A (Genuinely) Modest Proposal Concerning the Death Penalty

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Whether one is a supporter or an opponent of the death penalty, one of the issues discussed by Justice Dando must be of paramount concern: the possibility of executing an innocent person. Indeed, supporters might well be even more concerned about this problem than opponents since, if even a few demonstrably innocent people are executed, public opinion is likely to turn against the death penalty as an acceptable criminal sanction.[1]

One study has found that, between 1900 and 1991, 416 people were wrongly convicted of capital or "(potentially) capital" cases.[2] While this figure has been criticized,[3] no one would disagree that, if we are to have a death penalty, all reasonable steps should be taken to guard against the execution of the innocent.[4] It is to that end that this Article is directed.

Currently, in order to render a defendant eligible for the death penalty, a jury must find, beyond a reasonable doubt, that he committed all of the elements of the crime of murder.[5] Then, in a separate proceeding, the jury or judge must

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1. Even the comparative injustice of executing the non-shooter in a felony murder, while sparing the shooter because he was a juvenile, "unleashed a firestorm of criticism against the death penalty in England." That, along with cases in which an innocent man and an apparently guilty woman were executed, contributed to the abolition of the death penalty in 1957. Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 246 (1989).

2. MICHAEL L. RADELET, ET AL., IN SPITE OF INNOCENCE at ix-x (1992). The study originally appeared as Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

3. The Bedau-Radelet study is criticized in Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). Markman and Cassell make the important point that convicting someone of a "potentially capital" crime in a jurisdiction that does not have a death penalty is hardly the same thing as an erroneous death sentence since the jury was never asked to render the additional "death" verdict. *Id.* at 123-24. Their second argument, that erroneously convicted defendants are often spared prior to execution, *id.* at 125, is less telling in light of the movement of the Supreme Court toward speedier executions. See, *e.g.*, Herrera v. Collins, 506 U.S. 390 (1993), which held that a claim of actual innocence based on newly discovered evidence is not grounds for habeas corpus relief, although the Court left open the question of whether a *convincing* claim of actual innocence might be grounds for such relief.

4. "Nothing could be more contrary to contemporary standards of decency or shocking to the conscience than to execute a person who is actually innocent." *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting) (citations omitted).

5. It is not clear whether any crime other than murder can be subject to the death penalty. In Coker v. Georgia, 433 U.S. 584 (1977), the Court struck down the death penalty for the "rape of an adult woman." *Id.* at 592. However, it has not been decided whether rape of a child, aircraft hijacking, or treason could be subject to the death penalty even though no one was killed. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES

conclude that a statutory "aggravating circumstance" was also present, beyond a reasonable doubt.[6]

In those states that inform jurors as to the meaning of reasonable doubt,[7] the instruction usually is along the lines set forth in the 1850 Massachusetts case of *Commonwealth v. Webster*:[8]

> Reasonable doubt . . . is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[9]

While this might be thought to foreclose any misgivings whatsoever by jurors as to the accuracy of their verdict, the Supreme Court, in *Lockhart v. McCree*, recognized that jurors who vote to convict may nevertheless entertain "residual doubts" about the defendant's guilt that would "bend them to decide against the death penalty."[10] In fact, such residual doubt is specifically contemplated in the jury instruction approved by the Court in *Victor v. Nebraska*: "[A]bsolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case* . . . ."[11] However, as Justice Marshall pointed out, dissenting in *Lockhart*, the Court had consistently denied certiorari to defendants complaining that they had been forbidden to raise this issue with the jury.[12]

Nevertheless, in states which do allow an appeal to "residual" or "lingering" doubt as a means of escaping the death penalty, some courts have found it to be deficient representation for the defense counsel not to make such an argument to the jury.[13] Obviously, then, an appeal to residual doubt is not a mere formality,

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532 (6th ed. 1995).

6. Examples of aggravating circumstances would include the fact that the crime involved multiple victims, or that the crime was the murder of a policeman on duty.

7. "[Some] courts have thought that the words themselves are sufficiently clear not to require any embellishment." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.8, at 80 (1986) (footnotes omitted).

8. 59 Mass. (5 Cush.) 295 (1850).

9. This instruction, used in California, was recently approved by the Supreme Court in Victor v. Nebraska, 114 S. Ct. 1239 (1994) (case consolidated with Sandoval v. California) (emphasis omitted).

10. 476 U.S. 162, 181 (1986) (quoting Grigsby v. Mabry, 758 F.2d 226, 248 (8th Cir. 1985) (Gibson, J., dissenting)).

11. *Victor*, 114 S. Ct. at 1249 (emphasis in original).

12. *Lockhart*, 476 U.S. at 206 (Marshall, J., dissenting).

13. As the Supreme Court has observed, "where 'States are willing . . . to allow defendants to capitalize on "residual doubts,"' such doubts will inure to the defendant's benefit." Franklin v. Lynaugh, 487 U.S. 164, 173 (1988) (quoting *Lockhart*, 476 U.S. at 181) (emphasis omitted); *see also* Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987) (vacating death sentence); *Grigsby*, 758 F.2d at 247-48 (Gibson, J., dissenting); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (reversing death sentence), *cert. denied*, 471 U.S. 1016 (1985); Daniel v. Thigpen, 742 F. Supp. 1535, 1560 (M.D. Ala. 1990) (granting new trial).

but an argument that may, under the standards for ineffective assistance of counsel, be "outcome determinative."[14]

Some defendants have attempted to extend such holdings. In *Franklin v. Lynaugh*, the defendant argued that, in view of *Lockhart*'s recognition of residual doubt as a potentially helpful factor, he was entitled to an instruction "telling the jury to revisit the question of his identity as the murderer as a basis for mitigation" at the death phase of the trial.[15] The Court, while conceding, as it had in *Lockhart*, that such an argument might be helpful to the defendant, concluded that the Eighth Amendment right to present mitigating evidence did not extend to a right to an instruction on residual doubt.[16]

I would go further than the defendant's argument in *Franklin*. In my view, the jury should be instructed that, unless they unanimously agreed that they had *no* doubt about the defendant's identity as the murderer, they should not sentence him to death. To put it another way, if any juror retained any lingering doubt about the defendant's guilt, the death sentence should not be imposed. This is stronger than what the defendant sought in *Franklin*, in that it does not merely *permit* the jury to take lingering doubt into account as a (or as one of several) mitigating circumstance(s), but *requires* them to unanimously conclude that there is no lingering doubt before even proceeding to the death penalty phase.

However, I would limit this requirement to defenses which would render the defendant *completely innocent* of the crime. Thus, no heightened standard should generally be applied to such matters as mens rea at the trial stage[17] or aggravating factors, including prior convictions, at the penalty stage. The only issue that should be subject to this heightened standard is a claim such as alibi, or mistaken identity, that, if accepted, would negate any criminal connection to the death or the crime that caused it. Therefore, a defendant who admitted participating in a felony when death occurred, as in *Tison v. Arizona*, should not be entitled to this heightened standard on the issues of whether he was a "major participa[nt] in the felony committed, combined with reckless indifference to human life."[18] However, a claim of total non-participation, or total non-awareness that his participation was criminal, should be subject to the heightened standard.[19]

It follows that the usual "reasonable doubt" standard would appropriately be applied to a defendant who claimed that he was a getaway driver who arrived late and had nothing to do with the killing or to a defendant who claimed that, though

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14. These standards are set out in Strickland v. Washington, 466 U.S. 668, 693-95 (1984).

15. *Franklin*, 487 U.S. at 172-73.

16. *Id.* at 173. The main opinion was a plurality opinion joined by four Justices. However, Justice O'Connor, joined by Justice Blackmun, concurring in the result, concluded that, although in her view, petitioner was deprived of an opportunity to argue residual doubt as a mitigating factor, it did not matter since there was no right to such an argument. *Id.* at 187-89 (O'Connor, J., concurring). Thus six Justices agreed that there was no constitutional right to a jury instruction on residual doubt.

17. Unless the defendant claimed the absence of any culpable state of mind. *See infra* text accompanying notes 19-20.

18. Tison v. Arizona, 481 U.S. 137, 158 (1987). This is the standard to be met if the death penalty is to be imposed on a defendant who was not the actual agent of death.

19. Since a claim of insanity is, in effect, a claim of innocence, that too should be subject to the "no residual doubt" standard.

he shot at the victim, he missed, and someone else's bullet actually caused the death. Neither of these defendants is claiming complete innocence. However, an alleged "getaway driver" who claimed that he picked up a bank robber who was hitchhiking, with no knowledge that a criminal act had occurred, would be entitled to the instruction.

A difficult case is presented by a defendant who admits, for example, that he shot the victim, but claims that the shooting was an accident. In order to convict this defendant of capital murder in the first place, the government would have to prove a mens rea of at least reckless indifference to human life. If the defense was that this was a non-negligent accident, the defendant would be further entitled to the "residual doubt" instruction proposed here since acceptance of the defendant's claim would render him completely innocent of any wrongdoing. If the defendant claimed that he was merely negligent, he would arguably not be making a claim of "complete innocence." However, it would not be inappropriate to allow defendants who claim that they were merely negligent to also be entitled to the residual doubt instruction.

Another defendant might claim that he drove robbers to a store knowing that they planned to shoplift, but with no knowledge that they had weapons or planned a robbery. Since this defendant is not claiming that he is innocent of any wrongdoing, but rather admits participation in the series of criminal events that led to a death, the traditional "beyond a reasonable doubt" standard will suffice to determine if he could be executed under the *Tison v. Arizona* standard (which, if his claim is given any credence at all, he could not). The possibility of wrongly executing this defendant is simply not as disturbing as the possibility of executing a complete innocent.

It may seem fatuous to require a jury to distinguish between guilt "beyond a reasonable doubt" and guilt "with no lingering doubts." However, as a former prosecutor in Washington, D.C., I know that many guilty verdicts are not really "beyond a reasonable doubt" as that term is defined above.[20] The most common armed robbery case involves a stickup of a convenience store. Assuming that the clerk could make a convincing lineup identification of the defendant, and the defendant matched the general description of the robber initially given to the police, my office would have prosecuted the case, and would generally have convicted, even if there were no other eyewitnesses and little more corroborating evidence. But, aware as I was of the fallibility of eyewitness identification, I, and perhaps some of the jurors, could not honestly say that there were no doubts at all about guilt, despite being reasonably confident that the defendant was the true culprit.

Many capital cases involve a similar fact situation, with the added problem that the best witness, the victim, is "not available." My own impression of the "reasonable doubt" standard at work is that it represents about ninety-five to ninety-six percent certainty. If this is so, then there is plenty of room for a further requirement of "no residual doubt" for the death penalty. Moreover, the fact that, after the jury has decided guilt "beyond a reasonable doubt," it is instructed to apply an even higher "no residual doubts" standard to the facts would clearly

20. *See supra* text accompanying note 9.

signal to them that a different and more demanding standard was being used, and would cause them to rethink their view of the evidence.[21]

Giving this issue to the original jury after the finding of guilt avoids the problem raised by the plurality in *Franklin*:

> Finding a constitutional right to rely on a guilt-phase jury's "residual doubts" about innocence when the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal.[22]

Since my proposal is not to treat "residual doubt" as a mitigating circumstance, but rather to insist that the absence of it is a prerequisite to moving on to the penalty phase, residual doubt can and should be determined by the original guilt-phase jury. If, however, a defendant were to successfully appeal on this issue—such as, on the trial judge's failure to instruct on residual doubt—there would be no need to retry the guilt phase. Rather, as in current practice, a new jury would have to be formed, apprised of the evidence at the guilt phase, and asked to decide only the "no residual doubt" issue. Assuming that the penalty phase had originally been conducted properly, the appropriateness of the death penalty should not be revisited if no residual doubt is found.

Waiting to instruct the jury about residual doubt until after a guilty verdict as to the underlying crime also avoids another problem. If the jury were to receive the residual doubt instruction along with all the other instructions, defendants would argue that this might lead jurors to compromise by finding them guilty, but with lingering doubts precluding death, where the defendant would otherwise have been acquitted due to those doubts. Obviously, if the jury is unaware of the possibility that residual doubts might preclude the application of the death penalty, that could have no effect on their determination of guilt.

Accordingly I propose that, where the trial judge concludes that the defendant's defense,[23] if believed, would render him *completely innocent* as to the death of the victim or the crime that led to it, the judge, following a guilty verdict to a capital crime, should further instruct the jury on residual doubt. The instruction will vary according to the nature of the defendant's claim. Here is a sample instruction in a case where the defendant claims to have been outside the store at the time the victim was shot and to have had no connection to the robbery:

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21. Successful use of this standard by the defense will immediately give rise to a further claim that "the jury has said that it is not really certain that this defendant committed the crime; therefore, he should not be languishing in prison." To this claim I would respond that he has been found guilty beyond a reasonable doubt and that has always been sufficient. The mere fact that a higher standard has been imposed for the extreme and irrevocable sanction of execution does not mean that the issue of guilt must be revisited.

22. Franklin v. Lynaugh, 487 U.S. 164, 173 n.6 (1988).

23. I use the term "defense" broadly. I would not require the defendant to testify or his attorney to specifically claim a certain named defense. Rather, the judge should examine the overall thrust of the defense arguments. Such an instruction should only be given if the defendant makes a colorable claim of complete innocence.

> Although you have convicted the defendant of capital murder[24] beyond a reasonable doubt, we recognize that some jurors may continue to entertain lingering or residual doubts as to guilt. In order to ensure, as best we can, that no innocent person is executed, the law requires that, before the defendant is eligible for the death penalty, the original jury must unanimously conclude that they have no lingering or residual doubts that John Jones was one of the participants in the robbery of Mom and Pop's Store, and that he was at least reckless as to the death of the victim.[25]

It is likely that *Franklin* would preclude such an instruction being recognized as a federal constitutional right. Despite the absence of a majority opinion in that case, Justice O'Connor is clear in her concurrence that "the Eighth Amendment does not require" an instruction as to residual doubt.[26] Thus, this paper urges such a change on states, either through judicial interpretation of the state constitution or by statute. While it is not clear how many Americans agree with Blackstone's maxim that "[i]t is better that ten guilty persons escape, than that one innocent suffer,"[27] it is unquestionably right that it is better that ten guilty defendants escape execution (but be imprisoned for life) than that one innocent be hanged. It is toward that end that this paper is aimed.

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24. In order to convict the defendant of capital murder, the jury had to conclude, beyond a reasonable doubt, that the defendant was a *major* participant. Tison v. Arizona, 481 U.S. 137, 158 (1987). This issue, which has no bearing on "complete innocence," should not be subject to the residual doubt instruction.

25. This instruction assumes that the state had concluded that a claim of negligence is to be equated with "innocence," as discussed *supra* text accompanying note 20.

26. *Franklin*, 487 U.S. at 187 (O'Connor, J., concurring). Since, as Justice O'Connor points out, defendants have no right to present residual doubt claims as a mitigating circumstance, it is unlikely that the Court would hold that the absence of such doubts is a prerequisite to a death penalty verdict in some cases.

27. THE QUOTABLE LAWYER (David S. Shrager & Elizabeth Frost eds., 1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769)).

Crnelty and Original Intent: A Socratic Dialogue

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A large part of the day-to-day work of the Justices of the United States Supreme Court (and their law clerks) focuses on capital cases.[1] Of the thousands of petitions for certiorari received in the normal course each year, and of the few that are accepted for review, a disproportionate number come from prisoners on death row. In addition, and almost invisible to the public, are the significant time and resources the Court spends reviewing requests for stays of execution from prisoners whose executions are imminent. Each time a prisoner is scheduled to be executed anywhere in the country, the Supreme Court may be called upon to review the prisoner's arguments that the execution should not go forward. If the execution is not postponed by some lower tribunal, the Supreme Court will in almost every instance receive an application for stay of the execution and a petition for certiorari.[2] These often arrive within the last few hours before the scheduled time of the execution, and sometimes in the late night or early morning. The Court's orders granting or denying these stay applications and petitions sometimes offer hints of heated disagreements within the Court's sanctum.[3]

One of the striking things about these disagreements is how narrow they must be compared to just a few years ago. Both Justices William Brennan and Thurgood Marshall believed capital punishment was unconstitutional in every instance,[4] and they routinely dissented from denials of requests for stays on that ground.[5] In 1994, Justice Blackmun revealed that he, too, had come to believe that the administration of the death penalty could not meet the demands of the

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1. The author clerked for Associate Justice David H. Souter during the 1994 Term.

2. The number of executions has increased significantly over the past few years. In 1995, 56 condemned inmates were executed, the most in 20 years. Jack Cheevers, *Death Penalty Opponents Cling to Unpopular Cause*, L.A. TIMES, Feb. 22, 1996, at A1.

3. *See, e.g.*, Felker v. Turpin, 116 S. Ct. 1588 (1996) (granting stay, with four dissents); Bowersox v. Williams, 116 S. Ct. 1312 (1996) (vacating stay, with four dissents); Anderson v. Buell, 116 S. Ct. 831 (1996) (denying application to vacate stay, with four dissents); Netherland v. Tuggle, 116 S. Ct. 4 (1995) (vacating stay, with two dissents and two Justices registering votes to deny the application to vacate stay); Griffin v. Missouri, 115 S. Ct. 2603 (1995) (denying application for stay, with three Justices registering votes to grant stay); Fearance v. Scott, 115 S. Ct. 2572 (1995) (denying application for stay, with two Justices registering votes to grant stay); Jacobs v. Scott, 115 S. Ct. 711 (1995) (denying application for stay, with two dissents and one Justice registering a vote to grant stay).

4. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

5. *See, e.g.*, Boggs v. Muncy, 497 U.S. 1043 (1990).

Eighth Amendment's proscription of cruel and unusual punishments.[6] After his announcement, Justice Blackmun also voted to grant stays of execution in every case that came to the Court.[7] But these "big picture" disagreements over the constitutionality of the death penalty have ceased since Justice Brennan left the Court in 1990, Justice Marshall retired in 1991, and Justice Blackmun stepped down in 1994.

With their departures, the Court is left without a single Justice who opposes capital punishment on constitutional grounds in all cases. Of course, capital punishment is not the only issue on which the Court has swung to the right since the departures of Brennan, Marshall, and Blackmun.[8] But the complete absence of a Justice who believes in the unconstitutionality of the death penalty does make this issue seem to be one for which there is little likelihood that the Court will swing back toward the middle anytime soon.

Why is there a dearth of voices who are willing to oppose capital punishment on constitutional grounds? One possible answer is the continued strength of originalist constitutional interpretation on the Court and in the academy. Despite a number of attacks on the use of original intent in constitutional discourse,[9] its use is still commonplace.[10] The arguments from original intent that capital punishment is constitutionally permissible are particularly straightforward and powerful.[11] The text of the Constitution appears to assume its availability: the Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law."[12] Moreover, capital punishment

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6. Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting).

7. *See, e.g.*, Lawson v. Dixon, 114 S. Ct. 2700 (1994); Drew v. Scott, 115 S. Ct. 5 (1994).

8. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (addressing minority set-asides); Missouri v. Jenkins, 115 S. Ct. 2038 (1995) (addressing desegregation); United States v. Lopez, 115 S. Ct. 1624 (1995) (addressing the Commerce Clause); Shaw v. Reno, 509 U.S. 630 (1993) (addressing race-conscious redistricting).

9. The scholarship is extensive. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 359-69 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613 (1991); Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

10. One excellent example from the Court's recent jurisprudence is U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995). Three opinions were written: the opinion for the Court by Justice Stevens, a concurrence by Justice Kennedy, and a dissent by Justice Thomas. All three opinions relied heavily on historical materials and on an assumption that the present day Court has much to learn from the beliefs and intentions of the Framers. *See id.* at 1855-71 (opinion of Stevens, J.); *id.* at 1872-73 (Kennedy, J., concurring); *id.* at 1894-1903 (Thomas, J., dissenting).

11. *See, e.g.*, Callins v. Collins, 114 S. Ct. 1127, 1127-28 (1994) (Scalia, J., concurring).

12. U.S. CONST. amend. V.

was widely practiced in the United States at the time of the ratification of the Constitution.[13]

These intentionalist and textualist arguments have been answered elsewhere,[14] and my purpose here is to evaluate neither the arguments nor the answers. Instead, I offer a script of an imaginary dialogue between two Justices.

The following dialogue is based on *Euthyphro*, the first of Plato's four Socratic dialogues known collectively as *The Last Days of Socrates*. *Euthyphro* takes place as Socrates waits to enter court, where he is about to be tried for heresy and corrupting the minds of the young.[15] Socrates encounters an acquaintance, Euthyphro, a religious expert, who is on his way to bring charges against his own father for manslaughter. Socrates is startled by Euthyphro's mission and engages him in a light-hearted exchange about the nature of religious duty. How, Socrates asks, can Euthyphro be sure that bringing charges against his father is consistent with such duty? Euthyphro answers that he believes that his act is pious because it is what the gods would desire him to do. In the ensuing exchange, Socrates ties Euthyphro in knots of logic.[16]

When I recently read this dialogue, I was struck by some parallels between this dialogue and certain aspects of the debate about original intent in constitutional interpretation. I have changed the setting and recast the dialogue to explore these apparent parallels. With apologies to Plato, I offer the following as food for thought.

Setting: The Supreme Court chambers of Justice Socrates, in the late evening before the latest execution in Texas. The Justices are awaiting a last-minute application for stay contending that the execution will violate the Eighth Amendment proscription of cruel and unusual punishments. Justice Euthyphro is visiting with Justice Socrates to pass the time.

Justice Euthyphro: As always, I am going to vote against the application for stay. A couple of former Justices, and an occasional law clerk, urge me to change position on these matters because they believe it to be cruel and unusual for a state to execute someone. They have a poor comprehension, Socrates, of how the Constitution stands with regard to cruelty.

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13. *See* Harmelin v. Michigan, 501 U.S. 957, 980-81 (1991) (opinion of Scalia, J.) (noting that First Congress enacted criminal statutes that imposed death as penalty for some crimes); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 41-44 (1993) (discussing the death penalty in colonial times).

14. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 258-69, 282-84 (1972) (Brennan, J., concurring); Hugo Adam Bedau, *Thinking of the Death Penalty as a Cruel and Unusual Punishment*, 18 U.C. DAVIS L. REV. 873 (1985); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 324-26 (1986); William J. Brennan, Jr., *Foreword: Neither Victims nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1994).

15. *See* PLATO, THE LAST DAYS OF SOCRATES (Hugh Tredennick trans., 1954). The second dialogue, *The Apology*, sets out Socrates' speeches to the court. The third, *Crito*, and the fourth, *Phaedo*, portray discussions occurring while Socrates is in jail, the latter on the day of his death.

16. *See id.*

Justice Socrates: But tell me, Euthyphro, do you really believe that you understand the meaning of the Constitution, and what is and is not cruel, so accurately that in the circumstances you describe you have no misgivings? Are you not afraid that in voting to execute this man you may turn out to be condoning a cruel punishment?

Euthyphro: No, Socrates. I should not be worth much as a judge, and I would be no better than the common run of men, if I did not have accurate knowledge about that sort of thing.

Socrates: In that case, Euthyphro, the best thing I can do, I suppose, is to become your pupil, since you have this remarkable talent. So do tell me what you insist that you definitely know: what you mean by "cruelty," both in terms of executions and in all other constitutional connections. Is it not true that in every action cruelty is self-identical, and similarly that non-cruelty is in every instance the opposite of cruelty, but consistent with itself? In other words, that everything that is to be regarded as cruel has a single definite characteristic in respect to its cruelty?

Euthyphro: No doubt that is quite true, Socrates.

Socrates: Then tell me, how do you define cruelty and its opposite?

Euthyphro: Very well. One thing I can say for sure is that it is not cruel for the state to do just what it proposes to do in this case, that is, execute a murderer. I will cite you a piece of evidence to show that this is how the law stands: I mean that one must not give in to the doer of a murderous act, no matter who he may be. Observe what weighty evidence this is. You yourself believe that you should abide by the Constitution, yet at the same time you must agree that the Constitution assumes that capital punishment is a possible punishment, limited only by the assurance that no life be taken by the state without due process of law.[17] And you must also admit that the Framers supported capital punishment and assumed it to be a punishment that could be meted out constitutionally by the authorities. Yet you take me to task for voting in favor of capital punishment myself, thus contradicting yourself by laying down one rule for the Framers and another for me.

Socrates: Do you think that that is the reason I am never invited to Federalist Society colloquia, because when I hear anyone tell stories like these about what the Framers thought I somehow find it difficult to accept them? Some would say, I suppose, that my views are simply wrong. And now if you, who are an expert in this sort of thing, also believe these stories, perhaps it is true that people like myself must assent too. What is there to say, when we ourselves admit that we

17. *See* U.S. CONST. amend. V.

know nothing about the subject? But tell me, in friendship's name, do you really believe that you can know what the Framers thought and believed?

Euthyphro: Yes, indeed, Socrates. What I know, and what ordinary people do not, would astonish you.

Socrates: I should not be surprised. But you shall tell me about that some other time when we have leisure; at the moment I want you to try to answer more precisely the question that I put to you just now. You see, my friend, when I asked you before what cruelty was, you did not tell me enough; you said that what the state is doing now—executing this prisoner—was not cruel.

Euthyphro: Yes, and what I said was true, Socrates.

Socrates: Perhaps, but surely you admit that there are other actions that are indeed cruel.

Euthyphro: So there are.

Socrates: Well, then, do you recollect that what I urged you to do was not to tell me about one or two of the things that were or were not cruel, but to describe the actual feature that makes cruel actions cruel? Because you said, I believe, that cruel actions are cruel in virtue of a single characteristic. Or do you not remember?

Euthyphro: Yes, I do.

Socrates: Then explain to me what this characteristic is, so that by fixing my eyes upon it and using it as a pattern, I may be able to describe any punishment as cruel if it corresponds to the pattern and not cruel if it does not.

Euthyphro: If that is how you want your answer, Socrates, that is how I will give it.

Socrates: That *is* how I want it.

Euthyphro: Very well, then: as a constitutional matter, what was thought by the Framers[18] to be cruel is cruel, and what was thought by them not to be cruel is not cruel.

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18. Or, one could substitute "what was meant 'to the Americans who adopted the Eighth Amendment.'" *See* Harmelin v. Michigan, 501 U.S. 957, 975 (1991) (opinion of Scalia, J.).

Socrates: An excellent answer, Euthyphro, and in just the form that I wanted. Whether it is true I do not know yet; but no doubt you will go on to make it clear to me that your statement is correct.

Euthyphro: Certainly.

Socrates: Come along then. Let us consider what we are saying. The punishment that the Framers believed was cruel is cruel, and the punishment that the Framers believed was not cruel is not cruel, cruelty not being the same as "not cruelty" but its direct opposite. Is that not our position?

Euthyphro: Yes, it is.

Socrates: And the definition seems satisfactory?

Euthyphro: I think so, Socrates.

Socrates: Do you think that the Framers were all of one mind as to what was cruel and what was not cruel?[19]

Euthyphro: I think it unlikely.

Socrates: Then there might be some punishments that might be considered by some Framers as cruel and by other Framers as not cruel?

Euthyphro: Yes, I believe that is correct, Socrates.

Socrates: So apparently the same punishments were both considered cruel and considered not cruel by the Framers.

Euthyphro: Apparently.

Socrates: So by this argument, Euthyphro, the same punishments will also be constitutional and unconstitutional.

Euthyphro: Perhaps so.

Socrates: Then you did not answer my question, my talented friend. I did not ask you to tell me something which is actually at once both cruel and not cruel, and apparently what is at once both Framer-intended and Framer-unintended. So with regard to your present vote in favor of executing this murderer, it would not

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19. *See* Furman v. Georgia, 408 U.S. 238, 335 (1972) (Marshall, J., concurring) (reviewing opposition to capital punishment in colonial times and in the early republic).

be surprising if in doing this you are doing what is agreeable to some Framers but offensive to others.

Euthyphro: But I imagine, Socrates, that none of the Framers disagreed with another on this point, at any rate: that whoever kills without justification and is found by a jury of his peers to be guilty of murder beyond a reasonable doubt may be constitutionally executed, since such a punishment is not cruel.

Socrates: I am not sure of your claim, but we can set aside that disagreement, if you like. Let us assume that all Framers would have regarded this punishment as not cruel. But suppose that we now make a correction in our formula, to the effect that what *all* the Framers intended to be cruel is cruel and what they *all* intended to be not cruel is not cruel (whereas what some thought was cruel and others thought was not cruel is neither or both). Is this how you would like our definition to stand now with regard to "cruelty" and "not cruelty"?

Euthyphro: What is there against it, Socrates?

Socrates: Nothing on my part, Euthyphro, but I want you to consider on yours whether this assumption will make it easiest for you to instruct me as you promised.

Euthyphro: Very well. I should say that cruelty is what all the Framers believed was cruel, and that the opposite, what all Framers believed was not cruel, is non-cruelty.

Socrates: Should we then consider this definition in its turn, Euthyphro, to see whether it is satisfactory, or should we let it pass and simply accept both our own and other people's assumptions, taking the speaker's word for what he says? Should we not examine the implications of this statement?

Euthyphro: Yes, we should. All the same, I think that this definition is now satisfactory.

Socrates: We shall soon be better able to judge, my good sir. Consider this question: are those punishments that are constitutionally impermissible cruel because the Framers thought they were cruel, or did the Framers think they were cruel because they were cruel?

Euthyphro: I do not understand what you mean, Socrates.

Socrates: Well, I will try to explain more clearly. Do we speak of things as *carried* and *carrying*, *led* and *leading*, *seen* and *seeing*? And do you understand that in all such pairs of terms each is different from the other, and in what way they are different?

Euthyphro: Yes, I think I understand.

Socrates: Tell me, then: is a carried thing carried because one carries it, or for some other reason?

Euthyphro: No, the reason is just that.

Socrates: And a led thing is led because one leads it, and a seen thing seen because one sees it?

Euthyphro: Certainly.

Socrates: So we do not see a thing because it is a seen thing, but on the contrary it is a seen thing because we see it; and we do not lead a thing because it is a led thing, but it is a led thing because we lead it; and we do not carry a thing because it is a carried thing, but it is a carried thing because we carry it. Is my meaning quite plain, Euthyphro? What I mean is this: that if anything is produced, or acted upon in any way, it is not produced because it is a product, but it is a product because it is produced; and it is not acted upon because it is the object of an action, but it is the object of an action because it is acted upon. Do you not agree that this is so?

Euthyphro: Yes, I do.

Socrates: Well, then, is not an intended thing either a product or an object of some action?

Euthyphro: Certainly.

Socrates: So it is the same with this as with our other examples: it is not intended by those who intend it because it is an object of intent, but it is an object of intent because it is intended.

Euthyphro: Yes, that must be so.

Socrates: Then what do we say about constitutionally impermissible punishments? Are they not the punishments considered cruel by all the Framers, according to your definition?

Euthyphro: Yes.

Socrates: Just because they are cruel, or for some other reason?

Euthyphro: No, because they are cruel.

Socrates: So they are believed to be cruel because they are cruel, not cruel because they are believed to be cruel?

Euthyphro: It seems so.

Socrates: But it is because a punishment was believed to be cruel that it is constitutionally prohibited.

Euthyphro: Of course.

Socrates: Then what is constitutionally prohibited is not the same as what is cruel, Euthyphro, nor is what is cruel the same as what is constitutionally prohibited, as you assert. They are two different things.

Euthyphro: How do you make that out, Socrates?

Socrates: Because we agree that those punishments believed to be cruel are believed to be cruel because they are cruel, and not cruel because they are believed to be cruel.

Euthyphro: Yes.

Socrates: And we agree that what is Framer-intended is Framer-intended because the Framers intended it, from the very fact that they intended it; and that they do not intend it because it was already Framer-intended.

Euthyphro: That is true.

Socrates: But if what is Framer-intended to be cruel were identical with what is cruel, my dear Euthyphro, then if what is cruel were Framer-intended to be cruel because it is cruel, what is Framer-intended would be intended because it was intended; and if what is Framer-intended were Framer-intended because it is intended by the Framers, then what is cruel would be cruel because it is Framer-intended to be cruel. As it is, you can see that the relation between them is just the opposite, which shows that they are entirely different from each other. The one is cruel because it is believed to be cruel; the other is believed to be cruel because it is cruel. And if it is the latter that you believe, as you have said, then it seems to me that something might be cruel and not believed to be such, and something believed to be cruel that is not.

I rather think, Euthyphro, that when I asked you what cruelty is you were unwilling to disclose its essence to me, and merely stated one of its attributes, saying that cruelty has the attribute of being considered cruel by all the Framers; but you have not yet told me what it is that has this attribute. So, if you have no objection, please do not conceal the truth from me, but make a fresh start and tell me without reserve what cruelty *is*.

Euthyphro: But Socrates, I do not know how to convey to you what I have in mind. Whatever we put forward somehow keeps on shifting its position and refuses to stay where we laid it down. In any event, I have an urgent engagement somewhere, and it is time for me to be off. I will instruct my clerk to contact me by phone when the application arrives. Goodnight, Socrates.