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RULE OF LAW ABOLITIONISM

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ABSTRACT

In the dark days of the 1980s and 1990s, the abolition of capital punishment was virtually unthinkable. However, a new form of abolitionism – which I call Rule of Law abolitionism – has raised the hopes of death penalty opponents. In this chapter, I elucidate the logic of the Rule of Law abolitionist argument, distinguishing it from its more familiar doctrinal and moral variants. I then assess its strengths and weaknesses. On the basis of this critique, I indicate the route Rule of Law abolitionism must travel to bring about the demise of the death penalty.

The 1980s and 1990s were dark days for death penalty abolitionists. Rabid public support for capital punishment combined with the Supreme Court's attacks on federal habeas corpus made abolition virtually unthinkable. However, the emergence of a new form of abolitionism, coupled with the growing power of the moratorium movement, has occasioned a remarkable improvement in the abolitionist mood. I call this abolitionism "Rule of Law abolitionism."

While certain versions of Rule of Law abolitionism, most notably the "new abolitionism" or "legally conservative abolitionism" championed by Austin Sarat, have been discussed in the literature; there has been insufficient analysis of its conceptual claims. This chapter will remedy this oversight by illuminating the structure, logic, and specific content shared by

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different versions of Rule of Law abolitionism. Doing so will enable us to understand better the strengths and weaknesses of Rule of Law abolitionism, which is crucial if we are to evaluate how, and to what degree, it might contribute to the demise of capital punishment. This investigation is especially important given the organizing premise of this volume: the abolitionist movement is at a rare moment of opportunity, as the death penalty has come under attack from unusual political, cultural, and religious quarters.

Rule of Law abolitionism eschews controversial moral theory and futile disagreement with the Supreme Court's recent Eighth Amendment jurisprudence. Instead, it stands on intuitive, non-polemical assertions about the value of legal institutions. In the first part of the chapter, I compare Rule of Law abolitionism to more familiar types of abolitionism: (a) moral abolitionism, which argues that the death penalty violates substantive moral values; and more importantly (b) doctrinal abolitionism, which argues that the death penalty violates the U.S. Constitution. I then detail the conceptual contours of Rule of Law abolitionism, with frequent reference to the essays of Austin Sarat, Justice Harry Blackmun's *Callins* dissent, and seminal cases in the Supreme Court's capital jurisprudence. (As the reader will see, my conception of Rule of Law abolitionism is heavily indebted to Austin Sarat's "new abolitionism.") I show that Rule of Law abolitionism begins with the intuition, honored in *Furman* and *Gregg*, that legal violence must be more rational than extra-legal violence. Law's violence must be rational, rule-bound, and consistent. Rule of Law abolitionists argue that capital sentencing *cannot* be rationalized, and conclude that we must no longer "tinker with the machinery of death." Indeed, Rule of Law abolitionism concludes, we have a duty to oppose capital punishment. Along the way, I show that what distinguishes this argument from doctrinal or moral ones is the claim that rationality is a condition of legal legitimacy. Rule of Law abolitionists argue that by continuing to execute, capital jurisdictions reduce law to a species of mere coercion.

In the second part of the chapter, I submit Rule of Law abolitionism to critical scrutiny. I first identify its important rhetorical advantages, showing how Rule of Law abolitionism enables debates about capital punishment to occur outside the moralistic vocabulary that so often hampers the abolitionist cause. These benefits should not, however, obscure the weaknesses of Rule of Law abolitionism. I argue that Rule of Law abolitionism typically proves too much – its claim that sentencing procedures cannot be rational and rule-bound bleeds into an unpalatable

argument against punishment as such. And some versions prove too little – their procedural criticisms function as a roadmap for the reform, and strengthening, of the capital punishment regime. Although these problems complicate the promise of Rule of Law abolitionism, I conclude by gesturing toward some conceptual modifications that will hopefully help Rule of Law abolitionism realize its full potential.

THE DISTINCTIVENESS OF RULE OF LAW ABOLITIONISM

Three types of abolitionist arguments have been made in the United States in the past 50 years. I call them doctrinal abolitionism, Rule of Law abolitionism, and moral abolitionism. Doctrinal abolitionists argue that capital punishment is unconstitutional, and that the Supreme Court's capital jurisprudence since *Gregg* is wrong. Rule of Law abolitionists claim that the death penalty violates Rule of Law values. Doctrinal abolitionism and Rule of Law abolitionism are easily confused because they both invoke the procedural values of rationality, consistency, and fairness. Both argue that these values should trump other legal values (e.g., finality) whenever there are conflicts in capital cases. The difference is that Rule of Law abolitionism claims that Rule of Law values must prevail because they legitimate legal violence, not because the Constitution says so. Rule of Law abolitionism claims that Rule of Law values *legitimate* law, and therefore cannot be given up in favor of other legal values. Rule of Law abolitionism's contrast with moral abolitionism is much sharper. Moral abolitionist arguments proceed from premises found in moral philosophy and theology. Moral abolitionists typically claim that capital punishment contravenes substantive moral values such as human dignity.

To clarify the argument of Rule of Law abolitionism, I will first set it off from doctrinal abolitionism. This discussion must begin with a caveat: pure doctrinal abolitionists might not exist. I assume that most, if not all, of the judges and lawyers who have a doctrinal disagreement with *Gregg* have other reasons for opposing the death penalty.[1] This presents no problem because I use terms such as "doctrinal abolitionism" (or "Rule of Law abolitionism" or "moral abolitionism") to refer to certain types of arguments, not to characterize people's actual beliefs.

There are two types of doctrinal abolitionism. One contends that the death penalty violates the Eighth Amendment's cruel and unusual

punishment clause. A variety of arguments have been proposed along these lines: the death penalty is excessive, which means both that it "serve[s] no valid legislative purpose,"[2] and that it is excessively painful, both physically and emotionally[3]; death is an unusually severe punishment, insofar as it is final and irrevocable[4]; the death penalty violates human dignity.[5]

The most influential Eighth Amendment abolitionist arguments attack the foundation of the Supreme Court's post-*Furman* capital jurisprudence, the "death is different" doctrine.[6] The Court first gave precedential weight to the distinction between capital and non-capital forms of punishment in *Furman*:

> Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. ... This Court, too, almost always treats death cases as a class apart. ... Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. (*Furman v. Georgia*, 1972, pp. 286–287, 306)

Because of this qualitative difference, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina*, 1976, p. 305). The "death is different" doctrine says that since capital punishment is the ultimate sanction, capital punishment statutes must (a) establish special procedural safeguards to ensure that the death penalty is not imposed in an arbitrary and capricious manner (*Gregg v. Georgia*, 1976, p. 188) and (b) allow for "individualized" sentencing procedures (procedures that consider all relevant mitigating evidence such as the defendant's character, the circumstances of the offense, etc.) (*Woodson*, 1976; *Lockett v. Ohio*, 1978). The "death is different" requirements reflect the Court's view "heightened reliability" requires a heightened emphasis on the values of consistency and individuality.

Doctrinal abolitionists contend that the constitutional conditions specified by the "death is different" doctrine cannot be met. The basic strategy is to stress the constitutional indispensability of the value of rationality and consistency, and then to argue that capital punishment regimes cannot respect those values. For example, Zimring and Hawkins (1986) argue that basic facts about human psychology render capital sentencing a necessarily arbitrary and capricious process (p. 77–84).

The second set of arguments claim that capital punishment violates the Fourteenth Amendment's due process and equal protection guarantees.

Most of these arguments point to the ingrained racism of capital punishment, and most base their claims on what is known as the Baldus study. In this study, David Baldus, George Woodworth, and Charles Pulaski (1983) analyzed over 2,000 murder cases in Georgia.[7] Baldus and his colleagues make a persuasive showing that the race of the murder victim significantly influences sentencing decisions: when a victim is white, the murderer is 11 times more likely to receive a death sentence. The dissent in the landmark *McCleskey v. Klemp* (1987) argues that such bias clearly violate African American's right to equal protection under the law,[8] and the American Bar Association (ABA) (1997) called for a moratorium on the death penalty partially on these grounds.

Although I will not evaluate doctrinal abolitionism in detail, I will note that it has recently produced important substantive constraints on capital punishment. In 2002, *Atkins v. Virginia* barred execution of the mentally retarded. And in 2005, *Roper v. Simmons* barred execution of minors. Both decisions comment on how certain characteristics – mental retardation and youth – create intractable problems for capital sentencing. The Court concludes that neither minors nor mentally retarded capital defendants will receive reliable and adequate mitigating consideration from sentencers, and therefore cannot be considered constitutionally death eligible (see, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 320; *Roper v. Simmons* (2005) 543 U.S. 551, 572–573). In both cases, the Court weighs the value of mitigation against the value of stare decisis, and finds mitigation more important. (Of course, both decisions rest on a particular interpretation of "evolving standards of decency," as I will discuss below.)

But as a tool for the *abolition* rather than the curbing of capital punishment, the doctrinal approach is dead. To most legal observers, *McCleskey* sounded the death knell for any type of Fourteenth Amendment abolitionist argument.[9] And Eighth Amendment arguments appear just as bloodless. The Court's capital jurisprudence from the 1980s onward has moved away from ensuring the procedural safeguards promised by the "death is different" doctrine.[10] In fact, these decisions have produced a cruel irony: in some cases, a prosecutor's decision to seek the death penalty triggers *fewer* safeguards than do other forms of punishment (Denno, 2002, p. 437). So barring a miraculous ideological shift, the Court's early 21st century capital jurisprudence will enable, rather than inhibit, the death penalty.

This point is best captured by the Court's ruling in *Herrera*, where, as part of a sustained attack on habeas corpus, the Court rejected consideration of Herrera's newly discovered evidence of innocence on the grounds that "the

State's interest in finality must outweigh the prisoner's interest in yet another round of litigation."[11] As Chief Justice Rehnquist writes:

> The central purpose of any system of criminal justice is to convict the guilty and free the innocent ... [but] due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. To conclude otherwise would all but paralyze our system for enforcement of the criminal law. (*Herrera v. Collins*, 1993, p. 399)

Herrera illustrates the Court's willingness to uphold state sentencing schemes with minimal procedural protections. Concerned to protect states' "right" to minimal delay between sentencing and execution, *Herrera* indicates the Court's willingness to trump the values of fairness, rationality, and consistency with the value of finality. This calculus will never result in an abolition of capital punishment.

THE LOGIC OF RULE OF LAW ABOLITIONISM

The apparent death of doctrinal abolitionism, and the sociolegal research conducted in support of it, have spurred a search for new types of arguments against capital punishment.[12] While Rule of Law abolitionism grows out of this failure, it is not a radical departure from doctrinal abolitionism – in fact, the two look quite alike. For this reason, my first goal is to establish the difference between them. After doing so, I will lay out the logic and structure of the Rule of Law abolitionist argument, paying particular attention to why I call it "Rule of Law" abolitionism. Throughout this section, I will make liberal reference to the two most prominent Rule of Law abolitionist thinkers, Austin Sarat and Justice Harry Blackmun.

Doctrinal abolitionism employs *legal* arguments, whose form and content is dictated by U.S. legal conventions. These arguments occur in court opinions and law review articles; are made by judges, lawyers, and legal scholars; and are aimed at other lawyers, judges, legal scholars, and sometimes policymakers. The premises of these arguments are legal premises – previous holdings as well as "legal principles ... applied by the courts" (*Furman v. Georgia*, 1972, p. 269) – and their evidence consists of court opinions and psychological or sociological research. Of course, doctrinal arguments sometimes invoke what look like moral concepts: "cruelty" is a prevalent, and salient, example. But in the writings of the Court, the word "cruelty" refers to what the Court says cruelty is; the ordinary moral meaning of cruelty is bracketed. Justice Brennan's analysis of the meaning

of "cruelty" in terms of the Court's evolving interpretation of the cruel and unusual punishments clause is an instructive example of this substitution (pp. 258ff.).

Rule of Law abolitionist arguments are found in similar publications, appeal to similar premises and types of evidence, and employ a similar vocabulary. But Rule of Law abolitionism makes use of an important "porousness" in the operation of law: the Supreme Court sometimes appeals to *explicitly extra-legal* constraints on legal punishment. Most importantly, the Eighth Amendment says that legal punishments must not be excessive, or disproportionate to the crime. Modern Eighth Amendment jurisprudence, Justice Scalia notwithstanding, holds that standards for determining proportionality and excessiveness are set, in part, by the "evolving standards of decency" of society (*Weems v. United States*, p. 1910; *Trop v. Dulles*, 1958). That is, the Eighth Amendment envisions law as necessarily responsive to external norms of justice.[13]

Sarat contends – and I agree – that this responsiveness reveals that law must engage in practices of legitimation. He argues that these practices are fundamental to the smooth operation of legal institutions, insofar as those institutions regulate our lives through violence or the threat of violence.[14] For Sarat, the people who carry out law's violence are legal officials, juries, or private actors whose violent acts are statutorily required (in the case of police officers) or permitted (as in acts of self-defense) (Sarat & Kearns, 1991, p. 210). The violence they impose is of two sorts. The first is physical (incarceration, execution) and material (welfare cutbacks, "cleansing" of homeless camps, etc.). The second is metaphorical or interpretive violence; this violence "is inflicted wherever legal will is imposed on the world, whenever a legal edict, a judicial decision, or a legislative act cuts, wrenches, or excises life from its social context" (*ibid.*). This is a pretty capacious definition, and indeed, Sarat admits that under such a conception, it is difficult to identify any legal practice that is non-violent (*ibid.*). It is also somewhat reductive. Since law is part of our "social context" – as legal consciousness research demonstrates[15] – it seems mistaken to say that the legal process tears people out of their social context. Sarat makes this claim somewhat more specific when he says that interpretive violence consists (a) in legal institutions enforcing the illusion that legal rules are impartial rules, and are discovered rather than created (Sarat & Kearns, 1991, pp. 210, 217–218); and (b) in legal institutions claiming that judicial-interpretive acts (such as sentencing someone to death) do not differ in kind from the violence of punishment (actually executing someone) (Sarat & Kearns, 1991, p. 211). For now I will focus on his claims about how law's material violence

– the most important being acts of punishment – do not differ in kind from acts of violence the law is meant to forestall or avenge.

Legal institutions and legal actors, Sarat (1997) argues, are aware of their violence, indeed "the proximity of law to, and its dependence on, violence raises a nagging question and a persistent doubt about whether law can ever be more than violence or whether law's violence is truly different from, and superior to, what lurks beyond its boundaries". This nagging worry can be answered only through practices justifying and legitimating that violence. Legitimacy, he claims, is "the minimal answer to skeptical questions about the ways that state violence differs from the turmoil and disorder the state is allegedly brought into being to conquer" (Sarat, 2001, p. 19). (Although he does not say so, his view seems to be that the force at law's disposal is intrusive enough for us to object to it, but not powerful enough to compel assent and obedience – hence the need for justification and legitimation.)

On this point, Sarat finds support in everyday intuition, as well as a host of literature in legal and political philosophy.[16] Sarat goes on to argue that practices of legal legitimation take a particular form. Law legitimates its violence by drawing attention to ways in which its violence differs from, and is preferable to, extra-legal violence – the private violence of muggings, revenge killings, domestic abuse, etc. The law produces narratives that try to answer doubts about the law's violence by contrasting it to the allegedly worse violence of a lawless society (Sarat & Kearns, 1991, p. 221). Such narratives originate not only with lawyers or judges, I would add, but also with Hobbes' *Leviathan* and subsequent accounts of the anarchy of the state of nature. These narratives portray the law's own violence as superior insofar as it is rational and rule-bound (Sarat, 2001, pp. 38–39; 252). Indeed, one might add, it is *only* by rationalizing violence that the violence of the state of nature can be tamed. To be legitimate, Sarat concludes, a legal institution must impose – or appear to impose – violence in a rule-bound way.[17]

Rule of Law abolitionism must, of course, show that capital punishment cannot be imposed in a rule-bound way. But due to its focus on legitimating practices, Rule of Law abolitionism need not limit itself to strict doctrinal interpretations of rule-boundedness. For example, in the second chapter of *When the State Kills*, "The Return of Revenge: Hearing the Voice of the Victim in Capital Trials," Sarat argues that the use of victim impact statements – statements that detail the harm undergone by the family of the murder victim – during capital sentencing encourages a passionate identification with the family of the victim rather than a rule-bound consideration of the defendant's legislatively defined blameworthiness.

Although he touches on Eighth and Fourteenth Amendment issues, Sarat focuses on the way that the law's legitimation story depends on a philosophical distinction between revenge and retribution that is undermined by the use of victim impact statements. And in the fifth chapter, "The Role of the Jury in the Killing State," he employs a more sociological analysis to show how juror's folk beliefs influence capital sentencing in ways that are at odds with the law's idealized picture of itself.

Sarat's work is a sustained effort to show that capital punishment violates "central legal values and the legitimacy of the *law itself*" (Sarat, 2001, p. 253, emphasis mine). All Rule of Law abolitionism is about the "law itself." At this point, I must tackle the ambiguities in the term "law," since my explication of Rule of Law abolitionism depends on the meaning of this word. I find Alan Gewirth's view helpful that there are three primary senses of law (Gewirth, 1970). First, "law" can refer to the collection of characteristics that underlie all minimal legal systems (e.g., they guide human conduct). In this sense, "law" can refer to a conceptual unity or to a set of cultural practices. Second, "law" can refer to a particular legal system (e.g., U.S. law as opposed to French law). Finally, "law" can refer to a legal rule (e.g., Florida's attempted felony-murder rule), or, I would add, a systematic group of legal rules ("the law of capital punishment"). I take Rule of Law abolitionism to be arguing that the distinction between legal violence and extra-legal violence characterizes "law" in a sense that sits between Gewirth's first and second senses. "Law" refers to something more historical than law in the first sense and more basic than law in the second sense. Law refers to a set of practices that we can call "modern law" or "post-Enlightenment law." Doctrinal abolitionism, on the other hand, restricts its claims to law in the second sense, and can be agnostic about the existence of the first sense.

So according to the Rule of Law argument, law is partially constituted by the attempt to draw distinctions between rule-bound violence and extra-legal violence. The insistence on this constitutive feature of law differentiates doctrinal and Rule of Law abolitionism. On the latter view, as we can see in Sarat's essays mentioned above, the problem with the death penalty is not that it violates the Constitution "correctly understood" (although most Rule of Law abolitionists would say that it does), but that it is incongruent with the "nature" of law. It threatens to undermine the difference between legal violence and extra-legal violence. It threatens to reduce law to a species of coercion.

Now that we have gotten clearer on the conceptual boundaries of Rule of Law abolitionism, we can see why it is both interesting and important. Rule

of Law abolitionism derives its *normative* claims from the conception of law found in a rich set of legal *practices*. The argument begins with the idea that legal institutions must impose violence in a rule-bound way. This "must" refers to the fact that practices of legitimation constitute legal institutions as legal institutions. The second step is to show that capital punishment does not allow for such ruliness, and thereby renders legal institutions illegitimate. One must then conclude that since the death penalty destroys law, it ought to be purged from the law.[18] This "ought" is a normative one: we have a duty to abolish the death penalty. (This argument is actually an enthymeme, and requires a further premise: "it is desirable to have legal institutions.") In this way, Rule of Law abolitionism exerts a pull on our practical deliberation that is not available to doctrinal abolitionism. In short, Rule of Law abolitionism can make stronger normative claims than doctrinal abolitionism, yet need not rely on moral authority to ground these claims.

RULES, RATIONALITY, AND LEGITIMACY

Having examined the structure of Rule of Law abolitionism, I will turn to its basic content, analyzing the particular narrative of legitimation found in the U.S. Supreme Court. The Supreme Court's contemporary capital jurisprudence does indeed draw a distinction between legal violence and extra-legal violence, and uses that distinction to justify legal violence. This analysis will reveal why I call Rule of Law abolitionism "Rule of Law" abolitionism.

In his *Furman* opinion, Justice Stewart writes:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law. (*Furman v. Georgia*, 1972, p. 308)[19]

This discussion of extra- or pre-legal violence becomes part of Stewart's majority opinion in *Gregg v. Georgia*: "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs" (*Gregg v. Georgia*, 1976, p. 83, footnote omitted). Stewart's bold assertion requires careful interpretation. Marshall's dissent

understands these passages as claiming that a society lacking legal institutions empowered to mete out the death penalty would descend into a state of nature. "It simply defies belief," Marshall responds, "to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands" (*Gregg v. Georgia*, 1976, p. 238). But Marshall misreads Stewart. Stewart is not justifying the *death penalty*; rather, he is justifying legal violence, indeed legal *institutions*, more generally. He thinks that legal institutions, and the violence they inflict, are legitimate because they have provided a way out of the chaos of the state of nature, because they have ensured a society ruled by law. He is not claiming that if the law were not violent, people would not obey it, but rather that if the law were not violent, it would not serve the purposes it is supposed to serve. He is saying that since citizens have transferred their power to forcefully right wrongs to the law, legal institutions must not fail to exercise this violence. He writes:

> [Capital punishment's] precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance. As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its "divine right" to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function. (*Furman*, 1972, p. 333, citations omitted)

By claiming that the law's violence is a violence "essential" to the formation and preservation of civil society, the Court defuses objections to legal violence. But while this line of reasoning is meant to legitimate the law and legitimate the law's imposition of violence, it clearly does not legitimate *any* violence the law imposes. Insofar as law preserves the difference between civil society and the state of nature, its violence must be different from the violence it channels and forestalls. The Court establishes this difference in one way through Eighth Amendment limits on the kinds of violence that may be imposed. States are prohibited from drawing and quartering criminals, or making use of thumbscrews. But Stewart's remarks about law's debased copies – "vigilante justice" and "lynch law" – suggest that what is *more* important in marking this difference is restricting the procedures that determine how law decides who is to be punished and how they are to be punished. Both lynch law and official law put people to death (and hanging has never been declared unconstitutionally cruel) but lynch law employs inappropriate procedures.

What characterizes this foreclosed way of doing "justice" from which legitimate law is distinguished? Passion and emotion, especially hateful or vengeful passions or emotions (*Gregg*, 1976, p 154). Subjectiveness – violence that is "different in different men ... [dependent] upon constitution, temper" (*McGautha v. California*, 1970, p. 285). Whimsy and caprice (*Gregg*, 1976, p. 200). In other words, violence should not be an expression of our "baser selves" (*Furman*, 1972, p. 345), the "vice, folly, and passion to which human nature is liable" (*McGautha*, 1970, p. 285).

These matters are vague, if not obscure. Even a careful reader is precluded from delineating precisely the Court's conception of human fallibility, given its brief, scattered, and inchoate remarks. Furthermore, the Court has never been a forum for the production of penetrating analyses of human nature. But what is more important is the Court's characterization of legitimate punishing procedures. *Legitimate* legal punishment is imposed in a rule-bound way. Through rules, the law escapes the passion and prejudice that afflict human decision-making, and through rules, ours becomes a "government of laws, and not of men."[20]

This view of rules emerged almost whole cloth in *Furman*. Before *Furman* was handed down, almost every state with the death penalty gave its sentencers, be they juries or judges, absolute discretion to dispense death or mercy (Steiker & Steiker, 1995, p. 364). One year before *Furman*, *McGautha v. California* held that standardless jury sentencing did not violate the due process clause of the Fourteenth Amendment. Justice Harlan, writing for the *McGautha* majority, argued that introducing capital sentencing standards would be futile. He derided the attempts of the *Model Penal Code* authors to produce adequate sentencing criteria,[21] claiming that the rules provide no more than the most minimal control over the sentencing authority's discretion: "they do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances" (*McGautha v. California*, 1970, p. 207). Nor do they even try to exclude constitutionally impermissible considerations, such as the race or sex of the offender. In short, Harlan claimed, these standards provide no protection against a jury deciding on the basis of "whimsy or caprice." The proposed standards "do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected" (*ibid.*). Indeed, Harlan thought, there is no reason to expect any effort in this regard to succeed, and certainly no reason to say that the Constitution requires a jury's sentencing decision to be rule-governed.[22]

A year later, the Court abruptly changed its mind (in a manner of speaking – see footnote 23). *Furman* held that standardless sentencing rendered the death penalty unconstitutional (although two justices claimed that it was per se unconstitutional). Actually, it is hard to say what *Furman* said, because each justice issued a separate opinion. For this reason, I will follow most legal scholarship in reading *Furman* through *Gregg* and subsequent capital cases. According to *Gregg*'s plurality opinion, *Furman* stands mainly for the proposition that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg*, 1976, p. 189).[23] The *Gregg* plurality agrees that the statutes examined in *Furman* are cruel and unusual, but, citing Justice Stewart, says that they are "cruel and unusual in the same way that being struck by lightning is cruel and unusual" (*Gregg*, 1976, p. 188). That is, statutes that give juries unfettered discretion encourage random sentencing decision. Or, as Justice White argues, the statutory schemes analyzed in *Furman* provided "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not" (*Gregg*, 1976, p. 188). No agreement about the "worst" class of murderers could be induced from sentences handed down by juries.

But while the *Gregg* plurality agrees with this strand of *Furman*, they do not think that it is impossible to render capital sentencing more rule-bound, less arbitrary, and capricious. With a nod to Harlan, *Gregg* says that "while some have suggested that standards to guide a capital jury's sentencing deliberation are impossible to formulate, the fact is that such standards have been developed" (p. 193, citation omitted). To back up this claim, the plurality trots out the very same *Model Penal Code* sentencing standards excoriated by Harlan. *Gregg* then finds that Georgia's sentencing scheme provides similar guidance through its requirement that a jury find one of several statutory aggravating circumstances beyond a reasonable doubt before imposing a death sentence.[24]

Gregg's conception of rule-bound violence has two main components. First, *Gregg* characterizes the ruliness of violence in terms of consistency; when similar punishment is meted out for similar crimes, those punishments are administered in rule-bound way (p. 222). That is, lawful violence will be governed by the like cases principle ("treat like cases alike").[25] This leads to the second point. Legal violence cannot be lawful unless individual sentencing judgments are made in a "rational" way (pp. 189–194). So

Gregg says that capital sentencing standards must control and constrain the *way* the jury decides.

Clearly, "rationality" means many things, and while the word appears all over the Court's opinions, the Court takes no pains to define it. The Court's basic position seems to be that judges or juror sentences rationally when they base sentences on good reasons. To sentence properly, or rationally, is to sentence on the basis of *legal* reasons, reasons specified by legislatures and approved by the Court. In capital sentencing, good reasons for sentencing someone to death are statutory aggravators. Bad reasons are reasons that are "wholly unrelated to the blameworthiness of a particular defendant," or unrelated to the "character of the individual and the circumstances of the crime" (*Booth v. Maryland*, 1987, pp. 496, 502). Bad reasons are either irrelevant reasons, like whether one's breakfast is digesting well, or repugnant reasons, such as the race, class, or gender of the accused.[26]

Furthermore, to sentence rationally, sentences must make decisions on the basis of proper motivations. Take, for example, a sentencer who employs a "good" reason – a statutory aggravator such as "the murder was committed for pecuniary gain" – yet uses this reason as a cover for his or her racist view of the defendant. This is not an instance of proper sentencing. Proper sentencing requires a judge or juror to make a disinterested or impersonal sentencing decision (*Payne v. Tennessee*, 1991, p. 844).

Negatively speaking, this means that a sentencer should ignore his or her emotional response to the crime or the victim (*Booth v. Maryland*, 1987, pp. 508–509).[27] More specifically, sentencers should not make their decision out of a sense of sympathy with the victims of the defendant's crime or antipathy toward the defendant; sentencing should not be an exercise of passionate identification, or vengeance (*California v. Brown*, 1987). Positively speaking, a sentencer must endorse the law's "objective" standards (*Gregg*, 1976, p. 198; *Callins v. Collins*, 1994, p. 144). This entails a certain self-understanding or self-identification on the part of the sentencer. Sentencers should understand themselves (at least implicitly) to be agents of the state or of the legal institutions of the state, rather than private actors (*Furman*, 1972, p. 333).[28] This means that sentencers should make the law's reasons their own. The law specifies aggravating circumstances – "the murder was committed for pecuniary gain" – not to enable juries to eliminate one more poor black man from society, but to pick out the worst of the worst murderers as defined by the state. Of course, one's preferences *can* come into play, as long as these are statutorily permissible, and as long as they hold the weight the law says they should hold. But then they are not private reasons, they are legal ones.

It should now be clear why I call it "Rule of Law" abolitionism. Rule of Law abolitionism makes heavy use of this narrative of legitimation. Again, the idea is that law's violence should differ from extra-legal violence, and that this difference is the difference between rule-bound and "unruly" violence.[29] Rule of Law abolitionism is a claim that law must operate according to *rules*, that its sentencing decisions be rational and consistent.[30] It is at the same time a claim about the necessity of law's *rule*, the necessity that the law's reasons be authoritative in practical decisions about the imposition of law's violence. Sentencing is rule-bound when it proceeds on the basis of the reasons the Court endorses and for the reasons the Court specifies. Finally, Rule of Law *abolitionism* is the claim that the death penalty *cannot* be imposed according to rules, and therefore, legal systems that employ it are illegitimate.[31]

There is one more conceptual component of Rule of Law abolitionism. Rule of Law asserts a *duty* to oppose capital punishment, a duty to help legal institutions live up to the "core legal values" that constitute the definition of law. It asserts that we – judges, jurors, laypeople – have a duty to help the law in its attempt to distinguish its violence from extra-legal violence. For abolitionists, this general duty can be put in more specific terms: jurors have a duty to refuse to sentence to death, appellate judges have a duty to overturn lower court verdicts, citizens have a duty to campaign against capital punishment, or vote against politicians who support it. If abolitionism does not assert a duty – if it merely draws our attention to some inconsistency in the law – it is less an argument against capital punishment than a collection of information about legal practices of legitimation. If it is the latter, it cannot say that there is anything *wrong* with the death penalty.

This abolitionist duty must have two important characteristics. First, heeding this duty is not necessarily reducible to complying with federal or state statutes. To realize the core values of law, to prevent a law-killing violence, one might have to disobey the statutes that undermine or contravene those values. Law itself demands that a juror enter into capital sentencing with a firm conviction that he or she will not impose the death penalty; and perhaps even lie about these convictions during voir dire. Put more generally, the obligatoriness of law is not reducible to the command "obey valid rules." As a result, an investigation into the obligatoriness of law should not proceed on the terms found in the debate about the "prima facie obligation to law" that pre-occupies so many philosophers of law.[32]

Second, the duty to improve the law has a *legal* rather than a moral ground. Indeed, it is on this basis that I distinguish Rule of Law

abolitionism from moral abolitionism. This emphasis on legal grounds also illuminates a conception of legal duty that differs from that which prevails in the Anglo-American philosophical world. Most philosophers of law argue that if we have duties to law, we have them only when these duties are *morally* justified. (Rawls might be an exception.[33]) This means either that the particular rule, and the duty it imposes is just, or that the legal institution as a whole is *morally* just.[34]

STRONG AND WEAK RULE OF LAW ABOLITIONISM

I said above that Rule of Law abolitionism claims that the death penalty cannot be imposed according to rules. There seems to be some confusion about this claim in the Rule of Law abolitionist literature. This confusion leads to the existence of two general types of Rule of Law abolitionism, a weak and a strong one. Rule of Law abolitionism wants to argue that capital sentencing procedures cannot impose a sufficient amount of rationality, and that therefore, the death penalty must be given up. But by focusing on deficient death penalty procedures, abolitionists risk arguing only that the law has *not yet* devised adequate sentencing procedures. Rule of Law abolitionism would then be arguing only that the death penalty, *as currently administered*, is illegitimate. This would be a valuable critique of contemporary death penalty procedures, but not an argument against capital punishment.[35] Indeed, the focus on procedure has the rather awkward consequence of implying that the death penalty is redeemable, that the death penalty could be legitimately in principle.

On this weak interpretation, Rule of Law abolitionism can do little more than support calls for a moratorium on capital punishment. To be sure, it is quite good at *that*: justifications for moratoria are often couched in Rule of Law abolitionist terms. In Nebraska, for example, one of the co-authors of a moratorium bill was an ardent supporter of the death penalty, yet convinced his colleagues that a moratorium was required to respect "equal protection ... and due process."[36] This was not a doctrinal claim, as the constitutionality of the state's capital punishment regime was not the topic of discussion. Rather it was about the legitimacy, or as most senators put it, the "justice" of the legal system. Former Governor Paris Glendening justified Maryland's moratorium by citing the necessity of having "complete confidence that the legal process involved in capital cases is fair and impartial" (cited in American Bar Association, 2003). Finally, in the words

of former Illinois Governor George Ryan, once a staunch supporter of capital punishment:

> I started with this issue concerned about innocence. But once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life. The facts I have seen in reviewing each and every one of these cases raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die? What effect was race having? What effect was poverty having?[37]

It is important to understand the connections of Rule of Law abolitionism and the moratorium movement, because many abolitionists – especially Sarat (1997) – have placed heavy expectations on the moratorium movement. And not without cause: the movement seems to be a powerful one. In 1999, the ABA passed a resolution exhorting every capital punishment jurisdiction to institute a moratorium. By 2001, legislation to address the ABA's concerns had been introduced in 37 of the 38 states with the death penalty (Kirchmeier, 2002, p. 45). As of 2003, moratorium legislation had been introduced in 21 states as well as Congress. Former Governors Ryan and Glendening instituted moratoriums through executive order (Glendening's moratorium was overturned by Governor Robert Erlich). In January 2006, the New Jersey State Senate became the first legislature to institute a moratorium. Nationwide polls show that over 60 percent of U.S. citizens support a moratorium on capital punishment; this is a significant number, given that support for capital punishment has often been above 75 percent.[38] Add the support from conservatives such as George Will and Pat Robertson, and the idea of putting Rule of Law abolitionism in the service of the moratorium movement seems like a good one.

But it is not. Much of the anxiety behind the moratorium movement centers on the fallibility of capital procedures, the risk of error, the possibility of states taking innocent lives. Although this is a worry about the damage capital punishment does to legal legitimacy, it can be resolved by improving capital punishment procedures. It is a worry about getting the wrong man, not a man getting the wrong punishment. The moratorium movement is an exercise in *reform*, not abolition.[39] As Gross and Ellsworth have pointed out, "there is no inconsistency in the fact that sixty-four percent of the population favors a moratorium (at least when DNA is

mentioned), and about the same number favors the death penalty" (cited in Kaufman-Osborn, 2001, p. 684).

And while abolitionists should certainly welcome any reform of capital punishment, reform can impede, rather than further, the goals of abolitionism. I agree with Mona Lynch's claim that reformist gestures *enable* capital punishment by telling the courts, and the public, what must be done for the death penalty to gain full legal legitimacy (Lynch, 2002, pp. 918–919). Put in the service of reform, the invocation of Rule of Law values enables the law to assure us that its ultimate violence is bound by rational procedures. An illustration is the Report of the Illinois Governor's Commission on Capital Punishment. Governor Ryan appointed the Commission in 2000, following the release of the 13th person sentenced to death by Illinois which raised, in his eyes, "serious concerns with respect to the process by which the death penalty is imposed."[40] Ryan's concerns, as we have seen above, are about the fairness, or ruliness of legal violence. Moved by these concerns, Ryan charged the Commission with studying the state's system of capital punishment, and making suggestions for improvement. The Commission returned an impressive 200-page report with 85 recommendations for improvements to a broad range of issues including police investigation, forensic testing, prosecutorial discretion, trial lawyering, statutory aggravators and mitigators, post-conviction hearings, and more.[41]

While many of these recommendations are worthy ones, the very quality of the Report is a double-edged sword. The Report is a tool for reform, and, at the same time, a tool for achieving the appearance of legal legitimacy. It is easy to imagine retentionists happily agreeing to such studies, and even agreeing to implement many of their recommendations, because of the effect this would have on the seeming legitimacy of execution.[42] In fact, while few of the Report's recommendations have been acted on by the Illinois Legislature, its existence seems to have ameliorated concerns about the death penalty. Illinois courts have restarted the capital punishment machine, and nine people currently sit on death row.

For Rule of Law abolitionism to be a vigorous abolitionism, it must hew to a more robust argument. Abolitionism cannot ask only for "*more* rationality"; it cannot demand only that the majority, or some percentage, of legal events be characterized by reason rather than passion. Unless more rationality is impossible to attain, the demand for more rationality will be a *reformist* demand.[43] Enter strong Rule of Law abolitionism. Strong Rule of Law abolitionism claims that legitimacy can *never* be achieved in the context of capital sentencing; it claims that reform is impossible. Since the project of

establishing rational capital sentencing procedures is doomed to fail, the argument goes, we must give up execution for good.

Clearly, irrationality is a crucial component of this argument. Unfortunately, strong Rule of Law abolitionists spend little time explaining what they mean by it. To remedy this oversight, I will present the conception I see to be most congruent with the strong Rule of Law argument. This conception might not be faithful to the letter of Sarat and Blackmun's texts, but I think it puts their claims in the strongest light.

To say that capital sentencing is always irrational is to say that every legal actor's actions are always partly motivated by idiosyncratic, or subjective, reasons. It is to say that personal reasons always interfere with legal reasons. If only *some* people's actions were motivated by passion and prejudice, the state could give the task of devising sentencing guidelines, sitting on juries, appointing judges, etc., to those able to think impersonally and objectively. If everyone's actions were *sometimes* irrationally motivated, we could, in our better moments, devise tests that determine the rationality of a policy, sentencing guideline, or sentencing decision. In either of these cases, there would be enough rationality to legitimate the death penalty.

But strong Rule of Law abolitionism need not adopt the controversial view that *human beings* are inherently irrational (although Sarat and Blackmun sometimes suggest as much). It requires only that *legal* judgments be irrational. As I pointed out above, legal judgments are irrational when personal reasons interfere with legal reasons. And, according to a popular view in contemporary moral philosophy, this interference is an inevitable fact of practical life. We *always* deliberate on the basis of reasons that are peculiar to us; as Bernard Williams would say, we always deliberate on the basis of reasons contained in our specific "motivational set" (Williams, 1982, pp. 101–113). When a jury member decides to sentence on the basis of a statutory aggravator, she does so *only* because she so desires.

(Notice that an act that is irrational from a legal perspective can be perfectly rational from a general practical perspective. Acting in accordance with our "personal" interests is often the most rational thing to do. For example, one can imagine situations in which an African-American juror is right to refuse to convict an African-American defendant of possession of cocaine with the intent to distribute.)

We find this strong Rule of Law argument in what Sarat calls "new abolitionism" or "legally conservative abolitionism." Sarat's abolitionism asserts the necessity of rationalizing capital sentencing, while also asserting its impossibility. Legal rules, he argues, cannot check our personal desires. The reason is that law is an inherently violent enterprise.[44] Even the most

legitimate legal institution imposes legitimate violence, law is, at some level, always an instrument of coercion. And when we are confronted with threats of violence, Sarat suggests, we no longer deliberate in a disinterested fashion. At work here is a quasi-Hobbesian account of human psychology, where the drive for security and self-preservation overrides all other motivations. "Force," Sarat contends, "is disdainful of reason; it pushes it aside; it takes over completely" (Sarat & Kearns, 1991, p. 240). In short, the operation of law inevitably calls up passions that "short-circuit" our ability to make decisions in accordance with legal rules.

This conception of irrationality focuses on the experience of laypeople negotiating legal rules in their daily lives; it captures my situation when I deliberate about downloading music I have not purchased. This does not get the abolitionist very far, since judges, lawyers, and juries are not typically confronted by such threats of force. But in "A Journey through Forgetting," Sarat and Kearns (1991) identify three additional sources of legal irrationality: the indeterminacy of legal rules, ideological indoctrination, and the inherent subjectivity of practical deliberation.[45] This third source is just what the abolitionist needs, especially if "subjectivity" means that we can never escape self-interest. From here, Sarat can easily move to an abolitionist conclusion. *Gregg* states that capital punishment is legitimate only when rational and rule-bound. Since capital sentencing procedures are *necessarily* irrational, we must reject the death penalty if we want to preserve the distinction between law and violence (Sarat, 1997, 2001, 2002).

We find another example of strong Rule of Law abolitionism in Justice Blackmun's *Callins* dissent. Blackmun, too, argues that rules can never channel passion or prejudice. Blackmun says that *Furman* and *Gregg* mandate that "the death penalty must be imposed fairly, and with reasonable consistency, or not at all" (*Callins v. Collins*, 1994, pp. 1144, 1147). Surveying 30 years of the Court's capital jurisprudence, Blackmun notes that despite the wealth and diversity of capital sentencing schemes, and despite the Court's review of, and intervention into, these schemes, "the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else" (p. 1144). The cases that come before the Court show that capital punishment remains fraught with "arbitrariness, discrimination, caprice, and mistake" (p. 1144).[46]

Although Blackmun's explanation of this irrationality is even leaner than Sarat's, he concurs with Sarat in important respects.[47] Blackmun grudgingly accepts Harlan's view that capital sentencing guidelines cannot control arbitrariness, calling Harlan's *McGautha* opinion "partly prophetic" (p. 1146). The reason for this, Blackmun claims, is that the "decision whether a human being should live or die is ... inherently subjective" (p. 1153). He attributes this subjectivity to the fact that deliberation is steeped in "all of life's understandings, experiences, prejudices, and passions" (p. 1153). And this claim can be cashed out in the same fashion as Sarat's. "Life's understandings" inevitably undermine the act of making law's reasons our own. Since arbitrariness and irrationality is an inherent quality of capital sentencing, Blackmun concludes, we must "no longer ... tinker with the machinery of death" (p. 1145).

RULE OF LAW ABOLITIONISM – PROMISE AND PERIL

If doctrinal abolitionism is dead, what are the prospects for Rule of Law abolitionism? (From here on out, I will use "Rule of Law abolitionism" to refer to strong Rule of Law abolitionism, since weak Rule of Law abolitionism is not really abolitionism.) I think the persuasive possibilities of this argument are interesting and compelling. Since one need appeal only to traditional legal values, one can employ this argument without occupying the position of a bleeding-heart liberal. One can champion it without refusing to be "tough on crime," or without defending the life of figures such as Timothy McVeigh. On the other hand, Sarat writes, traditional abolitionism

> has been associated with, and is an expression of, humanist liberalism, political radicalism, or religious doctrine. Each represents a frontal assault on the simple and appealing retributivist rationale for capital punishment. Each puts opponents of the death penalty on the side of society's most despised and notorious criminals. (Sarat, 2001, p. 249)

Although Sarat (2001, p. 11) makes rather heavy weather of the rhetorical difficulties posed by McVeigh – calling him "the ultimate trump card, the living, breathing embodiment of the necessity and justice of the death penalty" – his general point is basically sound. When I try to explain my abolitionist views to skeptics, they almost invariably ask if I would object to the death penalty for McVeigh, Hitler, etc. As I understand it, this question expresses the intuition that there are *some* crimes that are so heinous, death is the only warranted punishment. And this intuition is not unreasonable. But Rule of Law abolitionism allows abolitionists to sidestep this problem. Rule of Law abolitionists can *agree* with moral, religious, or philosophical justifications of the death penalty while renouncing capital punishment.

Rule of Law abolitionism suggests that we reject the death penalty for the harm it does to "us," and "our" prized legal institutions, rather than for the harm it does to convicted murderers.

Although Sarat calls his abolitionism "legally conservative abolitionism," I am not suggesting that a Rule of Law abolitionist must take (or feign) a conservative position on crime. My point is that he or she need not take any position whatsoever. One of the great merits of Rule of Law abolitionism is that it operates outside stale ethical and political categories. Rule of Law abolitionism does not attack law in the "politically radical" fashion of Critical Legal Studies; it does not portray reigning legal values as legitimating tools of oppressive socioeconomic hierarchies. Nor does it attempt to re-evaluate, undo, or undermine these values.[48] And it does not, in the way of a particularly aggressive version of natural law theory, foist a moral code on the law. Rather, it comprises an "embrace" of law's central values and an attempt to uphold and strengthen these values. If Rawls is right that certain legal values can be endorsed regardless of one's substantive moral or political views, Rule of Law abolitionism seems to be one of them. (The co-authors of a Nebraska moratorium bill, a liberal and a conservative, described their differences as greater than those between "God and Satan," yet could agree that the death penalty was broken (Tysver, 1999).)

This feature is especially important in light of the death penalty's role in our broader "culture wars." This role has been explored at length elsewhere, and I will not pursue it here.[49] Needless to say, in a society where simplistic narratives of guilt and responsibility are encouraged and accepted, moral discourse, with its emphasis on will and responsibility, seems too heavily weighted in favor of the prosecution. Insofar as Rule of Law abolitionism avoids moral terminology, it enables debate about capital punishment to occur outside the conceptual confines of the culture wars. As Sarat (2001, p. 253) writes, Rule of Law abolitionism allows one to say that "the most important issue in the debate about capital punishment is one of fairness, not one of sympathy for murderers; concern for the law abiding, not for the criminal."

My claims about the rhetorical power of Rule of Law abolitionism are not idle speculation. In 2000, the New Hampshire state legislature voted to abolish capital punishment. Sarat conducted a series of interviews with state legislators and analyzed the reasons they gave for their votes. Sarat (2002, p. 361) presents evidence that the logic of Rule of Law abolitionism played a significant role in the debate. One senator's remarks indicated that he or she (the article does not include identifying information) had been converted by Rule of Law abolitionist arguments:

> You know, when they blow up a building in Oklahoma, it is pretty hard to stick with mercy and forgiveness. ... But when you think about all the injustice that is done in figuring out who gets the death penalty, it doesn't seem right. We aren't infallible, so who gets to choose who lives and who dies? That's why I decided to vote to get rid of the whole thing. (cited in Sarat, 2002, p. 363)

Another said that Rule of Law abolitionist arguments would enable her to sell her vote to her constituents:

> It ain't right to kill, and it doesn't matter who does the killing. ... But that is just what I think and I'm not sure that I could convince anyone else who thought differently. But when it comes to issues having to do with the fairness of the way people get treated, then that's different. Everyone can relate to that. I can go out and explain that I'm against this state having the death penalty because of the real problems in the way it works. ... I don't mind giving speeches about that. (cited in Sarat, 2002, p. 364)

While I cannot evaluate Sarat's evidence here, I think these citations make a prima facie case for the empirical effectiveness of Rule of Law abolitionism.

That said, there are some serious problems with Rule of Law abolitionism. First, strong Rule of Law abolitionism proves too much. While it imagines itself to be aimed at the abolition of capital punishment, it targets punishment as such. Neither Blackmun nor Sarat want to argue for the illegitimacy of every type of legal sanction. Blackmun writes, "the decision whether a human being *should live or die* is so inherently subjective – rife with all of life's understandings, experiences, prejudices, and passions – that it inevitably defies the rationality and consistency required by the Constitution" (*Callins*, 1994, p. 1153, emphasis added). Sarat adds: "when formality fails, when the forms of legal procedure cannot contain and control any particular form of legal violence, *that particular violence* must be rejected to that law itself can survive" (Sarat, 1997, emphasis added). But if we accept strong Rule of Law abolitionists' account of legal deliberation, if practical reason functions in the way Rule of Law abolitionists must say it does, judges, lawyers, and juries cannot impose punishment legitimately. As Sarat and Kearns (1991, p. 240) write, the modern criterion for legal legitimacy is that "rules, not personal will and desire ... really determine law's actions. If human beings cannot adopt the legal reasons enshrined in the justification of law as their own, personal will determines legal actions, and legal violence is indistinguishable from extra-legal violence. Unruliness cannot be limited to capital sentencing, and law's legitimating narrative is irredeemable. In this way, the attempt to mark one particular punishment as illegitimate slips into a wholesale indictment of the legitimacy of

punishment, and Rule of Law abolitionism becomes a doctrine of "total abolitionism." [50]

Second, if lawfulness is unachievable – if people are incapable of acting in accordance with legal reasons – legal institutions can only be *coercive*. And if legal institutions are only coercive, they cannot generate duties or obligations. Recall H.LA. Hart's famous distinction between "obligation" and "being obliged" (Hart, 1994, pp. 84–85). We might say that someone faced with the barrel of an Uzi is "obliged" to hand over their money to a mugger, but they have no "obligation" to do so. Obligations are, in some sense, not optional. "Obligation" refers to actions that we must perform or must refrain from doing. But obligations are *also* non-coercive. (For the purposes of this chapter, I will bracket the question of what makes obligations non-coercive.) So if law is simply an exercise of coercion, we can never have a duty to abolish capital punishment. Indeed, if law is an exercise of coercion, the duty to make that law accord with its legitimating principles, the duty to make the law's violence distinct from extra-legal violence, is really a type of violence. The problem, then, is a serious one: Rule of Law abolitionism forecloses the possibility of a duty to improve the law, and, as I have argued above, *that duty is precisely what a theory of abolitionism must defend.*[51]

And for those unimpressed by these conceptual issues, a deep rhetorical problem remains. Strong Rule of Law abolitionism violates the practical principle of "ought implies can," i.e., the principle that we have duties only when we are capable of doing what the duty commands us to do. For this reason, strong Rule of Law abolitionism lends itself to a fatalism at odds with the duty to improve the law. If rule-bound punishment is impossible, legal institutions can never be lawful. If lawfulness is unachievable, if legal institutions can only be coercive, this must cast doubt on the value of the Rule of Law abolitionist claim itself. It would be difficult to refute the obvious objection: If nothing can be done to make the law better, why should we try? Why should we eliminate one punishment, only to see others destroy law just as easily?

It might seem that Blackmun provides a version of strong Rule of Law abolitionism that escapes these problems. This would not be grounded in his views on the "inherent subjectivism" of judgment, but in his identification of an irresolvable conflict between the values of fairness and individuality. Fairness dictates that a capital sentencing scheme treat those convicted of murder with the "degree of respect due the uniqueness of the individual" (*Lockett v. Ohio*, 1978, p. 605).[52] To treat like cases alike, the sentencer must consider information about the defendant that enables an educated

judgment about relevant similarities to, or differences from, other capital defendants.[53] Indeed, *Lockett* requires sentencers to consider any relevant mitigating evidence, i.e., evidence that would justify a sentence less than death. The upshot is that sentencers have broad discretion to withhold capital punishment. In his *Callins* (1994), dissent, Blackmun argues that states cannot eliminate this discretion without also eliminating fairness: "a step toward consistency," he writes, "is a step away from fairness" (p. 1149). So the death penalty, as a sort of legal tragedy, provokes a contradiction in the due process values of consistency and individualization.[54] The "irreconcilability" of these values means that if the death penalty is administered, it will violate one value or the other; "the consistency and rationality promised in *Furman* are *inversely related* to the fairness owed to the individual when considering a sentence of death" (pp. 1155, 1149, emphasis mine). And since both values are of equal weight, and respect for both values is constitutionally necessary, capital punishment must be given up.

Since this "unique level of fairness" is applicable only to capital contexts, this argument does not undermine the very possibility of legal legitimacy. But it has its own weakness: there *is* no contradiction between consistency and fairness. Indeed, consistency *requires* sentencers to engage in individualized consideration.[55] While consistency requires that sentencing admit of rational patterns (or rules), consistency also requires those patterns to reflect the particularities of the defendants who come before the courts. If consistency is found only at the vague levels specified in most statutory aggravators, it is a false consistency. To produce a meaningful consistency, to really treat like cases alike, sentencers must know all the relevant facts about a defendant and the circumstances of his or her crime. So Blackmun can maintain the existence of a contradiction between consistency and fairness only by adopting an artificial, abstract, and simplistic interpretation of the concepts involved, by massaging the concepts of rationality and individualized consideration into an unrecognizable form, or by smuggling abolitionist content into the conceptualization of these values. Such an argument cannot adopt the morally neutral stance that befits Rule of Law abolitionism.

CONCLUSION

On my account, Rule of Law abolitionism floats between Scylla and Charybdis. Weak Rule of Law abolitionism fails as an argument against

capital punishment, while strong Rule of Law abolitionism proves too much. However, I think it is possible to improve and strengthen strong Rule of Law abolitionism. Although a detailed discussion is beyond the scope of this chapter, I will conclude by indicating the path I think Rule of Law abolitionism ought to take.[56]

I would begin by softening the requirements of legal legitimacy. Legal systems can be legitimate even when legal judgments are not made solely on the basis of "desire-independent" reasons. But this softening does not mean we must endorse the status quo. It means we must add another component to legal legitimacy: legitimate law must acknowledge the frailty and limitations of legal actors, and incorporate procedures that correct those limitations. Legal institutions must engage in an ongoing effort to improve legal procedures, and to fix the mistakes that result from imperfect procedural mechanisms. As Emmanuel Levinas argues, legitimate legal institutions must act on the principle that justice should always be "more just," that justice is "not yet just enough" (Levinas, 2001, pp. 51–52). Although this aspect of legitimacy might sound unfamiliar,[57] it is expressed, however ambivalently, in contemporary U.S. legal practices such as appellate review, habeas corpus, executive clemency, and the Eighth Amendment's evolving standards of decency clause.

This conception of legitimacy strengthens, rather than weakens, abolitionism. Postconviction review, clemency, and the evolving standards of decency clause all express the important legal value of, for lack of a better word, *revisability*. Revision is the law's answer to our imperfect rationality, and is a crucial component of legal legitimacy: to be legitimate, the law must revisit and revise its mistakes. Now, if mechanisms for revision are a condition of legal legitimacy, it is easy to see how an abolitionist argument would be made. *Any* punishment can be revised except the punishment of death. Death really is different, "unusual in its pain, finality, and enormity" (*Furman*, 1972, pp. 286–287). Since the death penalty cannot be revised, it undermines the legitimacy of law in a unique and troubling way. And as Sarat (1997) writes, "those who love the law ... must hate the death penalty for the damage it does to the object of that love."

This new argument has the advantages of existing versions of Rule of Law abolitionism, while enjoying two additional benefits. First, its compatibility with a more nuanced picture of legal deliberation is likely to find more assent than the accounts provided by current forms of Rule of Law abolitionism. Second, it does not generate a wholesale attack on legal legitimacy: the value of revisability cashes out in a rejection of capital punishment, not a rejection of punishment as such. This modesty enables the mainstream political appeal that abolitionists avidly seek. As such, this argument from revisability adds an important new layer to Rule of Law abolitionism, strengthening its role in the struggle against capital punishment.

NOTES

1. There have been doctrinal retentionists. In *Furman*, Justice Blackmun dissents from the plurality opinion holding that the death penalty violates the cruel and unusual clause of the Constitution. However, he writes, "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds" (p. 405). As we will see, Blackmun later changed his mind.

2. *Furman v. Georgia* (1972, p. 331). According to Justice Marshall, the Supreme Court's capital jurisprudence holds that only considerations of deterrence and retribution would make the death penalty non-excessive; neither, Marshall adds, does so (*Gregg v. Georgia*, 1976, pp. 233ff.)

3. *Gregg v. Georgia* (1976, p. 230; Justice Brennan, dissenting), Denno (2002), Bedau (1987).

4. *Furman v. Georgia* (1972, pp. 287ff.; Justice Brennan, concurring).

5. *Gregg v. Georgia* (1976, p. 241; Justice Marshall, dissenting), *Gregg v. Georgia* (1976, pp. 228–232; Justice Brennan, dissenting), Bedau (1997). This argument is typically the basis of international abolitionist movements. See, for example, the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, Office of the United Nations High Commissioner for Human Rights. http://www.ohchr.org/english/law/ccpr-death.htm (accessed July 20, 2006).

6. The best brief conceptual, doctrinal, and historical introduction to the Supreme Court's post-*Furman* capital jurisprudence is Carol and Jordan Steiker's "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment" (Steiker & Steiker, 1995).

7. See also Baldus, Woodworth, and Pulaski (1990) and Gross and Mauro (1989).

8. The *McCleskey* majority did not disagree with Baldus' methods or results, and did not disagree that the victim's race is one of the most important factors determining a murderer's sentence, but did not consider this sufficient to demonstrate "a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."

9. See, for example, Lynch (2002, pp. 903–908).

10. This is not limited to Eighth Amendment issues: in *Lockhart v. McCree* (1986), the Court upheld the constitutionality of death-qualified juries even though such juries are more likely to convict than juries selected for much less heinous crimes. There is a vast literature on this regrettable turn (see generally White, 1991; Denno, 1992; Harris, 1991). See also Justice Brennan's dissent in *Butler v. McKellar* (1990).

According to many legal scholars, the most significant aspect of this turn is the Court's restrictions on federal habeas corpus petitions (see Goldstein, 1990–1991; Weisberg, 1990). In 1996, Congress further limited federal habeas corpus protections by passing Title I of the Anti-Terrorism and Effective Death Penalty Act.

However, in "Sober Second Thoughts," Steiker and Steiker make a strong case, this turn is not really a turn, i.e., that the regulatory promises of *Furman* and *Gregg* were never met, and that the institution of capital punishment is hardly different today than it was before *Furman*, when sentences had unlimited discretion.

11. *Herrera v. Collins* (1993, p. 426). Although *Herrera* holds that a claim of actual innocence does not entitle a prisoner to a federal habeas hearing, in some ways, the holding is not as mind-boggling as it appears (see Berger, 1994).

12. See Lynch (2002) and Zimring (1993).

13. These extra-legal standards are meant to serve as "objective indicia" (Gregg, 1976) of these norms, rather than express the subjective opinion of the courts. However, the tests for the existence of these standards can get very complicated; they are much more than a matter of reading public opinion surveys or counting up bills passed by state legislatures. In *Atkins v. Virginia* (2002), the Court takes aspects of the wider cultural context, such as the fact that "anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime" as evidence for a consensus against execution of the mentally retarded (p. 315).

14. See Sarat and Kearns (1991).

15. Ewick and Silbey (1998) and Merry (1990).

16. See Reiman (1986) and Michelman (1986). Even legal positivists such as Alexander and Sherwin (2001, p. 189) agree. Raz (1983) does as well, although he does not immediately equate the distinction in violence with legitimacy (p. 30).

17. Sarat does not consider this to be a sufficient conception of law. He claims that law uneasily incorporates both a demand for rules and a demand for mercy (see Sarat & Hussein, 2004).

18. One can find many expressions of the intuition underlying Rule of Law abolitionism. Take, for example, Senator Russ Feingold's remarks during the introduction of the Federal Death Penalty Abolition Act of 1999: "The continued use of the death penalty demeans us. The death penalty is at odds with our best traditions .... And it's not just a matter of morality ... the continued viability of our justice system as a truly just system requires that we do so" (cited in Sarat, 2001, p. 260). See also Chapter 3 of Zimring and Hawkins' *Capital Punishment and the American Agenda* and Radin (1980).

19. Note that Stewart calls revenge "retribution." Supreme Court justices always equate retribution with revenge: Marshall does so (*Furman*, 1972, p. 343), although his remarks in *Gregg* are somewhat ambiguous (*Gregg*, 1976, pp. 237, 239–240); White does so (*Roberts v. Louisiana*, 1976, p. 355); and so does Brennan (*Furman*, 1972, p. 296). Their descriptions of "retribution" are almost completely equivalent to Nozick's description of revenge. I am not sure what is behind this conflation, but precision demands distinguishing them. There is a sea of legal and philosophical literature on this distinction and the meaning of retribution more generally. Other than Nozick's influential account, see Benn (1985), and Rawls (1985). One of the more thoughtful works is Robert Solomon's "Justice v. Vengeance: On Law and the Satisfaction of Emotion" (Solomon, 1999).

20. This phrase originates in the revolutionary *Marbury v. Madison*, and is cited in countless opinions, including Brennan's *McGautha* dissent.

21. The *Model Penal Code* 210.6 (Proposed Official Draft, 1962, and changes of July 30, 1962) is a famous attempt to subject sentencing to rules. The *Code* suggests

that a murder be found death eligible only if a sentencer finds one of the following proposed aggravating circumstances:

(a) The murder was committed by a convict under sentence of imprisonment.
(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
(c) At the time the murder was committed the defendant also committed another murder.
(d) The defendant knowingly created a great risk of death to many persons.
(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
(g) The murder was committed for pecuniary gain.
(h) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

22. Harlan writes, "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability" (*McGautha*, 1970, p. 204). Harlan argues that sentencing guidelines would be either so general as to constitute "meaningless boiler-plate" or so transparent and commonsensical ("a statement of the obvious") that they not be written into law (p. 208). General rules are not rules because they are too broad to eliminate discretion (even statutory aggravators such as "the murder was committed with an utter disregard for human life" pass constitutional muster (*Arave v. Creech*, 1993)); and since they will be understood differently by different juries they will not provide predictability and consistency. Rules specific enough to guide judgments (and lead to predictability and consistency) would be so specific as to be redundant or not wide enough to apply to more than a handful of cases; in either case, they, too, lose their function as rules. One could, of course, develop a complex hierarchical system of rules that allowed one to know which primary rules were to be followed in which circumstances. But, Harlan argues, solving the logical problem of rule-creation would only strengthen the practical problem of rule-application, as juries would be incapable of understanding such a system.

23. In a rather odd move, *Furman* and *Gregg* read arbitrariness and capriciousness in the language of the Eighth Amendment's cruel and unusual punishments clause, rather than the Fourteenth Amendment's guarantee of procedural due process. More than likely, this was to avoid overturning *McGautha* – which held that current capital punishment systems did not violate procedural due process – after only one year. This can get confusing, because *Furman* held that the death penalty violates the Eighth and Fourteenth Amendment (*Furman*, 1972, p. 240). To keep things straight

one must keep in mind that the Fourteenth Amendment guarantee of "due process" contains a procedural and a substantive due process clause. The substantive due process clause binds states to Eighth Amendment prohibitions against cruel and unusual punishment (see *Furman*, 1972, p. 241; also *Robinson v. California*, 1962). It is this part of the Fourteenth Amendment that *Furman* held was violated by capital punishment.

But Brennan traced the prohibition of arbitrariness and capriciousness to the Eighth Amendment's concern for human dignity (*Furman*, 1972, p. 274).

24. *Gregg* also holds that capital punishment schemes should have a separate guilt and sentencing phase, must provide for appellate review, and must insure that sentencing juries receive clear, accurate, and relevant sentencing information (pp. 189ff.).

25. Or at least a broad version of the like cases principle. The like cases principle is here understood to govern cases *within* a specific capital jurisdiction. But these can define the "worst" in different ways.

McCleskey suggests that the Court no longer cares much about consistent sentencing outcomes, or at least thinks that rational sentencing decisions can exist even when sentencing outcomes are inconsistent. Faced with the compelling evidence of the Baldus study, the *McCleskey* Court said that prejudice in McCleskey's *individual* case could not be inferred from evidence of systematic racial disparities in sentencing (pp. 292–297).

26. Many of the Court's concerns with arbitrary sentences are based in the fear of unchecked power in the hands of government officials or government offices that is also at the basis of the Court's due process jurisprudence, but I will not follow up these discussions.

27. The "Juror's Creed," printed in the handbook given to prospective jurors in Massachusetts, reads: "I am a JUROR. I am a seeker of truth .... I must lay aside all bias and prejudice. I must be led by my intelligence and not by my emotions" (cited in Nussbaum, 1995, p. 182, n. 86).

28. Technically, a crime is not committed against a person, but against the state. A typical bill of indictment for murder announces "John Doe did feloniously and unlawfully murder Jane Smith on or about____, in the City and County of____, all of which is against the peace and dignity of the State" (cited in Forer, 1980, p. 29).

29. And my account of the Court's legitimating distinctions – which perhaps imposes too much order on the imprecise logic of the Court's opinions – shows that Sarat's use of Nozick is not unhappy. Many of the Court's distinctions are contiguous with Nozick's. For Nozick, retribution is done for an officially specified wrong that requires some element of blameworthiness, rather than a harm (which is measured by the pain it causes to the victim). Retribution is carried out by a person or institution with no personal connection to the victim, while revenge is personal. Retributive punishments are meted out dispassionately, while revenge implies a particular "emotional tone," such as Schadenfreude. Retribution is based on general principles, which mandate like punishments for like crimes, while being vengeful in one case does not commit one to being so in others.

30. In *McGautha* (1972) Brennan argues that effective sentencing standards are necessary for the "rule of law" to prevail over the unfettered power of states to kill (p. 249). Sarat mentions the Rule of Law a number of times throughout his text,

although he gives it a very broad definition. He comes close to what I have argued when he writes that to "appear impartial and principled rather than personal and particularistic ... [is] crucial to the premises of what is called the 'rule of law' in liberal political thought" (1991, p. 218 n34) and that "all that is required to generate opposition to execution is a commitment to ... the rule of law" (2001, p. 254).

31. While the phrase "Rule of Law" is usually thrown around with abandon, it is the object of focused debate among some legal theorists and philosophers. Robust interpretations re-state in various ways Aristotle's view that "law is reason unaffected by desire" (*Politics*, iii, 16, 1287). Weak interpretations argue that the Rule of Law is reducible to the principle nulla poena sine lege, no punishment without law. This principle is often understood to correspond with the constraint that laws cannot demand the impossible and that laws must be understandable to a "rational" person.

For a comprehensive discussion of the distinction between robust and weak versions of the Rule of Law, see Neumann (2002, pp. 1–19). For robust interpretations of the Rule of Law, see Allen (1996) and Weinrib (1987). For weak interpretations of the Rule of Law, see Neumann (2002) and Lovett (2002). Raz and Fuller's interpretation of the Rule of Law occupies a position between these two extremes.

The Rule of Law theory that Rule of Law abolitionism endorses sits on the robust side of the continuum, but is weaker than that of Aristotle, Allen, or Weinrib.

32. Wellman and Simmons (2005), Alexander and Sherwin (2001), Wolff (1999), Wasserstrom (1999), Smith (1999), Raz (1999), Lyons (1984), Ladd (1970), and Gewirth (1970).

33. He argues for the existence of a "natural duty of justice" that "requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves" (Rawls, 1999, p. 99). However, this mention of a duty to "further just arrangements not yet established" is only a suggestion, and is not taken up in the rest of the book. Nor has it received any critical notice. Simmons announces agreement with it without defending it (Simmons, 1981, p. 147). Gewirth mentions a duty on the part of citizens to influence the content of laws according to their beliefs (Gewirth, 1970, p. 80). This type of duty, he says, applies to everyone in a constitutional democracy, but is especially weighty in unjust legal systems (Gewirth does not, I assume, bar the possibility that constitutional democracies can be unjust). However, Gewirth says this is a "political" duty rather than a legal one. I will not tackle the problem of the political here!

34. See Reiman (1986, p. 178), Michelman (1986, p. 71), and Flathman (1970).

35. This point is by no means original. See Garland (2002, p. 480) and Kaufman-Osborn (2001, p. 684).

36. O'Hanlon (1999). Governor Mike Johanns vetoed the bill.

37. The text comes from "I Must Act," Governor Ryan's speech at Northwestern University College of Law announcing a blanket commutation of Illinois death sentences. Ryan emphasized that he tried multiple times to get the Illinois state legislature to reform capital sentencing procedures. The full text can be found in *The New York Times*, January 11, 2003.

38. A comprehensive collection of poll data, with links to original sources, can be found at ;http://www.religioustolerance.org/execut2.htm (accessed July 20, 2006).

39. It should be noted that Zimring and Hawkins (1986) argue that moratoria were an important factor in the gradual abolition of capital punishment in Western Europe (p. 22).

40. Executive Order No. 4 Creating the Commission on Capital Punishment. http://www.idoc.state.il.us/ccp/ccp/executive_order.html (accessed July 20, 2006).

41. The full text of the report can be found at the homepage of the Illinois Committee on Capital Punishment: http://www.idoc.state.il.us/ccp/ (accessed July 20, 2006).

42. A recent bill allocating one billion dollars to provide state and federal inmates with DNA testing won bipartisan support. "Bipartisan Deal Reached on DNA Tests for Inmates," *Washington Post*, Thursday, October 2, 2003, A2. As one of the sponsors of the bill said, "I'm a believer in the death penalty, but there has to be 100 percent certainty. What we do in this bill is fix a flawed system."

43. The *McCleskey* majority recognizes this strategy, and rejects it: "Given [the] safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality [in capital sentencing] is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution" (*McCleskey*, 1987, pp. 314–315, n. 37).

44. This argument is the focus of "A Journey through Forgetting," which is itself inspired by the work of Robert Cover. It is perplexing to read this essay in light of Sarat's Rule of Law abolitionism. Sarat and Kearns argue that Rule of Law theory's very attempt to portray law as "impartial and principled" is a form of what they call interpretive violence (Sarat & Kearns, 1991, p. 217–218). As far as I can tell, interpretive violence occurs when legal institutions hide the fact that they traffic in physical violence (p. 221). If this is what Sarat thinks, there is a real tension between this essay and his more abolitionist ones. It seems to me that Sarat's abolitionist work endorses a de jure conception of legitimacy, while his other work endorses a de facto conception.

45. Sarat also makes this point by reference to empirical examples – the Baldus study, Sarat's own investigation of victim impact statements, and so on (Sarat, 2001).

46. While Blackmun employs an almost exclusively constitutional vocabulary – he is, after all, writing for the U.S. Supreme Court – his abolitionism is not merely doctrinal. Indeed, he maintains that the Constitution permits the imposition of capital punishment (p. 1147). His argument rests on the value of individualized sentencing consideration, which derives from "standards of decency that have evolved over time" (p. 1151). As I argued above, this invocation of evolving standards is a response to law's need to legitimate its violence. Blackmun's real concern is that absent legitimating constraints on capital punishment, execution comes "perilously close to simple murder" (*Herrera*, 1993, p. 446).

47. Sarat often refers to Blackmun's *Callins* dissent as a paradigm of "legally conservative" abolitionism.

48. For an introduction to the wide range of arguments advanced by critical legal scholars, see Kairys (1982). For a sensitive and sympathetic critique of Critical Legal Studies, see Kennedy (1997).

49. Connolly argues that debates about capital punishment restage debates between those liberal pluralists and those who consider pluralism to be moral nihilism (Connolly, 1999). Abolitionists should counter these charges of nihilism, he argues, by exposing the instability of the categories of guilt and responsibility.

Like Connolly, Sarat contends that the death penalty affects not only actors involved in capital trials, but also the culture at large. *When the State Kills* argues that capital punishment encourages American society to adopt simplistic solutions to difficult problems of achieving reconciliation, inflames the legal battle between victims of crime and criminals to achieve the status of "real" victims, and endorses "flattened narratives" of personal responsibility that are meant to restore a chaotic society to some sort of moral order. In my view, Sarat's most persuasive defense of this claim is his careful analysis of rhetoric of guilt and responsibility in the capital trial of William Brooks (2001).

Simon and Spaulding argue that most statutory aggravators are symbols of cultural narratives of evil (Simon & Spaulding, 1999).

50. For a defense of total abolitionism, see Scheerer (1986) and Steinert (1986).

51. Anyone who argues that law is reducible to coercive violence must agree to a dubious phenomenological position. If we cannot make legal reasons (the justifying reasons given by a specific legal institution) our own reasons, law is senseless. This does not mean that legal subjects cannot make sense of law, that if someone asks me "what is law?" I will have to say "I don't have the slightest idea." One can always have thoughts about law and even write books about it. The senselessness is not theoretical, but practical. What it means is that law will have authority not only in the sense that it can, through the threat of violence, get people to do what it says they should do, but in the sense that legal rules will have authority in our practical life even though that authority is not recognized or even *capable of being* recognized. When I drive, I must stop at a stop sign. It is open to me to step on the brakes or press the gas pedal, and I will probably step on the brakes because I do not want to pay a fine. But regardless of my deliberations, the "must," the brute authority of the stop sign, remains. This brute authority will be a coercive one: the law imposes "norms" on me that I must live with, but have no control over. Since they are not receptive to any claims I might make on my behalf, I cannot ward them off or even negotiate their influence. The sheer authority of legal rules, not just the threat of their violent enforcement, would, in Nietzsche's words, confront us like as "something unforeseen, a dreadful natural event, a plunging, crushing rock" (*On the Genealogy of Morals* II, §14). Of course, it would be hard to imagine a legal system where *no* rules are experienced in this way. But in the picture of law that Rule of Law abolitionists provide, it is constitutive of our relation to law that every legal rule is coercive at the level of our practical life.

52. *Woodson* reads, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense" (*Woodson*, 1976, p. 304).

53. Steiker and Steiker (1995) trace the odd development of individualization doctrine from the Court's concern with fairness and desert. The Steikers' analysis suggests that the conceptual and doctrinal issues surrounding fairness are even more complicated than I have let on, but that need not detain us here.

54. Scalia and Thomas both agree with Blackmun that individualized sentencing entails arbitrariness and irrationality (*Graham v. Collins*, 1993, p. 494). But Scalia draws a drastically different conclusion, arguing that the *Woodson/Lockett* line of cases should be overturned, and that he will not longer enforce them (*Walton v. Arizona*, 1990).

55. Steiker and Steiker (1995) make a related point in "Sober Second Thoughts," arguing that the values of consistency and individualized consideration are subsumed under the more general value of fairness.

56. I defend these claims in detail in *Thou Shalt Not Kill?: Legal Normativity and the Problem with Capital Punishment* (Yost, 2007).

57. Unger's discussion of "internal development" has important similarities (Unger, 1986, pp. 15–25).

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