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Is Capital Punishment Immoral Even If It Deters Murder?

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IS CAPITAL PUNISHMENT IMMORAL EVEN IF IT DETERS MURDER?

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After years of inconclusive debate, recent studies purport to demonstrate that capital punishment really does deter murder,¹ and that multiple lives are saved for each person

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executed.\textsuperscript{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.\textsuperscript{3} Moreover, the swifter the punishment is imposed, the greater the impact in deterring all types of murder among all ethnic groups.\textsuperscript{4}

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.\textsuperscript{5} There is currently a heated public debate over capital punishment.\textsuperscript{6} If these studies, and arguments such as Sunstein and Vermeule’s, are found persuasive, they may help sway the debate and contribute to a dramatic increase in executions.\textsuperscript{7}

\textsuperscript{2} See Dezhbakhsh et al., supra note 1, at 369 (eighteen fewer murders per execution); Shepherd, Murders of Passion, supra note 1, at 308 (three fewer murders); Zimmerman, supra note 1, at 390 (fourteen fewer murders).

\textsuperscript{3} See Shepherd, Deterrence Versus Brutalization, supra note 1, at 233-42.

\textsuperscript{4} See Shepherd, Murders of Passion, supra note 1, at 305, 308-09, 314-15.


\textsuperscript{6} 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, N.Y. TIMES, Feb. 1, 2000, at A1. 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. Al Baker, Republicans Seek a Bipartisan Vote on a Bill to Reinstate the State’s Death Penalty, N.Y. TIMES, Mar. 2, 2005, at B5; Pam Belluck, Massachusetts Governor Urges Death Penalty, N.Y. TIMES, Apr. 29, 2005, at A16; Alan Elsner, Republicans Want to Speed up Death Penalty, REUTERS NEWS SERV., July 6, 2005, available at http://www.infoshop.org/lnews/article.php?story=20050706222445418.

\textsuperscript{7} In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court imposed a moratorium on capital punishment pending what the Court 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, 428 U.S. 153 (1976) and companion cases. Between 1976 and 2003, there were 885 executions, and, as of the end of 2003, there were 3374 persons under sentence of death. Thomas B. Bonczar & Tracy L. Snell, Capital Punishment, 2003, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Dep’t of Justice), Nov. 2004, at 5, 10, http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf (last visited May 29, 2006). Between 1976 and 2002, there were 544,885 homicides. JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP’T OF JUST., HOMICIDE TRENDS IN THE UNITED STATES, http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm (last visited May 29, 2006). After remaining fairly constant over most of that period, the homicide rate dropped significantly in the late 1990s and early 2000s; between
Even assuming the validity of the studies, this article argues that capital punishment cannot be justified in the United States in the current historical context for moral reasons that trump consequentialist considerations. This is not an argument that capital punishment is absolutely immoral, since I believe it can be justified in a sufficiently just society. Rather, the argument is that the United States is not that society. Since capital punishment threatens to perpetuate existing social injustices that contribute to murder, substantial societal reform must first be undertaken before it could be considered justifiable. At that point it would be an open question whether capital punishment is needed to deter murder.

Part I details Sunstein 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 balance life against life. That is why capital punishment cannot be ruled out as an abstract proposition under any and all social conditions.

1999 and 2002 there were an average of 15,837 homicides per year. Id. Given these numbers, a sharp increase in the use of capital punishment could easily produce many thousands of executions.

8. 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: Déjà Vu All Over Again?, 2 J. EMPIRICAL L. STUD. 303 (2005) (criticizing the recent studies’ methodology and conclusions, in particular the Mocan & Gittings study); John J. Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 STAN. L. REV. 791, 836 (2005) (discussing the technical difficulty of accurately assessing the deterrent effect of capital punishment, critiquing the recent empirical studies as having failed to do so, and concluding that “neither adoption nor abolition of the death penalty could reliably be causally linked to homicide rates” and that “one cannot confidently conclude that the evidence points to either deterrent or antideterrent effects”). It seems likely that 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 II addresses the question of blameworthiness, focusing on juveniles and the mentally impaired. Since they oppose the execution of innocent people even if it would deter murder, Sunstein and Vermeule's consequentialist argument assumes that it is only justifiable to execute those who are morally responsible for their acts. Yet they support on deterrence grounds the execution of juveniles and the mentally impaired. This flies in the face of the moral objection that, in light of their mental incapacities, juvenile and mentally-impaired murderers are not sufficiently culpable to warrant the ultimate penalty. Part II concludes that this objection has merit.

Part III addresses the issue of social injustice as a cause contributing to murder. It argues that the consequentialist justification for capital punishment is morally permissible only under conditions of substantial social justice, and that these conditions do not currently exist in the United States. This is particularly true as to the disadvantaged segments of society, among whom both the commission of and victimization by murder is most common.

I. THE CONSEQUENTIALIST ARGUMENT

In light of evidence purporting to show that capital punishment deters murder, Sunstein and Vermeule argue from a consequentialist perspective\(^9\) that society may have a moral obligation to employ the death penalty. The argument proceeds as follows:\(^{10}\)

a. No valid distinction exists between government action and inaction, such that the government’s failure to act to save lives is the moral equivalent of the affirmative taking of life.

b. Absent countervailing considerations, of which the action/inaction distinction does not consist, government ought to act so as to preserve life.

c. When faced with life-life trade-offs, where lives will be

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9. By consequentialism, they mean the proposition “that government actions should be evaluated in terms of their effects on aggregate welfare.” Sunstein & Vermeule, supra note 5, at 717. As such, consequentialism is a version of utilitarianism. See sources cited infra note 11 and accompanying text.

10. This is a distillation of the analysis of Sunstein & Vermeule, supra note 5, at 717-28.
lost whether the government chooses to act or not to act, the government is morally obligated to choose to maximize life.

d. To the extent that it saves more innocent lives than those executed for committing murder, and to the extent that less drastic means to accomplish the same end are unavailable, capital punishment maximizes life and should therefore be practiced.

This section discusses areas of agreement with Sunstein and Vermeule's argument, and subsequent sections discuss areas of disagreement. First, I agree that there is no valid moral distinction between government action and inaction. Allowing someone to die when the government could take steps to prevent it is morally comparable 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. Under those circumstances, it would be equally immoral not to execute murderers so as to prevent murder. Hence, moral considerations other than the action/inaction 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 action/inaction distinction logically and morally incoherent. Second, the very purpose of government is to promote society's welfare. While varying moral perspectives exist with regard to promoting welfare, given the incoherence of the action/inaction distinction, it seems unlikely that any of the political philosophies that undergird this society would absolutely ban capital punishment.

Utilitarianism certainly would not support an absolute ban because, by definition, it requires government to maximize society's overall well-being.11 This is essentially

Sunstein and Vermeule's consequentialist argument; namely, that if practicing capital punishment would maximize society's aggregate welfare by deterring murder, then that is what should be done.\textsuperscript{12} 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 do not interfere with others' commensurate rights.\textsuperscript{13} If executing murderers would help promote people's right not to be murdered, then from a libertarian perspective that is what the government should do.\textsuperscript{14} Neither would Rawlsian egalitarianism support an absolute ban. Rawls' first principle of justice requires that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."\textsuperscript{15} One of these basic liberties would have to be the right not to be deprived of life without just cause.

\textsuperscript{12} Sunstein & Vermeule, supra note 5, at 705 ("We suggest . . . that on certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives"). See also id. at 717.

\textsuperscript{13} See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26, 34 (1974).

\textsuperscript{14} 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., J. Charles King, A Rationale for Punishment, 4 J. LIBERTARIAN STUD. 151 (1980); N. Stephan Kinsella, A Libertarian Theory of Punishment and Rights, 30 LOY. L.A. L. REV. 609 (1997). 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 13, 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 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.").

\textsuperscript{15} JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).
Rawlsian egalitarianism should therefore allow capital punishment in order to deter violations of that right, at least in a sufficiently just society. 16

This does not mean that utilitarianism, libertarianism and egalitarianism would require capital punishment, but only that they would not absolutely ban it. In some instances, all three approaches would counsel against capital punishment and require that it not be employed. For example, suppose that practicing capital punishment would produce more rather than less murders. Practicing it would then violate utilitarianism by detracting from society's well-being, violate libertarianism by contributing to the violation of people's libertarian rights, and violate egalitarianism by undermining the right not to be deprived of life without just cause.

The belief that moral philosophy neither absolutely bans nor absolutely requires capital punishment underlies Sunstein and Vermeule's conclusion that an empirical analysis of the actual impact of capital punishment is necessary to the moral decision of whether it is justifiable to practice it. 17 I agree that capital punishment can at times be justified on moral grounds. However, for reasons discussed

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16. 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 15, at 314. He also says 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. 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 only if it can be shown that capital punishment deters murder more than less drastic measures. Otherwise it would not be "needed to maintain just institutions." Id. In other contexts, however, capital punishment seems more problematic. For example, it would seem unjustifiable to 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, because capital punishment would then be helping to maintain unjust institutions.

17. Sunstein & Vermeule, supra note 5, at 745 ("Where capital punishment does not powerfully deter, the empirical predicate for that obligation disappears.").
below, I disagree with Sunstein and Vermeule that capital punishment can be justified in this society at this point in time.

A second area of agreement is that, in general, society ought to act so as to preserve life. In so doing, government will often have to make life-against-life trade-offs,¹⁸ and in making such decisions the goal should be to maximize life. This follows from all the philosophies discussed above.¹⁹ However, countervailing moral considerations may at times compete with the consequentialist argument for capital punishment. This article argues that Sunstein and Vermeule do not adequately discuss such considerations. In particular, they fail to discuss the related issues of murderers' blameworthiness for their acts and the impact of social injustices in contributing to murder. Parts II and III address these considerations.

II. THE QUESTION OF BLAMEWORTHINESS—EXECUTING JUVENILES AND THE MENTALLY IMPAIRED

A. Sunstein and Vermeule on Blameworthiness

Sunstein and Vermeule limit their analysis to the consequentialist goal of preventing murder.²⁰ This intentionally avoids the question of whether capital punishment is morally justifiable for retributive reasons.²¹ Consequently, they do not address the question of a murderer's blameworthiness for the act of committing murder. Blame is an essential component of a retributive

¹⁸. 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.

¹⁹. See supra notes 11-16 and accompanying text.

²⁰. See supra note 12.

²¹. For retributive arguments in favor of capital punishment, see, e.g., Paul G. Cassell, In Defense of the Death Penalty, in DEBATING THE DEATH PENALTY 183, 197 (Hugo Adam Bedau & Paul G. Cassell, eds., 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, in DEBATING THE DEATH PENALTY, supra, 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.").
justification for capital punishment, because absent blameworthiness it is hard to claim that a murderer deserves to die. But blame is irrelevant to a purely consequentialist rationale, whose only concern is with results, i.e., whether capital punishment deters murder. This is problematic for the consequentialist rationale, especially with regard to juveniles and the mentally impaired, in light of United States Supreme Court decisions banning their execution on moral grounds,\textsuperscript{22} strong public sentiments opposing the execution of such persons,\textsuperscript{23} and the large numbers likely to be executed if the consequentialist argument prevails.\textsuperscript{24}

\textsuperscript{22} Roper v. Simmons, 125 S. Ct. 1183, 1196 (2005) (banning the execution of juveniles under eighteen 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.”); Atkins v. Virginia, 536 U.S. 304, 316, 318 (2002) (banning the execution of the mentally retarded as cruel and unusual punishment on the grounds that “today our society views mentally retarded offenders as categorically less culpable than the average criminal” and “[m]entally 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.”); Ford v. Wainwright, 477 U.S. 399, 409-10 (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.”). These points admittedly 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 the debate advocating the execution of juveniles and the mentally impaired on consequentialist grounds is incomplete.

\textsuperscript{23} 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 2003, at 146 (2003), available at http://www.albany.edu/sourcebook/pdf/t251.pdf.

\textsuperscript{24} As of the end of 2003, 67 (representing 2\% of the total) prisoners under a sentence of death were under 18 years of age at the time of arrest; 341 (or 11\% of the total) were between 18 and 19; and 843 (or 27\% of the total) were between 20 and 24. Bonczar & Snell, supra note 7, at 7 tbl.7. Between 1976 and 2002,
Although they do not discuss the issue of blameworthiness, Sunstein and Vermeule seem aware of it when they unsuccessfully attempt to skirt the question of whether their analysis would justify executing innocent people if doing so would save more innocent lives through a deterrent impact on murder. Thus they say, though without explaining why: "[o]f course it is prima facie objectionable, worse than outrageous, if the state proposes to kill people whom it knows to be innocent." 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, 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. Absent blameworthiness, knowingly executing an innocent person to deter murder is immoral because it violates the innocent person's fundamental right to life.

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 and 24. Fox & Zawitz, supra note 7. Given these numbers, widespread use of capital punishment against juvenile and other young offenders would produce hundreds if not thousands of executions.

25. Sunstein & Vermeule, supra note 5, at 737. This is actually a contradiction in terms. To say that knowingly executing the innocent is "worse than outrageous" implies that it cannot be justified, but to say that it is "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 Sunstein and Vermeule's ambivalence over the issue of blameworthiness.

26. Given the virtual impossibility of employing capital punishment without error, it is inevitable that some innocent people will be executed. If these 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 731. 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 736 & n.93. On the other hand, many commentators have argued that procedural safeguards in capital
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. 27 Many criminal law doctrines that excuse or mitigate the sanction for actions that would otherwise be punishable or punished more severely—e.g., the defenses of insanity, 28 self-defense, 29 or duress 30—derive from concerns over whether someone ought to be deemed blameworthy under the circumstances.

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 over-reliance 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). In light of the racial and class bias that infects the capital punishment system and the society at large, see infra Part III.A & B, it is seriously doubtful that the system's inadequacies can be fixed without substantial societal reform. Cf. Kenneth Williams, The Death Penalty: Can It Be Fixed?, 51 CATH. U. 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.


28. See infra note 33.

29. 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”).

30. 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”).
Yet, Sunstein and Vermeule seem ambivalent about blameworthiness. 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." 31 If there is sufficient evidence that executing fifteen-year-old murderers (or, we must also assume, murderers of any age) would significantly deter murder, then, say Sunstein and Vermeule, "[i]n our view, there is a strong argument that states would then be morally obligated to extend capital punishment to such cases." 32 That certainly follows from a consequentialist perspective.

What is not clear is whether Sunstein and Vermeule 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 debates over the extent to which insanity should be a defense, 33 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. 34

Note, however, that the existence of the insanity defense and the banning of 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

31. Sunstein & Vermeule, supra note 5, at 746.
32. Id.
33. The dominant 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. Under the minority approach, the insanity defense is also available to people who understand the difference between right and wrong but who, as a result of mental disease or defect, lack the capacity to conform their behavior thereto. The assumption underlying both approaches is that absent a sufficient mental capacity, blameworthiness should not attach. On the insanity defense generally, see for example, 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).
34. See supra note 22.
mental incapacity or age, then some might be willing to proceed where they would otherwise not under a strict "you do the crime, you do the time" system.  

Unless executing mentally-impaired or juvenile murderers is morally objectionable for other reasons, Sunstein and Vermeule's consequentialist analysis suggests that it may be morally obligatory to execute them in order to deter murder. However, there is little evidence to support that position. 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. Therefore, the only way to determine whether executing juveniles and

35. In banning the execution of the mentally retarded in Atkins v. Virginia, 536 U.S. 304 (2002), and of juveniles under 18 in Roper v. Simmons, 125 S. Ct. 1183 (2005), the Supreme Court 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 5, at 705 & n.8, and it could be that executing juveniles and the mentally retarded 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.  

36. See supra note 1.  

37. Between 1976 and 1993, the homicide offending rate for those between 14 and 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. 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 twenty years, declined for all age groups, but by far the most for those between 14 and 17. Fox & Zawitz, supra note 7. 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 7, 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 in that case, it might not be necessary to execute them in order to deter murder, so long as at least the possibility of execution remains open, unless 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 does not, then one may have to conclude that something other than a resumption of capital punishment produced the decline in the juvenile murder rate, thereby undermining the deterrence hypothesis.
the mentally impaired deters murder is to change the law and study the effects.38

Although a consequentialist approach to the problem would seem to recommend it, Sunstein and Vermeule seem uncomfortable with such experimentation due to concerns over blameworthiness. Thus, one of their arguments against executing the innocent or using torture 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 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.59

However, not much, if any, reliable data exists 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 mere fact that they committed murder is not sufficient to establish that they are not victims. One must also ask whether juvenile and mentally-impaired murderers are sufficiently blameworthy to justify executing them. If not, then absent a deterrent effect executing them is a type of victimization.

In objecting to the execution of innocent people and torture, Sunstein and Vermeule show that they are not pure

38. This is certainly true with regard to juveniles. Only twenty-two juveniles under eighteen, thirteen of whom were in Texas, were executed between 1976 and the Supreme Court’s banning of their execution in 2005. See Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=27&did=203 (last visited June 11, 2006). That seems to be an insufficient sample to study the deterrent impact of executing them. It is not clear 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.

39. Sunstein & Vermeule, supra note 5, at 737.
consequentialists. As a result, they cannot complete their case for society's moral obligation to practice capital punishment without more fully addressing non-consequential objections to capital punishment. If it is immoral to execute blameless people to deter murder, and if at least some murderers are not morally blameworthy or have diminished blameworthiness, then how could society be morally obligated to execute them?

B. Why Is Blameworthiness Relevant?

Many things society does in the name of the general welfare result unavoidably in premature death to some innocent and blameless people. Indeed, it is hard to imagine a society being able to function otherwise. At times, whatever move is made puts lives at risk. In such situations, the argument that society should act to maximize life, unless there is good reason not to, seems strong.

Why, then, is blameworthiness relevant to capital punishment, if in fact it deters murder? If there are situations when morality permits, and perhaps requires, the sacrifice of innocent lives for the benefit of the whole, why is capital punishment different if executing innocent people would on balance save lives? If it is permissible at times to withhold treatment from a terminally ill person and even to practice euthanasia, 40 or in a hostage-taking situation to kill some innocents in order to save more, 41 then why is it not permissible to execute the mentally impaired or juveniles if that would contribute to deterring murder?

There is no logically correct way to resolve these questions, and, ultimately, a value judgment is required in terms of what are deemed relevant moral considerations. The terminal illness analogy might be distinguished from executing the mentally impaired or juveniles on the ground that the terminally ill person has little time to live and is suffering great pain. Allowing such a person to die or ending her life might be thought more humane than keeping her

40. See, e.g., EUTHANASIA EXAMINED (John Keown, ed., 1995) (containing 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, with or without the request of the party).
41. See infra note 43.
alive. The hostage-taking situation might be distinguished on the ground that there is no viable alternative. With regard to capital punishment, however, there are other potentially effective ways of deterring murder that should be exhausted before resorting to the execution of those whom society deems less blameworthy.

But suppose that executing mentally-impaired or juvenile murderers would deter murder by the mentally impaired and juveniles far more effectively than other measures. On pure consequentialist grounds, executing them would then 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. For example, society might believe that juveniles and the mentally impaired are not sufficiently blameworthy for the murders they commit to justify 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. For example, if human dignity entails the

42. See, e.g., John Harris, Euthanasia and the Value of Life, in EUTHANASIA EXAMINED, supra note 40, at 6; Bryan Jennett, Letting Vegetative Patients Die, in EUTHANASIA EXAMINED, supra note 40, at 169.

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

44. In particular, as this article argues, society should be more responsive to the needs of juveniles and the mentally-impaired, see infra Part II.C, and should implement reforms to address the social injustices that contribute to murder, see infra Part III.

45. Sunstein & Vermeule, supra note 5, at 746.

46. See, e.g., Dan W. Brock, Utilitarianism and Aiding Others, in THE LIMITS OF UTILITARIANISM, supra note 11, 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 11, 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
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 it does benefit society as a whole.\textsuperscript{47} In short, in the interest of protecting individual rights, justice may require that society forego that which benefits it 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.

C. Determining Blameworthiness

Blameworthiness is central to the jurisprudence of criminal law.\textsuperscript{48} The determination of blameworthiness depends on moral considerations that may trump a consequentialist calculation of society's overall welfare. Relevant considerations include the state of mind of mentally-impaired and juvenile murderers, as well as society's contribution to those murders.

A principal argument against executing the mentally impaired and juveniles is that they lack the mental capacity to be deemed deserving of punishment or, at least, execution.\textsuperscript{49} The concern over mental capacity ultimately derives from the belief that human beings have free will, \textit{i.e.}, the capacity to make reasoned and rational choices,\textsuperscript{50} 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.\textsuperscript{51}

\textsuperscript{47} RAWLS, \textit{supra} note 15, at 158-59, 248.
\textsuperscript{48} See \textit{supra} notes 27-30 and accompanying text.
\textsuperscript{49} With regard to juveniles, see \textit{Roper v. Simmons}, 125 S. Ct. 1183 (2005), discussed \textit{supra} note 22. With regard to mental capacity, see \textit{supra} note 33.
\textsuperscript{50} See, \textit{e.g.}, Kadish, \textit{supra} note 27, at 329-32 (describing free will and the capacity to choose as central to criminal responsibility); Morse, \textit{supra} note 27, at 530 ("Blaming and punishing an irrational agent for violating a rule she was incapable of following is unfair and an ineffective mechanism of social control.").
\textsuperscript{51} This sentiment is reflected in U.S. Supreme Court decisions banning the execution of the insane, the mentally retarded, and juveniles under 18. See \textit{supra} note 22.
Whether humans actually have the capacity to make free-willed choices, or whether their choices are determined responses to biological and environmental stimuli, is a long-standing debate that is probably unresolvable as a scientific matter.\(^5\) For example, the fact that two people respond differently in similar situations, or that a particular individual responds differently to similar situations over time, could be seen as evidence either of free-willed choice or of nuances in the stimuli that produce determined responses. Consequently, society's only option is to address the matter through the moral philosophies it adopts.

To illustrate, consider the case of a starving person who steals food to eat. From a consequentialist perspective, whether the thief has free will or not is irrelevant, since punishing the thief may deter thievery in either case. It matters not whether people freely choose or are conditioned to desist from crime in order to avoid punishment. The only question is whether society as a whole is better off in punishing that type of theft. From a retributive perspective, on the other hand, if the starving thief is deemed to lack or have diminished free will due to a biological instinct to survive, punishment might be thought undeserved or at least appropriately mitigated. Or if the thief is deemed to have free will, then the retributive decision of whether and how to punish him requires a moral judgment balancing his interest in remaining alive against other people's property interests.\(^5\)

\(^{52}\) See, e.g., MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997) (discussing the capacity or lack thereof to reason rationally in particular contexts as a way to reconcile the free-will/determinism conundrum); DANIEL N. ROBINSON, PRAISE AND BLAME 47 (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" that 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"); 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.").

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.

In the final analysis, society’s moral judgment about when people lack the mental capacity to be held criminally responsible for their acts or deserving of execution entails unavoidable line drawing. Mental competency is a question of degree. There is no clear-cut line between mental competence and incompetence, and there is ample room for disagreement among people’s moral sensibilities about the matter—as reflected in debates over what legal standard of insanity ought to be applied and what the age limit ought to be for executing someone.\(^5^4\)

Scientific analysis may help decide issues of mental competence by shedding light on how people’s mental processes actually function. But, as in all areas where science and law intersect, the meaning and validity of scientific findings will often be disputed and a value judgment will ultimately be required.\(^5^5\) Judicial wrangling over the

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54. See supra note 33 regarding the legal standard of insanity. See also the debate between the majority and dissent opinions in Roper v. Simmons, 125 S. Ct. 1183 (2005), regarding the appropriate age limit for execution.

55. 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.”).
constitutionality of the death penalty may also help by contributing to society's understanding of the moral issues, although in the long run the political process is likely to control the outcome. Consequently, the moral legitimacy of society's decision of whether to practice capital punishment 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, social and economic inequalities that impede people's opportunity to participate equitably in decision-making, or social injustices that are themselves to blame for causing crime. Without question, this society has historically been biased against the mentally impaired, and whether it is adequately and fairly responding to their needs for appropriate treatment today seems highly doubtful. 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 tens of thousands of school age children have committed murder in the past thirty years suggests that society has grossly failed to rear its children properly.

Under these conditions, society is not sufficiently just

56. 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).


58. 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" 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").

59. Almost 67,000 juveniles under 18 committed murder between 1976-2002. FOX & ZAWITZ, supra note 7. On society's failure to respond to children's needs, see for example, 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).
toward the mentally impaired or juveniles to justify executing
them. This is not to relieve them of responsibility for their
anti-social acts, but to limit how society may justly respond to
those acts for which it also 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 executing them for crimes
resulting from society's dereliction of its duty to them. When
society is at least partially to blame for murders committed
by juveniles and the mentally impaired, society must do what
it can to respond fairly to their needs and minimize their
anti-social behavior, attempt through rehabilitation to undo
the harm it has done to those who commit crimes as a by-
product of society's failures, and treat them humanely while
confined.

III. SOCIAL INJUSTICE AS A CAUSE OF MURDER—EXECUTING
THE DISADVANTAGED AND OPPRESSED

This section argues that Sunstein and Vermeule's failure
to address social injustice as a cause of murder, particularly
with regard to the disadvantaged and oppressed minorities,
among whom the murder rate is by far the highest, leads
them to reject what is likely to be a more effective and is in
any event a morally mandated response to murder — namely,
societal reform. This failure is fatal to their case for capital
punishment.

A. Societal Reform as an Alternative to Capital Punishment

Conspicuously absent from Sunstein 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. 60
The most likely explanation lies in the differing histories,

60. Between 1999-2001, the homicide rate in the United States was 3.5
times that in the European Union. See Gordon Barclay & Cynthia Tavares,
International Comparisons of Criminal Justice Statistics, 2001, at 3,
http://www.csdp.org/research/hosb1203pdf (last visited June 11, 2006). During
the 1990s, it was 3 times that of Canada. Answers.com, Crime in Canada,
None of these countries practice capital punishment. Wikipedia.org, Capital
11, 2006).
cultures, and circumstances of those societies. Thus, this article argues that the high murder rate in the United States is largely attributable to injustices in the structure and operation of society. For example, a strong case can be made that this society does not now conform to Rawls's second principle of justice, the difference principle,\(^\text{61}\) in that neither the requirement of fair equality of opportunity nor that of the organization of society such that its social and economic inequalities benefit the least advantaged are satisfied.\(^\text{62}\)

While it may be difficult to prove conclusively a link between social injustice and murder, the fact that the murder rate is so much higher among the disadvantaged lends credence to such a conclusion.\(^\text{63}\) If that conclusion is correct, then it follows that but for social injustice there would be less murder. Indeed, it seems likely that in a truly just society murder would be very uncommon. If so, then one way to deter murder is to reform society. Admittedly, societal reform is a complex process that requires time to complete. But so is gathering and analyzing the (never conclusive) data to establish the deterrent impact of capital punishment, designing a fair process for implementing it,\(^\text{64}\) and waiting for the deterrent impact to take effect. All the time, energy and money spent on that process could be devoted instead to reforming society, thereby speeding up the impact that

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61. Rawls, supra note 15, at 83 ("Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.").


63. See infra note 89. 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 7, at 6 tbl.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. U.S. Bureau of the Census, American Fact Finder: Educational Attainment, http://factfinder.census.gov (highlight "People" and click on "Education" hyperlink; then follow "Educational Attainment" hyperlink). 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. Id.

64. See supra note 26 (regarding the importance of and difficulties in designing and implementing a fair process for capital punishment).
reformation would have in reducing murder.

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

Sunstein and Vermeule mention societal reform as an alternative to capital punishment, but reject it as politically impracticable:

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 . . . .

This acknowledges that societal reform might reduce murder more than capital punishment. The fault in the analysis is that 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 viable. But if society's injustices cause murder, and if rectifying those

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65. See, e.g., 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); 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); Frank I. Michelman, In Pursuit of Welfare Rights: One View of Rawls' Theory of Justice, 121 U. PA. L. REV. 962 (1973) (exploring the possibility of deriving from Rawls's principles of justice constitutionally required welfare rights in the form of a guaranteed social minimum or guarantees to basic goods like education and health care).

66. Sunstein & Vermeule, supra note 5, at 733.
injustices can dramatically reduce murder, then society is morally obligated to choose reformation. To opt for capital punishment under those circumstances is an immoral choice because it would leave intact the murders that result from social injustice and that capital punishment does not deter, and because it would lead to the execution of people who would not have committed murder had society instead opted to reform. Political infeasibility is not a valid excuse for failing to do that which morality requires.

B. Societal Reform and the Black Community

The debate over capital punishment versus societal reform is particularly poignant for African Americans. In fact, the murder rate is much higher in the black than in the white community, most murders are intra-racial, and the death penalty is substantially less likely to be imposed when the victim is black. Consequently, the implications of

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67. See, e.g., Bryan Stevenson, Close to Death: Reflections on Race and Capital Punishment in America, in DEBATING THE DEATH PENALTY, supra note 21, 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”).

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 7, 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. at http://www.ojp.usdoj.gov/bjs/homicide/race.htm#vrace.

70. See, e.g., John Blume et al., Explaining Death Row's Population and Racial Composition, 1 J. EMPIRICAL L. STUD. 165, 166-67 (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). Based on Blume’s 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 5, at 729 & n.76. Note that they also find the death-sentence rate to be far the highest in black-on-white murders, where the rate is 2.2 times greater than in
Sunstein and Vermeule's argument for capital punishment is that in order to save the lives of innocent black victims, many more African Americans, and especially African-American males,\textsuperscript{71} should be executed than at present.

Before doing so, morality requires addressing the question of why the murder rate is so high among African Americans. The inescapable explanation is that this phenomenon is a by-product of this society's racist past and of its failure yet to rectify the injustices 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 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.\textsuperscript{72} An astounding one-third of African-American males under age 30 are either incarcerated or on probation or parole.\textsuperscript{73} Literally thousands of African-American males, the majority of them young, are likely to be executed with increased use of capital punishment.\textsuperscript{74}

\textsuperscript{71} This figure is extrapolated from the available data. In 2003, an estimated 12\% of black males in their 20s were incarcerated. Paige M. Harrison & Jennifer C. Karberg, \textit{Prison and Jail Inmates at Midyear 2003}, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Dep't of Justice), May 2004, at 11 & tbl.13, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf (last visited June 11, 2006). 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, \textit{Probation and Parole in the United States, 2003}, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Dep't of Justice), July 2004, at 4, 6-7 tbls.4, 7 & 8, http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf. Assuming 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 ballpark.

\textsuperscript{74} Between 1976 and 2002, there were a total of 275,998 black male homicide offenders. FOX & ZAWITZ, \textit{supra} note 7, 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

This may explain, despite the far higher incidence of murder among African Americans, why their support for capital punishment is far weaker than among whites.76 Even

http://www.ojp.usdoj.gov/bjs/homicide/tables/oarstab.htm. 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 7, at 6, 7, 11. If, in response to increased use of capital punishment as a means of deterrence, the death sentence rate were to rise to, say, 5%-10% of offenders, it is likely that thousands of black males, the majority 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, at 305. One study hardly seems enough to warrant executing thousands of African Americans.

76. A 2003 Gallup poll found that 67% of whites favored and 29% opposed the death penalty for murder, whereas for African Americans, 39% favored and 54% opposed the death penalty. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, supra note 23, at 146. In a 2001 Harris poll the figures were: 73% of whites favored the death penalty and 22% opposed, whereas 46% of African Americans favored and 43% opposed. Id. at 139 tbl.2.46. 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. Clark County (Ind.) Prosecuting Attorney, Public Opinion and the Death Penalty, http://www.clarkprosecutor.org/html/death/opinion.htm (last visited June 11, 2006). 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, Gallup Poll: Public Divided Between Death Penalty and Life Imprisonment Without Parole,
if capital punishment deters murder in the black community in the short run, African Americans may perceive it as unjust and, by distracting attention from societal racism, as perpetuating the conditions that cause murder in the black community. In the long run, this might result in more deaths from murder and execution combined than if society did the right thing now. In a society still racially divided as a result of societal racism, and with the impact of an increased use of the death penalty likely to be highest in the black community, its view of capital punishment should not be lightly overridden.

C. Can Capital Punishment Complement Societal Reform?

Sunstein and Vermeule suggest a possible response to the social injustice argument: "[A] plausible inference is that whatever steps states take to reduce homicide, capital punishment will provide further deterrence."77 This implies, even conceding that society is obligated to rectify its injustices, that as long as it proceeds to do so it should also practice capital punishment to deter murder further, at least until reform reduces murder to a level that capital punishment is no longer needed as a deterrent. However, Sunstein and Vermeule seem to believe that this point will never be reached: "Whatever states do, some level of homicide is inevitable."78 So even in a fully just society, they feel that capital punishment will be a needed and morally-obligatory deterrent.

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. This will slow down the speed at which societal reform could occur if society had the willpower to do what morality requires.

Second, as a practical matter, reliance on capital punishment may impede more aggressive reform efforts by distracting attention from societal injustices and focusing instead on what might seem to be a quicker fix. For example,


77. Sunstein & Vermeule, supra note 5, at 732.

78. Id.
the current emphasis on personal responsibility as the solution to social ills (as with welfare reform) has in fact diverted attention from society's contribution to those ills. Sunstein and Vermeule acknowledge this possibility, but then discount it:

[Perhaps capital punishment reduces the political incentive to adopt other strategies, and if this were so, the argument for capital punishment would surely be weakened. But there is little reason to believe that if capital punishment were abolished, there would be significantly larger efforts to reduce violent crime through education and training programs.]


Third, even acknowledging the likelihood of some amount of murder in a just society, capital punishment would not necessarily operate as a deterrent in that context. Below some level of execution, capital punishment may cease to work as a deterrent. Perhaps the murders that occur in a just society are of a type that capital punishment cannot deter. If in a just society it turns out that capital punishment decreases the residual murder rate, then a consequentialist case can be made for it. Until then, society's moral obligation is to do all it can to reform itself as quickly as possible.

D. Can Anyone Be Punished?

A possible objection to the societal reform argument is

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79. Compare Dripps, supra note 27, 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").

80. Sunstein & Vermeule, supra note 5, at 733.

81. In fact, one of the recent studies found that low levels of execution actually have the brutalizing effect of increasing the murder rate. Shepherd, Deterrence Versus Brutalization, supra note 1, at 233-42. The import of these findings is that states choosing to practice capital punishment must be prepared to execute large 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.
that it extends far beyond the field of capital punishment to
many other areas of social life where it may yield absurd
results. For example, if capital punishment is immoral when
societal injustices cause murder, the same could be said of the
entire criminal justice system. It can plausibly be argued
that crime in general, or at least certain types of crime, are a
by-product of social injustice.\textsuperscript{82} Does this mean that it is
immoral to imprison people who commit crimes that would
not occur but for social injustice?\textsuperscript{83}

The answer is not that simple. Having wronged both
those who commit crimes and those who are its victims,
society must respond justly to both in a balanced manner.
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 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 its contribution to the dilemma, society 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 means
of deterrence must be to begin practicing social justice.\textsuperscript{84}

\textsuperscript{82} See, e.g., Richard Delgado, “Rotten Social Background”: Should the
Criminal Law Recognize a Defense of Severe Environmental Deprivations?, 3
LAW & INEQ. 9, 23-37 (1985) (discussing social science studies identifying as
causes of crime such factors as poverty, substandard living conditions,
malnutrition, inadequate education, mistreatment by the police, and racism).

\textsuperscript{83} See, e.g., id. (advocating such a defense); FROM SOCIAL JUSTICE TO
CRIMINAL JUSTICE, supra note 53 (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, HRC Mission,
http://hrccoalition.org/node/6 (last visited June 11, 2006) (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”).

\textsuperscript{84} 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 that, as a result of the impact of negative
environmental conditions that impair the capacities on which moral
responsibility depends, “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
social conditions in which people have the opportunity to develop those
capacities).
Above all, having contributed to murder through social injustice, society must 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. For example, if one country unjustly invades another and finds its troops surrounded by an enemy engaged in justifiable self-defense, it is not justifiable to kill innocent people to save the 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.

E. Intergenerational Rights and Responsibilities

Another possible objection to the societal reform argument relates to the distinction between individuals and society. It is easier to justify requiring someone who has wronged another to rectify that wrong, even at the cost of some personal suffering, than to justify making innocent people suffer in order to correct society’s past wrongs. As between two individuals, when one of the two must suffer a loss as a consequence of some immoral act, the argument for imposing the loss on the culpable party is strong. But why should society, in correcting its past wrongs, be entitled to impose on those alive today who did not participate in perpetrating those wrongs? To a great extent, the answer depends on one’s view of intergenerational rights and responsibilities. This, in turn, depends on whether one has a more individualistic or communal view of society.

From an individualistic perspective, when those alive today benefit from the wrongs of their antecedents, requiring them to suffer in order to rectify the present effects of those wrongs is somewhat analogous to the two individuals discussed in the prior paragraph. As between innocent parties, some of whom suffer from society’s past wrongs and others of whom benefit, 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 the wrongs had not occurred. While such reasoning helps justify such measures as
affirmative action and reparations, it cannot justify allowing innocent people to be murdered due to the absence of capital punishment. This dilemma yields the strongest case for capital punishment on consequentialist grounds. The argument is 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.

Rawls speaks to this point in discussing slavery. For Rawls, 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.” However, he envisions the possibility that 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.” His example is an agreement among warring city-states to enslave rather than kill captives. Analogously one might argue, conceding capital punishment to be unjust in an unjust society, that it may nevertheless be practiced to prevent the worse injustice of allowing preventable murders to continue while society transitions to a more just state of affairs.

There are two problems with this reasoning, one principled and the other pragmatic. From a principled perspective, Rawls does not discuss whether his hypothetical parties are involved in a just or unjust war. This is an important distinction. Suppose one party has unjustly attacked another that is justifiably defending itself. In that context, the attacker’s agreement to enslave rather than kill


86. Rawls, supra note 15, at 248.
87. Id.
captives is unjust, since its obligation is to stop the unjust attack, in which case no one will be killed or enslaved. But when the attacker is unwilling to desist and likely to prevail, the agreement is just on the part of the defending party because it is the lesser of two unavoidable evils. The capital punishment analogy breaks down where society's injustices are contributing to murder because, unlike the defending party in the above example, there is no need to choose between unavoidable evils when society, like the attacking party, has the capacity (if not the willpower) to engage in obligatory reform.

From a pragmatic perspective, the transitional argument for capital punishment is too speculative and could be used 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, in my opinion, undeniable. What is not known and cannot be until attempted is how fast societal reform is possible and what impact it would have on murder rates. Perhaps seeing the process of reform would deter people from committing murder as well as or more effectively than capital punishment. Since the answers to these questions are so uncertain, it is morally appropriate to oppose capital punishment until vigorous societal reform is undertaken. Only then should the viability of capital punishment be considered.

Viewing society from a communal perspective, there are times, as Sunstein and Vermeule note, when society has no option but to make life-life choices among innocent parties. Such choices are pervasive in social life, and at some level impact almost everything society does. Fighting a war in order to save innocent lives, for example, will inevitably cost innocent lives. Similarly, activities undertaken to produce life-sustaining goods, such as the testing of newly developed drugs, will inevitably have side effects that cost lives.

How does all this relate to capital punishment? Foremost, society cannot justly make life-life decisions unless its decision-making process is just. In particular, when a decision-making process is controlled by those who stand to benefit from the decisions, the process is unjust to those who

88. Sunstein & Vermeule, supra note 5, at 707-08, 727, 749-50.
stand to suffer 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 for capital punishment, while both the victims and perpetrators of murder in this society disproportionately come from its disadvantaged classes, it is certainly arguable that the political process is tilted in favor of monied interests. Consequently, in response to public demands to address the high murder rate in disadvantaged communities, the monied elite might well prefer capital punishment over equalizing educational and employment opportunities through measures that redistribute wealth. Indeed, in response to a burgeoning social reform movement emanating from the civil rights and anti-Vietnam War struggles, over the past generation society's elites have promoted fear of crime and punitive approaches to crime as a primary means of undermining reform movements and preserving their privileged status.

89. See supra note 63. See also Andrew Carsen, Poverty, Crime, and Criminal Justice, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE, supra note 53, 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).


91. 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 the idea in principle); NAT'L RESEARCH COUNCIL, COMM. ON EDUC. FIN., EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES (Helen F. Ladd et al., eds., 1999) (a series of articles on various aspects of school finance litigation and reform).

92. See, e.g., KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (discussing 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
Capital punishment may save innocent lives. But so might other less draconian means of addressing crime in the form of societal reform measures that move this society in a more just direction, equalize opportunity, and preserve life in other respects as well. There is no way to know for sure which approach or combination of approaches will most effectively sustain life. Under those conditions, justice requires a decision-making process in which all society’s members have proportionate input. Such a process does not exist today.

IV. CONCLUSION

The answer to the question posed at the outset is that at this point in time in this society capital punishment is immoral even if it does deter murder. The great majority of people executed for murder or on death row come from disadvantaged backgrounds, and a greatly disproportionate number are African Americans. If capital punishment is increased in response to arguments such as those made by Sunstein and Vermeule, many more will be executed. And if for deterrence reasons the law is changed to allow the execution of juveniles and the mentally impaired, many of them will be executed too. This suggests that something is amiss in society, and that through its failings society itself has contributed to the problem.

The weakness of Sunstein and Vermeule’s consequentialist argument for capital punishment is that it looks solely at results and not at causes. When thousands of juveniles commit murder, society is partly to blame for failing to raise its children properly. When adverse social conditions and systemic racism produce murder, society is partly to blame for failing to correct those injustices. Instead of executing its most vulnerable members to solve a murder problem it has helped create, society’s obligation is to reform itself and create conditions that do not give rise to murder. If it fails to do so, society will bear responsibility for the deaths

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) (discussing 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”).
of both the innocent people who are consequently murdered and those it executes for murders that would not occur under more just social conditions.

Sunstein and Vermeule are respected and influential scholars. 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. Their consequentialist argument for capital punishment is sophisticated and erudite. But it is overly abstract and fails to take into account historical context and practical consequences. As such, their approach 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."93

93. Tom Lehrer, Wernher von Braun, on That Was the Year That Was (Reprise Records 1990).
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