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Counter-Revolutionary: Liberalism, Capital Punishment, and the Next Step Forward

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Capital punishment is predicated in part on the notion that collective, utilitarian justice, as embodied in the state, should supersede individual rights. The tension between the greater good and our instinctive understanding of the rights of the individual is a problem for the modern democratic state. Recall, for example, that the lynchings and race riots that accompanied the Ku Klux Klan's resurgence in the early twentieth century were generally justified by appeals to the greater good. Society depends on some individual subordination to the collective good, but when matters of life and death are involved, a liberal democracy should proceed cautiously.

Western liberal democracies have long been considered the crowning political achievement of the Enlightenment. American revolutionaries fought a bloody war that gave voice and content to such abstract Enlightenment ideals as liberty, tolerance, due process, and the value of the individual. Liberal democratic institutions have improved countless lives, yet for all the good that it has done, modern post-enlightenment liberalism remains glaringly imperfect. Capital punishment is one of its most notable eyesores, putting into bold relief the tension between our perceived (but sometimes erroneous) notions of the collective good and our resistance to sacrificing individual rights. Execution of the innocent, and administering a system that discriminates on racial and class grounds, offends notions of fairness and justice even as the state claims to act on behalf of us all.[1]

Capital punishment is anathema to liberal notions of human rights and civil liberties. It is time to finally cast it aside as an anachronistic vestige of bygone times. The death penalty is fundamentally incompatible with a truly liberal state.

American history is replete with hypocrisies, contradictions, and imperfections. The United States was conceived in the genocide of Indigenous Nations[2] and weaned on slavery.[3] The death penalty, like these other horrors,

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is a vestige of our medieval past that the framers of our Constitution chose not to abolish.[4] It is past time we remedied this error.

Philosophical Liberalism and the Death Penalty

I. History, Nature and Value in Liberal Enlightenment Philosophy

Liberalism is a political philosophy that emphasizes the protection of individual liberty as the chief concern of the state.[5] Liberalism has evolved into multiple strands. It includes a broad intellectual school of thought with subspecies ranging from modern-day democratic socialism to market libertarianism with multiple threads on a continuum in between.[6] At its core, liberalism stands for a few unshakable principles: the consent of the governed, individualism, egalitarianism, and human dignity. These basic principles (with grotesque exceptions, including slavery, genocide of native inhabitants, and subordination of women) were at the heart of the republic's revolutionary founding.

Liberalism is a product of the Age of Enlightenment, which itself was the product of the Scientific Revolution, which marked an emergence out of the thousand-year Christian Dark Ages.[7] Feudalism only began to recede in the sixteenth century. Moreover, before the Peace of Westphalia in 1648, the dominant political authority throughout much of Western Europe was the Catholic Church. With a few notable exceptions, concepts like individual liberty and the consent of the governed remained a distant concern.

Modern liberalism can trace its most influential origins to the work of English philosopher John Locke who, in 1689, first wrote of legitimate political authority as stemming from the consent of the governed and of the legitimate function of government being the protection of natural rights.[8] Although Locke owed much to earlier social contract theorists like Hugo Grotius and Thomas Hobbes, Locke's emphasis on the natural rights of the individual made a unique contribution. He argued that these natural rights, identified by Locke as life, liberty, and estate, emanated from outside the political sphere and were not derivative of the authority of the state.[9] It was then revolutionary to think of the individual as having rights apart from the body politic.

Early Enlightenment political philosophers like Locke and his earlier contemporary, Thomas Hobbes, promoted the social contract theory—the idea that individuals consent to subordinate some of their natural rights to a central authority in exchange for peace and security. Hobbes famously wrote that without the protections of organized society, life would be "solitary,

poor, nasty, brutish and short,"[10] and that when "all men have equal right unto all things," life becomes "a mere war of all against all."[11] This barbarity, Hobbes argued, was sufficient justification for the government to replace the natural rights of the individual, and to impose order through the "terror of some power."[12] Locke, while conceding the necessity of government imposition of order, did not believe the social contract required bargaining away all of our natural rights to a kind of absolute state power, as Hobbes did. According to Locke, when the state denies natural rights to an inordinate and intolerable extent, it loses its legitimacy, and political revolution becomes a moral necessity.[13] Thomas Jefferson and other members of the Continental Congress took this lesson to heart.

In 1762, the French philosopher Jean-Jacques Rousseau elaborated on social contract theory, arguing, "[L]et us agree that force doesn't create right, and that legitimate powers are the only ones we are obliged to obey."[14] At the dawn of the U.S. revolution, the pamphleteer and rabble-rouser Thomas Paine described social contract theory this way: "It is a perversion of terms to say that a charter gives rights. It operates by a contrary effect—that of taking rights away. Rights are inherently in all the inhabitants; but charters, by annulling those rights, in the majority, leave the right, by exclusion, in the hands of a few . . . and consequently are instruments of injustice."[15] Whereas the abdication of some natural rights to government was a "necessary evil,"[16] to Paine the creep of the tyranny of the majority was forever to be kept in check with skepticism and vigilance.

The idea of natural rights and the social contract that exists between the citizenry and a legitimate state that was conceived by Locke, elaborated upon by Rousseau, and fretted over by Paine, were the pulsing intellectual heart of the American Revolution. The Founding Fathers were convinced of the merits of these fundamental ideas. The Declaration of Independence, the Constitution, and our Constitution's Bill of Rights are all pregnant with Enlightenment ideas about the relationship between liberty and the state. These ideals form the very essence of what many patriotic Americans like to think about themselves today, and they are the ideals that we continually hold up to the world and to ourselves—ideals that this article will demonstrate are fundamentally incongruous with capital punishment.

The death penalty is the ultimate illiberal triumph of the state over the individual. The social contract at the heart of liberalism requires us all to give up some of our natural-born liberties to live in society, but when the state demands a life, it demands too much. When the state claims the right to take a life, even of one who commits a heinous and unforgiveable crime, it forgets its place.

II. The Death Penalty in History

Since humans began to organize themselves into groups, these groups have always put to death those they deemed the worst transgressors of their norms. What constitutes a capital crime, however, has varied wildly, as have the categories of people against whom the death penalty could be applied and the procedures governing how the death penalty may be carried out.

Hammurabi, in seventeenth century BCE Babylonia, issued a code of civil and criminal law that warranted death as punishment for 25 distinct transgressions, including robbery, incest, abetting conspiracy, and leaving the city gates with a slave—murderers, however, received a lesser punishment.[17] Hammurabi's Code was also scaled for different classes of people with different punishments for slaves and freemen, women and men, with the disfavored classes earning death for their transgressions while the privileged could escape with a fine.[18]

In sixth century Athens, the democratically elected legislator, Draco, replaced the oral laws and traditions of the city-state with a written code that prescribed execution for almost all crimes, including murder, cabbage thievery, sacrilege, and idleness.[19] When asked why Draco had converted so many offenses into capital crimes, the Greek biographer and historian Plutarch reported that in Draco's opinion, "the lesser [crimes] deserved it, and for the greater ones no heavier penalty could be found."[20] A few centuries later, the philosopher Socrates was famously sentenced to death for impiety and corrupting the youth under a different Athenian regime.[21] Similarly, the Hebrew Bible details many crimes for which death was required in ancient Israel, including murder, cursing a parent, blasphemy, adultery, homosexuality, bestiality, and working on the sabbath.[22] Later, in medieval Europe, capital crimes included murder, rape, arson, treason, witchcraft, and intermarriage between Jew and gentile.[23] In just the two centuries of the Spanish Inquisition from the thirteenth through fifteenth centuries, thousands of people were put to death for crimes including heresy, witchcraft, blasphemy, and sodomy, among other transgressions.[24]

Later, the eighteenth century British Parliament enacted England's Bloody Code, making 222 crimes punishable by death, including murder, treason, arson, cutting down a tree, the robbing of a rabbit warren, and the theft of goods worth more than twelve pence, which was about one-twentieth of the weekly wage for a skilled worker.[25] In the British American colonies in the seventeenth and eighteenth centuries, the capital laws of New England listed idolatry, witchcraft, blasphemy, buggery, adultery, and rebellion as among the many offenses that warranted the death penalty.[26] In New York, the Duke's Laws warranted the death penalty for denying the true god or traitorous denial of the King's rights.[27]

III. Liberalism's First Efforts to Rein In the Death Penalty

One of the first checks on the state's power to inflict punishments arbitrarily came with John Lackland's defeat at Runnymede, culminating in the Magna Carta in 1215.[28] In the Magna Carta, the English king ceded some of his authority to a group of noblemen in exchange for their support. The Magna Carta's *Lex Terrae* clause stated that

> "[n]o Freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."[29]

This was perhaps the first emergence of the rule of law as a check against the unrestrained authority of the state.

The Habeas Corpus Act of 1679 followed nearly a century of litigation involving the power of the courts to use habeas corpus as a writ of freedom as well as earlier parliamentary efforts to expand the writ's ambit.[30] Proposed by the English Parliament and assented to by the King, it required judicial review of the crown's decisions to hold prisoners.[31] A decade later, the dynastic and religious conflict between Protestant and Catholic branches of the house of Stuart brought about the Glorious Revolution, after which the winning faction, led by William of Orange and Mary II, assented to the English Bill of Rights of 1689.[32] Among other things, the English Bill of Rights prohibited the imposition of cruel and unusual punishments.[33] The Habeas Corpus Act of 1679 and the English Bill of Rights of 1689 were major influences on the American revolutionaries when those revolutionaries were drafting their own social compact a century later.[34]

Ratified in 1791, the Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments and is the legal provision under which abolition of the death penalty is most likely to be won.[35] The Eighth Amendment owes its inclusion in the Bill of Rights to the great orator of liberty (and slaveholder) Patrick Henry. Fearing that the absence of an explicit prohibition against cruel and unusual punishments would allow for government overreach and oppression, he cautioned the Virginia ratifying convention that "they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."[36] The Eighth Amendment is a direct product of such liberal skepticism.

The trouble with the Eighth Amendment, as with most provisions of the Bill of Rights, is its indefiniteness. What, exactly, is meant by "cruel and unusual punishment" was left purposefully vague by those who drafted and

ratified it. We know capital punishment was regularly employed throughout the several states and by the emerging federal government. Capital crimes in many of the states included arson, piracy, treason, murder, sodomy, burglary, robbery, rape, horse-stealing, slave rebellion, and counterfeiting.[37] In 1790, one of the first acts of the new national Congress was to enumerate federal crimes worthy of the death penalty, including treason, counterfeiting of federal records, murder, disfigurement, and robbery committed in federal jurisdictions or on the high seas.[38] The prescribed punishment was "hanging the person convicted by the neck until dead."[39] Hangings were a public spectacle in the United States from the colonial era until the mid-nineteenth century, when reformers began to argue that the display was, if not cruel, then at least in poor taste. By 1850, the majority of states had switched to more modest, privately conducted executions.[40] Extra-judicial lynchings, of course, continued to plague the nation well into the twentieth century.

IV. Recent U.S. Supreme Court Cases on Capital Punishment

Trop v. Dulles is a 1958 Supreme Court case involving a soldier facing denationalization as punishment for wartime desertion.[41] The Court recognized that the words "cruel and unusual punishment" were "not precise, and that their scope is not static[,]"[42] concluding that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[43] The Court found for the first time, 167 years after the Eighth Amendment was ratified, that loss of citizenship was too cruel and unusual a punishment to withstand constitutional scrutiny. More importantly, the case established that the protections afforded to the individual in a social contract with the state can expand and grow as societal norms change. Unsurprisingly, the case invited a flurry of challenges to the death penalty.

Since 1958, there have been two distinct tracks for challenging the death penalty as being violative of the Eighth Amendment. One attacks the procedures involved in imposing death sentences.[44] This track includes both broad attacks on the constitutionality of the death penalty under all circumstances and narrower attacks on procedural aspects affecting trials and appeals in capital cases. The second track addresses the categories of people upon whom the death penalty can be imposed.[45] Advocates proceeding on both tracks have succeeded in reducing the application of the death penalty.

The most significant attack on the death penalty came in 1972, in *Furman v. Georgia*.[46] In *Furman*, the Court consolidated cases involving one inmate convicted of murder in Georgia and two convicted of rape—one in Georgia and the other in Texas. All of the inmates challenged the imposition of the

death penalty as cruel and unusual. In a one-paragraph per curium opinion, the Court held that not only were the death penalty regimes in these two states unconstitutional, but that because every other capital jurisdiction in the U.S. had similar capital regimes, all were unconstitutional. This led to a four-year moratorium on the death penalty during which states passed new statutes they hoped would survive constitutional muster. During this time, 558 prisoners on death row had their sentences commuted to life in prison.[47] Two hundred forty-three were ultimately released from prison.[48]

There were a number of concurring opinions in *Furman*. Three justices found the death penalty to be impermissibly arbitrary as applied, affecting not the worst offenders but a randomly selected handful.[49] Justice Potter Stewart famously wrote that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual" and concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[50] Two Justices found the death penalty to be cruel and unusual in all circumstances. "Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity."[51]

Four years after *Furman*, after reconfiguring its capital punishment statute, Georgia was once again before the Supreme Court with a prisoner it hoped to execute. In *Gregg v. Georgia*[52] the Supreme Court authorized the execution of a death row inmate who had been convicted and sentenced in a process ostensibly designed to eliminate the arbitrariness that had made the death penalty constitutionally repugnant in *Furman*. In allowing the state to proceed, the Supreme Court held that capital punishment did not violate the Eighth Amendment in all circumstances.[53] The Court approved a process that laid down some guardrails, narrowed the definition of capital crimes, and bifurcated the trial into separate guilt and penalty phases. These changes were supposed to supply objective criteria to guide a jury's sentencing discretion[54] and provide opportunity for the jury to hear and consider mitigating and aggravating circumstances, thus winnowing the ultimate penalty down to those most deserving of death.[55] Finally, the Court required a meaningful appellate process.[56] With those protections in place to guard against the arbitrariness found in *Furman*, the Court once again gave its blessing to the state's use of the death penalty.[57]

After the Court held that capital punishment could proceed within certain procedural parameters, death penalty opponents tried to mitigate the damage. Opponents reasoned that if the death penalty was not *de facto* cruel and unusual, perhaps it was cruel and unusual when applied under certain circumstances and to certain groups.

In *Coker v. Georgia*[58] in 1977, a death row inmate challenged a death

sentence imposed for the rape of an adult woman. The Supreme Court held that the s entence was grossly disproportionate and excessive in relation to the crime.[59] Though the Court recognized that rape was "highly reprehensible" and "the ultimate violation of self[,]"[60] it reasoned that because the death penalty is "unique in its severity and irrevocability[,]" it should not be imposed for a crime that does not "involve the unjustified taking of human life."[61] In *Kennedy v. Louisiana* in 2008, the Court held that the death penalty could not be imposed for the rape of a child, limiting capital punishment exclusively to murder. "Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim."[62]

In *Enmund v. Florida*[63] in 1982, the Court considered the case of an inmate who had been sentenced to death for his peripheral role in a homicide.[64] The Court held that it violated the Eighth Amendment to impose on a murderer and his or her accomplice identical sentences when the accomplice did not intend to kill. "[P]unishment must be tailored to [] personal responsibility and moral guilt."[65] Capital punishment in the absence of intentional wrongdoing is "unconstitutionally excessive."[66] In *Tison v. Arizona*[67] in 1987, however, the Court allowed capital punishment in a case where an accomplice to murder demonstrated a reckless indifference to the value of human life which, the Court held, can be "every bit as shocking to the moral sense as an intent to kill."[68]

In *Thompson v. Oklahoma*[69] in 1988, an inmate who was sentenced to death for a crime committed when he was 15 years old challenged his sentence. The Court found it unlikely that a teenage offender could undertake "the kind of cost-benefit analysis that attaches any weight to the possibility of execution" and that "it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century."[70] Because the death penalty could not be expected to make "any measurable contribution to the goals that capital punishment is intended to achieve[,]" the Court deemed it "nothing more than the purposeless and needless imposition of pain and suffering."[71]

Then, in 1989, a challenge came from a death-sentenced prisoner who was 17 years old at the time he committed a murder.[72] The Supreme Court refused to extend *Thompson,* finding neither "historical nor [] modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age."[73] The Court overruled itself a mere 16 years later; in *Roper v. Simmons,*[74] a 5-4 Court found a national consensus in prohibiting capital punishment for juvenile offenders.[75] The standards of decency that mark the progress of a maturing society had apparently, but barely, evolved.

In a 2002 case out of Virginia, Daryl Adkins, an intellectually-disabled inmate, challenged the imposition of his death sentence.[76] There, the Court was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty" and found that Eighth Amendment "places a substantive restriction on the State's power to take the life of a mentally retarded offender."[77]

The history of capital punishment has reflected a transformation of the institution from an unrestrained terror wielded against those who found themselves on the wrong side of power[78] to a scarcely used vestige that society finds more and more unpalatable.

In the four decades since the *Furman* moratorium and *Gregg* reinstatement, the judiciary has been "tinkering with the machinery of death"[79] and trying to fine-tune the contradictions. Courts have had to grapple with the seemingly irreconcilable interests of ensuring that parties who face the death penalty receive individualized consideration of their special circumstances and ensuring that certain defendants aren't put to death based on morally impermissible considerations like race and class. As this tinkering has dragged on with still-imperfect results, it becomes more and more apparent that the this contradiction is inherent in the system and that the institution of the death penalty itself is fatally flawed.

As the Supreme Court has been confronted with different challenges to different aspects of the death penalty, it has faced the question whether capital punishment serves any legitimate penological function. It has considered historic and modern trends in penal theory,[80] the work product of state legislatures, trends in jury sentencing,[81] the direction of legislative changes,[82] international norms,[83] and the Justices' own notions about the acceptability of the death penalty[84] to assess "the evolving standards of decency that mark the progress of a maturing society." If some component of capital punishment does not meet one of the legitimate ends of criminal justice, then it should be discarded as cruel and unusual punishment.

Penology and The Aims of Criminal Justice

Penology is the study of crime and punishment. It concerns itself with the philosophy and practice of crime suppression and the ramifications of crime-suppression practices for society.[85] It identifies four distinct operational theories that govern society's efforts at crime suppression—rehabilitation, deterrence, incapacitation and retribution.[86] If the state demands that a life be given in service of one of the aims of criminal punishment, it must have some legitimate purpose. Otherwise, it violates the social contract. As will be shown below, the death penalty satisfies no legitimate penological goal.

I. Rehabilitation

Rehabilitation seeks to rehabilitate and reform an offender to allow him or her to reintegrate back into society.[87] Various schemes help to facilitate rehabilitation including community service, mental health counseling, substance abuse programs, job training, and victim-offender encounters.[88] The idea is to eliminate the negative influences on an offender's life while developing positive influences and strengthening the offender's ties to the community. Poetically, the practice of rehabilitation is the quest to relocate an offender's misplaced humanity.

The Court, for obvious reasons, considers rehabilitation to be an irrelevant penological consideration for death penalty cases. As Justice Stewart recognized in his concurrence in *Furman,*

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[89] Subsequent cases before the Court have consistently considered only deterrence and retribution as valid penological considerations in death penalty cases.[90]

Because of the procedural protections that govern how death sentences are carried out, a capital inmate spends an average of 176 months, nearly fifteen years, on death row before execution.[91] This penal purgatory provides an excellent opportunity for an offender to receive rehabilitative programming. In the event that death row inmates find themselves released from their capital sentences either because of actual innocence or for procedural reasons, it would benefit the offenders and their communities were they to emerge equipped with some level of training in the skills required in polite society. Nevertheless, the Court continues to refuse to acknowledge the value of rehabilitation for capital inmates.

The classic study of inmates released as a result of post-*Furman* commutations convincingly demonstrates that death row inmates can be rehabilitated.[92] For example, *Evans v. Muncy*[93] involved a Virginia inmate convicted of murder and sentenced to death after a jury found that "if allowed to live Evans would pose a serious threat of future danger to society."[94] This was the sole aggravating factor warranting a death sentence instead of a sentence of life without parole. Three years later, Evans found himself in the midst of a prison riot with multiple hostages taken. Guards and nurses taken hostage later swore affidavits that Evans "took decisive steps to calm the riot, saving the lives of several hostages, and preventing the rape of one of the nurses."[95] Evans claimed that his uncontested heroic action was proof that

he posed no serious threat of future danger to society and that accordingly, he should not have been sentenced to death. The Supreme Court declined to entertain his petition for a stay, and he was executed.

Is it possible that Evans had been rehabilitated by his three year stay on death row? We will never know what was in his heart or whether his case speaks to the possibility of rehabilitation on death row. We do know that on average, death row inmates are no more violent then offenders in the general prison population and that they respond positively to programming opportunities and privileges.[96] We also know, as Justice Marshall noted in his concurrence in *Furman*, that "[d]eath, of course, makes rehabilitation impossible."[97]

II. Deterrence

Deterrence seeks to reduce criminal activity by using punishment as a warning or threat. Deterrence seeks to impose serious consequences, thus discouraging people from undertaking antisocial activities.[98] The death penalty serves as the state's ultimate deterrent. Specific deterrence seeks to dissuade the individual malefactor from recidivism, while general deterrence seeks to deter others from crime.[99] Punishment serves a closely related educational function in the hope that when people know what the punishment is for criminal activity, they will be dissuaded. The death penalty serves no function as a specific deterrent. Once executed, a person can no longer be deterred; he or she is only incapacitated, which will be discussed below. The only relevant question , therefore, is whether execution serves a general deterrent function.

Statistics demonstrate that the murder rate in states that do not have capital punishment is notably lower then states that embrace capital punishment enthusiastically.[100] Those statistics fail to account for glaring discrepancies in poverty and education rates. A study done in 2008 indicates that the consensus of criminologists, north of 88% of those surveyed, say the death penalty "does not add any significant deterrent effect above that of long-term imprisonment."[101] A 1995 survey asked police chiefs, "What, in your opinion, works in the battle against crime?" The expanded use of the death penalty was the choice of only 1% of respondents, ranking well behind social programs addressing drug abuse, improved economic opportunity, improved education, and more police officers on the streets.[102] However, other studies can be found to validate the practice.[103] In its 2012 meta-analysis, the National Research Council concluded that "research to date is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates[;] [t]herefore, these studies should not

be used to inform deliberations requiring judgments about the effect of the death penalty on homicide."[104]

It cannot be demonstrated that the death penalty has any value as an effective deterrent. Thus, this argument for capital punishment ought to be abandoned. The connection between capital punishment and general deterrence is too tenuous and too ephemeral to be considered a legitimate reason to continue the practice. As Justice Stevens put it, "[t]he legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment, in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment."[105]

Assuming, *in arguendo*, that it could be conclusively demonstrated that capital punishment does have some value as a general deterrent to criminality, the practice would still be unacceptable. A liberal state has a moral responsibility to persuade with reason, not to cow with fear. While the "terror of some power" may have been acceptable for early modern pessimists like Thomas Hobbes, John Locke and his ideological progeny won the great debate over how a legitimate government should behave. The threat of death as a social deterrent hearkens back to a medieval mindset when the "ritualized and regulated application of violence on the state's behalf" was used to "shock spectators and to reaffirm divine and temporal authority" in a "theater of horror."[106] As a society, we ought to have moved away from that kind of barbarity. It is time our penological methods reflect that.

III. Incapacitation

Incapacitation as a penological goal seeks to remove a specific offender from society.[107] The death penalty makes that removal permanent. Incapacitation is a close cousin to specific deterrence in that it seeks to proactively prevent future offending by a specific offender. While deterrence aims to reduce the probability of future offending through the imposition of undesirable consequences, incapacitation seeks to remove an offender from society. In that regard, the penological philosophy of incapacitation abandons the notion of appealing to the better angels of an offender's nature. There is no lesson to learn, no element of rehabilitation or reeducation, no attempts to salvage some humanity from the offender; there is merely an effort to limit an offender's ability to cause future harm through the crudest means available.

While incapacitation may have a straightforward appeal and be tempt-

ingly practical, divorced from lofty notions about humanity and restorative justice, utilizing the death penalty for incapacitation is excessive. If the aim of incapacitation is solely to remove an offender from society to prevent the offender from being able to offend again, a term of natural life in prison would serve that end.

In the four decades since the reinstatement of the death penalty, a recurring concern for the Court has been proportionality and excessiveness. When a punishment is excessive, it becomes cruel and unusual.[108] The Court has created a two-part test for excessiveness: "[f]irst, the punishment must not involve the unnecessary and wanton infliction of pain . . . [and s]econd, the punishment must not be grossly out of proportion to the severity of the crime."[109] Under the penological purpose of incapacitation, the death penalty fails that test. While murder is a severe offense and the punishment for murder should also be severe, the penological aim of incapacitation is not about meting out justice or serving up revenge. Incapacitation is pragmatic and utilitarian, concerned solely with removing an offender from society. The death penalty is not being used to incapacitate criminal masterminds or notorious escape artists; it is applied to an unlucky cross-section of murderers no more difficult to incapacitate through a life sentence than any other offender.[110] Modern prisons are more than capable of dealing with even the most hardened offenders.[111] Extreme isolation in 'SuperMax' prisons presents ethical issues of its own, however.[112]

In 1764, the Italian jurist, Enlightenment philosopher, and pioneering penologist Cesare Beccaria derided the death penalty as "a war of a whole nation against a citizen whose destruction they consider as necessary or useful to the general good."[113] Utilizing the death penalty as a means of incapacitation is as disproportionate and excessive as the asymmetrical warfare of a nation against a citizen. Accordingly, the death penalty does not meet the purposes of incapacitation. If the death penalty is to be justified, it will have to be through some other penological purpose.

IV. Retribution

Retribution as a penological goal seeks to impose just desert punishment on an offender for wrongdoing.[114] Of the four penological models of crime suppression, retribution is the only one that is backward-looking, seeking to deliver punishment proportional to the offense. As public policy, retribution seems to scratch the innate itch for justice to see the guilty righteously punished for their transgressions. In that way, retribution is penology being the most honest with itself. It may be argued that the societal need for retributive justice is hardwired into our primate brains. The philosophical

debate between Locke and Hobbes about the nature of man and government is paralleled in biology. In the late eighteenth century, post-*Origin of Species,*[115] the English evolutionary biologist and "Darwin's Bulldog," Thomas Huxley, found himself defending evolutionary competition not only against the religious and political conventions of the day but also against a small minority who were unwilling to discount the evolutionary power of cooperation and mutual aid. Huxley believed "violence in the evolutionary past to have been frequent and adaptive[,]" leaving modern humans with a legacy of "dominance hierarchies and relatively frequent deaths from aggression."[116] In contrast, Pytor Kropotkin, the Russian naturalist and anarchist philosopher, believed humans to be "a naturally benign and unaggressive species, comparable to primates that have a consistently low frequency of conflict" and that violence was largely a product of "recent cultural novelties."[117] Recent literature suggests that they were both right.[118] A distinction exists between "reactive violence," violence that erupts from a swell of anger, frustration, or fear, and "proactive violence[,]" which is planned and calculated. Human brains, it seems, are hardwired with a lower propensity for reactive aggression compared to our closest primate cousins and a higher propensity for proactive aggression.[119] Biologically, human nature has no requirement for blind, reactive violence. However, regardless of whether humans are hard wired to violence and vengeance, or to cooperative behavior, retributive philosophy seeks to circumvent individual violence by placing the power to punish with the state. Thus retribution, whatever its origins, seeks to regularize the imposition of state violence. As such, it must be subservient to larger criminological aims. And here it founders. The one thing that any retributive philosophy is aimed at avoiding is the consequentialism of utilitarian theories that allow for the execution of the innocent. We know that we execute the innocent. Moreover, so long as humans are prone to error, that risk cannot be eliminated. Therefore, retribution as a basis for the death penalty has an Achilles heel.[120]

The Supreme Court seems to acknowledge the tension inherent in validating reactive, itch-scratching violence as state policy. In *Furman*, the Court had a colloquy amongst its members about the validity of retribution as a penological goal. Justice Stewart insisted that "[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."[121] Justice Marshall, however, was unwilling to give retribution the Court's imprimatur. "Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society . . . the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance . . . [t]o preserve the integrity of the Eighth Amendment, the Court has consistently

denigrated retribution as a permissible goal of punishment."[122] Ultimately the Court was unable to reach a consensus on the validity of retribution as a penological aim. The Court only agreed that the death penalty is valid as predicated on one of the penological goals, though never saying which.[123]

Retribution as a social policy is as old as the code of Hammurabi, the *lex talionis*, an eye for an eye, a tooth for a tooth; yet, as a matter of practice, we no longer take eyes for eyes or teeth for teeth. The death penalty is the only remaining instance of the punishment imposed literally matching the crime. Every other transgression against person or community can be reduced into a term of imprisonment, community service, or fine, and yet we continue to insist that a certain few deaths every year be met with corresponding death. The practice is an anachronism.

The families of victims of capital crimes may call for the murderers of their loved ones to be torn apart fistful by bloody, screaming fistful; this instinct is understandable and appropriate, but we recognize that there is no place in modern society for that kind of horror. The social contract requires citizens to yield their personal interests in vengeance to the state. While it may be tempting to heed the cry of the victims of capital crimes, to pay due deference to the family left behind calling for vengeance, a liberal state must resist that impulse. The state acts in the place of the injured party to seek justice, though when it does so, it must consider factors separate from the righteous blood-lust of the injured parties. Questions of humanity, restraint, decency, and national aspiration are beyond the scope of the individual wronged party, but these ideals must always be considered by the liberal state. As Justice Marshall articulated in *Furman*, "the Eighth Amendment is our insulation from our baser selves."[124] Because the urge for retribution is not a necessary component of human nature, because retribution is outmoded, and because we can live without it, we should live without it.

In his concurrence in *Furman,* Justice White said that when divorced from the social ends it was deemed to serve, the death penalty becomes "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the state would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[125] Here, it has been demonstrated that the death penalty no longer serves any discernible social or public purpose. The death penalty is not effective as a form of rehabilitation; it is dubious as a deterrent; it is excessive as a means of incapacitation; and it is both unseemly and unnecessary as a form of retribution. Accordingly, it should be abandoned.

Sentencing capital offenders to significant terms of confinement in prison with rehabilitative programing and the possibility of eventual release satisfies

all of the penological aims of crime suppression while remaining within the aspirational confines of the liberal state. A significant term of confinement is severe enough to deter members of the community from considering criminality while efficiently incapacitating the offender and neutralizing his or her ability to cause future harm. A significant term of confinement satisfies the desire for retribution without debasing the convicted party and discrediting the state in the process. Finally, a significant term of confinement with an eventual release date, even decades into the future, acknowledges the basic humanity of the offender, the offender's ability to change, and the possibility of rehabilitation. Respecting life and honoring the indelible humanity of the citizenry are fundamental first principles upon which the liberal state was founded.

The Death Penalty is Inconstant with Liberal Values

As demonstrated above, the death penalty serves no legitimate penological purpose that cannot be met through a term of significant incarceration and rehabilitation. It must then be asked, what societal function does the death penalty serve? While there is an argument to be made that the death penalty exists because it enjoys marginal popularity, meager popular support cannot suffice to justify a public policy as consequential as capital punishment.

Capital punishment currently holds a slim popular majority nationwide. In a 2016 Pew Research poll, only 49% of respondents favor the death penalty for people convicted of murder, while 42% oppose the death penalty.[126] This figure represents a 40-year low in the death penalty's popularity, down from a high of 78% approval in the mid-1990s.[127] Among the reasons for the decline in support for the death penalty since the 1990s is an increasing awareness of actual innocence; 71% of Americans surveyed say that there is some risk that an innocent person will be put to death, and only 26% believe the institution has sufficient safeguards against the execution of innocents.[128] In 2018, the percentage of capital punishment supporters rose to 54% with 39% in opposition.[129]

Capital punishment continues to enjoy a degree of popularity. Voters seem to approve of it and politicians run on it because it feels good to scratch the itch of retribution, but democratic approval alone does not make the practice inherently valid. The Court considers a number of factors, including public sentiment, when evaluating the "evolving standards of decency" that inform cruel and unusual punishment,[130] but a thin majority of public opinion is a flimsy consideration in matters of life and death. Democracy is important, but it is not the *raison d'être* of the liberal state. The will of the majority must always be tempered by respect for the rights of the minority. Our inalienable natural rights ought not be decided by the ebb and flow of popular opinion.

The death penalty is a favorite implement of some of the world's most repressive and repugnant regimes. The countries with the highest instances of capital punishment are, in descending order, China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt, Somalia, and the United States.[131] To be fair, the lion's share of the world's annual executions occur in the top five countries, with the United States executing 23 people in 2017 compared to Saudi Arabia's 146 and China's 1,000-plus.[132] However, in the past decade, the U.S. has held a position among the top-five executing nations on several occasions.[133] The inclusion of the U.S. on such an ugly and ignominious list ought to be cause for public concern.

Repressive regimes use the death penalty as a means of social control, not only for the removal of citizens the state considers inconvenient but more broadly to cultivate a sense of fear in the population at large. When a population knows that its government can lay claim to citizens' lives, the relationship between citizen and state changes. In that way, the death penalty serves as an omnipresent reminder of the state's awesome and horrible power. In her essay, *The Liberalism of Fear*, the political theorist Judith Shklar asserted that "systematic fear is the condition that makes freedom impossible and it is aroused by the expectation of institutional cruelty and by nothing else."[134] Where the threat of institutional cruelty and systemic fear exist, true freedom cannot. Because freedom and fear seem to be mutually exclusive, the United States ought to finally rid itself of the institution of capital punishment.

Conclusion

On October 11, 2018, in a unanimous *en banc* decision, the Supreme Court of Washington State ruled that the state's death penalty scheme was unconstitutional as applied.[135] The Court held that the "arbitrary and racially biased manner" in which the death penalty had been imposed was violative of state constitutional protections against the infliction of cruel punishments.[136] Washington now joins 19 other states and the District of Columbia in rejecting the death penalty either through popular referendum or judicial edict.[137] This development is welcome and happy news for libertarian skeptics, constitutional purists and, most especially, the death row inmates of Washington State whose capital sentences have been converted to life imprisonment. It remains unsatisfying, however, that the decision addressed only the flaws in Washington's capital punishment scheme as applied, and not the system itself. While laudable in its result, the Washington Supreme Court's opinion continues ignores the greater point that the death penalty is always incompatible with our professed values.

By birth or naturalization, Americans have entered into a social contract with the state. This contract guarantees people's natural rights, which exist outside of the political realm: life and liberty. When a person has transgressed with sufficient severity against the state, his or her liberty may be curtailed to serve the greater good, but it is not justifiable to take the transgressor's life. Capital punishment is demonstrably devoid of any legitimate penological purpose that cannot be achieved through a term of imprisonment and rehabilitative programming. In that way, the death penalty is gratuitous and excessive and inches ever closer to constitutional rebuke with every passing day. History has been on a slow march toward eliminating the death penalty for the last five decades. It is time now to finally and totally acknowledge that the death penalty is so fundamentally flawed that no amount of tinkering with the machinery can save it. As an institution, the death penalty is morally disquieting, contrary to our American aspirations, and grotesquely illiberal. It is time now to consign the practice to the dustbin of history.

NOTES

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