

NO, CAPITAL PUNISHMENT IS NOT MORALLY REQUIRED: DETERRENCE, DEONTOLOGY, AND THE DEATH PENALTY

Carol S. Steiker*

Cass Sunstein and Adrian Vermeule argue that, if recent empirical studies finding that capital punishment has a substantial deterrent effect are valid, consequentialists and deontologists alike should conclude that capital punishment is not merely morally permissible but actually morally required. While the empirical studies are highly suspect (as John Donohue and Justin Wolfers elaborate in a separate article in this Issue), this Article directly critiques Sunstein and Vermeule's moral argument. Acknowledging that the government has special moral duties does not render inadequately deterred private murders the moral equivalent of government executions. Rather, executions constitute a distinctive moral wrong (purposeful as opposed to nonpurposeful killing) and a distinctive kind of injustice (unjustified punishment). Moreover, acceptance of "threshold" deontology in no way requires a commitment to capital punishment even if substantial deterrence is proven. Rather, arguments about catastrophic "thresholds" face special challenges in the context of criminal punishment. This Article also explains how Sunstein and Vermeule's argument necessarily commits us to accepting other brutal or disproportionate punishments and concludes by suggesting that even consequentialists should not be convinced by the argument.

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* Professor of Law, Harvard Law School. I thank David Barron, Eric Blumenson, Philip Bobbitt, John Donohue, Richard Fallon, George Fisher, Pamela Karlan, Christopher Kutz, Daryl Levinson, Martha Minow, Erin Murphy, Stephen Schulhofer, Joseph Singer, Jordan Steiker, William Stuntz, and participants at faculty workshops at Harvard Law School and Stanford Law School for helpful discussions, and Brook Hopkins and Mary Ziegler for able research assistance.

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INTRODUCTION

As an opponent of capital punishment, I have participated in many (and witnessed many more) debates about the morality and wisdom of the death penalty. The debate usually begins with one of two dramatic gambits by the proponent of capital punishment, both of which derive their power from the grievous harms suffered by murder victims and their loved ones. The first gambit is to consider in detail the facts of one or more capital murders and to propose that only the punishment of death is an adequate and proportional response to the terrible suffering of the victim intentionally inflicted by the perpetrator—a predominantly retributive argument. The second gambit—a modified version of which Cass Sunstein and Adrian Vermeule use to begin their provocative article¹—is predominantly consequentialist. This gambit is to suggest that if the death penalty can prevent—through incapacitation of the offender or general deterrence—the loss to murder of even one innocent life, then it is a morally justified or perhaps even morally required penal response. A common response to both of these gambits is to ask why it is we do not rape rapists, torture torturers, or rape and then murder those who rape and murder in order to provide a proportional response to the suffering they have inflicted or to adequately deter future rapists, torturers, and rapist/murderers. This response suggests that our rejection of such extreme punishments points the way to a categorical, deontological limitation on the kinds of punishments we are justified in imposing, on either retributive or consequentialist grounds. The usual counter to this response is to acknowledge that we do not and should not impose such extreme punishments—that there is some moral limit to what we can justify as punishment—but to deny that the use of the death penalty crosses that line.

The debate—like a stylized form of dance—then tends to move from consideration of capital punishment in the abstract to its application in contemporary society. Here the opponent of the death penalty goes on the

1. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705 (2005) (in this Issue) (suggesting that “on certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives”).

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offensive, arguing that regardless of whether capital punishment is justified in the abstract, the fact that it is too often imposed arbitrarily, invidiously, or in error in our imperfect legal system renders it a morally unacceptable practice in contemporary society. The usual counter here is some combination of denying that the problems are as big as the opponent claims (citing the opponent's abolitionist bias), denying that problems of arbitrariness and discrimination affect the justice of imposing the death penalty if the defendant is guilty, and acknowledging that the erroneous conviction and execution of innocents is unjust but maintaining that the problem is either small enough to be acceptable (in light of the greater number of innocent lives saved) or fixable.

Sunstein and Vermeule want to dance to a very different tune. They start with some recent statistical studies of the impact of capital punishment on homicide rates—studies that claim to find strong deterrent effects after controlling for potentially confounding variables with multiple regression analysis.² Sunstein and Vermeule do not purport to vouch for the validity of this recent spate of studies, acknowledging that “it remains possible that the recent findings will be exposed as statistical artifacts or found to rest on flawed econometric methods.”³ This is a prudent concession, given the powerful reasons that are offered by John Donohue and Justin Wolfers in this Issue,⁴ along with many other experts,⁵ to reject this body of work as the basis for any public policy initiative. Rather, Sunstein and Vermeule argue that *if* such deterrent effects could ever be reliably proven or even if the evidence demonstrated a “significant possibility” that the use of capital punishment saves

2. *Id.* at 706 & n.9 (citing Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (suggesting that each execution on average prevents eighteen murders)).

3. *Id.* at 713.

4. See John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (in this Issue) (reviewing the main study cited by Sunstein and Vermeule and finding “that the existing evidence for deterrence is surprisingly fragile”).

5. See Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005) (noting that “it would be bad statistics and bad social policy” to generalize from one percent of the data to the remaining ninety-nine percent, and concluding that “for the vast majority of states for the vast majority of years there is no evidence for deterrence” and that even for the remaining one percent, “credible evidence for deterrence is lacking”); see also *Deterrence and the Death Penalty: A Critical Review of New Evidence: Hearings on the Future of Capital Punishment in the State of New York Before the New York State Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on Judiciary, and Assemb. Standing Comm. on Correction*, 2005 Leg., 228th Sess. 1-12 (N.Y. 2005) (statement of Jeffrey Fagan, Professor of Law and Pub. Health, Columbia Univ.), available at www.deathpenaltyinfo.org/FaganTestimony.pdf; Jeffrey Fagan, *Death and Deterrence Redux: Science, Alchemy and Causal Reasoning on Capital Punishment*, 3 OHIO ST. J. CRIM. L. (forthcoming 2006) (on file with author); Ted Goertzel, *Capital Punishment and Homicide: Sociological Realities and Econometric Illusions*, SKEPTICAL INQUIRER, July-Aug. 2004, available at http://www.findarticles.com/p/articles/mi_m2843/is_4_28/ai_n6145278.

a substantial number of lives by preventing future murders, *then* consequentialists and deontologists alike should join in supporting the retention and vigorous use of the death penalty.⁶ Indeed, they contend that under such conditions, capital punishment should be considered not merely morally permissible (as any consequentialist would hold) but actually “morally obligatory.”⁷ What Sunstein and Vermeule add to prior debates between consequentialists and deontologists regarding the death penalty is their insistence that recognition of the inapplicability of the act/omission distinction to the government as a distinctive kind of moral agent should strengthen the consequentialist argument in favor of capital punishment and undermine deontological objections to capital punishment, under the stipulated conditions of deterrence from which the argument proceeds.⁸

This argument neatly sidesteps some of the central wrangles in the typical death penalty debate described above. First, under the terms of Sunstein and Vermeule’s argument, there is no need to “draw the line” excluding some extreme punishments (like torture), because the argument denies the existence of any such categorical line prohibiting extreme punishments as a moral matter;⁹ the only question is whether the government can prevent more suffering inflicted by future offenders than it metes out as punishment on current offenders. Second, there is no need to address the vexing issue of how to weigh innocent lives of murder victims against (usually, but not always) guilty lives of convicted capital defendants because the argument holds that the government is equally responsible for the harms that flow from its failure to impose the death penalty and for those that flow from its imposition. Thus, all lives (innocent or guilty) are counted equally, and all that remains to do is count: if more private murders would be prevented than executions imposed, the balance favors executions. Third, the argument insists that the distributional problems of arbitrary or invidious infliction of the death penalty disappear as moral problems, at least when there is reason to believe that private murders are at least equally arbitrary or invidious in their distribution. Sunstein and Vermeule contend that the belief that there is a categorical prohibition of extreme punishments or the belief that arbitrariness, discrimination, or error in the distribution of capital punishment count as distinctive moral failures are examples of the operation of a “moral heuristic”—by which they mean a form of moral shorthand that leads to error.¹⁰ Specifically, they refer to error arising from the failure to fully appreciate the distinctiveness of the government as a moral agent that must treat the death penalty as an example of a “life-life tradeoff.”¹¹

6. Sunstein & Vermeule, *supra* note 1, at 715.

7. *Id.* at 705.

8. *Id.* at 708-09.

9. *See id.* at 734-37.

10. *See id.* at 740 n.106.

11. *Id.* at 708.

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The problem with Sunstein and Vermeule's argument is not their general premise regarding the government's distinctive moral agency, which, as they acknowledge, is likely to be far more congenial to the political opponents of capital punishment than to its supporters.¹² Rather, Sunstein and Vermeule's argument runs into serious problems when they attempt to transplant their insight about government agency from the arena of civil regulation to the arena of criminal justice. Sunstein and Vermeule's assertion that the state's execution of murderers is equivalent to its failure to adequately deter murders by private actors ignores the ways in which the construction of a governmental choice as a "life-life tradeoff" in the regulatory context does not map congruently onto the criminal justice context, either as a matter of morality or as a matter of justice.

As a matter of morality, Sunstein and Vermeule fail to grapple adequately with the fact that for their argument to succeed in the criminal context, they must jettison not only the act/omission distinction in the context of government action but also—and less convincingly—the distinction between purposeful wrongdoing on the one hand and merely reckless or even knowing wrongdoing on the other. Even more problematic is Sunstein and Vermeule's failure to acknowledge the social and political fact that executions are not mere fungible "killings" but rather are part of a practice of state punishment that can be unjust in ways quite distinct from the general wrongness of killing. Sunstein and Vermeule's reduction of the deontological objections to capital punishment to some version of the moral intuition that "killing is wrong"¹³ thus evades and fails even to acknowledge long-standing and widely discussed deontological objections to capital punishment qua punishment.

Moreover, despite their protestations to the contrary,¹⁴ Sunstein and Vermeule's argument in favor of capital punishment presents some conceptual slippery slopes upon which only the deontological arguments that they evade can offer some purchase. Their argument is unable to explain why we might not, under conceivable circumstances, be morally obligated to adopt punishments far more brutal and extreme even than execution, or to inflict similarly brutal and extreme harms on innocent members of an offender's family (as punishment of the offender, not of the innocent), or to extend the use of capital punishment to contexts in which many deaths result from behavior far less culpable than murder, such as highway fatalities due to drunkenness or negligence. From their moral position, the only arguments available to Sunstein and Vermeule against any of these practices are unsatisfactorily contingent on prudential considerations, which will not always provide plausible reasons to avoid such practices.

Sunstein and Vermeule wish to avoid making an exclusively consequentialist argument that appeals only to precommitted consequentialists.

12. *Id.* at 748-49.

13. *See id.* at 717-18.

14. *See id.* at 734-37.

Thus, they insist that their argument not only puts consequentialist justifications for capital punishment on a surer footing but also should be persuasive to some deontologists (at least if the number of lives saved by capital punishment reaches a certain level). Here, too, they fail to see that the context of criminal punishment changes arguments about “threshold” deontology—the acknowledgement by some deontologists that at some “threshold” of catastrophic consequences, categorical moral prohibitions should give way to consequentialist concerns.

Perhaps most surprising, it is not only deontologists who will fail to be moved by Sunstein and Vermeule’s arguments. If one applies to the question of how deterrence works (when it does) some of the same nuanced consideration of the operation of human cognition upon which Sunstein and Vermeule seek to draw to make their argument in favor of capital punishment, one sees that even committed consequentialists should not be convinced by Sunstein and Vermeule’s argument for the retention and use of capital punishment, even under the hypothetical conditions of deterrence that they assume.

This response proceeds in five Parts. Parts I and II explain why executions and private murders cannot be viewed as “life-life tradeoffs” either as a matter of morality (Part I) or justice (Part II). Part III explores some of the conceptual slippery slopes that Sunstein and Vermeule cannot avoid. Part IV explains why “threshold” deontologists should not be persuaded by Sunstein and Vermeule’s argument, and Part V explains why even their “base” of precommitted consequentialists should not be persuaded, either.

I. PRIVATE MURDERS ARE NOT EQUIVALENT TO EXECUTIONS AS A MORAL MATTER: NONPURPOSEFUL VERSUS PURPOSEFUL KILLINGS

The central insight on which Sunstein and Vermeule stake their argument is that the government is a distinctive moral actor that is equally responsible for things it *lets happen* as for things it *does*. Because governments, unlike individuals, “always and necessarily face a choice between or among possible policies for regulating third parties,”¹⁵ it would not be proper to characterize a governmental choice not to regulate to reduce a harm as a mere “omission” that might be excused on an individual level. For example, the lives the government would sacrifice by requiring a particular childhood vaccination (knowing that a small number of those vaccinated will die from the vaccine) should be viewed no differently from the lives that the government would sacrifice by *not* requiring such a vaccination (knowing that a large number of those unvaccinated will die from the spread of disease), even though the first set of deaths would result from government “action” and the second from government “inaction.” The government always has to choose among competing policies and make “life-life tradeoffs” of this kind. This collapse of the traditional

15. *Id.* at 721.

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act/omission distinction for the government as moral agent represents an insight on the collective level parallel to the doctrine in substantive criminal law that holds that culpable “omissions” count as “acts” for the purposes of individual criminal liability whenever an individual has a “duty” to act.¹⁶ Government, by its very nature, always has a duty to act on behalf of its citizens and thus cannot evade responsibility for omissions merely because they are omissions.¹⁷ This general point seems both interesting and right, as far as it goes.

But while the point may go very far in the regulatory context (where Sunstein and Vermeule recognize that it may have “broad implications”¹⁸), it does not go nearly as far as they suggest in the capital punishment context. Sunstein and Vermeule treat the use of capital punishment as simply another routine decision “in the general setting of government regulation”¹⁹ and thus miss the salience of an important moral distinction about the nature of government action in the context of capital punishment (and criminal justice more generally). In the regulatory context, when the government makes life-life tradeoffs, its treatment of lives on either side of the tradeoff is identical; it is risking lives whether it acts or fails to act, but in neither case is its purpose to take life. In the capital punishment context, this moral equivalence in the treatment of lives does not obtain; the government knowingly or recklessly loses or “takes” lives by not executing (assuming that it knows or thinks there is a good chance that executions deter), but it purposefully takes lives by executing. Sunstein and Vermeule wish to say that knowing or risking that *others* will act purposefully is the moral equivalent of acting purposefully oneself, or that even if it is not equivalent for individuals, it somehow becomes equivalent for the government (hence, their dramatic assertion that private murders should be viewed as the moral equivalent of government “executions”²⁰). But we do not recognize this moral equivalence for individual actors, and there is no good reason to do so for the government as actor, either. The collapse of the purposeful/nonpurposeful distinction is not the same as and does not follow from the collapse of the act/omission distinction. Rather, the difference between purposeful and nonpurposeful harms remains crucial for *both* acts and omissions.

To see that this is so on the individual level, consider again the substantive criminal law doctrine of treating certain culpable omissions as “acts” for the purposes of criminal liability. When individuals have a duty to act, their failure to do so counts as the *actus reus* or “bad act” component of criminal liability, but the collapse of the act/omission distinction here says nothing about whether the *mens rea* or “intent” component of criminal liability is met. Suppose a

16. See generally MODEL PENAL CODE § 2.01(3) (Proposed Official Draft 1985).

17. See Sunstein & Vermeule, *supra* note 1, at 724 (stating that “there is no escaping the [government’s] duty to choose policies in some fashion or other”).

18. *Id.* at 749.

19. *Id.* at 707.

20. *Id.* at 723.

mother fails to protect her child from abuse by the mother's boyfriend, who intentionally murders the child. (Let us stipulate that the mother's failure to act is causally linked to the death of the child.) Because the mother has an ongoing duty to protect her child (the way the government has a duty to protect its citizens), it is no defense for her to say that her failure to act was merely an omission for which she was not responsible. However, the degree of her moral culpability depends on her mens rea: if she did not know, but should have known, of the risk of death to her child, she would be guilty of negligent homicide; if she knew of and consciously disregarded a substantial risk of death to her child, she would be guilty of reckless homicide (manslaughter); if she knew to a practical certainty that her child would die, she would be guilty of second-degree murder; and if her purpose in failing to act was to bring about the death of her child, she would be guilty of first-degree murder.²¹ To acknowledge that the mother had a duty to act to prevent the intentional murder of her child by another is not and should not be the same as saying that her omission constituted intentional murder. Thus, for Sunstein and Vermeule's point to hold, they must insist that when the act/omission distinction collapses for the government as actor, the mens rea distinctions that we normally insist upon for individuals must collapse as well.

But there are no good reasons to think that degrees of mens rea are meaningless for the government as actor. Consider the raging debate in the wake of Hurricane Katrina about the government's failure to maintain the Lake Pontchartrain levees. Everyone acknowledges that the government cannot disclaim responsibility for the disaster in New Orleans on the ground that its failure to maintain the levees was merely an omission for which it was not responsible. Rather, the debate is about *how culpable* an omission the failure was: whether the government was aware of the risks; whether the likelihood of such a terrible disaster rose to the level of knowledge; even, in some bizarre conspiracy theories, whether the government intended the levees to fail.²²

21. I use the Model Penal Code's (MPC) degrees of mens rea for the sake of clarity. See MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962). The MPC, however, does not separate murder into degrees, as is ubiquitous in American law. The difference between knowledge and purpose is the traditional formulation of the line between first-degree and second-degree murder. See 18 PA. CONS. STAT. ANN. § 2502(a) (West 2005) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing."). In this context, an "intentional" killing is traditionally defined as one that is "willful, deliberate and premeditated." 18 PA. CONS. STAT. ANN. § Sec. 2502(d) (West 2005). In Pennsylvania itself, however—the original source of the first-degree distinction—the deliberation and premeditation requirements have not been interpreted to add anything distinctive to the concept of "intention"; whereas in other states, these requirements have added a further reflective dimension to the necessary "intention." Compare *Commonwealth v. Carroll*, 194 A.2d 911 (Pa. 1963), with *State v. Guthrie*, 461 S.E.2d 163 (W. Va. 1995), and *People v. Anderson*, 447 P.2d 942 (Cal. 1968).

22. See David Remnick, *Letter from Louisiana: High Water: How Presidents and Citizens React to Disaster*, NEW YORKER, Oct. 3, 2005, at 53 ("Everywhere I went in Louisiana and Texas to talk to evacuees, many of the poorest among them were not only

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There is no reason to think that any of these attributions of culpability are meaningless when applied to the government. Indeed, such a claim would prevent us from considering clearly relevant factors in assessing government action or inaction. In criminal law and in moral theory, the relevance of purposeful action is clear: those who purposefully transgress are more blameworthy because they have affirmatively chosen their course of action and its results (in terms of retributive justice), and they are more likely than those who do not act purposefully to act similarly in the future (in consequentialist terms).²³

What reasons do Sunstein and Vermeule offer to refute the quotidian moral significance of the difference between purposeful and nonpurposeful action, at least in the case of the government as actor? It turns out that they offer surprisingly little in the way of argument. They acknowledge that in the context of capital punishment, the government has a policy to kill when it executes and that no such policy exists toward private murders (just the opposite), but they insist that it is mere “intuition” that suggests that this difference is important.²⁴ They then nod toward “a large philosophical literature that considers whether the concept of culpability for intentional wrongdoing applies meaningfully to governments” and “also large literatures in jurisprudence and literary theory that consider whether the concept of intention can meaningfully be transposed from individual to collective decisionmakers.”²⁵ But nothing in the few works they cite supports the abandonment of the moral distinction between purposeful and nonpurposeful action either in general or for the government as actor. The single work that they cite as the “large literature” on whether it is meaningful to hold governments accountable for intentional wrongdoing—Christopher Kutz’s interesting book on complicity²⁶—is simply inapposite, as its central concern is fixing degrees of *individual* accountability for collective acts.²⁷ The other

furious . . . but inclined to believe . . . that the flooding of the city was, or could have been, a deliberate act.”).

23. In ruling that the imposition of the death penalty was unconstitutional for a defendant who did not himself kill, attempt to kill, or intend that a killing take place, the Supreme Court noted: “It is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’” *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (citing H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 162 (1968)).

24. Sunstein & Vermeule, *supra* note 1, at 723.

25. *Id.* at 723 n.63. Sunstein and Vermeule cite only one book for the first “large literature” and one book and two articles for the second.

26. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000).

27. Indeed, Kutz’s book works against the general idea that the distinction between purposeful and knowing states of mind is not meaningful, at least for individual actors. He considers this distinction important in discerning the presence of “participatory intention,” which he argues is the basis for assigning individual responsibility for collective harms:

Jointly acting groups consist of individuals who intend to contribute to a collective end, whether outcome or activity. Groups of individuals, all of whom merely know they happen to be contributing to a collective outcome, cannot be said to act jointly. So long as we see individual actions as aiming at the achievement of a collective end, we can attribute to them participatory intentions, defined in terms of their goals rather than their form.

“large literature” cited by Sunstein and Vermeule on the difficulty of determining governmental (as opposed to individual) “intention” in no way purports to claim that there is never any meaningful distinction between purposeful and nonpurposeful government action; rather, that literature explores the now-familiar problem of interpreting ambiguous governmental texts by reference to the multiple and conflicting “intentions” of collective actors.²⁸ This literature is simply inapposite here as well: there is nothing ambiguous or problematic about the “intent” of capital punishment statutes with regard to the death of those executed. There is no question that laws permitting the use of capital punishment “intend” to kill those who are sentenced under them in a way that is meaningfully different from laws that prohibit private murder but do not allow for the most extreme of penal sanctions.

What Sunstein and Vermeule really mean to claim is that, at least in the context of killing, the moral difference between acting purposefully and acting knowingly or recklessly should not matter because *it is right* to take lives purposefully in order to save more lives than one knows (or risks) will be lost otherwise. We can see this clearly in their discussion of Bernard Williams’s famous “Jim and the Indians” problem,²⁹ in which they suggest (contra Williams) that Jim should think of himself as responsible for the lives of the nineteen additional Indians whom he knows will be killed if he refuses to kill one.³⁰ We can see it even more clearly in their approach to the “trolley problem,” in which they suggest (contra most people’s moral intuition and Judith Jarvis Thomson’s deontological account³¹) that there is merely an emotional rather than a moral difference between, on the one hand, pushing a pedestrian off a footbridge into the path of a brakeless trolley car in order to prevent the death of five others on the track, and on the other hand, switching the same trolley onto a different track on which there is only one endangered person.³²

Id. at 89. Kutz simply does not consider the question of ascribing degrees of responsibility to collective entities (such as governments) themselves as actors.

28. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 *CRITICAL INQUIRY* 723 (1982); Max Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863 (1930).

29. See J. J. C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 98-99 (1973).

30. See Sunstein & Vermeule, *supra* note 1, at 743-44.

31. See JUDITH JARVIS THOMSON, *RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY* 94-116 (1986).

32. See Sunstein & Vermeule, *supra* note 1, at 742-43. Sunstein and Vermeule squirm to avoid unambiguously equating the pushing scenario with the switching scenario (temporizing that “there may be good moral reasons why certain brain areas are activated by one problem and not by the other,” *id.* at 742), but their treatment of “Jim and the Indians” and, indeed, their construction of capital punishment as a “life-life tradeoff” commit them to rejecting any essential moral distinction between the pusher and the switcher in the trolley problem.

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In this latter problem (unlike “Jim and the Indians”), there is no act/omission distinction at all. In each of the two versions of the trolley problem, there is affirmative action (pushing the pedestrian off the footbridge or switching the trolley onto a different track). The differences lie entirely in the attitude the actor has toward the death of the one and in the means the actor uses to bring about that death. In switching the trolley, the switcher knows that the one person on the alternate track will be hit by the trolley, but this is in no way the purpose of the action (the switcher would be thrilled if the one somehow avoided being hit), whereas in pushing someone from the footbridge, the pusher must intend that the one person be hit (otherwise the trolley would not derail and save the five). Moreover, the switcher merely redirects the source of an external threat to life, while the pusher directly interferes with the physical inviolability of the pedestrian in order to redistribute the harm caused by the brakeless trolley from the five to the one. In essence, the pusher denies that the pedestrian has a right not to be violated for the greater good. Sunstein and Vermeule want to characterize the widely held reluctance to legitimize the pusher’s purposeful and direct violation of the pedestrian’s rights in order to save others as a kind of cognitive error resulting from improper reliance on a “moral heuristic.” They urge us to be open to reconsidering and abandoning such moral heuristics, especially when doing so would save lives.³³

It is important to see that this argument is not the same as and does not follow from the argument for collapsing the act/omission distinction for the government as actor; rather, it represents a core dispute between consequentialist and deontological moral theories. Sunstein and Vermeule insist, as consequentialists, that there is nothing intrinsically wrong with individuals or governments “using” the lives of some to promote the greater good,³⁴ while deontologists insist that when it comes to lives and bodies, individuals have rights against such use that trump the greater good.³⁵ The “trolley problem” can be followed by the “organ transplant” problem to illuminate this dispute. If it is right to sacrifice one to save five in the trolley example, is it also right for a doctor to sacrifice one healthy patient in order to save the lives of five desperately ill patients, each of whom needs the immediate transplant of one of five different vital organs?³⁶

Consequentialists would see nothing intrinsically wrong with such a

33. *Id.* at 744 (“But for the reasons that we have given, no moral heuristic can provide an adequate moral objection to capital punishment, at least if the empirical evidence can show strong evidence of deterrence.”).

34. *Id.* at 743.

35. See Larry Alexander, *Deontology at the Threshold*, 37 *SAN DIEGO L. REV.* 893, 911 (2000) (“[T]he best conception of deontology would deem its core principle to be that one may never use another as a resource without his consent. In other words, a person’s body, labor, and talents do not exist for others’ benefit except to the extent that he freely chooses to benefit others.”) (footnote omitted).

36. See THOMSON, *supra* note 31, at 95.

sacrifice; any arguments against such a decision must flow from the bad consequences that might ensue if doctors were generally empowered to do such things (if a medical “institution” of involuntary organ donation were established).³⁷ Deontologists would object to such an institution even under hypothetical conditions that could ensure that the overall consequences to society would be beneficial (conditions that some involuntary organ donation plans plausibly might meet). Better to knowingly allow the five terminally ill patients to die (along with the five people on the trolley track and Jim’s nineteen Indians), says the deontologist, than to deny the right to personal inviolability of the healthy patient (or the pedestrian on the footbridge or the one Indian). Sunstein and Vermeule’s insistence on the moral equivalence of purposeful executions and knowing provision of suboptimal deterrence of private murders is, at bottom, a claim about the moral rightness of taking life to save life. Their contention that disagreement with this claim is merely improper reliance on a moral heuristic is, at bottom, a rejection of deontological moral reasoning.

This is a very big claim, indeed, and it is by no means required by (or even related to) the claim that the act/omission distinction is inapplicable to the government as actor. One can agree that the government is “acting” when (if) it fails to provide optimal deterrence for private murders and that, therefore, it bears some moral responsibility for those deaths and has a moral obligation to try to prevent them. But this acknowledgement does not entail that the government is required to take any action that would prevent such murders, no matter how morally problematic that action might be. Sunstein and Vermeule’s insistence that the government is morally obligated to retain capital punishment depends on collapsing a further distinction—the distinction between purposeful and nonpurposeful killing—a collapse that they support for individual as well as for government actors, as evidenced by their approach to “Jim and the Indians.” The evasion of this further distinction is necessary to equilibrate the government’s accountability for deaths it commands and for murders it forbids but fails to adequately deter, and thus to permit the choice to retain or abolish capital punishment to be portrayed as a “life-life tradeoff.” But the collapse of this further distinction is no small thing; it is no mere gloss on the acceptance of either the distinctive moral agency of government or the necessity for “life-life tradeoffs” in general. Rather, it is a separate moral claim that goes to the heart of the divide between consequentialism and deontology—a claim that Sunstein and Vermeule neither recognize as distinct nor adequately defend.³⁸

37. See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 11-12 (1955).

38. Sunstein and Vermeule seem to want to avoid mounting a forthright defense of consequentialism over deontology. See Sunstein & Vermeule, *supra* note 1, at 706 (“One of our principal points . . . is that the choice between consequentialist and deontological approaches to morality is not crucial here.”). Hence, they do not take the standard route of arguing that deontological moral theories are generally inadequate because of the paradox of asserting rights even in cases in which violating those rights could reduce the overall number

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Of course, Sunstein and Vermeule could (and do, briefly) claim that the government's purposeful killings are independently morally justified because the lives that it takes by executions are (usually) those of guilty murderers, while the lives that it knowingly or recklessly cedes to private murder are by definition those of innocents.³⁹ But when they switch to this kind of moral justification for the state's purposeful killing, Sunstein and Vermeule have switched to the language of deontological moral theory (retributivism) and thus acknowledge the nonequivalence of the state's actions in taking life through execution and through suboptimal deterrence of private murder: they are no longer on the terrain of life-life tradeoffs at all.⁴⁰ Yes, of course there are

of rights violations. Such a direct approach is taken, for example, by noted consequentialist theorists Louis Kaplow and Steven Shavell. *See* LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 47 (2002) (criticizing nonconsequentialists for failing "to pay attention to the effects of legal rules even when such effects concern the incidence of unfairness itself"). Rather, Sunstein and Vermeule assume that recognition of the distinctive moral agency of the government will lead to acceptance of a narrower version of this point—namely, that the government as moral agent is uniquely free from deontological restrictions that take this form, what philosophers call "agent-centered restrictions." *See* Samuel Scheffler, *Agent-Centered Restrictions, Rationality, and the Virtues*, in *CONSEQUENTIALISM AND ITS CRITICS* 243, 243 (Samuel Scheffler ed., 1988) ("An agent-centered restriction is, roughly, a restriction which it is at least sometimes impermissible to violate in circumstances where a violation would serve to minimize total overall violations of the very same restriction, and would have no other morally relevant consequences."). But Sunstein and Vermeule are simply wrong that recognition of the government's distinctive moral agency—its multitude of affirmative duties to act that private citizens do not share individually—gets them to their desired conclusion. Rather, I have shown that Sunstein and Vermeule cannot get from here to there (from recognizing the government's distinctive moral agency to accepting the government's duty to execute in order to prevent murders) without directly defending the consequentialist position that they seek to bracket.

39. They make this claim very briefly in their rejoinder to Bernard Williams. *See* Sunstein & Vermeule, *supra* note 1, at 744 ("Those who are subject to capital punishment are (almost always) egregious wrongdoers, not innocents.").

40. Sunstein and Vermeule's running analogy of capital punishment to shooting a hostage taker, *see, e.g., id.* at 716, 719, 735, 737, 740, runs into a similar problem, as the justifiability of shooting hostage takers is not based on its being a "life-life tradeoff" at all. Hostages, other citizens, and law enforcement agents alike are universally considered justified in killing hostage takers even when they kill more hostage takers than there are hostages, or even when the threat to the hostage is less than death. Indeed, in some jurisdictions, one can use deadly force to protect oneself or another not only from murder, but also from rape, robbery, or even burglary. *See, e.g.,* COLO. REV. STAT. ANN. § 18-1-704.5 (West 2005) (permitting any occupant of a dwelling to use deadly force "against another person when that other person has made an unlawful entry, . . . and when the occupant has a reasonable belief that such other person has committed [or intends to commit] a crime in the dwelling in addition to the uninvited entry, . . . and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant"); N.Y. PENAL LAW § 35.15(2) (McKinney 2005) (permitting the use of deadly force on another person when the actor "reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery"). The justification of self-defense (and defense of others) obviously cannot proceed on the grounds that it is a "life-life tradeoff," but must call on some other sort of justification, different from the kind that Sunstein and Vermeule purport to be making for

deontological justifications for purposeful killing in some situations, and there are special deontological arguments for killing guilty murderers, but these are not the kind of arguments that Sunstein and Vermeule purport to be making.

II. PRIVATE MURDERS ARE NOT EQUIVALENT TO EXECUTIONS AS A MATTER OF JUSTICE: REGULATION VERSUS PUNISHMENT

The fact that the government affirmatively intends the deaths of those whom it executes points to an even more central problem with Sunstein and Vermeule's attempt to portray capital punishment as a "life-life tradeoff." When the government executes, it is not merely "killing" (though of course it is doing that); it is engaging in a distinctive governmental practice that we call criminal punishment, which involves the deliberate infliction of unpleasant consequences in response to an offender's wrongdoing. This purposefulness is one of the defining features of criminal punishment as a practice, along with the public affixing of blame and the solicitation of certain emotions, such as shame (on the part of the punished) and condemnation (on the part of the public). These features of punishment explain why it is viewed not merely as regulation by other means but rather as a problematic practice that requires some special justification. Being an act done by the state in the name of the collective, it requires not only moral but also political justification: we would appropriately characterize improper executions as not only morally wrong but also unjust.⁴¹ Sunstein and Vermeule portray the central deontological objections to capital punishment as entirely confined to the "capital" aspect of it, and thus they are able to make their argument from moral equivalence: if government killing by execution is wrong, so is government "killing" through inadequate deterrence. But if government executions are wrong not only because they are killings but also because they constitute unjust "punishment," then there is no equivalence between what the government is doing through executions and what it is doing through inadequate deterrence.

This Part will sketch three accounts of why capital punishment might be thought to constitute unjust punishment. Through these accounts, I hope to demonstrate that Sunstein and Vermeule's depiction of deontological objections to capital punishment as "abstract injunctions against the taking of

capital punishment. For further discussion of why self-defense is an inapposite analogy for capital punishment, see HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 51-55 (1987).

41. See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 321-22 (2002) ("Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis. The legitimacy of punishment is bound up with the legitimacy of the norm it enforced and of the institutions promulgating the norm, imposing the punishment, and inflicting it."); Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 *CRIM. JUST. ETHICS* 1, 3 (1985) (discussing whether retributive and moral education theories of punishment are "compatible with a defensible political theory of the state").

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life”⁴² does not do justice to rich, subtle, and widely held scruples about the justice of the death penalty and thus constitutes an evasion of the central deontological objections to capital punishment qua punishment. Without confronting and rebutting these objections, Sunstein and Vermeule cannot fairly assert the equivalence of executions and private murders and thus cannot fairly characterize the choice of capital punishment as a “life-life tradeoff.” Moreover, these objections do not depend on the moral distinction between purposeful and nonpurposeful killing outlined in Part I; rather, these objections represent a separate and independent argument for the nonequivalence of executions and private murders.

A. Capital Punishment as a Failure of Proportionality

It is stunning how almost completely absent from Sunstein and Vermeule’s account of capital punishment is any discussion of whether or not such punishment is deserved by the offenders who receive it. A venerable deontological tradition with roots in Kantian retributivism holds that punishment is justified only as a response to wrongdoing by the offender and not by its consequential effects.⁴³ In its strongest form, retributivism imposes a duty to punish offenders according to their desert. In its weakest and perhaps most widely accepted form—as a side constraint on the useful deterrent, incapacitative, or rehabilitative functions that punishment can serve in a society—retributivism requires, at a bare minimum, that the uses of punishment be limited to situations in which the punishment is deserved by the offender and is proportional to the offender’s wrongdoing.⁴⁴ Under this theory, if the suffering caused by punishment is not deserved and is not proportional to the wrongdoing of those upon whom it is inflicted, then the infliction of such suffering constitutes a wrong—the imposition of unjust punishment—distinct from and worse than merely the suffering itself.

At first glance, a retributive argument might seem an odd one to make against capital punishment, as it is retributivism that offers some of the

42. Sunstein & Vermeule, *supra* note 1, at 750.

43. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (W. Hastrie trans. 1887) (1797).

44. See MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 237 (1984) (“[T]he popular form of mixed theory . . . asserts that punishment is justified if and only if it achieves a net social gain *and* is given to offenders who deserve it.”). This principle—that proportionality is a constraint on just punishment—is deeply embedded in American law and society. It has been repeatedly invoked by the Supreme Court for nearly a century as the bedrock of its Eighth Amendment jurisprudence, which looks to societal consensus to discern the content of “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *see, e.g., Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Coker v. Georgia*, 433 U.S. 584 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Weems v. United States*, 217 U.S. 349 (1910).

strongest arguments *in favor* of the death penalty. (Reconsider the depiction of a generic death penalty debate with which I began, in which retributive arguments are deployed by the proponent of capital punishment.) Kant's famous injunction—that a desert-island society about to disperse would still have an obligation to kill its last murderer—stands for the strong form of retributivism. This form of retributivism holds that the duty to impose deserved punishment exists regardless of any beneficial consequences that might be thought to flow from it.⁴⁵ Kant's use of the death penalty as the quintessential example of deserved punishment for the crime of murder seems, at first blush, natural and unobjectionable.

But there is good reason to think that capital punishment—at least as imposed in our contemporary society—routinely and inevitably runs afoul of retributivism's bedrock proportionality constraint.⁴⁶ It is rarely the case that execution as a form of suffering can confidently be viewed as disproportionate to the harms inflicted on the victims of capital murders.⁴⁷ Rather, the strongest argument for such disproportionality lies in the reduced culpability of most convicted capital offenders; this is an argument that remains powerful even today, *after* the Supreme Court has recently declared that mentally retarded and juvenile offenders may no longer be executed for their crimes.⁴⁸ Though capital defendants have usually committed (or participated in) heinous murders, they very frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are the victims of some sort of societal deprivation (be it poverty, racism, poor education, inadequate health care, or some noxious combination of the above).⁴⁹ In such circumstances, it is difficult

45. See KANT, *supra* note 43, at 198.

46. For other accounts of how capital punishment might fail to satisfy the constraints of retributive justice, see 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. L. REV. 407 (2005); David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1 (1998); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981).

47. The lengthy waits on death row in anticipation of execution are the strongest current argument for this sort of disproportionality. See, e.g., *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989) (holding that a person sought for extradition from the United Kingdom to the United States could not be extradited because of the likelihood that he would suffer "death row phenomenon" in the prolonged and uncertain wait for his execution, which would violate the European Convention on Human Rights). Some also argue that electrocution is excessively painful, but this argument is less compelling now that lethal injection has replaced electrocution as the predominant means of execution. See generally Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994).

48. See *Roper*, 125 S. Ct. at 1200 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *Atkins*, 536 U.S. at 321 (holding that "death is not a suitable punishment for a mentally retarded criminal").

49. See DOROTHY OTNOW LEWIS, *GUILTY BY REASON OF INSANITY: A PSYCHIATRIST*

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to say that these defendants deserve all of the blame for their terrible acts; if their families or societies share responsibility—even in some small measure—for the tragic results, then the extreme punishment of death should be considered undeserved.⁵⁰ Indeed, this point follows directly from Sunstein and Vermeule's own logic. If the government is responsible for private murders that it fails to prevent by providing adequate deterrence, is it not also responsible for private murders that it fails to prevent by providing adequate poverty relief, support for families, education, health care, and initiatives to promote racial equality? This recognition of the conflict between collective responsibility for criminogenic conditions and the imposition of individual criminal responsibility for crime is best captured by a *New Yorker* cartoon in which a jury foreperson delivers the following verdict: "We find that all of us, as a society, are to blame, but only the defendant is guilty."⁵¹

For this point to hold, it is not necessary to say that there are no capital defendants in our society who could be deemed sufficiently blameworthy so as to deserve the death penalty, or that all capital defendants not sufficiently blameworthy for capital punishment are blameless for their actions and deserve no punishment at all, or that criminal defendants in general are blameless and undeserving of any criminal punishment.⁵² Rather, the more modest point is simply the uncontroversial empirical fact that in our contemporary society, those most likely to commit the worst crimes (capital murders) are, as a group, also most likely to have had their volitional capacities affected or impaired by societal conditions for which we collectively bear some responsibility. Thus, it

EXPLORES THE MINDS OF KILLERS (1998) (documenting the prevalence of organic mental defects and histories of childhood abuse among death row inmates); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1172-73 (1999) (documenting the prevalence of histories of childhood abuse among murderers in general and capital defendants in particular); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 566, 585 (1995) (documenting the prevalence of impoverished backgrounds and histories of drug or alcohol abuse among death row inmates).

50. Jeffrey Reiman has made this argument most compellingly:

If people are subjected to remediable and unjust social circumstances beyond their control, and if harmful actions are a predictable response to those conditions, then those who benefit from the unjust conditions and refuse to remedy them share responsibility for the harmful acts—and thus neither their doing nor their cost can be assigned fully to the offenders alone Since I believe that the vast majority of murders in America are a predictable response to the frustrations and disabilities of impoverished social circumstances, and since I believe that that impoverishment is a remediable injustice from which others in America benefit, I believe that we have no right to exact the full cost of murders from our murderers until we have done everything possible to rectify the conditions that produce their crimes.

Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 131-32 (1985) (footnote omitted).

51. Michael Maslin, Cartoon, *NEW YORKER*, Feb. 24, 1997, available at <http://www.cartoonbank.com> (Cartoon No. 29638).

52. For an argument that social deprivation undermines the moral justification of all criminal punishment by modern societies, see Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 221 (1973).

cannot fairly be said that this group is deserving of our worst punishment, or, more affirmatively, it must be acknowledged that there is a retributive gap between the culpability of such offenders and the punishment inflicted upon them.⁵³

Moreover, from the standpoint of retributive justice, the strong evidence of discrimination (on the basis of race) or mere arbitrariness (on the basis of geography, among other things) in the imposition of capital punishment takes on a new and different significance from the disparate impact of the private murders that the government might fail to deter. The fact that the race of the defendant and/or the race of the victim frequently have been found to have salience in predicting whether a defendant will be sentenced to death⁵⁴ shows not only that there is some racial skewing in the distribution of capital sentences, but also that there is reason to question the underlying moral and legal judgment that any particular murder is one for which capital punishment is a proportional response. Similarly, the fact that defendants from otherwise similar counties in the same state face radically different prospects of receiving capital punishment⁵⁵ calls into question not only the procedures by which those deserving of capital punishment are chosen but also the reliability of the underlying judgment that any particular defendant so chosen deserves the death penalty. Unless one takes the position that capital punishment is a deserved and proportional response to *every* intentional killing no matter what the circumstances (a position neither required by retributivism nor permitted by American law⁵⁶), one can take no recourse in the argument that discrimination and arbitrariness merely exclude some deserving defendants from execution. Rather, discrimination and arbitrariness undermine our confidence in the very attribution of desert to the defendants chosen for execution.⁵⁷

53. This gap is not sufficiently addressed by the legal doctrine of mitigation in capital cases, which allows defendants to introduce evidence about their backgrounds and experiences that might reduce their culpability for the crime, because capital jurors (indeed, all jurors) are subject to the well-documented cognitive bias of the “fundamental attribution error,” which is the general tendency to attribute the causes of behavior, especially that of outgroup members, to dispositional rather than situational factors. *See generally* SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 67 (2d ed. 1991).

54. *See* DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 185 (1990); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638 (1998).

55. *See* JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* 347-48 (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

56. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *HARV. L. REV.* 355, 372-78 (1995) (discussing the Supreme Court’s Eighth Amendment requirement that capital statutes narrow the class of the death eligible to a subset of all murderers).

57. *See* Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 *MICH. L. REV.* 1177, 1182 (1981) (“When one criminal is executed and another of apparently equal culpability spared, there is no self-

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The strongest case for a retributive gap, of course, lies in the conviction and execution of the innocent—a moral wrong that we have new reason to believe is disturbingly prevalent in our capital punishment system.⁵⁸ Although all victims of private murder are, by definition, innocent, there is a special moral wrong in executing an innocent person, as one adds the horror of blame for heinous wrongdoing to the taking of life. Sunstein and Vermeule have nothing to say about this problem, other than to claim that, under the hypothetical conditions of deterrence to which they stipulate, the execution of the innocent could not be much of a problem, as future murderers would not be deterred by the death penalty under circumstances in which innocent defendants were likely to be punished instead of guilty perpetrators.⁵⁹

This rather lame assumption is far too insouciant. It is perfectly possible for an error-prone capital justice system to deter, under circumstances in which potential murderers are not aware of the innocence of those executed (either because *nobody* is aware of that fact or because potential murderers are not well informed of such events), or under circumstances in which well-informed potential murderers are not sensitive to significant changes in the likelihood of their conviction or execution because of the special salience of execution as a punishment. (This last point is exactly the argument Sunstein and Vermeule make about why our current capital punishment system—which, even in Texas, executes only a tiny fraction of murderers—might plausibly deter.⁶⁰) In light of the recent spate of death row exonerations, there is good reason to fear that the system of capital punishment might produce enormous retributive gaps too often to be considered a just system of punishment.

B. *Capital Punishment as a Failure of Equality*

There is a second and distinct flaw in the equivalence that Sunstein and Vermeule seek to maintain between racial inequality in the administration of capital punishment and racial inequality in the distribution of private murders.⁶¹ The racial inequalities in the administration of capital punishment—both the failure to give equal weight to the deaths of black victims as compared

evident reason why the sparing and not the execution is wrong.”).

58. See *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (holding the Federal Death Penalty Act unconstitutional because of high rate of error), *rev'd*, 313 F.3d 49 (2d Cir. 2002); *United States v. Quinones*, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002) (estimating the number of innocent defendants convicted and sentenced to death). See generally Lawrence Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004) (surveying the effect of large numbers of exonerations from death row on the American death penalty debate).

59. See Sunstein & Vermeule, *supra* note 1, at 735-36; see also *id.* at 736 n.93 (claiming that “estimates of the number of innocent people who have been executed since the . . . mid-1970s are ‘remarkably low’”) (citing various sources).

60. See *id.* at 713-14.

61. See *id.* at 728-31.

to white victims in similar cases and the greater willingness to take the lives of black defendants as compared to white defendants in similar cases⁶²—give rise to an inference of racial animus on the part of state actors (prosecutors and jurors). That is, these disparities reveal the unwillingness or inability, whether conscious or unconscious, of governmental actors to treat black citizens with equal concern and respect. But the racial inequality in the distribution of private murders does not plausibly reflect such pervasive animus on the part either of the murderers or the government. Of course, some murders are motivated by racial (or gender or other) animus. But as Sunstein and Vermeule recognize, the primary reason that the crime of murder has a disparate racial impact is that most murders are intraracial and that there is a higher murder rate among blacks than among whites. There is no reason to think that black murderers choose their black victims because of a conscious or unconscious racial animus toward members of their own race; rather, in our segregated society, black murderers most plausibly choose their victims because of their proximity—intimate, social, and geographical.

Sunstein and Vermeule's declared equivalence of racial disparity in punishment to racial disparity in victimization might hold up in a situation in which the government failed to provide adequate deterrence for crimes that were primarily the product of the perpetrators' private racial animus. In such circumstances, it would seem fair to say that the government was failing to give equal concern and respect to the victims of such racially animated crime. But the equivalence evaporates when there is much more evidence of racial animus in the imposition of punishment than in the distribution of crime. The distributional failings of capital punishment in terms of violations of the norm of equal concern and respect are simply qualitatively different from the distributional failings of private murders.

Sunstein and Vermeule could still argue (and they do, sort of⁶³) that the savings of disproportionately black lives under the hypothetical regime of deterrence to which they stipulate might (should?) make the racial discrimination that infects the capital punishment system “worth it,” even to blacks. This is a familiar all-things-considered application of the utilitarian calculus. But it is *not* a proper “life-life tradeoff” argument because it fails to acknowledge the difference in the kinds of discrimination that lie on either side of the trade. Sunstein and Vermeule do not seem to notice when their argument veers off the track of their novel claim that capital punishment should be viewed as a “life-life tradeoff” and onto the well-worn path of utilitarian

62. See *supra* note 54 (citing studies by David Baldus et al. demonstrating both forms of racial inequality).

63. See Sunstein & Vermeule, *supra* note 1, at 730 (“[M]ost murder is intraracial, not interracial. African-Americans are disproportionately victims of homicide, and their murderers are disproportionately African-American. For this reason, they have a great deal to gain from capital punishment if it does have a deterrent effect—very plausibly more, on balance, than white people do.”) (footnotes omitted).

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calculation of overall costs and benefits.

C. Capital Punishment as a Failure of Dignity

A third major wellspring of deontological objection to the justice of capital punishment is the claim that, unlike many ordinary punishments, it violates human dignity. This view has been given its most prominent exposition in Justice Brennan's concurring opinion on the unconstitutionality of the death penalty as "cruel and unusual punishment" under the Eighth Amendment in *Furman v. Georgia*.⁶⁴ This claim has an abstract, slippery quality to it that makes it difficult to assess whether the violence done to human dignity through the imposition of death as punishment is different in any meaningful way from the violence done to human dignity through the crime of murder. In what follows, I consider two common constructions of the claim and conclude that neither one offers a new ground to assert that the damage to human dignity from execution is distinct from the damage to human dignity from murder, at least under a hypothetical regime of proven deterrence. However, I offer a third construction of the argument from human dignity that does offer good reason to think that executions endanger that value in a way that is meaningfully different from and worse than private murders.

1. Punishments violate human dignity when they are excessive in relationship to their purposes.

Absent good reason to think that the American death penalty deters better than life imprisonment—that is, in the "real world" outside of Sunstein and Vermeule's stipulation to the contrary⁶⁵—this was and remains one of the primary arguments against the death penalty. As Justice Brennan wrote in *Furman v. Georgia*:

The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.⁶⁶

This argument is one on which consequentialists and deontologists can agree, as the utilitarian principle of parsimony and the deontological principle of proportionality both converge upon it in their own ways.⁶⁷ However, this common and powerful argument is taken off the table for consequentialists by Sunstein and Vermeule's stipulation of marginal deterrence, and it is covered

64. 408 U.S. 238, 269-305 (1972) (Brennan, J., concurring).

65. See Sunstein & Vermeule, *supra* note 1, at 716.

66. *Furman*, 408 U.S. at 279 (Brennan, J., concurring) (internal citations omitted).

67. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 373-74 (1997).

for deontologists by the arguments from proportionality that I address above.⁶⁸ Thus, this version of the dignitary objection to the justice of capital punishment adds nothing to the reasons already on the table for considering executions differently from private murders.

2. *Extreme punishments violate human dignity because they destroy the distinctive human capacities of the punished.*

This argument for why capital punishment is wrong—that it totally annihilates the very personhood of the punished—powerfully captures what is distinctive about death as a punishment.⁶⁹ To quote Justice Brennan again, “The true significance of these [examples of extreme] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.”⁷⁰ But because this version of the human dignity argument focuses exclusively on the effects of extreme punishments on the punished, it does not help to rebut the aspect of the “life-life tradeoff” argument that is my target here—the nonequivalence of the harms of executions and those of private murders. Private murders, too, totally annihilate the personhood of their victims; they are as cruel and degrading, from the perspective of their effects on their victims, as any execution.

There is, however, one feature of executions that distinguishes them from private murders from the perspective of their effects on the person killed. The suffering and degradation that is inflicted upon those executed is not only dehumanizing, it is dehumanization that is presented and publicly accepted as deserved.⁷¹ This is an important difference between killing as punishment and killing as murder, but it cannot count as a nonequivalence that matters unless it is one that also renders executions unjust. The possibility (indeed, the likelihood) that the imposition of blame and the assertion of moral desert that accompany executions are unjust is addressed above in the discussion of proportionality. Thus, this second version of the dignity argument, like the first, is already encompassed in the argument about proportionality and brings nothing new to the table regarding the equivalence of executions and private murders.

68. See *supra* Part II.A.

69. See HUGO ADAM BEDAU, *KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA* 133-35 (2004).

70. *Furman*, 408 U.S. at 272-73 (Brennan, J., concurring).

71. See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307, 414 (2004) (“[T]he targets [of inhumane punishment] become less than human in the eyes of society, not only demeaned and degraded but seen to be deserving of such treatment. Crime victims, in contrast, are never viewed in this light. Their degradation is never affirmed as deserved.”).

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3. *Extreme punishments violate human dignity because they destroy the distinctive human capacities of the society in whose name they are publicly inflicted.*

I offer here a third formulation of the human dignity argument against capital punishment that both asserts a difference between executions and private murders and does not depend for its force on the punishment being in any way disproportionate or undeserved. The imposition of extreme punishments such as execution (or rape or torture), even in cases involving the most deserving of murderers (or rapists or torturers), violates human dignity—not because of what it does to the punished, but rather because of what it does to all of us. Death, from either execution or murder, by definition destroys the human capacities of the person killed, but inflicting death (or rape or torture) as punishment can, in addition, damage or destroy the human capacities of those of us in whose name the punishment is publicly inflicted.

This threat to dignity stems from certain sociological facts about the way punishment works as a social practice. Punishment is a public act; it is generally presented by the government as deserved by the recipient, and that imputation of desert is generally accepted by the public; the imposition of punishment tends to elicit gratifying emotions of satisfaction because the public condemnation and suffering of an offender assuage to some degree the anger and hatred provoked by the offense. Nothing in this characterization is meant as a normative justification of punishment practices. I mean to take no position here on whether the “retributive hatred” that wrongdoing inspires is a moral good,⁷² or whether the public satisfaction of vengeful urges offers a satisfactory consequentialist defense of punishment.⁷³ Rather, I mean simply to suggest that when the purposeful infliction of extreme suffering is yoked with emotions of righteousness and satisfaction, it will inevitably suppress our ordinary human capacities for compassion and empathy. To be sure, the desire to punish may itself spring, at least in part, from compassion and empathy for crime victims. And not every kind of punishment necessarily suppresses to any great extent our capacities for compassion and empathy. But the inherent moral satisfaction that attends the practice of punishment when it includes the infliction of death or other very extreme forms of suffering does seem to permit, or even require, the weakening of important psychological constraints against brutality. In this way, brutal *punishment* poses threats to our human capacities distinct from and more insidious than other forms of brutality that might be authorized or tolerated by the government because punishment has a distinctive connection to

72. See, e.g., Jeffrie G. Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY 88, 91-92 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (defending “retributive hatred” as an appropriate moral response to certain types of wrongdoing).

73. See, e.g., 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (1883) (lauding the ability of the criminal law to provide a public means for the appropriate expression and satisfaction of the natural human desire for vengeance).

powerful human emotions.

I do not wish to make here the consequentialist form of this argument—that the suppression of compassion and the weakening of psychological constraints against brutality will lead to greater incidence of violence or other bad behavior (though I will embrace this point later⁷⁴). Rather, I mean to make a deontological point about human dignity. From any normative perspective, punishment takes its justification from the distinctive human capacity for agency. In retributive terms, punishment is justified as the product of human agency: the duty to punish derives from the will of the wrongdoer in choosing to offend. In consequentialist terms, punishment is justified in order to protect human agency from private threats. My version of the deontological argument from human dignity recognizes that, in extreme forms, punishment as a practice can impair some of the human capacities that are necessary for full agency and thus can affect the necessary precondition for any justification of punishment. True human agency requires not only reason and volition, but also distinctively human affective attributes, such as the ability to feel empathy, compassion, pity, or love. By damaging or destroying human capacities to enter imaginatively into the pain of others, extreme punishments impair us as social agents, free to will and choose our destinies in an interrelated social world.

It is true that the failure of the government to provide optimal deterrence for private murder also might inure us to human suffering, by making murders more common and by implicitly communicating that they are not that serious a problem. But this potential impact on human capacities pales in comparison to the moral and emotional salience of the celebratory aspects of publicly endorsed executions. Given that homicide is seriously punished and condemned in our society even in the absence of capital punishment, any failure to provide optimal deterrence would clearly have a far more muted impact on the kinds of human capacities that are my concern here.

Thus, this formulation of the argument from human dignity suggests, along with the arguments from proportionality and equality, that executions are morally objectionable in ways distinct from and worse than private murders. As noted at the outset, I have bracketed my objection in Part I throughout this entire Part and accepted for purposes of argument that the government bears the same moral responsibility for private murders as it does for executions. What the foregoing is meant to show is that even under this assumption, the government can be seen as committing distinctive moral wrongs through execution because executions, as punishments, have the capacity to be morally problematic in ways that go beyond their wrongness as “killing.”

74. See *infra* note 124 and accompanying text.

III. CONCEPTUAL SLIPPERY SLOPES

The claim that under hypothetical conditions of deterrence, we would have a *prima facie* moral duty to impose the death penalty as punishment for murder seems to commit us to more than capital punishment: the argument implies that we would have a similar *prima facie* moral duty to employ *any* punishment practices when “life-life tradeoffs” balance out in their favor. Despite Sunstein and Vermeule’s protests to the contrary,⁷⁵ their argument places us on a number of conceptual slippery slopes on which only some form of deontological reasoning can give us adequate purchase. I explore four such slippery slopes below that together illustrate the inadequacy of Sunstein and Vermeule’s conception of “life-life tradeoffs” as an account of when punishment is morally required (or even morally permitted).

A. *Execution of the Innocent*

It is an old move in the debate between consequentialists and deontologists for the latter to point out that the former would find nothing morally wrong with punishing an innocent person under circumstances in which it was clear that the benefits to society would outweigh the costs.⁷⁶ Sunstein and Vermeule’s argument runs into a version of this dilemma, because nothing in their argument requires that executions be “just” or “deserved.” According to Sunstein and Vermeule, even if executions are considered the moral equivalents of murders themselves, then the government would still be obligated to conduct them *if* it could be shown that by doing so it prevented more murders than it committed.⁷⁷ Sunstein and Vermeule take comfort in the assertion that there could not possibly be deterrence from executions if it was likely that innocent people would be executed (because the guilty would realize they would go unpunished and not be deterred).⁷⁸ I have explained above why I think this assertion is too insouciant and why even a substantially error-prone system might plausibly offer marginal deterrence.⁷⁹ Sunstein and Vermeule, perhaps correctly, dismiss concerns about deliberate decisions to hold show trials and execute the innocent as “too lurid” and improbable to be worthy of serious discussion.⁸⁰ But they cannot so easily dismiss the less lurid but far more probable concerns about the justice of maintaining a capital punishment system in which there is a substantial risk that innocents will routinely be executed. This possibility leaves Sunstein and Vermeule in the implausible

75. See Sunstein & Vermeule, *supra* note 1, at 734-37.

76. For discussions of this debate, see David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992); Rawls, *supra* note 37, at 10-13.

77. See Sunstein & Vermeule, *supra* note 1, at 738.

78. See *id.* at 735-36.

79. See *supra* text accompanying note 60.

80. Sunstein & Vermeule, *supra* note 1, at 737.

position of maintaining that the likelihood of wrongful execution of the innocent simply has no moral salience whatsoever, as long as the deterrent effect of capital punishment continues to hold.

B. Execution of Innocent Members of an Offender's Family

Another way to challenge Sunstein and Vermeule's response that we need not worry overmuch about execution of the innocent because it would not deter is to imagine circumstances in which execution of the innocent is highly likely to deter. Suppose that we imposed, as punishment of the guilty, execution of offenders *and* execution of one of their closest living relatives (mother, father, spouse, or child). There are plenty of good reasons to think that such a punishment regime (call it "execution plus") would offer greater marginal deterrence than execution of only the offender.⁸¹ Suppose we had reason to believe that "execution plus" was twice as effective as ordinary execution (i.e., that it could prevent thirty-six murders, as compared to the eighteen that Sunstein and Vermeule stipulate can be prevented by ordinary execution⁸²). We could understand the practice of "execution plus" as punishment only of the defendant and as the sad but necessary sacrifice of the relative. Wouldn't Sunstein and Vermeule's argument about our *prima facie* moral duties compel us to accept the killing of two people, one guilty and one innocent, in order to save thirty-six? Why isn't this an example of a "life-life tradeoff" that we ought to accept?

The only reasons that Sunstein and Vermeule can offer, consistent with their "life-life tradeoffs" argument, are unsatisfactorily contingent. First, they maintain that their "life-life tradeoffs" argument does not necessarily require a regime like "execution plus" because we could never get adequately reliable evidence of its marginal deterrent effect, given that "the necessary experimentation" might well be morally impermissible; in contrast, we have decades of data that allow us to compare the deterrent effect of executions to that of terms of imprisonment.⁸³ This response ignores the fact that analysis of the "data" that we have about capital punishment is simply one way of generating knowledge in the world, and an extremely flawed one at best. We have not been and never will be able to verify the deterrent effect of executions by conducting a "controlled" scientific experiment, which would randomly assign either execution or some term of years to similarly situated defendants in similarly situated jurisdictions. Rather, we have simply added the techniques of multivariate regression analysis, which can only crudely control for an

81. Indeed, this kind of punishment is used in other parts of the world. *See, e.g.,* Zahid Hussain, *Four Men Rape 18-Year-Old Teacher in Name of Tribal Justice*, *TIMES* (London) July 4, 2002, at 15 (describing the gang rape of an offender's sister as punishment for his violation of caste taboos).

82. Sunstein & Vermeule, *supra* note 1, at 706 & n.10.

83. *See id.* at 736.

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enormous variety of possible confounding variables, to other ways of generating knowledge about deterrent effects (such as questionnaires, clinical psychological experiments about probability and salience of sanction, or long-term, cross-jurisdictional comparisons of crime rates over time). This is why there is so much disagreement about whether the studies that Sunstein and Vermeule rely upon to generate their stipulation of marginal deterrence are themselves sufficiently “reliable” to require executions. There is simply no reason to think that we could not generate similarly plausible reasons to believe that other “disturbing practices”⁸⁴ such as “execution plus” would generate marginal deterrence. Tragically, there are ample data to be gathered from the experience of repressive regimes around the world, which have often relied upon threats to loved ones as powerful levers of social control.⁸⁵ Moreover, Sunstein and Vermeule themselves claim that we should not insist upon incontrovertible proof of marginal deterrence; rather, a “significant possibility” of such deterrence ought to be enough to command our action.⁸⁶ Surely, even absent experimentation, it would not be hard to defend the conclusion that there is a “significant possibility” that potential murderers would be more effectively deterred by the prospect of causing the death of a loved one in addition to their own death than they would be by the prospect of their own execution alone.

In a different vein, Sunstein and Vermeule might respond that a regime of “execution plus” would be politically infeasible, whereas ordinary capital punishment is eminently feasible, and policymakers must choose only among politically feasible alternatives.⁸⁷ This response, however, ignores the fact that the essence of their argument is moral rather than political. Under the terms of Sunstein and Vermeule’s argument, we should think of ourselves as morally obligated to execute family members of convicted murderers when it would provide sufficient marginal deterrence, whether or not there is the political will to carry out that moral obligation. Moreover, the moral obligation to embrace “execution plus” surely entails a concomitant moral obligation to try to change people’s minds and generate the political will to do what is morally right.

More persuasively, Sunstein and Vermeule might respond that the saving

84. *Id.* at 737.

85. See, e.g., Warren Hoge, *Threats and Responses: The Accusations; Britain Issues File on Iraq’s “Unique New Horror,”* N.Y. TIMES, Dec. 3, 2002, at A18 (describing the torture practices of Saddam Hussein’s regime in Iraq); Hussain, *supra* note 81 (providing an example of tribal justice in Pakistan); Larry Rohter, *A Torture Report Compels Chile To Reassess Its Past,* N.Y. TIMES, Nov. 28, 2004, at A14 (describing the torture practices of Pinochet’s regime in Chile). In Andre Dubus, III’s powerful novel, *House of Sand and Fog*, he depicts a young member of SAVAK, the ruthless secret police under the former Shah of Iran, describing how torture of political prisoners was far less effective than torture of their children: “Make a subversive watch his little one lose a hand or arm and they will tell you everything.” ANDRE DUBUS, III, *HOUSE OF SAND AND FOG* 61 (1999).

86. See Sunstein & Vermeule, *supra* note 1, at 715.

87. *Id.* at 733 (“Political constraints will rule out some policies that might be even better, from the standpoint of deterring murders, than capital punishment.”).

of lives generated by “execution plus” provides only a prima facie moral obligation to embrace it, by providing a good but rebuttable reason to think that cost-benefit analysis will work out in its favor. The fear and uncertainty that such a regime would engender among innocent people (who would live in terror that some nefarious relative might send them to the death chamber), the public outrage that the execution of innocent relatives would engender, or some combination of these and other bad consequences that might flow from a regime of “execution plus” would provide rule-utilitarian reasons to reject it, even if individual applications of the practice might meet the criteria for a desirable “life-life tradeoff.” This argument, while more plausible than the argument from political infeasibility, fails for the same sorts of reasons. People might *feel* more insecure under a regime of “execution plus,” but they would not actually *be* more insecure. After all, that is why the “life-life tradeoff” works out in favor of “execution plus”: people would be substantially less likely to be arbitrarily killed under such a regime. Thus, the government should try—would have a moral duty to try—to educate us so that we could understand that we would all be more secure with “execution plus” than without it. By Sunstein and Vermeule’s logic, we ourselves would have a moral duty to master our irrational fear and to overcome our moral outrage, which we should learn to see is really the operation of an unreliable “moral heuristic.”

C. *Imposition of Other Extreme Punishments*

“Execution plus” may seem like an overly dramatic and improbable example of the slippery slope problem. But it is important to realize that less dramatic but no less troubling versions of the same problem abound. Death is an awesome and terrible punishment, but it is not in itself the worst punishment that we can inflict. There are undoubtedly better and worse ways to die, as we have recognized by altering our modes of executions to make them progressively more humane. Yet capital murderers, as prosecutors like to point out during closing arguments, rarely give their victims the relatively peaceful death that lethal injection promises. The victims of capital murder are frequently raped, mutilated, tortured, or killed in extravagantly painful ways. Does this create a moral duty for us to execute in extravagantly painful ways if there is good reason to think that we could further reduce the number of such murders by doing so? Must we try to replicate, as closely as we can, the experience of being raped or tortured for rapists or torturers, if there is good reason to think that we could further reduce the incidence of such crimes by doing so? This is no merely hypothetical slippery slope. A version of this argument took place only a few years ago, when the state of Florida had several grisly mishaps with its electric chair, during which “Old Sparky” caused the heads of some executed defendants to burst into flames.⁸⁸ The debate ended

88. See Tony Mauro, *Bloody Execution Renews Outcry*, USA TODAY, July 9, 1999, at

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with the Florida legislature authorizing lethal injection as an alternative to the electric chair in order to avoid a Supreme Court ruling on the constitutionality of electrocution.⁸⁹ But for Sunstein and Vermeule, the question remains: If Florida Attorney General Butterworth was right that a flaming electric chair would deter potential murderers better than a properly functioning one,⁹⁰ would we be required to use it (and perhaps to develop even more horrifying means of execution)?⁹¹

Sunstein and Vermeule directly acknowledge that they think that the answer to these questions is yes, but they try to qualify their answer in the same unsatisfactory ways that I considered above in response to “execution plus.” First, they argue that we might lack sufficiently reliable evidence to support a conclusion that such extreme punishments would work better than less extreme ones.⁹² But our best understanding of human motivation—with or without multiple regression analysis—should often lead us to conclude that there is a “significant possibility” that more horrible punishments would deter horrible crimes better than less horrible punishments.⁹³ They then argue that second-order considerations, such as administrative difficulties, potential for abuse, or unforeseen consequences, might compel us to avoid such extreme punishments as a matter of rule utilitarianism.⁹⁴ But as they acknowledge, they—and we—are simply hostage to the facts here, and it is eminently plausible that we might conclude that our *ex ante* predictions of deterrent effects outweigh our *ex ante* fears of abuse and unforeseen consequences (exactly as Sunstein and Vermeule suggest they do in the capital punishment context⁹⁵). The qualifications that Sunstein and Vermeule offer give us no adequate purchase on the slippery slope toward extreme punishments. Rather, consideration of these qualifications reveals just how easy it is to generalize from capital punishment to punishments involving rape, torture, or agonizing death.

A3 (“Some state officials voiced approval of the botched execution, suggesting it might deter others from committing violent crimes.”).

89. See Lesley Clark, *High Court Dismisses Challenge to Constitutionality of the Electric Chair*, MIAMI HERALD, Jan. 25, 2000, at A1.

90. See Brian E. Crowley, *Butterworth’s Blunt Answer Sends a Charge*, PALM BEACH POST, Mar. 29, 1997, at B1.

91. Cf. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 286-89 (1949) (portraying a future dystopia in which the totalitarian state breaks down a potential dissident by threatening him with his most feared form of torture—ravenous rats).

92. Sunstein & Vermeule, *supra* note 1, at 734 (“This is an empirical issue, and no evidence, so far as we are aware, either undermines or confirms it.”).

93. Indeed, Sunstein and Vermeule’s own hypothesis, that the “salience” of executions—the special fear that they inspire—might be what leads to their deterrent effect despite their inconsistent and infrequent use, could be pressed into service in support of other extreme punishments that would be even more “salient.” See *id.* at 741.

94. *Id.* at 734 (“In any case, a ban on torture might, or might not, have a rule-consequentialist defense.”).

95. *Id.* at 728-31 (maintaining that arbitrariness and discrimination in the application of capital punishment do not outweigh the value of its deterrent effect).

D. Execution of Less Culpable Offenders

Wouldn't Sunstein and Vermeule's account also commit us to using capital punishment to further reduce massive threats to life in less culpable contexts than murder? Many plausible arenas for "life-life tradeoffs" leap to mind: consider drunk driving or other highway infractions such as using a cell phone while driving, failure to use proper child restraints, failure to maintain adequate swimming pool enclosures, smoking in bed, failure to maintain adequate smoke alarms, food or drug adulteration, and medical malpractice, among others.⁹⁶ Of course, there are many rule-utilitarian arguments one might make against extending capital punishment to some of these contexts. But defendants charged with the aforementioned offenses would likely be, on average, more responsive to the threat of capital punishment than current capital defendants, who more frequently suffer from cognitive impairments, act in highly charged situations, and face very serious criminal penalties in any event for their crimes.

Sunstein and Vermeule have a very puzzling answer to this problem. They insist that their argument in favor of capital punishment for murder does not extend to cases of nonpremeditated homicide because in such cases the tradeoff "is no longer an apples-to-apples comparison."⁹⁷ They reason that because the people whose lives would be saved by executions would be recklessly killed rather than intentionally killed, their deaths are not equal to the intentional deaths that the government commits with executions. This argument is hard to understand: Why isn't it just the lives that count, rather than the culpability of the person who causes the death? Sunstein and Vermeule do not seem concerned about the reduced culpability of juvenile offenders when they suggest that their analysis might compel the extension of the death penalty to juvenile murderers.⁹⁸ And in other "life-life tradeoffs," the government does not count the loss of lives differently because of the culpability of those that take them. Consider gun control. In calculating whether banning handguns costs lives or saves lives, the government does not count lives differently that

96. The number of deaths caused annually by drunk driving alone approximates or exceeds the number of lives lost to murder. Compare Brian Wingfield, *Goal on Curbing Alcohol-Related Traffic Deaths Is Proving Elusive*, N.Y. TIMES, Jan. 15, 2005, at A16 (finding the number of alcohol-related traffic deaths, 17,013, in 2003 was the fewest since 1999), and NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS (2005) (indicating 16,694 alcohol-related highway fatalities in 2004), available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809904.pdf>, with FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2004, at 15 (showing 16,137 murders in 2004), available at http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section2.pdf.

Recent studies suggest that cell-phone use while driving may be adding substantially to the overall total of highway fatalities. See News Release, Harvard Center for Risk Analysis, Updated Study Shows Higher Risk of Fatality from Cell Phone While Driving (Dec. 2, 2002) (describing a 2000 study that suggests that cell-phone use leads to approximately 2600 traffic-related fatalities annually), available at <http://www.hcra.harvard.edu/cellphones.html>.

97. See Sunstein & Vermeule, *supra* note 1, at 748.

98. *Id.* at 705.

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are lost to murder, reckless homicide, accident, and suicide; it just counts lives. Or consider the government's hypothetical choice between two courses of action during a riot or civil unrest: one that would prevent, say, ten intentional murders, and one that would prevent, say, twenty accidental or reckless killings during a stampede. Is there any reason not to treat this last choice as a "life-life tradeoff" in which the government would properly "trade" the ten intentional murders in order to prevent the twenty reckless killings?

Sunstein and Vermeule's focus on the mens rea of the individual who causes death is another version of the same mistake I explored in Part I. The moral equivalence that must exist in a "life-life tradeoff" lies in the *government's* attitude toward the taking of life, not in the attitudes of those whom the government's policy decisions affect. The very construct of a "life-life tradeoff" presumes that the government stands in equal relationship to harms that can be weighed precisely against each other, and the only harms that can be so weighed are (lost) "lives." The culpability of the individual agent bringing about the harm bears no essential relationship to the harm itself: if a bullet were to shatter my office window as I type this and kill me, the harm to me would not turn on whether the bullet came from (a) a disgruntled student who premeditated my death; (b) a crazed student who premeditated my death but lacked any moral culpability because of insanity; (c) the reckless act of a student using my computer for target practice; (d) the negligent act of a student cleaning a loaded gun; or (e) the nonnegligent discharge of a police officer's weapon because it was struck by lightning. Culpability matters in the question of the justice of the punishment inflicted on the agent of harm (at least under retributive principles), but it is hard to see how it ought to matter in a "life-life tradeoff."

In contrast, the *government's* attitude toward its actions—its mens rea, if you will—matters because the concept of a "life-life tradeoff" depends on the special moral agency of government, on the government owing equal duties of care to all affected by its decisions. Under this view of "life-life tradeoffs," capital punishment for murders and for drunk driving must come out the same way (assuming that deterrent effects are the same) because the government's attitude toward the deaths that it means to prevent by executions is the same. That is, in each kind of case, it knows or risks, but does not intend, that a certain number of people will be killed if it does not execute. I argued in Part I that this knowledge or recklessness is not equivalent to the government's purpose (to kill) in inflicting the death penalty, but my argument yields the same result in cases of both murder and drunk driving. Sunstein and Vermeule offer no theory of "life-life tradeoffs" that gives any reason why individual intention rather than government intention should be the necessary comparison.

The only good reason that the culpability of the individual agent of harm ought to matter in a "life-life tradeoff" is a retributive one, as Sunstein and Vermeule seem to concede by recognizing that capital punishment for homicides caused by drunk driving "might stand on a different moral footing"

from capital punishment for intentional murders because of “constraints of proportionality.”⁹⁹ But bringing in the “constraints of proportionality” to distinguish executions for drunk driving from executions for murder gives up the whole game; it eliminates the special moral force of the “life-life tradeoffs” argument that Sunstein and Vermeule wish to assert. If proportionality is indeed a constraint, it can often rule out executions for *murder* as well as for drunk driving, as I elaborated above.¹⁰⁰ And in cases in which proportionality does not rule out execution for murder—cases in which execution is proportional to the defendant’s culpability—we no longer need to count those executions as wrongfully taken lives in a “life-life tradeoff.”

Asserting the “proportionality” or retributive justice of executing murderers would allow (or perhaps require) us to execute them *even if the “life-life tradeoff” came out the other way* (that is, even if we saved only one innocent life for every eighteen executions). This kind of argument is the familiar mainstay of most supporters of capital punishment: the execution of those who kill is just (because they deserve it), and it is good social policy (if it contributes to any meaningful social good, including the saving of any innocent life, whether or not it results in a net savings of life overall). Sunstein and Vermeule assert that “nothing in our argument is inconsistent with the view that there are deontological constraints, or constraints of proportionality, that forbid the use of capital punishment for unintentional or merely reckless wrongdoing.”¹⁰¹ What they fail to see, however, is that grafting deontological proportionality onto their argument makes their argument both false (the lives on either side are not equal) and superfluous (that inequality does not matter). Sunstein and Vermeule’s acceptance of a proportionality requirement is tantamount to an admission of the irrelevance of their argument.

Sunstein and Vermeule’s last-minute and self-defeating appeal to retributive principles of justice is ultimately not surprising. Some such deontological principle is necessary to restrain the application of their argument not only from demanding the death penalty for drunk drivers, but also from requiring all of the other unjust and extreme punishments that lie further down the slippery slope on which the argument launches us.

IV. THE FAILURE OF THE “THRESHOLD”

Sunstein and Vermeule include an appeal to deontologists in their essentially consequentialist account of moral duties.¹⁰² Indeed, they must do so because otherwise their argument would come dangerously close to a

99. *Id.* at 748.

100. *See supra* Part II.A.

101. Sunstein & Vermeule, *supra* note 1, at 748.

102. *Id.* at 717 (“Deontologists will [support capital punishment] because an opposition to killing is, by itself, indeterminate in the face of life-life tradeoffs.”).

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tautology: if one thinks that government actions are morally right (or required) when they maximize lives (or utility or welfare), then one would support the use of capital punishment under stipulated conditions in which it maximizes lives (or utility or welfare). Their appeal to deontologists is of a particular kind, very familiar in these post-September 11th days of not-so-hypothetical ticking time bombs. At a certain catastrophic point, many deontologists agree that their categorical objections to even the clearest moral wrongs (e.g., murder, torture) should be overridden at some extreme “threshold” in order to prevent some terrible consequences (like the destruction of New York City, or even the killing of a substantial number of people).¹⁰³ Thus, Sunstein and Vermeule assert that if capital punishment does indeed result not merely in a net savings of lives, but rather in a really *substantial* net savings of lives (Sunstein and Vermeule posit eighteen lives saved per execution, drawing on the conclusions of one recent statistical analysis¹⁰⁴), even deontologists should put aside whatever moral objections they might have to the practice and agree that it is morally permissible, unless they cast their lot with the truly intransigent deontologists who admit to no threshold.¹⁰⁵

One can acknowledge that deontologists generally do (or believe that they generally should) accept a threshold override to their categorical reasoning at least in some circumstances, without granting Sunstein and Vermeule’s conclusion. The easiest way to reply to Sunstein and Vermeule is simply to assert that saving eighteen lives is nowhere near whatever threshold there is or ought to be. But this approach turns out to be not easy at all, as it requires some method of generating at least a ballpark threshold. Rather, a stronger and more convincing response to the “threshold” argument proceeds from recognizing the special weakness of this type of argument in the context of criminal punishment generally.

The best way to illuminate this weakness is to recognize that the most common “threshold” examples are emergency situations in which there is no alternative way to avoid the threatened catastrophe other than by violating the deontological principle. (Think of torturing the terrorist who knows the location of the ticking time bomb that will destroy New York.) In the context of criminal punishment, by contrast, the punishment itself is never directed solely or even primarily at the cause of the danger; rather, the substantial net savings of lives results from the deterrent effect that the punishment will have on the

103. See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 723 (1997) (declaring himself to be a “threshold deontologist”); THOMAS NAGEL, *MORTAL QUESTIONS* 56 (1979) (acknowledging that “it may become impossible to adhere to an absolutist position” when “utilitarian considerations favoring violation are overpoweringly weighty and extremely certain”); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 30 n.* (1974) (acknowledging but not answering the question whether moral constraints are absolute or “whether they may be violated to avoid catastrophic moral horror”).

104. Sunstein & Vermeule, *supra* note 1, at 706 & n.10.

105. *Id.* at 707.

future actions of other people.¹⁰⁶ Thus, in the criminal context, there is virtually never a true “emergency” such that imposing a particular criminal punishment is the only possible means to avert substantial harms in the future. Rather, there are always alternative means to prevent such future harms, including policing initiatives and other direct community interventions in the short term,¹⁰⁷ and funding for social programs such as education, health care, mental health services, and drug treatment in the medium and long term.¹⁰⁸

It is true that under the conditions of proven deterrence to which Sunstein and Vermeule stipulate, there may be somewhat greater uncertainty as to the preventive effect of such alternative measures than there is for the deterrent effect of capital punishment. But such relative uncertainty would not reduce the predicted deterrent effect of the alternative measures to zero. Rather, for a threshold deontologist, the number of lives saved by capital punishment would not be the stipulated eighteen, but the difference (if there is one) between eighteen and whatever predicted preventive effect alternative measures could produce. Even in cases in which the effect of alternative preventive measures was considerably more speculative than the “proven” effect of capital punishment, that difference is likely to be a much smaller number than eighteen (if there is a difference at all). This argument is a version of the “preferable alternatives” argument that Sunstein and Vermeule seek to rebut,¹⁰⁹ but with a twist: it grants that Sunstein and Vermeule are correct that there is no necessary reason for consequentialists to seek alternatives to capital punishment if they are satisfied that it produces net gains for society, but it shows that for threshold deontologists, preferable alternatives are key to estimating whether we are at the threshold to begin with.

Sunstein and Vermeule go on to contend that even if alternative preventive measures were adopted, capital punishment is always available as a complement: those eighteen lives are always out there to be saved by adding capital punishment to whatever mix of other preventive strategies could be pursued.¹¹⁰ But the threshold deontologist can easily respond that there will always remain the choice between *further* alternative preventive strategies and

106. This is yet another reason why Sunstein and Vermeule’s running “hostage” example is inapposite: cases of hostage taking are emergency situations of imminent threat, in addition to not being “life-life tradeoffs” to begin with. *See id.* at 719.

107. *See, e.g.*, Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407 (2000) (arguing that implementation of innovative community policing measures in New York, Chicago, and Boston was responsible, in part, for the substantial drop in homicide rates during the 1990s).

108. *See* John J. Donohue, III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1 (1998) (evaluating the cost- and crime-reducing potential of social spending in comparison to incarceration and establishing the conditions under which a shift of resources away from prisons and toward social programs would reduce crime).

109. Sunstein & Vermeule, *supra* note 1, at 732-34.

110. *Id.* at 733-34.

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capital punishment. We are never likely to achieve a world in which we have reached optimal spending on nonlethal preventive strategies and have nothing left to do but adopt capital punishment. Nor is it likely, in the event that we ever did achieve such a utopian world, that capital punishment could generate, even remotely, the same marginal deterrent effect, in light of the fact that the murders and murderers in such a world would be of a far different genesis than those in the world in which we currently live.¹¹¹

On a grander moral scale, preventing murders is only one way in which the state protects the lives of its citizens. It does so also through public health policies, environmental protection, workplace safety regulation, and the like. If the dollars spent on an execution that would prevent eighteen murders could be spent to prevent an equal number of people from dying in workplace accidents or from AIDS *without* violating any categorical moral prohibition, why should a threshold deontologist agree that any catastrophic threshold permitting violation of such a moral prohibition has been met? Given the costliness of the administration of capital punishment,¹¹² it seems unlikely that a deontologist would ever properly conclude that the marginal deterrence afforded by executions so far outweighed other possible savings of lives with the same dollars so as to cross some catastrophic threshold.

Finally, Sunstein and Vermeule's last, and rather desperate, salvo is to insist that no alternative preventive measures are politically feasible, given that "[s]witching to a Swedish-style welfare state" or "increasing job-training funds by several orders of magnitude" is "simply not in the cards anytime soon,"¹¹³ while capital punishment remains a relatively popular policy initiative. This argument is weak both as a descriptive and as a moral matter. There is absolutely no reason to think that, for any particular state in the United States, becoming Sweden is the only possible alternative to becoming Texas. Rather, there are many plausible alternative strategies to reducing homicide rates that could feasibly be adopted, the best proof being that some of them *have* been adopted in some states.¹¹⁴ Moreover, even if these policies are less politically popular than capital punishment, it is hard to see how that affects the moral duties of those who believe that capital punishment is categorically wrong. Surely, their moral obligation is to work toward feasible alternatives unless and until they conclude that there remains no possible way to prevent the feared threshold effect—a state of affairs that Sunstein and Vermeule have not come

111. Marge Piercy's provocative novel, *WOMAN ON THE EDGE OF TIME* (1976), imagines a future utopia that achieves essentially perfect equality, both material and social, and continues to provide for capital punishment—but almost never needs to use it.

112. See Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, 4 *ADVANCES ECON. ANALYSIS & POL'Y* 1, 2-3 (2004) (using county-level data to estimate that the United States spent approximately \$1.6 billion on capital cases between 1982 and 1997).

113. Sunstein & Vermeule, *supra* note 1, at 733.

114. See Donohue & Siegelman, *supra* note 108 (describing social programs that have been shown to reduce crime).

close to proving.

V. WHY EVEN CONSEQUENTIALISTS SHOULD WORRY

Consideration of why deontologists should not agree that their “threshold” (if they have one) has been crossed leads naturally to consideration of why even consequentialists should reject the conclusion that capital punishment is morally required, even under the hypothetical conditions of deterrence to which Sunstein and Vermeule stipulate. Such consideration suggests that, far from being a tautology, Sunstein and Vermeule’s claim that we are morally obligated to endorse capital punishment if we believe that it results in a net savings of life turns out to be false—even for consequentialists.

First, while it is clear from the foregoing that deontologists could fairly claim that any threshold for override of deontological principles has not been met, the very same reasoning should lead even consequentialists to realize that Sunstein and Vermeule have not met the burden of their argument. Capital punishment is morally required, under a consequentialist view, not merely if the government saves more lives by punishing than it sacrifices; rather, capital punishment is morally required only if the government can save more lives through capital punishment than it could save by deploying those resources in some other way. If it turned out that the government could save *more* AIDS patients, avert *more* fatal accidents, or cure *more* childhood diseases with the resources that executions would require, why should a consequentialist feel morally compelled to insist on capital punishment? Indeed, shouldn’t a “life-life tradeoff” perspective *require* that capital punishment be abandoned to fund such other initiatives? Of course, the comparative savings of lives might not work out in this particular way, but the point remains: our collective moral duties cannot be considered in artificial isolation but, rather, must be determined in the broader context of all government action.

Sunstein and Vermeule attempt to stress the urgency of the consequentialist case for capital punishment by insisting that, under their stipulated conditions of deterrence, executions “today” could start saving eighteen lives “tomorrow.”¹¹⁵ Here, it is important to consider exactly what the data upon which Sunstein and Vermeule build their stipulation purport to show. As Sunstein and Vermeule acknowledge,¹¹⁶ the same data supporting their eighteen-lives-per-execution figure also show that executions do *not* start saving lives as soon as they are implemented. Rather, only when the number of executions rose above a substantial numerical threshold—as they did in only six of the twenty-seven states studied—was a deterrent effect discernible.¹¹⁷ In thirteen of the states studied, executions at a rate below the threshold actually

115. Sunstein & Vermeule, *supra* note 1, at 733.

116. *Id.* at 711-12.

117. *Id.* at 712-13 & nn.34-37.

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increased the murder rate, through what the researcher deemed a “brutalization effect” by which capital punishment worked to devalue human life and affirm the legitimacy of retaliatory violence.¹¹⁸ This data should surely give a consequentialist great pause. There is no way to guarantee, either practically or morally, that a quota of murderers will be executed each year in order to ensure that executions have the hoped-for deterrent effect rather than the opposite brutalization effect. To use Sunstein and Vermeule’s (favorite but flawed¹¹⁹) hostage analogy, we would surely not want to shoot a hostage taker if there were some significant chance that the bullet would make him stronger or provoke his compatriots to kill even more hostages.

But the quirky changing of sign (from no effect to “brutalization” to deterrence) that one sees in the data on the effect of executions on homicides suggests a deeper problem for consequentialists in arguments about deterrence generally. Deterrence does not work in the real world the way economic models predict; there is no unchanging and predictable correlation between increasing severity of sanction and decreasing incidence of crime. Rather, sanctions, especially criminal ones, have *other* complex social and individual behavioral effects as well. For sophisticated players in the world of social norms theory and behavioral law and economics, Sunstein and Vermeule take an oddly wooden approach to deterrence in their article, essentially assuming that the problem is really one of determining the right execution “dose” to produce predictable deterrent consequences. What they fail to consider is that the sanction of capital punishment might have other social and behavioral effects that should make a sophisticated consequentialist wary of employing it in this way.

Sunstein and Vermeule neglect any consideration of the various mechanisms by which capital punishment might reduce homicide rates. They seem to assume that the only such mechanism is deterrence, by which potential capital offenders will avoid offending because of their fear of execution. But it is possible that capital punishment reduces homicide rates—if it does—because potential capital offenders internalize the legal norm against killing, in part because they accept the capital justice system as normatively valid. There is a large body of literature in psychology and sociology that suggests that legal compliance is primarily driven not by fear of sanction but rather by normative commitments of this kind.¹²⁰ Under this alternative view of legal compliance, it seems likely that whatever normative commitment people have to the use of capital punishment rests irreducibly on their belief that those who get executed are among the “worst of the worst” who deserve their fate. If we were to

118. Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005).

119. See *supra* notes 40, 106 and accompanying text (explaining why the hostage analogy is inapposite in two other ways as well).

120. For an important and generative work on this kind of alternative theory of legal compliance, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

collectively and publicly¹²¹ adopt Sunstein and Vermeule's rationale for ramping up executions (we need to execute a certain number of murderers in order to deter others, whatever else we might think about the actual desert of the ones executed), executions might cease to have the deterrent effect that recommends them (to Sunstein and Vermeule) in the first place. If capital punishment achieves reduction in homicide rates because people accept and internalize legal norms against killing largely on grounds of retributive justice, we might lose that very effect by switching to a wholly consequentialist justification for capital punishment. In other words, the choice of retributivism over consequentialism as a theory of punishment practices may be required on consequentialist terms.¹²²

Of course, there is perhaps better reason to think that capital punishment, unlike other sanctions, works—if it does—largely through its in *terrorem* effect, rather than through a norm-enforcing mechanism. After all, the data on the “brutalization” effects of relatively low rates of executions suggest that noncapital sanctions for homicide might better convey the norm that killing is wrong, an advantage that can be overcome only by much higher rates of executions. If *this* account of how capital sanctions work is correct, however, there is even more reason for consequentialists to worry about embarking on the path of capital punishment. Criminal sanctions, especially highly salient ones like execution, do not merely deter or fail to deter: they can also wreak changes, in deep and subtle ways, on the normative commitments of the individuals and societies in which they are deployed. The “brutalization” data give us reason to fear exactly such changes from the use of capital sanctions and therefore to worry that capital punishment may create a form of path-dependency on brutal criminal sanctions. If low levels of executions “brutalize” us a little, why should we not fear that, over time, high levels of executions will eventually brutalize us even more, ultimately leading to a society in which there are even greater levels of interpersonal violence, including murder, requiring even greater levels of capital punishment or other brutal repression? After all, the empirical studies upon which Sunstein and Vermeule rely¹²³ cover only a very short time period and tell us nothing about what our society might be like if we continued the time series well into the future—a future that could be changed in important ways by the continued practice of high levels of capital punishment. Indeed, history has demonstrated that capital punishment and other brutal sanctions are not guarantors of greater personal security but, rather, correlates of greater human degradation.¹²⁴

121. Here, I insist, as do Sunstein and Vermeule, on the necessity of a “publicity principle” on criminal punishment practices. See Sunstein & Vermeule, *supra* note 1, at 736.

122. For an elaborate and compelling generalization of this point, see generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U.L. REV. 453 (1997).

123. Sunstein & Vermeule, *supra* note 1, at 706 & n.9, 708-14.

124. See Emile Durkheim, *The Evolution of Punishment*, in DURKHEIM AND THE LAW 102 (Steven Lukes & Andrew Scull eds., 1983) (observing that increasing moderation in

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This point is, in essence, the consequentialist counterpart to the deontological argument from dignity that I sketched above.¹²⁵ The human capacities that may be impaired by enthusiastic embrace of capital punishment may ultimately lead to more of exactly the bad consequences executions seek to avoid. There simply is no permanent, eternal “truth” to any particular deterrent effect, however well documented. Where Sunstein and Vermeule go wrong—even if we were to grant perfect scientific validity to the studies upon which they rest their argument—is their stipulation that we can now know that whatever deterrent effect was found in the short term will reliably continue into the future and not change signs and revert to a “brutalization” effect yet again.

CONCLUSION

I have not undertaken here to make the affirmative case that capital punishment is morally impermissible, though much that I say can be taken to suggest that conclusion. Rather, I have attempted to show that Sunstein and Vermeule’s argument that there are new reasons to believe that capital punishment is morally required does not hold up under scrutiny. Much of what I say goes to rebut their claim that capital punishment should be viewed as a “life-life tradeoff.” But I also argue that, even if we were to accept that capital punishment is a “life-life tradeoff,” neither those who have categorical moral objections to the death penalty nor even those who fully embrace consequentialism should be willing to make the trade that Sunstein and Vermeule advocate—a trade that on closer inspection reveals itself as the most Faustian of bargains.

punishment has tended to coincide with increasing advancement of societies).

125. See *supra* Part II.C.

