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1-1-2001

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#### Recommended Citation

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# Why Do People Support Capital Punishment? The Death Penalty as Community Ritual

DONALD L. BESCHLE\*

## INTRODUCTION

Public attitudes toward capital punishment have been on something of a roller coaster ride in recent decades. After reaching historic lows in the 1960s, support for the death penalty skyrocketed to the point where, in 1988, Governor Michael Dukakis critically wounded his presidential campaign when he failed to voice support for capital punishment during a televised debate. Since then, no national candidate has made the same mistake.

But in recent years, as Ronald Tabak demonstrates, at least partly due to the ability to demonstrate the actual innocence of some on death row, support for the death penalty, though still commanding a majority nationwide, is trending down.<sup>1</sup> Death penalty opponents, while not abandoning hope of completely abolishing capital punishment, have focused on the short term goals of the moratorium movement. How successful is this movement likely to be, either in its short-term goals, or as a step toward complete renunciation of the death penalty? Any answer to that question will require that we explore the reasons that death penalty supporters have for their position. Does capital punishment meet some genuine social need in the United States, and if it does, how, if at all, can that need be satisfied in the absence of the death penalty? An exploration of these questions may lead us in some surprising directions.

## I. WHY DO PEOPLE SUPPORT CAPITAL PUNISHMENT? SOME STANDARD ANSWERS

Ronald Tabak reminds us that the abolition or retention of capital pun-

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1. See generally Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733 (2001).

ishment is primarily a political issue; he does not spend time dwelling on the Eighth Amendment prohibition of cruel and unusual punishment.<sup>2</sup> This is surely the pragmatic thing to do; the likelihood that the Supreme Court will ban the practice in the foreseeable future is essentially nonexistent.<sup>3</sup> To be sure, there will be courtroom battles, but these are likely to be successful only in refining the procedural requirements necessary to satisfy the Due Process Clause.<sup>4</sup> And ultimately, the most significant impact of these cases will likely prove to be their impact on public opinion rather than the black letter law that they produce.

Political issues will be resolved by the political branches of government, acting with at least one eye focused on public opinion. Polls indicate that public support for the death penalty is at its lowest point in decades,<sup>5</sup> but capital punishment retains the support of about two thirds of Americans.<sup>6</sup> How should an abolitionist deal with this persistent majority favoring retention?

One way to deal with opponents, particularly on emotionally charged issues, is to see them as either ignorant, acting in bad faith, or operating from base motives. But this will rarely succeed in winning converts; those acting in bad faith or out of bad motives are probably immune to counter-argument, and treating opponents as entirely ignorant leads to condescension, which is not the best way to change minds. An alternative approach requires us to take our opponents much more seriously, especially where their views command widespread support. For the most part, people are not drawn to beliefs or policies that they themselves regard as false, useless, or socially destructive. A sophisticated theologian will realize that popular acceptance of even the most distasteful heresy indicates that in some way it addresses a real, felt need, and that the way to counter it is not merely through denunciation, but an attempt to understand and respond to

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2. See generally *id.*

3. See *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court invalidated then-existing death penalty statutes, but three of the five justices in the majority did not object to capital punishment per se, merely to the arbitrary way in which those statutes determined who would be executed. *Id.* at 241, 308-11. Four years later, in *Gregg v. Georgia*, the Court approved a statute that provided "guidance" and "direction" to the sentencing jury. *Gregg v. Georgia*, 428 U.S. 153, 192-98 (1976) (Stewart, Powell, and Stevens, JJ., plurality opinion). Since then, the Court has shown no indication that it will find the death penalty to be a per se violation of the Constitution. See, e.g., *Pulley v. Harris*, 465 U.S. 37 (1989); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

4. See Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 818-19 (1993). Hoffman concludes that the Supreme Court is "process oriented" rather than "substantive," focusing on the procedures by which the death penalty is imposed, instead of the question of whether particular sentences are deserved. *Id.*

5. DEATH PENALTY INFO. CTR., SUMMARIES OF RECENT POLLS FINDINGS, at <http://www.deathpenaltyinfo.org/Polls.html> (last visited Jan. 28, 2001). This Website, maintained by the Death Penalty Information Center, contains an extensive collection of polling data on the death penalty.

6. The Death Penalty Information Center cites Gallup and Harris polls finding that, while support for the death penalty has eroded in recent years, it still stands at about sixty-five percent. *Id.*

that need in a more satisfactory way.<sup>7</sup>

In the same way, the legal reformer faced with persistent majority opposition should assume that that opposition reflects some genuine perceived need, and that that need will have to be taken into account in the framing of any proposed reform. Why do we have capital punishment in the United States? What are its goals, and how well does it achieve them? These are, of course, not merely philosophical inquiries. Putting aside the Eighth Amendment ban on cruel and unusual punishment,<sup>8</sup> any government practice that takes away life or liberty must at least satisfy the basic due process requirement of bearing a rational relationship to a legitimate government interest. What interest does capital punishment address?

The death penalty surely has no rational relationship to the goal of rehabilitation. Indeed, it might well be seen as the ultimate statement by the legal system that, at least in some cases, rehabilitation is impossible.<sup>9</sup> In contrast, capital punishment is clearly effective in achieving the goal of incapacitation, or specific deterrence, that is, making sure that the individual actor will never repeat his crime. But it seems unlikely that incapacitation is at the core of public support for the death penalty. If we put aside the rare case of a prisoner already under a life sentence either committing another murder in prison, or escaping and killing again, a life sentence without chance of parole will be just as effective in incapacitating a killer. Some opinion polls indicate that when the alternative of such a life sentence is presented, a significant number of people will abandon their support of the death penalty.<sup>10</sup> Thus, incapacitation is highly relevant to some. But the alternative of life imprisonment does not change the opinion of most supporters of capital punishment. It is unlikely that incapacitation is truly the dominant goal of death penalty supporters.

For decades, most policy arguments over capital punishment turned on

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7. For example, the contemporary theologian Hans Kung, in developing his case against atheism in his book, goes to great length to affirm that atheism must be taken seriously, that one must respect "the positive aspects of atheism" and the "negative aspects of belief in God," in order to conduct a mature dialogue. HANS KUNG, *DOES GOD EXIST? AN ANSWER FOR TODAY* 338 (1980). While ultimately leaving no doubt about his own stance, Kung maintains that believers can learn much of value from the positions of their opponents, who developed their opposition, in many cases, in response to genuine abuses and inadequacies in the conduct and teachings of religious leaders. *Id.*

8. U.S. CONST., amend. VIII; *see supra* note 3.

9. In recent years, the prominence of rehabilitation as a goal of the criminal justice system has faded even in regard to juveniles, the one group of offenders for whom the rehabilitative ideal survived for most of the twentieth century. But in recent years, states have moved sharply in the direction of subjecting more and more juvenile offenders to the full force of the more punitive, less rehabilitative, adult system. Stephen J. Schulhofer, *Youth Crime—and What Not To Do About It*, 31 VAL. U. L. REV. 435, 437 (1997).

10. DEATH PENALTY INFO. CTR., *SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY* (1993), at <http://www.deathpenaltyinfo.org/dpic.r07.html> (last visited Jan. 28, 2001). When explicitly made aware of alternatives including life imprisonment without parole, respondents divided almost evenly on whether they would still prefer the death penalty. *Id.*

its utility, or lack thereof, in deterrence. It is striking, therefore, to note that Ronald Tabak barely mentions the question of deterrence in his article. This omission, however, is not a serious flaw. On the contrary, it is strong evidence of the degree to which deterrence is no longer truly at the center of the capital punishment debate.

To be sure, death penalty advocates continue to assert their belief that capital punishment will deter, but this argument faces enormous obstacles. While not unanimous,<sup>11</sup> the majority of social science research on the issue concludes that the death penalty has no effect on the homicide rate.<sup>12</sup> In the face of this research, death penalty proponents appeal to the instinctive notion that the prospect of execution simply must be so frightening as to deter,<sup>13</sup> but this, of course, hypothesizes a rational, well-thought out decision by a fully competent potential killer, not overwhelmed by emotion or acting on the spur of the moment.

But there is a more fundamental problem regarding deterrence as the core value sought by the use of capital punishment. To deter, we need not execute only those who are actually guilty; as long as the intended audience of rational potential killers perceives the person who is executed as guilty, they will be deterred. Of course, open and frequent execution of the innocent might destroy the deterrent effect by breaking the link in the minds of the audience between the act of murder and the punishment, but a pure utilitarian would have little problem with a system that frequently executed the innocent, as long as it strikes terror into the hearts of the general public.<sup>14</sup> But few would approve of the careless execution of the innocent, regardless of its deterrent effect, and almost no one would approve of the intentional execution of such a person.

We are all, to some extent, children of the Enlightenment, and so, we feel comfortable arguing about capital punishment based upon its deterrent

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11. For arguments supporting the deterrent effect of capital punishment, see Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 397 (1975), and Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209, 225 (1975).

12. E.g., William Bailey, *Deterrence, Brutalization and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711, 711 (1998); Jon Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481, 481 (1999); see also Ernie Thomson, *Effects of an Execution on Homicides in California*, 3 HOMICIDE STUDIES 129, 145 (1999). For a discussion of earlier findings reaching the same conclusion, see FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 167-86 (1986).

13. Capital punishment supporter Ernest van den Haag gave voice to this conviction: "Even though statistical demonstrations are not conclusive, . . . I believe that capital punishment is likely to deter more than other punishments because people fear death more than anything else. . . . Whatever people fear most is likely to deter most." Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 965-66 (1985).

14. "Whether someone is guilty of a crime or deserves to die for it is not of concern to the pure utilitarian. But no one in her right mind is a pure utilitarian." Margaret Jane Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1170 (1985).

effect. Deterrence sounds logical, scientific, measurable and entirely rational.<sup>15</sup> But even if we accept, in the face of the weight of the evidence, the existence of a substantial deterrent effect, the fact that deterrence might be achieved without a vigorous commitment to executing only the guilty compels the conclusion that deterrence is, at best, a secondary foundation for the death penalty.

With rehabilitation, incapacitation and deterrence seen as implausible foundations for capital punishment, we find ourselves left with only retribution as a traditional justification. And this will strike most of us as strange. Less than three decades ago, Justice Thurgood Marshall could state that in modern America “no one has ever seriously advanced retribution as a legitimate goal,” but that the argument in favor of the death penalty was “always mounted on deterrent” grounds.<sup>16</sup> While this was somewhat of an overstatement,<sup>17</sup> Marshall was no doubt correct that retribution was generally seen as a rather primitive instinct, unworthy of a rational, modern legal system.

But in the years since Justice Marshall’s statement, there has been a noticeable trend “to return to the earlier notions of subjective culpability as the basis of criminal liability.”<sup>18</sup> This “return to retributivist-based notions of moral culpability” takes the position “that the purpose of the criminal law is to reflect the moral standards of our society and to punish those who, with culpability and awareness, violate those moral norms.”<sup>19</sup> Guilt, desert, and blameworthiness have returned to center stage, to at least share the spotlight with utilitarian concerns, if not to displace them, in criminal law.

To understand, and perhaps even to empathize with, this trend, we will have to first briefly explore contemporary understandings of what retribution is, and perhaps more importantly, what it is not. Retribution is not merely unrestrained vengeance, but instead depends heavily on concepts of proportionality. First of all, there must be proportionality between the criminal act and the punishment imposed. This is a double-edged principle; it demands that punishment be neither too lenient nor too severe. The biblical command of an “eye for an eye,”<sup>20</sup> usually invoked to justify sever-

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15. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 413 (1999) (arguing that Americans use deterrence arguments to mask their real commitment to other values which are considered illegitimate in a legal system committed to rational liberal discourse).

16. *Furman v. Georgia*, 408 U.S. 238, 363 (1972) (Marshall, J., concurring).

17. For a rare example of a defense of retribution during the years immediately preceding *Furman*, see H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 239 (1965), reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 119 (Gertrude Ezorsky ed., 1972).

18. RICHARD G. SINGER & MARTIN R. GARDNER, *preface to CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW*, at v (2d ed. 1996).

19. *Id.* Singer and Gardner endorse this position in their coursebook. See *id.*

20. 22 *Exodus* 23-25 (New American Bible) (stating that “if injury ensues, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe”).

ity, is also a demand for restraint. An eye for an eye precludes the taking of two eyes, or a life, for an eye.<sup>21</sup>

While the legal system clearly respects the general idea that there must be proportionality between the act and the punishment, for the most part it does not demand that the punishment literally recapitulate the crime. We do not sentence rapists to be raped; we do not sentence those guilty of assault to be beaten. For the most part, the substitution of some combination of jail time, fines and public humiliation, provided that the mix is sufficiently severe, satisfies our demands for justice. Where the crime is murder, however, public opinion shifts. To many, only losing one's life can be a proportional punishment for the taking of life.<sup>22</sup>

But this "hydraulic" theory of punishment for murder runs into an immediate and significant obstacle. Even in the most aggressively pro-death penalty states, capital punishment is imposed only upon some, but not all, murderers. This is, of course, partly due to the Supreme Court's holding that a broad mandatory death penalty would be unconstitutional,<sup>23</sup> but there is little reason to believe that even most supporters of capital punishment would impose it on all killers.

This leads to the second aspect of proportionality. There must be a relationship between the blameworthiness, i.e., the level of responsibility, of the criminal and the punishment imposed. The legal system must look beyond the mere act itself. This is almost instinctively obvious, and it is at the heart of the Supreme Court's demand in *Gregg v. Georgia*,<sup>24</sup> that a constitutionally applied death penalty must allow the jury to weigh both aggravating and mitigating factors.<sup>25</sup> But the demand that the legal system assess the degree of an individual's blameworthiness raises a number of serious problems as well.

A system that weighs individual aggravating and mitigating factors is likely to be quite indeterminate, and worse, may permit illegitimate factors to provide whatever level of determinacy the process actually has. Thus,

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21. See MARTIN HENBERG, *RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE* 18 (1990) ("Retribution is a measured return of evil according to some notion of what an agent (or group) is perceived to deserve. Revenge, on the other hand, is an unmeasured return of evil that may or may not connect to desert.").

22. The classic statement of this position is from Immanuel Kant:

[W]hoever has committed Murder, must *die*. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of Justice. There is no *Likeness* or proportion between Life, however painful, and Death; and therefore there is no Equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal.

IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (photo. reprint, Augustus M. Kelley Publishers 1974) (W. Hastie trans., 1887).

23. *Woodson v. North Carolina*, 428 U.S. 280, 301-03 (1976).

24. 428 U.S. 153 (1976).

25. *Id.* at 192-95.

even where juries are not consciously acting from base motives, race or the competence of defense counsel may play a prominent role in the sentencing decision. Where this occurs in a significant number of cases, it undermines the philosophical pillars of desert that support the entire structure of a defensible retributivism. Andrew Oldenquist defends the notion of retribution, but insists on conditions that will distinguish it from mere vengeance.<sup>26</sup> Prominent among these conditions are the requirements that the punishment must be predictable and the product of deliberation by a neutral decision maker, rather than one of passion made by those too close to the victim.<sup>27</sup> How closely does the post-*Gregg* death penalty process in the United States satisfy those conditions?

Procedural shortcomings can threaten the legitimacy of retribution-based punishment, but at least in theory, those flaws can be fixed. But the retributivist must confront an even more troubling objection. If retribution is based as much on the blameworthiness of the criminal as on the amount of harm done, how does the legal system respond to arguments based in biology, psychology or sociology that challenge the notion that the criminal had full capacity to exercise free will in choosing to transgress? Even the pre-Darwinian, pre-Freudian legal world of the early nineteenth century recognized that small children<sup>28</sup> and the obviously insane<sup>29</sup> could not be said to deserve punishment for the harm they caused. By the mid-twentieth century, the physical and social sciences had so shaken many people's belief in free will that it became more difficult to speak of criminals as deserving harsh treatment at all. Infants and the obviously deranged, it might be said, were different than the rest of us only in degree, not in kind.

More than any other factor, it is likely that this assault on the idea of free will led to the general abandonment of retributive theory noted by Justice Marshall,<sup>30</sup> and to the law's recourse to consequentialist alternatives. Perhaps a criminal did not "deserve" harsh treatment, but society, unfortunately, had to impose it to protect itself. But in recent years, the concept of individual responsibility for one's actions has returned to center stage.

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26. Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464, 464 (1988). Oldenquist maintains that "a moral community exacts retribution for its own good and not primarily to inform, correct, cure, use, or to send any kind of message to the criminal." *Id.* at 471.

27. *Id.* at 474.

28. At common law, children under the age of seven were held incapable of forming criminal intent. Children between seven and fourteen years of age were presumed incapable, but this presumption could be rebutted. Children over the age of fourteen were fully responsible for their acts. Margaret May, *Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century*, reprinted in 3 CRIME AND JUSTICE IN AMERICAN HISTORY: DELINQUENCY AND DISORDERLY BEHAVIOR 46, 47-48 (Eric H. Monkkonen ed., 1991).

29. See Daniel M'Naughten's Case, 8 Eng. Rep. 718 (1843). This case established the classic, rigorous test that a defendant had to meet to establish a defense of insanity. The defendant, under this test, must establish that he either was not conscious of the nature of the act he was committing, or that he was not aware that it was considered wrongful. *Id.* at 723.

30. See *supra* notes 16-17 and accompanying text.



This is evident not only in aspects of criminal law, such as the narrowing of defenses based on mental incapacity<sup>31</sup> and a sharply more punitive approach to juvenile crime,<sup>32</sup> but also on such political issues as welfare reform.

It is not clear how much of this return to notions of individual responsibility is based on a general sense of justice, and how much is based on the desire for deterrence. At this point, the arguments underlying retribution and those underlying deterrence intersect; the retributivist will only punish a free choice, deterrence assumes that punishment has an effect on people since they are capable of rational choice. And this should serve to remind us that the theories justifying punishment are not unrelated, and surely not mutually exclusive. But where does this leave us in understanding the reasons that lead people to support capital punishment?

Deterrence, as we have seen, cannot by itself justify capital punishment. Not only does the weight of the evidence contradict the assertion that the death penalty deters, but a single-minded focus on deterrence would justify executing innocent people who could be made to appear guilty, or executing not only the murderer, but his family as well, to raise the cost to future potential killers as they calculate whether to kill. In theory, retribution provides a more comfortable basis for responding to murder with capital punishment, but the severe problems inherent in any attempt to determine not only guilt, but also the degree of a killer's blameworthiness make reliance on retributive theory almost equally problematic. A principled retributivist should be genuinely disturbed at the Supreme Court's approval of the execution of minors,<sup>33</sup> adults with limited mental abilities,<sup>34</sup> or those who are deprived of a fully deliberative appeals process because of technical procedural points,<sup>35</sup> yet most death penalty supporters

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31. During the decades following World War II, broader definitions of the insanity defense and other arguments in favor of mitigating individual responsibility were accepted. See Heathcote W. Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L.J. 87, 88-89 (1974). But recently, the trend has been to treat such excuses with much greater skepticism. Cf. Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 266-68 (1987). Many attribute the public backlash against invocation of the insanity defense to the 1982 acquittal of John Hinckley, by reason of insanity, in his trial for the attempted assassination of Ronald Reagan. SINGER & GARDNER, *supra* note 18, at 831-33.

32. This has taken hold despite the significant decline in the actual incidence of juvenile violence. Eric R. Lotke, *Youth Homicide: Keeping Perspective on How Many Children Kill*, 31 VAL. U. L. REV. 395, 395 (1997).

33. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Supreme Court held that a defendant who was fifteen years old at the time of his crime could not be executed, but indicated that the execution of older minors was not impermissible. *Id.* at 818, 838.

34. *Penry v. Lynaugh*, 492 U.S. 302, 338-39 (1989) ("[I]t cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.").

35. A striking example is *Herrera v. Collins*, 506 U.S. 390 (1993), in which the Court rejected a second habeas corpus petition by a death row inmate that was based on new evidence of actual innocence, rather than on any alleged violation of procedural rights. *Id.* at 397-400. Only three justices

are undisturbed, if not enthusiastic, about these decisions.

Perhaps, then, it will be necessary to go beyond the standard, rational jurisprudential arguments to fully understand support for the death penalty. Oldenquist recognizes that there is a significant ritual element to the process of passing judgment and imposing penalties based upon retributive norms.<sup>36</sup> It may be useful to examine whether these symbolic, ritual elements may prove to be not merely secondary aspects of a retributive regime, but at the very core of what we do when we choose to punish, especially when the punishment we choose to impose is death.

## II. WHY DO PEOPLE SUPPORT CAPITAL PUNISHMENT? AN ALTERNATIVE EXPLANATION

The standard rationales put forward to explain and justify capital punishment are, at best, only partially successful. Deterrence is an empirically questionable justification, and in any event, cannot stand alone. Retribution may be theoretically sound, but it cannot justify a system that tolerates either the execution of the innocent or of those not fully responsible for their actions. But discovering this and declaring it to be so does not allow an abolitionist to simply declare intellectual victory. We are still left with the task of understanding the strong popular appeal of the death penalty. Over the years, commentators have noted that capital punishment serves both symbolic purposes and rational goals,<sup>37</sup> but few have considered the possibility that these symbolic or ritual aspects were of central importance in understanding the death penalty. Instead, the symbolism and ritual of capital punishment would either be seen as merely an aspect of deterrence (the execution sends a message to the community that causes them to fear the executioner) or retribution (the ritual of the execution serves to express community outrage),<sup>38</sup> or if not serving one of these goals, as self-evidently insufficient to support the death penalty. But if we take the symbolic, non-rational elements of capital punishment seriously, we may find that they

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would hold that a defendant who could show "that he probably is innocent" is entitled to habeas corpus relief. *Id.* at 442 (Blackmun, J., with whom Stevens & Souter, JJ. joined, dissenting). Four justices assumed "for the sake of argument" that a showing of innocence meeting an "extraordinarily high" standard of proof might require federal court intervention "if there were no state avenue open to process such a claim." *Id.* at 417. And Justices Scalia and Thomas would simply hold that there is simply no constitutional right to judicial consideration of newly discovered evidence. *Id.* at 427-28 (Scalia, J., with whom Thomas, J. joined, concurring).

36. Oldenquist, *supra* note 26, at 471.

37. See, e.g., Elizabeth D. Purdum & J. Anthony Paredes, *Rituals of Death: Capital Punishment and Human Sacrifice*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 141-53 (Michael L. Radelet ed., 1989); Mary Ellen Gale, *Retribution, Punishment and Death*, 18 U.C. DAVIS L. REV. 973, 996-99 (1985); Hardy Jones & Nelson Potter, *Deterrence, Retribution, Denunciation and the Death Penalty*, 49 UMKC L. REV. 158, 167-69.

38. On the expressive function of punishment generally, see JOEL FEINBERG, *DOING AND DESERVING* 96-105 (1970).

not only provide surprising insight into the meaning and significance of the death penalty, even in a modern, rationalist, society, but also provide lessons regarding the likelihood that various abolitionist strategies, such as promoting DNA testing or declaring moratoria until assurances that bias is eliminated from the system can be provided, will succeed.

Exploration of something as amorphous as the symbolic power of the death penalty will require a framework for analysis, and a powerful framework can be found in the theories of Rene Girard. Drawing on literature, anthropology, religion, and psychology, Girard has put forward a sweeping theory of culture.<sup>39</sup> From his original academic base in literary criticism, Girard found that great works of literature repeatedly put forward the proposition that human desire is grounded neither in the characteristics of the person nor the object desired but rather in mimesis, i.e., the need to imitate others.<sup>40</sup> People will seek to obtain an object or pursue a way of life because someone else does the same.<sup>41</sup>

Imitation is, of course, absolutely necessary for the growth of the individual from infancy to maturity, and on a broader scale, for the transmission of culture from one generation to the next. And in both literature and life, the impulse to imitate can lead to comic results.<sup>42</sup> But, perhaps more often, it will lead to tragedy, as rivals compete for the same goals. Desire for the same goals leads to desire to be like one's rival, and this leads to conflict as each rival redoubles his effort to supplant the other. Without intervention by social institutions, this cycle of imitative rivalry, or mimesis, will escalate to violence.<sup>43</sup>

Girard found this tendency toward mimesis in both fiction and the social sciences, particularly anthropology.<sup>44</sup> The function of law, Girard contends, is to limit imitation so that it does not spiral out of control and threaten the community.<sup>45</sup> But legal and cultural institutions, operating as they normally do, will sometimes fail to effectively restrain escalating violence. As more individuals see themselves as rivals for the same objects,

39. For the most thorough available presentations of Girard's thoughts, see RENE GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., 1977) [hereinafter GIRARD, *VIOLENCE*], and RENE GIRARD, *THINGS HIDDEN SINCE THE FOUNDATION OF THE WORLD* (Stephen Bann & Michael Metteer trans., 1987) [hereinafter GIRARD, *THINGS HIDDEN*]. For a good single volume explaining and exploring the implications of Girard's thought, see GIL BAILIE, *VIOLENCE UNVEILED: HUMANITY AT THE CROSSROADS* (1999).

40. See GIRARD, *VIOLENCE*, *supra* note 39, at 146; GIRARD, *THINGS HIDDEN*, *supra* note 39, at 283-98.

41. GIRARD, *VIOLENCE*, *supra* note 39, at 145.

42. The classic literary example is Cervantes's *Don Quixote*. GIRARD, *THINGS HIDDEN*, *supra* note 39, at 15-16.

43. The pattern of mimesis leading to conflict and tragedy can be found in Greek tragedy. GIRARD, *VIOLENCE*, *supra* note 39, at 46-48, in early Bible stories, BAILIE, *supra* note 39, at 137-40, in Shakespeare, GIRARD, *THINGS HIDDEN*, *supra* note 39 at 36, and in Dostoevsky, *id.* at 338-47.

44. GIRARD, *THINGS HIDDEN*, *supra* note 39, at 3-138.

45. *Id.* at 10-19.

violence erupts, and each act of violence in turn attracts its own imitators.<sup>46</sup> Some dramatic step must be taken to stop the spiral of violence and reunite the community; since violence must return violence, this step must itself be violent.<sup>47</sup> The community must identify a common enemy, who can be seen to be the source of the community's discord. The community will turn its concerted violence against that enemy, and since that person has no supporters in the community, there will be no further violent response. The crisis brought about by mimetic violence will be averted, at least until a new cycle of violence arises.<sup>48</sup>

This process produces at least one striking paradox. The victim who was declared to be the source of the community's discord has now, by virtue of the violence directed against him, become the source of the community's newfound peace. The victim has become, in some strange way, sacred as the bestower of good and evil.<sup>49</sup> Girard sees this scapegoating process as the point of origin of religion.

In its many forms, religion, according to Girard, will attempt to maintain community cohesion through controlled reenactment of the murder of the community's chosen victim. This could take place either through an actual killing, or by a symbolic reenactment of the original act.<sup>50</sup> In either case, the reenactment will be strictly regulated. It must be performed only by those authorized, and in the manner prescribed, by the community. To attempt the act outside of these parameters will not only be ineffective, it will be sacrilegious.<sup>51</sup>

Girard examined the practices of primitive societies, and concluded that the victim chosen by the community need not actually be guilty of anything in order for the process to be effective. When a murder threatened community stability in primitive societies, community leaders would consciously avoid selecting the actual murderer as the sacrificial victim. While this seems perverse to modern eyes, it is actually entirely consistent with the goal of the process, which is to bring peace to the community.

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46. GIRARD, VIOLENCE, *supra* note 39, at 18-27.

47. "Only violence can put an end to violence, and that is why violence is self-propagating. Everyone wants to strike the last blow, and reprisal can thus follow reprisal without any true conclusion ever being reached." *Id.* at 26.

48. "Where only shortly before a thousand individual conflicts had raged unchecked between a thousand enemy brothers, there now reappears a true community, united in its hatred for one alone of its number. All the rancors scattered at random among the divergent individuals, all the differing antagonisms, now converge on an isolated and unique figure, the *surrogate victim*." *Id.* at 79.

49. "[T]he surrogate victim—or, more simply, the final victim—inevitably appears as a being who submits to violence without provoking a reprisal; a supernatural being who sows violence to reap peace; a mysterious savior who visits affliction on mankind in order subsequently to restore it to good health." *Id.* at 86.

50. Thus, animal sacrifices may be substituted for human sacrifice "to reproduce the mechanism of violent unanimity." *Id.* at 97.

51. Societies will often outlaw imitative behavior outside of the context of the carefully controlled community ritual. GIRARD, THINGS HIDDEN, *supra* note 39, at 10-23.

The true killer will most likely have friends and relatives in the community, who would retaliate to avenge his execution. Only one who can be seen as the enemy of the entire community can unify the community against him.<sup>52</sup> The sacrificial victim, then, is both the enemy and the benefactor of the community. Thus, he is best seen as both part of, and outside of the community.<sup>53</sup> Primitive tribes would often choose a stranger to fill this role, but only after the victim had been partially integrated into the community. Examples might include slaves.<sup>54</sup> Similarly, when tribes later sacrificed animals, instead of humans, they used domestic animals because, while different from people, they were still members of the community.<sup>55</sup>

The community's victim must be seen as guilty by the community, even if he has been chosen arbitrarily. Primitive societies developed rituals which encouraged, or even required, the sacrificial victim to violate social taboos or to claim and receive great privileges prior to the sacrifice.<sup>56</sup> This would give the community a reason to kill, because now the victim's behavior would mark him as a transgressor, or one who wrongfully claimed special status, yet, paradoxically, to the extent that the community acceded to his earlier claims of privilege, would also mark the victim as someone special.

Of course, Girard recognizes that the way that society "avoid[s] being caught up in an interminable round of revenge"<sup>57</sup> must evolve. Primitive rituals will not suffice to unify the modern community; the community will no longer accept that those rituals identify those responsible for community discord. The creation of an effective modern judicial system, then, is the highest level of human development in the effort to constrain social violence.<sup>58</sup> In a post-Enlightenment world, only a convincing demonstration of actual guilt will satisfy the community's demand for justice in the identification of its enemies. This emphasis on rational demonstration of guilt will, to most people, sharply distinguish modern legal systems from earlier societies that employed ritual or such methods as trial by combat.<sup>59</sup> But despite the obvious differences, Girard emphasizes that ultimately each of these systems serves the same goal.<sup>60</sup> Modern legal systems, no less than

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52. See GIRARD, VIOLENCE, *supra* note 39, at 21-22.

53. "[A]ll victims, even the animal ones, bear a certain *resemblance* to the object they replace; otherwise the violent impulse would remain unsatisfied. But this resemblance must not be carried to the extreme of complete assimilation, or it would lead to disastrous confusion." *Id.* at 11.

54. *Id.* at 271.

55. See *id.* at 272-73.

56. *Id.* at 104-07. A prisoner might be encouraged to violate the law, or coerced into a ritualistic escape attempt. *Id.* at 274-75. A society might choose to execute its kings, and as part of the ritual require that the king ritually engage in forbidden acts of violence or incest. *Id.* at 104-10.

57. *Id.* at 20.

58. *Id.* at 22.

59. "It has long been assumed that a decisive difference between primitive and civilized man is the former's general inability to identify the guilty party and to adhere to the principle of guilt." *Id.* at 22.

60. *Id.*

their predecessors, seek to break the cycle of imitative violence by directing the community's mimetic violent urge toward the punishment of a common enemy.

A modern American observer might be quick to dismiss the notion that the victimage process identified by Girard in early societies could carry significant weight in explaining the contemporary administration of the death penalty. But Girard's theories, perhaps surprisingly, provide clear explanations for a number of aspects of capital punishment that seem either unrelated to, or even in conflict with, the accepted jurisprudential goals of deterrence or retribution. Some of these aspects may be rather trivial. For example, how might we explain the persistent public fascination with the ritual of the condemned prisoner's last meal?<sup>61</sup> On the eve of execution, we see the legal system granting the prisoner a special privilege; is this a vestige of the primitive practice of exalting the victim and extending him kingly privileges before the ritual sacrifice?

The framework provided by Girard's theories would explain much more significant things as well. As we have seen, both deterrence and retribution would demand that the death penalty be imposed only upon the most calculating and evil killers. Executing the young or the mentally retarded<sup>62</sup> serves neither of these goals particularly well. But if the true purpose behind the execution is to unite the community against a common enemy, the choice of a victim who is in some way significantly different than most of us will actually further this goal, by making us less likely to empathize or identify with the "monster."<sup>63</sup> Might this also explain, even better than any degree of conscious racism, the over-representation of minority groups on death row?

When a prisoner on death row falls ill or attempts suicide, the state will exert itself to restore him to health, so that he may later be put to death.<sup>64</sup> Does this make any sense in the context of deterrence or retribution theo-

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61. The Texas Department of Criminal Justice actually maintains a Website of last meal requests by executed prisoners. TEXAS DEP'T OF CRIMINAL JUSTICE, FINAL MEAL REQUESTS, at <http://tdej.state.tx.us/stat/finalmeals.htm> (last updated Feb. 9, 2000). An entire book has been devoted to last meal requests and last words. RICHARD K. NONGARD, FINAL WORDS: PARTING THOUGHTS AND LAST MEALS FROM DEATH ROW (1997). Newspapers often describe last meals. E.g., Richard C. Paddock, *Triple Killer Prepares to Die As Appeal Rejected; Execution: Lawyers Say He Should Be Spared Because of Mental Illness. He Has Been on Death Row 17 Years*, L.A. TIMES, May 3, 1996, at 1, LEXIS, News Library, Lat File (reporting on a last meal of "fried pork chops, baked potato, asparagus, saled with bleu cheese dressing, French bread with butter, apple pie with ice cream and a glass of whole milk"); James Varney, *Time Runs Out for Killer; Antonio James Is Put To Death*, TIMES-PICAYUNE, Mar. 1, 1996 at A1, LEXIS, News Library, Notpic File (reporting on a last meal of "fried oysters, fried shrimp, fried catfish, crawfish etoufee, seafood gumbo, hush puppies, French fries, pecan pie and Coca-Cola").

62. See *supra* notes 31-34 and accompanying text.

63. See GIRARD, VIOLENCE, *supra* note 39, at 271.

64. Failure to do so might well be seen as a violation of the prisoner's right to medical treatment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Prison authorities have a duty to avoid "deliberate indifference" to prison suicides. *Titte v. Jefferson County Comm'n*, 10 F.3d 1535, 1539 (11th Cir. 1994).

ries? But Girard notes that for a ritual sacrifice to be effective, it must be carried out according to accepted rubrics; merely seeing to it that the prisoner is no longer alive will not suffice.<sup>65</sup>

To the extent that the death penalty is successful in fulfilling deterrent or retributive goals, the community's reaction to the murderer following his execution should be one of unambiguous revulsion. Yet, at least some of the more prominent murderers of recent years have been the subject of fascination, inspiring works of biography and even fiction.<sup>66</sup> Is this fascination with the executed criminal a modern version of the elevation of the sacrificial victim to a sacred status?<sup>67</sup>

The ability of Girard's theories to explain a number of puzzling aspects of the modern American death penalty is striking. What are the consequences of recognizing the importance of the symbolic, ritualistic elements of the death penalty? If the primary function of the death penalty is neither deterrence nor retribution, but rather to provide a ritual to unite the community by causing them to direct their hatred toward a particular individual, how will this affect the debate on abolition or suspension of capital punishment? How does a legal system committed to rational deliberation deal with the appearance of powerful and seemingly non-rational matters?

### III. IMPLICATIONS FOR THE MORATORIUM MOVEMENT AND ABOLITIONISTS

To recognize that the symbolic, ritualistic aspects of the death penalty, far from being merely amusing peripheral things, are actually central to an understanding of the needs addressed by capital punishment is not to entirely ignore matters of utility or retribution. A retributivist may obviously also expect, or at least hope, that punishment will also have some deterrent effect. Likewise, punishment rituals primarily aimed at uniting the community in its hatred of a common enemy will also impact concerns that are more readily accepted as central to criminal justice.

It seems clear that Girard's theory regards the scapegoating process as essentially pursuing consequentialist ends. The purpose sought is community peace, a reduction in the need for members of the community to engage in mimetic violence. In this regard, the execution of the scapegoat can be seen as acting to promote deterrence, but in a very different way than the commonly accepted notion that a rational, welfare-maximizing

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65. When Nazi leader Hermann Goering was able to commit suicide on the eve of his scheduled execution, he was seen as, in some sense, managing to frustrate the judicial process that had sentenced him to death. JOSEPH E. PERSICO, NUREMBERG, INFAMY ON TRIAL 421-25, app. at 445-47 (1994).

66. See, e.g., NORMAN MAILER, THE EXECUTIONER'S SONG (1993) (discussing Gary Gilmore); ANN RULE, THE STRANGER BESIDE ME (20th anniv. ed. 1999) (discussing Ted Bundy); TERRY SULLIVAN & PETER T. MAIKEN, KILLER CLOWN (1999) (discussing John Wayne Gacy).

67. See GIRARD, VIOLENCE, *supra* note 39, at 275.

potential killer will decide not to kill because of the cost involved. Instead, capital punishment will act in a more subtle way to promote a sense of community and reduce people's need to act in violent ways as individuals. Whether such an effect actually exists, of course, would seem extremely difficult, if not impossible, to establish.<sup>68</sup> And the scapegoating process is even more firmly linked to concepts of retribution. While the scapegoat need not be actually guilty in order for the process to be effective, it is essential that he be perceived as guilty.<sup>69</sup> If the community sees the execution as unjust, it cannot succeed in uniting the community. In a primitive society, a ritualistic selection process might suffice; in the Middle Ages, trial by combat or by fire could be seen to reveal guilt. Today, few in America would accept the results of such a system. The mechanism that decides who will be executed must conform to modern standards of fairness sufficient to satisfy the public that the condemned, at the very least, committed the act for which he has been condemned,<sup>70</sup> and perhaps also, is sufficiently blameworthy to deserve capital punishment.<sup>71</sup>

Here, at the point where retribution and the need for a scapegoat to unite the community converge, we can begin to comment specifically on the current proposals for a moratorium on the imposition of capital punishment. The existence of DNA evidence, with its essentially unprecedented power to provide nearly certain proof of innocence, may well constitute a two-edged sword for abolitionists. While some consequentialists might accept the occasional execution of one who is "actually innocent" as a necessary price to achieve social benefits, surely no one would endorse the execution of one who has clearly established innocence. Thus, it is difficult to imagine how even an ardent death penalty supporter would object to postponing executions until all available scientific tests were performed in search of definitive proof of innocence.

But if DNA can provide overwhelming evidence of innocence, it can likewise provide overwhelming evidence of guilt. And there will no doubt be many capital cases where there simply is no such evidence, either exculpatory or incriminating, at all. Supporters of capital punishment might well be advised to enthusiastically endorse widespread DNA testing as a prerequisite to the imposition of a death sentence. In return for freeing a

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68. One study concludes that capital punishment, when executions are widely publicized, leads to a decrease in the incidence of non-capital crimes. William C. Bailey & Ruth D. Peterson, *Capital Punishment and Non-Capital Crimes: A Test of Deterrence, General Prevention, and System—Overload Arguments*, 54 ALB. L. REV. 681, 699 (1990). Classical deterrence theory would find this puzzling; how can severely punishing one type of act lead to a decrease in the incidence of an entirely different kind of act? Yet, if executions serve the purpose of reducing the overall need for the community to act in aggressive ways, as Girard maintains, the findings may well make sense.

69. See *supra* notes 56-59 and accompanying text.

70. This consideration is essential in a retributive system, but not necessarily so in a system based solely upon deterrence. See *supra* notes 13-14 and accompanying text.

71. See *supra* notes 24-32 and accompanying text.



relatively small number of the actually innocent, death penalty advocates will be able to reinforce public confidence in the overall reliability of the system.

The immediate, and telling, abolitionist response will be that since it seems clear that mistakes are made in the imposition of the death penalty in the absence of DNA evidence, we can assume that at least some of those sentenced to death where no such evidence is available will also be actually innocent. While this seems true, it also seems unlikely to change that many minds. First, we must keep in mind that DNA testing will, in some cases, prove telling evidence of guilt. At most, the abolitionist argument founded on the possibility of actual innocence eliminates capital punishment when scientific evidence is inconclusive. This will reduce the number of executions (or perhaps merely change the identities of those condemned); it will not end them.

Second, with respect to cases where scientific evidence is inconclusive, there may be an unanticipated side effect from the use of DNA to exonerate a small number of defendants. In the fictional courtroom world of Perry Mason, defense counsel would provide clear evidence not only of innocence, but of who actually committed the crime. Perry never won a case merely by establishing reasonable doubt. It is likely that this extremely popular television series subtly led people to believe that defense lawyers bore the burden of proving innocence, and in fact, were frequently able to succeed. Will real life stories of defense counsel using DNA evidence to prove innocence lead the public to presume guilt in any case where such evidence is unavailable?

To a retributionist, convincing evidence of guilt will be essential to justify punishment. But, as we have seen, the scapegoating process is essentially consequentialist. The absence of evidence of innocence will serve just as well as the presence of definitive evidence of guilt in uniting the community. We might note the frequent demands, not only by the public, but by courts, that the execution process be speeded up. Appeals are to be limited,<sup>72</sup> and even exculpatory evidence must be ignored if deadlines are missed or other procedural technicalities unobserved.<sup>73</sup> While these opinions are defended on the rational grounds that condemned prisoners are "abusing the system" by raising meritless argument after meritless argument, this seems to be an example of the need to execute one seen to be guilty (whether he is or not) trumping the powerful demands of a sophisticated retributionism that only the guilty be punished.<sup>74</sup> In light of this, it

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72. See generally Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65; William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985).

73. See *supra* note 35 and accompanying text.

74. There are, of course, utilitarians who, while they would not defend intentionally executing the innocent, are relatively untroubled by the occasional execution, by mistake, of the innocent, concluding

seems likely that the reaction to the availability of DNA and other strong scientific evidence of innocence in some cases will not lead death penalty supporters to question the overall legitimacy of the practice, but at best, to agree to limited procedural reform to assure that the demonstrably innocent are not executed, and at worst, to an even stronger conviction in both the guilt of those who cannot produce such evidence, and the correctness of subjecting them to the ultimate penalty.

Of course, none of this should lead to the conclusion that all available steps, including the use of DNA testing, should not be used in an effort to assure that those who are actually innocent are not executed. But the simple fact that this proposition can be readily endorsed by those with a full range of views on the general acceptability of capital punishment is a clear sign that, at most, a moratorium based on doubts about actual innocence will lead only to somewhat more care in the selection of those sentenced to death, rather than stronger sentiment against the death penalty itself.

The next step in any abolition movement will be much more contentious. If we can assure that the actually innocent are not executed, or even go further and assure that capital punishment is imposed only on those whose guilt is supported by DNA evidence or its scientific equivalent, have we fully satisfied the demand of a sophisticated retributionist theory that the punishment be imposed only upon those who deserve it? And have we fully satisfied the requirement of an effective community ritual that the community will be united in its opposition to the demonstrably guilty convict?

For the retributionist, the answer should depend on the degree to which the commission of the act of killing is seen as a fully responsible act. Even the common law would find, in extreme cases, that mental state or infancy would make a killer simply not responsible, either fully or partially, for his act.<sup>75</sup> Public opinion, and even expert opinion, has waxed and waned over the years with respect to the degree to which people could justly be held to act pursuant to a sufficient degree of free will to justify full responsibility for their acts.<sup>76</sup> Currently the pendulum seems to have swung toward maximizing individual responsibility. This can be seen in public and legislative attitudes toward juvenile crime,<sup>77</sup> and excuses such as the insanity defense.<sup>78</sup> But, especially in the context of capital punishment, serious controversy remains. The Supreme Court has made clear that the decision to impose the death penalty must be made not on the basis of the killer's acts alone, but only after consideration of aggravating and mitigating fac-

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that the social benefit of the death penalty outweighs the loss of innocent lives. Van den Haag, *supra* note 13, at 967.

75. See *supra* notes 28-29 and accompanying text.

76. See *supra* note 31.

77. See *supra* note 32 and accompanying text.

78. See *supra* note 31.

tors.<sup>79</sup> Mitigating factors will often include claims that, for one reason or another, the defendant simply did not have full capacity to control himself. And while these arguments may be effective in individual cases, the Court has been extremely reluctant to hold that, as a general rule, youth<sup>80</sup> or even seriously deficient mental capacity<sup>81</sup> will require the state to forego the death penalty. And evidence that racial factors play a role in the selection of those sentenced to die has not led the Court to question the fundamental legitimacy of capital punishment.<sup>82</sup>

If retentionists are truly acting from retributivist motives, arguments that point to the fact that the death penalty system does not single out the most fully culpable for capital punishment with any degree of reliability should weigh heavily. And while it is a more profound assault on capital punishment than one based on assuring that only the actually innocent are executed, it does pose problems of its own.

To a retributionist, the fact that teenagers, those with limited mental capacity, or a disproportionate number of members of minority races are sentenced to death should be troubling. But if retentionists are actually acting in a way consistent with Girard's theories of the scapegoating process, not only will these facts not shake support for capital punishment, they will actually strengthen it. As we have seen, Girard maintains that the victim most likely to unify the community in opposition is one who is in some way noticeably different, although also a member of the community.<sup>83</sup> The same facts that make a killer less likely to serve retributionist, not to mention deterrent, goals by his execution make him more likely to unite the community in its hatred of him. Thus, to the extent that the need to replicate the scapegoating process, rather than retribution, is at the core of support for the death penalty, abolitionist arguments based on the fact that we do not choose only the most calculating, rational killers for death will be ineffective.

But the argument for suspension or abolition of the death penalty based upon the present system's inability to select those, and only those, most fully deserving of death contains another serious limitation. Just as the argument based on actual innocence may highlight the fact that most of those sentenced to die did commit the crime for which they were convicted, so the argument based upon degree of blameworthiness highlights

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79. *Gregg v. Georgia*, 428 U.S. 153, 192-98 (1976) (Stewart, Powell, and Stevens, JJ., plurality opinion).

80. *Thomson v. Oklahoma*, 487 U.S. 815, 815, 838 (1988).

81. *Penry v. Lynaugh*, 492 U.S. 302, 338-39 (1989).

82. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the Supreme Court rejected an attack on the death penalty based upon statistics that indicated not only that black defendants were more likely than white defendants to be sentenced to death, but also that the race of the victim was significant. A black defendant convicted of killing a white victim is more likely to receive a death sentence than any other combination of races of killer and victim. *Id.* at 321 (Brennan, J., dissenting).

83. GIRARD, VIOLENCE, *supra* note 39, at 271-73.

the fact that some killers are more fully responsible than others, a fact that is, of course, also starkly illustrated by the principle that many killers are not eligible for the death penalty, even in the most death penalty prone states.<sup>84</sup>

Several years ago, I was the moderator of a panel discussion on the death penalty that included both retentionists and abolitionists.<sup>85</sup> One of the retentionists mentioned the case of Adolf Eichmann, the high-ranking Nazi official convicted of genocide and executed by the State of Israel in the early 1960s.<sup>86</sup> The abolitionist response was to brush the example aside as irrelevant. On reflection, it occurred to me that the Eichmann example is very relevant to any death penalty debate, but that it poses serious difficulties not merely for abolitionists, but for retentionists as well.

The double-edged nature of the Eichmann example lies in the fact that the state of Israel has executed Adolf Eichmann and no one else in its more than fifty year history. Abolitionists must contend with the fact that even in a community that rejects capital punishment as a general proposition, a case can and did occur where the criminal's harm was so great, and his level of personal responsibility so significant that the community demanded the ultimate punishment.<sup>87</sup> But retentionists must contend with the fact that this community has never found another case rising to the level of the one that justified capital punishment.

The differences between Eichmann and those executed today in the United States seem infinitely greater than the differences between those we execute and those we "merely" imprison for life. Perhaps one need not closely resemble Eichmann in order to truly deserve death, but unless one takes the position that all murderers should be executed,<sup>88</sup> it is hard to see treating a randomly chosen killer and an architect of genocide in the same way as satisfying any rational sense of justice. But at the same time, to take a position favoring total abolition of capital punishment would seem to deny the existence, however rare, of exceptional cases of extreme, unmitigated evil. Of course, one might take the position that while such cases exist, it is simply beyond our power to identify them; we cannot fully com-

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84. Early common law subjected anyone who wrongfully caused the death of another to the death penalty, but beginning in the thirteenth century, killings were divided into murder and manslaughter. See Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974-82 (1932). Modern statutes further divide murder into two or more degrees, usually reserving the death penalty for those convicted of first degree murder. *Austin v. United States*, 382 F.2d 129, 133-34 (D.C. Cir. 1967).

85. The presentations of the panelists are set forth in Symposium, *Reflections on a Quarter-Century of Constitutional Regulation of Capital Punishment*, 30 J. MARSHALL L. REV. 399 (1997).

86. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM* (1965).

87. Even in the case of Eichmann, there was some opposition to the death penalty although it tended to be voiced after, rather than before, it was carried out. *Id.* at 250-52.

88. The Supreme Court has found, however, that a broad mandatory death penalty would be unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, Powell, and Stevens, JJ., plurality opinion).

prehend the circumstances that may have led to the commission of an outrageous act.<sup>89</sup> And yet, almost all of us do recognize the case where the harm caused is exceptional, and the reasons for mitigating punishment seem entirely absent.

If we focus on retributionist concepts, then, each side of the capital punishment debate encounters serious difficulties. The process by which individual killers are selected for death seems to make indefensible distinctions. Still some cases do stand out as calling for the ultimate penalty. The retentionist has trouble defending the actual application of capital punishment; the abolitionist has trouble arguing that death is never deserved.

This should draw us back to the conclusion that what is going on here, on both sides of the capital punishment debate, is something other than a conscious, rational contest over the philosophical bases for retribution. But how can the issue of capital punishment be addressed if support for the practice rests largely on grounds that are nonrational yet important to the community? If we examine Girard's work looking for clear guidance, we will not necessarily find satisfactory answers.

Girard explicitly states that he has no interest in pursuing reform through political action.<sup>90</sup> Instead, viewing the historical landscape through the lenses of a radical Christianity,<sup>91</sup> he contends that abandonment of the scapegoating mechanism will occur only through the complete renunciation of the use of mimetic, retaliatory violence, even in pursuit of just ends.<sup>92</sup> Girard's theology sees this as the ultimate goal toward which humanity is heading. In his view, the execution of Jesus was the historical event that planted, however tenuously, the sense of the horrible consequences of the use of violence to unify the community against a "criminal."<sup>93</sup> In the intervening two thousand years, this sense of revulsion against the community's use of violence has grown, and it will inevitably

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89. Full comprehension of the causes of antisocial acts will not necessarily mean that the legal system is not still justified in exacting punishment. "[T]here is a difference between explaining a person's wrongful behavior and explaining it away. . . . Otherwise, there would be no basis for moral responsibility . . . ." Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 284 (1987).

90. "What is interesting in our work here is not the possibility of making impressionistic applications of the theory in order to denounce any aspect of society we please." GIRARD, *THINGS HIDDEN*, *supra* note 39, at 34.

91. The conventional Christian view of the crucifixion of Jesus is that it was a sacrificial act, demanded by God the Father, to atone for mankind's sin. Thus, since the act was demanded by and pleasing to God, the conventional view can be seen as endorsing the retributive process. Girard, in contrast, sees the execution of Jesus as a clear injustice. The slow realization by mankind of the injustice of the act will eventually lead to the rejection of retaliatory violence, even where it seems in human terms, to be fully justified. *See id.* at 180-223.

92. "Jesus explains to us mankind's true vocation, which is to throw off the hold of the founding murder." *Id.* at 216.

93. "The Cross derives its dissolving capacity from the fact that it makes plain the workings of what can now only be seen—after the Crucifixion—as evil. . . . Under the influence of the spirit, the disciples perpetuated the memory of the event . . . in a form that reveals the innocence of the just man who has suffered martyrdom." *Id.* at 193-94.

become so robust that public confidence in the scapegoating mechanism will be completely undermined.<sup>94</sup>

Yet even Girard maintains that undermining public acceptance of the use of community violence to counter violence carries with it significant dangers. If ritual violence is to be used to unify the community, then abandoning an effective method of satisfying the mimetic urge may lead to greater intra-community violence.<sup>95</sup> As actors in the political and legal system, we can hardly avoid taking some position; we do not have the luxury of sitting on the sidelines and waiting for inevitable historical forces to take effect. But can we ignore the possibility that in undermining public confidence in the death penalty, we may deprive the community of a unifying tool that serves an important purpose? If the community cannot enact a ritual of violence against criminals, will it engage in even more destructive violence against those, within or outside the community, seen as the other?

The most direct response to the claim that communities need capital punishment is, of course, to point to the large number of communities that have renounced it. This includes not only other nations, but a number of American states. If western European nations and states such as Vermont and Minnesota do not need the death penalty, why do states such as California and Texas feel that need? And why does a state such as New York, having gone without the death penalty for decades, feel the need to reestablish it?

If the ultimate value of capital punishment is its symbolic power, then perhaps the most important task for abolitionists will be to put forward alternative symbolic routes to the same goal, that of achieving community unity. Girard points out that within religious communities, human sacrifice gave way to animal sacrifice, which has largely given way to purely symbolic rituals of sacrifice.<sup>96</sup> These non-lethal rituals retain much of the power of the earlier, destructive practices. It would seem likely that within the secular religion of the law, the same process might apply.

This suggests that if the death penalty is to be abolished, it must be replaced with an alternative community ritual. If this substitution is not effective, then efforts to undermine public confidence in the death penalty may be counterproductive. As more members of the community lose faith in capital punishment, the ritual of the death penalty becomes less able to fulfill its goal of uniting the community. But rather than reacting by abandoning capital punishment, its supporters are likely to insist that it is failing

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94. See *id.* at 196-202.

95. "[V]iolence, having lost its vitality and bite, will paradoxically be more terrible than before its decline. As the whole of humanity makes the vain effort to reinstate its reconciliatory and sacrificial virtues, this violence will without doubt tend to multiply its victims . . ." *Id.* at 196.

96. "In order to reproduce a model of the mimetic crisis in a spirit of social harmony, the enactment must be progressively emptied of all real violence so that only the 'pure' form is allowed to survive." *Id.* at 21.

because it simply isn't being invoked forcefully or frequently enough. When ritual fails, a common response is to repeat it, more fervently and frequently, hoping that eventually it will be effective.<sup>97</sup> We may be witnessing this phenomenon already. It is easy to conclude that the recent increase in the number of executions has led to an increase in the calls for abolition of capital punishment, but is it possible that, in turn, the increased calls for abolition, which refute the notion that the death penalty unites us, leads supporters to insist on progressively speedier executions?

It would be nice to think that the community rituals that might replace capital punishment would be uplifting affirmations of the values of a universal community. But Girard's analysis suggests that while that might be possible at some distant "omega point"<sup>98</sup> in the future, present day human communities still require rituals that unite them in some form of opposition to the other, to that which is foreign and threatening. European nations that have abolished the death penalty are relatively homogenous in language, culture and ethnicity; perhaps this provides them with a sufficient sense of unity and distinctiveness against the "other" so that they have less of a need to find a common enemy within, at least one who must be dealt with violently.<sup>99</sup>

But perhaps the relative homogeneity of European nations is, at best, only a partial explanation. For while these countries no longer execute criminals, and also have lower overall rates of incarceration than the United States, this hardly means that they do not unite in their expressions of revulsion against those who commit violent crime. It is often overlooked, for example, that as harsh as American prison conditions may be, observers rate prison conditions in some abolitionist countries as far worse.<sup>100</sup> Incarceration is, of course, the use of state coercion and, while short of execution or torture, a violent act against the criminal. The experience of other nations, and some American states, indicates that community denunciation of a criminal followed by lengthy, harsh treatment can fulfill the symbolic goals sought by the death penalty as well as actual executions, at least in most cases.

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97. "[D]emystification of the system necessarily coincides with the disintegration of that system. . . . In fact, demystification leads to constantly increasing violence . . . ." GIRARD, *VIOLENCE*, *supra* note 39, at 24.

98. The term is not Girard's but that used by theologian-paleontologist Pierre Teilhard de Chardin, to signify the ultimate point of evolution. URSULA KING, *SPIRIT OF FIRE: THE LIFE AND VISION OF TEILHARD DE CHARDIN* 176 (1996).

99. Of course, at some point a strong sense of community and solidarity can be dangerous, leading to xenophobia, or exclusion or belittling of anyone who appears to be outside of the community consensus. For a discussion of the issue of cultural minorities, and the principle of nationality, see DAVID MILLER, *ON NATIONALITY* 119-54 (1995).

100. Human Rights Watch maintains a summary of prison conditions. HUMAN RIGHTS WATCH, *ENDING THE ABUSIVE TREATMENT OF PRISONERS*, HUMAN RIGHTS WATCH PRISON PROJECT, at <http://www.igc.org/hrw/advocacy/prisons> (last visited Jan. 19, 2001).

Any campaign to abolish the death penalty, it would seem, will be effective only if it can satisfy the community's need to denounce the criminal, and treat him harshly, while stopping short of killing him. And this will, no doubt, be troubling to at least some abolitionists. Many who oppose the death penalty simultaneously work for a less harsh criminal justice system in general, one focusing on rehabilitation and eschewing any punishment beyond the minimum necessary to achieve that goal, and possibly the goal of deterrence. But to the extent that the abolitionist movement is seen as simply a part of an overall movement to be less punitive, more understanding and sympathetic to, violent criminals, it is likely to meet fierce resistance.

Public opinion polling has shown that public support for the death penalty drops significantly when the question is phrased to highlight the alternative of a life sentence without chance of parole.<sup>101</sup> In very rational terms, this option assumes with reasonable certainty that the killer will not kill again. But perhaps more significantly, it emphasizes the fact that the community, through the judicial system, has not minimized the crime, or the community's revulsion. We have denounced the murderer, and will be subjecting him to harsh treatment. For many, this is sufficient to satisfy the needs addressed by the scapegoating process.

Abolitionists, especially those grounded in strong religious beliefs, will often shape their arguments around concepts of forgiveness of, and empathy with, the condemned killer.<sup>102</sup> To those of us who share those beliefs, these arguments can seem powerful. But such an approach may be counterproductive. In at least some cases, the community will be unable to forgive or empathize. It will demand an unambiguous communal denunciation of the criminal, followed by unambiguously punitive actions against him. To ignore this will be to undermine any movement against capital punishment.

Perhaps an effort to simultaneously undermine public confidence in the death penalty and emphasize alternative ways of expressing communal outrage might succeed in satisfying the urges that support capital punishment. But perhaps a different approach might prove fruitful as well. Recently, the New Hampshire legislature voted to abolish that state's death penalty, but the repeal measure was vetoed by Governor Shaheen.<sup>103</sup> No one has been executed in New Hampshire in decades;<sup>104</sup> New Hampshire

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101. See *supra* note 10.

102. Certainly the most prominent recent example is *Dead Man Walking*. HELEN PREJEAN, *DEAD MAN WALKING* (1993).

103. See Norma Love, *Death Penalty Stays in New Hampshire*, AP ONLINE, June 27, 2000, 2000 WL 23360324.

104. The last execution in New Hampshire was in 1939. *Id.*



has a low incidence of violent crime.<sup>105</sup> Why, then, would a governor feel the need to veto the repeal measure?

It is too easy to simply reject this as political grandstanding. The legislators who voted for repeal, after all, were just as likely as the governor to have an accurate sense of general public sentiment. Perhaps Governor Shaheen's veto illustrates as well as any recent political development the symbolic power of the death penalty. Might the mere existence of the death penalty serve a significant purpose, even if it is never invoked? Believers in classical theories of deterrence would quickly answer affirmatively; to them, the death penalty frightens potential murderers, effectively negating their murderous desires, and avoiding the need to even impose the sanction. But empirical evidence does not support such an effect.<sup>106</sup>

The mere existence of capital punishment on the statute books may serve the symbolic function of asserting the community's belief that there are cases of unmitigated evil that deserve a violent community response. This mere assertion may satisfy the demand for at least symbolic, if not actual, violence. Perhaps Governor Shaheen's veto was as effective as the imposition of an actual death sentence in fulfilling capital punishment's ritual goals. Along those same lines, we might note that Illinois Governor Ryan, in declaring a moratorium on executions, coupled it with a reaffirmation of his belief in the death penalty itself. Might the death penalty, somewhat like nuclear weapons, have an effect even if never used?

Of course, in the case of nuclear weapons, great efforts are made to see to it that they never need to be used. Similarly, the moratorium movement might strive to so severely limit the application of the death penalty that it becomes essentially extinct, while never denying, and perhaps vigorously asserting, its theoretical validity, and perhaps its appropriate use in an exceptionally rare case. It is often overlooked that a number of nations that have essentially abolished the death penalty have done so while reserving capital punishment for truly exceptional circumstances, such as wartime treason.<sup>107</sup> The case of Israel's execution of Eichmann again comes to mind. Thus, even a community generally in favor of abolition hesitates, when asked whether no crime, even in theory, might justify the death penalty. It will be difficult for a committed abolitionist to substitute "hardly ever" for "never" when asked when capital punishment is justified. But perhaps ultimately reaching the point where the United States adopts its own version of "Adolf Eichmann, but no one else" is the goal that either the moratorium or abolitionist movement can, or should, strive for.

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105. "The state had the nation's lowest murder rate in 1998, has no capital trials pending, and has no one on death row." *Id.*

106. *See supra* note 12.

107. A number of abolitionist nations retain the death penalty for treason or certain wartime offenses. ZIMRING & HAWKINS, *supra* note 12, at 29 tbl.2.1, 31 tbl.2.3.

## CONCLUSION

Ronald Tabak is surely correct in concluding that capital punishment is ultimately a political, rather than merely a legal, issue. Its retention or abolition will depend more on public sentiment than on courtroom arguments about the Eighth Amendment. And for abolitionists, this means that large numbers of supporters of capital punishment must be convinced to change their position. This is unlikely to occur unless the motives that animate death penalty supporters are understood and addressed. It may be emotionally satisfying to attribute support for the death penalty entirely to the actions of cynical politicians and the attitudes of morally obtuse citizens, but such a position is unlikely to actually change many minds.

Standard justifications for capital punishment, deterrence and retribution, fall seriously short of explaining many aspects of the death penalty as currently applied. But Girard's contention that society has a strong need for powerful rituals of violence to provide a sense of community and solidarity against a common enemy provides an intriguing alternative view of the key function of capital punishment. It is not entirely unrelated to traditional rationales; it is consequentialist, but not in the rationalist manner of classical deterrence theory; it will not work in modern society if it violates the retributionist demands that the victim be actually responsible for the alleged crime. In light of all this, what can we say about the current moratorium movement?

To the extent that the moratorium movement insists that no execution go forward in the face of scientific evidence of innocence, it can hardly be opposed. But DNA and other evidentiary advances are also sure to provide nearly incontrovertible evidence of guilt as well. To the extent that the movement emphasizes the possibility of "actual innocence," it risks simultaneously strengthening the resolve of death penalty supporters in the many cases where there is no doubt of who committed the crime.

If the moratorium movement is to move beyond "actual innocence," it can expect much tougher going. Many states' continued willingness to execute minors or those with mental deficiencies is stark evidence of peoples' felt need for rituals that condemn evil; arguments, however powerful, based on the criminals' lack of full responsibility, arguments that should weigh heavily in the mind of a sophisticated retributionist, make surprisingly little headway. Perhaps this is due, as Girard would observe, to the eagerness of the community to select a victim who is identifiably different in some way from the rest of us. Perhaps it is due to death penalty supporters' suspicion that to absolve one killer of full responsibility will lead to absolving all.

It is unlikely that we will see a widespread social rejection of all violence, even violence in the pursuit of justice, in the foreseeable future. Society, sadly, will still need to express revulsion, and do so through legal

means. If the moratorium movement is to move beyond securing more reliable procedures to determine who is executed to something approaching abolition, it will have to take seriously the need of the public to respond as strongly as possible to the presence of true evil in the community. I am not at all sure that I have any final answers to the question of how to simultaneously satisfy this need and at least approach the goal of complete abolition of the death penalty. Perhaps the best possible solution will be to work toward an American solution that resembles that of Israel: capital punishment for Eichmann, or the extremely rare equivalent, but for no one else. Perhaps this is where the moratorium movement might lead. We might retain the symbol of capital punishment, but renounce its actual use.