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ARTICLES

CAPITAL PUNISHMENT AND THE MORALITY OF HUMAN RIGHTS[†]

MICHAEL J. PERRY[‡]

INTRODUCTION

In the midst of the countless grotesque inhumanities of the twentieth century, there is a heartening story, amply recounted elsewhere: the emergence, in international law, of the morality of human rights.¹ The morality of human rights is not new; in one or another version, the morality is very old.² But the

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¹ See, e.g., ROBERT F. DRINAN, *CRY OF THE OPPRESSED: THE HISTORY AND HOPE OF THE HUMAN RIGHTS REVOLUTION* (1987); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

² See LESZEK KOLAKOWSKI, *MODERNITY ON ENDLESS TRIAL* 214 (1990).

It is often stressed that the idea of human rights is of recent origin, and that this is enough to dismiss its claims to timeless validity. In its contemporary form, the doctrine is certainly new, though it is arguable that it is a modern version of the natural law theory, whose origins we can trace back at least to the Stoic philosophers and, of course, to the Judaic and Christian sources of European culture. There is no substantial difference between proclaiming "the right to life" and stating that natural law forbids killing. Much as the concept may have been elaborated in the philosophy of the Enlightenment in its conflict with Christianity, the

emergence of the morality in international law, in the period since the end of World War II, is a profoundly important development—a development that makes the moral landscape of the twentieth century a touch less bleak. Although it is only one morality among many, the morality of human rights has become the dominant morality of our time. Indeed, unlike any morality before it, the morality of human rights has become a global morality; human-rights-talk has become the moral *lingua franca*.³ Nonetheless, neither the morality of human rights nor its relationship to the law of human rights is well understood.⁴

As it has emerged in international law, what does the morality of human rights hold? The International Bill of Rights, as it is informally known, consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).⁵ The Universal Declaration refers, in its preamble,

notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality.

Id.

³ As Jürgen Habermas has recently noted: “Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity.” JÜRGEN HABERMAS, *RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY* 153 (Eduardo Mendieta ed., 2002).

⁴ For a brief overview of the subject of human rights, see James Nickel, *Human Rights*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2003), at <http://plato.stanford.edu/entries/rights-human/>. For a more extended discussion, see JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2d ed. 2004). For historical context, see Kenneth Cmiel, *The Recent History of Human Rights*, 109 *AM. HIST. REV.* 117 (2004).

⁵ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., at 49, U.N. Doc. A/6316 (1966); *International Covenant on Economic, Social and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., at 52, U.N. Doc. A/6316 (1966); *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). The Universal Declaration was adopted and proclaimed by the General Assembly of the United Nations on Dec. 10, 1948. The ICCPR and the ICESCR, which are treaties and as such are binding on the several state parties thereto, were meant, in part, to elaborate the various rights specified in the Universal Declaration. The ICCPR and the ICESCR were each adopted and opened for signature, ratification and accession by the General Assembly of the United Nations on Dec. 16, 1966. The ICESCR entered into force on Jan. 3, 1976, and as of June 2004, has 149 state parties. The ICCPR entered into force on Mar. 23, 1976, and as of June 2004, has 152 state parties. In October 1977, President Jimmy Carter signed both the ICCPR and the

to “the inherent dignity . . . of all members of the human family”⁶ and states, in Article 1, that “[a]ll human beings are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood.”⁷ The two Covenants each refer, in their preambles, to “the inherent dignity . . . of all members of the human family”⁸ and to “the inherent dignity of the human person”—from which, the covenants insist, “the equal and inalienable rights of all members of the human family . . . derive.”⁹ As the International Bill of Rights makes clear, then, the fundamental conviction at the heart of the morality of human rights is this: each and every (born) human being—each and every member of the species *homo sapiens*—has inherent dignity;¹⁰ therefore, no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity.¹¹

ICESCR. Although the United States Senate has not ratified the ICESCR, in September 1992, with the support of President George H. W. Bush, the Senate ratified the ICCPR. The Senate ratified the ICCPR subject to certain “reservations, understandings [and] declarations” that are not relevant here. See 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (statement of Sen. Mitchell). So the United States is a party to the ICCPR but not to the ICESCR.

⁶ *Universal Declaration of Human Rights*, *supra* note 5, pmb. at 71.

⁷ *Id.* art. 1 at 72.

⁸ *International Covenant on Civil and Political Rights*, *supra* note 5, pmb. at 49; *International Covenant on Economic, Social, and Political Rights*, *supra* note 5, pmb. at 52–53.

⁹ *International Covenant on Civil and Political Rights*, *supra* note 5, pmb. at 52–53; *International Covenant on Economic, Social, and Political Rights*, *supra* note 5, pmb. at 49. The relevant wording of the two preambles is as follows:

The State Parties to the present Covenant,

Considering that . . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

.....

Agree upon the following articles:

Id.; see also *International Covenant on Civil and Political Rights*, *supra* note 7, pmb. at 52–53.

¹⁰ Cf. IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES (Robert P. Kraynak & Glenn Tinder eds., 2003); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 15, 25 (2004).

¹¹ The morality of human rights holds not that every human being has inherent dignity, but only that every *born* human being has inherent dignity. I comment on this state of affairs elsewhere in the work of which this essay is a part, in the course of discussing abortion from the perspective of the morality of human rights. Because abortion is not an issue in this essay, I will bracket the born/unborn distinction and

To say that every human being has *inherent* dignity is to say that one's dignity inheres in nothing more particular than one's being a human being;¹² it does not inhere, for example, in one's "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹³ According to the morality of human rights, because every human being has inherent dignity, no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity. The conviction that every human being has inherent dignity—and that therefore no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity—is so fundamental to the morality of human rights that when I say, in this Article, "the morality of human rights," I am referring, unless the context indicates otherwise, to this conviction. For the sake of simplicity, I will say that an action or policy "violates" a human being if the rationale for the action/policy denies that the human being has, or treats her as if she lacks, inherent dignity.

The morality of human rights is one thing, the law of human rights, another. What is the relationship of the former to the latter? How do we get from the morality of human rights to the law (international, transnational, and national) of human rights? What rights—that is, what rights-claims, claims about what one may not do to someone or about what one must do for someone—should we who affirm the morality of human rights, *because we affirm it*, want the law to protect (and seek to have it protect if it doesn't already)?

say simply that according to the morality of human rights, every human being has inherent dignity.

¹² Cf. CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING 1891–PRESENT: A HISTORICAL, THEOLOGICAL, AND ETHICAL ANALYSIS 132 (2002).

Human dignity comes from God's free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God. . . . Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor, young or old; male or female; healthy or sick.

Id.

¹³ The ICCPR, in Article 26, bans "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *International Covenant on Civil and Political Rights*, *supra* note 5, art. 26, at 56.

We who affirm the morality of human rights, *because* we affirm it, should do (i.e., we have good reason to do) what we can, all things considered, to prevent government from violating human beings. That is, we should do what we reasonably can to prevent government from taking actions or pursuing policies that deny that one or more human beings have, or treat them as if they lack, inherent dignity. (“Loosely specified obligations must not be confused with no obligations at all.”)¹⁴ One of the things that we in liberal democracies can do, that we are politically free to do, to prevent governments—our own government as well as other governments—from violating human beings is support laws that forbid, or if enacted would forbid, governments to take actions or pursue policies that violate one or more human beings. This is surely not the only thing we can do,¹⁵ but it is one of the most important things we can do.¹⁶

It would be a mistake, however, to think that we who affirm the morality of human rights should want the law to ban *only* actions/policies that violate (i.e., whose rationales violate) one or more human beings. We should also want the law to ban actions/policies that, even if they (their rationales) do not violate any human being—even if they neither deny that any human being has inherent dignity nor treat any human being as if she lacks it—are nonetheless a source of unwarranted human suffering or other harm.¹⁷ I am referring here to significant human suffering (or other harm), not trivial human suffering. Dietrich Bonhoeffer observed that “[w]e have for once learnt to

¹⁴ Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 341 (2004).

¹⁵ See *id.* at 327–28.

¹⁶ When I say that a government action/policy violates a human being, I mean that the rationale for the action/policy violates a human being; that is, the rationale either denies that one or more human beings have inherent dignity or treats them as if they lack it. What the Nazis did to Jews was embedded in an ideology according to which Jews are pseudohuman; the Nazis denied that Jews have whatever moral status—whatever dignity, whatever worth—true human beings have. (According to the morality of human rights, the moral status that human beings have is inherent dignity.) Whether or not Bosnian Serbs believed that Bosnian Muslims were pseudohuman, Bosnian Serbs certainly treated Bosnian Muslims as if they lacked inherent dignity. How else to understand what Bosnian Serbs did to Bosnian Muslims—humiliation, rape, torture, murder? In that sense, what Bosnian Serbs did to Bosnian Muslims constituted a *practical* denial—an *existential* denial—that Bosnian Muslims have inherent dignity.

¹⁷ I develop this point elsewhere in the work of which this essay is a part.

see the great events of world history from below, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from the perspective of those who suffer.”¹⁸ If we decline to do what we can, all things considered, to diminish unwarranted human suffering (or other harm)—and by “we” I mean here primarily the collective we, as in “We the People,” acting through our elected representatives—we decline to do what we can, all things considered, to protect those who endure that suffering. We thereby fail to respect their inherent dignity; *we violate them by treating them as if they lack inherent dignity*. Primo Levi wrote that once we know how to alleviate torment and don’t, we become tormentors.¹⁹ Martin Luther King, Jr. said: “Man’s inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good.”²⁰ Sometimes it is not, or not only, a government action/policy that violates human beings; sometimes the violation consists in our failure to do what we can, all things considered, to protect human beings from the action/policy.²¹

¹⁸ See Dietrich Bonhoeffer, *After Ten Years: A Letter to the Family and Conspirators*, in *A TESTAMENT TO FREEDOM* 510 (Geoffrey B. Kelly & F. Burton Nelson eds., 1990). Bonhoeffer continues: “This perspective from below must not become the partisan possession of those who are eternally dissatisfied; rather, we must do justice to life in all its dimensions from a higher satisfaction, whose foundation is beyond any talk of ‘from below’ or ‘from above.’” *Id.*

¹⁹ See Eric A. Johnson, *Harm to the “Fabric of Society” as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from Ravin v. State*, 27 SEATTLE U. L. REV. 41, 65–66 (2003).

²⁰ Nicholas D. Kristof, *The American Witness*, N.Y. TIMES, Mar. 2, 2005, at A19 (quoting Martin Luther King, Jr.).

²¹ See *id.*; see also Christopher L. Blakesley, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1112 (2003). What Amartya Sen, borrowing from Immanuel Kant, calls the distinction between “perfect” and “imperfect” duties is relevant here—though I would mark the distinction by different terms: “determinate” and “indeterminate” duties.

[The human right to freedom from torture] includes . . . an affirmation of the need for others to consider what they can reasonably do to secure the freedom from torture for any person. For a would-be torturer, the demand is obviously quite straightforward, to wit, to refrain and desist. The demand takes the clear form of what Immanuel Kant called a perfect obligation. However, for others too (that is, those other than the would-be torturers) there are responsibilities, even though they are less specific and come in the general form of “imperfect obligations” (to invoke another Kantian concept). The perfectly specified demand not to torture anyone is supplemented by the more general, and less exactly specified, requirement

To say, in the present context, that an instance of human suffering is “unwarranted” is to say that the action/policy that is a source of the suffering—that is a cause of the suffering or that fails to intervene to diminish the suffering—is not warranted, that it is not justified. Not justified *from whose perspective?* It is scarcely surprising that the action/policy, and therefore the suffering that it causes, or fails to intervene to diminish, are justified from the perspective of those whose action/policy is in question. But theirs is not the relevant perspective. The relevant perspective belongs to those of us who, in coming face to face with the suffering, must decide what, if anything, to do, or to try to do, about it;²² in making that decision, we must reach our own judgment about whether the suffering is warranted.

This, then, is the relationship of the morality of human rights to the law of human rights; this is how we get from the morality of human rights to the law—more precisely, to what we believe *should be* the law—of human rights: We who affirm the morality of human rights, because we affirm it, should want the law to ban actions/policies that violate any human being or that are otherwise a source of unwarranted human suffering. We should want the law to protect certain rights; we should support laws—we should work to get laws on the books if they are not

to consider the ways and means through which torture can be prevented and then to decide what one should, thus, reasonably do. . . .

Even though recognitions of human rights (with their associated claims and obligations) are ethical affirmations, they need not, by themselves, deliver a complete blueprint for evaluative assessment. An agreement on human rights does involve a firm commitment, to wit, to give reasonable consideration to the duties that follow from that ethical endorsement. But even with agreement on these affirmations, there can still be serious debates, particularly in the case of imperfect obligations, on (i) the ways in which the attention that is owed to human rights should be best paid, (ii) how the different types of human rights should be weighed against each other and their respective demands integrated together, (iii) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on. A theory of human rights can leave room for further discussions, disputations and arguments. The approach of open public reasoning . . . can definitively settle some disputes about coverage and content (including the identification of some clearly sustainable rights and others that would be hard to sustain), but may have to leave others, at least tentatively, unsettled. The admissibility of a domain of continued dispute is no embarrassment to a theory of human rights.

Sen, *supra* note 14, at 321–23 (footnotes omitted).

²² See Johnson, *supra* note 19, at 65–66.

already there, and to keep them there if they are—that (would) protect certain rights (rights-claims): rights not to be subjected to actions/policies that violate human beings or that otherwise are a source of unwarranted human suffering.

There is no doubt that we who affirm the morality of human rights should want the law to protect *a* right to life. (A right to life, in one or another version, is widely regarded as the mother of all human rights.)²³ But *which* right to life? Not every imaginable right to life has precisely the same scope. The particular right at issue in this essay concerns capital punishment: Should we who affirm the morality of human rights want the law to protect human beings from—by giving them a right to be free from—capital punishment? To ask that question is necessarily to ask whether (and if so, why) we should want the law to protect a particular right to life, namely, one that bans capital punishment.²⁴

²³ See, e.g., William P. Clark, *For Reagan, All Life Was Sacred*, N.Y. TIMES, June 11, 2004, at A27 (“[T]here is no cause more important . . . than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning.”) (quoting Ronald Reagan); Bishop Victor Galeone, *A Pro-Choice Catholic Politician?*, 34 ORIGINS 199, 200 (2004) (“[T]he right to life is the foundation of all our other rights. Just as a building without a foundation will ultimately collapse, so too every other right we enjoy will crumble unless buttressed by this most basic right of all.”).

²⁴ A little context never hurts. “As of January 1, 2003, 112 countries had abolished the death penalty in law or practice, and 83 countries retained it.” E. CHRISTIAN BRUGGER, *CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION* 191 n.2 (2003).

Today, all members of the European Union have banned the death penalty. Abolition has been made a prerequisite for EU membership, giving Eastern and Central European nations who desire to join the EU strong incentives to prohibit the practice. In principle and in practice, Western European governments are unequivocally opposed to capital punishment.

Kathryn F. King, *The Death Penalty, Extradition, and the War against Terrorism: U.S. Responses to European Opinion about Capital Punishment*, 9 BUFF. HUM. RTS. L. REV. 161, 171 (2003).

China was responsible for nearly two-thirds of the world’s known executions last year [2003], which totaled at least 1,146 people worldwide, Amnesty International says in a new report released yesterday at a meeting of the U.N. Human Rights Commission in Geneva. . . . China carried out more than 726 known executions, followed by 108 in Iran, 65 in the United States and 64 in Vietnam. These four countries accounted for 84 percent of all executions around the world.

China, Iran, U.S., Vietnam Conducted Most Executions in 2003, U.N. WIRE, April 7, 2004; cf. Eric Neumayer, *The Determinants of Death Penalty Abolition in Global Perspective* (Jan. 2004) (unpublished manuscript, on file with author).

Consider the trajectory of the international law of human rights with respect to capital punishment. The International Bill of Rights is the informal name for three documents, including the Universal Declaration of Human Rights and the ICCPR. The third document—the International Covenant on Economic, Social and Cultural Rights—is not relevant in the context of this essay. Neither the Universal Declaration nor the ICCPR (i.e., the ICCPR as it was adopted in 1966 and entered into force in 1976) articulate the right at issue in this essay: the right not to be executed. (The ICCPR does state, in Article 6, that “[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.”²⁵ It also states that “[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”)²⁶ In 1989, however, the United Nations General Assembly adopted the Second Optional Protocol to the ICCPR, Article 1 of which provides: “1. No one within the jurisdiction of a State Party to the present Protocol shall be executed. 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”²⁷ Article 2 of the Second Optional Protocol permits a State, at the time it ratifies or accedes to the Protocol, to reserve for itself the right to apply “the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.”²⁸

²⁵ *International Covenant on Economic, Social and Cultural Rights*, *supra* note 5, art. 6, at 52.

²⁶ *Id.*

²⁷ G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. 49, at 207, U.N. Doc. A/44/49 (1989).

²⁸ *Id.* As of January 2005, fifty-two states have ratified the Second Optional Protocol, including Australia, Austria, Belgium, Denmark, Germany, Greece, Hungary, Ireland, Italy, Netherlands, New Zealand, Norway, Portugal, Slovakia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland. (Of the listed states, only Greece and Spain entered a reservation under Article 2; Spain subsequently withdrew its reservation.) See Amnesty International, *Ratification of International Treaties*, at <http://web.amnesty.org/pages/deathpenalty-treaties-eng> (last updated Dec. 16, 2004); cf. Eric Neumayer, *Death Penalty Abolition and the Ratification of the Second Optional Protocol 3* (September 2004) (unpublished manuscript, on file with St. John's Law Review), available at <http://www.lse.ac.uk/collectoins/geographyandenvironment/whoswho/profiles/neumayer/pdf/deathpenaltyarticle2.pdf>.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, when it entered into force in 1950, did not articulate a right not to be executed; to the contrary, Article 2(1) of the European Convention stated that “[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”²⁹ In 1982, however, the Council of Europe adopted Protocol No. 6 to the European Convention, Article 1 of which provides: “The death penalty shall be abolished. No one shall be subjected to such penalty or executed.”³⁰ Article 2 provides: “A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war”³¹ Then, in 2002, the Council of Europe went even further by adopting Protocol No. 13 to the European Convention, which provides in relevant part:

Noting that Protocol No. 6 to the Convention . . . does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

. . . .

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.³²

Should we who affirm the morality of human rights also affirm the trajectory marked by the Second Optional Protocol to the ICCPR and Protocol No. 13 to the European Convention?³³

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, Europ. T.S. No. 5.

³⁰ *Id.*

³¹ *Id.* As of December 2004, forty-four states have ratified Protocol No. 6. See Amnesty International, *supra* note 28.

³² *Id.* As of December 2004, twenty-nine states have ratified, and fourteen other states have signed but not yet ratified, Protocol No. 13. See Amnesty International, *supra* note 28.

³³ We should note, too, that the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, adopted by the General Assembly of the Organization of American States in 1990, provides for the total abolition of the death penalty, but allows a state to “reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature,” if the state makes a reservation to that effect at the time it ratifies the Protocol. Organization of American States, *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, art. 2 (1990), available at <http://www.oas.org/juridico/english/Treaties/a-53.htm>. The Protocol “shall enter into

That is, should we want the law, including international law, to protect the right not to be executed?³⁴

There are several reasons to oppose capital punishment, only one of which is that every human being has inherent dignity. (As I explain below, however, to affirm that every human being has inherent dignity is not necessarily to oppose capital punishment.) Other reasons to oppose capital punishment concern the way the system of capital punishment (“the machinery of death,” as Supreme Court Justice Harry Blackmun famously called it)³⁵ functions in one’s society. One may oppose capital punishment because, for example, some innocent persons will be executed,³⁶ or because the poor are more likely to be executed than the rich for the same kind of crime,³⁷ or because those whose victims are white are more likely to be executed than those whose victims are black.³⁸ But for those of us who affirm the morality of human rights—who affirm that every human being has inherent dignity—no question about capital punishment is more fundamental than the question whether we should want the law to ban capital punishment *even if we knew how to construct a perfectly functioning system of capital punishment*: a system in which no innocent person would

force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession with the General Secretariat of the Organization of American States.” *Id.* at art. 4. As of May 2004, there were eight state parties to the Protocol: Brazil (which entered a reservation under Article 2), Costa Rica, Ecuador, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela. Chile has signed but not yet ratified the Protocol.

³⁴ See generally WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2002).

³⁵ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari) (“From this day forward, I no longer shall tinker with the machinery of death.”).

³⁶ See Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587 (2004); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 *OHIO ST. J. CRIM. LAW* 573, 574–75 (2004); cf. Adam Liptak, *Study Suspects Thousands of False Convictions*, *N.Y. TIMES*, April 19, 2004, at A15.

³⁷ See J. Michael Echevarria, *Reflections on O.J. and the Gas Chamber*, 32 *SAN DIEGO L. REV.* 491, 494 (1995).

³⁸ See, e.g., HUGO ADAM BEDAU & PAUL G. CASSELL, *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* (2003); Symposium, *Race to Execution*, 53 *DEPAUL L. REV.* 1403 (2004); Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 *PACE L. REV.* 107 (2003).

be executed,³⁹ the rich would be just as likely to be executed as the poor, those whose victims are black would be just as likely to be executed as those whose victims are white, and so on. Is it necessarily the case that even under a perfectly functioning system of capital punishment, to execute a human being—any human being—is to treat him as if he lacks inherent dignity (and thereby to violate him)?⁴⁰

To say that this is the most fundamental question about capital punishment for those of us who affirm the morality of human rights is not to say that it is the most important question. In the real world, where systems of capital punishment are, and probably always will be, far from perfectly functioning, the most important question is whether these imperfect systems—as distinct from some imaginary perfect systems—are morally tolerable.

I. CAN ONE FORFEIT ONE'S INHERENT DIGNITY?

Whereas the issue of abortion leads us to think about when human beings *acquire* inherent dignity, the issue of capital punishment leads us to think about when, if ever, human beings *forfeit* inherent dignity. To affirm, as some of us do, that only some human beings have inherent dignity—namely, human beings who have not acted in such a way that they have forfeited their inherent dignity—is not to affirm the morality of human rights; it is to affirm *less than* the morality of human rights.⁴¹

³⁹ See Pam Belluck, *Massachusetts Offers Plan for Death Penalty*, N.Y. TIMES, May 3, 2004, at A4.

A commission appointed by [Massachusetts] Gov. Mitt Romney has come up with what it considers the first virtually foolproof formula for [insuring that no innocent person is executed], and Mr. Romney is expected to use the plan to try to bring back capital punishment to the state, where it was abolished two decades ago.

Id.

⁴⁰ I assume—I'm sure we all assume—that it is not morally problematic to punish convicted criminals (some more severely than others, depending mainly on the gravity of the crime and/or the culpability of the criminal), and that it would not be morally problematic to punish them even if there were no deterrent effect. This does not mean, however, that we may punish convicted criminals in any way we choose. Five years for stealing a loaf of bread crosses the line. Torture crosses the line (i.e., torture as criminal punishment, not as a way of getting information that will enable us to save lives). This essay addresses the question whether capital punishment crosses the line. The issue is not whether we are justified in punishing criminals, but whether we are justified in punishing them by killing them.

⁴¹ See *supra* note 12.

Now, even one who believes that human beings can forfeit their inherent dignity by acting in a sufficiently depraved way—indeed, even one who denies that there is such a thing as inherent dignity—can oppose capital punishment, because, as I noted in the preceding paragraph, there are multiple reasons to oppose capital punishment, only one of which is that every human-born being (i.e., at least every born human being) has inherent dignity. Still, one who believes that every human being has inherent dignity has an additional, and fundamental, reason to want the law to ban capital punishment (though, again, to believe that every human being has inherent dignity is not necessarily to oppose capital punishment). Before I develop the point, however, I want to consider whether it makes sense to think that human beings, by acting in a sufficiently depraved way, can forfeit—can alienate themselves from—their inherent dignity.

This question brings us back to an issue I have addressed elsewhere.⁴² What is the ground of the inherent dignity of every human being; why—in virtue of what—does a human being have inherent dignity? Although the International Bill of Rights is silent about the ground of inherent dignity, the Bill says nothing to suggest that our inherent dignity depends on anything we have done or have failed to do. What some of us believe about the ground of inherent dignity leaves no room for the possibility that human beings can forfeit their inherent dignity: We believe that human beings have inherent dignity not because of anything we have done or have failed to do, but because of who we are, namely, beloved children of God and sisters/brothers to one another; moreover, God's love for us does not depend on whether or not we have acted in a depraved way.⁴³

Bear in mind that one who acts in a depraved way may well be one who, from an early age, has had his humanity beaten out of him and his depravity beaten into him. Do we really want to say, in effect, that one can have one's inherent dignity beaten out of him?⁴⁴ And even if one could forfeit one's inherent dignity by

⁴² See Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005).

⁴³ See *supra* note 12.

⁴⁴ My friend and former colleague Ron Wright, an acclaimed expert in criminal justice, wrote in an e-mail message that this

[P]aragraph begins with a red herring—yes, there are people whose nightmarish childhood explains their nightmarish crimes as adults. But

acting in a sufficiently depraved way, presumably one could get it back by acting in a sufficiently repentant way. Even a depraved criminal can be “born again”; indeed, even a depraved criminal can become a saint. So why think that the premise that one can forfeit one’s inherent dignity supports the case for capital punishment? “As I live—declares the Lord Yahweh—I do not take pleasure in the death of the wicked but in the conversion of the wicked who changes his ways and saves his life.”⁴⁵

During the papacy of John Paul II, the Roman Catholic Church became one of the most insistent and influential voices

those cases are tougher for prosecutors to win. The measured proponent of capital punishment would say that a perfectly operating system should reserve the death penalty only for those who demonstrate depravity by committing a crime that was not compelled in some sense by their upbringing. There are plenty of examples.

E-mail from Ronald Wright, to Michael Perry (July 14, 2004) (on file with author).

⁴⁵ *Ezekiel* 33:11 (New American). Jeffrie Murphy writes:

In a letter to Marcellinus, the special delegate of the Emperor Honorius to settle the dispute between Catholics and Donatists, Augustine is concerned with the punishment to be administered for what must have, to him, seemed the most vicious of crimes: the murder of one Catholic priest and the mutilation of another by members of a radical Donatist faction.

JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 109 (2003).

Murphy then quotes from Augustine’s letter:

I have been a prey to the deepest anxiety for fear your Highness might perhaps decree that they be sentenced to the utmost penalty of the law, by suffering a punishment in proportion to their deeds. Therefore, in this letter, I beg you by the faith which you have in Christ and by the mercy of the same Lord Christ, not to do this, not to let it be done under any circumstances. For although we [bishops] can refuse to be held responsible for the death of men who were not manifestly presented for trial on charge of ours, but on the indictment of officers whose duty it is to safeguard the public peace, we yet do not wish that the martyrdom of the servants of God should be avenged by similar suffering, as if by way of retaliation. . . . We do not object to wicked men being deprived of their freedom to do wrong, but we wish it to go just that far, so that, without losing their life or being maimed in any part of their body, they may be restrained by the law from their mad frenzy, guided into the way of peace and sanity, and assigned to some useful work to replace their criminal activities. It is true, this is called a penalty, but who can fail to see that it should be called a benefit rather than a chastisement when violence and cruelty are held in check, but the remedy of repentance is not withheld?

Id. at 110; cf. Albert Camus, *Reflections on the Guillotine*, in ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* 230 (Justin O’Brien trans., Vintage Books 1974) (“We know enough to say that this or that major criminal deserves hard labor for life. But we don’t know enough to decree that he be shorn of his future—in other words, of the chance we all have of making amends.”).

in support of the abolition of capital punishment.⁴⁶ Yet, until relatively recently, the Church taught that one *can* forfeit one's inherent dignity. As E. Christian Brugger notes:

Though the Catholic tradition has always affirmed the absolute immunity of *innocent* human life from intentional attacks and destruction, moral culpability for gravely wrong acts has traditionally been understood to forfeit that status. The tradition is quite clear that the lives of those who deliberately commit serious crimes are *not inviolable* . . . [Thomas] Aquinas says that a grave sinner "falls" from human dignity and may be treated as a beast, Pius XII that a dangerous criminal, "by his crime, . . . has already disposed himself of his *right* to live." In both cases, the life of the malefactor through the malefactor's own deliberate act(s) *becomes* violable.⁴⁷

Brugger then goes on to explain that "[t]his is not the teaching of the [1997] *Catechism [of the Catholic Church]* or of [the pope's 1995 encyclical] *Evangelium Vitae*. In fact, John Paul II emphatically states in the latter that '*Not even a murderer loses his personal dignity*' (no. 9)."⁴⁸ The Church's new position is that we human beings cannot forfeit our inherent dignity, because God's love for us—which is the fundamental ground of our inherent dignity—is unceasing. The Administrative Committee of the United States Conference of Catholic Bishops recently declared "each person's life and dignity must be respected, whether that person is an innocent unborn child in a mother's womb . . . or even whether that person is a convicted criminal on death row."⁴⁹ There is nothing distinctively Roman Catholic—or even Christian—about this position.⁵⁰

⁴⁶ See *infra* note 49.

⁴⁷ BRUGGER, *supra* note 24, at 26 (alteration in original) (footnote omitted). Brugger quotes this passage from Aquinas:

By sinning man departs from the order of reason, and therefore falls away from *human dignity*, insofar as man is naturally free and exists for his own sake, and falls somehow into the slavery of the beasts, so that he may be disposed of according to what is useful to others. . . . Therefore, although it be evil in itself to kill a man who preserves his *human dignity*, nevertheless to kill a man who is a sinner can be good, just as it can be good to kill a beast. . . .

Id. at 173 (alteration in original) (footnote omitted).

⁴⁸ *Id.* at 26–27.

⁴⁹ U.S. Conference of Catholic Bishops' Admin. Comm., *Faithful Citizenship: A Catholic Call to Political Responsibility*, 33 ORIGINS 321, 325 (Oct. 23, 2003).

⁵⁰ According to Michael Lerner, editor of *Tikkun*, Sarah's existential orientation—her love for the Other—is as Jewish as it is Christian:

In any event, the morality of human rights holds that each and every (born) human being has inherent dignity. There is no exception for depraved criminals. From the perspective of the morality of human rights, then, the question is not whether, as U.S. Supreme Court Justice William J. Brennan insisted, “even the vilest criminal remains a human being possessed of common human dignity.”⁵¹ The question, rather, is whether executing a human being under a system, even a perfectly functioning system, of capital punishment necessarily treats him as if he lacks inherent dignity and thereby violates him?⁵² And if the answer is “No, not necessarily,” a further question arises: Should we who affirm that every human being has inherent dignity *nonetheless* want the law to protect the right of every human being not to be executed?

II. INHERENT DIGNITY AND CAPITAL PUNISHMENT: THE “UNCONDITIONALIST” PRINCIPLE⁵³

The Catholic Church now teaches that every human being, innocent or not, has inherent dignity—a dignity that cannot be forfeited and is therefore inalienable; and John Paul II taught that to execute a human being is to fail to respect “the inalienable dignity of human life”; it is to treat him as if he lacks

Jesus’ message of love is . . . an intrinsic part of Torah Judaism . . . It was the Torah, not Jesus, that first taught “Thou shalt love thy neighbor as thyself” and “Thou shalt love the Lord your God with all your heart, with all your soul, and with all your might.” It was this same Judaism that taught a truly revolutionary message: “Thou shalt love the stranger (Hebrew: ger, which might also be translated as “The Other” or “the Powerless one,” based on the follow-up point made in Torah, “Remember that you were a Ger in Egypt” when the Jewish people were enslaved).

Michael Lerner, *Jesus the Jew*, 19 *TIKKUN*, May/June 2004, at 33; cf. RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* xviii-xix (2000) (“[T]he language of love . . . compels us to affirm that even . . . the most radical evil-doers . . . are fully our fellow human beings.”).

⁵¹ *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 273 (1972)).

⁵² Three of seven judges on the Canadian Supreme Court stated in a case that the death penalty “is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity.” *Kindler v. Canada*, [1991] 2 S.C.R. 779, 818.

⁵³ For a magisterial history of western—in particular, Christian—thinking about capital punishment, see JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

inherent dignity.⁵⁴ But is executing a human being necessarily to treat him as if he lacks inherent dignity?

As E. Christian Brugger explains in his recent, important book, *Capital Punishment and Roman Catholic Moral Tradition*,⁵⁵ the Church has long taught that it is morally permissible to choose to do something in order to achieve a good end even if one foresees that one's choice may or even will have the effect of killing a human being, so long as one does not intend one's choice to have that effect.⁵⁶ However, the Church's teaching contains this important proviso:

⁵⁴ Pope John Paul II, *Declaration of the Holy See to the First World Congress on the Death Penalty*, June 21, 2001, at http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20010621_death-penalty_en.html; see also MEGIVERN, *supra* note 53, at 444–46.

In his *Urbi et Orbi* address in December 1998, Pope John Paul II said: "May Christmas help to strengthen and renew, throughout the world, the consensus concerning the need for urgent and adequate measures . . . to end the death penalty." Pope John Paul II, *Illuminating Present World Problems with Bethlehem's Light*, 28 ORIGINS 505, 506 (1999). In January 1999, during a trip to St. Louis, he appealed to Governor Mel Carnahan of Missouri to commute the death sentence of Darrell Mease to life without parole. On January 28, the governor announced he had done what the pope had asked. In the pope's homily at the St. Louis World Dome several days later he said: "I renew the appeal I made most recently at Christmas for a consensus to end the death penalty, which is both cruel and unnecessary." Pope John Paul II, *Homily in the Trans World Dome*, 28 ORIGINS 599, 601 (1999). At an international congress on the death penalty in June 2001, the Holy See stated that it "has consistently sought the abolition of the death penalty and his Holiness John Paul II has personally and indiscriminately appealed on numerous occasions in order that such sentences should be commuted to a lesser punishment." It added, "[i]t is surely more necessary than ever that the inalienable dignity of human life be universally respected and recognized for its immeasurable value." Zenit News Agency, *The Shifting Sands of Capital Punishment: High Profile Cases in Islamic Countries; Changes in U.S.*, Jan. 19, 2002, at <http://www.zenit.org/english/visualizza.phtml?sid=15359>; see also Alessandra Stanley, *Pope, in St. Louis Mass, Urges U.S. Catholics to Oppose Death Penalty*, N.Y. TIMES, Jan. 28, 1999, at A16.

Preaching consistency in moral values, Pope John Paul II today urged America's Roman Catholics to extend the crusade to protect human life to include murderers on death row. "The new evangelization calls for followers of Christ who are unconditionally pro-life," the Pope preached to 100,000 people [in St. Louis]. "Modern society has the means of protecting itself, without definitively denying criminals the chance to reform." He called the death penalty, "cruel and unnecessary," and said it was so "even in the case of someone who has done great evil."

Id.

⁵⁵ BRUGGER, *supra* note 24. Brugger wrote his book under the supervision of John Finnis and Oliver O'Donovan. *Id.* at 5.

⁵⁶ Brugger explains:

The fact that the effect . . . is unintended . . . does not by itself guarantee a morally good act. . . . [O]ne's acceptance of side effects is subject to another moral principle, namely, the principle of proportionality: an unintended lethal act of self-defense is still wrong 'if it is not proportionate to its end' (i.e., if more violence than necessary is used to bring about the good end of rendering the aggressor incapable of committing harm).⁵⁷

For example, one may choose to fire a gun at someone who is unjustly attacking one's life, or someone else's life, even though one foresees that this choice may well result not merely in disabling the attacker but in killing him. (The attacker may or may not be morally blameworthy; e.g., he may be psychotic.) The important thing, for the Church, is that in firing one's gun, one intends only to disable the attacker, not to kill him.

The Church has long taught that it is always morally forbidden to kill an *innocent* human being intentionally.⁵⁸ Why did John Paul II seem to go further and teach that it is always morally forbidden to kill *any* human being, innocent or not, intentionally?⁵⁹ Brugger has explained that to kill someone

What is the morally relevant basis for distinguishing between what one intends and what one merely foresees? . . . Intention is an act of the will whereby some good or apparent good is chosen in response to reason moving it to act. Since the will is a rational appetite, what one intends is what one desires, or what one endeavors to have, be, or bring about; we might say it is what one sets one's heart upon, what one seeks to possess, or rest in. A foreseen effect that lies outside one's intention is not absent from one's deliberations, but is not what one directly commits oneself to when acting; it is not for that effect's sake that one chooses to act. The two effects stand in a different relationship to the will of the actor. To be sure, in foreseeing such a state of affairs resulting from one's freely chosen action, one is willing to do an act which brings about those states of affairs. In intending action *x* with consequence *y*, I consent to bring about *y* (i.e., I choose a *y*-bringing-about action). But I have no commitment to *y*, no morally relevant interest in bringing about *y*, and no morally relevant desire to see *y* happen.

Id. at 184–85 (footnotes omitted).

⁵⁷ *Id.* at 185 (footnote omitted).

⁵⁸ Cristina L.H. Traina, *Religious Perspectives on Assisted Suicide*, 88 J. CRIM. L. & CRIMINOLOGY 1147, 1148–49 (1998).

⁵⁹ According to Brugger, this teaching is now the *emergent* position of the magisterium of the Roman Catholic Church, although the 1997 *Catechism of the Catholic Church* does not state this teaching. See generally BRUGGER, *supra* note 24, at 9–37; see also E. Christian Brugger, *Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment*, 115 FIRST THINGS 7, 7–8 (August/September 2001).

The new framework [of the 1997 *Catechism of the Catholic Church*] is laying a theoretical foundation for a change (not “development” precisely

intentionally is necessarily to want to kill him⁶⁰ (though it is *not* necessarily to want to be in the situation in which one feels constrained to want to kill him), and to want to kill a human being, no matter what “beneficial states of affairs [killing him] promises, . . . is *contrary to the charity we are bound to have for all.*”⁶¹ By contrast, to kill someone with foresight but not intent is not necessarily to want to kill him; indeed, it may be that one would rejoice if one’s action did not result in killing anyone, even if it is virtually inevitable that one’s action will yield death.⁶²

So, according to John Paul II, as interpreted by Brugger, one may never kill a human being intentionally: “[T]he intentional destruction of a person’s life” is necessarily a failure of love; it is necessarily “contrary to the charity we are bound to have for all”; as such, it is necessarily a failure to respect “the inalienable dignity of human life.”⁶³ To respect the inalienable dignity of a human being—to treat a human being as if he *has* inherent dignity, not as if he *lacks* it—is to treat him lovingly; to fail to treat him lovingly—to act “contrary to the charity we are bound to have for all”—is to fail to respect his inherent dignity. (“[W]hereas ‘Thou shalt love thy neighbour as thyself’ represents the Greek of the Septuagint (Leviticus 19:18) and of the New Testament, the Hebrew from which the former is derived means rather ‘You shall treat your neighbor lovingly, for he is like yourself.’”)⁶⁴ Because to execute a human being is necessarily to kill him intentionally, one may never execute a human being. For government to execute a human being is necessarily for it to treat him as if he lacks inherent dignity. According to this “unconditionalist” principle, there are *no* conditions in which it is morally permissible to execute a human being—or, more generally, to kill a human being intentionally. The moral

understood) in the Church’s teaching on the death penalty that would at minimum state that the exigencies of retribution (i.e., of the need to redress the disorder introduced by the criminal’s crime) [do not justify] the inflicting of capital punishment. That is to say, death as a *punishment* is never legitimate.

Id.

⁶⁰ See *supra* note 56.

⁶¹ BRUGGER, *supra* note 24, at 173. For a development of the point, see E. Christian Brugger, *Aquinas and Capital Punishment: The Plausibility of the Traditional Argument*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 357 (2004).

⁶² See *supra* note 56.

⁶³ See BRUGGER, *supra* note 24, at 173, 193.

⁶⁴ J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 243 (1977).

impermissibility of such action is unconditional: No matter what conditions obtain—even if, for example, in a particular society capital punishment has been shown to have a significant deterrent effect—to kill a human being intentionally is beyond the moral pale.

Should we who affirm the morality of human rights accept the unconditionalist principle that to kill a human being intentionally—*any* human being, innocent or not—is always and everywhere a failure of love and therefore a failure to respect the inherent dignity of the victim? Whether Brugger is correct in attributing this principle to John Paul II is not important for present purposes. My concern here is not with Brugger's attribution, but with the principle itself.⁶⁵ I want to test the principle by means of the following three hypotheticals.

Hypothetical #1: I am a human rights activist in a country in the grip of a brutal dictator. My five-year-old daughter and I have been kidnapped by a paramilitary squad that is doing the dictator's bidding. I know that tomorrow morning, as I am forced to watch, my child will be raped, tortured, and murdered, and then I will be tortured and murdered. The only way I can spare my child, who is now sleeping beside me, this horrific fate

⁶⁵ I do believe, however, that Brugger's attribution is accurate. So, apparently, do the U.S. Catholic bishops. In November 2000, in a statement titled "Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice," the U.S. Catholic bishops wrote:

We are guided by the paradoxical Catholic teaching on crime and punishment: We will not tolerate the crime and violence that threaten the lives and dignity of our sisters and brothers, *and we will not give up on those who have lost their way*. We seek both justice and mercy.

U.S. Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* 22 (2000) (emphasis added). During Lent of 2004, 45 U.S. Catholic bishops from 12 southern states issued a statement of their own, in which they declared that:

A Catholic approach never gives up on those who violate laws. We believe that both victims and offenders are children of God. Despite their very different claims on society, their lives and dignity should be protected and respected. We seek justice, not vengeance. We believe punishment must have clear purposes: protecting society and rehabilitating those who violate the law.

Southern U.S. Bishops, *Toward Restorative, Not Retributive, Criminal Justice*, 34 ORIGINS 63 (2004). If Brugger's attribution is correct, and if John Paul II were to deem this principle "irreformable" or "infallible," cf. BRUGGER, *supra* note 24, at 141–63, Antonin Scalia would have to resign from the Supreme Court—or so he says. See Antonin Scalia, *God's Justice and Ours*, 123 FIRST THINGS 17, 17–18 (May 2002); see also Antonin Scalia and His Critics: *An Exchange on the Church, the Courts, and the Death Penalty*, 126 FIRST THINGS 8, 9 (October 2002).

is by killing her tonight, quickly and painlessly. If I choose to kill her, would I be treating my child as if she lacks inherent dignity? Of course not. If I choose to kill my daughter, I would be doing so because she is infinitely precious to me; I love my daughter more than life itself. To insist that if I choose to kill my daughter, I would be treating her as if she lacks inherent dignity is, in a word, ridiculous. Therefore, the claim that to kill a human being intentionally is necessarily to treat him as if he lacks inherent dignity—and thereby to violate him—is implausible. To say that in killing my daughter intentionally I would not be treating her as if she lacks inherent dignity is not to say that in choosing not to kill her, I would be treating her as if she lacks inherent dignity, or even that, all things considered, I should kill her. It is just to say that in killing her intentionally so as to spare her the horrible fate that awaits her in the morning, I would not be treating her as if she lacks inherent dignity; I would not be violating her.

Hypothetical #1, which is a counterexample to the unconditionalist claim that to kill a human being intentionally is necessarily to treat him as if he lacks inherent dignity, may lead one to revise the claim, so that it now states: To kill a human being intentionally, *not for his own sake but for the sake of another*, is necessarily to treat him as if he lacks inherent dignity. This revised claim is not only more plausible than the original claim. (It is one thing to use someone as a means—an instrument—to an end that is good *for someone else*; it is another thing to use someone as a means to an end that is good *for them*.) The revised claim is also sufficient to vindicate the position on the death penalty that Brugger attributes to John Paul II, because to execute a human being is not to kill him for his own sake. Should we accept the revised claim? This brings us to the second hypothetical.

Hypothetical #2: I am the commander of a military force fighting a just war against the brutal dictator in Hypothetical #1. It is imperative that we destroy the enemy's principal munitions factory; if we succeed, the end of the war will be in sight. I face a choice. A new, more powerful bomb has just been added to our arsenal; I can order my pilots to drop this bomb on the factory. However, the dictator has arranged for about 1000 people—mainly the factory workers, most of whom are forced to work in the factory, and their families—to live in close proximity

to the factory, so as to deter us from bombing it. I foresee (but do not intend) that if we drop the bomb on the factory, the bomb and the secondary explosions will kill virtually all 1000 people, including the factory manager, his wife, and their children. Alternatively, I can send a special operations unit to infiltrate and destroy the factory. I am attracted to this option, even though it is more risky, because if all goes as planned, as few as 100 of the 1000 people would be killed, whereas under the first option, virtually all 1000 would be killed. For various reasons, however, the only plan that stands a realistic chance of succeeding involves invading the factory manager's home while he and his family are sleeping, threatening to kill the members of his family one by one unless he cooperates, and, if necessary, actually killing a member of his family to demonstrate that the threat is real. (Pretending to kill a member of his family won't work.) According to the revised claim, in killing a member of the factory manager's family intentionally, I would be treating the victim—his wife, for example—as if she lacks inherent dignity, because I would not be killing her for her own sake. But is it plausible to think that in killing her intentionally, I would be treating her as if she lacks inherent dignity?

It is easy to see that making a person die rather than live so that you can achieve some goal, however worthy, is using him as a means to your end. But it is extremely difficult to see how causing a person to die by one means rather than causing him to die by another, *in cases where it is permissible to cause the death by the first means . . .* is using him as a means, or failing to respect him as an end.⁶⁶

After reflection, I choose the second option; I choose, that is, intentionally causing the death of a member of the factory manager's family rather than merely foreseeably causing it, in a context in which (1) the foreseeably-killing-her option is morally legitimate, (2) she is going to die—she is going to be killed—no matter which of the two options I choose, and (3) the intentionally-killing-her option is significantly better than the foreseeably-killing-her option in terms of minimizing the loss of human life.

⁶⁶ DAVID BOONIN, A DEFENSE OF ABORTION 223 (2003) (emphasis added). Hypothetical #2 was inspired by a hypothetical in Boonin's book. *See id.* at 222–27.

While [the great Christian ethicist Paul Ramsey] was committed to an absolute prohibition against murder as the intentional killing of innocent life, he was prepared to attach two *exempting conditions* to it. One *may* directly kill when (1) the innocent will die in any case and (2) other innocent life will be saved.⁶⁷

This second hypothetical—which, like the first one, is a counterexample to the claim that to kill a human being intentionally is necessarily to treat him as if he lacks inherent dignity—may, like the first one, lead one to further revise the claim, so that it now states: To kill a human being intentionally, not for his own sake but for the sake of another, *in a context other than one in which he is going to be killed no matter which option is chosen and the intentionally-killing-him option is significantly better than the foreseeably-killing-him option in terms of achieving a morally legitimate objective*, is necessarily to treat him as if he lacks inherent dignity. This further revised claim is not only more plausible than the original claim; it is also sufficient to vindicate the position on the death penalty that Brugger attributes to John Paul II: To execute a human being is not to choose intentionally-killing-him over foreseeably-killing-him in a context in which he is going to be killed no matter which option is chosen. Should we accept the further revised claim? This brings us to the third and final hypothetical.

Hypothetical #3: I am the President of the United States. I have just been informed that a group of terrorists has planted a nuclear bomb in the middle of New York City, and only they know where the bomb is located. The bomb will explode in two hours, killing millions of people, unless I (through those who will obey my orders) kill, within the next hour, someone, X, in the protective custody of the United States whom the terrorists desperately want dead. (X is being held in a secret location thousands of miles from New York City.) There is no way to fool the terrorists, and every reason to believe that they will keep their word. According to the further revised claim, in acceding to the terrorists' demand, I would be treating X as if he lacks inherent dignity, because I would neither be killing X for his own sake nor choosing intentionally-killing-X over foreseeably-

⁶⁷ Gene Outka, *The Ethics of Human Stem Cell Research*, in GOD AND THE EMBRYO: RELIGIOUS VOICES ON STEM CELLS AND CLONING 29, 46 (Brent Waters & Ronald Cole-Turner eds., 2003) (footnote omitted).

killing-X in a context in which X is going to be killed no matter which option is chosen. But is it plausible to think that in acceding to the terrorists' demand, I would be treating X as if he lacks inherent dignity?

Now we have arrived at the heart of the matter. Let's assume that in the pursuit of a particular objective—saving the lives of millions of people, for example—Y may, if necessary, act in such a way that he foreseeably (but not intentionally) kills Z. That is, let's assume that in doing so, Y does not treat Z as if Z lacks inherent dignity. Now, a different scenario: If Y is to achieve the same objective, Y must kill Z intentionally. Why should we believe that in the second scenario, but not in the first, Y, in killing Z, would be treating Z as if Z lacks inherent dignity? The only possibly relevant difference I can discern is this: In the first scenario, in which Y foreseeably (but not intentionally) kills Z, Y does not want to kill Z, whereas in the second scenario, in which Y intentionally kills Z, Y necessarily wants to kill Z (because, again, to intend to bring about a state of affairs is necessarily to want to bring it about). But why should this difference, in and of itself, be determinative? After all, (1) Y wants to achieve the same compelling objective in each scenario, and it is no less true in the second scenario than in the first that (2) if Y chooses to act to achieve the objective, Y's act kills Z and (3) Y does not desire Z's death as an end in itself but only because the objective cannot be achieved without killing Z; indeed, Y passionately desires that the objective could be achieved without Z's having to die.⁶⁸ Recall John Paul II's claim, per Brugger, that intentionally killing a human being, no matter what "beneficial states of affairs it promises, is in itself wrong, because, as the intentional destruction of a person's life, it is contrary to the charity we are bound to have for all."⁶⁹ It is far from clear, however, why in the second scenario, but not in the first, for Y to kill Z in the course of acting to achieve the objective would be for Y to act "contrary to the charity that we are bound to have for all"—why it would be for Y to treat Z as if Z lacks inherent dignity. Y is caught in the unbreakable grip of a tragic conflict; he has an opportunity to prevent a disaster of truly

⁶⁸ See H. David Baer, *Proportionalism Defended*, 143 *FIRST THINGS* 3, 4 (May 1994).

⁶⁹ BRUGGER, *supra* note 24, at 173; see also *supra* note 61 and accompanying text.

catastrophic—even holocaustal—proportions. To insist that in the second scenario, but not in the first, we know that for Y to kill Z is necessarily for Y to treat Z as if Z lacks inherent dignity is implausible. What if Y would choose to kill Z even if Z were someone Y loves dearly? What if Y would readily kill himself rather than Z if doing so would achieve the objective?

Because it yields counterintuitive results in some imaginable cases, the unconditionalist principle—that there are *no* conditions in which it is morally permissible to execute a human being, or, more generally, to kill a human being intentionally—is, at best, a problematic basis for arguing that the law should protect the right of every human being not to be executed.⁷⁰ Though less so, each of the two principles I've articulated in this section as more plausible alternatives to the unconditionalist principle is still problematic.⁷¹

III. INHERENT DIGNITY AND CAPITAL PUNISHMENT: THE “CONDITIONALIST” APPROACH

One may want to argue that in punishing a convicted criminal, government is acting partly for the criminal's own sake—treating him as a responsible, accountable human being

⁷⁰ According to Charles Fried, “[W]e can imagine extreme cases where killing an innocent person may save a whole nation. In such cases it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall.” CHARLES FRIED, *RIGHT AND WRONG* 10 (1978). By contrast, John Finnis has written:

There are hard cases, as everybody knows. The prospect . . . of damage apparently avertable by violating the moral absolute, can seem indubitable and be felt as overwhelming. But these are cases in which we do not see the relevant parts of the scheme of providence—a scheme of which we never, in this life, see the whole or even much. . . . To deny the truth of moral absolutes . . . is incoherent with faith in divine providence. . . . [T]o respect the moral absolutes which are made known to us by God through reason and faith is to cooperate with God, who has practical knowledge of everything without limit.

JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 12, 20 (1991). Those of us who cannot accept Finnis' theology of providence will likely side with Fried in this dispute.

⁷¹ Alternative #1: To kill a human being intentionally *not for his own sake but for the sake of someone else* is always to violate him. Alternative #2: To kill a human being intentionally *not for his own sake but for the sake of someone else, in a context other than one in which he is going to be killed no matter which option is chosen and the intentionally-killing-him option is significantly better than the foreseeably-killing-him option in terms of achieving a morally legitimate objective*, is always to violate him.

and also trying to rehabilitate him. (Of course, depending on prison conditions, etc., government may not really be trying, or trying very hard, to rehabilitate.) But in punishing a convicted criminal by killing him, government is not acting even partly for the criminal's own sake.⁷² Nor is government choosing intentionally-killing-him over foreseeably-killing-him in a context in which the criminal will be killed no matter which option is chosen. Nor is executing a convicted criminal necessary to prevent a catastrophe, like the deaths of millions of people. What, then, if anything, justifies maintaining a system—even a perfectly functioning system—of capital punishment? What, if anything, justifies executing human beings? To maintain a system of capital punishment without a sufficiently weighty justification for doing so is to treat those who are killed under the system as if they lack inherent dignity, as if they are what Thomas Aquinas believed some criminals to be: “fall[en] away from *human dignity*, . . . fall[en] somehow into the slavery of the beasts, so that [they] may be disposed of according to what is useful to others.”⁷³ Is there a sufficiently weighty justification for maintaining a system of capital punishment?

According to the Catholic Church, no modern society need execute a convicted criminal in order to protect itself from him; section 2267 of the 1997 *Catechism of the Catholic Church* states, in relevant part:

Today, . . . as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming

⁷² Even if it happens to be the case that the criminal *wants* to die, that is not why government is executing him.

Jeffrie Murphy called to my attention, in discussion, the (Kantian?) argument that one respects the human being by giving him the punishment he deserves—and disrespects him by failing to do so. If Jack deserves the death penalty, therefore, one respects Jack by giving it to him—and disrespects Jack by failing to do so. But, of course, the question is whether Jack or anyone *does* deserve the death penalty. To argue that in punishing a convicted criminal by killing him, government is acting partly for the criminal's own sake—government is respecting him by giving him the punishment he deserves—is to beg the question: Does anyone “deserve” the death penalty?

⁷³ See BRUGGER, *supra* note 24, at 173 (quoting Aquinas); see also Brugger, *Aquinas and Capital Punishment: The Plausibility of the Traditional Argument*, *supra* note 60, at 365–66.

himself—the cases in which the execution of the offender is an absolute necessity “are . . . practically non-existent.”⁷⁴

The Church’s position on this point seems right. But, still, even a modern society may need to execute some convicted criminals in order to protect itself, not from *those* criminals, but from some *other* criminals, or from some would-be criminals. That is, capital punishment might have a deterrent effect; at least, it might have a deterrent effect in *some* societies.

And, indeed, recent economic studies indicate that in the United States, capital punishment does have a deterrent effect.⁷⁵ In one study, for example, the three co-authors—one of whom is my Emory colleague, economist Joanna Shepherd—conclude “that capital punishment has a strong deterrent effect; each execution results, on average, in 18 fewer murders—with a margin of error of plus or minus 10. Tests show that results are not driven by tougher sentencing laws, and are also robust to many alternative specifications.”⁷⁶ Now, I am not competent either to vouch for or to challenge the conclusion that Professor Shepherd and her colleagues have reached. I do want to emphasize that it remains a matter of great controversy not only whether capital punishment in the United States has a deterrent effect,⁷⁷ but also whether, given the limited data available, we can know whether it does.⁷⁸ And, indeed, in a more recent paper, Professor Shepherd reaches a more nuanced conclusion: that in the United States, “[e]xecutions deter murders in six states and have no effect on murders in eight states. In thirteen states, executions *increase* murders—what I call the ‘brutalization

⁷⁴ See BRUGGER, *supra* note 24, at 9–37 (quoting JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* (1995)).

⁷⁵ For a compilation of recent studies, along with abstracts, see Criminal Justice Legal Foundation, *Articles on Death Penalty Deterrence*, at <http://www.cjlf.org/deathpenalty/DPDeterrence.htm> (last visited Feb. 16, 2005).

⁷⁶ The quoted language is from the abstract of the article: Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003).

⁷⁷ See, e.g., Rudolph J. Gerber, *Economic and Historical Implications for Capital Punishment Deterrence*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 437, 437–38 (2004).

⁷⁸ See Richard Berk, *New Claims about Executions and General Deterrence: Deja Vu All Over Again?*, J. EMPIRICAL LEGAL STUD. (forthcoming), available at <http://preprints.stats.ucla.edu/396/JELS.pap.pdf>. Richard Berk is a professor in the UCLA Department of Statistics.

effect.”⁷⁹ Nonetheless, I will assume, for the sake of discussion, that capital punishment in the United States has a deterrent effect of the magnitude that Professor Shepherd and her colleagues suggest, because this assumption brings to the fore a fundamental question about the legitimacy of capital punishment. There is surely no more compelling warrant for maintaining a system of capital punishment than the system’s deterrent effect: If a deterrent effect of the magnitude that Professor Shepherd and her co-authors suggest—if keeping 18 people (plus or minus ten) from being murdered—does not warrant maintaining a system of capital punishment, then nothing (other than, perhaps, a much larger deterrent effect) can warrant maintaining a system of capital punishment. Does a deterrent effect of that magnitude warrant maintaining a system of capital punishment?

I don’t know how to go about answering that question—except indirectly. Consider, then, these three questions:

- 1) In Hypothetical #3, would saving the lives not of millions of people but of 18 hostages warrant the president’s killing X?
- 2) If a system of torture-plus-capital-punishment would deter 36 murders per execution—twice the number that, according to Professor Shepherd and her co-authors,

⁷⁹ Joanna M. Shepherd, *Deterrence versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. (forthcoming 2005) (manuscript at 1, on file with author) (emphasis omitted).

In general, the states that have executed more than nine people in the last twenty years experience deterrence. In states that have not reached this threshold, executions generally increase murders or have no significant impact. On average across the U.S., executions deter crime because the states with deterrence execute many more people than do the states without it. The results of this paper help to explain the contrasting conclusions of earlier papers: whether deterrence exists depends on which states are examined. My results have three important policy implications. First, if deterrence is the objective, then capital punishment generally succeeds in the few states with many executions. Second, the many states with numbers of executions below the threshold may be executing people needlessly. Indeed, instead of deterring crime, the executions may be inducing additional murders: a rough total estimate is that, in the many states where executions induce murders rather than deter them, executions cause an additional 250 murders per year. Third, to achieve deterrence, states must generally execute many people. If a state is unwilling to establish such a large execution program, it should consider abandoning capital punishment.

capital punishment alone deters per execution—would that warrant establishing a system of torture-plus-capital punishment?⁸⁰

3) Does a deterrent effect of the magnitude that Professor Sheperd and her co-authors suggest warrant maintaining a system of capital punishment?

There is no algorithm—at least, I know of none—for determining what number of savable lives is large enough to warrant the intentional killing of a human being, but if we answer, or are inclined to answer, “No” to the first two questions just posed, why wouldn’t we answer, or be inclined to answer, “No” to the third question as well? In June 2001, at an international conference on the death penalty, the Holy See of the Catholic Church stated that “[i]t is surely more necessary than ever that the inalienable dignity of human life be universally respected and recognized for its immeasurable value.”⁸¹ If one answers “No” to the first two questions and “Yes” to the third, is it plausible to claim that one recognizes “for its immeasurable value,” and respects, “the inalienable dignity” of those who will be executed under a system of capital punishment?

The United States Congress has authorized, at least partly for deterrent purposes, the execution of some convicted criminals even as it declines to make other choices that would save lives—the choice, for example, to impose stricter automobile safety regulations, which would save the lives of tens of thousands of people. Is it plausible, then, to claim that the Congress is treating those who will be executed as if they possess “the inalienable dignity” of which the Holy See, following the lead of John Paul II, speaks? We can ask much the same question about any state legislature that maintains a system of capital punishment even as it declines to make other life-saving choices—for example, to ban secondhand smoke in public places, which research suggests would save many lives.⁸²

⁸⁰ See Henry Schwarzschild, *Reflections on Capital Punishment*, 25 ISRAEL L. REV. 505, 508 (1991).

⁸¹ BRUGGER, *supra* note 24, at 191–92 (citation omitted).

⁸² See Sanjay Gupta, *A Montana Ordinance Has a Surprising Effect—and Triggers a CDC Warning*, TIME, May 10, 2004, at 82 (reporting that the Centers for Disease Control estimate that in the United States, “secondhand smoke causes 35,000 deaths a year from heart disease—a figure some experts believe will have to be revised upward”).

Again, there is no algorithm for determining what number of savable lives is large enough to warrant the intentional killing of a human being. There is, however, a crucial question—a counterfactual question—for anyone who affirms that every human being has inherent dignity and who must decide whether intentionally to kill one human being, A, or whether to authorize someone else to kill A, in order to save the lives of a number of others: “If someone I love dearly—my child, for example—were in the position that A is in, would I want my child to be killed in order to save those lives?” (A may be a convicted murderer under a sentence of death, for example, or A may be the person that the terrorists in Hypothetical #3 want the president of the United States to kill.) If the answer is “No,” it seems fair to suspect that intentionally killing A would be a failure of love, but if the answer is “Yes,” it seems doubtful that intentionally killing A would be a failure of love, that it would treat A as if he lacks inherent dignity. Of course, to allow that intentionally killing A would not be a failure of love, that it would not treat A as if he lacks inherent dignity, is not to deny that killing A would be, all things considered, tragic—even, perhaps, tragically misguided.

* * *

Those who affirm the morality of human rights and accept the unconditionalist principle that to kill someone intentionally is necessarily to treat him as if he lacks inherent dignity and thereby to violate him, have reason to want the law to protect the right not to be executed. As do those who affirm the morality of human rights and accept either of the two alternative principles I articulated in the preceding section.⁸³ But, again, some of us who affirm the morality of human rights can accept neither the unconditionalist principle nor either of the two alternatives. What reason do we who fit that profile have for wanting the law to protect the right not to be executed?

Earlier, I asked whether subjecting a human being to capital punishment, even under a perfectly functioning system of capital punishment, is necessarily to treat him as if he lacks inherent dignity and thereby to violate him. “Necessarily” is a strong word. Assume—though it may strain credulity to do so—that the policymakers who choose to maintain, rather than to abolish,

⁸³ See *supra* Section II.

a system of capital punishment do so because, even though they sincerely believe that even the most depraved criminal has inherent dignity, they also sincerely believe that system's deterrent effect *is* great enough to warrant maintaining the system. Shouldn't we then conclude that the policymakers—even if their sincere belief that the system's deterrent effect is great enough to warrant maintaining the system is, by our lights, wrong—are not treating those who will be executed under the system as if they lack inherent dignity—and, therefore, are not violating them?

But what practical difference should it make if the policymakers are not violating those who are executed under the system? None that I can see. As I explained earlier in this essay, we who affirm the morality of human rights should want the law to ban not only actions/policies that violate human beings, by denying that they have, or by otherwise treating them as if they lack, inherent dignity. We should also want the law to ban actions/policies that, even if they do not violate human beings, are nonetheless a source of unwarranted human suffering (or other harm). Again, if we decline to do what we can, all things considered, to diminish unwarranted human suffering, we decline to do what we can, all things considered, to protect those who endure that suffering. We thereby fail to respect their inherent dignity; we violate them by treating them as if they lack inherent dignity. As I noted earlier, sometimes it is not, or not only, a misbegotten government action/policy that violates human beings; sometimes the violation consists in our collective failure to do what we can, all things considered, to protect human beings from the action/policy.

Again, to say that the suffering of human beings is “unwarranted” is to say that the action/policy that causes the suffering, or that fails to intervene to diminish it, is not warranted, that it is not justified, from the perspective of those of us who, in confronting the suffering, must decide what, if anything, to do, or to try to do, about it; in making that decision, we must reach our own judgment about whether the action/policy that is the immediate cause of the suffering—here, a system, *any* system, of capital punishment—is warranted. Therefore, if we—we who affirm the radical, outlandish, subversive teaching that every human being, even the most

depraved criminal, has inherent dignity⁸⁴—conclude that no system of capital punishment is warranted, is justified, by its deterrent effect (*if* it has a deterrent effect), we should affirm the trajectory marked by the Second Optional Protocol to the ICCPR (1989) and Protocol No. 13 to the European Convention (2002). We should want the law to protect the right not to be executed. Of course, if we conclude—contrary to what we've been assuming here for the sake of discussion—that capital punishment has no (or no significant) deterrent effect, we have that reason for wanting the law to ban capital punishment.

Another reason for opposing capital punishment merits mention here: Contrary to what we have been assuming in this chapter, it is difficult to see how systems of capital punishment, which do not function even close to perfectly, can be made—reformed—to do so.

The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defense, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may . . . affect any case that comes before the courts, and is almost certainly present to some degree in all court systems. . . . Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment.⁸⁵

This is a weighty reason to be concerned about the justice of relying on capital punishment, even if we assume for the sake of discussion that the death penalty has, or may have, some deterrent effect.⁸⁶

⁸⁴ Cf. GRAHAM GREENE, *THE POWER AND THE GLORY* 169–70 (1940).

When you visualized a man or a woman carefully, you could always begin to feel pity . . . [W]hen you saw the lines at the corners of the eyes, the shape of the mouth, how the hair grew, it was impossible to hate. Hate was just a failure of imagination.

Id.

⁸⁵ This statement was made in 1995 by the president of the Constitutional Court of the Republic of South Africa. *State v. Makwanyane*, Constitutional Court of the Republic of South Africa, 1995, Case No. CCT/3/94, [1995] 1 LRC 269.

⁸⁶ See Marshall, *supra* note 36, at 576.

A new group of abolitionists is emerging. These new abolitionists are not particularly interested in the philosophical, theoretical, or theological debate about the propriety of capital punishment. Rather, they have concluded that regardless of whether one believes that the government has

the right to take life as an abstract matter, one cannot support the death penalty given the practical issues surrounding the unfairness and inaccuracy of its implementation.

Id.

