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RACE, CAPITAL PUNISHMENT, AND THE COST OF MURDER*

In recent years, American discussion about capital punishment has shifted its focus from the question of the inherent morality of capital punishment itself to the justness of its administration. Opponents of the death penalty now rarely argue that death is itself an immoral or ineffective punishment but rather that the risks of its being unfairly applied are intolerable. In particular, death penalty opposition groups have made some headway, both legally and in the court of public opinion, by publicizing wrongful convictions and executions.

However, surprisingly little attention has been paid to another long-standing procedural worry about the death penalty in the United States, namely, the apparent racial disparities in capital sentencing.¹ Empirical studies dating back to the 1940s indicate that, all other things being equal, racial minorities, particularly African-Americans, are disproportionately more likely to receive the death penalty for murder than are convicted whites.² The U.S. General Accounting Office conducted a comprehensive review of the relevant studies in 1990 and concluded that even with the reforms sparked by the Supreme Court's 1972 decision in *Furman*,³ racial disparities in the "charging, sentencing, and imposition of the death penalty" persisted. For example, three-fourths of the studies examined by the GAO determined that black defendants were more likely to receive the death penalty, especially when their victims were white.⁴ State and federal government studies conducted since 2000 largely confirm these findings.⁵ In effect, murder functions as a status crime in the U.S., with one set of prescribed punishments for African-Americans and another set for other offenders.

At one time, such charges of racial injustice were a key weapon in the arsenal of death penalty abolitionists. The Furman decision was partially based on concerns about such racial disparities, but since the Court's decision in *McCleskey vs. Kemp* in 1987, the issue is no longer as prominent among the arguments of death penalty opponents. However, I believe that the issue of racial disparities in capital sentencing deserves to be reinvigorated and reconceptualized. Furthermore, once the racial injustice in question is understood not as a judicial wrong done to particular minority defendants, but as a political wrong inflicted on African-Americans as a class, we will find that a moratorium on the use of the death penalty in the U.S. is appropriate at this historical moment.

1. RACIAL DISCRIMINATION AND THE COURTS

The Supreme Court's decision in *Gregg*⁶ in 1976 ended the *de facto* moratorium on capital punishment. Since then, the arguments of capital punishment opponents have not been warmly welcomed in American courts, and the argument that the death penalty is imposed in a seemingly racist fashion is no exception. Death penalty supporters have often portrayed worries about racial discrimination as unprincipled last-ditch attempts to play a "race card" by those who have lost the public argument about the intrinsic morality of the death penalty.⁷ Consequently, capital punishment opponents have tended to see judicial resistance to concerns about racial discrimination as a sign of judicial ill will, illogic, or ignorance. Yet even if these charges are true, recent court rulings contain principled arguments that present intellectual and pragmatic obstacles for the opponents of capital punishment, arguments that therefore cannot simply be dismissed.

For instance, the Supreme Court has insisted that defendants cannot simply cite statistical evidence of racial discrimination in order to have their sentences overturned, but must provide evidence of discrimination specific to their case.⁸ Even if there exists a high probability, on the basis of past

cases, that an individual African-American defendant was a victim of racial discrimination, this does not by itself demonstrate that any particular defendant was so victimized, the Court reasoned. So although the African-American defendant in *McCleskey vs. Kemp* cited a well-known study indicating that African-American defendants in Georgia were significantly more likely to be sentenced to death, particularly if convicted of killing a white person, the Supreme Court ruled that because McCleskey failed to produce any evidence of racial discrimination arising from his own trial, his death sentence could not be overturned.

Despite McCleskey's failure, the Court's ruling might be seen as a positive development by capital punishment skeptics. For by demanding that defendants produce evidence of racial discrimination specific to the case at hand, the Court acknowledged the possibility of racial discrimination and its relevance to procedural justice, and also endorsed the seemingly egalitarian notion that each capital case be decided only on its particular merits. For death penalty opponents confident that racial discrimination affects capital sentencing, the Court appeared to offer an avenue by which to redress racial discrimination.

Yet as it turns out, this is a narrow avenue at best. A good deal of the justifiable suspicion harbored by African-Americans and other racial minorities toward the criminal justice system has little to do with events in the courtroom. Rather, they are acutely aware of the extra-judicial discrimination that takes place before a defendant even enters a courtroom.⁹ Examples of such discrimination include prosecutors who, aware of jurors' prejudices, more frequently opt to prosecute African-Americans for murder, and police officers who more aggressively pursue and prosecute crime in African-American neighborhoods. And as many predicted, the reforms instituted after Furman (sentencing guidelines that limit judge and jury discretion in imposing death; bifurcated trials with distinct guilt and penalty phases; automatic appeals of death sentences; and state reviews to determine if a given sentence

aligns with those in similar previous cases, etc.) shifted racial discrimination to these earlier stages of the judicial process. Procedural mechanisms are unlikely to identify these forms of discrimination, nor will they help to identify several other possible sources of racial discrimination, including the selection of jurors, judges' rulings, and inequities in the quality of defense counsel. Thus, for the Court to require specific evidence of racial discrimination in capital cases turned out to be a hollow victory for the anti-death penalty cause, since few defendants who are actual victims of racism will be able to provide specific and decisive evidence of that racism. Capital trials rarely feature any racist "smoking guns," like the audio tapes, presented in O.J. Simpson's murder trial, of police officer Mark Fuhrman using racist language. Few defendants are able to offer specific evidence of discrimination within trial proceedings, but even fewer are able to prove discrimination of the extra- or pre-judicial variety. However widespread, the racial discrimination that has survived the Furman reforms is likely to be undetected by most any judicial mechanism or form of oversight.¹⁰ As Justice Blackmun noted, "we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system," especially without sacrificing some measure of individualized sentencing.¹¹

I would therefore suggest that these legal and practical hurdles are insurmountable, and that if death penalty opponents hope to use the evidence of racial discrimination to further the cause of capital sentencing reform, they must place the significance of this evidence in a new light. Unfortunately, opponents of capital punishment also appear to be fighting an uphill battle on this front. For beyond suggesting how racial discrimination is relevant to death penalty policy, they must also confront those who deny its relevance altogether. Some advocates of capital punishment believe that even if such racial disparities exist, they do not constitute a reason to reconsider, reform, or suspend capital punishment. Ernest van den Haag, among others, has argued that we do no

wrong to members of minority groups who might not be executed but for their minority group status. In “The ultimate punishment: A defense,”¹² van den Haag argues that when considering the distribution of capital punishment among the guilty, those whose execution result from racial discrimination have no ground to complain about unfair treatment. “[M]aldistribution ... among those who deserve [a punishment] is irrelevant to its justice or morality” he writes. Furthermore,

Even if poor or black convicts guilty of capital offenses suffer capital punishment, and other convicts equally guilty of the same crimes do not, a more equal distribution, however desirable, would merely be more equal. It would not be more just to the convicts under sentence of death. ... To put the issue starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished.

So according to van den Haag, to argue for a moratorium or further reforms, because of the seemingly racist fashion in which capital punishment has been administered, only leads to fewer instances of just treatment. The “failure to do justice in all cases is no reason to withhold punishment or reward from individuals”¹³ in some cases. Van den Haag is not alone in this view; even some opponents of capital punishment hold that so long as individuals can be said to deserve to die for their crimes, no injustice is done to them even if their sentence may have been influenced by racial discrimination.¹⁴

Arguments like van den Haag’s, when combined with the current legal hurdles I identified earlier, ought to force opponents of capital punishment to think creatively about how evidence of racial discrimination can be used to advance the cause of sentencing reform. My task, then, is to reconceptualize the importance of racial discrimination so as to overcome both van den Haag’s position and the barriers confronting previous abolitionist efforts. I.e., I intend to show not only that racial discrimination is relevant to death penalty policy, but that properly understood, it supports the implementation

of a moratorium. I shall not argue that death is an inherently immoral punishment. Rather, I shall accept for the sake of argument that for at least some murderers, death is in principle a just sanction.

What abolitionists and death penalty supporters have overlooked is the injustice that racial discrimination in capital sentencing creates not only for defendants but for other minority individuals. In particular, neither side has recognized that racial discrimination creates not simply a judicial injustice to capital defendants but a social or political injustice to African-Americans as a class. I shall offer a pair of related arguments that, by focusing on the injustices done to minority communities as a whole and not simply on capital defendants, are adequate to justify a moratorium on capital punishment. The thrust of these arguments is that racial discrimination distorts the “market” for murder created by the law. It does so by altering the relative value of individuals’ rights and liberties, whereas it is inimical to the spirit of democratic equality under the law for the value of those rights and liberties to be distorted by factors unrelated to individual desert.¹⁵

2. COSTS AND EXPECTATIONS

I shall now suggest that current capital punishment practices are unfair to African-Americans as a class, and that this unfairness gives us enough reason to support a moratorium. My argument begins from the observation that a society’s practices have a strong role in determining its citizens’ expectations. When a society adopts a particular policy or engages in a particular practice, individuals in that society acquire beliefs about how various other individuals or institutions are likely to behave toward them. In the case of African-Americans, they are perfectly justified in believing that should they commit murder, the criminal justice system is likely to treat them more harshly than other individuals, whether due to the greater likelihood of being arrested, charged, or convicted, or

due to the greater likelihood of execution following conviction. Notice that any individual African-American need not be certain that she would be executed; indeed, no one can truly be certain of the legal consequences of violating the law in one particular instance. Still, the litany of empirical evidence regarding capital punishment makes it justified for African-Americans to form the belief or expectation that the legal system will mete out harsher punishments for African-American murderers. I do not assert here that all African-Americans have this expectation – for some may be ignorant of these statistics – only that it would be rational for them to do so.

In this instance, the expectations impacted are the expectations surrounding the costs of murder. I contend that this difference in the costs of murder for African-Americans and other groups amounts to a distinct injustice, not only to actual African-American murderers or defendants, but to African-Americans as a class.

Consider the following thought experiment: Suppose that in a small village, there is one bakery, but this bakery has two sets of prices for its goods: Right-handed shoppers consistently pay less than left-handed shoppers. For right-handers, a baguette is \$1, for left-handers, \$2. Right-handers pay \$5 for an apple pie, left-handers, \$10, and so on. There exist no significant differences to explain this price differential (left-handers are not twice as wealthy as right-handers, e.g.). Given that this is the only bakery in the village, are left-handed shoppers treated unjustly by this pricing arrangement? Clearly so. But does the injustice lie in left-handers paying a higher price, or in the fact that they face a higher price for baked goods in the first place? Those who choose not to shop at the bakery at all and forego baked goods are treated unjustly, it seems, even though they do not actually pay the higher prices. Moreover, this injustice exists even if, for instance, the higher prices offered to left-handers are fair in some objective sense. If baguettes cost the bakery \$2 to produce, and are sold to left-handers for \$2, this price could

be said to be fair in that it reflects the bakery's costs, which is one way in which we might describe a price as fair. But it remains unjust for right-handers to enjoy a discount on irrelevant grounds.

I suggest that African-Americans are in precisely the same situation with regard to "buying" murder as our left-handed villagers are with regard to buying bread. The practice of racial discrimination in the criminal justice system gives African-Americans sufficient justification for believing that they face higher probable costs (death) from murder than do other individuals, and for little reason other than their race. Such a cost differential is unfair, not only to those who actually "purchase" murder from the criminal justice system, but also to all those law-abiding African-Americans who face the higher costs but opt not to murder at all. Indeed, the injustice here is worse than the injustice done to left-handed villagers. For although another bakery could open, one charging the same prices for all consumers, the criminal justice system is the only possible "vendor" of murder and thus entirely determines the index of costs for crime.¹⁶

3. FIRST ARGUMENT FOR A MORATORIUM

I do not mean to crassly suggest that murder is simply a good to be purchased in exchange for punishment, nor that people need murder in the way they need bread. But how can we argumentatively capture the important intuition underlying this thought experiment? To do this, I offer the following argument:

- (1) Principle of Legality: Respect for individual autonomy demands that an individual should be held legally responsible for violating the law only if that law was fixed, clear, publicly promulgated, and established prior to the violation, thus enabling individuals to rationally determine the costs they confront for violating the law.

This principle applies only to what I will call, in a quasi-Rawlsian vernacular, minimally just states. Such states have a framework establishing the rule of law, are to some degree well-ordered, and while not necessarily perfectly just, provide at least a minimum level of freedom and security to their citizens. The Principle of Legality is not meant to apply either to grossly unjust states, where it may be justified for individuals not to be held legally responsible for violations of unjust laws, or to international contexts, where individuals might be reasonably be held responsible for unjust acts despite the lack of an established legal code. The United States and other Western democracies meet the requirements of minimally just statehood.

- (2) Principle of Equal Status: Individuals do not enjoy equal legal status relative to a given crime if (a) the law or legal practices provide different individuals with different expectations about the likely costs of committing that crime, and (b) the differences in expectations are best explained by a factor other than differences in individuals' desert.

Regrettably, current American practices surrounding capital punishment for murder fail to respect this principle. Those practices result in African-Americans facing a different schedule of costs than other citizens, since they are more likely to be executed for the crime of murder. In itself, citizens facing different schedules of costs is not necessarily unjust, since citizens may sometimes justifiably face different schedules of costs. For example, repeat offenders face harsher punishments than do first-time offenders. Though this may be justified by considerations of deterrence, we may also appeal to desert or justice to do so: Repeat offenders' violations of the law are less representative than the violations of one-time offenders, thus reflecting a more serious deficiency of moral character and a greater willingness to break the law, and so repeat offenders deserve stiffer penalties. Nonetheless, it is

unjust for citizens to face different schedules of costs because of factors irrelevant to justice, such as their race.

- (3) African-Americans who murder are persistently more likely to be executed than are other murderers, a fact best explained by racial discrimination.¹⁷

Relevant statistical studies suggest that the greater probability of African-Americans being executed is not merely a recent or aberrant phenomenon. Rather, racial discrimination in capital sentencing has deep historical roots. Furthermore, a number of the studies in question found that racial disparities exist even when other factors (e.g. geography, the nature of the charge, whether the defendant used a public defender, etc.) are considered, thus suggesting that race plays the dominant role in explaining these racial disparities.¹⁸

- (4) So African-Americans face rational expectations regarding the costs of murder different from the rational expectations other potential murderers face.
- (5) This difference in expectations is therefore due to race, a factor irrelevant to individual desert.
- (6) With respect to murder, African-Americans do not enjoy equal legal status.
- (7) If individuals do not enjoy equal status relative to a given crime, they are treated unjustly in proportion to the harm they would suffer were they to commit the crime and suffer the corresponding punishment.

This premise simply states that the more serious the punitive consequences of committing a crime, the more serious an injustice it is not to enjoy equal status with regard to that crime. If, for instance, statistical findings implied that African-Americans who double park paid on average twice as high a fine than other drivers, this would be unjust, and over time, African-Americans would be justified in forming roughly the same expectations regarding the costs of double parking as I have argued they are justified in forming regarding

the costs of murdering. However, not only is double parking a less serious injustice than murder, it is treated as such, since the punishments for it are far less severe. Hence, the injustice done in a society in which the penalties for double parking are influenced by race is less severe than the injustice done by the racial disparities in capital sentencing for murder.

Like the Principle of Legality, this premise is limited to minimally just states, with the further caveat that in such states, the severity of punishment at least approximates the seriousness of crimes. The rationale for this limitation is this: One way to determine the seriousness of a crime, and in turn the severity of comparative injustice relative to the punishment for a crime, is measured by what may be called the crime's generic loss. I.e., a crime's seriousness is determined by the usual or typical loss, measured in preference satisfaction, its commission inflicts on those who suffer it. For the most part, murder is a greater loss to its victims than is double-parking because the loss of possible preference satisfaction is far greater. This will not hold true in all cases, since there may be individuals for whom the loss of life would be a minor loss, but this is likely to be rare. Furthermore, a crime's generic loss tends to track its generic benefit. Murder is generally a greater benefit to murderers than double parking is to double parkers, though again, this may not hold true in extraordinary cases. If comparative injustice (i.e., the degree to which a person is treated unjustly if she is punished more harshly than others for the same act) corresponds with a crime's generic benefit, then an individual who commits a crime with a greater generic benefit but is punished more harshly than others who commit the same crime suffers a greater comparative injustice than the individual who suffers a comparative injustice relative to a crime with a lesser generic benefit. In grossly unjust states, it could well be true that the seriousness of punishments is not well indexed to the seriousness of crimes, such that, e.g., double parking is punished more harshly than murder. In such states, racial discrimination could also result in comparative injustice but premise 7 would not necessarily hold true. Again,

we may suppose that the U.S. meets this additional requirement for a minimally just state.

- (8) The stringency of measures to ensure equal legal status must be proportionate to the injustice they aim to redress.

Again, supposing that double parking penalties were greater for African-Americans, we would be understandably reluctant to demand a moratorium on citations for double parking. Not citing double parkers not only invites chaos, but it is an overreaction to the injustice in question. A number of other less severe measures might be taken to address this injustice before we suspend the ticketing of double parkers altogether.

Conclusion: Given the distinctive harmfulness of capital punishment (its severity, irreversibility, etc.), a moratorium on capital punishment is at least temporarily justified, until differences in expectations regarding the costs of murder approximate differences in desert. (Thus, African-Americans as a class, not simply those accused or convicted of murder, or those sentenced to die, are treated unjustly).

Notice also that my argument is sufficient to establish a general moratorium on capital punishment until we are reasonably confident that it is not being imposed in a racially discriminatory manner, but not because of the consequences of racial discrimination for actual minority defendants in capital cases. I do not deny that those defendants are treated unjustly, but my argument focuses on the consequences that the practice of discrimination has on the expectations of African-Americans in general regarding the costs of murder. Thus, it is no objection to my argument that any particular member of a racial minority group may not suffer from actual discrimination in sentencing. Not only do African-Americans have reason to believe that they might be subjected to capital punishment because of their race (even if their being so subjected is not a certainty), the fact of existing racial discrimination causes African-Americans to confront an unjust schedule

of costs. Hence, they face the costs of a racially discriminatory system even if they do not suffer that discrimination themselves. The very choice as to whether to commit murder is, for African-Americans at least, an unfair one. For African-American defendants, to be victimized by racial discrimination by being specifically sentenced to die is to suffer a second injustice.

Note also that my argument does not require that the racial discrimination in question be intentional or conscious, nor is it relevant when, within the judicial process, the discrimination happens. So long as African-Americans face higher costs for murdering, where these costs are best explained by race, then it is irrelevant whether the cost differentials result from intentional discrimination. Indeed, these cost differentials may reflect otherwise legitimate goals shared by police, prosecutors, etc., such as crime prevention.

4. SECOND ARGUMENT FOR A MORATORIUM

Obviously, African-Americans are not only potential initiators of crime; they are also potential victims, and one of the more striking findings of the studies conducted on the effect of race on capital sentencing is that the race of murder victims has at least as much impact on capital sentencing as does the race of defendants. For example, Baldus et al. in their landmark study of capital sentencing in Georgia, found that African-American defendants were 1.1 times as likely as defendants of other races to be sentenced to death for murder, while defendants of all races are 4.3 times more likely to be sentenced to death when the victim is white than when the victim is of another race.¹⁹

These findings provide us with a second argument for a moratorium on capital punishment, similar in spirit to the first. The obvious corollary of the finding that murderers are much more likely to be executed for killing whites is that murderers who kill African-Americans are much less likely to be executed. We can again ask how such a finding can be translated into conclusions about the costs of murder.

According to these findings, the cost of murdering an African-American is often significantly less than the cost of murdering anyone else. Implicitly, then, the lives of African-Americans are treated as less valuable than the lives of others. Thus, current sentencing practices afford African-Americans less than the full protection of the laws. In my previous argument for a moratorium, I appealed to the Principle of Equal Status, arguing that African-Americans face different expectations regarding the costs they face as would-be murderers. Here I appeal to a second principle:

Principle of Equal Protection: Individuals do not enjoy equal protection relative to a given law if (a) the costs of violations of that law vary depending on who the victim of the violation is, and (b) these cost differences are explained by factors unrelated to the intrinsic seriousness of the violation.

According to this principle, African-Americans do not currently enjoy the equal protection of the laws against murder. Moreover, while the costs of committing a crime against certain individuals are sometimes greater than the costs of committing that same crime against other individuals, such cost differences are justified when they reflect differences in the moral nature of the crime. For example, killing a young child is nearly always morally worse than killing an adult, as it reflects a certain depravity of mind and terminates a life whose value has hardly begun to be realized. Hence, imposing higher costs or penalties on killing children is reasonable. But the same cannot be said for imposing lower costs on murderers who kill African-Americans. There is nothing intrinsically better about the death of an African-American than the death of anyone else.

The Principle of Equal Protection thus grounds a second argument for a moratorium:

- (1) Principle of Legality.
- (2) Principle of Equal Protection.
- (3) The murder of African-Americans imposes lower costs on its perpetrators, a fact best explained by racial discrimination.

- (4) So African-Americans face rational expectations regarding the costs of their being murdered different from the rational expectations faced by other potential victims of murder.
- (5) This difference in expectations is therefore due to race, a factor irrelevant to determining the intrinsic seriousness of a crime.
- (6) With respect to murder, African-Americans do not enjoy equal legal protection.
- (7) If individuals do not enjoy equal protection relative to a given crime, they are treated unjustly in proportion to the harm they would suffer were they to be victimized by that crime and were the perpetrators to suffer the corresponding punishment.
- (8) The stringency of measures to ensure equal legal protection must be proportionate to the injustice they aim to redress.

Conclusion: Given the distinctive harmfulness of capital punishment (its severity, irreversibility, etc.), a moratorium on capital punishment is at least temporarily justified, until differences in expectations regarding the costs of murder approximate differences in the intrinsic seriousness of acts of murder. (Thus, African-Americans as a class, not simply those who are murdered, are treated unjustly).

As with the first argument, premises 1 and 7 again apply only to minimally just states, characterized by an established rule of law and at least an approximate correspondence between the severity of crimes and the severity of punishments.

Notice that my second argument again identifies an injustice done to African-Americans as a class, not only to those who are murdered. African-Americans are treated unjustly because their lives and interests are being given less significance than the lives of other individuals, an injustice which is not confined to those murdered. The judicial system has effectively created a market for murder in which there exist comparatively greater incentives for killing African-Americans.

5. WHY A MORATORIUM?

Even with these two positive arguments for a moratorium, some may still doubt that my arguments justify something so strong as a moratorium on capital punishment. Indeed, some might conclude that we can address the injustice I have identified with (a) a moratorium only on the execution of African-Americans, or (b) executing all those who murder African-Americans while not executing those who murder others.

Such measures would eliminate the two injustices identified in my arguments, but it would do so only by introducing a new injustice, this time to whites. If whites could expect to be executed for murder whereas African-Americans could not, then whites would face a greater cost for murdering than would African-Americans. Similarly, if only those who murder African-Americans are executed, then the lives of whites are accorded less importance than the lives of others. We would simply have turned the switch of injustice in the other direction.

Still, critics such as van den Haag might claim that I have overlooked an alternative to a moratorium: that all deserving murderers be executed, regardless of their race or that of their victims. Such critics would reject my proposal for a moratorium on capital punishment simply because it precludes us from giving at least some murderers, regardless of their race, what they deserve, namely, to die. Recall that for van den Haag, not executing minority murderers because their sentences result from racial discrimination does not produce a more just outcome – only a more equal one. So long as murderers deserve to die, it cannot matter from the standpoint of justice how we arrive at our judgments that those murderers deserve to die. And, since my argument for a moratorium has implicitly assumed that death is at least in principle a deserved punishment for murder, I cannot deny the underlying premise of van den Haag's position.

In one respect, van den Haag's objection simply overlooks what I view as the relevant injustice: not the execution of

those murderers who might not be executed but for their race, but the costs borne by African-Americans generally as a result of racial discrimination. One objective of this essay has been to shift the orientation of the debate between abolitionists and figures such as van den Haag regarding a moratorium. Until now, the debate has centered on actual executions instead of the costs of racial discrimination to African-Americans as a class. But we can well imagine that van den Haag might still insist that, even if I have identified a genuine injustice towards African-Americans, a moratorium absolutely prohibits us from giving the most unrepentant killers their just deserts.

Admittedly, a position like van den Haag's, held with obvious passion and backed only by sketchy argumentation, is difficult to refute. Nonetheless, I shall offer what I hope is a plausible case against it.

Van den Haag's position can be understood in two ways. First, he could put it forth in an absolutist sense, such that no amount of comparative injustice is ever sufficient to justify withholding from anyone what they deserve in a non-comparative sense. On this interpretation, irrespective of the means by which a good or a burden is distributed, any allocation in which at least some individuals end up with precisely what they deserve is more just than any outcome in which no individuals do. If we assume that some murderers deserve to die for their crimes, this ahistorical conception of justice would conclude that it is irrelevant how we determine who should die, or whether this determination is made on the basis of a factor irrelevant to justice.

It is crucial to appreciate how radical this interpretation is with regard to the relationship between desert, in the metaphysical or pre-political sense, and fairness. Despite their disagreements, most every theory of justice, including prominent liberal, libertarian, Aristotelian and republican theories, accepts that how an allocation of benefits and burdens is arrived at, in particular whether that allocation is fair or treats people equally, is relevant to justice.²⁰ Of course, such

theories disagree about the proper balance between historical and other considerations. Strongly libertarian theories such as Robert Nozick's view historical facts about the acquisition, transfer, etc., of rights, benefits, and burdens as more central to justice than egalitarian theories such as John Rawls', in which the distribution of benefits and burdens must also meet conditions of fairness unrelated to historical facts. But none of these theories rejects out of hand the thesis that justice is partially determined by the history of the relations amongst the parties. Therefore, if van den Haag's objection to a moratorium is simply that comparative injustice is irrelevant to overall justice, he is rejecting a long tradition of thought that understands the elements of justice in such a way that simple desert is constrained by considerations of equality or fairness. No doubt, identifying the precise relationship between desert, equality, fairness, etc., is a great philosophical challenge. Yet it seems unlikely that there is no relationship at all, as van den Haag's position might suggest.

For instance, what might van den Haag say to the following scenario?: An enterprising investigative journalist uncovers that a prestigious award, say the Congressional Medal of Honor, is tainted by racial discrimination such that the committee responsible for identifying Medal recipients only seriously considers white soldiers and whenever a suitable African-American candidate is put forth for consideration, the committee dismisses that candidate out of hand.²¹

Would it be reasonable to take measures to redress this inequity, perhaps even suspending the awarding of the Medal of Honor while identifying a means through which to ensure that the Medal be awarded on equal terms in the future? Intuitively, the answer is 'yes'. But based on his position on racial discrimination in capital punishment, Van den Haag's response would be clear: Just as "maldistribution ... among those who deserve [a punishment] is irrelevant to its justice or morality," so too (presumably) would maldistribution among those who deserve an honor be irrelevant to its justice, and so a history of racial discrimination in its distribution would be

no reason to re-examine the processes by which the honorees are selected. A “more equal distribution” of the award by, for instance, not awarding it at all for a certain period would not be more just, only more equal. Van den Haag’s response, I gather, would be not to respond. Better that some get less than what they deserve than that no one get exactly what they deserve, he would be compelled to say.

This example, in my estimation, indicates how implausible van den Haag’s position is when interpreted in this absolutist way. Obviously, there are significant disanalogies between this example and capital punishment. First, in this case, the remedy (identifying worthy African-American recipients) is both obvious and easy to implement. But this does not make the more dramatic remedy (a moratorium on capital punishment) any less justified. Second, this example concerns a deserved benefit instead of a deserved punishment. But it is unclear why that should matter or why we should think the comparative injustice in the awarding of the Medal of Honor is adequate to justify reform but comparative injustice in the allocation of capital punishment is not. Both are apparent examples of racial discrimination causing individuals not to receive exactly what they deserve. Yet why should it be so much more important that individuals receive their deserved punishments than that they receive their deserved honors? If anything, the greater severity of death as a punishment, when compared to the value of the Medal of Honor as a benefit, makes reform of capital punishment practices more urgent than reform of the imagined scenario by the Medal of Honor is awarded. As suggested in premise 7 of both of my arguments, the significance of comparative injustice grows in proportion to the penalties in question.

An alternative interpretation of a position like van den Haag’s would treat the matter in a consequentialist fashion. I.e., the consequences of implementing a moratorium and thereby not executing any of those who deserve it is worse than the consequences of continuing to employ the death penalty, even in a racially discriminatory way. By

“consequences” here, we would mean more than simply the causal consequences of these options, but also the logical and moral implications thereof. Van den Haag himself does not seem to be concerned here with deterrence, but something more akin to the relative levels of justice and injustice involved. On this interpretation, then, van den Haag would be issuing a moral judgment about the comparative badness or evil of foregoing partial desert for some in favor of equalizing fairness for all, to wit, that it is morally worse not to execute any murderers for a time than it is for some otherwise deserving murderers to be executed in part due to their race. Such talk of comparative badness or injustice should cause consternation, since it is difficult to determine whether one course of action is more just than another. Nor is it obvious that the most just policy is the one in which either the maximum number of just acts are performed or the amount of justice we realize maximized. Nevertheless, if van den Haag were to admit the relevance of comparative injustice at all and maintain that it is still more just to allow executions tainted by racial discrimination, then we must examine how such a judgment could be reached.

First, we must clarify what the alternatives in fact are. My proposal is for a moratorium on capital punishment, but not a moratorium on punishing murderers. Rather, convicted murderers would receive a suitably severe punishment (say, life imprisonment) in lieu of death. Thus, the questions we must address are: First, how much injustice is done when an individual murderer who deserves to die is instead either imprisoned for life or imprisoned until capital punishment is reinstated? Second, how much justice is “gained” when we do not execute those African-Americans who might have been executed in part because of their race but are spared because a moratorium is in place? Third, how much is gained in fairness to African-Americans as a whole when we no longer impose racially differentiated costs on them for murder? These values, multiplied by the number of individuals

affected, will determine the comparative levels of justice involved.

In my estimation, the numbers do not tell a favorable story for van den Haag. On average about 3500 prisoners were held on Death Row in the U.S. over the past five years.²² Let us dub this Group One. Under a moratorium, few if any of these individuals would be executed "on schedule", a loss from the standpoint of justice (if we accept that death is a just penalty for murder). Historically about a third of those sentenced to die in the U.S. have been African-American, and over 1000 of those currently on Death Row are African-American. While it is unclear exactly how many of these are slated for execution in part due to racial discrimination, the number is likely to be substantial, probably in the hundreds. Call this Group Two. At the same time, the African-American population in the U.S. is nearly 35 million. This is Group Three. For van den Haag to emerge victorious on this question, the injustice of not immediately giving those in Group One precisely what they deserve must be greater than the justice gained (by means of a moratorium) *vis-a-vis* Groups Two and Three. But a comparison of the numbers involved shows that the injustice done to each member of Group One must be many thousands of times worse than the injustice done to each member of Groups Two and Three, absent a moratorium. I have no argument to show that each postponed execution is a thousand-fold worse than each instance of an individual's being chosen for execution because of her race. Nor do I have an argument to show that each postponed execution is a thousand-fold worse than each instance of an individual suffering unfair costs and not enjoying equal legal status and protection because of her race. Yet suffice to say that defenders of van den Haag's position bear the burden of proving these incredible claims.

A moratorium puts an end to the injustice I identified earlier: the creation of a legal universe in which African-Americans bear greater costs under, and enjoy fewer benefits from, the practice of capital punishment. This is a universe

occupied by tens of millions of Americans. Even if living in such a universe is a modest injustice, the number of individuals living in it creates an injustice greater in magnitude than the justice done by executing murderers who deserve it. If it is better to give some murderers less than what they might deserve than to give some African-Americans murderers or those who murder whites more than they comparatively deserve, then surely it is better to give some murderers less than they deserve than to give the entire African-American community less than what it deserves, namely, equal status under, and the equal protection of, the law. On the whole, it seems unlikely that the relative quantities of justice and injustice favor van den Haag's view.

I have argued that racial discrimination in capital trials and sentencing disrupts this kind of equality across social relations because it causes African-Americans to enjoy higher costs and lower benefits from the legal system, and for no reason related to desert or justice. A moratorium stops the perpetuation of an unequal social relation between African-Americans and whites. So even assuming that capital punishment is at least sometimes a just punishment for murder, a comprehensive moratorium on capital punishment – at least until the equalization of costs across racial lines is achieved – is the least unjust way to proceed.

6. BAN OR MORATORIUM?

Finally, let me address a more pragmatic worry about my proposal. I have argued for a temporary moratorium until differences in expectations regarding the costs of murder approximate differences in the intrinsic seriousness of acts of murder and differences in desert. That is, a moratorium would no longer be necessary when cost differences reflected only considerations of desert instead of racial divisions. But how would we know when such cost equalization occurred, since we would not be imposing the death penalty while the moratorium is in effect? A critic may say that this

epistemological barrier effectively transforms my temporary moratorium into a permanent ban.

While determining when such cost equalization is reached may be difficult, it is not hopeless. First, we can appeal to the evidence regarding the imposition of other punishments. If, for instance, a moratorium on capital punishment were in place for three years, we could then examine evidence regarding the imposition of other punishments, such as life imprisonment, etc., to determine if costs are equalized with respect to those punishments. If they are, then we have some evidence that societal attitudes and practices are less biased, making it reasonable to suppose that costs would be equalized for capital punishment were it re-instituted. Second, we could implement a form of delayed execution wherein states are permitted to sentence convicted murderers to die, but they are prevented from implementing the punishment for a prescribed period, say, two years. During that period, state commissions and other government bodies could determine if the sentences handed out during the prescribed period continue to reflect racial bias. If they do not, then the moratorium is lifted and executions could again proceed.

7. CONCLUSION: LIBERTY AND EQUALITY

My positive arguments for a moratorium make clearer sense of how a moratorium follows from evidence of racial discrimination: Current capital punishment practices are unjust because even if convicted African-Americans deserve to die, the greater likelihood of their execution violates African-Americans' equal status under the law. By imposing a *de facto* stiffer schedule of costs on African-Americans for murder, our legal system arbitrarily (i.e., unjustifiably) imposes a kind of death premium on them. Moreover, the lesser likelihood that those who murder African-Americans will be executed violates African-Americans' rights to equal protection under the law. By imposing a lower cost on the murder of African-Americans, our legal system unfairly discounts the value of

their lives and liberties. Such a discounting would not be justified unless we could show that a greater wrong is done by the murder of whites than by the murder of African-Americans. A moratorium, then, functions as the policy equivalent of a class action suit on behalf of the African-American community as a whole.

My two arguments therefore capture how racial discrimination in capital sentencing is a form of social injustice, not merely a judicial wrong to particular defendants. As Rawls understood, the very notion of the rule of law is intimately connected to the value of individual liberty. He wrote:

The rule of law is obviously closely related to liberty... A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties.²³

In present circumstances, a variety of racial biases infect the application of the law, thus providing African-Americans with different and, I would argue, unfair expectations regarding their actions and the actions of others. They face greater costs as murderers and those who murder them are given the equivalent of a discount on murder. The result is that the interests, indeed the very lives, of African-Americans are given less weight than the lives and interests of other Americans. This result alone is morally troubling. Yet this implied inequality in the value of African-American lives and interests has far-reaching effects on liberty. Because the value of one's liberties can depend on their relation to other people's liberties, inequalities of liberty between individuals produce inequalities in expectations and opportunities. In the case of African-Americans and capital punishment, their liberties, while in a formal sense equal to the liberties of whites, are worth less, in a real sense, than the liberties of whites.

Notice also that my two arguments avoid the hurdles that have faced abolitionist invocations in the past. Since my arguments turn on the costs created by racial discrimination, not the wrongs done to particular defendants or victims, they circumvent the worry that actual discrimination may be difficult or impossible to prove in the cases of particular defendants. All my argument requires is that racial discrimination occurs at a broad social level, without needing to identify either the exact sources of said discrimination or evidence of its being directed at any particular defendant.

NOTES

* David Adams, Jonathan Adler, Lori Alward, Ann Hubbard, Shannon Kincaid, Richard Lippke, Daniel McDermott, Thaddeus Metz, Laurie Shrage, and Rivka Weinberg provided me valuable feedback on this article, as did audiences at Pace University, Emerson College, the University of Buffalo, and the 2003 APA Pacific Division meeting.

¹ Samuel Walker, Cassia Spohn, and Miriam DeLone, (eds.), *The Color of Justice: Race, Ethnicity and Crime in America*, 3rd edn. (Belmont, CA: Wadsworth, 2004), Chapter 8, provides an excellent introduction to the history of this issue and the relevant research.

² Among the more well-known studies: Guy B. Johnson, "The Negro and crime", *Annals of the American Academy of Political and Social Science* 217 (1941), pp. 93–104; Marvin E. Wolfgang and Marc Reidel, "Race, judicial discretion, and the death penalty", *Annals of the American Academy of Political and Social Science* 407 (1983), pp. 119–133; and David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative review of death sentences: An empirical study of the Georgia experience", *Journal of Criminal Law and Criminology* 74 (1983), pp. 661–753.

³ *Furman vs. Georgia* 408 U.S. 238 (1972).

⁴ U.S. General Accounting Office, "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities", GAO/GGD-90-57, 26 February 1990.

⁵ See U.S. Department of Justice *The Federal Death Penalty System: A Statistical Survey (1998–2000)* (2000); U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis, and Revised Protocols for Capital Case Review* (2001); Joint Legislative Audit and Review Committee, *Review of Virginia's System of Capital Punishment* (2002); and Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* (2002). For an excellent review of this recent evidence,

see Kathryn Roe Eldridge, "Racial disparities in the capital system: Invidious or accidental?", *Washington and Lee School of Law Capital Defense Journal* (spring 2002), pp. 305–325.

⁶ *Gregg vs. Georgia* 428 U.S. 153 (1976).

⁷ Nor are such portrayals limited to defenders of the death penalty. Philip Devine, who opposes capital punishment on theological grounds, nonetheless holds that playing the "race card" in order to cast doubt on capital punishment is "politically irresponsible." ("Capital punishment and the sanctity of life", *Midwest Studies in Philosophy* 24 (2000), pp. 229–243, 233) Devine sees attempts to play the race card, as he puts it, as continuous with support for affirmative action, and since it is dubious to base the allocation of benefits such as education on the race of individuals, so too should we ignore considerations of race in life-and-death decisions such as whether to execute. Whether capital punishment is deserved or not, considerations of "social justice," particularly concerning comparative justice among individuals, cannot override "strict and unambiguous" requirements of institutional justice (p. 234).

⁸ *McCleskey vs. Kemp* 481 U.S. 279 (1987). For discussion of the need to offer specific evidence of discrimination, see Laurence Thomas, "Statistical badness", *Journal of Social Philosophy* 23 (1992), pp. 30–41, 31, and Howard McGary, "Police discretion and discrimination," in John Kleinig (ed.), *Handled with Discretion: Ethical Issues in Police Decision Making* (Rowman & Littlefield, 1996), pp. 136–137.

⁹ Leadership Conference on Civil Rights, *Justice on Trial* (1999), contains a summary of the evidence in favor of racial discrimination in law enforcement. See also Coramae Richey Brown, *Unequal Justice* (Bloomington: Indiana UP, 1993); Building Blocks for Youth, "And justice for some" (2000); Human Rights Watch, "Racism and the administration of justice"; Coramae Richey Mann and Marjorie Sue Zatz (eds.), *Images of Color, Images of Crime* (Los Angeles: Roxbury Publishing Co., 2002); and Walker, Spohn, and DeLone, *The Color of Justice*, Chapters 4–8.

¹⁰ Walker, Spohn, and DeLone, *The Color of Justice*, 268.

¹¹ *Callins vs. Collins* 510 U.S. 1141, 1154–1155 (1994).

¹² *Harvard Law Review* 99 (1986), pp. 1662–1669. Van den Haag expressed similar views in "The collapse of the case against capital punishment." *National Review* 31 (March 1978).

¹³ Stephen Nathanson, "Does it matter if the death penalty is arbitrarily administered?", *Philosophy and Public Affairs* 14 (1985), pp. 149–164, 152.

¹⁴ Though opposed to capital punishment in principle, Christopher Meyers, "Racial bias, the death penalty, and desert," *The Philosophical Forum* 22 (1990), pp. 139–148, argues that "evidence of racial bias in the judicial process" is irrelevant once it is established that a person deserved

to die, since defendants whose death sentences result from such bias do not receive more than they deserve.

¹⁵ For a different retributivist strategy drawing upon claims of racial discrimination, see Daniel McDermott, "A retributivist argument against capital punishment", *Journal of Social Philosophy* 32 (2001), pp. 317–33. McDermott argues that the concept of a deserved punishment includes that the punishment be inflicted by a legitimate authority, but legal institutions that engage in racial discrimination lose their legitimacy. McDermott's argument has the great advantage of undermining the 'specific evidence' reasoning in *McCleskey*. So if McDermott is correct, then capital punishment would be unjust when inflicted by a legal system lacking the proper authority, regardless of whether the individual can show that she herself was the victim of racial discrimination. But McDermott's argument only throws us back onto the question of the injustice involved in racial arbitrariness. If a legal institution forfeits some of its right to punish when it is unjust, in precisely what way has the American legal system been unjust in its administration of capital punishment? Furthermore, it could be said that McDermott's argument shows too much, since it might be understood to imply that any injustice in the application of a sanction causes a state to lose permanently its rightful authority to utilize that sanction.

¹⁶ Despite my talk of "costs," etc., I am not appealing to a deterrence theory of punishment here. Theorists of all stripes can accept that punishments may be viewed as the costs of criminal wrongdoing, even though the justification of punishment need not rest on the effect such costs have on deterring crime.

¹⁷ See the multiple-regression analysis conducted by Baldus et al., *loc. cit.*, n 2.

¹⁸ Walker, Spohn, and DeLone, *The Color of Justice*, 267 ff.

¹⁹ Baldus et al., "Comparative review of death sentences", 708–710.

²⁰ Marxism is perhaps the most obvious exception to this generalization.

²¹ Hardly a farfetched scenario: See Elliott V. Converse et al., *The Exclusion of Black Soldiers from the Medal of Honor in World War II: A Study Commissioned by the United States Army to Investigate Racial Bias in the Awarding of the Nation's Highest Military Decoration* (Jefferson, NC: McFarland and Co., 1997).

²² U.S. Department of Justice Bureau of Justice Statistics, "Capital Punishment 2001".

²³ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 235.

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