

ABSTRACT

IS CAPITAL PUNISHMENT IMMORAL EVEN IF IT DOES DETER MURDER?

Thomas Kleven

After years of inconclusive debate, recent studies purport to demonstrate that capital punishment does indeed deter murder, perhaps to the tune of multiple saved lives for each person executed. In response to these studies, Professors Sunstein and Vermeule have argued that since capital punishment leads to a net savings of innocent lives, it may be morally required on consequentialist grounds. I argue, even assuming the validity of the studies, that capital punishment cannot be justified in the United States in the current historical context for reasons of justice that trump consequentialist considerations. Mine is not an argument that capital punishment is absolutely immoral, since in a sufficiently just society I think it can be justified, at least in some instances. Rather the point is, first, that the consequentialist argument countenances the execution of those who due to diminished mental capacity are not sufficiently blameworthy to warrant the death penalty, in particular children and the mentally impaired; and, second, that since social injustices contribute to murder, particularly among the impoverished and disadvantaged, that substantial societal reform must be undertaken before capital punishment could be considered justifiable. At that point it is an open question whether capital punishment would even be needed as a deterrent to murder.

IS CAPITAL PUNISHMENT IMMORAL EVEN IF IT DOES DETER MURDER?
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After years of inconclusive debate, recent studies purport to demonstrate that capital punishment does indeed deter murder,¹ perhaps to the tune of multiple saved lives for each person executed.² The basic thrust of the findings appears to be that, while at low levels of execution there is no deterrent effect and even a brutalizing effect that increases murder, beyond some threshold level of executions capital punishment is an effective deterrent, that the impact is greater the swifter the punishment is imposed, and

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¹ See, e.g., Harold Brumm & Dale O. Cloninger, *Perceived Risk of Punishment and the Commission of Homicides: A Covariance Structure Analysis*, 31 J. ECON. BEHAV. & ORG. 1 (1996); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569 (2001); Hashem Dezhbakhsh & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence From Postmoratorium Panel Data*, 5 AM. J. L. & ECON. 344 (2003); Zhiqiang Liu, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 EASTERN ECON. J. 237 (2004); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. Law & Econ. 453 (2003); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004); Joanna M. Shepherd, *Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 U. MICH. L. REV. 203 (2005); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004). As always with respect to such complicated empirical matters, there are studies as well that purport to show no deterrent effect. See, e.g., Craig J. Albert, *Challenging Deterrence*, 60 U. PITT. L. REV. 371 (1999); KEITH HARRIS & DERRAL CHEATWOOD, *THE GEOGRAPHY OF EXECUTION: THE CAPITAL PUNISHMENT QUAGMIRE IN AMERICA* (1997); Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003); Jon Sorenson, Robert Wrinkle, Victoria Brewer & James Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQUENCY 481 (1999).

² See Dezhbakhsh & Shepherd, *supra* note 1 (18 fewer murders per execution); Shepherd (2004), *supra* note 1 (3 fewer murders); Zimmerman, *supra* note 1 (14 fewer murders).

that by and large it works to deter all types of murder and among both whites and blacks.

In response to these studies, Professors Sunstein and Vermeule have argued that since capital punishment leads to a net savings of innocent lives, it may be morally required on consequentialist grounds.³ There is currently a heated public debate over capital punishment, with some proposing its abolition and others pushing to increase its use.⁴ If these studies and arguments such as Sunstein's and Vermeules's are found persuasive, they may help sway the debate and could contribute to a dramatic increase in the number of executions.⁵

³ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. ____ (2005).

⁴ On the one hand, for example, we have the Governor of Illinois imposing a moratorium on death sentences per doubts about the fairness of the defendants' trials. Dirk Johnson, "Illinois, Citing Faulty Verdicts Bars Executions," *New York Times*, Feb. 1, 2000. On the other hand, we have Massachusetts and New York considering reinstating capital punishment, and proposals in Congress to speed up the execution process by limiting appeals to federal courts. Pam Belluck, "Massachusetts Governor Urges Death Penalty," *New York Times*, Apr. 29, 2005; Al Baker, "Republicans Seek a Bipartisan Vote on a Bill to Reinstate the State's Death Penalty," *New York Times*, Mar. 3, 2005; "Republicans want to speed up death penalty," *Reuters News Service*, July 6, 2005.

⁵ In *Furman v. Georgia*, 408 U.S. (1972), the Supreme Court imposed a moratorium on capital punishment pending what it perceived to be needed procedural reform. As states began to reform their laws, the Court sanctioned the resumption of capital punishment in *Gregg v. Georgia* (1976) and companion cases. Between 1976 and 2003 there were 885 executions, and as of the end of 2003 there were 3,374 persons under sentence of death. Thomas B. Bonczar & Tracy L. Snell, "Capital Punishment, 2003," *Bureau of Justice Statistics Bulletin* 5, 10, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>. Between 1976 and 2002, there were 544,885 homicides. After remaining fairly constant over most of that period the homicide rate dropped significantly in the late 1990s and early 2000s; between 1999-2002 there were an average of 15,837 homicides per year. James Alan Fox & Marianne W. Zawitz, "Homicide

I shall argue here, even assuming the validity of the studies,⁶ that capital punishment cannot be justified in the United States in the current historical context for reasons of justice that trump consequentialist considerations. Mine is not an argument that capital punishment is absolutely immoral, since in a sufficiently just society I think it can be justified. Rather the point is that the United States is not that society, that capital punishment threatens to perpetuate the society's present injustices, and that substantial societal reform must first be undertaken before capital punishment could be considered justifiable. At that point it is an open question whether capital punishment would even be needed as a deterrent to murder.

Trends in the United States," Bureau of Justice Statistics at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm>. Given these numbers, a sharp increase in the use of capital punishment could easily produce many thousands of executions.

⁶ All the studies appear to be rigorous multi-variable regression analyses. As such, they may well influence the public debate over whether and how extensively capital punishment should be practiced. If the studies are accurate, an increase in executions might save even more lives. But as with all scientific analyses of causal relations, the validity of the methodology will always be open to question. See, e.g., Richard Berk, *New Claims about Executions and General Deterrence: Deja Vu All Over Again?* 2 J. EMP. L. STUD. 303 (2005) (criticizing the recent studies' methodology and conclusions, in particular the Mocan & Gittings study). In addition, as with the studies purporting to show no deterrent effect, *supra* note 1, there will always be some uncertainty as to the existence and extent of the causal connection between capital punishment and the murder rate. There is no uncertainty, however, about what will happen if the pro-deterrence studies contribute to the current push in this society for more and swifter executions. If that comes about, thousands more people are likely to be executed. It is imperative, therefore, that these studies be subjected to extensive critical inquiry. Beyond that, even if the studies are accurate, it is equally important to debate their policy and moral significance.

Part A of the paper details Sunstein's and Vermeule's thesis and sets forth points of agreement. In particular, I agree that consequentialist or utilitarian considerations have a prominent place in a just society, and that any society must make decisions that trade off life against life. That is why capital punishment cannot be ruled out as an abstract proposition under any and all social conditions.

Part B addresses the question of blameworthiness, focusing specifically on juveniles and the mentally impaired. Since they oppose the execution of innocent people even if that would deter murder, Sunstein's and Vermeule's consequentialist case for capital punishment assumes that it is only justifiable to execute those who are morally responsible for their acts. Yet they seem to support on deterrence grounds the execution of juveniles and the mentally impaired, implying that they view them as morally responsible for the murders they commit. Part B discusses objections to executing juveniles and the mentally impaired, on grounds that they are not sufficiently blameworthy to justify the ultimate punishment, and concludes that these objections have merit.

Part C addresses the issue of social injustice as a cause contributing to murder. I argue that the consequentialist justification for capital punishment is

morally permissible only under conditions of substantial social justice, and that those conditions do not now pertain in the United States, in particular as to the disadvantaged segments of society among whom murder is most common. Part D briefly concludes.

A. The Consequentialist Argument

In light of evidence purporting to show that capital punishment deters murder, Sunstein and Vermeule argue from a consequentialist or utilitarian perspective that society may have a moral obligation to employ it. The logic of the argument, as I understand it, proceeds as follows:

- a. No valid distinction exists between government action and inaction, such that government's failure to act to save lives is the moral equivalent of its affirmatively taking life.
- b. Absent countervailing considerations, of which the action/non-action distinction does not consist, government ought to act so as to preserve life.
- c. When faced with life-life trade-offs, i.e., when lives will be lost whether the government chooses to act or not to act, it ought (i.e., is morally obligated) to choose to maximize life.
- d. To the extent capital punishment deters more murders than those executed for committing murder, and to the

extent that other less drastic means to accomplish the same end are unavailable, it maximizes life and therefore should be practiced.

In this section I discuss areas of agreement with the argument, and in subsequent sections areas of disagreement. First, I agree that there is no valid moral distinction between government action and inaction. Therefore, for the government to allow someone to die when it could take steps to prevent it is comparable from a moral perspective to the affirmative taking of someone's life. Therefore, the argument that it is absolutely immoral for the government to execute someone for murder is incoherent when doing so deters murder, because under those circumstances it would be equally immoral not to execute murderers so as to prevent murder. Therefore, moral considerations other than the act/non-act distinction must be employed to resolve the question of whether to engage in capital punishment.

The reason why government action and inaction are morally equivalent is two-fold. First, at least when the government is capable of acting and has knowledge of the consequences of its choice to act or not, the choice not to act is in itself an action. This makes the act/non-act distinction logically and morally incoherent. Second, the very purpose of government is to promote society's welfare.

While varying moral perspectives are possible as regards what society may or may not do, or must or must not do, in promoting welfare, given the incoherence of the act/non-act distinction it seems unlikely that any of the political philosophies that undergird this society would absolutely ban capital punishment.

Utilitarianism certainly wouldn't support an absolute ban because by definition it requires government to maximize society's welfare,⁷ and if practicing capital punishment would do so then that's what should be done. This is essentially Sunstein's and Vermeule's argument. Nor would libertarianism support an absolute ban because by definition it requires government to protect people's right to live as they see fit so long as they don't interfere with others' commensurate right,⁸ and if executing murderers would help promote people's right not to be murdered then that's what should be done.⁹ Nor would Rawlsian egalitarianism support

⁷ See, e.g., John C. Harsanyi, *Morality and the theory of rational behavior*, in AMARTYA SEN & BERNARD WILLIAMS, EDS., *UTILITARIANISM AND BEYOND* 39 (1982); Henry R. West, *Mill's Proof of the Principle of Utility* in HARLAN B. MILLER & WILLIAM H. WILLIAMS, EDS., *THE LIMITS OF UTILITARIANISM* 23 (1982).

⁸ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

⁹ Some libertarians view the right to life as inalienable, and argue that capital punishment violates the murderer's right to life despite the murderer's having violated the victim's right. See, e.g., George H. Smith, *A Killer's Right to Life*, 10 *LIBERTY* 46 (1996). Others view murderers as having forfeited the right to assert their own right to life, and support capital punishment as justifiable retribution for violating the victim's right to life or per society's interest in promoting the libertarian principle of non-aggression against others. See, e.g., N. Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 *LOY. L.A. L. REV.* 609 (1997); J. Charles King, *A Rationale*

an absolute ban because its first principle requires that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others,"¹⁰ one of which basic liberties would have to be the right not to be deprived of life without just cause, and if executing murderers would deter violations of that right then that's what should be done.¹¹

for Punishment, 4 JOURNAL OF LIBERTARIAN STUDIES 151 (1980). Libertarians tend to favor retributive and restitutive theories of punishment, and to oppose punishment for the sake of deterring others. See, e.g., Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 166 (1996) ("Criminal law only incidentally concerns the use of punishment to deter others from committing crimes in the future"). The objection to deterrence as a justification flows from libertarianism's commitment to the principle that no one may be compelled to serve the interests of others against their will. See NOZICK, *supra* note 8, at ix, 33-34. But where there are harms (like murder) for which restitution is impossible and no compensation is adequate, society as a whole has a legitimate interest in preventing those harms. Therefore, deterrence seems consistent with libertarian principles, so long as sanctions are imposed on those who because of their acts deserve to be punished and not on innocent people. See, e.g., King, *supra* at 158 ("[E]veryone...has reason to wish to see a practice followed that will raise the cost of violating the principles of right and thereby discourage people from doing so...A chief point of the whole practice is to deter, but the practice does not thereby allow punishing those who have committed no offense.").

¹⁰ JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).

¹¹ Rawls does not develop a full theory of punishment and does not directly discuss capital punishment. He does say that "the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end." RAWLS, *supra* note 10, at 314. And that "(h)aving agreed to these principles [of justice] in view of the reasons already surveyed, it is rational to authorize the measures needed to maintain just institutions, assuming that the constraints of equal liberty and the rule of law are duly recognized." *Id.* at 576. To me this suggests that it might well be justifiable in a generally just society to execute those who intentionally and unjustifiably deprive others of their lives and who are mentally competent enough to be deemed blameworthy for their acts; but if, and only if, it can adequately be shown that capital punishment deters murder more so than other measures that don't deprive the murderer of his own life. Otherwise it would not be "needed to maintain just institutions." In other contexts, however, capital punishment seems more problematic. For example, it would seem unjustifiable to

This does not yet mean that utilitarianism, libertarianism and egalitarianism would require capital punishment, but only that they would not absolutely ban it. In fact, in some instances all three approaches would counsel against capital punishment and require that it not be employed. Suppose, for example, that practicing capital punishment would produce more rather than less murders. Then practicing it would violate utilitarianism by detracting from rather than promoting society's welfare, would violate libertarianism since government would then be contributing to rather than protecting against the violation of people's libertarian rights, and would violate egalitarianism by undermining the right not to be deprived of life without just cause.

That moral thinking neither absolutely bans nor absolutely requires capital punishment, but rather sometimes supports and sometimes counsels against it depending on the circumstances, is what leads Sunstein and Vermeule to conclude that an empirical analysis of the actual impact of capital punishment is necessary to the moral decision of

execute thieves, even if execution were the most effective deterrent, because the punishment imposed on the thief is disproportionate to the injustice that thievery entails. And it would seem unjustifiable to execute those subjected to social injustices that causally contribute to the murders they commit, since then capital punishment would be helping to maintain unjust institutions.

whether to practice it. I agree with their argument up to this point, that is, I agree that capital punishment can at times be justified on moral grounds. However, for reasons to be developed below I do not think that capital punishment can be justified in this society at this historical juncture, whereas I take Sunstein and Vermeule to argue that it can be.

A second area of agreement is with the notions that absent countervailing considerations society ought to act so as to preserve life, that in so doing government will often have to make life against life trade-offs, and that in making such decisions the goal should be to maximize life. That society should preserve life, and a goal of preserving more rather than less life, follows from all the philosophies discussed above. And that life-life trade-offs unavoidably impact many if not most government decisions - capital punishment, going to war, environmental regulation, social welfare benefits, constructing highways, and many more - is apparent. However, countervailing moral considerations may at times compete with the consequentialist argument for capital punishment, and in my judgment Sunstein and Vermeule do not give adequate play to such considerations, in particular to the related issues of murderers' blameworthiness for their acts and of the impact

of social injustices in contributing to murder. The next two parts address these considerations.

B. The Question of Blameworthiness - Executing Juveniles and the Mentally Impaired

Sunstein and Vermeule limit their analysis to the consequentialist goal of preventing murder. This intentionally avoids the question of whether capital punishment is morally justifiable or required for retributive reasons irrespective of its deterrent effect.¹² Consequently, they do not address the question of a murderer's blameworthiness for the act of committing murder. While blameworthiness is an essential and sticky component of a retributive justification for capital punishment, I also think it relevant to and problematic for a consequentialist rationale. This is especially so with regard to juveniles and the mentally impaired in light of Supreme Court decisions banning their execution on moral grounds,¹³ strong public sentiments opposed to executing

¹² For retributive arguments in favor of capital punishment, see, e.g., Paul G. Cassell, *In Defense of the Death Penalty*, in HUGO ADAM BEDAU & PAUL G. CASSELL, EDS., *DEBATING THE DEATH PENALTY* 183, 197 (2004) ("Capital punishment's retributive function vindicates the fundamental moral principles that a criminal should receive his just deserts. Even if capital punishment had no incapacitative or deterrent utility, its use would be justified on this basis alone."); Louis P. Pojman, *Why the Death Penalty Is Morally Permissible*, *id.*, at 51, 56 ("Intentionally taking the life of an innocent human being is so evil that absent mitigating circumstances, the perpetrator forfeits his own right to life. He or she deserves to die.").

¹³ *Atkins v. Virginia*, 536 U.S. 304, 316, 318 (2002) (banning the execution of the mentally retarded as cruel and unusual punishment on

them,¹⁴ and the large numbers likely to be executed if the consequentialist argument holds sway.¹⁵

the grounds that "today our society views mentally retarded offenders as categorically less culpable than the average criminal"; and that: "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."); *Roper v. Simmons*, 125 S.Ct. 1183, 1196 (2005) (banning the execution of juveniles under 18 at the time of the offense: "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); *Ford v. Wainwright*, 477 U.S. 399 (1986) (banning the execution of the insane: "For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life... Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."). Admittedly these points are debatable, as evidenced by the closeness of the cases, with *Roper* and *Ford* being 5-4 decisions and *Atkins* 6-3. The point is that without that debate advocating the execution of juveniles and the mentally impaired on consequentialist grounds is incomplete.

¹⁴ In a 2003 Gallup poll 75% of the respondents opposed the death penalty for the mentally ill, 82% for the mentally retarded, and 69% for juveniles. Sourcebook of Criminal Justice Statistics Online at <http://www.albany.edu/sourcebook/pdf/t251.pdf>.

¹⁵ As of year end 2003, 67 (representing 2% of the total) of prisoners under sentence of death were under 18 years of age at the time of arrest; 341 (or 11% of the total) were between 18-19; and 843 (or 27% of the total) were between 20-24. Bonczar & Snell, *supra* note 5, Table 7, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>. Between 1976 and 2002, 66,764 homicide offenders (representing 11% of the total offenders) were under the age of 18 at the time of the offense; another 218,648 homicide offenders (representing 36% of the total) were between 18-24. Fox & Zawitz, *supra* note 5, at <http://www.ojp.usdoj.gov/bjs/homicide/tables/oagetab.htm>. Given these numbers, widespread use of capital punishment against juvenile and other youthful offenders would produce hundreds if not thousands of executions.

Although they do not discuss the issue of blameworthiness, Sunstein and Vermeule seem aware of it when they attempt to skirt, unsuccessfully I think, the question of whether their analysis would also justify executing innocent people if that would on balance save yet more innocent lives through its deterrent impact on murder. Thus they say, though without explaining why, that “[o]f course it is prima facie objectionable, worse than outrageous, if the state proposes to kill people whom it knows to be innocent.”¹⁶ But why should that be so if it would deter the murder of even more people? For example, to the extent that potential murderers value their loved ones’ lives more than their own, an entirely plausible assumption in many instances, then executing murderers’ loved ones might well deter more murders than would executing the murderers themselves. If that seems objectionable on moral grounds despite the net saving of life, whereas executing murderers does not, it must be because murderers are thought blameworthy whereas their loved ones are not and because absent blameworthiness knowingly executing an innocent

¹⁶ Sunstein & Vermeule, *supra* note 3, at ___. This is actually a contradiction in terms. To say that knowingly executing the innocent is “worse than outrageous” implies that it can’t be justified, but to say that it is only “prima facie objectionable” only creates a presumption that could conceivably be overcome, for example by a consequentialist showing that intentionally executing the innocent would save even more innocent lives. This contradiction demonstrates, I think, Sunstein’s and Vermeule’s ambivalence over the issue of blameworthiness.

person in order to deter murder is deemed immoral - for example, because it violates the innocent person's fundamental right to life.¹⁷

Therefore, Sunstein and Vermeule assume that murderers are morally blameworthy. In this society that assumption underlies criminal law in general and death penalty jurisprudence in particular.¹⁸ Many criminal law doctrines

¹⁷ Given the virtual impossibility of employing capital punishment without error, it is inevitable that some innocent people will be executed. If these knowing executions are to be distinguished from executing other innocent people such as murderer's loved ones, it must be because not to allow capital punishment at all due to the inevitability of mistakes would condemn even more innocent people to death by murders that could be deterred through the use of capital punishment. As Sunstein and Vermeule put it: "a legal regime with capital punishment predictably produces far fewer arbitrary and irreversible deaths than a regime without capital punishment." *Id.*, at ___. That depends on the adequacy of the process of determining guilt and the frequency of mistakes. Sunstein and Vermeule argue that the evidence shows there to be substantial accuracy in inflicting capital punishment. *Id.*, at ___ and note 94. On the other hand, many commentators have argued that procedural safeguards in capital cases are grossly inadequate. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000) (discussing the political incentives of the capital punishment system to convict and the many serious errors resulting from the inadequacy of the process - e.g., inadequate representation of and resources available to capital defendants, prosecutorial misconduct such as suppressing evidence favorable to defendants, and overreliance on an overtaxed appeals process to correct mistakes - and advocating a more conscientious effort to assure fair trials in capital cases); Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265 (2001) (discussing evidence of frequent errors in capital cases and recommending solutions). Personally, in light of the racial and class bias that infects the capital-punishment system and the society at large, see *infra* Part C, I seriously doubt that its inadequacies can be fixed. Compare Kenneth Williams, *The Death Penalty: Can It Be Fixed?* 51 CATH. L. REV. 1177 (2002) (arguing that, except for war criminals and mass murderers, the death penalty should be abolished because of the incurable racism that infects the system). If not, then substantially increasing capital punishment is likely to substantially increase the incidence of innocent executions, possibly to the point of overwhelming any deterrent impact capital punishment may have.

¹⁸ See, e.g., Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 Vand. L. Rev. 1383 (2003); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the*

that excuse or mitigate the sanction for actions that would otherwise be punishable or punished more severely - e.g., the defenses of insanity, self-defense, or duress - have their roots in concerns over whether someone ought to be deemed blameworthy under those circumstances.¹⁹

Yet at times Sunstein and Vermeule seem ambivalent about blameworthiness. Thus with regard to juvenile and mentally-impaired murderers they say that "no *a priori* argument either precludes or mandates extending capital punishment to all such cases."²⁰ And if there is sufficient evidence that executing 15-year-old murderers (or, we must also assume, murderers of any age) would significantly deter murder, then "[i]n our view, there is a strong argument that

Interpretation of Doctrine, 73 CAL. L. REV. 323, 329-32 (1985); Stephen J. Morse, *Brain and Blame*, 84 Geo. L.J. 527 (1996).

¹⁹ Re insanity, see *infra* note 34. Re self-defense, see, e.g. Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 999-1000, 1027 (2005) (rejecting traditional theories of self-defense based on a "lesser harmful results" approach where "the aggressor alone is responsible for the situation and hence the weight of his interests ought to be diminished," or a "forced choice" approach where the defender's act is excused because he "lacks real choice, and so his act is not fully voluntary" or is justified because "the aggressor, as the one who forces the defender to choose between his own life and the life of the aggressor, ought to be the one who pays the price"; and advocating "a theory of forced consequences" based on "the unjust threat posed by the aggressor." Re duress, see, e.g., John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 277-78 (1999) (rejecting the "traditional Aristotelian" view of the defense of duress as based on the involuntary and "essentially unfree" nature of the act, as well as "moralized" theories that justify certain voluntary acts on the basis of "contextualized normative judgments"; and advocating a "utilitarian model" that excuses certain coerced acts due to their "undeterrability").

²⁰ Sunstein & Vermeule, *supra* note 3, at __.

states would then be morally obligated to extend capital punishment to such cases.”²¹

That certainly follows from a consequentialist perspective. What is not clear is whether they view such murderers as blameworthy, in contrast to the innocent people it would be “worse than outrageous” to execute on consequentialist grounds. That the issue is controversial is evidenced by the insanity defense as well as the Supreme Court’s banning of the execution of the insane, the mentally retarded and juveniles as cruel and unusual punishment, all of which derive from a perceived (albeit debatable) lack of blameworthiness.²²

Note, however, that the existence of the insanity defense, and banning the execution of the mentally impaired and of juveniles, might well detract from the deterrent impact of the death penalty. If capital punishment deters murder, it must be because potential murderers are aware of the possibility. But if they are also aware of the possibility of escaping execution through an insanity defense or because of their mental incapacity or age, then

²¹ Sunstein & Vermeule, *supra* note 3, at ___.

²² See *supra* note 13.

some might be willing to proceed; whereas, they might not under a "you do the crime, you do the time" approach.²³

Therefore, unless executing mentally-impaired or juvenile murderers is morally objectionable for other reasons, Sunstein's and Vermeule's consequentialist analysis suggests that it may be morally obligatory to execute them in the face of evidence of its deterrent effect. In fact, however, there is little such evidence. None of the studies purporting to show the deterrent effect of capital punishment controlled for the age or mental state of the offender, and one cannot assume that juveniles and the mentally impaired will respond to capital punishment in the same way as "normal" adults.²⁴ Therefore, the only way to

²³ In banning the execution of the mentally retarded in *Atkins*, *supra* note 13, at 320, and of juveniles under 18 in *Roper*, *supra* note 13, at 1196, in addition to the moral objections the Supreme Court raised to their execution per diminished culpability, it also questioned whether they are susceptible to deterrence due to their impairments and immaturity. In both instances the Court was speculating, as Sunstein and Vermeule note with regard to *Roper*, Sunstein & Vermeule, *supra* note 3, at ___, and it could be that executing them deters murders by other juveniles and mentally-impaired persons. But that is not a sufficient reason for executing them, if there are moral objections to doing so. Beating a three year old child might well be an effective way to control her behavior, but that does not make it right.

²⁴ Between 1976 and 1993, the homicide offending rate for those between 14-17 years of age almost tripled from 11.4 to 31.3 per 100,000 population. Between 1993 and 2002, the rate declined rapidly to 9.0, somewhat less than the 1976 rate. During that period the overall homicide rate, which between the early 1970s and mid 1990s was roughly twice what it had been in the prior 20 years, declined for all age groups but by far the most for those between 14-17. Fox & Zawitz, *supra* note 5. What accounts for this decline? Following the Supreme Court's reinstatement of the death penalty in 1976 after a four year moratorium, executions, of which there were a total of only 885 between 1977 and 2003, began to rise in the mid-1980s from 21 in 1984 to a peak of 98 in 1999 followed by a drop to 65 in 2003. Bonczar & Snell, *supra* note 5,

tell whether executing juveniles and the mentally impaired deters murder is to change the law and experiment on them.²⁵

Although a consequentialist approach to the problem would seem to recommend such experimentation, at times Sunstein and Vermeule seem uncomfortable with that, stemming seemingly from concerns over blameworthiness. Thus, one of their arguments against executing the innocent or using torture in order to deter murder is as follows:

[I]t 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

at 10. Conceivably, the decline in the murder rate is attributable to the resumption of and increase in executions. But the decline was greatest among those under 18, who were the least likely to be executed. Why so? Conceivably because of the fear that the death penalty might be practiced more frequently against them as well. But then in that case it might not be necessary to execute them in order to deter murder, so long at least as the possibility of execution remains open; unless, on the other hand, the failure to extend the death penalty to them over a period of time dissipates the fear. If so, now that the Supreme Court has banned the execution of juveniles, one might expect the juvenile murder rate to rise again. If it doesn't, then one may have to conclude that something other than a resumption of capital punishment produced the recent decline in the juvenile murder rate, thereby undermining the deterrence hypothesis. If it does, then the only way to tell whether executing juveniles deters murder will be to change the law and begin executing them in sufficient numbers to study the impact.

²⁵ That is certainly true with regard to juveniles. Only 22 juveniles under 18, 13 of whom were in Texas, were executed between 1976 and the Supreme Court's banning of their execution in 2005. Death Penalty Information Center at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203#execsus>. That clearly seems an insufficient sample to study the deterrent impact of executing them. I don't know what data is available with regard to the mentally impaired who were executed prior to the bans on executing the insane in 1986 and the mentally retarded in 2002. In any event, accurately evaluating the deterrent impact of executing the mentally impaired on other mentally impaired people would seem quite hard to do, since the size of the target group (other mentally impaired people) on which the extent of the deterrence depends is highly uncertain.

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 reliable data about its deterrent effects.²⁶

But not much, if any, reliable data with regard to juveniles and the mentally impaired. Would experimenting on them in order to gather the data make them "hapless victims", especially if it should turn out that executing them has no deterrent effect? The fact that they did the deed is not enough to answer no, because that begs the very question at issue of whether juveniles and the mentally impaired are sufficiently blameworthy for the murders they commit to justify executing them. If not, then executing them is a type of victimization.

In objecting to the execution of innocent people and other disturbing practices, Sunstein and Vermeule show that they are not pure consequentialists. Consequently, I don't think they can complete their case for the sometimes moral obligation of society to practice capital punishment without more fully addressing non-consequential objections to capital punishment as applied not only to the mentally impaired and juveniles but also in general. If it is immoral to execute blameless people to deter murder, and if at least some murderers are not morally blameworthy or for

²⁶ Sunstein & Vermeule, *supra* note 3, at __.

some reason have diminished blameworthiness, then how could society be morally obligated to execute them?

Let's begin by asking, in light of the fact that society routinely and unavoidably makes life-life trade-offs involving innocent people, why the issue of blameworthiness is thought relevant at all to capital punishment. Many things society does or chooses not to do risk life and cause premature death to some innocent and blameless people. When that is so, the argument that society should act so as to maximize life unless there is good reason not to seems strong. Everything else being equal, not to prefer more over less life would contravene the high value that all moral philosophies place on human life.

The value of human life, though, entails more than mere longevity, and at times the quality of life may enter the equation. For example, just as a terminally ill person might choose to die rather than prolong a life of pain, so a society might decide to limit the resources it expends to keep terminally ill people alive and to devote them instead to improving the society's overall well-being in other ways that may or may not involve life-life trade-offs.²⁷ So long

²⁷ See, e.g., NORMAN DANIELS & LAMES E. SABIN, *SETTING LIMITS FAIRLY: CAN WE LEARN TO SHARE MEDICAL RESOURCES?* (2003) (on the importance of developing a fair and democratic process for making decisions regarding the allocation of resources for medical treatment in light of the inevitability of having

as that decision is made pursuant to a fair process, meaning one in which all affected parties can fairly participate and which fairly accounts for their interests, it would not seem morally objectionable. Such a decision would seem permissible, for instance, in a society conforming to Rawlsian principles of justice, under which there is no absolute right to life but only the right to have one's life treated as of comparable value to everyone else's life through a fair decision-making process.²⁸

So if there are situations when morality permits, and perhaps requires, the sacrifice of innocent lives for the benefit of the whole, why not with regard to capital punishment if it could be shown that executing innocent or otherwise blameless people would on balance save lives? If it is permissible at times to withhold treatment from a terminally ill person or even to practice euthanasia,²⁹ or in a hostage-taking situation to kill some innocents in order to save yet more,³⁰ then why not to execute the mentally impaired or juveniles if in fact that would contribute to deterring murder?

to prioritize the uses of scarce resources and the unresolvable ethical debates over their proper allocation).

²⁸ See RAWLS, *supra* note 10, at 221-43 (discussing political justice and the rule of law).

²⁹ See, e.g., JOHN KEOWN, ED., EUTHANASIA EXAMINED (1995) (essays from a variety of perspectives on various types of euthanasia, from the withholding of life-saving treatment to active mercy killing of the terminally ill, and whether with or without the request of the party).

³⁰ See *infra* note 31.

It seems to me that there is no logically correct way to resolve these questions, and that ultimately a value judgment is required in terms of what are deemed relevant moral considerations. The terminally ill analogy might be distinguished from executing the mentally impaired or juveniles on the ground that the terminally ill person has little time to live in any event and is suffering great pain, such that allowing the person to die or ending her life is thought more humane than keeping her alive. And the hostage-taking situation might be distinguished on the ground that there is no viable alternative,³¹ whereas there are other potentially effective ways of deterring murder that should be exhausted before resorting to the execution of those society deems blameless.

But suppose it turns out that executing the mentally impaired or juveniles really would deter certain types of murder far more effectively than other measures; for example, murders by other mentally impaired people and juveniles who might be more likely to kill in the absence of the possibility of facing execution. Then on pure

³¹ For example, although it may not have been a classic hostage-taking situation, the principle criticism of the government's assault on the Branch Dividians at Waco, in which numerous people including children were killed, has been that there was still time to negotiate a solution. See, e.g., DAVID B. KOPEL & PAUL H. BLACKMAN, NO MORE WACOS: WHAT'S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT (1997) JAMES R. LEWIS, ED., FROM THE ASHES: MAKING SENSE OF WACO (1994); DICK J. REAVIS, THE ASHES OF WACO: AN INVESTIGATION (1995).

consequentialist grounds executing them would be permissible or per Sunstein and Vermeule even obligatory. If that seems objectionable it must be - and this is the crux of the moral debate - that for some reason it would be inhumane to execute them even for the overall benefit of society, which is simply another way of saying that they are not sufficiently blameworthy for the murders they commit to warrant executing them.

This is an example of a familiar objection to utilitarianism as a philosophy, namely, that it allows individuals to be used for society's benefit in ways that violate human dignity.³² For example, if human dignity entails the right to be free, and if people operating behind a veil of ignorance would not under any conditions agree to subject themselves to slavery, then to an adherent of a Rawlsian theory of justice slavery is morally wrong even if

³² See, e.g., Dan W. Brock, *Utilitarianism and Aiding Others*, in WILLIAMS & MILLER, *supra* note 7, at 225, 239 (arguing that utilitarianism would justify forced organ donation at the cost of the donor's life in order to save two other persons' lives, and that the example shows utilitarianism's insufficient sensitivity to the rights of individuals and its preparedness to use people "in whatever way will maximize overall utility"). Compare Harsanyi, *supra* note 7, at 59-60 (rejecting the moral monstrosity claim by excluding anti-social preferences and employing a rule-utilitarian approach that recognizes "the importance of social institutions which establish a network of moral rights and of moral obligations... that... must not be infringed upon on grounds of immediate social utility"). Harsanyi's move is tantamount to incorporating into the utilitarian decision-making process moral constraints that trump what a social utility analysis would otherwise require, and akin to Sunstein's and Vermeule's reluctance to support executing the innocent in order to save yet more innocent lives.

it does benefit society as a whole.³³ In short, in the interest of protecting individual rights justice may require at times that society forego that which benefits society as a whole. Before proceeding to execute the mentally impaired or juveniles, or anyone for that matter, fairness requires a fair assessment of such moral considerations.

Blameworthiness, as noted, is central to the jurisprudence of criminal law. And the determination of blameworthiness depends on moral considerations that at times may trump a consequentialist or utilitarian calculation of society's overall welfare. The two considerations I want to address here are the state of mind of mentally-impaired and juvenile murderers and society's contribution to those murders.

A principal argument that has been advanced against executing the mentally impaired and juveniles below a certain age is that they lack the mental capacity to be deemed deserving of punishment or at least of execution.³⁴

³³ RAWLS, *supra* note 10, at 158-9, 248.

³⁴ See *supra* note 13. As debates over what constitutes legal insanity show, what mental capacity is required to hold someone blameworthy is controversial. The prevailing approach in this society is that a person must be incapable of understanding the difference between right and wrong in order to avoid punishment on grounds of insanity. The underlying assumption must be that absent that understanding people lack the ability to choose to conform to society's notions of right behavior, and that absent that ability blameworthiness shouldn't attach. On the other hand, under the minority approach the insanity defense is available to people who understand the difference between right and wrong but who as a result of irresistible impulses or other reasons are

The concern over mental capacity ultimately derives from a commitment to the notion that human beings have free will, meaning the capacity to make reasoned and rational choices, and from the moral sentiment that executing people when that capacity is lacking or highly impaired would violate human dignity in much the same way as executing the innocent.

Whether humans actually have the capacity to make free willed choices, or whether their sense of having free will is an illusion and their choices are really determined responses to biological and environmental stimuli, is a long-standing debate that is probably unresolvable as a scientific matter. For example, the fact that different people respond differently in similar situations, or that particular people respond differently to similar situations over time, could be seen as evidence of free-willed choice or of nuances in the stimuli that produce determined

incapable of conforming their behavior thereto. But the assumption underlying the prevailing approach must also be that absent the capacity to understand the difference between right and wrong people lack the ability to choose to conform to society's notions of right behavior, and that absent that ability blameworthiness shouldn't attach. If the policy underlying the two insanity rules is the same, then how to distinguish between them? Perhaps on the ground that it seems too easy to manufacture a claim of, or too hard to determine, inability to conform when someone knows the difference between right and wrong, whereas a genuine incapacity to understand that difference is easier to determine. On these points and the insanity defense generally, see, e.g., ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* (1967); ROBERT F. SCHOOP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY* (1991); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371 (1986); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000).

responses. Consequently, society's only option is to address the matter through the moral philosophies it adopts, whether those philosophies themselves are a product of free choice or are determined.³⁵

My take on the matter is dialectical and pragmatic. Dialectically speaking, human action is a process in which free will and determinism are internally related to each other, meaning that people's choices are free-willed and determined at the same time; meaning that people's choices are in response to and are highly conditioned though not totally controlled by circumstance, and whether the free-willed or deterministic component of action is more prominent or significant depends on the context.³⁶ Thus an

³⁵ See, e.g., DANIEL N. ROBINSON, PRAISE AND BLAME (2000) (noting the centrality of the free will versus determinism conundrum to the issue of blameworthiness, and attempting to transcend the dilemma through a form of "moral realism" which asserts the existence of objective moral truths that are knowable through intuition and reason and that warrant praise or blame on the basis of "introspectively known powers of action and restraint... subject to projection onto creatures of the same or similar type," at 47); EUGENE SCHLOSSBERGER, MORAL RESPONSIBILITY AND PERSONS 6 (1992) ("[W]e are morally evaluable for those properties we instantiate that show something about us as moral agents, that reveal, reflect, or express our attitudes, beliefs, values, and so on. A person is blameworthy insofar as the moral stance reflected in those moral beliefs and values is incorrect... Autonomy, freedom, and the ability to do otherwise are not prerequisites for moral responsibility.")

³⁶ See BERTELL OLLMAN, DANCE OF THE DIALECTIC 27 (2003) ("There are not some elements that are related to the factor or event in question as 'causes'... and others as 'conditions'... Instead we find as internally related parts of whatever is said to be the cause or determining agent everything that is said to be a condition, and vice-versa."). A similar approach seems implicit in some theories of criminal law. Compare, e.g., MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997) (on the capacity or lack thereof to reason rationally in particular contexts as a way to reconcile the free-will/determinism conundrum); Morse, *supra*

unemployed and starving person would more likely opt to take the risks associated with stealing food than someone with a job and a full belly. But since the starving person could choose to starve to death rather than steal to survive, a moral judgment must be made as to whether it is just to punish him under those circumstances.

Pragmatically speaking, since it is impossible to tell whether free will or determinism drives action, then both are viable explanations and which explanation is adopted in given instances only matters when the practical consequences differ.³⁷ Thus punishing or excusing the starving thief can be justified under either explanation depending again on one's moral philosophy. From a pure consequentialist perspective, whether the thief or anybody else has free will or not is irrelevant since punishing the thief may deter thievery generally in either case, whether because people freely choose or are simply conditioned to desist from crime in order to avoid punishment. The only question is whether society as a whole is deemed better off in punishing that type of theft. From a retributive perspective, since it

note 15 (on the ability or lack thereof to exercise self-control in context as a way to reconcile the free-will/determinism conundrum).

³⁷ See WILLIAM JAMES, PRAGMATISM (1907) (from Lecture Two: What Pragmatism Means: "The pragmatic method is a method of settling metaphysical disputes that otherwise might be interminable... The pragmatic method in such cases is to try to interpret each action by tracing its respective practical consequences... If no practical differences whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle.")

presumes free will, if we say in light of an instinct to survive that the starving thief lacks or has diminished free will, then punishment might be thought unwarranted or at least appropriately mitigated. If, on the other hand, we say the person has free will, then whether to punish him requires a moral judgment balancing his interest in remaining alive as against other people's property interests.³⁸

So would it be inhumane to execute the mentally impaired and juveniles, or are they sufficiently blameworthy for the murders they commit to warrant executing them? If executing them seems objectionable, it is not because they totally lack free will or are unresponsive to conditioning. Except in the case of severely delusional people or infants, that is probably not the case; and if executing the mentally impaired and juveniles actually deterred murder the proof would be in the pudding.

In the final analysis, therefore, society's moral judgment about when people lack the mental capacity to be held criminally responsible for their acts or deserving of

³⁸ Compare Jeremy Waldron, *Why Indigence Is Not a Justification*, in WILLIAM C. HEFFERNAN & JOHN KLEINIG, EDS., *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 98, 99 (2000) (opining, while noting the philosophical argument for indigence as a justification for criminal acts, that such a defense is unlikely to be recognized since that "would call into question the legitimacy of the general rules of property in a society").

execution entails unavoidably debatable line drawing. Mental competency is a question of degree. There is no clear-cut line on one side of which people are clearly mentally competent and on the other side clearly not. And there is ample room for disagreement among people's moral sensibilities about the matter, as reflected for example in debates over what the legal standard of insanity ought to be and what the age limit ought to be for executing someone.³⁹

Scientific analysis can help decide by shedding light on how people's mental processes actually function, although there will often be disputes over the meaning and validity of scientific findings and as in other areas where science and law intersect a value judgment will ultimately be required.⁴⁰ And judicial wrangling over the constitutionality of the death penalty may help by

³⁹ See *supra* note 34, re the legal standard of insanity. See the debate between the majority and dissent opinions in *Roper*, *supra* note 13, re the appropriate age limit for execution.

⁴⁰ See, e.g., Maureen L. Condic & Samuel B. Condic, *The Appropriate Limits of Science in the Formation of Public Policy*, 17 NOTRE DAME J. LAW ETHICS & PUB. POL. 157, 161-62 (2003) ("When it comes to morals, the key insight to remember is that scientific research is about the possible, not about the ethical or the good. As such, scientific evidence can inform society whether something can, at this point in time, be done and scientific judgment can predict whether it is probable something will be done in the future, but science is inherently silent on the topic of whether it should be done... In matters both practical and moral, it is nearly impossible to navigate the arcane world of the newly possible without some input from scientists themselves. Rationally considering the direction public policy will take to best serve the interests of a free and democratic society requires an assessment of what is, in fact, possible now, what will be (to the best of our knowledge) likely in the future and what risks are associated with this possibility. Such an assessment can only be made by relying on the testimony of scientific experts.").

contributing to society's understanding of the moral issues, although in the long run the political process is likely to control the outcome.⁴¹ Consequently, the moral legitimacy of society's decision of whether to practice capital punishment and against whom depends on the justness of the decision-making process. If that process is unfairly biased in one way or another, then the decisions emanating from it are morally illegitimate.

Unfair biases might consist of procedural defects such as a political process structured in favor of or against a particular group or class, or of social injustices that impede people's opportunity to participate equitably in decision-making or are themselves to blame for causing crime. Without question this society (and many others) have historically been biased against the mentally impaired,⁴²

⁴¹ See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that courts are highly limited in their ability to bring about meaningful social change due to a lack of sufficient independence from other branches of government on whose support they depend to implement their rulings, and that courts are most effective when they follow rather than lead political reform).

⁴² See, e.g., BRUCE A. ARRIGO, *THE COUNTOURS OF PSYCHIATRIC JUSTICE* 97-104, 130-35 (1996) (surveying the evolution of psychiatric institutions in the United States from the colonial period characterized as "often gruesome and brutal"; to the first half of the 19th century when despite a small scale "moral treatment movement" based on "principles of decency and respect" most mentally disordered people remained untreated; to the latter half of the 19th century when the moral reform movement dissipated and which witnessed institutionalization in large-scale psychiatric facilities where the mentally disordereds' experiences "were comparable to their experiences in colonial America"; to the first half of the 20th century characterized, despite a more humane mental hygiene movement that benefited a few, by a burgeoning institutionalization of the mentally disabled in state hospitals that functioned as "holding

and whether it is adequately and fairly responding to their needs for appropriate treatment today seems highly doubtful.⁴³ Juveniles below a certain age are excluded from the political process, and the assumption that parents and other adults will adequately account for their interests may not always be warranted. That school-age children murder by the tens of thousands is a sign that this society has grossly failed to respond to their needs for appropriate rearing.⁴⁴

Under these conditions I would say that society is not sufficiently just toward the mentally impaired or juveniles as to justify executing them. This is not to relieve them of responsibility for their anti-social acts, but to limit how society may in justice respond to anti-social acts for

tanks"; to the latter 20th century which gave rise to a deinstitutionalization movement emphasizing outpatient treatment and maintenance-based strategies, but which has been characterized by acute housing problems and ineffective support services leading to a revolving door pattern of periodic crises, commitment and release, and by the increased incarceration of the mentally disabled in facilities which lack professional and supportive care and where they are frequently victimized).

⁴³ *Id.* at 3, 13, 103 (characterizing the history and present-day legacy of the treatment of the mentally disabled, despite periodic reform movements, as "the politics of abandonment" and as based on "an implicit and negative assumption about individuals who act differently from what we determine to be acceptable or normal behavior"; and concluding that "the failure of existing mental health law to adequately provide for the needs of disordered citizens is immense").

⁴⁴ Almost 67,000 juveniles under 18 committed murder between 1976-2002, *supra* note 15. On the society's failure to respond to children's needs, see, e.g., ROBERT V. HECKEL & DAVID M. SHUMAKER, CHILDREN WHO MURDER: A PSYCHOLOGICAL PERSPECTIVE (2001) (identifying declining support systems for young children per changes in family structure, lack of community services, unresponsive schools and juvenile justice system as contributing factors).

which it too bears responsibility. Society may and is indeed obligated to limit the freedom of those whose conduct shows they are likely to murder innocent people. But there is something perverse about society's executing them for crimes resulting from its dereliction of duty towards them. More consistent with human dignity, when society is itself at least partially to blame for murders committed by juveniles and the mentally impaired, is for it to do what it can to respond fairly to their needs so as to minimize their anti-social behavior, to attempt through rehabilitation to undo the harm it has done to those who commit crimes as a by-product of society's failings so that they can resume normal lives, and to treat humanely those who must remain confined because they have become irretrievably incorrigible.

C. Social Injustice as a Cause of Murder - Executing the Disadvantaged and Oppressed

One countervailing consideration relating to capital punishment that Sunstein and Vermeule do consider is the question of whether sanctions for murder less drastic than execution, for example life imprisonment, might better deter murder.⁴⁵ If so, then given the goal of preventing the murder of innocent people, their analysis would counsel

⁴⁵ Sunstein & Vermeule, *supra* note 3, at ___.

against capital punishment because life imprisonment would preserve more life. However, in light of evidence of the apparent deterrent impact of capital punishment, they find this common objection to capital punishment unavailing.⁴⁶ There are, however, other means of deterring murder that Sunstein and Vermeule either give short shrift to or do not address at all, and whose availability is I believe fatal to their case for capital punishment.

Conspicuously absent from Sunstein's and Vermeule's argument is a contextual analysis of why the murder rate is so high in the United States as compared with other developed countries that do not practice capital punishment.⁴⁷ Suppose one concludes, as seems most likely, that the explanation lies in the differing histories, cultures and circumstances of those societies. And suppose one concludes, as would I, that the high murder rate here is largely attributable to injustices in the structure and operation of the society. For example, it seems to me a strong case could be made that the United States does not now conform to Rawls' second principle of justice, the

⁴⁶ Sunstein & Vermeule, *supra* note 3, at __.

⁴⁷ Between 1999-2001 the homicide rate in the United States was 3.5 times that in the European Union. Gordon Barclay & Cynthia Tavares, *International comparisons of criminal justice statistics*, 2001 at 3 at <http://www.csdp.org/research/hosbl203pdf>. During the 1990s it was 3 times that of Canada. At <http://www.answers.com/topic/crime-in-canada>. None of these countries practice capital punishment. At http://en.wikipedia.org/wiki/capital_punishment.

difference principle, in that neither the requirement of fair equality of opportunity nor of the organization of society such that its social and economic inequalities benefit the least advantaged are satisfied.⁴⁸ While it may be difficult to conclusively prove a link between those injustices and murder - in the same way that factual uncertainties complicate most any public issue - the fact that the murder rate is so much higher among the disadvantaged lends credence to such a conclusion.⁴⁹

If that conclusion is correct, then it follows that but for social injustice there would be less murder. Indeed, I am convinced that in a truly just society murder would be very uncommon. If so, then one way to deter murder would be to reform society. Admittedly, that may be a complex process that requires time to complete. But so would be gathering and analyzing the (never conclusive) data to establish the deterrent impact of capital punishment,

⁴⁸ RAWLS, *supra* note 10, at 75-83.

⁴⁹ See *infra*, note 63. For example, among those on death row at the end of 2003, almost all of whom were male, 52% had not graduated high school at the time of their arrest, 38% had a high school degree, and only 9% had attended college. Bonczar & Snell, *supra* note 5, at Table 5. As of 2000, by way of comparison, among the country's male population 25 and older (representing 60% of those on death row at the time of their arrest) 20% had not graduated high school, 28% had a high school degree, and 52% had attended college. Among the country's male population 18-24 (representing 38% on death row), 29% had not graduated high school, 30% had a high school degree, and 41% had attended college. U.S. Census Bureau, Educational Attainment at <http://factfinder.census.gov/servlet/SAFFPeople?sse=on>.

designing a fair process for implementing it,⁵⁰ and then waiting for the deterrent impact to take effect. And all the time, energy and money spent on that process could be devoted instead to reforming society, thereby speeding up the impact that process would have in reducing murder.

Now suppose one believes that this society is morally obligated to comply with Rawls' theory of justice, and even that Rawls' principles of justice are implicit in the society's foundational moral principles as set forth in the Declaration of Independence and the Constitution.⁵¹ If it is reasonable to think that reforming society in accordance with those principles would greatly reduce or eliminate murder, then to opt instead for capital punishment might well in the long run produce more innocent deaths than reforming society. If so, then the moral choice, even pursuant to Sunstein's and Vermeule's consequentialist approach, must be to opt for societal reform.

⁵⁰ See *supra* note 17, on the importance of and difficulties in designing and implementing a fair process for capital punishment.

⁵¹ Compare Linda M. Keller, *The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 560 (2003) (arguing that the government has "the duty to facilitate the pursuit of happiness by providing minimum economic means," including basic economic rights now widely accepted in the international community to such things as food, shelter, education, employment and health care); CASS M. SUNSTEIN, *THE SECOND BILL OF RIGHTS* (2004) (arguing that Franklin Roosevelt's so-called Second Bill of Rights, including the right to education, a job, a decent home and adequate health care, merits the status of the Declaration of Independence as a statement of society's most fundamental principles).

Sunstein and Vermeule do mention societal reform as an alternative to 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. Capital punishment, by contrast, is very much a live policy option...⁵²

This acknowledges the possibility that societal reform might reduce murder more than capital punishment might deter it. But it treats societal reform and capital punishment as if they are otherwise equal policy choices, such that the only task is to decide which is more politically doable. Yet if society's injustices have caused murder, and if society can dramatically reduce murder by rectifying those injustices, then that is the choice it is morally obligated to make. To opt for capital punishment under those circumstances is an immoral choice because it would leave in place the murders of innocent people that are caused by social injustice and that capital punishment does not deter, and would lead to the execution of people who would not have committed murder had society instead reformed itself. Political infeasibility is not a valid excuse for failing to do that which morality requires.

⁵² Sunstein & Vermeule, *supra* note 3, at __.

Sunstein and Vermeule suggest a possible response to this argument: "(A) plausible inference is that whatever steps states take to reduce homicide, capital punishment will provide further deterrence."⁵³ In other words, conceding that society is obligated to rectify its injustices, the argument might be that so long as it proceeds to do so it should also practice capital punishment so as to further deter murder, at least until societal reform reduces murder to a level that capital punishment is no longer needed as a deterrent. In fact, Sunstein and Vermeule seem to believe that point will never be reached: "Whatever states do, some level of homicide is inevitable."⁵⁴ So even in a fully just society, they seem to feel that capital punishment will be needed as a deterrent and therefore be morally obligatory.

There are several objections to this line of argument. First, since resources are always limited, practicing capital punishment will divert resources that could be devoted to societal reform, and thus may slow down the speed at which societal reform could occur if society had the will power to do what justice requires.

⁵³ Sunstein & Vermeule, *supra* note 3, at ___.

⁵⁴ Sunstein & Vermeule, *supra* note 3, at ___.

Second, as a practical matter, society's use of capital punishment may deter more aggressive efforts to reform society by distracting attention from societal injustices and focusing instead on what might seem a quicker fix to the problem. Sunstein and Vermeule acknowledge this possibility, but then discount it:

(P)erhaps 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.⁵⁵

Perhaps not, but society's unwillingness to do what justice requires cannot justify doing instead what justice condemns. Moreover, I think it can strongly be argued, and indeed is likely, that the emphasis in the current era on personal responsibility as the solution to social ills (as, for example, with welfare reform) has in fact diverted attention from society's contribution to those ills.⁵⁶ And continuing down that path yet further may only solidify the focus on

⁵⁵ Sunstein & Vermeule, *supra* note 3, at ____.

⁵⁶ Compare Dripps, *supra* note 18, at 390 (discussing the psychological tendency in this society to "overassess individual responsibility and underassess situational factors" in assessing blameworthiness); Susan L. Thomas, 'Ending Welfare as We Know It,' or Farewell to the Rights of Women on Welfare? A Constitutional and Human Rights Analysis of the Personal Responsibility Act, 78 U. DET. MERCY L. REV. 179, 202 (2001) (arguing that the Act violates women's human rights and advocating "a welfare law that enhances rather than diminishes the citizenship of all single mothers in poverty who need governmental assistance to survive").

personal responsibility and make efforts to reform society even less likely.

Third, even acknowledging the likelihood of some amount of murder in the just society, it is not necessarily the case that capital punishment would operate as a deterrent in that context. Perhaps below some level of execution capital punishment ceases to work as a deterrence.⁵⁷ Perhaps the murders that occur in a just society are of a type that capital punishment cannot deter. Once there, if it turns out that capital punishment will deter the still residual murder rate, then there is a consequentialist case for it. But until we get there, society's moral obligation is to do all it can to reform itself as quickly as possible.

A possible objection to this line of reasoning is that it extends far beyond the field of capital punishment to many other areas of social life, and that if followed it would lead to ridiculous results. For example, if capital punishment is immoral when society's injustices cause murder, could not the same be said of the criminal justice system as a whole in light of the plausible argument that

⁵⁷ In fact, two of the recent studies have found that low levels of execution actually have the brutalizing effect of increasing the murder rate. Dezhbakhsh & Shepherd, *supra* note 1; Shepherd, *Deterrence versus Brutalization*, *supra* note 1. The import of these findings is that states choosing to practice capital punishment must be prepared to execute larger enough numbers of people to make deterrence work, and that continuing to execute people after the murder rate has been lowered below a certain level either through the deterrent impact of capital punishment or societal reform would be self-defeating.

crime in general, or at least certain types of crime, are a by-product of social injustice. Does this mean that it is immoral to imprison people who commit crimes that would not occur but for social injustice?⁵⁸

For me the answer is that, having wronged both those who as a by-product of social injustice commit crimes and those who are its victims, society must now respond justly to both in a balanced way. Society is obligated to protect the innocent, and toward that end may restrain those who for whatever reason are unwilling to refrain from crime. Society is also obligated as far as possible to attempt to rehabilitate those whose crimes result from social injustice, so as to enable them to regain the freedom that human dignity demands. Society may continue to confine those who have become irretrievably incorrigible, but in light of society's contribution to the situation must accord them humane treatment while confined. Subject to these constraints confinement may be used as an incidental means of deterring others from crime, but society's principal

⁵⁸ See, e.g., Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivations?*, 3 LAW & INEQ. 9 (1985) (advocating such a defense); WILLIAM C. HEFFERNAN & JOHN KLEINIG, *supra* note 38 (essays pro and con on whether and the extent to which poverty does and should excuse or mitigate punishment for criminal behavior); Human Rights Coalition, Mission of the HRC at www.hrcoalition.com (advocating the dismantling of the prison system in favor of "a system of accountability that is truly based in the community and focuses on healing, not punishing").

means of deterrence must be to begin to practice social justice.⁵⁹

Above all, having contributed to murder through social injustice, society may not compound the problem through practicing capital punishment in the name of deterrence. Sometimes as a result of their immoral actions people and societies put themselves in situations where even acts of self-preservation become immoral. If the United States unjustly invades another country and finds its troops surrounded by an enemy engaged in justifiable self-defense, it is not justifiable to kill innocent people to save its troops lives. Those who commit murder in response to society's having treated them unjustly may not be entirely innocent, but for society to execute them after helping create the situation is perverse.

A second possible objection relates to the distinction between individuals and society as a whole. It is easier to justify requiring someone who has wronged another to rectify that wrong even at the cost of some personal suffering, than

⁵⁹ Compare R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 462 (1994) (arguing, as a result of the impact of negative environmental conditions that impair the capacities on which moral responsibility depends, that "the criminal law systematically punishes substantial numbers of the most deprived who... cannot reasonably be said to have moral responsibility for their charged conduct"; and, while acknowledging the need to confine those who pose a continuing danger to others, advocating the creation of the social conditions in which people have the opportunity to develop those capacities).

to justify society's making innocent people suffer in order to correct its past wrongs. As between two individuals, when one of the two must suffer as a consequence of some immoral act on the part of one of them, then the argument for imposing the suffering on the culpable party is strong. But should society in correcting its past wrongs be entitled to impose suffering on those alive today who did not participate in perpetrating those past wrongs?

To a great extent the answer depends on one's perspective of society as more individualistic or communal in nature and on one's view of the nature of intergenerational rights and responsibilities. From an individualistic perspective, to the extent that those alive today benefit from the past wrongs of their antecedents, then requiring them to suffer in order to rectify the present effects of those wrongs is somewhat analogous to the example in the prior paragraph. As between innocent parties who suffer today from society's past wrongs and other otherwise innocent parties who benefit today from those wrongs, if one side must suffer then the moral choice would seem to be the latter, at least as long as they are left no worse off than if those wrongs had not occurred. While such an analysis helps justify (say) affirmative action and

reparations,⁶⁰ it won't do when in the absence of capital punishment innocent people may be murdered, including people who themselves suffer from society's past injustices.

So suppose society acknowledges that its past injustices contribute to murder and is undertaking to reform itself. And suppose it is argued that practicing capital punishment along with vigorous societal reform will in the long run produce the least net loss of innocent life as a result of murder, even if it delays somewhat the achievement of a just society. This seems to me to be the strongest case for capital punishment on consequentialist grounds.

Rawls speaks to this point when he envisions the possibility that in some contexts slavery might be justified in order to "relieve even worse injustices," and when it constitutes "an advance on established institutions" and "in time... will presumably be abandoned altogether."⁶¹ His example is an agreement among warring city-states to enslave

⁶⁰ See, e.g., Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251 (2004) (advocating an atonement model of reparations centered on restorative justice in which all have a civic duty to participate irrespective of personal guilt and especially white Americans who benefit from the lingering effects of slavery); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 686, 694-727 (2004) (advocating a corrective justice model of reparations based on the collective responsibility of past and present generations to correct the present harms of historical racism); Dennis Klimchuck, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257 (2004) (advocating an unjust enrichment model of reparations and noting its applicability to those who subsequently benefit from prior wrongs).

⁶¹ RAWLS, *supra* note 10, at 248.

rather than kill captives. On the other hand, since slavery violates the fundamental right to liberty, it can never be justified for the utilitarian reason that "the greater gains to some outweigh the losses to others."⁶² Analogously one might argue, conceding capital punishment to be unjust in an unjust society, that it may nevertheless be practiced in order to prevent the worse injustice of allowing preventable murders to continue while society is transitioning to a more just state of affairs in which murder may be non-existent or minimal and capital punishment no longer needed as a deterrent.

I have two qualms with this reasoning, one principled and the other pragmatic. From a principled perspective, Rawls does not discuss whether the hypothetical parties are involved in a just or unjust war. To me this is important. Suppose one party has unjustly attacked another which is justifiably defending itself. Then I would say that as to the attacking party the agreement to enslave rather than kill captives is unjust, since its obligation is to stop the unjust attack so that no one need be killed or enslaved. But if the attacking party is unwilling to desist, then as to the defending party the agreement is just because it is the lesser of the two available evils. So the capital

⁶² *Id.*

punishment analogy breaks down, where society's injustices are contributing to murder, because there is no need to choose between available evils when society has the capacity, if not the will power, to engage in obligatory reform.

From a pragmatic perspective my problem is that the transitional argument for capital punishment is too speculative, and could be used as a sophisticated way to justify capital punishment while undertaking less than vigorous societal reform. That this society is grossly unjust and that its injustices are largely responsible for the murder rate is, from my vantage point, undeniable. What we don't know, and can't until we try, is how fast it is possible to reform society and what the impact would be in reducing murder. Moreover, while in the absence of societal reform it may be that capital punishment deters murder, it does not necessarily follow that it would be an effective deterrent if societal reform were vigorously undertaken. Perhaps seeing the process of reform would deter people from committing murder as or more effectively than capital punishment. If so, then practicing capital punishment would be positively immoral on consequentialist grounds. Since the answers to these questions is so uncertain, the morally appropriate stance is to oppose capital punishment until

vigorous societal reform is undertaken and only then to be willing to consider its viability.

From a communal perspective there are times, as Sunstein and Vermeule note, when society has no option but to make life-life choices as among innocent parties. In fact, such choices are pervasive in social life and at some level impact most everything society does. Fighting a war in order to save innocent lives, for example, will inevitably cost innocent lives. And activities undertaken to produce life-sustaining goods will inevitably have side effects that cost lives. How does all this cut with regard to capital punishment?

Foremost, for purposes of this essay, society cannot justly make life-life decisions unless its decision-making process is just. In particular, a process that favors those who stand to benefit from the decision would be unjust as to those to be sacrificed for the common good. For example, drafting the working class to fight wars or locating polluting industries in working class areas, while excusing society's elite from those risks, would be unjust if the political process that produced those decisions were controlled by that very elite.

As applied to capital punishment, both the victims and perpetrators of murder in this society disproportionately

come from its disadvantaged classes.⁶³ And it is certainly arguable that the political process is tilted in favor of monied interests.⁶⁴ And also arguable, in response to public demands to address this society's high murder rate, that the monied elite would prefer capital punishment over (say) equalizing educational opportunities by restructuring a public-school finance system that greatly favors monied interests or over equalizing employment and income opportunities through measures that would redistribute wealth.⁶⁵ Indeed, from my perspective what has happened in this country over the past generation, in response to a burgeoning social reform movement emanating from the civil rights and anti-Vietnam War struggles, is that society's elites have promoted fear of crime and punitive approaches

⁶³ See *supra*, note 49. See also, Andrew Carsen, *Poverty, Crime, and Criminal Justice*, in HEFFERNAN & KLEINIG, *supra* note 38, at 25 (discussing studies of New York City that find a strong correlation between murder rates and areas with high concentrations of poverty, unemployment, lack of college education, and single parent families); JAMES F. SHORT, JR., *POVERTY, ETHNICITY, AND VIOLENT CRIME* (1997) (documenting the overconcentration of violent crime in high poverty areas and analyzing the adverse environmental conditions associated with those areas that contribute to crime).

⁶⁴ See, e.g., JOSHUA COHEN & JOEL ROGERS, *ON DEMOCRACY: TOWARD A TRANSFORMATION OF AMERICAN SOCIETY* (1983); STEVE FRASER & GARY GERSTLE, EDS., *RULING AMERICA: A HISTORY OF WEALTH AND POWER IN A DEMOCRACY* (2005); KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* (2002).

⁶⁵ See, e.g., PHILIP HARVEY, *SECURING THE RIGHT TO EMPLOYMENT* (1989) (arguing for and detailing a feasible program for guaranteeing a right to employment for all in the United States, and noting how guaranteed-job proposals have historically been thwarted by business interests despite public support for it in principle); NATIONAL RESEARCH COUNCIL, COMMITTEE ON EDUCATION FINANCE, *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen, eds., 1999) (a series of articles on various aspects of school finance litigation and reform).

to crime as a primary means of undermining reform movements and preserving their privileged status.⁶⁶

It is true that capital punishment entails life-life trade-offs, and it may be that capital punishment saves innocent lives. But so would other less draconian means of addressing crime, means that would move this society in a more just direction and preserve life in other respects as well, and there is no way to know with any assurance which approach or combination of approaches will most effectively protect life. Under those conditions justice requires a decision-making process in which all society's members, and in particular those classes that disproportionately suffer from crime and punishment, have proportionate input into the process. And that does not exist today.

The foregoing analysis is particularly poignant as applied to African Americans.⁶⁷ The facts are that the murder rate is much higher in the black than in the white

⁶⁶ See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997) (how society's elites manipulate fear of crime for political advantage, leading to excessively punitive approaches to crime prevention in inner-city areas and roll-backs of social welfare programs); Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 39 (1997) (how politicians and the media exploit and overly exaggerate crime, leading to an overemphasis on crime prevention through punishment and producing "a distorted image of what is important and how social policy should be developed").

⁶⁷ See, e.g., Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in BEDAU & CASSELL, *supra* note 12, at 76, 85 (arguing that "endemic racial bias issues provide a particularly useful vehicle for demonstrating that the death penalty should be abandoned in this country").

community,⁶⁸ that most murders are intra-racial,⁶⁹ and that the death penalty is substantially less likely to be imposed when the victim is black.⁷⁰ Therefore, the implications of a societal obligation to practice capital punishment is that many more African Americans, and especially African-American males,⁷¹ should be executed than at present.

Before proceeding to do so, morality requires that we ask why the cited facts pertain. To me the inescapable explanation is that they are a by-product of this society's racist past and of its failure yet to rectify the injustices

⁶⁸ Between 1976 and 2002, the homicide victimization rate per 100,000 population among whites ranged between 3.3-6.1, whereas among African Americans it ranged between 20.4-39.3. Fox & Zawitz, *supra* note 5, at <http://www.ojp.usdoj.gov/bjs/homicide/tables/vracetab.htm>. Between 1976 and 2002, 51% of murder victims were white and 47% were black; of the offenders 46% were white and 52% black. *Id.* at <http://www.ojp.usdoj.gov/bjs/homicide/race.htm#vrace>.

⁶⁹ Between 1976 and 2002, 86% of white victims were murdered by other whites and 94% of black victims were murdered by other African Americans. *Id.*

⁷⁰ See, e.g., John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMP. L. STUD. 165, 166-7 (2004) (finding, based on capital convictions between 1977-1999, that African Americans are sentenced to death at lower rates than whites, and that the death-sentence rate is highest in white-victim/black-offender cases, next highest in white-victim/white-offender cases, and lowest in black-victim/black-offender cases); Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1395-98 (1988) (discussing studies showing that offenders are more likely to receive the death penalty when the victim is white than black, including the famous Baldus study used in *McClesky* that found that the chance of receiving the death penalty was 4.3 times greater when the victim was white than black). Extrapolating from Blume et als. data, Sunstein and Vermeule find that the death-sentence rate is 4.2 times greater in white-on-white than in black-on-black murders. Sunstein & Vermeule, *supra* note 3, at ___. (Note that they also find the death-sentence rate to be by far the highest in black-on-white murders, where the rate is 2.2 times greater than in white-on-white murders, thus indicating a substantial prejudicial effect against black offenders when the victim is white.)

⁷¹ The vast majority of murders are committed by males. Between 1976 and 2002, 89% of offenders were male and 11% were female. Fox & Zawitz, *supra* note 7, at <http://www.ojp.usdoj.gov/bjs/homicide/gender.htm#osex>.

done to the black community. The result of these injustices is reflected in virtually every aspect of American life. African Americans are grossly over represented on the poverty and unemployment roles, on the average have far lower family incomes and receive a far inferior education than whites, are still subjected to substantial overt discrimination in housing and employment, and are grossly underrepresented in the political process.⁷² An astounding one-third of African-American males under age 30 are either incarcerated or on probation or parole.⁷³ As many as 60% of the thousands of African-American males likely to be executed with increased use of capital punishment fall into this age group.⁷⁴

⁷² On these points, see Thomas Kleven, *Brown's Lesson: To Integrate or Separate Is Not the Question, But How To Achieve a Non-Racist Society*, U. MD. L.J. OF RACE, REL., GEN. & CLASS ___ (2005) .

⁷³ This figure is extrapolated from the available data. In 2003 an estimated 12% of black males in their 20s, and by extrapolation from the gross numbers about another 1% under 20, were incarcerated. Paige M. Harrison & Jennifer C. Karberg, "Prison and Jail Inmates at Midyear 2003," U.S. Department of Justice Statistics Bulletin, at 11 & Table 13, at <http://www.ojp.usdoj.gov/bjs/pub/pjim03.pdf>. Also in 2003 about 30% of those under correctional supervision were incarcerated, while more than twice as many (70%) were on probation (59%) or parole (11%). Of the probationers 30% were black, of the parolees 41% were black, and more than 80% of those on probation or parole were males. Lauren E. Glaze & Seri Palla, "Probation and Parole in the United States, 2003," Tables 4, 7 & 8, U.S. Department of Justice Statistics Bulletin at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>. If we assume a comparable age breakdown of those on probation or parole as those incarcerated, then an estimate of as many as 20%-24% of black males under 30 on probation or parole in addition to the 13% incarcerated seems in the ball park.

⁷⁴ Between 1976 and 2002, there were a total of 275,998 black male homicide offenders. Black males between the ages of 18-24 represented 41% of all these offenders, and black males aged 14-17 represented another 12%, for a total of 53%. Fox & Zawitz, *supra* note 5, at

The impact on the black community of crime and of punitive approaches to dealing with crime has been devastating and will continue to be so with increased use of capital punishment. Given the society's racist heritage, its paramount moral obligation to the black community is to rectify the on-going injustices that contribute to such high crime and murder rates there. This is not to excuse murder. But after creating the situation in the first place, for society to resort to the death penalty and to execute thousands of young, mostly male African Americans as a way to deter murder in the black community is doubly racist and smacks quite frankly of genocide.⁷⁵

<http://www.ojp.usdoj.gov/bjs/homicide/tables/oarstab.htm>. During that period, black males over 25 represented 46% of black male offenders, *id.*, and more than half of all homicide offenders of all races aged 25 or above fell into the 25-34 age range. *Id.* at <http://www.ojp.usdoj.gov/bjs/homicide/tables/oagetab.htm>. Assuming half of the 25-34 aged offenders fell between 25-29, it seems reasonable to presume that black males between 25-29 represented as many as 12% of all black male offenders. This yields a total of at least 65% black male offenders under 30; if those under 18 are excluded, the total is 53%. Between 1977 and 2003, a total of 2,723 African Americans (representing about 1% of the black male offenders between 1976 and 2002) received death sentences, almost 99% of whom were males and about 62% of whom were under 30. Bonczar & Snell, *supra* note 5, at 6, 7, 11. This yields approximately 1,671 black males under 30 who received death sentences. If in response to a push to increase capital punishment as a means of deterrence the death sentence rate were to rise to 5%-10% of offenders, it is not a stretch to project that many thousands of black males under 30 would be executed.

⁷⁵ Given the racist history of this society and the uniqueness of the African-American experience, it cannot be assumed that studies purporting to show that in general capital punishment deters murder apply as well to the black and white communities. Only one of the recent studies controlled for race, and it did find a deterrent effect for both white and black victims. Shepherd, *Murders of Passion*, *supra* note 1. One study hardly seems enough to warrant executing thousands of African Americans.

Perhaps this explains, despite the far higher incidence of murder in the black community, why support for capital punishment there is far weaker than among whites.⁷⁶ Even if capital punishment deters murder in the black community in the short run, the community might perceive it as unjust and as distracting society's attention from addressing societal racism, thereby perpetuating the conditions that cause murder in the black community and in the long run resulting in more deaths from murder and execution combined than if society did the right thing now. In a society still divided along race lines as a result of societal racism, and with the impact of an increased use of the death penalty to be highest in the black community, its view of capital punishment should be respected and not lightly overridden.

D. Conclusion

⁷⁶ A 2003 Gallup poll found that 67% of whites favored and 29% opposed the death penalty for murder, whereas for African Americans the figures were 39% in favor and 54% opposed. Sourcebook of Criminal Justice Statistics Online at <http://www.albany.edu/sourcebook/pdf/t250.pdf>. In a 2001 Harris poll the figures were: 73% of whites in favor of the death penalty and 22% opposed; 46% of African-Americans in favor and 43% opposed. Sourcebook 2002, Table 2.46 at <http://www.albany.edu/sourcebook/pdf/section2.pdf>. Public opinion regarding capital punishment has fluctuated over the years. Annual Gallup polls show public support versus opposition to the death penalty at 68%/25% in 1953, declining to a low of 42%/47% in 1966, rising to a high of 80%/16% in 1994, declining again to 65%/27% in 2001, and rising to 71%/26% in 2004. At <http://www.clarkprosecutor.org/html/death/opinion.htm>. However, support for capital punishment is less when the question asked is whether death or life imprisonment is the better penalty for murder. In 1985 56% favored death and 34% life, rising to a high of 61% favoring death and 29% life in 1997, and declining to 50% favoring death and 46% life in 2004. Death Penalty Information Center at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=1029>.

Sunstein and Vermeule are well respected and influential scholars, and Sunstein has established a reputation as one of the academy's leading liberal voices. As such, their touting of capital punishment may have a significant impact in lending support to efforts to expand the use of capital punishment in this society. As a result, many more people could be executed, most will be young men, most from disadvantaged circumstances, and a staggeringly disproportionate number will be African American. Those facts should give us pause, because they strongly suggest that something is wrong with the system and that extending capital punishment will only perpetuate and worsen the injustices of the society.

Sunstein's and Vermeule's argument is sophisticated and erudite, but in my view it is overly abstract and fails to take into account historical context and practical consequences. As such, it brings to mind a line from a Tom Lehrer song of yesteryear: "Once the rockets are up, who cares where they come down? That's not my department says Wernher von Braun."⁷⁷

⁷⁷ "Wernher von Braun" in the album "That Was the Year That Was."

