

# IS CAPITAL PUNISHMENT MORALLY REQUIRED? ACTS, OMISSIONS, AND LIFE- LIFE TRADEOFFS

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*Many people believe that the death penalty should be abolished even if, as recent evidence seems to suggest, it has a significant deterrent effect. But if such an effect can be established, capital punishment requires a life-life tradeoff, and a serious commitment to the sanctity of human life may well compel, rather than forbid, that form of punishment. The familiar problems with capital punishment—potential error, irreversibility, arbitrariness, and racial skew—do not require abolition because the realm of homicide suffers from those same problems in even more acute form. Moral objections to the death penalty frequently depend on a sharp distinction between acts and omissions, but that distinction is misleading in this context because government is a special kind of moral agent. The widespread failure to appreciate the life-life tradeoffs potentially involved in capital punishment may depend in part on cognitive processes that fail to treat “statistical lives” with the seriousness that they deserve. The objection to the act/omission distinction, as applied to government, has implications for many questions in civil and criminal law.*

INTRODUCTION.....	704
I. EVIDENCE .....	710
II. CAPITAL PUNISHMENT: MORAL FOUNDATIONS AND FOUR OBJECTIONS ...	716
A. <i>Morality and Death</i> .....	717
B. <i>Acts and Omissions</i> .....	719
1. <i>Is the act/omission distinction coherent with respect to            government?</i> .....	720

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2. <i>Is the act/omission distinction morally relevant to capital punishment?</i> .....	724
C. <i>The Arbitrary and Discriminatory Realm of Homicide</i> .....	728
D. <i>Preferable Alternatives and the Principle of Strict Scrutiny</i> .....	732
E. <i>Slippery Slopes</i> .....	734
F. <i>Deontology and Consequentialism Again</i> .....	737
III. COGNITION AND CAPITAL PUNISHMENT .....	740
A. <i>Saliency</i> .....	741
B. <i>Acts, Omissions, and Brains</i> .....	741
C. <i>A Famous Argument that Might Be Taken as a Counterargument</i> .....	743
IV. IMPLICATIONS AND FUTURE PROBLEMS .....	744
A. <i>Threshold Effects (?) and Regional Variation</i> .....	745
B. <i>International Variation</i> .....	745
C. <i>Offenders and Offenses</i> .....	746
D. <i>Life-Life Tradeoffs and Beyond</i> .....	747
CONCLUSION .....	748

## INTRODUCTION

Many people believe that capital punishment is morally impermissible. In their view, executions are inherently cruel and barbaric.<sup>1</sup> Often they add that capital punishment is not, and cannot be, imposed in a way that adheres to the rule of law.<sup>2</sup> They contend that, as administered, capital punishment ensures the execution of (some) innocent people and also that it reflects arbitrariness, in the form of random or invidious infliction of the ultimate penalty.<sup>3</sup>

Defenders of capital punishment can be separated into two different camps. Some are retributivists.<sup>4</sup> Following Immanuel Kant,<sup>5</sup> they claim that for the most heinous forms of wrongdoing, the penalty of death is morally justified or perhaps even required. Other defenders of capital punishment are consequentialists and often also welfarists.<sup>6</sup> They contend that the deterrent

1. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 309, 371 (1972) (Marshall, J., concurring).

2. See Stephen B. Bright, *Why the United States Will Join the Rest of the World in Abandoning Capital Punishment*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?* 152 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) [hereinafter *DEBATING THE DEATH PENALTY*].

3. See, e.g., James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (Columbia Law Sch., Pub. Law Research Paper No. 15, 2000) (on file with authors).

4. See, e.g., Luis P. Pojman, *Why the Death Penalty Is Morally Permissible*, in *DEBATING THE DEATH PENALTY*, *supra* note 2, at 51, 55-58.

5. 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).

6. Arguments along these lines can be found in Pojman, *supra* note 4, at 58-73.

effect of capital punishment is significant and that it justifies the infliction of the ultimate penalty. Consequentialist defenses of capital punishment, however, tend to assume that capital punishment is (merely) morally permissible, as opposed to being morally obligatory.

Our goal here is to suggest that the debate over capital punishment is rooted in an unquestioned assumption and that the failure to question that assumption is a serious moral error. The assumption is that for governments, acts are morally different from omissions. We want to raise the possibility that an indefensible form of the act/omission distinction is crucial to some of the most prominent objections to capital punishment—and that defenders of capital punishment, apparently making the same distinction, have failed to notice that according to the logic of their theory, capital punishment is morally obligatory, not just permissible. We suggest, in other words, that on certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives.<sup>7</sup>

The suggestion bears not only on moral and political debates, but also on constitutional questions. In invalidating the death penalty for juveniles, for example, the Supreme Court did not seriously engage the possibility that capital punishment for juveniles may help to prevent the death of innocents, including juvenile innocents.<sup>8</sup> And if our suggestion is correct, it relates to many questions outside of the context of capital punishment. If omissions by the state are often indistinguishable, in principle, from actions by the state, then a wide range of apparent failures to act—in the context not only of criminal and civil law, but of regulatory law as well—should be taken to raise serious moral and legal problems. Those who accept our arguments in favor of the death penalty may or may not welcome the implications for government action in general. In many situations, ranging from environmental quality to appropriations to highway safety to relief of poverty, our arguments suggest that in light of

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7. In so saying, we are suggesting the possibility that states are obliged to maintain the death penalty option, not that they must inflict that penalty in every individual case of a specified sort; hence we are not attempting to enter into the debate over mandatory death sentences, as invalidated in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Woodson v. North Carolina*, 428 U.S. 280 (1976). For relevant discussion, see Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993).

8. *Roper v. Simmons*, 125 S. Ct. 1183 (2005). Here is the heart of the Court's discussion:

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument. . . . [T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

*Id.* at 1196. These are speculations at best, and they do not engage with the empirical literature; of course, that literature does not dispose of the question whether juveniles are deterred by the death penalty.

imaginable empirical findings, government is obliged to provide far more protection than it now does, and it should not be permitted to hide behind unhelpful distinctions between acts and omissions.

The foundation for our argument is a significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one.<sup>9</sup> A leading national study suggests that each execution prevents some eighteen murders, on average.<sup>10</sup> If the current evidence is even roughly correct—a question to which we shall return—then a refusal to impose capital punishment will effectively condemn numerous innocent people to death. States that choose life imprisonment, when they might choose capital punishment, are ensuring the deaths of a large number of innocent people.<sup>11</sup> On moral grounds, a choice that effectively condemns large numbers of people to death seems objectionable to say the least. For those who are inclined to be skeptical of capital punishment for moral reasons—a group that includes one of the current authors—the task is to consider the possibility that the failure to impose capital punishment is, *prima facie* and all things considered, a serious moral wrong.

Judgments of this sort are often taken to require a controversial commitment to a consequentialist view about the foundations of moral evaluation. One of our principal points, however, is that the choice between consequentialist and deontological approaches to morality is not crucial here. We suggest that, on certain empirical assumptions, theorists of both stripes might converge on the idea that capital punishment is morally obligatory. On

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9. See, e.g., Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 453 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005) [hereinafter Shepherd, *Deterrence Versus Brutalization*]; Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 308 (2004) [hereinafter Shepherd, *Murders of Passion*]; Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States*, 65 AM. J. ECON. & SOC. (forthcoming 2006) [hereinafter Zimmerman, *Alternative Execution Methods*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=355783](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=355783); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 163 (2004) [hereinafter Zimmerman, *State Executions*].

10. See Dezhbakhsh et al., *supra* note 9, at 344. In what follows, we will speak of each execution saving eighteen lives in the United States, on average. We are, of course, suppressing many issues in that formulation, simply for expository convenience. For one thing, that statistic is a national average, as we emphasize in Part IV. For another thing, future research might find that capital punishment has diminishing returns: even if the first 100 executions deter 1800 murders, it does not follow that another 1000 executions will deter another 18,000 murders. We will take these and like qualifications as understood in the discussion that follows.

11. In recent years, the number of murders in the United States has fluctuated between 15,000 and 24,000. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES tbl.1 (2003), available at <http://www.fbi.gov/ucr/03cius.htm>.

consequentialist grounds, the death penalty seems morally obligatory if it is the only or most effective means of preventing significant numbers of murders; much of our discussion will explore this point. For this reason, consequentialists should have little difficulty with our arguments. For deontologists, a killing is a wrong under most circumstances, and its wrongness does not depend on its consequences or its effects on overall welfare. Many deontologists (of course not all) believe that capital punishment counts as a moral wrong. But in the abstract, any deontological injunction against the wrongful infliction of death turns out to be indeterminate on the moral status of capital punishment *if* the death is necessary to prevent significant numbers of killings.

The unstated assumption animating much opposition to capital punishment among intuitive deontologists is that capital punishment counts as an “action” by the state, while the refusal to impose it counts as an “omission,” and that the two are altogether different from the moral point of view. A related way to put this point is to suggest that capital punishment counts as a “killing,” while the failure to impose capital punishment counts as no such thing and hence is far less problematic on moral grounds. We shall investigate these claims in some detail. But we doubt that the distinction between state actions and state omissions can bear the moral weight given to it by the critics of capital punishment. Whatever its value as a moral concept where individuals are concerned, the act/omission distinction misfires in the general setting of government regulation. If government policies fail to protect people against air pollution, occupational risks, terrorism, or racial discrimination, it is inadequate to put great moral weight on the idea that the failure to act is a mere “omission.”

No one believes that government can avoid responsibility to protect people against serious dangers—for example, by refusing to enforce regulatory statutes—simply by contending that such refusals are unproblematic omissions.<sup>12</sup> If state governments impose light penalties on offenders or treat certain offenses (say, domestic violence) as unworthy of attention, they should not be able to escape public retribution by contending that they are simply refusing to act. Where government is concerned, failures of protection, through refusals to punish and deter private misconduct, cannot be justified by pointing to the distinction between acts and omissions.

It has even become common to speak of “risk-risk tradeoffs,” understood to arise when regulation of one risk (say, a risk associated with the use of DDT) gives rise to another risk (say, the spread of malaria, against which DDT has been effective).<sup>13</sup> Or suppose that an air pollutant creates adverse health effects

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12. Indeed, agency inaction is frequently subject to judicial review. See Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996).

13. See generally RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan Baert Wiener eds., 1995) (considering “risk-risk tradeoffs” on topics such as DDT, the use of estrogen for menopause, and clozapine theory

but also has health benefits, as appears to be the case for ground-level ozone.<sup>14</sup> It is implausible to say that, for moral reasons, social planners should refuse to take account of such tradeoffs; there is general agreement that whether a particular substance ought to be regulated depends on the overall effect of regulation on human well-being.

As an empirical matter, criminal law is pervaded by its own risk-risk tradeoffs. When the deterrent signal works, a failure to impose stringent penalties on certain crimes will increase the number of those crimes. A refusal to impose such penalties is, for that reason, problematic from the moral point of view. It should not be possible for an official—a governor, for example—to attempt to escape political retribution for failing to prevent domestic violence or environmental degradation by claiming that he is simply “failing to act.” The very idea of “equal protection of the laws,” in its oldest and most literal sense, attests to the importance of enforcing the criminal and civil law so as to safeguard the potential victims of private violence.<sup>15</sup> What we are suggesting is that to the extent that capital punishment saves more lives than it extinguishes, the death penalty produces a risk-risk tradeoff of its own—indeed, what we will call a *life-life tradeoff*.

Of course, the presence of a life-life tradeoff does not resolve the capital punishment debate. By itself, the act of execution may be a wrong, in a way that cannot be said of an act of imposing civil or criminal penalties for, say, environmental degradation. But the existence of life-life tradeoffs raises the possibility that for those who oppose killing, a rejection of capital punishment is not necessarily mandated. On the contrary, it may well be morally compelled. At the very least, those who object to capital punishment, and who do so in the name of protecting life, must come to terms with the possibility that the failure to inflict capital punishment will fail to protect life—and must, in our view, justify their position in ways that do not rely on question-begging claims about the distinction between state actions and state omissions, or between killing and letting die.

We begin, in Part I, with the facts. Raising doubts about widely held beliefs based on older studies or partial information, recent studies suggest that capital punishment may well save lives. One leading study finds that as a national average, each execution deters some eighteen murders. Our question whether capital punishment is morally obligatory is motivated by these findings; our central concern is that foregoing any given execution may be equivalent to condemning some unidentified people to a premature and violent death. Of course, social science can always be disputed in this contentious domain, and spirited attacks have been made on the recent studies;<sup>16</sup> hence, we mean to

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for schizophrenia).

14. See *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1051-53 (D.C. Cir. 1999).

15. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

16. See Richard Berk, *New Claims About Executions and General Deterrence: Déjà*

outline, rather than to defend, the relevant evidence here. But we think that to make progress on the moral issues, it is productive and even necessary to take those findings as given and consider their significance. Those who would like to abolish capital punishment, and who find the social science unconvincing, might find it useful to ask whether they would maintain their commitment to abolition if they were firmly persuaded that capital punishment does have a strong deterrent effect. We ask such people to suspend their empirical doubts in order to investigate the moral issues that we mean to raise here.

In Part II, the centerpiece of the Article, we offer a few remarks on moral foundations and examine some standard objections to capital punishment that might seem plausible even in light of the current findings. We focus in particular on the view that capital punishment is objectionable because it requires affirmative and intentional state “action,” not merely an “omission.” The act/omission distinction, we suggest, systematically misfires when applied to government, which is a moral agent with distinctive features. The act/omission distinction may not even be intelligible in the context of government, which always faces a choice among policy regimes, and in that sense cannot help but “act.” Even if the distinction between acts and omissions can be rendered intelligible in regulatory settings, its moral relevance is obscure. Some acts are morally obligatory, while some omissions are morally culpable. If capital punishment has significant deterrent effects, we suggest that for government to omit to impose it is morally blameworthy, even on a deontological account of morality. Deontological accounts typically recognize a consequentialist override to baseline prohibitions. If each execution saves an average of eighteen lives, then it is plausible to think that the override is triggered, in turn triggering an obligation to adopt capital punishment.

Once the act/omission distinction is rejected where government is concerned, it becomes clear that the most familiar, and plausible, objections to capital punishment deal with only one side of the ledger: the objections fail to take account of the exceedingly arbitrary deaths that capital punishment may deter. The realm of homicide, as we shall call it, is replete with its own arbitrariness. We consider rule-of-law concerns about the irreversibility of capital punishment and its possibly random or invidious administration, a strict scrutiny principle that capital punishment should not be permitted if other means for producing the same level of deterrence are available, and concerns about slippery slopes. We suggest that while some of these complaints have

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*Vu All over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005); 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](http://www.deathpenaltyinfo.org/FaganTestimony.pdf) [hereinafter *Deterrence and the Death Penalty*]. For a response to Fagan’s testimony, see generally Shepherd, *Deterrence Versus Brutalization*, *supra* note 9.

merit, they do not count as decisive objections to capital punishment, because they embody a flawed version of the act/omission distinction and generally overlook the fact that the moral objections to capital punishment apply even more strongly to the murders that capital punishment apparently deters.

In Part III, we conjecture that various cognitive and social mechanisms, lacking any claim to moral relevance, may cause many individuals and groups to subscribe to untenable versions of the distinction between acts and omissions or to discount the lifesaving potential of capital punishment while exaggerating the harms that it causes. An important concern here is a sort of misplaced concreteness, stemming from heuristics such as salience and availability. The single person executed is often more visible and more salient in public discourse than any abstract statistical persons whose murders might be deterred by a single execution. If those people, and their names and faces, were highly visible, we suspect that many of the objections to capital punishment would at least be shaken. As environmentalists have often argued, “statistical persons” should not be treated as irrelevant abstractions.<sup>17</sup> The point holds for criminal justice no less than for pollution controls.

Part IV expands upon the implications of our view and examines some unresolved puzzles. Here we emphasize that we hold no brief for capital punishment across all contexts or in the abstract. The crucial question is what the facts show in particular domains. We mean to include here a plea not only for continuing assessment of the disputed evidence, but also for a disaggregated approach. Future research and resulting policies would do well to take separate account of various regions and of various classes of offenders and offenses. We also emphasize that our argument is limited to the setting of life-life tradeoffs—in which the taking of a life by the state will reduce the number of lives taken overall. We express no view about cases in which that condition does not hold—for example, the possibility of capital punishment for serious offenses other than killing, with rape being the principal historical example, and with rape of children being a currently contested problem. Such cases involve distinctively difficult moral problems that we mean to bracket here. A brief conclusion follows.

## I. EVIDENCE

For many years, the deterrent effect of capital punishment was sharply disputed.<sup>18</sup> In the 1970s, Isaac Ehrlich conducted the first multivariate

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17. Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189, 189 (2000).

18. Compare, e.g., Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398 (1975) (estimating each execution deters eight murders), with William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187, 187 (1975) (finding Ehrlich's data and methods unreliable). A good overview is Robert Weisberg, *The Death*

regression analyses of the death penalty, based on time-series data from 1933 to 1967, and concluded that each execution deterred as many as eight murders.<sup>19</sup> But subsequent studies raised many questions about Ehrlich's conclusions—by showing, for example, that the deterrent effects of the death penalty would be eliminated if data from 1965 through 1969 were eliminated.<sup>20</sup> It would be fair to say that the deterrence hypothesis could not be confirmed by the studies that have been completed in the twenty years after Ehrlich first wrote.<sup>21</sup>

More recent evidence, however, has given new life to Ehrlich's hypothesis.<sup>22</sup> A wave of sophisticated multiple regression studies have exploited a newly available form of data, so-called "panel data," that uses all information from a set of units (states or counties) and follows that data over an extended period of time. A leading study used county-level panel data from 3054 U.S. counties between 1977 and 1996.<sup>23</sup> The authors found that the murder rate is significantly reduced by both death sentences and executions. The most striking finding was that *on average, each execution results in eighteen fewer murders.*<sup>24</sup>

Other econometric studies also find a substantial deterrent effect. In two papers, Paul Zimmerman uses state-level panel data from 1978 onwards to measure the deterrent effect of execution rates and execution methods. He estimates that each execution deters an average of fourteen murders.<sup>25</sup> Using state-level data from 1977 to 1997, H. Naci Mocan and R. Kaj Gittings find that each execution deters five murders on average.<sup>26</sup> They also find that increases in the murder rate result when people are removed from death row

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*Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. & SOC. SCI. 151 (2005).

19. See Ehrlich, *supra* note 18, at 398; Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977).

20. For this point and an overview of many other criticisms of Ehrlich's conclusions, see Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

21. See *id.*; Weisberg, *supra* note 18, at 155-57.

22. Even as this evidence was being developed, one of us predicted, perhaps rashly, that the debate would remain inconclusive for the foreseeable future. See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 100-01 (2000).

23. See Dezhbakhsh et al., *supra* note 9, at 359.

24. *Id.* at 373.

25. Zimmerman, *Alternative Execution Methods*, *supra* note 9; Zimmerman, *State Executions*, *supra* note 9, at 190.

26. Mocan & Gittings, *supra* note 9, at 453. Notably, no clear evidence of a deterrent effect from capital punishment emerges from Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 330 (2003), which finds that the estimate of deterrence is extremely sensitive to the choice of specification, with the largest estimate paralleling that in Ehrlich, *supra* note 18. Note, however, that the principal finding in Katz et al., *supra*, is that prison deaths *do* have a strong deterrent effect and a stunningly large one—with each prison death producing a reduction of "30-100 violent crimes and a similar number of property crimes." *Id.* at 340.

and when death sentences are commuted.<sup>27</sup>

A study by Joanna Shepherd, based on data from all states from 1997 to 1999, finds that each death sentence deters 4.5 murders and that an execution deters 3 additional murders.<sup>28</sup> Her study also investigates the contested question whether executions deter crimes of passion and murders by intimates. Although intuition might suggest that such crimes cannot be deterred, her own finding is clear: all categories of murder are deterred by capital punishment.<sup>29</sup> The deterrent effect of the death penalty is also found to be a function of the length of waits on death row, with a murder deterred for every 2.75 years of reduction in the period before execution.<sup>30</sup> Importantly, this study finds that the deterrent effect of capital punishment protects African-American victims even more than whites.<sup>31</sup>

In the period between 1972 and 1976, the Supreme Court produced an effective moratorium on capital punishment, and an extensive unpublished study exploits that fact to estimate the deterrent effect. Using state-level data from 1977 to 1999, the authors make before-and-after comparisons, focusing on the murder rate in each state before and after the death penalty was suspended and reinstated.<sup>32</sup> The authors find a substantial deterrent effect: “[T]he data indicate that murder rates increased immediately after the moratorium was imposed and decreased directly after the moratorium was lifted, providing support for the deterrence hypothesis.”<sup>33</sup>

A recent study offers more refined findings.<sup>34</sup> Disaggregating the data on a state-by-state basis, Joanna Shepherd finds that the nationwide deterrent effect of capital punishment is entirely driven by only six states—and that no deterrent effect can be found in the twenty-one other states that have restored capital punishment.<sup>35</sup> What distinguishes the six from the twenty-one? The answer, she contends, lies in the fact that states showing a deterrent effect are executing more people than states that are not. In fact the data show a

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27. Mocan & Gittings, *supra* note 9, at 453, 456.

28. Shepherd, *Murders of Passion*, *supra* note 9, at 308.

29. *Id.* at 305. Shepherd notes:

Many researchers have argued that some types of murders cannot be deterred: they assert that murders committed during arguments or other crime-of-passion moments are not premeditated and therefore undeterrable. My results indicate that this assertion is wrong: the rates of crime-of-passion and murders by intimates—crimes previously believed to be undeterrable—all decrease in execution months.

*Id.*

30. *Id.* at 283.

31. *Id.* at 308.

32. Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence from a “Judicial Experiment,”* at tbls.3-4 (Am. Law & Economics Ass’n Working Paper No. 18, 2004), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1017&context=alea> (last visited Dec. 1, 2005).

33. *Id.* at 3-4.

34. Shepherd, *Deterrence Versus Brutalization*, *supra* note 9.

35. *Id.* at 207.

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 713

“threshold effect”: deterrence is found in states that had at least nine total executions between 1977 and 1996. In states below that threshold, no deterrence effect can be found.<sup>36</sup> This finding is intuitively plausible. Unless executions reach a certain level, murderers may act as if the death penalty is so improbable as not to be worthy of concern.<sup>37</sup> Shepherd’s main lesson is that once the level of executions reaches a certain level, the deterrent effect of capital punishment is substantial.

All in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its “apparent power and unanimity.”<sup>38</sup> But in studies of this kind, it is hard to control for confounding variables, and reasonable doubts inevitably remain. Most broadly, skeptics are likely to question the mechanisms by which capital punishment is said to have a deterrent effect. In the skeptical view, many murderers lack a clear sense of the likelihood and perhaps even the existence of executions in their states; further problems for the deterrence claim are introduced by the fact that capital punishment is imposed infrequently and after long delays. Emphasizing the weakness of the deterrent signal, Steven Levitt has suggested that “it is hard to believe that fear of execution would be a driving force in a rational criminal’s calculus in modern America.”<sup>39</sup> And, of course, some criminals do not act rationally: many murders are committed in a passionate state that does not lend itself to an all-things-considered analysis on the part of perpetrators.

More narrowly, it remains possible that the recent findings will be exposed as statistical artifacts or found to rest on flawed econometric methods. Work by Richard Berk, based on his independent review of the state-level panel data from Mocan and Gittings, offers multiple objections to those authors’ finding of deterrence.<sup>40</sup> For example, Texas executes more people than any other state, and when Texas is removed from the data, the evidence of deterrence is severely weakened.<sup>41</sup> Removal of the apparent “outlier state[s]” that execute the largest numbers of people seems to eliminate the finding of deterrence

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36. *Id.* at 239-41.

37. Less intuitively, Shepherd finds that in thirteen of the states that had capital punishment but executed few people, capital punishment actually *increased* the murder rate. She attributes this puzzling result to what she calls the “brutalization effect,” by which capital punishment devalues human life and teaches people about the legitimacy of vengeance. *Id.* at 40-41.

38. See Weisberg, *supra* note 18, at 159.

39. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 175 (2004).

40. See Berk, *supra* note 16; *Deterrence and the Death Penalty*, *supra* note 16, at 6-12.

41. Berk, *supra* note 16, at 320. It has also been objected that the studies do not take account of the availability of sentences that involve life without the possibility of parole; such sentences might have a deterrent effect equal to or beyond that of capital punishment. See *Deterrence and the Death Penalty*, *supra* note 16. A response to Berk can be found in Shepherd, *Deterrence Versus Brutalization*, *supra* note 9.

altogether.<sup>42</sup> Berk concludes that the findings of Mocan and Gittings are driven by six states with more than five executions each year. Berk, however, proceeds by presenting data in graphic form; he offers no regression analyses in support of his criticism.

These concerns about the evidence should be taken as useful cautions. At the level of theory, it is plausible that if criminals are fully rational, they should not be deterred by infrequent and much-delayed executions; the deterrent signal may well be too weak to affect their behavior. But suppose that like most people, criminals are boundedly rational, assessing probabilities with the aid of heuristics.<sup>43</sup> If executions are highly salient and cognitively available, some prospective murderers will overestimate their likelihood, and will be deterred as a result. Other prospective murderers will not pay much attention to the fact that execution is unlikely, focusing instead on the badness of the outcome (execution) rather than its low probability.<sup>44</sup> Few murderers are likely to assess the deterrent signal by multiplying the harm of execution against its likelihood. If this is so, then the deterrent signal will be larger than might be suggested by the product of that multiplication. Levitt's theoretical claim assumes that prospective murderers are largely rational in their reaction to the death penalty and its probability—standing by itself, a plausible conjecture but no more.

As for the recent data, it is true that evidence of deterrence is reduced or eliminated through the removal of Texas and other states in which executions are most common and in which evidence of deterrence is strongest.<sup>45</sup> But removal of those states seems to be an odd way to resolve the contested questions. States having the largest numbers of executions are most likely to deter, and it does not seem to make sense to exclude those states as "outliers."<sup>46</sup> By way of comparison, imagine a study attempting to determine what characteristics of baseball teams most increase the chance of winning the World Series. Imagine also a criticism of the study, parallel to Berk's, which complained that data about the New York Yankees should be thrown out, on the ground that the Yankees have won so many times as to be "outliers." This would be an odd idea, because empiricists must go where the evidence is; in the case of capital punishment, the outliers provide much of the relevant evidence. Recall here Shepherd's finding, compatible with the analysis of some skeptics, that the deterrent effect occurs only in states in which there is some threshold

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42. Berk, *supra* note 16, at 320-24; Shepherd, *Deterrence Versus Brutalization*, *supra* note 9.

43. On bounded rationality in general, see RICHARD H. THALER, *QUASI-RATIONAL ECONOMICS* (1991).

44. See Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 *PSYCHOL. SCI.* 185, 188 (2001); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61 (2002).

45. See Shepherd, *Deterrence Versus Brutalization*, *supra* note 9.

46. *Id.*

number of executions.<sup>47</sup>

But let us suppose, plausibly, that the evidence of deterrence remains inconclusive. Even so, it would not follow that the death penalty as such fails to deter. As Shepherd also finds in her most recent study,<sup>48</sup> more frequent executions, carried out in closer proximity to convictions, are predicted to amplify the deterrent signal for both rational and boundedly rational criminals. We can go further. A degree of doubt, with respect to the current system, need not be taken to suggest that existing evidence is irrelevant for purposes of policy and law. In regulation as a whole, it is common to embrace some version of the precautionary principle<sup>49</sup>—the idea that steps should be taken to prevent significant harm even if cause-and-effect relationships remain unclear and even if the risk is not likely to come to fruition. Even if we reject strong versions of the precautionary principle,<sup>50</sup> it hardly seems sensible that governments should ignore evidence demonstrating a significant possibility that a certain step will save large numbers of innocent lives.

For capital punishment, critics often seem to assume that evidence on deterrent effects should be ignored if reasonable questions can be raised about the evidence's reliability. But as a general rule, this is implausible. In most contexts, the existence of legitimate questions is hardly an adequate reason to ignore evidence of severe harm. If it were, many environmental controls would be in serious jeopardy.<sup>51</sup> We do not mean to suggest that government should commit what many people consider to be, *prima facie*, a serious moral wrong simply on the basis of speculation that this action will do some good. But a degree of reasonable doubt need not be taken as sufficient to doom a form of punishment if there is a significant possibility that it will save large numbers of lives.

It is possible that capital punishment saves lives on net, even if it has *zero* deterrent effect. A life-life tradeoff may arise in several ways. One possibility, the one we focus on here, is that capital punishment deters homicides. Another possibility is that capital punishment has no deterrent effect, but saves lives just

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47. *See id.*

48. *Id.*

49. For overviews of the precautionary principle and related issues, see INTERPRETING THE PRECAUTIONARY PRINCIPLE (Tim O'Riordan & James Cameron eds., 1994); ARIE TROUWBORST, EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW (2002).

50. *See, e.g.*, Julian Morris, *Defining the Precautionary Principle*, in RETHINKING RISK AND THE PRECAUTIONARY PRINCIPLE (Julian Morris ed., 2000).

51. Indeed, those skeptical of capital punishment invoke evidence to the effect that capital punishment did not deter, and argue, plausibly, that it would be a mistake to wait for definitive evidence before ceasing with a punishment that could not be shown to reduce homicide. *See* Lempert, *supra* note 20, at 1222-24. This is a kind of precautionary principle, arguing against the most aggressive forms of punishment if the evidence suggested that they did not deter. We are suggesting the possibility of a mirror-image precautionary principle when the evidence goes the other way.

by incapacitating those who would otherwise kill again in the future.<sup>52</sup> Consider those jurisdictions that eschew capital punishment altogether. What sanction can such jurisdictions really apply to those who have already been sentenced to life in prison without parole? Sentences of this sort may take more lives overall by increasing the number of essentially unpunishable within-prison homicides of guards and fellow inmates.<sup>53</sup> Many murderers are killed in prison even in states that lack the death penalty.<sup>54</sup> And if murderers are eventually paroled into the general population, some of them will kill again. Overall, it is quite possible that the permanent incapacitation of murderers through execution might save lives on net. A finding that capital punishment deters—and deterrence is our focus here—is sufficient but not necessary to find a life-life tradeoff.

In any event, our goal here is not to reach a final judgment about the evidence. It is to assess capital punishment given the assumption of a substantial deterrent effect. In what follows, therefore, we will stipulate to the validity of the evidence and consider its implications for morality and law. Those who doubt the evidence might ask themselves how they would assess the moral questions if they were ultimately convinced that life-life tradeoffs were actually involved—as, for example, in hostage situations in which officials are authorized to use deadly force to protect the lives of innocent people.

## II. CAPITAL PUNISHMENT: MORAL FOUNDATIONS AND FOUR OBJECTIONS

Assume, then, that capital punishment does save a significant number of innocent lives. On what assumptions should that form of punishment be deemed morally unacceptable, rather than morally obligatory? Why should the deaths of those convicted of capital murder, an overwhelmingly large fraction of whom are guilty in fact, be considered a more serious moral wrong than the deaths of a more numerous group who are certainly innocents?

We consider, and ultimately reject, several responses. Our first general contention is that opposition to capital punishment trades on a form of the distinction between acts and omissions. Whatever the general force of that distinction, its application to government systematically fails, because government is a distinctive kind of moral agent. Our second general contention is that, apart from direct state involvement, the features that make capital punishment morally objectionable to its critics are also features of the very murders that capital punishment deters. The principal difference, on the empirical assumptions we are making, is that in a legal regime without capital punishment far more people die, and those people are innocent of any

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52. See Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625, 630-31 (2005).

53. See *id.* at 630 n.9.

54. See Katz et al., *supra* note 26, at 340.

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 717

wrongdoing. No one denies that arbitrariness in the system of capital punishment is a serious problem. But even if the existing system is viewed in its worst light, it involves far less arbitrariness than does the realm of homicide. Let us begin, however, with foundational issues.

#### *A. Morality and Death*

On a standard view, it is impossible to come to terms with the moral questions about capital punishment without saying something about the foundations of moral judgments. We will suggest, however, that sectarian commitments at the foundational level are for the most part irrelevant to the issues here. If it is stipulated that substantial deterrence exists, both consequentialist and deontological accounts of morality will or should converge upon the view that capital punishment is morally obligatory. Consequentialists will come to that conclusion because capital punishment minimizes killings overall. Deontologists will do so because an opposition to killing is, by itself, indeterminate in the face of life-life tradeoffs; because a legal regime with capital punishment has a strong claim to be more respectful of life's value than does a legal regime lacking capital punishment; and because modern deontologists typically subscribe to a consequentialist override or escape hatch, one that makes otherwise impermissible actions obligatory if necessary to prevent many deaths—precisely what we are assuming is true of capital punishment. Only those deontologists who both insist upon a strong distinction between state actions and state omissions *and* who reject a consequentialist override will believe the deterrent effect of capital punishment to be irrelevant in principle.

Suppose that we accept consequentialism and believe that government actions should be evaluated in terms of their effects on aggregate welfare. If we do so, the evidence of deterrence strongly supports a moral argument in favor of the death penalty—a form of punishment that, by hypothesis, seems to produce a net gain in overall welfare. Of course, there are many complications here; for example, the welfare of many people might increase as a result of knowing that capital punishment exists, and the welfare of many other people might decrease for the same reason. A full consequentialist calculus would require a more elaborate assessment than we aim to provide here. The only point is that if capital punishment produces significantly fewer deaths on balance, there should be a strong consequentialist presumption on its behalf; any argument against capital punishment, on consequentialist grounds, will face a steep uphill struggle.

To be sure, it is also possible to imagine forms of consequentialism that reject welfarism as implausibly reductionist and see violations of rights as part of the set of consequences that must be taken into account in deciding what to

do.<sup>55</sup> For some such consequentialists, killings are, under ordinary circumstances, a violation of rights, and this point is highly relevant to any judgment about killings. But even if the point is accepted, capital punishment may be required, not prohibited, on consequentialist grounds, simply because and to the extent that it minimizes rights violations. Private murders also violate rights, and the rights-respecting consequentialist must take those actions into account.

But imagine that we are deontologists, believing that actions by government and others should not be evaluated in consequentialist terms; how can capital punishment be morally permissible, let alone obligatory? For some deontologists, capital punishment is obligatory for moral reasons alone.<sup>56</sup> But suppose, as other deontologists believe, that under ordinary circumstances, the state's killing of a human being is a wrong and that its wrongness does not depend on an inquiry into whether the action produces a net increase in welfare. For many critics of capital punishment, a deontological intuition is central; evidence of deterrence is irrelevant because moral wrongdoing by the state is not justified even if it can be defended on utilitarian grounds. Compare a situation in which a state seeks to kill an innocent person, knowing that the execution will prevent a number of private killings; deontologists believe that the unjustified execution cannot be supported even if the state is secure in its knowledge of the execution's beneficial effects. Of course, it is contentious to claim that capital punishment is a moral wrong. But if it is, then significant deterrence might be entirely beside the point. It is simply true that many intuitive objections to capital punishment rely on a belief of this kind: just as execution of an innocent person is a moral wrong, one that cannot be justified on consequentialist grounds, so too the execution of a guilty person is a moral wrong, whatever the evidence shows.

Despite all this, our claims here do not depend on accepting consequentialism or rejecting the deontological objection to evaluating unjustified killings in consequentialist terms. The argument is instead that by itself and in the abstract, this objection is indeterminate on the moral status of capital punishment. To the extent possible, we intend to bracket the most fundamental questions and to suggest that whatever one's view of the foundations of morality, the objection to the death penalty is difficult to sustain under the empirical assumptions that we have traced. Taken in its most sympathetic light, a deontological objection to capital punishment is unconvincing *if* states that refuse to impose the death penalty produce, by that

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55. Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 15-19 (1982).

56. See Pojman, *supra* note 4, at 58-59. As noted below, the case of Israel is a good test for such deontologists; Israel does not impose the death penalty, in part on the ground that executions of terrorists would likely increase terrorism. Do deontologists committed to capital punishment believe that Israel is acting immorally? In our view, they ought not to do so, at least if the empirical assumption is right and if the protection of lives is what morality requires.

very refusal, significant numbers of additional deaths. Recall the realm of homicide: for deontologists who emphasize life's value and object to the death penalty, the problem is acute if the refusal to impose that penalty predictably leads to a significant number of additional murders. In a hostage situation, police officers are permitted to kill (execute) those who have taken hostages if this step is reasonably deemed necessary to save those who have been taken hostage. If the evidence of deterrence is convincing, why is capital punishment so different in principle?

Of course, these points might be unresponsive to those who believe that execution of a guilty person is morally equivalent to execution of an innocent person and not properly subject to a recognition of life-life tradeoffs. We will explore this position in more detail below. And we could envision a form of deontology that refuses any exercise in aggregation—one that would refuse to authorize, or compel, a violation of rights even if the violation is necessary to prevent a significantly larger number of rights violations. But most modern deontologists reject this position, instead admitting a consequentialist override to baseline deontological prohibitions.<sup>57</sup> Although the threshold at which the consequentialist override is triggered varies with different accounts, we suggest below that if each execution deters some eighteen murders, the override is plausibly triggered.

To distill these points, the only deontological accounts that are inconsistent with our argument are those that *both* (1) embrace a distinction between state actions and state omissions *and* (2) reject a consequentialist override. To those who subscribe to this complex of views, and who consider capital punishment a violation of rights, our argument will not be convincing. In the end, however, we believe that it is difficult to sustain the set of moral assumptions that would bar capital punishment *if* it is the best means of preventing significant numbers of innocent deaths. Indeed, we believe that many of those who think that they hold those assumptions are motivated by other considerations—especially a failure to give full weight to statistical lives—on which we focus in Part III.

### B. *Acts and Omissions*

A natural response to our basic concern would invoke the widespread intuition that capital punishment involves intentional state “action,” while the failure to deter private murders is merely an “omission” by the state. In our view, this appealing and intuitive line of argument goes rather badly wrong. The critics of capital punishment have been led astray by uncritically applying the act/omission distinction to a regulatory setting. Their position condemns the “active” infliction of death by governments but does not condemn the “inactive” production of death that comes from the refusal to maintain a system

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57. For an overview, see Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 898-901 (2000).

of capital punishment. The basic problem is that even if this selective condemnation can be justified at the level of individual behavior, it is difficult to defend for governments.<sup>58</sup> A great deal of work has to be done to explain why “inactive,” but causal, government decisions should not be part of the moral calculus. Suppose that we endorse the deontological position that it is wrong to take human lives, even if overall welfare is promoted by taking them. Why does the system of capital punishment violate that position, if the failure to impose capital punishment also takes lives?

Perhaps our argument about unjustified selectivity is blind to morally relevant factors that condemn capital punishment and that buttress the act/omission distinction in this context. There are two possible points here, one involving intention and the other involving causation. First, a government (acting through agents) that engages in capital punishment intends to take lives; it seeks to kill. A government that does not engage in capital punishment, and therefore provides less deterrence, does not intend to kill. The deaths that result are the unintended and unsought byproduct of an effort to respect life. Surely—it might be said—this is a morally relevant difference. Second, a government that inflicts capital punishment ensures a simple and direct causal chain between its own behavior and the taking of human lives. When a government rejects capital punishment, the causal chain is much more complex; the taking of human lives is an indirect consequence of the government’s decision, one that is mediated by the actions of a murderer. The government authorizes its agents to inflict capital punishment, but it does not authorize private parties to murder; indeed, it forbids murder. Surely that is a morally relevant difference, too.

We will begin, in Part II.B.1, with questions about whether the act/omission distinction is conceptually intelligible in regulatory settings. Here the suggestion is that there just is no way to speak or think coherently about government “actions” as opposed to government “omissions,” because government cannot help but act, in some way or another, when choosing how individuals are to be regulated. In Part II.B.2, we suggest that the distinction between government acts and omissions, even if conceptually coherent, is not morally relevant to the question of capital punishment. Some governmental actions are morally obligatory, and some governmental omissions are blameworthy. In this setting, we suggest, government is morally obligated to adopt capital punishment and morally at fault if it declines to do so.

1. *Is the act/omission distinction coherent with respect to government?*

In our view, any effort to distinguish between acts and omissions goes

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58. Compare debates over going to war: Some pacifists insist, correctly, that acts of war will result in the loss of life, including civilian life. But a refusal to go to war will often result in the loss of life, including civilian life.

wrong by overlooking the distinctive features of government as a moral agent. If correct, this point has broad implications for criminal and civil law. Whatever the general status of the act/omission distinction as a matter of moral philosophy,<sup>59</sup> the distinction is least impressive when applied to government, because the most plausible underlying considerations do not apply to official actors.<sup>60</sup> The most fundamental point is that, unlike individuals, governments always and necessarily face a choice between or among possible policies for regulating third parties. The distinction between acts and omissions may not be intelligible in this context, and even if it is, the distinction does not make a morally relevant difference.

Most generally, government is in the business of creating permissions and prohibitions. When it explicitly or implicitly authorizes private action, it is not omitting to do anything or refusing to act.<sup>61</sup> Moreover, the distinction between authorized and unauthorized private action—for example, private killing—becomes obscure when the government formally forbids private action but chooses a set of policy instruments that do not adequately or fully discourage it.

To be sure, a system of punishments that only weakly deters homicide, relative to other feasible punishments, does not quite authorize homicide, but that system is not properly characterized as an omission, and little turns on whether it can be so characterized. Suppose, for example, that government fails to characterize certain actions—say, sexual harassment—as tortious or violative of civil rights law and that it therefore permits employers to harass employees as they choose or to discharge employees for failing to submit to sexual harassment. It would be unhelpful to characterize the result as a product of governmental “inaction.” If employers are permitted to discharge employees for refusing to submit to sexual harassment, it is because the law is allocating certain entitlements to employers rather than employees. Or consider the context of ordinary torts. When Homeowner *B* sues Factory *A* over air pollution, a decision not to rule for Homeowner *B* is not a form of inaction: it is the allocation to Factory *A* of a property right to pollute. In such cases, an apparent government omission is an action simply because it is an allocation of legal rights. Any decision that allocates such rights, by creating entitlements

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59. For discussion of the philosophical controversy over acts and omissions, see generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993); Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160 (1995) (reviewing DWORKIN, *supra*); Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481 (2002).

60. Here we proceed in the spirit of Robert Goodin by treating government as a distinctive sort of moral agent with respect to whom many quotidian moral distinctions have little purchase. See ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* (1995). Goodin, we should note, does not address the act/omission distinction at any length, although he seems to reject it. See *id.* at 89.

61. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

and prohibitions, is not inaction at all.

Suppose that government officials face a choice between two (and only two) packages of policies for reducing the murder rate. Suppose that Package A contains a range of legal instruments, such as ordinary imprisonment, imprisonment without parole (perhaps for life), postincarceration programs to prevent recidivism, and so on. Package B contains all the same instruments *plus* capital punishment.

Stipulating to the validity of the evidence discussed in Part I, the crux of the issue is this: to opt for Package A over Package B will inevitably ensure a significant increase in the number of deaths. In this setting, it is hard to make sense of the claim that capital punishment involves intentional government “action” in some morally distinctive way. It is tautologically true that a package lacking capital punishment does not include the particular “action” of imposing that form of punishment. But for government to opt for Package A—even in the sense of simply leaving in place previously enacted laws that adopted Package A—is no less an intentional “action” than it is to opt for Package B. Some criminal justice policy or other will necessarily be in place. The only interesting or even meaningful question government ever faces is not whether to act, but what action should be taken—what mix of criminal justice policies government ought to pursue. The policy mix that does not include capital punishment is not an “omission” or a “failure to act” in any meaningful sense. If a government chooses that mix, it is allocating a certain set of rights to both murderers and their victims; the latter are certainly given a right to be free from murder, but the right is limited by the terms of the anticipated punishment. In the extreme case, suppose that a state failed to punish certain classes of murders (say, those who kill African-Americans), that it punished such murders only infrequently, or that it punished such murders with just a slap on the wrist. Under any of these approaches, the distinction between authorizing murder and failing to prevent it would become thin.

To be sure, officials and citizens who opt for a system that lacks capital punishment do not “intend” to kill anyone in particular. But consider a situation in which regulators refuse to adopt motor vehicle or drug-safety regulations that would prevent significant numbers of statistical deaths. Is the refusal acceptable because it leads to deaths that are not, strictly speaking, intended? The very concept of “intentional” action, and the moral relevance of intention, are both obscure when government is the pertinent moral agent. The executioner who administers the injection acts intentionally, but so does the private murderer. Those who emphasize intention presumably do not mean to focus narrowly on the actual individual who carries out the final action on the state’s behalf. (Does it matter so much that the executioner is on the government’s payroll? What if the executioner is a volunteer?) The real point is that in a regime of capital punishment the executioner acts pursuant to an explicit government policy, whereas (the idea runs) there is never a government policy to murder the particular citizens whose deaths would have been deterred

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 723

by capital punishment.

It is true that there is no such policy, and intuition seems to suggest that its absence is important, but the moral relevance of its absence is obscure. If the point appears intuitively important, it is only because of the abstract or statistical character of the eighteen persons whose murders are deterred by each execution (a theme to which we return in Part III). People generally pay little attention to statistical deaths, but this lack of attention seems to be a cognitive failure, not a proper basis for morality or policy.<sup>62</sup> The legal regime whose package of crime-control instruments happens not to include capital punishment does indeed embody an explicit government policy: a policy that inevitably and predictably opts for more murders over fewer. That the victims of those murders cannot be personally identified in advance does not seem to be a morally impressive basis for favoring the regime that makes their murders inevitable. If we put aside the intentional actions of low-level officials, the relevant policies in either regime will be set by a complex process of democratic and regulatory interaction among voters, legislators, administrators, and judges. In this large-scale process of collective decisionmaking, the concept of intention might be coherent, but it becomes too attenuated to bear the moral weight often put upon it.<sup>63</sup> The regime with capital punishment does not seem importantly different, on the score of intentions, than the regime without it.

In this light, the idea that the government “authorizes” capital punishment but “forbids” private murder is too simple. Two points are important. First, of course, it is true that the government does not authorize private killings in a retail sense, barring cases of self-defense or defense of others. At the wholesale level, however, to adopt a package of criminal justice policies that does not include capital punishment is to ensure the murders of a large number of (as yet unidentified) victims. The government’s inability to identify the victims before the fact must be morally irrelevant. Second, there is a sense in which the regime without capital punishment comes perilously close to licensing private killings, because in that regime policymakers know or should know that the prohibition on murder is supported by a weaker deterrent signal.

To be sure, government creates property rights, and it does not create lives in the same sense; however, the cash value of a prohibition lies in the scheme

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62. See George Loewenstein et al., *Statistical, Identifiable and Iconic Victims and Perpetrators* (Stanford Law Sch., John M. Olin Law & Econ. Working Paper No. 301, Mar. 2005), available at <http://ssrn.com/abstract=678281>.

63. There is a large philosophical literature that considers whether the concept of culpability for intentional wrongdoing applies meaningfully to governments. See, e.g., CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000). There are also large literatures in jurisprudence and literary theory that consider whether the concept of intention can meaningfully be transposed from individual to collective decisionmakers. See, e.g., 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).

of punishments that enforce it. Where the enforcement scheme is feeble, the prohibition is as well. On the empirical assumptions we are making, a government that eschews capital punishment rejects an effective mechanism for enforcing the baseline prohibition of murder. In the extreme case, ineffective enforcement mechanisms make the prohibition of murder begin to look like something of a sham. (Recall that 15,000 to 25,000 people are killed in the United States each year.)

It is no objection, to any of the foregoing points, that “government” is merely a convenient shorthand for a way of organizing individuals. Of course, government is staffed by natural persons and can only act through individual agents. But where those agents are invested with regulatory authority over third parties—when natural persons are acting as officials rather than as the subjects of regulation—there is no escaping the duty to choose policies in some fashion or other. To see this, imagine an absolute monarch who defines homicide, defines the limits of self-defense, sets the terms of imprisonment for homicide, and so forth. Now imagine that, when subjects kill each other, the monarch invokes her liberty as a natural person to decline to “intervene,” or to “act.” Accordingly, the monarch chooses not to adopt capital punishment. Here the invocation of the natural liberty of the monarch-as-person is farcical, even unintelligible. The monarch-as-monarch has already set all the ground rules that help to determine the frequency and incidence of homicide; as monarch, she has already structured the terrain. It is irresponsible, indeed incoherent, for her then to disavow her regulatory role by invoking the natural person’s liberty not to “act.” She might decide not to execute anyone, of course. But that decision would have to be justified on other grounds than the distinction between governmental acts and governmental omissions.

## *2. Is the act/omission distinction morally relevant to capital punishment?*

So far we have argued that the act/omission distinction is conceptually obscure when applied to government, whatever its merits when applied to individuals. The arguments that most plausibly support the distinction do not make much sense in the context of public officials, and in any case the category of government inaction is hard to understand, except by tautology, in the context of criminal punishment. Even if that argument fails, however, capital punishment may still be morally obligatory for governments. The relevant acts may be morally required or the relevant omissions morally blameworthy. We begin by reviewing the considerations that underpin the act/omission distinction as applied to individuals; these considerations lose their force where government is the moral agent at issue. We then turn to the ideas that declining to adopt capital punishment is a culpable omission and that adopting capital punishment is a morally obligatory act.

Suppose that there is some clear and nontautologous sense in which a system of capital punishment counts as “action” and that this is not the case for

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 725

a refusal to impose capital punishment, which therefore counts as a kind of omission or failure to act. What is the moral importance of this distinction? Individuals, let us suppose, are prima facie obligated not to harm others, but they have no obligation to assist them. Of course, this view raises many puzzles, not least in the definition of the relevant categories, but let us accept it for present purposes and ask how it applies where government is the moral agent.

With respect to individuals, the act/omission distinction is sharply contested, but consider some grounds on which it might be defended. First, those who injure others, and who commit harms, are far more vicious than those who fail to take steps to prevent harm to others. By their deeds, actors display a far worse character than omitters, and this difference is properly taken into account by both morality and law. Second, human beings have a presumptive right to go about their private lives without official interference; if omissions were sanctioned, through morality or law, liberty would be badly compromised. It is no infringement on liberty, or rights, to tell people that they must not harm others. But it is a significant infringement to tell people that they must assist others. On this view, the act/omission distinction is defensible, for individuals, because it respects liberty. Third, it is fully plausible to think that an all-things-considered assessment of consequences justifies the act/omission distinction, at least in most domains. Of course, it is possible to find cases in which an omission causes a serious welfare loss on balance, as, for example, when a bystander refuses to take relatively simple steps to prevent a homicide. But for a legal system, an assessment of the consequences of omissions, in individual cases, would be quite overwhelming, and many of those who are omitting to help some are, at the same time, helping others (for example, their children or others who need assistance). An insistence on an act/omission distinction might well have good consequences at the systemic level. We are not contending that for individuals this distinction makes sense in specific cases or in general; we are attempting more modestly to isolate the reasons that best justify it.

Those reasons, however, lose their force in the regulatory setting. It is possible that government officials are more "vicious" when they engage in, say, unlawful and environmentally destructive behavior than when they fail to take steps against such behavior by private parties; it is hard to see the moral relevance of that difference in the evaluation of government policy. Government officials cannot plausibly claim that their liberty is abridged when citizens ask them to take steps against, say, domestic violence, occupational deaths, or rape. At first glance, it is difficult to see how consequentialist considerations could justify an approach that would draw a sharp distinction between problematic actions (e.g., in the form of unjustified enforcement proceedings against alleged violators of the Clean Air Act) and problematic omissions (e.g., in the form of unjustified refusal to enforce the Clean Air

Act).<sup>64</sup>

The government cannot easily claim that it is under no duty to assist people, at least when those people are at risk of criminal violence. In administrative law, it is greatly contested whether agency inaction is subject to some special immunity from judicial review, and any such immunity turns largely on pragmatic considerations involving the limits of oversight by federal judges.<sup>65</sup> Likewise, governmental failure to protect people against private violence generally does not give rise to constitutional liability,<sup>66</sup> but this too is largely because judges have a limited capacity to enforce liability in such cases. Apart from law, there is no reason to think that omissions of this kind are properly insulated from moral criticism if significant numbers of deaths are a predictable consequence. Consider the question of famines. Amartya Sen has famously shown that in governments with a free press and democratic elections, no nation in the history of the world has ever experienced a famine.<sup>67</sup> It would be implausible to say that a government's failure to prevent a famine is morally unproblematic, and, indeed, anticipated public outrage at the prospect of mass starvation lies at the heart of Sen's finding.

Alternatively, and equivalently, we can put these points within the usual language of the act/omission distinction. It is standard that an omission can count as an action when there is a "duty" to act, especially where the party subject to the duty has himself created the conditions that threaten harm. Where government is concerned, these requirements will often be fulfilled far more often than for typical private parties. Where citizens are murdering each other, government is not a bystander, innocent or otherwise, because the decision whether to murder is made, at least in part, in light of the government's criminal justice policies. The background rules against which citizens act to threaten the lives of others or to protect their own lives, including rules about and limitations on self-defense, are themselves products of government action—including the action of the special bureaucracies that lawyers call "criminal courts."

The previous points suggest that even if inflicting capital punishment is an "act" while declining to inflict it is an "omission," the omission may nonetheless be morally culpable. Conversely, the act may be morally obligatory if large numbers of lives are saved. Even strict deontological accounts of the impermissibility of killing typically build in a threshold exception: when the

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64. The proper role of judicial review is, of course, contested, mostly for pragmatic reasons, but even here the distinction is not so sharp. See Bhagwat, *supra* note 12; Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

65. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

66. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

67. See AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981). We are grateful to William Stuntz for the example.

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 727

threshold is crossed, the moral agent is obliged<sup>68</sup> to commit otherwise impermissible acts in order to save third-party lives.<sup>69</sup> Moral theorists are typically vague as to where the threshold lies, but if each execution saves eighteen lives, then we are right in the neighborhood at which most theorists blanch at the collateral costs of deontological prohibitions.<sup>70</sup> We offer more general remarks on deontology and its relation to the act/omission distinction below. The point here is that capital punishment may be morally obligatory even if capital punishment counts as an act while failing to impose capital punishment counts as an omission.

We have questioned both the coherence and the moral relevance of the act/omission distinction as applied to capital punishment. We want to be clear, however, that in this setting, as elsewhere, rejecting the act/omission distinction only begins the analysis. For government to opt for a large highway-building project, for example, inevitably and predictably results in the deaths of a statistical set of workers who are no less real for being unidentifiable in advance. The reason the highway project is acceptable (if it is) might be either that more deaths would occur on net absent the project or, more broadly, that the social benefits are higher than the costs. Likewise, capital punishment might or might not be shown to save lives, on net; might or might not turn out to be welfare-enhancing, all things considered; and might or might not turn out to be just, depending on whether we hold a welfarist conception of justice. Our point here is limited: the crucial questions that determine whether capital punishment is life-saving, welfare-enhancing, or otherwise just are not questions about the difference between actions and omissions.

Consider, in this regard, the “reasonable doubt” standard of criminal law, under which it is better that some number of guilty defendants go free than an innocent person be convicted. It is possible to imagine a defense of the reasonable doubt standard on act/omission grounds: perhaps the government “acts” when it convicts and “fails to act” when it does not convict; perhaps government errors through action are much worse than government errors through inaction. Yet this seems an unlikely description. To acquit, or to decline to convict, is government “action” whether performed by a judge or by

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68. A more precise formulation would be “permitted or obliged,” because it is unclear which moral modality holds, according to threshold deontology, once the baseline deontological prohibition is waived. Without digressing too far into moral theory, we suggest that, conditional on accepting threshold deontology, the agent is obliged (not merely permitted) to promote the best overall consequences once the threshold has been crossed. In our view, it would be distinctly odd to say that a moral agent is permitted to infringe deontological constraints to save a large number of lives, but is not obliged to do so. For the related question whether general consequentialism entails an obligation to promote best consequences overall, or instead recognizes a class of supererogatory acts, see SHELLY KAGAN, *NORMATIVE ETHICS* 153-70 (1998).

69. For an overview, see Alexander, *supra* note 57, at 898-900.

70. See KAGAN, *supra* note 68, at 81 (stating that a “low threshold might permit killing one to save ten”).

a jury acting as the state's agents<sup>71</sup> under rules and procedures set by the state. Yet the reasonable doubt standard can still be straightforwardly defended on a claim that the overall social consequences of false convictions are much worse than the overall social consequences of false acquittals. If so defended, the standard is perfectly sensible and need not be justified by reference to an obscure distinction between acts and omissions. So, too, in our setting: apart from the distinction between acts and omissions, there is a reasonable question about whether capital punishment really does provide net social benefits. The relevant material for answering that question, however, is the empirical evidence discussed in Part I, rather than conceptual arguments that struggle to adapt the act/omission distinction to the state.

Those who object to capital punishment typically favor life imprisonment, or even life imprisonment without parole, as a morally acceptable alternative. But once an empirical lens is introduced, this preference becomes quite puzzling. A significant number of those who have committed egregious murders, and might otherwise be subject to capital punishment, are killed in prison. State officials must be aware of this fact. Indeed, one study finds an extremely large deterrent effect from prison deaths, with a reduction of 30 to 100 violent crimes and an equivalent reduction in property offenses per death.<sup>72</sup> Is it so clear that an official execution is much worse than a statistical risk of murder? Is it so much worse for the state to authorize its officials to execute people than for the state to imprison people with the knowledge that many of those imprisoned will be killed by private or public actors—not expressly authorized to be killed, to be sure, but with little likelihood of official punishment? We think that those who oppose capital punishment ought not to see life imprisonment as substantially better if many convicted murderers are going to be killed, directly by state actors or with the acquiescence of state actors, in prison.

### C. *The Arbitrary and Discriminatory Realm of Homicide*

Of course, there are important objections to capital punishment that do not trade on (some version of) the distinction between acts and omissions. Some of the most powerful of these objections invoke values associated with the rule of law. There are several concerns here.

Some innocent people are executed, and their deaths are obviously irreversible.<sup>73</sup> No legal system can ensure complete accuracy in criminal convictions. Even under the “no reasonable doubt” standard, errors are made.

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71. See Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1108 (2001).

72. See Katz et al., *supra* note 26, at 340.

73. See Liebman et al., *supra* note 3; Lawrence Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004).

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 729

But errors are sometimes said to be intolerable when the state is depriving people of their lives, precisely because mistaken deprivations cannot be reversed.

The death penalty inevitably contains a degree of arbitrariness. Justice Stewart famously made the point when he wrote that receiving the death penalty is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>74</sup> Justice Stewart’s point is undoubtedly overstated for current capital punishment systems. But if any such system operates as a kind of death lottery, in which similarly situated people are not treated similarly, perhaps it is unacceptable for that reason alone.

Even within the set of guilty defendants, the death penalty may be administered in a way that reflects objectionable or invidious discrimination. In 2003, forty-two percent of the death row population was African-American and fifty-six percent was white.<sup>75</sup> In some times and places, African-American defendants have been more likely to receive capital punishment than whites. More recently, those who kill white people appear to be more likely to receive capital punishment than those who kill African-Americans.<sup>76</sup> The system of capital punishment might reflect a form of institutional racism; even if not, the system might simply operate against the background of racial injustice, ensuring intolerable inequalities in the imposition of death. In any event, capital defendants who are poor, or otherwise unlikely to have good lawyers, are far more likely to face the death penalty.

Some people believe that even if capital punishment could be morally acceptable if it were fairly administered, the inevitability of unfair administration means that we must eliminate it. These arguments point to strong reasons for reforming the existing system to increase accuracy and decrease arbitrariness. But the arguments do not succeed as objections to capital punishment as such. Once the act/omission distinction is no longer central, it becomes clear that *the standard moral objections to capital punishment apply even more powerfully to the murders prevented by capital punishment*. Those murders also cause irreversible deaths: those of the victims. Private murders are also often highly arbitrary, involving selectivity on any number of morally irrelevant or objectionable grounds. African-Americans, for example, are far more likely than other groups to be the victims of murder. In

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74. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

75. THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2003 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>.

76. For a well-known discussion, see Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1401 (1988). For recent evidence, see John Blume et al., *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004). On the basis of data analyzed by Blume et al., it is possible to estimate the rate at which death sentences are issued (per 1000 murders): for cases involving black offenders and black victims, the rate is 6.7%; black offenders and white victims, 62.2%; white offenders and white victims, 28.4%; and white offenders and black victims, 18.6%.

2003, forty-eight percent of murder victims were white and forty-eight percent were African-American—meaning that the racial disparity in the probability of becoming a murder victim is even greater than the racial disparity in the probability of ending up on death row.<sup>77</sup> An important corollary is that the benefits of capital punishment, to the extent that it operates as a powerful deterrent of murder, are likely to flow disproportionately to African-Americans.<sup>78</sup>

To be sure, this effect will be attenuated if death sentences are imposed less frequently on those who murder African-Americans. In the most pessimistic projection, capital punishment is likely to be disproportionately inflicted on African-Americans, and because that punishment is most likely to be imposed when whites have been killed, the resulting savings are likely to go largely to whites. On this view, the “life-life tradeoffs” may turn out, all too often, to be “African-American-life to white-life tradeoffs.” In the abstract, it may be unclear how to make that tradeoff—even if it involves larger numbers, and innocence, on one side of the ledger. The simplest response is that on the current numbers, this projection is unrealistic. Because interracial murders are only a small fraction of all murders, and because death sentences for interracial murders are only a small fraction of all death sentences, capital punishment does not, in fact, make it necessary to trade off African-American lives against white ones.

To spell the claim out in more detail: most murder is intraracial, not interracial.<sup>79</sup> 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.<sup>80</sup> In

77. See FED. BUREAU OF INVESTIGATION, *supra* note 11, at tbl.2.3.

78. See Kennedy, *supra* note 76, at 1401.

79. See FED. BUREAU OF INVESTIGATION, *supra* note 11, at tbl.2.7 (tabulating murders as follows: white murdering white: 3017; African-American murdering African-American: 2864; white murdering African-American: 226; African-American murdering white: 501).

80. This judgment is supported by Blume et al., who provide figures relevant to the demographics of murder:

National Estimate of Death Row Composition Using Seven States' Data, 1976-1978

	Black Offender-Black Victim	Black Offender-White Victim	White Offender-White Victim	White Offender-Black Victim
National Known Murderers	113,649	19,987	118,488	7048
Estimated Number of Death Sentences	767	1243	3368	131
Estimated Percent of Death Row	14.6%	23.8%	55.0%	2.5%

Note: Using seven states with known race of offender-race of victim data, the table estimates the percentage of death row consisting of the indicated racial combinations for the thirty-one states in this study. The percentages in the third row do not total 100% because we limit our

any event, the more natural response to existing racial disparities is to lower them, rather than to eliminate the penalty altogether.

For the rule-of-law questions, as for all others, the core problem of capital punishment is that it presents a risk-risk tradeoff, or a life-life tradeoff. To say the least, it is extremely desirable to prevent arbitrary or irreversible deaths, but this consideration is on both sides of the ledger. The relevant analogy is not, say, to a policy that uses racial classifications to increase security or national wealth. The closer analogy would be one that uses racial classifications in order to minimize the overall use of racial classifications, or to hasten the day when racial classifications are no longer useful.<sup>81</sup> A still closer analogy would be a policy that increases certain risks but that in the process decreases other risks of greater magnitude. Whatever the merits of such tradeoffs across different settings, a one-sided complaint about a harm or loss that is on both sides of the ledger is not a sufficient objection to a policy of this sort.

On this view, the crucial point is that on the empirical assumptions we are making, a legal regime with capital punishment predictably produces far *fewer* arbitrary and irreversible deaths than a regime without capital punishment. In a sensible regime of capital punishment, legal rules, enforced by administrative, judicial, and citizen oversight, attempt to reduce arbitrariness and error up to the point where further reductions would inflict unacceptable harms.<sup>82</sup> Where killing is carried out by private parties, however, there are no such institutions for keeping arbitrariness in check. Most striking is the potential size of the opportunity cost of foregone capital punishment. Stipulate that for every foregone execution (conducted under procedural safeguards), the cost is, on average, some eighteen arbitrary and irreversible murders—as some of the evidence in Part I suggests. Suppose, for example, that five hundred additional death row inmates were executed in the next year.<sup>83</sup> Unless the marginal deterrent benefit of each additional execution diminishes very rapidly, the result would be to save thousands of innocent people—in all probability, far

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national murder sample to those cases with whites and blacks as offenders and victims.

See Blume et al., *supra* note 76, at 26. Because cases of white victims and African-American offenders are such a small percentage of the total number of murders, the pessimistic scenario discussed in the text is not a plausible reading of the numbers.

81. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 341-43 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”); *United Steelworkers of Am., AFL-CIO v. Weber*, 443 U.S. 193, 208 (1979) (upholding voluntary private affirmative action plans “designed to break down old patterns of racial segregation and hierarchy”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part) (“In order to get beyond racism, we must first take account of race.”).

82. This formulation is meant as a placeholder for the appropriate degree of reduction. We bracket the relevant questions here, beyond noting that the courts typically use a calculus of decision costs and error costs to assess the marginal value of additional procedures. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

83. The death row population is now over 3000. See BONCZAR & SNELL, *supra* note 75, at 1.

more people than were killed in the terrorist attacks of September 11, 2001. The people whose lives are lost, and whose deaths could be averted, are killed arbitrarily and without fair process. In short, rule-of-law criticisms of capital punishment either smuggle in the distinction between acts and omissions or else overlook the fact that the same objections apply even more powerfully to the utterly arbitrary killings that capital punishment prevents.

*D. Preferable Alternatives and the Principle of Strict Scrutiny*

Some critics of the death penalty believe that there are other, better ways of deterring murder, and states ought to use those methods instead.<sup>84</sup> Deterrence might occur through superior law enforcement efforts. Or it might occur through taking steps to reduce people's incentives to engage in violent crime, such as education, job training, and other steps toward poverty reduction. On this view, capital punishment reduces the pressure to take better and less barbaric steps to control homicide.

Here there is an analogy, though an imperfect one, to the principle of "strict scrutiny" found in many areas of constitutional law. Although constitutional law often permits government to act in ways that burden important rights, government must typically show that no alternative policy would promote the same goals with less burden on the affected right.<sup>85</sup> The analogy is imperfect because strict scrutiny in the courts is often "strict in theory but fatal in fact,"<sup>86</sup> with courts often barring government from satisfying strict scrutiny by reference to arguments that are routinely acceptable in the process of policy evaluation. Here we use "strict scrutiny" as a shorthand for the argument that capital punishment is justified only if, and when, a rational policy evaluation would show that no alternative policies could do as much to reduce murder rates. The Supreme Court has not accepted this idea as a matter of constitutional law.<sup>87</sup> But perhaps it should be accepted as a normative matter.

Here is the simplest response: on the basis of the evidence that we are assuming to be true, a plausible inference is that whatever steps states take to reduce homicide, capital punishment will provide further deterrence. Whatever states do, some level of homicide is inevitable; so long as liberty is respected, a significant number of murders will continue to occur in every state. If states undertook the steps that are recommended as less restrictive alternatives—and they surely should undertake some of them—then capital punishment would

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84. See Hugo Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in *DEBATING THE DEATH PENALTY*, *supra* note 2, at 15.

85. See, e.g., *Grutter*, 539 U.S. at 326-27.

86. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

87. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 733

still reduce that level from what it would otherwise be. In other words, a key assumption of the strict scrutiny view is that the alternative policies are substitutes for capital punishment. Yet they would likely turn out to be complements instead. Many steps can be taken simultaneously to reduce violent crime, and reform of the criminal justice system is only one of those steps.

Moreover, the strict scrutiny position rests upon an excessively simple view of legal policymaking. The first question is always what policies lie in the feasible set. Political constraints will rule out some policies that might be even better, from the standpoint of deterring murders, than capital punishment. Switching to a Swedish-style welfare state might (or might not) reduce crime dramatically, but we will never know because we will never try it. So too, increasing job-training funds by several orders of magnitude might result in many fewer murders, but such policies are simply not in the cards anytime soon. Capital punishment, by contrast, is very much a live policy option, even in many states that do not currently use it.<sup>88</sup>

Perhaps the apparent political constraints are partially endogenous; perhaps capital punishment reduces the political incentive to adopt other strategies, and if this were so, the argument for capital punishment would surely be weakened. But there is little reason to believe that if capital punishment were abolished, there would be significantly larger efforts to reduce violent crime through education and training programs. We cannot rule out the possibility that abolition would result in a better mix of measures, all things considered. But if the death penalty has the deterrent effect suggested by the recent literature, then this would be a surprising conclusion.

In general, there is no reason to say that capital punishment must be prohibited unless and until all available alternatives have been tried and proven inferior. No sensible principle of policymaking bars regulators from adopting a clearly desirable practice, unless and until they show that all other potential projects are inferior. Such a view overlooks the opportunity cost of searching through the policy space and exhausting the available alternatives. In the setting of capital punishment, the alternatives might be tried and fail; even if they succeed, approaches based on education and social-welfare provision will often have a longer lag time before they bear fruit. In either case, while the policy experiments are ongoing, a large number of murders will go undeterred. The hard question is what the *interim* policies should be while regulators search for optimal arrangements, and it begs the question to say that the interim policy must be a regime without capital punishment. Why should that be so, if there is powerful evidence that instituting capital punishment today will save many lives starting tomorrow?

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88. See, e.g., Rick Klein, *Science Key in Building Case for Death Law*, BOSTON GLOBE, Sept. 30, 2003, at B1 (reporting that a majority of Massachusetts residents support the death penalty and that the state's governor is developing a capital punishment proposal).

As the last point shows, the strict scrutiny idea goes wrong in the same sort of way that the earlier arguments go wrong: by overlooking the possibility that the regime without capital punishment itself inflicts even larger net harms—harms to the very same values that animate opposition to capital punishment. This is a version of the act/omission mistake. Stipulating that capital punishment saves many more innocent lives than it takes, the strict scrutiny argument has the default position backwards. Criminal justice policy would do well to adopt capital punishment while the search for regulatory alternatives proceeds; it is the alternatives that should be strictly scrutinized, to be rejected unless and until they prove themselves superior.

### E. *Slippery Slopes*

Our argument might seem to have serious slippery-slope problems. Suppose, for example, that the best way to deter heinous crimes is to torture perpetrators. Suppose that if torture were undertaken, there would be a significant reduction in the number of such crimes. The logic of our hypothesis is that torture would be morally obligatory on certain factual assumptions.

We accept this claim about what our hypothesis entails. To make the case as simple as possible, suppose that some criminals torture their victims and that if such criminals were themselves tortured, the incidence of torture would decrease substantially. Suppose, that is, a ban on (state) torture ensures that (private) torture will occur far more often than it otherwise would. In our view, the ban on state torture reflects a use of the act/omission distinction in a context in which the distinction is not easy to defend. If, for example, state torture of a torturer would prevent eighteen acts of torture—of, say, children—the argument for banning state torture would be greatly weakened.

None of this means that a ban on state torture is indefensible.<sup>89</sup> Here, as always, rejecting the act/omission distinction says nothing, by itself, about what policies are best from any point of view. State practices of torture might actually increase torture, rather than diminish it, perhaps by weakening the social prohibition on torture. This is an empirical issue, and no evidence, so far as we are aware, either undermines or confirms it. Hence, state torture might be self-defeating if its goal is to reduce private torture. In any case, a ban on torture might, or might not, have a rule-consequentialist defense. Suppose, not implausibly, that the benefits of state torture are low; suppose that its costs, prominently including the risks of abuse, are high; and suppose that front-line decisionmakers cannot be trusted to sort good instances from bad instances. Everything depends on what the facts turn out to be.

The last point is crucial. Because arguments about policies such as capital

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89. For relevant considerations, see Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. (forthcoming 2005) (on file with authors).

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 735

punishment and torture are hostage to what the facts turn out to show in particular domains, slippery-slope arguments are disabled; instead of a slope, there is just a series of discrete policy problems. Support for capital punishment need not, by analogical reasoning or otherwise, commit policymakers to support for public floggings or punitive mutilation or other horrors. Nor is there any obvious mechanism that would push policymakers or citizens to adopt those other practices once they have adopted capital punishment.<sup>90</sup> Not only is there no slope, there is no a priori reason to believe the ground slippery.

Perhaps the torture example fails to get to the heart of what is most objectionable in our argument. Return to a problem raised above and focus on the following situation: suppose that holding a show trial to frame and convict one innocent person of murder would deter eighteen real murders. Wouldn't you be obliged to defend that, crazy as it is? Or consider an analogous situation: suppose that the state could withhold exonerating information and ensure the execution of several innocent people. Is it legitimate, or even mandatory, for the state to withhold that information? On one view, these questions are fair. It is possible to imagine a finding that conviction of innocent people would deter murders, so that the failure to hold show trials or to withhold exonerating information is, in effect, condemning large numbers of people to unjustified deaths. On utilitarian grounds, the show trials might be permissible or even mandatory. On deontological grounds, the answer is at first clear: the state cannot take the lives of innocent people. But if our argument is correct, the deontological argument might not be so clear after all: might not the failure to conduct show trials or to exonerate innocent people be a way of taking the lives of innocent people, too?

An initial problem with slippery-slope questions of this kind is that they often obscure more than they clarify.<sup>91</sup> First, as John Rawls pointed out long ago, the systemic effects of a government policy that allowed sham convictions of the innocent, including debilitating uncertainty for other innocents, would

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90. For criticism of slippery-slope arguments that lack a specific mechanism, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

91. It is tempting to think that there is a kind of moral floor for the infliction of severe punishment. On this view, such punishment cannot be inflicted unless the defendant has done something very grave—and considerations of deterrence cannot justify severely punishing, for example, parking tickets or minor traffic offenses. For those who endorse this view, it is possible to believe that government cannot punish innocent people or impose sentences that are grossly excessive in comparison to the crime. But it is also possible to believe that government can impose the death penalty after people have, under stringent standards, been convicted of committing especially egregious murders. Of course any moral "floor" will be controversial, and the most adamant opponents of capital punishment might believe that it is below the floor by its very nature. We do not mean to untangle the moral complexities here. Our only suggestion is that even for those who insist on a moral floor, the death penalty may be acceptable if it is imposed on those who have committed especially egregious murders.

themselves have to be folded into the overall assessment.<sup>92</sup> From a consequentialist standpoint, executing the innocent would be a very poor strategy for government to follow. For one thing, there will always be plenty of convicts in the pipeline whose guilt is certain. Why take the extra risk and trouble of executing the innocent? More important still is the following: each execution of someone known to be innocent, or whose guilt is doubted, would dilute the deterrent signal that the government would (by hypothesis) be attempting to strengthen. In the limiting case, if capital punishment were entirely random, falling with utter arbitrariness upon innocent and guilty alike, there would be no deterrence at all; there would be no reason for any prospective criminal to take the threat of capital punishment into account. To the extent that deterrence occurs, Justice Potter Stewart's comparison of capital punishment to being struck by lightning does not hold.

Note that, if the findings discussed in Part I are valid, it must be the case that the present system of capital punishment is *not* a wholly capricious system of punishment, pervaded by false positives. At the very least, some or many prospective murderers must believe that the system has a high degree of accuracy. We do not mean to overstate this point. Of course, it remains undeniable that capital punishment is sometimes imposed erroneously<sup>93</sup> and undeniable too that it is sometimes imposed arbitrarily or on invidious grounds *within* the set of guilty defendants. Nothing we say here is meant to suggest that states should be content with erroneous or arbitrary death sentences. But the evidence plausibly suggests that there is substantial accuracy, in the sense of avoiding false positives, in the infliction of capital punishment.

A corollary to Rawls's point about the systemic costs of executing the innocent is that a government policy of executing the innocent could be implemented only if the policy were itself a secret; only a conspiracy to keep the policy secret would prevent it from unraveling. No such conspiracy is likely to succeed. Put in less consequentialist terms, such a policy would violate the publicity principle emphasized by Rawls and others. It could not be defended publicly and still accomplish its central goal.<sup>94</sup> The publicity principle is a principle of political morality that can be given both deontological and consequentialist justifications,<sup>95</sup> so moral theorists of many stripes could reject this sort of hypothetical.

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92. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 32 & n.27 (1955).

93. Independent estimates of the number of innocent people who have been executed since the reinstatement of capital punishment in the mid-1970s are "remarkably low." Allen & Shavell, *supra* note 52, at 629 n.7. One estimate puts the number at five people in the last three decades. See FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 170 (2003). A slightly earlier study, by opponents of capital punishment, identified no more than three. See MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* 279 (1992).

94. On the publicity condition, see JOHN RAWLS, *A THEORY OF JUSTICE* 177 (1971).

95. For an overview of issues, see David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154 (Robert E. Goodin ed., 1996).

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 737

Second, it is not clear how policymakers could have reliable evidence about the deterrent effects of conviction of the innocent, torture, or other disturbing practices without first experimenting on hapless victims—and the necessary experimentation might well be impermissible on moral grounds *ex ante*, even if the policies themselves would be permissible given certain experimental findings *ex post*. Capital punishment, however, is already the status quo in most states, and policymakers already have many decades' worth of data about its deterrent effects.

Finally, and most fundamentally, we doubt that the intuitions which drive extreme hypotheticals of this sort have moral significance in any event. Of course, it is *prima facie* objectionable, worse than outrageous, if the state proposes to kill people whom it knows to be innocent. The widely held moral and legal norm against executions of innocent people is certainly an individual and social good, whatever one's views about the foundations of morality. But suppose that a situation arises in which execution of an innocent person really is the only way to save eighteen, or eighty, or eighteen hundred innocent people. We are not sure how to handle such situations. There is no reason to think that intuitions about the extreme cases are reliable trackers of moral truth, or to assume that such intuitions have any privileged connection to what a considered moral theory would permit or require. Consider the fact that innocent people die in war and even in attacks that are well short of war; consider also the obvious tension between some apparently pro-life intuitions and the accepted practice of killing (executing) hostage-takers. (Do opponents of capital punishment reject this practice?) We offer more remarks on the moral status of particular intuitions below and in Part III.

Overall, the possibility of a deliberate decision to execute the innocent seems to us too lurid to have a place in serious discussions of the death penalty. Of course, real-world systems of capital punishment tolerate some risk that unidentified persons will be erroneously executed; in that aggregate sense, real-world systems of capital punishment cannot absolutely ensure that only the guilty are executed.<sup>96</sup> As we have emphasized, however, the world of homicide also ensures the deaths of a number of statistical, unidentified victims—indeed a much larger number. From the standpoint of a government attempting to deter homicide, moreover, executing the innocent is costly and indeed counterproductive from the deterrence point of view—a practice to be minimized on the very same deterrence grounds that animate capital punishment in the first place.

#### *F. Deontology and Consequentialism Again*

What is the relationship between the foregoing argument, particularly our

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96. Note, however, that on existing estimates, the number of executions of innocent people appears to be very small. *See supra* note 93.

rejection of the act/omission distinction as applied to government's policy choices, and standard debates about deontological and consequentialist approaches in moral theory? We do not think this is a crucial analytic lens for the questions we address.<sup>97</sup> We are aware that some deontologists will disagree. But as we have emphasized, our argument does not challenge deontological claims as such, except insofar as they apply the act/omission distinction to government and reject any consequentialist override of deontological injunctions. The simple injunction "thou shalt not kill" is too general to cut between the relevant options at the lower level of policy choice. If capital punishment strongly deters killings, and if the government that eschews capital punishment can fairly be charged with those killings, then the government's only choices are to kill more or to kill fewer; the deontological injunction might then be interpreted to require rather than to forbid capital punishment.

To be sure, some opponents of capital punishment tend to build the act/omission distinction directly into the deontological injunction itself. "Thou shalt not kill" might be interpreted just to mean that the state and its agents shall not themselves kill. Moreover, opponents sometimes assume away the problem of consequentialist overrides. But as we have seen, both the act/omission distinction and the idea that deontological injunctions are absolute are highly contentious assumptions, above all for government actors. They assume, implausibly, that the moral distinctions and considerations that apply to individuals apply without qualification to government officials and that they require independent arguments on their behalf. In many cases, no such argument is offered; all that is typically offered is an intuition that the state must not kill, period.

We do not believe that, upon reflection, the intuition can be defended, nor do we think that case-specific intuitions should be morally dispositive. In part this is because of familiar arguments in moral theory that commitments to generalizable moral principles should trump intuitions in particular cases.<sup>98</sup> In part it is because the reliability of such intuitions is highly suspect. Recent research in cognitive psychology, which we discuss in Part III, suggests that the intuitions underpinning the act/omission distinction may represent cognitive errors, without any moral relevance or larger importance. The only point we emphasize here is that, stipulating that capital punishment powerfully deters killings, an opposition to killing is most naturally understood to support capital punishment rather than to undercut it. Opponents of capital punishment who build the act/omission distinction directly into an absolutist deontological

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97. For a recent argument that most or all substantive moral positions can be formulated at will in either deontological or consequentialist terms, see Campbell Brown, *Consequentialise This* (unpublished manuscript), available at <http://personal.bgsu.edu/~browncf/papers/ConsequentialiseThis.pdf> (last revised Sept. 10, 2004).

98. See generally R.M. HARE, *MORAL THINKING: ITS LEVELS, METHODS, AND POINT* (1981).

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 739

injunction, by stating a position against *state* killing with no consequentialist override, face the prospect that their position will ultimately come to rest upon little more than an inarticulate intuition, a conclusion masquerading as an argument.

Overall, the crucial question is what the facts show, a point to which we return in Part IV. Perhaps capital punishment might best be restricted to certain classes of offenders or offenses, or even to certain geographic regions; different polities might, in their different factual circumstances, each do well by adopting or rejecting capital punishment as appropriate. It might even turn out that the system of capital punishment is so riddled with errors and arbitrariness that it would be unwise and unjust to adopt it, simply because it is a hopelessly defective tool of criminal justice. Although we doubt that this is so, for the reasons given in Part I, it *could* be so, and a belief that it is true would supply a very respectable reason for opposing capital punishment. What does not supply such a reason is an indeterminate and unprocessed intuition that the state should not “kill.”

None of this is to suggest that intuitionism is the only possible basis for opposing capital punishment; of course it is not. Perhaps the death penalty is opposed (as it is sometimes endorsed) on expressivist grounds; perhaps the social meanings of capital punishment are what drive opponents as well as advocates.<sup>99</sup> But if the evidence outlined here is correct, expressivist opposition is not so easy to sustain. A failure to protect women against domestic violence or workers against severe occupational risks is objectionable on expressive grounds because it reflects contempt for the safety of women and workers.<sup>100</sup> A failure to take steps that would prevent significant numbers of murders is itself expressively objectionable, on parallel grounds.

There is a final point involving democracy itself. On one view, government’s central obligation is to follow the public will, assuming that it has been properly focused and channeled through processes of public deliberation.<sup>101</sup> If the public opposes capital punishment, and insists on an act/omission distinction, then officials should oppose it too, unless, perhaps, opposition can be shown to be ill informed or to have failed the minimal requirements of political deliberation. And on this view, public support for capital punishment would be presumptively binding as well. We do not mean to say anything contentious about democratic legitimacy here. Both citizens and representatives must ask themselves what morality requires. If a life-life tradeoff is involved, the moral question is inevitably affected. And if capital punishment saves large numbers of innocent lives, then participants in democracies are obliged to take note of that fact.

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99. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

100. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993).

101. See WILLIAM BESSETTE, *THE MILD VOICE OF REASON* (1994).

## III. COGNITION AND CAPITAL PUNISHMENT

Those who object to capital punishment, and who believe that evidence of deterrence is irrelevant, think that they are operating in accordance with a freestanding moral principle. They will not be enthusiastic about the suggestion that their moral judgments are instead a product of some kind of cognitive error. But in the regulatory domain as a whole, it has become standard to say that cognitive processes contribute to large mistakes, at least on questions of fact.<sup>102</sup> For risk regulation, people do seem to focus on a subset of the harms at stake in a way that produces both excessive and insufficient reactions to environmental problems.<sup>103</sup> More generally, a form of “tradeoff neglect” pervades regulatory policy,<sup>104</sup> and it is easy to imagine that the moral domain has its own kinds of tradeoff neglect. For example, it is common, in the environmental domain, to focus on the risks associated with some kind of environmental degradation but to neglect the risks associated with environmental regulation; those who focus on the costs of regulation often neglect the risks of inaction.<sup>105</sup>

In a related vein, a great deal of recent work has emphasized the possibility that heuristics and biases can be found in the moral arena, making it possible that deeply felt moral intuitions are a result of errors and confusions.<sup>106</sup> This is a possibility and no more. Certainly we cannot demonstrate that moral opposition to capital punishment is sometimes rooted in selective attention or an identifiable heuristic. But, return to the hostage situation to which we have referred: police officers are permitted to kill those who have taken hostages, at least if the killing is reasonably believed to be necessary to save human lives. If capital punishment is deemed different, it might be because the lives to be saved are merely statistical, as compared with the lives of hostages, which are entirely vivid. Statistical lives and harms are pervasively neglected in policy, in part for cognitive reasons.<sup>107</sup> More generally, consider two points, the first involving salience and the second involving the foundations of the act/omission distinction.

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102. Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 777 (1990).

103. This is the theme of HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* (1996).

104. *Id.*

105. *Id.*

106. See, e.g., Jonathan Baron, *Heuristics and Biases in Equity Judgments: A Utilitarian Approach*, in *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS* 109 (Barbara A. Mellers & Jonathan Baron eds., 1993); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001); Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005).

107. See Loewenstein et al., *supra* note 62.

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 741

A. *Salience*

It is obvious that people's reactions to factual and moral questions are greatly affected by vividness or *salience*.<sup>108</sup> If an event, such as a terrorist attack, seems salient, people will think it is more likely to occur. And if an event is salient, people may not pay much attention to less salient possibilities, such as the risk that a response to a terrorist attack will cause a significant number of deaths of its own. When people neglect tradeoffs, it is often because one aspect of the situation is highly visible, or "on screen," while other aspects are less visible or perhaps invisible.

Consider in this regard the life-life tradeoffs potentially involved with capital punishment. Those subject to capital punishment are real human beings, with their own backgrounds and narratives. Some of them have been subject to multiple forms of unfairness, in the legal process and elsewhere. At least some were wrongly convicted. By contrast, those whose lives are or might be saved by virtue of capital punishment are mere "statistical people."<sup>109</sup> They are both nameless and faceless, and their deaths are far less likely to be considered in moral deliberations. It is for this reason, perhaps, that the advocates of capital punishment often focus on the heinousness of the (salient) offender, while the abolitionists focus on his or her humanity. We suspect that the discussion would take a different form if the victims of a regime lacking capital punishment were salient too,<sup>110</sup> and the example of police behavior in hostage situations supports the suspicion. None of this argument establishes the claim that the death penalty is morally required if it saves far more lives than it ends. But it does raise the possibility that moral intuitions, for many people, are a product of the salience of one set of deaths and the invisibility or speculative nature of another.

B. *Acts, Omissions, and Brains*

Outside of the domain of government, we have not questioned the act/omission distinction. But in some settings, it may be worth considering the possibility that the act/omission distinction operates as a heuristic for a more complex and difficult assessment of the moral issues at stake.<sup>111</sup> Consider in

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108. See SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 125-26, 178-80 (1993) (discussing the salience heuristic and the closely related heuristics of vividness and availability); cf. Robert M. Reyes et al., *Judgmental Biases Resulting from Differing Availabilities of Arguments*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 2, 5-12 (1980) (demonstrating that vivid, concrete information exerts greater influence on mock jury deliberations than abstract, pallid information).

109. See Heinzerling, *supra* note 17, at 189.

110. Cf. PHILIP K. DICK, *THE MINORITY REPORT* (2002).

111. The argument is ventured in JONATHAN BARON, *JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING* (1998).

this regard the dispute over two well-known problems in moral philosophy.<sup>112</sup> These problems do not involve the act/omission distinction, but they implicate closely related concerns. We suggest that people's asymmetrical reactions to the two problems say a great deal about the operation of the act/omission distinction.

The first, called the trolley problem, asks people to suppose that a runaway trolley is headed for five people, who will be killed if the trolley continues on its current course. The question is whether you would throw a switch that would move the trolley onto another set of tracks, killing one person rather than five. Most people would throw the switch. The second, called the footbridge problem, is the same as that just given, but with one difference: the only way to save the five is to throw a stranger, now on a footbridge that spans the tracks, into the path of the trolley, killing that stranger but preventing the trolley from reaching the others. Most people will not kill the stranger. What is the difference between the two cases, if any? A great deal of philosophical work has been done on this question, much of it trying to suggest that our firm intuitions can indeed be defended in principle.<sup>113</sup>

Without engaging these arguments, consider a suggestive experiment designed to see how the human brain responds to the two problems.<sup>114</sup> The experiment's authors do not attempt to answer the moral questions in principle, but they find "that there are systematic variations in the engagement of emotion in moral judgment"<sup>115</sup> and that brain areas associated with emotion are far more active in contemplating the footbridge problem than in contemplating the trolley problem. An implication of the authors' finding is that human brains are hardwired to distinguish between bringing about a death "up close and personal" and doing so at a distance.<sup>116</sup>

Of course, this experiment is far from decisive; emotions and cognition are not easily separable,<sup>117</sup> and there may be good moral reasons why certain brain areas are activated by one problem and not by the other. Perhaps the brain is closely attuned to morally relevant differences. But consider the case of fear, where an identifiable physical region of the brain makes helpfully immediate but not entirely reliable judgments<sup>118</sup>—something analogous, very plausibly, is

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

113. *Id.*

114. Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCI.* 2105 (2001).

115. *Id.* at 2107.

116. *Id.* at 2106-07.

117. See MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001).

118. See Joseph E. LeDoux & Jeff Muller, *Emotional Memory and Psychopathology*, 352 *PHIL. TRANSACTIONS: BIOLOGICAL SCI.* 1719, 1719 (1997).

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 743

true in the context of morality.<sup>119</sup>

For capital punishment, the implication is straightforward. For many people, the prospect of lethal executions is akin to the prospect of throwing the stranger into the path of a train in the footbridge problem. We expect that the relevant part of the brain would light up for most people who sincerely imagine themselves in the position of executioner. But for almost everyone, no such lights would be found after learning that the consequence of abolishing capital punishment was to ensure somewhere between eight and twenty-eight statistical deaths for each foregone execution. No unambiguous moral lesson follows from an understanding of the operation of the human brain. But, it is perhaps illuminating if moral judgments are caused by rapid intuitions that do not involve a great deal of cognitive work and that have no obvious connection to the morally relevant features of the situation.

### *C. A Famous Argument that Might Be Taken as a Counterargument*

Our general claims might be thought to run up against Bernard Williams's well-known critique of utilitarianism, rooted largely in a story about an unfortunate tourist named Jim.<sup>120</sup> In Williams's tale, Jim is a tourist in a small town in South America. He notices that twenty Indians are about to be shot. The leader of the shooters gives Jim a chance to save all but one of the Indians, but for a price: Jim has to shoot one of them. Williams believes that for utilitarians, the moral answer is clear: Jim should shoot. But in his view, it is not clear that this is what morality requires. In Williams's words, utilitarianism

cuts out a kind of consideration which for some others makes a difference to what they feel about such cases: a consideration involving the idea, as we might first and very simply put it, that each of us is specially responsible for what he does, rather than for what other people do.<sup>121</sup>

Williams asks:

[H]ow can a man, as a utilitarian agent, come to regard as one satisfaction among others, and a dispensable one, a project or attitude round which he has built his life, just because someone else's projects have so structured the causal scene that that is how the utilitarian sum comes out?<sup>122</sup>

We believe that an intuition akin to Williams's helps to explain opposition to capital punishment even in the face of evidence of the sort that we have outlined. But there are three responses:

*Most modestly:* Capital punishment, on the evidence given here, more closely resembles a hostage situation than Jim's case. Recall that police officers

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119. Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 *TRENDS COGNITIVE SCI.* 517, 522-23 (2002).

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

121. *Id.* at 99.

122. *Id.* at 116.

are permitted, even expected, to use deadly force against those who have taken hostages if that is the only way to save innocent people. Those who are subject to capital punishment are (almost always) egregious wrongdoers, not innocents.

*Somewhat less modestly:* An understanding of the attitudes around which people have built their lives might constrain people, but such an understanding does not constrain states, at least not in the same way. If Jim is a police officer, asked to save twenty hostages, he might well be morally obliged to shoot one of them if that is the only way to save the other nineteen. If Jim is the head of state, asked to engage in military intervention to prevent a mass slaughter (say, in Rwanda), it is not so clear that he should refuse even if he knows that military intervention will also result in innocent deaths at the hands of his own military. At the very least, the moral question cannot be answered, at the level of the state, by insisting “that each of us is especially responsible for what he does, rather than for what other people do.”<sup>123</sup>

*Less modestly still:* Williams’s own arguments seem to us to rely on question-begging claims about causation and about what counts as intentional action. He is right to say that we are particularly responsible for what we do, but in Jim’s case, how does that precept cash out, exactly? Granted, Jim faces bad choices through no fault of his own, but can Jim disclaim responsibility for the unnecessary deaths of nineteen people?

It is more than plausible to say that for rule-utilitarian reasons, societies benefit from strong moral prohibitions on the taking of innocent life. Perhaps we do better if most people share Jim’s reluctance to shoot the innocent. In the real world, relevant Jims, engaged in on-the-spot consequentialist analyses, may well engage in killings that are unjustified even on consequentialist grounds. Here, as elsewhere, a moral norm may operate as a kind of heuristic, one from which individuals and societies gain a great deal.<sup>124</sup> 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.

#### IV. IMPLICATIONS AND FUTURE PROBLEMS

In this Part, we expand upon the implications of our approach and highlight some remaining puzzles, not with the goal of resolving all issues, but with a view to indicating the contours of existing puzzles and some possible directions for future research. We also emphasize that our argument is limited to the setting of life-life tradeoffs: cases in which capital punishment is used to deter killing, rather than other offenses.

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123. *Id.* at 99 (emphasis omitted).

124. *See* Sunstein, *supra* note 106, at 531.

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 745

*A. Threshold Effects (?) and Regional Variation*

The statistic that each execution saves eighteen lives, on average, is an aggregated statistic based on national-level data—something like a national average. Averages can be misleading, of course, and a look at regional variation suggests a potentially complicated picture. The most recent work suggests the possibility that states fall into three sets: a set of states in which capital punishment deters very strongly, a set in which it has no deterrent effect at all, and even a set in which capital punishment has perverse effects, slightly raising murder rates. The pronounced deterrent effect at the level of the national average occurs because, where capital punishment does deter, it deters powerfully. As we mentioned in Part I, Joanna Shepherd suggests there is a “threshold effect” at work here: in states that execute very few people, capital punishment either has no effect or even backfires, perhaps because (Shepherd conjectures) a “brutalization effect” operates, while in states that execute a larger number, there are large deterrent effects.<sup>125</sup> Whatever the validity of the particular mechanisms Shepherd proposes, it seems plausible that capital punishment deters strongly in one set of states and has little effect in others. If this is correct, does it undermine our thesis?

The simple answer is no, not at all, because we hold no brief to promote capital punishment everywhere, at all times and places. Where capital punishment is a powerful deterrent, we have suggested that states may well be morally obligated to adopt it. Where capital punishment does not powerfully deter, the empirical predicate for that obligation disappears. Retributivists might continue to argue for capital punishment on other grounds, but we are not retributivists and see no inherent moral necessity for capital punishment if it produces little in the way of benefits in the protection of human life. If future work were to overturn the recent evidence that capital punishment deters, that work would also, in our view, overturn the case for capital punishment altogether.

*B. International Variation*

What holds for variation across states within the United States holds a fortiori for variation across liberal democratic polities. The European Union and its member states firmly reject capital punishment as violative of human dignity; more broadly, the United States is one of only a small number of nations that permit capital punishment. How does this international variation bear upon our thesis?

The short answer is that we have nothing to say about such polities, because the relevant facts are not yet known. It might turn out that, due to variation in some relevant factor, capital punishment is appropriate for our

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125. See *supra* Part I and corresponding references.

circumstances but not for the circumstances of (some set of) other polities; nothing in our view excludes this stance. If capital punishment turns out to deter strongly in some populations, or given some background legal and economic systems, but not otherwise, then the scope of the moral obligation to adopt capital punishment would vary accordingly. Israel does not execute terrorists, in part because of a belief that executions of terrorists would breed more terrorism; if the belief is correct, as seems plausible, then the failure to use capital punishment is correct, too. Those who favor capital punishment might well ask whether they reject Israel's policy on retributive grounds. For pro-capital punishment deontologists, no less than for anti-capital punishment deontologists, serious life-life tradeoffs might be involved. Is it possible to sustain a deontological argument for executing terrorists if the consequence is to produce many more terrorists? We think that retributivists should hesitate before giving an affirmative answer.

### *C. Offenders and Offenses*

Other dimensions of variation include differences in classes of offenses (e.g., murders for profit versus murders animated by passion) and classes of offenders (e.g., juvenile murderers, mentally disabled murderers, and so on). As we noted in discussing the slippery-slopes argument in Part II.E, no a priori argument either precludes or mandates extending capital punishment to all such cases, because a priori arguments are not helpful here.

Let us consider the example of juvenile offenders. In a recent decision, the Supreme Court held that capital punishment may not be inflicted upon offenders who were under eighteen years old at the time of the offense.<sup>126</sup> Acknowledging the paucity of evidence either way, the Court speculated that such offenders are less deterrable than adults.<sup>127</sup> Below, we will review findings suggesting, by analogy to crimes of passion, that this speculation is mistaken. What if the facts turn out to be otherwise than the Court guessed? Suppose that there turns out to be a significant class of fifteen-year-old murderers, perhaps predominantly murdering other fifteen-year-old innocents, and suppose that relevant data suggested that allowing capital punishment for fifteen-year-old murderers would significantly deter those murders.

In our view, there is a strong argument that states would then be morally obligated to extend capital punishment to such cases (bracketing whether such a course would be legally permitted). If the obligation would attach, it is precisely because killing fifteen-year-old innocents is morally unacceptable and because capital punishment would be the best system for reducing the overall number of such killings. Only an implausible version of the act/omission distinction would suggest otherwise. On the other hand, suppose that the

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126. *Roper v. Simmons*, 125 S. Ct. 1183, 1196 (2005).

127. *Id.*

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 747

Court's speculation is correct and that murders by juveniles turn out to be genuinely undeterrable, perhaps because juveniles are not yet capable of reasoning clearly about the expected costs and benefits of crime or frequently act out of uncontrollable passion. Then the factual predicate for our view would simply fail to apply.

The same holds true for classes of offenses. Recent work has suggested, contrary to the intuitions of many, that capital punishment may well deter types of murders previously thought undeterrable.<sup>128</sup> In particular, the frequent conjecture that murders animated by passion are undeterrable may turn out to be erroneous. Should future work identify such a category of undeterrable murders, however, our view would straightforwardly entail that capital punishment ought not extend to such cases.

#### *D. Life-Life Tradeoffs and Beyond*

Every case we have discussed so far involves what we have called life-life tradeoffs: cases in which state execution deters many private executions. A very different set of moral and institutional problems arises when the issue is whether capital punishment should be used to deter serious offenses other than killing. Consider the sentence of capital punishment for particularly serious forms of rape, which the Supreme Court invalidated as cruel and unusual punishment.<sup>129</sup> Apart from constitutional constraints, would states be morally obligated to employ capital punishment if it could be shown, empirically, that each such execution would deter many future rapes?

We have given simple answers to the foregoing questions about variation in regional and international circumstances, and in classes of offenders and offenses, but no simple answers are possible here. The reason is that, unlike the other cases, the harms on the two sides of the ledger are not the same. Where capital punishment of murderers is at issue, the taking of life is the only morally relevant action in the picture, and the state's taking of life is entirely commensurable with the crimes it deters.<sup>130</sup> When other offenses are at issue, additional moral questions of commensurability and aggregation arise. May the state inflict a permanent deprivation of all personhood (death) upon a few to deter serious, but temporary, deprivations of autonomy (rape) that would otherwise be inflicted upon many? What if the many are children? The moral analysis here will necessarily be more complicated. If a utilitarian or consequentialist framework is used, the effects must be "translated" in some

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128. Shepherd, *Murders of Passion*, *supra* note 9, at 305.

129. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

130. This assumes that one rejects, as we did in *supra* Part II, the attempt to build the act/omission distinction right into the definition of the relevant action. We have rejected, in other words, the idea that the state's taking of life is itself a morally different act from the "private" taking of life that is made possible by the state's choice of a criminal justice policy that does not include capital punishment.

way so as to permit tradeoffs to occur. Suppose that an execution of a rapist would deter thirty rapes. How should capital punishment be evaluated in that event? It is most unclear how to think about these and similar cases; here we mean to bracket such questions entirely.

Likewise, nothing we say here entails a view, one way or another, on the question (for example) whether drunk drivers who kill recklessly or negligently should be subject to capital punishment. A relevant question is, of course, what the facts would show. Perhaps executing drunk drivers would not, in fact, save any lives, because drunk driving is not sensitive to criminal sanctions. More importantly, however, the question is different in principle from the ones we have addressed above. As with rape, capital punishment for nonpremeditated homicide is no longer an apples-to-apples comparison. We have argued that, once the act/omission distinction is rejected as to government action, the moral objections to capital punishment apply even more strongly to the murders that capital punishment apparently deters. This is not clearly true with respect to homicides caused by drunk driving. In such cases, the homicides deterred by capital punishment might stand on a different moral footing.

In short, 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. As we have noted, some opponents of capital punishment believe that deontological constraints forbid the use of capital punishment even in cases of egregious intentional killing. We make no attempt to argue, from within deontology, that they are wrong. But if life-life tradeoffs are involved, we believe that the deontological objection, shorn of act/omission confusion, is much harder to defend than a similar objection to the death penalty for drunk drivers.

#### CONCLUSION

We conjecture that something like the following set of views about capital punishment has been, and probably still is, widespread in the legal academy: capital punishment does not deter, or at least no one has set out even plausible evidence that it does so;<sup>131</sup> some categories of murders, especially crimes of passion, are undeterrable (at least by capital punishment);<sup>132</sup> even if capital punishment has a deterrent effect, the effect is trivial, perhaps because of the relatively small number of capital sentences and the long time lags between sentencing and execution;<sup>133</sup> and the system of capital punishment is rife with error and arbitrariness.<sup>134</sup>

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131. See Lempert, *supra* note 20, at 1222.

132. See *id.* at 1193-94.

133. See *id.* at 1192-93.

134. See *id.* at 1224.

December 2005] *IS CAPITAL PUNISHMENT MORALLY REQUIRED?* 749

The recent evidence raises legitimate doubts about all of these views: capital punishment may well have deterrent effects; there is evidence that few categories of murders are inherently undeterrable, even so-called crimes of passion; some studies find extremely large deterrent effects; and error and arbitrariness undoubtedly occur, but the evidence of deterrence suggests the possibility that some or even many prospective murderers may be receiving a clear signal.

The moral and legal commentary on capital punishment ought to be sensitive to any significant revision in what we know. The realm of homicide is replete with problems of discrimination, injustice, and arbitrariness, and these problems are far more severe than they are in the world of capital punishment as presently administered. If deterrence occurs, life-life tradeoffs are inescapably involved. And if deterrence occurs, a government that settles upon a package of crime-control policies that does *not* include capital punishment might well seem, at least *prima facie*, to be both violating the rights and reducing the welfare of its citizens—just as would a state that failed to enact simple environmental measures promising to save a great many lives.

The most common basis for resisting this conclusion, and our principal target here, is some version of the distinction between acts and omissions. With respect to government, at least, we mean to raise objections to that distinction in general, and the objections extend well beyond the domain of capital punishment. Death penalty opponents frequently appeal to an intuition that intentional killing by the government and its agents is morally objectionable in a way that simply allowing private killings is not. Whatever the moral relevance of the distinction between acts and omissions for individual conduct, we think it gets little purchase on questions of governmental policy. Government cannot help but act in ways that affect the actions of citizens; where citizens decide whether or not to kill each other in light of government policies, it is not clear even as a conceptual matter what it would mean for government not to act. For government to adopt a mix of criminal justice policies that happens not to include capital punishment is not an “omission” or a “failure to act” in any meaningful sense.

Likewise, deontological injunctions against unjustified killing, which we have not questioned here, are of little help in these settings. Unjustified killing is exactly what capital punishment prevents. In any case, the strongest arguments in favor of the act/omission distinction, involving individual liberty and overall consequences, do not apply in the context of public officials.

If this argument is correct, it has broad implications, some of which may not be welcomed by advocates of capital punishment. Government engages in countless omissions, many of which threaten people’s health and safety. Consider the failure to reduce highway fatalities, to regulate greenhouse gas emissions, to prevent domestic violence, to impose further controls on private uses of guns, or even to redistribute wealth to those who most need it. Suppose that it is not sensible, in these and other contexts, to characterize government

omissions as such. Or suppose that even if the characterization is sensible, it lacks moral relevance. If so, then government might well be compelled, on one or another ground, to take steps to protect people against statistical risks, even if those steps impose costs and harms; everything will depend on what the facts show and on the costs and benefits of alternative policies.<sup>135</sup>

Any objection to capital punishment, we believe, must rely on something other than abstract injunctions against the taking of life. If the recent evidence of deterrence is ultimately shown to be correct, then opponents of capital punishment will face an uphill struggle on moral grounds. If each execution saves many innocent lives, the harms of capital punishment would have to be very great to justify its abolition, far greater than most critics have heretofore alleged. There is always residual uncertainty in social science and legal policy, and in this domain the empirical controversy continues; we have attempted to describe, rather than to defend, the recent findings. But if those findings are right, capital punishment has a strong claim to being not merely morally permissible, but morally obligatory—above all from the standpoint of those who wish to protect life.

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135. For a general attack on the act/omission distinction from a utilitarian perspective, see BARON, *supra* note 111. If our argument is correct, some of Baron's arguments should be appealing to deontologists as well, and his controversial commitment to utilitarianism is not a necessary foundation for his conclusions.