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RETRIBUTION, JUSTICE, AND THERAPY

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CRUEL AND UNUSUAL PUNISHMENTS

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Amendment VIII
> *The Constitution of The United States of America*

This constitutional statement of right, like that of the English Bill of Rights (1689) from which its language was drawn, should be viewed as placing an absolute ban on certain punitive practices.[1] Indeed, this is an instructive way (at least initially and primarily) to view all bans contained in the Bill of Rights – as side constraints on permissible legislative enactment.[2] In the language of moral theory, one can say that a constitutional bill of rights is the attempt to formulate reasonable deontological restrictions (restrictions of principle) on the pursuit of social utility.[3] The constitutional provisions tell citizens what their rights are, and it is wrong in principle (not just bad policy) to pursue even laudable social goals in violation of such rights. As Ronald Dworkin has suggested, "The Constitution ... injects an extraordinary amount of our political morality into the issue of whether a law is valid".[4] Thus if one can mount a good argument that to treat a person in a certain way is gravely unjust or would violate some basic human right of his, this is also and necessarily a good argument that it is unconstitutional to treat him in this way. The Constitution is a document of moral principle and is in this sense anti-democratic.

This essentially deontological or principled conception of constitutional rights (as absolute bans on certain means a majority might be tempted to employ to maximize social utility) will be presupposed in the following discussion of cruel and unusual punishments.[5] In other words, my basic questions will be the following: Are there certain punishments which one would want to oppose in principle, as unjust violations of the rights of the person being punished, regardless of the social utility (e.g. deterrence) which might flow from such punishments? Since I believe that the answer to this question obviously is *yes* (will anyone stand up for torture and mutilation?),

another and much more difficult question must next be confronted – namely, what is it about such punishments which make them cruel and unusual in the sense of being wrong in principle? When an answer to this question has been developed, I shall turn to the final question I wish to explore in this essay: Is there any good reason for believing that *death* is cruel and unusual, that capital punishment should be opposed in principle? Attempting to answer this final question will require a consideration of recent Supreme Court cases in which the death penalty has been discussed in terms of the Eighth Amendment.

What does it mean to say that the infliction of some punishment *P* is wrong *in principle*? Getting at this question is, as I have suggested, to get at the core of the Eighth Amendment ban on cruel and unusual punishments. I shall argue that the best way to explicate the concept of a punishment's being wrong in principle is through a *retributive* conception and justification of punishment – i.e. a conception and justification resting upon the concepts of justice, rights and desert (and *not* social utility). Before arguing positively for this, however, let me first briefly suggest why other ways of proceeding (other conceptions of cruel and unusual) will not work.

(1) *Literalism*. The only punishments banned are those which cause great physical suffering and which happen with statistical infrequency – i.e. punishments which satisfy the literal meaning of the words "cruel" and "unusual".[6]

This analysis, of course, is absurd. Would anyone seriously maintain that radical mutilation or disfigurement will become acceptable as a punishment if we do it under anesthetic and several times a week? Surely not. And does anyone seriously maintain that we can meet all the reasonable objections of those who believe that the death penalty violates the Eighth Amendment by suggesting that we execute painlessly and with great frequency? Physical suffering is a relevant factor and, if severe enough, may even be a sufficient condition for calling a punishment cruel. It is not, however, reasonable to regard it as a *necessary* condition – as the case of anesthetized mutilation demonstrates. (Psychological suffering poses interesting problems because it is present in many punishments – e.g. long term imprisonment – which most persons would be reluctant to regard as cruel and unusual. The extent to which, if at all, this reluctance is justified is a question I shall explore later in the essay).

(2) *Historical Authority*. The only punishments banned are those which the Founding Fathers regarded as cruel and unusual at the time the Constitution was enacted.[7]

Surely this will not do either. Suppose that the Founding Fathers banned punishment *P1* because of their realization that *P1* had horrendous property *Q*. Suppose further that punishment *P2* also has horrendous property *Q* but that the Founding Fathers did not realize this. Are we then to be prohibited from attacking *P2* on constitutional grounds even though we realize that it has the very same property the Founding Fathers most wanted to oppose? This would be a strange kind of historical piety indeed. (For this reason it seems to me incorrect to suppose that the issue of whether the death penalty is cruel and unusual punishment is closed merely because the Founding Fathers did not explicitly ban it.) In my view of constitutional intent, the Founding Fathers should be viewed as intending to formulate reasonable deontological side constraints or restrictions of principle on the pursuit of majoritarian utilitarianism. Thus, whenever we can mount a good argument for a principled restriction, we are at least not wildly far afield of their intent – as we would clearly be if we tried to interpret the Constitution in terms, not of principle, but of some notion of wise or useful or efficient social policy. The Bill of Rights is not a document of policy; it is a document attempting to give us just or fair ground rules for the pursuit of policy.

(3) *Consensus*. The only punishments to be banned are those which would be rejected as inconsistent with the moral conscience of the citizens of the society at a certain time in history – namely, the time at which the Court is actually considering the constitutional permissibility of a certain punishment. This is at least part of what it means to claim that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".[8]

This consensus test is open to two interpretations. On one, it is irrational; on the other, it is redundant. First, let us suppose that the consensus is the sort one could discover by taking a random sample of citizen preferences – e.g. an opinion poll. It is, of course, ludicrous to regard the Constitution as sanctifying this kind of consensus. Probably the best test of what the citizens will find morally tolerable is that which is enacted by their representatives. But to say that a punishment passes the Eighth Amendment test if it has been enacted into law by a legislature is simply to abandon constitutional review of legislative enactments – i.e. to abandon the very point of having a Bill of Rights. One cannot use a right to check majoritarian excess if that right is interpreted in terms of majoritarian preference or tolerance. If tomorrow an opinion poll reveals (as I fear it might if such a poll were taken) that Americans are tolerant or even in favor of torture

and mutilation, the Eighth Amendment will not have to be reinterpreted in light of that fact. Thus this kind of appeal to consensus is irrational.

A second interpretation of the consensus test is the following: A punishment will be rejected as cruel and unusual if it would be rejected as shocking the conscience, not of a majority of people selected at random, but of those citizens who are truly informed, educated, and morally sensitive.[9] These are two problems with this elitist consensus. First, it is very likely that the characterization of the elite will be circular and question-begging – i.e. we shall count as members of the relevant elite only those persons who hold the view we want to appeal to consensus to defend (opposition to the death penalty, perhaps).[10] Second, and more important, is the following problem: If genuinely enlightened persons all agree that some punishment *P* is evil and shocking to the conscience, it must be because of some property *Q* (pain, unfairness, degradation, etc.) which they have found in *P*. But then *P* is wrong because of property *Q*, not because of a consensus of enlightened judges. *P* is not wrong because there is a consensus against it; there is a consensus against it because it is wrong and can be demonstrated to be so by argument (the showing that *P* contains *Q*).[11] This reveals that the consensus is morally redundant. We can go directly to *P* and condemn it as wrong because we can see that it bears morally obnoxious property *Q* – i.e. we can be brought to see whatever it is about *P* that the elite sees which makes them form a consensus against it.[12]

(4) *Utilitarianism*. A punishment is to be banned as cruel and unusual only if it is more extreme than that required for the pursuit of a legitimate state end or goal. As Bentham might put it, the purpose of punishment is to cause pain to the criminal as a means of deterring him and others from engaging in anti-social conduct, conduct which undermines the general welfare. Any pain inflicted beyond what is required for these goals is simply the gratuitous infliction of suffering and constitutes cruelty.[13]

In American law, the utilitarian interpretation of the cruel and unusual punishment clause has taken the form of the so-called "least restrictive alternative" test – i.e. a punishment is cruel and unusual (in the sense of being "excessive" – a crucial word in the total language of the Eighth Amendment) if it is more restrictive or intrusive than necessary to accomplish a legitimate state purpose.[14] For example: Capital punishment will be cruel and unusual if the same legitimate state purpose (deterrence of murder, say) could be accomplished with a less restrictive or intrusive punishment – e.g. long term imprisonment.

There is insight in this test, and it can be reformulated in retributive

language so as to represent a demand of justice rather than utility. For example, I shall later suggest that "excessive" can be interpreted as "lacking a reasonable *proportionality* to the seriousness of the offense" – where the legitimate state purpose is conceived to be, not simply deterring murder, but also insuring that the punishment for murder will be of a gravity justly proportional to the gravity of murder. And so too for other crimes and punishments.[15] When interpreted in a strictly utilitarian manner, however, the test simply will not work as an interpretation of the Eighth Amendment – and this for one very simple reason: It will not account for the paradigms, for the cases of punishments which everyone would agree are cruel and unusual: torture and mutilation. The Eighth Amendment does not tell us that torture and mutilation may be used only when required by a legitimate state purpose; it tells us rather that torture and mutilation may never be used *at all*, regardless of the state's purpose. It is this absolute or side constraint nature of a constitutional ban which no utilitarian outlook can capture. Constitutional bans are not policies; they are constraints on policies. Thus they cannot be explicated in terms of policy considerations.

The above comments have been far too sketchy, but I hope that they have at least provided grounds for suspicion against some common and initially tempting analyses of the Eighth Amendment ban on cruel and unusual punishments. I now wish to move to more positive considerations. I wish to develop a retributive account of the concepts of cruel and unusual punishment which will account for why the ban on such punishments must be regarded as a side constraint or principled restriction on policy. A retributive theory of punishment is one which characterizes punishment primarily in terms of the concepts of justice, rights and desert – i.e. is concerned with the just punishment, the punishment the criminal deserves, the punishment society has a right to inflict (and the criminal has the right to expect). In this way the theory makes central the special moral status of persons – unique individuals who, because they are autonomous and responsible creatures, must not be used for the benefit of others (as we use objects or animals) but who must be regarded as inviolate. Human persons have that special value which Kant (the most illustrious defender of retributivism) called *dignity* – a value which we respect when we address ourselves to them in terms of their unique characters and acts (i.e. what those characters and acts *deserve*) and not in terms of the general usefulness of treating them in certain ways.[16] The retributivist obviously does not want to ignore such utilitarian matters as deterrence and rehabilitation and incapacitation, but he insists that these values be pursued only after the values he regards as primary (rights, justice, and desert) have

been secured. The intuitive idea, then, is that a cruel and unusual punishment is among the class of unjust punishments, of undeserved punishments, of punishments we have no right to inflict – regardless of utility. A general theory of the *just punishment* is thus what is required. For reasons I have already suggested, such a theory will have a strong bearing upon constitutional interpretation. But, given that every reasonable person of every nationality must care about the restrictions demanded by justice on the pursuit of utility, it should also be of interest to those with no particular concern for American constitutional law.

Worries about the justification of particular kinds of punishment normally presuppose, of course, a belief that punishment in general is justified. Though I do not hold that this belief is obviously correct,[17] I shall assume its correctness for purposes of the present discussion. Otherwise, the discussion of the nature of certain punishments (torture, mutilation, and other cruel and unusual punishments) might be boringly brief – i.e. one might argue that these are wrong simply in virtue of their being punishments at all. Of course, even if one thought this, one might still want to argue that certain punishments have *something else* wrong with them. Just because one believes that all members of a series of acts *A1* .... *An* are bad, one is not committed to believing that they are *equally* bad. So even the person who thinks that all punishments are evil might still reasonably believe that torture is a worse instance of this kind of evil than, say, a small fine.

Thus our basic worry is not whether punishment of any kind is ever justified, but is rather the following: Given that we are going to punish in some way, are there certain *kinds* of punishment or certain *amounts* of punishment or certain *procedures* surrounding punishment which are so objectionable as to be banned outright or severely limited for reasons other than utilitarian deterrence? All of these worries – kind, amount, procedure – may plausibly be regarded as covered in the Eighth Amendment – a claim (controversial with respect to procedure) for which I shall argue later in the paper. *P* is intrinsically the sort of thing (torture perhaps) which we simply should not do to a person. *P* is not intrinsically evil but this amount of *P* (30 years in prison for possession of one marijuana cigarette, perhaps) is too much of *P* for this sort of conduct. *P* is the kind of punishment which is likely to be adminstered in an arbitrary and capricious way.[18] These are the three primary ways we are inclined to object to a particular punishment on grounds of justice (and thus oppose it in principle) and thus are the primary ingredients of the Eighth Amendment ban on cruel and unusual punishments.

Stating all this, of course, is not to solve anything – but is only to set the

problems for discussion. *Why* are certain punishments intrinsically objectionable? *How much* punishment is too much (or too little)? All punishments certainly can be administered in an arbitary and capricious way, so what is it about certain punishments which make such administration more likely?

Here traditional retributive theories are not as precisely helpful as one would like though they do give us a start in the right direction. Retributivism, as a general justification for punishment, proceeds in the following way – a way drawn from the theory of Immanuel Kant:[19] Punishment is justified primarily by backward looking considerations – i.e. the criminal, having engaged in wrongful conduct in the past, *deserves* his punishment. It would be unjust for him not to receive it. In receiving it, he pays a kind of *debt* to his fellow citizens – to those other members of the community who, unlike him, have satisfied the social obligation of reciprocity, have made the sacrifice of obedience that is required for any just legal system to work. Since all persons benefit from the operation of a just legal system, and since such systems require general obedience to work, it is only fair or just that each person so benefiting make the sacrifice (obedience or self-restraint) required and thereby do his part. Those who do not must pay in some other way (receive punishment) because it would be unfair to those who have been obedient if the criminal were allowed to profit from his own wrongdoing. (In this view a certain kind of profit – not bearing the burden of self-restraint – is intrinsic to criminal wrongdoing.) Hegel, who elaborated this Kantian retributive theory, argued that the criminal, who as a rational person could see that even he derived benefits from participation in a community of law, could be regarded as rationally willing (though not empirically desiring) his own punishment.[20] This being so, he deserves it in the sense that he has a *right* to it.[21] It is important to see that this theory grounds punishment on justice or fairness (i.e. justice demands that we inflict the punishment deserved, that we have the right to inflict, that the criminal has the right to receive), *not* on utility. The basic principle is that no person should profit from his own wrongdoing, and retribution keeps this from happening. If a person does profit from his own wrongdoing, from his disobedience, this is *unfair* or *unjust*, not merely to his victim, but to all members of the community who have been obedient – one reason why crime is an offense against the *state*. Now it may be, as the utilitarian might argue, that such unfairness – if widespread – would have socially undesirable consequences. But this is is not Kant's argument. His argument is that the *injustice or unfairness itself*, regardless of consequences, demands retribution. As H. L. A. Hart has argued, "a theory of punishment which disregarded these moral convictions [about

justice] or viewed them simply as factors, frustration of which made for socially undesirable excitement, is a different kind of theory from one which *out of deference to those convictions themselves* [justifies] punishment".[22] Kant's theory is clearly of this latter sort.

I have attempted to defend this retributive outlook in detail in other essays, and I shall not go over this ground again here except to mention three general points in an attempt to counter the bad press the theory usually gets:[23] (1) The theory is not an attempt to give approval to such barbaric motives as a desire for vengeance or vindictiveness. The only motive behind it is the desire to do justice. Thus retributivism is not an irrational cry for more and nastier punishments. Indeed, if retributivism were followed consistently, we should probably punish less and in more decent ways; for we now treat many criminals in ways harsher than, in justice, they deserve. (2) Retributivism is built around a rather attractive (if controversial) model of human beings as free or autonomous creatures, as enjoying rights, and responsible for what they do. Surely this is more attractive than the "you are sick and helpless or like a child" model behind a therapeutic response to crime or the "you can be used and manipulated for the common good" model behind utilitarian deterrence theory.[24] (3) Even many people who do not like the *name* "retributivist" are persuaded by considerations that are clearly retributive in nature. Suppose it was suggested that we punish negligent vehicular homicide with life imprisonment and first degree murder with a couple of years in jail, and suppose this suggestion was justified with the following utilitarian reason: Conduct of the first sort is much more common and dangerous than conduct of the latter sort (we are much more likely to be killed by a negligent driver than by someone who kills us with the primary object of killing us), and thus we should use the most severe deterrents against those who are genuinely dangerous. If we object to this suggestion, as most of us would want to, that this would be unjust or unfair because it would not be apportioning punishment to fault or desert, we should be making a retributive argument. Thus even if the label "retributivist" repels most people, many of the actual doctrines of the theory do not.

Let us grant for present purposes, then, that the retributive outlook sketched above can provide a reasonable general justification of punishment in terms of its being unjust or unfair to allow criminals to be free-riders or parasites on schemes of social cooperation – something which would occur if they were not made to sacrifice in some way for not having made the required sacrifice of self-restraint. How will this help us in determining the *kinds* or *amounts* of punishment which will be tolerable – i.e. what

alternative methods of sacrifice will be allowed, and which ones will be prohibited?

Here the guidance provided by the retributive theory is not as clear as one would like. Some version of the *jus talionis* ("like for like") principle seems initially tempting; but even Kant – one of its staunchist defenders – cannot consistently maintain it to the end. One immediate problem is that the principle cannot with sense be taken literally in all cases. Hegel observes "It is easy enough . . . to exhibit the retributive character of punishment as an absurdity (theft for theft, robbery for robbery, an eye for an eye, a tooth for a tooth – and then you can go on to suppose that the criminal has only one eye or no teeth)".[25] Kant also sees that there is a problem in applying *jus talionis* to "punishments that do not allow reciprocation because they are either impossible in themselves or would themselves be punishable crimes against humanity in general".[26] With respect to rape, pederasty and bestiality, for example, Kant believes that imprisonment is inadequate as a punishment but that a literal return of like for like would either be immoral (e.g. the rape of the rapist) or impossible (e.g. we cannot by definition commit bestiality upon a human criminal). Thus he proposes castration for the former two offenses and expulsion from society for the latter. He admits, however, that this is not a literal application of *jus talionis* but only in some sense captures the intuitive "spirit" of the principle.

What is it to capture the "spirit" of the principle? Perhaps something like the following: The principle of *jus talionis*, though requiring likeness of punishment, does not require *exact* likeness in all respects. There is no reason in principle (though there are practical difficulties) against trying to specify in a general way what the costs in life and labor of certain kinds of crime might be, and how the costs of punishment might be calculated, so that retribution could be understood as preventing criminal profit.[27]

There are still serious difficulties here, however – the chief being that, once a literal reading of *jus talionis* is abandoned, its application "in spirit" seems to be largely a matter of intuition unguided by any systematic theory. Kant's favorite example of *jus talionis* is the penalty of death for the crime of murder – this in spite of the fact that the punishment for *almost everything else* is imprisonment, a punishment which can literally satisfy "like for like" only for the offenses of false imprisonment or kidnapping. And speaking explicitly of the death penalty, Kant argues that this punishment must be "kept entirely free from any maltreatment that would make an abomination of the humanity residing in the person suffering it".[28] The criminals "innate personality," he claims, protects the criminal against any morally indecent

treatment.[29] In suggesting that the state should never do anything to a criminal that humiliates and degrades his dignity as a person, Kant seems to be working toward a ban on those punishments that have been described as cruel and unusual – i.e. a principled ban on certain punishments (torture and mutilation?) even when the "like for like" principle would seem to require them. There is insight here, but how the insight is to be squared with his support of castration as a punishment is a mystery to me.

The principle of *jus talionis* has thus produced a bit of a muddle, and the explanation for this is the following: Though a conception of reciprocity explains why the guilty should be punished, it is not clear that this same principle will explain why like should be returned for like or even that the evil inflicted on the criminal should be of equal gravity with that which the criminal has inflicted on his victim. The criminal has acted unfairly and that is why he must be punished. But unfairness is unfairness, murder being no more *unfair* than robbery. Thus if murder if worse than robbery (and thus deserves a worse punishment), this cannot be shown on the basis of purely formal considerations. Consider, again, the punishment for rape if the "like for like" position is adopted. If it be argued that the position does not entail that we rape the rapist but only do to him something of *equal* evil, it can be replied that the question "What evils *are* equal?" does not admit of a purely formal answer. Thus a retributivism grounded on fairness can at most demand a kind of *proportionality* between crime and punishment – i.e. demand that we rank acceptable punishments on a scale of seriousness, rank criminal offenses on a scale of seriousness, and then guarantee that the most serious punishments will be matched with the most serious crimes, the next most serious punishments with the next most serious crimes, and so on. This ranking must be reasonable, of course, but there is no reason to suppose that it will be determined solely or even primarily by considerations of fairness – i.e. no reason to suppose that seriousness can be totally analyzed in terms of fairness. In particular, considerations of fairness alone will not answer the question of which punishments will be allowed as the most serious. There will be substantive reasons for not allowing certain punishments (e.g. torture) even if these would satisfy a fairness principle of proportionality.

Let me say one other thing at this point about the concept of proportionality as applied to punishment. It can mean either (a) doing to the criminal something of equal gravity to what he has done to his victim or (b) making sure that the most serious punishments are applied to the most serious offenses, etc. So if the most serious punishment in a particular legal system in 20 years in prison and if this punishment is applied to the crime of murder,

it could plausibly be argued that the proportionality demand stated in (b) has been satisfied, but not that stated in (a). And my argument thus far has been that (b), but not (a), can reasonably be derived from Kant's theory. At most a constrained variant of (a) might be derivable: (a*) do to the criminal something of equal gravity to what he has done to his victim unless this would require our doing something (e.g. torturing) to which there are serious substantive moral objections. If we allow such substantive restrictions, however, we shall be forced to admit that the decision to allow or not to allow *death* to remain as a system's most severe punishment cannot – contrary to Kant – be based simply on considerations of fairness or proportionality. We must at least reflect upon the possibility that our choice of this as a punishment will be constrained by other morally relevant properties of death.[30]

So far, then, we can get this much from Kant's theory: A punishment will be unjust (and thus banned on principle) if it is of such a nature as to be degrading or dehumanizing (inconsistent with human dignity). The values of justice, rights and desert make sense, after all, only on the assumption that we are dealing with creatures who are autonomous, responsible, and deserving of the special kind of treatment due that status. This is why animals can be treated wrongly but cannot be wronged, cannot be treated unjustly, cannot have their rights violated. A theory of the just punishment, then, must keep this special status of persons and the respect it deserves at the center of attention. And there are at least two ways suggested by Kant whereby, in punishing, we can fail to do this: First, we can employ a punishment which is in itself degrading, which treats the prisoner as an animal instead of a human being, which perhaps even is an attempt to *reduce* him to an animal or a mere thing. Torture is of this nature. Using Kantian language, one might say that torture is addressed exclusively to the sentient or heteronomous – i.e. *animal* – nature of a person. Sending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes – these are not *human* ways of relating to another person. He could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any other characteristically human activities during the process – a process whose very point is to reduce him to a terrified, deficating, urinating, screaming animal. I cannot, of course, *prove* that it is wrong to treat people in this way; for the wrongness of doing this is more obvious than any premises which could be given to justify its being wrong. Anyone who did not see this could not be made to understand anything else about morality. For we have here a paradigm of not treating a person as a person – and thus an undermining of that very

value (autonomous human personhood) upon which any conception of justice must rest.[31] It is unjust to be tortured, everyone has a right not to be tortured, no one has a right to torture, no one deserves torture – all these claims flow from a theory of punishment (such as retributivism) which takes seriously and makes central the special status of persons.

A second way in which a punishment can fail to show respect for the status of autonomous persons is through radical lack of proportionality.[32] An autonomous person has a right that his punishment be *addressed* to that status – to those unique features of his individual, responsible conduct which occasion the punishment. A punishment radically disproportionate to the seriousness of the offense is not addressed to that for which he is responsible and blameworthy and deserving of punishment but is necessarily addressed to something else – e.g. society's mere *dislike* of him or his conduct.[33] This, in my view, is how the concept of "excessive" found in the Eighth Amendment should be interpreted.[34] To the degree that a person is being punished out of reasonable proportion to the seriousness of his offense, then to that degree is he being *used* – not being punished as justice would demand.

But is not the amount of punishment prescribed for an offense a criterion for how serious the offense is? That is, is it not almost true by definition that the most serious offenses will carry the most serious punishments – the prescription of the punishment by society being an index of how seriously society deplores the conduct? This challenge, in my judgment, is to be met in the following way: A just society cannot criminalize conduct simply because in deplores that conduct; its grounds for deploring the conduct must be *reasonable*. Conduct such as homosexuality does not cease to be morally trivial and become morally serious simply because a majority of people *think* it is morally serious and deplore it. As the Supreme Court correctly held in the *Robinson* case: if narcotic addiction is a disease, then no reasonable society may criminalize it – no matter how much it may represent a status detested and deplored by many persons.[35] In a just society, therefore, punishment must be proportional to the *objective* seriousness of the conduct, not to its subjective seriousness – i.e. the degree to which it is held in disapproval by the society at large.

A present, of course, we lack a coherent theory of objective seriousness. Thus, except in extreme cases, it will be practically difficult if not impossible to guarantee just proportionality in punishing. For one who cares about justice, however, this lack will stimulate research and thinking in order that a reasonable theory on these matters may be developed. The alternative is simply to stop caring about doing justice – hardly an acceptable outcome.[36]

As I indicated previously, a theory of justice alone may not be able to tell us which offenses are most serious; it may require supplementation by a consideration of the substantive or intrinsic character of certain kinds of conduct. A theory of justice, however, can at least demand the following: that everyone has the right to have offenses graded in terms of individual fault or blameworthiness (i.e. desert) and not mere social utility, that other even substantive bases for grading be reasonable,[37] that punishments be graded on a comparable basis, and that there be a matching between seriousness of punishment and seriousness of offense. A theory of justice may not be able to supply all the details for ranking, but it can supply the framework.

Thus (by a process of deduction, variation, and free association) I have extracted the following from a generally Kantian account of retributive sentencing: A punishment will be banned in principle if (1) it represents a direct assult on the dignity of persons or (2) it is radically disproportional to the seriousness (the *objective* seriousness) of the conduct criminalized. Consideration (1) is, of course, more basic than (2) – i.e. certain punishments might pass the proportionality test but would still be rejected because they fail what might be called the "respect for persons" test. Thus the punishment of torture by an act of torture could hardly be faulted on grounds of proportionality, but it would still be rejected as an intrinsically inhuman method of punishment.

Both of the above notions – intrinsic heinousness and radical lack of proportionality – have a secure place in the interpretation of the Eighth Amendment. A ban on the first is clearly a part of the original meaning.[38] and a ban on the second has been prominent in twentieth century Eighth Amendment cases – including the recent *Coker* case where it was held (incorrectly in my judgment) that death was too severe a penalty for the crime of rape.[39]

Now what has gone on so far, even if one does not agree with the theoretical background, has probably done nothing more than produce *conclusions* which almost everyone would regard as non-controversially reasonable – namely, that justice demands absolute side constraints against punishments which are intrinsically heinous or radically disproportionate. This is required if we are to respond to criminals as *people* – as individuals with unique characters and degrees of responsibility. (We are not to think of them simply in terms of dangerousness – as on a par with wild animals, or such natural disasters as earthquakes, or even madmen.[40])

What I wish to do now is to move this general account I have been giving into an area of genuine controversy – namely, the penalty of *death*. Given

the above sketch of the concepts of cruel and unusual punishments, is it reasonable to regard the punishment of death as falling under this description? That is, are there good reasons why, on grounds of justice or respect for rights (rather than utility), we should accept an absolute ban or principled restriction against the penalty of death? Does it belong, in other words, in the same camp as torture, mutilation, or punishments of radical disproportionality? We have the right not to be treated as animals – in a dehumanizing way. We have the right to be punished with sanctions proportional to our offenses. Do we also have the right not to be punished with death? If so, is this because death is necessarily a dehumanizing punishment or because it necessarily lacks proportionality with all possible offenses (or both) – or for some new reason entirely?

It should be obvious at the outset that there is no reason to believe that a punishment of death will always fail to satisfy the proportionality requirement. It would, of course, fail to satisfy this requirement for many offenses – but surely not for at least some acts of *murder*. (Kant's intuition seems correct here.) It is often said that, by making the criminal wait for a long time in terror and uncertainty before execution, we do something worse to him than any murderer does to a victim.[41] But this is just not so. What about the killers of Moro? Or suppose Patty Hearst's abductors had finally killed her? Are these acts not quite proportional to capital punishment? (It is also perhaps worth noting that much of the waiting is *chosen by the prisoner* while he files appeals.) Or what if the murderer tortured and mutilated his victim before the murder? We think of these activities as so horrible that we shall not even allow them as punishments, so surely their horribleness plus killing could be proportional to capital punishment – if anything, capital punishment might seem disproportionally *little* here. (A query: If torture and mutilation are so terrible that we will not allow them as punishments even when we do allow death, why then do we rank murder as an offense as *more serious* than torture and mutilation?)[42] Thus, if the concept of proportionality can be worked out at all, it seems that it should be possible to work it out for some acts of murder punishable by death.

Even when proportionality is satisfied, however, we shall not use a certain punishment if it is intrinsically degrading to the humanity of the criminal – e.g. we shall not torture the torturer. Is there perhaps, then, something intrinsically degrading, showing lack of respect for persons as persons, in the punishment of death – so that it too could be banned even in cases where it satisfies the proportionality demand?[43]

Now it is easy to think that capital punishment is intrinsically degrading if

we allow ourselves to be dominated by a certain picture of what capital punishment is like – e.g. the final part of Truman Capote's *In Cold Blood.*[44] But all that this may show is that brutalization may preceed and may accompany (as surrounding circumstances) the punishment of death.[45] This would be a reason for objecting to and changing those circumstances. But it would not be an objection to death *simpliciter* as a punishment. For suppose we consider another picture: the final scene of Plato's dialogue *Phaedo*, depicting the execution of Socrates by self-administered painless poison amid discourse with friends and family – all those around, even the jailer, showing great respect. This seems, at least intuitively, to depict a humanized death – a civilized execution. In this way, thus, does death seem to differ from torture. Is it conceptually possible to depict Socrates at a civilized torture session, a humanized case of evisceration of Socrates, a way of sending high voltage through Socrates's testicles which shows respect for him as a person? The answer seems *no.*[46] In a variety of social contexts (e.g. euthanasia) people are now rallying around the slogan "Death with Dignity." This suggests that they intuitively grasp some distinction between death *simpliciter* (which is surely bad) and circumstances which could surround death which would make it, not just bad, but degrading. But can we imagine anyone, who understands language and knows how to think, suggesting the slogan "Torture with Dignity" as part of a campaign against the excesses of certain political regimes? Death may be brought about in a degrading way; torture *must* be brought about in a degrading way. Thus we could imagine devising ways to humanize executions, to design them so that respect for the criminal would be shown. We cannot (*logically* cannot) imagine devising humanized or civilized torture sessions.[47]

Thus it seems to me that it is by no means obvious that exectuion *in itself* is necessarily – like torture – a way of showing lack of respect for a person, a way of treating hin as or reducing him to an animal. Thus death may pass both the proportionality test and the respect for persons test. If so does this then show that the punishment of death cannot legitimately be opposed in principle, that we have no general right not to be executed by the state, and that opposition to the death penalty on principle is, at best, a kind of well-meaning sentimentality or, at worst, merely an illegitimate attempt to legislate our preferences for policy through the vehicle of constitutional law?[48]

In the remaining part of this essay, I shall present a defense for an answer *no* to this question. That is, I shall argue that a basic right of citizens in just societies is compromised by the death penalty and thus that there are grounds for a side constraint or principled restriction against it. My argument will

support, in broad outline, a primary portion of the majority reasoning in *Furman v. Georgia* and later capital punishment cases.[49]

In what way did the court hold capital punishment to the unconstitutional? Many arguments were given, but the one which comes through most clearly is the following: The death penalty is applied in an *arbitrary* and *capricious* way[50] – e.g. it tends to be used upon the poor and blacks and on almost no one else. Thus we are required on constitutional grounds to do *one* of the following: (a) devise ways to keep capital punishment from being applied in an arbitrary and capricious manner or (b) ban it outright.[51] Against the general thrust of this argument, two charges are immediately to be made: (1) *All* punishments (including imprisonment) are arbitrary and capricious in the way noted, but it is absurd to say that all punishments are unconstitutional. And yet the court decision might seem to commit us to this absurd conclusion.[52] (2) To call capital punishment arbitrary and capricious is to make a *procedural* objection to it, one which could best be expressed by the Fourteenth Amendment "due process of law" or "equal protection" clauses. Why then drag in the Eighth Amendment, as the court did, in support of its decision? The Eighth Amendment, in banning cruel and unusual punishments, is surely *substantive* and not procedural in nature; and bringing it in simply muddies the waters.[53]

What I should like to do now is the following: Develop a principle relevant to the capital punishment issue which (a) breaks down a sharp substance-procedure distinction and thus renders the Eighth Amendment relevant and (b) distinguishes death from other punishments – especially imprisonment. That is, I want to meet both of the above objections and thus vindicate the major thrusts of the Court's reasoning.

What will the principle be? Recall that I am concerned with principles which rest on *rights* (i.e. with principles proper) and not with useful social policies. And what possible rights could be relevant to the kinds of punishment permissible other than the ones already mentioned (right not to be dehumanized; right to proportionality) and tentatively rejected for the death penalty? I shall suggest the following: *the right not to be dealt with negligently by one's government*, the right not to have one's basic interests threatened in casual and irresponsible ways by the state.[54] But is this not simply a statement of procedure; and, as such, how can it bridge the substance-procedure gap? To answer this objection, we can do no better than to turn to the writings of Judge Learned Hand whose discussion of negligence in tort law will be useful for our present purposes:

The degree of care demanded of a person by an occasion is the resultant of three factors:

the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.[55]

In other words, there is no such thing as negligence *per se* or in the abstract. Whether the steps I take to reduce risk (the *procedures* of my acting) are negligent or not will depend in part on the (*substantive*) gravity of the harm that might result. Thus what constitutes due care as a precaution against my hurting your mailbox may not come close to what constitutes due care as a precaution against hurting your eyes. And, in the criminal area, what constitutes due process with respect to a parking fine may not come close to what constitutes due process for a long jail term.[56]

How does this apply to capital punishment? In the following way: All trial, conviction, and sentencing procedures are subject to *error* – to the possibility that they will convict the innocent. And there are two kinds of innocence at stake here: those totally innocent of any wrongdoing and those whose conduct, though meriting convicting of something (e.g. manslaughter), does not merit conviction of an offense of supreme gravity (e.g. murder in the first degree). Due process is an attempt to guard against both sorts of error. And what will be responsible (i.e. non-arbitrary and non-capricious) principles of due process for various criminal sanctions? How is the state to exercise due care instead of negligence in dealing with its citizens in terms of penal sanctions? Obviously, if Hand is correct, this question can be answered sensibly only if we have a reasonable view of the gravity of the (substantive) *harm* that might result from the error. Thus we have broken down the sharp line which supposedly separated substance and procedure, and the Eighth Amendment at least has a foot in the door. One objection to the Court's reasoning is thus met. But what about the other objection – that the Court's condemning of capital punishment as cruel and unusual because arbitrary and capricious logically must condemn *all* punishments in our society (even imprisonment) as cruel and unusual? Obviously, the objection can be met in only one way – namely, by showing that death is a *graver harm* than loss of liberty and that, therefore, higher standards of due care (due process) must surround the former sanction.

Can this be shown? Perhaps not in all cases – particularly in the case of life or extremely long-term imprisonment. Studies on the effects of long-term incarceration in "total institutions" indicate that long-term confinement develops in persons an "institutional personality" – i.e. a personality with diminished affect, neurotic dependencies, loss of autonomy and mental

competence generally: in short, a kind of death (of personhood).[57] If these studies are correct, then long-term incarceration will be a kind of slow torture and psychic mutilation and *should* no doubt be banned on Eighth Amendment grounds (something the courts may be moving toward in declaring whole prison systems in violation of the Eighth Amendment).[58] This being so, it is a *virtue* of the Court's analysis that its arguments against death also apply to long-term incarceration. If they applied to all incarceration (or even to long-term incarceration if it does not have the above consequence), however, this would indeed be an absurdity. So what is it about death *simpliciter* which makes it a graver harm than loss of liberty *simpliciter*? Is it that people *fear* death more? – surely not, since many people fear death less than loss of liberty ("Give me liberty or give me death!") because they value liberty as a primary good of greater value than life.[59] Is it because death must entail intolerable suffering or degradation? No. As I have previously argued, certain manners of death may have this defect, but not necessarily death itself. What then?

One of the most common claims made in defense of the claim that death is worse than loss of liberty is the claim that death is *irrevocable*. But this will not do. Everything that is past is irrevocable. If I kill you in error, I have indeed done you an irrevocable injury. But so too if I imprison you falsely for five years. Margaret Radin, in her excellent discussion of capital punishment, attempts to meet this worry in the following way:

> Of course, even one day in prison is irrevocable in the sense that all past events and their resultant effects on human beings are irrevocable. Yet, although it might be difficult to articulate, most people intuitively recognize a distinction between the irrevocability of everything and the irrevocability of death or mutilation. The latter is the strong sense of irrevocability referred to here. It encompasses irreversible deprivations of attributes or capacities essential to, or at least closely connected with, complete personhood.[60]

This will not work. Radin is trying to show that death is a greater evil than loss of liberty because death is irrevocable – that is, she is supposed to be analyzing "grave harm" in terms of "irrevocability". But she is actually reasoning quite the other way around – i.e. analyzing irrevocability (in the "strong sense") in terms of grave harm. But if we already know the harm of death is greater than the harm of loss of liberty, we do not need the concept of irrevocability at all. One suspects that her analysis is unhelpfully circular – a suspicion reinforced when we notice that a synonym for "irrevocable" ("irreversible") is used in the analysis.

Let me then simply step in at this point and offer my own suggestion:

Death is a greater harm than loss of liberty because it is (a) totally *incompensable* and (b) represents *lost opportunity* of a morally crucial kind. First, the concept of incompensability.[61] This is a concept which obviously admits of degrees. Some harms which we do to people are of such a nature – e.g. damage to their property or income – that it makes sense to speak of totally compensating them for their loss. For other harms, we cannot totally compensate; but we can at least make a reasonable attempt. Loss of liberty seems to me of this nature. In a culture such as ours, we know what it is like – and it intuitively seems reasonable and acceptable – to set a monetary value on my time and labor. Indeed, I can reasonably *bargain* these away for money – as when I work for a living. Thus if I am imprisoned by the state in error, it is at least not intuitively absurd to suggest that damages be paid as a way of compensating for the resulting harm. (We cannot totally compensate, of course, but we can in some sense make a reasonable stab at it.) But what would it be like to be paid anything even resembling adequate compensation for being tortured, radically mutilated, or debased in some other way – for being deprived of my status of honor or dignity as a person? If these have a price, this means that in a very real sense I do not have them to begin with – a man whose honor has a price simply being a man without honor. Suits in tort law may be brought and won here, of course, but how many winners would really believe that they had been even close to adequately compensated? How many would have bargained for this "price" in advance? Let us now move to death: On a scale of incompensability, death does indeed seem at the top. It is both logically and empirically impossible to compensate me if I am executed in error. (A wrongful death action may pay off someone, but necessarily *not me*). In contract law, we do not even *allow* people to bargain away for money their life or their personal integrity against torture and mutilation; but we do allow them to bargain away almost totally their personal liberty – e.g. by joining a volunteer army.[62] Should we punish people by doing *S* to them when we shall not even allow them to do *S* to themselves – even for pay?

The question, of course, is rhetorical; and I shall move from it to present the upshot of what I have been saying thus far. I have argued that death is like torture and mutilation (and unlike loss of liberty) in at least one important respect: that when we injure someone by killing him in error, we have done him an injury which is incompensable. Not so with imprisonment in error; for this is at least compensable to a significant degree. Thus in at least this one respect death is a graver harm than loss of liberty, and thus it is reasonable to require greater standards of due care or due process to prevent

error in its application as a punishment. The Court was thus correct: the procedures which surround the punishment of death may properly be called arbitrary and capricious even if those same procedures are adequate for imprisonment.

But is this all? Is the only reason that death is worse than loss of liberty the fact that the former (when done in error) is totally incompensable and the latter (when done is error) is only partially incompensable? This does not seem correct – not as the *whole* story. Surely death is a worse injury than loss of liberty even when the punishment is *correctly* administered (i.e. not in error) – this being the very point, after all, of having death as the most severe sanction in one's arsenal of responses to crime. What this shows is that the person in favor of the death penalty for the most serious crimes (and reserving imprisonment for lesser crimes) *cannot consistently oppose the Court's reasoning in Furman v. Georgia*! For by his own admission, the death penalty *is* more serious than imprisonment; and thus, unless he wants (unreasonably) to quarrel with the claim that standards of due care or due process are in part a function of gravity of harm, he must agree with the Court that higher standards of review are required for the death penalty than for any other.

Why, then, might death reasonably be regarded as substantively more serious than loss of liberty? An answer to this question might help provide an interesting reason for why death is an incompensable injury – i.e. a reason more interesting than "You cannot compensate Jones if Jones is no longer around to be compensated".

Thus I shall now turn to the second point I want to make about death – that it represents *lost opportunity* of a morally crucial kind.[63] What I shall say here will be very brief; and it may also seem rather old-fashioned and romantically sentimental. Be that as it may, here it is: the most important thing within a human life (something stressed by philosophers from Socrates through Kant and by such other admirable and insightful individuals as Jesus and Tolstoy) is the *development of one's own moral character*, the development of oneself in such a way that one's life can honestly be said to be coherent, meaningful, and perhaps even admirable. To use the language of Plato and Socrates, one might say that what is most important in a human life is not what happens when the *body* is confined but is rather any harm that may come to the *soul* – or, to use less metaphysically provocative language, harm that may come to those crucial attributes of moral character and integrity which are most essential to personhood. The development of a morally coherent personality is the most crucial task or project of any human life –

a project which we all muddle through with various degrees of success or failure (mostly failure) for our lifetimes. To block or interrupt this project (or to preclude one's ever having an opportunity to have a change of heart, reflect on one's life, and *start* such a project) is, in my judgment, the gravest harm that one can do to a person. Imprisonment (unless of such a nature or duration as to have profound effects on the inmate's mental health) will not do an individual this kind of harm – witness the number of inmates who in a very real sense have become "new people" while serving prison terms. But death, alas, provides no such opportunities and thus can certainly harm a person in this highly significant (one could say spiritual) way.[64] For death is the *loss* of significant opportunity (the opportunity to accomplish certain things, to treat people differently, to become a new person); and for many persons this must be the most terrifying thing about it.

> His mental sufferings were due to the fact that that night, as he looked at Gerasim's sleepy, good-natured face with its prominent cheekbones, the question suddenly occurred to him: 'What if my whole life has been wrong?' It occurred to him that what had appeared perfectly impossible before, namely that he had not spent his life as he should have done, might after all be true. It occurred to him that his scarcely perceptible attempts to struggle against what was considered good by the most highly placed people, those scarcely noticeable impulses which he had immediately suppressed, might have been the real thing, and all the rest false . . . . 'But if that is so,' he said to himself, 'and I am leaving this life with the consciousness that I have lost all that was given me and it is impossible to rectify it – what then?' (Leo Tolstoy, *The Death of Ivan Ilych*)

Given the exceptional moral gravity of having one's prospects for a morally significant and meaningful life interrupted, one might well want to deny the state any right to do this – i.e. one might adopt a direct absolute ban on the penalty of death. For it is by no means clear that one can show repect for the dignity of a person as a person if one is willing to interrupt and end his most uniquely human capacities and projects. Thus, contrary to initial and plausible impressions of the kind sketched previously, there is perhaps a case to be made that the punishment of death is degrading after all. Even if one does not buy this, however, one must at the very least – given the considerations I have noted – have strong sympathy with the disjunctive position articulated by the Court – namely, that granting the supreme gravity of the penalty of death, the Constitution requires either (a) significantly more stringent standards of review for this penalty than for any other or (b) an outright ban on the penalty. Recent Court decisions requiring an elaborate consideration of mitigating and aggravating circumstances before a sentence of death may be imposed are an attempt to work with (a).[65] If this attempt fails – i.e. if it

turns out that the standards of review surrounding imprisonment are really the best we can do – then we may be led indirectly into an outright ban on the death penalty. I am hoping for failure.

> I have no pleasure in the death of the wicked; but that the wicked turn from his way and live.
>
> *Ezekiel* XXXIII, 11

NOTES

[1] The best general treatment of the constitutional issues surrounding an application of the Eighth Amendment – with special focus on the death penalty – will be found in Margaret Jane Radin, 'The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause,' *University of Pennsylvania Law Review*, Volume 126, No. 5, May, 1978, pp. 989–1064. My own treatment of this topic has been enormously influenced by her essay.

[2] The notion of side constraints (as opposed to patterns or end results) as basic in moral theory has been developed by Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), Chapter 3.

[3] See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), all references under the headings 'Constitution' and 'Constitutional convention' on 591 of Index.

[4] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 215.

[5] I realize that these matters are more complex than I am suggesting here. What I wish to explore in this essay, however, is how far one can go with a purely deontological conception of constitutional restrictions and a purely retributive conception of punishment. It turns out, I think, that one can go pretty far.

[6] See Chief Justice Burger's discussion (with respect to cruelty) in *Furman v. Georgia*, 408 U.S. 238, 392 (1972) (Burger, C.J., dissenting).

[7] *Furman v. Georgia*, 408 U.S. 238, 418 (Powell, J., dissenting).

[8] *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.).

[9] *Furman v. Georgia*, 408 U.S. 360 ff. (Marshall, J., concurring). Justice Marshall considers and rejects the opinion poll model and adopts a version of an elitist model involving a prediction of what people would deplore if fully informed.

[10] One is reminded of John Stuart Mill's "competent judge" test in *Utilitarianism* (Chapter 2). Mill attempts to show that contemplative pleasures are superior to sensual pleasures because persons who have experienced both (competent judges) prefer the former to the latter. Any person who has experienced both and does *not* judge in this way, however, would obviously pose a problem for Mill's test. How does he deal with this? In the following circular way: such persons reveal that they have lost their capacities for finer feelings and thus lose their status of competence.

[11] This, of course, is logically similar to Socrates's puzzle in Plato's dialogue *Euthyphro*: Is that which is pious pious because the gods approve of it; or do the gods approve of it because it is pious?

[12] The elite, of course, may be *epistemologically* relevant – i.e. they may get us to see or appreciate some morally relevant feature which we otherwise might have missed but for their insight. Their attitude toward the feature is not what *makes* it relevant, however.

[13] Jeremy Bentham, *The Principles of Morals and Legislation* (1789), especially Chapter XIV.

[14] "There is no reason to believe that [capital punishment] serves any penal purpose more effectively than the less severe punishment of imprisonment" (*Furman v. Georgia*, 408 U.S. 305) (Brennan, J., concurring). The general constitutional notion of the least restrictive alternative is articulated in *Shelton v. Tucker*, 364 U.S. 479.

[15] Consider persons in an "original position" of the kind described by John Rawls. *supra* note 3. It seems reasonable to suppose that they would chose a system in which penalties were no more severe than necessary to accomplish whatever purpose they set as reasonable. If Rawls is correct in claiming that choices in such a constrained setting yield principles of justice, then we have a non-utilitarian foundation for a least restrictive alternative principle.

[16] For more on this, see my 'Rights and Borderline Cases,' *Arizona Law Review* 19, Number 1 (1977) 228–241.

[17] See my 'Marxism and Retribution,' *Philosophy and Public Affairs* 2 Number 3 (Spring 1973) 217–243.

[18] It has been argued, for example, that capital cases bring out the worst and the most irrational in juries and judges. See Charles L. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake* (New York: Norton, 1974).

[19] I have elaborated this Kantian account more fully in my 'Marxism and Retribution,' *supra* Note 17. See also my *Kant: The Philosophy of Right* (London: Macmillan, 1970).

[20] See my 'Marxism and Retribution,' *supra* note 17.

[21] For more on punishment as a *right* of the criminal, see Herbert Morris, 'Persons and Punishment,' *The Monist*, 52, No. 4 (1968) 475–501. This is reprinted in my *Punishment and Rehabilitation* (Belmont, Calif.: Wadsworth, 1973).

[22] "Murder and the Principles of Punishment," *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), p. 79.

[23] The retributive theory of punishment is, fortunately in my judgment, undergoing a bit of a renaissance at the moment. For a careful discussion which generally deplores this, see Hugo Bedau's essay in the 'Symposium: The New Retributivism,' *The Journal of Philosophy* LXXV, Number 11 (November 1978) 601 ff.

[24] For an argument that utilitarianism also tends to treat persons as children, see Adrian M. S. Piper, 'Utility, Publicity, and Manipulation,' *Ethics*, 88, No. 3 (April 1978) 189–206.

[25] *Philosophy of Right*, translated by T. M. Knox (Oxford: Oxford University Press, 1952), p. 72.

[26] *The Metaphysical Elements of Justice*, translated by John Ladd (Indianapolis: Bobbs-Merrill, 1965), p. 132.

[27] One interesting attempt to work something like this out may be found in Claudia Card, 'Retributive Penal Liability,' *American Philosophical Quarterly Monographs*, No. 7, 1973. According to Card, a retributively just punishment exposes the offender to

hardship that is comparable to the worst that anyone could reasonably expect to suffer from such conduct were it to become general in the community. As Andrew von Hirsch has pointed out, however, this will not do "because it gives disproportionate emphasis to the potential harmfulness of the conduct, and relegates culpability to the role of a limiting principle" ('Symposium: The New Retributivism,' *supra* note 23). Von Hirsch's essay is a reply to Bedau.

[28] *Supra* note 26, p. 102.

[29] *Supra* note 26, p. 100.

[30] As I shall later argue, the mere fact (if it is a fact) that people tend to *believe* that death is horrendous is not a morally relevant property of death. (What people believe about death is surely not a property of death at all.) Such beliefs about death, however, might be relevant in a Rawlsian "original position" (*supra* note 15) in that they might prompt the rational choosers to place special constraints on its intentional causation.

[31] For an expansion of this sort of argument (or of a defense for not giving an argument), see my 'The Killing of the Innocent,' *The Monist* 57, No. 4, (October 1973) 527–550. (Reprinted in the present collection.)

[32] I say *radical* for the following reason: Any departure from proportionality is less than ideal justice would demand, but it may be impossible to grade these matters in a very fine way. We should still want to condemn, however, cases where the gap in seriousness between punishment and offense is clearly too wide.

[33] Obvious examples here are severe punishment for drug use, or consensual homosexual activity among adults, or any other "victimless crimes."

[34] See *Lockett v. Ohio*, 98 S. Ct. 2981 (1978) (White, J. dissenting in part and concurring in part). Justice White articulates both the utilitarian and the retributive analyses of "excessive".

[35] *Robinson v. California*, 370 U.S. 660 (1962).

[36] Andrew von Hirsh has made a start toward developing a framework for a theory of objective seriousness. See *supra* note 27 and his *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976). Though von Hirsch believes that such devices as the Sellin-Wolfgang survey technique for measuring degrees of seriousness have a use, he sees clearly that objective criteria for seriousness cannot be ultimately based on popular judgments. Von Hirsch has not (as I believe he would be the first to admit) given us very much, but he has given us a start – and a start in the *right direction* (toward just retribution).

[37] "Reasonable" may equal "would be chosen by parties in a Rawlsian original position." See *supra* note 15.

[38] For an excellent survey of the history of the Eighth Amendment and its interpretation, see *Furman v. Georgia*, 408 U.S. 314 (Marshall, J., concurring).

[39] *Coker v. Georgia*, 433 U.S. 584 (1977). In my judgment, the Court erred in not considering *degrees* of rape and aggravating circumstances which might render a punishment of death proportional – a point well made by Justice Powell in the dissenting part of his judgment.

[40] Some criminals (e.g. the psychopathic killer) are perhaps best regarded as wild animals or other non-responsible natural forces of destruction. Such a way of looking at them is not to regard them as persons; but this is all right because, from the moral point of view, *they are not persons*. If drastic steps (e.g. execution) are advocated for them, this cannot coherently be regarded as capital punishment (since they are not

responsible and thus not legitimately open to *punishment*) but must be regarded simply as painless extermination – something done in the same spirit in which we destroy a mad dog. I see nothing *intrinsically* wrong about such steps (i.e. see no reason for believing that psychopaths have a moral right to life); but the *practical* dangers of acting in this way (i.e. letting legal authorities – as in Nazi Germany – decide who is and who is not a person) are so grave that it is irresponsible even to consider this as a legal option. For more on this, see my 'Moral Death: A Kantian Essay on Psychopathy,' *Ethics* 82, Number 4 (July 1972) 284–298.

[41] Albert Camus argued in this way in his essay 'Reflections on the Guillotine.' One other serious problem about long delays is the following: during the delay a prisoner can in a very real sense become a "new person" by morally transforming himself. Is it fair that this new person be executed for a crime committed by a different and previous self? As I shall argue later in the paper, the possibility of self-transformation is a very good reason against the penalty of death.

[42] There is, of course, the utilitarian reason: we wish to give the torturer an incentive for not killing his victim after the torture session is over.

[43] There are three bad arguments (addressed to me in various public discussions) that the infliction of the death penalty is intrinsically wrong which – since they may be widely used – are perhaps worth a brief attack. (1) Punishing people by killing them *degrades us* – *we* are demeaned in the process. But we shall be demeaned by doing this only if doing it is wrong; it cannot be wrong *because* it demeans us. This begs the question. (2) "Two wrongs do not make a right" – a favorite cliché of Americans, particularly undergraduate students. This, of course, begs the question also. The very point at issue is whether capital punishment is a wrong. (3) We must defend the value of the "sanctity of human life" – a value compromised when we execute. This bare slogan is of little help, because it can plausibly cut both ways on the capital punishment issue. Looking at the condemned person, we shall cite sanctity of life as a reason for not killing him. If we look at the *victim* (of murder), however, we could just as well cite sanctity of life as a reason *for* capital punishment – i.e. our use of a punishment this serious is our way of expressing how seriously we take the crime of murder. With analysis, however, this slogan can be turned into an argument – one which I shall develop later in the paper. Even analyzed, however, it will rest on a controversial assumption – namely that killing is morally worse than letting die. For a defense of this assumption, see my 'The Killing of the Innocent,' *supra* note 31.

[44] This book (based on a factual murder and execution) was made into a successful Hollywood movie. Both the book and the movie depict two marginal human beings of unclear responsibility who, after being convicted of murder and sentenced to death, arouse our pity and compassion as they reveal both their humanity and animality in touching ways. Their route to death (except for their contact with Capote) is cold and impersonal.

[45] For more on the distinction between death and the terrible circumstances which may surround death, see my 'Rationality and the Fear of Death,' *The Monist* 59, Number 2 (April 1976) 187–203.

[46] This is not to say that some persons – e.g. Church martyrs, soldiers who will not betray comrades under torture, etc. – cannot rise above the inherent degradation of what is being done to them. Their animal nature is being addressed, but they hold out for a very long time (perhaps until death) before allowing that nature to answer. I am

grateful to Merrilee Salmon for discussing these matters with me.

[47] We would be more inclined to regard as insane a person who voluntarily tortured himself than a person who voluntarily took his own life.

[48] This is the suspicion expressed by Justice Rehnquist in his dissent in *Furman v. Georgia* – a suspicion shared by some of the other dissenting Justices.

[49] The major relevant cases, other than *Furman v. Georgia*, are: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Jurek v. Texas*, 428 U.S. 276 (1976); *Coker v. Georgia, supra* note 39; and *Lockett v. Ohio, supra* note 34.

[50] This is also the central argument of Charles Black's widely read book on capital punishment, *supra* note 18.

[51] The Justices are clearly divided on which alternative is preferable.

[52] Again, see Black (*supra* note 18) for a clear statement of and an attempt to meet this objection.

[53] "The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument [dealt with and dismissed in *McGautha v. California*, 402 U.S. 207] . . . and it would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication" (*Furman v. Georgia*, 408 U.S. 399 and 400) (Burger, C.J., dissenting).

[54] Again, it is perhaps worth noting (for those who are impressed, as I am, by his theoretical machinery) that Rawls's contractors (*supra* note 3) would surely adopt such a principle in the original position.

[55] *Conway v. O'Brien* (2 Cir. 1940) 111 F. 2d 611, 612. See Also *United States v. Carroll Towing Co.* (2 Cir. 1947) 159 F. 2d 169.

[56] Mr. Justice Harlan wrote: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case" (*Reid v. Covert*, 354 U.S. 1) (1957).

[57] See Erving Goffman, *Asylums* (New York: Doubleday, 1961). See also my 'Rationality and the Fear of Death,' *supra* note 45.

[58] It is not uncommon for federal court to declare the prison systems of entire states (e.g. Arizona) to be in violation of the Eighth Amendment – the primary reason usually being overcrowding. But what is the matter with overcrowding? Presumably the effects it has on prisoners. But what if long-term incarceration has the same or similar effects?

[59] As noted above (*supra* note 30) attitudes toward death as opposed to other punishments could be relevant in the Rawlsian original position; but, unless these attitudes are absolutely uniform for all persons, it is hard to see how the application of the punishment could be fair – i.e. some will be more hurt by it than others. Again, one needs an objective account.

[60] Radin, *supra* note 1, p. 1022. Irrevocability is probably the most frequently cited reason in defense of the claim that death is more serious than loss of liberty. See Black, *supra* note 18. And Justice Marshall: "Death is irrevocable; life imprisonment is not" (*Furman v. Georgia*, 408 U.S. 346).

[61] For an excellent discussion of the distinction between compensable and incompensable injuries, see Nozick, *supra* note 2, Chapter 4.

[62] We do, of course, have the concept of a Faustian contract. But we also take these to be perverse.

[63] I have elaborated this point in great detail in my "Rationality and the Fear of Death," *supra* note 45. I am very grateful to Ellen Canacakos for discussion of this closing portion of the paper.

[64] I say *can* instead of *must* because some persons (e.g. Socrates and other exceptionally rare individuals) seem to have attained personal excellence prior to their execution. The Justices in *Furman v. Georgia* who seem to me closest to the view I am here articulating are Marshall and Brennan. Marshall (at 346) writes "Death, of course, makes rehabilitation impossible." And Brennan (at 272,273) writes: "When we consider why [certain punishments] have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded."

[65] *Lockett v. Ohio*, *supra* note 34. There is, of course, a social cost of having stricter procedures to prevent error – Hand's third factor in his algebra of negligence. The primary social costs for criminal due process will be expense, court time, and – of course – the greater possibility that guilty and dangerous persons will be freed to prey again upon innocent victims and that others will be less effectively deterred from crime. I have had little to say about these matters – not because I think they are unimportant but because (as indicated in note 5) I wanted to see how far one could go via a different route. On the capital punishment question, however, this issue will not be too central for the following reason: Probably no one would want to grant *less* due process than existed prior to *Furman*. But, even with that amount, executions had become so infrequent as to have (probably) very insignificant deterrence value. Studies seem to indicate that it is *certainty* of punishment (and not severity) which tends to deter. See Jack R. Gibbs, *Crime, Punishment, and Deterrence* (New York: Elsevier, 1975).