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WHAT'S GUILT (OR DETERRENCE) GOT TO DO WITH IT?: THE DEATH PENALTY, RITUAL, AND MIMETIC VIOLENCE

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INTRODUCTION

For decades, the death penalty has been one of the most passionately debated topics in American law. Lawyers, social scientists, philosophers, theologians, the mass media, and ordinary citizens have argued over its wisdom and legitimacy. Remarkably, though, when the principal arguments for and against the death penalty are examined closely, they seem inadequate to the task of either justifying the death penalty or proving convincingly that it must be abolished.

As a question of constitutional law, the death penalty debate unsurprisingly has focused on whether executions are "cruel and unusual" within the meaning of the Eighth Amendment.¹ Beyond questions of how to give specific content to those general terms, the government's choice of criminal punishments must meet a more fundamental requirement. At the very least, due process of law requires that there be a rational basis for government action that deprives one of life or liberty.² Thus, rational argument must support the choice of punishment. Of course, the choice of

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1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. Although Justices have disagreed sharply over how stringent the burden is upon government to demonstrate that its actions are rational, even the most deferential would maintain that some minimal rationality must be established. For example, in *Lochner v. New York*, 198 U.S. 45 (1905), the dissenters did not challenge the notion that the state of New York must act reasonably in its economic regulation; rather, they applied a more permissive standard of determining reasonableness. See *id.* at 76 (Holmes, J., dissenting); *id.* at 66-74 (Harlan, J., with whom White & Day, JJ., join, dissenting). Professor Cass Sunstein maintains: "Above all, the American Constitution was designed to create a deliberative democracy. . . . The minimal condition of deliberative democracy is a requirement of reasons for government action." CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 19-20 (1993).

punishment never has been subject to strict scrutiny, which would impose a requirement that the punishment go no further than necessary to achieve the government's interest.³ Still, the choice by government to impose a severe punishment may not be arbitrary; rational grounds for the choice are required.

The search for a rational basis for the death penalty has led to two primary, alternate justifications, both of which abolitionists contest.⁴ The first of these is the consequentialist argument that imposition of the death penalty furthers clearly defined purposes, usually deterrence, better than do less severe punishments.⁵ Abolitionists seem most comfortable contesting this line of argument.⁶ Although proponents of the death penalty by no means concede an inability to demonstrate the validity of their consequentialist arguments,⁷ the weight of evidence seems to refute proponents' claims of deterrence.⁸

When faced with the weaknesses of deterrence-based consequentialist arguments, death penalty proponents gravitate toward arguments based on retributive theory.⁹ According to this line of thought, desert and individual responsibility justify, if not demand, the symmetry of capital punishment as a response to murder, irrespective of the existence or nonexistence of any deterrence.¹⁰ Though some abolitionists have tried to frame their case upon retributivist thought, this line of argument is

3. Such a requirement would, more or less, constitutionalize Jeremy Bentham's classic utilitarian conclusions regarding punishment. Because the end of law "is to augment . . . happiness" and "punishment . . . is [an] evil," punishment should not be imposed in excess of its ability "to exclude some greater evil." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Wilfrid Harrison ed., Basil Blackwell & Mott, Ltd. 1948) (1789).

4. See, e.g., WALTER BERNs, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 83-152 (1991); see generally MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE (1990) (exploring retributive thought).

5. See BERNs, *supra* note 4.

6. See MARK TUSHNET, THE DEATH PENALTY 5-7 (1994).

7. See *id.*

8. See, e.g., KILMAN SHIN, DEATH PENALTY AND CRIME 1-71 (1978); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 186-90 (1973).

9. See HENBERG, *supra* note 4.

10. See *id.* at 221-28.

used primarily by death penalty advocates.¹¹

Recent Supreme Court cases seem to take the position that the state need not win the consequentialist debate in order to defend the death penalty.¹² Retribution, it would appear, provides a sufficient foundation. Analysis of the Court's death penalty jurisprudence, however, shows a surprising lack of sympathy for arguments that seem to go directly to the core concerns of retributivism, the assessment of personal responsibility, and even the question of guilt itself.¹³ Perhaps these cases indicate that something else is going on here, something of which the Justices themselves may be largely unaware, something neither retributivist nor consequentialist, and perhaps somewhat beyond the limits of traditional rational argument.

René Girard, a theorist whose work attempts to connect literary criticism, anthropology, and theology, contends that religion, law, and indeed many of the bonds of civilization and culture, rely on ritualized violence in order to break and tame the cycle of imitative, or mimetic, violence that inevitably arises within society.¹⁴ Girard's theories evoke controversy, but if they are even partially correct, they may shed a great deal of light on the role played by the death penalty in American society. They may explain much that recourse to either consequentialism or retributivist theory leaves unexplained.

If Girard's theories do help explain the persistence of the death penalty, they also may require those who debate the issue to confront new questions. Defenders of the death penalty, on the one hand, will be hard pressed to establish that, at least as it is currently administered, it is not weighted down with aspects that are not merely inadequate to satisfy a consequentialist, but perhaps are beyond the scope of what we can accept as rational, even under retributivist theory. Abolitionists, on the other hand, will be challenged by the apparent need of society for ritualized community violence. In other words, is abolition possible without the creation of some alterna-

11. See TUSHNET, *supra* note 6, at 4-7.

12. See *generally id.* at 113-17 (discussing recent death penalty decisions by the Court).

13. See *id.*

14. See RENÉ GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., Johns Hopkins University Press 1977) (1972).

tives to satisfy a powerful social need, regardless of whether rational or nonrational foundations form the bases for that need?

Part I of this Article gives a necessarily brief overview of Supreme Court death penalty jurisprudence over the last decades, focusing on the main lines of consequentialist and retributivist argument put forward by abolitionists and death penalty proponents. Part II explores the ultimate inability of either consequentialist or retributivist arguments to explain significant parts of current death penalty jurisprudence satisfactorily. Part III sketches Girard's theories of mimetic violence and the role of the scapegoat, and applies these ideas to explain the role of the death penalty in American society. Finally, Part IV discusses the implications of accepting an explanatory model based upon Girard's thought for the future of the death penalty debate.

I. THE DEATH PENALTY AND THE SUPREME COURT: A BRIEF HISTORY

The Eighth Amendment provides that the federal government may not impose "cruel and unusual punishments."¹⁵ More broadly, the Fifth Amendment provides that no person may be "deprived of life, liberty, or property without due process of law."¹⁶ The Fourteenth Amendment extends the due process guarantee to the states, and the Supreme Court has held that the Eighth Amendment is incorporated in that guarantee, and thus also binds the states.¹⁷

Before the 1960s, the Supreme Court considered a number of issues regarding the procedure under which the death penalty was imposed, but did not seriously entertain the argument that the penalty was itself unconstitutional.¹⁸ In 1889, the Court rejected the argument that the new electric chair was a cruel and

15. U.S. CONST. amend. VIII.

16. *Id.* amend. V.

17. See *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the proscription of cruel and unusual punishment through the Fourteenth Amendment Due Process Clause).

18. See *Francis v. Resweber*, 329 U.S. 459 (1947) (rejecting a due process and Eighth Amendment challenge to the ability of a state to attempt to execute a prisoner after the first attempt had failed); *In re Kemmler*, 136 U.S. 436 (1890) (rejecting a due process challenge).

unusual means of imposing the death penalty,¹⁹ and in a grisly 1947 case, a sharply divided Court held that it was not cruel and unusual to electrocute a murderer a second time when the chair malfunctioned and delivered an insufficient shock the first time.²⁰ In 1931, however, the Court held that a defendant facing the death penalty was entitled, as other criminal defendants at the time were not, to appointed counsel.²¹

In 1963, Justice Arthur Goldberg circulated a memorandum to his colleagues urging that the Court select several cases for review as vehicles to determine "[w]hether, and under what circumstance, the imposition of the death penalty is proscribed" by the Constitution.²² In light of the abolition of the penalty by most western democracies and declining public support at the time within the United States, Justice Goldberg contended that the issue was ripe for consideration.²³ He also stated that in his opinion, the death penalty had to be justified as an effective deterrent, because vengeance was not "an acceptable goal of punishment."²⁴ Justice Goldberg's memorandum did not persuade the Court to grant review, but it generally is regarded as the starting point of the contemporary history of the Court's struggle with this issue.

Between 1963 and 1972, the Supreme Court considered several death penalty cases, rejecting challenges based both upon the absence of clear standards to guide juries in choosing the penalty²⁵ and upon the need for bifurcated proceedings to address

19. See *In re Kemmler*, 136 U.S. at 447.

20. See *Francis*, 329 U.S. at 463. For a full account of the case, see ARTHUR S. MILLER & JEFFREY H. BOWMAN, *DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS* (1988).

21. See *Powell v. Alabama*, 287 U.S. 45 (1932). This case was the famous case of the "Scottsboro Boys," nine young blacks accused of raping two white women. The case commanded national attention. See generally JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1994) (describing the trial of the "Scottsboro Boys" and the public reaction).

22. Memorandum from Arthur J. Goldberg to the Conference Re: Capital Punishment, October Term, 1963, reprinted in TUSHNET, *supra* note 6, at 149-62.

23. See TUSHNET, *supra* note 6, at 155-58.

24. *Id.* at 159. Justice Goldberg contended that the burden of proving the existence of a deterrent effect was on the state, and that, at best, the evidence was inconclusive. See *id.* at 159-60. The state's burden, therefore, had not been met. See *id.*

25. See, for example, *McGautha v. California*, 402 U.S. 183 (1971), which held that it was not unconstitutional to "commit[] to the untrammelled discretion of the

guilt and punishment.²⁶ Several Justices dissented, however, and, for the first time, significant abolitionist sentiment appeared in the pages of the *United States Reports*.²⁷ During this period, state courts in California²⁸ and New Jersey²⁹ ruled that the death penalty violated state constitutional provisions.

Finally, in 1972, the Court invalidated the death penalty as applied under then-existing statutes.³⁰ *Furman v. Georgia* was decided not only by the narrowest of margins, but also featured five separate opinions from the five Justices in the majority.³¹ Justices Brennan and Marshall found the death penalty to be unconstitutional per se;³² Justices Douglas, Stewart, and White found that its application was arbitrary and discriminatory, but did not go so far as to state that death penalties could not be framed in a way that would satisfy constitutional standards.³³

The connecting thread running through the five opinions was the principle that punishment must be rational.³⁴ Although

jury the power to pronounce life or death in capital cases." *Id.* at 207. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), however, the Court held that a state could not enforce a blanket exclusion of jurors with anti-capital punishment sentiments from juries in capital cases, but in doing so, recognized and implicitly endorsed the fact that juries might be given wide discretion in imposing the death penalty. *See id.* at 518-21.

26. *See McGautha*, 402 U.S. at 208-20. The argument in favor of bifurcation is that a defendant cannot be placed in a position of having to waive his right to be silent on the issue of his guilt in order to introduce evidence that would serve to mitigate the severity of his punishment. *See id.* at 210-11.

27. *See id.* at 226-312 (Douglas, J., with whom Brennan & Marshall, JJ., join, dissenting).

28. *See People v. Anderson*, 493 P.2d 880 (Cal. 1972).

29. *See State v. Funicello*, 286 A.2d 55 (N.J. 1972).

30. *See Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

31. *See id.*

32. "When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes." *Id.* at 305 (Brennan, J., concurring). "[T]he death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment." *Id.* at 358-59 (Marshall, J., concurring).

33. Justice Douglas was concerned with selective application of the death penalty, particularly its impact on minority defendants. *See id.* at 249-57 (Douglas, J., concurring). Justice Stewart was concerned with the arbitrary way in which the penalty was imposed, *see id.* at 306-10 (Stewart, J., concurring), as was Justice White, *see id.* at 310-14 (White, J., concurring).

34. *See id.* at 249 (Douglas, J., concurring); *id.* at 274 (Brennan, J., concurring);

death penalty litigation often is thought to revolve around the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments also imply this primary requirement of rationality.³⁵ The basic test of the rationality of a government act is determining whether it relates to achieving a legitimate government end.³⁶ Inquiry must begin, then, with an inventory of the legitimate ends of punishment. The most commonly noted purposes of punishment are incapacitation,³⁷ deterrence of others,³⁸ rehabilitation of the offender,³⁹ and retribution—the most difficult to define clearly.⁴⁰ Certainly, a punishment that accomplished none of these goals would be vulnerable to attack as irrational. Because criminal punishment is an explicit concern of the Eighth Amendment, one would be justified in demanding, if not the extremely close fit between means and ends that strict scrutiny demands, then at least something more than a minimum suggestion of rationality.⁴¹

id. at 310 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring; *id.* at 331 (Marshall, J., concurring).

35. See SUNSTEIN, *supra* note 2. Professor Tribe has noted that even in abandoning the strict scrutiny given to means-end relationships during the era of *Lochner v. New York*, 198 U.S. 45 (1905), "the Court never wholly abandoned the position that legislatures . . . must always act in furtherance of public goals." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 582 (2d ed. 1988).

36. See TRIBE, *supra* note 35, at 582-83.

37. See NIGEL WALKER, *WHY PUNISH?* 34-41 (1991). Incapacitation, that is, rendering the individual offender unable to repeat his crime, is usually a temporary matter, running the length of the offender's prison term. See *id.* at 34. Thus, "most sentences merely postpone opportunities for reoffending." *Id.* Of course, the longer a prison term, the closer a sentence gets to substantially, if not entirely, incapacitating a prisoner.

38. See generally ZIMRING & HAWKINS, *supra* note 8. Deterrence usually is discussed in terms of its effect on others, rather than on the offender, although the offender also may be deterred in the future. See *id.* at 18-33.

39. See PHILIP BEAN, *PUNISHMENT* 53-65 (1981). Although rehabilitation generally is seen as the most modern theory of punishment, it can trace its philosophical roots to Plato and St. Thomas Aquinas, among others, who saw "[w]ickedness [as] a mental disease," and "punishment . . . as a moral medicine." *Id.* at 54.

40. See the excerpts from Kant, Hegel, and others collected in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 102-35 (Gertrude Ezorsky ed., 1977) [hereinafter *PHILOSOPHICAL PERSPECTIVES*]; see also the extensive treatment of the subject in HENBERG, *supra* note 4.

41. The requisite closeness of the fit between legislative means and ends is one of the most pervasive issues in constitutional law. See SUNSTEIN, *supra* note 2; TRIBE, *supra* note 35.

To Justice Brennan, punishment became arbitrary, and thus unconstitutional, when it exceeded the severity necessary to achieve any of the accepted goals of punishment.⁴² The death penalty obviously does not seek to rehabilitate. Justice Brennan stated that life imprisonment could achieve incapacitation, and that the "remote and improbable" risk of death was unlikely to have a significant deterrent effect.⁴³ As for retribution, which Justice Brennan described as "[t]he asserted public belief that murderers . . . deserve to die,"⁴⁴ the fact that the overwhelming majority of murderers were not punished by death led him to the conclusion that "the execution of a random few" did not further the retribution goal significantly.⁴⁵

Justice Marshall's opinion is probably best known for its rejection of the notion that uninformed public opinion could suffice to establish the constitutional acceptability of the death penalty.⁴⁶ For the purposes of this Article, however, it is more significant that Justice Marshall alone among the Justices explicitly rejected retribution's legitimacy as a goal of punishment.⁴⁷ Overstating the empirical case, he maintained that "no one has ever seriously advanced retribution as a legitimate goal" in contemporary America, but that the debate concerning capital punishment was "always mounted on deterrent" arguments.⁴⁸ Perhaps more in-

42.

A punishment is excessive . . . if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.

Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). Here, Justice Brennan essentially puts forward the position of Jeremy Bentham: Because "all punishment in itself is evil . . . it ought only to be admitted in as far as it promises to exclude some greater evil," and "[it] ought not to be inflicted. . . where the mischief may be prevented . . . without it: that is, at a cheaper rate." BENTHAM, *supra* note 3, at 158-62.

43. *Furman*, 408 U.S. at 302 (Brennan, J., concurring).

44. *Id.* at 304 (Brennan, J., concurring).

45. *Id.* at 304-05 (Brennan, J., concurring).

46. *See id.* at 329-33 (Marshall, J., concurring).

47. *See id.* at 342-45 (Marshall, J., concurring).

48. *Id.* at 363 (Marshall, J., concurring). Although consequentialist arguments were more prominent in the years preceding *Furman*, retribution was not entirely without

teresting was his assertion that to accept retribution as a legitimate goal would render the Eighth Amendment essentially unenforceable: "all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act."⁴⁹

Justices Douglas, White, and Stewart did not reject the notion that the death penalty might be defended on rational grounds, but they found fatal flaws in the then-current practice. The selective imposition of death, and the likelihood of its application in unacceptable discriminatory ways troubled Justice Douglas.⁵⁰ Justices White and Stewart each accepted the legitimacy of retribution, but found that imposition of capital punishment on a "capriciously selected random handful"⁵¹ of offenders could not meaningfully satisfy what Justice Powell termed humankind's "retributive instincts."⁵²

Although the four dissenters obviously found capital punishment to be rational and constitutionally justifiable, their opinions primarily sounded a theme of judicial deference to legislatures rather than mounting a direct defense of the death penalty.⁵³ In fact, several Justices felt compelled to disparage the

its defenders. See, e.g., H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 239 (1965), reprinted in PHILOSOPHICAL PERSPECTIVES, *supra* note 40, at 119-34.

49. *Furman*, 408 U.S. at 344 (Marshall, J., concurring).

50. See *id.* at 250-57 (Douglas, J., concurring).

51. *Id.* at 309-10 (Stewart, J., concurring). "[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied." *Id.* at 311 (White, J., concurring).

52. *Id.* at 454 (Powell, J., dissenting).

53. "If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts." *Id.* at 403 (Burger, C.J., dissenting). "[The abolitionist argument] makes sense only in a legislative and executive way and not as a judicial expedient." *Id.* at 410 (Blackmun, J., dissenting). "The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative action is its responsiveness to the democratic process, and to revision and change . . ." *Id.* at 462 (Powell, J., dissenting).

The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.

practice: Justice Blackmun stated that as a legislator, he would vote against the death penalty;⁵⁴ Chief Justice Burger stated that he might vote similarly under the same circumstances;⁵⁵ and Justice Powell, in the course of analyzing the goals of punishment, stated that retribution was a permissible, although perhaps "unworthy" rationale.⁵⁶

Although the abolitionist community widely regarded *Furman* as the final victory,⁵⁷ the case contained the seeds of its own demise; one that would come swiftly. Because at least two Justices in the *Furman* majority believed that the death penalty could be made rational, and therefore constitutionally acceptable, by being made more determinate, legislators explored ways of doing just that. The most determinate option, of course, was a mandatory death penalty, but, in 1976, the Court found such statutes unconstitutional, at least as applied to broad categories of murder.⁵⁸ A constitutionally acceptable death penalty, it was held, must permit "particularized consideration" of the crime and the defendant.⁵⁹ In *Gregg v. Georgia*,⁶⁰ however, the Court approved a statute that gave "guidance" and "direction" to a jury in deciding which defendants should be sentenced to death.⁶¹ Once again, most Justices either expressly or implicitly endorsed both deterrence and retribution as legitimate goals of punishment,⁶² but now it was held essential to consider the particular blameworthiness of the defendant.⁶³

Thus, the Court has taken the position that a rational system

Id. at 467 (Rehnquist, J., dissenting).

54. *See id.* at 406 (Blackmun, J., dissenting).

55. *See id.* at 375 (Burger, C.J., dissenting).

56. *See id.* at 453 (Powell, J., dissenting).

57. "With *Furman*, the . . . campaign against the death penalty appeared to have reached a successful . . . conclusion The Court, it might have seemed, had abolished the death penalty." TUSHNET, *supra* note 6, at 54. "To many observers, *Furman* had, for all practical purposes, ended the practice of executions in America." FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 64 (1986).

58. *See Woodson v. North Carolina*, 428 U.S. 280 (1976).

59. *Id.* at 303.

60. 428 U.S. 153 (1976).

61. *Id.* at 192-98.

62. *See id.* at 183-87; *id.* at 207-26 (White, J., concurring in the judgment).

63. *See id.* at 183-87.

of retribution (and apparently also of deterrence) may not insist that the punishment automatically mirror the criminal's act. Retribution must indicate society's response not merely to the consequences of the act, but also to the extent to which the actor was unusually dangerous or blameworthy. Three Justices rejected this view, and voted to uphold mandatory death sentences;⁶⁴ Justices Brennan and Marshall continued to insist that all death penalties were unconstitutional;⁶⁵ and Justice Marshall renewed his argument that retribution was not a legitimate basis for punishment.⁶⁶

Although most of the Justices rejected the contention that retribution was an illegitimate purpose of punishment, case law existed to support the contention that retribution alone might be suspect.⁶⁷ Deterrence appeared to be the more secure justification. Post-*Gregg* developments, however, suggest a distinct reversal of that position. In 1977, the Court held that the death penalty as punishment for rape was unconstitutionally excessive.⁶⁸ The Court also held that the death penalty could be used only in cases of intentional murder; it was impermissible if applied to a defendant who neither killed nor demonstrated any intent that anyone be killed.⁶⁹ Most commentators interpret these cases to indicate that death constitutionally may be imposed only for murder.⁷⁰

64. *Woodson*, 428 U.S. at 306-07 (White, J., with whom Burger, C.J. & Rehnquist, J., join, dissenting).

65. See *Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting).

66. See *id.* at 239-41 (Marshall, J., dissenting).

67. "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct 'Retribution is no longer the dominant objective of the criminal law,' but neither is it a forbidden objective" *Id.* at 183 (citing *Williams v. New York*, 337 U.S. 241, 248 (1949)).

68. See *Coker v. Georgia*, 433 U.S. 584, 592, 597-98 (1977) (stating that although "[s]hort of homicide, [rape] is the 'ultimate violation of self'", the death penalty was "an excessive penalty for the rapist who . . . does not take human life").

69. *Enmund v. Florida*, 458 U.S. 782, 788 (1982). Nevertheless, the Court has subsequently held that a participant in a felony who did not himself kill another might receive the death penalty under felony murder principles if he was a "major" participant and displayed "reckless indifference to human life." *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

70. This seems to be the clear implication from *Coker*. See *Coker*, 433 U.S. at 597-98 (noting that "life . . . is not over" for the rape victim). As Professor Mark

In terms of pure deterrence, of course, the conclusion that the death penalty can only apply in murder cases could not be sustained. Although the efficacy of using the death penalty to deter murder may be questioned,⁷¹ no reason exists to believe that it would deter other crimes any less. The conclusion that rape and other felonies may not be punished by death seems to indicate clearly that, perhaps surprisingly, deterrence may not be the sole rationale behind the imposition of severe punishment. Far from being an illegitimate justification, retribution seems to be an essential element of the modern justification of the death penalty.

Since 1977, the basic principles established in *Gregg* and the cases immediately following it have been maintained. The arguments that have broken out generally have accepted their basic paradigms. The death penalty itself is now impervious to constitutional challenge; Justices Marshall and Brennan, the consistent dissenters on that point,⁷² no longer sit on the Court. Death still requires justification as being rational, however, and when an individual case or a general practice suggests that capital punishment might be arbitrary, the Court at least has taken challenges seriously, more so than any fundamental attack on the per se use of the death penalty.⁷³

These challenges, though not entirely ignorant of matters of deterrence,⁷⁴ focus primarily on the extent of the defendant's

Tushnet wrote: "Since 1977, it has been generally accepted that capital punishment is reserved for people who commit murder; if death is an excessive punishment for rape, it appears hard to come up with a crime other than murder for which it would not be excessive." TUSHNET, *supra* note 6, at 74.

71. See generally ZIMRING & HAWKINS, *supra* note 57, at 167-86 (stating that the deterrent effect is nil or very small in relation to total homicide volume).

72. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

73. See, e.g., *Pulley v. Harris*, 465 U.S. 37, 50 (1984) (determining that a California statutory scheme was not "arbitrary" for failing to require proportionality review).

74. In *Coker*, the Court struck down the death penalty for rape "even though it may measurably serve the legitimate ends of punishment." *Coker*, 433 U.S. at 593 n.4. Presumably, deterrence is at least one of those ends. In *Enmund*, while focusing on individual culpability, the Court also noted: "We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." *Enmund v. Florida*, 458 U.S. 782, 798-99 (1982).

blameworthiness, highlighting the centrality of the retributive justification for the death penalty. Thus, at some point the offender's age will make death unconstitutional. The Court has noted that "such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."⁷⁵ Although a mentally retarded person may be executed,⁷⁶ an insane person may not be.⁷⁷ Given the distinctions that the Court has made, these decisions must relate more to retribution and blameworthiness than to deterrence. Unsuccessful challenges have been framed in terms of retribution, as well. The argument that the death penalty is subject to racial bias⁷⁸ assumes that if capital punishment is to exist, it should be reserved for those most blameworthy, untainted by extraneous factors.⁷⁹

In recent years, the futility of direct attacks on the constitutionality of capital punishment has led to a series of procedural disputes focusing on the availability of habeas corpus review of state proceedings.⁸⁰ In general, the Court has displayed grow-

75. *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988). The Court held that a defendant who was 15 years old at the time of the crime could not be executed. *See id.* Even the dissenters, although unwilling to set the age at 16, agreed that "at some age a line does exist . . . below which a juvenile can never be considered fully responsible for murder." *Id.* at 872 (Scalia, J., dissenting).

76. *See Penry v. Lynaugh*, 492 U.S. 302, 338-39 (1989) ("In light of the diverse capacities and life experiences of mentally retarded persons, it 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.").

77. *See Ford v. Wainwright*, 477 U.S. 399 (1986).

78. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting a statistically based argument that Georgia's death penalty was administered in a racially discriminatory way).

79. *McCleskey* argued, for example, 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 highly significant. *See id.* at 321 ("[C]ases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim . . .") (Brennan, J., dissenting).

80. *See J. Thomas Sullivan, "Reforming" Federal Habeas Corpus: The Cost to Federalism; The Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. REV. 291 (1992) (discussing the Court's movement toward a more restrictive view of the writ of habeas corpus); *see also 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 (1993) (noting that recent Eighth Amendment jurisprudence has taken a "process oriented" approach focusing on death penalty procedures, rather than a "substantive" approach focusing on the extent to which particular death sentences are deserved).

ing impatience with the length of postconviction proceedings, and has acted to expedite the actual imposition of the penalty.⁸¹ Many of the particulars of these disputes are unnecessary for this Article's purposes, but, as will be discussed below, the general tone of impatience has led to at least a few decisions that should trouble those who are committed to defending capital punishment based on retributive theory. At this point, it will be useful to step back from the specific decisions of the Supreme Court and discuss more broadly the rationales that have been used to justify or attack capital punishment over the years.

II. RATIONALIZING PUNISHMENT

Evidence of the existence of a sense that some limits must be placed on the range and severity of punishment imposed upon criminals preceded the drafting of the Eighth Amendment.⁸² Enlightenment reformers debated the question of punishment, and insisted that it must be justified as producing some recognizable benefit.⁸³ They viewed the imposition of suffering as bad, and therefore not a legitimate end in itself.⁸⁴ Although reformers acknowledged the fact that the act of imposing punishment might itself produce pleasure, that sort of "benefit" was unworthy of rational human beings.⁸⁵ Under this view, to pun-

81. Professor Sullivan has noted that "[t]he political and judicial outcry for 'reform' of federal habeas corpus practice has been mirrored in a series of recent Supreme Court decisions effectively streamlining the process for seeking federal relief from state court convictions." Sullivan, *supra* note 80, at 291 (citing *Delo v. Stokes*, 495 U.S. 320 (1990); *Woodard v. Hutching*, 464 U.S. 377 (1984)).

82. As early as 1809, a volume of the views of various prominent thinkers on the question of capital punishment could be compiled, including, among others, Beccaria, Montesquieu, Thomas More, Erasmus, Benjamin Franklin, Samuel Johnson, and Jeremy Bentham. See generally BASIL MONTAGU, *THE OPINIONS OF DIFFERENT AUTHORS UPON THE PUNISHMENT OF DEATH* (reprint, William S. Hein & Co. 1984) (1809).

83. See *id.*

84. See BENTHAM, *supra*, note 3, at 29 (outlining his formulation of the principle).

85. Benjamin Franklin, arguing against the common 18th century practice of executing thieves, analogized excessive punishment to crime itself. "To put a man to death for a crime which does not deserve death, is it not murder?" Letter from Dr. Benjamin Franklin to Benjamin Vaughn, Esq. On the Criminal Laws, and the Practice of Privateering (Mar. 14, 1785), in 1 MONTAGU, *supra* note 82, at 161. He went on to describe an execution for minor theft as "barbarous . . . bloody-minded, and revengeful." *Id.* at 164.

ish for no other reason than to enjoy the imposition of pain was bestial.⁸⁶ The punisher, under those circumstances, became no better than the criminal.⁸⁷

By no means were the reformers without opposition. Some commentators defended unbridled vengeance as necessary to address some fundamental human instinct.⁸⁸ The nineteenth century, however, saw the fundamental victory of the position that the imposition of punishment, and its degree, had to be justified. Physical punishments and banishment largely gave way to prison sentences.⁸⁹ Special treatment for juveniles and the insane began to take root as well.⁹⁰ To a large extent, this post-Enlightenment trend was committed to rehabilitation as its primary rationale; thus the particular characteristics of the individual convict were of central importance.⁹¹

Perhaps out of frustration at its limited success, rehabilitation largely has faded from popular discussion of rationales for punishment, with the possible exception of cases involving juveniles.⁹² Of course, the death penalty does not, and never has, found its justification in rehabilitation. Rehabilitation has been relevant to the death penalty debate only insofar as abolitionists have argued that the obvious irrelevance of the penalty to rehabilitative ends calls for its rejection.⁹³ Thus, for purposes of this

86. *See id.*

87. *See id.*

88. For a discussion of the pervasiveness of retributive thought, see HENBERG, *supra* note 4, at 21-42. Henberg discusses some of the extremes to which the urge to retribution can lead, such as the historic practice of trying and executing animals for the damage they caused, as well as the possibility that there may be a genetic basis for the urge to retaliate. *See id.*

89. *See* LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 74-82 (1993).

90. *See id.* at 163-66 (discussing the development of separate juvenile justice systems); *id.* at 140-48 (discussing the insanity defense and related issues).

91. For discussion of the development of prisons in the late-18th and early-19th centuries, and the rise and fall of the rehabilitative ideal, see Randall McGowan, *The Well-Ordered Prison: England, 1780-1865*, in *THE OXFORD HISTORY OF THE PRISON* 79-109 (Norval Morris & David J. Rothman eds., 1995); and David J. Rothman, *Perfecting the Prison: United States 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON*, *supra*, at 111-29. For a discussion of the rehabilitative ideal of the "reform school" for juvenile corrections, see Steven Schlossman, *Delinquent Children: The Juvenile Reform School*, in *THE OXFORD HISTORY OF THE PRISON*, *supra*, at 363-89.

92. *See* BEAN, *supra* note 39, at 169.

93. One might argue that execution "rehabilitates" the offender in that, by paying

Article, rehabilitation as a legitimate goal can be put aside.

A second rational goal of punishment is incapacitation of the defendant, that is, assuring that he is unable to repeat his crime. Surely, the death penalty incapacitates, but this justification of capital punishment does not seem prominently advanced in either scholarly or popular debate. Life imprisonment effectively achieves incapacitation nearly as well as does death.⁹⁴ The rare instance of a murder in prison committed by a convict already serving a life sentence does not seem to generate great public concern and a death penalty limited to this small number of cases will not satisfy death penalty proponents. Most current debate over capital punishment therefore turns on two broad justifications: deterrence of others and retribution.

The argument connected most obviously to rational thought, with its insistence upon a demonstration of the connection between means and ends, is the argument based upon deterrence. The contention that the threat of execution will cause at least some killers to abandon their plans is intuitively appealing, and continues to draw wide support.⁹⁵

the ultimate price, he purges his guilt and is reconciled to God. Apparently, the Mormon doctrine of "blood atonement", which maintains that a murderer who has spilled another's blood must not only die, but actually have his own blood spilled, in order to expiate his guilt in the eyes of God was instrumental in leading the Utah legislature to establish and maintain the firing squad as a mode of execution. See Martin R. Gardner, *Illicit Legislative Motivation As a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U. L.Q. 435, 440-49. This type of "rehabilitation," however, is hardly what the term signifies in common usage; this type of "rehabilitation" actually seems more properly to be a form of retribution.

94. The public understandably is concerned with the possibility of a convicted murderer being released and killing again, but the rate of recidivism among released murderers is extremely low. See Hugo Adam Bedau, *Recidivism, Parole and Deterrence*, in *THE DEATH PENALTY IN AMERICA* 173, 175-80 (Hugo Adam Bedau ed., 3d ed. 1982). This, of course, may be due to the fact that the least pernicious killers are the most likely to be paroled. Even this concern is mooted in large part by imposing a sentence of life without parole.

95. The most prominent academic proponent of the existence of a deterrent effect has been Isaac Ehrlich. See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, AM. ECON. REV., June 1975, at 397; Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975). But see ZIMRING & HAWKINS, *supra* note 57, at 174-79 (attacking Ehrlich's views and methodology). The empirical evidence, however, probably is less important in the debate than the strong intuitive feeling that somehow, capital punishment *must* deter. Er-

The notion that deterrence stands as a sufficient justification for the death penalty is subject to two strong lines of attack. First, empirical support for the existence of a deterrent effect is, at best, sparse. No correlation exists between the presence or frequency of the death penalty and the murder rate in various states.⁹⁶ Within particular states, the murder rate does not seem to respond to changes in the imposition of death.⁹⁷ Although the findings are not quite unanimous,⁹⁸ and cannot be definite because clinical precision cannot be obtained in the absence of knowing the unknowable fact of how many murders would have been committed at a particular time in a particular state were the law different, the general consensus among social scientists is that the deterrent effect of the death penalty is unproven.⁹⁹

One response to this situation might be to argue that the burden is not on the defenders of a historically common punishment to prove its efficacy, but rather upon its opponents to prove the opposite.¹⁰⁰ Because that probably cannot be done, given the inability to set up a valid controlled experiment, history and intuition should prevail. This proposition, however, does not answer the second argument against the use of deterrence to justify the death penalty. If deterrence alone could justify the death penalty, then there would be no reason to limit its use to crimes involving the taking of life. Indeed, there would be no

nest van den Haag wrote: "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).

96. See Thorsten Sellin, *Homicide in Retentionist and Abolitionist States*, in CAPITAL PUNISHMENT 135 (Thorsten Sellin ed., 1967).

97. See SHIN, *supra* note 8, at 25-36.

98. See Ehrlich's two articles, *supra* note 95.

99. See ZIMRING & HAWKINS, *supra* note 57, at 167-86.

100. This appears to be the position taken by the Supreme Court:

Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification.

Gregg v. Georgia, 428 U.S. 153, 186-87 (1976).

reason to limit its use to any category of the most serious crimes. Surely the risk of death might deter burglars, embezzlers, those who operate illegal gambling operations, and a host of others. Indeed, because many of these lesser crimes more commonly are the products of calculated decisions to break the law than is homicide, which often is the product of an eruption of passion, the use of the death penalty might be more of a deterrent for these lesser crimes.¹⁰¹ History validates this position; prior to the nineteenth century, executions for crimes that neither took nor endangered life were common.¹⁰²

Over the last two hundred years, governments clearly have rejected that conclusion, first, by legislatures drastically limiting the list of capital crimes, and finally, by the Supreme Court ruling that the constitution demands some proportionality between crime and punishment and that therefore death may serve to punish only those who take, or at least threaten, life.¹⁰³ It is apparent, then, that deterrence alone, even if well established, cannot serve to fully justify the death penalty.

Perhaps because of this realization, but more likely because of the inability to demonstrate actual deterrent effects of capital punishment, proponents largely have shifted ground.¹⁰⁴ If not actually conceding deterrence's failure to justify capital punishment, academic proponents have come to rely more on retribution to justify the death penalty.¹⁰⁵ Commentators have attempted to demonstrate that retribution, properly understood, is

101. Thus, in *Coker*, the dissenters pointed out that the death penalty might well deter rapists at least as effectively as it deters murderers. See *Coker v. Georgia*, 433 U.S. 584, 617 (1977) (Burger, C.J., dissenting). The majority countered this view by stating that a penalty may not be disproportionate "even though it may measurably serve the legitimate ends of punishment." *Id.* at 593 n.4.

102. The earliest Anglo-American abolitionist arguments were directed largely against the broad range of capital offenses. For a list of dozens of capital crimes other than murder, see the excerpt from P. Colquhoun (1800), reprinted in 1 MONTAGU, *supra* note 82, at 80-83.

103. See *supra* notes 68-70 and accompanying text.

104. See van den Haag, *supra* note 95, at 965.

105. Thus, Ernest van den Haag, after pointing out that most abolitionists he has discussed the question with would still abolish the death penalty even if its deterrent effect could be proven, states: "[Deterrence] is not necessary for me either, since I would be for capital punishment on grounds of justice alone." *Id.* at 965.

a more sophisticated concept than mere revenge.¹⁰⁶ Unlike deterrence, retribution depends heavily upon concepts of proportionality, and upon the idea that to call upon the criminal to experience approximately the same fate as his victim is almost self-evidently just.¹⁰⁷ By committing the crime, the criminal has, in effect, indicated that he believes that such an act is permissible. When society inflicts the same fate upon the criminal, it then does so, in a sense, at the criminal's own invitation.¹⁰⁸ In a more metaphysical way, the retributive act restores some sort of balance that existed prior to the commission of the crime.¹⁰⁹

Like deterrence, retribution cannot fully supply the underlying rationale for severe punishment. Most strikingly, the principle that punishment literally should recapitulate the crime, which is at the heart of the retributivist case for capital punishment,¹¹⁰ clearly would be rejected in a wide range of other contexts. A person who is guilty of assault is not physically assaulted and a rapist is not raped. Little doubt exists that were a state to either assault the assaulter or rape the rapist, such punishment would be found unconstitutional.¹¹¹ The response

106. See, e.g., HENBERG, *supra* note 4, at 17-29.

107. See *id.* at 59-76.

108. This notion is associated most closely with Immanuel Kant.

The undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself."

IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 196 (photo. reprint, Augustus M. Kelley Publishers 1974) (W. Hastie trans., 1887).

109. Marvin Henberg has written about this "hydraulic" or "homeostatic" metaphysical view, where God or nature demands "an equal and opposite reaction to each crime or sin" in order to place the world back in balance. See HENBERG, *supra* note 4, at 81-83.

110. See *id.* at 165.

111. Even the dissenters in *Furman* could state: "Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears—punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution." *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting). See also *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), where the court, in an opinion written by Judge, later Justice, Harry Blackmun, found Arkansas's use of the strap to discipline prisoners to be unconstitutional. *Id.* at 579.

to this argument might be that only in the case of homicide is literal retribution necessary; in other cases, a rough equivalence of pain can be struck through some combination of prison, monetary penalties, and shame to equal the harm caused.¹¹² Only death, however, equals death.¹¹³ The loss of all freedom, assets, and honor is inadequate.¹¹⁴

This view is problematic for a number of reasons. First, it proves too much. If homicide uniquely justifies capital punishment, then what of the long history of use of the penalty for lesser crimes? Death was chosen as a punishment centuries before it could be justified as a mirror image of the crime involved.¹¹⁵ The justification of retribution seems to be a post hoc rationalization, rather than the original foundation, of the death penalty. Second, along the same lines, if the punishment must mirror the crime, should all willful homicides mandate the death penalty? Such a regime has been found unconstitutional,¹¹⁶ and it almost certainly would meet with public disapproval. The existence of the death penalty as a likely or certain punishment has, in the past, led juries to acquit even in the face of strong evidence of guilt.¹¹⁷ Popular opinion does not support the notion

112. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 205-12 (2d ed. 1986) (stating that the legal system generally acts in a way that indicates that the harm done by crimes can be translated into a common currency, either of money itself or jail time, sufficient to deter and to redress whatever harm was done).

113.

[W]hoever has committed murder, must die. There is, in this case, no juridicial 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.

KANT, *supra* note 108, at 198.

114. See *id.*

115. See DAVID D. COOPER, *THE LESSON OF THE SCAFFOLD* (1974) (indicating that the death penalty was widely used in the 1700s).

116. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

117. Judge Robert Sullivan, in examining the history of the trial of Lizzie Borden, concluded that the fact that a conviction would have led to the death penalty was a significant factor in leading to an acquittal despite copious evidence of guilt. See ROBERT SULLIVAN, *GOODBYE LIZZIE BORDEN* 191-94 (1974). Sullivan went on to wonder "how many persons have escaped punishment for murder solely because the death penalty was the jury's only alternative to acquittal." *Id.* at 194.

that all murderers should die. Executing some murderers believed to be particularly blameworthy should satisfy the retributive urge.

Third, apart from the death penalty, retribution does not seem to be the primary goal of punishment, even if one accepts the notion that the harm inflicted by the criminal can be translated into a roughly equivalent amount of loss of liberty. If retribution motivated the punishment of all crimes, the public would not demand increased prison terms for a wide range of crimes. When the public calls for more severe punishment for thieves or burglars or vandals, the nature of the crimes has not changed. What has changed is society's assessment of the efficacy of the present punishment as deterrence. A consistent retributive regime would serve to limit increases, as well as reductions, in punishment.

Perhaps the practice rather than the theoretical underpinnings of the death penalty present the most profound problem with employing retribution as a justification. Retribution is, of course, absolutely dependent upon the guilt of the criminal.¹¹⁸ One powerful argument for retribution as a better theory than deterrence is that deterrence might be achieved by the execution or other punishment of the innocent, as long as the general population believed that they were guilty.¹¹⁹ To the retributivist, however, inflicting a penalty, especially the death penalty, upon an innocent person would be inexcusable.

Among the general public, perhaps the most common citation in support of retribution is the Old Testament edict demanding

118. See BEAN, *supra* note 39, at 13 (discussing the essential connection between punishment and guilt).

119. Perhaps the easiest criticism of pure reliance on utilitarian theory to justify punishment is that "it would be possible to manufacture evidence against an innocent man to set an example to others. . . . Alternatively, . . . if the advantage of deterrence could be achieved by seeming to punish the criminal it would then be possible to *pretend* to punish him." *Id.* at 34. No one would defend intentional execution of the innocent merely for deterrence, but some are untroubled by the execution of the innocent by mistake, concluding that the social benefits of the death penalty outweigh "the loss of innocent lives through miscarriages." van den Haag, *supra* note 95, at 967.

an eye for an eye.¹²⁰ This, like all retributionist theories, is a double-edged command. It not only warns against inadequate punishment, but also against excessive punishment.¹²¹ Further, it warns even more strongly against punishment of the innocent.¹²² It is instructive to see how ancient Israel itself put the demand into practice, especially with respect to the death penalty. The procedural demands necessary to sustain a capital sentence were increased to a level that would put the Warren Court to shame.¹²³ The Sanhedrin, the judicial body having final authority over death sentences, it is said, would be regarded as "bloody" or excessively prone to sustain death sentences if executions exceeded one every seven years.¹²⁴

Observers have noted that this same phenomenon has become manifest in contemporary Israel. Not only is the death penalty reserved for those implicated in genocide against the Jewish people,¹²⁵ but the recent remarkable restraint of Israeli appellate courts in freeing John Demjanjuk, accused of atrocities dur-

120.

The first and, in most parts, oldest version of the *lex talionis* is Exod. 21.22-25: "When men strive together, and hurt a woman with child, so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. If any harm follows, then 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."

HENBERG, *supra* note 4, at 69 (quoting 21 *Exodus* 22:25).

121.

Critics of retributive thought often argue that retribution is indistinguishable from revenge, but it is exactly the search for limitation that separates the two. 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.

Id. at 18.

122. See Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRal of Prague*, 90 MICH. L. REV. 604, 618 (1991) (noting that Jewish law developed "rules . . . so strict that they assure[d] conviction of only the factually guilty").

123. See *id.* at 616-25. The authors noted that, compared to Jewish law relating to criminal procedure, "the restrictions embodied in the Bill of Rights [are] rather tepid." *Id.* at 618.

124. Or perhaps one every 70 years. See *id.* at 618 n.83.

125. See TOM TEICHOLZ, *THE TRIAL OF IVAN THE TERRIBLE: STATE OF ISRAEL V. JOHN DEMJANJUK* 96 (1990).

ing World War II, demonstrates the demands placed on one who would seek retribution of the most drastic and final kind to take similarly extreme measures to assure that unjust executions do not occur.¹²⁶

This same impulse can be seen in decades of American law. The unique nature of the death penalty has led the Supreme Court to demand what some have called "super due process," a web of procedural protections beyond those usually afforded to criminal defendants.¹²⁷ In recent years, however the notion that capital cases require extraordinary procedures has lost much steam.¹²⁸ Rather than seeing long delays and the infrequent use of the death penalty as reaffirmation of the demands of certainty associated with retributive theory, some see such delays as illegitimate.¹²⁹

Perhaps most striking has been the Court's discussion of the question of actual innocence. To delay an execution because of constitutional violations collateral to guilt may well interfere with retribution; to delay an execution because of lingering doubt as to guilt is quite different. Yet the Court, although not without hesitation and dissent, has set formidable procedural hurdles to those who claim new evidence of innocence.¹³⁰ The Court has refused to hold explicitly that the execution of a defendant in the face of significant evidence of innocence would be unconstitutional.¹³¹ If delay on collateral questions places retri-

126. See Iva L. Shafiroff, *A Nazi Saved by Jews: Israeli Court Was Very Generous to Demjanjuk*, L.A. DAILY J., Sept. 24, 1993, at 6. Demjanjuk's appeal was "one of the longest appeals in Israel's history." TEICHOLZ, *supra* note 125, at 302.

127. See 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, 738 (1985).

128. See *id. passim*; Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991).

129.

A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Powell, J., concurring).

130. See generally Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65 (arguing that the Court in recent years has restricted the use of habeas because it does not think of habeas as part of the criminal justice system).

131. In *Herrera v. Collins*, 560 U.S. 390 (1993), the Court rejected a second habeas

bution beyond utilitarian concerns in a hierarchy of values, delay in the interest of resolving claims of innocence surely does the opposite.¹³²

A strong adherent of deterrence theory would not find this troubling; the existence of executions of the innocent is the price paid for the social benefit of deterrence.¹³³ Few deterrence proponents, however, seem willing to go that far, at least explicitly.¹³⁴ When considering an individual case, surely deterrence alone may not justify the death penalty. Yet, when the analysis shifts to the system as a whole, deterrence is invoked more prominently.¹³⁵ The effect of accepting deterrence as sole justi-

corpus petition by a death row inmate that was based on evidence of actual innocence, rather than on any alleged violation of procedural rights. *See id.* at 393, 418-19. Although three dissenters would hold that a defendant who could show "that he is probably innocent" is entitled to habeas corpus relief, *id.* at 442 (Blackmun, J., with whom Stevens & Souter, JJ., join, dissenting), the majority disagreed. *See id.* at 402-03. Justices Scalia and Thomas simply would hold that there is no constitutional right to judicial consideration of newly discovered evidence. *See id.* at 427-29 (Scalia, J., with whom Thomas, J., joins, concurring). The other Justices assumed, "for the sake of argument," that a "truly persuasive demonstration" of innocence, meeting an "extraordinarily high" standard of proof, might require federal intervention "if there were no state avenue open to process such a claim." *Id.* at 417. Because the Court suggests that the existence of the governor's pardon power is an acceptable alternative "state avenue," *see id.* at 411-17, the suggestion seems to be that the actual innocence argument is open only when a governor denies clemency in the face of indisputable proof of innocence. In other words, it is unlikely ever to be available in practice.

132. "[B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States," the Court has rejected the notion that actual innocence claims should be routinely heard. *Id.* at 417.

133. *See, e.g., van den Haag, supra* note 95, at 967 (rejecting the notion that miscarriages of justice support abolishing the death penalty). In contrast, Margaret Jane Radin has written:

A pure utilitarian would argue that we should execute whomever, and however many, we need to in order to deter the "right" amount 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).

134. *See, e.g., Radin, supra* note 133, at 1170.

135. *See* Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1019 (1985).

fication for systemic imperfections is, of course, to accept, perhaps unconsciously, that guilt is not essential.¹³⁶ Such a conclusion undermines any sophisticated retributive justification for punishment.

Thus, neither of the commonly invoked rationales succeeds in explaining the acceptability of the current system of capital punishment. Deterrence clearly fails, whether examined with an eye toward the empirical question of whether it is effective, or the theoretical question of whether, if effective, it alone can justify capital punishment. Retribution can serve as a rationale for capital punishment, but it cannot explain the willingness of a system of capital punishment to accept any noticeable likelihood of the execution of the innocent. Likewise, it is hard to see how retributive theory supports a system in which only a tiny subset of killers is put to death, and those who are, are not necessarily the most culpable.¹³⁷

One is left, then, with two alternatives. The first alternative is that the death penalty successfully is defended by the deft use of both deterrence and retribution in tandem. Thus, retribution would justify most executions and those that cannot be so justified would instead be justified by deterrence. One or the other theory would succeed in explaining each aspect of contemporary American capital punishment. Indeed, this often seems to be the way in which the death penalty actually is defended, whether consciously or not.¹³⁸ This explanation is unsatisfying. It seems

136. Cf. van den Haag, *supra* note 95, at 967 (explaining that imperfections are inherent in any government-operated system and that innocents are killed accidentally by routine government functions).

137. A sophisticated retributive theory does not focus merely on the act; it also focuses on "the subjective culpability of the offender committing it." Gale, *supra* note 135, at 1012. Clearly, the Supreme Court's post-*Gregg* insistence on some consideration of the particular circumstances of the murder recognizes this principle. See *Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976) (requiring that the blameworthiness of the defendant be considered). Reaction to the imperfection of "proportionality review" procedures varies. Compare F. Patrick Hubbard, "Reasonable Levels of Arbitrariness" in *Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113 (1985) (arguing that no system can be perfect and that we must accept a level of "reasonable arbitrariness"); with Radin, *supra* note 133, at 1172 (concluding that "no one can deserve to die when the issue of whether anyone can (ideally) deserve to die is morally uncertain and when in any event it is certain that we cannot select out all and only those who deserve to die").

138. Cf. Hardy Jones & Nelson Potter, *Deterrence, Retribution, Denunciation and*

too cobbled together, too obviously an after-the-fact attempt to defend an a priori position.

The second alternative is that neither of the rationalist explanations is really at the core of society's acceptance, perhaps need,¹³⁹ for capital punishment. At least occasionally, observers note the symbolic uses of capital punishment.¹⁴⁰ Often, this is done in a way that emphasizes the entertainment value of an execution; however, this may also be subsumed in deterrence theory, because the symbolism of the execution is seen as a warning to others, or in retributive theory, because that symbolism is meant to express the community's outrage.¹⁴¹ Inevitably, then, discussions of symbolism collapse back into discussions of one of the major rationalist justifications, or they simply assume that the symbolism of the act, once removed from rational explanations, self-evidently cannot support the death penalty.

Perhaps, however, this argument dismisses too easily the non-rational, not merely as an explanation of what goes on, but more importantly, as something that has such strength that it must be dealt with in a more respectful way rather than simply being dismissed as unworthy. A possible place to start such an effort to understand and to react to the power of the death penalty can be found in the work of the anthropologist and social and literary critic René Girard.

Death Penalty, 49 UMKC L. REV. 158, 169 (1981) (arguing that even if capital punishment could be based on a deterrence theory, the justification would have to be supported by retributive consideration).

139. Cf. HENBERG, *supra* note 4, at 32-42 (theorizing that humans have biologically and culturally evolved to desire retribution for past wrongs).

140. See, e.g., Gale, *supra* note 135, at 996-99; Jones & Potter, *supra* note 138, at 167-69 (arguing that the death penalty is expressive, but in the opposite way than its defenders believe); see also, e.g., JOEL FEINBERG, DOING AND DESERVING 96-105 (1970) (discussing the expressive function of punishment generally); 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 139-55 (Michael L. Radelet ed., 1989) (exploring the "socio-religious" aspects of executions by comparing modern executions in Florida with human sacrifices of the Aztecs).

141. Thus, Professor Gale has classified denunciation as one of the utilitarian aspects of capital punishment. Gale, *supra* note 135, at 996-99. Purdum and Paredes view some explanations of the capital punishment ritual as being "unabashedly religious." Purdum & Paredes, *supra* note 140, at 151.

III. MIMESIS AND THE SCAPEGOAT: THE THEORIES OF RENÉ GIRARD

René Girard, Professor of French Literature, Language, and Civilization at Stanford University, has developed a sweeping and controversial theory of culture.¹⁴² Beginning with insights drawn from his original academic base in literary criticism, his theory has grown to include work in anthropology, religion, psychology, and other social sciences. As might be expected, the wide scope of his work invites criticism from specialists; the attempt to forge a simple unifying theory to explain human culture will almost invariably claim too much. Yet one need not accept the full measure of his thought to be impressed by the power of his insights and their ability to illuminate at least significant parts of culture.

Beginning with his work as a literary critic, Girard explored classic portrayals of human action and, more significantly, the motivations and decisions behind them.¹⁴³ Repeatedly, he found that great works of literature demonstrate that the source of human desire is neither some characteristic of the person who desires nor the object that is desired.¹⁴⁴ Rather, desire is rooted in mimesis, the need to imitate others.¹⁴⁵ People want an object, a way of life, or the love of another person primarily because someone else does as well.¹⁴⁶ This desire is the source of envy and recurring conflict. On occasion, as in Cervantes's *Don Quixote*, this compulsion to imitate can be comic.¹⁴⁷ Perhaps more often, however, it leads to rivalry and possible tragedy.¹⁴⁸

142. The most thorough presentations of Girard's ideas can be found in GIRARD, *supra* note 14, and RENÉ GIRARD, *THINGS HIDDEN SINCE THE FOUNDATION OF THE WORLD* (Stephen Bann & Michael Metteer trans., 1987) [hereinafter *THINGS HIDDEN*]. Probably the best single volume explaining and developing Girard's thought, particularly its implications for contemporary religion, is GIL BAILIE, *VIOLENCE UNVEILED: HUMANITY AT THE CROSSROADS* (1995).

143. See Paul Dumouchel, *Introduction*, in *VIOLENCE AND TRUTH: ON THE WORK OF RENÉ GIRARD* 1-21 (Paul Dumouchel ed., 1988).

144. See GIRARD, *supra* note 14, at 145.

145. See *id.* at 143-68; *THINGS HIDDEN*, *supra* note 142, at 283-98; see also BAILIE, *supra* note 142, at 111-20.

146. See GIRARD, *supra* note 14, at 145.

147. See *THINGS HIDDEN*, *supra* note 142, at 15-16; Dumouchel, *supra* note 144, at 3-6.

148. This pattern of mimesis leading to rivalry and tragedy is a recurring literary

Girard did not stop at the insight that mimesis is often at the center of fiction, however. Examining material from the social sciences, particularly anthropology, he concluded that humans have a universal tendency toward mimesis.¹⁴⁹ At some level, this seems empirically irrefutable; the socialization of the child, of course depends on it.¹⁵⁰ Girard maintains that the imitative impulse continues throughout life, and unlike the situation involving the small child, often is hidden and unrecognized.¹⁵¹ To a certain extent, imitation is a positive occurrence, as one seeks to model oneself after others in ways that may be benign and even beneficial. At some point, however, imitation becomes rivalry and rivalry becomes hostile.¹⁵² The desire to be like another person, and to desire what the other person desires, leads to conflict, which itself leads to a redoubling of the effort to imitate, supplant, and become the rival.¹⁵³ Inevitably, this cycle must lead to violence; the goal of cultural institutions is to intervene to stop it.¹⁵⁴

theme beginning with Greek tragedy, see GIRARD, *supra* note 14, at 46-48, and the earliest Bible stories, see BAILIE, *supra* note 142, at 137-40, and continuing through the works of Shakespeare, see THINGS HIDDEN, *supra* note 142, at 36, Dostoevsky, see *id.* at 338-47, and George Eliot, see Dumouchel, *supra* note 143, at 6-8.

149. See THINGS HIDDEN, *supra* note 142, at 3-138.

150.

[T]here is nothing, or next to nothing, in human behavior that is not learned, and all learning is based on imitation. If human beings suddenly ceased imitating, all forms of culture would vanish. Neurologists remind us frequently that the human brain is an enormous imitating machine. . . .

. . . . [I]n children—as in animals—the existence of acquisitive imitation has been recognized by researchers. . . .

An equivalent situation rarely occurs among adults. That does not mean that mimetic rivalry no longer exists among them . . . but adults . . . have learned to fear and repress rivalry.

Id. at 7, 9.

151. See *id.* at 7-19.

152. See *id.*

153. Thus, the function of the law, and other cultural institutions, is to prohibit imitation, at least that sort of imitation that spirals out of control and becomes destructive. See *id.* at 10-19. This function is inherently very tricky. Much imitation gives rise to cohesion, and, of course, to cultural transmission. See *id.* To this extent, mimesis is necessary. At some point, however, it becomes destructive. See *id.* Law and other cultural institutions attempt to stop it at or prior to that point. See *id.*

154. See *id.*

Normal cultural institutions, however, may inadequately restrain this escalating violence because mimesis ensures that each violent act attracts its own imitators, and each mimetic desire converges so that more and more individuals see themselves as rivals for the same objects.¹⁵⁵ At some point, the need to stop the cycle of rivalry requires that a dramatic step be taken to reunite the community. Because violence must return violence, this step itself must be violent.¹⁵⁶ A common enemy must be identified, and the community must come to believe that this enemy is the source of all discord in the community.¹⁵⁷ The enemy then can be dispatched and this act of violence will not lead to a response, because the victim will have no supporters in the community. At least until the cycle repeats itself, society averts the crisis caused by mimetic violence.¹⁵⁸

A huge paradox then arises. The victim who was targeted as the source of all evil now has become the source of the community's peace and order.¹⁵⁹ The victim in some way now becomes sacred, the bestower of good and evil.¹⁶⁰ Perhaps the

155. See GIRARD, *supra* note 14, at 18-27.

156. "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.

157.

[A]ny community that has fallen prey to violence or has been stricken by some overwhelming catastrophe hurls itself blindly into the search for a scapegoat. Its members instinctively seek an immediate and violent cure for the onslaught of unbearable violence and strive desperately to convince themselves that all their ills are the fault of a lone individual who can be easily disposed of.

Id. at 79-80.

158.

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.

159. "[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.

160. See *id.*

community now will see the victim as having controlled the entire process, rather than having been its passive object.¹⁶¹ In this process, Girard saw the origin of religion.

According to Girard, religion attempts to recreate and maintain the sense of the community's unity through controlled reenactment of the murder of the victim.¹⁶² Perhaps through a highly ritualized actual killing, perhaps through some symbolism or reenactment of gestures short of the killing itself, community leaders will repeat this founding murder.¹⁶³ At the same time, however, the reenactment will be strictly limited. It will be performed only when, by whom, and in the way so prescribed by the community. To engage in the same act outside of the sanctioned parameters will be prohibited, will be, in effect, sacrilege.¹⁶⁴

The victim, of course, need not actually be guilty of anything in order for the process to be effective. In fact, the victim most assuredly is not guilty of all that the community believes him to be guilty of—that is, instigating all of the community's discord. To bolster his argument, Girard relied on the practice of primitive societies lacking an accepted and powerful central governing system.¹⁶⁵ When a murder threatens the stability of the community, the community's leaders will find a victim to sacrifice, but quite consciously will avoid selecting the person who actually is guilty of the act that threatens the community.¹⁶⁶ Although this approach appears to be bizarre, it is quite logical when one recalls that the fundamental purpose of the sacrifice is to bring peace to the community.¹⁶⁷

The true killer likely is a full member of the community, one with relatives and friends. If he is killed, it will set off another round of retaliation from those who will take his side. Instead,

161. *See id.* at 94-99.

162. *See id.* at 99.

163. Thus, the function of ritual is to require imitation of unifying violence, but under strict control. *See THINGS HIDDEN*, *supra* note 142, at 19-23.

164. In addition to the required reenactments of religious ritual, the primary function of law and other cultural institutions is to restrain mimesis. *See id.* at 10-19.

165. *See GIRARD*, *supra* note 14, at 22.

166. *See id.* at 21-22.

167. *See id.*

the community leaders will select one who can deflect the cycle of violence by assuming the role of the enemy of the entire community, including the guilty party's clan.¹⁶⁸ Although the victim has been chosen arbitrarily, the community will actually believe that he is responsible for the community's discord.¹⁶⁹ To destroy this belief exposes the killing of the victim as merely another step in the cycle of violence that would itself require counterviolence.

Girard has noted that the sacrificial victim is seen as both a part of, and outside, the community.¹⁷⁰ He is part of the community in that his death will bring peace, and he will, therefore, be seen as intending benefit to the community.¹⁷¹ The sacrifice comes about by directing the entire community against the victim; labeling him as distinctly "sacrificable."¹⁷² Examples of this behavior in primitive tribes are not hard to find. Often the sacrificial victim is a stranger or outsider, but not until the community somehow virtually enfolds him.¹⁷³ When animal sacrifice replaces human sacrifice, it is likely to be the sacrifice of a domestic animal, that is, one who lives within the human community.¹⁷⁴

Although the victim may have been chosen arbitrarily, the

168. In a modern culture, the way to gain unanimity is for the system to "reorganize itself around the accused and the concept of guilt. . . . Instead of following the example of religion and attempting to forestall acts of revenge . . . or to redirect them to secondary objects, our judicial system *rationalizes* revenge" *Id.* at 21-22. The purpose, however, remains the same, to unite all in the community and to end the cycle of violence. *See id.*

169. *See id.*

170. "[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.

171. *See id.* at 270-71.

172. *Id.* at 270-72 (The victim becomes a "monster . . . no longer regarded in the same way as the other members of the community").

173. Thus, prisoners of war and slaves commonly were chosen as sacrificial victims, as were children. *See id.* at 271. In all those cases, the victim is not fully part of the community, but is nevertheless within it. *See id.* In a more advanced society, judicial condemnation will serve to brand one as being beyond the moral community, while still living within it.

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

community still must believe in his guilt.¹⁷⁵ Primitive societies have developed rituals in which the sacrificial victim is encouraged, or even required, to violate social taboos, and to claim great privileges prior to the time of the sacrifice.¹⁷⁶ Thus, the community sees the sacrifice as avenging these acts, and reaffirms its adherence to the taboos that serve to restrain the acquisitive rivalry that exists in community life.¹⁷⁷

The need to re-create, at least symbolically, the "founding murder" may be seen in a number of institutions. Girard saw this as the basis of all religions.¹⁷⁸ The pattern may be seen elsewhere, however, especially in a time in which traditional religion receives less community respect. The pattern by which, for example, entertainers or politicians are singled out as special, showered with privileges and praise, and then attacked by the same people who lionized them, symbolically, if not literally, "killing" them by destroying their career or reputation, seems consistent with the victimage process. The contemporary application of the death penalty is also consistent with this process.

To hypothesize that the primary reason behind the death penalty is its function as a symbolic sacrifice, meant to bring about peace by uniting the community, permits one to explain a number of features of the contemporary death penalty that simply are not consistent with the rationalist theories that either deterrence or retribution serve as its basis. Some of these features are peripheral, for example, the tradition of the last meal. This tradition is akin to the traditions in primitive cultures, whereby the sacrificial victim is permitted, if not required, to exercise privileged behavior prior to the sacrifice.¹⁷⁹ The ritualized privilege gives the community a reason to kill because the victim has claimed a privilege that he does not deserve, but also marks

175. *See id.* at 271-72.

176. *See id.* at 104-07.

177. In some tribes a prisoner chosen to be killed would first be "encouraged to violate the laws," permitted to steal, or subjected to a ritualistic attempt to escape. *See id.* at 274-75. Societies might choose to execute their kings, and require that the king ritually engage in forbidden acts, including acts of violence or incest, either actually or symbolically. *See id.* at 104-10.

178. *See THINGS HIDDEN, supra* note 142, at 30-47.

179. *See GIRARD, supra* note 14, at 275.

the victim as, paradoxically, someone special and worthy of special treatment.¹⁸⁰ Thus, the condemned prisoner may have anything he wants as a last meal; once again privilege precedes execution.

More importantly, Girard's theories explain more salient features of the death penalty. For example, if retribution or deterrence were truly the foundation of the contemporary death penalty, one would expect that it would be imposed on the most calculating, evil killers. Yet one sees that, instead, it is often imposed on those who, like the sacrificial victim, are like typical members of the community, but at the same time are significantly different. Executing the young,¹⁸¹ the mentally retarded,¹⁸² or members of a minority group¹⁸³ will not serve deterrence and in many cases will not serve retribution, as well as would executing those who more closely resemble the majority of the community. As we have seen, the choice of a victim who is in some significant way not like everyone else actually furthers the efficacy of the sacrificial victim by making it easier for most, or all, of the community to avoid empathy or identification with him.¹⁸⁴

The community's fascination with at least some of those executed individuals also comports with Girard's theories. Why does a Gary Gilmore or a Ted Bundy continue to be the subject of biography and even fiction years after he is dead? One might say that it is a function of society's "fascination with evil," but that phrase merely restates, rather than explains, the phenomenon. Could this be a reflection of the phenomenon of elevating the sacrificial victim to the status of a god?¹⁸⁵

If the function of the sacrifice is to unify a fragmented community, and if ritual killing rather than actual killing can perform that function, one would expect actual killing to be in demand most where ritual is least effective. Thus, where religion

180. *See id.*

181. *See supra* note 75 and accompanying text.

182. *See supra* note 76 and accompanying text.

183. *See supra* note 79 and accompanying text. *But see infra* text accompanying notes 206-08 (discussing the impact of the belief that the death penalty is disproportionately applied to minority groups).

184. *See supra* notes 169-73 and accompanying text.

185. *See GIRARD, supra* note 14, at 275.

is more privatized, and where religious and other social diversity exists, the legal system and its rituals may need to assume this religious function. One would predict, then, that the death penalty most likely would be used in a more culturally diverse society. This is consistent with the often-noted fact that the culturally and religiously diverse United States is unique among western democracies in its use of the death penalty.¹⁸⁶ Nations that have renounced the death penalty generally are more homogeneous; such homogeneity provides alternative channels for expressing community unity.¹⁸⁷

Most significantly, the theory accounts for the recent tendency of courts to place less emphasis on complete certainty of guilt and more emphasis on expediting the execution process.¹⁸⁸ As this Article has shown, the efficacy of the sacrifice depends not upon the actual guilt of the sacrificial victim,¹⁸⁹ but upon the community's willingness to believe in that guilt. At some point, however, too cavalier an attitude toward guilt or innocence would destroy the execution's unifying power; the execution would merely become another act of unjust violence, calling for its own retribution, or as Girard would see it, imitation.¹⁹⁰

Girard saw an evolution in the ways that society "avoid[s] being caught up in an interminable round of revenge."¹⁹¹ The highest level of human development is the creation of an effective modern judicial system.¹⁹² Such a system constrains social violence by appealing to principles of justice, and identifying the community's enemies by a convincing demonstration of guilt.¹⁹³ This emphasis on a reliable finding of guilt will, to many, sharply distinguish modern legal systems from primitive societies that

186. See ZIMRING & HAWKINS, *supra* note 57, at 3-25.

187. Of course, not all ways of celebrating cultural unity and homogeneity are positive. Solidarity within the group can be the cause, or the effect, of xenophobia or war. See BAILIE, *supra* note 142, at 60-64, 157-63.

188. See *supra* notes 128-33 and accompanying text.

189. See *supra* notes 166-67 and accompanying text.

190. The judicial system can use its own violence to cure the violence of the criminal "without fear of contagion" only to the extent that it can rationalize revenge as being directed only at the guilty. GIRARD, *supra* note 14, at 21-23.

191. *Id.* at 20.

192. See *id.* at 20-21.

193. See *id.* at 22.

relied on ritual sacrifice or such methods as trial-by-combat. To Girard, these differences only mask the extent to which each system serves the same goal.¹⁹⁴ Like more primitive systems, modern legal systems seek to break the cycle of imitative violence by directing the punitive urge of all members of society toward a common enemy.

If the primary function of the death penalty is to provide a ritual by which to unite the community in common opposition to a particular individual, allowing it to break the escalating cycle of intracommunity violence, what does that mean for the debate over the legitimacy of the death penalty? Are abolitionists asking the right questions? Is effective argument even possible under these circumstances? How does a legal system based upon rational argument deal with a matter so weighted down with hidden, seemingly nonrational considerations?

IV. THE IMPLICATIONS OF GIRARD'S THEORIES TO THE DEATH PENALTY DEBATE

As an overarching explanation of all cultural institutions, Girard's theories of mimesis and sacred violence surely may be subject to criticism. Can all desire essentially be mimetic? At some basic level, the desirability of an object such as food is generated by the self (without it, one dies) and by the nature of the object (when one is hungry, the relative value of bread and cardboard is surely not a function of the fact that someone else chooses bread). Further, all modeling does not lead to escalating rivalry. Some degree of imitation is absolutely essential to preserve the species; the young must model themselves in ways that allow them to grow and thrive.

It is just as difficult, however, to deny that Girard has identified phenomena that are of great significance and that explain much of human violence and the attempts, themselves violent, made to contain it. Specifically, Girard's theories have remarkable explanatory power when applied to the imposition of the death penalty. Much of what surrounds the death penalty and seems puzzling in light of rational analysis is utterly logical

194. See *id.* at 23.

when executions are seen as sacred mimetic violence.

A. How Well Does the Theory Explain the Use of Capital Punishment in Contemporary America?

First, this Article addresses some peripheral matters. The tradition of the sumptuous last meal offered to the condemned prisoner remains a subject of peculiar fascination for the media and the public.¹⁹⁵ The ritualistic sacrifice performed by a number of societies required that they grant some privileged status to the victim prior to his execution.¹⁹⁶ Thus, the victim might be invested with the trappings of royalty ceremoniously, and actually allowed to enjoy unusual benefits prior to the sacrifice. The "last meal" would seem to be a vestige of this type of ritualistic grant of privilege to one who will then be executed for the effrontery of enjoying unusual privilege.

A truly bizarre, if uncommon, twist on capital punishment is provided by instances in which a death row prisoner, perhaps on the very brink of execution, falls ill or attempts suicide.¹⁹⁷ At this point, the state frantically works to restore the prisoner's health, so that he might then be executed.¹⁹⁸ If the purpose of

195. Media descriptions of last meals are legion. See, e.g., Rhonda Cook, *Execution Is Still on Schedule for Killer of Students in 1981*, ATLANTA J. & CONST., May 2, 1996, at C3, available in 1996 WL 8206111 ("fried bass, cole slaw, hushpuppies, french fries with ketchup, tartar sauce and hot sauce [and] either sweetened iced tea or a Coke"); Richard C. Paddock, *Triple Killer Prepares to Die As Appeal Rejected*, L.A. TIMES, May 3, 1996, at A1 ("fried pork chops, baked potato, asparagus, salad 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 (New Orleans), Mar. 1, 1996, at A1, available in LEXIS, News Library, Notpic File ("fried oysters, fried shrimp, fried catfish, crawfish etouffee, seafood gumbo, hush puppies, French fries, pecan pie and Coca-Cola"). In fact, this phenomenon is not limited to the United States. See, e.g., Tan Ooi Boon, *Martin Hanged, Leaving Behind Mystery Over Another "Victim"*, STRAITS TIMES (Singapore), Apr. 20, 1996, at Home 25, available in LEXIS, News Library, Strait File ("pizza and a cup of hot chocolate").

196. See *supra* note 179 and accompanying text.

197. Perhaps the most famous instance of this phenomenon involved Nazi leader Hermann Goering. See JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 421-25, 445-47 (1994). In some jurisdictions, more death row inmates die of suicide than are executed. See Michelle Locke, *Suicide, Natural Causes: How Most Inmates Die on Death Rows*, CHI. TRIB., Mar. 6, 1996, at 2, available in 1996 WL 2650108.

198. Indeed, failure to do so might well violate the prisoner's right to medical

capital punishment is simply to achieve the rational benefits presumed to flow from the prisoner's death, this sequence of events is absurd. If one examines ritual sacrifice, one sees that societies place overwhelming importance on precise adherence to the ritual; if each step is not followed exactly, it will not be seen as effective in re-creating the unifying primal sacrifice.¹⁹⁹ The prisoner who commits suicide spoils the ritual. If the execution is seen as symbolic, it becomes clear why merely seeing to it that the condemned prisoner is dead will not do.

More important is the explanatory power of Girard's theories with respect to more fundamental matters. If, on the one hand, the purpose of the death penalty is deterrence or retribution, one would expect it to be seen as clearly inappropriate when someone whom the community could not see as being fully volitional or fully like others were involved. If, on the other hand, the purpose of the death penalty is to unite the community in a ritual expression of violence against someone seen as an outsider, then a fully volitional requirement is inapposite; it actually furthers the goal of community catharsis to execute someone who is noticeably unlike everyone else. The latter conclusion seems closer to describing the contemporary American death penalty. Youth and mental retardation, except when they become extreme, do not bar execution.²⁰⁰ The media dwells consistently on the brutal, "animal-like" behavior of the condemned which led to his sentence.²⁰¹ Most commentators agree that Susan Smith was spared the death penalty by the successful efforts of her lawyers to "humanize" her, by showing the jury that she was, ultimately, a person not that different from themselves, rather than some Medea-like,²⁰² alien, creature.²⁰³

treatment. See *Estelle v. Gamble*, 429 U.S. 97 (1976). In general, prison authorities have a duty to avoid "deliberate indifference" to prison suicides. See *Tittle v. Jefferson County Comm'n*, 10 F.3d 1535, 1539 (11th Cir. 1994).

199. For a comparison of ritual in Aztec human sacrifice and the contemporary American death penalty, see Purdum & Paredes, *supra* note 140, at 140-53.

200. See *supra* notes 75-77 and accompanying text.

201. See, e.g., Joseph J. Gilbert, *Strange Justice in Maryland*, WASH. POST, Oct. 2, 1996, at A17 (noting, in an opinion piece, the brutal nature of a crime); William Miller, *Pirtle's Execution Upheld, Court Affirms Death Penalty for Brutal Spokane Murders*, SPOKESMAN REV. (Spokane, Wash.), Oct. 13, 1995, at B1, available in 1995 WL 8790446.

202. See generally, EURIPIDES, *MEDEA*, in 1 PLAYS OF EURIPIDES (Edward P.

The theory would seem to explain much of the media coverage of executions and those executed. Organized demonstrations outside prison walls to celebrate the execution, and the media's coverage of these events, can be seen as attempts to formally proclaim the community's newfound unity in its hatred of the criminal.²⁰⁴ The continued fascination with the criminal, whether Gary Gilmore, John Wayne Gacy, or Ted Bundy, betrays something more; the community makes the condemned man a celebrity, someone special, someone who has played an active role in uniting the community, albeit against himself.

Perhaps most significantly, Girard's theories help to explain why most of the capital punishment debate has been so fruitless. An argument based upon deterrence is beside the point if what supports the impulse behind executions is far removed from the rational calculus of cost and benefit that the deterrence debate assumes as its foundation. An argument based upon retribution and desert likewise will miss the central point of the ritual that surrounds the death penalty. Additionally, the theory can explain why the reinstatement of the death penalty has not ended demands for its expansion and for other increases in the level of punishment of criminals.

Girard has stressed that the efficacy of the ritual killing of the common enemy is only effective if it actually does lead to substantial unanimity among the rest of the community.²⁰⁵ If a substantial part of the community sees a killing as being unjust, it becomes just one more step in the mimetic escalation of violence, one that itself calls for a violent response, which will in

Coleridge trans., London, G. Bell 1891) (involving a Greek enchantress who killed her children).

203. See Naomi Chase, *Acknowledging the Susan Smith in Us All*, PLAIN DEALER (Cleveland), Aug. 8, 1995, at 5E, available in 1996 WL 7124234; Mike Dorning, *Susan Smith's Jurors Felt Her Pain: Quiet End Sought to Public Ordeal*, CHI. TRIB., July 30, 1995, at 3.

204. In fact, for many years, executions were public events, permitting the entire community to participate, at least vicariously. Eventually, however, public hangings lost support because crowds became more rowdy and officials no longer believed that the spectacle was having its desired deterrent effect. For a thorough recounting of the decline and eventual abolition of public executions see generally COOPER, *supra* note 115.

205. "The true 'scapegoats' are those whom men have never recognized as such, in whose guilt they have an unshaken belief." THINGS HIDDEN, *supra* note 142, at 46-47.

turn trigger its own countermeasures. To a certain extent, the United States already may have reached that state of affairs. Although polls show that large majorities favor the death penalty,²⁰⁶ these majorities do not reach the point of consensus. Perhaps most disturbingly, to the extent that the death penalty is seen as disproportionately applied to members of identifiable minority groups,²⁰⁷ the tendency of the penalty to divide, rather than unite, the community becomes more acute.

If the ritual does not work, that is, does not unite the community, the reaction will not be to abandon it, but to insist on its repetition.²⁰⁸ The attempts to do it just right, and therefore effectively, will become more frantic. Here one reaches a critical point in the analysis. If Girard's theories do, in fact, explain the essential nature and function of the death penalty, how should the abolition debate be framed? Can the abolitionist argument succeed without removing something critical to social stability?

B. How Does the Theory Alter the Death Penalty Debate?

As has been previously discussed the death penalty debate has taken shape around the central notions of deterrence and retribution.²⁰⁹ Although some commentators have noted the ritual aspects of capital punishment, these observations are usually somewhat peripheral to the analysis.²¹⁰ If Girard's theories are valid, the traditional framework for debating the death penalty must be altered. If the central function of the death penalty is neither to deter potential bad actors by raising the cost of future killings, nor to punish on the basis of desert, but to ritually unite the community through an act of common violence against a designated adversary, the usual arguments for and against capital punishment may lose much of their relevance.

Girard himself will be of little help here. He does not use his

206. See TUSHNET, *supra* note 6, at 119-20.

207. See *supra* notes 78-79 and accompanying text.

208. See *supra* note 170 and accompanying text; see also Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POLY 555 (1995) (noting that only in the United States is the use of the death penalty increasing).

209. See *supra* Part II.

210. See *supra* note 140.

theories to make specific recommendations for social change. Indeed, he has cautioned against the use of his ideas as weapons to critique specific social practices.²¹¹ Instead, he has advocated a thorough societal rejection of mimetic violence, which he sees as the inevitable result of the growth of the indictment of violence contained in the Christian gospels.²¹² Unlike Girard, legal commentators are required to deal with particular questions of social policy, and are constrained from basing arguments entirely upon religious faith.²¹³ Still, if the death penalty is essentially an exercise in ritualized sacrifice meant to unify the community, a number of specific consequences do seem to follow. Abolitionists will likely find Girard's theories more attractive than retentionists, but even retentionists may find that they can draw support from the new analytical approach.

1. Implications for Retentionists

If Girard's theories are valid, the symbolic function of the death penalty is not merely an interesting side issue, but central to its existence. Girard maintains that the ritualized community violence employed by society is not merely a luxury, but serves an important purpose.²¹⁴ It creates a mechanism through which the escalating urge to imitate violence can be broken.²¹⁵ If that mechanism is taken away, what will ensue? Girard sounds a warning: Effective rituals of violence, he says, appear to be essential to social cohesion. In their absence, imitative violence escalates unchecked.²¹⁶

For retentionists, this could lead to a new line of argument. The argument would resemble classical deterrence arguments in

211. "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." THINGS HIDDEN, *supra* note 142, at 34.

212. *See id.* at 180-223.

213. For a discussion of the extent to which public policy arguments may acceptably rest on religious grounds in a liberal democracy, see KENT GREENWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

214. *See GIRARD, supra* note 14, at 17 (stating that sacrifice by society is "an instrument of prevention in the struggle against violence").

215. *See id.*

216. *See id.* at 119-20 (suggesting that festivals "commemorate a sacrificial crisis" in order to bring the community together).

that it would be consequentialist, but it would not assume that those inclined to murder make rational cost-benefit calculations. If the sacrificial ritual is effective, it will reduce the level of violence in the community, but not by altering people's perceptions of the cost of committing violence.²¹⁷ Rather, it will reduce the level of violence by breaking the cycle of imitative violence, and by creating a sense of unity in the community in its opposition to the executed criminal.²¹⁸ If this is so, the effect may be reflected in indices far beyond the community's murder rate. Interestingly enough, one recent study purports to show that the community's use of the death penalty, although it does not serve to reduce the homicide rate, is correlated with a reduction in lesser crimes.²¹⁹ In terms of classic deterrence theory, this would seem to be a mere coincidence. How can increasing the penalty for act A deter people from committing act B? If deterrence is not a matter of rational cost-benefit analysis, however, but rather a consequence of reduction in the need for members of the community to act in hostile, aggressive ways generally, it may be more than coincidence.

In short, retentionists could argue that Girard has demonstrated that societal cohesion requires at least occasional formal use of the ultimate penalty in order to unify the community. If this argument is accepted as true, then it easily follows that the proper victim of such a sacrifice should be one who has set himself deliberately against community norms in the most radical way possible, by deliberately taking the life of another. To abandon the death penalty, then, would be to deprive the community of an important tool of social cohesion. *Gregg v. Georgia*²²⁰ recognized that in a modern society committed to the rule of law, the victim must not be chosen in an arbitrary way, but rather in

217. See *id.* at 124 (proposing that ritual violence will not awaken hostility in the group).

218. See *id.* (stating that "[t]he community stands united before the onslaught of 'evil spirits'").

219. See 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) (stating that, on the basis of their research, they have determined that capital punishment has an effect on crimes such as robbery, burglary, and assault when executions receive a certain amount of television coverage).

220. 428 U.S. 153 (1976).

a way that is accepted by the community as rational.²²¹ This reform was necessary in order to maintain the social acceptance of capital punishment, without which it could not serve its unifying function. To go further, according to this retentionist argument, would be dangerous because the abandonment of the death penalty could foster disunity.

Basically, a retentionist might accept Girard's work insofar as it is descriptive, but reject his call for a renunciation of all forms of sacrificial community violence as dangerous and utopian. Even the descriptive parts of Girard's theory will present problems for retentionists, however, as will be seen in the following section.

2. *Implications for Abolitionists*

Abolitionist arguments have tended to take one of two different forms. The first, exemplified by Justices Brennan and Marshall, rejects capital punishment in theory as well as in practice.²²² The second, exemplified by the final death penalty opinions of Justice Blackmun,²²³ is more modest. Instead of attacking the fundamental theoretical underpinnings of capital punishment, it focuses on the empirical reality of the practice.²²⁴ The capriciousness and unfairness of that empirical reality, and its failure to satisfy the demands of the theory establish that even if the theory is sound, the practice is indefensi-

221. See *id.* at 188-95 (explaining that a jury will not be allowed to sentence a defendant in a "capricious or arbitrary" manner).

222. See *Furman v. Georgia*, 408 U.S. 238, 286 (Brennan, J., concurring) (stating that the imposition of death is a socially unacceptable denial of human dignity that violates the Eighth Amendment); *id.* at 342-70 (Marshall, J., concurring) (concluding that the death penalty does not foster the goals of retribution, deterrence, preventing recidivism, encouraging confessions, eugenics, or reducing state expenditures, and that the public is morally opposed to capital punishment).

223. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."); see also *Sims v. California*, 114 S. Ct. 2782 (1994) (Blackmun, J., dissenting to denial of cert.).

224. "The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution." *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).

ble.²²⁵ In the 1970s, centrist Justices struck down the prevalent death penalty statutes, but continued to maintain that defensible procedures were possible.²²⁶ Justice Blackmun, in essence, took this a step further, concluding that, as a practical matter, creating a death penalty that satisfies the demands of its own underlying theory is impossible.²²⁷

On the surface, the Brennan-Marshall approach seems more attractive to abolitionists. It is more "principled;" it refutes death penalty advocates more thoroughly. By disposing of the underlying theory, it assures the end of capital punishment, not merely its reform. The Blackmun approach is seen as conceding too much, as insufficiently grounded in principle; it is somewhat grudgingly endorsed as a second-best approach. Perhaps, however, the emphasis placed on these two lines of argument should be reversed.

Gil Bailie calls attention to Girard's conclusion that the ritualized killing that unifies the community loses its effectiveness if and when the community begins to question assumptions such as the actual guilt of the victim.²²⁸ Girard states that the community turns away from violence, then, not because it rejects the theory that one who has caused intolerable dissension by his own acts of violence deserves to die, but rather because it sees that its chosen victim is not really guilty of that at all.²²⁹ For Girard, writing from a radical Christian perspective, the para-

225. See *id.* at 1155-57 (Blackmun, J., dissenting).

226. See *id.* at 1147-57 (Blackmun, J., dissenting) (explaining the series of decisions by the Supreme Court regarding capital punishment).

227. See *id.* at 1157 (Blackmun, J., dissenting) (holding that capital punishment is unconstitutional).

From the moment when knowledge of the mechanism begins to spread, there can be no turning back. It is impossible to rehabilitate a sacrificial mechanism in the process of decomposition because growing awareness of these mechanisms is what decomposes them; any effort to interrupt or reverse the process can only be made at the cost of the knowledge being disseminated.

THINGS HIDDEN, *supra* note 142, at 128.

228. Once we see a victim as a victim, we empathize, and "unanimity requires that all empathy for the victim or victims of the violence be extinguished." BAILIE, *supra* note 142, at 16. Bailie comments on contemporary society's increasing tendency to identify itself with victims, rather than with victors. See *id.* at 17-29.

229. See THINGS HIDDEN, *supra* note 142, at 180-223.

digm here is the execution of Jesus.²³⁰ The community's execution of one who is totally innocent leads those who can see the magnitude of the injustice to reject the very notion of returning violence for violence.²³¹ Prior beliefs about the justice of retribution must give way to the harsh reality of its misuse.

As this Article has shown, the proposition that capital punishment advances the goal of deterrence significantly has been extensively refuted.²³² Abolitionists, however, have had less success in refuting the theory of retribution. Perhaps it is best to turn away from attempts to establish that an undoubtedly guilty, fully competent and volitional, deliberate murderer does not merit the death penalty and toward more persistent attempts to illustrate the gap between this theoretical proposition and the actual practice of capital punishment.

When Michigan, in 1847, became the first jurisdiction to abandon capital punishment, it did so largely in response to public revulsion over the execution of a prisoner subsequently shown to be innocent.²³³ The most compelling arguments made against the death penalty in modern times often focus on its use in cases that, if not involving the innocent,²³⁴ at least involve killers who seem less than fully competent or volitional.²³⁵ Even when the death penalty is rejected in principle, the basis is likely to be grounded in religious conviction, rather than an attempt to rationally refute retributive theory.²³⁶

230. See *id.* at 202-20; BAILIE, *supra* note 142, at 217-33.

231. See THINGS HIDDEN, *supra* note 142, at 202-20.

232. See ZIMRING & HAWKINS, *supra* note 57, at 167-86 (concluding that any deterrent effect is slight at best).

233. See Rachel Reynolds, *Byline*, Gannett News Service, Sept. 18, 1989, available in LEXIS, News Library, Arcnws file (explaining that the death penalty was struck down after an innocent man was hung for the rape and murder of a young woman).

234. For an inventory of erroneously decided death penalty cases, see MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 282-356 (1992).

235. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989); see generally EMILY F. REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION (1993) (criticizing the Supreme Court's decision allowing mentally retarded individuals who have committed capital crimes to be sentenced to death).

236. For example, see HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993), providing a powerful critique of capital punishment that does not seek to deny the guilt of offenders, but, rather, is based explicitly upon the religious conviction that retaliation is wrong.

Thus, it is unlikely that a direct assault on the theories put forward to support the death penalty will effectively refute it. Instead, a strategy that points out the empirical reality of the death penalty, and the ways in which it fails to satisfy the demands of the theories used to justify it, may effectively erode the ability of executions to perform their function of unifying the community. Girard, again writing from his radical Christian perspective, sees the ultimate victory of those who reject retributive violence as flowing from the inevitable, if gradual and fitful, spread of the lessons learned in the aftermath of the execution of Christ.²³⁷ The failure of the death penalty to satisfy rational demands placed on it by retributive theory, however, also can be argued in secular terms.²³⁸

Deterrence theory can be debated on the basis of empirical evidence.²³⁹ Even so, once the burden of proof is placed upon opponents of capital punishment, and set at a level that demands a great deal of certainty, the deterrence debate becomes futile. It will never be possible to disprove deterrence with sufficient certainty to satisfy that burden.²⁴⁰ Further, as this Article has shown, deterrence theory seems less and less central to the debate, even as it is understood currently. Most abolitionists and retentionists seem committed to their positions regardless of the evidence on deterrence. Deterrence seems to be an argument added to bolster a position already taken.

On its face, retribution theory does not depend on empirical evidence. Instead, retribution depends on the validity of the proposition that, as applied to capital punishment, one who deliberately kills deserves to die. It may be futile to argue with that central contention, as a matter of abstract theory. But the process of deciding who has killed, and more importantly, who has killed with sufficient deliberation, is subject to empirical analysis. To demonstrate that the current system of applying capital punishment, or perhaps any practical system for doing

237. See *THINGS HIDDEN*, *supra* note 142, at 180-223.

238. This approach is essentially the one taken by Justice Blackmun in his final death penalty opinions. See *supra* notes 223-27 and accompanying text.

239. For a discussion of empirical data and research methods used in developing such data, see ZIMRING & HAWKINS, *supra* note 8, at 92-268.

240. See *id.* at 327-36 (explaining the problems of measurement in deterrence studies).

so, will fall far short of its stated goal of identifying the most culpable killers may effectively undermine faith in the sanction. Such a demonstration will not undermine the theoretical validity of retributive notions, but instead will undermine the practical ability to act as the theory demands. Justice Blackmun's own change of heart is the most prominent example of such a loss of faith.²⁴¹ Furthermore, Girard's theories would predict that when enough members of the community reach that conclusion, the death penalty will be unable to achieve its primary purpose of forging community unity.²⁴²

To conclude that the most effective way to attack the death penalty is to undermine confidence in its ability to satisfy in practice the demands of retributive theory, however, leaves crucial questions unanswered. Girard's theories present abolitionists with a significant challenge. If one accepts the notion that ritualized community violence plays an important role in bringing about and maintaining social cohesion,²⁴³ then the elimination of the ritual, or the process of undermining its ability to unite the community, is not self-evidently a good thing. Girard warns that a society deprived of its ritual violence may fall apart, because it will lack any method of putting an end to the intensifying cycle of imitative violence to which all societies are drawn.²⁴⁴ Therefore, abolitionists must face the question of whether it is reasonable to risk these negative social consequences by undermining the death penalty as a means of achieving social harmony.

Perhaps this question is somewhat academic. To a large extent, the damage to the social function of the death penalty already may have been done. Although majorities currently favor capital punishment, the minority that opposes it is by no means

241. See *supra* notes 223-27 and accompanying text.

242. See GIRARD, *supra* note 14, at 119-42.

243. "[D]emystification of the system necessarily coincides with the disintegration of that system. . . . In fact, demystification leads to constantly increasing violence." *Id.* at 24. Unless the renunciation of present forms of violence itself repudiates violence, it may well be a step backward. See THINGS HIDDEN, *supra* note 142, at 245.

244. The violence that replaces ritual violence may be "more energetic, more virulent, and the harbinger of something far worse—a violence that knows no bounds." GIRARD, *supra* note 14, at 24-25.

insignificant.²⁴⁵ The disproportionate use of the death penalty in cases involving racial minorities is accentuating division in the overall community, rather than promoting unity.²⁴⁶ Outspoken opposition to executions, either in general or in particular, destroys the solemn unanimity of the community in its violence toward the condemned individual, and in so doing, interferes with the ritual's effectiveness. To Girard, this opposition results from the inevitable spread of the Christian message.²⁴⁷ Whether it is a consequence of religious or secular conviction, and whether it is a trend that inevitably will grow or not, it seems clear that capital punishment does not have the power to break the cycle of social violence effectively.

When the ritual does not work, one response is to demand that it be repeated more often, until it does work. Thus, it is unsurprising that the first few executions of the modern era led to demands for more, and that the current fifty or so executions that occur each year have, in turn, merely led to demands for more, and swifter, instances of capital punishment.²⁴⁸ Nevertheless, if the first few executions failed to unite the community, those that follow are also likely to fail. The question remains whether the response of the community will be to turn away from violence or to demand even more.

If one believes, as Girard does, in the ultimate and inevitable triumph of the message of nonviolence,²⁴⁹ then perhaps one can go about the task of delegitimizing violent social institutions

245. One clear example of this minority viewpoint is expressed by Girard. See *infra* note 249 and accompanying text.

246. See *supra* notes 78-79 and accompanying text.

247. See GIRARD, *supra* note 14, at 119-42.

248. See *supra* notes 80-81 and accompanying text (discussing the growing demand for expediting the death penalty process).

249.

[E]verything in the Kingdom of God comes down to the project of ridding men of violence. . . .

. . . .

To leave violence behind, it is necessary to give up the idea of retribution; it is therefore necessary to give up forms of conduct that have always seemed to be natural and legitimate. . . . what must be given up is the right to reprisals and even the right to what passes, in a number of cases, for legitimate defence.

THINGS HIDDEN, *supra* note 142, at 197-98.

with no particular recommendation for how to replace them.²⁵⁰ This is especially so if the suggested replacement merely mitigates, rather than eliminates, the use of violence as a tool of social control. If one concedes, however, that the millennium is not imminent,²⁵¹ one must address in the near term the very real problem for abolitionists posed by Girard's theories. If the ritual violence of capital punishment cannot unite the community, then what substitute can achieve that end?

At the very least, opposition to the death penalty should not be presented merely as part of a broad denial of the legitimacy of social values widely held by the community, specifically the strong disapproval of violent crime. Not only would such an argument be unlikely to succeed, but if it were to succeed, it would in all likelihood leave a significant part of the community with enough unrelieved anger to make social unrest and backlash highly probable. Thus, through both rhetoric and practical proposals, such as advocacy of life sentences without parole, a responsible abolitionist argument must give the community a way, short of actual execution, to unify in its condemnation of violent crimes. Nevertheless, although the need may be clear for successful alternatives to the ritual functions currently achieved through the death penalty, the specific question of the nature of such alternatives needs much more thought.

In this regard, it is interesting to note that most western democracies, for all practical purposes, have abolished the death penalty.²⁵² Yet, several of these countries retain it in theory for

250. Thus, Girard stated: "I am fully in favour of the major liquidation of philosophy and the sciences of man that is currently taking place. . . . the real accomplishments of modern thought . . . are critical and negative." *Id.* at 135-36. Further, this "desacrilization" process must be followed by "[t]he definitive renunciation of violence, without any second thoughts . . . the condition *sine qua non* for the survival of humanity itself" *Id.* at 137.

251. The millennium, in Christian theology, is the thousand-year period of peace foreseen in the Book of Revelations. See JOHN F. HARRISON, *THE SECOND COMING: POPULAR MILLENARIANISM 1780-1850*, at 3-10 (1979). Premillennialists believe that this period will follow the Second Coming of Christ. See *id.* at 4. Postmillennialists, in contrast, believe that the climax of the thousand-year period of righteousness will be the Second Coming of Christ. See *id.* Contrary to widespread belief, the millenium does not have any necessary connection with the expiration of any particular thousand-year period calculated from the birth of Christ. See *id.* at 5, 7.

252. See ZIMRING & HAWKINS, *supra* note 57, at 4-6.

some exceptionally rare instances, such as certain acts committed in time of war.²⁵³ Perhaps the mere presence of the ultimate sanction on the statute books, even if it is never, or hardly ever invoked, helps to satisfy the need for social solidarity. It does, after all, proclaim the community's belief that someone, even if that person is only hypothetical, justifiably is the target of the whole community's wrath. Thus, the fact that the death penalty is available in Israel for those guilty of Nazi atrocities may well serve a salutary social purpose, even though only one man has ever been executed under this provision.²⁵⁴

Perhaps, then, the practical abolition of the death penalty will require a concession that it is still available in theory. This returns the discussion, in a way, to what for many is the beginning of the death penalty debate: the Bible. As previously noted, the Bible solemnly prescribes death as appropriate punishment, but, in practice, ancient Israel constructed procedures to assure infrequent application.²⁵⁵ Thus, the community satisfied its need to affirm its solidarity in opposing the crime without requiring actual, frequent executions. If one embraces this theory, current trends in the United States are disturbing. Increasingly, calls are being made, not only for the enactment of death penalty statutes, but for streamlined procedures that will assure the completion of more executions.²⁵⁶

Unfortunately, then, the question of whether effective alternative rituals can serve the same social function of uniting the community in opposition to a common enemy must remain open. Girard's theories suggest that the question of alternative rituals must be addressed if real progress is to be made in furthering the abolitionist cause.

V. CONCLUSION

In a legal environment that assumes rational argument to be the foundation of governmental decision making, it is easy to overlook the possibility that elements of the legal system are

253. *See id.* at 5.

254. *See id.* at 6. The exception, of course, was Nazi war criminal Adolf Eichmann. *See id.*

255. *See supra* notes 122-24 and accompanying text.

256. *See supra* notes 127-32 and accompanying text.

best explained by powerful, nonrational motives. The contemporary debate over capital punishment proceeds, as it has for centuries, with a focus on rational justifications for the practice. Yet, powerful evidence that the practice does not advance the rational goals set forth as its objectives should make one wonder about society's basic assumptions concerning the death penalty's real function.

Although commentators have noted the symbolic function of executions, this usually has been relegated to the margins of the debate; unsurprisingly, the debate has focused on the purported goals of deterrence and retribution. Upon close examination, however, these goals seem strangely beside the point. Supporters of the death penalty are unmoved by evidence that it does not deter violent crime, or by evidence that in practice the death penalty falls woefully short of the demands of retributive theory.

Perhaps, then, the key to understanding the death penalty is to see it as filling a nonrational, yet very real, need. René Girard's theory of mimetic violence provides an intriguing alternative explanation for the death penalty, and one that also explains its resistance to rational argument. If Girard is correct, the death penalty serves primarily as a ritual of violence through which the community attempts to unify itself, concentrating its urge to mimetic violence on one individual identified as the other, the enemy of the community. If the death penalty should be understood in this way then one must view the surrounding debate in a fundamentally different way.

The debate over the deterrent effect of capital punishment seems to be largely irrelevant. Not only has the Supreme Court decided that a showing of deterrence is unnecessary,²⁵⁷ but most death penalty supporters, even if they believe in the deterrent effect of the death penalty, do not seem to rest their support of capital punishment on the existence of such an effect. As retribution becomes more central to the justification of capital punishment, it is unsurprising that abolitionists find themselves feeling the need to challenge the fundamental notion that a deliberate, fully volitional killer deserves to die under any circumstances.

257. See *Edmund v. Florida*, 458 U.S. 782, 798-99 (1982).

If Girard's theories explain capital punishment, then the truth or falsity of the retribution proposition is not really at the heart of the practice. The death penalty is, at its core, consequentialist, but not in the sense that it will deter potential killers by getting them to adjust their mental cost-benefit calculations. Instead, it seeks to reduce the amount of violence in the community by creating communal unity in opposition to the executed killer. The ability of the death penalty to achieve those consequentialist goals is largely dependent upon the extent to which the community believes that it is applied consistently with deeply held retributivist ideas.

Rather than launching a frontal assault on the theoretical legitimacy of the death penalty, particularly under retributive theory, perhaps the most effective way to attack the death penalty is to expose its failings, in the real world, to satisfy the demands of retributive theory. Does the present system actually determine, in a reliable way, the subset of killers who are most culpable? Can any system do so?²⁵⁸ If these questions continue to be raised effectively, they may seriously interfere with the ability of the death penalty to serve its central purpose of uniting the community. Of course, this route holds its own dangers. One response to the failure of the death penalty to "work" might be not to abandon it, but rather to expand it, in an attempt to somehow get it to work. After all, its proponents are unclear about just why it once worked, and so they will fail to understand the futility of trying to make a divisive death penalty do the work of unifying the community. Furthermore, the need for the unifying ritual to break the cycle of mimetic violence will remain.

Retentionists, of course, can draw their own conclusions from Girard's theories. They may argue that his theories merely demonstrate the important function that capital punishment serves,

258. Jewish law, which set up such high procedural barriers to executions as to make them nearly impossible, did so in light of the fallibility of any human judgment, however careful. "In effect, the law demands a differentiation between the quality of God's omniscient justice and the fragile, fallible justice of the worldly courts." Rosenberg & Rosenberg, *supra* note 122, at 620. Thus, the inevitability of imperfection in judging guilt weighed heavily against imposing punishment, even when guilt seemed probable. *See id.*

one that is abandoned only at the risk of removing an important tool to further peace in the community. Rituals are not merely amusing sideshows; they are crucial to any community.

Opponents of the death penalty must accept the challenge of providing alternative ways of allowing the community to effectively express its unity in opposing violent crime. Finding such alternatives will not be easy. In a diverse, contentious, fragmented nation, forging unifying rituals that are effective will be a challenge. The first step is to realize that such a task is necessary. That realization will require serious consideration of the possibility that the rationalist arguments over deterrence and retribution, which both sides assume are at the core of the death penalty debate, may be far less important than they seem.