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DETERRING MURDER: A REPLY

Cass R. Sunstein* and Adrian Vermeule**

We are most grateful to John Donohue, Justin Wolfers, and Carol Steiker for their valuable and illuminating responses to our article.¹ Donohue and Wolfers explore empirical questions,² on which we have little to say. Steiker investigates the moral issues,³ and here our Reply must be more extensive.

Donohue and Wolfers believe that, with respect to the death penalty, “existing evidence for deterrence is surprisingly fragile.”⁴ They attack the peer-reviewed empirical work of a number of social scientists, including Hashem Dezhbakhsh, Paul Rubin, Joanna Shepherd, H. Naci Mocan, R. Kaj Gittings, and Paul Zimmerman.⁵ They highlight theoretical claims by Lawrence Katz, Steven Levitt, and Ellen Shustorovich, who emphasize the infrequency of capital punishment and who thus doubt the claim of deterrence.⁶ (Interestingly, Katz, Levitt, and Shustorovich do find that prison deaths have massive effects in deterring murders and other crimes.⁷) Most importantly, their own work,

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1. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (in this Issue).

2. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (in this Issue).

3. Carol Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (in this Issue).

4. Donohue & Wolfers, *supra* note 2, at 794.

5. See Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortality Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 453 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 308 (2004); Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States*, 65 AM. J. ECON. & SOC. (forthcoming 2006); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 163 (2004).

6. See Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 330 (2003).

7. See *id.* at 340.

using existing data, suggests that deterrence has not been shown.

Donohue and Wolfers misunderstand the point of our article. Let us distinguish among three purposes for which one might discuss the recent deterrence evidence: (1) to argue that, in fact, capital punishment deters murder; (2) to argue that the evidence has reached a threshold of reliability such that policymakers should change laws now, adopting capital punishment; and (3) to argue that the evidence has reached a threshold of reliability, much lower than in (2), such that it is worthwhile to consider the moral implications of the evidence. We do not mean to take a stand on either (1) or (2). We do not know whether deterrence has been shown; and contrary to Donohue and Wolfers's suggestion, we do not insist "that it would be irresponsible for government to fail to act upon the studies."⁸ Nor do we conclude that the evidence of deterrence has reached some threshold of reliability that permits or requires government action upon it right now.⁹ Plainly, Donohue and Wolfers have a quarrel with other social scientists, but not with us—except, perhaps, insofar as we are willing to take the recent evidence as a motivation for rethinking the moral issues.¹⁰

Suppose that Donohue and Wolfers are fundamentally right and that their own analysis shows that current evidence of deterrence is weak. Even if that were true, we could certainly imagine a regime of capital punishment that

8. Donohue & Wolfers, *supra* note 2, at 794. We do argue that definitive evidence should not be required for policymakers to take action, but that is a far more modest claim.

9. *Compare id.* ("This empirical evidence leads to the heart of [Sunstein and Vermeule's] claim that it would be irresponsible for government to fail to act upon the studies and vigorously prosecute the death penalty."), with Sunstein & Vermeule, *supra* note 1, at 715 ("In any event, our goal here is not to reach a final judgment about the evidence. It is to assess capital punishment given the assumption of a substantial deterrent effect. In what follows, therefore, we will stipulate to the validity of the evidence, and consider its implications for morality and law.").

10. Donohue and Wolfers take a number of quotations out of context, so as to give the impression that we have a strong commitment to the recent studies:

While Lawrence Katz, Steven Levitt, and Ellen Shustorovich found no robust evidence in favor of deterrence, several researchers claim to have uncovered compelling evidence to the contrary. This latter research appears to have found favor with Cass Sunstein and Adrian Vermeule, who describe it as "powerful" and "impressive," and they refer to "many decades' worth of data about [capital punishment's] deterrent effects." While they claim not to endorse any specific analysis, these "sophisticated multiple regression studies" are "[t]he foundation of [their] argument," and they specifically rely on many of the recent studies that we will re-examine as buttressing their premise that "capital punishment powerfully deters killings."

Donohue & Wolfers, *supra* note 2, at 793-94 (internal citations omitted).

We hope that, taken as a whole, our essay shows a kind of interested agnosticism. We cannot help but add that as new entrants into the death penalty debate, we are struck by the intensity of people's beliefs on the empirical issues, and the extent to which their empirical judgments seem to be driven by their moral commitments. Those who oppose the death penalty on moral grounds often seem entirely unwilling to consider apparent evidence of deterrence and are happy to dismiss such evidence whenever even modest questions are raised about it. Those who accept the death penalty on moral grounds often seem to accept the claim of deterrence whether or not good evidence has been provided on its behalf.

would, in fact, deter homicides. It is worthwhile to ask how the moral issues should be assessed *if* deterrence could be established. In any case, one of our central goals is theoretical. We aim to use the area of capital punishment as a way of challenging the act/omission distinction in the context of government decisions.¹¹ Our hope is that this challenge is relevant to a wide range of issues, not merely capital punishment. In our view, regulation is pervaded by life-life tradeoffs, and criminal law is illuminatingly analyzed as a form of regulation.

Carol Steiker does not accept this latter claim, and hence she engages our arguments directly.¹² But she does not defend the act/omission distinction. For government, at least, she seems to agree that this distinction is unhelpful, at least outside the context of criminal justice. Even for criminal justice, she does not insist on the value of the act/omission distinction.¹³ Nonetheless, she rejects our argument on three grounds. The first involves what she sees as the need to distinguish between purposeful and nonpurposeful acts.¹⁴ The second points to considerations of justice that seem to raise serious doubts about capital punishment.¹⁵ The third involves slippery slopes that, in her view, make our argument unacceptable.¹⁶ We take up these claims in sequence.

Purposeful versus nonpurposeful action. Steiker notes that in the criminal law, it is entirely standard to distinguish between purposeful and nonpurposeful acts. Those who purposefully cause harm are punished more severely than those who are negligent or even reckless. Steiker believes that the same distinction, pointing to different degrees of mens rea, greatly matters when the government is the actor. A government that takes life is doing so purposefully, whereas a government that fails to protect life is acting negligently or at worst recklessly.¹⁷ Steiker is puzzled that we seem to ignore this conventional—"quotidian"¹⁸—distinction. Because capital punishment involves the purposeful taking of life, and because the failure to impose capital punishment does not, Steiker believes that it is wrong to speak of life-life tradeoffs in this context.¹⁹

We shall argue that even though the distinction between purposeful and nonpurposeful actions is important for the purpose of criminal punishment, it is not important for the purpose of evaluating what governments should be doing. A government that negligently fails to prevent hurricane damage may be less blameworthy than a government that chooses to create hurricane damage, but

11. Sunstein & Vermeule, *supra* note 1, at 719-28.

12. Steiker, *supra* note 3, at 753.

13. *Id.* at 754 ("Rather, Sunstein and Vermeule's argument runs into serious problems when they attempt to transplant their insight about government agency from the arena of civil regulation to the arena of criminal justice.").

14. *Id.* at 756-63.

15. *Id.* at 763-74.

16. *Id.* at 774-82.

17. *Id.* at 757-58.

18. *Id.* at 759.

19. *Id.* at 762.

governments that have failed to prevent hurricane damage had better start doing so. As a preliminary matter, two closely related points are important to underline: (1) where governments are concerned, the distinction between acts and omissions is both conceptually obscure and morally irrelevant;²⁰ and (2) governments do not have “intentions” or “purposes,” at least not in the way that people do.²¹ Steiker stipulates to the first point,²² but she may not fully appreciate its force. In our view, the first point, properly appreciated, requires acceptance of the second point as well.

As for the first: Suppose that we have rejected the act/omission distinction for governments and that we accept the evidence of deterrence for purposes of argument. It follows that, where government chooses not to adopt a policy of capital punishment that would deter significant deaths,²³ government is itself acting with willful disregard of the resulting deaths. True, government does not know the precise identities of the victims, but that should be neither here nor there. A lifeguard who left her post, knowing to a practical certainty that a number of people would predictably drown as a result, would be a murderer, even if the identities of the victims were unknown *ex ante*. Steiker recognizes that, under the Model Penal Code and in most jurisdictions, conduct of this sort would itself constitute legal “murder.”²⁴ Perhaps such conduct would not be murder in the first degree, depending upon the relevant criminal code and upon the factual details. But it is unclear why that legal difference is relevant and unclear why it should underwrite a wholesale objection to capital punishment at the level of policy evaluation. We return to this point shortly.

As for the second point: In the example above, we have treated government as a really big person, as does Steiker. It is worth underscoring, however, that the same structural features of government policymaking that render the act/omission distinction obscure, for government, also render the distinctions among various shadings of culpable intention obscure, for government. Steiker claims to accept, at least for the sake of argument, that the act/omission distinction fails for governments. But Steiker then uses unusual locutions about governmental intention, referring to governmental *mens rea*²⁵ (What *mens* could possibly be referred to here?) and to the “‘intent’ of capital punishment statutes.”²⁶ In our view, Steiker’s own quotation marks around “intent” indicate a healthy recognition that a metaphor has been stretched beyond the breaking

20. Sunstein & Vermeule, *supra* note 1, at 721 (“The distinction between acts and omissions may not be intelligible in this [government] context, and even if it is, the distinction does not make a morally relevant difference.”).

21. *Id.* at 722.

22. Steiker, *supra* note 3, at 756.

23. Here, we bracket the diminishing marginal effect of additional executions, as we discuss in our article. See Sunstein & Vermeule, *supra* note 1, at 709 n.10.

24. Steiker, *supra* note 3, at 756 & n.16.

25. *Id.* at 758.

26. *Id.* at 760.

point. Individuals qua individuals have intentions to take actions, as do individual officials. But government itself is not a person, and the underlying individual actions are usually inputs into complicated collective decisionmaking processes, such as voting in legislatures and multimember courts. The outputs of such processes need not correspond to anyone's individual intentions and are hard to classify into the fine shades that the criminal law uses for assessing the culpability of individual intentions.

Steiker rightly observes that people speak about degrees of culpable intention with respect to government policy, as in the case of disaster relief.²⁷ But the question is whether this freighted talk is really about individual-level morality or is instead a kind of shorthand or heuristic for evaluating complicated institutional questions, such as whether particular governmental officials are acting as faithful agents for the polity as whole. Steiker assumes the former, but in our view the latter is more plausible. Moralized talk about whether "governmental" intentions are culpable is metaphorical shorthand for institutional criticism and for moral criticism of particular individuals who happen to occupy government posts. In pressing the distinction between purposeful and nonpurposeful action for government actors, Steiker takes the metaphor too literally.

Let us put these points aside; still, we believe that Steiker's argument from *mens rea* is unconvincing. No one doubts that *mens rea* matters in the criminal law. Whatever the foundations of punishment, special sanctions should be imposed on intentional wrongdoing; the decision to do so can be defended on grounds of both deterrence²⁸ and retribution. Steiker rightly contends that "those who purposefully transgress are more blameworthy."²⁹ But how does this claim bear on our argument? A governor of a state may well be more blameworthy if he intentionally causes a disaster than if he stands by and negligently allows a disaster to occur. But no one is talking about the appropriate punishment of governors or about how much to "blame" individual public officials. The question is how to evaluate official policies. Let us stipulate that a mayor who encourages and promotes domestic violence is more blameworthy than one who negligently permits such violence to occur. But how does that point relate to the evaluation of policies to control domestic violence—or to the legitimacy of capital punishment? Even if we accept the view that the criminal law should distinguish between purposeful and nonpurposeful action, it hardly follows that the government should decline to impose capital punishment *if* the effect of its decision is to condemn significant

27. *Id.* at 758 ("Everyone acknowledges that the government cannot disclaim responsibility for the disaster in New Orleans on the ground that its failure to maintain the levees was merely an omission for which it was not responsible.").

28. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

29. Steiker, *supra* note 3, at 758.

numbers of innocent people to death.

In other words, the distinction between purposeful and nonpurposeful action is drawn for particular purposes, not in the abstract. Suppose that a standardized test is graded incorrectly, and the question is whether the incorrect grade should be changed. The usual answer is that it should indeed be changed; that answer does not depend on the state of mind of the initial grader (maybe it was a computer). Now suppose the question is the right mix of policies to discourage crime. The answer to that question does not turn on the state of mind of the government officials who developed the initial policy. If officials have negligently adopted a policy that allows one group of people—say, Hispanics, women, or gays and lesbians—to be subject to criminal violence, they had better change that policy, even if the resulting punishments are adopted intentionally and the earlier policy caused harm only as a result of negligence.

Justice. Steiker's more fundamental objection is that public executions are unjust. To support this conclusion, she makes three independent arguments. First, she contends that all criminal sentences must be proportionate to the crime. In her view, capital punishment is not proportionate in view of the difficult circumstances of those who are subject to it. Victims of capital punishment

very frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are the victims of some sort of societal deprivation (be it poverty, racism, poor education, inadequate health care, or some noxious combination of the above.).³⁰

Steiker's plea for proportionality is meant as a deontological check on permissible punishments. Second, Steiker argues that capital punishment suffers from a failure of equality because of racial disparities in its administration. Here she points to evidence that African-American defendants, and also those defendants who kill white people, are disproportionately likely to receive the death penalty.³¹ Third, Steiker contends that capital punishment violates human dignity. On this count, her preferred argument is that the death penalty "destroy[s] the distinctive human capacities of the society" that administers it.³² With respect to dignity, the problem with capital punishment is not what it does to convicted criminals; it is "what it does to all of us."³³

We accept many of Steiker's concerns, but we do not think that she has offered a convincing response to our arguments. Steiker contends that the death penalty represents a failure of proportionality, in part because of the deprivations frequently faced by those who commit the most heinous

30. *Id.* at 766.

31. *Id.* at 769-70.

32. *Id.* at 772.

33. *Id.*

murders.³⁴ Nothing in our arguments is inconsistent with the suggestion that a proportionality requirement should constrain permissible punishments; given certain circumstances, such a requirement might have good consequences, deontological justifications, or both. But suppose, not implausibly, that some or many hostage takers are mentally ill, drug addicts, or otherwise products of severe deprivation. Would it follow that police officers should not be permitted to kill hostage takers?³⁵ Now suppose that capital punishment saves lives. If so, many of those who would be saved also face severe deprivation; not irrelevantly, one deprivation that they would otherwise face involves the loss of their life. Why should they be sacrificed for the sake of their killers?³⁶ This last question suggests that Steiker's deontological sympathies include an unacknowledged baseline. Steiker seems to assume that capital punishment "uses" murderers for the sake of innocent people. But it would be equally plausible to say that an abolition of capital punishment "uses" innocent people for the sake of murderers.

In any case, Steiker's proportionality argument would seem to raise serious questions about life imprisonment as well. Life imprisonment, especially without hope of parole, might be disproportionate to any offense if an offender's deprived background is taken into account. And it is reasonable to think that those who are subject to life imprisonment "frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are the victims of some sort of societal deprivation."³⁷ Is life imprisonment to that extent unacceptable, in Steiker's view? A proportionality argument would certainly prohibit capital punishment for minor crimes, and perhaps for all crimes short of the most egregious murders, but the view that it forbids capital punishment for those murders must be parasitic on some independent, and suppressed, normative argument that capital punishment is always and everywhere impermissible (at least on certain assumptions about the

34. *Id.* at 781-82.

35. We do not understand Steiker's rejection of our analogy to hostage takers. *See id.* at 762 n.40, 783 n.106. For our analogy, see Sunstein & Vermeule, *supra* note 1, at 740 ("Police officers are permitted to kill those who have taken hostages, at least if the killing is reasonably believed to be necessary to save human lives. If capital punishment is deemed different, it might be because the lives to be saved are merely statistical, as compared with the lives of hostages, which are entirely vivid."). Steiker refers to self-defense, Steiker, *supra* note 3, at 758 n.21, but it is permissible to kill hostage takers to protect hostages, not merely oneself. *See* N.Y. PENAL LAW § 35.15(2) (McKinney 2005), *quoted by* Steiker, *supra* note 3, at 758 n.21. Steiker contends that one can kill hostage takers even when there are more hostage takers than hostages, Steiker, *supra* note 3, at 758 n.21, but that fact makes our argument a fortiori. Steiker adds that hostage situations are emergencies that feature imminent threats, *id.* at 783 n.106, but the expansion of the temporal horizon does not undermine the analogy so long as evidence of deterrence is convincing.

36. *See* Sunstein & Vermeule, *supra* note 1, at 708 (introducing the concept of a "life-life tradeoff" in the capital punishment debate).

37. Steiker, *supra* note 3, at 766.

backgrounds of those subject to it). That is not a proportionality claim: it is a substantive bar on a particular type of punishment, no matter how proportional it may be. At bottom, it is a conclusion, not an argument.

Issues of racial equality are certainly important in this domain, and hence we emphasize that if deterrence occurs, African-Americans have more to gain from capital punishment than white people do.³⁸ Steiker replies that racial animus plays a role in the imposition of capital punishment, whereas most murders of African-Americans do not have any such racial component.³⁹ It is not clear that her premise is correct. If African-Americans disproportionately are victims of murder, a racially discriminatory past is almost certainly a contributing factor, and there is reason to wonder about a criminal justice system that does not provide African-Americans equal protection against the risk of homicide. In addition, the term "racial animus" may not be an apt description of existing inequalities in the system of capital punishment.⁴⁰

But let us grant Steiker her premises. What follows? Is capital punishment impermissible on grounds of equality if it turns out that (a) its administration is infected by racial bias, but (b) African-Americans are disproportionately beneficiaries of its deterrent effect? That conclusion seems implausible. If racial animus is present, the natural solution is to eliminate racial bias, not to eliminate capital punishment. And if that solution proves impossible, a small racial bias in administration of the death penalty might not be fatal if that penalty has a large "tilt" toward protection of the lives of innocent African-Americans. Suppose that a particular penalty provides massive and disproportionate protection to Catholics but that the penalty is, occasionally, imposed on Catholics just because of anti-Catholic animus. Should the penalty be eliminated as a way of preventing discrimination against Catholics? This is hardly clear, especially if a feasible alternative is simply to police the penalty's imposition more closely to root out animus in specific cases.⁴¹

38. Sunstein & Vermeule, *supra* note 1, at 730.

39. Steiker, *supra* note 3, at 769.

40. See *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987) ("At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . In light of the safeguards designed to minimize racial bias in the process, . . . we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."). We do not mean to take a stand on this question; we simply suggest that the idea of "racial animus" is contested in this domain.

41. There are complex issues in the background here about the relationship between discrimination and deterrence. Suppose that white murderers, and those who kill African-Americans, are less likely to receive the death penalty. If so, these actors will face less deterrence, in a way that will (assuming that deterrence occurs) lead to more murders by whites and more murders of African-Americans. Or suppose that African-American murderers, and those who kill whites, are unusually likely to receive the death penalty. If so, there will be extra deterrence of African-American murderers (in a way that might help African-American victims, since most murders are not cross-racial) and extra deterrence of murders of white people (in a way that will not help African-American victims). Our

Steiker's dignity argument⁴² is not our absolute favorite, because we fail to see what it adds to her other claims. True, it is possible to assert that capital punishment, by its very nature, threatens the human capacities of societies that use it. Steiker does not contend that this is an empirical claim; she is not arguing that capital punishment actually has harmful effects on society's capacities. If her claim is not empirical, what kind of argument is it, and what does it add to her other objections to the death penalty? We assume that Steiker also believes that a society's human capacities are undermined if that society fails to prevent homicide. Now suppose that capital punishment deters significant numbers of murders; if so, the failure to use it is plausibly taken as a threat to the human capacities of societies that fail to stop preventable murders. Steiker here seems to reassert the distinction between government acts and government omissions, despite her earlier acknowledgement that the distinction should be abandoned. With the appeal to human dignity, it is not clear that Steiker has supplied a distinctive argument against the death penalty.

Slippery slopes. Steiker concludes with a set of slippery slope arguments. She believes that the logic of our argument would require execution of innocent people, including members of the killer's family.⁴³ Let us suppose, with Steiker, that significant deterrence would result from a system in which the state executed not only offenders but also their spouses and their children. Nothing in our argument is inconsistent with the claim that there is a deontological check on deliberate decisions to execute innocent people. On any theory, the killing of innocent people is a *prima facie* moral wrong. What we do insist upon is the presence of life-life tradeoffs; we are discussing the particular context of decisions to protect people from being killed. We therefore emphasize that (1) killing is on both sides of the question where governmental rules about capital punishment are concerned, because government cannot help but act;⁴⁴ and that (2) almost all deontological views recognize a consequentialist override to deontological rules.⁴⁵ We have hardly argued for execution of innocent people. But if the execution of an innocent person were genuinely necessary to save an exceedingly large number of people (10,000, 100,000, or 100 million?), we believe that the execution might well be justified, and we doubt that Steiker would disagree. For both consequentialists and deontologists, the killing of innocent people could be justified in some imaginable world.

assumption here is that race-neutral deterrence is best and that a discriminatory system of capital punishment is a problem, even if it might lead, on some assumptions, to benefits for members of traditionally disadvantaged groups.

42. Steiker, *supra* note 3, at 772 ("Extreme punishments violate human dignity because they destroy the distinctive human capacities of the society in whose name they are publicly inflicted.").

43. *Id.* at 775.

44. Sunstein & Vermeule, *supra* note 1, at 749.

45. *Id.* at 716-17.

But in our world, it is exceedingly unlikely that such a justification could ever be convincing, even on consequentialist grounds.⁴⁶ As we have emphasized, the execution of innocent people would dilute the deterrent signal that the consequentialist wishes to strengthen.⁴⁷ As Rawls emphasizes, a policy of that sort would itself have systemic costs that would affect its desirability.⁴⁸ If the consequentialist objection to the killing of innocents is “unsatisfactorily contingent,”⁴⁹ so be it; almost all consequentialist arguments are contingent, in the sense that they depend on (contingent) consequences. And as we have noted, our argument is consistent with the claim that deontological arguments forbid the execution of innocent people, so long as the override threshold is not met. What we emphasize is that the situation with capital punishment is most unlikely to require execution of the innocent, in which case the deontological position is unaffected.

In any case, policy evaluation should not be driven by bizarre hypotheticals of this sort. In the United States, at least, no one is likely to execute innocent people in order to produce greater deterrence. In reality, the worst possible risk is that officials will administer a system of capital punishment in which almost all are guilty, but officials know, at the statistical level, that a very few (comparatively speaking) innocents may have fallen into the net, yet cannot practically be sorted from the guilty. The execution of innocents, if it ever occurs, might be “intentional” or “purposeful” in the sense that an execution is intentionally or purposefully carried out, but only in that sense; Steiker is not arguing that officials deliberately execute those they know to be innocent. Even on Steiker’s view, the officials who conduct an execution have a kind of aggregate-level knowledge without purpose—a state of mind that is less culpable than a deliberate intention to kill the innocent. On our view, the execution of any number of innocent people is a good reason to increase the accuracy of the system of capital punishment. Standing by itself, however, it is not a sufficient reason to abolish the death penalty if there is strong evidence of deterrence.

Finally, it is important to see that innocence is on both sides of the issue here. We have emphasized that if capital punishment deters murders, it saves innocent lives, perhaps many more than would be saved by abolishing capital punishment. If Steiker really accepts that government omissions are to be evaluated on par with government acts, then she faces a tradeoff between the

46. Steiker also devotes considerable space to the suggestion that consequentialists might, in the end, reject capital punishment, because such punishment might not ultimately result in a net saving of lives. Steiker, *supra* note 3, at 785-88. Our argument is based on the assumption that a net saving occurs; if it does not, we agree that there is no good moral argument for capital punishment.

47. Sunstein & Vermeule, *supra* note 1, at 735-37.

48. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 32 & n.27 (1955); see also Sunstein & Vermeule, *supra* note 1, at 735-36 (discussing Rawls’s argument).

49. Steiker, *supra* note 3, at 775-76.

few innocent lives that might occasionally be lost under capital punishment and the innocent lives (certainly far more numerous) that capital punishment will save.

Most generally, Steiker reads us to say “that there is nothing intrinsically wrong with individuals or governments ‘using’ the lives of some to promote the greater good.”⁵⁰ In so saying, she appears to suggest that we reject the deontological claim that people should be treated as ends rather than merely as a means. But we do not believe that this claim is properly or even plausibly understood to forbid punishment that is motivated in part by deterrence goals. Suppose that the government imposes life imprisonment on certain rapists, partly because it believes that life imprisonment will deter people from being rapists. Is the government “using” the lives of rapists to promote the general good, and, if it is, does Steiker mean to condemn that? If it is legitimate to punish wrongdoers in part to deter wrongdoing, then our argument should not violate any principle against the “use” of human lives. Steiker goes far beyond the deontological imperative against treating people *merely* as a means;⁵¹ she comes close to saying that it is always morally impermissible to consider consequences in choosing criminal punishments—a view that would bar deterrence-based justifications for the issuance of parking tickets.

We have tried to offer an account of capital punishment that is agnostic about the contest between consequentialist and nonconsequentialist accounts of morality. Our minimal claim is that, in evaluating criminal penalties, deterrence should play a significant role in moral judgments, even for those whose central commitment is to human life and human liberty. And if capital punishment has significant deterrent effects, then the moral argument for the ultimate penalty is greatly strengthened—even, we think, to the point of raising the possibility that capital punishment may be morally required.⁵²

50. *Id.* at 761.

51. This is Kant’s “Formula of Humanity.” See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).

52. Recall here the use of deadly force to stop hostage takers; in at least some cases of that sort, the use of such force is obligatory from the moral point of view. See *supra* note 35 and accompanying text.

