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Chad W. Flanders  
*Saint Louis University School of Law*

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## THE CASE AGAINST THE CASE AGAINST THE DEATH PENALTY

Chad Flanders\*

*Despite the continuing belief by a majority of Americans that the death penalty is morally permissible, the death penalty has few academic defenders. This lack of academic defenders is puzzling because of the strong philosophical justification the death penalty finds in traditional theories of punishment. The three major theories of punishment (the deterrent, the retributive, and the rehabilitative), far from showing that the death penalty is not justified, tend to provide good reasons to favor the death penalty. Indeed, every attempt to show that the major theories of punishment rule out the death penalty either involves smuggling in other assumptions that are not intrinsic to the theory of punishment or puts into question that theory's ability to serve as a theory of punishment in general. Because arguments against the death penalty find little traction from within punishment theory, ideas outside of punishment theory, such as "dignity," "decency," or "civilization," provide better grounds for criticizing capital punishment. The article begins sketching how such an argument might proceed, but does not give a fully fleshed-out version of the argument, in part because it is unclear whether such an argument can succeed.*

**Keywords:** *death penalty, criminal justice, retribution*

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## INTRODUCTION

In America, the death penalty remains popular, at least marginally so, although the support it enjoys varies from state to state,<sup>1</sup> and may be waning nationwide.<sup>2</sup> Academic opinion, however, is something entirely different. The death penalty, it is almost universally agreed, is at worst barbaric and at best a waste of money. Indeed, academic defenders of the death penalty are few and far between; it is hard to think offhand of a prominent, consistent proponent of capital punishment in the American academy.<sup>3</sup>

Cass Sunstein and Adrian Vermeule's article in the *Stanford Law Review*,<sup>4</sup> a widely discussed and vigorously debated defense of the death penalty, is the classic exception that proves the rule. For in the very same issue, the law review presented not one but two ferociously strong rebuttals by prominent professors representing the nearly unanimous academic consensus that the death penalty is both immoral (Carol Steiker) and inefficient (John Donohue).<sup>5</sup> Moreover, the distinct impression left by Sunstein

1. For a recent, excellent study that shows how state-specific support for the death penalty is, see DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2012). This article (for reasons explained later) mostly abstracts from contingent, historically particular facts about the implementation of the death penalty.

2. See *U.S. Death Penalty Support Stable at 63%*, GALLUPPOLITICS (Jan. 9, 2013), <http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx> ("Although views on the death penalty have been fairly static since 2010, support has been gradually diminishing since the high point in 1994, when 80 percent were in favor. By 2001, roughly two-thirds were in favor, and since then it has edged closer to 60 percent.").

3. Prior to his death, Ernest van den Haag was probably the most vocal, and most notable, academic supporter of the death penalty. See, e.g., ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983). Today, the most prominent legal academic in support of the death penalty is probably Paul Cassell. See Cassell, *In Defense of the Death Penalty*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2181453](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181453). But Cassell (a former judge) is probably best known for his work in defense of victims' rights, not for his defense of the death penalty. Stephanos Bibas and Douglas Berman have co-authored two articles defending the in-principle justifiability of the death penalty, but their position is nuanced and amounts to less a defense of the death penalty than a statement about the relationship of the emotions to punishment. See, e.g., Bibas & Berman, *Engaging Capital Emotions*, 102 N.W. L. REV. COLLOQUY 355 (2008).

4. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

5. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Carol Steiker, *No, Capital Punishment Is Not*

and Vermeule's reply given in the same issue is that this was less a full-throated defense of the death penalty than an exercise in proving that governments are responsible not only for their acts (the punishment the government metes out) but also for their omissions (the murders it allows). In fact, it is unclear whether, outside of the confines of the larger normative ambitions of that article, Sunstein, at least, would defend the death penalty.<sup>6</sup>

This lack of prominent defenders of the death penalty is a puzzling state of affairs, and not least because of the large disconnect that exists between the academic mainstream and popular opinion. Usually, when there is strong public support for a measure, there are at least some academic backers, and not merely in the cocktail party sense of provocatively supporting the death penalty but actually taking a position in a law review article or a book. There is, again, little of this on display, especially in legal academia.

But the current academic consensus on the death penalty is also puzzling because the death penalty can be justified by nearly any theory of punishment, as this article demonstrates. The death penalty is retributive for murderers (among possible other crimes); it potentially deters the commission of future murders (even though the statistics on this are notoriously hard to prove, no one has shown conclusively that the death penalty cannot, or even that it does not, deter); and it can play a part in the moral rehabilitation of the offender, at least in the time he has before his execution (this was why religious leaders would visit the condemned in their cells, to counsel them to repent of their sins).<sup>7</sup> Punishment theory as a whole provides no barrier to showing that the death penalty is a fully justifiable and justified punishment for certain offenders.

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*Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

6. See Douglas Berman, *Does Cass Sunstein Really Think Capital Punishment May Be Morally Required?* SENT'G L. & POL'Y BLOG (Jan. 8, 2009), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2009/01/does-cass-sunstein-really-think-capital-punishment-may-be-morally-required.html](http://sentencing.typepad.com/sentencing_law_and_policy/2009/01/does-cass-sunstein-really-think-capital-punishment-may-be-morally-required.html) ("I have a feeling that Sunstein considered this article to be academic musings not a policy paper for the management of the federal criminal justice system.").

7. The death penalty can also be defended expressively or as a means of incapacitation. These theories are not treated here, in large part because it seems rather obvious that (a) the death penalty can express society's condemnation of the offender and (b) the death penalty incapacitates the offender.

In making this claim about punishment theory, this article puts itself firmly against Matthew Kramer's recent, comprehensive book on the death penalty, *The Ethics of Capital Punishment*, which this article uses as a foil for its arguments.<sup>8</sup> Kramer insists that the death penalty cannot be squared with any of the major theories of punishment, and so offers a fourth theory of punishment, the "purgative," that shows that the death penalty is justified for a certain class of particularly heinous crimes.<sup>9</sup> His book is helpful in framing the major argument of this article, for two reasons. First, Kramer's book represents a rare, prolonged effort in defense of the death penalty, something which merits noticing in itself: it is not often one finds a book published by a major press, and receiving some high-profile notice, that concludes that the death penalty is, all things considered, a justified punishment.

Second, on the way to defending his novel ("purgative") argument for the death penalty, Kramer nonetheless buttresses the existing academic consensus against the death penalty by claiming that no major theory of punishment can justify the death penalty. Whereas many academics seem to assume that the death penalty cannot be justified, Kramer presents detailed arguments. This article disagrees strongly with Kramer, and maintains that his book does not get us any closer to showing that, *within the major theories of punishment*, the death penalty is not justified.<sup>10</sup>

But the qualifying phrase of the last sentence is important: the fact that the death penalty can be justified in terms of punishment philosophy does not mean that it can be justified all things considered. There are many things (torture may be one of them) that might fulfill the purposes of punishment, but might not be permissible on other moral and legal grounds. It is not easy, however, to show exactly *how* the death penalty might be unjustifiable in ways that lie outside of traditional theories of punishment. To show that it

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8. MATTHEW KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT* (2011) [hereinafter *ETHICS*].

9. *Id.* at ch. 6. This article also does not deal with Kramer's "purgative theory" because it supports my overall thesis, *viz.*, that the death penalty is amply justified in terms of the major punishment theories. That is, the purgative rationale offers a *further* ground (if one were needed) for defending the death penalty, albeit one that may not be suitable for a modern, liberal state.

10. Although this article could not possibly examine all of Kramer's arguments in detail—that would require a book—it does find them useful as starting points. It is thus less a review of Kramer's book and more an analysis of the state of the debate about the death penalty that Kramer's book provocatively (if imperfectly) captures.

would be unjustifiable in this way would require proving that some larger moral idea (civilization, dignity, humanity, or even morality as a whole) entails the impermissibility of using death as a penalty. Developing such a larger moral idea is not an easy burden to bear, and the few who have tried have not been entirely successful in bearing it. Historically, at least, there was not thought to be any barrier between a society condoning the use of the death penalty, and that society being civilized, humane, or moral.<sup>11</sup>

The point of this article is not to provide an argument against the death penalty. It is, rather, to show that there are many sound arguments for the death penalty with traditional theories of punishment (the justification for the death penalty is overdetermined) and to open the way for a deeper exploration of the reasons why we might object to the death penalty. This article, then, has two major ambitions. The first is to show that none of the traditional justifications for punishment (retribution, deterrence, or rehabilitation) bars the use of death as a penalty. Every attempt to show that they do render the death penalty impermissible either involves smuggling in other assumptions that are not intrinsic to punishment theory, or puts into question that theory's ability to serve as a theory of punishment more generally. The second ambition of this article is to outline how the real case against the death penalty must be made outside of punishment theory and rely on more general normative presuppositions, ones not confined to punishment theory. The article begins sketching how such an argument might proceed, but does not give a fully fleshed-out version of the argument, in part because it is unclear whether such an argument can succeed.

The article itself breaks into four brief parts. In the first three, it discusses three major theories of punishment: the deterrent, the retributive, and the rehabilitative. It argues that, far from showing that the death penalty is *not* justified in terms of the three punishment theories, the theories tend to provide good reasons to *favor* the death penalty. The first two of these parts build on, but criticize, the argument that Kramer makes against the death penalty in the initial chapters of *Ethics*; in the third part this paper takes on an argument against the death penalty made by Dan Markel. The final part, and the final claim, of the article is that arguments against the death penalty find little traction from within punishment theory, and so, if they are to succeed, they need to look outside of it if any real ground is to be gained.

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11. See *Kansas v. Marsh*, 548 U.S. 163, 187–88 (2006) (Scalia, J., concurring) (European counties, until recently, retained the death penalty.).

## I. DETERRENCE

One of the most common arguments for the death penalty is that it is necessary to deter the commission of future murders; conversely, it is commonly argued that we should be against the death penalty because it does not deter future murders. This latter point assumes that the only possible justification for the death penalty is deterrence, which is not true. Even if the death penalty does not deter, it may be justified on other grounds, such as retributive or rehabilitative grounds.

Still, if the argument from deterrence works, it seems to be an especially strong argument: if we can stop future murders by executing one convicted murderer, why would we not do so?<sup>12</sup> Indeed, this part contends that within the terms of deterrence theory, there is absolutely no good rebuttal to this question. If we buy the general aims of deterrence theory in punishment (and we should), and if there is a reasonable probability that the death penalty deters, then *given deterrence theory*, the death penalty is justified.

The first issue we must address when it comes to deterrence is the deceptively simple question of whether there is, in fact, any good evidence that the death penalty deters. The debate over this is controversial, fierce, and—it must be said—ultimately inconclusive. It is, all sides concede, very difficult to measure whether the death penalty deters. There are too many variables at play, and it is hard to control for them—so hard, in fact, that it is doubtful whether we will ever have reliable statistics on whether the death penalty actually deters. Most writers on the topic conclude that we simply cannot know whether or not the death penalty deters, and this seems the only sound conclusion we can make about the actual data showing (or not showing) deterrence.<sup>13</sup>

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12. Sunstein & Vermeule, *supra* note 4. Sunstein & Vermeule put the number of murders deterred by each execution to be eighteen, relying on (controversial) empirical studies. This article will not assume the number this high (in fact, it won't assume any number greater than one). We should remember that it is also the case that the benefits of deterring one murder go beyond saving one life: there are many costs to murder, of which a lost life is only one. See MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS* (2010), for a similar accounting for the larger costs of crime.

13. See Donohue & Wolfers, *supra* note 5, at 72 (data mixed and ambiguous on deterrent effect of the death penalty); see also KRAMER, *ETHICS*, *supra* note 8, at 32 (evidence for deterrence effect of death penalty at best “inconclusive”).

But we can nonetheless conjecture, and in fact we need to. It seems at least plausible to think that people would be deterred by the threat of death.<sup>14</sup> At least *some* people would. It may not be many. But even if it is one or two, the deterrence argument works on its own terms: it prevents either an equal or greater harm than the harm it causes. The deterrence argument would only fail if there were proof that the death penalty had no deterrent effect, or even caused some people to kill. The intuition that either of these things is true can be hard to understand. Most people, if not all, fear death, and would want to avoid it. That this fear of death would not deter those who kill in the heat of passion or out of mental illness (or who are irrational) is not directly to the point; the point is only that the death penalty would need to deter *some* from killing, not *all* from killing.<sup>15</sup> It has seemed to many intuitively plausible that there is a level of use of the death penalty that is consistent and transparently administered that would cause a net decrease in killings.

There is, however, a deeper point buried in the inconclusive statistical debate. To question whether *death deters* is ultimately to question the foundation of general deterrence theory, the idea that the harsher a penalty, the greater the deterrence value. If we accept general deterrence in other areas of punishment, which we by and large do, there is no reason to suddenly reject it in the death penalty context. This point is a truth that will apply to many of the purported objections to the death penalty that come from punishment theory. There is usually no reason to think that if the justification is valid for other punishments (deterrence or retribution as a justification for prison, say), it would all of the sudden become invalid in the case of the death penalty. Even to make the case that the death penalty would deter less than or just as much as life in prison without parole is not to make the case that the death penalty would not deter *at all*.

The point about the statistical debate, and the conclusion that because we cannot solve it we must resort to conjecture, is *not* to say that statistics do not matter. This article does not side with Dan Kahan, who thinks that

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14. See, e.g., Gary Becker, *Further Comments on Capital Punishment*, BECKER-POSNER BLOG (Dec. 25, 2005), <http://www.becker-posner-blog.com/2005/12/further-comments-on-capital-punishment-becker.html> (citing quantitative data and quoting from philosophers on the “natural fear of death”).

15. See KRAMER, *ETHICS*, *supra* note 8, at 35 (Those “whose psyches are not . . . woefully unattended to reality . . . can be expected to act with a general sense of the danger that attends their homicidal misdeeds.”).

the debate about deterrence is ultimately a side show for a deeper, non-deterrence-based, expressive disagreement about capital punishment.<sup>16</sup> No, statistics matter. But statistics are hard to come by, and may simply be impossible to produce. We have to do the best we can with what we have, which is what we broadly know about human nature. *Contra* Kahan, an honest reckoning with deterrence-based arguments does not get us to non-deterrence arguments, but to more abstract, more philosophical arguments about deterrence, as we will shortly see.

In the end, then, we are only left to guess about the statistics, although we can bring to bear considerations (such as the ones briefly listed above) to buttress our guess work and make our guesses educated. This ambiguous, even hesitant conclusion, in a sense, is all that needs to be shown: that at least deterrence theory on its own does not provide a bar to the justification of the death penalty. We do not know that the death penalty does not deter, and what we *do* know does not give us warrant to think that it deters *less* than other punishments, so we certainly cannot oppose it for that reason.

But Matthew Kramer wants to make a stronger argument against the deterrent justification for the death penalty, one which, if true, would (he thinks) lead us to reject entirely the deterrence rationale for the death penalty. Kramer's argument does not depend on saying that, as a contingent matter, the death penalty does not deter. Rather, Kramer is worried about the theoretical commitments that accompany a deterrence-based justification for the death penalty.<sup>17</sup> Because of those deeper theoretical commitments, Kramer argues, we should reject deterrence-based arguments for the death penalty. Kramer's argument occurs frequently in the literature, and he is not unique in making it,<sup>18</sup> although I will refer to his version of it in what follows. If it is successful, it is a serious theoretical challenge to the deterrence argument for the death penalty.

Briefly, Kramer alleges (or seems to allege) that those who accept deterrence-based claims should be committed to the idea that *whenever* performing an action would be useful to maximize the amount of murders deterred, then we should perforce perform that action.<sup>19</sup> So, if killing an

16. Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414 (1999).

17. KRAMER, ETHICS, *supra* note 8, at 38.

18. It is, basically, an argument against consequentialism in ethics.

19. KRAMER, ETHICS, *supra* note 8, at 42, 44. Puzzlingly, Kramer admits in the conclusion to the chapter that any system of criminal justice must include deterrence as

innocent person, or torturing a guilty one, would maximize the number of lives saved, we should do it. It is not only permissible, but mandatory, within the deterrence framework. Kramer's point about deterrence-based arguments is forceful (and familiar), but it does not accomplish what he means it to accomplish.

If the purpose of Kramer's analysis here is to show that deterrence cannot justify the death penalty, then it manifestly fails. For the fact that deterrence-based arguments would justify *more* than the death penalty does not prove that they do not *at least* justify the death penalty. It only shows that there would be some unwanted or unwelcome consequences should we subscribe to the deterrence justification. These consequences may be acceptable to some, but not to others. But they do not show that a deterrence-based justification will not work for the death penalty; in fact, the bad consequences assume that the deterrence argument for the death penalty *succeeds*, to the point of succeeding *too well*.

Nor is it clear (and this is the more important claim) that because we accept the deterrence argument for the death penalty, we must accept it in all sorts of other cases, and make it apply to *everything* about the criminal law. In fact, the deterrence argument for the death penalty is a circumscribed and actually very limited one. It says simply that if on balance the death penalty saves more lives than it kills, it is justified. It does not require adopting consequentialism as a philosophy of government, or even of the criminal law.<sup>20</sup> In short, we do not have to have a criminal law that is bound by a sort of crimped and crabbed uniformity.

H.L.A. Hart and John Rawls, in their writings on punishment, were famous for making a version of this point (as Kramer acknowledges).<sup>21</sup> For

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a value. *Id.* at 68 (deterrence a "major and salutary function of the general institution of punishment").

20. Consider an analogy: to say we should go bowling tonight because it is "fun" is not to adopt "fun" as a general philosophy of life, nor does it mean fun is the highest value in any other but the highly circumscribed context of "What should we do tonight that doesn't cost too much money and isn't too much trouble?" Similarly, to defend the death penalty because it deters is not to adopt deterrence as an overall rationale for government, or even for punishment itself. It is only to say, "We should execute this person for this crime if we are able to save more lives by doing it."

21. See H.L.A. Hart, *A Prolegomena to Punishment*, in *WHY PUNISH, HOW MUCH?* 195 (Michael Tonry ed., 2011); John Rawls, *Two Concepts of Rules* (1955), reprinted in JOHN RAWLS, *COLLECTED PAPERS* 20, 23 (Samuel Freeman ed., 1999). The idea has its origins in the thought of Beccaria. See CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (1794).

them, our theoretical account of the various areas of the criminal law need not be all of one piece. We can have a theory of why we have the institution of punishment, but we can have another and different theory for how we distribute punishments (once we have decided to have the institution of punishment). Hart and Rawls believed that the institution of punishment has a utilitarian justification, but the rationale for the distribution of punishment is something closer to retributivism. Showing how punishment can be plural in this way was one of Hart and Rawls's greatest achievements in punishment theory.

But their point about the distinction between the *aim* of punishment and its *distribution* can be generalized.<sup>22</sup> We can have a theory of what things should be criminalized (a theory of the substantive criminal law) that is distinct from a theory of why we punish (a theory of punishment) and distinct from a theory of how and how much we should punish (a theory of sentencing). We can be Kantians about what conduct should be criminalized, but we can be consequentialists about the purposes of punishment, and we can be Kantians again about what modes of punishment are permissible, or compatible with human dignity. There is no reason why these three parts of the criminal law have to be justified according to the same principles. To say that being a utilitarian in *one* area entails anything about any *other* area does not follow.

So when Kramer suggests that a deterrence-based justification for the death penalty would justify making a crime of “not turning in someone who has committed a crime” (because that would deter others from committing a similar crime), he errs.<sup>23</sup> We can decide that “not turning someone in” should not be a crime for deontological (or other moral) reasons, but still hold that the reason we execute those who commit a murder is consequentialist.<sup>24</sup> In general, the *types of things we criminalize* and the *reasons why we punish those who commit the things we criminalize* need not have the same basis. The criminal law can be plural in this way. It does not have to be, but it can be.

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The Hart-Rawls argument is elaborated in Chad Flanders, *Cost as a Sentencing Factor: Missouri's Experiment*, 77 MO. L. REV. 391 (2012).

22. Indeed, Hart thought the point could be generalized to all of law.

23. KRAMER, ETHICS, *supra* note 8, at 50–51.

24. All the same, it is not obvious that “not turning someone in” *shouldn't* be a crime, even for deontologists.

We can decide that the death penalty is only justified for those who are guilty of murder because this will deter others from killing. We do not have to adopt consequentialism for the entire criminal law if we adopt consequentialism as a rationale for punishment; nor, more specifically, do we have to adopt consequentialism as a whole to say that consequentialism is why we favor the death penalty. Further (to put the point in a slightly different way), there is no contradiction in saying that deterrence in punishment is limited by all sorts of constraints, deontological and otherwise. We might say: the death penalty is justified only in a liberal state, and only when a person has had due process (a right to a fair trial and so forth). But we can then say: *given those constraints*, why we execute rather than put someone in jail for the rest of his life is the marginal deterrent value of an execution.

As was already mentioned, of course, telling whether the death penalty actually does deter murder is a nearly impossible proposition if we hold ourselves to a high level of statistical proof. But many, if not most, government policies are not held to such a high level, even those dealing with life and death decisions or with criminal punishment more generally (as Sunstein and Vermeule point out in their article). The death penalty probably does deter, although perhaps not very much.<sup>25</sup>

The point is, deterrence-based punishment theory at worst provides no argument against the death penalty, and at best provides an intuitively appealing case for it. To summarize, we cannot argue against the death penalty on the grounds that it does not deter because (a) we do not know, and (b) it might in fact deter. Nor can we oppose the deterrence-based argument on the ground that deterrence might justify many other bad things; it might, but (a) we are not necessarily committed to these other things, and (b) the fact that many other things might be justified does not show that the death penalty is not justified. There are no grounds here to be against the death penalty, and many intuitive grounds to be in favor of it.

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25. To deter effectively, our death penalty use would probably have to increase, or be more consistently applied. But these points do not detract from the overall point that the death penalty could be justified because it deters; it is a separate debate what would need to happen to make the death penalty an effective deterrent.

## II. RETRIBUTION

The death penalty has traditionally been justified on retributivist grounds. To see this, we need look no further than the great retributivist, Immanuel Kant, who famously argued that he who kills “must die.”<sup>26</sup> Kant felt that the categorical imperative required that anyone who killed must be killed in turn. And although problems of proportionality bedevil retributivist analysis, the death penalty offers retributivists a comparatively easy call: the only proper punishment for murder is that the murderer dies. A life for a life. It is somewhat surprising, then, that Kramer along with another prominent retributivist (Dan Markel<sup>27</sup>) actually argue that retributivism, properly understood, is incompatible with the death penalty. Here Kramer and Markel are against the retributivist tradition, which makes their arguments at the least interesting and novel, and (if only for that reason) worth considering. But they are important for another, unintended reason, because they show how retribution is in the end a rather *limited* theory, one that does not give us much guidance in which punishments are permissible and which are not.

As a general matter, retributivists say that punishment must be given to an offender because it is deserved, and not because it will make the offender better (rehabilitation) or deter others (deterrence). So the success or failure of the retributivist argument does not stand or fall with statistics, or our best reasonable guess about what those statistics might say. Nonetheless, there is a key similarity between retributivist and deterrence arguments about the death penalty: if we argue that either cannot justify the death penalty, we have to explain why the theory might be able to justify other punishments, but not the punishment of death. The previous part questioned whether we could reject the deterrent potential of the death penalty without also rejecting the principle underlying deterrence theory: why think that the death penalty would not deter, while jail or fines or probation would?

So too with retributivism and the death penalty. If punishment is imposed because it is deserved, a person may deserve death for his crime;

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26. Immanuel Kant, *The Penal Law and the Law of Pardon*, in WHY PUNISH?, *supra* note 23, at 32.

27. Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. REV. 407, 466–67 (2005).

indeed, many of the great philosophical defenders of retribution (Kant the greatest among them) thought that this was obvious and axiomatic. Moreover, some contemporary retributivists are explicit that their theory of retribution tends to underdetermine which punishments we should give, and how much we should give of them.<sup>28</sup> This underdetermination would seem to apply to both the method and the length of punishments: it leaves open the possibility that the appropriate punishment for some crimes should be death. At least, there seems no a priori reason to think that retributivism would be incompatible with the death penalty, and at least an intuitive case that the proper deserved punishment for murder is death, because a punishment should be roughly proportional to the harm caused.

In fact, there is no good argument from within retributivism to show that it cannot justify the death penalty, and any argument that purports to do so must smuggle in assumptions outside of retributive theory. We can see this happening in both Kramer's and Markel's attempts to find a retributivist argument against the death penalty. Their arguments are thus exemplary of a certain tendency: to want to maintain that it is the theory of punishment that really excludes the death penalty, when in fact it is something else (something outside the theory) that is doing the real work. This part begins with Kramer's attempt, which is most explicit in its reliance on an assumption external to retributivism to deny retributivism's compatibility with the death penalty. It then argues that even with these external assumptions, Kramer does not give a good retributivist argument against the death penalty. Finally, this part turns to Markel's "retributive" argument against the death penalty.

Kramer explicitly adopts and accepts the point that retributivist justifications of punishment underdetermine what severity of punishment should be given.<sup>29</sup> For theft, how can we be certain that the deserved punishment is five years rather than ten years, for example, or even prison at all? Retributivism, it is commonly objected, gives no firm answer to any of these questions. (This is a serious problem for retributivism, but this is not the place to deal with this problem at any length.<sup>30</sup>) Indeed, as an implication of retributivism's indeterminacy when it comes to punishments,

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28. See Chad Flanders, *The Limits of Retribution*, BYU L. REV. (forthcoming 2014); see also KRAMER, ETHICS, *supra* note 8, at 122.

29. KRAMER, ETHICS, *id.* at 122.

30. See the discussion in Flanders, *supra* note 30.

Kramer concedes that retributivism does not rule out the legitimacy of capital punishment.<sup>31</sup>

It is possible, Kramer says, that someone might deserve death as a punishment for his crimes. Indeed, it bears emphasizing that the indeterminacy of retribution is pervasive. Retribution does not, in itself, give a reason why someone should deserve *any* particular punishment for any given crime. It only says that those who have committed a crime deserve to be punished, and (at most) those who commit a worse crime should be punished more harshly than those who commit a lesser crime.

So Kramer concedes that nothing in retributivism shows that the death penalty is impermissible: it is one of a class of punishments that it might be appropriate to give to an offender. But Kramer thinks that combined with another, intuitively acceptable principle, we should reject the compatibility of retribution and the death penalty. That principle, the Minimal Invasion Principle, says that any “significant exertion of legal-governmental power” must (1) “be in furtherance of an important public purpose” and (2) “employ the least invasive or restrictive means that is sufficient to achieve that purpose.”<sup>32</sup>

Is the death penalty ruled out by a combination of retributive theory and the Minimal Invasion Principle?<sup>33</sup> To show that it was ruled out, we would need to know several things. First, we would need to know that in fact a punishment other than death would be an appropriate punishment for certain crimes. Kramer himself rightly rejects total skepticism about desert

31. KRAMER, *ETHICS*, *supra* note 8, at 125, 134 (principle of proportionality compatible with the death penalty).

32. This principle is not very well developed by Kramer given the work he is asking it to do: its first mention is in a footnote. *See id.* at 4 & n.3; Kramer borrows the idea from the work of Hugo Adam Bedeau.

33. Note that Kramer is saying that not retribution alone, but retribution *plus* the Minimal Invasion Principle rules out the death penalty. *See* KRAMER, *ETHICS*, *supra* note 8, at 69 n.1 (minimal invasion is an “independently correct precept of political morality” and not a tenet of retributivism). But the Minimal Invasion Principle is not a principle of reason, so that one *must* adopt it. Sometimes one might want the quickest punishment that serves its purpose, not the minimally invasive punishment, or the most expressive, or the most efficient, etc., etc. (Of course, Kramer may say that if one wants the quickest or most expressive punishment, then the punishment must be minimally invasive relative to *those* goals; if this is the case, then the Principle starts to lose much of its content.). It is not obvious, either, that the Minimal Invasion Principle is a “central tenant” of liberalism, as Kramer alleges. *Id.* at 117.

and proportionality.<sup>34</sup> He denies that there is no answer as to what punishments are appropriate for certain crimes; it is plausible that there is a range of correct answers in most cases.<sup>35</sup> But then it seems likewise possible that there could be certain crimes where death would be the *only* appropriate punishment (where the range is reduced to only one punishment). Death would be the least invasive or restrictive means that is sufficient to achieve the purpose of giving certain offenders (murderers, say) what they deserve. It is hard to say how we could determine that this was *not* the case.

Kramer replies to this claim by arguing that a punishment such as life in prison without the possibility of parole is less invasive than the death penalty, but is nonetheless sufficient to satisfy the goals of retributive punishment.<sup>36</sup> As just mentioned, we do not know that life in prison without parole is, after all, sufficient in every case to meet the goals of retributive punishment. Maybe it is, but maybe it is not. The problem is (again) one of specifying the *right amount* of punishment in retributive theory, along with retributivism's general failure to give us any firm guidelines on how to do so.

And Kramer's invocation of life imprisonment as a punishment raises two further questions to which we would need to know the answers. First, how do we know that life imprisonment is *less invasive* than the death penalty? As the United States Supreme Court has recently said, life imprisonment with no parole is basically a sentence to die in prison.<sup>37</sup> Why is this necessarily *less* invasive than simply putting someone to death, without letting him linger? Cesare Beccaria, for one, thought that a life of prison labor was more burdensome, more of a punishment, than death (years of denial of autonomy *followed* by death, rather than a quick death).<sup>38</sup> It is not obvious that he was wrong about this; and if he is not, then in some cases where the punishment could be *either* death or *life in prison*, the Minimal Invasion Principle would counsel giving the death penalty rather than life.

34. KRAMER, ETHICS, *supra* note 8, at 120–22.

35. Whether that range is useful for policy purposes is, however, another question. Nonskepticism about desert does not mean that desert is determinate enough to fix with confidence the punishment for a given crime.

36. *E.g.*, KRAMER, ETHICS, *supra* note 8, at 117.

37. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

38. BECCARIA, *supra* note 23, ch. 28 (“Perpetual slavery, then, has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death. *I say it has more.*”) (emphasis added). Some offenders have famously preferred death to life in prison.

But what if Kramer is right about death being worse than life in prison? There is still the possibility that for some crimes, the proper punishment is either death or torture followed by death. Suppose that this is the case for some truly awful crimes, such as genocide: the only way to give the offender what he deserves is either to kill him outright or to torture him and then to kill him. In this case, *at least death* is morally required, and not merely morally permissible. Kramer has not ruled out the possibility that there are cases such as these, cases where death would be the minimally invasive punishment (compared to death-plus-torture), and not merely life in prison. In other words, Kramer has not shown that in some cases, at least, death may be the *only* permissible punishment under retributivism, even if it incorporated the Minimal Invasion Principle—something that Kramer concedes is not entailed by retributivism.

Dan Markel offers another retributive argument against the death penalty which is worth analyzing.<sup>39</sup> His argument can at times be difficult to parse, and what follows can only be an imperfect reconstruction of it. Markel presents his argument as a *retributive* conceptual argument against the death penalty. But the concept he actually says is opposed to the death penalty is not always “retribution.” He says that executions offend human dignity, but it is not clear that retributivists are committed to any one view of human dignity, or even if they are committed to an idea of human dignity at all. It may be, as a contingent matter, that most or all retributivists believe in human dignity, but it is not a necessary part of retributivism, at least in the way many conceive of it.

Markel’s argument, like Kramer’s, also reveals the conceptual limitations of retributive theory. Retributivism, at its core, does not say that all types of punishment must be consistent with human dignity; it only says that the reason we punish is because the person deserves it. A further principle—call it the Dignity Preserving Principle—saying that only *some* ways of punishing are morally permissible, or compatible with a respect for human dignity, is a principle that derives its basis from outside of retributivism (and

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39. Markel, *supra* note 29. Markel makes several arguments against the death penalty, not all of which should be considered as unique to retribution. Another of Markel’s arguments, which can be put under the category of “rehabilitative” (Markel calls it “communicative”), is considered in the next section. Markel also makes (what he calls) several “contingent” arguments against the compatibility of retribution and the death penalty, which are not examined here (for reasons that are briefly given in Part IV of the article).

outside of punishment theory generally; deterrence theorists do not have to subscribe to any version of human dignity, nor do rehabilitationist theorists).<sup>40</sup> It appears that the good of retributive justice *simpliciter* can be achieved even if it degrades the dignity of the punished and the punisher, because human dignity is not part of retributivist philosophy proper (torture could be apt retribution for someone who has tortured others, even though it may degrade the dignity of everyone involved). Degrading a person's dignity through certain kinds of treatment may be bad for many other reasons, and it almost certainly is; the point is that these reasons are not intrinsically *retributive* reasons.

But suppose, contrary to what was just argued, that retributivism is internally committed to a relatively robust idea of human dignity. Why suppose that idea of dignity is incompatible with the death penalty, and yet compatible with putting people in prison for the rest of their natural lives? Kant thought that respect for the dignity of an offender who committed murder *required* that we put him to death, that anything less would be to treat him as less than an autonomous end-in-himself. Hegel followed Kant in this regard, and Herbert Morris, in his Kant-inspired essay "Persons and Punishment," also seemed to think that in some cases an offender's dignity was honored when he was executed.<sup>41</sup> Certainly Markel would not want to back down from the idea that punishing a person for a wrong is part of respecting that person's dignity (he agrees with Kant on this point<sup>42</sup>). But he is not clear about what changes when we switch to capital punishment (his example of a punishment flatly incompatible with human dignity is torture, not death). So *even if* retribution requires a commitment to human dignity, it is far from obvious that this commitment rules out the death penalty. If putting someone in prison for life without the possibility of

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40. Note that this point is true *even if* dignity requires punishment of some sort (it is the only way to treat someone as truly accountable for his or her actions, for instance). The fact that someone deserves punishment does not limit what *kinds* of punishment he or she may deserve.

41. HERBERT MORRIS, *Persons and Punishment*, in *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY & MORAL PSYCHOLOGY*, 31, 36 (1976).

42. There is also the possibility that the person who has committed a grave crime has *already* lost his dignity. Kramer may himself subscribe to this principle, because given his "purgative" rationale for the death penalty, some people presumably no longer are fit to walk on the earth.

release (so that he inevitably dies in prison) is consistent with treating him with dignity, is executing him outright any less so?<sup>43</sup>

### III. REHABILITATION

This leads us to the final theory of punishment this article considers, that of rehabilitation.<sup>44</sup> Rehabilitation as a general rationale for criminal punishment has fallen out of favor in America over the past thirty to forty years, at least in theoretical debates about punishment. There are very few avowed rehabilitationists out there, although the movement for restorative justice may have some elements of rehabilitationism in it.<sup>45</sup> Punishment as rehabilitation, the conventional story goes, just does not work—although this seems to be something of a self-fulfilling prophecy. Rehabilitation does not work because we are not willing to invest the resources and the will power necessary to make it work.

It is common, at least in the popular press, to see defenses of the death penalty in terms of deterrence and retribution (“just deserts”), but it is much less common, indeed very rare, to see death as a possible tool of rehabilitation. In fact the *strongest* argument against the death penalty from within punishment theory comes from rehabilitation. If someone is condemned to death and is executed, he can no longer be rehabilitated; barring an appeal to reform in the afterlife, this much seems obvious. For secularists, at least, a dead person cannot be made morally better through actually dying. So we might think that here is a good opportunity to condemn capital punishment using the resources of punishment theory.

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43. In a later article, Markel writes that “nothing intrinsic to retributivism says that the most severe punishment the state must impose is the death penalty.” Dan Markel, *Executing Retributivism*, 103 Nw. L. REV. 1163, 1203 (2009). But nothing intrinsic to retributivism *rules out* that the most severe punishment the state could impose is death, or even that death be one of a variety of punishments the state can give. *But cf. infra* note 48.

44. Kramer does not consider rehabilitation, because he considers it a “non-starter” as a justification for the death penalty. Kramer, however, does cover Markel’s “communicative” argument against the death penalty, which this article places in the rehabilitative category.

45. For an excellent analysis of how rehabilitation as a theory has fallen on hard times, see Francis Allen, *Legal Values and the Rehabilitative Ideal*, in *WHY PUNISH?*, *supra* note 23, at 97.

This point can be interpreted as the basis of Dan Markel's strongest argument against the death penalty.<sup>46</sup> As part of his theory, Markel says that one of the aims of retribution is to communicate to the offender, convincingly, that his crime was wrong and that he deserves punishment for it. The ultimate aim, Markel continues, is to have the offender "internalize" the values that his crime has flouted: decency, fair play, and respect for persons.<sup>47</sup> Markel says that internalization is part and parcel of retributivism; this idea seems incorrect, or at least unconvincing.<sup>48</sup> Still, no matter where in punishment theory we place the internalization of the right values, the idea that such internalization is incompatible with executing the offender has a certain plausibility. As Markel puts it, "After the execution, the offender cannot conduct himself in a manner that affirms notions of moral responsibility or equal liberty under law; in other words, he is precluded from participating in the goods animating retributive justice."<sup>49</sup> Having rehabilitation (or "internalization") as a goal of punishment precludes death as a punishment. Or so the argument alleges.

But even though it is correct that reform and rehabilitation cannot happen *after* a person's death, there is no reason to think that it cannot happen *before*, no matter how brief the "before" is. All that must remain open is that the offender have time to recognize that he has done wrong, to repent, and to accept his punishment as just. There is no reason to think that for this to happen before an execution is a conceptual impossibility, although practically it may not happen very often.<sup>50</sup> Markel himself imagines

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46. See Markel, *supra* note 29. Markel thus holds that his version of retributivism itself rules out at least one punishment, *viz.*, death.

47. *Id.* at 415.

48. As intimated in the last section, retribution is about punishing someone because he deserves it, not as part of an effort to get him to internalize certain values. "Internalization" is a process of moral reform, and not of giving someone their just deserts (a person can be punished justly, according to retribution, yet fail to internalize anything).

49. Markel, *supra* note 29, at 416. Here especially Markel's language is more suggestive of rehabilitation and moral reform than retribution.

50. See STUART BANNER, *THE AMERICAN DEATH PENALTY: A HISTORY* 22 (2002) (penitence historically as part of capital punishment); see also Stephen P. Garvey, *Is it Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1340 (2004) (contemplating reconciliation between defendant and victim prior to execution).

an example of an offender who has undergone repentance and asks to have his death sentence imposed on him as a fit punishment.<sup>51</sup>

Even if it is very unlikely that reform will actually happen before an offender is executed, all we need to hold out is the possibility that it may happen and that it is a good thing when it does happen. After all, it probably does not happen very often now that prisoners sentenced to months (or even decades) in prison are able to reform themselves, morally speaking. Yet, we hold out the hope that they might reform themselves.<sup>52</sup> Again, if we deny that reform can happen in *this* context—that a death sentence imposed on an offender after a trial can lead him to recognize the error of his ways—we have to explain why we might believe it will happen in other penal contexts. If it is a matter of giving the offender more time before he dies to repent, then the compatibility of reform and the death penalty is guaranteed by an easy fix (something Kramer notes in his analysis of Markel’s argument<sup>53</sup>): mandate that a person sentenced to death be executed only after a certain amount of time, say six months, has passed.

Our distance from some of the historical bases of punishment may have jaded us to the possibility of reform and rehabilitation when death was the sentence (and indeed to the possibility of reform in *any* penal context). But those in early America saw no incompatibility between sentencing someone to death and then having a priest visit him in prison the night before his execution.<sup>54</sup> There was still time even for those condemned to death, they thought, to have the prisoner repent of his crimes and thereby save his immortal soul. Surely the good of internalization (or moral conversion) is still a good even if people do not live on in the afterlife. Even today, we

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51. Markel, *supra* note 29, at 464 (“Say Jack has committed a murder revealing unmitigated wickedness. However, he has confessed to the crime, taken responsibility for his actions, apologized to his victim’s family, and feels guilty unto death, so much so that he would prefer to die at the hands of the state (rather than by his own hand) because he does not want to deprive the state of any deterrent benefits that might flow from his execution. . . . Ex hypothesi, he has spent two years on death row, where he has focused on internalizing the meaning of moral accountability, equal liberty under law, and democratic self-defense.”).

52. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (prospect and possibility for reform of juveniles in prison). *Miller* held out the possibility of reform as a reason not to imprison juveniles for life without the possibility of parole. But if moral reform is an *intrinsic* good (as Markel seems to believe that it is), it should not matter whether prisoners are released for it to be a good worth realizing.

53. KRAMER, *ETHICS*, *supra* note 8, at 109–10.

54. *See* Banner, *supra* note 52.

can plausibly imagine an offender coming to repent of his crime and to see his death as an appropriate and even a necessary punishment for his crime(s). Our understanding of what moral reform consists in (and what its object is) may change, but our understanding of its possibility should not.<sup>55</sup> Even a secularist can and should acknowledge the good of moral reform, of a person recognizing and repenting of his wrongs, prior to that person's execution.

#### IV. THE CORE OF THE CASE AGAINST THE DEATH PENALTY?

The burden of the previous three parts was that the death penalty cannot (at the very least) be shown to be objectionable by any of three major theories of punishment. There is no bar, in other words, from deterrence, from retribution, or from rehabilitation to the justifiability of the death penalty. Generally, if we are to reject the possibility that the death penalty can be justified in any of these theories, we risk undermining the basis of those theories more generally. If we believe that death does not deter, why do we believe that prison deters? If we believe that death does not give an offender his just deserts, why believe that life in prison would? If an offender cannot be moved to reform by the prospect of death, why believe that he can be reformed by the prospect of years in prison? The death penalty is (in a way) just another punishment, and so it stands to reason that it will find support in theories that attempt to justify punishment in general. This broader point about punishment is what previous parts of this article have tried to elucidate.

But if opposition to the death penalty cannot be derived from within any philosophy of punishment, then that opposition must properly come from moral or legal principles that are *outside* of the philosophy of

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55. The rehabilitationist argument is, as I have said, the one theory with the greatest possibility of being a convincing argument against the death penalty (one could say that on certain conceptions of rehabilitation, rehabilitation can *only* happen if one stays alive). It is therefore interesting that few have developed the idea of "rehabilitation" in any robust sense in pursuit of a refutation of the moral validity of the death penalty (as noted in the article, Markel allows the possibility of moral reform prior to being executed). This is perhaps another marker of how regrettably far out of favor rehabilitation as a general theory of punishment has fallen.

punishment. Two moral principles might be invoked here. The first principle, which this article is not so much concerned with, is procedural: it says that the death penalty is unjustified because it is arbitrarily or discriminatorily imposed.<sup>56</sup> This is a strong argument against the death penalty *as practiced*, but it is less strong as an argument against the death penalty *in theory*. A solution to the arbitrary or discriminatory use of the death penalty is to apply it more consistently (use fair procedures); it is not necessarily to abolish it altogether. And here too we can make the general point: most if not all punishments, at least in America, are applied in a discriminatory and arbitrary way. This fact does not make a case for abolishing criminal punishment entirely. At the very least—and this is the important point—these types of procedural objections do not show anything *intrinsically* wrong with the death penalty.

As a result, this article is more interested in a second kind of principled objection to the death penalty, which also derives from outside the philosophy of punishment *proper*. This second type of principled objection does not appeal to any merely procedural norms, but rather to substantive moral or political ideals.<sup>57</sup> We have already seen two examples of this objection, in the section on retributivism. Kramer, in his book, relied on the Minimal Invasion Principle to show that retribution could not be justified. According to that principle (by Kramer's lights), retribution could never be the least invasive punishment that was necessary to accomplish the aims of retribution. Even if the argument succeeded, it was an argument that relied on a substantive moral ideal *external* to the theory of retribution. Markel, too, ended up relying on something like a "Dignity Preserving Principle" which, this article has maintained, is also outside of retributivism proper. That human dignity requires the abolition of the death penalty is controversial:

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56. The now classic essay on arbitrariness as it relates to the death penalty is Stephen Nathanson, *Does It Matter If the Death Penalty Is Arbitrarily Administered?*, 14 PHIL. & PUB. AFFAIRS, 133 (1985). Kramer devotes a chapter (with many citations) to the practical and due process concerns about the death penalty in his book. See KRAMER, ETHICS, *supra* note 8, at ch. 7 ("The Death Penalty in Operation"). The procedural arguments surrounding the death penalty usually amount to two: first, that the death penalty is not consistently administered and indeed is administered almost in a random way, and second, that the death penalty is applied in a discriminatory way, falling disproportionately on poor people and minorities.

57. This type of principled objection is also not contingent in the way that the argument from poor procedures is contingent.

many have thought that a proper respect for human dignity requires executing some criminals, rather than sparing them from death. But whether or not a respect for human dignity entails abolishing the death penalty is not something that can be answered from within any theory of punishment, even retribution.

Another popular moral principle used to object to the death penalty is captured in the notion that the death penalty is not *civilized*. This language is familiar from United States Supreme Court opinions, although a majority has stopped short of ever calling the death penalty itself inconsistent with the evolving “standards of decency” of a civilized society.<sup>58</sup> Nonetheless, several Justices in the past forty years or so have alleged (in so many words) that the death penalty is not a penalty that a civilized society can abide. But even so, these Justices have stopped short of giving a fully spelled-out understanding of what standards are requisite for a society to be “civilized.”<sup>59</sup> Many “civilizations” of course have tolerated and used the death penalty, with the number shrinking only relatively recently in history.

Jeffrey Reiman has given one of the only (if not the only) extended philosophical defense of the argument that civilized society should not allow the death penalty.<sup>60</sup> A civilized society, Reiman argues, borrowing from Émile Durkheim, will gradually reduce the amount of “horrible things” that it imposes on those it punishes.<sup>61</sup> A growth in civilization means a reduction in horrible punishments such as torture and (Reiman adds) the death penalty. Even though torture is marked by “intense pain” and the death penalty usually is not, death still involves the “total subjugation” of one person to another.<sup>62</sup> Execution is thus like torture in that it “enacts the total subjugation of that person to his fellows.”<sup>63</sup> A civilized society rejects such subjugation.

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58. *E.g.*, *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (“At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of *uncivilized* and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”) (emphasis added).

59. As I note below, I think Brennan comes closest to doing so.

60. Jeffrey Reiman, *Justice, Civilization, and the Death Penalty*, 14 PHIL. PUB. AFF. 115 (1985).

61. *Id.* at 136.

62. *Id.* at 140.

63. *Id.*

This summary gives Reiman's argument painfully short shrift, and it is worth emphasizing that his argument is one of the more promising avenues by which to object to the death penalty. It is an especially important research agenda, as the Supreme Court seems to have explicitly (but not in any deep fashion) relied on a theory of civilization to justify its death penalty jurisprudence. It is an agenda that has yet to be seriously picked up in the legal academy, and it needs defenders. Nonetheless, here are three observations (reservations, actually) about Reiman's argument, which any defense of the death penalty as "uncivilized" will have to address and overcome.

The first observation is whether *all* punishment, at least in the modern era, involves the total or near total subjugation of the offender. Certainly prison—the total deprivation of an offender's freedom—would seem to come close to a total subjugation.<sup>64</sup> Death, in this respect, might not be completely different in kind from most punishments, certainly not from the common alternative to death: life in prison without the possibility of parole. If we were to give up any kind of subjugation entirely as an option in the modern penal state, we may end up dramatically transforming our criminal justice system (at least the American system).

This leads to a second observation. Reiman qualifies his claim about the civilizing trend of society by saying that we become more civilized when we stop doing horrible things to those we punish *provided that society does not become more dangerous as a result*.<sup>65</sup> We have already seen that finding out whether or not the death penalty would deter future crimes is something we will probably never know with certainty. We can only make an educated guess about how great (or small) the deterrent effect would be, and act in light of our best estimate. Reiman seems to concede that *if* the death penalty deterred, and saved lives, then a civilized society might justly impose it. This admission seems a rather significant concession, and one which potentially undermines Reiman's argument.

It seems as a result of this last concession that the idea of "civilization" stands on both sides of the debate here. Thus a third observation: a civilized

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64. Of course, prison involves more than only the deprivation of a person's freedom: that person is also, *inter alia*, humiliated, shunned, shamed, degraded, debased, insulted, and many times (perhaps even usually) physically harmed. All of these further show the prisoner's near total subjugation at the hands of the state in *any* punishment. He is, as it were, "dominated" by the state.

65. *Id.* at 138.

society also protects its members, and the death penalty may be necessary to do so. Moreover, civilized society also tries to vindicate the claims of those who have been victimized by crime and does not merely act to protect future victims. Here too, the death penalty may be necessary. Does not executing those who commit child rape show respect for the victims of child rape, even if it might not deter other rapists?<sup>66</sup> Failing to punish the child rapist *at all* would certainly be uncivilized: it would show that the criminal had the last word in expressing his contempt for his victim. But this leaves open the possibility that a civilized society might need the death penalty to give the emphatic last word to the claims the state makes on behalf of the victims of crimes.

## CONCLUSION

The majority of this article has been about the death penalty, but the article has implications that move beyond that particular punishment. Those implications stretch into philosophy of punishment more generally, and the possibility of finding resources within the classic theories of punishment to criticize certain modes or methods of punishment. A recurring theme of this article has been that to reject the deterrent, retributive, or rehabilitative theories as justifications for the death penalty means potentially rejecting them as justifications for all punishments, which no one generally wants to do. If this conclusion is sound, then there is no purchase in critiquing the death penalty from within the philosophy of punishment itself. None of the theories of punishment reviewed in this article offer much support, if any, for the idea that the death penalty is unjustified. Indeed, some of them give us ample resources with which to endorse the death penalty.

This lack of resources within the various punishment theories means we have to go elsewhere, to broader normative territory, to criticize the death penalty. We have to look at ideas of human dignity, or of decency, or of civilization. But even here, we should not look too narrowly at the death penalty alone. Again, the problem is not merely that the death penalty might not be compatible with the norms of a civilized society, but that *much* of the way we punish is incompatible with those norms. The focus on

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66. Cf. Bibas & Berman, *Engaging Capital Emotions*, *supra* note 3.

the wrongness of the death penalty may have obscured us from larger questions about criminal justice in America. Even if the death penalty were abolished tomorrow, the question of whether our practices of punishment are civilized would still remain. Moreover, it is unclear whether if we kept the death penalty, yet made our other punishment practices more humane and less pervasive, we wouldn't in fact be a more, rather than a less, civilized society.<sup>67</sup>

As intimated in the last part, it is no easy thing to come up with a fully worked-out and compelling account of what "civilization" requires. Yet this is what those who oppose the death penalty on the basis of it being uncivilized, or indecent, or inhumane are required, or ought to be required, to do. Amazingly, it seems to be what the United States Supreme Court is implicitly committed to as well. It has said that its test in evaluating punishments generally, and the death penalty especially, is the evolving standards of a civilized society.<sup>68</sup> But such a large concept cannot merely consider how we treat those whom we imprison or execute (although it surely must consider these things), but must look at the victims of crime as well. Civilization does not speak only on the side of criminal offenders, but more generally: it looks at how we treat everybody in many different areas of life. It is only when we have a grip on the larger idea of "civilization" that we can look at whether the death penalty has a place within the punishment scheme of a modern, "civilized" society.<sup>69</sup>

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67. For a provocative suggestion along these lines, see Christopher Glazek, *Raise the Crime Rate*, n+1 (Jan. 26, 2012), <http://nplusonemag.com/raise-the-crime-rate>.

68. The task of trying to tease out what theory (if any) the Supreme Court has about "civilization" is beyond the scope of this article. Certainly a place to start would be the chorus of opinions in *Furman v. Georgia* and especially the opinion of Justice Brennan, *supra* note 60.

69. For an historical survey of the relationship between punishment and civilization, see JOHN PRATT, *PUNISHMENT & CIVILIZATION* (2002).