Death Penalty Abolition, the Right to Life, and Necessity

Abstract: One prominent argument in international law and religious thought for abolishing capital punishment is that it violates individuals' right to life. Notably, this *right-to-life argument* emerged from normative and legal frameworks that recognize deadly force against aggressors as justified when necessary to stop their unjust threat of grave harm. Can capital punishment be necessary in this sense—and thus justified defensive killing? If so, the right-to-life argument would have to admit certain exceptions where executions are justified. Drawing on work by Hugo Bedau, I identify a thought experiment where executions are justified defensive killing but explain why they cannot be in our world. A state's obligations to its prisoners include the *obligation to use nonlethal incapacitation* (ONI), which applies as long as prisoners pose no imminent threat. ONI precludes executions for reasons of future dangerousness. By subjecting the right-to-life argument to closer scrutiny, this article ultimately places it on firmer ground.

Keywords: death penalty, future dangerousness, imminence, incapacitation, necessity, right to life

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In the last century, there has been a dramatic shift away from capital punishment worldwide (Hood and Hoyle 2015: 10–22). Various arguments have contributed to this shift, but perhaps none more so than the *right-to-life argument*—that is, capital punishment should be abolished because it violates individuals' fundamental right to life (see Yorke 2009). This principle appears in Protocol No. 13 of the European Convention of Human Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, and the Catholic encyclical *Fratelli Tutti* (Schabas 2019; Francis 2020: §269). It also appears in debates on whether capital punishment violates domestic law (e.g., Barry 2019).

Despite the prominence of the right-to-life argument in legal and religious thought, there has been insufficient attention to whether it is internally consistent. Notably, the argument emerged from normative and legal frameworks that recognize deadly force against an aggressor as justified when necessary to stop their unjust threat of grave harm (i.e., death or serious bodily injury). Can capital punishment ever be necessary in this sense—and thus justified defensive killing? If so, the right-to-life argument would have to admit certain exceptions where executions would be justified. The internal consistency of the right-to-life argument to abolish the death penalty hinges on whether executions could qualify as justified defensive killing.

The philosophical literature on defensive killing gives little attention to capital punishment, focusing instead on war and individual self-defense (see Coons and Weber 2016). That is understandable since capital punishment—as the term implies—typically is understood as *punishment* for past harms, not defensive killing to prevent future ones. Still, one reason given in support of capital punishment is its effectiveness incapacitating offenders from committing future violence (e.g., *Gregg v. Georgia* 1976: 183). Even death penalty opponents like Jeremy

Bentham note the power of this argument. He calls its "greatest perfection … taking from the offender the power of doing further injury" (Bentham 2009: 167). The idea that executions are necessary to protect society from capital offenders is implicit in statutes that list future dangerousness as an aggravating factor or requirement for a death sentence (see Edmondson 2016).

There may be a temptation to quickly dismiss the claim that capital punishment could be justified defensive killing since it kills an offender in custody who poses no imminent threat. For some, only imminent threats can justify defensive killing (Ferzan 2004). But many question this view and various laws fail to reflect it (Baron 2011; Allhoff 2019; Ford 2022). Such skepticism toward the imminence requirement means that defenders of the right-to-life argument cannot take this requirement as a given. They must make the argument for why the imminence requirement applies in the case of the death penalty and precludes it as justified defensive killing.

This article presents such an argument. I begin by examining the right-to-life argument and explaining why its defenders must address whether capital punishment can be justified defensive killing. I then consider a thought experiment by Hugo Bedau to show that an execution would qualify as justified defensive killing under certain imagined conditions, which our world lacks. To justify an execution as defensive killing under real-world conditions, the state must show that the condemned, though defenseless and not an imminent threat at the time of execution, poses a future danger that requires deadly force to prevent it. Empirical research finds predictions of future dangerousness to be notoriously unreliable, so executions based on them are morally suspect. Moreover, a state's obligations to its prisoners, I argue, include the *obligation to use nonlethal incapacitation* (ONI), which applies as long as a prisoner poses no imminent threat. This obligation precludes the death penalty for the purpose of incapacitation since it

involves killing a non-imminent threat. Justifying capital punishment as defensive killing fails, then, even if predictions of future dangerousness improve. By subjecting the right-to-life argument to closer scrutiny, this article shows that it is internally consistent and ultimately places it on firmer ground.

The Right-to-Life Argument for Abolition

All major international treaties prohibiting capital punishment treat it as contrary to the right to life. Protocol No. 13 of the European Convention on Human Rights emphasizes: "everyone's right to life is a basic value in a democratic society and … the abolition of the death penalty is essential for the protection of this right" (Council of Europe 2003). Likewise, the Second Optional Protocol to the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly states: "abolition of the death penalty should be considered as progress in the enjoyment of the right to life" (United Nations Office of the High Commissioner of Human Rights 1989). The Protocol to the American Convention on Human Rights to Abolish the Death Penalty uses similar language: "abolition of the death penalty helps to ensure more effective protection of the right to life" (Organization of American States 1990). Nearly half of all nations have endorsed one or more of these treaties (Schabas 2019: 217), a sign of growing recognition of the right to life as reason to abolish capital punishment.

This line of argument also features prominently in religious thought, especially Catholic social teaching (Jones 2018: 236–239). Francis (2020: §263) in his encyclical *Fratelli Tutti* says that "the death penalty is inadmissible" and calls "for its abolition worldwide." He then cites "the inalienable dignity of every human being" as grounds to end the practice (Francis 2020: §269).

The idea that capital punishment violates individuals' right to life has a certain prima facie appeal. Capital punishment involves the state, in the most deliberate way possible, taking someone's life. Still, many recognize the right to life without concluding that the death penalty violates it. For instance, John Locke affirms the rights of life, liberty, and property, while understanding political power as including the "right of making laws with penalties of death" (Locke 2003: §§3, 87). When we think about rights, few are absolute. There are some circumstances where they can be forfeited or permissibly infringed upon. Such features of rights open potential paths for the right to life to coexist with capital punishment. It therefore is not immediately obvious that the right to life leads to abolition of the death penalty. There are additional steps in the argument to flesh out.

Here I provide what its defenders hopefully will regard as a charitable reconstruction of the right-to-life argument. The right to life represents the most fundamental right—the basis for exercising all other rights—and as such generates an especially strong presumption against killing. The leading justifications for the death penalty are retribution and general deterrence (*Gregg v. Georgia* 1976: 183). The right-to-life argument does not necessarily reject retribution and deterrence as justifications for penalties short of death, like loss of property or liberty, which carry a lower (but still high) justificatory burden. But this argument rejects that deterring others and ensuring just deserts for the guilty are valid justifications for the extraordinary step of killing a prisoner. The state's obligation to uphold the right to life—even of those who have committed grave crimes—takes priority over considerations of retribution and deterrence.

Decisive evidence on capital punishment's deterrent effect compared to imprisonment has been elusive (National Research Council 2012). But even if capital punishment were an effective deterrent, the right-to-life argument would reject deterrence as a justification for it.

According to this view, the right to life rules out killing someone as a means to deter *others* from violence. The right-to-life argument's principled rejection of deterrence and retribution excludes two leading justifications for the death penalty. But another notable justification remains, which the following section explores.

The Defensive Killing Justification

The normative and legal frameworks that gave birth to the right-to-life argument do recognize circumstances where defensive killing is justified. Most death penalty opponents endorse the right to use deadly force when necessary, in self-defense or defense of others, to stop an aggressor's unjust threat of death or serious bodily injury (e.g., Paul II 1995: §55). Except for pacifists, the right to life still permits defensive killing. That raises a potential challenge for the right-to-life argument: Can capital punishment ever qualify as justified defensive killing?

Rather than appealing to retribution or deterrence, this justification appeals to incapacitation. One virtue of capital punishment is its effectiveness incapacitating offenders—those executed never harm again. The *defensive killing justification* represents an especially stringent version of this rationale for capital punishment: an execution is justified only if it is necessary to prevent a capital offender's threat of death or serious bodily injury.

The defensive killing justification differs from the *societal self-defense justification* sometimes offered for capital punishment. The latter's core idea is to bring together backward- and forward-looking considerations to justify punishment (Boonin 2008: 192). It takes punishment as necessary to protect society given its deterrent effect in reducing future crime. It then says that the most just way to distribute the necessary harm of punishment is for it to fall on those who have broken the law through past violence. Some who defend this approach to

punishment argue that it justifies the death penalty (Farrell 1985: 367–368; Montague 1995: 131–157), but others question that conclusion (Hurka 1982: 659; Tadros 2011: 348–351).

Despite using the term *self-defense*, this justification ultimately makes the case for punishment by appealing, within certain constraints, to deterrence. That goal notably differs from the standard justification for individual self-defense—incapacitation. In fact, some express skepticism that self-defense can justify punishment (Alexander 2013). We need not resolve that debate here. The important point is that, when deployed to defend capital punishment, the societal self-defense justification appeals to this penalty's ability to deter others from violence, which the right-to-life argument rejects as a valid ground to take a prisoner's life.

In contrast, the defensive killing justification appeals to the goal of incapacitation. If capital punishment were necessary to incapacitate some prisoners—that is, stop their (not others') unjust threats of grave harm—it would count as justified defensive killing. Those who embrace the right-to-life argument, aside from pacifists, recognize that justification as valid. So if some executions met the criteria for justified defensive killing, proponents of this argument would have to concede that it fails to imply abolition of the death penalty, even granting its underlying assumptions regarding retribution and deterrence.

Seeming to appreciate that concern, at least one formulation of the right-to-life argument expresses some hesitancy about rejecting the death penalty without exception. In his encyclical *Evangelium Vitae*, John Paul II writes that punishment "ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society." He then adds that such cases of necessity "are very rare, if not practically non-existent" (Paul II 1995: §56).

One strategy to close off this loophole is to appeal to the idea of the imminence requirement—that is, a necessary condition to justify deadly force is an imminent threat—and claim that it applies in all cases of defensive force. In other words, only imminent threats can justify deadly defensive force (see Ferzan 2004). That view carries the implication of precluding executions as justified defensive killing.

Here is why: capital punishment never kills an imminent threat but rather someone already rendered defenseless. To illustrate, imagine if a prisoner on their way to the execution chamber breaks free and attacks the surrounding guards, who then kill the prisoner in self-defense. Though the killing occurs minutes before the scheduled execution and has the same effect, it is distinct from an execution. The guards kill in self-defense to stop an imminent threat. An execution occurs under much different circumstances: the condemned is usually bound, unable to stop the deadly force awaiting them, and not an imminent threat.[1] If defensive killing only can be justified against imminent threats, capital punishment fails to qualify as justified killing.

That strategy of countering the incapacitation rationale for capital punishment has a flaw, however. It simply accepts as true a highly contested claim. Critics of the imminence requirement stress that necessity and imminence sometimes come apart, such as situations where it is necessary to use deadly force now to stop a grave threat that, though not imminent, will manifest itself later absent preventive action (see, e.g., Robinson 1982: 217). Deadly force is morally justified in these scenarios lacking an imminent threat, critics argue, and the imminence

[1] Some may suggest gladiator contests, where the condemned could defend themselves, as a counterexample. Being sentenced to such combat was not a true death sentence, though. There were distinctions in ancient Rome between *gladii poena* (certain death by sword), *summum supplicium* (certain death by more cruel methods like being thrown to the beasts), and *ludi damnatio* (condemnation to gladiatorial games). The last penalty forced individuals into combat where death was possible but not assured (see Bauman 1996: 14, 122). Furthermore, my description of capital punishment remains apt for present practices since gladiator combat is rightly seen as morally repugnant and not a realistic sentencing option today.

requirement errs by failing to recognize such exceptions (Baron 2011; Allhoff 2019; Ford 2022). Notably, the law rarely reflects the imminence requirement across *all* contexts. The Model Penal Code and some jurisdictions' criminal statutes omit the imminence requirement in their justifications for deadly defensive force (Dubber 2015: 149, 164; Baron 2011: 234). Moreover, law enforcement officials frequently have legal permissions to use deadly force against certain non-imminent threats. In many jurisdictions, suspects who have shown themselves to be dangerous in the past—for example, by committing or attempting a violent felony—are liable to deadly force when necessary to prevent their escape, regardless of whether they pose an imminent threat (Stoughton, Noble, and Alpert 2020: 81–84).

To be sure, some existing legal permissions to use deadly force against non-imminent threat may be too broad and morally dubious (see Fabre 2016; Jones forthcoming). Still, the prevalence of such permissions makes clear that a blanket imminence requirement for deadly defensive force is a controversial view, which lacks robust support. Defenders of the right-to-life argument cannot simply assume that the imminence requirement applies to capital punishment and precludes it as justified defensive killing. That argument must be made.

Bedau's Thought Experiment

Let's turn to whether capital punishment could be justified defensive killing. This section considers a thought experiment by Hugo Bedau and uses it to suggest that executions could be justified defensive killing, at least in a fictional world different from ours in significant ways.

The nature of an execution poses challenges to understanding it as defensive killing. It kills someone already rendered defenseless in contrast to the paradigm case of justified defensive killing: deadly force against an unjust aggressor posing an imminent threat to life. If we stretch

our imagination far enough, though, it is possible to imagine an execution that meets the criteria for justified defensive killing. Consider this thought experiment by Bedau:

> *Execution that Restores Life:* Executing a murderer brings their victim back to life without fail, restoring the latter's body and mind to how it was immediately before the murder. An execution is the only way to achieve this end. (Bedau 1993: 183)[2]

Despite his opposition to the death penalty, it strikes Bedau as obvious that an execution would be justified in this scenario.[3] His claim has prima facie appeal, but exactly why requires explanation, especially in light of a challenge to Bedau's view. Gary Colwell (2002) points out that, if executing an offender restores their victim's life, the person executed no longer appears guilty of murder. The fact that their victim is now alive violates a necessary condition for the crime of murder. Colwell thus questions the fairness of punishing someone with death for an offense that, following their punishment, does not involve permanently taking a life. One must overcome this challenge to justify capital punishment in Bedau's thought experiment.

The solution lies in understanding an execution in this scenario as defensive killing. Like in our world, law enforcement officials in Bedau's do not always succeed in preventing murder. But unlike our world, these officials sometimes have a chance to undo murders they failed to prevent. If the state fails to kill an aggressor at t_1 before their victim's death, the state's goal becomes executing the aggressor—following their arrest and conviction—at t_2 after the victim's death. An execution at t_2 stops an unjust threat to the victim's life posed by the aggressor's continued existence. At both t_1 and t_2, the intention and effect of killing the aggressor are the

[2] Bedau does not explicitly say that executing murderers is the only way to revive their victims, but context implies it. He writes: "taking life deliberately is not justified so long as there is any feasible alternative" (Bedau 1993: 179).
[3] Before Bedau, Justice Richard Maughan of the Utah Supreme Court expressed a similar idea: "Were there some way to restore the bereaved and wounded survivors, and the victims, to what was once theirs; there could then be justification for the capital sanction. Sadly, such is not available to us" (*State v. Pierre* 1977: 1359). This remark is mentioned by Barry (2017: 540).

same: saving a victim's life by stopping an unjust threat to it. So there is reason to conclude that defensive killing at t_2 is every bit as justified as at t_1.

Some may question whether executing an aggressor at t_2 truly counts as defensive killing. Admittedly, the unusual causal relations in Bedau's fictional world alter the status of actions in ways that are not immediately intuitive. In this thought experiment, a murderer who lives keeps their victim unjustly confined to the jaws of death. The murderer's past wrong renders their mere existence an unjust threat to a life already taken—a type of threat that never arises in our world. When an execution stops that threat and restores the victim's life, perhaps the aggressor is no longer guilty of murder. Still, the execution counts as justified defensive killing. This justification must show that the principle of necessity was met: the executed prisoner posed an unjust threat to life that only lethal means could stop. And the state can make exactly that case. The execution stopped the prisoner's unjust threat to their victim's life—a goal that only lethal means could achieve.

Predictions of Future Dangerousness

Bedau's thought experiment shows that it is possible to imagine a world where executions would be justified defensive killing. Of course, in our world, executions do not bring murder victims back to life. But they do incapacitate capital offenders and prevent future violence by them. Under real-world conditions, a defensive killing justification for the death penalty would have to rely on predictions of a capital offender's future dangerousness to show why executing them is necessary to prevent them from murdering or seriously harming others.

In the United States, considerations of future dangerousness play a significant role in capital sentencing. Two states, Oregon and Texas, require jurors to consider "whether there is a

probability that the defendant would commit criminal acts of violence." Jurors must unanimously answer this question in the affirmative to sentence a capital offender to death (Edmondson 2016: 860, 906). In other states, future dangerousness counts as an aggravating factor in favor of a death sentence that juries weigh along with other aggravating and mitigating factors (Edmondson 2016: 873–879). Even when future dangerousness is not raised at trial, interviews of capital jurors find that this concern often impacts their decisions (Blume, Garvey, and Johnson 2001).

No US jurisdiction limits death sentences to cases that satisfy the principle of necessity—the capital offender poses an unjust threat to life that *only* lethal means can stop. Even in Texas and Oregon, their statutes permit death sentences for those who pose just a small risk of violence or who are only likely to engage in violence that fails to justify deadly force. But despite such loose criteria, sentencing outcomes under these laws still provide insight into the accuracy of future dangerousness predictions. If states cannot make these predictions with reliable accuracy, executions justified as necessary to prevent future threats rest on morally suspect claims.

The US Supreme Court consistently has upheld the constitutionality of future dangerousness as a factor that juries in capital cases can consider (*Jurek v. Texas* 1976; *Barefoot v. Estelle* 1983), despite social science evidence casting doubt on such predictions. The American Psychiatric Association (1982) urged the court in *Barefoot v. Estelle* to prohibit psychiatric testimony predicting capital defendants' future dangerousness because of its unreliability. Evidence at the time showed that psychiatric predictions that an inmate posed a future danger were wrong two-thirds of the time (American Psychiatric Association 1982: 5). The Supreme Court did not question that high rate of false positives—that is, predicting dangers that never transpire—but still allowed psychiatric predictions of future dangerousness in capital

cases. The court reasoned that, through the adversarial process, juries could distinguish reliable from unreliable evidence regarding future dangerousness (*Barefoot v. Estelle* 1983: 900–901).

Subsequent research has shown the Supreme Court's hopes to be unfounded (Cunningham 2006). The error rate of expert testimony on future dangerousness proves to be even higher than the best estimates at the time *Barefoot v. Estelle* was decided. One study identified 155 cases in Texas where the defendant was sentenced to death following expert testimony that they were a future danger. Those predictions of future dangerousness were almost always wrong: only five percent of inmates committed a serious assault and none committed a homicide while incarcerated during the time period studied (Edens et al. 2005: 62–63). Juries do not fare any better. Many jurors greatly overestimate the likelihood that someone convicted of a capital crime will murder again if not executed. In interviews, capital jurors in Texas reported that they believed this probability to be 50 percent. That estimation turns out to be 50- to 250-times greater than the actual prevalence of capital offenders who commit homicide again after going to prison (Cunningham et al. 2011: 2), based on studies of different jurisdictions in the US (Marquart, Ekland-Olson, and Sorensen 1994; Sorensen and Wrinkle 1996; Sorensen and Pilgrim 2000; Cunningham, Reidy, and Sorensen 2005; Sorensen and Cunningham 2009; Reidy, Sorensen, and Cunningham 2013).

Some may point to the more restrictive conditions on death row compared to elsewhere in prison to explain why those predicted to be a future danger often do not cause grave harm again. That explanation, however, fails to stand up under scrutiny. Several studies of Texas inmates look at violence by capital offenders deemed a future danger and sentenced to death but later moved to the general prison population after their sentence was overturned. These former death row inmates live in the same prison conditions as capital offenders not deemed a future danger at

trial. Rates of violence between these groups are statistically indistinguishable from each other. So despite jury predictions to the contrary, former death-row inmates are not more dangerous and few engage in serious violence (Marquart, Ekland-Olson, and Sorensen 1989; Cunningham et al. 2011).

Studies of other jurisdictions arrive at similar conclusions. Like in Texas, Oregon juries must deem a capital offender a future danger to sentence them to death. Analysis of prison violence by capital offenders finds that Oregon juries fare no better than chance in their predictions: "juries were right 90% of the time when predicting that future violence was not likely, and wrong 90% of the time when they predicted that future violence was likely" (Reidy, Sorensen, and Cunningham 2013: 299). This lack of accuracy, combined with low base rates of violence by capital offenders in prison, means that jury predictions of dangerousness are wrong the vast majority of the time. The same is true for federal capital trials (Cunningham, Sorensen, and Reidy 2009).

Decades of research on expert and jury predictions of future dangerousness in capital cases suggest the same conclusion: at present, we cannot make these predictions with reliable accuracy. This finding undermines the claim that executions are necessary to incapacitate certain capital offenders because of their future dangerousness. We have no reason to believe such predictions. In fact, since most capital offenders never engage in serious violence in prison, the predictions are likely wrong. The state's inability to provide plausible grounds for its predictions of capital offenders' future dangerousness puts in jeopardy the defensive killing justification to execute them.

But perhaps it can be salvaged. Studies of future dangerousness show that only a small percentage of capital offenders will kill in prison, but also that it is difficult to predict the few

who will. Even if the risk of future lethal violence is low for imprisoned capital offenders—one percent or less according to studies of US prisons (Cunningham et al. 2011: 2)—that risk is higher than if they were executed since an execution eliminates all such risk. Now a death sentence, it should be pointed out, does not offer the same certainty as an execution. Summary executions are not a realistic option legally or morally given the need for due process, so a death sentence comes with some risk that the condemned could kill while awaiting execution (see Sorensen and Pilgrim 2006: 60–61).

Still, it is plausible that a death sentence, by cutting short an offender's life, limits their opportunities for violence and reduces that risk compared to a prison sentence.[4] Though rare, some convicted of capital offenses kill again in prison—directly[5] or by ordering it[6]—or after escaping[7] or being released.[8] We can compare these sentences' relative effectiveness:

$$0.99 \leq X < Y < 1$$

X = probability that capital offender sentenced to prison never unjustly kills in the future

Y = probability that capital offender sentenced to death never unjustly kills in the future

Imprisonment comes with only a small risk of future lethal violence, but that risk is greater than it is for capital punishment. This slight difference opens the door for arguing that capital punishment satisfies the principle of necessity.

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[4] That claim is questionable in the US, where most death sentences are overturned (Baumgartner and Dietrich 2015) and executions that do occur usually take place close to two decades after conviction (Bureau of Justice Statistics 2021: 2). I grant this claim, though, for the sake of argument.

[5] E.g., Thomas Creech who killed a fellow inmate after receiving life sentences for murder in Idaho (Boone 2020).

[6] E.g., Clarence Ray Allen who while serving a life sentence for murder in California conspired with a recently released inmate to murder witnesses from his previous case (Egelko and Finz 2006).

[7] E.g., Jeffrey Landrigan who escaped from an Oklahoma prison where he was serving a sentence for murder and went on to commit another murder in Arizona (Schwartz 2010).

[8] E.g., Kenneth McDuff who was sentenced to death, had his sentences commuted to life following *Furman v. Georgia* (1972), and was eventually paroled, after which he murdered multiple people in Texas (Cartwright 1992). I thank an anonymous reviewer for suggesting the examples in footnotes 5–8.

To understand why requires a closer look at this principle. What necessity demands is clearest under conditions of certainty. If one has only two options against an unjust threat to life—lethal option *A* or nonlethal option *B*—and it is certain *A* will stop the threat and *B* will not, *A* satisfies necessity. Conversely, if it is certain that *A* or *B* will stop the threat, *A* is not necessary. One should choose *B* because it achieves the same end while causing less harm. Such certainty, however, is elusive under real-world conditions. Available options almost always offer probabilities of success greater than zero but less than one. Indeed, that describes the choice facing the state when deciding between a death sentence and imprisonment for a capital offender.

Under uncertainty, the necessity principle typically is understood as offering guidance between options equally likely to stop a threat but with different risks of harm (Lazar 2012: 10). If tripping or shooting an aggressor each have 0.8 probability of preventing their threat to life, one should trip them—it is equally likely to succeed while posing less risk of serious harm. In many cases, imprisonment will be just as effective as capital punishment in preventing unjust threats to life by capital offenders. Yet the state has difficulty knowing in advance for which offenders imprisonment will be effective and for which it won't. It instead knows the expected effectiveness of imprisonment generally in preventing lethal violence. On this measure, a death sentence beats out imprisonment. So perhaps capital punishment does not violate the principle of necessity and is justified defensive killing.

But there is reason to question this argument. As Seth Lazar (2012: 12) points out, it is implausible that *any* small increase in the likelihood of stopping a threat provided by deadly force automatically justifies it over the most effective nonlethal alternative (see also McMahan 2016). Due to the grave and irrevocable harm caused by deadly force, if its likelihood of preventing a threat is just marginally better than a nonlethal tactic, such a small difference

appears insufficient to justify it. Indeed, it is difficult to justify deadly force in the following scenario: shooting a fully or partially culpable aggressor raises the likelihood of stopping their threat from only 0.98 to 0.99 compared to an available nonlethal option. Lazar's nuanced understanding of necessity aligns with that judgment. His conception of necessity still gives priority to innocent over culpable life in evaluations of whether and what level of defensive force is justified, yet stops short of giving absolute priority to innocent over culpable life in those moral calculations. And that is the problem with trying to justify capital punishment as defensive killing. The nonlethal alternative of imprisonment has a high likelihood of success in stopping serious violence by capital offenders, which a death sentence can only slightly improve upon.

As the gap in likely effectiveness widens in favor of deadly force, justifications of such force on defensive grounds become more plausible. In the case of capital punishment, one development that could widen that gap is improved predictions of future dangerousness. Currently, juries and psychiatrists are no better than chance in predicting which capital offenders pose a future danger, but advances in research could change that. If our ability to predict future dangerousness improved significantly, perhaps the state could better identify those few capital offenders with a high likelihood of killing again. Let's imagine for these individuals that the probability of a death sentence preventing future lethal violence remains over 0.99, yet the probability of a prison sentence achieving that same end is only 0.7. In this scenario, capital punishment is in a stronger position to satisfy the principle of necessity.

It is difficult to specify exactly how wide the gap in likely effectiveness between lethal and nonlethal options must be to justify the former. We can gain traction in answering that question for capital punishment by looking at prisoners generally and seeing what level of risk justifies deadly force on defensive grounds. As the next section explains, this analysis reveals an

especially stringent obligation on the state to avoid lethal means to incapacitate prisoners, provided they pose no imminent unjust threat to life. That obligation precludes executions as justified defensive killing, even if predictions of future dangerousness improve.

Obligation to Use Nonlethal Incapacitation

A state has immense power over its prisoners, which comes with responsibilities. If it decides to imprison individuals for crimes, it must allocate the resources needed to safeguard their lives. So at the same time that the state takes rights away from those imprisoned, it acquires special obligations to them. There is debate over the extent of those obligations, but most agree on certain basic ones—providing food, clothing, essential medical care, and security.

I would like to suggest that one of these obligations is to incapacitate prisoners through nonlethal means. If a state uses lethal incapacitation as a first resort, it takes life unnecessarily and shows disregard for the lives of its prisoners. Beyond just avoiding this wrong, the state must proactively prevent violence through nonlethal means. If the state is negligent in this regard and allows prison conditions that endanger inmates' lives, it forsakes a basic obligation to them.

It is important to qualify this obligation. First, it does not apply when prisoners pose an imminent unjust threat of death or serious bodily injury that only deadly force can stop. Such threats, to be sure, can stem from the state's failure to fulfill its obligation to prevent violence through nonlethal incapacitation. Still, the state retains the right to use deadly force when necessary to stop imminent and unjust threats to life, otherwise the obligation suggested here would prove too restrictive and conflict with a widely recognized permission for defensive force.

Second, assigning blame to the state when it fails to uphold its obligation to prevent violence does not mean prisoners who initiate violence are free from blame. Various actors often

bear responsibility for prison violence. The important point is that the state is more than just a bystander to such violence—it has a responsibility to prevent it. Indeed, when rampant prison violence occurs, we rightly fault the state for allowing such conditions to develop.

Third, the obligation defended here specifically limits the state's use of deadly force for the goal of incapacitation. Its implications do not extend to deadly force that aims to achieve other ends, like retribution. The discussion below focuses on whether the defensive killing justification—not other potential justifications for the death penalty—succeeds or fails in light of this obligation to prisoners. That approach aligns with the article's overall goal: to assess the internal consistency of the right-to-life argument.

With those caveats, the state's obligation to incapacitate through nonlethal means can be expressed as follows:

> *Obligation to Use Nonlethal Incapacitation* (ONI): If prisoners pose no imminent, grave, and unjust threat that only deadly force can stop (or is significantly more likely to stop), the state has an obligation to use nonlethal means to incapacitate them.

ONI gives just one exception—an imminent, grave, and unjust threat that requires deadly force to stop it—where the prohibition against lethal incapacitation does not apply. In other words, it applies the imminence requirement to the state in any efforts to prevent future harm by prisoners.

Some may support the general goal of incapacitating prisoners by nonlethal means but find ONI too restrictive. Nonlethal incapacitation can be challenging and costly, especially for dangerous inmates. Couldn't some prisoners pose future dangers so great that ONI becomes too onerous and no longer applies? If so, that opens the door to justifying executions as defensive killing, at least under conditions where the state could reliably predict future dangerousness.

Various examples, however, suggest a different conclusion: ONI remains in place regardless of a how great a prisoner's future danger is. Consider the appeals process for those

sentenced to death, even those deemed a future danger. Rather than immediately execute these offenders, countries like the US grant them appeals that take years to exhaust. Though critics call for shorter appeals, most grant that those sentenced to death have a right to at least *some* appeals. As long as they do, the state has a corresponding obligation to find nonlethal means to prevent serious violence by prisoners pursuing appeals. So most already recognize ONI during the appeals process. Its binding nature during this time, regardless of an offender's future danger, undermines the idea that such danger can override ONI.

Consider, too, how the state handles dangerous individuals in its custody not sentenced to death. Bentham makes this point when arguing against the death penalty:

> It has been asserted, that in the crime of murder [capital punishment] is absolutely *necessary*; that there is no other means of averting the danger threatened from that class of malefactors. This assertion is, however, extremely exaggerated…. Even these malefactors are not so dangerous nor so difficult to manage as madmen…. Yet it is never thought necessary that madmen should be put to death. They are not put to death: they are only kept in confinement; and that confinement is found effectually to answer the purpose. (Bentham 2009: 177)

Though we may find Bentham's talk of madmen a bit dated, he makes a point that has stood the test of time—those sentenced to death are no more dangerous than many others in the state's custody. In fact, research suggests that prisoners serving shorter sentences for less serious crimes often are *more* violent in prison than capital offenders, even when both are confined to the same conditions (Cunningham, Reidy, and Sorensen 2005). If these noncapital offenders fail to pose a danger sufficient to override ONI, the state cannot claim that capital offenders do.

For utilitarians like Bentham, conceivably there could be some scenario—say an evil Hulk convicted of grave crimes—where the prisoner's future threat and costs of preventing it by nonlethal means are so great that the utilitarian calculus calls for an execution. In practice,

though, such cost-benefit calculations are deeply problematic given the nature of the state's obligations to its prisoners.

To illustrate, imagine if a state considered starving its prisoners to feed more of its poor and benefit society as a whole. There is something deeply wrong with that mindset. Most obviously, it opens the door to rationalizing horrific abuses of state power. But more fundamentally, it fails to understand the state's relationship to its prisoners, which generates obligations particularly resistant to being overridden. By taking away their liberty, the state renders prisoners dependent on it for their life and welfare. As a result, the state has a greater responsibility to safeguard prisoners' lives than it does to others less dependent on it. Allowing any resident to starve is a tragedy, yet such neglect is especially egregious when the state makes someone dependent on it for basic necessities and then fails to provide them.

Just as the state's obligation to feed its prisoners is largely resistant to being overridden, the same appears true for ONI. When the state has a noncapital offender in custody, it never considers killing them as an option for incapacitation, absent an imminent threat. That absolute prohibition makes sense given the state's immense power over its prisoners. Pursuing nonlethal incapacitation may require extra resources—perhaps ones the state would prefer not to spend—but there is a strong intuition that the state must provide those resources, at least for noncapital offenders. Indeed, for this class of offenders, there appears to be an overlapping consensus for ONI. For some, the state fulfills ONI by dedicating resources to high-security prisons to protect against particularly dangerous inmates. For others, a more humane and effective way of fulfilling ONI comes through pairing incarceration with more robust rehabilitative practices (an approach common in Scandinavia). Regardless of which side one falls on, the important point here is that

neither side sees executing noncapital offenders as a morally or politically viable option for ensuring public safety.

If ONI applies to all noncapital offenders, it should apply to capital offenders. Capital offenders are no more dangerous than the most dangerous noncapital offenders. Since the latter's level of risk fails to override ONI, it cannot be the case that the former's level of risk does. So ONI holds for *all* prisoners, which has the effect of prohibiting executions for defensive killing. After all, ONI only permits deadly force to incapacitate prisoners who pose a grave imminent threat, and executions kill prisoners who are defenseless and pose no such threat.

ONI reframes the decision facing states when lethal and nonlethal means of incapacitation have different likelihoods of success. It is a mistake to try to determine how wide that gap must be in favor of lethal means to justify an execution. Regardless of how wide it is, ONI prohibits executions for incapacitation. States therefore should not see executions as a solution when nonlethal methods falter. ONI instead suggests committing to efforts to improve nonlethal incapacitation.

Addressing Objections

Let's turn now to three potential objections to ONI.

Objection 1: If a prisoner kills despite good faith efforts to observe ONI, it no longer applies

This objection recognizes that executions should not be the state's first option. But if an inmate kills despite good faith efforts to prevent such violence, surely the state is justified in pursuing lethal incapacitation where nonlethal measures failed. In such cases, it is reasonable to conclude that executing the prisoner is necessary to protect life.

Though tempting, that conclusion fails to hold up under scrutiny. It is far from obvious that lethal means become necessary after a prison killing since it only shows that *particular* nonlethal measures failed to incapacitate, not the failure of all such measures. In the wake of prison violence, the state's obligation to pursue nonlethal incapacitation remains, as long as the imminent threat to life has passed.

That point is evident in the case of a juvenile prisoner or one with intellectual disability who murders another inmate. Assume they bear some but diminished culpability for their crime, due to their youth or intellectual disability. In US law, these exculpatory factors categorically bar the death penalty (*Atkins v. Virginia* 2002; *Roper v. Simmons* 2005), a prohibition in line with most people's intuitions (*Atkins v. Virginia* 2002: 316–317; Death Penalty Information Center 2022). One explanation for moral unease with an execution in this case is that it is wrong to kill those who lack culpability for intentional harms they pose—so-called innocent aggressors (see Thomson 1991; McMahan 1994; Otsuka 1994). But that explanation, even if correct, doesn't work here since the prisoner is still partially culpable. That detail makes it hard to deny that the prisoner would be liable to defensive killing if they posed an *imminent* threat to life that only lethal means could stop. But if the same prisoner posed *no* imminent threat, there is a robust consensus against deadly force. This prohibition applies regardless of past violence or future danger, which highlights ONI's binding nature.

Objection 2: ONI overlooks how culpability lowers the risk needed to justify defensive killing

Some argue that an aggressor's culpability determines their liability to defensive harm. An example by Jeff McMahan illustrates this idea. Normally it is impermissible to intentionally kill someone you know poses no threat and use them as a means to save your life. But imagine a

villain makes a futile effort to kill you—their gun is empty, which you know yet they don't—while the real threat comes from a second villain pointing a loaded gun out a basement window. The only way to save your life is to kill the first villain so that they drop and block the window. Some have the intuition that killing the first villain would be justified (McMahan 2005: 391–392). According to this view, culpability loosens the restriction against killing those who pose no actual threat. By analogy, one could argue that capital offenders' culpability for grave crimes lowers the bar for justifying defensive killing against them. Their culpability makes its permissible to use lethal incapacitation against a level of risk that, for other offenders, only justifies nonlethal measures.

This argument rests on a contested claim applied to a context where it is especially dubious. McMahan notes that not everyone shares the intuition that deadly force against the first villain is justified. He also expresses reservations with relying on culpability as a principle to guide deadly force decisions since it fails to specify where to draw the line between justified and unjustified defensive killing. If McMahan's example featured a bystander who attempted murder *a year ago*—a threat long passed—and presently makes no threat, would they be liable to deadly force (McMahan 2005: 392–393)? That is far less plausible. Even defenders of culpability as a basis for liability agree and reject "free-floating" conceptions it (Ferzan 2012: 686). When culpability indefinitely robs one of protections against deadly force, it distorts the principle of necessity and risks turning defensive killing into a form of punitive action.

That is the problem with lowering, just for capital offenders, the bar to justify executions on defensive grounds. It treats capital and noncapital offenders differently based on their past action rather than future threat. This backward-looking approach is at odds with the principle of necessity, which focuses on stopping future threats, not punishing past wrongs. If deadly force is

unnecessary for imprisoned noncapital offenders posing the greatest risk of future danger, it also should be unnecessary for imprisoned capital offenders posing no greater risk.

Objection 3: ONI would not apply to past political communities with far fewer resources

This objection stems from the contingent grounds on which ONI appears to rest. The argument for ONI appeals to the resources that states have today for nonlethal incapacitation. Political communities, of course, have not always had so many resources. ONI seems less plausible for past political communities without the resources and technology to establish secure facilities for incapacitating capital offenders. ONI describes an obligation grounded in contingent facts about the world today, which limits its application to past societies or ones that could emerge.

Even if this objection is true, showing that ONI applies to current states remains significant. Establishing this obligation robs executions today of a potentially compelling justification. Contemporary nations that execute—like China, Iran, and the US—hardly are weak states lacking nonlethal modes of incapacitation or resources to improve them when they falter. It is absurd to suggest that executions carried out today are necessary on defensive grounds.

Whether ONI would apply in past political communities with scarce resources is a tougher question. Consider a small, poor community ravaged by murderous raids, which leave it teetering on the edge of existence. It captures an attacker and has genuine worries about being able to securely confine them. There is the real risk of the captive's escaping and pillaging again. An execution in such dire circumstances seems like it might satisfy the principle of necessity. Yet it also seems natural in this scenario—indeed, appropriate—to feel moral unease about killing *on defensive grounds* someone bound and defenseless. For past societies with scarce

resources, it is not immediately obvious whether executing dangerous captives would be justified defensive killing. Fortunately, that question proves far less thorny for states today.

Conclusion

Calls to abolish the death penalty because it violates the right to life prove consistent with recognizing certain forms of defensive killing as justified. Besides thought experiments like Bedau's, where executing a murderer extracts their victim from the jaws of death, it is a mistake to understand the death penalty as necessary for incapacitation. By developing and defending the obligation to use nonlethal incapacitation (ONI), this article offers a novel explanation for why the death penalty fails to qualify as justified defensive killing. ONI places the imminence requirement on the state in its efforts to prevent violence by prisoners. ONI thus has the effect of precluding the death penalty—a practice that kills individuals rendered defenseless who pose no imminent threat—for the purpose of incapacitation.

This article focuses on establishing the internal consistency of the right-to-life argument to abolish the death penalty. As such, it does not purport to address all potential objections to the right-to-life argument. Notably, the right-to-life argument categorically rejects retribution and an offender's culpability as valid grounds for the death penalty. Many proponents of the death penalty, of course, reject this premise. If retribution is a valid ground for executions, the right-to-life argument fails despite its internal consistency.

It is beyond this article's scope to evaluate retributive arguments for the death penalty, except to note that retribution has long been a more controversial basis for killing than incapacitation. Though objections to deadly force that is necessary to stop grave unjust threats tend to be limited to pacifists, a far broader range of critics object to taking life on retributive

grounds.[9] Appeals to future dangerousness can be understood, in part, as an attempt to establish a less controversial moral basis for the death penalty. Through introducing and defending ONI, this article's contribution lies not in defeating all justifications for the death penalty, but in depriving proponents of the practice of a justification with potentially broad appeal.

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[9] These critics include those who grant retribution as a valid rationale for punishment, but still reject it as a justification for the death penalty (see Brooks 2004).

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