

**THERAPEUTIC JURISPRUDENCE, THE DEATH PENALTY,  
AND THE SIGNIFICANCE OF LIFE**<sup>1</sup>

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Therapeutic jurisprudence is a vast international movement of legal scholars and practitioners aspiring to use law as a therapeutic agent.<sup>3</sup> To accomplish this goal, therapeutic jurisprudence focuses on those many aspects of the life of the law that enhance and promote the well-being, as well as the physical and mental health of its participants. Therapeutic jurisprudence also concentrates on detecting the antitherapeutic effects of certain legal norms and institutions in order to expose them and to eventually eliminate or neutralize them through both preventive and reformative action.

The notion of human dignity figures prominently at the center of this therapeutic venture, demanding a minimum of respect for the humanity of defendants caught in the machinery of the criminal justice system and with the view to their successful return to society, however difficult such reintegration may be.<sup>4</sup>

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<sup>3</sup> Bruce J. Winick defines therapeutic jurisprudence as the study of law’s healing potential. Bruce J. Winick, Applying the Law Therapeutically in Domestic Violence Cases, 69 UMKC L. REV 33, 33 (2000). On the basic meaning of therapeutic jurisprudence, see Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY 645, 646 (David B. Wexler & Bruce J. Winick eds., 1996).

<sup>4</sup> Javier Llobet Rodríguez, DERECHOS HUMANOS Y JUSTICIA PENAL 45 (Heredia: Poder Judicial, Depto. De Artes Gráficas, 2007) explains how the dignity of human being is the principle around which all human rights turn. Stephen J. Wermiel in *Law and Human Dignity: The Judicial Soul of Justice Brennan* indicated that “[t]he concept of human dignity has emerged in the United States in recent decades as an important theoretical and sometimes practical source of individual rights and liberties”, 7*Wm. & Mary Bill of Rts. J.* 223 (1998). This notion, associated with self-respect and autonomy, is also contained in art. 1 of the 1948 Universal Declaration of Human Rights and in the Preamble to the United Nations

Therapeutic jurisprudence has abstained from a clear-cut definition of the term therapeutic, allowing it to encompass a variety of legal areas in which the law can promote the well-being of its subjects.<sup>5</sup> This overriding concern implies an affirmation of the value of human life. True, criminal punishment is supposed to affect to a certain degree the well-being and autonomy of the criminal offender as a member of society. This is carried out, however, in a manner consistent with the human dignity of the criminal offender and pursuing constructive social goals. None of these requirements are met in the execution of the death penalty.

While it is possible to serve a term of imprisonment in a dignified way, the execution of the death penalty suppresses the very existence of the noun in the expression “human dignity.” The Hungarian Constitutional Court in its 1990 decision declaring the unconstitutionality of capital punishment, held that on the basis of the Hungarian Constitution, “human life and human dignity formed an inseparable unity, having a greater value than other rights,” and thus being an absolute limitation to the criminal power of the State, which has “a primary responsibility to respect and protect.”<sup>6</sup> The concurring opinion of the Hungarian Constitutional Court Judges Dr. Tamás Lábady and Dr. Ödön Tersztyánszky expressed, “human dignity is the elevating quality of our human existence and value: it is worthy of an unconditional respect, the honor of our human essence. It is an *a priori* value in the same way that life is, and it expresses the human dimension of life. Being a human and human dignity are inseparable from one another. Both are inalienable, immanent, essential properties of man. To be worthy of life means to be worthy of being a human person, and that is why human life and human dignity may in fact not be handled separately.”<sup>7</sup>

Furthermore, the goal of the death penalty is purely negative and does not improve either society or the individual.<sup>8</sup> The death penalty is the antitherapeutic legal institution *par excellence*. It forecloses any therapeutic

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Charter. Art. 1 of the German Constitution states that “[t]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority”. Further, Markus Dirk Dubber, in *Toward a Constitutional Law of Crime and Punishment*, has pointed out that the basic concept underlying the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishment is nothing less than the dignity of man, 55 *Hastings L.J.* 2004, 509, 514.

<sup>5</sup> David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY* 811, 812 (David B. Wexler & Bruce J. Winick eds., 1996).

<sup>6</sup> *Decision No. 23/1990: 31 October 1990 on Capital Punishment*, in *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* 118 (László Sólyom and Georg Brunner, eds., The University of Michigan Press, 2000).

<sup>7</sup> *Id.* at 124

<sup>8</sup> Regarding the false claims of beneficial effects on society, see chapter IV B. on page 689 and following of this article.

communication and excludes its subjects as enemies to be put to death,<sup>9</sup> irrespective of their human predicament, without any deep reflection of the philosophical, religious, moral and psychological implications of cutting another human being's life short.

Cesare Beccaria formulated in 1764 for the first time the principles of modern criminal punishment in his book *On Crimes and Punishments*.<sup>10</sup> His legal and political philosophy was animated by a double concern, the respect for human dignity and the pursuit of the "good life,"<sup>11</sup> which could be translated in therapeutic jurisprudential terms as "well-being." These reasons, again very close to the basic ideas of therapeutic jurisprudence, led him to revolt against the death penalty because he considered it useless, absurd and illegitimate (contrary to the social contract).<sup>12</sup> Moreover, when dealing with capital punishment, Beccaria expressed that "If the passions or the necessities of war have taught us how to shed human blood, the laws, which moderate the conduct of men, should not augment that cruel example, which is all the more baleful when a legal killing is applied with deliberation and formality."<sup>13</sup>

The death penalty's antitherapeutic nature becomes especially evident when physicians take part in the executions. Leading medical associations agree that their participation in the actual execution of the death penalty is against medical ethics. The American Medical Association, for instance, has introduced policies designed to discourage doctors from participating in executions. Other examples include Amnesty International and the World Medical Association. The American College of Physicians, together with Human Rights Watch, the National Coalition to Abolition the Death Penalty, and Physicians for Human Rights, has published a thorough report explaining the importance of the ethical prohibition against physician involvement in executions.<sup>14</sup>

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<sup>9</sup> Manuel Cancio Meliá, *Pena de Muerte: Paroxismo del "derecho penal" del enemigo*, in ANUARIO DE DERECHO PENAL 2007: PENA DE MUERTE Y POLÍTICA CRIMINAL (2007).

<sup>10</sup> CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (University of Toronto Press 2008) (1764).

<sup>11</sup> Alvaro Pires, *Beccaria, l'utilitarisme et la rationalité pénale moderne*, in HISTOIRE DES SAVOIRS SUR LE CRIME ET LA PEINE. TOME II : LA RATIONALITE PENALE ET LA NAISSANCE DE LA CRIMINOLOGIE 83-143 (Christian Debuyst, Françoise Digneffe, Jean Michel Labadie et Alvaro Pires, eds., Les Presses de l'Université de Montréal, Les Presses de l'Université d'Ottawa, De Boeck Université 1998).

<sup>12</sup> *Id.* at 25.

<sup>13</sup> BECCARIA, *supra* note 126, at 55

<sup>14</sup> BREATH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES (The American College of Physicians; Human Rights Watch; National Coalition to Abolish the Death Penalty; Physicians for Human Rights 1994).

This paper will contrast the destructive nature of the death penalty with a therapeutic orientation in the field of criminal punishment. Furthermore, it will refute all therapeutic claims from capital punishment partisans.

### I. Irreparable elimination of life versus therapeutic approach in criminal sentencing

The final and irreparable nature of imposed death contrasts with the flexibility, creativity, and life enhancing nature of a therapeutic approach in criminal sentencing. This contrast is even sharper if one considers that the rigid decision imposing the death penalty may constitute an irreparable mistake. Given that human fallibility is an unavoidable fact, it is not possible to assume with absolute certainty that the death penalty is the result of a fair and just criminal process. In this respect Victor Hugo affirmed, “an irreparable penalty presupposes an infallible jury.”<sup>15</sup> The new developments in DNA evidence have amply demonstrated the ever-present possibility of judicial error in this matter. When the South African Constitutional Court decided about the unconstitutionality of the death penalty in 1995, it expressed: “a level of arbitrariness and the possibility of mistake that might be inescapable, and therefore tolerable in relation to other forms of punishment, burst the parameters of constitutionality when they impact on the deliberate taking of life.”<sup>16</sup>

In addition to fallibility, arbitrariness and proneness to abuse are also part of human nature. One cannot therefore presume a fair and just criminal process. Furthermore, such a presumption would become irrevocable after the death of the criminal defendant.

### II. The death penalty contravenes the therapeutic mandate of Hippocrates

The Hippocratic principle of first doing no harm<sup>17</sup> is not fully applicable in a punitive situation because legal punishment is supposed to cause some kind of harm. However, a corollary of this principle is to cause the least possible harm, which would be equivalent to applying the least intrusive or the least invasive treatment when there are others available. This idea constitutes the core of modern enlightened criminal law initiated by Cesare Beccaria and is

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<sup>15</sup> Cited by M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 621 (Oxford University Press 5<sup>th</sup> ed. 2007).

<sup>16</sup> S. Makwanyane and Another, 1995 (3) SA 391, 511.

<sup>17</sup> STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE 143-144 (University Press 2004).

generally known as the principle of *ultima ratio* or of minimal intervention.<sup>18</sup> On this basis, Hugo Bedau concludes that the death penalty ought to be eliminated.<sup>19</sup>

The death penalty is the most harmful punishment, socially and individually. From a social viewpoint, it transforms countries which allow it into societies of executioners creating a flawed model for future behavior and acknowledging failure to use methods different from the ones employed by the worst criminals. From an individual viewpoint, except in cases of euthanasia, causing the involuntary death of another is not anymore humane than torture. First, even though in itself the act of executing the death penalty may apparently be painless in certain cases<sup>20</sup>, the mere expectation of being deprived of one's life is normally extremely painful and inhumane. Part of this inhumanity is the absolute denial of redemption or rehabilitation with all its anti-therapeutic connotations. The family and friends of the convicted also experience considerable more pain than with other forms of punishment because the death penalty eliminates all hope.

The death penalty also differs from the suffering experienced in other forms of punishment by its sharp contrast between the executioner's absolute powers and the condemned's total passivity.<sup>21</sup> Being completely at the mercy of their executor is a key characteristic of torture victims,<sup>22</sup> which has been totally eliminated from the catalogue of punishments in democratic legal systems, as well as in human rights international conventions. The self becomes "not a locus of activity, but rather a point of pure passivity, a vanishing point defined by the direction of the outside forces that have taken on what had been his active powers." <sup>23</sup> This also makes evident that torture is inherent in the death penalty.

The need to look for a less invasive alternative has led a majority of countries to abandon the death penalty to the point that by December of 2007 there were 91 completely abolitionist countries in the world while another 10 countries had abolished the death penalty only for ordinary

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<sup>18</sup> JAVIER LLOBET RODRIQUEZ, CESARE BECCARIA Y EL DERECHO PENAL DE HOY 170 (Editorial Jurídica Continental 2d ed. 2005).

<sup>19</sup> HUGO ADAM BEDAU & PAUL G. CASSELL, DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT 32 (Oxford University Press, 2004).

<sup>20</sup> About the dubious medicalization of the death penalty through the lethal injection see Deborah W. Denno, The Lethal Injection Quandary: How medicine has dismantled the death penalty, 76 Fordham L. Rev. 1 (2007).

<sup>21</sup> HUGO BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 124 (Northeastern University Press 1987).

<sup>22</sup> David Sussman, Defining Torture, 37 Case W. Res. J. Int'l L. 225.

<sup>23</sup> Id. at 229.

crimes. On the other hand, 44 countries that retain the death penalty in law may be regarded as abolitionists *de facto* on the grounds that no executions have been carried out for at least 10 years or an official moratorium was in place on December 31, 2007. There are only 51 actively retentionist countries.<sup>24</sup>

The European Court of Human Rights in the *Soering* case<sup>25</sup> considered that the long exposure to the death row in Virginia amounted to a violation of Article 3 of the European Convention of Human Rights, which prohibits torture and other inhumane or degrading treatment.<sup>26</sup> Moreover, it is not necessary to spend a long term in death row to consider the death penalty inhuman and degrading. That is why the death penalty *per se* has been declared unconstitutional in the Republic of South Africa<sup>27</sup> and in Hungary. The decision of the Hungarian Constitutional Court was preceded by an opinion of the Minister of Justice considering capital punishment to be unnecessary and inhuman and not justifiable on morals or utilitarian grounds. A crucial part of the decision was finding that right to human life and human dignity are core human rights that form an indivisible whole. The decision of the South African Constitutional Court was based on the circumstance that the death penalty puts an end not only to the right to life itself but also to other personal rights. Another basic argument was the cruelty of the death row expectations. It was important for the decision that the South African constitution recognizes an unqualified right to life. This type of express provision was not considered necessary by the concurring opinion of Judge De Meyer in the *Soering* case, who pointed out that capital punishment “does not reflect the contemporary situation and is now overridden by the development of legal conscience and practice.”<sup>28</sup> The totality of the European countries has adhered to protocol 6 of the European Convention of Human Rights, which contains an absolute prohibition of the death penalty.<sup>29</sup> Protocol 13 to the Convention took the

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<sup>24</sup> This list was obtained from ROGER HOOD & CAROLYNE HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 404-413 (Oxford University Press 2008).

<sup>25</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H. R. (ser. A) (1989).

<sup>26</sup> In Italy where Article 27 of the Constitution prohibits the death penalty, the Constitutional Court decided that the clause of the extradition treaty between the United States and Italy, giving the Minister of Justice discretionary power to decide on the basis of assurances given by the requesting state, was unconstitutional (*Gazzetta Ufficiale, Prima Serie Speciale [Official Gazzette]*, 27, 03.07.1996 / h) Codices (Italian)).

<sup>27</sup> S. Makwanyane and Another, 1995 (3) SA 391.

<sup>28</sup> Judge De Meyer alludes to international human rights conventions that “clearly reflect the evolution of legal conscience and practice towards the universal abolition of the death penalty.” *Soering*, 161 Eur. Ct. H. R. at 51.

<sup>29</sup> All member states of the Council of Europe have signed and ratified Protocol 6, with the exception of Russia who has signed but not yet ratified.

final step: abolishing the death penalty under all circumstances without the possibility of reservation from the parties to the Protocol. In addition, the Lithuanian Constitutional Court, like the European Court of Human Rights, “has deemed the death penalty to be a form of inhuman and degrading treatment.”<sup>30</sup> Similarly, both the Lithuanian and Albanian Constitutional Courts have decided against the constitutionality of legislation that permitted the death penalty because it represents an affront to human dignity. The Ukrainian Constitutional Court has added the possibility of judicial error to the argument based on the principle of human dignity.<sup>31</sup>

Although as a general proposition the death penalty has not been totally banished from major international human rights instruments, it is important to point out that these are living instruments which must be interpreted in the light of present day conditions. In the case of Article 3 of the European Convention of Human Rights, the European Court of Human Rights recognized that it “cannot but be influenced by the development of commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”<sup>32</sup> In Western Europe, for example, there is a virtual consensus that the death penalty is, under current circumstances, no longer consistent with regional standards of justice.

Judge Trechsel’s dissenting opinion in the *Soering* decision sharply identified the inhuman nature and thus antitherapeutic essence of the death penalty with the following words: “It may seem surprising that the Convention prohibits inhuman and degrading treatment but permits capital punishment which may be regarded as a clear example of such treatment.”<sup>33</sup>

### III. The therapeutic value of fairness in sentencing is incompatible with the death penalty

#### A. Fairness and uncertainty in the death penalty

Fairness in sentencing tends to reduce individual and social conflict and contributes to the awakening of a sense of social responsibility in the criminal offender. A fair sentence is therefore a therapeutic sentence. A fair sentence favors the process of reconciliation between the lawbreaker and the

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<sup>30</sup> BERTRAND MATHIEU, *THE RIGHT TO LIFE* 55 (Council of Europe 2006).

<sup>31</sup> *Id.* at 55. See also PATRICK CAPPS, *HUMAN DIGNITY AND THE FOUNDATION OF INTERNATIONAL LAW* 106 (Hart Publishing 2009).

<sup>32</sup> *Soering*, 161 Eur. Ct. H. R. at 40.

<sup>33</sup> *Id.* at 75.

community, while an unfair sentence is bound to generate antisocial reactions.<sup>34</sup>

The death penalty's uncertainty makes it intrinsically unfair. We do not know "what dreams may come, when we have shuffled off this mortal coil."<sup>35</sup> We cannot understand the real extent of the death penalty because it includes an element of great uncertainty, a premature passage to the "undiscovered country from whose bounds no traveler returns."<sup>36</sup> The full consequences of killing a human being, both for the killer and for the killed, remain a mystery. The basic principle of modern democratic justice is **nullum crimen, nulla poena, sine lege**, that is no crime and no punishment without a previous law. This principle has developed to the point of prohibiting not only *ex post facto* punishments, but also those that are uncertain and indeterminate. The ignorance of what lies beyond death makes the death penalty absolutely uncertain and therefore antitherapeutic.

#### B. Fairness and proportionality in the death penalty

The antitherapeutic unfairness of the death penalty is not diminished by the need to impose extreme punitive responses to acts of extreme criminality. The existence of life imprisonment as ultimate penalty accomplishes this function and makes the atrocity involved in the deliberate killing of other human beings unnecessary. The very idea of imprisonment was introduced by the Quakers of Pennsylvania as a reaction against gruesome corporal punishment and the widespread use of the death penalty for a great majority of offenses.<sup>37</sup>

Homicide does not require necessarily the death penalty as a fair punitive response. Proportionality in sentencing does not mean direct equivalence between the punishment and the crime, such as in the absurd examples of raping the rapist or stealing from the thief. Imprisonment presents a whole gamut of functional equivalents to the magnitude of the crime in order to justly compensate the offender's culpability. The South African decision about the unconstitutionality of the death penalty expressed that "the right to life is not subject to incremental invasion. Life cannot be diminished for an hour, or a day, or 'for life.' While its enjoyment can be qualified, its existence cannot. Death is totally irreversible. Just as there are no degrees of life, so there are no degrees of death."<sup>38</sup> Albert Camus also underscored that

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<sup>34</sup> EDGARDO ROTMAN, *BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS* 15 (Greenwood Press, Inc. 1990).

<sup>35</sup> *Hamlet*, Act III, sc. I.

<sup>36</sup> *Idem*.

<sup>37</sup> Rotman, *supra* note 150 at 33.

<sup>38</sup> S. Makwanyane and Another, 1995 (3) SA 391, 511.

death has no degrees or probabilities, and that both culpability and the body of the executed enter into a definitive rigidity.<sup>39</sup>

Furthermore, given the nature of international crimes such as war crimes, genocide and crimes against humanity, Robert Sloan indicates that proportionality based on the *lex talionis* principle “would apparently require punishments that contemporary human rights law prohibits.”<sup>40</sup> He consequently indicates that since no punishment from a crude talionic perspective can fit serious human rights atrocities, justice only demands that more serious crimes should receive stronger disapproval than the less serious ones.<sup>41</sup>

Indeed, in the field of international criminal law no punishment can fit the most horrendous international crimes such as slaughter of innocent civilians, systematic rape and genocide. Again, Sloane points out that for purposes of proportionality, the gravity of the harm seldom offers “a particularly helpful metric” as opposed to the individual circumstances of the convicted person.<sup>42</sup>

Leon Shaskolsky Sheleff has raised the issue of whether there is a certain class of extreme acts that demand capital punishment in the name of the very principle of the sanctity of life that is generally invoked to abolish it. He gives the example of the war criminals convicted during the Nuremberg trials, where he thinks the principle of proportionality should lead to the most severe penalty, which could not be conceived as less than death.<sup>43</sup> These ideas have changed through time, however.

The criminalization of the core international crimes brought about a change of paradigm, a moral revolution in which the value of human life and dignity was placed above ideas and ideologies that justified mass murder and other atrocities. The existing impunity of major atrocities such as crimes against humanity, genocide and war crimes ended with the Nuremberg trials and through the evolution of global justice that led to the creation of the International Criminal Court. This evolution culminated with a total rejection of the death penalty, even for the worst offenders, setting up an

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<sup>39</sup> ALBERT CAMUS in REFLEXIONS SUR LA GUILLOTINE 25 (Editions Gallimard 2002) (1957)

<sup>40</sup> Robert Sloane, The Expressive Capacity of International Punishment, 43 Stan. J. Int'l L. 53 (2007).

<sup>41</sup> Id.

<sup>42</sup> Id. at 52.

<sup>43</sup> LEON SHASKOLSKY SHELEFF, ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT, PHYSICAL TORTURE 16-17 (The Ohio State University Press 1987).

influential standard of civilized punishment that may eventually persuade countries that still maintain the death penalty to abolish it.<sup>44</sup>

IV. Rebuttal of the therapeutic effect of the death penalty

A. The death penalty does not save lives.

Those who affirm the deterrent effect of the death penalty attempt to justify the death penalty as a lifesaving mechanism supposedly therapeutic. The deterrent effects of capital punishment are, however, very flimsy and uncertain. There is a classic example of the non-deterrent nature of the death penalty: the pickpockets were more active than ever in the crowds watching the public execution of convicted pickpockets.<sup>45</sup>

Beccaria from a utilitarian viewpoint considered that permanent penal servitude was much more deterrent than the death penalty.<sup>46</sup>

Jack P. Gibbs, prominent expert in the field of deterrence, concluded in 1981 that there was no compelling evidence to prove or disprove the effects of general deterrence; and Elliot Curry referred to recent research pointing at informal sanctions as more deterrent than formal ones.<sup>47</sup> Hans Göran Franck, in agreement with other long-time experts in the field, notes that most murderers generally do not retain the ability to think rationally at the time of their crimes, and those who carry out well-planned premeditated murders usually believe that they have a chance of getting away with it. Regarding fanatics, political and ideological murderers, they are even less likely to be deterred by the risk of the death penalty. Franck cites a United Nations research group concluding that the death penalty did not have a deterrent effect on drug traffickers.<sup>48</sup> Neither the preventive effectiveness of

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<sup>44</sup> Edgardo Rotman, *The Influence of International Criminal Law on the Advancement of Prisoners' Rights*, in J.P. TAK & M. JENDLY, PRISON POLICY AND PRISONERS' RIGHTS 131-137 (Wolf Legal Publishers: Nijmegen, The Netherlands, 2008)

<sup>45</sup> Albert Camus refers to a book by Koestler that mentions that at the time in which thieves were executed in England, other thieves exercised their talents within the crowd that surrounded the scaffold. See CAMUS, *supra* note 155, at 20.

<sup>46</sup> BECCARIA, *supra* note 126, at 53.

<sup>47</sup> ELLIOT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 57-58 (Pantheon, 1985). See also EDGARDO ROTMAN, LEGAL ASPECTS OF CRIME PREVENTION 33-34 (International Penal and Penitentiary Foundation 1998).

<sup>48</sup> HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY 30 (Kluwer Law International 2003).

the death penalty regarding terrorist crimes has been challenged by empirical research in Europe.<sup>49</sup>

In January 2005, Jeffrey Fagan, Professor of Law and Public Health at Columbia Law School, a specialist in econometrics and statistics, testified during hearings on the “Future of Capital Punishment in the State of New York” that studies claiming that executions reduce murders are “fraught with technical and conceptual errors: inappropriate measures of statistical analysis, failures to consider all the relevant factors that drive murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, and the absence of any direct test of deterrence.”<sup>50</sup> In a scientific report sponsored by the United States Department of Justice in December 2006, the researchers concluded, “that there is little empirical evidence in favor of the deterrence hypothesis.”<sup>51</sup> In 1988, another report sponsored by the United Nations found no scientific evidence that the death penalty had a higher deterrent effect than lifetime prison.<sup>52</sup> Other studies show that the use of capital punishment has contributed to a rise in crime, attributing this increase to a “brutalization effect,” similar to that triggered by other violent events.<sup>53</sup> One of the greatest criminologists and jurists of all time, Luis Jiménez de Asúa, relying on Freud’s psychoanalytical theories, explained that often feelings of guilt impel murderers who execute their crimes with a subconscious hope of receiving the death penalty.<sup>54</sup>

#### B. The death penalty does not reinforce social bonds

It is necessary here to address false claims related to Durkheim’s theory that the death penalty would supposedly have therapeutic effects on society by reinforcing social bonds.<sup>55</sup> Durkheim’s theory of punishment is based on the idea of a collective or common conscience, that is, on the sum of beliefs and

<sup>49</sup> See studies quoted by Meliá, *supra* note 125, at 77. Meliá cites Ugaz Sanchez Moreno’s assertions that the total lack of relation between the existence of the death penalty and the reduction of crime is the only scientifically and universally demonstrated fact.

<sup>50</sup> Deterrence and the Death Penalty: A Critical Review of New Evidence: Hearings on the Future of Capital Punishment in the State of New York Testimony to the New York State Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction, (January 21, 2005) (statement of Jeffrey Fagan, Colum. L. Sch.).

<sup>51</sup> Ethan Cohen-Cole et al., *Reevaluating the Deterrent Effect of Capital Punishment: Model and Date Uncertainty*, in U.S. DEPARTMENT OF JUSTICE, Award No. 2005-IJ-CX-0020.

<sup>52</sup> HANS GÖRAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 33 (Kluwer Law International 2003).

<sup>53</sup> *Id.* at 33.

<sup>54</sup> JIMÉNEZ DE ASÚA, *PSICOANÁLISIS CRIMINAL* 240 (Ediciones Depalma 6th ed. 1982).

<sup>55</sup> Mariangela Travagliati, *Èmile Durkheim e la pena de morte*, in *STUDI DI SOCIOLOGIA* (Sept. – Dec. 2002).

feelings held in common by a social group.<sup>56</sup> According to this theory, the function of punishment is not only to vindicate the collective conscience injured by the criminal offense, but also to reaffirm the social bonds and feelings of those who have not transgressed social normative codes.<sup>57</sup> The death penalty would thus be explained by the need to maintain social cohesion. From this proposition, it is possible to draw a false claim that the death penalty is in a social sense therapeutic. The death penalty, in this view, symbolically asserts social values and communicates them emphatically to social actors who have not committed crimes.<sup>58</sup> This argument relies on Durkheim's idea that "anything that offends or violates the common conscience threatens the solidarity - the very existence - of society,"<sup>59</sup> and his conclusion that punishment serves to restore and reconstitute social unity.<sup>60</sup>

State imposed cohesion through the imposition of the death penalty would make sense, however, only in primitive forms of society, based on the Durkheimian category of "mechanical solidarity." In these societies individual freedom is suppressed by homogeneous collective thought, that is as Suzanne Keller puts it: "an externally mediated and orchestrated cohesion leading to a collective like-mindedness and lack of individuation."<sup>61</sup> This is also true for authoritarian societies, in which the individual is trampled for the sake of a political or religious ideology, and where the fear to be executed is the key factor to compel cohesion. On the contrary, in more evolved and complex forms of society which allow more individual freedom, reflecting what Durkheim calls "organic solidarity," social cohesion is based on a sense of personal attachment and reciprocal obligations<sup>62</sup> rather than on forced compliance or the reassurance obtained from the symbolic imposition of capital punishment.

We should therefore distinguish between a genuine togetherness, what Ferdinand Tonnies characterized as "natural cohesion and empathic social bonds,"<sup>63</sup> from the coercive and artificial imposition of order through the widespread imposition of the death penalty. Before affirming that unpunished crime breaches the social codes, we must question the

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<sup>56</sup> EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 96 (The Free Press 1964)

<sup>57</sup> Travagliati, *supra* note 171, at 463.

<sup>58</sup> *Id.* at 465.

<sup>59</sup> IRVING M. ZEITLIN, *IDEOLOGY AND THE DEVELOPMENT OF SOCIOLOGICAL THEORY* 264 (Prentice-Hall 4<sup>th</sup> ed. 1990).

<sup>60</sup> *Id.*

<sup>61</sup> SUZANNE KELLER, *COMMUNITY: PURSUING THE DREAM, LIVING THE REALITY* 43 (Princeton University Press 2003).

<sup>62</sup> *Id.* at 43.

<sup>63</sup> *Id.* at 44.

underlying assumption of a real social cohesion. In fact, we find a prevailing lack of togetherness in today's societies. Crime, therefore, does not destroy an inexistent social cohesion, but it is often the result of the absence of a sense of togetherness. Crime as a consequence of lack of togetherness is related to a process of general dissolution of old normative codes in many areas of human activities, which insinuates itself in the nineteenth century and gradually strengthened since then. The degree of social cohesion derived from the symbolic application of the death penalty is fragile and superficial, when not totally negligible. It is extremely dubious that the death penalty has any therapeutic effect either on individuals or on society as a whole.

In any event, it is questionable that the fleeting moments of solidarity against the perpetrators of horrendous crimes can in any way reinforce social bonds at a deeper level or have any therapeutic effect whatsoever over the individuals or the society as a whole.

C. The death penalty is not therapeutic for the victim's family

Criminal sanctions should be based on the degree of the culpability of the offender and not on its impact on the victim's family. The effects of the execution of the death penalty on the family of the victim have been analyzed in depth by Bruce Winick.<sup>64</sup> Winick explained that in the United States a capital sentence, far from giving closure to the family's grief and anger, typically marks the beginning of a lengthy process, in which family wounds continue to fester. It is true, as he underscores, that the murder of loved ones inevitably provokes shock, anguish, anger and depression. But this is not alleviated by the pre-trial process, the trial itself, and the penalty phase, which Winick characterizes as an unsatisfying appearance. The lengthy legal process reactivates the feelings of panic and anxiety that they experienced at the time of crime. Rather than putting an end to this unfortunate chapter in their lives, the capital process can prolong their nightmare indefinitely. If and when an execution actually occurs, it frequently does not bring the victim's survivors the relief they were seeking or put an end to the long ordeal. Winick concludes that it may actually be more therapeutic for the family if the case is not treated as a capital case.

The mother of a murdered daughter expressed: "When life without parole is imposed upon a convicted killer, it means that! There are no automatic appeals as in death penalty cases. There are no excessive costs and years of new trials and sentencing for the victim's family. It is over! And,

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<sup>64</sup> Bruce Winick, *Determining When Severe Mental Illness Should Disqualify a Defendant From Capital Punishment*, in MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE 45-78 (Robert Shopp et al. eds., 2009).

incarceration for life without parole is far less costly. ...For most of us, the word “closure” is offensive and inappropriate. For a family whose loved one has been taken from them without dignity, there is a giant hole in their lives that can never be filled. It is a false expectation to believe that State-sanctioned killing will fill that void.”<sup>65</sup> Another mother of a murdered daughter asks herself: “Is it appropriate for us to take a life in order to show value for another one? Must we continue to extend the circle of death and grief in order to say that murder...is simply a value that we cannot accept? ...Somewhere, sometime, the violence has to stop- and I am content to have it stop with me.”<sup>66</sup>

From a therapeutic viewpoint, the emotional and psychological well-being of surviving family members of homicide victims “is more likely to benefit in the long run through services and direct assistance for coping with their grief. There are more constructive ways of confronting grief than holding out hope that the loved one’s killer will be put to death by the State. In that vein, emphasis should be placed on policies and programs that constructively assist surviving family members in coping with the murder of a loved one.”<sup>67</sup>

#### V. The death penalty and the significance of life

The death penalty should be examined not only from the perspective of the executed but also from the standpoint of those legislators who adopt the death penalty and the judges who have to apply it. These representatives of state power, their constituencies who accept and promote the death penalty, as well as all the protagonists of the practice of the death penalty, unwittingly constitute a society of executioners. Such a momentous decision should give pause to deep reflection on the significance and meaning of life. Most religious traditions have postulated the sacredness or sanctity of human life.<sup>68</sup> Although this argument cannot be generalized because many do not

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<sup>65</sup> Stanley and Phyllis Rosebluth, *Accidental Death is Fate, Murder is Pure Evil*, in James R. Acker & David R Karp, WOUNDS THAT DO NOT BIND 124 (Carolina Academic Press 2006).

<sup>66</sup> Linda White, *A Tiger by the Tail: The Mother of a Murder Victim Grapples with the Death Penalty*, in James R. Acker & David R Karp, WOUNDS THAT DO NOT BIND 66 (Carolina Academic Press 2006).

<sup>67</sup> Charles S. Lanier and Beau Breslin, *Extinguishing the Victims’ Payne or Acquiescing to the “Demon of Error”: Confronting the Role of Victims in Capital Clemency Proceedings*, in James R. Acker & David R Karp, WOUNDS THAT DO NOT BIND 195 (Carolina Academic Press 2006).

<sup>68</sup> NGAIRE NAFFINE, LAW’S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON 102 (Hart Publishing 2009) affirms that with “the flourishing of the human rights movement in the second half of the twentieth century and the articulation of human rights in a variety of international documents, there has been a fortification of

share such religious views, it should nevertheless allow for sustained reflection about the enormity of the deliberate killing of human beings in cold-blood implied by the death penalty, and the extent to which the death penalty constitutes an acknowledgement of the failure of dialogue which is a basic trait of humanness. This inhumanity, present in many murderers, is shared by the judicial, administrative or legislative executioner. In this respect, Albert Camus said in 1957, “an execution is not simply death. It is just as different from the deprivation of life as a concentration camp is from prison. It adds to death a premeditated arrangement known to the future victim, a process that is itself a source of moral sufferings more terrible than death. Capital punishment is the most premeditated of murders, to which no criminal’s deed, however calculated, can be compared. For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.”<sup>69</sup>

A reflective attitude regarding the application of the death penalty should lead to an inquiry into the relationship of the individual life of criminals subject to capital punishment and life in a larger sense, that is, life as the source of all value and meaning, also present in the worst offenders. The exploration into this deeper notion of life includes not only its biological and social aspects but also its cosmic or universal dimension. An inquiry into the death penalty impelled by therapeutic concerns leads to questioning whether one can destroy life without some degree of ethical concern, not even considering religious arguments about its sacredness.

The death penalty aims at the particular life of convicted offenders, as they actually lived it, that is, a narrow, conflicted existence, shaped and constrained by a series of conditioning influences of social, environmental and biological nature. It thus assumes that it is eliminating a petty notion of pure individual life: the “brief candle,” the “walking shadow,” of the “poor player that struts and frets its hour upon the stage and then is heard no more.”<sup>70</sup> A deeper inquiry into this matter should address the question whether besides the particular life of the individual offender the death penalty unknowingly constitutes a metaphysical negation of life<sup>71</sup> as source

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the tendency among lawyers to ascribe inherent (and necessarily pre-legal) spiritual value to human beings.” She also cites bioethicist Leon R. Kass for the proposition that the terms “sanctity of life” and “human dignity” are mutually implicated, as inseparable as the concave and the convex.

<sup>69</sup> CAMUS, *supra* note 155, at 30

<sup>70</sup> Macbeth, Act V, sc. v.

<sup>71</sup> To the metaphysical negation of the life of the executed one can oppose the dialectical negation that Hegel characterized as the negation of the negation. A metaphysical

of value and meaning, sacred to many, unfathomable to all. This quest addresses the possibility to perceive life in its larger sense and whether this understanding of the hidden dimension of life would eventually help to stop capital punishment.

In this inquiry, one should also examine the mind of the executioner in a broad sense, that is the legislator, the judge or the voter, and determine to what extent they have dehumanized, demonized, and ultimately excluded certain criminal offenders from the human community. This is the result of an ideology that works under the illusion that these particular criminal offenders should no longer be treated as persons with whom to communicate but as enemies who have to be destroyed, surrendering thus to the illusion of security above and beyond humanity and justice<sup>72</sup>

The recognition of human life's value and significance is often contingent on each nation's political structure. In authoritarian states, the overriding value protected by their criminal legislation is obedience to the state to which other values or interests are subordinate. In the criminal codes of totalitarian states the most serious crimes are against the state. The subordination of the values of life to the integrity of state power explains the frequent use of the death penalty in such societies. Even crimes against the person are viewed as crimes against the public administration. On the other hand, in liberal democracies heirs of the political traditions of the Enlightenment, the supreme value is the individual human being. The consequent emphasis on human life resulted in a dramatic rejection of the death penalty.

Sadly legislators are seldom aware of the complexity of human violence and aggression based on powerful biological, sociological and anthropological conditionings. The lack of awareness of the origin, dynamics and ramifications of human violence has profound consequences. The oversimplification of human violence through the apparent solution of capital punishment not only reveals criminological ignorance but also the fundamental contradiction that underlies attempting to control violence and murder through the violence of the death penalty.

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negation would be the destruction of a grain of wheat, while the dialectical one would be to plant it, that is, preserving it while transcending it (*Aufhebung*). Similarly in the field of criminal punishment, the dialectical negation of the criminal offender would be represented by the rehabilitative project, as opposed to his/her elimination. See Edgardo Rotman, *L'Évolution de la Pensée Juridique sur le but de la Sanction Pénale*, in *Aspects Nouveaux de la Pensée Juridique, Recueil d'Études en Hommage à Marc Ancel* 163 (Pedone, Paris, 1975).

<sup>72</sup> See Edgardo Rotman, *La Crise de la Politique Criminelle Humaniste à l'Aube du Vingt-et-unième Siècle* in G. KELLENS AND M. DANTINNE, *ONG SCIENTIFIQUES ET POLITIQUES CRIMINELLES* 89-94 (Wolf Legal Publishers: Nijmegen, The Netherlands, 2009).