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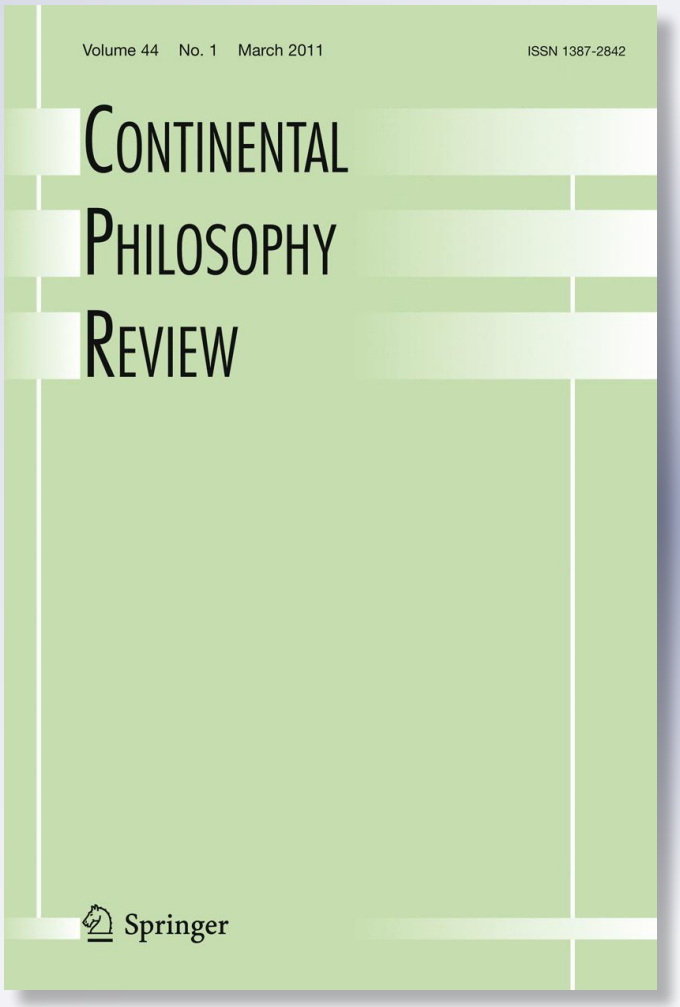

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Responsibility and revision: a Levinasian argument for the abolition of capital punishment

Benjamin S. Yost

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Abstract Most readers believe that it is difficult, verging on the impossible, to extract concrete prescriptions from the ethics of Emmanuel Levinas. Although this view is largely correct, Levinas' philosophy can, with some assistance, generate specific duties on the part of legal actors. In this paper, I argue that the fundamental premises of Levinas' theory of justice can be used to construct a prohibition against capital punishment. After analyzing Levinas' concepts of justice, responsibility, and interruption, I turn toward his scattered remarks on legal institutions, arguing that they enable a sense of interruption specific to the legal domain. It is here that we find the conceptual resources most important to my Levinasian abolition. I argue that the interruption of legal justice by responsibility implies what I call the "principle of revisability." The principle of revisability states a necessary condition of just legal institutions: To be just, legal institutions must ensure the possibility of revising *any and all* of their rules, principles, and judgments. From this, the argument against capital punishment easily follows. Execution is a legal act, perhaps the only legal act, that cannot be undone. An application of the principle of revisability to this fact leads to the conclusion that legal institutions cannot justly impose capital punishment. After defending these points at length, I conclude with some observations on the consequences of the principle of revisability for law more generally.

Keywords Emmanuel Levinas · Capital punishment · Philosophy of law · Justice · Responsibility

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B. S. Yost (✉)
Providence College, 1 Cunningham Square, Providence, RI 02918, USA
e-mail: byost1@providence.edu

Were one to categorize Levinas' ethics in the jargon of moral philosophy, one would have to say that his work is meta-ethical in nature, due to its emphasis on the *meaning* of ethics (EI 90).[1] Given this methodological thrust, Levinas has little to say about our concrete moral duties. Of course, the substance of Levinas' philosophy deepens his commitment to such reticence. That is, his conception of ethics requires him to refuse to make claims about what other people ought to do. The key concept of Levinas' analysis of ethics is responsibility—responsibility names the way the ethical subject receives and responds to the demands placed on it by others. In Levinas' view, responsibility is asymmetric—meaning that the other has no responsibility to me—and radically singular—my responsibilities are *mine* and cannot be passed off to, or shared by, anyone else. Now, if responsibility is singular and asymmetric, it is non-generalizable, and cannot be used to deduce moral norms that bind anyone other than oneself. Indeed, to convert singular demands into generalized norms will turn out to be, in some sense, a betrayal of responsibility. In doing so, one shirks one's responsibilities by passing them off to others. What this means is that Levinas *himself* cannot make general claims about what other people ought to do, because doing so would undermine the account of responsibility he is trying to defend. Levinas cannot, therefore, address the basic concern of mainstream normative ethics, which is to establish a catalogue of moral duties. Instead, Levinas encourages vigorous criticism of these catalogues, on the grounds that they justify limits on our responsibilities.

We can see why many readers deny that Levinas' work provides *any* action-guiding rules or principles.[2] The most that scholars of this sort think can be said is that Levinas requires us to constantly scrutinize our own ethical principles in a project of unending self-criticism.[3] I think this view is mostly correct, but I will argue that Levinas' basic ethical concepts *can* sometimes lead to valid action-guiding norms. Or at least his basic ethical concepts can lead to norms that obtain in the juridical domain. This is so because Levinas argues that norms of legal justice have general moral authority.

[1] *Ethics and Infinity,* tr. Philippe Nemo (Pittsburgh: Duquesne UP, 1985); hereafter cited as EI. Other abbreviations are as follows: *Is It Righteous to Be?: Interviews with Emmanuel Levinas*, ed. Jill Robbins (Stanford: Stanford UP, 2001) [IRB]; *Otherwise than Being, or Beyond Essence*, tr. Alphonso Lingis (The Hague: Martinus Nijhoff, 1980), 101 [OBBE]; *Autrement qu'être ou au-dela de l'essence* (Paris: Librairie Générale Française, 1996) [AE]; *Totality and Infinity*: *An Essay on Exteriority*, tr. Alphonso Lingis (Pittsburgh: Duquesne UP, 1969) [TI]; *Totalité et infini*: *essai sur l'exteriorité* (Paris: Librairie Générale Française, 1996) [TeI]; *God, Death, and Time,* tr. Bettina Bergo (Stanford, Stanford UP, 2000) [GDT]; *Dieu, la mort et le temps* (Paris: Bernard Grasset, 1995) [DMT]; "The Paradox of Morality" in *The Provocation of Levinas*, eds. Robert Bernasconi and David Wood (New York: Routledge, 1988) [PM]; "The Rights of Man and the Rights of the Other" in *Outside the Subject*, tr. Michael B. Smith (Stanford: Stanford UP, 1994) [RMRO]; "The Rights of Man and Good Will" in *Entre Nous*, tr. Michael B. Smith and Barbara Harshav (New York: Columbia UP, 1998) [RMGW]; "Ideology and Idealism," in *Of God Who Comes to Mind*, trans. Bettina Bergo (Stanford: Stanford UP, 1998) [II]; *Difficult Freedom,* tr. Sean Hand (Baltimore: Johns Hopkins UP, 1990) [DF]; "Freedom and Command" in *Collected Philosophical Papers* (Dordrecht: Kluwer, 1987) [FC]; "Sociality and Money," tr. François Bouchetoux and Cambell Jones (*Business Ethics: A European Review* 16.3. 2007) [SM]. Citations to the original interviews will appear in footnotes.

[2] For more on this strand of Levinas scholarship, see Perpich (2008, pp. 1–12). Perpich herself makes what I consider to be the best defense of this interpretation of Levinas, and I agree with most aspects of her argument (2008, pp. 124–149).

[3] Bergo (1999, p. 257); Bernasconi (1990).

In doing so, he grants moral authority to a set of norms that are fairly specific (e.g., states ought to treat people equally, provide democratic avenues for social change, etc.). But—and this is the more important point—he also makes some fairly specific suggestions about how those norms ought to be "interrupted" by responsibility. As I will show below, combining these two aspects of his thinking generates a criterion of legal justice that, in certain cases, generates duties prescribing what legal actors ought to do.[4]

One of the duties in question is the duty to oppose capital punishment, and it is this duty that will be the focus of my paper. It is important to note at the outset that it cannot be found in the letter of Levinas' texts. On three occasions, Levinas expresses disapproval of the death penalty, and implies that legal institutions ought not to execute wrongdoers.[5] Unfortunately, each remark is cryptic and brief. Later in the paper, I will develop the arguments implied by these remarks as best as I can, but I will conclude that these arguments fail in various obvious ways. My main concern in this paper is to show how Levinas could most successfully assert the prohibition against capital punishment. While the fundamental premises of this reconstruction come straight from Levinas' texts and interviews, I have had to supply a fair amount of the argumentative framework, and it is probably most accurate to say that resulting argument is Levinasian, or Levinas-inspired, rather than Levinas' own.

Much of this framework will be built on the basis provided by the familiar Levinasian story about the interruption of justice by responsibility. After analyzing Levinas' concepts of justice, responsibility, and interruption, I will turn toward his scattered remarks on legal institutions, arguing that they enable a sense of interruption specific to the legal domain. It is here that we find the conceptual resources most important to my Levinasian abolition. I will argue that the interruption of legal justice by responsibility implies what I call the "principle of revisability." The principle of revisability states a necessary condition of just legal institutions: To be just, legal institutions must ensure the possibility of revising *any and all* of their rules, principles, and judgments. From this, the argument against capital punishment easily follows. Execution is a legal act, perhaps the only legal act, that cannot be undone. An application of the principle of revisability to this fact leads to the conclusion that legal institutions cannot justly impose capital

[4] Levinas himself was skeptical of the idea that his work might have consequences for political or legal philosophy. When questioned about the relation of his philosophy to political concerns, he responded "How do you expect me to move from the absolute splendors of *hesed*, of charity, to an analysis of the state procedures at work in our democracies?" (IRB 195). But some of Levinas' readers join me in disagreeing with Levinas' evaluation. Those who argue that Levinas' philosophy has political implications include Burggraeve (2002), Caygill (2002), Critchley (1992), Critchley (2007), Perpich (2008). Critchley and Perpich defend very general implications. Caygill and Burggraeve derive more concrete ones, especially with respect to the extension and protection of human rights, but not in the detailed fashion pursued here.

[5] "The suppression of the death penalty seems to me an essential thing for the coexistence of charity with justice" (IRB 51). "The death penalty no longer belongs to [the categories of] justice?" (IRB 207). See also PM 175, where Levinas says that the abolition of the death penalty is a sign of democracy and the search for a "better justice." (All of these interviews were conducted after France abolished capital punishment.) In his religious writings Levinas says that "justice without passion is not the only thing man must possess. He must also have justice without killing" (DF 147).

punishment. And if we add the Levinasian idea that we have a duty to work for a better justice, we generate a duty to oppose capital punishment. After defending these points at length, I will conclude with some observations on the consequences of the principle of revisability for law more generally.

Before proceeding to the argument proper, I want to say why I do not take a more obvious route to abolitionism. When I presented an early version of this paper, I discovered that readers are impressed by Levinas' claim that in the relationship to the other, one is always subject to the command "thou shalt not kill [*tu ne tueras point*]" (GDT 106; DMT 123). At first sight this command does seem to translate directly into an abolitionist position: It appears to generate a moral prohibition against killing that binds us as soon as we come into contact with an other. Legal actors (judges, juries, prosecutors) would then have a moral duty to refrain from sentencing a murderer to death. But matters are not so simple. First, while Levinas does describe the "thou shalt not kill" as a command, we should not be quick to turn this into a universal moral duty. Levinas uses the word "command" to indicate that the relationship to the other is an essentially normative relationship, that the simple fact of my relationship to the other binds me in certain ways. But for reasons canvassed above, this tells us *nothing* about the content of our concrete duties. Second, Levinas' terminology is equivocal, and he sometimes characterizes the command as "you shall not commit *murder* [*tu ne commettre pas de meurtre*]" (TI 199; TeI 217; emphasis mine). Sometimes he even switches between "*meurtre*" and "*tuer*" in successive sentences (DMT 123)! There is an important distinction here: "Murder" or *"le meurtre*" means unjustified or unlawful killing, whereas "killing" or "*la tuerie"* lacks this juridical sense.[6] If this command is to be understood as "you shall not commit *murder*," the abolitionist conclusion does not follow, since killing is not always unjust. To take an example familiar to Levinas, immediately after commanding "thou shalt not kill," God commands his people to execute murderers (Ex. 20:13; 21:12). Furthermore, the permissibility of specific types of killing finds support in thousands of years of legal and moral practice. If a mother shoots an aggressor who is plausibly threatening to murder her children, and the aggressor dies, we say that the mother has killed rather than murdered.

These considerations do not, by themselves, show that Levinas endorses a normative distinction between killing and murder, or that he condones any type of killing. The most compelling point is a conceptual one. If "thou shalt not kill" is taken to be absolute, unpalatable consequences follow. One would be unable to use lethal force to protect one's fellows—*for whom one is responsible*—against even the greatest evil. If "thou shalt not kill" is taken to be absolute, as it must be for abolitionism to follow in any simple way, Levinas would have to concede that the use of lethal force against the Nazis was unethical. The merits of pacifism are many, and Levinas is a pacifist in some complicated ways, but radical pacifism of the sort under discussion is not a position he endorses (DF 138–141; IRB 167).[7]

[6] I want to thank an anonymous reviewer for reminding me that Levinas quite frequently uses "*tuer*" instead of "*muertre*." .

[7] See also Atterton (2009).

That Levinas had this point in mind is very likely, given that he refrains from grounding any of his objections to capital punishment in the "thou shalt not kill."[8]

1 Justice

I want to begin by distinguishing the different conceptions of justice that one finds in Levinas' oeuvre, and the different conceptions of justice that I will employ in this paper. This is necessary because Levinas uses justice in different ways in different texts, and the meaning of the term can shift even within the same text. Furthermore, there are important characteristics of justice that Levinas gestures toward but does not adequately thematize. Achieving clarity in this matter is crucial if the argument developed here is to be adequately persuasive.

In *Totality and Infinity*, justice names a structural feature of the face-to-face, or self-other, relation. In the section titled "Truth and Justice," it names one of the features that make the ethical relation ethical. Justice refers to the way that my relationship to the other calls my freedom into question, revealing my free activity in pursuit of my ends as something that needs to be justified to the other (TI 82–101). At a general level, this calling into question breaks open my egoism so that I can take up my responsibilities for the other and engage in the ethical life (244–245). In an inversion of modern usage, justice is the occasion for me to recognize the other as my master, rather than my equal (TI 72). More concretely, justice is shown to be the condition of possibility of criticizing the state and conventional morality, occupying a role traditionally reserved for reason.

Otherwise than Being abandons this way of thinking about justice. Justice is rejected as a name for a feature of the basic normative relationship, and it is replaced by others such as "substitution" and "asymmetry." To be sure, justice does figure as a feature of the self-other relationship, but it is a feature of the relationship between the self and *multiple* others. Justice names the situation where the infinity of my responsibility is tamed, where I am confronted with multiple responsibilities, and must choose between them. Justice also names the normative consequences of this situation: My singular responsibility turns into a requirement to treat everyone as having equal moral standing (OBBE 160). Here we find a deep normative tension. One the one hand, justice is a falling-away from the ethical relationship, as the requirements of infinite responsibility simply cannot be honored in the realm of justice. Instead, justice requires the development of concrete moral codes, with their embrace of dischargeable duties, excuses, second-order rules of decision, and the like. On the other hand, justice is ethically vindicated because it forces us to take account of *all* of our responsibilities. In this sense, justice is an intensification of responsibility, rather than its violation.

[8] In the lectures contained in *God, Death, and Time*, Levinas characterizes responsibility as a responsibility for the other's death. This may look like a ground for a related type of abolitionist argument, but it is not. Although we are responsible for the other's death, this does automatically generate a prohibition against capital punishment, at least insofar as we must be just as well as responsible. For example, if the death penalty deters murder, our responsibility for the others' deaths might require us to endorse capital punishment.

One other important difference between the two books is that in the latter, justice has a specifically legal-political sense. In *Totality and Infinity*, Levinas employs legal metaphors of judgments and trials in his discussion of justice, but the content of the discussion is always about the ethical relation, not about legal and political institutions and their values (244–245). In *Otherwise than Being*, however, the conception of justice makes room for some of the word's ordinary meanings. Justice is used to characterize societies in which equal rights are asserted, defended, and respected (OBBE 160–161). This legal-political conception of justice is what dominates Levinas' post-*Otherwise than Being* period; as far as I know, he never returns to the *Totality and Infinity* account. The main development of this later period is to move beyond the extremely thin description of justice contained in *Otherwise than Being* to gesture toward what one might call a Levinasian theory of legal and political justice, one that incorporates a response to the demands of responsibility and whose application would, to some degree, further the interests of ethics.

With this overview in hand, I want to distinguish between two conceptions of legal and political justice, as it is the legal-political sense of justice that is at issue in this paper, and because the two conceptions can be easily confused. The first is the conception of justice defended by mainstream liberal political philosophers. Here, "justice" names the virtue characterizing institutions that respect, enable, and protect freedom and equality. In the liberal conception of justice—and I am painting with a very broad brush here—autonomy and fairness are the basic values that legitimate political and legal institutions strive to exemplify. Liberal societies are ones in which people can live under their own conception of the good, and can run their own lives effectively and efficiently. In addition, liberal societies arrange matters so that the burdens and benefits of social cooperation are distributed fairly, and no one gets the fruits of social cooperation without taking on social burdens proportional to their benefits or vice versa. To be sure, Levinas never explicitly discusses things in quite this precise a manner: We find instead scattered passages that outline an impoverished way of conceiving of justice as "bookkeeping," "a balance of accounts in an order where responsibilities correspond exactly to liberties taken" (OBBE 125; see also RMRO 123–124).

Levinas mercilessly criticizes many features of this conception of justice (criticisms which clearly apply to the ethical version as well). He opposes its emphasis on measuring duties and limiting responsibilities, and he questions its insistence on equal rights. More fundamentally, he rejects its metaphysical underpinnings, exemplified by Kant's ontological claim that freedom is the essence of humanity, and Kant's axiological claim that autonomy is the fundamental ethical and juridical value. This is because Levinas puts responsibility where Kant, and the liberal tradition more generally, would put freedom—to be human is to be responsible, and the other's needs constitute the fundamental value. Being responsible for others is about transcending the drive toward self-preservation and self-enhancement that Levinas refers to as the *conatus essendi*. Being responsible for others is about addressing the needs of the other without reserve and without concern for one's own being. As a result, our responsibilities for others cannot be determined by, nor limited by, the responsibilities others bear for us. Duties are not

cut from the cloth of reciprocity. This view is in sharp distinction to liberal justice, which is all about honoring the *conatus*, marking out a sphere that surrounds each individual self, protecting its ability to reach its vision of the good life, and minimizing all non-self-initiated claims on its time, money, and labor—in short, enhancing its ability to persevere in its chosen way of being.

But just as Levinas embraces justice in the very broad sense, so too does he embrace legal-political justice, stating that "institutions and juridical proceedings are necessary," even ethically necessary (IRB 67).[9] In fact, Levinas explicitly endorses the liberal conception, claiming that it is the specific features of liberal justice that distinguish just legal and political regimes from totalitarian or fascist ones (IRB 51). He says that states *ought* to fairly apportion rights and responsibilities, to strive for equality in benefits and burdens. Levinas reserves his most serious praise for a feature of liberal justice that would likely be unrecognizable to a mainstream political theorist. Levinas identifies within liberalism something he calls the "bad conscience of justice" (IRB 206). For Levinas, this is the consciousness that justice is "not yet just enough" (IRB 51–52), that justice, to use an overused phrase, is always yet to come.[10] This consciousness is evidenced by the fact that liberalism "continue[s] to preach that within justice there are always improvements to be made in human rights" (PM 177–178) and recognizes that "justice does not give itself as definitive… an even better justice would be necessary" (IRB 51). In striving for an even better justice, the bad conscience of justice harbors a certain utopianism: "The liberal state is a state which holds justice as the absolutely desirable end and hence as a perfection" (PM 177). But this does not mean that it thinks perfection can be reached—it does not. The bad conscience of justice simply refuses to use the fallibility of human judgment as an excuse for "worse justice." The bad conscience of justice commits itself to "an ever-improving law" and strives to overcome these hurdles, even though they are in principle insurmountable (IRB 230).

In my view, Levinas' praise of liberalism is overly charitable, insofar as the bad conscience of justice is not really a component of mainstream liberalism, at least as far as I am aware.[11] Indeed, the bad conscience of justice is at odds with a value held dear by liberalism, namely *finality*. (I will discuss finality in more detail below.) So if Levinas means to be characterizing liberal justice, his characterization is inaccurate, and we should consider the characterization to be Levinas' *own* account of liberal justice. It is of course possible that Levinas was fully aware that he was developing his own account, in which case there is no attribution to be deemed erroneous. At any rate, given these interpretive complications, some terminological distinctions are in order.

[9] This claim is scattered throughout the interviews contained in *Is it Righteous to Be?* One finds a more concrete discussion of this necessity in Levinas' "Ethics and Politics," (Hand 1989).

[10] The way that Levinas describes conscience and the emphasis on the necessity of critique recalls *Totality and Infinity*'s discussion of conscience (TI 100–101), although that discussion remains on a purely moral plane.

[11] Rawls ventures in this direction when he posits the existence of a "natural duty of justice" that "constrains us to further just institutions not yet established," (Rawls 1999, p. 99); presumably this duty requires us to "reform" institutions if they are unjust, (Rawls 1999, p. 3). But the suggestion is too brief to be conclusive.

I will refer to the mainstream liberal-egalitarian conception of justice as justice *sensu stricto*. I will refer to Levinas' conception of justice—which adds the bad conscience of justice to liberal justice—as Levinasian justice, or justice *sensu lato*. When I use justice in the very broad sense found in *Otherwise than Being*, the usage will be evident from the context, so I will not give it a special name.

2 Justice, interrupted

Since Levinas' expanded conception of justice is crucial to my abolitionist argument, I want to devote more time to its analysis. The specifically Levinasian color of this conception becomes clear when we notice that the "improvement" at issue in the bad conscience of justice does not refer solely to an asymptotic approach to equality; the "improvement" is not reducible to the effort to ensure equal rights or to balance benefits and burdens. As we will see below, the search for a better justice is more comprehensive, requiring legal actors also to honor their singular responsibilities (responsibilities that will sometimes trump the duties picked out by justice *sensu stricto*). These additional responsibilities are incumbent on legal actors because justice is born out of responsibility, because justice is grounded in responsibility. To understand Levinasian justice, we need to examine the structural relation of justice and responsibility, which Levinas names "interruption." Since responsibility is the more fundamental of the two concepts, that is where we will begin.[12]

For Levinas, responsibility is the source of all normativity, be it political, legal, or ethical (OBBE 123). He contends there would be no axiological orientation in a world without it. Here, I would argue, Levinas follows Kant in thinking that the existence of normativity depends on the existence of an unconditional authority. For Kant, in a world void of a categorical imperative, a world containing only hypothetical imperatives, there would be nothing that we really ought to do. There would only be things we ought to do given our commitment to achieving certain ends ("if you want to retire early, live frugally"). Such norms do not bind us at all—if we give up the end to which they refer, we free ourselves from the requirements imposed by the norm.

Of course, Levinas differs from Kant in his conception of the categorical imperative; for Levinas, the categorical imperative is not the authoritative command that issues from my own practical reason and commits me to willing rationally. Rather, it is the authoritative command that issues from the other and submits me to the other. "Responsibility" names the effect of this submission, it names both "what happens next," i.e., what the ethical subject does in response to this submission, and also the fundamental normative relation between the self and other that results.[13]

[12] To describe the relation of responsibility and justice, Levinas often uses temporal metaphors such as "responsibility is prior to justice." What Levinas means to express in these passages is an axiological priority. For more on this point, see Bernasconi (1999, p. 80).

[13] Levinas does not make this distinction, but "responsibility" is different from "a responsibility" in the same way that "obligation" or "obligatoriness" is different from "an obligation." The first term in the two pairs refers to the way that actions are made necessary, the second refers to the necessary act. "My responsibility" can refer to either, and is therefore ambiguous.

In an important sense, Levinas' theory of responsibility is an account of unconditional authority that is meant to solve what he sees as the main problem with the Kantian one. Kant locates the source of the categorical imperative in constitutive principles of a will which is necessarily concerned with its own integrity. (Indeed, Kant's categorical imperative is really the command to act so that you never harm the integrity, or undermine the power of, your will.) Because he does so, the normativity generated by the categorical imperative is not ultimately unconditional—it is shot through with the self-interest of the *conatus essendi*: Without a concern for our own will, the categorical imperative would not bind us. So, Levinas thinks, we need a more rigorous account of unconditionality.

Levinas' analysis of responsibility is meant to furnish this account; it is in "responsibility for the other…," he writes, "[that] the adjectives unconditional, undeclinable, absolute take on meaning" (OBBE 124). Thinking about Levinas' attempt to develop a theory of the unconditional can help us see why responsibility has the features it does. Each of the main features of responsibility ensures that the constraints put on action by responsibility will themselves not be conditioned by the *conatus essendi*.[14] In what follows, I will discuss the features most relevant to the argument of this paper.

The first is *asymmetry* (OBBE 158). Responsibility is a one-directional normative relation: My responsibilities to the other do not require him or her to have the same, or any, responsibilities for me. Responsibility is like parents' responsibility for their young child—they are responsible to and for their child although their child is not responsible for them. As Levinas often puts it, responsibilities are duties with no correlative rights. The asymmetry of responsibility contrasts with the equality of justice (*sensu stricto*), where I have duties to others only insofar as they have duties to me. Justice excuses me from living up to my responsibilities when I am the victim of serious inequality, or when I am in a position of extreme vulnerability. Responsibility, on the other hand, is a doctrine of "no excuses."

A second feature is *singularity*. Responsibility is a relation between two, and only two, relata (OBBE 86, 100, 107). Responsibility is a relation between me and one other. This means that my responsibility is a unique one. Only I bear the responsibilities that I bear. My responsibilities respond to a singular demand that is placed on *me and no one else*. This demand does not target me because of my particular attributes; my responsibility for the homeless person does not target me because I have more money than he does. To illustrate by way of another contrast—in a regime where burdens were precisely correlated with benefits, I could be excused from my duty to help if there were someone wealthier than me passing by.

A third crucial feature of responsibility is its *passivity*. The responsible self does not assume, choose, or consent to responsibility. The responsible self does not commit itself to its duties through an operation of its will; it *is committed*. Responsibility is actualized before the self could deliberate about whether it ought to consent to its duties (OBBE 101, 103, 140). As such, the duties placed on me by responsibility are valid not because they are endorsed by practical reasons; rather,

[14] I recognize that this quasi-Kantian interpretation of Levinas is an unusual one, but nothing in the argument of the paper depends on it.

their validity is groundless, or, as Levinas prefers to say, anarchic (OBBE 100, 159). Put in a positive way, these demands are authoritative because they are urgent, because they express the urgent needs of the other. To say that that normative authority must be sanctioned by self-legislated reason would be to say that my duties must be good for me in some sense in order to be authoritative, and again, this mires us in the *conatus essendi*.

Emerging from these features and their opposition to the *conatus* is a picture of the responsible self that is exceedingly vulnerable. The responsible self cannot put rational limits on its responsibility for others. It cannot deflect the burdens that press upon it. It cannot refuse to send aid to children suffering from famine because the lack of food is "not its fault." It is this vulnerability, oddly enough, that leads to justice. There is more than one other in the world, and the multiplicity of others raises a problem: The self, in its vulnerability, is radically responsible for all of them. Implicit in this responsibility for everyone is a deep normative tension: Every other's claim is *equally* valid. In rushing to someone's assistance, I turn my back on another who makes the very same claim on me. And what if I tried not to turn my back on anyone? I would be paralyzed, overcome by the impossibility of taking any specific course of action. I would be like Buridan's ass, which, confronted with equally attractive bales of hay, starves to death for want of an ability to decide between them.

Here then, is the origin of justice (in the very broad sense): The responsible self *must* act, it must do something, but to do anything it needs to have some rough criteria for determining which responsibilities to act on. Justice is necessary, *ethically* necessary, because the requisite criteria for action are provided by principles of justice, or more specifically, by the catalogue of rights and duties generated by principles of justice. As noted above, the rights and duties in question encompass not only political rights and duties, but moral ones as well. Specific moral codes are part of the broad sense of justice because they tell us what we ought to do when confronted with competing moral demands.

Of course, the relation between responsibility and justice is not this simple. Even though justice is "justified" by responsibility, justice and responsibility still generate mutually exclusive normative requirements. As Levinas puts it, justice and responsibility generate "internal contradictions" in our duties to others (IRB 51). I am responsible, so I must live up to my responsibility for *this* other *and* for all the other others. Even if justice requires me to shift my attention elsewhere, I am *still* responsible to the other in front of me. There is a normative remainder that cannot be made to disappear. An oft-quoted passage addresses this impossibility: "[T]he contemporaneousness of the multiple is tied about the diachrony of two: Justice remains justice only in a society where there is no distinction between those close and those far off, but in which there also remains the impossibility of passing by the closest" (OBBE 159). It is this impossibility, this normative remainder, this contradiction that remains even after its "solution" has been put in place (IRB 51), that is an interruption.

Put otherwise, the interruption of justice is the fact that I am justified in turning away from the other in front of me—I must do it—but I am also *at fault* for this very turning away. I both can and cannot appeal the equality of my fellows to justify my

deeds. More specifically, I can, in a very real sense, justify my turning-away to the one I turn toward. And I can justify my turning-away in the sphere of public reason—a sphere that has a very real necessity and importance. But I cannot justify my turning-away to the one I turn from. My responsibility interrupts justice in delegitimizing this turning-away with respect to the one I turn from. In short, the interruption is the fact that the answer to the question "am I doing what I ought to do?" will oscillate between a Yes and No, resisting a conclusive answer and remaining continuously unsettled.

We are now in a position to make a more accurate assessment of Levinas' views on justice, particularly the ambivalence that characterizes these views. For Levinas, justice (still in the very broad sense) entails "the necessity of comparing what is incomparable… of objectifying and objective rationality, of the very idea of universality" (IRB 115–116; see also IRB 67). Given Levinas' conception of responsibility, this necessity is in some sense a necessity to impose a certain violence on the other. To act justly, the responsible self must violate asymmetry and disrespect the other, treating the other as something she is not. One treats the other not as an ultimate authority, which is what she really is, but as a being with rights that can measured and calculated and with duties of her own. Furthermore, one must use the data one has gathered to rationally deliberate about which needs are most urgent and need to be addressed first (IRB 56). The responsible self is now compelled to act on the basis of *reasons*, rather than its anarchic responsibility. Seen in this light, "the other is no longer the unique person offering himself to the compassion of my responsibility, but an individual within a logical order or a citizen of a state in which institutions, general laws, and judges are both possible and necessary" (IRB 16). In short, justice violates the asymmetry, singularity, and passivity of responsibility.

In fact, in leveling out the asymmetry of responsibility, justice introduces the possibility of evil in the guise of a full-blown egoism. In a regime of equal rights, where I am identified as having equal claim on others, the priority of responsibility can be inverted, and the precedence of the other's rights over my own (RMGW 158) can be forgotten. Responsibility can become, in the name of responsibility, concern for self. My normative status as an autonomous being with rights can lead to an illegitimate self-satisfaction that deludes me into acting selfishly and justifying those selfish actions by recourse to the defense of my rights. "The unlimited initial responsibility, which justifies this concern for justice… can be forgotten. In this forgetting consciousness is a pure egoism" (OBBE 128).

But again, Levinas warns us against thinking of justice (with the exception of justice *sensu stricto*) as a degraded or insufficient type of responsibility. It can be hard to see why, but Levinas helps us out in an interview, where he says that justice limits "not my responsibility, but my action, modifying the modalities of my obligations [*mes obligations*]" (IRB 55; see also OBBE 159).[15] What Levinas means is that what is limited in justice is not my responsibility as such—my responsibility remains infinite—but rather the infinite response that the responsible self directs toward the other that demands it. Insofar as justice requires me to

[15] The passage in French can be found in Poirié (1996, p. 119).

respond to *all* the others that require my assistance, justice alters the character of my infinite response. The infinity of my response is disengaged from the one in front of me and redirected toward everyone that needs it. Correlatively, justice serves as a corrective for the blindness that can accompany the response to the other—duties of equal treatment draw our attention to our responsibilities to others who have not yet come to our attention and ameliorate the "risk of being uncharitable toward the third party, who is also [a] neighbor" (IRB 230). As a result, I would go so far as to say that justice is really an *intensification* of responsibility. Because justice pushes us to be responsible for everyone, not just the person in front of us, justice pushes us to be *more* responsible than we would be in the peace of the one-for-the-other relationship.

3 Law and legal institutions

I now want to consider the consequences of Levinas' notion of interruption for legal justice specifically. It is these consequences for the legal domain that will furnish the fundamental premises of my abolitionist argument. But as we proceed, we should bear in mind that Levinas never says much about law. He devotes a few pages of his major works to a consideration of legal and political institutions, he has two short essays on human rights, and he makes number of brief claims in his interviews, the latter being the most important source for the argument on offer.[16] Nevertheless, even these scattered remarks involve substantive conceptual commitments. Namely, they imply a specific conception of the purpose or point of legal institutions, a conception that shows legal justice to be ethically necessary.

The purpose of legal institutions can be found in the way that law, in the form of legal institutions, responds to the normative conflicts that characterize justice. As I discussed above, normative conflicts emerge from the equally urgent demands that confront responsible beings, conflicts which introduce the need to think about rights and duties. But these conflicts also generate a need for procedures that help us to calculate and measure our rights and duties. Since equality demands that these procedures be as objective and impersonal as possible, these conflicts generate a need for *institutions* to make authoritative decisions in this arena. More specifically, institutions are needed to give content to our more-or-less indeterminate rights (the right to life, for example), and also to make decisions when our rights claims come into conflict (your right to life versus my right to self-defense). We also need institutions to determine procedures for the acquisition of rights (acquiring property, making contracts, etc.). Finally, we need institutions to *enforce* our rights and duties, and to impose sanctions when they are violated. To put it in a Kantian way, these needs, combined with the ethical necessity of justice itself, make it necessary to institute legal institutions. Or as Levinas puts it, "institutions are necessary to carry out decisions… Justice and the just State constitute the forum enabling the

[16] The essays are "The Rights of Man and the Rights of the Other" and "The Rights of Man and Good Will." The most important interviews for our purposes are contained in *Is It Righteous to Be?: Interviews with Emmanuel Levinas*.

existence of charity within the human multiplicity" (IRB 230). Legal institutions just are the institutions in question, and so legal justice is ethically necessary.

The second point to bear in mind is that Levinas' further characterization of law and legal institutions comes quite close to mainstream liberal views. He says that legal justice is an order governed by "a sovereign judge who decides among equals" (IRB 183), and he argues that the legitimacy of legal institutions is measured by how well they ensure our rights (RMRO 116). The list of basic rights contained in the liberal and Levinasian conceptions is roughly the same, though Levinas' catalogue has a definite European social democratic flavor—he says that besides negative rights, we have positive rights to "education and participation in political power… health, happiness, work, rest, a place to live,… and even the right to social advancement" (RMRO 120; see also RMGW 155). And in essays both early and late, Levinas goes so far as to say that the point of law is to ensure and enhance human *freedom* (FC 23; RMRO 117).[17] In other words, Levinas would agree that the duties generated by Kant's Principle of Right or Rawls' two principles of justice impose real obligations on us.

Of course, for Levinas, the normativity of principles of justice derives from responsibility. This means that principles of *legal* justice get their normative force from responsibility, and *this* means that principles of legal justice are susceptible to interruption by responsibility. Clearly this susceptibility means that Levinas' conception of law is not reducible to the strictly liberal one. To see how the Levinasian view makes a difference—especially with respect to capital punishment—we need to explore the role of interruption in legal justice more closely.

As I will discuss below, Levinas gestures toward two ways in which legal justice is interrupted by responsibility.[18] First, the interruption of justice by responsibility means that justice is inseparable from mercy; there must be occasions for mercy after a sentence is handed down. Second, it means that there must always be an occasion for a legislative or judicial revision of legal rules and legal principles. Levinas pays most attention to the first, and thinks that this is where an argument against capital punishment might be made. After discussing this type of interruption, I will argue that Levinas is wrong to think it can ground a successful abolitionist argument. I will then move to the second type of interruption, which Levinas does *not* link to abolition, but which, in fact, is just what abolitionism needs.

4 Mercy

The first type of interruption is the interruption of justice by what Levinas most often calls charity. The concept of charity cannot be found in either *Totality and Infinity* or *Otherwise than Being*, but it appears in some of his essays on religion,

[17] Roger Burggraeve's underappreciated book addresses this point in a sensitive fashion (2002).

[18] By necessity, I will concentrate on interruptions in criminal law, but some of what I have to say would apply to civil law as well.

and it plays an important role in his interviews. Charity [*charite*] refers to "a gratuitous act" (PM 176),[19] and thus resembles the generosity or gratuity that characterizes responsibility (OBBE 125).[20] But Levinas uses charity primarily when discussing the legal domain, where charity means mercy. Levinas writes, "when the verdict of justice is pronounced, there remains for the unique I that I am the possibility of finding something more to soften the verdict. There is a place for charity after justice" (PM 175). What this means is that justice (*sensu stricto*) must be done. A judge, or in certain U.S. jurisdictions, a jury, must determine a wrongdoer's punishment in accordance with strict laws of justice; a judge must make sure that a wrongdoer gets what he deserves for harming others (IRB 67).[21] A judge must also make sure that she treats all wrongdoers equally—equality meaning that everyone who commits the same type of crime with the same *mens rea* ought to be punished in the same way—and must treat like cases alike. But because justice emerges from responsibility, justice is interrupted by responsibility: "[J]ustice is awakened by charity, but the charity which is before justice is also after" (IRB 52). After justice is done, charity must be considered. After the sentencing authority has determined what justice requires, it must determine whether it ought to be lenient, whether the sentence, imposed with the "rigor of always rigorous justice," should be softened or ameliorated (IRB 68). Although judges and juries cannot look at the face in their initial determination of what justice requires, after the initial determination has been made, they *should* look at the face, and consider the wrongdoer in his or her uniqueness. Indeed, Levinas thinks that this turn toward the face is part of the sentencing authority's "role" in a just legal system (IRB 194, 207, 68). "It is necessary that I rediscover the unique, once I have judged the thing; each time anew, and each time as a living individual and as a unique individual" (IRB 51). Of course, looking at the particulars of a wrongdoer's crime does not lead only to mitigation and mercy. When the particulars are especially vile or inhumane, they might instead lead sentencers to increase the wrongdoer's punishment. But the Levinsian turn toward the particular *does* always lend itself to mercy, insofar as the attention to particulars is linked to a response to the appeal of the wrongdoer.

[19] Poirié (1996, p. 143).

[20] In these discussions, Levinas also uses the word "mercy" [*miséricorde*] and occasionally the conjunction "mercy and charity" (RMGW 157). It is somewhat surprising to find Levinas using either of these words. While "mercy" has become at least partially separated from its religious roots and can be used to name a legal virtue, neither "*charite*" nor "*miséricorde*" carries the same neutral sense. Indeed, they have a profoundly Thomistic resonance. Levinas recognizes the Christian inflection (IRB 69), but does not mention Aquinas. The oversight is unfortunate, because conjoining the two terms in their Thomistic sense actually serves Levinas' purposes. For Aquinas, charity is the highest virtue; it is the love of the good, both in God and in human beings (*Summa Theologica* II-II.23). We act charitably when we love others as creatures of God, and treat them as creatures of God. Mercy, on the other hand is a virtue that comes into play when we are confronted with the suffering of others (II-II.30). We act mercifully when we empathize with others' suffering, and attempt to ameliorate that suffering. So the conjunction "charity and mercy" is quite appropriate, insofar as the other is figured as the suffering other, but also as height. The other is both leper and God. That point aside, Levinas seems to use charity and mercy interchangeably, as can be seen when he discusses the role of *hesed* in biblical thought (IRB 69).

[21] Levinas seems to endorse a roughly retributive justification of punishment in his cryptic "An Eye for an Eye" (DF 146-48).

Levinas' exhortation to mercy does not mean that judges should be caricatures of bleeding-heart liberals who take pity on everyone. To grant mercy to everyone would be *too* lenient, and would violate the judge's responsibility to the victims of the crime. It is certainly difficult to determine exactly what counts as "too lenient"—a single-minded insistence on justice is too much justice, but once the door to mercy is open, it is hard to know when to close it. Levinas does not elaborate on this difficulty, but it seems to me that it is simply a matter for good judgment, or as Levinas puts it, a "lucidity not limited to yielding before the formalism of universality, but upholding justice itself in its limitations" (RMRO 123).[22]

5 Levinas' inchoate abolitionism

Before turning to the second type of interruption, I want to consider Levinas' explicit abolitionist arguments, and explain why they are unsatisfactory. The first relies on the point about interruption and mercy just discussed. Levinas says, "this after-verdict, with its possibilities of mercy, still fully belongs—with full legitimacy—to the work of justice. On the condition, however, that the death penalty no longer belongs to the [categories of] justice?" (IRB 207). If there is an argument implied by this suggestion—and I will ignore the hesitance expressed by the interrogative form—it must begin with the thought that sentences should *always* be less than what is deserved, that wrongdoers must *always* be granted mercy (in other words, that judges and juries should act like caricatures of bleeding-heart liberals). Only then would it follow that execution is constitutively incompatible with justice. Only if wrongdoers must always be granted mercy would every death sentence need to be converted into a lesser penalty. But if this is the argument Levinas has in mind, it can be rejected rather easily. First, to say that all wrongdoers should be granted mercy is to turn mercy into a steadfast rule, to eliminate the role of judgment, the "moral effort of the human," that Levinas himself thinks is at work in just legal systems (IRB 231). An unwavering application of a rule stipulating mercy would be just as objectionable as a refusal to deviate from what justice (*sensu stricto*) prescribes. More concretely, it would ignore the fact that to grant mercy to

[22] Even though this emphasis on judgment would sit uneasily with most legal theorists committed to Rule of Law values, Levinas' point here does not stray too far from actual legal practice. Take executive clemency. Clemency refers to an executive act that postpones punishment (a reprieve), lessens the severity of a punishment (a commutation), or vacates punishment entirely (a pardon). Clemency attests to an interruption insofar as it occurs *after* justice has been done, and executives make clemency decisions merely by considering the wrongdoer's individual case. In the practice of clemency, we also see something like an appeal to the groundlessness of responsibility: Constitutionally speaking, neither governors nor clemency boards are required to follow rule or precedent when making a decision. Clemency decisions are matters of pure discretion, as opposed to the guided discretion of, say, capital sentencing. (I take this terminology from George Rainbolt's unpublished manuscript, "Mercy, Justice, and the Death Penalty.") When an executive makes clemency decisions, she is allowed to grant clemency for any reason she chooses. The Supreme Court of Florida holds that "an executive may grant a pardon for good reasons or bad, or for any reason at all" (348 So. 2d 312 [1977]). The U.S. Court of Appeals for the Sixth Circuit holds that the executive "need give *no reasons* for granting it, or for denying it" (118 F. 3d 460 [1997], emphasis mine).

some wrongdoers (like Klaus Barbie, whom Levinas said he could never forgive) is not just a deviation from justice, but a mockery of it.

The argument fails in a second way. It overlooks the possibility that executing some wrongdoers might already involve an exercise of mercy. In 1995, Timothy McVeigh blew up the Alfred P. Murrah building in Oklahoma City, killing 168 people. He was tried, convicted, and executed in 2001. In that same year, 66 other murderers were executed, and none of them, to my knowledge, had victims in the double digits. So McVeigh was given the same punishment as the other murderers, even though he clearly "deserved" something much more severe than what they received. How else to explain the state's willingness to punish people like McVeigh *less* severely than they deserve—to forgo equality, to treat McVeigh *better* than his fellow murderers—except to say that some sort of *mercy* has been granted?[23] If this explanation holds, Levinas' argument cannot be used to impugn the death penalty. The requirement to grant mercy will not, by itself, always lead to a sentence less than death; for some murderers, the sentence of death is *already* a merciful one.

Levinas advances a second abolitionist claim, one that makes use of the idea of the bad conscience of justice discussed above. Levinas simply states that the search for a better justice entails the abolition of capital punishment (PM 175). This is mere assertion rather than argument, unless one can show why the death penalty and justice are incompatible. Since Levinas never attempts such a showing, he has nothing to stand on here. However, the bad conscience of justice *does* figure in my version of Levinasian abolitionism, and I think such a showing can be made. To see how, let us turn to the second type of interruption.

6 Revision and abolition

The second type of interruption finds its place *after* the possibility for the first type of interruption has passed. It finds its place after the sentencing authority has completed its task. This type of interruption can be described very simply—it is the requirement that legal institutions institute and maintain provisions for reviewing and revising a wrongdoer's sentence. We find this interruption, to some degree, in the U.S. legal system. In criminal cases, someone convicted of a crime can request direct review by state courts of appeal. In this type of review, the defendant argues issues in the trial record—she can argue that the evidence does not support the verdict, that evidence was improperly excluded or permitted, that there were problems with voir dire, and so on. If the conviction is upheld, the prisoner can seek postconviction review by the state supreme court. Given an adverse ruling at this level, the prisoner can seek review of her sentence or conviction by filing for habeas relief in the federal courts. At the federal level, the process works in much the same way. State and federal courts of appeals also have, in addition to their authority to overturn lower court judgments or to require lower courts to reconsider a particular legal issue, the power to enforce certain interpretations of laws, and in extreme

[23] Louis Pojman and Jeffrey Reiman discuss this general problem at length, even though they disagree on its consequences for the death penalty debate (Pojman and Reiman 1998).

cases, to strike them down as unconstitutional. So courts have the authority to revise prior judgments as well as the laws and principles that underlie those judgments. Of course, municipal, state, and federal governments can also revise laws and principles by passing new laws, or amending or voiding old ones. And in some cases, laws and principles are revised by the citizenry directly.

Levinas indicates his understanding of the importance of this type of revision when he says that "justice, the justice that deserves its name… leaves open the possibility of a revision of a judgment once pronounced"; justice must keep open the possibility of a "recourse for the judged" (IRB 194). In other words, the possibility of revision of a particular sentence—by the courts or by an executive or by some other institutional form—is constitutive of just legal systems. But Levinas is also committed to the more *general* type of revision—the revision of laws and legal principles. The bad conscience of justice obsesses not only about the injustice done to this or that person, but also about the conception of justice that underlies concrete legal practices. In just legal systems, legislation is thought to be "always unfinished, always resumed, a legislation open to the better" (IRB 206).[24]

It is crucial to note that the Levinasian way of grounding revision in the search for a better justice grants revision an absolute status. Practices of revision respond to the ethical imperative to question whether any legal judgment is good enough.[25] Because this imperative derives from the bad conscience of justice and the responsibility that animates it, it is unconditional; "always unfinished, always resumed." It is, in fact, the unconditionality of this imperative that makes revision an *interruption* of justice, though I will save discussion of this point for later. With this account of revision in hand, we can proceed to the heart of the Levinas-inspired argument against capital punishment. Although the preparation has been lengthy, the argument itself is quite simple. We begin with the idea that procedures for revising existing judgments are a necessary part of law, at least insofar as law is to be legitimate, or just. Procedures for revision are not just practices we happen to have in some form or another, they are practices we have to have, insofar as we are committed to advancing legal justice and opposing state coercion. Put otherwise, revisability—in a Levinasian sense, where the possibility of revision must always be present—is a criterion of legal (and political) justice. The requirement that revision must always be possible, which I will call the "principle of revisability," tells us that any legal institution that lacks procedures for revision, implements them deficiently, or limits their scope, will be an unjust, coercive one. A corollary of the principle of revisability is that specific legal actions that cannot be revised will also be unjust, even if they are carried out by an otherwise just legal system. From here,

[24] The difference between this and the more optimistic Enlightenment view it recalls is that Levinas does not think that a "happy end" to history is certain. He sees no guarantee that the world will not implode into fascism and totalitarianism.

[25] This point reveals a more specific version of the "bad conscience of justice" described above. The necessity of revision means that legal actors can never pat themselves on the back. They can never rest satisfied with the current state of legal rules and procedures. Rather, legal actors must remain in a constant state of *anxiety*—anxiety that justice has not been done, that responsibilities have not been met. This disposition combats our tendency to think to ourselves that "we have tried hard enough and thus may take it that justice has been done" (Bator 1963, p. 453). (This citation is from an influential legal scholar, discussed below, who approves of this tendency, and thinks that we should embrace it.)

the argument for abolition easily follows. Until we can raise the dead, we cannot undo executions. Execution is a legal act that cannot be revised.[26] Therefore, execution is an unjust act, and legal actors are precluded from taking any facilitating role in the imposition of capital punishment.

As the previous sentence indicates, this is both a conceptual and a normative argument. Conceptually speaking, the argument shows that the death penalty is not part of a just legal system. And the fact that capital punishment is unjust, combined with our duty to work toward just legal institutions, imposes a *duty* on us—we must oppose capital punishment. Since Levinas lacks a developed theory of moral duties, it is hard to say exactly what this means, and my suggestion will therefore be tentative. In my view, the scope of the duty would be narrow; not everyone must take up the abolitionist flag, writing articles against capital punishment, or camping out in front of courthouses. But for those lay, legal, and political actors who find themselves participating in death penalty proceedings, the duty is a strict one. It requires those participants to refuse to comply with capital punishment statutes.

A final piece of clarification—unlike most abolitionist arguments, mine focuses neither on the executed person, nor on the damage done to his or her person. My Levinasian argument emphasizes the damage done to *law*. To be sure, since the argument shows that execution is unjust, it shows that anyone who is executed is treated unjustly. And this is an important fact to establish. But the argument is really about law: When imposed, the death penalty requires an institution that finds its motivation and inspiration in principles of justice to debase itself into mechanism of violent coercion. The death penalty requires legal institutions to contravene the basic principles compliance with which render legal commands duties rather than threats. This is important to note in part because it opens up new rhetorical avenues in the struggle against capital punishment.[27] In focusing on how the death penalty wrongs a convicted murderer, most abolitionist arguments ask an audience to side with the murderer. It is reasonable to suppose that many people who are on the fence about capital punishment find this an insurmountable problem. However, the Levinasian argument presented here requires the audience to identify and ally with legal institutions rather than convicted murderers. And in the United States, this strategy has, in some cases, proven to have politically significant effects.[28]

7 Why Levinas?

One might wonder whether we need Levinas and the complicated story about interruption to make this argument, or whether we could employ a more readily intelligible view. I will concede that *any* theory of law that both attributes a point or purpose to law and recognizes human fallibility will place *some* emphasis on

[26] Mike Davis contests this assertion of the unrevisability or irrevocability of capital punishment (1984, p. 150). I attempt to defeat this argument in a work in progress titled "The Irrevocability of Capital Punishment.".

[27] I am indebted to Austin Sarat for this way of framing the matter.

[28] Sarat (2002).

revision. Whatever one considers the purpose of law to be, one will want to make sure that law actually achieves its ends, and that will involve the revision of judgments, statutes, and principles. Take for example, the view that the purpose of law is to secure equal rights. This view commits its holders to procedures of revision insofar as any given list of rights can be underinclusive, overinclusive, insufficiently enforced, incorrectly applied, and so on. But while many theories of law are hospitable to some form of the principle of revisability, they will not suffice for the argument I've developed. This is because finality is always seen as a value whose importance sometimes outweighs that of revision. And this attitude critically compromises the principle of revisability's abolitionist thrust. I want to briefly outline why this is so, canvassing reasons why both the consequentialist and non-consequentialist traditions of legal theory embrace finality.

The consequentialist argues for finality by calling attention to the difficulties facing legal systems that ignore finality in their search for accuracy. Somewhere along the line, the argument goes, the quest for improved accuracy will reach a point of diminishing returns, a point where it costs an enormous amount to gain a very slight improvement.[29] The core of the consequentialist argument is the view that, as Lawrence Solum puts it, "justice has a price, and there is a point at which that price is not worth paying."[30] In other words, legal systems that do not limit revision use an inordinate amount of scarce social resources to purchase a paltry bit of justice. And the consequentialist says that since these resources could generate a far greater good if spent elsewhere, they *should* be spent elsewhere, and revision should be limited.

This leads to a second problem, one that pushes both consequentialists and non-consequentialists to limit revision: A system unconditionally committed to revision would generate injustice. For example, if adversaries in a civil trial were required to prove beyond any shadow of a doubt the existence of facts relevant to the dispute, they would sometimes be embroiled in a life-long process of fact finding.[31] In such a case, justice could not be done. Or consider a criminal trial—if the state had to prove beyond any shadow of a doubt that a defendant was guilty of the crime charged, very few wrongdoers would ever be convicted. More generally, an undue emphasis on revision could lead to a complete breakdown of the legal system. As Paul M. Bator argues, in an important essay that influenced the Rehnquist Court's habeas jurisprudence, "if the existence *vel non* of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists."[32] The principle of revisability, coupled with the fact of the fallibility of our cognitive powers, would lead to a system in which judgment would be deferred indefinitely, all the while taking up the court's time and energy. Or as Justice Rehnquist puts it, the principle of revisability would exhaust law to the point of "paralysis."[33]

[29] Solum (2004, p. 247).

[30] Ibid.

[31] Ibid., p. 185.

[32] Bator (1963, p. 447).

[33] *Herrera v. Collins,* 506 U.S. 390 (1993), p. 399. One cannot avoid tripping over consequentialist justifications of finality in Supreme Court opinions. See, for example, *Smith v. Murray*, 477 U.S. 527

As for non-consequentialist defenses of finality, there is the influential argument that legal institutions enhance freedom when they establish a framework of stable expectations.[34] Rawls observes that when people know exactly how to avoid sanctions, to generate rights and duties, and to navigate economic incentives and disincentives, they can devise plans and carry them out without hindrance. When the system of laws is regular and constant, people can achieve the ends they set for themselves. In other words, by enabling people to achieve the ends that they set for themselves, law serves autonomy. The concern coming from these quarters is that a legal regime that took the principle of revisability seriously would threaten our ability to efficiently engage in goal-directed activity. In a regime of indefinite revision, we would always have to worry that our plans would be thwarted in the future, given that any and all activities would be vulnerable to changes in regulation. So we need constraints on revision to make sure that freedom is not unduly hindered.

In their responsiveness to these concerns, most non-Levinasian theories of justice limit courts' ability to revise their rules and principles. At some point, they force deliberation to come to an end, and foreclose any further reconsideration. It is at this point that we see the difference the Levinasian view makes. For Levinas, revision cannot come to an end; it is a "permanent revolution" that involves "ceaseless" judicial "reinventions" (II 9; IRB 52). And the consequences of this difference for the death penalty are massively important—if finality has an important enough place in law, revision cannot do abolitionist work. Only by showing that the possibility of revision must *always* be present can one show that legal institutions cannot justly put people to death.

But care must be taken here. Although the argument I'm developing asserts that the possibility of revision must always be present, this does not imply that legal systems must reject finality altogether. Legal institutions *must* make room for finality, otherwise they would run afoul of Levinas' own conception of justice. If legal institutions were never authorized to do anything—punish criminals, enforce contracts, etc.—they would be unable to serve the crucial purposes they are meant to serve. But in fact, the principle of revisability says only that there must always be procedures for revising previous judgments, and that any actions the law takes must be capable of being undone. So, for example, the actual *imposition* of a legal sanction does not automatically violate the principle: A fine can obviously be undone, even corporeal punishment can be undone, insofar as we agree that compensation is an acceptable method of undoing punishment.[35] And courts need not engage in endless findings of fact—verdicts can be passed on incomplete evidence, as long as those verdicts are revisable.

Footnote 33 continued
(1986), p. 539; *McCleskey v. Kemp*, 481 U.S. 279 (1987), pp. 490–91; *Mathews v. Eldridge*, 424 U.S. 319 (1976), pp. 334–335; and *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), pp. 574–75.

[34] Rawls (1999, p. 207).

[35] This is not to say that the principle of revisability would authorize any type of punishment other than execution. It might, for example, prohibit especially traumatic punishments such as torture. But it would prohibit torture only if one could argue that the trauma of torture cannot be undone. While such an argument might be made, it is not, to me, as clear-cut as the argument regarding execution.

To conclude, I want to note that the principle of revisability has further consequences for the U.S. legal system. I cannot explore all of these here, so I will focus on one of the most important. The Antiterrorism and Effective Death Penalty Act (AEDPA) was signed into law in 1996. It is one of the most important recent expressions of the value placed on finality. One of the stated rationales of the Act is to "provide for an effective death penalty," but the Act reaches beyond capital punishment to mount a broad attack on habeas corpus as such.[36] The AEDPA severely restricts habeas corpus by virtually eliminating a petitioner's ability to file successive habeas petitions, and by prohibiting federal courts from reviewing state court decisions unless those decisions are contrary to, or involve an "unreasonable application" of federal law, or unless those decisions are based on an "unreasonable determination of the facts." The Act also institutes a 1-year statute of limitations for habeas petitions. In the following pages, I will argue that the principle of revisability shows this statute of limitations to be unjust.

The AEDPA is expressly designed to "reform" habeas, ensuring that state court judgments are given greater deference and appeals are completed in a quicker fashion. Section 2244(d)(1)(A) introduced a 1-year statute of limitations on filing federal habeas petitions, starting on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Today, any petition filed after the deadline is denied, unless the petitioner can make an extremely persuasive showing of actual innocence. There is no specific probability of innocence that triggers an exception, but it certainly over 50%.[37] That is, a petitioner whose probability of being innocent is "merely" 45% will have her late petition rejected.

The statute of limitations is very slightly ameliorated by what are called tolling provisions, which allow petitioners some lenience in submitting their petitions. The most important of these establish "equitable tolling." Equitable tolling provisions allow federal courts to review late habeas petitions in those "rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result."[38] But the bar for gross injustice is extremely high, and purposefully so.[39] To understand how high this bar is set, and how heavily finality is weighted post-AEDPA, we need to look at an example in a bit of detail. *Rouse v. Lee* concerns Kenneth Rouse, an African-American man convicted of first-degree murder by a

[36] Antiterrorism and Effective Death Penalty Act (1996). A writ of a habeas corpus is an order to bring an inmate to court so that it can be determined whether she is lawfully imprisoned. In the United States, habeas petitions are granted to determine whether a petitioner is being held in accordance with the Constitution. As such, habeas corpus is an immensely important check on state power.

[37] For more on this point, see Pettys (2007).

[38] *Harris v. Hutchinson*, 209 F.3d 325 (2000), p. 330.

[39] As the Fourth Circuit Court of Appeals put it in the *Harris* case just cited: "Any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result" (*Harris v. Hutchinson*, 209 F.3d 325 [2000], p. 330).

North Carolina court. Rouse filed a habeas petition that was denied by a district court because it had arrived *three days late*.[40] The Fourth Circuit Court of Appeals affirmed this denial, citing the AEDPA's statute of limitations.

Rouse asked the court to apply equitable tolling for two reasons. First, Rouse's attorney filed the petition late because he misunderstood a very fine point of federal civil procedure called the "mailbox rule." The Court rejected this argument, arguing that attorney mistakes generally do not constitute an "extraordinary circumstance" outside of a petitioner's control.[41] Rouse also appealed to the importance of his constitutional claims, and the possibility of gross injustice, which had been dismissed without a hearing by the North Carolina Supreme Court. The most important of these claims centered on the fact that one of the jurors admitted—after the conclusion of the trial—that during voir dire he intentionally hid the fact that his mother was murdered by an African-American. The juror said he concealed this information because he wanted to sit on Rouse's jury. Unfortunately for Rouse, this desire was motivated not by a sense of civic duty, but by racism. The juror reportedly expressed hatred of African-Americans, calling them "niggers," claiming that they place less value on life than whites, and claiming that they rape white women in order to brag to their friends. The obvious conclusion is that the juror wanted to sit on Rouse's jury because he wanted to take part in the killing of an African-American.[42]

The Court rejected this substantive argument as well. While *Harris* states that the statute of limitations can be overlooked if "gross injustice would result," *Rouse* understands the injustice in question to be the injustice related to the late filing of the claim, not injustice as such. That is, *Rouse* holds that the claim that racism infected Rouse's death sentence is simply *irrelevant* to equitable tolling.[43] The reason is, of course, finality.[44] The *Rouse* court argues that the merits of Rouse's case cannot be considered, because considering the merits of untimely petitions would undermine the point of the statute of limitations, and would lead toward unpredictable and indeterminate standards of review.[45] And the whole point of the AEDPA, they remind us, is to avoid unpredictability, indeterminacy, and drawn-out appeals.

There are many other examples one could use to illustrate the pernicious effects of the AEDPA.[46] But the foregoing should be enough to provide a sense of the Act's

[40] 339 F.3d 238 (2003).

[41] Ibid., p. 248 ff.

[42] Ibid., p. 257.

[43] Ibid., p. 253.

[44] Ibid., p. 251.

[45] The *Rouse* Court seems to find it perfectly acceptable to refuse Rouse relief in order to teach him and other petitioners a lesson about deadlines. In all seriousness, the Court asserts that granting Rouse relief would be unfair to other petitioners who got their papers in on time (2003, p. 253).

[46] A more recent example is the case of Troy Anthony Davis, convicted of murdering an off-duty police officer in Savannah, Georgia. Seven of the nine witnesses who testified against Davis at his trial have since recanted, and many of those witnesses have said they were coerced by police investigators. The Georgia State Supreme Court and the 11th Circuit Court have refused to consider this testimony, citing procedural rules contained in the Antiterrorism and Effective Death Penalty Act of 1996. For a detailed discussion, see the Amnesty International report: "'Unconscionable and Unconstitutional': Troy Davis Facing Fourth Execution Date in Two Year" (2009).

impact. As such, it indicates something of the wider practical import of the principle of revisability. Insofar as the principle of revisability states that there can be no absolute procedural bar to a reconsideration of a legal judgment, it shows the statute to be unjust. And this places a duty on legislators to overturn it.

So the principle of revisability, and the interruption of justice by responsibility more generally, does generate specific action-guiding norms with respect to the abolition of capital punishment and other issues in law. Does this mean that Levinas' work contains a plentitude of concrete norms? I am not sure. A positive answer depends on whether my results can be duplicated in other domains of social practice, or if law is an exception. To duplicate this result, one would have to find a social practice whose constitutive rules either explicitly or implicitly garner normative authority from their relation to responsibility. And one would have to figure out what, concretely, an interruption would look like in such a domain. *And* it would have to be the case that the interruption would generate a specific norm.[47] These are quite stringent conditions. But since they can be met in the instance discussed here, it is at least possible they can be met in others as well.

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[47] Some of Levinas' remarks suggest that the economic system might be another place to look (SM).

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