

IS CAPITAL PUNISHMENT MURDER?

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ABSTRACT

This Article argues that just as the act of forcing sex upon a rapist is itself rape, the execution of a murderer is itself murder. Part I clears the way by defeating three simple, but common, arguments that capital punishment is not murder. Part II shows that despite moral theorists' best attempts to show otherwise, executions seem to instantiate all the morally relevant properties of murder. Part III notes a lacuna in the literature on capital punishment: Even if there is a good moral reason to execute murderers, the distinction between capital punishment and murder requires a plausible account of the state's right to execute citizens. We have no such account.

INTRODUCTION

Moral objections to the death penalty are common: our methods of execution are arguably inhumane;¹ mistakes by lawyers, judges, and juries might cost innocent lives;² and, arguably, racial biases infect death penalty proceedings so profoundly as to render them unjust.³ These are all objections to the way we *practice* capital punishment, not to the idea of capital punishment itself. Death penalty advocates can, and have, responded by suggesting reform rather than abolition—we need more humane methods of execution, better standards of evidence or better lawyering in capital trials, and less racial bias in our courts.⁴

A more radical objection goes beyond an indictment of practice: just as the act of forcing sex upon a rapist is itself rape, the execution of a murderer is itself murder (throughout this Article, “murder” will reference the moral, not the legal, concept). This objection, if sound, strikes a blow that death penalty advocates cannot parry through reform. Compare: A practice of punishing inmates with rape cannot be salvaged by more humane methods—there simply is no morally accept-

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1. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring) (“In striking down capital punishment, . . . [w]e achieve a major milestone in the long road up from barbarism.”) (internal quotation marks omitted).

2. See, e.g., James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1864 (2000).

3. See, e.g., Michael Cholbi, *Race, Capital Punishment, and the Cost of Murder*, 127 PHIL. STUD. 255 (2006).

4. See, e.g., MATTHEW H. KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT* 267–329 (2014).

able way to commit rape. It is equally absurd to propose better standards of evidence or better lawyering—as if the state’s failure to violate the “correct” people is the real moral problem. And while a practice of raping inmates is worse if it is infected by racial bias, a resolutely non-racist practice would still be morally indefensible. Murder, like rape, is a terrible violation of human dignity; such violations have no place in the pursuit of justice.

But while the conviction that capital punishment is murder may be common popularly, it is seldom the thesis of a rigorous academic defense.⁵ In fact, several influential theorists dismiss the objection out of hand—Matthew Kramer, for example, calls it “outlandish.”⁶ But this out-of-hand dismissal is strange. Executions are deliberate killings, the justification of which is contentious. Why should we be so certain that capital punishment is not murder? There are three simple, but common, arguments that capital punishment is not murder. Part I defeats them. Part II shows that despite centuries of effort dedicated to showing otherwise, executions seem to instantiate all the morally relevant properties of murder, even when a fair trial correctly ascertains a murderer’s guilt. Part III notes a lacuna in the literature on capital punishment: Even if there is a good reason to execute murderers, the distinction between capital punishment and murder requires a plausible account of the state’s right to execute citizens. We have no such account.

I. THREE SIMPLE ARGUMENTS THAT CAPITAL PUNISHMENT IS NOT MURDER

The first argument is that capital punishment is not murder because the state does not (intentionally) kill innocent people. As Jeffrey Reiman puts it, “if the state kills a murderer, though it does the same physical act that he did, it does not do the wrong that he did, since the state is not killing an innocent person.”⁷ In that same vein, Thom Brooks writes that “[e]xecuting a murderer may be intentional, but it is not directed at an innocent victim. Capital punishment is not like state-sponsored murder.”⁸

But is it *true* that the killing of a murderer cannot itself be a murder? Suppose that a member of the Sharks is notorious for murdering Jets. Eventually, his past catches up with him and an up-and-coming Jet takes his life. The Jet kills someone guilty. In fact, the Jet kills precisely because that someone is guilty. We can even suppose that the Jet’s con-

5. Professor Steiker exposes the failure of several attempts to distinguish capital punishment from murder. Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 778–79 (2006). But Steiker’s argument stops short of a positive argument that capital punishment is murder.

6. KRAMER, *supra* note 4, at 36.

7. Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 116 (1985).

8. THOM BROOKS, PUNISHMENT 154 (2012). In fairness, both Brooks and Reiman oppose capital punishment, all things considered. But the point here is that both professors quickly dismiss the idea that capital punishment is murder.

victions about the moral necessity of retribution are his dominant motivation. Still, gang members who kill murderers are murderers themselves. Nothing turns on the gang affiliations in this example. Even if they choose their victims with perfect accuracy, vigilantes have no right to take the life of another.⁹ The first simple argument is thus wrong: The killing of a murderer is *often* murder; so, the state's intention to kill guilty people is not, by itself, sufficient to distinguish capital punishment from murder.

The second simple argument aims to shore up the deficiencies of the first. Whereas the up-and-coming Jet has no right to kill the Shark, the state has *authority* over the citizens it executes.¹⁰ The idea is that authority includes the right to punish, and, in particular, includes the right to punish with death. Now, it is worth pointing out that this argument assumes a solution to the problem of political authority—one of political philosophy's truly perennial problems.¹¹ Worse, it is possible to be an authority in general without having the specific authority to perform executions. Parents arguably have authority over their children, teachers over their students, and CEOs over their employees. Still, if any of these authorities punishes a subordinate with death, she is a murderer. Thus, the second simple argument does not merely presume a solution to the problem of political authority; it boldly presumes a solution that entails the state's right to execute citizens. We will revisit the state's right to execute in Part III. For now, note that an invocation of state authority fails as a *simple* argument that capital punishment is not murder.

The third, and most sophisticated, argument holds that equating capital punishment and murder entails a similar classification of all state-inflicted punishments. If capital punishment is murder—the objection goes—imprisonment is kidnapping. A fine for criminal behavior is extortion. But that—the objection concludes—is absurd, so capital punishment is not murder.¹²

Admittedly, it is sometimes plausible that the moral classification of an action changes when it is performed by the state. If a private citizen locks you in her basement, it is probably kidnapping; if the state locks

9. John Simmons may disagree. See generally A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311 (1991). Simmons' defense of punishment does not rule out the moral propriety of vigilantism. *Id.* However, Simmons' view is a minority position, and Simmons is concerned with the right to punish in general rather than with capital punishment in particular.

10. See, e.g., Raphael T. Waters, *Capital Punishment: An Act of Murder, Revenge, or Justice?*, 16 CONTEMP. PHIL. 2, 4 (1994).

11. The problem of political authority, roughly, is to justify the claim that the state is morally entitled to have certain powers over citizens. See, e.g., Tom Christiano, *Authority*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2013 Edition), <http://plato.stanford.edu/archives/spr2013/entries/authority/>. The problem is the focal point of a debate that is centuries long and far from resolved. By simply *assuming* that states have authority over citizens, the second simple argument fails to justify an important, arguably dubious premise.

12. See BROOKS, *supra* note 8, at 154; Reiman, *supra* note 7, at 116; John Stuart Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271, 276 (Gertrude Ezorsky ed., 1972).

you in prison, it might not be. Other times, however, the fact that the state is the agent makes no moral difference at all. If the law called for an employee of the state to force convicted rapists into restraints before sexually penetrating them against their will, we would call the practice state-sponsored rape. And by identifying this practice as state-sponsored rape, we would not thereby commit ourselves to the view that imprisonment is state-sponsored kidnapping. Political authority is not a license to perform actions that lie on the wrong side of a certain moral threshold. Death penalty abolitionists can coherently hold that killing for the sake of punishment lies on the wrong side of the relevant threshold. Of course, the abolitionist still has to make her case. The point here is that the third simple argument fails: capital punishment can be murder even if imprisonment is not kidnapping.

The objection that capital punishment is morally equivalent to murder deserves closer scrutiny than it is typically given. We need to identify the morally salient properties of murder and then ask whether executions instantiate them.

II. CAPITAL PUNISHMENT HAS THE PROPERTIES OF MURDER

What is murder? Our moral concept has three key elements: it is a *killing* (murder goes beyond temporary incapacitation), it is in some sense *deliberate* (a tragic accident is not a murder), and it is *unjustified* (killing in, say, self-defense is not murder). There are two main views about how to interpret the last element, about what can justify a deliberate killing. The first is that we may deliberately kill when doing so is necessary to achieve an end that is worth killing for. This sort of means-end reasoning is most famously associated with consequentialism, but a suitably modified deontology might embrace it as well.¹³ The second view, typically associated with more traditional forms of deontology, holds that a killing is justified only if the victim has somehow forfeited her right to life. This Article's definition of murder is ecumenical.

A murders *B* if

- (a) *A* causes *B*'s death;
- (b) *A* is mentally competent;¹⁴
- (c) *A* intends to cause *B*'s death;
- (d) *B*'s death is not necessary for an end]that is worth killing for; and
- (e) *B* has not forfeited her right to life.

Satisfying (a)–(c) makes an action a deliberate killing; satisfying *both* (d) and (e) makes a deliberate killing unjustified, whichever conception of justification one favors.

13. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2006).

14. Mental competence, here, is a relatively thin notion. An insane person is not competent. But I do not want a notion of competence so thick that one has to be a perfect (or even mostly perfect) moral agent to count. Rather, competence marks a threshold below which people cease to count as full-fledged agents.

Admittedly, this definition of murder might be too demanding. Consider (c): If *A* assaults *B* on a deserted street corner and callously leaves while *B* dies from her injuries, it is plausible that *A* has murdered *B*, even if *A* did not specifically intend *B*'s death.¹⁵ But assuming an overly demanding definition is a good argumentative strategy: This Part shows that executions seem to satisfy (a)–(e). If it turns out that the true definition of murder is less demanding than (a)–(e), the argument will stand nonetheless.¹⁶

Clearly, most executions satisfy (a)–(c). So, if capital punishment is not murder, the difference will have to come from (d) or (e). To avoid the conclusion that capital punishment is murder, death penalty advocates need to show that executions are necessary for an end that is worth killing for (section II.A), or that murderers forfeit their right to life (section II.B).

A. *Clause (d): Ends Worth Killing For?*

What moral end both requires capital punishment and is so important that it is worth killing for? Deterring would-be murderers is a historically popular answer, but the “overwhelming consensus” among leading social scientists is that empirical research “strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment.”¹⁷ Worse, the principle that deterrence is sufficient to justify punishment threatens to legitimate barbaric punishments such as rape or torture.¹⁸ To distinguish capital punishment from murder, we should look instead to ends of a non-consequentialist nature. There are two such ends on offer: (a) that criminals should get their *just deserts* and, recently, (b) that communities should *purge evil*.

15. See Alan C. Michaels, *Defining Unintended Murder*, 85 COLUM. L. REV. 786 (1985). That we intuitively believe such an action can amount to murder in the moral sense is likely related to its satisfying the legal definition of murder in the United States.

16. Although this definition is demanding, it does not require that one understand one's killing to be murder. This is intentional. The husband who sincerely believes in his right to force sex upon his wife still commits rape. The inquisitor who sincerely believes that he is not torturing is still a torturer. We cannot morally “downgrade” a serious assault on human dignity by believing—even sincerely—that our actions are permissible. We *might* hold that under certain conditions a sincere, mistaken belief about the character of one's action reduces one's moral culpability. But it is implausible that the moral classification of a serious assault on human dignity depends upon subjective impressions of what one is doing.

17. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 489–90 (2009). Admittedly, Sunstein and Vermeule cite several studies that suggest a deterrent effect. Sunstein & Vermeule, *supra* note 13, at 706. But that, in light of Radelet and Lacock's data, is a bit like eschewing the overwhelming consensus among earth scientists to focus on the handful of studies that deny global warming.

18. See, e.g., KRAMER, *supra* note 4, at 38–44; Steiker, *supra* note 5, at 778–79. Kramer's criticism targets all instances of deterrence theory while Steiker focuses specifically on Sunstein and Vermeule.

1. Just Deserts

It is one thing to insist that criminals get their just deserts. It is quite another to identify execution as someone's just deserts. Why might murderers deserve to be executed?

Some answers to this question are implausible on their face. Theories of fair play, for example, might justify punishment for crimes like tax evasion. But for well-documented reasons, fair play loses its luster when invoked to show that murderers should be put to death.¹⁹ The most promising answer, for defenders of capital punishment, is also one of the oldest: *lex talionis* ("lex").

It may be intuitive to demand equality between crime and punishment, but *lex* has largely fallen from favor. It seems barbaric to suggest that the state should see to the rape of rapists. Some have tried to rescue the intuitive appeal of *lex* by construing it merely as the principle that worse crimes should meet with worse punishments. This construal, however, abandons the initially intuitive demand for equality between crime and punishment—that a more serious crime gets a harsher punishment does not imply that the harshness of the crime and the punishment are on par. Moreover, this construal of *lex* is useless for distinguishing capital punishment from murder. It does not identify execution, life in prison, or anything else as the fitting penalty for murder.²⁰

However, in a mostly overlooked article, Jeremy Waldron aims to rescue *lex* from barbarism without reducing it to the claim that worse crimes should meet with harsher punishments. He begins by distinguishing (a) the *deontic* properties of an action, (b) the properties on which the deontic properties *supervene*, and (c) the properties of an action that are morally *irrelevant*. Murder, for example, has the deontic property of being wrong, its wrongfulness supervenes (in part) on its being an intentional killing, and the fact that it happened on a Tuesday is morally irrelevant.²¹ Call the middle class of properties—those on

19. Theories of fair play represent the law as a fair, mutually beneficial system of cooperation. They advocate punishment to offset the 'extra' measure of freedom that criminals wrongly claim for themselves. GEORGE SHER, *DESERT* (Marshall Cohen gen. ed., 1987); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968). As a defense of *capital* punishment, fair play is doubly problematic. First, even if it is plausible to represent the act of murder as the presumption of an extra degree of freedom, why is execution (and not a suitably long prison sentence) necessary to offset it? The fair play theorist needs a rigorous method for measuring degrees of freedom, and such methods have been hard to defend. Second, and most foundationally, it is simply implausible that a breach of fairness is the wrongmaker in capital crimes. When someone breaches a mutually beneficial system of fair play, she wrongs those who willingly restrain themselves. But murder is principally wrong because of harm done to the victim. So, when applied to capital crimes, theories of fair play advocate punishment for the wrong reason. KRAMER, *supra* note 4, at 80–96; Russ Shafer-Landau, *The Failure of Retributivism*, 82 *PHIL. STUD.* 289 (1996); David Dolinko, *Some Thoughts About Retributivism*, 101 *ETHICS* 537 (1991).

20. Stephen Nathanson, *An Eye for an Eye?*, in *THE ETHICAL LIFE* 398 (Russ Shafer-Landau ed., 2015); KRAMER, *supra* note 4; Sarah Roberts-Cady, *Against Retributive Justifications of the Death Penalty*, 41 *J. SOC. PHIL.* 185 (2010); Claire Finkelstein, *Death and Retribution*, 21 *CRIM. JUST. ETHICS* 12 (2002).

21. Jeremy Waldron, *Lex Talionis*, 34 *ARIZ. L. REV.* 25, 34 (1992).

which the action's deontic status supervenes—the *wrongmakers*. They are the properties that make an offense the kind of offense it is. Waldron's interpretation of *lex* is that a criminal's punishment should instantiate "some or all" of the wrongmakers of her offense.²²

"Some or all" is probably not the qualification Waldron intends. Suppose that a particular crime has two wrongmakers, one weighty and one utterly trivial. Should we say that a punishment satisfies the demands of *lex* if it instantiates the trivial wrongmaker while ignoring the weighty one? The driving motivation behind *lex* is that punishments should somehow equal crimes. It is more consistent with that motivation, and with Waldron's intent to capture "what ultimately matters in our reckoning something an offense," to hold that a punishment should instantiate the *most salient* wrongmakers of an offense.²³ Punishment should include the wrongmakers that are most relevant for making an offense the kind of offense it is.

Waldron does not favor the death penalty. But, at this point, it is hard to see how his interpretation of *lex* can avoid it. That one deliberately kills is surely one of the most salient wrongmakers for murder. But Waldron continues,

[We can] understand the wrongness of killing in terms that are a little more abstract in character. Why is killing wrong? Because it radically disrupts an autonomous life. Very well, then let us radically disrupt the autonomous life of the offender. Does this mean that we have to kill him? It depends on whether or not we have available some other punishment that shares this abstract feature with acts of killing.²⁴

The implicit suggestion here is that being confined to prison radically disrupts autonomous life, and thus that a prison sentence of some suitable length can satisfy the demands of *lex* with respect to a murderer. So, Waldron's comprehensive view is that a criminal's punishment should instantiate the most salient wrongmakers of her offense, and that we can use a process of abstraction to avoid controversial punishments. When execution gives us pause, we can ask why killing is wrong in the first place (it radically disrupts autonomous life), and then select a lesser punishment (such as imprisonment) that shares this abstract feature with execution.

Advocates of capital punishment, however, should not be satisfied. Waldron identifies "radically disrupting an autonomous life" as the wrongmaker for murder. But that specification is seriously incomplete: a dose of Rohipnol disrupts autonomy; murder disrupts autonomy *totally* and *permanently*. Totality and permanence, in fact, are essential for understanding murder as the distinctive sort of wrong it is. And if matching punishment to crime is our aim, it is a mistake to ignore the wrongmakers that distinguish murder from lesser crimes. This, for the advocate of capital punishment, might seem like good news: we have a

22. *Id.* at 35.

23. *Id.* at 37.

24. *Id.* at 41–42.

new, sophisticated interpretation of *lex* that recommends total and permanent disruption of autonomy for murderers. Unfortunately, the same features that suggest capital punishment also invite the implications that led to *lex*'s original fall from favor.

If we go along with Waldron and ask why forced sexual penetration is wrong, we can answer abstractly by saying that rape is a sexual violation that degrades the victim. But it degrades the victim in an altogether different way than, say, verbally insulting her intelligence. Waldron himself concedes that its sexual nature is necessary for understanding rape as the sort of wrong it is. And this, in turn, yields the requirement that a rapist's punishment involve sexual degradation. Oddly, Waldron acknowledges that his version of *lex* recommends that public officials sexually degrade rapists. But he tries to cancel that implication by invoking an altogether different moral principle, that we should not engender "nasty sadism and sexual corruption" in our public officials.²⁵ Waldron suggests, here, that satisfying *lex* is not an absolute duty, but "a rather good idea . . . [that] would naturally take its place among a range of considerations."²⁶

Now, Waldron is of course correct that any single moral principle is but one among a range of considerations. But it is desperately awkward to insist that a moral principle is "a rather good idea" if it suggests that the state should sexually degrade prisoners. That an allegedly moral principle implies something so monstrous seems like the *best possible* evidence that it is false. Most of us reject the principle that animal's suffering is of no moral consequence because it has terrible implications; a similar point holds for the principle that the end always justifies the means. Why, then, should we excuse *lex* for suggesting rape?²⁷ Worse, suggesting rape is not *lex*'s only trespass. It suggests that torturers should be tortured, that serial killers should be brought to the edge of death and then resuscitated so that we can do it all over again, and, generally, that any heinous wrong should be visited upon those who perpetrate it. A single barbaric implication may raise doubts; this legion renders *lex* quite implausible.

To sum up: *Lex talionis* is the most promising attempt to identify execution as a murderer's just deserts (the principle of fair play, once again, is unsuited to capital crimes²⁸). But we should reject Waldron's interpretation for the same reasons that *lex* originally fell from favor. Of course, we can still construe *lex* as merely demanding harsher punishments for worse crimes. But that weakened principle does not pinpoint execution as a murderer's just deserts.

25. *Id.* at 38.

26. *Id.*

27. Like Waldron, Reiman acknowledges that *lex* would sometimes require "a degree of cruelty that would be monstrous." See Reiman, *supra* note 7, at 127. But Reiman does not seem to think that that monstrously cruel implications constitute a reason to abandon *lex* altogether.

28. See Russ Shafer-Landau, *supra* note 19.

2. Purging Evil

Matthew Kramer has recently, and prominently, argued that capital punishment is necessary to purge evil. His purgative rationale begins with a sophisticated account of evil actions.²⁹ What's important here is that Kramer reserves capital punishment for cases of "extravagant evil," cases in which someone causes great harm and manifests contempt or indifference for human dignity. He references the serial killer and serial rapist Richard Ramirez as an example. In committing an extravagant evil, thinks Kramer, Ramirez has not merely done evil things, he has become evil himself. He has "established that his life is antithetical to the dignity of humankind."³⁰

But why is execution rather than, say, imprisonment, necessary to purge evil? Ancient purgative accounts invoke the community's relationship to God. Kramer himself cites the story of Achan, an ancient Israelite who is supposed to have sinned in a particularly serious way. According to the story, Achan's life was itself a blot on Israel's relationship to God, so the Israelites had to get rid of him to set things right. But Kramer correctly observes that a community's relationship with God can no longer justify capital punishment: Even if God exists, liberal democratic governments may not kill citizens for theological reasons. So, whereas ancient purgative accounts invoke a moral relationship between communities and God, Kramer turns to the value of a relationship between one's political community and the rest of humanity:

Such depravity, embodied by [Ramirez], poses an affront to humankind so long as . . . [he] remains alive. That depravity therefore taints the relationship between [Ramirez's] community and the rest of humanity. Removing the taint . . . requires terminating the existence of [Ramirez].³¹

The relationship Kramer has in mind is not "socio-psychological" or "anthropological."³² It is an ethical relationship, and, he insists, the mere presence of an evil person tarnishes it whether or not the rest of the world wants the criminal to be executed.

Some critics have tried to refute Kramer's account "from the inside," showing that it does not live up to its own aspirations.³³ Sometimes, however, the most straightforward criticism is also the strongest. Kramer's purgative rationale depends upon a series of truly remarkable metaphysical claims: Evil inheres in a human host, somehow "taints" the Good, and the agents of Good must kill Evil's host to preserve the moral order. To be clear: I am not holding Kramer to the controversial standards of a stringent physicalism. I am sympathetic to moral realism, even to non-naturalist accounts of moral properties. But whereas the moral realist argues that we should hold certain abstract beliefs about

29. KRAMER, *supra* note 4, at 179–221.

30. *Id.* at 236.

31. *Id.* at 230.

32. *Id.* at 236.

33. See, e.g., John Danaher, *Kramer's Purgative Rationale for Capital Punishment: A Critique*, 9 CRIM. L. & PHIL. 225 (2015).

the nature of morality, Kramer suggests that we *kill people*. So we need, and do not have, an excellent argument that all the metaphysical details of Kramer's account are true—that Evil emanates from bad people, that Evil overcomes the Good it contacts rather than the other way around, and that killing Evil's human host restores the moral order. An unsupported, esoteric metaphysics is not a good reason for governments to kill citizens.³⁴

We have examined, in this section, attempts to distinguish executions from murder by showing that capital punishment is necessary to achieve an end worth killing for. Saving innocent lives might be such an end, but there is, again, no evidence that the death penalty deters. The remaining candidates—giving murderers their just deserts and purging evil—are unsustainable.

B. *Clause (e): Forfeiture?*

Perhaps we can distinguish capital punishment from murder by showing that murderers forfeit their right to life. Such an argument would not necessarily show that we have a good reason to perform executions—that an action does not violate anyone's rights is not, on its own, a reason to perform it. But if capital criminals do not have a right to life, executions would at least not be murder.

Forfeiture theory is a family of views, unified by the very general claim that in doing something wrong, one forfeits some right or other.³⁵ As Christopher Wellman puts it, a wrongdoer's "moral status has changed in such a way that [the] [v]ictim (or perhaps the authorities) may now treat [her] in a way that would have been impermissible before . . ."³⁶ Members of the forfeiture family distinguish themselves by advancing different claims about which offenses entail the forfeiture of which rights. What we might call the *classic principle of forfeiture* holds that by violating someone's right to X, one loses one's own right to X. Now, if true, the classic principle would distinguish capital punishment from murder—it implies that murderers have no right to life. Unfortunately, it has barbaric implications: rapists would have no right against being raped, torturers would have no right against being tortured, serial killers would have no right against being brought to the edge of death and then resuscitated a number of times equal to their number of their victims, and so on.

34. Worse, Kramer's almost enchanted metaphysics might make his account unsuitable for liberal democracies. The ancient version of purgation invoked the relationship between a community and God. But as Kramer correctly observes, it is not the business of a liberal democratic government to promote right relations with God. But it is also, arguably, not the business of a liberal democratic government to pursue highly idiosyncratic (and metaphysically contentious) conceptions of Good—particularly not when the pursuit requires executing citizens.

35. See, e.g., Alan H. Goldman, *The Paradox of Punishment*, in PUNISHMENT 30 (A. John Simmons et al. eds., 1994) (providing a classic statement of forfeiture theory); see also, e.g., David Boonin, *THE PROBLEM OF PUNISHMENT* 103–19 (2008) (providing an excellent summary of Goldman and others, as well as trenchant criticism).

36. Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 377 (2012).

There are two plausible responses to the barbarism objection.³⁷ The first concedes that the classic principle would permit the state to rape rapists, but suggests that such a punishment will be ruled out by other moral considerations. There may be "side constraints against certain treatments . . . that would rule out any 'cruel and unusual' forms of punishment."³⁸ This is probably correct. But it is irrelevant to the objection at hand. The objection is that the classic principle is too barbaric to warrant serious consideration. As we saw in Waldron's discussion of raping rapists, the fact that a principle has such monstrous implications in the first place is the best possible evidence that it is false.

The second, and better, response is to recognize that "we need not construe rights forfeiture theory as the claim that a wrongdoer forfeits the same particular right which she herself violates."³⁹ Forfeiture is a *family* of views, and the best way for the forfeiture theorist to avoid barbaric implications is to abandon the classic principle in favor of something else. Perhaps rapists and torturers forfeit their right to liberty, for example, instead of their respective rights against rape and torture.

This strategy successfully answers the barbarism objection, but makes it harder to distinguish capital punishment from murder. Capital punishment is not murder if murderers forfeit their right to life, and the classic principle promised to remove a murderer's right to life in a non *ad hoc* way. Without the classic principle to lean upon, we need a different principle that explains why murderers forfeit their right to life, but at the same time does not remove anyone's right against being raped or tortured. On closer inspection, in fact, our rights against being raped and tortured are not a special case. Basic human rights protect our dignity. They include the right not to be enslaved (it is impermissible to enslave wrongdoers), to freedom of thought (wrongdoers are entitled to hold unpopular political opinions), and to freedom of religion (wrongdoers do not forfeit their right to worship, or not, in their preferred way). To mobilize forfeiture in defense of capital punishment, we thus need a principle that removes a murderer's right to life, but does not remove *any* of the basic human rights that, intuitively, cannot be removed.

I can see several ways forward, but none are plausible. We might relativize our principle of forfeiture so that it applies only to murderers—'Anyone who murders forfeits her right to life.' Alternatively, we might introduce domain restrictions on the classic principle—'In violating a right to X, one loses one's own right to X,' but this principle is valid only for particular values of X. Either way, our new principle is *ad hoc*. Advancing a principle that applies only to murderers, or carefully

37. The implausible response, to my mind, is to bite the bullet and accept the barbaric consequences. A principle of forfeiture capable of removing one's right against being raped or tortured implies that a person can become a mere object for sexual use, or a mere plaything for torturer. Morality is conceptually connected to the right, the good, virtue, justice, and care. I cannot see how reducing persons to mere objects furthers any such goal.

38. Wellman, *supra* note 36, at 385.

39. *Id.*

introducing domain restrictions so that the classic principle applies to murderers but not to apparent counterexamples, is very close to simply *stipulating* that capital punishment is not murder. The general idea of forfeiture is plausible—in committing a wrong, our moral status often does seem to change such that people can treat us in ways that would formerly have been impermissible. But as a justification of capital punishment, forfeiture is not promising.

Here, to sum up, is the definition of murder.

A murders B if

- (a) A causes B's death;
- (b) A is mentally competent;
- (c) A intends to cause B's death;
- (d) B's death is not necessary for an end that is worth killing for; and
- (e) B has not forfeited her right to life.

Executions obviously satisfy (a)–(c). We saw in section II.A that attempts to distinguish capital punishment from murder through (d) fail. There is no evidence that capital punishment deters, there is no good argument that executions are necessary to give murderers their just deserts, and the purgative rationale suggests that governments kill citizens for the sake of an esoteric metaphysics. Here, in section II.B, we saw that (e) cannot do the trick either. While the general concept of forfeiture has merit, its application to the death penalty is problematic. Therefore, and despite centuries of creative work by advocates of capital punishment, executions seem to instantiate the morally salient properties of murder.

Murder, like rape, is a terrible assault on human dignity; such violations have no place in the pursuit of justice. Unfortunately, the case for capital punishment gets even worse.

III. THE STATE'S MORAL RIGHT TO EXECUTE?

Historically, advocates of legal punishment have focused on articulating general justifying aims—punishment should deter, mete out just deserts, rehabilitate, express the community's disapproval, or accomplish some hybrid of these penal goals. All these defenses of punishment are missing something crucial. Recall the up-and-coming Jet who dispatches the notorious Shark: Even if he deterred would-be murderers, meted out just deserts, or accomplished whatever penal goal executions are supposed to serve, the Jet commits murder. He does not have the *moral right* to kill the Shark. Similarly, showing that state executions deter would-be murderers, mete out just deserts, or whatever is insufficient to distinguish capital punishment from murder. We need to show that states have the moral right to punish citizens with death.

The literature contains only one serious argument in defense of the state's right to perform executions.⁴⁰ It builds on a general defense

40. Most treatments of capital punishment do not even mention the possibility that states lack the right to kill citizens for the sake of punishment. Kramer's recent book on

of the state's right to punish, and represents the right to punish as a consequence of our right to protect ourselves: people in the state of nature have the right to protect themselves by threatening to harm those who would violate their natural rights. But if people have the right to threaten harm for the violation of their natural rights, they must also (lest their threats become empty) have the right to do as they threaten. Since harming those who violate natural rights is punishment, people in the state of nature have a natural right to punish. To ground the state's right to punish, these arguments typically go on to suggest that when people in the state of nature form a polity, they (voluntarily or otherwise) give their natural right of punishment to the state.⁴¹

Because we are considering capital punishment in particular, the most important vulnerability of this argument concerns the extension of the general right to punish to the specific right to perform executions. Is it *true* that we are morally permitted to threaten death in particular, and then to carry out that threat to maintain our credibility? More precisely, what principle shows that it is permissible to both make and fulfill death threats? The difficulty in answering this question is the same difficulty we encountered in the context of forfeiture: Any principle that can justify executions is either barbaric or *ad hoc*.

We might, for example, hold that a principle of deterrence governs the making of threats: we may threaten, and carry out, whichever harms most effectively deter would-be rights violators. Thus, if the threat of death is the best deterrent, we may use it. The problem here should be clear: The principle of deterrence is barbaric. If rape was the most effective deterrent (for whatever crime), deterrence maximization implies that it is permissible to threaten sexual violation and then rape those who ignore our warnings.

capital punishment is compendious—three hundred and twenty-seven pages of exposition and argument accompanied by an eleven-page bibliography—but the question of the state's right to execute citizens never arises. KRAMER, *supra* note 4. Summary resources do not recognize the challenge either. See, e.g., Kevin Murtagh, *Punishment*, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/punishme/> (last visited Feb. 24, 2018). And some of those who do consider the question make bad arguments. Thom Brooks, for example, aims to defeat the objection that “the state does not have [the] right to kill its citizens.” BROOKS, *supra* note 8, at 153. But after a short excurses, he returns to the main line of inquiry by equivocating: “Now return to the objection that capital punishment is unjustified because the state's role is to protect and promote the well being of its citizens.” *Id.* at 154. The objection is that states *lack the right to kill citizens*, not that states *have a duty to promote citizens' wellbeing*. Showing that the latter does not rule out capital punishment does nothing to blunt the force of the former.

41. Several theorists have defended a view along these lines. See, e.g., Christopher Heath Wellman, *Rights and State Punishment*, 106 J. PHIL. 419 (2009); Simmons, *supra* note 9; Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327 (1985); Thomas Hurka, *Rights and Capital Punishment*, 21 DIALOGUE 647 (1982); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 137–42 (1974). Some spell out the details slightly differently than I have above, but those differences are both overshadowed by the commonalities and irrelevant to our main concern: justifying the right to employ *capital* punishment.

Alternatively, we might reject deterrence maximization in favor of some kind of principle of equality, holding that it is permissible to make and fulfill threats that are on par with the harms one is trying to deter. Thomas Hurka, for example, suggests that in defense of one's right to *X*, one may issue (and carry out) a threat such that: (a) one does not threaten a right of greater importance than the right to *X*, and (b) one could not achieve the same deterrent effect by threatening a less important right.⁴² To protect your right against being slandered, for example, you may threaten to slander others, provided that a threat against a less important right would not have equal deterrent value.

Unfortunately, Hurka's principle is barbaric too. If the threat of rape deters would-be rapists more effectively than anything less severe, Hurka's principle implies that we may threaten sexual violation and then rape anyone who does not heed our warnings. A similar point holds for would-be torturers. Rape and torture, moreover, are not special cases. As we saw in the discussion of forfeiture, many basic rights are not attenuated by crime. We should not rape or torture wrongdoers; we should not enslave them, or curtail their freedoms of thought and religion either. So, as in the case of forfeiture, we need a principle that explains why it is permissible to make and fulfill death threats, but, at the same time, does not license the violation of many other basic rights. We could relativize our principle to would-be murderers—'We have the natural right to protect our right to life by making and fulfilling death threats.' Alternatively, we could place domain restrictions on Hurka's principle of equality—'We may protect our natural rights by threatening a right of equal or lesser value and then carrying out that threat,' but this principle applies to the right to life and not to apparent counterexamples. Either way, our principle is *ad hoc*. Advancing a principle that applies only to murderers, or carefully introducing domain restrictions so that Hurka's principle applies to murderers but not to apparent counterexamples, is, as before, very close to simply stipulating that we have the natural right to perform executions.

It is plausible that we may have the right to make, and fulfill, *some* threats in defense of our natural rights. But the defender of capital punishment needs, and does not have, a principle that explains why we are entitled to threaten death in particular. We thus lack any good argument in defense of our, or the state's, right to employ capital punishment.

CONCLUSION

All three simple arguments that capital punishment is not murder fail; capital punishment seems to instantiate all the morally relevant properties of murder; and *even if* executions did serve an important moral end, the distinction between capital punishment and murder

42. Hurka, *supra* note 41, at 652–53. Condition (b) makes it worthwhile to again note that there is no reputable evidence that the death penalty deters more effectively than imprisonment. Hurka notes this, but the lack of evidence has become more conspicuous since his article's publication.

presumes an account of the state's right to execute citizens. The only reasonable conclusion, at this point, is that just as forcing sex upon a rapist is rape, the execution of a murderer is murder.

This, once again, is not an indictment of the way that we practice capital punishment. More humane methods of execution cannot solve the problem—as though it would be permissible for the state to murder citizens, so long as it does so in a relatively painless fashion. Nor is it sufficient to increase the accuracy of capital trials, so that the state murders only the “correct” people. Nor, finally, does the real moral issue concern the balance of federal and state power. Capital punishment is murder. It has no place in the pursuit of justice.