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LIFE, DEATH AND THE LAW—AND WHY CAPITAL PUNISHMENT IS LEGALLY INSUPPORTABLE

PETER FITZPATRICK¹

It is fitting at the outset to thank my gracious and scholarly colleague, Professor Tayyab Mahmud, not just for his abounding generosity since my coming here, but for all that he did to make that possible. My gratitude can also be confidently generalized. Having some affection for the medieval notion of the wandering scholar, and having visited many academic institutions, in none have I been received with a more expansive kindness or with a more effective concern, whether it be by Dean Steinglass and a thoroughly efficient administration, by the exciting academic community, or by the truly remarkable librarians. No matter how well briefed one may be beforehand, visits of this kind always offer engaging revelations; always reveal pockets of surprising scholarship. Cleveland-Marshall College of Law has certainly been no exception. That serendipity extends to the students and to the discovery that so often their enthusiasm and intellectual commitment spring from the work many of them do along with their studies. Here was a felt affinity since my law degrees were acquired whilst working.

And, here also is another apt connection. The generous endowment of the Chair which I am privileged to occupy—the Joseph C. Hostetler-Baker & Hostetler Chair—marks the life and achievements of one of the firm’s founding partners, Joseph C. Hostetler. Not the least of his achievements was to have combined work and study for his law degree. And he did this by way of occupations having a certain cachet which mine lacked: a synoptic history of the firm has it that he worked his way through Case Western Reserve Law School, at one point selling suspenders in every state in the Union, at another working as a police beat reporter. To bring things a little more up to date, I am ultimately grateful to Mr. John Deaver Drinko and his colleagues for the great opportunity they have provided me.

Savigny made the startling claim that “law has no existence for itself; rather its essence lies . . . in the very life of men.” And, he would doubtless now add, “in the very life of women.”² An oblique but, hopefully, productive way of making out that claim would be to see what happens to this existential imperative—to law’s integral commitment to life—when law is called upon to deal death. In responding to such a call, and if Savigny is right, law should then manifest something of a fundamental dissonance, even a terminal incoherence. In this lecture, I want to show how that is what happens in the judicial discourse on the death penalty in the United States. I will approach this demonstration in a way that may at first seem paradoxical, in a way that will bring out the deep affinity between law and death. That affinity is one in which death is, in a sense, the limit of law—a limit that constitutes law. Law cannot, then, go beyond its own constituent limit.

¹Thanks to Linda Usdin for orientations, to Louise Mooney and Marie Rehmar for making an occasion of this talk, and to Phyllis Crocker for a generosity of references.

²See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 27 (Daniel Heller-Roazen trans. 1998).

In its supreme stasis, death is often equated with “law itself in its origin, in its very order.”³ This tends to be put in terms of death as the ultimate or final assertion of law as sovereign, its mundane mode being capital punishment.⁴ Borrowing Dean’s apt summary, law becomes a “principal instrument” of a transcendent sovereignty whence it is “backed up by coercive sanctions ultimately grounded in the right of death of the sovereign.”⁵ All of which gives some force to law’s deathly claim to determine finally, to fix and hold life, denying its protean possibility. Death in this guise can be found, for example, fully operative in the Benthamite dream of “total and certain order” through law.⁶ Or it can be found in the quest of legal positivists for such an order within law itself—a law which, in its achieved autonomy, would not have any essential relation to what is beyond it. Such a self-sufficing law “sever[s] its relation to the lifeworld by constituting that world of mundane sociality as its outside or other.”⁷ In this dimension of it, death, being “always the horizon of the law,” is a horizon which cannot be gone beyond, which denies any essential relation beyond it, leaving that which it demarcates to its own immanence, to its self-posed autonomy.⁸

There is, however, a diametrically different sense in which death is the horizon of the law. The horizon now is not a closed finality but the opening to all possibility that is beyond affirmed order. Death denies and dissolves such order and makes something else possible, something unknowable with any assurance beforehand: “it exposes us to the immeasurability of something we can never experience.”⁹ So, to “make a work of death” by regarding its finality only, and by constituting an autonomous law in the image of death, is to deny the importunate mystery of death itself. Death in its determinate predictability is not only the greatest certainty but, in its opening to what is unknowably beyond, also the greatest uncertainty—and, what is central to my argument, it is death which makes uncertainty as uncertainty certain.¹⁰ “Things” are always dying to what they are and, in this dying, the

³Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 42 (Drucilla Cornell et al. eds. & Mary Quaintance trans. 1992); Cf. MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION 144 (Robert Hurley trans. 1981).

⁴See, e.g., John Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 308 ¶ 3 (1965); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 331-33 (John Ladd trans. 1965); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 49 (Alan Sheridan trans. 1979).

⁵MITCHELL DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY 105 (1999).

⁶DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 281 (1989).

⁷Peter Goodrich, *Fate as Seduction: The Other Scene of Legal Judgement*, in CLOSURE OR CRITIQUE: NEW DIRECTIONS IN LEGAL THEORY 117 (Alan Norrie ed. 1993).

⁸This resonates with rejection and denial. Death can, however, be affirming when chosen instead of continuing life in terms contrary to what that life had been, dying rather than renouncing a belief or a friendship for example—“the affirmation of value, up against the boundary of death.” JOHN BOWKER, THE MEANINGS OF DEATH 39 (1991).

⁹FRANÇOISE DASTUR, DEATH: AN ESSAY ON FINITUDE 4 (John Llewelyn trans. 1996).

¹⁰JEAN-LUC NANCY, THE INOPERATIVE COMMUNITY 12-13 (Peter Connor trans. 1991).

possibility of their being other than what they are is continually created. Law, then, is also this uncertain dimension of death and even, in a sense, primarily so, since law is only called to affirm certainty in the face of uncertainty. Before saying more about these two dimensions of death and the law, and especially about the effect of their combination, let me “set” the story so far in familiar terms.

Here I will combine a regard for the logics of the rule of law with a regard for Thomas Hobbes. To start with Hobbes: On first looking into his *Leviathan*, into the founding text of Western secular government, what we seem to find is a most complete justification for sovereign power. Life in the natural state, where we find a war of all against all, is so “solitary, poor, nasty, brutish, and short” that there is a primal transfer of “all power and strength” to a singular, sovereign ruler, and in this way the subject becomes comprehensively committed to all actions of the sovereign “as if they were his own”; subjects are thus inextricably bound to Leviathan “to him that beareth their person,” and so much so that “none of his subjects can be freed from his subjection.”¹¹ Having such an encompassing, such a complete power over life, there would seem to be nothing in the way of Leviathan's taking it away. At this point, however, Hobbes circumscribes the power of Leviathan. Since the primal covenant is entered into for the preservation of life, should Leviathan seek to take life away, he can be utterly resisted.¹² So, in his very power of determination—determination through laws that are the “command” of the sovereign—Leviathan must have a responsive regard to where that power came from. Hobbes would go even further in Leviathan's regard for life. With this unexpectedly tender side to him, Leviathan has to secure “the safety of the people,” but “by *safety* here is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself.”¹³ So much is this so, that Hobbes deduces from it an extensive list of “liberties” of the subject and a most extensive collection of “duties” imposed on Leviathan for ensuring the well-being and improvement of the people.¹⁴ Laws, the very command of Leviathan, must be infused with a responsive regard for his subjects.¹⁵

Let me now take this perhaps surprising divide in the power and the laws of Leviathan, a divide between determinative force and responsiveness, and transpose it to the logics of the rule of law. Countless histories and juridical affirmations would have us believe that certainty, predictability, and order characterize the rule of law. As against the vagaries of an arbitrary and discretionary power, the rule of law clearly marked out an area of calculability in which the individual could now purposively progress. In order for this law, and “not men,” to rule, it had to be coherent, closed and complete. If it were not coherent but contradictory, something else could be called on to resolve the contradiction. If it were open rather than closed, then something else could enter in and rule along with law. If it were

¹¹THOMAS HOBBS, *LEVIATHAN* 85, 100-01 – chs. 13, 17 and 18 (Encyclopedia Britannica 1952).

¹²*Id.* at 115 – ch. 21.

¹³*Id.* at 153 – ch. 30.

¹⁴*Id.* at ch. 30.

¹⁵*See, e.g., id.* at 113, 132, 139 – chs. 21, 26 and 27.

incomplete and not a whole *corpus juris*, and if it were thence related to something else, then that something else could itself rule or share in ruling with law. For all of which, law had to be self-generating and self-regulating because, if it were dependent upon something apart from itself for these things, then, again, those things would rule along with or instead of law.

We can, however, take each of these imperative qualities of the rule of law and evoke their opposite “in” the rule of law itself. For law to rule, it has to be able to do anything, if not everything. It cannot, then, simply secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change; otherwise, law will eventually cease to rule the situation that has changed around it. So, how could the rule of law be complete if it must ever respond to the infinite variety of fact and circumstance impinging on it? How could it be closed when it must hold itself constantly responsive to all that is beyond what it may at any moment be? And how could law, in extending to what is continually other to itself, avoid pervasive contradiction? Law cannot be purely fixed and pre-existent if it is to change and adapt to society, as it is so often said that it must. Its determinations cannot be entirely specific, clear and conclusive if it has integrally or at the same time to exceed all determination, to assume a quality of “everywhereness.”¹⁶

We can also see modern law similarly stretched between stable determination and responsive change in the persistent squabbles that so enliven jurisprudential thought. These intractably polarized debates alternate between law's being autonomous and its being dependent. Taking the latter first, it is readily said that law is dependent on society, politics, the popular spirit, scientific administration, the economy, or the narratives in which it is embedded. In a more diachronic vein, we are told that law has to change along with society or history otherwise it becomes increasingly irrelevant and, eventually, obsolete. The contrary claims for autonomy, although a little more venerable, have not lost any of the force of their assertion. With them law somehow has to stand apart from the remorseless demands of society, history, and so on, and even to exclude its “own history.”¹⁷ In being so placed, “absolute and detached from any origin,” law not only stands distinctly apart from, say, society, but also orders, shapes, or even creates society—to adopt long-enduring and standard formulations.¹⁸ To the extent that society does not so conform, law yet retains its hold as the measure against which that “failure” and passing imperfection are to be measured. In this, and indeed in all the various applications and changes throughout its history, a law remains insistent that law. Law's autonomous binding force cannot be contained by what it is or has been, by its history, but extends to all that it will be. Law is eternally present.

Given this divide and its persistence, perhaps inquiry should be diverted. Rather than seeking law in that which simply conforms to either side or both sides of the opposition, perhaps we could seek a law which “is” in-between the opposed dimensions, which “is” the experienced combination of them, and which has its

¹⁶A. Carty, *English Constitutional Law from a Postmodernist Perspective*, in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 196 (P. Fitzpatrick ed. 1991).

¹⁷JACQUES DERRIDA, ACTS OF LITERATURE: (*BEFORE THE LAW*) 190 (Avital Ronell trans. 1992).

¹⁸*See id.* at 194; D.R. KELLEY, HISTORY, LAW AND THE HUMAN SCIENCES: MEDIEVAL AND RENAISSANCE PERSPECTIVES 42-45 (1984); LIEBERMAN, *supra* note 6, at 281.

being because each dimension is inexorable yet unable to be experienced by itself. And perhaps these dimensions are equivalent to the divide between law's autonomy and law's dependence. If so, then it would seem that the condition of being in law is always unresolved and calling for incessant decision and judgment. Nonetheless, we may find prospects for resolution in these dimensions being not only opposed but also somehow integral to each other. A complete determination of position and a responsiveness to what is beyond position are antithetical things, but there can be neither position without responsiveness to what is always beyond it nor responsiveness without a position from which to respond. In their separation, these dimensions mark the horizon of law, the horizon both as a condition and quality of its contained being, and the horizon opening onto all which lies beyond that being. These dimensions of law are integral to each other. The separate insistence on each would be death, carrying with it either a terminal fixity or a dissolving responsiveness to what is beyond. Law subsists in-between these two dimensions.

Operatively, law so subsists in the decision—the decision of the subject, the judge, and the legislator. The legal decision is always unique. It cannot be rendered beforehand in terms of some empirical reality or in terms of a previous decision. If it could be reduced in either of those ways, there would be no “call” for the decision, no demand for “fresh judgment.”¹⁹ Put another way, the responsibility—or, in terms of an archaic usage, the responsibility—involved in judgment cannot be accommodated within the determined or the known. There is always “in” the legal judgment a “secret,” a mystery, a “madness.”²⁰ The point can be concentrated by way of an example. It is exactly because the political trial eliminates the judicial ability to respond, that the judge in such a trial is not considered to be making a legal decision. The trial is “fixed”—in both the standard and colloquial senses.²¹ To be “legal,” the decision must be approached in openness. The decision could always have been otherwise than what it is. Yet, for a legal decision, the decision-maker has to gather some fixing elements, some incipiently determinant points of reference; otherwise, the process of deciding would disappear in pure responsiveness. The determinant cannot, however, be complete in itself. Its very persistence as stable, predictable, decided law depends on its constantly responding and adjusting to every moment of impinging difference which confronts it. Enduring determination depends, then, on responsiveness. It must ever sustain an illimitable capacity to be other than what it is, a capacity compatible with its being quite other to what it is—compatible ultimately with its reversal. Perhaps the most compendious illustration comes from the clash of guiding legal maxims produced in situations of extreme challenge to law where, to translate from the Latin, the responsive clarion to “let justice be done though the heavens fall” confronts the determinant counter that “the preservation of the republic is the supreme law.” We also come across numerous ways in which these two dimensions are brought together in law. “Equity” provides a dramatic instance, using the term in its usual association with the common law (but it could be extended to equivalents found in various principles of interpretation and general standards in civil codes). Although usually advanced as a supplement to the

¹⁹Derrida, *supra* note 3, at 23.

²⁰*Id.*; JACQUES DERRIDA, *THE GIFT OF DEATH* 65 (David Wills trans. 1995).

²¹J. SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* 149 (2d ed. 1986).

common law mitigating its constrained legalism, the pivotal ability of equity explicitly to combine law's determination with its responsiveness is indicated in the two most common criticisms leveled at it: it was either too much a matter of arbitrary discretion, varying with "the length of the Chancellor's foot," or it lost its essential flexibility through a rigid respect for precedent.

Coming closer to my central concern, judicial discourse on the death penalty, let me take the judicial decision as a final general instance. There is a necessary, if usually blithe, acceptance of a radical duality in the judicial role. In sentencing, for example, the judge is supposed to stand constantly, objectively apart from popular sentiment, especially of the more atavistic kind, yet also to have a responsive regard to such sentiment. Conflicting "rules" of interpretation enable the judge to render a statute in a fixedly "literal" way or, alternatively, in a responsively expansive way which has a continuing regard to the purpose or to the "mischief" the statute was supposedly aimed at. Generally, judges are observed more and more to be giving effect to changing times when making their decisions, yet they never do only that. Rather, they always seek to base the decision in what is already given. The resulting duality is reflected in the alternation of criticisms of judges for being too rigid or too loose, too conservative or too liberal, too remote or too involved, too cold or too passionate. What is happening here is that the judicial decision subsists in-between these dualities. It can neither dissipate in responsiveness nor be completely pre-determined. In either scenario, there would simply be no decision.

Whilst in this engaged mode, let us plunge straight into the equivalent juridical division in cases on the death penalty. In the whole post-*Furman* era, that is for over a quarter of a century now, the judiciary has posited and wrestled with a seemingly intractable division when deciding on the application of the death penalty. The terms of that divide have become quite set. There must, on one side, be a responsive regard for "the uniqueness of the individual" being sentenced. In this same vein, it is said there must be "fundamental fairness." For such things, obviously, there has to be a broad and effective "discretion" in the decision-maker. Yet, this seeming imperative is accompanied by the refrain that discretion cannot be "unbridled." As it is put again and again, "arbitrariness" has to be avoided. There has to be a determinant "objectivity," "rationality," and "consistency."²²

The supposed solution has been the guiding of discretion in terms of legislatively specified conditions. A typical patterning of these can be found in the Ohio death penalty statute which, in setting out "criteria for imposing death . . . for a capital offense," lists nine "aggravating circumstances" which are to be considered in relation to seven mitigating "factors."²³ As Justice Powell helpfully described a similar arrangement, "the various factors . . . do not have numerical weights attached to them."²⁴ Indeed, a great many of these factors are very broad and, in their terms, import a large discretion. But even if definite numerical weights were attributed to these factors, the combining of nine circumstances with seven factors would produce a staggering number of possible permutations. Quite apart from all that, there would remain Justice Harlan's observation that "no list of circumstances would ever be

²²See *Callins v. Collins*, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting) (provides a good coverage in these terms).

²³OHIO REV. CODE ANN. § 2929.04 (WEST 1999).

²⁴*Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

really complete”; to which he would add that the prior elaboration of factors “which call for the death penalty” appears to be “beyond present human ability.”²⁵ Coming inevitably to Justice Blackmun’s incandescent dissent in *Callins v. Collins*,²⁶ it is for reasons such as these, combined with his view that it was impossible to reconcile a responsive fairness with a determinant consistency, that he announced his resolve “from this day forward” to “no longer tinker with the machinery of death.”²⁷

Admirable as the sentiments may be, fundamental problems are raised by the reasoning. There are two such problems. One is to do with the allegedly exceptional quality of the death penalty—with whether death does make a difference, as the common claim has it, and with what that difference may be. The other problem has to do with the telos of standard judicial and other reformist arguments against the death penalty.²⁸ The issue here is whether these are ultimately arguments against the penalty itself, against its being the *death* penalty, or arguments against its administration and utility. I will now briefly consider these problems. That consideration may, for some, incline my thesis towards the acceptability of the death penalty, but I will move on to show how these problems orient us towards a position where the death penalty becomes insupportable “in” law.

First then, the question of whether the decision to impose the death penalty is exceptional. Justice Blackmun would only go so far as to say: “There is a heightened need for fairness in the administration of death.”²⁹ This does not show whether or how the judgment to deal death is different to any other legal decision. The desiderata that he and others propound – the achievement or the balancing of fairness and objectivity—are obviously not exclusive to decisions about capital punishment. Nor is the labelling of such decisions as arbitrary. The scene of legal judgment, as we visited it earlier, is inevitably arbitrary. It does not, and cannot, cognitively extend to all things that may make the decision what it is. The decision is always a choice and a denial, a “cutting” into the infinite variety of inclination, fact, and circumstance that could possibly inform it.³⁰

If in terms of its judicial presentation, the death penalty cannot be dislodged as exceptional, can the arguments specifically advanced against it be any more successful? It has, for example, often been argued judicially that the death penalty should not be imposed on juveniles or on the mentally incapacitated because of their attenuated responsibility.³¹ This, however, is inexorably to say that the death penalty should and can be imposed where responsibility is found ample enough. And the

²⁵*McGautha v. California*, 402 U.S. 183, 204, 208 (1971) *vacated*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

²⁶*Callins v. Collins*, 114 S. Ct. 1127, 1128-38 (1994).

²⁷114 S. Ct. at 1130 (Blackmun, J., dissenting).

²⁸There is a poignancy to “telos” here in that it “means at once ‘perfection,’ ‘completion,’ ‘death.’”; ROBERTO CALASSO, *THE MARRIAGE OF CADMUS AND HARMONY* 19 (Tim Parks trans. 1993).

²⁹*Callins*, 114 S. Ct. at 1132.

³⁰Derrida, *supra* note 3, at 24.

³¹*See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *McCullum v. North Carolina*, 512 U.S. 1254 (1994).

original argument, progressive as it well may be in other ways, leaves open the question of degree, the question of how old, how mentally effective one has to be in order to be put to death. In a very strict constructionist vein, Justice Scalia would project us back to the initial publication of Blackstone's *Commentaries on the Laws of England* in 1769 and claim that this work somehow informed the making of the Eighth Amendment; then in Blackstone's capacious reaches, he finds that capital punishment in England could be imposed at the age of seven years.³² He does not quite have the courage of his convictions. He does not go on to hold that seven seems a reasonable age at which to put children to death. The very debate about infantile or mental capacity imports a resolution as its orienting telos—imports an appropriate point at which the child, etc., can be killed. Debates of this kind are often combined with the argument that the death penalty is not justified where incapacity would negate or diminish its deterrent effect. The massive implication of this argument, however, is that where the accused's capacity is sufficient, deterrence can be effective and, on that ground, the death penalty is justified.

Let me take another significant set of arguments advanced against the death penalty which, valuable as they are in themselves, nonetheless end up being complicit with it. These are arguments to the effect that, because of limiting or defective or corrupt procedures, or because of incompetent representation of the accused, a wrongful verdict may have been reached or such a verdict is being sustained—and, for good measure, the increasing limitation on review is seen as sheltering these travesties.³³ Judges quite often see the failure of the so-called system in these terms and quite often hope, if not always expect, that “one day this [Supreme] Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme.”³⁴ Again, one could hardly impugn such arguments as far as they go, but they go too far in at least implicitly advancing a realizable truth justifying the imposition of the death penalty.

The drama of recent events demands that such arguments be illustrated outside of the sphere of the judicial. Governor George Ryan, after inveighing last week against “the shameful record” of his state of Illinois “of convicting innocent people and putting them on death row,” announced both a moratorium on executions and his intention to appoint a panel to study the sentences of death.³⁵ The immediate drama lay not only in the surprise of the announcement but also in the Italians lighting up the Coliseum to celebrate—an apt location perhaps, given the amount of capital punishing that went on there. But this, as well as other exuberant responses, is at

³²*Thompson*, 487 U.S. at 864; SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND vols. 1-4 (1978). Justice Scalia finds “original” justification in the Constitution for the death penalty itself. Evoking the Fifth Amendment and the inclusion there of capital crime within its protective range, he finds that this “clearly permits” the death penalty. *Callins*, 114 S. Ct. at 1128. Simply presupposing the existence of something is not “permitting” it.

³³*See, e.g.*, *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Tison v. Arizona*, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting); *Callins v. Collins*, 114 S. Ct. at 1129 (1994) (Blackmun, J., dissenting).

³⁴*Callins*, 114 S. Ct. at 1138 (Blackmun, J., dissenting).

³⁵Dirk Johnson, *Illinois, Citing Verdict Errors, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

best premature. Governor Ryan supports the death penalty. The moratorium will remain in force until, says the Governor, "I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection."³⁶ There is, then, still a discoverable certainty to all this, and the Governor's standard of such certainty may not be very stringent. In announcing a moratorium, he described the "system" as having only come "close to the ultimate nightmare, the state's taking of innocent life." Given the large part which chance played in revealing the innocence of so many, almost as many of the condemned had been exonerated as executed, it is at least probable that there are innocent others among those whom the system has disposed of.

I will soon take up other arguments against the death penalty which provide an affirmation of it, but for now I will conclude this present account of those arguments by looking at perhaps the strongest one of them. This argument would deny that the death penalty could ever be imposed with assurance. "The problem," says Justice Blackmun, "is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants."³⁷ The trouble with this argument is that, like the others, it is wedded to a positive, realizable truth, a truth that could have prevailed without the error. It allows of a justified imposition of capital punishment where the truth of the situation is perceived as cogent or overwhelming. More significantly, it still allows of irresolvable contention with utilitarian varieties of truth. It may be, as the English nostrum has it, that it is better for ten of the guilty to go free than for one of the innocent to be convicted, but it is arguably preferable for one of the innocent to be executed rather than ten of the guilty go free. The argument has been put bluntly by, *mirabile dictu*, a Chicago prosecutor:

Sooner or later, it is going to happen. It comes with the territory. It is not humanly possible to design a system that is perfect. And if people are not prepared for the eventuality that human institutions are going to make mistakes, then they shouldn't support the death penalty, and they shouldn't elect legislators who support it.³⁸

So, if these various arguments against capital punishment do not definitively counter the decision to inflict *death*, and if judicial analysis of the death penalty simply reproduces the dimensions of ordinary legal decision-making, what—to borrow a phrase—is the difference death makes? To set that question, I will return to my initial argument advancing law as a putative settlement of the space in-between these dimensions—in-between determinate position and what was ever beyond it. That line of argument was most evidently set against the standard assertions of law's stability, fixity, implacability, or, in the language so often used in

³⁶*Id.* at A16. The tendency since has been very much Ryanwards. For example, Bills have been introduced into the House and Senate to enhance the "protection" of those accused of capital crimes. Editorial, *Bills to Stop Executing the Innocent*, N.Y. TIMES, Apr. 4, 2000, at A30. And "[r]acial disparities in death sentences are to be reviewed by the Justice Department." *World-Wide*, WALL ST. J., Feb. 11, 2000, at 1.

³⁷*Callins*, 114 S. Ct. at 1130 (Blackmun, J., dissenting).

³⁸See Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov., 1999, at 66, 88.

capital cases, against law's finality. Even at its most settled, or especially at its most settled, we saw that law could not "be" otherwise than responsive to what was beyond its determinate content "for the time being." Neither, however, could law dissipate in a pure responsiveness. Hence, there were the contrary yet standard claims as to what law may be outlined at the beginning of my talk—the division between determinant force and responsiveness with-in the rule of law, the combination of Leviathan's awesome assurance with an unexpectedly accommodating side, the jurisprudential division between law's autonomy and its dependence on society, history, and such. How or in what terms can law in this insistent ambivalence have some place, some palpability, some hold? Even if it cannot be positively rendered in terms of existent situations, law is nonetheless always operatively attached to such situations, and it is in the legal decision, in the place of legal judgment, that law becomes operative. Such decision or judgment cannot be reduced to antecedents or to some "factual" truth. There cannot, that is, be a complete comprehending of everything to which a decision has responded or will respond. Law can always be other than what it "is." The hope extinguished in its determinative fixity is resurrected in its responsiveness.

To convey the difference freighted with death, let me continue, in what is now leading to a conclusion, to mirror the path of my lecture so far by considering two further judicial arguments which would both counter yet implicitly affirm the death penalty. First, an argument which goes some way towards accommodating law's responsive dimension. When looking at standards of responsibility, or at what is "cruel and unusual" in terms of punishment, or at the proportionate relation between crime and penalty, judges have derived meliorative content or assurance from the practices of various societies. The problem with this resort, so far as it is used to counter the penalty of death, is that the practices of societies can become more rather than less draconic, something which Justice Scalia has been quick to observe,³⁹ and yet again the death penalty becomes more embedded in law through reformist discourse rather than excluded from it. For the development of my argument, however, there is a further point which this resort to the social tends to emphasize and that is, as we have seen, the essential openness of law cannot be bound to or by any specific reference to social practice or in any other way. The quality of openness has to be sustained. The second line of argument starkly makes the point in relation to racial discrimination in legal processes leading to the imposition of the death penalty.⁴⁰ Reformist argument here may not appear to be an advance on the others. It could be heard as saying that in the rectifying, actual or potential, of such racial discrimination, capital punishment is being affirmed. Let me now combine these two arguments, one based on evidence of the social and the other on racial discrimination, and indicate their undermining effect on the sustainability of capital punishment in law.

In the situation of racial discrimination, what difference does death make with its "unique finality," to borrow a pointed judicial phrase?⁴¹ After all, in a certain literal sense, with its "cutting" determination the scene of legal judgment is inevitably

³⁹*Thompson*, 487 U.S. at 865 (Scalia, J., dissenting).

⁴⁰*See, e.g.*, SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989).

⁴¹*Coleman v. Balkcom*, 451 U.S. 949, 955 (1981) (Marshall, J., dissenting).

discriminatory. Some modes of existence are elevated in the decision and others suppressed or ignored. Law, however, maintains its seductive appeal to the excluded through its responsive ability always to be other than what it is. The penalty of death denies that prospect. It denies the protean promise held out by the rule of law to extend equally to all its subjects and to surmount, in particular, all differences of ascribed status. With the imposition of the death penalty, the other is excluded utterly in the name of law itself. The Supreme Court's effort to counter this effect ends up by aggravating it. Here we come inexorably to the much-discussed miasma that is *McCleskey v. Kemp*.⁴²

In *McCleskey* the court faced the dissolution of the whole scene of legal judgment. The defendant *McCleskey*, described as a black man, had been sentenced to death in Georgia for the murder of a police officer described as white. It was claimed by or for *McCleskey* that the imposition of this penalty was racially discriminatory and that this discrimination violated the requirement of equal protection of the laws in the Fourteenth Amendment and the prohibiting of "cruel and unusual punishment" in the Eighth. The case turned on the nature of the evidence supporting these claims. This comprised a study, known as the Baldus study, which showed in general statistical terms that defendants charged with killing white victims were much more likely to be sentenced to death than defendants charged with killing black victims. By eliminating the effect of an array of non-racial variables, the study sought to show that race was "a" or "the" decisive factor. This was the relevant evidence, but the study also extended to, and the court was manifestly worried about, other statistical evidence of discrimination in capital cases in Georgia. Henry Louis Gates summarized matters this way:

The Baldus study was scrutinized and hailed by various prominent statisticians, including the representatives of the National Academy of Sciences, as among the most sophisticated empirical work ever done on criminal sentencing. The experts agreed that the Baldus study proved that capital sentencing in Georgia is a discriminatory process.⁴³

The minority decisions in this case accepted the statistical evidence as establishing unconstitutional discrimination. The majority did not. They would not have accepted that any statistical evidence could establish the requisite discrimination.⁴⁴ Discrimination had to be intentionally or purposively directed against the defendant specifically. For the majority, statistical probability was not

⁴²*McCleskey v. Kemp*, 481 U.S. 279 (1986). For discussions particularly germane to my argument here see Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035 (1994); Henry Louis Gates, *Statistical Stigmata*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell et al. eds. 1992).

⁴³Gates, *supra* note 42, at 334.

⁴⁴This view of the majority opinion was seemingly not shared by one of its members, Justice Scalia. See Dorin, *supra* note 42. It remained the view of the writer of that opinion, however, even as he came to reject the decision itself. See JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

enough even if for Justice Brennan in the minority the “empirical” quality of such evidence was its strength.⁴⁵

What the majority propounded, again and again, was the “uniqueness” of each case, of each capital crime and of each capital defendant. Judges and juries had to be unlimited in their ability to accommodate this uniqueness, to exercise their “fundamental . . . discretion”, to “consider” the “varying” and “innumerable factors” potentially involved.⁴⁶ In all this, juries must be allowed to decide matters in their own “unpredictable”, “varying”, and ultimately inexplicable ways, even if this will involve “some risk” of racial discrimination.⁴⁷ The horrifying alternative summoned up by the majority was the dissolution of the whole criminal justice system. If statistical evidence of racial oppression were given effect, then the like effect would have to be given to “other kinds of prejudice” extending, for example, to “membership in other minority groups and even to gender”, or to “the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim”, or, it could be added, to the poverty of the defendant; furthermore, this dissipating responsiveness would extend to “other types of penalty” beside death.⁴⁸ “Relying” on the Baldus study, then, “questions the very heart of the criminal justice system.”⁴⁹ Indeed. It is, however, completely contradictory to elevate utterly an illimitable responsiveness to the specific defendant—elevate it so high as to exclude cogent societal evidence of pertinent oppressions—and then utterly to deny that responsiveness by visiting death on that defendant. Such a death not only freezes forever the range and quality of possible responsiveness to that defendant, it also effects a general denial of law’s responsiveness. Law cannot be hermetically trapped in this way and yet be operatively sustained as law.

Short of complete dissolution, it has often been observed, and aptly established, that within the operation of the death penalty the criminal law becomes, as it is put, distorted, and especially where responsiveness to the accused is truncated; and there are clear indications also that the denial of law’s responsiveness debases the legal system as a whole.⁵⁰ I will end with what are perhaps the two most egregious.

One involves restrictions on the writ of habeas corpus. A leading U. S. authority puts the significance of the writ fairly typically: “The writ of habeas corpus, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity Today it is said to be ‘perhaps the most important writ known to constitutional law of England’ Its significance in the United States has been no less great.”⁵¹ A little more exactly, the modern function of the writ, challenging arrogations of the executive, dates from the sixteenth and seventeenth centuries.⁵² Its more general use to challenge the legality of any detention is even

⁴⁵*McCleskey*, 481 U.S. at 338.

⁴⁶*Id.* at 294, 311.

⁴⁷*Id.* at 305, 308, 311.

⁴⁸*Id.* at 308, 315-17.

⁴⁹*Id.* at 313 n.37.

⁵⁰GROSS & MAURO, *supra* note 40.

⁵¹CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 350 (5th ed. 1994).

⁵²R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 7-20 (ch. 1) (2d ed. 1989).

more venerable and can be traced as far back as an English case of 1214 from which it is clear that the writ already had a settled existence.⁵³ Habeas corpus, in short, has had a very long history as a responsive conduit for the reversal or modification of legal determination. Because of its impertinent effectiveness in challenging death penalty decisions, its general ability to uphold constitutional imperatives has been judicially narrowed.⁵⁴ This narrowing has been legislatively matched in various ways, for example by the establishing of a one-year limit on filing petitions for habeas corpus, a limit which comes from the candidly titled Antiterrorism and Effective Death Penalty Act of 1996. It was a string of successful petitions for habeas corpus in *Vasquez v. Harris* which provided the most startling denial of law's responsiveness, and thence of law itself.⁵⁵ With a manifest petulance, the Supreme Court proclaimed that "No further stays of Robert Alton Harris's execution shall be entered by the federal courts except upon the order of this Court"—a diktat of naked determination aptly described as "lawless."⁵⁶ Judge Kozinski commented on that command, with a like disregard for the law, that "the drama had no other possible outcome," and he somehow discerned that "enough is enough."⁵⁷

Foucault once observed that in law we have not as yet "cut off the head of the King."⁵⁸ From the aphorism's resonant meanings, we can for now conclude with one, that in law we still seek or at least purport to find a transcendent truth, a truth that is sufficient and entire, a truth which allows us to find and decree an ultimate "enough." To take a stark example which concludes a recent and highly critical survey of the operation of the death penalty in the United States:

The steady accumulation of wrongful convictions and death sentences in the United States constitutes a prima facie case that we are dealing with widespread, systemic flaws in the administration of justice. Until those flaws are corrected, we should declare a moratorium on executions.⁵⁹

This is to seek a quality of truth in a place—the scene of legal judgment—where it cannot be found. Obviously, there has to be a determinate decision, some limits, some lack of responsiveness, if law is to "be" at all. Granted that, there still remains the matter of how the limits were reached, how the decision was made, how it is to be sustained and regarded; and in all these things there is a judgment, a choice, a denial of what could otherwise be. Being attuned to the responsiveness accommodated and the responsiveness eliminated in the decision could orient and even impel us towards the recognition of many things—towards the recognition that the legal decision cannot be accorded a complete and positive content, a recognition that such a decision is ultimately unknowable, that it is inevitably partial and

⁵³SELDEN SOCIETY, 1 SELECT PLEAS OF THE CROWN 67 (no. 115).

⁵⁴*Callins*, 114 S. Ct. 1137-38 (Blackmun, J., dissenting).

⁵⁵Evan Caminker & Erwin Chermersky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 246-52 (1992).

⁵⁶*Id.* at 246.

⁵⁷Alex Kozinski, *Tinkering with Death*, NEW YORKER, February 10, 48, 51-52 (1997).

⁵⁸FOUCAULT, *supra* note 3, at 88-89.

⁵⁹Berlow, *supra* note 38, at 91.

arbitrary, that it entails the denial and sacrifice of the other, and the recognition that, to minimize these ineluctable defects, the decision must be made and brought to bear in as open, accountable and revisable a manner as possible. The death penalty, even as it denies law's necessary responsiveness, pushes us to a horizon of law where responsiveness cannot be ignored and where its disturbing implications for the nature of the legal decision become insistent. That is another story. For now, enough has to be enough.