

5-1-1995

## Reflections on O.J. and the Gas Chamber

J. Michael Echevarria

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### Recommended Citation

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

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# Reflections on O.J. and the Gas Chamber

J. MICHAEL ECHEVARRÍA\*

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## INTRODUCTION

Instead of saying, as we always have, that the death penalty is first of all a necessity, and afterwards that it is advisable not to talk about it, we should first speak of what the death penalty really is, and only then decide if, *being what it is*, it is necessary.<sup>1</sup>

Picture this: On Monday morning, June 13, 1994, the former wife of a national sports celebrity is found murdered in front of her Brentwood, California townhouse.<sup>2</sup> Along with her body is also found the corpse of a 25-year-old male friend.<sup>3</sup> The scene is described by police officers as among the most gruesome they have ever viewed.<sup>4</sup> The ex-wife is nearly decapitated and the state of the male corpse provides evidence of a fierce struggle.<sup>5</sup> The scene is drenched in blood. Six days later the sports celebrity is charged with double homicide.<sup>6</sup> Under California law, a double homicide constitutes an “aggravating circumstance” entitling the prosecution to seek the death penalty.<sup>7</sup> The celebrity, who

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1. ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE 7 (Richard Howard trans., 1957).  
2. Josh Meyer & Eric Malnic, *O.J. Simpson’s Ex-Wife, Man Found Slain*, L.A. TIMES, June 14, 1994, at A1.  
3. *Id.*  
4. See CNN News (CNN television broadcast, July 1, 1994) (transcript 349-5) (criminal defense attorney Roger Cossack: “I have a contact in the police department who has told me that this is one of the most gruesome crime scenes that they have ever seen.”).  
5. See CNN News (CNN television broadcast, Oct. 23, 1994) (transcript 406-1) (Lt. John Rogers of the Los Angeles police department comments on the crime scene); CNN News (CNN television broadcast, July 11, 1994, (transcript 359-1) (same).  
6. Jim Newton & Shawn Hubler, *Simpson Held After Wild Chase*, L.A. TIMES, June 18, 1994, at A1.  
7. CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1995).

has an estimated net worth of more than ten million dollars,<sup>8</sup> hires a battery of world renowned attorneys, forensic experts, and investigators.<sup>9</sup>

Within weeks, experts conclude that the celebrity will probably not face the possibility of the gas chamber<sup>10</sup> because of his celebrity status and because the victim is his spouse.<sup>11</sup> Less than three months after the celebrity is charged with the crimes, the prosecution announces that although the state contends that the brutal murders were premeditated, the state shall not seek the death penalty.<sup>12</sup> No specific reasons are given by the prosecution for its decision.<sup>13</sup>

Now picture this: An African-American male murders a white female. The evidence against him is highly circumstantial—there are no

8. See Alan Abrahamson, *Simpson Legal Fees Could Run Into Millions*, L.A. TIMES, July 9, 1994, at A1 (an accountant hired by Nicole Brown Simpson in connection with the couple's 1992 divorce estimated Mr. Simpson's net worth at \$10.8 million).

9. Simpson's trial team consisted not only of noted trial attorneys Robert Shapiro, Johnnie Cochran and F. Lee Bailey, but also noted appellate attorney Alan Dershowitz, noted criminal procedure expert Gerald Uelman, noted DNA expert Barry C. Scheck, and attorneys Sara Caplan, Carl E. Douglas, Peter Neufeld, and Robert Kardashian. The forensic experts employed by Mr. Simpson include Dr. Henry Lee, Michael Baden, Dr. Edward Blake, and Robert Blasier. Mr. Simpson also obtained the services of a jury consultant, Jo-Ellen Dimitrius; an expert on battered women, Lenore Walker; and a number of investigators, including John E. McNally, Zvonko Pavelic, and Patrick J. McKenna.

10. It should be noted that a federal court recently held that California's method of execution—by administration of lethal gas—violates the Eighth Amendment. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994).

11. Henry Weinstein & Alan Abrahamson, *Death Penalty Unlikely for Simpson, Experts Say*, L.A. TIMES, July 10, 1994, at A1. The reasons cited for the likelihood that the death penalty would not be sought were described as follows:

There are many reasons why [Simpson] likely will be an exception [to the rule of seeking the death penalty]: He does not have a lengthy criminal history. He has been a national hero. It has become increasingly difficult for prosecutors to obtain the death penalty in Los Angeles County. Seeking the death penalty might make it more difficult to garner a conviction. His execution would leave two young children of one of the victims without a parent. And, finally, the death penalty is rarely imposed in spousal murders.

*Id.* See also Linda Deutsch, *Will Simpson Face the Death Penalty? Race and Celebrity Play a Big Role. Smart Money Says The D.A. Will Go For A Life Sentence*, PHILADELPHIA INQUIRER, Sept. 6, 1994, at A5; John Riley, *Lawyers: O.J. Could Sidestep Death Penalty*, NEWSDAY, June 19, 1994, at A52.

12. Jim Newton & Ralph Frammolino, *Prosecution Won't Seek Death Penalty Against Simpson*, L.A. TIMES, Sept. 10, 1994, at A1.

13. *Id.* (In a letter sent to Simpson's lawyers, Assistant Dist. Atty. Frank Sundstedt said the decision was made after "consideration of all available aggravating and mitigating penalty phase evidence.").

eyewitnesses.<sup>14</sup> The defendant, who cannot afford an attorney, is represented by an overworked public defender. The death penalty is sought by the state because of, among other reasons, the “quality” of the victim. After a short trial, a verdict is returned. The defendant is sentenced to death.<sup>15</sup>

O.J. Simpson is lucky. During the same period when prosecutors considered whether to seek the death penalty against Simpson, 2812 people in this country were sitting on death row.<sup>16</sup> Most were poor, many were black, and many were guilty of murdering whites.<sup>17</sup> It is likely, nay, inevitable, that some of these people were not guilty of the crime for which they had been sentenced. Some of these people will be executed. Are their deaths necessary? Beneficial? Justifiable?

Three rationales are often advanced in justification of the continued imposition of the death penalty: (1) deterrence, (2) safety, and (3) retribution.

Empirical data concerning the death penalty’s deterrent value shows that the justification is dubious at best. Far more studies show that capital punishment empirically has no deterrent value when compared to studies that reach the opposite conclusion. In fact, the evidence seems to indicate that capital punishment actually tends to increase the homicide rate. With respect to the murders of Nicole Simpson and Ronald Goldman, it is unlikely that the death penalty, which was on the statute books in California at the time,<sup>18</sup> had a deterrent effect on the murderer. It apparently did not enter the calculus of the decision-maker

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14. Although not empirically verifiable, it is likely that for many, if not most, premeditated murders there are no eye-witnesses. So it naturally follows that there must be many cases fitting this profile. An example of a case with a factual background strikingly similar to the Simpson case is *State v. Lane*, 72 Ariz. 220, 233 P.2d 437 (1951), where Charles Lane was sentenced to death for the murder of his ex-wife after a seven day trial in which no eye-witnesses presented testimony.

15. It has been well documented that when a black murders a white he is far more likely to be sentenced to death than if he murders another black. See *McClesky v. Kemp*, 481 U.S. 279, 291 (1987) (citing David C. Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707-10 (1983)).

16. Weinstein & Abrahamson, *supra* note 11, at A1.

17. A recent study reveals that although blacks only make up 12% of the general population, they represent 40% of the death row population. Katie Monagle, *The Death Penalty: Race May Determine Justice*, SCHOLASTIC UPDATE, Sept. 4, 1992, at 13. In many states the disparities are shocking. For example, blacks make up the following percentages of death row prisoners in the following states: Maryland (90%), Illinois (63%), Pennsylvania (60%). *Id.* When the race of the victim is taken into account the disparity is even greater: 84% of the inmates on death row murdered whites. *Id.* Since 1945 only one white person has been executed for murdering a black. *Id.*; see also Michael Ross, *Is the Death Penalty Racist?*, HUM. RTS. Q., Summer 1994, at 32.

18. See CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1995).

with a sufficient gravity to change the ultimate decision. Would deterrence be proved, however, if the rich and powerful were subject to capital punishment's force? Who can say? It is clear, however, that the question will never be answered because the penalty is unlikely to be imposed, given its legal requirements, on a person who can afford to hire exemplary legal counsel.<sup>19</sup>

Capital punishment's safety justification also lacks merit. Of course, if a murderer is executed, he no longer poses a threat to the safety of the community. However, our safety can be equally protected by the provision for life imprisonment without possibility of parole. Furthermore, the public safety argument has little merit in cases like *People v. Simpson*.<sup>20</sup> In that case, prosecutors claim that the defendant acted out of jealousy.<sup>21</sup> This is an implicit acknowledgement that the potential victims were not the public-at-large, but the object of his wrath—his ex-wife.

19. In 1972, the Supreme Court held that most capital punishment statutes in the nation at the time were unconstitutional under the Eighth Amendment because the statutes provided jurors with unguided discretion. *Furman v. Georgia*, 408 U.S. 238 (1972). Before *Furman*, unbridled discretion resulted in an aberrant (and unconstitutional) pattern of sentencing. *Id.* at 249-50. To cure the constitutional infirmity, capital sentencing statutes were thereafter re-written to give juries detailed guided discretion. See RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 59-63 (1991).

Since the imposition of the death penalty now turns on detailed, specific enumerated aggravating and mitigating factors (*see, e.g.*, CAL. PENAL CODE § 190.2), a premium is placed on trial counsel's ability to develop and explore mitigating circumstances concerning the defendant's background, experience, and psychological makeup. Experts are often hired to make the latter evaluation.

The failure to present such evidence can have disastrous consequences. In one Georgia case, Jerome Holloway was sentenced to death. *Holloway v. State*, 361 S.E.2d 794 (Ga. 1987). Mr. Holloway had an IQ of 49 and an intellectual capacity of a 7-year old. Unfortunately, his counsel failed to present this evidence. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994). The same was true of Alvin Smith who had an IQ of 65. *Id.* (referring to *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987) (setting aside death sentence on other grounds), *aff'd sub nom. Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (en banc)).

20. Felony Complaint For Arrest Warrant at 1, *People v. Simpson*, No. BA097211, available at 1994 WL 564433, at \*1.

21. See *Excerpts of Opening Statements by Simpson Prosecutors*, L.A. TIMES, Jan. 25, 1995, at A14 [hereinafter *Excerpts of Opening Statements by Simpson Prosecutors*]; see also *CNN News* (CNN television broadcast, November 7, 1994, 5:00 p.m. (EST)) (transcript 1037) available at 1994 WL 3691744, at \*2 (concerning possible sources of a "jealous obsession" theory); Bill Boyarsky, *A Cynical Game of Leaks, Denials*, L.A. TIMES, Aug. 10, 1994, at A20.

Given that there is no good evidence that the death penalty serves a deterrent function and given that the safety function can be equally served with a less drastic measure, the only true justification that remains is retribution. In recent years there has been much debate as to the legitimacy of retributive justice.<sup>22</sup> However, in the context of the Simpson case, capital punishment justifications based on retributive theory come under closer scrutiny. The public's lack of desire for retribution most likely influenced the prosecution's decision to not seek the death penalty against Simpson.<sup>23</sup> As a result, the Simpson case exemplifies the arbitrary nature of the death penalty when it is sought on retributive grounds. In any event, even if retribution is a legitimate interest, capital punishment is still not warranted.

A number of studies (anecdotal and otherwise) indicate that innocent persons have been sentenced to death.<sup>24</sup> This is hardly surprising for a number of reasons. First, capital punishment must ordinarily be premised on a finding of first degree homicide (that is, premeditated murder).<sup>25</sup> Because the crime ordinarily involves a great degree of secrecy and stealth, convictions are often based on circumstantial evidence. As a result, a first degree murder conviction presents a greater possibility of error than other crimes in which the miscreant does not as

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22. See, e.g., JEFFRIE G. MURPHY, *RETRIBUTION RECONSIDERED* (1992); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989); Robert Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379 (1979); ANDREW VON HIRSCH, REPORT OF THE COMMISSION FOR THE STUDY OF INCARCERATION, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); M. Kay Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263 (1975); JOHN KLEINIG, *PUNISHMENT AND DESERT* (1973); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); Richard Wasserstrom, *Why Punish the Guilty?*, in PHIL. PERSP. ON PUNISHMENT 328 (Gertrude Ezorsky ed., 1972).

23. For example, in a Field Organization poll taken shortly after the murders, only 35% of white respondents and 3% of black respondents believed that the prosecutor should seek the death penalty. *NBC Nightly News* (NBC television broadcast, July 19, 1994) available at 1994 WL 3519927 at \*2. A Gallup Organization survey of 1,011 adults conducted July 25-29, 1994 came up with similar results: 39% of white respondents and 10% of black respondents favored the death penalty for Mr. Simpson. Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52, 54.

24. See *infra* note 101. The most recent example of the execution of an innocent man comes from Huntsville, Texas. Jesse Jacobs was convicted in 1986 of the murder of the former wife of his sister's boyfriend. Jacobs confessed but later recanted. Jacob's sister was later convicted of involuntary manslaughter for the same crime. Although the evidence was fairly compelling that Mr. Jacobs did not pull the trigger, the United States Supreme Court denied his stay of execution. See *Jacob v. Scott*, 31 F.3d 1319 (5th Cir. 1994), cert. denied, 115 S. Ct. 711 (1995) (mem.); *Faster Isn't Always Better*, L.A. TIMES, Jan. 8, 1995, at M4.

25. See, e.g., GA. CODE ANN. § 16-5-1 (1995); TEX. PENAL CODE ANN. §§ 19.02 & 19.03 (West 1995); FLA. STAT. ANN. § 782.04 (West 1995); MODEL PENAL CODE § 210.2 (1985).

actively plan out and conceal his crime. It is thus inevitable that a certain percent of innocent people will be convicted of first degree murder, especially where the victim is a sympathetic person<sup>26</sup> and the defendant is unpopular. Additionally, given the class-based nature of the system many first-degree homicide defendants are inadequately served by their trial counsel. Unlike Simpson, most defendants simply cannot afford to present to a jury numerous alternative scenarios of the crime.<sup>27</sup> Potential "reasonable doubts" only exist to the extent they are presented at trial. Moreover, even where it is indisputable that the defendant committed the act, absolute culpability can never be firmly established because of the *mens rea* requirement (especially in light of emerging medical and biological evidence vitiating the notion of free will).<sup>28</sup>

The question thus becomes: Should we impose a perfect (that is to say, irreversible) penalty in the context of an imperfect (that is to say, error-prone) system? More specifically: Given that it is inevitable that innocent people will be condemned to death, is there a legitimate purpose being served by killing an innocent person? If it could be proven that the death penalty was necessary for deterrence or safety, arguably a (weak) argument could be advanced. But given that the only rationale that survives is retribution, it is hard to justify the continued existence of capital punishment.

It is not the purpose of the author to survey all the extensive literature on the topic of the death penalty. More than one thousand books have been written on the topic and the arguments, by now, are all familiar.<sup>29</sup> Rather, this Article examines the traditional rationales advanced in support of the death penalty in light of the Simpson case. In many ways, the Simpson case sheds light on the essential unfairness,

26. In newspaper stories concerning the Simpson case, several prosecutors commented that, among other things, in deciding whether or not to pursue the death penalty, the "quality" of the victim plays a critical role. Weinstein & Abrahamson, *supra* note 11, at A31.

27. This is demonstrated by the various and sundry theories the defense has given, such as the rogue-racist-cop theory. See Jeffrey Toobin, *An Incendiary Defense*, NEW YORKER, July 25, 1994, at 56.

28. See *infra* part II.B.1.

29. Three excellent and comprehensive books on the topic are: JOHAN THORSTEN SELLIN, *THE PENALTY OF DEATH* (1980); CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974); and ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983).



arbitrariness and inefficacy of capital punishment. Part One of this Article reviews the traditional philosophical justifications advanced in support of the death penalty and compares them with the empirical data currently available. Deterrence is discussed in the context of its historical promoters, primarily the utilitarians, as represented by Jeremy Bentham. Safety is discussed in the context of sociological studies regarding recidivism. And retributive justice is discussed in the context of Immanuel Kant's methodology and recent formulations by current legal scholars. The justifications are also discussed, paying particular attention to how they do or do not apply in the Simpson case.

Part Two looks at the data concerning, and the reasons for, the incidence of conviction error in capital cases. Emphasis will be placed on the difficulty of establishing the crime, the subjectivity of the *mens rea* requirement in the context of psycho-biological data and the problems inherent in obtaining justice where the defendant is penurious. Special attention is given to the type and quality of representation accorded Simpson as contrasted with the type and quality of representation accorded most capital defendants.

Part Three concludes by comparing the empirical data with the philosophical justifications for capital punishment. It is the position of the author that when we discover essentially what capital punishment is all about, it is clear that it cannot be considered necessary.

## I. THE PHILOSOPHICAL DEBATE AND THE EMPIRICAL EVIDENCE

### A. *Deterrence*

#### 1. *Theory*

The argument most often advanced in support of the death penalty is that it saves lives. The premise is based on the utilitarian notion that the law should maximize the aggregate "good" to society.

Utilitarianism can be traced to the ancient Greeks.<sup>30</sup> Jeremy

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30. See PLATO, *THE LAWS* (Trevor J. Saunders trans., Penguin Books 1970). Protagoras expressed the opinion that since a past wrong cannot be undone, punishment serves the goal of deterring the wrongdoer in the future. Although not strictly a utilitarian, Epicurus (270-234 B.C.) can also be viewed as the seminal figure in utilitarianism. The Eighteenth and Nineteenth Century English philosophers who developed the theory, namely Jeremy Bentham and John Stuart Mill, premised their philosophy on a monistic view of morality. For these theorists, the "good" (i.e., moral) is congruent with that from which pleasure is derived. Epicurus first advanced the principle that pleasure is the end to which mankind should strive. See Epicurus, *Letter to Menoeceus* and *Principle Doctrines*, in *THE ESSENTIAL EPICURUS*, 61, 69 (Eugene

Bentham, an Eighteenth century English social reformer, popularized the application of utilitarianism to penal legislation.<sup>31</sup> Bentham developed his philosophy during the so-called Age of Reason, as a reaction to theological philosophy (i.e., natural law) which he regarded as unscientific.<sup>32</sup> His philosophy can be summarized as follows: The first

O'Connor trans., Prometheus Books 1993).

31. Jeremy Bentham, who indisputably was the leader of the philosophical movement known as utilitarianism, is and was considered by many, including John Stuart Mill, to be not so much a philosopher as a social reformer because of his failure to offer proof with respect to his first principle that the good is pleasure. JOHN PLAMENATZ, *THE ENGLISH UTILITARIANS* 77 (1966). The most common critique of Bentham (and Mill, for that matter) is that he engages in psychological reductionism by simplifying human nature. What is most amazing, however, is that the deterrence argument, which is likewise based on unproven behavioral assumptions, has not significantly evolved since the time of Bentham. See, e.g., Robert Bork, *Amicus Curiae* brief at 34, *Fowler v. North Carolina*, 428 U.S. 904 (1974) (No. 73-7031) ("The efforts of most criminals to avoid detection and to escape after being caught, show very clearly that they are sensitive to a calculus of pains and pleasures."); see also Michael Davis, *Death, Deterrence and the Method of Common Sense*, 7 *SOC. THEORY & PRACTICE* 145 (1981).

32. The importance of this historical fact—that Bentham was reacting to people such as Thomas Aquinas, St. Anselm, and St. Augustine—cannot be underestimated. This reaction is more clearly seen in the writings of John Stuart Mill, Bentham's ideological heir. Mill lamented the fact that the history of scientific thought was constantly advancing while moral philosophy had remained stagnant for centuries. JOHN STUART MILL, *UTILITARIANISM* 306-15 (Longmans, Green & Co. 1901). Rather than engage in deontological ruminations (like Immanuel Kant) with respect to morality and truth, Mill proposed that legislation and morals involve practical, rather than theoretical concerns. *Id.* Thus, the approach that was suggested was supposedly based on empiricism and not any notions of intuitive morality. In Mills' words:

Whether happiness be or be not the end to which morality should be referred to an *end* of some sort, and not left in the dominion of vague feeling or inexpiable internal conviction, that it be made a matter of reason and calculation, and not merely sentiment, is essential to the very idea of moral philosophy; is, in fact, what renders argument or discourse on moral questions possible.

JOHN STUART MILL, *Bentham, in* *ESSAYS ON ETHICS, RELIGION AND SOCIETY* 75 (J.M. Robson ed., 1969). The relevance of this, of course, is that utilitarianism avoids subjective moral arguments because of its mechanical rigidity and ends-centered pragmatism. Thus, it is certainly true, as one author recently noted, that the guilt or innocence of a potential capital punishment victim is irrelevant with respect to the success of a utilitarian/deterrence argument. Eric Reitan, *Why the Deterrence Argument for Capital Punishment Fails*, *CRIM. JUST. ETHICS*, Winter/Spring 1993, at 26, 30.

The sole question for the utilitarian is whether pleasure, in the aggregate, is advanced. Whether utilitarianism can be defended on moral grounds is highly problematic. Thomas Carlyle, the nineteenth century English philosopher, reportedly referred to utilitarianism as a "pig philosophy." ALAN RYAN, *JOHN STUART MILL* 200 (1970).

principle of moral philosophy is the principle of utility. Utility means that every person is morally obligated to promote the greatest happiness for the greatest number of persons. Happiness (which is synonymous with the good) means pleasure. Human action, inasmuch as it produces or reduces pleasure, can only be judged based on its consequences and not its motives. It is the function of the state to sanction human action, where such sanction is necessary for the promotion of the common good. Deterrence is a legitimate aim of legislation to the extent it maximizes the common good by inhibiting those who would reduce the common good and by providing a common source of security for all. The degree of depravity of an individual's disposition is inversely proportional to the strength of the temptation needed to prompt him to a malevolent act. The lawmaker, in passing legislation, must estimate the strength of the temptation to do malevolence and make the punishment sufficiently severe to act as a deterrent.<sup>33</sup>

Although Bentham saw punishment, in and of itself, as an evil (punishment leads to pain and pain is the opposite of pleasure), later utilitarians have justified its use in the context of the death penalty because, it is argued, its absence will lead to greater evil. In other words, the death penalty is seen as the result of a morally-justified tradeoff. Society sacrifices a convicted murderer in order to protect an indefinite number of innocent victims. Sparing the murderer's life, a utilitarian would argue, runs the risk of endangering innocent people.<sup>34</sup>

The utilitarian believes it is possible to deduce moral propositions from psychological assumptions; the main psychological assumption being that every potential murderer is a rational and calculating individual who will weigh the costs incident to certain behaviors with the resultant benefits to be derived and choose to do that which maximizes his own pleasure (i.e. choose to do an act only when its benefit outweighs its constituent cost.)

The utilitarian/deterrence argument also rests on a number of other assumptions with respect to human behavior and motivation:

1. Potential murderers will have knowledge of the potential punishment to be meted out for their crimes;
2. The State's legal sanction of involuntary execution will not, in the mind of the potential murderer, legitimize his illegitimate actions;

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33. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 14-19 (J.H. Burns & H.L.A. Hart eds., 1982); JEREMY BENTHAM, *Principles of Law*, in 1 THE WORKS OF JEREMY BENTHAM 365 (Russell & Russell 1962).

34. VAN DEN HAAG & CONRAD, *supra* note 29, at 69.

3. A potential murderer values the continuation of his own life as a greater benefit than the cessation of another's life; and

4. Death is a greater deterrent to conduct by a potential murderer than is the possibility of life-long incarceration.<sup>35</sup>

## 2. Practice

How does the deterrence argument hold against experience? The overwhelming weight of the evidence suggests that capital punishment saves no lives. There simply is no proof of any deterrent effect.

The most thorough empirical studies have been undertaken by Thorsten Sellin, a noted criminologist, who originally drafted a report for the Model Penal Code Project for the American Law Institute in 1959 and followed up this report with studies in 1967 and 1980.<sup>36</sup> Sellin conducted two types of studies: (1) studies comparing the homicide rate in capital punishment states with the homicide rate in non-capital punishment states and (2) studies comparing the homicide rate in a state when capital punishment is in effect with the homicide rate in the same state after it has been abolished.

Sellin's first study compared the homicide rates in geographically contiguous states.<sup>37</sup> The study assumed that geographically contiguous states were likely to have similar historical, economic, and cultural backgrounds.<sup>38</sup> As a result, such a comparison would tend to reduce the incidence of confounding variables. The results were startling. There was no evidence that the homicide rate was generally lower in the

35. It should be noted that Bentham's original formulation is not as simplistic as later adherents to the doctrine of deterrence. Bentham, for example, believed that individuals had varied, diverse and individuated dispositions colored by education and socioeconomic factors. Thus, Bentham posited what has become known as "act utilitarianism," which requires a calculation of each act, as opposed to "rule utilitarianism," which adopts general rules based on a cost-benefit analysis in common situations. WILLIAM K. FRANKENA, *ETHICS* 35-41 (2d ed. 1973). Bentham's emphasis was more on education than on penal legislation.

36. THORSTEN SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* (1959); THORSTEN SELLIN, *CAPITAL PUNISHMENT* (1967); THORSTEN SELLIN, *THE PENALTY OF DEATH* (1980).

37. THORSTEN SELLIN, *THE PENALTY OF DEATH* 122-33 (1980). The first set of contiguous states Sellin looked at included Michigan, Indiana and Ohio, *id.* at 144, the second set included Minnesota, Iowa and Wisconsin, *id.* at 149, the third set included North Dakota, South Dakota and Nebraska, *id.* at 151, 168, and the final set included Rhode Island, Massachusetts and Connecticut, *id.* at 147.

38. *Id.* at 132.

capital punishment states when compared to the non-capital punishment states.<sup>39</sup> In 1988, new studies replicated Sellin's results.<sup>40</sup>

In 1967, Sellin undertook a more focused state-by-state study that analyzed the deterrent effect of the death penalty on a particular type of capital homicide: police officer killings.<sup>41</sup> It has frequently been argued that the death penalty should have the greatest deterrent effect on murders of arresting police officers.<sup>42</sup> Once again, the evidence indicated that there was no deterrent effect from use of the death penalty. In fact, in a 1980 study conducted by Sellin, the evidence indicated that police officers had a higher risk of being killed in states that employed the death penalty.<sup>43</sup> Sellin's findings were once again replicated by others in 1982 and 1987.<sup>44</sup>

Only one researcher reached results contrary to Sellin—Isaac Ehrlich.<sup>45</sup> Ehrlich's analysis rested on the assumption that some, but not all, offenders respond to incentives. Using an economic model, he reported a causal relationship between the rate of murder and the probabilities of apprehension, conviction, and execution. Ehrlich also suggested there exists a systematic relationship between employment and earning opportunities on the one hand and the frequency of murder and related crimes on the other. His empirical data is not inconsistent with the hypothesis that, on balance, capital punishment reduces the murder rate. He reported that the murder rate is correlated negatively with participation in the labor force and positively with the rate of unemploy-

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39. *Id.* at 171-72. The results of Sellin's study and the findings of other scholars are summarized in PATERNOSTER, *supra* note 19, at 222.

40. Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 SOC. FORCES 774, 784-85 (1988). The researchers looked at homicide rates for the period of 1973-1984 and found no overall deterrent effect. The time period chosen corresponded to homicide rates after the Supreme Court clarified the issue of the constitutionality of capital punishment in *Furman v Georgia*, 408 U.S. 238 (1972). Prior to that time it could have been argued that the death penalty had been so rarely imposed as to not yield a valid statistical model for analysis. Sellin's original research covered a time period (1920-1955) that preceded *Furman*.

41. THORSTEN SELLIN, *CAPITAL PUNISHMENT* 138-54 (1967).

42. VAN DEN HAAG, *supra* note 29, at 234 ("Without the death penalty an offender having committed a crime that leads to imprisonment for life has nothing to lose if he murders the arresting officer.").

43. SELLIN, *supra* note 37, at 97.

44. William C. Bailey, *Capital Punishment and Lethal Assaults Against Police*, 19 CRIMINOLOGY 608, 613 (1982), William C. Bailey & Ruth D. Peterson, *Police Killings and Capital Punishment: The Post Furman Period*, 25 CRIMINOLOGY 1, 12 (1987). These studies went further than Sellin's original study by taking into account other factors such as the risk or certainty of execution.

45. Isaac Ehrlich, *The Deterrent Effort of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 401-02 (1975).

ment. Ehrlich's results, however, have been completely refuted and discredited.<sup>46</sup>

The second type of research undertaken by Sellin looked at homicide rates within one state where the state had periods with and without the death penalty ("retentionist" and "abolitionist" periods, respectively).<sup>47</sup> The evidence once again indicated that homicide rates during abolitionist periods and during retentionist periods did not vary significantly.<sup>48</sup> Sellin's original research results were replicated in 1983 and 1988 by others.<sup>49</sup>

Sellin did not study the short term effect of publicized executions. However, other researchers have investigated whether publicizing executions has a deterrent effect on homicide. The results are, once again, startling. The overall conclusion is that the local homicide rate actually tends to increase shortly after publicized executions.<sup>50</sup> This is the so-called "brutalization effect."<sup>51</sup> Executions tend to have a brutalizing effect on the local populace by, in some sense, legitimizing murder. The incongruity of the death penalty was noted as early as 1764 by Italian utilitarian, Cesare di Beccaria:

46. William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187, 192 (1975); Peter Pasell & John B. Taylor, *The Deterrence Controversy: A Reconsideration of the Time Series Evidence*, in CAPITAL PUNISHMENT IN THE UNITED STATES 357, 359 (Hugo A. Bedau & Chester M. Pierce eds., 1976); Brian E. Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s*, 61 MINN. L. REV. 743, 745 (1977); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981); Stephen J. Knorr, Comment, *Deterrence and the Death Penalty: A Temporal Cross-Sectional Approach*, 70 J. CRIM. LAW & CRIMINOLOGY 235, 240 (1979).

47. SELLIN, *supra* note 41, at 315-16.

48. *Id.* at 315.

49. Richard Lempert, *The Effect of Executions on Homicide: A New Look in an Old Light*, 29 CRIME & DELINQ. 88, 93 (1983); Peterson & Bailey, *supra* note 44, at 12.

50. Leonard D. Savitz, *A Study in Capital Punishment*, 49 J. OF CRIM. LAW, CRIMINOLOGY & PUB. SCI. 338, 341 (1958); David R. King, *The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683, 685-87 (1978); William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453, 456 (1980); William C. Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. LAW & CRIMINOLOGY 827, 855 (1983); David D. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. OF SOC. 139, 146 (1980).

51. Bowers & Pierce, *supra* note 50, at 453, 456.

[L]aws designed to temper human conduct should not embrace a savage example which is all the more baneful when the legally sanctioned death is inflicted deliberately and ceremoniously. To me it is an absurdity that the law which expresses the common will and detests and punishes homicide should itself commit one.<sup>52</sup>

### 3. Observations

When it comes to the deterrence argument, theory and practice are at odds. Part of the difficulty lies in the problems inherent in social science analysis in general. Because behavior can be influenced by so many factors, it may be difficult, if not impossible, to scientifically trace the sociological etymology of a particular behavior. In the context of such a historically persistent problem like crime, the uncertainty is magnified.<sup>53</sup> One author suggests that the deterrence argument can never be proven for this reason:

[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be . . . .

The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific'—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself.<sup>54</sup>

Hegel reportedly observed that if reality did not comport with his theory so much the worse for reality. And so it goes with the deterrence argument: the argument persists in the face of empirical evidence to the

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52. SELLIN, *supra* note 41, at 43 (1967) (citing CESARE DI BECCARIA, ON CRIMES AND PUNISHMENT (1764)).

53. Of course, one of the common criticisms of the empirical data concerning the deterrence argument is that it is of too recent vintage. Because the death penalty has been so infrequently imposed in this country over the last fifty years, no true analysis can be undertaken. That is, presumably in the "good old days" capital punishment was routinely and commonly administered, and one would expect to find a commensurate deterrence effect as a result of its predictability. Unfortunately, most (if not all) social scientific studies concerning capital punishment/deterrence have been undertaken in this century. Older evidence, by necessity, is anecdotal. The anecdotal evidence, however, does not bear out that capital punishment is an effective deterrent. It was once observed that at a time when public hanging was common in Great Britain, 164 of 167 condemned criminals awaiting execution in Bristol prison had personally witnessed one or more executions. CARL WELLMAN, MORALS AND ETHICS 273 (1975). Apparently these individuals were not deterred. And there is, of course, the often repeated incident reported by Boswell, in his *Life of Johnson*, of Dr. Johnson observing four pickpockets active in a crowd assembled to view a pickpocket hanged.

54. BLACK, *supra* note 29, at 25-26, *quoted in* Gregg v. Georgia, 428 U.S. 153, 185 (1976).

contrary. The deterrence argument probably persists because of its common sense appeal.<sup>55</sup>

The "common sense" of the argument is founded on assumptions regarding human behavior, the foremost being the rationality of the criminal mind. This assumption may be flawed. I will defer that discussion, however, for Parts Two and Three of this Article.

With respect to the Simpson case, a number of salient points concerning deterrence can be made. First, and most obviously, the crime was committed in a state where the death penalty is in full force and effect<sup>56</sup> and capital punishment is routinely a major campaign issue.<sup>57</sup> In short, the majority of the populace is undoubtedly aware that death is a possible sentence for first degree murder.<sup>58</sup> Yet, the murderer was obviously not deterred. It may, of course, be the case that the murderer was not deterred because he acted in rage.<sup>59</sup> And while the murderer's rage may not sufficiently negate a charge of first degree homicide,<sup>60</sup> it nonetheless limited the actor's ability to rationally weigh the consequences of his actions.<sup>61</sup>

What is so extraordinary about the Simpson case is that it is so ordinary. The prosecution's case-in-chief reflects, in many respects, the typical statistical profile of a homicide case in the United States. About eighty percent of all murders in this country are committed by people

55. See, e.g., Michael Davis, *Death, Deterrence, and the Method of Common Sense*, 7 SOC. THEORY & PRACTICE 145 (1981).

56. Of the 2,812 people on death row in 1994, 388 (or 14%) are in California. Weinstein & Abrahamson, *supra* note 11, at A1.

57. See Robert Scheer, *Death Penalty: A Fashionable Idea for the '90s*, L.A. TIMES, Nov. 6, 1994, at M5 (commenting on the use of the death penalty as a campaign issue in the 1994 California gubernatorial campaign); James Ridgeway, *Death Becomes Us: The Capital Punishment Craze*, L.A. VILLAGE VIEW, Oct. 7-13, 1994, at 6 (noting that the death penalty has become so politically popular that only one politician of national stature, the recently defeated ex-governor of New York, Mario Cuomo, is publicly opposed to it).

58. See, e.g., John T. Noonan, *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011 (1993) (regarding the notoriety surrounding the execution of Robert Alton Harris).

59. See *supra* note 21 and accompanying text.

60. Many courts hold that premeditation can literally occur in seconds. That is, the deliberation required to satisfy the *mens rea* requirement for first degree homicide can occur over a very short period of time. See, e.g., *Commonwealth v. Carroll*, 412 Pa. 525, 194 A.2d 911 (1963); *Hammil v. People*, 145 Colo. 577, 361 P.2d 117 (1961).

61. Things such as leaving bloody gloves at the crime scene confirm this, at least circumstantially.



who knew their victim.<sup>62</sup> Half of the victims had a social or romantic connection to the murderer.<sup>63</sup> It has been estimated that there are 2500 spousal homicides annually.<sup>64</sup> Reportedly, Simpson told others that if he could not have Nicole, no one could.<sup>65</sup> The murder was most likely not the act of a calculating mind. In this sense, the murder, as presented by prosecutors in the Simpson case, was typical. Deterrence in this context is simply a non-issue, as it probably is in the vast majority of homicides.

## B. Safety

### 1. Theory

A second justification frequently advanced for the death penalty is safety. The argument is fairly straightforward: if a convicted murderer is put to death, there is zero probability that he will murder again. The underlying assumption is that since the person has murdered in the past he presents a greater threat to society in the future than do other individuals. Thus, society is protected by incapacitating this threat.

### 2. Practice

A number of studies have examined the threat posed by a convicted murderer to commit another murder or serious offense. The overall conclusion is that convicted murderers are actually less likely to commit further homicides than other criminals (such as those incarcerated for property offenses). That is, if one looks at the prison population and attempts to predict the threat of future homicide, a murder conviction is not a terribly meaningful variable—it will no more predict future homicidal behavior than would a conviction for other offenses.

Two types of studies, generally, have been undertaken: (1) studies looking at the behavior of convicted murderers in prison after their

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62. John M. Dawson & Barbara Boland, *Murder in Large Urban Counties, 1988*, BUREAU OF JUST. STAT. SPECIAL REP., May 1993, at 4.

63. *Id.*

64. See Andrea Stone et al., *Women Who Become Statistics*, USA TODAY, July 13, 1994, at 3A (reporting that 2,500 women a year are killed by intimate partners). According to the Bureau of Justice Statistics there were 1,059 spousal homicides in 1988 alone. *Id.*

65. Ray Richmond, *Therapist Under Fire; Forward Prefers to Talk About Book*, TV Special, HOUS. CHRON., Aug. 5, 1994, at 1 (Dr. Susan Forward, Nicole Simpson's therapist, quotes Nicole Simpson as having told her that O.J. threatened, "If I can't have you, no one can!").

conviction, and (2) studies looking at the behavior of convicted murderers in the general population after being released from prison.

The first set of studies—studies examining the behavior of convicted murderers while incarcerated—focus on the institutional violence of capital offenders. In 1988, Marquart and Sorenson studied the behavior of Texas death row inmates, from 1973 to 1986, who were released into the general prison population after their sentences had been commuted to life.<sup>66</sup> Of the forty-six inmates in the group, not one committed another homicide.<sup>67</sup> The following year, the researchers broadened their study by looking at 558 inmates from twenty-nine states and the District of Columbia whose death sentences had been commuted.<sup>68</sup> Only six (or one percent) committed another murder while incarcerated.<sup>69</sup> Other studies show that convicted murderers are no more violent in prison than inmates incarcerated for non-homicide offenses.<sup>70</sup>

The second set of studies—studies examining the behavior of convicted murderers released into the general population—reach similar results. The two most comprehensive studies were undertaken by Stanton and Sellin. In his study in 1969, Stanton looked at the behavior of 7370 inmates released into the general public for various reasons.<sup>71</sup> Of this total, sixty-five were convicted murderers.<sup>72</sup> Persons previously

66. James W. Marquart & Jonathan R. Sorenson, *Institutional and Postrelease Behavior of Furman-committed Inmates in Texas*, 26 CRIMINOLOGY 677, 677-78 (1988).

67. *Id.* at 688. It should be noted that these inmates' sentences had been commuted because the Supreme Court held that the death penalty was unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972). This is important because had the offenders committed another offense they would not have been sentenced to death, but merely life imprisonment (a sentence they were already serving). This is another example of how the deterrence argument has been shown to be erroneous.

68. James W. Marquart & Jonathan R. Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society From Capital Offenders*, 23 LOY. L.A. L. REV. 5, 27 (1989).

69. Four of the victims were other inmates and two were correctional officers. *Id.* at 21.

70. See THORSTEN SELLIN, *THE DEATH PENALTY* (1982). His survey of federal prison violence for the year 1964 revealed that 84 percent of prison homicides were committed by inmates committed for non-homicide offenses. Inmates incarcerated for property crimes were three times as likely to commit a homicide as compared to convicted murderers. Sellin's follow-up study for the year 1965 indicated that 89 percent of the homicides in prison that year were committed by non-capital murder offenders.

71. John M. Stanton, *Murderers on Parole*, 15 CRIM. & DELINQ. 149, 149-55 (1969).

72. *Id.* at 150.

convicted of non-homicide offenses were three times as likely to be rearrested as homicide offenders.<sup>73</sup> Stanton's follow up study, looking at the years 1948 through 1957, indicated that non-homicide offenders were four times as likely to be rearrested.<sup>74</sup> Sellin looked at the activity of 63,065 released inmates, including 6800 persons convicted of willful homicide.<sup>75</sup> The evidence indicated that those convicted of armed robbery, aggravated assault, and forcible rape were more likely to kill after release than those convicted of premeditated murder. Moreover, of the 6800 released murderers 99.7% did not commit another murder.

Other researchers have reached similar results.<sup>76</sup> One author has summarized the conclusions of the various studies as follows:

[T]he few studies that have been conducted do not indicate that offenders who had been sentenced to death are highly prone to commit another murder or another offense either in the confines of the prison or if released to the community. Those who have been sentenced to death are not likely to commit serious or assaultive offenses while in prison, nor are they likely to commit homicide or a violent offense when released on parole. In fact, it would appear from these data that former capital defendants constitute somewhat *less* of a risk to fellow prisoners, prison staff members, and the general public than incarcerated property offenders.<sup>77</sup>

### 3. Observations

If the sole goal of the death penalty is protection, capital punishment, as presently constituted, is underinclusive and ineffective. The people convicted of capital offenses, while certainly more prone to violence than the general public, appear to be no more prone to violence than other (non-capital) offenders. The state is killing the wrong people. The world is simply not an appreciably safer place by executing only those convicted of capital offenses.

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73. *Id.* at 152.

74. *Id.*

75. See SELLIN, *supra* note 70.

76. See Marquart & Sorenson, *supra* note 66, at 26-28; Hugo A. Bedeau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Hugo A. Bedeau, *Capital Punishment in Oregon 1903-1964*, 45 OR. L. REV. 1, 34 (1965); Stanton, *supra* note 71, at 155; Gennaro F. Vito & Deborah G. Wilson, *Back From the Dead: Tracking the Progress of Kentucky's Furman Commuted Death Row Population*, 5 JUST. Q. 101, 110 (1988).

77. PATERNOSTER, *supra* note 19, at 240. For other studies reaching similar results see HENRY J. STEADMAN & JOSEPH J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE 100-06 (1974) (tracking the behavior of over 1,000 inmates transferred to civil mental hospitals); TERENCE P. THORNBERRY & JOSEPH E. JACOBY, THE CRIMINALLY INSANE: A COMMUNITY FOLLOW-UP OF MENTALLY ILL OFFENDERS (1979) (tracking over 500 patients from a maximum security institution for the criminally insane).

Safety, like deterrence, appears to be based on a number of "common sense" assumptions concerning human behavior. But when it comes to people who murder, these assumptions are highly problematic. Discussion concerning the roots of the problem will be deferred to Parts II and III of this Article.

With regard to the Simpson case, one point stands out: in deciding whether or not to seek the death penalty, the prosecution probably considered the potential threat to the community posed by the defendant.<sup>78</sup> The prosecution, while not stating its reasons for doing so, probably chose not to pursue the death penalty because of, among other reasons, Simpson's lack of a substantial prior criminal record and the fact that the victim was his spouse.<sup>79</sup> In short, the prosecution most likely felt that Simpson was not a good candidate for asserting a "public threat" because of the alleged narrow focus of his wrath. That is, he only presented a threat to one person—his former wife. But, of course, if a prosecutor were normally driven by such rational motives, the death penalty would rarely be sought. The vast majority of murderers simply do not pose a threat of murdering again. The reason for applying the death penalty must be found elsewhere. Capital punishment apparently is not driven by any safety argument.

### C. Retribution

#### 1. Theory

A third justification advanced in favor of the death penalty is retribution. Society, as a whole, presumably feels better (or at least is brought into equilibrium) when the life of those who take a life is taken.<sup>80</sup> Retribution is not based on any utilitarian, or at least easily verifiable utilitarian, principle. That is, retributive justice is not based on a notion of an end justifying a mean. Rather, it is based on the deontological notion that some things, in and of themselves, are justified and moral.

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78. See *supra* notes 11-13 and accompanying text.

79. Only 1.2% of all men currently on death row killed their wives or ex-wives. Weinstein & Abrahamson, *supra* note 11, at A1.

80. Equilibrium is defined by Hegel as homeostasis: the state of being before offensive behavior has been committed.

The seminal figure in retributive justice is Immanuel Kant. Kant believed that nothing is unconditionally good except the “good will.” The good will rationally acts out of a sense of duty. Duty represents the moral law and consists of observing three categorical imperatives: (1) one should act consistent with a principle which one would will to become universal law; (2) in so acting, persons must be treated as an end, in and of themselves, and never as a means; and (3) one should act as if one was legislating for a universal end.<sup>81</sup>

The ultimate moral value is human freedom.<sup>82</sup> Government exists to expand human freedom. Ironically, human freedom is expanded when citizens surrender some freedoms—the freedom to do that which is legally proscribed—so that society can enjoy the freedom obtained by being secure. Freedom is the only value which can be used to limit freedom. It therefore follows that some forms of coercion are morally permissible to the extent they advance, and are consistent with, rational freedom.<sup>83</sup>

Government, which acts to expand freedom in general by restricting it in particular, acts by consent. People consent to government coercion (i.e., the rule of law) because they benefit by having others obey the law. Law provides people with security which, in turn, expands their freedom.<sup>84</sup>

The coercion exerted by the government in enforcing the rule of law does not entail a violation of personal freedom so long as it can be shown that in some antecedent position of choice<sup>85</sup> a person would have been rational to adopt such a rule. Consent is the key: persons consent to the rule of law and, more importantly, to the consequences that flow from a violation of the rule. Violation of the rule merits punishment because of the theory of political obligation.<sup>86</sup>

Kant’s theory of political obligation is, to some extent, consistent with Rousseau’s notion of the social contract (i.e., the polity’s implicit

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81. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 62 (1785).

82. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35, 43-44 (1797).

83. *Id.* at 36.

84. *Id.* at 76.

85. John Rawls refers to this “antecedent position” as the “original position.” JOHN RAWLS, A THEORY OF JUSTICE 17-22 (1971). Briefly stated: a just (or moral) principle is a rule that would be agreed to by rational, self-interested, and unenvious persons who know they have entered into a society structured according to their agreement, but who do not know *a priori* what positions, or natural endowments, or particular interests they will have or occupy in that society. *Id.* The act of choosing the rule is based on Kant’s first categorical imperative.

86. Kant, *supra* note 81 at 113.

assent to legal arrangements).<sup>87</sup> If the law is to remain just, there must be some guarantee that those who disobey it will not gain an unfair advantage over those who obey. Criminal wrongdoing inherently entails gaining an unfair advantage or profit (i.e., being relieved of the burden of self restraint). Criminal punishment then, has as its object the restoration of the proper balance between benefit and obedience.

To what degree must punishment be meted out? Kant's answer is based on the principle of equality:

What kind of what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer of the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. . . . To say, "I will to be punished if I murder someone" can mean nothing more than, "I submit myself along with everyone else to those laws which, if there are any criminals among the people, will naturally include penal laws."<sup>88</sup>

This is the theory of retributive justice. Members of society who violate the moral law have consented to punishment. Punishment entails paying back a debt to society. The principle of equality requires that the payment be proportionate to the advantage unfairly obtained. *Lex talionis* (the principle of "an eye for an eye") requires that those who have taken a life be put to death. It is the only method by which societal equilibrium can be restored.<sup>89</sup>

87. *Id.*

88. *See supra* note 85.

89. Kant's theory proposes that criminals deserve to be punished because of the unfair advantage they have obtained. The state is morally required to nullify this advantage. The degree of nullification is to be measured by the rule of strict equality (*lex talionis*). It therefore follows that the only morally appropriate sanction for murder is death.

Another example of a recent Kantian justification is based on the principle of corrective justice. "[C]orrective justice is that branch of justice that requires those who cause losses by acting in wrongful ways to repair, correct, or annul such losses." Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1663 (1992).

[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.

*Id.* at 1685.

Modern day proponents of the death penalty also ground their justifications on retribution. Their theories, however, have a decidedly more psychological or anthropological bent. Two recent examples will suffice. Walter Berns, a resident scholar at the American Enterprise Institute, in his book<sup>90</sup> and elsewhere,<sup>91</sup> justifies the death penalty as an appropriate societal psychological response to heinous crimes. Basing his theory on Aristotle's proposition that anger is not only a justified response to, but also intimately connected with, the notion of justice, Berns justifies the death penalty as a way of rewarding this anger and thus teaching law-abidingness. In so doing, the law inspires awe in human life by making its taking subject to the most drastic of consequences.

J. Anthony Paredes, an anthropologist, views the death penalty as being connected with the populace's magical belief that death will restore order in a disorganized society.<sup>92</sup> This belief is based on the tribunal structure of the family, where retribution is justified for the killing of a family member.

## 2. Practice

Since retribution is based on the deontological notion that goodness inheres to an act itself, and is not based on the act's consequences, it is a little more than difficult to test the hypothesis empirically. It is simply impossible to quantify, for example, how society is brought back into equilibrium when a murderer is executed.

Recent retributivist justifications are based on the notion of what we can call, for the lack of a better term, collective relief or collective release. Public opinion polls can be used to test the assumption that retribution is the underlying justification supporting capital punishment. In a 1985 Gallup poll, nearly fifty percent of those expressing support for the death penalty reported that their support was based on either their notion of *lex talionis* ("an eye for an eye") or the notion that murderers simply deserved to die.<sup>93</sup> A 1986 poll by the same organization showed that seventy-three percent of those in favor of the death penalty

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90. WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND MORALITY AND THE MORALITY OF THE DEATH PENALTY 152, 173 (1979).

91. See Walter Berns, *Defending the Death Penalty*, 26 CRIM. & DELINQ. 503, 509-11 (1980).

92. J. Anthony Paredes, *Some Anthropological Observations on Capital Punishment in the USA*, 17 INT'L. J. COMP. & APPLIED CRIM. JUST. 220 (1993).

93. See PATERNOSTER, *supra* note 19, at 246. In the poll, 72% of those polled favored the death penalty. Of the supporters, 30% did so based on *lex talionis* and 18% on just desserts.

would still be in favor of the death penalty even if it could be proved that it had no deterrent effect.<sup>94</sup>

### 3. *Observations*

While the arguments based on deterrence and safety are grounded on assumptions concerning the behavior of the offender, the argument regarding retribution is based on no such assumption. Rather, retribution is based on an empirically untestable philosophical proposition. However, to the extent the theory is based upon the perception of a public need, it seems to be borne out by the popularity of the death penalty. Whether this “bloodlust” is a sufficient justification for killing the innocent will be addressed in Part III.

With regard to the Simpson case, it is interesting to note that public opinion polls conducted shortly after the murder indicated that nearly two-thirds of all white respondents and nearly all black respondents believed that Simpson should not get the death penalty.<sup>95</sup> The public's lack of desire for retribution can be explained in several ways: Simpson is a national celebrity; he is an African-American who rose from poverty.<sup>96</sup> In short, he is a person whose other accomplishments outweigh (or at least mitigate) warranting the ultimate sentence. If Simpson is found guilty, most people feel he does not deserve to die.<sup>97</sup>

But why not? The fact that someone is a rich and famous celebrity should be irrelevant. If anything, these factors should cut the other way. That is, if a person has wealth and advantage, then he has less excuse for his behavior. But presumably, “a man is more than the worst thing he has ever done.”<sup>98</sup> We know of Simpson's other accomplishments. Many see themselves in Simpson. This feeling tempers their desire for vengeance. The common perception of Simpson is that he is not a wild animal or a vicious killer. Those who believe he is guilty see him as a flawed human being. But once again, the reasoning is illogical. If anything, this heightens his moral responsibility since he is a person of

94. *Id.*

95. *See supra* note 23.

96. Ron Borges et al., *How Carefully Crafted Image was Shattered by Killings*, TORONTO STAR, June 25, 1994, at A1.

97. *See* Michael Kinsley, *What Americans Won't Do*, TIME, June 27, 1994, at 80.

98. SISTER HELEN PREJEAN, DEAD MAN WALKING 61 (1994) (concerning the author's first hand experience of ministering to accused killers).



“normal” experience who has acted abnormally. It is one thing to have grown up in and been surrounded by a depravity so overwhelming that it shapes one’s life and behavior. It is another thing to not be in an environment that so warps one’s personality. In the latter setting it is easier to argue that one has freely chosen his destiny, whereas in the former, destiny is imposed by forces beyond the control of the actor. But it is, of course, those from the worst backgrounds who are sentenced to death,<sup>99</sup> those who by their nature and circumstance prevent us from feeling empathy simply because of their “foreignness.”

The public’s response to the Simpson case highlights that the retribution argument is theoretical and does not comport to reality. People want others to die not so much because they are morally deserving (i.e., because they acted out of free will and chose their punishment) but rather, because they are somehow repugnant to our sensibilities. But this repugnance or depravity does not necessarily entail an exercise of free will. The death penalty is thus reserved for those to whom we feel alienation. It is reserved for those in whom we cannot see ourselves.

## II. THE EVIDENCE CONCERNING THE BASES FOR THE INCIDENCE OF ERROR

Any legal system will be imperfect since these systems are designed by men and women. Like the wrongfully-convicted Dmitri in Dostoevsky’s *The Brothers Karamazov*,<sup>100</sup> innocent people have been and will always be convicted. It is inevitable. But are there certain offenses more prone to conviction error than other offenses? First degree homicide may be such an offense because of the elements of the crime the state must establish, the manner in which the elements are established, and the socio-economic vagaries of the defendant.

### A. *The Empirical Evidence*

#### 1. *Practice*

Two recent studies have shed light on the issue of conviction error in capital cases. The first is the well-publicized article by Professors Hugo

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99. See *supra* note 17 and accompanying text.

100. FYODER DOSTOEVSKY, *THE BROTHERS KARAMAZOV* (R. Pevear & L. Volokhonsky trans.).

Adam Bedau and Michael L. Radelet.<sup>101</sup> Bedau and Radelet looked at capital cases in the United States during the twentieth century. In particular, they looked at "potentially capital cases:" cases in which a person was convicted of an offense that fell within the class of capital offenses regardless of whether the particular jurisdiction administered the death penalty.<sup>102</sup> Their study concluded that 350 innocent persons were wrongfully convicted of capital crimes and twenty-three were wrongfully executed.<sup>103</sup> In more than one third of these cases, Bedau and Radelet found perjury by a prosecution witness.<sup>104</sup> In twenty percent of these cases, they found that a conviction was obtained, at least in part, because it was demanded by community outrage.<sup>105</sup>

The New York State Defenders Association's Wrongful Conviction Study Project conducted the second study in 1991.<sup>106</sup> The researchers looked at homicide convictions in New York state during the period of 1965 to 1988. The study focused on those convicted of homicide, regardless of whether such conviction constituted a capital offense. In determining whether the original conviction was in error the study looked at objective criteria: cases where the conviction was overturned and either (1) the defendant was subsequently acquitted on retrial, (2) the charges were dismissed, or (3) the charges were resolved by conviction of a non-homicide crime.<sup>107</sup> The study concluded that the state wrongfully convicted fifty-nine people of homicide.<sup>108</sup> The reasons for

101. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 84 (1987).

102. *Id.* at 31.

103. *Id.* at 72.

104. *Id.* at 60.

105. Bedau and Radelet grouped the causes of wrongful conviction into four categories: (1) Police Error (including coerced or false confessions, negligence or overzealous police work); (2) Prosecutor Error (including suppression of exculpatory evidence or overzealous prosecution); (3) Witness Error (including mistaken eyewitness identification, perjury by a prosecution witness, and unreliable or erroneous prosecution testimony); and (4) Other error (including misleading circumstantial evidence, incompetence of defense counsel, judicial denial of admissibility of exculpatory evidence, inadequate considerations of alibi evidence, erroneous judgement on cause of death, fraudulent alibi or false guilty plea made by defendant, conviction demanded by community outrage, and unknown reasons). *Id.* at 57.

106. Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807 (1991).

107. *Id.*

108. *Id.* at 808.

the wrongful convictions were similar to the reasons found by Bedeau and Radelet.<sup>109</sup>

Finally, between the years 1973 and 1992, 451 convicted murderers had their underlying convictions overturned on appeal.<sup>110</sup> These 451 people all had one thing in common: they were all sentenced to die.

## 2. Observations

There has been a good deal of criticism concerning the validity of studies attempting to show that persons in this country have been wrongfully convicted of capital crimes.<sup>111</sup> One author has gone as far as to say that there is no evidence that anyone has been wrongfully executed in the United States in the last fifty years.<sup>112</sup> Others maintain the likelihood of error is almost non-existent because of the procedural safeguards afforded to capital defendants.<sup>113</sup>

It simply strains logic and credulity, however, to believe that any human system will be infallible. This is especially true where a heinous crime has been committed and guilt or innocence is the product of the collective assessment of a group of twelve human decisionmakers, each bringing to bear his or her own particular biases and prejudices. This is particularly true when the defendant is a member of an unpopular group. There are a great number of studies showing, for example, African-Americans are far more likely to be sentenced to death than white Americans.<sup>114</sup> Of course, race and ethnicity have nothing to do with innocence or guilt. Yet, race plays a role in the decision-making process.

Moreover, those who argue that the data are misleading or inaccurate attack the data only to the extent it goes to the identity issue. Critics of these studies assert the right person was convicted—the defendant actually committed the murder. Even if that is right, it does not address whether the defendant deserved the death penalty. The critics do not, because they cannot, face the issue of *mens rea*. Assuming the

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109. *Id.*; see also *supra* note 100.

110. David O. Stewart, *Dealing with Death*, A.B.A. J., Nov. 1994, at 50.

111. See, e.g., Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

112. Paul G. Cassell, *In Defense of the Death Penalty*, LEGAL TIMES, May 3, 1993, at 33.

113. See SENATE COMM. ON THE JUDICIARY, ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF THE DEATH PENALTY, S. REP. NO. 251, 98th Cong., 1st Sess. 14 (1983) (“[T]he procedural safeguards for criminal defendants mandated by the Supreme Court in recent years . . . have all but reduced the danger of error in [capital] cases to that of a mere theoretical possibility.”).

114. See *supra* note 15.

defendant committed the act, it does not inexorably follow that he is guilty of first-degree homicide.

There can be no dispute that innocent people have been, and will be, convicted. The only dispute concerns the number of people that have been and will be wrongfully convicted. Since studies rely only on those cases where the error was later found empirically, the actual number of wrongful convictions must be higher since it is implausible to believe that every conviction error has been found. A capital defendant can rarely afford to present a defense where every conceivable bit of exculpatory or explanatory evidence is presented, where every conceivable theory of innocence is explored, where every shade of scientific doubt is presented. In short, a capital defendant rarely obtains the same legal representation retained by Simpson. If every capital defendant had an expense account of \$10 million,<sup>115</sup> maybe the incidence of conviction error would be minimized.<sup>116</sup> But this is far from reality.

### *B. What the Evidence Cannot Show*

The empirical evidence, which is understated, demonstrates that capital conviction error occurs frequently. This is demonstrated by objective evidence of exculpation: witnesses recanting their testimony, subsequent scientific evidence, etc. The evidence of empirically provable error is understated, however, for a fundamental reason: there are some things that cannot be proven empirically. Three things stand out: (1) the defendant's intent (*mens rea*), (2) the ability of the defendant's counsel to present the evidence (legal representation), and (3) the defendant's state of mind (capacity).<sup>117</sup>

115. See *supra* note 8.

116. Although given the other factors that come into play with respect to the decision to impose the death penalty, such as racism, this is doubtful.

117. An example of how an attorney's inability to develop psychological evidence can have a devastating effect on his client is demonstrated by the sad case of Dalton Prejean:

Compare Simpson, if you will, with a man named Dalton Prejean. He was executed in Louisiana in 1990 for the murder of a state policeman. Prejean was undeniably guilty. But he was also brain-damaged, marginally retarded, a down-and-out, a brutalized kid who had killed before and spent hunks of his life in jail. He was a sweet man, most of the time, but when threatened or challenged he tended to overreact.

Prejean was provided a court-appointed lawyer, a lone practitioner who had never tried a death penalty case before. The lawyer, Thomas Guilbeau, later

## 1. *Mens Rea*

### a. *Theory*

Thirty-seven states and the federal government employ the death penalty.<sup>118</sup> The three states where it is employed the most are Texas, Florida and Virginia.<sup>119</sup> In each state, the death penalty is codified in a detailed and specific statute.<sup>120</sup>

Most death penalty statutes look the same (probably because of certain Supreme Court rulings). A comparison of California's statute with those of Texas, Georgia and Florida evidences certain commonalities. Each state bifurcates the acts that entitle the state to seek death between first degree homicide generally and specific enumerated crimes.<sup>121</sup> Discussion here shall be limited to first-degree homicide.

For first degree homicide there must be (1) a specific intent to murder and (2) premeditation and deliberation.<sup>122</sup> In theory, the death penalty is aimed at punishing the most heinous offenders.<sup>123</sup> Since this is essentially a judgment as to moral culpability, the most significant element to establish is intent, that is, *mens rea*.

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presented the appeals court with an astonishing document. He listed all the things he didn't do—the witnesses he didn't call and the documents that he had not presented. Prejean received the death penalty from a jury that was never told of his mental instability. Had they known, they said later, they never would have voted for death.

Richard Cohen, *A Suspect in a Double Murder on the Coast: The Death Penalty is Brought into Focus*, PHILADELPHIA INQUIRER, June 25, 1994, at A8.

118. Stewart, *supra* note 110, at 50.

119. *Death Row U.S.A.*, [Spring 1995] DEATH ROW U.S.A. REP. (NAACP Legal Defense & Educ. Fund) Apr. 30, 1995 at 9.

120. *See supra* note 25.

121. The most common enumerated crimes are: the killing of a peace officer; the killing of a correctional officer during an escape or altercation while in prison; the killing of a fireman; kidnapping; arson; sexual battery; robbery; burglary; use of explosives; escape from lawful arrest; train wrecking; killing of a witness; killing of a judge; killing of a prosecutor; killing of an elected official; an especially heinous crime; killing while lying in wait; killing because of race, religion, nationality; killing by use of poison; multiple murders. *See, e.g.*, CAL. PENAL CODE §§ 190.2, 190.3 (West 1988 & Supp. 1995).

122. *See supra* note 25 (citing Texas, Georgia, and Florida statutes and the Model Penal Code).

123. Most states allow the jury to consider aggravating circumstances in assessing whether the death penalty is warranted. *See, e.g.*, CAL. PENAL CODE §§ 190.2, 190.3 (West 1958 & Supp. 1995); FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1995).

*b. Practice*

As previously noted, the *mens rea* required for first degree homicide entails deliberative and premeditated conduct. If the offender is not mentally incapacitated (which, of course, could be a defense)<sup>124</sup> and is acting in a calculative fashion (i.e., seeking to avoid detection and subsequent punishment) his crime will most often be committed in stealth. Most often there will be no direct eyewitnesses and proof will be circumstantial. How does a prosecutor go about establishing *mens rea*?

The state, of course, has the burden of establishing all the substantive elements of a crime beyond a reasonable doubt. For capital murder, that means the state must establish a specific intent to take a human life. Sometimes this is easy. The defendant makes out a very detailed plan on paper of the crime he intends to commit. This is rare. But even in such instances *mens rea* is established through inference. This is because in the vast majority of capital cases it is likely that the defendant never testifies at trial.

What if there is no hard evidence of a plan and what if, as is most often the case, the defendant does not take the stand? The prosecution's burden of production is more difficult to meet. The prosecution must now rely on witnesses, and often, these witnesses did not directly observe the crime. There are several types of witnesses: (1) occurrence witnesses,<sup>125</sup> (2) authentication witnesses,<sup>126</sup> (3) opinion witnesses,<sup>127</sup> and (4) expert witnesses.<sup>128</sup> These witnesses, however, only serve the purpose of establishing the identity of the murderer. They establish the fact that the defendant committed the crime. Absent a confession or an admission against interest, these witnesses cannot directly establish *mens rea*. So how is *mens rea* established?

Usually the prosecutor puts on these witnesses to establish that the defendant could only accomplish his crime in one of several ways. For example, a forensic expert might be used to show that the defendant

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124. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.02 (1987).

125. MCCORMICK ON EVIDENCE § 206, at 372 (John W. Strong ed., 4th abr. ed. 1992).

126. *Id.* § 220, at 404.

127. *Id.* § 11, at 17-19.

128. *Id.* § 13, at 21.

killed the victim by firing a revolver at close range. The manner in which the crime is committed allows an inference to be drawn as to the defendant's intent. A gun aimed directly at a person's head at close range is rarely the result of an inadvertent act.<sup>129</sup>

### c. Observations

Because of the manner in which *mens rea* is established, it is difficult to quantify how often error is committed. How can you look within the soul of the defendant? One thing is clear, however. There is often error in establishing something that is much more facile to establish—the identity of the murderer.<sup>130</sup> If a jury is frequently wrong in determining who the killer is, logic tells us that it must be even more frequently wrong in determining *mens rea*, given that this is something fundamentally more difficult to determine.

A classic example is the Simpson case. Apparently, there were no eyewitnesses to the murders. The state's case consists solely of circumstantial evidence of two types: (1) evidence that put Simpson at the scene of the crime—DNA tested blood drops at the scene,<sup>131</sup> a bloody glove at Mr. Simpson's home,<sup>132</sup> hair samples,<sup>133</sup> and the testimony of a limousine driver regarding Simpson's absence from his house at the relevant times,<sup>134</sup> and (2) evidence that established a motive—Simpson's relationship to the victim and his prior history of spousal abuse.<sup>135</sup> Because Simpson was charged with first degree murder, the state was put to the task of establishing premeditation. The state's circumstantial evidence included the weapon used (no one walks around with a fifteen inch stiletto knife), the clothing worn (dark) and Simpson's alleged history of stalking his former wife.<sup>136</sup>

But in the absence of an eyewitness, there was and is no dispositive way to prove premeditation. The jury could only infer premeditation. There is no way, for example, to discredit a theory that Simpson went to the crime scene intending to murder the victim, had a change of heart, and then suddenly enraged upon discovering her in the presence of another man acted reflexively and brutally in the heat of passion. Even

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129. For a good discussion of the case law in this area, see C.R. McCorkle, Annotation, *Homicide: Presumption of Deliberation or Premeditation From the Circumstances Attending the Killing*, 96 A.L.R. 2d 1435 (1964).

130. See *supra* notes 101-10 and accompanying text.

131. See *Excerpts of Opening Statements by Simpson Prosecutors*, *supra* note 21.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

if there had been an eyewitness, absent a confession, there simply is no dispositive way of entering the mind of the miscreant.<sup>137</sup>

## 2. *Incompetent Counsel*

### a. *Theory*

It is likely that very few capital defendants plead guilty to a charge that possibly entails the imposition of death. The people on death row are there because of a conviction by a jury in an adversarial proceeding. Guilt or innocence, in practical terms, is a result of the presentation of evidence at a legal proceeding. Under the Sixth Amendment every person charged with a serious criminal offense is entitled to be represented by counsel and if the defendant is penurious the state will appoint the same.<sup>138</sup> In theory, if a person is represented by an attorney he can defend himself in a fair and just manner and the result of the trial will be fair and just. In theory.

### b. *Practice*

That crime is a function of socio-economic factors is beyond dispute.<sup>139</sup> The highest crime neighborhoods in the community are all too frequently also the poorest neighborhoods.<sup>140</sup> It necessarily follows that most defendants are poor. Indeed, the evidence indicates that most people charged with capital offenses cannot afford attorneys and thus must have attorneys appointed for them or rely exclusively on the offices of the local public defender.<sup>141</sup> That the imposition of the death penalty and wealth are related is irrefutable. For example, in

137. And even if there was a confession there still is no way of dispositively proving premeditation for at least two reasons: (1) the declarant could have been mentally incapacitated at the time of the statement, and (2) a confession is not necessarily actually true, it is merely legally presumed true if it is against one's interest.

138. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

139. See, e.g., NATIONAL RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 131-39 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993) (concerning the nexus between low socioeconomic status and crime); E. Britt Patterson, *Poverty, Income Inequality, and Community Crime Rates*, 29 CRIMINOLOGY 755 (1991) (same).

140. NATIONAL RESEARCH COUNCIL, *supra* note 139, at 131-39.

141. Lisa R. Duffett, Note, *Habeas Corpus and Actual Innocence of the Death Sentence After Sawyer v. Whitley: Another Nail into the Coffin of State Capital Defendants*, 44 CASE W. RES. L. REV. 121, 128 (1993).



California, as of July 1, 1994, 388 persons were on death row.<sup>142</sup> Every single person so situated was poor enough to qualify for state-appointed counsel.<sup>143</sup>

Often the attorneys appointed to represent capital defendants are inexperienced.<sup>144</sup> The public defenders that represent capital defendants are overworked.<sup>145</sup> It is not surprising, then, that the legal services obtained by capital defendants are often poor, if not incompetent. In fact, one study concluded that legal errors are made in at least fifty percent of all capital cases.<sup>146</sup>

A recent study by the Spangenberg Group of Newton, Massachusetts sheds light on the situation.<sup>147</sup> The group prepared a study for the State Bar of Texas analyzing legal representation in death penalty cases.<sup>148</sup> The group's conclusion was as follows: "We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation . . . . In summary, the results of our study discloses that the situation in Texas can only be described as desperate."<sup>149</sup>

A number of studies have shown that court-appointed attorneys in capital cases are severely underpaid by statute.<sup>150</sup> For example, Louisiana allows a maximum total compensation of \$1000 per capital

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142. Weinstein & Abrahamson, *supra* note 11, at A1.

143. Bob Egeldo, *The Death Penalty is for Poor People, History May be on Simpson Side*, DET. FREE PRESS, Sept. 6, 1994, at 5A (citing Lynn Holton, spokeswoman for the California Judicial Council, as his source). In contemplating the relationship between the death penalty and wealth one is reminded of the lyrics to the traditional english ballad, "Gallows Pole," popularized by the rock group Led Zeppelin in its 1970 recording:

Hangman, hangman, hold it a little while/I think I see my friends coming,  
riding many a mile/Friends, did you get some silver?/ Did you get a little  
gold?/ What did you bring me, my dear friends, to keep me from the Gallows  
Pole?/I couldn't get no silver/ I couldn't get no gold/ You know we're too  
damn poor to keep you from the gallows pole.

LED ZEPPELIN, *Gallows Pole*, on LED ZEPPELIN III (Atlantic Records 1970).

144. Bright, *supra* note 19, at 1850.

145. *Id.* at 1843-44, 1848; see also Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled To Render The Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).

146. Duffett, *supra* note 141, at 128.

147. See Gary Taylor, *Texas Death-Penalty Study Hit*, NAT'L LAW J., Apr. 26, 1993, at 3.

148. *Id.*

149. *Id.*

150. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 32-33; see also Steve Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority, and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 849-70 (1992).

case.<sup>151</sup> The same is true in Alabama.<sup>152</sup> In Oklahoma, the limit is \$3200.<sup>153</sup> The effect of this statutory scheme is to create a scarcity of good available attorneys.<sup>154</sup> Often, courts are forced to appoint any available attorney, regardless of experience.<sup>155</sup>

### c. Observations

None of the aforementioned studies purports to estimate the rate of conviction error in capital cases based on attorney error. The reports are couched in subjective valuations regarding legal representation. But it is not difficult to hypothesize that because of the lack of qualified legal representation in these cases, the incidence of error may be higher than in other matters. This is probably because there are two groups of attorneys working on these matters: (1) inexperienced attorneys and (2) overworked attorneys. In the first category fall those attorneys appointed by the court who have little or no experience in death penalty litigation. In the second category fall experienced public defenders whose caseloads are simply too heavy. Exculpatory or mitigating evidence is often not developed and significant leads are not pursued simply because the attorney does not have the time nor the resources.

In some states public defenders are effectively limited to fees of less than \$1000 in capital cases.<sup>156</sup> By necessity, the opportunity for

151. Klein, *supra* note 145, at 366. For a comprehensive review of this area, see Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991).

152. Klein, *supra* note 145, at 366.

153. *Id.* at 366-67.

154. *Id.* at 367.

155. *Id.*

156. It has been noted that:

Almost anything pays more than defending a client in a death penalty case. In some rural areas of Texas, lawyers receive no more than \$800 to handle a capital case. Generally the hourly rate is \$50 or less. In Virginia, the effective hourly rate for defending a poor person facing execution is \$13. In Kentucky, the most a lawyer can get in a capital case is \$2500.

Ridgeway, *supra* note 57, at 6. Moreover, attorneys for the Southern Center for Human Rights which handles over 60 capital cases a year make an annual salary of \$23,000. *Id.* New York public defenders make \$32,000 a year. *Id.* (Compare that to first year Wall Street firm associates who routinely make over \$80,000.) It has bitterly been noted that at Robert Shapiro's estimated hourly rate of \$650, an indigent person in Alabama could rent Mr. Simpson's counsel for about ninety minutes. *Talk Back Live* (CNN television broadcast, Aug. 22, 1994, 1 a.m. (EST)) (transcript 101) (comments of Susan Rook).

capital defendants to put on scientific, medical, and other expert testimony is severely limited.<sup>157</sup> The necessity for effective assistance of counsel in capital cases is heightened by the fact that since the Supreme Court's decision in *Gregg v. Georgia*,<sup>158</sup> states now bifurcate capital trials into two phases: (1) guilt and (2) penalty.<sup>159</sup> The penalty phase does not present the opportunity for the presentation of objective facts concerning the guilt or innocence of the accused, but involves the presentation of subjective mitigation or aggravation character evidence.<sup>160</sup> A premium is placed on the ability of counsel to present this evidence. Two examples are illustrative.

In *Mitchell v. Kemp*,<sup>161</sup> William Mitchell shot and killed Christopher Carr. He was arrested and later confessed. At the penalty phase of the trial Mr. Mitchell's counsel failed to put on any evidence of mitigating circumstances:

Mitchell's counsel did not offer mitigating evidence because he failed to investigate possible sources of such evidence. Evidence presented at Mitchell's habeas hearing and available at the time of the trial indicated that of Mitchell's attorney had investigated Mitchell's family, friends, and school and psychological records, he could have presented numerous character witnesses and a history of Mitchell's psychological deterioration as a result of violent homosexual prison rapes, overwhelming poverty, and familial turbulence.<sup>162</sup>

Mr. Mitchell was sentenced to die.<sup>163</sup>

In *Washington v. Strickland*,<sup>164</sup> David Washington pleaded guilty to three brutal murders. At the penalty phase of the trial his attorney neither sought nor requested a psychiatric evaluation of his client.<sup>165</sup> Mr. Washington was sentenced to die.<sup>166</sup>

In stark contrast stands the Simpson matter. Mr. Simpson has a net worth estimated to be more than \$10 million.<sup>167</sup> He hired not only

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157. For example, it has been estimated that it costs anywhere between \$2500 to \$10,000 to present expert testimony to refute a prosecution's bodily secretion evidence. Ridgeway, *supra* note 57 (quoting Professor Stephen Bright of the Harvard Law School).

158. 428 U.S. 153, 195 (1976).

159. See Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987).

160. *Id.* at 486-87.

161. 762 F.2d 886 (11th Cir. 1985).

162. Fong, *supra* note 159, at 46 (citations omitted).

163. 827 F.2d 1433, 1434; *Mitchell v. Georgia*, 234 Ga. 160, 214 S.E.2d 900 (1975).

164. 673 F.2d 879 (5th Cir. Unit B), *rev'd on reh'g*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *rev'd*, 466 U.S. 668 (1984).

165. 466 U.S. at 673.

166. *Id.* at 675.

167. See Abrahamson, *supra* note 8, at A1.

some of the best trial attorneys,<sup>168</sup> but also attorneys at the top of their field in appellate work,<sup>169</sup> criminal procedural matters,<sup>170</sup> and DNA evidence.<sup>171</sup> Additionally, his trial team consisted of scientific experts in DNA analysis,<sup>172</sup> autopsies,<sup>173</sup> and blood samples,<sup>174</sup> and also top forensic and criminal investigators.<sup>175</sup> Before trial it was estimated that Simpson would spend \$1 million a month in attorneys' fees.<sup>176</sup> Because of his wealth, Simpson was able to make a voluminous number of pre-trial motions.<sup>177</sup> Regardless of the outcome in the Simpson case, one thing is clear: he received the best defense money could buy. In murder cases, however, this is the exception and not the rule.

### C. *The Emerging Problem of Free Will*

#### 1. *Theory*

Punishment<sup>178</sup> is based on notions of moral culpability, which in turn is inextricably linked to the concept of free will.<sup>179</sup> Thus, if one

168. Robert Shapiro, Johnnie Cochran, and F. Lee Bailey.

169. Harvard Law School Professor Alan Dershowitz.

170. Santa Clara University Law School Dean Gerald Uelman.

171. Barry C. Scheck.

172. Michael Baden or Edward Blake.

173. Dr. Henry Lee.

174. Michael Baden or Edward Blake.

175. John E. McNally, Zvonko Pavelic, and Patrick J. McKenna.

176. By one estimate, Simpson would spend about \$50,000 a day (or more than \$1 million a month) in legal fees. George de Lama & Vincent J. Schodoloski, *Simpson Case: Most is Yet to Come*, CHI. TRIB., July 10, 1994, at C1; see also Abrahamson, *supra* note 8, at A1, A21.

177. A partial list of the motions filed include: Motion for Pre-Trial Discovery, Motion for Immediate Disclosure of Exculpatory Leads, Motion to Permit Independent PCR HLA DQ Alpha DNA Testing, Motion to Suppress and Return Evidence, to Quash and Traverse Warrant.

178. I use the term "punishment" here as opposed to "incarceration," "confinement," or "imprisonment" on purpose. The latter terms are justified by many goals, including moral culpability, but also deterrence, safety, and rehabilitation. Pure punishment, however, is based solely on moral culpability.

179. The notion of free will, in turn, may be viewed as merely a philosophical construct. John Stuart Mill observed:

The metaphysical theory of free-will, as held by philosophers . . . was invented because the supposed alternative of admitting human actions to be *necessary* was deemed inconsistent with every one's instinctive consciousness, as well as humiliating to the pride and even degrading to the moral nature of man.

is thought not to have acted volitionally, he is not deemed deserving of punishment. This principle has been embodied in the law of homicide at least since the time of *Daniel M'Naghten's Case*<sup>180</sup> in 1843. At common law, the criminally insane could not be executed for their crimes for this reason.<sup>181</sup>

The death penalty, as we have seen, is justified on three grounds: deterrence, safety, and retribution. If the defendant is mentally incompetent, the latter two goals are not served. To the extent confinement is needed of the criminally insane it must be conceded that it would literally be overkill to execute such a person.

It should be noted also that whatever the merits of the death penalty, even its proponents will admit that only those deserving of the most serious penalty should receive it.<sup>182</sup> To the extent a person is not morally culpable the death penalty has no application.

## 2. Practice

In the past decade an enormous body of scientific literature based on biological and neurological data has seriously put into question the notion of free will with respect to, at least, certain types of criminally deviant behavior.<sup>183</sup> A review of all the extensive literature would be

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6 JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE (1843), reprinted in JOHN STUART MILL, THE LOGIC OF THE MORAL SCIENCES 22 (Open Court Publishing Co. 1988) (8th ed. 1872). Clarence Darrow, for one, doubted that free will exists and thus decried the use of punishment for retribution:

All punishment for the purpose of causing suffering, or growing out of hatred, is cruel and anti-social; that however much society may feel the need of confining the criminal, it must first of all understand that the act had an all-sufficient cause for which the individual was in no way responsible, and must find the cause of his conduct, and, so far as possible, remove the cause.

CLARENCE DARROW, CRIME: ITS CAUSE AND TREATMENT 36 (1922).

180. 8 Eng. Rep. 718 (1843).

181. It should be noted that there are a growing number of jurisdictions in this country that have attempted to severely limit, if not abolish, the insanity defense. Margaret C. McHugh, Comment, *Greenfield v. Wainwright: The Use of Post Miranda Silence to Rebut the Insanity Defense*, 35 AM. U. L. REV. 221 n.1 (1985). The restriction of the insanity defense, however, can be justified because of society's need for protection or society's need to rehabilitate the offender. Obviously it cannot be based on notions of deterrence (which assumes the machinations of a rational mind) or retribution. *But see* McCollum v. North Carolina, 114 S. Ct. 2784 (1984) (upholding execution of mentally disabled defendant).

182. See, e.g., David Dolinko, *Forward: How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 588 (1986).

183. See, e.g., Rochelle C. Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 Vand. L. Rev. 313, 318-21 (1992); Maureen P. Coffey, Note, *The Genetic Defense: Excuse or Explanation?*, 35 WM. & MARY L. REV. 353, 358-78 (1993).

impossible. One example, however, is illustrative. Lawrence Taylor cogently states the problem.<sup>184</sup>

Taylor discusses the possibility that criminals are not shaped by their environment but are marked by genetic differences in their physiological make-up.<sup>185</sup> Animals, when encountering a threat, are genetically programmed for fight or flight.<sup>186</sup> Over the course of several million years of evolution, humans were also so programmed.<sup>187</sup> When the world was less civilized humans regularly had to fight to survive, making aggression (or at least some forms of violence) adaptive.<sup>188</sup> However, with the advance of civilization violence became seen as anti-social and maladaptive.<sup>189</sup> Thus, most people today can control or do not have the desire to commit violent acts.<sup>190</sup> However, there appears to be a group in society that is genetically predisposed towards violent criminal acts.<sup>191</sup> This is reflected in recidivism rates which indicate that the vast majority of crimes are committed by a small number of individuals.<sup>192</sup>

Taylor has identified a portion of the brain that may cause violent criminals to act as they do.<sup>193</sup> The portion of the brain, known as the limbic brain, is the locus of violent behavior.<sup>194</sup> This portion was first developed in more primitive animals and then inherited by humans in the evolutionary process.<sup>195</sup> As human brains have become more complex there is a greater chance for a malfunction of the brain.<sup>196</sup> Within the limbic portion of the brain is a small almond-shaped portion known as the amygdala.<sup>197</sup> "The amygdala is, apparently, a critical

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184. See LAWRENCE TAYLOR, *BORN TO CRIME: THE GENETIC CAUSES OF CRIMINAL BEHAVIOR* (1984).

185. *Id.* at 17.

186. *Id.* at 51.

187. *Id.* at 29-30, 51.

188. *Id.* at 33.

189. *Id.* at 9-10, 33.

190. *Id.* at 33, 62.

191. *Id.* at 33, 48.

192. *Id.* at 51-52.

193. *Id.* at 51.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 52.

organ in the regulation of emotions in general and of fear, rage and anger in particular."<sup>198</sup>

Researchers have found that when the amygdala is removed or destroyed an animal that is normally vicious becomes complacent and will not attack what would be its normal prey.<sup>199</sup> On the other hand, when the amygdala is stimulated the animal becomes extremely aggressive and will attack other animals with an inordinate amount of viciousness.<sup>200</sup> Researchers have also found that when other portions of the brain are stimulated, an animal which is in the process of a vicious act will immediately stop its attack and display calm and submissive behavior.<sup>201</sup>

Generally, what is true of mammal brains is true of human brains.<sup>202</sup> That violence can be traced to a specific brain site is evidenced by a study of epileptics.<sup>203</sup> Epilepsy is a hereditary disorder of the brain that is characterized by electrical discharges within the brain and the resultant excessive stimulation of certain areas.<sup>204</sup> When the electrical discharges occur in the temporal lobe area of the limbic brain the reaction of the individual can take on a potentially criminal nature.<sup>205</sup> A team of Russian researchers found that criminals with epilepsy had a much higher incidence of violent criminal acts over a similar size group of schizophrenics.<sup>206</sup> A study of the Massachusetts General Hospital looked at the incidence of epilepsy in violent criminals.<sup>207</sup> The study showed that fifty percent of the violent criminals exhibited epileptic-like phenomena.<sup>208</sup> (This is ten times greater than the general population.)<sup>209</sup>

A wealth of other scientific evidence also suggests that there is a genetic component to crime and violent behavior.<sup>210</sup> The literature is too voluminous to even summarize. But the importance of the evidence

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198. *Id.* at 52.  
199. H. MARK & F.R. ERVIN, VIOLENCE AND THE BRAIN 59 (Harper & Row, 1970).  
200. TAYLOR, *supra* note 184, at 53.  
201. *Id.* at 52-53.  
202. *Id.* at 53.  
203. *Id.* at 54.  
204. *Id.*  
205. *Id.* at 55.  
206. *Id.*  
207. *Id.* at 57.  
208. *Id.*  
209. *Id.*  
210. For a good discussion of the scientific evidence, see Dreyfuss & Nelkin, *supra* note 183, at 313; Coffey, *supra* note 183, at 353.

with respect to the legal paradigm is self-evident. The notion of free-will has been challenged by the notion of biological determinism:

Genetics has profoundly altered the perception of personhood within our culture. This change has, in turn, challenged many of the core principles on which current norms are based and has compelled lawmakers to reconsider the legal rules that mediate the relationships among persons and between individuals and the broader community.<sup>211</sup>

Peter D. Kramer poses the rhetorical question: who or what are we?<sup>212</sup> The question is of more than academic interest. In the past half dozen years a number of studies have shown that not only certain behaviors, but entire personalities can be reshaped by drug therapy.<sup>213</sup> The drugs, by and large, act on specific sites within the brain.<sup>214</sup>

### 3. Observations

To the extent it is possible to localize a specific site in the brain as the cause of a behavior, and to the extent scientific research reveals that the behavior can be modified by altering the chemistry of this site, our fundamental notions of free will are challenged. Is a person's conduct the result of a freely made decision or of a biological predisposition? Early in the *Simpson* case the prosecution opined that the defense might interject a diminished capacity defense.<sup>215</sup> Indeed, Simpson retained the services of psychiatric experts.<sup>216</sup>

Since the death penalty obviously serves no rehabilitary purpose, it can only be justified, or morally sustained, based on notions of just dessert. Should we execute someone who did not will his actions? Can such an execution be morally justified?

211. Dreyfuss & Nelkin, *supra* note 183, at 315.

212. PETER D. KRAMER, LISTENING TO PROZAC (1993).

213. Stanley N. Wellborn, *New Ways to Heal Disturbed Minds*, U.S. NEWS & WORLD REP., Feb. 16, 1976, at 33; David Gleman & Mary Hager, *Psychotherapy in the '80s*, NEWSWEEK, Nov. 30, 1981, at 70.

214. For a good book on the cartography of the brain, see WILLIAM H. CALVIN & GEORGE A. OJEMANN, CONVERSATIONS WITH NEIL'S BRAIN: THE NEURAL NATURE OF THOUGHT AND LANGUAGE (1994).

215. *This Week With David Brinkley* (ABC television broadcast, June 19, 1994) (comments of Los Angeles District Attorney Gil Garcetti); *see also Larry King Live* (CNN television broadcast, June 18, 1994) (transcript 1150) (comments of Los Angeles District Attorney Gil Garcetti).

216. Dr. Saul Faerstein.



### III. THE PERFECT REMEDY IN THE IMPERFECT SYSTEM

#### A. *Against Deterrence*

The original question posed was whether the death penalty should be considered necessary. Something is necessary, by definition, only if it furthers some legitimate goal. Three goals have been advanced in support of the death penalty. The first goal is deterrence.

Based on the empirical evidence, it is clear that the death penalty does not serve the goal of deterrence. Too many studies indicate that the homicide rate bears no relation to the existence or non-existence of capital punishment to ignore this conclusion.<sup>217</sup> In fact, the data seem to suggest that the death penalty actually has the opposite effect by brutalizing society.<sup>218</sup>

As previously discussed, the deterrence argument is based on a number of utilitarian assumptions regarding human behavior and motivation. None of these assumptions is necessarily true. First, the utilitarian argument only makes sense if we assume that murder is the product of a calculating, rational mind, and not a by-product of a genetic predisposition. But it would appear that violent behavior, at least to some extent, may be based more on body chemistry than anything else.<sup>219</sup>

Even if this were not so, the assumption is that a murderer values the continuation of his own life over the cessation of the life of his victim. Why? It does not inexorably follow that this is the case. This proposition is clearly refuted by those serving time on death row. There are people who have committed murder knowing that the penalty is death. The calculus of the decision making process, if such a process intelligibly exists (a problematic proposition, at best), probably turns more on the criminal's calculation of his likelihood of being caught rather than the degree of punishment involved.<sup>220</sup>

But in any event, looked at in a light most favorable to death penalty proponents, the empirical data, at best, is equivocal. Maybe the death penalty deters some murders, maybe it does not. Its use, then, is a social experiment. Its cost is the cost of innocent lives. Until the empirical

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217. See *supra* notes 36-52 and accompanying text.

218. See *supra* notes 50-53 and accompanying text.

219. See *supra* notes 183-214 and accompanying text.

220. Indeed, French social theorist Jacques Barzun, a proponent of the death penalty, has opined that death is probably a preferable to life imprisonment for most men. Jacques Barzun, *In Favor of Capital Punishment*, 31 AM. SCHOLAR 181 (1962).

debate can be resolved, if ever, there would seem to be no utilitarian justification for the continued imposition of the death penalty.

### *B. Against Safety*

The second utilitarian argument is safety. The finality of the death penalty insures that convicted murderers will kill no more. The empirical data, of course, seem to indicate that the threat of further homicide is greatly exaggerated. But the threat exists nonetheless.

To justify a safety argument, since it is based on notions of utility (maximization of the aggregate good) it would have to be shown that the number of future homicides prevented exceeds the number of innocent people convicted. The evidence with respect to the latter figure, by necessity, can never be empirically established with any degree of certainty. And thus, the continuation of the death penalty once again becomes a social experiment.

But if safety is the goal, the experiment is unnecessary. The same result can be obtained without the sacrifice of any innocent blood. Convicted murderers can be sentenced to solitary confinement for life without the possibility of parole.<sup>221</sup>

### *C. Against Retribution*

The only goal in favor of the death penalty that remains is retribution. Does retribution justify the continuation of a system that invariably will result in the execution of those not deserving of punishment (i.e., the innocent)? The only answer can be no for several reasons.

First, retributive justice is a deontological notion based on the premise that the act justifies itself: the death penalty is warranted, not for the results that obtain, but rather, it is warranted, in and of itself, because of the virtue inherent in it. Retribution is based on Kant's notion of the categorical imperative. One categorical imperative is that since

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221. The most common objection to this is based on cost. That is, the argument is often advanced that society should not bear the cost of sustaining the life of a convicted first degree murderer. But numerous studies have indicated that it is actually cheaper to incarcerate a person for life than it is to execute him. See, e.g., Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 108 n.184 (1992); Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 PACE L. REV. 1, 16 n.88 (1994).

retribution is not based on utility, persons cannot be used to obtain objectives. Each act, in and of itself, must be justified. But if innocent lives are taken people are being used. The innocent (who are, by definition, not deserving of punishment) are used to serve a purpose disconnected with the act taken against them. That is, justice does not inhere to the act of executing the innocent. If such an act ever makes sense it can only be for some other utilitarian purpose. But, as we have seen, the death penalty does not serve any utilitarian purpose.<sup>222</sup>

Second, to be consistent with Kant's first moral imperative—one should act consistent with what one would will to become universal law—the death penalty can only be imposed on the guilty. No one would will as universal law that the death penalty be imposed occasionally on the innocent. But, of course, it is impossible to insure such perfection given that the imposition of a sentence is based on the machinations of an inherently fallible system.

Third, even if every person executed is proven infallibly to have committed the crime, the death penalty is not justified on a theory of retributive justice because retribution is synonymous with moral culpability. Given recent advances in medical technology, it is highly problematic whether a jury can ever determine who is deserving of death. The state of the evidence is inchoate. Until we know more about the true nature of free will, although incarceration will still be justified (for purposes such as safety and rehabilitation), death is not justified because the consequences of error (in determining the culpable) are needlessly irreversible.

The fallacy of the retribution argument is highlighted by the *Simpson* case. The death penalty was not sought by the prosecution presumably because of the common perception that it would not be imposed by a jury, and by seeking it, the prosecution would diminish its chances of obtaining a conviction.

But why would a jury not impose the death penalty if it was convinced beyond a reasonable doubt that Mr. Simpson deliberately and

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222. One obvious counter to this is that there are always costs attendant to obtaining a benefit. Often this cost is life. For example, the state chooses to permit the manufacture, sale and use of automobiles knowing full well that people will be killed in automobile accidents. The analogy is false. An automobile accident is just that, an accident—an unplanned and unintentional act by private citizens. This is much different than a planned and intentional act by the state. A better analogy would be as follows. Suppose it was shown that in order for a community to avail itself of automobiles the local government would have to randomly execute X numbers of citizens by lottery. Would the use of automobiles in this context be justified? Moreover, would the use of automobiles be justified where other modes of transportation (i.e., rail or bus) exist? The answer is obvious.

wilfully murdered two people? No one, of course, can answer this question. But there are a number of possibilities. First, the imposition of the death penalty would represent the use of a person for strictly utilitarian purpose. Few believe that Mr. Simpson presents a threat to the general public and even fewer believe that his otherwise exemplary life merits such harsh vengeance. If executed then, it would be for the sake of setting an example for others (i.e., for deterrence). This sacrifice, in the absence of a truly depraved sacrificial lamb, may offend our sensibilities. In short, execution here would violate Kant's first moral imperative.

But more importantly, given the wealth of seemingly contradictory circumstantial and scientific evidence adduced before trial—evidence only obtainable by virtue of Mr. Simpson's financial resources—there would always remain in a jury's mind a tiny doubt as to the guilt or innocence of the accused. But where the accused, in circumstances unconnected with his crime, has led a depraved and morally reprehensible life, a jury may be inclined to dismiss such doubts on the logic that the accused deserves to die, if not for this crime, than for others he must have committed. If the accused has led an exemplary life, however, the possibility of innocence, no matter how remote, is not so easily excused. The ultimate judgment thus becomes a function, not of the actual crime itself, but of other unproven crimes. Retribution is exacted not so much because the accused acted badly, but because the accused is bad. For this reason the death penalty reveals its true socio-economic face.

#### CONCLUSION

There is only one justification for the death penalty that survives scrutiny: retribution. There is also one inevitable consequence of the death penalty: innocent people will be executed. The death penalty only serves some vague, intangible interest in justice. It is not necessary when counterbalanced by the specific, tangible interest in not having the state intentionally take innocent lives. The state's legitimate interests can be served by a less drastic measure. An irreversible remedy in a fallible system is never justified. It was for this reason that recently retired Justice Blackmun vowed never again to "tinker with the machinery of death. . . . The problem is that the inevitability of factual,

legal and moral error gives us a system that we know must wrongly kill some defendants . . . .<sup>223</sup>

In the end, no one can say whether Simpson is or was deserving of death. But one thing is clear: regardless of whether a jury convicts him, there remains the possibility that he is not guilty. It is this doubt—even if it be deemed an unreasonable one—that in the end may have condemned the prosecution to not even attempt to seek the death penalty. How can we put O.J. to death? What if we are wrong?

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223. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (mem.) (Blackmun, J., dissenting).