

Capital Punishment

(alternate title: **Why Death is the ‘Ultimate’ Punishment**)

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ABSTRACT

Both proponents and opponents of capital punishment largely agree that death is the most severe punishment that societies should consider imposing on offenders. This chapter considers how (if at all) this ‘Ultimate Thesis’ can be vindicated. Appeals to the irrevocability of death, the badness of being executed, the badness of death, or the harsh condemnation societies express by sentencing offenders to death do not succeed in vindicating this Thesis, and in particular, fail to show that capital punishment is more severe than the most likely alternative punishment offenders would suffer, namely, lifelong incarceration. The most plausible vindication of the Ultimate Thesis instead resides in how being condemned to death alters a person’s psychological relation to death. Our ordinary tendencies toward “death denial” diminish the terror that our awareness of death can otherwise induce in us, thereby enabling us to pursue worthwhile lives despite knowing of death’s inevitability. But condemned individuals are continually compelled to confront both the reality and specific circumstances of their own deaths and so do not enjoy the protective psychic shield that death denial provides us. This ‘relational’ rationale does not obviously succeed in *proving* the Ultimate Thesis, but if the Thesis is true, this rationale is essential to its justification.

KEYWORDS: capital punishment, death, death denial, Ernest Becker, terror management theory, value of death, welfare

Usque adeone mori miserum est? (Is it then so wretched a thing to die?)

— Virgil, *Aeneid*

Proponents and opponents of capital punishment disagree about many matters: whether it deters serious crime, which crimes (if any) deserve death, and whether capital punishment is (or even can be) fairly administered. (Davis 1996, Kramer 2011, Cholbi and Madva 2018, Yost 2019) My goal here is not to revisit these longstanding disputes. Rather, my focus shall fall on a premise that both proponents and opponents appear to endorse. I will call this premise the *Ultimate Thesis*:

Capital punishment is the most severe type of punishment that societies may permissibly consider imposing.

The Ultimate Thesis does not assert that death is the most severe punishment states *could* inflict on offenders. For example, states could inflict capital punishment preceded by years of torture, follow capital punishment by various forms of posthumous harm, or subject an offender's family to various forms of vicarious punishment. But such punishments strike most of us as barbaric and beyond the moral pale, and as such, death seems to represent the most severe punishment that a decent society should consider utilizing.

Note that the Ultimate Thesis does not claim that death will prove to be the most severe punishment that could be inflicted on *each and every* offender. Some offenders may have belief systems in which death is harmless, or even beneficial (e.g., the Buddhist conviction that death is a release from the suffering inherent to human existence). Others could contract a very painful illness that renders death an appealing prospect for them. If true then, the Ultimate Thesis represents a *generic* truth about the severity of capital punishment, one which will admit of occasional exceptions.

Opponents of capital punishment may take umbrage at the Ultimate Thesis, claiming that because it is by its nature unjust, societies ought *not* consider utilizing it. But the

Ultimate Thesis does not beg the question against such opponents. No doubt these opponents would prefer that societies come *not* to take seriously the prospect of executing offenders. At the same time though, the distinctive, nay excessive, severity of death often plays a role in arguments against capital punishment (for example, in Beccaria and Camus). If the death penalty is ‘cruel and unusual’ or a violation of human rights, then this is traceable to its severity, i.e., to the truth of the Ultimate Thesis. In contrast, for many proponents of capital punishment, its distinctive severity may function as a premise in the reasoning they advance in favor of the practice. Retributivist supporters of capital punishment, for example, argue that it is *because* the Ultimate Thesis is true that offenders who have committed the most heinous crimes deserve to die for them. The Ultimate Thesis thus does not beg the question for or against the moral justifiability of the death penalty.

The Ultimate Thesis, I submit, operates in the background of capital punishment discourse. For instance, the United States is the among the few nations that both retains capital punishment and is sufficiently transparent in the operations of its courts and its punitive practices to draw conclusions about how capital punishment is utilized. Since the *Gregg* verdict in 1976, the American system of capital punishment has operated under a set of procedural safeguards and legislative mandates often captured under the heading “guided discretion.” States utilizing capital punishment were then required to establish specific sentencing guidelines for death sentences, including the introduction of both aggravating and mitigating factors; to bifurcate trials, so that there are separate deliberations for the determination of guilt and for the determination of sentences; and to have automatic appeals of death sentences. States were also required to conduct proportionality reviews to identify and eliminate disparities in capital sentencing. Why subject capital punishment to this heightened level of scrutiny? At least in part because of the tacit acceptance of the Ultimate Thesis. For since the 1960’s, a ‘death is different’ jurisprudence has developed in the US

which views death as the sole member of a distinctly harsh punitive category. Justice William Brennan (*Furman* 1972) stated that relative to other punishments, death is “an unusually severe punishment, unusual in its pain, in its finality, and its enormity.” Justice Stewart agreed:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.

And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

That capital punishment is uniquely severe thus warrants the high level of judicial and legislative scrutiny. As the Court wrote in *California v. Ramos* (1983), the “qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” American jurisprudence and legal practice thus seem committed to the Ultimate Thesis: Death belongs to a distinct category of severity, qualitatively worse than the other criminal sanctions permitted in the American system.

My objective here is to consider how, if at all, the Ultimate Thesis can be philosophically vindicated. Crucially, an adequate vindication of the Ultimate Thesis must be *ordinal*, i.e., it must demonstrate that capital punishment is more severe than other punishments to which offenders convicted of capital crimes might be subject. In trying to vindicate the Ultimate Thesis, I shall assume that capital offenders, if not executed, would be subject to life incarceration without possibility of release, which provides the baseline for justifying the thesis. In other words, any vindication that appeals to some fact F that supposedly renders death uniquely severe will fail if life incarceration turns out to be equally, or even more, severe with respect to F.

Surprisingly, vindicating the Ultimate Thesis proves more difficult than we might expect. A number of plausible rationales in its favor will end up being problematic. That death is distinctive among punishments in being irrevocable; that being executed is bad for an offender; that death itself is bad for us; and that being sentenced to die expresses particularly forceful societal condemnation of an offender; none of these provide sufficient warrant for the Ultimate Thesis. Its best defense, I shall argue, rests on what I call a *relational* rationale. Death is unique in its severity because being condemned to execution alters an individual's relationship to death, rendering the circumstances of one's death unsettlingly concrete, forcing the individual into a confrontation with mortality that they could otherwise avoid, and impeding the 'death denial' that enables us to live happy and meaningful lives. In other words, death is distinctive among punishments because the state of living as a condemned person is an acutely bad condition for a person to occupy.

1. The Irrevocability of Death

A first possible defense of the Ultimate Thesis appeals to a distinct feature that death is purported to have, one mentioned by Justices Brennan and Stewart. Capital punishment is 'final' or 'irrevocable' in ways that other punishments seemingly are not. J.S. Mill, who was otherwise a supporter of capital punishment, found this consideration particularly compelling as an argument against it:

There is one argument against capital punishment, even in extreme cases, which I cannot deny to have weight ... and which never can be entirely got rid of. It is this — that if by an error of justice an innocent person is put to death, the mistake can never be corrected; all compensation, all reparation for the wrong is impossible. (Mill 1868)

Capital punishment seems distinctive among punishments in that its harms cannot be undone or compensated for. For a wrongly executed offender, there is seemingly no prospect of being ‘made whole’ again. In contrast, many punishments inflict harms that can be remedied. An individual wrongly convicted and subsequently fined could be compensated for this mistake inasmuch as the state could return the fined sum (perhaps with interest).

We may set aside the question of whether the *irrevocability* of death, in combination with the possibility of erroneous conviction, grounds a compelling case for abolition. (Yost 2019) For our purpose is to determine whether irrevocability vindicates the Ultimate Thesis. In my estimation, it does not.

First, it is not obvious that death is unique among punishments in being irrevocable. Iwao Hakamada, a Japanese professional boxer, was sentenced to death in 1968. He was exonerated due to falsified evidence and released in 2014, having spent 45 years awaiting his execution. Japanese law allows for monetary compensation in cases of wrongful convictions, but such compensation would fall well short of the recompense to which Hakamada is arguably entitled. He entered prison as a 32 year old man and left it at age 77. Even if (somehow) his life could be extended by an additional 45 years, there is no sense in which his life could be returned to him. Hakamada cannot be restored to any semblance of his biographical *status quo ante*. For his confinement precluded his pursuit of many central life projects, precluded his having normal relationships with friends and family, and seems to have been responsible for his developing a psychotic illness.¹ It thus defies belief to suppose that Hakamada could be adequately compensated for his prolonged incarceration.

Second, certain views about the possibility of posthumous benefit imply that death is not irrevocable. A number of philosophers have argued that just as a person could be posthumously harmed by having their pre-mortem desires or interests

thwarted, so too might a person be posthumously benefitted by having those desires or interests advanced. (Pitcher 1984, Bennett 1999, Boonin 2019) If (for instance) failing to inter a person's remains in accordance with the desires expressed in their will harms the dead, then so too would interring their remains in accordance with their will benefit them. Michael Davis (1984) has likewise argued that an executed person could be compensated by having their posthumous interests advanced (supporting their families, contributing to their favored charitable causes, etc.). In a reply to Davis, Benjamin Yost (2011) argues that full redress requires not only compensation in a material sense but also the restoration of control over one's life. Yost's proposal buttresses the case for capital punishment being irrevocable, but re-introduces the question of whether it is unique among punishments in being irrevocable. Consider Hakamada again. Indeed, his being executed would have precluded his having control over his *future*, and it is control over one's future — the capacity to consciously direct one's choice and actions and to affect the environment to attain one's aims — that Yost believes is necessary for restoration or full compensation. (2011: 334) But our ability to control our future in ways that matter to us (that reflect our autonomous or values, say) is significantly shaped by the degree to which our present degree of control over the future reflects our past control over our lives up to that point. For Hakamada to be given (say) control over the small window of time that, given his age, he still has available to him hardly restores him to a position where his control of his life *overall* is comparable to the control he would have had absent his long term incarceration. Hence, long term imprisonment (including life imprisonment without release) seems no less irrevocable than death with respect to control. At most, this appears to be a difference of degree, not the emphatic difference in kind necessary to vindicate the Ultimate Thesis.

Thus, we have reason to conclude either that death simply is not irrevocable or is hardly unique among punishment in being such. Either way, irrevocability holds little promise as a way of vindicating the Ultimate Thesis.

A final mark against an appeal to irrevocability concerns irrevocability's relevance to the ranking of the badness of harms. Assume that I am incorrect and as a matter of fact death *is* uniquely revocable among punishments (or at least, less clearly revocable than lifelong incarceration). Does it follow then that, all things being equal, capital punishment is more severe or harmful than other punishments, as the Ultimate Thesis states? Suppose that a person could be subject to one of two harms: X, which is very harmful but revocable, or Y, which is far less harmful but irrevocable. Which of these is it worse to suffer? Of course, Y seems worse than X if X is *as a matter of fact* revoked, since even though X is more harmful its harms would thereby be undone. But it is hard to see why a property that harm may come to have matters to how bad it is intrinsically. To suppose otherwise (I would hypothesize) is to conflate the harmfulness of some event with the moral justification of subjecting someone to it. Perhaps judicial systems have good moral reason to inflict only revocable punishments on offenders, given the chances of erroneous conviction. Justice may thus speak against imposing irrevocable punishments. But this consideration would not show that capital punishment (supposing, again, that it is distinct among punishments in being irrevocable) is worse for offenders than other, revocable punishments.

2. The Badness of Execution

A second possible rationale for the Ultimate Thesis rests on the specific badness of being executed, i.e., on the particular ways in which execution might be a bad way to *die*. Execution could prove painful, and appears to involve a kind of humiliation,

degradation, or indignity not found in other ways we could die. An executed person dies completely subject to the power of the state, with many of the details of their deaths (its time, location, circumstances, etc.) chosen by state officials rather than by the condemned person. The marks of what we would standardly take to be a ‘good death’ (dying in a place of one’s choosing, surrounded by loved ones, etc.) seem absent in the case of an execution.

To be sure, some condemned individuals are executed in ways that are painful. Sarat (2014) estimates that 3% of all executions in the US from 1890-2010 were “botched,” defined as executions in which breakdowns or departures from execution protocols result in “unnecessary agony for the prisoner” or “reflect gross incompetence of the executioner.” Shockingly, execution methods thought to be humane, such as lethal injection, are most often botched. I share Sarat’s distaste for the frequency of botched executions and concur that it reflects very poorly on the moral sensibilities of societies that have retained capital punishment that they seem either unwilling or unable to execute individuals without also subjecting them to bodily cruelty and mental distress. That said, it is certainly *possible* for execution to be free of physical agonies, and while a 3% of rate of botched executions is morally indefensible, a condemned prisoner would still seem to stand an excellent chance (97%) of their executions ‘going smoothly,’ at least from a purely physiological standpoint.

But the major challenge for this rationale is discharging the ordinal burden. Even if it is true that one’s execution would represent a bad death, it may well be true that an individual who, thanks to their life sentence, will die in prison dies a death under only marginally better circumstances. They too will not die in a place or under circumstances of their choosing. And while they would be spared the indignity of execution, by spending longer in prison, such individuals would be subject to the many day-to-day

indignities of prison life (being surveilled, searched, etc.). Hence, being executed, even if bad in various ways, is not obviously worse than a life spent in, followed by dying in, prison. That being executed is bad in particular ways does not show, then, that capital punishment is more severe than life imprisonment, as the Ultimate Thesis demands.

I suspect that much of the perceived badness of capital punishment derives simply from its being precursor to something else perceived to be bad — death itself. So let us now consider whether that form of badness might vindicate the Ultimate Thesis.

3. The Badness of Death

That death itself (the state or condition of being dead) is bad would seem to be the most obvious rationale for the Ultimate Thesis. After all, capital punishment is distinct from other seemingly less severe punishments in that it results in one's being dead, an evil in itself (one might think).

Perhaps surprisingly, the badness of death is a contested philosophical thesis. One influential school of thought, Epicureanism, denies that death can be bad for us. While disputes exist about how best to interpret the position of Epicurus himself, the Epicurean position is that death does not impact our welfare because death is not a condition we will ever find ourselves in. We die but death does not *happen* to us. Assuming that death represents the cessation of our existence as subjects, there will not be anything that it is for death to be bad, and so (the Epicurean reasons) nothing that takes place while we are dead can impact our welfare at all, either because we will not exist or will be unable to experience what takes places once we are dead. Hence, if, as Epicurus contended, death is “nothing to us,” then capital punishment is in fact not harmful to us at all, in which case it certainly will not be more harmful or severe than

(say) life imprisonment. Epicureanism about death thus represents a ringing *rejection* of the Ultimate Thesis.

Epicureanism's chief philosophical rival concerning death's value is *comparativism* or deprivationism. (Egerstrom 2021) Comparativists believe that Epicureanism is correct so long as the *intrinsic* significance of death to our welfare is concerned. Death itself, comparativists agree, cannot harm us. But Epicureanism overlooks how death could be *extrinsically* significant to our welfare. When we die at a given time, we are thereby precluded from living longer, and a longer life will sometimes prove better than the shorter actual life we enjoyed. A young person who dies in the proverbial 'prime of their life' is likely to have been harmed by their deaths, according to comparativism, because such a death results in their life having less overall welfare than it would have had if they had lived a longer life ending in a more natural death. In this sense, death can be harmful to us — not because death is an adverse condition to be in, but because death can result in a life that contains less overall well-being than a longer life we might have had were death delayed.

As we shall see in section 6, the most plausible justification for the Ultimate Thesis has something of a comparativist flavor. But comparativism's own relationship to the Ultimate Thesis is equivocal. In some instances, for example, when an offender is executed at a young age and had several decades of decent life ahead of them, execution would likely result in a shorter (and worse) life than the longer (and better) life he would have had behind bars until his natural death. Such executions represent harms to offenders, likely of a large magnitude. Yet in other instances, comparativism implies that death (and hence execution) could well prove beneficial to an offender. Much will turn on the quality of life that such individuals confront in prison, particularly as they age. We know little about the conditions of prisoners in some nations where the death

penalty is common (for instance, Iran, Egypt, Iraq, and Saudi Arabia, which accounted for 88% of all known executions in 2020 (Amnesty International 2021)). But life incarceration is not an attractive prospect, involving the loss of virtually all personal freedoms and the deprivation of many of the goods (close personal relationships, meaningful work, engagement with art and nature) that contribute to making human life worthwhile. Add to this that some spend long enough in prison to develop the chronic medical conditions associated with aging, and it is difficult not to conclude that prison life is arduous, even tortuous, for many.

In relation to the comparativist account of death's significance, the implications of these conditions are perverse: The worse the conditions of incarceration, the better an alternative death proves to be. Condemned prisoners seem to be precisely those individuals for whom, because the quality of life they would have had while incarcerated for life would be so poor, their overall welfare would often be greater were they executed before their deaths due to other causes. A shorter life thanks to execution could be better than a longer life served behind bars. In such cases, the Ultimate Thesis is not satisfied, for life incarceration is more severe than execution.

Of course, offenders live under a variety of prison conditions, are executed at different ages, have different expected lifespans, etc. Hence, the comparativist account is unlikely to imply that death is (in comparison to life incarceration) beneficial in each and every case. At the same time though, death will be a comparative or extrinsic benefit in enough cases that the Ultimate Thesis, understood as a generic but not universal claim regarding the severity of capital punishment, appears to be false.

Hence, whether we follow Epicureanism or comparativism in thinking about death's badness, the Ultimate Thesis does not seem to be vindicated. Either death is no evil at all (as Epicureans maintain) or its being an evil to the offender is too contingent a

matter to lend sufficient support to the Ultimate Thesis as a generic claim concerning the severity of capital punishment.²

4. Expressive Rationales

Perhaps the rationales adduced so far in support of the Ultimate Thesis have overlooked the moral connotations of capital punishment. An alternative rationale might instead appeal to the *expressive* features of being sentenced to death. (Primoratz 1989) A society that condemns a person to die is asserting that such an individual has no place within its civilization, not even behind bars. Capital punishment thus seems to be a renunciation not merely of a criminal offense, but a particularly emphatic renunciation of the offender. And as Justice Stewart noted, in rejecting the prospect of rehabilitation, the death penalty depicts an offender as irredeemable, outside the community of moral agents who are (in principle) responsive to legal or moral demands. All punishments arguably communicate that an offender no longer has the moral standing others have. But capital punishment, it might seem, communicates the loss of virtually all moral standing.

An expressive rationale for the Ultimate Thesis thus rests the badness of capital punishment on facts about a society's *condemnation* of the offender. And no doubt in many cases, this condemnation, with its message of exclusion or dehumanization, induces shame in offenders. But I doubt that any expressive rationale can make adequate sense of the Ultimate Thesis.

For one, the expressive rationale does not seem to imply that capital punishment is inherently worse than the most likely alternative punishment, life incarceration. A society that decides an offender will never return to the wider world is expressing its belief that the offender cannot be rehabilitated to the point that they can become full

citizens again. Hence, in *de facto* exiling an offender, both life incarceration and execution communicate that an offender no longer belongs in the moral community, so it is at least contentious that the latter is more ‘expressively’ severe than the former. At the same time, there may well be punishments that societies may permissibly consider that seem more severe than capital punishment from an expressive perspective. A lifetime of hard labor or of involuntary participation in medical or scientific experimentation, for instances, may convey that an offender is a mere thing or resource, a message no less derogatory or contemptuous (in my estimation) than the message conveyed by capital punishment. Thus, the notion that capital punishment is uniquely severe in its expressed condemnation of the offender is contestable.

But an expressive rationale for the Ultimate Thesis also faces a more direct challenge. The expressive rationale depends on the thesis that a punishment’s severity can be measured by its expressive severity. What, if anything, in turn accounts for a punishment’s expressive severity though? Why, on its face, is capital punishment more expressively severe than life incarceration? The most credible answer, in my estimation, is simply that it is *more* severe, quite apart from any expressive considerations. Suppose we imagine a system of punishment being built from scratch, with one of our aims being to satisfy a proportionality constraint between the seriousness of offenses and the expressive severity of punishment wherein the most serious offenses are subject to the most expressively severe punishments and the least serious offenses are subject to the least expressively severe punishments, etc. How would such a ranking proceed, and (supposing that consensus is reached about the relative seriousness of offenses) how would disputes regarding the rankings of expressive severity be adjudicated? I speculate that such disputes would be settled by devolving to the perceived non-expressive harmfulness of the punishments at issue — that (say) in deciding whether a fine is more

expressively severe than a night behind bars, we would draw upon our beliefs regarding how much suffering, etc., each would impose on the offender. If (in the spirit of the Ultimate Thesis) capital punishment turned out to be the most expressively severe punishment that we are willing to countenance, this would likely be due to capital punishment being most severe on the kinds of non-expressive grounds we have considered previously (because death is irrevocable, because being executed is bad, because death is harmful, etc.) Note that this does not mean subscribing to the notion that non-expressive severity is 'natural' in that it has no sociocultural component. It could well be that some punishments owe their severity to socially contingent facts (for instance, the severity of punishments involving public shaming will often depend on the symbolic meanings of certain practices). And perhaps the willingness to subject an offender to a punishment *adds* to the severity of a punishment. Some of the sting of criminal punishment may reside in the fact that one's society has decided to subject the offender to penal hardships. But my suggestion, however, is that with respect to accounting for the relative severity of punishments, expressive considerations look largely superfluous. If capital punishment is more expressively severe than life incarceration, this is because it is more severe as such. Hence, even if expressive severity tracks punitive severity, it cannot itself vindicate the Ultimate Thesis. The Ultimate Thesis requires vindication in more fundamental, non-expressive terms.

That none of the four rationales considered thus far (death's irrevocability, the badness of being executed, the badness of death, or the expressive severity of capital punishment) offer a compelling rationale for the Ultimate Thesis may seem to warrant skepticism about the Ultimate Thesis. To see where a plausible rationale for it can be found, we must consider how being sentenced to die alters our relationship to our own mortality.

5. A 'Relational' Rationale

Michael Selsor was sentenced to die in 1976 and was executed in 2012. When asked about the difference between the death penalty and a life sentence without parole, Selsor said:

The only difference between death and life without parole is one you kill me now, the other one you kill me later. There's not even a shred of hope. There's no need to even try to muster up a seed of hope because you're just gonna die of old age in here.

Selsor rightly highlights that either sentence results in death, and as such, the sentences place individuals in equally hopeless situations. But the equal hopelessness of these sentences does not make them equally severe (Brownlee, forthcoming). For a death sentence involves a measure of terror that a life sentence does not. How so?

Human beings learn from a young age that they are mortal creatures. Philosophers such as Heidegger and others (Scheffler 2013, May 2014) hypothesize that our awareness of this fact, and in particular, of the finitude of our earthly lives, significantly shapes our desires, values, and behaviors. This awareness of our finitude may give our choices and projects their urgency, lend our lives the shape or narrative coherence needed to make them meaningful, and render intelligible our concern for future generations and for our legacies. Some go so far as to argue that finitude is sufficiently central to a well-lived human life that, whatever the drawbacks of mortal life, we should not desire immortality.

At the same time though, humans show a distinct tendency to fear death and to want to avoid confronting death. Ernest Becker (1973) postulated that much of human conduct and culture is ultimately rooted in our effort to manage the terror that our tacit

awareness of death induces. Faced with our own inevitable physical demise, we undertake projects aimed at heroism or “symbolic” immortality in an effort to resist the threat to the meaningfulness of our lives that death represents. Contemporary “terror management theory” (Solomon et al 2015) lends empirical support to Becker’s claims regarding death denial, developing experimental evidence suggesting that heightened awareness of death (“mortality salience”) increases anxiety and motivates behaviors that function to reduce this anxiety, including behaviors that reflect and reinforce the normative practices we take to give our lives their meaning. No doubt these tendencies to evade or transcend death are often detrimental, both individually and socially. Terror management theorists assert that various social evils can be traced to the anxieties death raises: Our efforts to buttress the symbolic meanings of our lives by identifying ourselves with our preferred cultural belief system can sometimes lead to prejudice or violence against those groups or institutions perceived as threats to that belief system or even to fascistic political tendencies.

Our awareness of our mortality thus seems to be a double edged sword: We cannot avoid knowing of our own mortality, and perhaps there is some solace to be had in the thought that being self-consciously mortal is the distinguishing ethical characteristic of our species, a characteristic that at least sometimes leads to prosocial attitudes and ambitions. Moreover, there is growing empirical evidence that contemplating death can lead to a greater sense of life satisfaction. (Easter 2021) Seen in this light, “death denial” and the psychological avoidance appear to be harmful to us.

But there are nevertheless certain benefits to *not* living in the shadow of our mortality. Marcus Aurelius’ advice to ‘live each day like it’s your last’ captures an important truth. We should appreciate the finite lifetimes we are given and not fritter away our lives on trivial matters. But living each day like as if it is your last would, in

reality, mean a daily confrontation with one's own mortality that few of us would find tolerable. Aside from the fact that most people's last days are likely to be some of the worst days in their lives (ill, in pain, bedridden, and the like), such a life would likely distract us from the very concerns that make our lives go well. To be focused on life coming to an end may well prevent us from being absorbed in the very things we are striving to appreciate. Being mindful of our mortality (arguably healthy) can disintegrate into an obsessive awareness of it (arguably unhealthy). Our "death denying" tendencies thus have an unexpected upside: By keeping death at the margins of our consciousness for the most part, they free us to live the sorts of life that we would hope to live if in fact each day is our last.

Our tendency toward death denial also keeps us from fixating on the precise circumstances of our death. We benefit, I suggest, by being able to live, for much of our lives at least, with only a hazy sense of how and when we will die. Of course, we can draw upon demographic and medical information to arrive at a reasonable prediction of the circumstances of our deaths, and many of us will reach a point as death nears where prudence demands careful consideration of what we most desire from our dying experience. But death denial allows us to keep death itself a nebulous threat, and in so doing, keep us yoked to our day-to-day lives and to our efforts to make those lives as rewarding as they can be. Again, my claim is not that death denial and the psychological avoidance of death is an unalloyed good. But there is a time and place for reflection on our mortality, and the preoccupation with death that might arise if we did not have a strong natural instinct toward the psychological avoidance of death would in turn trigger frequent anxiety and dismay. We should therefore not hope to find ourselves as Tolstoy's Ivan Ilyich does when reflecting on the syllogism he was taught as a boy ("Caius is a man, men are mortal, therefore Caius is mortal"), unable to grasp how this

abstract reasoning could apply to him as a concrete person. But we should nevertheless be glad that we are psychologically constituted such that death remains, for much of life at least, an abstraction instead of a concrete reality.

Condemned individuals do not have this luxury. For soon after their convictions, they are thrust into a mindset in which death is much harder to deny and the circumstances of their deaths strikingly specific. The condemned prisoner can of course attempt to put this reality out of their mind, but their knowledge of their own deaths is likely to make their own mortality an ever present companion. Indeed, this confrontation with is woven into their social identity and defines their existence. Death row prisoners are typically separated from the larger prison population, clad in distinctive garb, and housed in a place (death row) whose name bespeaks their fate. Surveillance is constant. But ironically, solitary confinement (often in excess of recognized international human rights norms) entails that condemned prisoners are largely abandoned to themselves, with virtually no contact with the world outside the prison and little if any exposure to nature.

Those facing life incarceration will at some point have to confront their deaths. But their lives are not structured around their deaths in the way that the lives of the condemned are. This, in my eyes, singles out execution as a singularly traumatic punishment. It thus belongs in a special category of severity inasmuch as it alters their relation to death in ways that are likely to puncture the protective shield provided by death denial or death anxiety, a shield which (I suggested earlier) enables us to live good lives even in the knowledge that those lives must end.

We see evidence for this *relational* rationale for the Ultimate Thesis in Dostoevsky's account of a mock execution in *The Idiot*. (Dostoevsky himself had been the subject of a mock execution in 1849.)

About twenty paces from the scaffold, where he had stood to hear the sentence, were three posts, fixed in the ground, to which to fasten the criminals (of whom there were several). The first three criminals were taken to the posts, dressed in long white tunics, with white caps drawn over their faces, so that they could not see the rifles pointed at them. Then a group of soldiers took their stand opposite to each post. My friend was the eighth on the list, and therefore he would have been among the third lot to go up. A priest went about among them with a cross: and there was about five minutes of time left for him to live.

He said that those five minutes seemed to him to be a most interminable period, an enormous wealth of time; he seemed to be living, in these minutes, so many lives that there was no need as yet to think of that last moment, so that he made several arrangements, dividing up the time into portions--one for saying farewell to his companions, two minutes for that; then a couple more for thinking over his own life and career and all about himself; and another minute for a last look around. He remembered having divided his time like this quite well. While saying goodbye to his friends he recollected asking one of them some very usual everyday question, and being much interested in the answer. Then having bade farewell, he embarked upon those two minutes which he had allotted to looking into himself; he knew beforehand what he was going to think about. He wished to put it to himself as quickly and clearly as possible, that here was he, a living, thinking man, and that in three minutes he would be nobody; or if somebody or something, then what and where?

In Dostoevsky's tale, the time between the man learning of his execution and the event itself was relatively brief, but it is dominated by his awareness of his pending demise. Capital

punishment as practiced in the contemporary U.S. is likely to be far worse on this score. American death row inmates often spend decades awaiting execution, and their paths toward death are sometimes marked by one or more stays of execution. They are thus likely to undergo prolonged stretches of life punctuated by periods of death anxiety. In contrast, the offender incarcerated for life is largely spared these repeated concrete reckonings with their own deaths.

This relational rationale for the Ultimate Thesis thus holds that the distinctive severity of capital punishment resides in its placing an offender in a difficult and perpetual "dying role". Many experts on end of life experience believe that dying individuals benefit from being allowed to occupy a dying role, a social status wherein, because their pending deaths are fully acknowledged by themselves and others, they can choose and act in light of the fact of that pending death. By playing the dying role, an individual is given license to make practical preparations for their deaths, clarify and solidify their relations with others, and reconcile themselves to their deaths. (Emanuel et al 2007) Being in the dying role is thus essential to any effort to make one's death meaningful. But the value to us of occupying the dying role has limits, limits that are likely exceeded by condemned offenders. The dying role is after all supposed to be a prelude to death itself, such that the dying role occupies a *brief* final chapter in one's overall biography. Condemned individuals, on the other hand, may slip in and out of the dying role as their deaths approach. The limited freedom they have on death row is likely to compound the challenges associated with playing the dying role over a long stretch of time because they will have fewer opportunities to find meaning in their own deaths (fewer opportunities to interact with those with they have important relationships, to visit places of significance, etc.).

My relational rationale does not insist that the harms associated with how condemnation and execution alter our relationship to death preclude condemned individuals from ultimately coming to terms with their own deaths. It maintains instead that being sentenced to die likely operates to undermine psychological dispositions regarding death that, while far from perfectly rational, enable us to pursue worthwhile lives. It thus differs from vindications of the Ultimate Thesis appealing to the badness of *being* executed insofar as the distinctive severity of death as a punishment consists not in the badness of life's final moments but in how death projects itself further back into the condemned person's biography, resulting in an atypically large phase of their life being a dying phase. What in small doses is likely beneficial to us — a thoughtful and sustained examination of death and its individual significance to us — is administered to condemned individuals in large doses, doses that from the standpoint of their quality of life, are likely to be injurious. Their capacity to keep the terror of death at bay is likely to be taxed to its limits. Death is a more severe punishment than any morally permissible alternatives, including life incarceration, because condemned individuals are made to live with their own deaths in ways that few others are.

6. Comparativism Reconsidered

Some may object that my relational rationale introduces an inconsistency. For having argued in section 3 that comparativist accounts of the value of death cannot explain the severity of capital punishment in ways that vindicate the Ultimate Thesis, I am now putting forth a comparativist rationale for that thesis. The relational rationale seems to say, after all, that an individual sentenced to death suffers a distinct harm that an individual sentenced to life does not: they are compelled to confront their deaths in ways that are unsettling or even traumatic, a harm that those incarcerated for life do not undergo.

Admittedly, my relational rationale for the Ultimate Thesis has a comparativist spirit in that it invites consideration of alternative lives that one and the same individual might have, and in particular, a life ended in execution versus that same life ending in natural death after lifelong incarceration. But the relational rationale does not see these lives as comparable *ceteris paribus*, i.e., the latter individual's life is not simply a longer version of the former's life. For the fact of being condemned to die alters the former's relationship to death so as to profoundly change, in a largely negative way, the quality of their life. Death's role in my relational rationale thus differs from the usual role it plays in comparativist accounts of death's significance. Death's significance, on the relational rationale, is not that it truncates a person's life and so precludes the possibility of a longer (and perhaps better) life. Its significance is that it alters their actual life *intrinsically*, making it worse. The relational rationale is thus comparative inasmuch as it compares lives with respect to how an individual is able to relate to death instead of with respect to the possibilities foreclosed by death.

This insight can be made more intuitive if we envision examples wherein the harms that I have suggested confront the condemned individual under the relational rationale are detached from death as such. Imagine an individual S convicted of murder but who pursues multiple appeals of his death sentence.³ Finally, after two decades of appeals and multiple stays of execution, S is exonerated and freed. It would not be surprising if S suffered the terror that being condemned to death brings, according to my relational rationale for the Ultimate Thesis. S may well have lived in more or less constant awareness of his own death and its likely circumstances, occupying an ongoing dying role that prevented him from enjoying the kind of psychological equanimity that our natural tendency to deny death seems to provide us. But note that S's long walk through the valley of the shadow of death ended *without* his execution or even his death. This underscores that the relational rationale is comparative, but the baseline of comparison is only incidentally related to death *per se*.

Death's role, on the relational rationale, is less about how it places temporal bounds on the possibilities for life than about how living in death's shadow undermines the value of a person's actual life. Hence the relational rationale does not appeal to the extrinsic badness of *death* to vindicate the Ultimate Thesis. It appeals instead to the comparative intrinsic badness of lives in which offenders face death in divergent ways that in turn impact on their quality of life.

Reducing the time on death row by shortening the time between offenders being sentenced to death and the carrying out of their sentence could mitigate the terror in the face of death highlighted by my relational rationale. But I doubt it could wholly eliminate it. Furthermore, the kinds of procedural safeguards found in American capital punishment practices (particularly automatic appeals of death sentence) likely contribute to the long duration between sentencing and execution. But such safeguards seem crucial to ensuring that if capital punishment can be carried out justly, it will be. It is therefore an irony of such practices that measures meant to ensure that capital punishment is justly administered likely contribute to making it worse for those subject to it.

Lastly, that the relational rationale pinpoints what makes death a particularly severe punishment as compared to life incarceration does not preclude its severity being amplified in many cases by other considerations. A condemned offender who suffers the terror of death posited by my relational rationale may be further harmed if (say) his execution is also painful. The relational rationale draws on a distinct harm of capital punishment to defend the Ultimate Thesis, but it does not claim that this is the only harm.

7. Conclusion

I hope to have shown that my relational rationale is the best candidate for vindicating the unique punitive severity associated with capital punishment. ‘Death is different,’ on my view, because as a sanction for criminal conduct, it alters our relationship to our own deaths in psychologically terrifying ways.

The purpose of this exercise has not been to settle any debates about the moral justifiability of capital punishment. Nevertheless, it should enrich those debates. For whether capital punishment is excessively cruel depends on what its severity consists in. So if my arguments in favor of the relational rationale are sound, then these debates should focus on whether subjecting offenders to the kind of psychological terror posited by the relational rationale is warranted. Proponents of capital punishment will presumably need to muster persuasive arguments that it is not excessively cruel, whereas its opponents will need to muster persuasive arguments that it is.

We set out initially to see whether the Ultimate Thesis could be philosophically vindicated. I have proposed that my relational rationale is the *best* candidate for its vindication, but I am more hesitant about whether that rationale in fact vindicates the Ultimate Thesis. For as I argued in section 3, comparativism about death’s value suggests that, at least sometimes, capital punishment is *less* harmful to an offender than lifelong incarceration. My relational rationale adds a further harm of capital punishment to the mix: the psychological terror involved in a condemned person’s forced confrontation with their own death. It is not obvious how weighty this further harm is. In other words, is it better for a person’s welfare overall (a) to live a shorter life culminating in execution, in which a significant phase of their life will be lived in death’s psychological shadow or (b) for a person to live a longer life in which they never experience freedom from incarceration but are spared the terror of living in death’s psychological shadow? I doubt that any definitive answer is available here. A different way to look at the matter: Suppose that an offender convicted of a

serious crime and sentenced to death is considering whether to exhaust every possibility of appeal, with the understanding that their only chance of a successful appeal is not to prove their innocence and thereby go free but to prove that their death sentence is unwarranted and thereby be incarcerated for life. Should such an offender exhaust every appeal? It would not, to my eyes, be *irrational* for them to do so. For in doing so, they relieve themselves of the psychological terror I have argued is distinctive to life as a condemned person. Conversely though, it would also not seem irrational for them *not* to exhaust every appeal, on the grounds that life incarceration is sufficiently arduous that death will come as a blessing. Thus, I doubt that my relational rationale can provide a straightforward vindication of the Ultimate Thesis. Nevertheless, if the Ultimate Thesis is true, my relational rationale is indispensable to an explanation of its truth.⁴

REFERENCES

- Amnesty International. "Death Penalty 2020." Available at: <https://www.amnesty.org/en/documents/act50/3760/2021/en/> [accessed 22 Mar 2022]. 2021.
- Behrendt, Kathy. "Unmoored: Mortal Harm and Mortal Fear." *Philosophical Papers* 48, no. 2 (2019): pp. 179-209.
- Bennett, Belinda. "Posthumous Reproduction and the Meaning of Autonomy." *Melbourne University Law Review* 23, no. 2 (1999): 286-307.
- Boonin, David. *Dead Wrong: The Ethics of Posthumous Harm*. Oxford: Oxford University Press, 2019.
- Brownlee, Kimberly. "Punishment and Precious Emotions: A Hope Standard for Punishment." *Oxford Journal of Legal Studies*, forthcoming.
- California v. Ramos*. 463 U.S. 992 (1983)

Cholbi, Michael, and Alex Madva. "Black Lives Matter and the Call for Death Penalty Abolition." *Ethics* 128, no. 3 (2018): 517-544

Davis, Michael. "Is the Death Penalty Irrevocable?" *Social Theory and Practice* 10, no. 2 (1984): 143-156.

Davis, Michael. *Justice in the Shadow of Death: Rethinking Capital and Lesser Punishments*. Lanham: Rowman & Littlefield, 1996.

Easter, Michael. *The Comfort Crisis*. New York: Rodale Books, 2021.

Egerstrom, Kirsten. "Making Death Not Quite as Bad for the One Who Dies" In M. Cholbi and T. Timmerman, eds., *Exploring the Philosophy of Death and Dying: Classical and Contemporary Perspectives* (New York: Routledge, 2021), pp. 92-100.

Emanuel, Linda, Bennett, Katherine, and Virginia E. Richardson. "The Dying Role." *Journal of Palliative Medicine* 10 (2007): 159-168. <http://doi.org/10.1089/jpm.2006.0134>.

Furman v. Georgia. 408 U.S. 238 (1972)

Grassian, Stuart. "Psychopathological Effects of Solitary Confinement." *American Journal of Psychiatry* 140 (1986):1450-54.

Gregg v. Georgia 428 U.S 53 (1976)

Kramer, Matthew. *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences*. Oxford: Oxford University Press, 2011.

May, Todd. *Death: The Art of Living*. Abingdon: Routledge, 2014.

Mill, John Stuart. "Speech in Favour of Capital Punishment." British Parliament, 1868.

Pitcher, George. "The Misfortunes of the Dead." *American Philosophical Quarterly* 21, no. 2 (1984): 183-188.

Primoratz, Igor. "Punishment as Language." *Philosophy* 64 (1989), no. 248: 187-205.

Sarat, Austin. *Gruesome Spectacles: Botched Executions and America's Death Penalty*. Palo Alto: Stanford University Press, 2014.

Scheffler, Samuel. *Death and the Afterlife*, ed. N. Kolodny. New York: Oxford University Press, 2013.

Solomon, Sheldon, Greenberg, Jeff, and Tom Pyszczynski. *The Worm at the Core: On the Role of Death in Life*. New York: Random House, 2015.

Yost, Benjamin S. "The Irrevocability of Capital Punishment." *Journal of Social Philosophy* 42, no.3 (2011): 321-340.

----- (2019) *Against Capital Punishment*. Oxford: Oxford University Press.

NOTES

¹ Some clinicians (Grassian 1986) now propose the term "death row syndrome" to designate the distinctive constellation of mental health symptoms exhibited by death row prisoners.

² One possibility that I have overlooked is that death is bad for us simply because it represents the cessation of our subjectivity or of our existence. On such views, death is bad neither because of the badness of being dead, nor because death precludes from having a better life overall. Rather, its badness stems from its being the state of affairs in which we are 'annihilated' (Behrendt 2018) This view strikes me as very plausible (psychologically, at least) as an explanation of why death seems bad and why we fear it: Death produces disorientation and anxiety us because it amounts to the end of the world as we individual human subjects know it. Yet this view is not promising as a way of accounting for the Ultimate Thesis. For being executed merely establish the circumstances under which a person dies, not *that* they will die. Execution does not, in other words, transform us from immortals to mortals. Hence, if death is bad because it is our annihilation, execution is no worse in that respect than dying in any other way.

³ This example is loosely based on Curtis Flowers, tried in Mississippi six times for the 1996 murder of four people at a furniture store. Four times he was convicted only to have the convictions overturned on appeal. These prosecutions finally came to end in 2020, when his case was dismissed and he was freed from all custody and supervision.

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