



TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2000

Capital Punishment and Religious Arguments: An Intermediate Approach

Samuel J. Levine
Touro Law Center, slevine@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

9 Wm. & Mary Bill Rts. J. 179 (2000-2001).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

CAPITAL PUNISHMENT AND RELIGIOUS ARGUMENTS: AN INTERMEDIATE APPROACH

Samuel J. Levine*

Determining the place and use of capital punishment in the American legal system is a challenging affair and one that is closely associated with and determined by religion's role in American legal decision-making. Both capital punishment and religion are controversial issues, and tend to challenge legal scholars and practitioners about whether they should function together or alone as valid parts of the legal system in the United States. Professor Levine argues that religious arguments should be employed to interpret and explain American legal thought when the need or proper situation arises. He uses capital punishment as an example of how to properly reconcile a controversial legal issue with religious thought. Professor Levine suggests that religion acts as a comparative law model and provides another valid and instructive way of viewing capital punishment. Religious thought serves to provide explanation and insight into controversial American legal issues, and helps legal scholars and practitioners toward forming permanent solutions.

* * *

INTRODUCTION

An analysis of the relationship between religion and capital punishment is particularly challenging, involving a synthesis of at least two highly complex and controversial issues: the place of capital punishment in the United States and the place of religion in American legal and political decision-making. Yet, it is arguable that these issues should be viewed together, as capital punishment raises moral and ethical considerations¹ so profound that perhaps they are not properly

* Law Clerk to the Honorable Loretta A. Preska, United States District Court for the Southern District of New York; Adjunct Professor, Fordham University School of Law; L.L.M. 1996, Columbia University; Ordination 1996, Yeshiva University; J.D. 1994, Fordham University; B.A. 1990, Yeshiva University.

I thank Dave Douglas, Steve Garvey, and the editors of the *William & Mary Bill of Rights Journal* for inviting me to write this essay in connection with the symposium on religion and capital punishment held at the College of William & Mary, Marshall-Wythe School of Law on April 7, 2000. I thank Fraida Liba and Yehudah Tzvi for their encouragement.

¹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (“At bottom, the battle [over capital punishment] has been waged on moral grounds.”).

addressed without some reference to religious thought.² Indeed, questions of the potential application of religion to the American legal system generally, and to capital punishment in particular, have sparked a vast body of both scholarship and case law presenting widely differing perspectives and approaches.³

² Religion has consistently played a role in discussions of capital punishment in the courtroom, judicial opinions, and legal scholarship. *See, e.g.*, Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived From Panel Data*, 60 U. PITT. L. REV. 321, 347-50 (1999); Chad Baruch & Karsten Lokken, *Research of Jewish Law Issues: A Basic Guide and Bibliography for Students and Practitioners*, 77 U. DET. MERCY L. REV. 303, 304 n.15 (2000) (stating that “[p]rosecutorial reference to Jewish law as it relates to capital punishment has frequently been the subject of appellate discussion” and citing sources); Kevin M. Doyle, *A Catholic Lawyer’s View of the Death Penalty*, 29 ST. MARY’S L.J. 949 (1998); Robert F. Drinan, S.J., *Will Religious Teachings and International Law End Capital Punishment?*, 29 ST. MARY’S L.J. 957 (1998); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 306 (1998); Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. JURIS. 271 (1996); Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY’S L.J. 1037, 1038-39 n.4-6 (1998) [hereinafter Levine, *Capital Punishment*] (citing sources); Samuel J. Levine, *Playing God: An Essay on American Capital Punishment*, 31 NEW MEX. L. REV. (forthcoming 2001) [hereinafter Levine, *Playing God*]; Sister Helen Prejean, C.S.J., *Capital Punishment: The Humanistic and Moral Issues*, 27 ST. MARY’S L.J. 1 (1995); Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on “Eye for Eye” and the Death Penalty*, 1998 UTAH L. REV. 505, 509 n.12 (1998) (citing sources); Robert W. Tuttle, *Death’s Casuistry*, 81 MARQ. L. REV. 371 (1998); Elizabeth A. Brooks, Note, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 GA. L. REV. 1113 (1999); Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors’ Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335 (1997).

In addition, it is arguable that reference to religious sources for guidance in questions related to capital punishment is consistent with the Supreme Court’s repeated emphasis on the defendant’s moral culpability as a factor in a determination of a capital sentence. *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 625 & nn.95-101 (1999) (citing cases); Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 36 n.65 (1997) (same); Laura S. Underkuffler, *Agentive and Conscientious Decisions in Law: Death and Other Cases*, 74 NOTRE DAME L. REV. 1713, 1724-25 (1999) (same); *see also* Levine, *Playing God*, at Part I (citing and analyzing cases and articles).

³ *See, e.g.*, Samuel J. Levine, *Law, Ethics, and Religion in the Public Square: Principles of Restraint and Withdrawal*, 83 MARQ. L. REV. 773, 773 n.2 (2000) (citing sources); *see also* Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, 205-06 (1998). This article describes the debate between Michael McConnell and Bruce Ackerman on whether lawmakers and judges may permissibly rely on religious beliefs, and observes that

[w]ith passion and eloquence, McConnell favored—and Ackerman opposed—

Using capital punishment as an example, this Essay aims to suggest an intermediate approach to the application of religious thought to American legal issues.⁴ This Essay posits that American law should not grant religious principles an intrinsic measure of legal authority in answering American legal questions.⁵ At the same time, religious thought should not be rejected as a source of reasoning in American legal analysis. Thus, this Essay supports an approach that allows religious arguments to be considered and possibly adopted on the basis of their potential relevance and logic vis-a-vis American legal thought. While such an approach places certain limitations on the influence of religious principles in American law, at the same time this mode of analysis does not automatically exclude religious arguments that have relevance independent of their religious significance.⁶ Therefore, this approach likely allows for widespread use of religious ideas in American legal discourse, as religious ideas are acceptable to the extent that they present ideas that are helpful in considering questions arising in American legal thought.

permitting reliance on religious beliefs [E]ach scholar saw himself as speaking for the long-settled consensus of American political culture—one that until recently would have needed little explicit justification—and each portrayed his opponent . . . as someone seeking to disrupt this consensus.

Id.; cf. MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION FREDERICK CLAUSE JURISPRUDENCE* 27 (1995) (contrasting scholars who “have contended that American politics and public life are hostile to religion” with those “baffled by the suggestion that American public life discriminates against religion”); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 477 (1996) (describing “[t]he gulf between those who would rely on faith and those who would rely on reason” and citing illustrations of respective positions).

⁴ It should be recognized, however, that the very notion of an intermediate position toward a legal controversy, in particular one relating to religion, may depend in large degree on difficult questions of neutrality and perspective. See GEDICKS, *supra* note 3; Samuel J. Levine, *The Challenges of Religious Neutrality*, 13 J. L. & RELIGION 531 (1998-99); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996).

⁵ Cf. *United States v. Lynch*, No. 96-6137, 1996 WL 717912, at *2 (2d Cir. Dec. 11, 1996) (rejecting argument, based on natural law, that it should nullify statute for “violat[ing] principles superior to the Constitution” and finding that “[u]nder Supreme Court precedent, well-settled constitutional principles, and the rule of stare decisis, we decline to invalidate a federal statute . . . on the basis of natural law principles”).

⁶ Consistent with the attempt to support an intermediate position, this approach thus rejects what one scholar has called a “dogma[] of liberalism,” the categorical view that “religious beliefs are irrational or non-rational and therefore cannot meet the standards of public reason.” Ronald F. Thiemann, *Religion and Legal Discourse: An Indirect Relation*, 81 MARQ. L. REV. 289, 296 (1998).

I. THE GENERAL APPROACH: RELIGION AS COMPARATIVE LAW

In an illuminating contribution to a symposium that explored the relationship between religion and the judicial process,⁷ Professor Steven Smith offers a strong argument for the inclusion of religious perspectives in the consideration of American legal questions.⁸ In response to the position that “any governmental reliance on religion is improper,”⁹ Smith cites Professor Stephen Carter’s argument that, in the context of constitutional interpretation, “if judges may properly consult views of morality or philosophy outside the text, then there is no good reason to restrict them from considering religious perspectives.”¹⁰ Expanding on Carter’s thesis, Smith suggests that “[a] similar argument could be made, perhaps even more cogently, about judicial common law-making.”¹¹ Therefore, rejecting the “distorting image of religion as a ‘self-contained package’ . . . relevant mostly to specialized or exotic issues,”¹² Smith finds that “it hardly seems surprising that religion might be relevant to the broad range of issues considered in the law.”¹³ Smith convincingly observes that

[a]fter all, religious teachers, prophets, theologians, and mystics have over the centuries spoken profoundly on the crucial issues of birth, life, family, work, commitment, government, justice, violence, deceit, and death. These are the same kinds of issues that come before the courts on a daily basis for discussion and resolution.¹⁴

⁷ See Symposium, *Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 MARQ. L. REV. 177 (1998).

⁸ See Smith, *supra* note 3.

⁹ *Id.* at 217.

¹⁰ *Id.* at 217 (citing Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989)). As Smith puts it, “if the Constitution does not enact Herbert Spencer, neither does it enact John Stuart Mill; but we *do* seem to carry on a sort of active flirtation with Mill’s ideas.” *Id.* at 209; see also Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 518 (1998). He states:

We are free to hear the voices of religious values, mathematical principles, classical literature, popular music, and quotations by Sherlock Holmes in our effort to understand the issues we must consider . . . Judges are free to hear the voices of William Shakespeare, Sir Arthur Conan Doyle, John Locke, Robert Browning, Johann Wolfgang von Goethe, Oliver Wendell Holmes, Moses, Jesus, Sojourner Truth, Frederick Douglass, and Martin Luther King, Jr., without embarrassment or hesitation as we deliberate.

Id.

¹¹ Smith, *supra* note 3, at 217.

¹² *Id.* at 215.

¹³ *Id.* at 216.

¹⁴ *Id.*

Indeed, he declares, “[i]t would be remarkable if religion did *not* have much to say about many of these issues.”¹⁵ Premised on these observations, Smith relies on religious principles to offer an innovative alternative to current legal doctrine regarding the law of damages, incorporating religious insights into the complexity of human reaction to the effects of personal injury.¹⁶

Significantly, however, in response to criticism that his approach requires acceptance of religious beliefs, Smith explains that these insights “*might* be religious in character, but there seem[s] to be no reason why they *need to be* religious” in nature.¹⁷ Thus, Smith’s approach appears to achieve a balance: a willingness to consider relevant teachings that may be gleaned from religious perspectives without accepting the authority of religious values in American legal thought.¹⁸ To the extent that such an approach would not only permit but require an examination of the rationale behind a religious principle and the soundness of its reasoning within the logic of American legal thought, the approach may prove acceptable to some who have expressed opposition to judicial incorporation of religious ideas.¹⁹

¹⁵ *Id.*

¹⁶ *See id.* at 218-27.

¹⁷ *Id.* at 225 (emphasis in original).

¹⁸ *Cf.* Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523, 531 (1998). The author suggests that

the most promising type of religiously informed judging would view religion as an independent source of moral truth, but a source to be tested and put in conversation with competing sources [t]his form of judicial thinking would permit a judge’s religion to play an important role in the process of judicial decisionmaking. At the same time, however, by placing his or her religious source of truth in conversation with competing sources—secular as well as religious—it would avoid the narrowness of religious fundamentalism, a narrowness that too often leads to moral understandings that are seriously incomplete, if not simply mistaken no claims of truth, whether secular or religious, should be immune from challenge, criticism, or debate.

Id.; Griffen, *supra* note 10, at 518-19 (explaining that “[r]eligious values are neither more, nor less, appropriate factors for justifying judicial decisions from a philosophical perspective” and that “[t]he mere fact that religious voices are different from others does not make them less reliable, less articulable, or less deserving of consideration and assertion, nor are they less susceptible to candid criticism and debate in the judicial context”); *id.* at 521 (stating that “the sources from which we obtain our conception of justice should not be artificially restricted. We must certainly deliberate and debate their validity with vigorous diligence out of proper regard for sound reasoning”); Thomas L. Shaffer, *On Checking the Artifacts of Canaan: A Comment on Levinson’s “Confrontation,”* 39 DEPAULL. REV. 1133, 1142 (1990) (“Substantive pluralism, serious about moral values, would be a society in which moral beliefs are described, aired, and discussed, even in legislatures and in the courts. No moral belief would be silenced because it was also religious.”).

¹⁹ *See, e.g.,* Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L.J. 273, 276-77 (2000) (adopting a “*principle of secular rationale* that citizens

In fact, through this approach, the value of religious ideas to American law may be analogous to the effective use of comparative law to help illuminate and develop legal principles.²⁰ As Smith observes, and as his example of the law of damages illustrates, religious systems often raise and address issues that arise in American law, examining these issues from a different point of view. Religion, then, may provide a contrast case to the American legal system, offering perspectives that may shed light or perhaps offer useful alternatives in assessing both settled and emerging areas of law.²¹

in a liberal democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, an adequate secular reason for this advocacy or support,” and “taking a secular reason as roughly one whose normative force, that is, its status as a prima facie justificatory element, does not evidentially depend on the existence of God (or on denying it) or on theological considerations, or on the pronouncements of a person or institution *qua* religious authority”); Sherry, *supra* note 3, at 492, 478 (arguing that “government may not make decisions that are themselves based on contested religious beliefs that cannot be rationally supported, that privilege religious over secular beliefs, or that single out religious beliefs from among other nonrational beliefs for preferential treatment,” but that “to the extent that a religiously-motivated conclusion is also supportable by rational argument, it should not pose a problem in a secular state; it is only nonrational arguments that threaten the primacy of reason”); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safer for Religious Minorities*, 47 DEPAUL L. REV. 499, 501 (1998) (positing that “religious reasons should *not* be deemed legitimate justifications for public policy” because “[a]ll laws should be justified by secular reasons accessible to all citizens, whether religious or not”).

²⁰ See generally Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025 (1999) (describing different forms of comparative law).

²¹ Cf. P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TUL. L. REV. 165, 167 (1994) (“[T]he utility of the comparative method is beyond dispute. Comparative law not only provides alternative solutions to be used in legal reform but also gives us a better understanding of our existing law. In short, it is an indispensable tool of legal science.”); Shmuel Shilo, *The Contrast Between Mishpat Ivri and Halakhah*, 20 TRADITION 91, 98 (1982). The author states

The most important and fruitful aspect of the comparative method . . . is the in-depth study of legal institutions, both in the Jewish legal system and in the other legal systems, in order to understand how universal questions of law (and let us remember that most legal problems seeking a solution, are universal in nature) are answered by Jewish law as compared with other legal systems. Often the solutions to similar problems resemble each other in all legal systems, but many times Jewish law has its own unique approach to a question or a legal institution.

Id.

Indeed, courts and scholars have employed principles from the Jewish legal system, for example, to analyze numerous areas of American law. For a compilation of sources, see, for example, Daniel G. Ashburn, *Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions*, 71 U. DET. MERCY L. REV. 295 (1994) (providing an historical overview of Jewish law in American Jurisprudence); Baruch & Lokken, *supra* note 2; Samuel J.

Moreover, in addition to providing a helpful theoretical framework and offering a thought-provoking application of the theory, Smith's approach appears to paint an accurate descriptive portrait of the attitudes of many judges who incorporate religious thinking into their judicial opinions. While scholars have documented numerous examples of judicial citation of religious principles,²² as Professor Kent Greenawalt has noted, a judge "is not likely to say that an otherwise debatable legal conclusion is correct because it conforms to Christianity, or some other supposedly true religious understanding."²³

II. APPLYING THE APPROACH: THE EXAMPLE OF CAPITAL PUNISHMENT

Scholars and courts alike have addressed the relationship between various religious traditions and the administration of capital punishment in the United States.²⁴ An examination of some of the attempts to apply religious principles in this area suggests that religious thought has much to offer the contemporary debate over capital punishment. At the same time, it appears that the value of many religious arguments lies in their appeal to a logic that need not rely on the authority of a religious system.

Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 442-43 nn.3-11 (1997); Samuel J. Levine, *Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion*, 26 FORDHAM URB. L.J. 1041 (1999); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 817-19 nn.14-28 (1993).

²² See, e.g., Ashburn, *supra* note 21 (describing American use of Jewish law); Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993); see also Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH L. REV. 1139 (1996) (describing a Texas judge's spiritual journey through life). But see Conkle, *supra* note 18, at 530 n.17 (stating that "[f]or whatever reasons, it is rare for judges in the contemporary United States to openly refer to religious values—whether their own or those of the culture—as support for their judicial decisions"); Griffen, *supra* note 10, at 517. The author states:

We claim to respect the role of moral knowledge in helping us think and debate our varying ideas about what the legal principles should be, and we profess a desire to have men and women serve as judges who possess moral knowledge. But we want the moral knowledge to originate from secular sources, not those that are religious.

Id.; Smith, *supra* note 3, at 213 (finding that "the neglect of religious perspectives, or of religion as a possible resource, persists in the discourse of legal practice; there is little evidence of religious ideas in the typical lawyer's brief or judicial opinion").

²³ KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 142 (1995). For a discussion supporting this practice on a normative level, see Levine, *supra* note 3, at 776-77 & nn.10-21.

²⁴ See *supra* note 3.

For example, in a recent symposium about capital punishment,²⁵ Kevin Doyle, the Capital Defender of New York State, spoke “as a Catholic about [his] views of the death penalty.”²⁶ Doyle identified three fundamental propositions, based in his Catholic faith, underlying his opposition to capital punishment: “(1) that human beings are fallible; (2) that racism is mortally sinful; and (3) that human life is sacred.”²⁷ The articulation of these three rationales is significant in that each idea, though supported by theological beliefs, finds a basis in American legal reasoning, independent of religious thinking.²⁸ The acknowledgment that human beings are fallible is indisputable and serves as one of the main arguments for opponents to capital punishment, who warn that human error may result in the implementation of the most severe and irrevocable of punishments.²⁹ Likewise, death penalty opponents point to statistics demonstrating the influence of racial factors in determining the likelihood that a particular individual will be sentenced to death.³⁰

²⁵ See Symposium, *Thoughts on Death Penalty Issues Twenty-Five Years After Furman v. Georgia*, 29 ST. MARY'S L.J. 929 (1998).

²⁶ Doyle, *supra* note 2, at 949.

²⁷ *Id.* at 950.

²⁸ Cf. William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on The Practice of Justice*, 51 STAN. L. REV. 991, 1001 (1999). The author states:

Most of the Christian objections to the death penalty have secular analogues in the liberal public critique. No doubt many lawyers who participate in anti-death penalty activism draw inspiration from their religious commitments, even though their public arguments take a secular form. And the liberal public critique is influenced by Christian views.

Id.

²⁹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring) (footnote omitted) (“No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.”); CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981); MICHAEL L. RADELET, ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Michael L. Radelet, et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996); Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61 LAW & CONTEMP. PROBS. 105 (1998).

³⁰ Many authors have discussed racial bias in the administration of the death penalty. See, e.g., ADALBERTO AGUIRRE, JR. & DAVID V. BAKER, *RACE, RACISM AND THE DEATH PENALTY IN THE UNITED STATES* (1991); SOUTHERN CENTER FOR HUMAN RIGHTS, *DISCRIMINATION AND DEATH: REPORT ON EFFORTS TO STOP DISCRIMINATION IN THE INFLECTION OF THE DEATH PENALTY* (1990); Stephen B. Bright, *Race, Poverty, Disadvantage, and the Death Penalty*, 22 AM. J. CRIM. L. 272 (1994); Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty*, 11 LA RAZA L.J. 75 (1999); Randall L. Kennedy, *McClesky v. Kemp: Race,*

Finally, the dignity of human beings and the importance of protecting innocent life are fundamental to the American legal system and find powerful expression in substantive and procedural safeguards protecting those accused of capital crimes.³¹ Indeed, the same arguments that Doyle identified as religious in nature, removed from their religious roots, have actually played a central role in contemporary American legal discourse over capital punishment. Thus, these arguments provide a useful example in examining the role of religious argument in the context of capital punishment.³²

The observation that religion offers insights valuable to consideration of the issue of capital punishment in the United States suggests that the automatic

Capital Punishment, and the Supreme Court, 101 HARV. L. REV. 1388 (1988); Katherine R. Kruse, *Race, Angst, and Capital Punishment: The Burger Court's Existential Struggle*, 9 SETON HALL CONST. L.J. 67 (1998); Kevin Reed, et al., *Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395 (1994); Melanie Shaw, *Race, Statistics and the Death Penalty*, 34 HOW. L.J. 503 (1991); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Example*, 95 HARV. L. REV. 456 (1981); see also Prejean, *supra* note 2, at 7 (asserting that "[w]hen you consider the history of the death penalty in this country, it is obvious that the race of the victim has always played a part").

³¹ The Supreme Court has emphasized repeatedly that death penalty jurisprudence is different from all other areas of the law because "death is different." See, e.g., *Harris v. Alabama*, 513 U.S. 504, 516 n.1 (1995) (Stevens, J., dissenting) (citing Supreme Court cases confirming that "death is a fundamentally different kind of penalty"); *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting) (identifying "death-is-different" jurisprudence); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree.").

For scholarly treatment of the "death is different" doctrine, see, for example, HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* (1987); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1674 & n. 123 (1998) ("The Supreme Court . . . has rested an entire jurisprudence of capital punishment on the premise that state killing is sui generis and that noncapital precedents sometimes provide insufficient protection when applied in the capital context. The Court has declared by way of justification that 'death is different.'"); Underkuffler, *supra* note 2, at 1729 (citing Supreme Court cases that describe uniqueness of death penalty); cf. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."); 4 WILLIAM BLACKSTONE, *COMMENTARIES* 358 ("[I]t is better that ten guilty persons escape, than that one innocent suffer."). But see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflection on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 397 (1995) (finding that "[t]he Court echoed the 'death is different' principle in a number of . . . cases, but close examination of the Court's decisions over the past twenty years reveals that the procedural safeguards in death cases are not as different as one might suspect").

³² At the same time, those who favor reliance on religious principles may find helpful the realization that arguments nearly identical in substance to religious ideas have been employed effectively when articulated without resort to religious authority.

exclusion of religious thought might unnecessarily lessen the intellectual vitality of public discourse. Of course, it is possible to maintain that any or all of these ideas evolved in American society independent of religious thought. Such an objection, however, seems largely irrelevant. To the extent that religion offers insights that, at the very least, enrich the level of discussion, ignoring these insights would seem to prove counterproductive and unfortunate.

Moreover, in addition to articulating arguments that often appeal to American legal reasoning, religious thought may present these arguments in a manner and context that lend deeper meaning to concepts already familiar within American legal discourse. The notion that human life is sacred, for example, finds strong support in both religious thought and in what Professor Michael Perry calls “the moral culture of the United States.”³³ Therefore, according to Perry, “it would be silly to insist that . . . citizens, legislators, and other policymakers should . . . forgo reliance on the claim that every human being is sacred unless, in their judgment, a persuasive . . . secular argument supports the claim.”³⁴ In short, Perry explains,

the proposition that each and every human being is sacred is not only embedded, in one form or another, in many different religious traditions; it is also axiomatic for most persons, including most religious nonbelievers, who are committed to liberal democracy as the morally best form of government and, more broadly, the idea of human rights.³⁵

Nevertheless, even if the idea that human life is sacred exists independent of religious thought, there may be much to gain by looking at the way the idea finds expression in religious sources. Two statements in the *Talmud* dramatically emphasize the value of a single human life. First, based on the language of a verse relating to Cain’s murder of Abel,³⁶ the *Talmud* observes that the commission of a murder not only kills the actual victim of the crime; a murder also “kills” future

³³ See Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DEPAULL. REV. 1, 23 (1998).

³⁴ *Id.*

³⁵ *Id.* at 24; cf. Izhak Englard, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903 (2000) (discussing laws infringing on basic human dignity); Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States*, 6 PAC. RIM L. & POL’Y J. 1, 39 (1997) (asserting that “the idea that all human life is equally and intrinsically precious . . . has been central to the moral foundations of society for many centuries”).

³⁶ In *Genesis* 4:10, God tells Cain that “the voice of your brother’s blood calls out to Me.” In the original Hebrew, the word for “blood” is in the plural, prompting the *Talmud*’s comment that the verse refers not only to the blood of Abel himself, who was actually murdered, but also to the blood of his descendants who, as a result of his murder, never lived.

generations who could have descended from the murder victim.³⁷ Second, the *Talmud* states, in equally dramatic terms, that preserving a single life is tantamount to preserving an entire world.³⁸

Both of these statements are open to numerous interpretations and applications³⁹ valuable to American legal thought. In fact, in the context of the American debate over capital punishment, the importance of protecting innocent life could, theoretically, be invoked, in various forms, by death penalty proponents and opponents alike. Regardless of how the principle is used, however, the *Talmud's* eloquent and insightful articulation of the idea that human life is sacred is likely to add analytical and emotional depth⁴⁰ to the conversation.⁴¹

³⁷ See TALMUD BAVLI, *Sanhedrin* 37a.

³⁸ See *id.*

³⁹ For example, one interpretation by a twentieth century scholar of Jewish law and philosophy explains the latter statement as a reference to the unique role and contribution that each individual has in the world and the corresponding destruction that therefore results from a murder. See 4 ELIYAHU DESSLER, MICHYAV M'ELIYAHU 89 (Aryeh Carmell ed., 1986). An American legal scholar has cited the statement as a moving expression of the "continuing impact" of a crime. See Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323, 338 (1994).

⁴⁰ The emotional force of the Talmudic statements is important, as the *Talmud* records that these statements were among those pronounced by judges during the cross-examination of incriminating witnesses in capital cases, as an appeal to one who might thereby reconsider an attempt to bear false witness. See TALMUD, *supra* note 37.

⁴¹ The same may be true more generally of attempts to rely on Jewish law and philosophy in discussions of capital punishment in the United States. There has been much documentation of the often simplistic use—and, occasionally, the apparent misuse—of Jewish thought by judges, attorneys, and scholars who have addressed the issue of capital punishment. See, e.g., Levine, *Capital Punishment*, *supra* note 2, at 1038-39 n.4-6 (citing sources); Rosenberg & Rosenberg, *supra* note 2, at 509 n.12 (citing sources). As one contemporary scholar of Jewish law has noted, however, there exist within Jewish legal tradition regarding capital punishment "divergent views" that reflect "a variety of conflicting principles." BASIL F. HERRING, *JEWISH ETHICS AND HALAKHA FOR OUR TIME: SOURCES AND COMMENTARY* 170, 150 (1984). Therefore, as I have suggested elsewhere, consistent with the approach suggested in this Essay, rather than attempting directly to rely on a supposedly authoritative position in Jewish law, it would seem prudent to "focus[] on the conceptual underpinnings behind pertinent Jewish law, considering the potential relevance and effect of those conceptualizations on American legal thought." Levine, *Capital Punishment*, *supra* note 2, at 1039.

In contrast, I have expressed doubt about attempts to apply to the American legal system religious ideas that would seem to have meaning only within a religious system. See *id.* at 1043 & nn.22-24 (asserting that "[a]lthough the processes of repentance and atonement are inherent parts of the Jewish legal system, that is clearly not the case in American penal law"). But see Symposium, *The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1351 (2000); Dennis M. Cariello, *Forgiveness and the Criminal Law: Forgiveness Through Medicinal Punishment*, 27 FORDHAM URB. L.J. 1607 (2000); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999); David M. Lerman, *Forgiveness*

Similarly, Doyle's discussion of the Catholic position that human life is sacred offers an insight often absent from American legal discourse. Doyle emphasizes that "it is not only the life of the executed that is sacred but also the life of the executioners."⁴² In addition, according to Doyle, Catholicism teaches, based on the Natural Law tradition, that "the greatest impact of immoral acts is not on the actee but on the actor. So what we do as moral actors shapes us, humanizes or dehumanizes us."⁴³ Though religious in origin, both of these insights are understandable independent of religious thought. Therefore, Doyle's conclusion, that "the exercise of the death penalty on a human being warps and numbs people,"⁴⁴ is plausible without reference to Catholic doctrine.

CONCLUSION

Independent of its relationship to religion, capital punishment persists as one of the most controversial areas of American public discourse. Thus, attempts to address the issue of capital punishment through reliance on religious argument appear to inject yet an additional level of complexity. After all, questions regarding the place of religion in American legal thought have already sparked a growing body of legal scholarship, comprising what Professor Smith has called a "voluminous" debate.⁴⁵ This Essay posits that such added complexity should be welcomed, both as helpful in the discussion of capital punishment in the United States and, more generally, as an example of the possibility and utility of looking to religious thought, not as binding legal authority, but as a comparative law model deserving attention in the consideration of American legal issues.

in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?, 27 FORDHAM URB. L.J. 1663 (2000); Samuel J. Levine, Teshuva: *A Look at Repentance, Forgiveness, and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000).

⁴² Doyle, *supra* note 2, at 955.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Smith, *supra* note 3, at 203 n.1.