Capital Punishment and the Right to Life: Some Reflections on the Human Right as Absolute

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INTRODUCTION

The right to life of the person and its various applications in different political situations is one of the most debated subjects of our day. This question is important today for a number of reasons: the widespread demand for abortion, the drive for the right to die, and the challenge to capital punishment. The debate seems at times to be confused: those opposing all forms of war and capital punishment seem to approve of abortion; while others vehemently opposed to abortion, approve of war and capital punishment. But this inconsistency disappears once an absolute view of man's right to life is recognized. Under an absolute view of man's right to life, capital punishment is never justified.

This article hopefully contributes to the philosophical-moral debate on the question of the human right to life. It first examines various international covenants and philosophical schools and their ambiguous conceptualization of man's right to life. The article, in the context of capital punishment, then develops a theory of man's absolute right to life. The right to life is considered absolute because it is necessary to maintain two essential characteristics of man, his mystery and his priority-setting ability. Because capital punishment denies these essential characteristics, it is never justified.

I. THE NON-EXISTENCE OF THE ABSOLUTE RIGHT TO LIFE IN PUBLIC INTERNATIONAL DOCUMENTS AND PHILOSOPHICAL SCHOOLS

Documents of various world-wide and multi-national regional conferences and assemblies concerned with the human

condition are ambivalent in their treatment of the problem of when the life of a human being may be taken. These covenants and conventions do not justify the right to life by any philosophical understanding of life, at least not explicitly. Some documents couple the phrase “right to life” with the term “inalienable,” or with some other derived right. These documents seem to be self-contradicting. They describe the right to life as inalienable and then proceed to specify conditions allowing the death penalty. In other words, although the documents speak of the inalienable right to life, they permit the taking of human life under certain circumstances and after certain legal procedures. This contradiction results from a tension between the moral principle of right to life and the right’s application or underlying policy\(^1\) in various circumstances. A brief examination of some of these documents demonstrates the tension between this moral principle and the right’s application.

The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations in 1948 recognizes the right to life. Article 3 provides: “Everyone has the right to life, liberty and security of person.”\(^2\) The Article does not say that the right to life is inalienable; it says simply that each person has such a political right, similar to that of the American Declaration of Independence. It is a statement of a general moral principle incorporated into a political document binding those who belong to the UN. Yet, each nation is free to apply its own meaning and interpretation of this general moral principle by domestic legislation. Article 3 does not recognize an absolute or inalienable right to life *per se* as distinct from other types of rights.

In some United Nations Educational, Scientific, and Cultural Organization (UNESCO) documents preparatory to the Universal Declaration, however, there was a statement attempting to establish the basis of the declaration by calling attention to the right to life *per se*.\(^3\) These preparatory documents

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1. A policy “sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community”; a principle is a standard to be observed because “it is a requirement of justice or fairness or some other dimension of morality.” R. Dworkin, Taking Rights Seriously 22 (1978).
3. Human Rights: A Symposium, 268 United Nations Educational, Scientific & Cultural Organization Ed. (1949). However, this legislative history is ambiguous as to the meaning of the right to life *per se* because exceptions are made.
attempt to explain that the right to life is the foundation of all other rights as well as the condition of their existence, but they do not demonstrate a jurisprudential or moral basis in any philosophical concept of the person. As articulated in the UNESCO preparatory documents, such a right to life is a dubious foundation for all the other human rights because the right to life is not demonstrated. If we cannot establish the right to life as foundational, all other rights of the person flowing from the right to life, are nonfoundational as well. The difficulty is establishing a basis for the right to life. Of course, there is not universal consensus on the meaning and importance of the person. It therefore comes as no surprise that these international documents did not try to specify the foundation underlying man’s right to life. Yet, without a philosophical analysis of the concept “person,” all rights become the arbitrary giving or retaining by the covenant-community, the State, even if by all states. For if the State may define or give human rights, it may just as logically take them away at some time in the future. Because these UNESCO documents fail to establish a philosophical foundation for man’s right to life, thus implying that the State has the right to define the right to life, these documents are unsatisfying. Indeed, although these documents represent a forward movement politically, they are morally and philosophically dangerous.

Another document, The International Covenant on Civil and Political Rights, was submitted to the United Nations General Assembly by the Economic and Social Council and approved by a 106 to 0 vote in December, 1966. Its purpose was to elaborate and make more specific the UN's Universal Declaration of Human Rights. Part III, article 6 of The International Covenant specifies that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” It is significant that the right to life is to be protected by law, yet, the right finds its basis in life itself, in the person himself. This is significant because the foundation of this right resides in the person and not in the law; the law only guarantees this right. But the term “inherent” is not further developed. Thus in a period of twenty years, we may note some significant progress in understanding the nature of

4. Id. at 267-68.
6. Id. (emphasis added).
the right to life as well as other rights. Whereas The Universal Declaration of Human Rights gave only the general moral imperative of the human right to life, the International Covenant places the source of the right to life in the human person himself. The International Covenant does not confer the right to life; under the Covenant, the right resides in the very nature of the person.

The document goes on to say that the right to life cannot be "arbitrarily" taken away and then specifies when life can and cannot be taken. The document adopts an approach, similar to due process analysis, to prevent a capricious or arbitrary taking of human life without protection of law. Life can be taken for serious crimes, but only according to proper procedures. But, the document does not specify what constitutes serious crimes; it leaves this task determination to individual countries and the domestic law.

Another regional document, the Convention for the Protection of Human Rights and Fundamental Freedoms, was signed in Rome in November, 1950, by the participant Western European nations, and entered into force September 3, 1953. Section I, article 2 of the document provides:

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force

7. The International Covenant provides:

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention of the Prevention and Punishment of the Crime of Genocide. This penalty can be carried out pursuant to a final judgment rendered by a competent court.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.


which is no more than absolutely necessary:
(a) in defense of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of
a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or
insurrection.  

This article specifies that persons have a right to life but
does not explain or justify this right. It further elaborates that
life can be taken only for an action the domestic law of the
country labels as meriting the death penalty and only upon sent-
tencing by a court of proper jurisdiction. The article sets limits
restricting the taking of life, but assumes, once again, that
human life may be legally taken by public authority if certain
conditions are met.

The Convention for the Protection of Human Rights and
Fundamental Freedoms recognized that an individual's right to
life, not an individual's life, is to be protected by law. This dis-
tinction is significant in determining whether a right is con-
ceived to be naturally an accompaniment of the person or
whether it is a stipulation of law constructed by society. The
difference is not minor. In the first case, the right to life would
inhere in the very person, whereas in the second case, the right
can be given as the State sees fit only if the State follows the
proper procedure. In other words, the distinction is whether the
right inheres in the very "nature" of the person or whether such
a right exists only as an appendage of positive law.

The last paragraphs of the article have yet to be inter-
preted, and thus raise a subsidiary question to the basic right to
life question: whether public authority can take life when it is
effecting any arrest or only arrests for a "grave offense," a direct
threat to human life. A simple reading of the text allows the tak-
ing of life in any arrest, for instance, even if a person refuses to
stop for a traffic violation.

Another document, the American Convention on Human
Rights, in article 4\textsuperscript{10} recognizes, not the right to life, but the

\textsuperscript{9} Id. at 224.
\textsuperscript{10} Article 4 of the American Convention on Human Rights provides:

1. Every person has the right to have his life respected. This right shall be
protected by law, and, in general, from the moment of conception. No one shall
be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed
only for the most serious crimes and pursuant to a final judgment rendered by
right to have one's life respected and the document makes this respect for life enforced by law. This is different from saying that one has simply an inherent right to life. Respect is simply esteem or opinion, a less essential quality than life. Life is a quality in the very nature of the thing considered. The American Convention then states that no one shall arbitrarily be deprived of his life. Once again, the supposition is that the only right one has with regard to his life is the assurance that if the State deems it advisable to take life, it must be done so in a procedurally acceptable way, weakening the right considerably. A nation may set up the most flimsy procedural due process, for example, a military tribunal with very limited protection and appeal, and still satisfy the Convention. If the right to life is not considered inherent, the burden on the State to show a situation when life may be taken could, conceivably, be slight. The State could classify numerous behaviors as capital offenses (rape, kid-napping, armed robbery, etc.). But, if the right to life inheres in the person, the burden on the State seeking to deprive a person of this right is very great. This burden would be met, if at all, in only the most serious violations of social behavior (murder, treason). In addition, an inherent right serves notice to the nation-state that the right is of paramount importance, internationally recognized, and that a State would be subject to international disapproval if that right were not protected. Article 4 of the document, nonetheless, fails to recognize the right to life as inherent.

Article 4, however, makes more progress toward respecting life than previously discussed documents. Article 4 does restrict the taking of life to those within the ages of eighteen to seventy

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a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

years. Since the Convention is the first of its kind for many nations, the only hope for passage of the document was to allow each State broad discretion in defining crimes. Thus the absolute bar against capital punishment was confined to narrow age groups. For most persons the Convention guaranteed only some form of due process before life could be taken. The article provides that nations that have abolished capital punishment shall not reestablish it. Even the unborn generally are given some right to protection under the Convention. But abortion could be permitted under certain conditions. The very young and the old, as well as pregnant women, are all protected. Moreover, capital punishment may be imposed only for the most serious breach of social behavior specified by domestic law. The document, in other words, attempts to limit the extent of capital punishment as much as possible under present international mores. This is a step forward.

The United States Constitution is another example of a document that assumes the State has the right and the moral capacity to take the life of an individual human being. This view is supported by the wording of the document, statements of Supreme Court Justices, and United States Supreme Court opinions. Until Furman v. Georgia\textsuperscript{11} it was assumed to be constitutional for each state to take human life after conviction of certain crimes. In Furman, Chief Justice Burger correctly observed that the plain language of the Constitution upheld this power of the several states as well as that of the United States.\textsuperscript{12}

The document's language seems to permit this taking of life by the State. The fifth amendment says that a person cannot "be deprived of life, liberty, or property, without due process of law . . . ."\textsuperscript{13} The fourteenth amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."\textsuperscript{14} The import of these amendments seems to be that the State may take the life of an individual human being, if it is done with due process.\textsuperscript{15}

\textsuperscript{11} 408 U.S. 238 (1972).
\textsuperscript{12} Id. at 380 (Burger, C.J., dissenting).
\textsuperscript{13} U.S. Const. amend. V.
\textsuperscript{14} U.S. Const. amend. XIV, § 1.
\textsuperscript{15} "Due process" implies that punishment may not be "cruel and unusual" as prescribed in the eighth amendment. Neither procedural nor substantive due process can possibly be maintained in the face of capital punishment. The reason is disarmingly simple: the law may change at any time whereas the punishment inflicted is absolute and irrevocable. Therefore, in the face of this absolute deprivation of the most fundamental
In a dissenting opinion in *Furman v. Georgia*, Chief Justice Burger cites the language of these amendments, permitting the use of the death penalty, implying that these amendments give the State the power to take life of the individual human being.\(^\text{16}\) Within the context of that discussion, Mr. Justice Powell and other dissenters in *Furman* cited *Wilkerson v. Utah\(^\text{17}\)* and *In re Kemmler\(^\text{18}\)* as examples in which the Court held the State had not violated either of the two amendments cited although the State had executed individuals.\(^\text{19}\)

The *Furman* majority held that the State could not take an individual's life because it would, given the unrestricted jury discretion in that case, constitute "cruel and unusual punishment," in violation of the eighth and fourteenth amendments. The right of the State to take life, however, was not at all questioned by

\(^{16}\) of all legal nationalized rights (life), substantive due process can never be achieved no matter how good the arguments for capital punishment might be. Once again, there can be no exit from this problem without a philosophical analysis of the concept of human person. All legal determinations will finally be dependent on this moral concept. *Furman v. Georgia*, 408 U.S. 238 (1972), did not even attempt such an endeavor. One can see this same solicitude on the part of the Supreme Court in its more recent cases concerning the death penalty.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), a divided Court concluded that the Georgia legislature had successfully responded to the constitutional concerns in *Furman*. The Court's plurality opinion found that the bifurcated proceeding established by the Georgia statute suitably directed and limited the discretion of the sentencing body where the state sought the death penalty. *Id.* at 196-206. The Georgia scheme narrows the class of offenses for which capital punishment can be imposed by defining 10 "mitigating and aggravating circumstances." *Ga. Code Ann.* § 27-2534.1 (1978). During the sentencing phase, the jury determines whether any of the charged statutory aggravating circumstances apply, and whether to sentence the defendant to death. *Ga. Code Ann.* § 27-2503(b) (1978).

The lead opinion in *Gregg* concluded:

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

428 U.S. at 198.

16. 408 U.S. at 380 (Burger, C.J., dissenting).


18. 136 U.S. 436 (1890). *Kemmler* decided that death inflicted by electrocution is constitutional.

19. 408 U.S. at 421-22 (Powell, J., dissenting).
the majority of the Court and the case did not turn on that point. The majority did not even contend that the taking of life was "cruel and unusual," although this question was raised and answered in the affirmative by Mr. Justice Brennan and Mr. Justice Marshall in separate dissents. Given the great diversity in Furman (nine different opinions), it is difficult to imagine the present Court declaring the death penalty unconstitutional per se. In fact, the more recent decisions of the Court, particularly Gregg v. Georgia and Godfrey v. Georgia, both held that the death penalty was not per se "cruel and unusual punishment." The concern in these cases was not the right of the State to impose the death sentence but the due process necessary to avoid "capricious and freakish" results in its application. If the clause, "cruel and unusual" had not been in the Constitution with reference to the imposition of punishment, one could wonder if taking of individual life would still have been considered unconstitutional even by a minority of the Court. The Supreme Court decisions clearly support the view that the Constitution allows capital punishment.

Further examination of these documents reveals a preoccupation with rights of many kinds. Some rights are discussed in terms of types of persons who possess them, such as women, children, and minorities. Other rights are discussed in terms of entitlements, such as work, speech, assembly, and income. Other rights are categorized in terms of human, natural, legal, and positive concepts.

The question might be asked, however, why these important documents deal with the right to life, basic to the actualization of all other human rights, in such an incomplete, haphazard, and conditional manner regarding its moral-philosophical foundation. Perhaps we have already touched on one possible answer. Because legal systems depend upon a moral consensus to elaborate and enforce rights, a concise and complete articulation of the right to life is difficult to achieve. Additionally, the very concept of "human rights" has evolved from the High Middle Ages, through the Renaissance, the French and American Revolutions, the 19th century Marxist and Humanist movements, to the present. Each of these periods marked a stage in the evolution of human rights. What is needed, then, is more emphasis on the

very concept of "human rights" and how the right to life fits more intimately into the whole scheme of human rights.

Leo Strauss suggests another answer, that the right to life has always been considered to be self-evident, meaning that it is so basic that it does not need philosophical and moral justification or explanation. He mentions that those thinkers most responsible for developing ideals of rights in modern thought assumed the right to life to be self-evident and gave only minimal consideration to the question in their treatises. None articulated a philosophy of the right to life, but simply an understanding of life itself, encompassing all capacities of human experience which could be used to argue against the taking of life of an individual human being. On the other hand, current practical documents have no philosophical basis. Because there is a great diversity in the understanding of the human person, one document satisfying the diversity of political systems, is and was patently impossible. But an effort must be made to firmly establish the foundation of the human right to life. As long as this is not done, the right itself is in jeopardy.

II. What are Rights?

It is logical at this point to ask what "rights" are. This has been the subject of much recent controversy. There is a great amount of literature and thought available on this subject from various philosophical schools.

In general, rights involve an ability to act free from coercion. From another perspective, rights are transactional, implying an object to be satisfied. Rights, in other words, are always "in relation to." Some philosophers define rights as those areas in which a person is endowed with crying needs, which no one may hear without acting. A right implies more than a claim to dutified effort and implies success in the effort.

24. Perhaps the controversy continues in its pristine form in the great jurisprudential debate in American and European circles through the book of R. Dworkin, Taking Rights Seriously (1978). Dworkin states on the problem of rights: "Legal positivism rejects the idea that legal rights can pre-exist any form of legislation; it rejects the idea, that is, that individuals or groups can have rights in adjudication other than the rights explicitly provided in the collection of explicit rules that compose the whole of a community's Law."
25. For a discussion of natural rights see Wainwright, Natural Rights, 4 Am. Philo-
It seems, too, that some rights may or may not be considered alienable, with most philosophers saying that none are inalienable in the sense that one must always have them met, or the objects needed provided. Rights are therefore both inherent and relational. That is, they may be exercised in relation to and are limited by, the rights of others as well as the State interest for the common good. Rights are considered to be conditional. Society always has the prerogative to place conditions on rights, even though they can be demanded without shame. The implication is that society has the prerogative to determine which rights, or at least the degree to which rights, can be demanded without shame and which claims must be met. Hence, there is in the philosophical literature, the same problem regarding inalienability which exists in the enumeration of rights found in international and regional documents. These philosophers and documents never specify what rights are to be considered absolute. One suspects that for these authors and documents there are none, at least in the sense that there are no rights so absolute that society may not regulate their exercise.

Recognizing the conditional nature of these rights, philosophers acknowledge that priorities must be set when rights are involved in allocating objects, and most say that priorities and rights are correlated. Some philosophers, however, suggest rights exist in objective human existence and nature, establishing a source and structure for value priorities, without, however, ranking or arranging rights and priorities. None of the philosophers mentioned, however, justify man's right to life as inalienable. This is very serious, for if there is no consensus on this question, then the drive to eliminate capital punishment from the major juridical systems seems doomed to failure.

III. Analysis of Capital Punishment

Insofar as capital punishment is the ordered and volitional taking of human life by the organized state, it is morally wrong

SOPHICAL Q. 79 (1967).

26. See Frankena, Natural and Inalienable Rights, 64 PHILOSOPHICAL REV. 212 (1955); Brown, Inalienable Rights, 64 PHILOSOPHICAL REV. 192 (1955).

27. See, e.g., T. Green, Lectures on the Principles of Political Obligation 154-59 (1917 ed.).


29. See Strauss, supra note 22.
and violates the individual’s absolute right to life. An absolute right to life is essential to recognize the mysterious character of life. Additionally, to prioritize other rights it is necessary to recognize man’s rights to life as absolute. Capital punishment is wrong because it becomes difficult if not impossible to recognize the characteristics of man as mysterious and priority setting.

The first human characteristic capital punishment denies is that human life is a totality which an individual can experience as going on within and around him, in which he is involved, and over which he has only limited control. Individual human beings experience this totality when contemplating their own birth and death. They do not know what, when, or if they were anything before their birth, nor do they recall how or when they were born, nor do they know precisely what will go on after they die. This is the great mystery of human existence. In this sense, men experience both knowing and not knowing some things about life in terms of its beginning and end. One does not know when he will die. Death is something that happens, coming from without, and over which one has no real control. Death comes inexorably but one does not know when or where. One might attempt to control the beginning of another’s conception through contraceptive means, but even this is subject to error and calculations fail. Hence, men are not fully in control of their own individual lives either originally or finally. A person, even the most simple, discovers his own existence. He contributes to his life’s development, and others help him in this, but he did not give himself life. One cannot say that the State gave it, nor can one say that his parents gave it. One recognizes that his life has so many sources that he cannot specify them all, nor does he know them all or their ramifications. In the face of such simple recognition, one can only say that man is not totally responsible for the existence of his own life. Life is an accumulation of an unknowable number of sources. Man’s life, therefore, is not totally his and cannot be taken by him for that reason; men cannot take their own lives because life is a mystery from beginning to end. Similarly, life does not belong to society and it is for that very reason that the State cannot, in principle, take life.

To justify capital punishment for whatever reasons is to deny that men experience life as a process over which they do not have total control; it is also to say that men can and should determine when life will end. Yet, when men acknowledge that they are limited, fallible, and mortal they are acknowledging
their limits before a mystery. To set up criteria for taking life is
to say that men know what life is and can define it by determin-
ing when human life should end. Man does not experience the
beginning and end of human life in this way. Indeed, he experi-
ences boundary situations where his capacity to know and act
are limited. Man's life is fundamentally a mystery. Capital
punishment simply denies the givenness and totality of human
life; capital punishment also implies that men know more about
life than they do. Capital punishment is a denial of the human
mystery. Capital punishment is therefore always morally wrong,
no matter what the justifications.

It is often pointed out that when a group takes human life
on the basis of its lawful standards, as in capital punishment,
the dignity of human life is lessened. It is suggested that men in
society need a sense of the sacred. The argument here suggests
capital punishment brutalizes life since capital punishment com-
pletely secularizes the concept of death, destroying life's mystery
by defining when life ends. By destroying mystery and the
sacred in society, capital punishment destroys the very purpose
for which human life exists, a never-ending search for human
meaning. No one has the right to frustrate this human dimen-
sion by imposing death. Capital punishment brutalizes not just
because we become used to the taking of human life, making it
easier to do in other situations, but, above all, because capital
punishment lessens our sense of the sacred and mystery to an
even greater degree than our technological society has already
done. Men feel that they can control and manipulate life if they
are presumed to have the right to define and therefore destroy
it. When man can completely control, calculate, and change life,
it is no longer considered sacred, since sacredness involves admi-
ration and wonder in its presence as well as an invitation to pon-
der and reflect. This is to say why and how capital punishment
brutalizes men and fosters vindictiveness among them. We can-
not morally destroy what we do not know or understand, and
the mystery of human existence by definition, is the ultimate
 unknowable. Yet, as mentioned above, this mystery and sacred-
ness of human existence renders every act of capital punishment
morally wrong.

30. Some contemporary scientists describe life as a gift. Parsons, Fox & Lidz, The
"Gift of Life" and Its Reciprocation, 39 SOC. RESEARCH 367 (1972).
31. See generally Parsons, supra note 31, at 385.
The consequences of the brutalization caused by denial of man's right to life are everywhere in modern society. There is the paradox of a heightened consciousness of fundamental human rights on a global basis and, at the same time, a thoughtless and feverish preparation for nuclear war which can completely destroy human life. Along with this modern consciousness of human rights has come an unprecedented century of wars, gas chambers, and internment camps which have brutally taken the lives of hundreds of millions of innocent human beings. Moreover, the world-wide phenomenon of the taking of human life via abortion, infanticide, and euthanasia is another disturbing factor in this brutalization. Capital punishment is a further addition to this universal brutalization of human life in that it lessens our sense of mystery and the sacred. Indeed, the ultimate protection of any human life is that it is esteemed by individuals and by society. This sense of the sacred protects human rights and human life which the laws presuppose but cannot create.

Examination of the actions and crimes for which life may be taken under current standards reveals that the taking is always justified in terms of the actor's intent and conduct (mens rea, actus reus). These actions always took place when an individual, in some step-by-step process, pursued a goal over which he had control, in the sense that he either could or could not have committed the acts. In other words, the moral dimension of a person's action is always determinate for any capital offense. There is always mention made of intention.\(^ {32}\)

Examination of legislation passed by state legislatures since 1972 reveals this to be the case. For example, a Montana statute provides:

**Aggravating circumstances.** Aggravating circumstances are any of the following:

1. The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

2. The offense was deliberate homicide and was committed by a defendant who had been previously convicted of

\(^ {32}\) The actions for which death may be imposed include unlawful killing, homicide, or murder, which vary slightly in definition but which can usually be encompassed under the term "murder." The statutes defining the term always require a deliberate or willful act. E.g., Ala. Code § 13-1-70 (1975); Cal. Penal Code § 187 (West Supp. 1980); Ga. Code Ann. § 26-1101 (1977); Miss. Code Ann. § 97-3-19 (1972).
another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 45-5-102, and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim.

. . . .

Effect of aggravating and mitigating circumstances. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency.33

Man's intellect and will must be involved in some action and the actor must plan some particular action (mens rea, actus reus). If his mind and will are not involved and his action is simply the result of pure emotion, if there is no thought involved, capital punishment may not be invoked.

Recent legislation, enacted after Furman, carefully stipulates that, when intent is absent in an action for which capital punishment shall be imposed, capital punishment shall not be sought. Such conditions or "mitigating" circumstances are set up to exclude use of capital punishment because in such a case, it would not be humane. When these circumstances so obstruct the intellect and the will that these latter are not engaged, there can be no truly human action and therefore there can exist no crime worthy of capital punishment. For example, the Arkansas Code provides:

Mitigating circumstances. —Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;
(2) the capital murder was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;
(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;
(4) the youth of the defendant at the time of the commission of the capital murder; or
(5) the capital murder was committed by another person and the defendant was an accomplice or his participation relatively minor.44

These statutes seem to indicate that the mind and will are in some sense absolutely material to the case and subject to some sort of objective verification. This is to say that the mind and will are spiritual because the statutes assume that men can know the mind and will and can observe them in specific actions, thus enabling them to make a judgment as to culpability. Western jurisprudence assumes individuals are responsible for their actions and that it is up to the individual to show that, given mitigating circumstances, he was not responsible for the act committed.

The union of intellect and will permits the total integration of individual human life and gives rise to man's capacity to act in a human manner. Because imposition of capital punishment requires considering the actor's mental process, when we deal with actions specified for capital punishment, we deal with the spiritual dimension of man in his very ability to act humanly. Mind and spirit are presupposed for any action worthy of capital punishment. Once again, we arrive at the mystery of person who must be respected as a moral entity. The power of the group to protect itself is without question. But the exercise of this power to destroy freely and knowingly the spiritual and moral entity of any one person, constitutes an ultra vires act by society. Such an act is not the exercise of the moral power of the community

but the raw power of superior force. It is the ultimate affront to the person.

That the exercise of capital punishment is immoral is also demonstrated by the argument that capital punishment is justified because it deters crime. Capital punishment is, as we have said, an affront to the human mind, will, and action (the human mystery). It destroys all subsequent human actions, eating, sleeping, loving, even hating, that could take place within a prison cell. Outside of the revenge motive, the ends of society are promoted by the continuation of this human mystery in a jail cell, even for the rest of the person’s natural life. The State may not morally destroy this mysterious and sacred entity called man, any man, voluntarily. Capital punishment supposes, therefore, that man is totally material and hence can be destroyed, with little acknowledgement of the notion of spiritual self-fulfillment, even eventual or possible self-improvement by remorse and compassion. Capital punishment is immoral because it denies that these characteristics of human life exist or that amelioration of any spiritual person is always possible precisely because he is spiritual. Capital punishment is therefore a capitulation to human despair, the antithesis of morality and ethics.

In this respect capital punishment is like abortion and euthanasia because it attempts to define life by “defining” its limits, its beginning and end. Hence, man’s claim of the power to destroy these human and spiritual capacities in another human person, justified on the basis of an assumption of the power to define life, is a direct attack on life and the right to life. Capital punishment is worse than either abortion or euthanasia, because, unlike the latter, it is justified in terms of a volitional act by the subject of the killing. Hence, capital punishment is a more direct attack on the totality of human life because it attacks the spiritual subject for what in fact he has done.

Capital punishment involves more than taking life on merely biological grounds, as in the case of abortion involving arguments about biological factors such as physical condition or

35. It is significant that the group assumes it has the power to destroy mind and will. This assumption can be seen insofar as it is a legislature which specifies the action for which life will be taken and life can only be taken when mind and will are involved. Substantiating the argument that the group assumes it has power to destroy mind and will is much of the new legislation, requiring that a special group of men must hear the case before a sentence of death can be carried out.
development of the fetus, population pressures, and a pregnant woman's physical and emotional health, or on emotional grounds as in the case of euthanasia involving arguments concerning suffering. Rather, capital punishment involves taking life because of human action. Proponents of abortion and euthanasia argue that a life should not exist if it does not contribute to society, causes unpleasant emotions, or is not biologically perfect, or if there are too many people in a family or in the world. The proponents of abortion deny that these unborn entities are part of human life. In abortion this fetus does not contribute to society but causes severe emotional distress in the mother. Capital punishment makes the same judgment only on the basis of action. The spiritual subject is put to death by the State because of his actions.

One is allowed to live only based on the use he has made of his mind and will. Not only must human life be defined in terms of biology and emotion, but also in terms of spiritual action on the part of the acting subject. In the case of capital punishment, spiritual actions determine who lives and who dies. When we kill a person for doing specified forbidden actions, we end all his future spiritual possibilities and define his end by the imposition of death. Again, herein lies the basic immorality of capital punishment. This is the consequence of objectifying man and saying that he is subject to manipulation, indeed, the ultimate manipulation of death by others. This is to give way completely to the goals and values of technology, that men can use and define each other for certain purposes as they use and define machines for their own ends and change all of these ends for their own purposes. If society is allowed to define the actions allowing imposition of the death penalty, it can do so on the basis of any grounds whatever, or, at least define standards or priorities for determining which actions are allowed to dictate such a result. George Kateb aptly describes the moral repercussions resulting when men are deemed to have the power to define life in terms of action:

[T]he idea that you can make, manufacture, or fabricate people, or plan in some precise way for their very being in all its details, must lead to the idea that you can throw away what you do not like, or what you think you have botched, or what you may have made too many of, or what it would simply be easier to do without. You do not need malignant intentions to do such things; all you need is moral mediocrity expressing
itself in bureaucratic euphemism and covering itself in neat respectability.\textsuperscript{36}

Abolition of the death penalty is necessary, therefore, not only because the death penalty destroys an important element of man's existence, life's mystery, but also because once death is imposed as punishment for some actions, it can be imposed for other actions, potentially in an arbitrary fashion.

Furthermore, the present standards for deciding whether capital punishment is applicable, create other difficulties. First, the standards, making fine distinctions, are difficult to apply. Second, the harshness of the penalty imposed under the standards are not necessarily proportionate to the seriousness of the action. Pennsylvania, for example, provides capital punishment for murder.\textsuperscript{37} The code says that when murderers are convicted, capital punishment is the mandatory sentence in the following "aggravating" circumstances:

(1) The victim was a fireman, peace officer or public servant

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person

(3) The victim was being held by the defendant for ransom

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.
(5) The victim was a prosecution witness to a murder and was killed for the purpose of preventing his testimony.
(6) The defendant committed a killing while in the perpetration of a felony.
(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
(8) The offense was committed by means of torture.
(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the

\textsuperscript{37} This argument is not to justify murder, of course, but to point out how contradictory it is to say that murder, as a crime, merits capital punishment.
commission of the offense.\textsuperscript{38}

Almost all fifty states have passed similar statutes specifying such aggravating circumstances to be determined in a bifurcated trial. Such circumstances are difficult to determine in actual practice. This simply creates a further difficulty of distinguishing murder from homicide, similar to the difficulty in distinguishing first and second-degree murder and manslaughter—a traditional problem for criminologists.

As the Pennsylvania statute illustrates, to determine whether capital punishment is imposed requires examining factors such as the identity of the victim. If the victim falls within the statutory definition of fireman, capital punishment may be appropriate. If the victim is not a fireman, and none of the other specified conditions are met, then capital punishment could not be imposed. The actor's conduct might be equally serious but not trigger the death penalty. While the group defining capital punishment defines life in terms of a certain action, it also defines life in terms of conditions and circumstances surrounding the action such as murder in a "heinous, cruel, or depraved manner" or if the victim is the President of the United States, a foreign governmental official, a law enforcement officer, or a fireman. Additionally, it is frequently said that society has the right to take life if actions are judged to be "serious," "enormous," "dangerous," "destructive," or "heinous" with little thought given to the extent these are nebulous and ambiguous concepts, always subject to arbitrary definition by judges. The death penalty's arbitrary and disproportional administration supports the prevention of the death penalty because it denies the essentially mysterious character of man.

Another characteristic of human life that capital punishment denies is that men are priority and value setting beings. Each individual either sets priorities himself or someone does it for him. In either case, such priority determination is a characteristic necessary for human life. Capital punishment, however, denies the necessity for priorities and that men are priority-setting beings. If individual human life can be taken, it is not absolute or inalienable; consequently, there is no ultimate foundation or standard for setting priorities. That men do set priorities can readily be seen in human experience. Men set priorities in order

to provide necessities and preserve life in an environment of scarce and limited resources. Usually, priorities are discussed in terms of physical needs on the one hand, emotional and spiritual needs on the other. All these values are necessary for human life, but none can be satisfied in only one way. So priorities must be set in terms of a scale of value or importance and the degree to which this society can satisfy such needs.

There is ample evidence that men do set priorities. Harold Lasswell says that men decide who gets what, where, when, how, and why. They must and do decide this based on what is most important to them. There must be some ultimate value for measuring other values. If this is removed, then we have a system without direction or meaning. If there is no absolute value, we are in the realm of utilitarianism or positivism, where there is no inherent justification or foundation for human rights. If we say that human life is an absolute that cannot be taken volitionally even by the organized State, then we have such a firm basis. Recognizing man's right to life as absolute is necessary for man to properly set priorities. Of course, this does not mean that society cannot defend itself against actions which are destructive of innocent people; it may certainly do so, even in harsh terms, but not by the imposition of death. Yet, even in emergency situations (self defense) the taking of human life is the lesser evil.

To advocate capital punishment and to say that a group has the right to take human life, implying that the group has the power, duty, or obligation to define human life, is really to deny that men do in fact set priorities. It also denies that there is an absolute standard underlying all human rights and consequent valuables in terms of which allocation can take place.

Ethical theories suggest, and men in practical politics set, priorities and allocate resources to provide objects of need. Law rests behind all these needs. Men use values and a hierarchy of values to justify or explain allocation. Men provide objects to satisfy needs and rights are fulfilled in accordance with values. The problem becomes one of finding the source or absolute foundation of all of these rights and combining them into a whole which can order the rest. In other words, the ultimate value held as foundational, gives meaning and significance to all the rest. If this ultimate value cannot be found, then the whole

40. See generally, Lederberg, Human Nature: A Reevaluation, 40 Soc. Research
system is subject to arbitrariness. The argument must apply above all to the foundational principle of human rights.

Only within the individual can the ultimate value be found. If the individual's right to life is not assumed to be absolute, then we have no foundational basis for allocating goods and services and providing needs. Without an absolute right to life, there will be no objective standard to rank priorities.

The totality of individual human life embraces biological, social, and spiritual needs and capacities. It is above all else, man's spiritual capacities, mind, "heart," and will, that integrate the other human needs and the priorities necessary to allocate them. That the group can define which action may result in death suggests that the group is prior to life itself because it defines it and the defining itself has no ultimate standard. If a person does not have an absolute right to life, life itself becomes an alternative priority, along with other priorities like food, clothing, and shelter, which can be capriciously given or taken. Life becomes something which is totally material in the minds of men, a commodity to be allocated by the State. In this way, life becomes "cheapened," and finally brutalized because it is placed on the same level of other material needs of men; it becomes brutalized above all by the organized society's denial that human life, at its origins, continuum, and end, is fundamentally a mystery. It is a mystery which gives human existence dignity and importance. Capital punishment violently and completely denies this basic thesis, no matter how much "due process" is employed in its execution. Philosophically, then, imposition of capital punishment is never justified because it destroys fundamental characteristics of human life.

Traditionally, capital punishment has been justified by more practical arguments. But even these practical arguments do not support the death penalty. The traditional justification of capital punishment is that the group may take the life of an individual human being if rational criteria could be set up for determining actions meriting execution, usually for the sake of protecting the community, or even to channel the moral outrage of the community in the face of certain heinous actions specified by law. Basically, the criterion is that the group may take life if it safeguards the common good.\textsuperscript{41} Capital punishment is consid-

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375 \text{ (1973).}
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\textsuperscript{41} See, e.g., T. \textit{Aquinas}, \textit{Summa Theologica}, II-II, Q. 64, Art. 2. (1947 ed.).
ered a deterrent to crime.⁴² Thus, it is argued, the group is protected from self-destruction and individuals are protected from harmful action by capital punishment because capital punishment deters criminal acts.

Statistics indicate, however, that capital punishment does not deter crime.⁴³ At the very least, there is great disagreement among the experts about the deterrent effect of capital punishment.⁴⁴ The deterrence argument has never been proven. We simply do not know how many would have killed if capital punishment did not exist. At the same time, the vast majority of violent crimes are non-deliberate, that is, they proceed from the heat and passion of the moment, where capital punishment does not enter into the calculus of the crime. It is therefore difficult to prove the deterrence argument one way or the other. This argument, however, is irrelevant from a moral point of view for the reasons we have already given. The negative moral impacts of the death penalty are so serious, that capital punishment should be foreclosed from a moral perspective in any event.

CONCLUSION

We have attempted to show that man's right to life is absolute because man is thinking, spiritual, and mysterious. The moral argument was made that since human life is a mystery in its beginnings, its duration, and possibilities, as well as in its cessation, its "definition" does not exist. We have also attempted to show that unless this philosophical-moral stance is accepted as the basis for the right to life, then there is no final measure for any other human value or right. Imposition of capital punishment denies these mysterious and priority-setting characteristics

⁴² We mention this argument, not because it goes to the heart of the problem, but because it is so important in the pragmatic thinking of many of our contemporaries.

⁴³ Homicide rates in retention states are two to three times that of abolitionist states. E. Sutherland and D. Cressey, CRIMINOLOGY, 342 (10th ed. 1978). States that have abolished the death penalty have experienced no unusual increase in homicide and reintroduction of the death penalty has not been followed by a significant decrease in homicide. Sellin, Effect of Repeal and Reintroduction of the Death Penalty on Homicide Rates, in The Death Penalty in America 339-74 (2d ed. 1968 H. Bedau). This data was substantiated in a recent study. Bailey, Murder and the Death Penalty, 65 J. CRIM. L. & C., 416 (1974).

⁴⁴ For example, researchers have reached contradictory conclusions concerning the deterrent effect of the death penalty. See E. Van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question (1975); Symposium, Statistical Evidence on the Deterrent Effect of Capital Punishment, 85 YALE L.J. 164 (1975).
of man and, therefore, is never justified. Societies are built precisely on the value they place on human life. The foundation of any State is always a philosophic-moral concept concerning the fundamental right to life which cannot be evaded; and law's underlying premise is always its view of the person and his right to life.