

# On the (Im)morality of the Death Penalty

Meir Dan-Cohen<sup>†</sup>\*

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## The agenda

The death penalty is an abomination, a moral stain on the states that still impose it. This is not the conclusion of this essay but its starting point. When discussing such a fraught topic as capital punishment, it is vain to feign intellectual detachment and value-neutrality. One starts from where one stands, and tries to elaborate considerations that clarify and justify one's position as best one can. In doing so, I do not purport to canvass the entire age-old debate. Instead, I'd like to ground the position I hold in a particular moral outlook, which I find appealing, and which in one form or another enjoys considerable support. Although the issues I raise regarding the death penalty are distinctly moral, and so have universal scope, my arguments also relate to some specifics of American law. This is not a mere coincidence. The pivotal legal text bearing on the capital punishment debate in the U.S. is obviously the Eighth Amendment. And even if the key phrase, "cruel and unusual punishment," does not wear its moral credentials on its sleeve, the Supreme Court's interpretation does. On this interpretation, "[t]he basic concept underlying

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<sup>†</sup> Milo Reese Robbins Chair in Legal Ethics, School of Law, University of California, Berkeley.

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the Eighth Amendment is nothing less than the dignity of man.”<sup>1</sup> By arguing that the death penalty is incompatible with human dignity, I hope to show that it is at once immoral and, in the U.S., unconstitutional as well.

This view is of course not new. In supporting it I follow a distinguished chorus of philosophers and jurists who argued for it. But though I find many of their arguments cogent, we must be alert from the start to a potential pitfall. A salient feature of the ongoing debate is its intensity; the stakes appear to be particularly high. Whatever bolsters the death penalty’s advocates’ vehemence, the abolitionists would appear to be impelled by the enormity of death.<sup>2</sup> But a focus on death does not quite explain the agitation. If the moral significance of the death penalty were to be assessed in light of the magnitude of human slaughter perpetrated in other fields, it would shrink to insignificance; the death toll of capital punishment contributes barely a drop to this ocean of blood. Moreover, various governmental actions and policies have a vastly greater impact on the incidence of death than the abolition of the death penalty would. And yet we don’t find an intense public or scholarly engagement with, say, changes in traffic laws as we find in connection with capital punishment. In this respect, tying the death penalty to human dignity is a step in the right direction, but further elaboration is required to explain the perceived magnitude of the moral concerns.

There is a second challenge that a dignity-based moral theory, and correspondingly, a dignity-based interpretation of the Eighth Amendment, must face: Why is dignity of such paramount importance so as to trump other considerations or override them?

Another puzzle at the heart of the American constitutional debate arises from the Supreme Court’s decision that banishment is precluded by the Eighth Amendment.<sup>3</sup> This holding creates what appears as a startling inconsistency: if banishment, sometimes described metaphorically, and with some hyperbole, as “civil death,” is unconstitutional, how could the

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<sup>1</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>2</sup> Opponents of the death penalty are of course also rightly alarmed by additional factors, such as the risk of wrongful executions, racially discriminatory administration of the death penalty, and other such weighty worries. But these are all derivative from the perceived enormity of the death penalty relative to other penalties, or from the special significance of punishment relative to other deprivations, which I discuss later.

<sup>3</sup> See *Trop*, 356 U.S. at 101. Terminology in this area is not entirely settled and includes such terms as “expatriation” and “denationalization.” For the sake of simplicity, I use “banishment” to combine withdrawal of citizenship with deportation.

death penalty, inflicting as it does the real thing, be permissible? Pointing out the inconsistency is one thing; removing it, another. For consistency can be attained in two ways. An abolitionist hoping to leverage the inconsistency in her favor will encounter the opposite response, illustrated well by Justice Frankfurter's rhetorical flourish when advocating the constitutionality of banishment: "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"<sup>4</sup> If the desired consistent approach to the penalties of banishment and death would deem both unconstitutional, we need an account that explains why both violate the standard of human dignity set by the Court.

One final item in Eighth Amendment jurisprudence is noteworthy, and helps set our present agenda. It is the prohibition against slavery as a form of punishment. The backdrop to this prohibition is a shameful fact: that in abolishing slavery, the Thirteenth Amendment explicitly exempts slavery as punishment. Even so, in order to be a constitutionally permissible penalty, slavery must meet the Eighth Amendment standard of dignity, and it plainly does not.<sup>5</sup> This then provides another fixed point of reference in terms of which the shape of the dignity standard can be explored.

My suggestion is that, duly understood, the dignity-based prohibitions against banishment and slavery cast some light on the indignity of the death penalty as well. There is indeed an opposition between the ideal of dignity and the death penalty, but the opposition is not as straightforward and not as clearly visible as the dominant exponents of this opposition in the current debate would make it seem.<sup>6</sup> To appreciate the immorality of capital punishment, we need to ponder with greater care both the role of dignity within a more comprehensive moral theory, as well as the meaning, within such a theory, of killing as a form of punishment. We need also rethink some fundamentals of the prevailing interpretation of the Eighth Amendment, so as to place the opposition on firmer theoretical grounds, and to fully appreciate the high moral stakes.

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<sup>4</sup> *Id.* at 125 (Frankfurter, J., dissenting).

<sup>5</sup> See, e.g., Scott Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1033 (2009).

<sup>6</sup> There is burgeoning legal literature on the conflict between dignity and the death penalty. For two recent contributions, see generally Kevin Barry, *The Death Penalty & The Dignity Clauses*, 102 IOWA L. REV. 383 (2017); Phyllis Goldfarb, *Arriving Where We've Been: Death's Indignity and the Eighth Amendment*, 103 IOWA L. REV. 386 (2018).

All this obviously combines to a rather hefty agenda; within the confines of the present essay, I can only chart the main steps in the argument, and must move at a swift pace.

### **Eighth Amendment criteria – a critique**

In order to pursue the line of argument I propose, we need first take a closer look at the current debate. Though this debate is highly charged, there are a few points of broad agreement. Chief among them is the view that the discussion regarding capital punishment, and of the Eighth Amendment more generally, is about proper limits on the severity of punishment. As already mentioned, this is interpreted to require that punishment must comport with human dignity. But what does this mean? The Supreme Court's answer, shared by proponents and opponents of the death penalty alike, is that "[t]his means, at least, that the punishment not be 'excessive.'"<sup>7</sup> The Court offers in turn two criteria for excessiveness. "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."<sup>8</sup> Call these, respectively, *pointlessness* and *proportionality*. Upon inspection, neither turns out to be of much help.

Starting with the latter, proportionality is unhelpful in this context since it addresses a different question than the one before us. As others have observed, proportionality provides only an ordinal, not cardinal, criterion.<sup>9</sup> Assuming any given ranking of offenses and any ranking of punishments, strictly speaking, the requirement of proportionality only insists that the two rankings correspond to each other: a less severe offense should not receive a harsher punishment than a more severe offense.<sup>10</sup> But when it comes to the moral assessment of the death penalty, the principal question is whether the penalty is *ever* permitted, independently of the type of crime. For this inquiry, proportionality is simply beside the point.<sup>11</sup>

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<sup>7</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L. F. 259, 282-88 (1990).

<sup>10</sup> This is easiest to see in the case of incarceration which is the most common form of punishment for most felonies. For how are we to calibrate the rate of exchange between, say, robbery or arson on the one hand and the length of a prison term on the other?

<sup>11</sup> Even if one believed that there is some meaningful intuitive relationship between punishment and crime that can amount to "proportionality," this would serve at most as an auxiliary limitation on the severity of punishment. Surely, punishment that is equal to

In elaborating the criterion of pointlessness, the Court explains that “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”<sup>12</sup> But for two reasons, this criterion is not very useful either. First, rather than offering a limitation on punishment, this criterion merely states a tautology. If a particular imposition does not serve *any* legitimate penological purpose, and amounts to the infliction of gratuitous suffering, it is “punishment” in name only, akin to “punishing” the innocent. Just as the government’s failure to label a particular imposition “punishment” does not immunize that imposition against Eighth Amendment scrutiny,<sup>13</sup> attaching that label to an imposition does not by itself bring it within the amendment’s ambit. If a purported “penalty” turns out to be an exercise of naked power, then it falls outside of the scope of the Eighth Amendment, and is subject instead to other general limitations on violence.

The second drawback of the pointlessness criterion is that it is radically at odds with the way Eighth Amendment limitations are commonly treated. The question of whether a form of punishment offends against human dignity and so is “cruel and unusual” does not arise in a void. There are a number of paradigm penalties, “such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like,”<sup>14</sup> which are taken to be beyond the pale, thus forming an essential backdrop for the consideration of any contested penalty, such as death. These paradigms provide the measures of adequacy for any standards by which the Eighth Amendment is to be applied; they are not treated as inviting an investigation into the potential benefits of meting out these penalties. Indeed, had such an invitation been issued and accepted, the results would be highly uncertain. For what, say, is the assurance that this or that ghastly punishment would not have an incremental effect on deterrence?

We can draw from this critical observation a more positive point. Especially in light of the strategic location within the Eighth Amendment terrain, as well as within the corresponding moral landscape, of the kinds of paradigms just mentioned, the overall role assigned to the amendment

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the crime would be deemed “proportional” to it. Given people’s boundless propensity for perpetrating atrocities against each other by way of crime, the corresponding severity of permissible punishment would in principle be boundless too.

<sup>12</sup> *Gregg*, 428 U.S. at 183.

<sup>13</sup> *See Trop*, 356 U.S. at 94-99.

<sup>14</sup> *Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting)).

by different parties to the death penalty debate appears to be the same. It is best characterized in terms of a more general normative stance that has become widely accepted in recent years. Seen from that point of view, the Eighth Amendment imposes on punishment a set of moral *side-constraints*.<sup>15</sup> What in the present context gives such constraints their bite is not their barring “penalties” that perform no useful function, but rather their barring of some penalties even if they do. The point of letting considerations of human dignity exclude potentially beneficial policies and practices is precisely to mark the moral primacy of humanity’s moral worth over other advantages such policies and practices might secure. Interpreting the Eighth Amendment as concerned with “excessive” punishment defeats this purpose by reintroducing, through a back door as it were, the kinds of considerations the ideal of dignity is meant to exclude.

Neither proportionality nor pointlessness provide satisfactory criteria for whether punishment offends human dignity and so violates the Eighth Amendment. But this conclusion implies a more fundamental challenge to the broad consensus that underlies the death penalty debate. As I have mentioned, it is generally taken for granted that the Eighth Amendment codifies a concern about the harshness of punishment, so that the issue raised by the death penalty is allegedly its extreme severity. The standard of excessiveness (with its two subordinate criteria, pointlessness and proportionality) allegedly addresses this concern. But talk about excessiveness misses the target when the target is the congruence of punishment with the dignity of man. *Excessive* is a quantitative term, designating something of which there is too much. In what sense, though, can punishment be excessive? What quantitative dimension serves as the underlying metric for such assessment? The seemingly obvious answer, *severity* and its quasi-cognates such as *harshness* and *cruelty*, won’t do. These terms focus on the negative experiential quality of punishment, on the suffering it involves. Such negative experiences are assumed to form a scale, and excessive severity is reached when punishment exceeds a certain point on this scale. This picture does not, however, accurately describe how judgments under the Eighth Amendment are actually made.

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<sup>15</sup> The canonical texts are RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978), especially Chapters 4, 7, and 12, and ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26-53 (1974). For an illuminating overview, see SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* (rev. ed. 1994). For a book-length study of the application of this template to various areas of law, see EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010).

It is hard to illustrate this point without wallowing in the details of the outrages people perpetrate in the name of justice, but two examples out of many will suffice. First, objections to various forms of punishment are rife with such adjectives as *horrible* or *gruesome*, which do not refer to the victim's experience but to the spectator's.<sup>16</sup> One result of invoking the criteria these adjectives represent is that an execution that is less agonizing to the inmate but more shocking to the spectator, such as beheading, is banned in favor of harsher forms of execution, such as the electric chair, that have the opposite effects.<sup>17</sup> As to the second example, one reliable measure of harshness is the offender's own preference. But in a number of cases, courts have overruled the offender's preference, such as when sex offenders were denied the option of castration, which they preferred to a long prison term, on the ground that castration violates the Eighth Amendment whereas a lengthy prison term does not.<sup>18</sup> In neither of these instances do judgments of impermissible punishment align along a dimension of severity, where severity measures the suffering or the deprivation visited on the offender.

If the Eighth Amendment does not serve (exclusively) to limit the severity of punishment, what is its role? Relatedly, if excessiveness and its two auxiliary criteria, proportionality and pointlessness, do not provide adequate guidance for the indignity of punishment, what does?<sup>19</sup> These questions arise specifically in the context of American constitutional discourse, but as already mentioned, they echo the moral issues that arise

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<sup>16</sup> For examples of these adjectives used in assessing forms of execution, see Martin Gardner, *Executions and Indignities – An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 114-28 (1978).

<sup>17</sup> See, e.g., Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 38-39 (2008).

<sup>18</sup> See, e.g., *State v. Brown*, 326 S.E. 2d 410 (S.C. 1985) (holding that a trial court could not suspend a 30-year sentence on condition of surgical castration); see generally Jeffrey Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615 (1999); Lystra Batchoo, *Voluntary Surgical Castration of Sex Offenders: Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment*, 72 BROOK. L. REV. 689 (2007). The two dimensions of assessment here distinguished form a Venn diagram in which the circles largely overlap: gruesome penalties which upset the spectator's sensibilities, such as flaying alive, tend to involve great suffering as well. Some adjectives commonly used in this context, such as *barbaric*, pertain to the entire area covered by the diagram without differentiating the very different ways in which punishment may be offensive.

<sup>19</sup> Recall that in spelling out the dignity standard, the Court says that "[t]his means, at least, that the punishment not be 'excessive.'" *Gregg*, 428 U.S. at 173. The operative words here are "at least."

outside this context as well. As we have also noted, the linchpin that ties the two domains, morality and the constitution, is the ideal of human dignity. This ideal has come to the fore in recent years, in law as well as more broadly in the public arena, and invoking it has acquired considerable rhetorical force. But in order to pursue our present agenda, we must go beyond the rhetoric, and probe dignity a bit further. We need a conception of dignity that will set the moral limits on punishment along lines that are not confined to the harshness of the sanction imposed. Such a conception of dignity should help us answer the following questions. What, other than harshness, is the dimension along which punishment may offend against dignity? How do various forms of punishment, in particular banishment and slavery, fare along that dimension? And how does all of this bear on the morality of the death penalty? A conception of dignity that answers these questions is not enough, however. As already mentioned, dignity must be shown to have such paramount importance as to be worthy of constitutional protection that excludes or overrides other considerations that would otherwise permissibly guide us in regard to punishment as they do in other fields.

### **A morality of dignity<sup>20</sup>**

The idea of human dignity has a long pedigree, leading all the way back to the Old Testament vision that humanity was created in the image of God. But although it is quite likely that this *imago Dei* theme still colors our contemporary attitudes, the religious provenance disqualifies it from serving as the direct source for constitutional interpretation, and indeed for a secular morality focused on the ideal of humanity's special moral worth. In seeking to understand the idea of human dignity, we need to look for some alternative sources. No one holds a copyright on the requisite secular conception of dignity, and various versions exist. But one thinker stands out. Immanuel Kant's rendition of the notion of human dignity as the centerpiece of a moral theory is by far the most influential source of reflection on the subject in modern times. In the centuries that have elapsed since Kant, mountains of writing on his views have been generated, and his ideas have spread beyond philosophy and seeped into the general culture. It is possible today, especially for those sitting on the bench, to espouse the ideal of human dignity without mentioning Kant's name. Even so, it is highly unlikely that the shape the ideal takes in

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<sup>20</sup> This section, and a few other paragraphs in this paper, are adapted from MEIR DANCHEV, *NORMATIVE SUBJECTS: SELF AND COLLECTIVITY IN MORALITY AND LAW* (2016).



contemporary hands is not at least in some way Kantian, if not quite Kant's. To be sure, philosophers carry no formal authority, and enlisting them in support of this or that view does not have the force of precedent. Even so, tracing the Kantian origins of some central themes in the present discussion of the morality of the death penalty may increase clarity and add substance. I start, accordingly, by sketching a version of a Kantian morality of dignity, which will provide context and direction for the rest of the argument. Note the triple qualification. First, what follows is just a *sketch*, containing only the broad contours of the conception of dignity I wish to deploy. Second, it's only one *version* among several that have been proposed, in part because there may have been more than one strand in Kant's own mind regarding the concept of dignity and its role within his moral outlook.<sup>21</sup> And third, like many other writers in this field, my objective is not a definitive statement of Kant's theory, but a train of thought that is recognizably *Kantian* in origin and inspiration.<sup>22</sup>

The key to any Kantian morality of dignity is obvious; it is the Humanity formulation of the Categorical Imperative, probably the most often cited statement in all of Kant's work: "Act in such a way that you

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<sup>21</sup> For a particularly illuminating version of this strand, see CHRISTINE KORSGAARD, *THE SOURCES OF NORMATIVITY* (Onora O'Neill ed., 1996).

<sup>22</sup> In mounting a dignity-based Kantian argument against the death penalty, we face at the outset a formidable opponent, Immanuel Kant. Famously, or rather notoriously, Kant himself was an avid proponent of the death penalty. "If. . . [someone] has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice." IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, 102 (John Ladd trans., 1965). As it turns out, this does not present an insurmountable obstacle to drawing on Kant's ideas in opposition to the death penalty. When it comes to applying his broader theory to specific instances, Kant is not always the best Kantian. As others have argued, Kant's own arguments in favor of the death penalty are deficient and do not make a compelling case. They leave much room for constructing a case in opposition to the death penalty that usefully draws on Kant's other views. See, e.g., Attila Ataner, *Kant on Capital Punishment and Suicide*, 97 *KANT-STUDIEN* 452-82 (2006); Steven Schwarzschild, *Kantianism on the Death Penalty (and Related Social Problems)* 71 *ARCHIVES FOR PHIL. L. & SOC. PHIL.* 343-72 (1985). Although Kant advocates the death penalty, his overall view of punishment comports with the dignity-based side-constraints approach presented here (see *supra* note 15 and accompanying text). On Kant's view, the morally adequate sanction is the joint product of two considerations, lexically ordered. The sanction must be equivalent to the crime; in this case, a death for a death. This measure is dominated, however, by a second one: "But the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." KANT, *id.* This limitation applies notwithstanding the possibility that the murder itself may have involved such "abomination" of the victim's humanity. See generally Nelson T. Potter, Jr., *Kant and Capital Punishment Today*, 36 *J. VALUE INQUIRY* 267 (2002).

always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”<sup>23</sup> But this language is not self-explanatory, and in order to successfully turn the key it provides, a nutshell version of some other aspects of Kant’s moral theory is necessary. The first step is Kant’s insistence on human intelligibility.<sup>24</sup> Purged of its metaphysical groundings in Kant’s own philosophy, and in the sense relevant to the practical domain, this amounts to holding that all human action makes sense, has a point; it is, to use another idiom, meaningful. What makes action intelligible, what gives it meaning, is that it is done for the sake of something or other. That for the sake of which an action is done is its end. Now the same idea can also be expressed in the vocabulary of value. To act intelligibly requires that the end for which one acts be deemed worth pursuing, and so valuable. In this sense all action consists in the attempted realization of purported values. One goal of a theory of the practical domain is to account for the values we pursue. What Kant offers in this regard is a theory of value centered around a binary division between two types of value: *price* and *dignity*. Roughly, price expresses the value of things for us, that is, *for* persons, whereas dignity expresses our own value; it is the value *of* persons. But this is too rough, since price is not a unitary value: Kant further distinguishes between *market price* and *fancy price*. Though he does not elaborate much on this subdivision, commentators tend to associate the latter with esthetic value, whereas market price designates what we may think of as pragmatic value.<sup>25</sup> Building a house or a table is the realization of pragmatic value; listening to music, visiting a museum, or taking a trip to the Grand Canyon, are realizations of esthetic value. This distinction requires a clarification of what it means for something to have value *for us*. The italicized expression is ambiguous between (1) serves our interests or satisfies our desires, and (2) is deemed valuable by us. Now some of the things we value, those that possess pragmatic value, are valuable for us in the first sense. But those possessing esthetic value are not. We enjoy or admire the *Mona Lisa* or the Grand Canyon because of the value they possess; they are not valuable because of the enjoyment or admiration they elicit.

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<sup>23</sup> IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (Herbert James Paton, ed. & trans., 13th ed. 1976).

<sup>24</sup> For a helpful discussion of Kant’s uses of “intelligible” in this connection, see HENRY ALLISON, *KANT’S THEORY OF FREEDOM* 214-29 (1990).

<sup>25</sup> See, e.g., HERBERT PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT’S MORAL PHILOSOPHY* 189 (1946).

Nevertheless, everything for the sake of which our actions are performed or toward which they are oriented, and so everything that is valuable, is valuable *for us* in the second sense: all the values we pursue, all the ends that make our actions, and more broadly our lives, meaningful and worthwhile, originate in us.

To view the values that guide our actions and our lives as originating in us is also to view ourselves as self-governing, and thus as autonomous. And this interpretation of our autonomy as a matter of being the authors of our lives naturally leads to a further idea, of being our own authority: we implicitly view ourselves as validating our values.<sup>26</sup> To recapitulate: to be intelligible is to pursue ends, and this is the same as projecting and realizing values. Since we deem these values worth pursuing, we must endorse them. This is the sense in which, in pursuing any value at all, we must recognize ourselves as the ultimate authority. Now the key to the authority relationship is the notion of deference: to recognize an authority is to defer to it as a source of valid objectives, guidelines, and demands. Kant sometimes labels this attitude *reverence*, or less dramatically *respect*. In this sense, in projecting and pursuing one's goals and so in following one's values, each person recognizes herself as a definitive authority, implicitly enacting an attitude of self-respect.

But even if each person is the ultimate authority for the ends she pursues and so for the values she endorses, the resulting deference and the dignity it implies would seem to be distributive: I implicitly assert my own dignity; you, yours. Morality, however, is mostly concerned with respect for others' dignity rather than for one's own. To see why respect extends to humanity as a whole, we need to attend more closely to the notion of intelligibility. If to encounter a human being is to encounter an intelligible being, then it is to encounter a being with whom communication and, hence, mutual interpretation and understanding are in principle possible. For this to be the case, I must be able to see another's objectives, no matter how different from mine, as values, that is as ends capable of making sense of her actions and more broadly of her life in the same way that my values make sense of mine. And this involves a further aspect of intelligibility: its dependence upon abstraction.

Consider the following scenario. When David puts on a suit and tie, he knows what he is up to: he is going to the *opera*, to see *Fidelio*.

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<sup>26</sup> Cf. Colin Bird, *Status, Identity, and Respect*, 32 POL. THEORY 207, 213 (2004) ("To recognize persons as self-legislators in a Kantian sense just is to recognize a kind of authority that they bear").

The italics draw attention to two possible descriptions of David's end at different levels of abstraction. But though other formulations are possible, notice that some such abstraction is necessary in order to account for David's dressing up. If instead of referring to the "opera" David were to conceive of a highly detailed, step-by-step depiction of the route that leads from his home to the opera house, and of a brick-by-brick description of this end point, while omitting the designation of his destination as the opera, then despite the abundant detail, or rather because of it, he would be at a total loss to know what to wear.

The situation is similar when making sense of another person's conduct. David observes Ruth wearing a t-shirt and jeans. Why? She explains that she is on her way to a soccer game. But suppose David has never heard of soccer. At this point, the more abstract idea of a ball game, or failing that, just a game, may help him make sense of Ruth's attire. If this is not sufficient, the explanation of Ruth's behavior may have to appeal to even more abstract notions, such as entertainment or edification, which David associates with his own venture. Why does Ruth put on this casual dress? Because like David she is "dressing appropriately for the occasion." What is this occasion? As in David's case, it is a form of entertainment or edification, or, like him, she is going to have a good time. Variation in dress style at the more concrete level is rendered intelligible by appeal to such notions as "dress code," "appropriate," and "occasion" at the abstract. In order for David and Ruth to be intelligible to themselves and so potentially to each other, they must in principle be able to see what they are each up to. And so, they must be able to ascribe to each other ends, and thus values, that can be construed as ends and values, that is as pertaining to endeavors appropriate for a human life and making sense of it. This amounts to their viewing themselves as respectively articulating at a relatively high level of detail a shared cluster of more abstract meanings that they both associate with the very idea of a human life. Whereas the interpretation of these abstract meanings implicit in David's life will differ in innumerable ways from the one implicit in Ruth's, each of them manifests at a higher level of resolution content that at a high level of abstraction belongs to the category of humanity as such. Stated in reverse, in fixing their individual identities, both David and Ruth are enacting and articulating a more abstract identity, their common identity as *persons*, which they share with everyone else.

This in turn has crucial ramifications for David's and Ruth's appropriate attitudes to each other. In going to the opera or to a soccer game, they each display their autonomy consisting in projecting and

following their respective values. They thus implicitly treat themselves as the authority for deeming these endeavors worthwhile, and correlatively, they both occupy a stance of self-respect. But as we have just seen, this is not the end of the story. Once they realize that neither is alone in this regard, they discover that at a certain level of abstraction, the capacity in which they each respect themselves, that is, as an autonomous human being engaged in the projection and attempted realizations of values, thus as a person, is shared by the other. And so, the respect they each owe themselves extends to the other as well.

Five points that are particularly germane to our topic follow. First, this account gives dignity a foundational, and so an especially secure position that other values lack. All other values are in principle contestable. But as long as we contest them, we are committed to the validity of some values. The very fact that we pursue any ends, and so have any values at all, quite apart from their content, implies our own worth, and so provides a foothold for a system of moral values designed to acknowledge this value and give substance to this acknowledgment.

Second, dignity cannot be gained or lost; it accrues to all of us by virtue of being human, and so, at a suitable level of abstraction, persons: participants in the production of meaning and value.

Third, impinging on someone's dignity is not primarily a matter of that person's experience but of the action's meaning. An action is consonant with a person's dignity insofar as it is respectful of her, and that requires that it recognize her as possessing the distinctive value dignity signifies. And contrarily, an action fails this test when it amounts to a denial of its target's value. In either case, the moral status of the action is measured by its meaning, by the message it conveys; it's not just a matter of brute facts.

Fourth, respect (in the relevant sense) cannot be selective along individual lines. The respect underwritten by the idea of dignity is due to persons. It is grounded in the shared abstract meanings common to humanity as a whole, and consists in the recognition of each individual as instantiating such universal meanings. When the attitude one has toward any individual human being, including oneself, addresses that individual qua intelligible being, and so as a site of meaning, this attitude extends to everyone else. Conversely, disrespect for any person is a denial of abstract value as such, and so amounts to a repudiation of everyone's moral worth.<sup>27</sup>

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<sup>27</sup> Here's an analogy. Suppose you write the equation  $2+2=4$ , and someone says, no, it

The final point concerns the preemptive force of dignity, and is the product of combining the first point and the fourth. In light of the foundational role of dignity in the system of values, to deny everyone's dignity (by denying someone's dignity), is to renounce the authority that upholds all values and so amounts to withdrawing the foundation on which their claim to validity rests. Repudiating anyone's dignity is a serious matter indeed.

### **Punishment and dignity**

Before assessing the compatibility of the death penalty with the standard of dignity, we must first consider why punishment in general poses a special threat to dignity, requiring a dedicated constitutional provision to avert it. The question is not trivial. Call any government policy or action that has negative effects on some individuals, a *deprivation*: changes in traffic laws may increase road fatalities, fiscal policy may create unemployment, policies bearing on smoking will have predictable effects on the incidence of cancer, and so on. As these examples remind us, deprivations can be severe, and indeed, lethal. Government routinely disadvantages people for the sake of the greater good, and yet none of these practices is as morally fraught as the practice of punishment, nor hedged by as strict a system of restrictions. To be sure, there is a salient difference between these other deprivations and punishment. Road fatalities, for example, do not involve the deliberate killing by the government of any individual. But if our concern were solely with the harmful consequences, such as death, why would this difference matter?

I cannot hope to do justice to this foundational question in the present context, but a requisite shortcut toward an answer is provided by comparing punishment to crime. As is quite clear, our moral assessment of at least core felonies is not exhausted by their harmfulness. In placing murder above, say, robbery, and at the top of the severity list, we do not investigate which crime is more socially harmful in the aggregate; we compare only the two felonies' distributive effects. Furthermore, part of what makes murder such a heinous crime is that death is the offender's

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should say 5. Then you write it again, expecting him to hold the same view, but when asked, he says, in this case it's correct, it is 4. This won't do. In denying the equation in the first instance, your interlocutor committed himself to denying it in the second instance too. Validity, which goes to the meaning of the equation, belongs to the *type* rather than to the *tokens*. To deny the validity of any token, is to deny the validity of the type, and so of all other tokens of that type.

conscious objective rather than just a foreseeable side effect of her action, and that the action is the product of “premeditation and deliberation.” We can in turn interpret these characteristics of our moral assessments of crime in Kantian terms. By deliberately inflicting a severe deprivation one enacts a conception of the victim as a mere means, someone whose own rights and interests can be trampled at will; this amounts to an especially egregious expression of disrespect, and so to a derogation of the victim’s dignity. More than other deprivations, punishment similarly poses a direct threat to its objects’ dignity, thus raising moral concerns, the intensity and shape of which are not adequately explained by the setbacks to welfare it involves, and coming perilously close to licensing the equivalent of crime. Why is such a license issued nonetheless? What distinguishes in point of moral permissibility punishment from crime and sets the two apart?

To answer these queries, we must turn again to Kant, who is present in the wings of the American death penalty debate not only in his capacity as the author of a dignity-centered morality, but also due to his more direct contributions to the theory of punishment. Here too he often appears in present-day discussions incognito, since the traces that lead back to him have been partially erased by the spread of his ideas and their absorption into mainstream legal and other public discourse. At first sight, a straight line may appear to lead from crime to punishment: punishment simply serves to reduce the incidence of crime, mostly through deterrence. But within a Kantian approach, such benefits as crime reduction are insufficient to legitimate punishment: deliberately inflicting on someone a severe deprivation for the sake of a social good is to blatantly use the offender as a means to society’s ends, in violation of the Categorical Imperative, and so in derogation of her own moral worth.<sup>28</sup> The legitimacy of punishment depends on its congruity with the offender’s dignity.

Punishment has to satisfy this condition in a more active and a more passive sense. In the active sense, the deprivation imposed as a sanction must be deserved. Deserved punishment, that is predicated on the offender’s guilt, can be said to uphold the offender’s dignity by manifesting a conception of the offender as a responsible moral agent answerable for her deeds. This aspect of punishment confers legitimacy on the government’s engaging in what would otherwise be the equivalent of a crime. This is the ineliminable retributive streak to which any Kantian

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<sup>28</sup> This moral diagnosis applies clearly to occasions in which framing an innocent person would advance deterrence. The challenge is to spell out the difference that having committed a crime makes in this regard.

theory of punishment is committed. But even when punishment satisfies this criterion, it may fail the passive test that is extrinsic to considerations of moral assessment and desert. Punishment should not convey a message of disrespect even when a sanction is deserved. Combining in various proportions such factors as pain, disfiguration, and gruesomeness, the stock examples of Eighth Amendment violations I quoted earlier (the rack, the thumbscrew, and the like), call them *degradations*, assume such an invidious meaning, and are for this reason beyond the pale.

Much of the discussion of the death penalty is conducted, often implicitly, in light of the latter category. Though I myself believe that the death penalty offends against human dignity in both regards just distinguished, concern with degradation tends to draw attention to the forms of execution, propelling in part the trajectory from the electric chair to the lethal injection. And in doing so, it diverts some attention away from the immorality of a penalty of death as such, irrespective of the way of bringing death about. However, the abomination I speak of at the beginning of this essay attaches to the infliction of death quite apart from the graphics and gratuitous suffering of this or that form of execution. My aim is accordingly to examine the limitations on just punishment that the first, “active” connection between dignity and punishment imposes. Why does the unusual license punishment grants to the government to inflict on people deliberate deprivations expire when it comes to death? The answer I propose requires that we consider the death penalty not against the background of the degradations just mentioned, but as a member of a different cluster of penalties deemed unconstitutional, a cluster that includes banishment and slavery as well.<sup>29</sup>

### **Death, banishment, and slavery**

I begin from the idea just mentioned that what reconciles punishment with the offender’s dignity is the link between punishment and the offender’s guilt. This link draws our attention to what we can think of as the apparent perversity of punishment among government deprivations. Normally, the negative effects of a deprivation provide a reason against the predicate policy or action. The policy is adopted or the action performed only if there are some countervailing reasons in their favor that outweigh the negative effects; the negative effects are then deemed a regrettable necessity. In the case of punishment, by contrast, the

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<sup>29</sup> I’m grateful to Alejandro Awad Cherit for prodding me on the issues addressed in the last two paragraphs.



negative effect is itself a reason in favor: at least part of the point of the practice is to inflict a deprivation on the offender. In this regard, punishment is an exception to a very wide rule: negative effects ordinarily count against an action, practice, or policy. To better understand the exception, however, we must look closer at the rule. Note that the rule is not limited to effects on people. Deleterious effects on the rain forest or on the deer's natural habitat provide a reason against a policy that would have those consequences. But though of wide application, the rule does not always hold; it all depends on the target of the negative effects. For example, extinguishing a fire has negative effects on the fire, and antibiotics destroy germs. Yet these negative effects are welcome, providing a reason for the relevant practices rather than against them. Plainly, negative effects may favor an action or a policy when the targets, such as fires and germs, are ascribed a negative value.

These examples teach an important if unsurprising lesson. The apparent perversity of punishment simply reflects its evaluative character: punishment is predicated on a negative value judgment regarding the offender and is designed to give this judgment substance and expression. But this also highlights the potential threat punishment poses to the offender's dignity. Though by dint of their criminality offenders merit a negative valuation, and so may justly deserve the deprivation visited on them, they are never the equivalents of fires or germs. The idea of human dignity denies that the negative judgment passed on offenders defines their value in toto. No matter how grievous the offense, the offender retains her dignity. Punishment cannot accordingly amount to an ascription to the offender of a net negative value; it must be limited to a pro tanto response to the badness displayed by the criminal act, without derogating from humanity's moral worth which attaches to the offender and remains untouched by the crime. By asserting the desirability of destroying the accused, the death penalty denies her value altogether.<sup>30</sup> The moral gravity of doing so can also be now more fully appreciated. As I have argued, such a denial of moral worth cannot be confined to the offender alone; it cannot be cabined in that way. When punishment crosses the partial, pro tanto, line and becomes total, it no longer addresses

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<sup>30</sup> Professor Joshua Kleinfeld makes a similar point: "the key to understanding what capital punishment means is to see that it is not just killing but killing *as a penalty for wrongdoing*. It is best interpreted as an expressive claim to the effect that the very worst wrongs are so serious as to forfeit one's moral humanity and, with it, the rights grounded in one's moral humanity, including the right to life." See Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 985 (2016).

the offender's own culpable actions. Instead, such punishment devalues the offender's personhood, which is not unique to her, but is common to all. This amounts to devaluing humanity as a whole, and thus, invalidating all valuation as such.

This negative moral significance of the death penalty can be corroborated and clarified by linking it to the two other kinds of punishment deemed unconstitutional I have mentioned, banishment and slavery. In distinction from the *degradations* discussed earlier, these three kinds of punishment amount to what we can call *annihilations*, cumulatively highlighting a different pattern of disrespecting the offender's dignity and thus violating the Eighth Amendment as well.

I have indicated at the outset the puzzle of a constitutional ban on banishment when we take harshness to be the criterion for indignity and so for infringements of the Eighth Amendment. Some people may prefer death to being expelled from their society; yet it is nonetheless implausible that, as a general matter, banishment should be considered harsher than death. A similar point is true of slavery. Although slavery is of course associated with a wretched life, this is not its defining nor its morally decisive characteristic. No matter how shocking the actual fate of slaves has always been, we can still consider a hypothetical "lucky" slave, whose owner treats him humanely, so that the slave's actual daily experience is no different from that of many non-slaves. (This, after all, does not set a very high standard!) And yet, this state of affairs would not annul the enslavement nor remove its moral stain. As long as we rank punishments exclusively on a harshness scale, forbidding banishment and slavery while upholding the death penalty is indeed, as Justice Frankfurter complained, "empty of reason."<sup>31</sup> And since reasoning by analogy is a two-way street, the result of insisting on consistency could be licensing banishment (and slavery) as much as banning death. We are now, however, in a better position to block this option. In applying the Eighth Amendment to various forms of punishment, we are not looking at the location of a penalty on a unitary scale of harshness relative to some cutoff point; we interpret instead the penalty's meaning as regards human dignity. What banishment and slavery have in common, and what makes them impermissible forms of punishment, is not their excessive harshness, but their invidious meaning, a meaning that is shared by the death penalty as well.

Recall the story of Ruth and David and the construal of human

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<sup>31</sup> See *Trop*, 356 U.S. at 125 (Frankfurter, J., dissenting).

identity in terms of variable levels of abstraction it helps introduce. As illustrated by this example, *person* and *individual* label the two polar extremes on a spectrum of abstraction over which our identities range: *person* alludes to the abstract meanings common to humanity as such, whereas *individual* alludes to the vastly more detailed elaboration of those meanings in each human life. However, this spectrum contains innumerable intermediate levels, and one way in which these levels can be conceptualized is in terms of the various roles people occupy and of which their identities are partially composed. Many of these roles are nested: a *cardiologist* and a *dermatologist* are both *physicians*. In what sense do they occupy different roles and in what sense one and the same? Variable abstraction provides an answer: roles that diverge at lower levels of abstraction converge at a higher level. But here we need draw a further distinction. Both *person* and *individual* are comprehensive terms, in that at their respective levels of abstraction they each pertain to a human being as a whole, whereas *cardiologist* and *physician* are partial, pertaining to some aspects of their bearer's identity but not at all to others. In addition to terms that refer to partial roles, however, there is logical room for a comprehensive term that applies to a human being as a whole, but at an intermediate level of abstraction. *Citizen* is such a term.<sup>32</sup> There is a long and no doubt checkered tradition in which an ideal of citizenship is conceived in this way.<sup>33</sup> According to this view, to be French, for example, is to be constituted by a concatenation of meanings that at a suitable level of abstraction defines a common identity of the French. In the resulting picture, the social identity designated by *citizen* is intermediate between the discreet individual on the one hand and universal humanity, which *person* designates, on the other. Intermediate in what sense? One answer would be numerical, as *many* is intermediate between *one* and *all*. But thinking of human identity in the medium of intelligibility and meaning supports a way of relating individuality, citizenship, and personhood in terms of levels of abstraction: the social is more abstract than the individual, and the universal, yet more abstract. Or

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<sup>32</sup> Cf. Pamela Johnston Conover, *Citizen Identities and Conceptions of the Self*, 3 J. POL. PHIL. 133 (1995).

<sup>33</sup> *Ideal* both in the normative sense of signifying an aspiration, and in the descriptive Weberian sense of marking an ideal type. As used here, *citizen* does not designate a purely formal legal category. It stands, roughly, for the notion of full membership in a political community. The term "community" in this context signifies such common "thick" factors as language and culture. Law plays a central role in this combination of factors, but is not exclusive, and so is not exhaustive of what citizenship in the relevant (ideal) sense amounts to.

stated in reverse, social meanings are a more concrete elaboration of universal meaning, and individual meanings a further and yet more concrete elaboration of social ones.

Within this picture, it is easy to see what banishment and slavery have in common, and what distinguishes them from other government deprivations as attacks on the offender's moral worth. Banishment and slavery each address the offender in a comprehensive capacity, as a citizen in the one case and a person in the other, and they each assert the desirability of erasing or eradicating her at the respective levels of abstraction. In doing so, both banishment and slavery proclaim the offender to be worthless or worse.<sup>34</sup>

I have so far made the point in the idiom of value, but the same point can be made in the language of rights, providing a further link to Eighth Amendment jurisprudence. Not only do both banishment and slavery strip offenders of their rights, but, to quote Chief Justice Warren in regard to banishment, they also strip them of their "right to have rights."<sup>35</sup> This expression, originally introduced by Hannah Arendt,<sup>36</sup> is meant to draw attention to an aspect of banishment, and correlatively, of slavery, that is supposedly decisive in explaining why these penalties violate the Eighth Amendment. But though suggestive, the expression is obscure. What is this putative "second order" right Arendt and Warren invoke? And what difference does denying it make compared to simply withdrawing the offender's "first order" rights? Warren himself does not elaborate, but Arendt's position, though less than crystal clear, offers

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<sup>34</sup> For a characterization of banishment (expatriation) along similar lines see Justice Brennan's statement that this form of punishment "necessarily involves a denial by society of the individual's existence as a member of the human community." *Furman*, 408 U.S. at 273-74. See also Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1494-98 (1986). There is of course a widely discussed question of whether globalization has eroded this conception of citizenship, and, correlatively, the extent to which banishment retains the significance it may have once had. For a recent installment in this discussion, see Patrick Sykes, *Denaturalisation and Conceptions of Citizenship in the 'War on Terror'*, 20 CITIZENSHIP STUD. 749 (2016). It should be clear that nothing in my argument depends on how this issue is resolved. My point is that a certain *ideal* of citizenship is associated with a moral objection to banishment on grounds of human dignity. Irrespective of whether this ideal is still valid (and, for that matter, ever was), the association between this ideal conception of citizenship and the immorality of banishment is instructive as to why the death penalty violates human dignity along the lines discussed in the text.

<sup>35</sup> *Trop*, 356 U.S. at 102. See also *Perez v. Brownell*, 356 U.S. 44, 64 (1958).

<sup>36</sup> Hannah Arendt, *The Rights of Man: What are They?* 3 MOD. REV. 24 (1949); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296, 298 (1976).

enough of a clue, which can be applied to Warren's use of this expression as well.<sup>37</sup>

Arendt introduces the "right to have rights" mostly in connection with revocation of citizenship and the plight of the stateless. But the gist of her position, especially as it bears on our present concerns, can be best conveyed in terms of our discussion of the hypothetical "lucky" slave.<sup>38</sup> I maintained that being treated humanely by a master would not morally rectify the enslavement. Why? If the slave's level of welfare and range of choices were to match those of some non-slaves, where does the infamy lie? It is natural to answer this question by pointing out that the non-slave's advantages, such as they are, are grounded in some rights, whereas the slave's are not. But in considering this difference, we must tread carefully. A likely construal of this difference would highlight its practical side: the slave's options appear precarious since they can be withdrawn at any time at the master's whim, whereas those of the non-slave are secure. This, however, need not be the case. We can imagine a master whose firm, perhaps obsessive character makes it all but impossible for her to depart from her relatively benign attitude toward her slaves, whereas a regime of rights may be feebly enforced and the rights easily infringed. Evidently, rights have a significance that goes beyond the practical advantages and protections they are designed to provide. What rights have in common, as rights, and independently of their content, is the recognition of their possessor as a *right-holder* and so as a denizen of the normative domain. Correspondingly, by stripping slaves of rights, slavery goes beyond affecting their life-conditions; it also seeks to annihilate their status as persons and repudiate any moral value that attaches to them. This explains why two patterns of welfare, a slave's and a non-slave's, may be identical and yet have a fundamentally different moral significance. However, the explanation seems to rest on the presence or absence of the totality of one's "first order" rights; why posit an additional meta-right "to have rights" as Arendt and Warren do? Isn't such a putative right redundant and idle?

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<sup>37</sup> Arendt's use of this expression prompted a lively discussion. See, e.g., Frank Michelman, *Parsing 'A Right to Have Rights'*, 3 CONSTELLATIONS 200 (1996); SEYLA BENHABIB, *THE RELUCTANT MODERNISM OF HANNAH ARENDT* (1996); Christoph Menke, *The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument*, 74 SOC. RES. 739 (2007); Natalie Oman, *Hannah Arendt's "Right to Have Rights": A Philosophical Context for Human Security*, 9 J. HUM. RTS. 279 (2010).

<sup>38</sup> Arendt too discusses slavery in this context, but this is not her main concern. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 297 (1976).

One way to see the motivation for this extra step is by simply noting the multiplicity of first order rights. Each such right supposedly represents some weighty concern (otherwise it would not have been granted in the first place), and so withdrawing it must be supported by an equally weighty reason. Such a reason may indeed exist, and so lead to the withdrawal of each one of a person's rights. But although a piecemeal process of eliminating a person's rights may eventually result in abrogating all of them, this process does not quite add up to denying the right-holder's normative standing. The gap between withdrawing rights in the aggregate and withdrawing a single meta-right can be seen when we imagine what a process of piecemeal withdrawal of specific rights would look like. There are two possibilities, and neither is the equivalent of withdrawing a single meta-right. One possibility is that cancelling rights piecemeal would be understood as moving their holder on a sliding scale of "relative" or pro tanto enslavement. But slavery is a binary, yes-or-no, concept; one cannot be partially enslaved. The alternative option is that enslavement occurs only when the last right is sequentially removed, and so no rights remain. But this implies the absurdity that whether one is a slave (or, in the case of banishment, is still a citizen) depends on whether one retains a single right, no matter how trivial. To get to the special affront signified by abrogating someone's rights (by banishment or enslavement), it appears that the rights must be abrogated in their totality, in one fell swoop, as it were. But as long as we conceive of rights as discrete, each representing a different interest or concern, abrogating them all would appear to be an entirely arbitrary act. For an act of repealing all one's rights to make sense, these rights must be unified in some manner; they must form a coherent totality or be anchored in one, so that this common denominator or basis would form the target at which the aggregate withdrawal of all one's "first order" rights could coherently aim.

Though this explains the motivation for introducing a singular, unifying term of the kind suggested by Arendt and espoused by Warren, the expression they use feels ad hoc and obscure; we don't have a clear notion of where this putative right comes from or what it comes down to. Arendt does point out a way out of this quandary by equating "the right to have rights" to a concern for human dignity. We can retain the gist of her position by tying it to our preceding discussion. As I have argued, *citizen* (in connection with banishment), and *person* (in connection with slavery), each designate at their respective levels of abstraction a human being, connoting the normative valence associated with humanity. And

this valence of “humanity,” its moral worth, is what undergirds all human rights. In short, by “a right to have rights,” Arendt, and subsequently Warren, allude to dignity by another, and less perspicuous, name.<sup>39</sup> The same line of reasoning, which discredits punishment by banishment and slavery, applies to the death penalty as well. Like these other penalties, the death penalty addresses the offender in a comprehensive manner, as an individual in this case, emphatically conveying the desirability of annihilating him. This amounts in all three cases to a denial of a human being’s worth.<sup>40</sup>

One final argumentative goal remains to be met. It concerns Justice Frankfurter’s earlier mentioned complaint, that abolishing punishment by banishment (and, one might add, by slavery) while upholding the death penalty, renders American “constitutional dialectic . . . empty of reason.”<sup>41</sup> Disagreements among judges, as among philosophers, are of course common, but for the most part, opponents can see each other’s point. So there is something startling about the way Frankfurter dismisses the opposing view. However, the interest in his observation goes beyond the etiquette or the politics of judicial style, and reaches to the merits of the issue at hand. Frankfurter blames the vacuity of “constitutional dialectic” in this case on the judgment that “loss of citizenship is a fate worse than death.”<sup>42</sup> Such a judgment would indeed be odd, and incorporating it into one’s constitutional stance, strikingly incongruous. I have argued, however, that no such judgment need underlie abolishing banishment (and slavery) while retaining the death penalty. As we have seen, Frankfurter’s observation implicitly draws on a view of the Eighth Amendment according to which all penalties must be ranked on a unitary scale of severity. But outlawing banishment and slavery (as well as other aspects of Eighth Amendment jurisprudence I have mentioned) is not well explained by such a scale. I have advocated instead transposing the assessment of these penalties from the register of

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<sup>39</sup> Cf. Kleinfeld, *supra* note 30, at 1004 (“‘dignity’ is the name Europe gives for the quality in virtue of which human beings have rights”). But especially since the American Supreme Court interprets the Eighth Amendment in terms of human dignity, I don’t quite see the appeal of containing this idea along geographic lines. Arendt herself is skeptical regarding the prospects of grounding human rights in “abstract” universal humanity, and at any rate, her take on dignity is different from the one I outline here. But this is not the place to get any further into these issues.

<sup>40</sup> The points raised here echo themes eloquently expressed in Justice Brennan’s opinion in *Furman*, 408 U.S. at 290-92.

<sup>41</sup> *Trop*, 356 U.S. at 125 (Frankfurter, J., dissenting).

<sup>42</sup> *Id.*

welfare or experience to the register of meaning. In this register, the moral equivalence between the death penalty on the one hand and banishment and slavery on the other becomes less visible, and the inconsistency between upholding the one while invalidating the others easier to miss.

The three penalties we consider – death, banishment, and slavery – all share the same morally decisive failing: they proclaim the offender’s worthlessness by deeming the obliteration of the offender, respectively as an individual, a citizen, and as a person, to be a desirable thing. This is their shared invidious meaning. But there is a difference nonetheless. Citizenship and personhood are entirely constituted by meanings and norms; they do not designate natural phenomena. Correspondingly, banishment and slavery, the respective negations of citizenship and personhood, manifestly operate on the same plane. And so these penalties’ invidious meaning is particularly salient. Not so in the case of capital punishment. Somewhat paradoxically perhaps, it is because death is such an immense and yet naturally common deprivation, a total termination of all experience and welfare, that applying to it the experiential scale of assessment seems particularly compelling, eclipsing the dimension of meanings, values, and rights. To talk about death as a matter of ceasing to be a site of meanings, or to be deemed lacking in value, or be forever stripped of all rights, sounds like a euphemism. When death is compared to banishment and slavery in the dimension of harshness, retaining the first while prohibiting the two others is indeed absurd. Not so when we compare them in the dimension of meaning. The inconsistency remains blatant but is not equally conspicuous. Its persistence does not attest to a complete “emptiness of reason;” only to ordinary myopia, and perhaps some bad faith.