

To Live or Die?

Is There a Moral Obligation to Execute the Worst of the Worst?

*On July 9, in *People v. Harris*, the New York Court of Appeals overturned the first death sentence imposed under the state's death penalty statute, enacted in 1995, although portions of the law were upheld. The U.S. Supreme Court has twice recently ruled on the death penalty; first in *Atkins v. Virginia* (execution of the mentally retarded is unconstitutional) and then in *Ring v. Arizona* (aggravating factors in capital cases must be found by juries). The debate continues. Many wish to have the death penalty abolished, but is there a moral obligation to execute the worst of the worst?*

Yes

By Robert Blecker

The past counts. We remember — the dead and those whom we would kill....

Eleven-year-old Barbara Joe Brown walked to a convenience store to make a phone call. Two men forced her to a riverbank, where they repeatedly raped and tortured her. They slashed her with broken bottles and drove pointed sticks through her vagina to her abdomen. Bobby fought back as best she could; and when she begged for her life, they smashed her face with a brick, and repeatedly stabbed her. An hour later the child died.

Those who tortured her deserve to die. We know it. We feel it. There are moral facts, you see. Human beings are capable of great triumph, and vicious destruction. Michelangelo and Einstein were great contributors; Jeffrey Dahmer and Charles Manson were vicious killers. Of course there will be boundary cases. At twilight I cannot tell exactly when day becomes night, but this I know: 12 noon is day, 12 midnight, night.

Better and worse, good and evil are not entirely subjective and arbitrary. The core — extreme predatory cruelty — is real clear. We can point to hundreds on death row who deserve to die. Unfortunately, we can also point to thousands who do not. And not because they are innocent. Almost all of them did commit murder. But they are not the worst of the worst.

Most abolitionists also see this as a moral question, not answered entirely by public opinion, costs and benefits, deterrence, and public safety. For them, too, right and wrong is real: it is simply wrong (absent self-defense or just war) to kill others. (Some abolitionists do admit that people deserve to die, but they would never trust "the government" to execute.) Others do not understand retributivists' felt obligation to the past, to the victim, to see justice done. They do not feel our rage so they cannot share our extreme resentment; they cannot or choose not to see the difference between retribution — limited, proportional — and wild revenge.

Tragically but traditionally, the law seeks to eliminate emotion as a source of knowledge and action. The U.S. Supreme Court, in *California v. Brown*, made a terrible mistake by affirming the command to the jury not to be moved by "mere sympathy" or other "emotion." Great ethicists and moral psychologists have long known that every moral question is essentially an emotional one.

To define, select, prosecute and punish the worst of the worst — to answer the question of whether this person, in all his or her concrete humanity, deserves to die — we must bring intuition and informed emotion to bear. The jury should feel sympathy if it can, and antipathy if it must. It will, it must, and it should act on its informed emotion. History has shown that unchecked, emotion can produce terrible carnage. But so, too, has pure ideology — detached reason, drained of all emotion.

The first step is for states to radically refine their aggravators, greatly reducing the class of death-eligibles to those few who, by redefinition, commit the worst crimes. First and foremost, eliminate the felony murder aggravator, which today accounts for more than half the condemned on death row. Instead, focus on the especially "heinous, atrocious, and cruel", "especially depraved" victimizers. If states do this, racial discrimination would nearly disappear; justice would more nearly be done.

At the sentencing phase the question, no longer guilt but desert — life or death, not factual so much as moral — forces us to assess the character of the criminal. By seeking death, but only for the worst of the worst, we can better afford skilled advocates who will more effectively humanize the defendant. And then, too, we will remember the victim: "As we put ourselves in his situation, as we enter ... into his body, and in our imaginations ... animate anew the deformed and mangled carcass of the slain, when we bring home his case to our own bosoms, we feel ... an emotion The sympathetic tears which we shed for that immense and irretrievable loss [is] but a small part of the duty which we owe him.... We feel that resentment which ... he would feel.... His blood, we think, calls aloud for vengeance." What Adam Smith's Theory of Moral Sentiments called "vengeance" in 1759, we continue to refine into retribution — limited, proportional, deserved.

The worst of the worst deserve to die and the people have an obligation to execute them. But we are also obliged to prevent those who deserve a life in prison but not to die, from being haphazardly executed. As we await wholesale legislative redefinitions and particular executive clemency, should we pause? No! We must not extend life with its pleasures to those who should never again play or listen to music. A moratorium would be morally perverse.

What then? Prosecutors should re-evaluate cases, and awaiting legislative redefinition, leave in prison those who killed where the robbery went bad or those whose victim was a co-felon who became a snitch. These common murders are hardly the worst of the worst. But, at the same time, we must remember little Bobby; we must not let our anger cool, our memory fade, or anguished deliberation diminish our felt need for justice — to execute as quickly as possible those who most deserve to die.

Robert Blecker is a professor of criminal law and constitutional history at New York Law School.