 89, at 178 (explaining the importance of human *psyche* and soul); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501, 1515-16 (1981). As food for thought, consider the hypothetical case raised in ROBERT KANE, *THROUGH THE MORAL MAZE: SEARCHING FOR ABSOLUTE VALUES IN A PLURALISTIC WORLD* 75-77 (1994); see also R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1400 (1995).

95. THOMAS AQUINAS, *SUMMA THEOLOGICA II* (Fathers of the English Dominican Province trans., 1929), reprinted in FRANCISCO DE VITORIA, *REFLECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE II-II* q. 64, 240 (John P. Doyle trans., 1997).

96. *Id.* at 240-41.

In our cultural context, it is difficult to see these arguments as either consistent with Aquinas's own major principles or as a convincing moral justification for the death penalty. The assumedly dangerous and infectious murderer, for example, could today be affordably placed into partial or virtually total isolation, temporarily or permanently, and be publicly denounced, if not subjected to corporal punishment, all falling short of the death penalty. Death is thus simply not necessary for Aquinas's cited purpose, even if we assume that executing someone ends his harmful social influence.

The Thomistic argument that a sinful and presumably illegal act reduces the defendant to the level of a beast fares no better. Some of the most obvious death penalty cases—such as treason resulting in the death of one's comrades—are not particularly bestial. More importantly, however, there is an obvious and inescapable tension between the claim that the worst murders cause the forfeiture of human dignity and a descent to the beasts on the one hand, and a stringent mens rea requirement for the death penalty on the other.<sup>97</sup>

To say that the defendant, at the time of the offense, was operating at a sub-human, animalistic level,<sup>98</sup> and yet engaged in premeditation and deliberation or malice aforethought is to indulge in patent self-contradiction. Aquinas did not mean that murders cannot be rationally planned in a way incapable to beasts. Nor can he mean that a condemnee who has supposedly reduced himself to the sub-rational level of mere beast could be treated in any socially useful way, as for food consumption.<sup>99</sup>

Doubtlessly, a truly evil person is morally worse than the most destructive beast. A mob enforcer who sets fire to an uncooperative business place is quite worse than a cow that starts a fire resulting in the same damage. The cow cannot, presumably, be morally bad at all, unlike the arsonist. The arsonist has freely and rationally exercised his powers of deliberation and choice for immoral ends. He can be morally worse than the beast because he possesses capacities, for good or evil, which exalt him far above the beast. This only starts, rather than ends, the death penalty debate.

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97. See *supra* notes 19-34 and accompanying text.

98. See FINNIS, *supra* note 89, at 280-81.

99. For further critique of Aquinas's position, see *id.* at 281-84.



However generously interpreted, Aquinas's attempt to find a rational and moral justification of the death penalty fails. But some, though hardly all,<sup>100</sup> of Aquinas's contemporary admirers adhere to something similar to a Thomistic defense of capital punishment under limited circumstances.<sup>101</sup> Much of the debate among contemporary Thomists on the moral status of capital punishment, however, focuses on the special problem of interpreting the Thomistic doctrine of an action's possible "double effect."<sup>102</sup>

In particular, this further Thomistic-inspired debate focuses on whether imposing the death penalty involves intentionally killing the condemnee as an instrumental means to further retributive justice, or whether instead the execution simply manifests retributive justice.<sup>103</sup> The death penalty would presumably be permissible only under the second description, and not under the first, with the common ground being that the death penalty would always be wrong if it amounted to taking a life only as a means to some desirable end.<sup>104</sup>

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100. See, e.g., Germain Grisez, *Toward a Consistent Natural-Law Ethics of Killing*, 15 AM. J. JURIS. 64, 67-70 (1970).

101. See, e.g., JOHN FINNIS, FUNDAMENTALS OF ETHICS 126-33 (1983). For a statement regarding this dispute among contemporary Thomists, see JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 317 (1987).

102. See AQUINAS, *supra* note 95, art. 7, at 248. Aquinas holds that: "[N]othing hinders one act from having two effects, only one of which is intended [whether as an end or as a means], while the other is beside the intention." *Id.* The intended effect, and not the unintended effect, however well foreseen or even certain and inevitable, is what generally gives the act its primary moral character. See *id.* In particular, "the act of self-defence may have two effects, one is the [presumably intended and legitimizing] saving of one's life, the other is the [arguably somehow unintended if quite predictable] slaying of the aggressor." *Id.* The legitimacy of this act of self-defense is also subject to a further test of "proportionality," which often refers to something like an act's moral legitimacy in all other relevant respects, rather than to any sort of utilitarian balance of pains and pleasures. For further discussion of the principle of double effect, see Joseph M. Boyle, Jr., *Toward an Understanding of the Principle of Double Effect*, 90 ETHICS 527 (1980); Nancy Davis, *The Doctrine of Double Effect: Problems of Interpretation*, 65 PAC. PHIL. Q. 107 (1984); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334 (1989); Suzanne M. Uniacke, *The Doctrine of Double Effect*, 48 THOMIST 188 (1984).

103. See FINNIS, ET AL., *supra* note 101, at 317; see also FINNIS, *supra* note 89, at 279-80 (discussing the use of the death penalty as manifestation of retributivist justice).

104. See FINNIS, ET AL., *supra* note 101, at 317. The Thomists are thus

Assume that capital punishment can be inflicted for reasons apart from its usefulness as a means of, for example, deterring future crime, or communicating some message to the community. The state might believe, as does Professor John Finnis,<sup>105</sup> that the death penalty is intended as simply an act of retributive justice that responds justly to a prior criminal act. The death penalty is thus a self-contained act or at most one that looks backward toward the criminal's act, and not forward toward achieving some future goal. The death penalty could therefore in itself establish or implement justice.<sup>106</sup>

There is, however, a basic problem with this approach to justifying the death penalty. Whether or not this approach violates the principle of double effect is perhaps difficult to decide, but is really of little consequence. The basic problem instead is that it is deeply question-begging. To say, as Professor Finnis does, that the death penalty may, in some cases, bring or restore retributive justice is simply a controversial moral conclusion. It is not itself a moral justification or even a moral argument for the death penalty.

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united in opposing the death penalty as a means of gratifying public frustration, or sending a message, or generally deterring future criminal acts. All of these rationales would involve the state in directly attacking the fundamental good of life as a means to some further end, whatever the moral character of that desired further end.

105. See JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 128-33 (1983). *But see* FINNIS, *supra* note 89, at 282, 293 n.C (rejecting the argument that modern capital punishment can be seen as the direct instantiation of the good of justice rather than the choice of an immoral means to a good end).

106. See FINNIS, *supra* note 105, at 129-30. Gerard V. Bradley argues that premodern societies might differ from our own, in that premodern societies might intend only their own defense from grave danger in executing a criminal, given the absence of any other adequate means of societal self-protection. See GERARD V. BRADLEY, *NO INTENTIONAL KILLING WHATSOEVER: THE CASE OF CAPITAL PUNISHMENT*, in *NATURAL LAW AND MORAL INQUIRY* 155, 168 (Robert P. George ed., 1998). In passing, we should note the potential for broad abuse in the double effect principle's allowance for this redescription of intention. Few murderers care about the death of their victim, as opposed to some lawful aim which, for reasons beyond the murderer's control, might not be achievable by any means short of actually killing the victim. We cannot allow M to say that in murdering V, he intended only to put a sure and permanent stop to V's nagging by the only effective means available, and did not also intend V's death, however much he may have foreseen V's inevitable demise. Any regret on M's part or any disproportionality of M's act, is irrelevant to this point.

We can thus respond to Finnis by saying, for example, that the death penalty does not restore justice of any sort, because we happen to think that it is unjust in the same respect that Finnis thinks it is just. Or we can say that even if the death penalty can be retributively just, it is nonetheless immoral in some overridingly important way. Of course, to say that the death penalty is unjust or immoral hardly shows that it really is unjust or immoral. But Finnis's crucial question-begging is thereby at least made clear. Both Finnis and the opponent of the death penalty must offer responsive arguments as to how capital punishment is or is not immoral. For current purposes, the upshot is that Professor Finnis cannot merely announce that the death penalty establishes justice, without addressing the reasons why it might instead be morally impermissible in all cases.

### B. Kant and Hegel on the Death Penalty

The historical death penalty advocate with the greatest contemporary influence is probably Immanuel Kant.<sup>107</sup> This does not mean that the thrust of Kant's defense of capital or other forms of punishment is particularly clear.<sup>108</sup> Kant's defense of capital punishment is

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107. Much of Kant's moral, political, and legal philosophy could be said to bear indirectly on the logic and justification of the death penalty, but the single most directly relevant source is IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 140-45 (Mary Gregor trans., 1991).

108. Compare Douglas Lind, *Kant on Criminal Punishment*, 19 J. PHIL. RES. 61 (1994) (describing Kant as a retributivist) and Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 273, 274 (1982) (describing Kant as holding "that only a retributivist theory is properly responsive to the criminal's dignity as a rational agent capable of moral conduct") with Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 509 (1987) ("It is no longer clear to me to what extent it is proper to continue thinking of Kant as a paradigm retributivist in the theory of punishment.") (citing, *inter alia*, Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973)) and Vernon Thomas Sarver, *Kant's Purported Social Contract and the Death Penalty*, 31 J. VALUE INQUIRY 455 (1997) (describing Kant as apparently in some relevant respects a social contract theorist) and B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 LAW & PHIL. 151 (1989) (describing Kant's theory of punishment as thus bifurcated in nature). See also Sarver, *supra*, at 458 (describing Kant's punishment for murder as ignoring his focus on the public insecurity caused by the murder in favor of correspondence with the act itself).

as vague, imagistic, metaphorical, and rhetorical as any call for its abolition. Kant's approach is actually superficially and fundamentally self-contradictory.

Kant begins by defining punishment in terms of a ruler's right to inflict pain.<sup>109</sup> Because Kant holds that the death penalty is, with certain odd exceptions,<sup>110</sup> absolutely required for all murderers,<sup>111</sup> the penalty of death would seem to be more a strict matter of public duty than of public right. But this is partly over terminology. We may also wonder about Kant's definitional link of punishment to the infliction of pain.<sup>112</sup> Would a painless execution, carried out in otherwise appropriate fashion, offer no punishment at all? Would an intelligent and morally responsible person who is invulnerable to pain not be subject to punishment, even if duly incarcerated for twenty years? It is certainly possible to interpret Kant as referring to the typical case, in which pain is quite certainly a factor. But this will still not suffice. We could still retain the institution of punishment, as in the form of the deprivation of life or liberty for blameworthy criminal acts, even if people were all invulnerable to pain.

While these preliminary sorts of problems hardly show that there is anything wrong with Kant's account of capital punishment, they do suggest that Kant's theory in general does not flow

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109. See KANT, *supra* note 107, at 140.

110. It turns out that the death penalty may be inappropriate in cases of killing a fellow soldier in a duel or where a mother kills her nonmarital child. See *id.* at 144-45. Kant explains that the nonmarital child may be ignored by the law, as it was born outside the law and has metaphorically infiltrated the commonwealth without authorization. See *id.* at 145. Kant does not discuss whether there is a chronological age at which this logic ceases to apply. This problem arises because there is presumably no age at which one ceases to have been born impermissibly, and thus outside the protection of the law. Kant is thinking in particular of the mother's presumed shame and dishonor in being known, presumably at any later time, to have given birth to a nonmarital child. See *id.* But in light of the broad assumption that the child is outside the protection of the law, it is actually unclear why such a child could not be killed by anyone without the murderer evading at least the penalty of death, or, for that matter, why the same general logic should not apply to anyone who kills a person who is intentionally present within the commonwealth illegally. Kant is thus clearly not above massaging general principles in accordance with his own cultural and personal intuitions as to what is appropriate.

111. See *id.* at 142.

112. See *id.* at 140.

rigorously from uncontroversial premises. Kant argues, for example, that the kind and amount of punishment in a given case must reflect "the principle of equality."<sup>113</sup> Kant explains this principle by asserting that "whatever undeserved evil you inflict upon another . . . , you inflict upon yourself."<sup>114</sup> We shall of course assume that Kant actually means that punishment is deserved, whether the punishment itself is an evil or not. In any event, Kant concludes that the death penalty is the only suitable response to murder.<sup>115</sup>

Kant's crucial argument is that "[t]here is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer . . . ."<sup>116</sup> Of course, as previously discussed, Kant does not really believe the death penalty is appropriate for all premeditated murders, let alone for all types of murders.<sup>117</sup> Certainly, our own system of jurisprudence does not consider all murderers to deserve death.<sup>118</sup> Nor can Kant possibly believe that, in general, the punishment for serious crimes such as espionage, false imprisonment, skyjacking, forgery, or tax evasion, should somehow

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113. *Id.* at 141.

114. *Id.* Of course, one might question the equality or proportionality of the death penalty where the victims and murderers differ radically in the most elemental circumstances of life, including age. *See, e.g.*, Igor Primorac, *Life for Life: Arguments Against Capital Punishment*, 29 PHIL. STUD. (Ireland) 186, 189 (1982); Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1081-82 (1992) (contrasting a two-year-old and a ninety-five-year-old victim).

115. *See* KANT, *supra* note 107, at 142.

116. *Id.*; *see also* Lind, *supra* note 108, at 64 (explaining Kant's law of retribution). Actually, Kant seems a bit unsure as to whether the likeness or proportionality is supposed to be between the crime itself and the punishment, or the crime along with the defendant's state of mind and the punishment.

117. *See supra* note 110 and accompanying text.

118. *See, e.g.*, 18 U.S.C. § 3593 (Supp. 1999) (describing hearing to determine justifiability of death sentence in a given case); CAL. PENAL CODE § 190.3 (West 1998) (containing requirements for death penalty and life imprisonment in homicide cases); FLA. STAT. ANN. § 921.141 (West 1997) (detailing consideration of possible mitigating circumstances); ILL. COMP. STAT. ANN. ch. 720, 5/9-1 (West 1998) (listing exceptions to the death penalty); TEX. CRIM. P. CODE ANN. art. 37.071 (West 1996) (detailing consideration of possible mitigating circumstances in capital case procedure); VA. CODE ANN. § 19.2-264.4 (Michie 1997) (listing various possible mitigating circumstances in a sentence proceeding); *see also* authorities cited *supra* note 21.

mimic or parallel the underlying crime. Thus, why should there be perhaps any crimes—false imprisonment, for instance—in which there must be at least a rough physical correspondence between crime and punishment?

The equivalence between murder and the death penalty may be rather crude. The state does not insist on an eye for an eye, however equivalent the crime and punishment. A twenty-year-old might deliberately murder a dying ninety-year-old, or vice versa. A murderer might kill one or many persons. Kant must at least insist that there is no similarity,<sup>119</sup> and no clear commensurability, between life and death. This is Kant's crucial point. But it is a point that is at best equivocal. The unbridgeable gulf between death and life helps explain why society considers murder a serious crime, and why many think that a term of imprisonment, of whatever length, is an inadequate response to murder. The same unbridgeable gulf between life and death, however, also means that only in cases of capital punishment, the state itself deliberately and premeditatedly extinguishes a unique, irreplaceable embodiment of the deepest and most valuable mysteries in the common human experience. The incomparability of life and death explains why murder is wrong, and why capital punishment is wrong, even when the condemned murderer but not the condemning state is evil.

Certainly, Kant does argue that the murderer has manifested inner wickedness<sup>120</sup> in the act of murder, whereas the state in the act of capital punishment does not. It is certainly true that some murderers, though hardly all, know or believe their acts to be morally wrong, while the state believes all instances of capital punishment to be morally justified, at least at the time of execution.<sup>121</sup> But this only shows that the state's own *mens rea* typically differs from that of the

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119. See KANT, *supra* note 107, at 142. Hegel argues similarly that "since life is the full compass of a man's existence, the punishment [for murder] . . . can consist only in taking away a second life." HEGEL, *PHILOSOPHY OF RIGHT* 247 (T.M. Knox trans., 1967). Hegel's formulation usefully, if unintentionally, raises the possibility that what is most deeply wrong about murder may also be inescapably relevant to the moral quality of capital punishment.

120. See KANT, *supra* note 107, at 142.

121. Of course, the state is on notice of the possibility of mistake and the statistical evidence for racial and other bias in the imposition of the death penalty. See authorities cited *supra* note 2.

murderer, and that the condemning state should be credited with subjective innocence or good faith. Good faith, however, hardly shows that the act of execution is morally justified from an objective standpoint.

Kant is the first to admit that the worst kinds of crimes should not be matched with the worst penalties imaginable. If capital punishment is assigned for some murderers, Kant does not want society to respond to mass murderers with capital punishment following, for example, prolonged torture,<sup>122</sup> time in the stocks, or a criminal fine. Yet if a new crime were invented that is much worse than any crime heretofore imagined, it is certain that the state would respond not only with great severity, but with an immoral punishment.

At some point, it becomes morally wrong for the state to try to legitimately emulate or parallel the degree of severity, pain infliction, wickedness, depravity, or inhumanity displayed by the convicted defendant. At some point, the proposed penalty will be morally wrong for the reasons previously suggested. That point is reached with the imposition of the penalty of death.

An important mistake made by Kant, and by other defenders of the death penalty, is the focus on what the convicted murderer morally deserves. What the murderer deserves is not the only relevant moral constraint on criminal punishment. Let it be simply stipulated that a particular convicted murderer deserves the death penalty. This may be stated in other ways. In a given case, it may be conceded that the death penalty is not an unfair punishment in light of the crime the defendant committed. In such a case, the death penalty may be just because the condemnee has forfeited all of his relevant rights due to his wickedness. All this can be true.

But saying that capital punishment is morally deserved, or fair, or just, or not violative of the defendant's rights does not exhaust the relevant moral considerations. A penalty may, for example, be deserved, but there may be independent moral considerations dictating

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122. Consider Leibniz's rhetorical question: "Can an assassin who has cut the throats of a hundred passers-by . . . be condemned more and punished more, in proportion . . . ?" LEIBNIZ, *POLITICAL WRITINGS* 167 n.\* (Patrick Riley trans., 2d ed. 1972) (describing the cruel ability among extremely evil men). Kant explicitly prohibits mistreatment of persons sentenced to death. See KANT, *supra* note 107, at 142.

that all things considered, it would nevertheless be morally wrong to impose that penalty. Clear cases of both deserved rewards and deserved penalties may be postulated in which this is the case.

Consider, for example, a case in which a particular child has won a race fairly, and therefore deserves the small prize specified in advance. Are there, in such a case, any moral considerations that could possibly trump the child's desert? Clearly there are. Suppose, however oddly, that the prize turns out to be the only means of buying bottled water for a seriously dehydrated losing contestant. It is only now remembered that the prize was solemnly promised earlier to some third party.

Deserved rewards are not exclusively subject to moral override. Deserved penalties can be overridable as well. Suppose a student's paper deserves a failing grade, but the grader knows that a failing grade means that the student would then be made an involuntary human sacrifice.<sup>123</sup> In such a case, not giving the deserved penalty in the form of a failing grade, is not merely morally permissible, but morally required. Nor would the analysis change if the deserved

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123. We may assume that no replacement human sacrifice would then be selected. For real and hypothetical examples in which, for one reason or another, we might choose not to punish the deserving, or at least not to punish the deserving in full accord with their deserts, see Douglas N. Husak, *Why Punish the Deserving?*, 26 *NOUS* 447, 448-49 (1992). See also Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 *PHIL. & PUB. AFF.* 115, 134 (1985) (stating that "from the fact that something is justly deserved, it does not automatically follow that it should be done, since there may be other moral reasons for not doing it such that, all told, the weight of moral reasons swings the balance against proceeding" and finding a counterbalancing civilizing mission in abolishing the death penalty). Our argument does not rely on a civilizing mission in abolishing the death penalty, but we certainly do not need to object to Reiman's argument in this respect. It might certainly be argued that there is a difference between deserving a prize or a grade and deserving to be executed, with the latter desert being "deeper" or less contractually based. Giving or withholding from a student a deserved grade, however, seems to have non-contractual elements as well. It is also readily argued that where we do not give persons what they deserve, we should in some, if not all, cases mark that discrepancy and perhaps attempt some sort of moral compensation. It seems, though, that we can accommodate this intuition in the case of not executing those who deserve to die. Presumably, some aspect of their treatment, or the way we regard such persons, could be adjusted to appropriately reflect that such persons are thought to deserve execution.



penalty were more severe, such as permanent expulsion from school as opposed to a failing grade on a single paper.

Also, the analysis would not change if the reason for overriding a deserved serious penalty were systematic and uniform, or even universal. Suppose as a universal and unalterable law of nature that even the most deserved failing grades cause serious cardiovascular damage. There would arise a moral imperative to devise some viable alternative system of student evaluation for use in all cases. The fact that a given student's failure was due entirely to that student's own free, deliberate, and premeditated decisions would, in such a case, not change the result.

Thus, even if we could devise a fully coherent Kantian account of deserving the penalty of death, as opposed to any alternative punishment, such a theory would still be morally inadequate. Even if a defendant clearly deserves the penalty of death, and such a penalty would be fair, just, and not violative of the defendant's rights, the state could still be invariably and uniformly barred, under standard social conditions, from imposing such a penalty by independent moral considerations of the sort discussed thus far.

A basically Kantian argument could, however, be pushed a bit more aggressively, as it is by Hegel. In Hegel's view, "punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being."<sup>124</sup> Hegel thus goes beyond saying merely that capital punishment does not violate the condemnee's rights. Instead, the condemnee has a moral right to be punished, presumably with death. Thus, the death penalty is linked to honoring the condemnee's rational capacities.<sup>125</sup>

Hegel's modifications of the basic Kantian theory of capital punishment do not, however, make much difference in the end. Assume that the convicted defendant has a moral right to be punished. The problem is that having a moral right to be punished does not imply that it is, all things considered, morally right to punish the defendant, capitally or otherwise. After all, not all moral rights are absolute and utterly inviolable. Some are merely *prima facie* or

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124. HEGEL, *supra* note 119, at 71.

125. *See id.*

defeasible.<sup>126</sup> Some rights are easily overridden. A person's assumed moral right to not be lied to may be overridden in cases of moral necessity, or even to avoid hurt feelings, or the spoiling of a surprise.

Hegel would have to offer a convincing account of why the convicted criminal's moral right is nearly absolute, and not merely *prima facie*. We might note that the constitutional free speech and free exercise rights of prisoners are hardly absolute.<sup>127</sup> Why shouldn't the prisoner's right to be executed be overridable, at least occasionally? And if at least occasionally, Hegel has then opened the door to the argument for always overriding that right on moral grounds.

Whether a right is merely *prima facie* or not, it certainly may be waivable or alienable. Any moral rights inherent in a promise may be waived merely by releasing the promisor.<sup>128</sup> Criminal defendants certainly can waive various constitutional rights.<sup>129</sup> It is all the more clear that most "honors,"<sup>130</sup> as Hegel refers to execution, can be declined. Academy Awards can be rejected in advance. One would expect that many condemnees would be inclined to freely and voluntarily waive their moral right to be executed, as opposed to enduring some other severe, long-term punishment. Why is this right thought to be unwaivable? We can only suspect that Hegel must at this point rely on, and add nothing to, Kant's question-begging assumption that only death is a morally fitting response to a murder. Hegel's rather imperious solicitude for the supposed rights of the murderer adds little.

The basic question-begging nature of the Kantian account of the death penalty cannot be resolved through the language of the

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126. See, e.g., RICHARD B. BRANDT, *ETHICAL THEORY* 437-39 (1959); see also George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 978-80 (1985).

127. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-53 (1987) (discussing free exercise); *Turner v. Safley*, 482 U.S. 78, 84-91 (1987) (discussing free speech).

128. Thus, one's moral right to a promised performance may ordinarily be waived at the promisee's sheer arbitrary discretion. For a legal analogue, see *Hubacheck v. Estate of Brown*, 148 N.W. 121, 122 (Minn. 1914).

129. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *State v. Johnson*, 988 S.W.2d 115, 120 (Mo. Ct. App. 1999); *Calvert v. State*, 726 So. 2d 228, 232 (Miss. Ct. App. 1998).

130. HEGEL, *supra* note 119, at 71.

condemnee's rights. Recall that Kant has defined punishment itself in terms of the state's right,<sup>131</sup> not of the criminal's right, and has defined punishment specifically in terms of the infliction of pain.<sup>132</sup> In response, we need not claim that there can be no moral right that is, by definition, intended to be painful for the rightholder. We need only claim that if there is an absolute, non-waivable, intentionally painful moral right, such a right would be so odd that explaining and justifying such a paradoxical right would require nearly all the argument that would be needed to justify the death penalty without any reliance on the condemnee's rights. The reference to the condemnee's rights simply does not help.

### C. *The Contemporary Theory of Ernest van den Haag*

The leading contemporary American advocate of the death penalty who was strongly influenced by the Kantian-Hegelian approach is probably Ernest van den Haag.<sup>133</sup> Professor Van den Haag maintains the Kantian-Hegelian focus on what the convicted criminal deserves, or at least on arriving at a punishment that somehow roughly matches or corresponds to the criminal's own acts.<sup>134</sup> He argues, in

131. See *supra* note 107 and accompanying text.

132. See *supra* note 110 and accompanying text.

133. Van den Haag's numerous relevant works include: ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983); ERNEST VAN DEN HAAG, *THE DEATH PENALTY ONCE MORE*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 445 (Hugo A. Bedau ed., 1997), reprinted in 18 U. CAL. DAVIS L. REV. 957 (1985); Ernest van den Haag, *For Capital Punishment*, 25 ISRAEL L. REV. 460 (1991); Ernest van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250 (1987) (reviewing ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* (1985)); Ernest van den Haag, *Refuting Reiman and Nathanson*, 14 PHIL. & PUB. AFF. 165 (1985); Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986).

134. See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986) (arguing, in the context of the question of the possible maldistribution of capital punishment, that "[t]he only relevant question is: does the person to be executed deserve the punishment?"). But see Ernest van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250, 1254 (1987) (book review) ("But what does murder deserve in the first place? Execution? Life in prison? Twenty years? Ten? Just deserts theory cannot tell."); see also *id.* at 1256 ("[T]he just deserts principle does not prescribe a scale of penalties, or enable us to do so, beyond suggesting that punishments must be felt to be deserved, that is, felt somehow to retribute (pay

particular, that unlike most other crimes,<sup>135</sup> the principal effect of murder is “irreversible and irrevocable.”<sup>136</sup> Correspondingly, “[t]he death penalty has these characteristics as well. Thus it seems to fit murder.”<sup>137</sup>

Of course, any homicide, whether faultless, negligent, or somehow intentional, is equally irreversible. So irreversibility cannot help us much in finding even an admittedly rough<sup>138</sup> correspondence between crime and punishment. Professor Van den Haag relies instead on the culturally common intuitive sense that for at least some murders, nothing less than the death penalty is somehow suitable, given our sense of analogy and proportion.<sup>139</sup>

What can be said to further validate the rough collective intuition upon which Van den Haag’s conclusion rests? Professor Van den Haag argues in particular that the death penalty is not degrading,<sup>140</sup> that a life sentence, as opposed to execution, can become undeserved over time,<sup>141</sup> and that execution can be both deserved<sup>142</sup> and not excessively severe.<sup>143</sup> These principles, it is believed, allow us to

back) for the moral and material injuries crimes cause . . . . There need not be an equivalence of suffering. Retribution is circumscribed, albeit vaguely, only by our sense of proportion.”). It would seem that the logic of the death penalty in fact reduces to the admittedly haziest of cultural intuitions.

135. Professor Van den Haag does not argue, however, that other crimes with irreversible and irrevocable principal effects deserve death. Nor does he argue that a crime such as treason, whose effects might be reversible, should not be subject to the death penalty.

136. Van den Haag, *For Capital Punishment*, *supra* note 133, at 461.

137. *Id.* Of course, there are other possible punishments that can be brutally permanent, but Van den Haag does not endorse such possibilities.

138. *See supra* note 134.

139. *See* Van den Haag, *For Capital Punishment*, *supra* note 133, at 461.

140. *See* Van den Haag, *THE DEATH PENALTY ONCE MORE*, *supra* note 133, at 968-70. The intended contrast here is preeminently with Justice Brennan’s analysis of the death penalty in *Furman v. Georgia*, 408 U.S. 238, 257, 271 (1972) (Brennan, J., concurring) (“[T]he primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings.”). In our view, the death penalty for minor crimes would be too severe, but need not be degrading or undignified.

141. *See* Van den Haag, *Refuting Reiman and Nathanson*, *supra* note 133, at 172-73.

142. *See* VAN DEN HAAG & CONRAD, *supra* note 133, at 454.

143. *See id.*; *see also* Louis Pojman, *In Defense of the Death Penalty*, 11 INT. J. APPLIED PHIL. 11, 11 (1997) (referring to Nuremberg war criminals) (“[D]eath was too good for these moral monsters. The gravity of their crime

roughly triangulate upon the penalty of death in some cases, at least as closely as the subject matter admits. In reality, though, these principles are of little help. Let us briefly address each in turn.

First, we need not claim that the death penalty is degrading. Common forms of execution may be considered degrading by some.<sup>144</sup> But not all executions, at least in theory, need be degrading, in the sense of tending to humiliate or reduce the standing and dignity of the condemnee, or being so intended. This is, however, irrelevant to the basic objection raised to capital punishment. An execution may be deserved, fair, just, rights-respecting, and even intended to honor the condemnee.<sup>145</sup> An execution that is intended to honor the condemnee, or at least his rationality, may not be degrading.<sup>146</sup> But a dignified and non-degrading execution in this sense may still be immoral for other reasons.

The basic problem with capital punishment, again, is not one of degradation, but of extinction. A unique, irreplaceable locus of immense mystery and value, in the form of a particular consciousness, self-consciousness, and active free will, is simply annihilated, however dignified the method. It is not as though capital punishment turns consciousness merely into some humiliating shadow of its former self. Rather, it utterly abolishes a conscious self. To go from existing to not existing need not be degrading. But going from existing to not existing does entail the complete loss of whatever value was associated with the existing thing. It is the intentional and otherwise unnecessary destruction of this value that cannot be justified, however severely or painfully we may punish the evil defendant.

The second argument, that a life sentence, as opposed to the penalty of death, can become undeserved over time is interesting, but can be seen as misleading if not mistaken. A prisoner at age sixty,

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defies quantification, but they deserved no less punishment than death.”). The argument herein is compatible with imposing any degree of suffering or pain the courts rightly think appropriate.

144. For thorough documentation, see Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997). For discussion of the jurisprudential concerns of Justices Marshall and Brennan, see Michael Mello, *Adhering To Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 592 (1995).

145. See *supra* notes 123-25 and accompanying text.

146. See Van den Haag, *Refuting Reiman and Nathanson*, *supra* note 133, at 172; HEGEL, *supra* note 120, at 71.

who has served forty years of a life sentence for a murder committed at age nineteen may not have much in common with his former self at age nineteen.<sup>147</sup> He or she may be, in significant respects, a different person. In a sense, therefore, a person is being punished for the crimes of another.

Of course, the problems of personal identity and the continuity thereof can be daunting.<sup>148</sup> It is not clear which elements of one's identity must change, and by how much, before one does not deserve to be punished for the actions of one's largely different former self. It seems there is enough continuity of identity over time to conclude that no injustice is done by continued imprisonment many years after the crime. We are in no hurry to consider whether accused Nazi war criminals are the relevantly same persons forty years after their crimes.

On the other hand, some persons seem to change more fundamentally in five years than others do in forty. This shows that Van den Haag cannot rely on the objective passage of time in addressing issues of desert and the lapse of desert.<sup>149</sup> Suppose someone seemed a genuinely different person two or three years after murdering another person. Does the logic of identity really require the prisoner's release in such a case?

Professor Van den Haag may or may not be wrong about the logic of identity and desert over the passage of time. He may be correct in that regard, but the relatively prompt execution of the defendant as a genuine solution to the problem of reduced desert over time is nevertheless objectionable. No doubt executing the defendant effectively moots the problem, but it still remains problematic.

If we execute a murderer, we may, on Van den Haag's own logic, simply be preventing the murderer from developing into a person who does not deserve to be punished, let alone executed. If life imprisonment becomes undeserved over time, the prisoner eventually might not have deserved to be executed had he not been executed. Of course, in this case, there is no one around to be unjustly treated, and in that sense there is no injustice. But that is only because we

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147. *See id.* at 172-73.

148. *See, e.g.,* Amelie O. Rorty, *Introduction*, in *THE IDENTITIES OF PERSONS* 1-15 (Amelie O. Rorty ed., 1976).

149. *See* Van den Haag, *supra*, note 146, at 173.

have intentionally blocked any growth and change of the criminal's identity by killing him. It is not as though an executed person refuses to mature over time. The logic of continuing personal identity is mysterious enough so that murderers have a moral right to be released in a few years if they seem to have significantly changed.

Finally, Van den Haag's third argument that in some cases, the death penalty is deserved and not too severe is worth noting.<sup>150</sup> The claim of desert is not one that we need contest.<sup>151</sup> The question of whether the death penalty is too severe is central to the emotions and politics of the death penalty. Many death penalty advocates believe that life imprisonment is less severe than the death penalty<sup>152</sup> and that death, as opposed to life imprisonment, can therefore be the appropriate penalty in some cases. Professor Van den Haag speaks for many in holding that "[t]o believe that capital punishment is too severe for any act, one must believe that there can be no act horrible enough to deserve death."<sup>153</sup>

Of course, this argument largely just re-raises the issues of desert, which are morally overridable for reasons discussed previously.<sup>154</sup> The death penalty may never be too severe, in the sense of more than the condemnee deserves. The basic fallacy, however, lies in assuming that if we start with some serious crime and then continue to add to the vileness, reprehensibility, or harm of the crime, we must eventually reach a point at which capital punishment becomes not only deserved, and in that sense not too severe, but morally permissible in all other respects as well. Rather than reiterate a response, the severity of a punishment, and its proportion to the underlying offense, should be thoroughly contemplated.

It is often overlooked, because the variety among "life" sentences<sup>155</sup> and our cruel and unusual punishment jurisprudence<sup>156</sup>

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150. See *supra* notes 141-42.

151. See *supra* notes 123-25 and accompanying text.

152. But see John Stuart Mill, *Speech in Favor of Capital Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 271, 272 (Gertrude Ezorsky ed., 1972).

153. VAN DEN HAAG & CONRAD, *supra* note 133, at 454.

154. See *supra* notes 123-25 and accompanying text.

155. See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 *CORNELL L. REV.* 1, 4 (1993) (noting that jurors' incorrect assumptions as to early release of putative "life" sentence pris-

leads to the result that the choice between a life sentence and the death penalty has little to do with the severity of the penalty actually inflicted. No doubt most defendants would prefer a life term, as it is currently served, to the death penalty, as it is currently carried out. No doubt the fear of death is deep and pervasive.<sup>157</sup> But this does not show that no life sentence is more severe than any standard death penalty, by a defendant's judgment. Thus, there are no grounds for assuming that all life sentences will be less severe than death.

Admittedly, it is hard to know precisely how to measure the severity of a penalty. One complication is that an interminably delayed execution may involve additional suffering and may begin to resemble a life sentence. One could argue as well that a defendant who painlessly and unexpectedly assassinates a political figure suffers far more than his victim, given his conscious appreciation of the looming, unknown date of his execution.<sup>158</sup> More importantly, though, there seem to be extremely wide variations in the severity of a life sentence.

In fact, merely knowing that a defendant has been sentenced to life—assuming that a genuine life term is imposed—tells little about the severity or degree of suffering associated with the life sentence. Life sentences can vary remarkably in the degree of severity and suffering involved. A life sentence could, for example, involve any conditions, whether deemed cruel and unusual or not,<sup>159</sup> allowing the convicted defendant to retain consciousness, self-consciousness, identity, capacity for premeditation, deliberation, and free will.

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oners as affecting some death penalty decisions). For a more general discussion of what might be called the broad family of life term sentences, see Julian H. Wright, Jr., Note, *Life Without Parole: An Alternative To Death or Not Much of a Life At All?*, 43 VAND. L. REV. 529 (1990). For an interesting specific proposal, see David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 130-31 (1998).

156. See, e.g., *Hudson v. McMillian*, 503 U.S. 1 (1992); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Furman v. Georgia*, 408 U.S. 238 (1972).

157. But see *Phaedo*, in PLATO, *EUTHYPHRO, APOLOGY, CRITO, AND PHAEDO* 69 (Benjamin Jowett trans., 1988).

158. For a discussion of the unique quality of anticipating a fixed date of execution, see VICTOR HUGO, *THE LAST DAYS OF A CONDEMNED MAN: AND OTHER PRISON WRITINGS* (Geoff Woolen ed., 1992).

159. See *supra* note 153 and accompanying text.



The idea of a life sentence is thus compatible with a wide variety of conditions. In theory, a life sentence could be served in richly subsidized Napoleonic fashion, on a well-populated tropical island paradise. The distinction between guard and servant could be blurred. Such a sentence would be considered insufficiently severe. But one can imagine life sentences served in a dramatically different fashion.

One can, for example, envision a life sentence served in solitary confinement in its entirety. The theory would be that a deliberate act of murder shows one to be incapable of functioning acceptably in any society. The murderer may be deemed to have deliberately rejected the requirements of sociability. The convicted defendant's incapacity to function in any society—including amongst guards and fellow inmates—may be permanent. There is thus both poetic justice and a certain functional logic in holding such a person to either be incapable of, to have rejected, or to be undeserving of, further social contact. Solitary confinement may also succeed in conveying to the murderer a sense of the value of other persons' lives. Such lessons are more likely to be actually learned over a full lifetime of solitude than during the pendency of one's own execution. Solitary confinement mirrors and responds to the underlying solipsism of murder.

In theory, solitary confinement could, if otherwise appropriate, be imposed only up until it resulted in the substantial destruction of the identity, self-consciousness, or free will of the prisoner. At that point, perhaps the life-term prisoner in solitary confinement could be allowed a degree of "virtual" reality or interactive Internet access, just short of any risk of harm to any other persons. It should soon be technologically possible to reduce the risk posed by an inmate to guards, doctors, and other inmates to near zero. This possibility by itself weighs against the death penalty.<sup>160</sup>

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160. Particularly with new cybertechnologies, more sophisticated restraint devices, and the reduction and spreading of the cost thereof, the social danger of an inmate sentenced to solitary confinement can approach a vanishing point. The courts have held that a defendant's minimal dangerousness in prison counts as a mitigating factor in capital cases. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) ("[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.").

It is certainly possible to argue that because solitary confinement is really a matter of degree, some degrees of solitary confinement may, independent of our "consciousness" criterion, amount to cruel and unusual punishments. If thumbscrews, floggings, or the torture rack are considered cruel and unusual,<sup>161</sup> so too may the more extreme forms of solitary confinement.<sup>162</sup> Perhaps at least some versions of solitary confinement, apart from our consciousness criterion, become cruel and unusual at such an early point that they cannot be appropriate punishments for murder.

These considerations make it inherently difficult, if not impossible, to answer the broader problem of identifying a cruel and unusual punishment. The death penalty advocate has carved out a thin, if not entirely nonexistent, slice of the possibilities in this respect. Under such a view, the death penalty is not thought cruel and unusual, but any other sentence is either cruel and unusual or is insufficient punishment, if not both.

Realistically, the death penalty advocate must argue that a life term with a given level of solitary confinement is insufficient punishment, but that the same life term with only a minimal change in the terms or severity of the solitary confinement—say, somewhat less contact with guards or less television—is cruel and unusual. This is odd, because both insufficiency of punishment and excessiveness of punishment are largely about the degree of severity of the

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161. See, e.g., *Furman v. Georgia*, 408 U.S. 238 at 272-73 (Brennan, J., concurring); *O'Neil v. State*, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

162. See *Smith v. Shettle*, 946 F.2d 1250, 1252 (7th Cir. 1991) (Posner, J.) ("Subject only to such restraints as the cruel and unusual punishments clause of the Eighth Amendment may place upon the severity of the punishment, a state can confine a prisoner as closely as it wants, in solitary confinement if it wants; a prisoner has no natural liberty to mingle with the general prison population."); *Wallace v. Robinson*, 940 F.2d 243, 247 (7th Cir. 1991) (en banc) ("[T]he cruel and unusual punishments clause of the [e]ighth [a]mendment . . . would have something to say about unending solitary confinement even if state rules gave the warden complete discretion over the subject."); *Porth v. Farrier*, 934 F.2d 154, 157 (8th Cir. 1991) (applying a totality of circumstances approach in determining whether a prison official's conduct "was so inhumane, base or barbaric so as to shock the sensibilities" thus violating the Eighth Amendment) (quoting *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989)); *Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987) (holding that violation of the Eighth Amendment could occur by forcing a prisoner to sleep on the floor of a cold, rat-infested solitary confinement cell).

punishment under the circumstances. Yet one form of punishment is supposedly insufficient, while virtually the same punishment with only minor changes must be thought cruel and unusual by the death penalty advocate, lest it be recognized as just severe enough. Why does every adequate form of isolating a sociopath shock the conscience,<sup>163</sup> where execution does not?

In general, death penalty advocates should concede that some forms of solitary confinement can amount to a literal death of society, while still “teaching” the offender whatever lesson society may wish to impart more effectively than would the offender’s physical or mental death. Such alternatives to the death penalty can involve the socially gratifying imposition of as much pain and suffering on the defendant as society wishes, consistent with the Eighth Amendment.<sup>164</sup> Some alternatives to the immediate or even the delayed

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163. See, e.g., *Porth*, 934 F.2d at 157. It is certainly true that many opponents of capital punishment have objected to the ostracism or social isolation of the murderer, on the grounds that this form of punishment somehow unjustifiably severs the bonds of community between the murderer and the rest of society. See, e.g., Brian Calvert, *Retribution, Arbitrariness and the Death Penalty*, 23 J. SOC. PHIL. 140, 158 (1992) (arguing that extreme forms of social isolation are potentially brutalizing and akin to torture); Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464, 470 (1988) (“[W]hat a moral community communicates to criminals by punishing them is that they still belong to the community, they are still members.”); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501, 1516 (1981) (“[C]apital punishment is ostracization to the ultimate degree. It . . . insuperably destroys those bonds of community which criminal punishment should strive to reaffirm.”); Leon Sheleff, *The Death Penalty: Response*, 25 ISRAEL L. REV. 512, 521 (1991) (discussing lengthy solitary confinement as potentially undermining “human dignity and social decency”). One can only reiterate that the state’s proof of premeditated murder shows that the defendant is capable of the conscious exercise of free will, but it also suggests the defendant’s lack of minimum basic skills and values underlying social interaction. This suggests that much of the murderer’s future interaction should, for various reasons, be “virtual” rather than “real.” By way of analogy, the most reprehensible drunk drivers need not be reunited with the driving community. No strong moral imperative exists in judicially denying a murderer’s rejection of, or incapability of living up to, basic social requirements.

164. The imposition of pain and suffering is constrained by the Eighth Amendment, but our collective standards of decency can presumably devolve as well as evolve over time. Cf. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (stating that it is unlikely society would consistently characterize its shared desire for the official infliction of pain); *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

execution of the offender can match or exceed execution in the degree of constitutionally permissible pain and suffering imposed on the offender.

#### IV. A FINAL CAVEAT: FREE WILL AND THE PARADOX OF MITIGATION IN PRACTICE

In developing the abolitionist position, the astonishment of familiar capacities, such as consciousness, self-consciousness, continuous personal identity, and freedom of the will, have been emphasized, whether used for good or evil. In the actual litigation of a death penalty case, some of these capacities may be disputed and others taken for granted. We certainly can imagine an insanity defense that calls into question the defendant's continuing personal identity, but this will be unusual. It is more common for defense counsel to deny the accused's freedom of the will at the time of the offense. This may take the form of an alleged complete defense, such as duress,<sup>165</sup> necessity,<sup>166</sup> or other forms of insanity.<sup>167</sup> More interestingly, though, defense counsel may seek to deny or diminish the accused's free will as a potential mitigating factor to avoid the death penalty.

The idea in such cases is to show that nature or social and familial background circumstances have undercut the accused's freedom of will. Even if the necessary mens rea for the charged offense can be shown, the accused's moral responsibility or blameworthiness is, in such a case, somehow diminished. It is therefore arguably

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(stating society's desire for official pain is inconsistent and can change over time). A society is unlikely, in any event, to consistently characterize its own shared desire for the official infliction of pain as an instance of moral backwardness.

165. See, e.g., *United States v. Bailey*, 444 U.S. 394, 409-11 (1980); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching For Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989).

166. See, e.g., *Bailey*, 444 U.S. at 409-11; *People v. Raszler*, 169 Cal. App. 3d 1160, 1163-66, 215 Cal. Rptr. 770, 772-74 (1985); *State v. Moe*, 24 P.2d 638, 639-40 (Wash. 1933); see also WRIGHT, *supra* note 77, at ch. 3 (1996).

167. See, e.g., *United States v. Scott*, 437 U.S. 82, 97-98 (1978); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 302-483 (2d ed. 1986) (considering insanity and other defenses); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 289-317 (1987).

inappropriate to sentence the accused to death.<sup>168</sup> Under typical capital sentencing statutes, some of the most significant mitigating factors<sup>169</sup> are those often thought to minimize the defendant's freedom of will and responsibility. The courts have been, in a limited sense, receptive to such evidence.<sup>170</sup> Also, jurors may be

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168. See, e.g., Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 327 (1996) ("During the penalty or sentencing phase of capital trials, lawyers present mitigating evidence of client psycho-social deprivation to the jury in an attempt to explain specific violent acts of criminal lawbreaking and, thus, invite mercy."); *id.* at 333 ("Victimization theory provides defense counsel with a causal, determinist explanation of the defendant's crime."); Austin Sarat, *Bearing Witness and Writing History in the Struggle Against Capital Punishment*, 8 YALE J.L. & HUMAN. 451, 457 (1996) (stating that in such "bad structures rather than bad agents" narratives, "the criminal himself is often portrayed as a victim . . ."); see also Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996) (maintaining that judges and juries will not condemn someone whom they view as another human being); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995). For general background, see *Death Penalty: Aggravating and Mitigating Circumstances*, 104 HARV. L. REV. 139 (1990); Marc D. Hauser, Comment, *Capital Mitigation Evidence in the Seventh Circuit*, 92 NW. U. L. REV. 1129 (1998).

169. See, e.g., 18 U.S.C. § 3592(a) (1998) (listing impaired capacity, duress, and "severe mental or emotional disturbance" among mitigating factors to be considered); CAL. PENAL CODE § 190.3 (Deering 1998) (listing "extreme mental or emotional disturbance," "extreme duress" or "substantial domination," "mental disease or defect," intoxication, and the defendant's age); FLA. STAT. ANN. § 921.141(6) (West 1997) (listing similar mitigating circumstances); 720 ILL. COMP. STAT. ANN. 5/9-1(c) (West 1998) (listing "extreme mental or emotional disturbance" not rising to the level of a defense and "compulsion of threat or menace of the imminent infliction of death or great bodily harm"); VA. CODE ANN. § 19.2-264.4(B) (Michie 1997) (listing "extreme mental or emotional disturbance," capacity impairment, age, and mental retardation).

170. See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (requiring capital sentencing jury to hear all relevant and potentially mitigating evidence); *Boyde v. California*, 494 U.S. 370, 382 (1990) (referring to the belief that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse"); *California v. Brown*, 479 U.S. 538, 541 (1987) ("[T]he capital defendant generally must be allowed to introduce any relevant mitigating evidence . . ."); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("Evidence of . . . emotional disturbance is typically introduced . . . in mitigation."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (requiring consideration of "any aspect of a defendant's character or record and any of the circum-

more or less sympathetic to such claims of reduced blameworthiness.<sup>171</sup>

The capacities for consciousness and self-consciousness, as well as for freedom of the will, are of immense and incomparable value, and the value of their preservation argues against the death penalty. There are certainly cases in which the attorney for the accused should argue for an acquittal or for mitigation based on the absence or insufficiency of such free will.<sup>172</sup> But seeking to undercut the client's free will, in a capital sentencing hearing, involves certain risks.

Some have observed that the defendants actually sentenced to death "are a far cry from the rational agents of Kant's metaphysical imagination."<sup>173</sup> In particular, "many of those condemned to die are

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stances of the offense that the defendant proffers as a basis for a sentence less than death"); *United States v. Pullen*, 89 F.3d 368, 371 (7th Cir. 1996) ("[T]he more the crime can be made to seem the inevitable consequence of circumstances external to the defendant's character, or rather the more the defendant's character can be made to seem the product of external circumstances—the less responsible the defendant can be made to seem . . ."). By way of concrete example, consider *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (admitting evidence that defendant, as a child, had the habit of inhaling gasoline fumes that resulted in lack of concentration, and other negative considerations); see also Carol S. Steiker & Jordan M. Steiker, *The Constitutional Regulation of Capital Punishment Since Furman v. Georgia*, 29 ST. MARY'S L.J. 971, 975 (1997) (referring to the requirement that a sentencer in a capital case "consider[] all potentially mitigating aspects of the person's crime, character and background").

171. See, e.g., Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1538 (1998) (noting that jurors surveyed found age, retardation, and other responsibility-diminishing factors as mitigating circumstances); Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1174 (1995) (noting that forty-three percent of jurors surveyed believed incorrectly that the law required a death sentence upon a showing of the defendant's future dangerousness); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 2 ("[T]here are disturbing indications that jurors do not adequately understand instructions on mitigation in death penalty cases.").

172. See, e.g., WRIGHT, *supra* note 77, at ch. 3 (arguing that the logical scope of the necessity defense encompasses more than the narrow scope currently recognized).

173. Hugo Adam Bedau, *How to Argue About the Death Penalty*, 25 ISRAEL L. REV. 466, 479 (1991).

mentally ill, mentally retarded, or were children at the time of the offense."<sup>174</sup> Drawing the jury's attention away from a locus of arguably immense value within persons does not guarantee avoidance of the death penalty.

Thus, downplaying whatever freedom of will the defendant may have possessed involves substantial risks. The basic problem is that a mitigating circumstance "[m]ay be in the eye of the beholder."<sup>175</sup> What the law intends to be mitigating, the jury may actually treat as aggravating.<sup>176</sup> At the very least, what the law intends as mitigating may be inseparable from some factor the jury treats as aggravating. In this connection, Judge Easterbrook has observed that "jurors may not be impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that, when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate."<sup>177</sup>

Broadly speaking, for example, the law may consider the condition of youthful immaturity as a mitigating condition.<sup>178</sup> Even so, a jury may still conclude that a youthful offender is especially dangerous because of his youth.<sup>179</sup> The tactic of minimizing the defendant's freedom of will, however appropriate, may thus backfire. With regard to a condemnee diagnosed as a child with organic brain

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174. Stephen B. Bright, *Death Penalty Moratorium: Fairness, Integrity at Stake*, 13 CRIM. JUST. 28, 29 (1998). This is, of course, not to argue that persons with limited free will are not themselves of immense and incomparable value. By assumption, such value may be ascribed to their capacities for consciousness, self-consciousness, or continuing personal identity.

175. See *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (citing *Stanley v. Zant*, 697 F.2d 955, 969 & n.11 (11th Cir. 1983)).

176. See, e.g., *Emerson v. Gramley*, 91 F.3d 898, 906 (7th Cir. 1996) ("The narratives that defense counsel and their 'mitigation specialists' present often contain material that the jury is likely to consider aggravating rather than mitigating.") (quoting *Burger*, 483 U.S. at 793); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 410 (1989-1990) ("[J]urors may view certain mitigating factors as factors aggravating the gravity of a capital crime.").

177. *Burris v. Parke*, 130 F.3d 782, 784-85 (7th Cir. 1997).

178. See, e.g., CAL. PENAL CODE § 190.3 (West 1999) (listing age as a possible mitigating factor); VA. CODE ANN. § 19.2-264.4 (Michie 1997).

179. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993).

damage<sup>180</sup> and an IQ of between fifty and sixty-three,<sup>181</sup> the Supreme Court has observed that the defendant's "mental retardation and history of abuse is . . . a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."<sup>182</sup> Under current penological practice, a prosecutor plausibly can argue for the defendant's future dangerousness even if sentenced to a life term.<sup>183</sup>

This is not to suggest that defense counsel should exaggerate the freedom of will and rational autonomy of their clients at sentencing hearings. Often, the opposite strategy is well-advised. Typically, however, the jury is already committed to the belief, expressed in their verdict at the guilt phase of the trial, that the defendant's criminal act was undertaken with deliberation and premeditation.<sup>184</sup> Whether a typical jury will actually find the defendant's free will and other capacities to be worth preserving is doubtful. Nevertheless, there are serious risks as well as potential benefits in a strategy of

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180. See *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989) (plurality opinion); cf. *Rector v. Bryant*, 501 U.S. 1239, 1239 (1991) (Marshall, J., dissenting from denial of certiorari) (arguing that certiorari should be granted to determine the competency of a condemned prisoner where the condemnee's mental incapacity renders him "unable to recognize or communicate facts that would make his sentence unlawful or unjust").

181. See *Penry*, 492 U.S. at 307. Here, we are merely assuming that such scores, whether or not valid as measures of generalized intelligence, indicate some diminution of free will and culpability. Whether this is true need not be addressed.

182. *Id.* at 324.

183. See *id.* at 323-24 ("Even in a prison setting, the prosecutor argued, Penry could hurt doctors, nurses, librarians, or teachers who worked in prison."); see also *Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994) (plurality opinion) ("[T]hat a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff").

On the merits, it is worth recalling the above discussion of the possible varieties of solitary confinement under life imprisonment. See *supra* notes 144-49 and accompanying text. Some forms of solitary confinement, particularly in an era of advanced communication and restraint technologies, pose risks to the safety of other persons no more than roughly equal to those posed by a prisoner condemned to execution. In reality, the safety of other persons does not provide any inescapable reason for preferring the penalty of death.

184. See *supra* note 21 and accompanying text.



minimizing, at the sentencing phase, any freedom of will the defendant may be capable of exercising.

## V. CONCLUSION

In present society, imposition of the death penalty should be excluded on moral grounds. The death penalty is not more suitable than any other available penalty, even for the worst crimes, and the degree of pain and suffering and message-conveying involved in a punishment is uncorrelated with whether the punishment involves death. Even if it could be shown, however, that the death penalty was the uniquely deserved punishment in at least one case, that would not validate the death penalty. It is clear that the imposition of even the most deserved penalties can be overridden on independent moral grounds. Reliance on any claim of unfairness, injustice, or rights violation is unnecessary.

Further, retribution in the case of the death penalty is always overridden by the incomparable value of each unique individual consciousness, along with other profoundly mysterious, familiar, and commonly shared capacities for self-consciousness, continuity of personal identity, and free will. To convict a defendant of any serious crime is to concede the existence of these capacities, however maliciously they were employed on the occasion of the offense.

The general argument could be rebutted, or amplified, at almost any point. Instead of prematurely seeking closure, three points that are of as much emotional as theoretical interest should be noted. The first is a response to an estoppel argument that is founded upon the idea that the typical convict has freely chosen to murder someone. Is such a person really in any position to complain about harshness or even immorality in sentencing? Wouldn't any complaint about the sentence of death also implicitly condemn the defendant's own conduct?<sup>185</sup>

The answer is that the condemnee in such a case is indeed in no position to complain. It is simply not plausible to condemn capital punishment, but not the typical murder. The murderer has, in this sense, no standing to object. But this does not end the moral inquiry.

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185. See TOM SORRELL, *MORAL THEORY AND CAPITAL PUNISHMENT* 151 (1987) (discussing the theory of Immanuel Kant).

The scope of moral obligation belonging to a conscientious citizenry is not dictated by the scope of an alleged victim's personal right to complain. An executed pickpocket could simply have refrained from picking the pocket. That fact, however, would not legitimize the penalty.

The second point addresses the value of a single human life. It is clear enough that in most contexts, a human life has less than infinite value.<sup>186</sup> Such implicit valuations of human life may vary only arbitrarily.<sup>187</sup> But saving any life may not be worth paying any price. Workplace safety rules, airline travel policies, highway design rules, the permissibility of war, and the legal and moral tolerance of risky leisure activities all testify to this assertion.<sup>188</sup>

By way of response, principled opposition to the death penalty does not imply that life expectancy should always be maximized. Life's essential measures consist of more than mere duration. Intentionally taking the life of another person is generally unjustified, except in cases where it is clear that an innocent life or great bodily harm hangs in the balance.<sup>189</sup> Even in such a case, there must be a

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186. See Robert Holyer, *Capital Punishment and the Sanctity of Life*, 34 INT. PHIL. Q. 485, 497 (1994) ("[I]t is clear that we do not regard human life as of infinite value.").

187. See generally W. KIP VISCUSI, *FATAL TRADEOFFS* (1992) (noting the truly remarkable range of variation in statistical lives saved annually per unit of cost by various sorts of rules and regulatory schemes).

188. For general background, see Charles Fried, *The Value of Life*, 82 HARV. L. REV. 1415 (1969) (discussing, *inter alia*, the problem of valuing lives in immediate, concrete peril as opposed to remote, statistical lives). For background on the "Just War" theory, see JENNY TEICHMAN, *PACIFISM AND THE JUST WAR* (1986); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1992). For philosophical discussion of self-defense, see SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE* (1994); Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361 (1999).

189. It is assumed that the debate over any unique deterrent power of the death penalty, as opposed to all other possible penalties, cannot resolve the capital punishment debate. See authorities cited *supra* note 7. Even in maintaining the self-defense analogy, a plea may be unacceptable where the claim is merely that killing someone will probably save some limited number of lives down the line, as the deterrence theorist might argue. Of course, the closer we move to broadly utilitarian calculations, or to allowing deliberate killing so as to minimize the overall death rate, the harder it becomes to rule out capital

showing of a reasonable belief that killing the aggressor is genuinely necessary to save the life that is being defended.<sup>190</sup> One cannot, for example, kill an aggressor that one clearly has the power to disarm. Similarly, the government cannot morally execute an offender that it has the power to render harmless through punishments other than death.<sup>191</sup> Where lesser, but no less effective, means of social self-defense are available, they must be used.

This leads to the third and final concern. The life of a deliberate murderer is not an innocent life, nor, arguably, even like that of a soldier in the service of unprovoked aggression. Murderers and their innocent victims are not on a behavioral par. As has been asked in another context, can't moral judgments be made?<sup>192</sup> Or as one prominent defender of the death penalty has asked,

[W]hat sort of humanism is it that respects equally the life of Thomas Jefferson and Charles Manson, Abraham Lincoln and Adolf Eichmann, Martin Luther King and James Earl Ray? To say that these men, some great and some unspeakably vile, equally possess human dignity is to demonstrate an inability to make a moral judgment derived from or based on the idea of human dignity.<sup>193</sup>

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punishment, or for that matter, to establish any inviolable moral rule at all. But as of yet, most persons would not consistently endorse a broad utilitarianism of killing. For general discussion, see Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21 (1978).

190. See generally *Taylor v. State*, 710 N.E.2d 921, 924 (Ind. 1999) (affirming that defendant did not meet burden showing he had a "reasonable belief that deadly force was necessary to prevent serious bodily injury to himself or a third person"); *Allen v. City of Atlanta*, 510 S.E.2d 64, 65 (Ga. 1998) (citing a Georgia statute); *State v. Johnson*, 954 P.2d 79, 85 (N.M. 1998). It is sometimes held that self-defense must not only appear to be reasonably necessary, but that the threatened harm must be imminent. Any such requirement will not be relied upon, despite its relevance to the logic of capital punishment, because it is far from clear that the imminence requirement is itself justifiable.

191. As an admittedly odd hypothetical case, consider that a government probably lacks the moral authority to kill even an aggressive invading army if, miraculously, the press of a button would instantly and permanently transfer that invading army to a secure prison. We abstract away from many complications, of course, in reaching such a conclusion.

192. See MARY MIDGLEY, *CAN'T WE MAKE MORAL JUDGMENTS?* (1991).

193. WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* 163 (1979).

In response, reliance upon human dignity is not elucidating, largely because of its normativity, murkiness, and ambiguity. In contrast, we have direct experience of our own consciousness and we at least have the direct subjective impression of our own freedom of will.<sup>194</sup> Direct subjective impression of our own dignity as persons, however, is not similarly possible. And technically, there has been no reliance on any claim that persons who are sufficiently self-conscious must be self-conscious in equal degree. Self-consciousness itself is astounding and deeply inexplicable, and having more self-consciousness than another person does not change that basic fact.

Lincoln and Manson were equally conscious and free agents. If they were also not equal in their degrees of consciousness and free agency, they were, in any event, both plainly above the threshold level that matters. Or if Manson was not, this result can hardly be welcomed by the death penalty advocate who depends on a finding of some sufficient mens rea for execution in the first place.

Lincoln and Manson were hardly equal in virtue, in criminal innocence, in benevolence, or moral admirability. There is a clear and important sense in which their lives are not deserving of equal respect. They were equal in certain important respects, and wildly unequal in others. The latter criteria are undeniably of enormous moral significance. History will not judge Lincoln and Manson as moral peers, as long as judgments of moral character continue to be made.

Certainly, the moral deserts of Lincoln and Manson were very different. But not everything that the state distributes, including life and death, should be distributed on the basis of virtue, character, or moral desert. Moral desert does not exhaust all moral considerations, and is subject to being overridden, as shown previously.<sup>195</sup> More

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194. For the view that this subjective experience, however vivid, may be misleading, see B.F. SKINNER, ABOUT BEHAVIORISM 217-18, 197-98 (1974). Of course, Skinner in particular would not be inclined to suggest that we dispense with the illusion of free will, but then cling to traditional understandings of human dignity. See generally B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

195. See *supra* notes 123-25 and accompanying text.

broadly, not all good and bad things should be distributed in accordance with the single criterion of moral desert.<sup>196</sup> Penicillin is properly allocated, not in accordance with moral desert, but medical need. While the allocation of criminal punishment normally hinges on desert, the death penalty is a bit more complicated as discussed above. Execution destroys far more that is of profound moral value than other, perhaps equally or more severe punishment.

At this point, the death penalty advocate may be excused for impatience. Death may indeed be different. But the death penalty advocate may respond that Hitler, at least, was also radically different. Would any kind of prison sentence, even a genuine life term, be truly fitting, suitable, and somehow proportionately equivalent to the crimes against humanity Hitler committed?

It is certainly right to say that a standard life term is not in any sense fitting, suitable, or proportionate in the case of Hitler. We must ask, however, whether any standard sort of death sentence would be fitting, suitable, or proportionate. The best approach may be to admit that neither the death penalty nor a life term would be appropriate. The retributive paradigm, and perhaps the idea of legal punishment itself, breaks down in the case of Hitler.

The death penalty advocate might finally say that in any event, whatever Hitler might have really deserved, he deserved no less than the death penalty. In response, the theory of punishment can accommodate punishments that are admittedly not fitting or proportionate, but that are clearly no more severe than the unspecifiably deserved punishment. But could it not be equally reasonable to say that Hitler instead deserved no less than some sort of extremely prolonged physical or mental torment consistent with consciousness over time? Both forms of punishment may be morally inadequate, but why is perpetual conscious torment, in whatever form, necessarily more inadequate? The punitive possibilities are limited only by morality and the penological imagination. In any event, it is plausible that death would be too good for Hitler. Other non-death penalties might be a bit less "too good" for Hitler.

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196. See generally MICHAEL WALZER, SPHERES OF JUSTICE 3-6 (1983) (stating that different goods have different appropriate distributional criteria).