

# Reconsidering the Legitimacy of Capital Punishment in the Interpretation of the Human Right to Life in the Two Traditional Approaches

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**Abstract**—There are debates around the legitimacy of capital punishment, i.e., whether death could serve as a proper execution in our legal system or not. Different arguments have been raised. However, none of them seem able to provide a determined answer to the issue; this results in a lack of instruction in the legal practice. This article, therefore, devotes itself to the effort to find such an answer. It takes the perspective of rights, through interpreting the concept of right to life, which capital punishment appears to be in conflict with in the two traditional approaches, to reveal a possibly best account of the right and its conclusion on capital punishment. However, this effort is not a normative one which focuses on what ought to be. It means the article does not try to work out which argument we should choose and solve the hot debate on whether capital punishment should be allowed or not. It, again, does not propose which perspective we should take to approach this issue or generally which account of right must be better; rather, it is more a thought experiment. It attempts to raise a new perspective to approach the issue of the legitimacy of capital punishment. Both its perspective and conclusion therefore are tentative: what if we view this issue in a way we have never tried before, for example the different accounts of right to life? In this sense, the perspective could be defied, while the conclusion could be rejected. Other perspectives and conclusions are also possible. Notwithstanding, this tentative perspective and account of the right still could not be denied from serving as a potential approach, since it does have the ability to provide us with a determined attitude toward capital punishment that is hard to achieve through existing arguments.

**Keywords**—Capital punishment, right to life, theories of rights, the choice theory.

## I. INTRODUCTION

THE word ‘capital’ originates from the Latin word ‘*capitalis*’ which literally means ‘regarding the head’, and is referred to here as execution by beheading [1]. Capital punishment was universally applied all over the world until the middle 20th Century. Since World War II, there has been a trend toward abolishing it. However, at the same time over 60% of the world population is still under the regulation of death penalty, such as in China, India, the United States and Indonesia and some country has reintroduced it after suspension for several years, Sri Lanka and Philippines for example. Whether the capital punishment should be abolished

therefore is under fierce debate, not only among states, but also among scholars.

## II. THE DEBATE AROUND THE LEGITIMACY OF CAPITAL PUNISHMENT

There are basically two campaigns regarding the legitimacy of capital punishment: the campaign of abolitionists and the campaign of retentionists. The former proposes abolition of capital punishment, while the latter insists its value and existence. The primitive support of capital punishment comes from the philosophical idea and theory of retribution.

### A. Retributivism

Retributivism considers punishment as a response to a past crime in a proportionate way [2], the leading figures of which are Kant and Hegel [2]-[6]. Kant insisted that retribution is the requirement of respecting human dignity which lies in the moral belief that a human being could only be treated as an end, but not as means to enhance common good or other good of him [7]. In this sense, punishment must be made in a ‘like for like’ way according to the principle of equality [2]. ‘Whatever underserved evil you inflict upon another within the people, that you inflict upon yourself’ [2]. Therefore, anyone who commits murder — ‘commits it, orders it, or is an accomplice in it’ — must suffer death himself [2]. Only the imposition of the death penalty to the murder serves in accordance with the strict law of retribution [2], [8]. Georg Wilhelm Friedrich Hegel followed Kant’s retributivist approach but not the latter’s strict equivalence. Rather, Hegel preferred punishments to be commensurable in value with precipitating crimes, since a punishment is ‘an annulment, a cancellation’ [9], of the performance of the crime or ‘a return to a previous state of affairs’ [9], [10]. Notwithstanding, the value of life is incommensurable to any other punishments except for life itself, therefore death penalty is the only just punishment for murder [10]. Kant’s and Hegel’s theories of retributivism are still considered nowadays as valid justifications for capital punishment to be a just penalty for at least atrocious crimes such as child murders, serial killers, torture murderers, and mass killing in terrorism, massacre or genocide [11], [12].

Abolitionists on the contrary refuse to build the legitimacy of capital punishment on retribution in two ways. The first is the reality that criminal law always does not react to a crime in a retributivist way, while the second is the belief that capital punishment could not generate a promising deterrent effect,

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which ought to be the function of the criminal law and punishment rather than retribution, and therefore, the retributivist justification of it could no longer stand. The first refute is five-fold. Firstly, capital punishment is rather revenge than retribution [13]. Retribution is purely a disguise for the disliked but actual reason of revenge. Secondly, retribution is uniquely applied in capital punishment, when taken into account that most crimes are not punished by subjecting the perpetrator to a similar act. For example, rapists are not punished by being sexually assaulted [14]. This uniqueness breaks it away from the normal practice of punishment. Thirdly, capital punishment functions as a 'double punishment' [15], to the convicted since the long process during which they wait for death [16], has already been a cause of much pain [15]. Death is a second punishment for them. Fourthly, not all murderers received a death penalty at last, so it is not operated fairly retributively [17]. Therefore, even retribution could ground the existence of capital punishment on the theoretical level it could not be realized completely in practice. Fifthly, sometimes life imprisonment without possibility of parole causes more suffering than death and may serve as a better retribution to serious crimes [18].

With those points above, retributivists' support of capital punishment is not successful in the view of abolitionists, but the latter could not justify their proposal for abolishing it either. Even retribution is a substantial revenge or a unique punishment it does not mean it should be abolished [19]. Moreover, mismatch between crime and punishment may not be true, since the most serious murders upon which the capital punishment is applied currently are quite likely to have put victims into the similar or a crueler situation of waiting for death. The second punishment therefore serves exactly as a just supplement. In the same sense, the one who has brought death to another deserves death more than a life sentence, at least when extremely cruel murders are committed [20]. In addition, there are certain countries which apply death penalty consistently to particular types of murder, and therefore, fairly. In a conclusion, none of the five sub-points in the first refute gives a full reason to stop the practice of capital punishment.

The second refute is not decisive either. Anti-retributivists believe that punishing a criminal is for the purpose of deterring future crimes [21], against the opinion held by retributivists that punishment could only be justified for reasons of its own [22], [23]. However, neither of them could allege its domination and the current theories on punishment end up with loose consensus on a combination of both [24]. Even if we move one step further and investigate their underlying ethical commitments, controversies remain again. The former is based on the lineage of consequentialism, which insists the allowance of an action should depend on its ability to bring about good — here of capital punishment is its deterrent effect. On the contrary, the latter has faith in deontology [25] that validates an action ultimately according to the value in itself — capital punishment is therefore right as long as it is for the criminal's own sake, treat him as an end rather than as means, or will be accepted by all rational agents. Using punishment to prevent future crimes that no matter will

be committed by the man punished or other potential criminals is considered against the latter, and thus, could not serve as the justification by retributivists [26]; although, it is advocated to be central in punishment by other scholars who prefer to choose actions and policies according to the consequences. There has been no end in the battle between deontology and consequentialism, so there would be no agreement on whether to allow capital punishment. More than that, even if we shift our focus from retribution to deterrence, retentionists may still contend that execution by death could serve the deterrence function besides its justification in retribution. Then the question on capital punishment becomes whether it could deter potential crimes more effectively than any other type of punishment, and thus justify its existential value in an otherwise being replaced situation.

### *B. Deterrent or Not?*

Cesare Beccaria is probably the best known person for opposing capital punishment because of its lack of deterrent effect. According to him, the justification of punishment rises from its defence of the social contract [21], upon which our society builds. The goal of penalties is achieving the greatest good for society [21]. Specifically, it requires making the public environment safer by their ability to deter future crimes [21]. In this sense, the problem of whether a form of punishment should exist depends exclusively on whether it deters, rather than as retribution. Capital punishment, however, provides a negative answer to the latter question. On one hand, it could not deter determined criminals [21], since they must be not afraid of death. On the other, it is not likely to generate a more deterring effect than perpetual punishment [21], because a steady example over a long period of time is more shocking than a single and transient execution [21]. Consequently, the death penalty should be replaced. Statistics show there is no reason to believe capital punishment has a robust deterrent effect [27], and many scholars follow Beccaria, in calling for abolishing capital punishment and replacing it with life sentence without the possibility of parole [28].

Karl Marx implied his objection to the death penalty, also on account of its shortage of deterrence at an early stage [29]. While later, on the ground of data showing that murders and suicides 'follow closely the execution of criminals' [30]. Marx further found out that death penalty actually causes murders rather than deterring future crimes [31]. It was noted again by Benjamin Rush during the late 18<sup>th</sup> Century [32]. Supported by some comparative researches among states with and without capital punishment [33], this 'counter-deterrent or brutalizing effect' [29] gives more weight on the attitude that capital punishment should be abolished.

Retentionists, however, argue that punishment by death does have a deterrent effect and is more effective than permanent imprisonment. Therefore, it should not be replaced by it or any other type of punishment. Along with the statistics showing the obscurity of the deterrent effect of capital punishment, there are evidences seemingly to suggest its unique function in preventing future crimes [34]. Even with

the fail-to-show-effect data, retentionists could still say that their failing to prove does not mean capital punishment has *de facto* no deterrent effect [35]. The brutalizing effect could not be confirmed either. On one hand, it is hard to say whether the cause-effect relationship is that capital punishment brings about murders or death penalty exists because of murders. Thus, whether capital punishment is brutalizing the society or murders are brutalizing the law is not clear [36]. On the other hand, since in a state that allows capital punishment, the number of murders without its existence could not be achieved, it is unfair to say executions will trigger homicide; the removal of the death penalty may end up in more murders [37]. The same goes with the comparison of the deterrent effect between capital punishment and life sentence, for talking about the crime rate without death penalty in a country which applies it is purely a presumption as well.

The uncertainty of statistical studies and their contradictory results, again, make neither the abolitionist nor the retentionist able to allege its victory over the other. The former then raises new arguments to critique capital punishment and support replacement of it by life sentence. One is permanent imprisonment costs less than carrying out an execution, and the other is the irreversibility of death.

### C. On Expenditure and Irreversibility

Every government's operation depends on taxes which come from its citizens. It is natural to pay attention to expenditure since revenue is limited. In this sense, if other factors being the same or hard to compare, the punishment that costs less might be the preferred option [38]. Abolitionists thus quote reports and studies [39] to show that the death penalty actually spends more than permanent imprisonment. They argue that the former not only requires a longer and more complex judicial process, but also the need for the level of security to be enhanced on death row [40]. The long time period, extremely difficult legal representation on both sides, multi-levels trials, as well as the execution, all make capital punishment much more expensive than any other type of punishment. If it could be replaced by life sentence without the possibility of parole, revenue will be saved to be spent on other more urgent needs. However, less expenditure implies a less complex procedure and a lower level of security. Regarding the former, the fairness of a trial and the efficacy of punishment may suffer, meaning a greater possibility of an innocent man being sent to prison [35]. While for the latter, the chance of a prison break increases [35]. Both outcomes seem to sabotage the basic values affiliated with criminal justice. However, if abolitionists do not want to sacrifice those values, they might have to admit that permanent imprisonment spends more than death penalty [41], although unwillingly. Expenditures they provide to support their studies are one-sided; there is no other side which could tell us how much it will cost if all executions are replaced by life sentences. It is still quite likely that the cost in keeping a convicted individual in prison for a life time will exceed that of executing the prisoner by death [41]. Accordingly, the goal of saving revenue by replacing capital punishment may not be achieved.

Abolitionists then argue that even though the life sentence may cost more, it might not be a bad thing. By all means, it could save innocent lives which may be taken by mistakes or flaws inevitable in the justice system [41]. On the contrary, the death penalty eliminates a human being absolutely from this planet. The result could never be reversed, even when a mistake is found afterward. This is the problem of the irreversibility of capital punishment that has been criticised most strongly [40]. A similar argument is raised that crimes are a failure of both the criminals and the society. Therefore, the state could not be justified to take its citizens' lives for actions it is responsible for, at least in part [43]. However, they could not ensure the victory of abolitionists either. Regarding the failure of the justice system, there are cases with suspicious evidence, and there are cases where there is absolutely no doubt, such as the Holocaust. Applying the death penalty in the latter cases includes no wrongful executions. In this sense, requiring a higher standard of proof may greatly prevent incriminating the innocent [44]. In addition, a reprieve in a death sentence is able to spare the innocent from actually being executed as well [45]. As to the failure of the social system, even though the state is inevitably connected to crimes, this connection is indirect. It could not be used to excuse offenders from being responsible for actions they directly choose to take and receiving punishment [43]. For those reasons, abolishing capital punishment totally is of no necessity.

As shown above, the uncertainty of expenditure could not show a clear preference for death penalty or permanent imprisonment, nor could the wrongful executions or social failure rule out the overall existence of capital punishment. Those drive the concern of the debate to a seemingly more solid evidence — public opinion.

### D. What Public Opinions Say

Public opinion is always introduced as an overwhelming argument for a state to abolish the death penalty. Since democracy is the fundamental institution adopted by most modern countries to decide law and policy, the attitude of the majority prevails over any other evidences provided by scholars presented above. A referendum is usually the best place to reveal public opinion in a state that needs it to change its constitution where the capital punishment lies. For example, Ireland passed a constitutional amendment by referendum in 2001 to prohibit reintroduction of the death penalty. It reveals the universal determination of its people to abolish capital punishment forever after it has been prohibited in the statute law in 1990. In a country which does not need or has not requested a referendum, attitudes of the public could only rely on polls. According to some existing surveys, more than 75% of people support the abolition of death penalty in Australia [46] and Norway [47], and less than half of the population is in favour of it in France, Finland, Italy and New Zealand [48]. Those numbers and evidences support the abolitionists' opposition to capital punishment. However, public opinion varies considerably by state. Distinct from the examples above, America [49], Belarus [50], India [51], and

China [36] maintain a high percentage of population supporting the death penalty, especially its application on serious crimes [52]. Since citizens of a state could only decide the law and policy within that state, the inclination to abolish it in one state or even in most states could not justify its ban in other states. While at the same time, some states' application could not be counted as the reason for another state's use or reintroduction of capital punishment either. Moreover, public opinion is subject to change from time to time, which again reveals that a certain outcome of polls on the death penalty could not be universalized. The massive rise in support of the reintroduction of the death penalty among South African youth after more than two decade moratorium [53] is a good example. In addition, public opinion may be discriminative. It has been pointed out that Americans are more likely to support the death penalty when they have been told that it is mostly applied to African Americans [54]. On that ground, even a stable and most widely accepted public opinion within the realm of a state could not be relied upon legitimately. The public therefore again says little about whether we should abolish or retain capital punishment.

There are other arguments against the death penalty such as that it is cruel, inhumane and degrading [55], and arguments for it, the important psychological role it plays, in Japan for instance [56]. However, those are even more obscure and uncertain than the four discussed above. The last straw abolitionists hold is the right to life with which they hope could defeat retentionists once and for all.

#### *E. Right to Life*

Capital punishment is alleged by abolitionists as the worst violation of human rights [40], a psychological torture [57], or 'the ultimate irreversible denial of human rights' [58], since it deprives a man of his right to life. Human life in their eyes is so valuable that even the most cruel murderers or torturers should not be subject to punishment by death [40]. Beccaria insisted that right to life is retained by each individual when they come into a state, and therefore, the state has no right to take their lives [59]. That is why international declarations and covenants, as well as domestic constitutional norms, always incorporate right to life as an important inalienable human right or constitutional right. Death, no matter what form it takes, therefore could never be justified.

Retentionists, however, argue that even if the right to life could not be alienated; it could be forfeited or waived [60]. Inalienability means whether to maintain life or to lose it ought not to be determined by anyone other than the possessor of the life [60]. It does not exclude the possibility that the possessor may choose in person to lose it by committing a capital crime [60]. Locke, Mill and William Blackstone all agree with this view, although they lay great emphasis on the right to life as abolitionists [61]-[63]. According to Locke, behaviours which are against the law of nature, such as serious crimes, depart the transgressor from the rule of reason [61], [64]. He therefore loses his capacity to enjoy a right and steps into a state of war with other members of a society. That confers the latter with a legitimate reason of self-protection to

kill the former. Since the right to punish has been transferred to that state when the member of the society enters the state and becomes a citizen of it, the same reason justifies the state's appliance of capital punishment as well [61], [64]. Blackstone and Albert Camus embraced a similar view with Locke that serious crimes will cut off the transgressor's connection with the society, degrade him as a monster and put him under the punishment by death [63], [65]. Mill, in clearer words, contended that 'adoption of a rule that he who violates that right in another forfeits it for himself' [66] is the best way to respect the value of life. The death penalty therefore does not intrude in the realm of right to life.

Having faced indeterminacy in the previously discussed arguments — retributivism, deterrent effect, expenditure, irreversibility and public opinion — the introduction of right to life, even emphasis on the value of life, is again unable to solve the debate between abolitionists and retentionists. Each side still has reasons to support their own attitude, which results from the unclearness of the answer to the key question — whether the human life is so valuable that it could neither be alienated nor forfeited, or even could not be alienated but could be forfeited. This unclearness seems come from the undecided meaning of right to life. If the meaning of this right could be clarified, the key question may be answered, and the attitude toward capital punishment would reach a determined conclusion accordingly. In this sense, a further interpretation of the right to life is needed. This interpretation will be carried out by the two leading approaches in defining a right — the will theories and the interest theories.

### III. THE TWO MAIN APPROACHES IN INTERPRETING THE CONCEPT OF A RIGHT

Since the 16<sup>th</sup> century to now, the effort in defining the concept of a right has been an endless stream. However, this stream never deviated from the fundamental intellectual line drawn by the will theories and the interest theories [67]-[70]. The will and the interest, thus, are considered as the two main approaches in the western rights expounding tradition. These two approaches each have two sub-groups — the classical version and the modern version [71], [72]. The classical versions of them are the Will Theory and the Benefit Theory; while the modern versions of them are the Choice Theory and the Interest Theory.

The will theories originated from Kant's rationalist and natural law effort in upholding the value of human rationality under the new physics' determinism during the Age of Enlightenment [71], [72]. Kant differentiated the scientific world and the moral world, both of which are pre-determined. However in the moral world, human rationality still plays an important role. It makes human beings able to conceive the content of the determined universal law, or the categorical imperative [73]. If a human choice or decision on an action is made according to that law, this choice is considered as rightful and therefore a right [3]. In other words, *Willkür* on the grounds of *Wille* [3], both *Willkür* and *Wille* are always translated into 'will' [74]. Kant's rights theory thus is referred to as 'the Will Theory'.

The classical version of the interest theories rose with Bentham and Mill's empirical and utilitarian tradition. Transcendental principles were criticized, while empirical and perceivable reasons for actions were preferred, which was utility in their view [42], [75]-[77]. Bentham and Mill both agreed that utility is the core of regulative rules, although they diverged on whether utility could only be counted quantitatively or it still differs qualitatively [42], [77], [78]. The law is aiming at maximizing utility and preventing losses [75]. The right, which is confirmed and conferred by the law, therefore takes utility as its defining point as well [79]. Their theories of rights are referred to as 'the Benefit Theory', since they use 'benefit' more frequently in denoting utility.

Hart was greatly influenced by Bentham in the philosophical approach, so he developed legal positivism and rejected rationalism and natural law tradition [80], [81]. However, Hart believed in an inclusive legal positivism, which means moral values are not excluded in acknowledging the existence of the law [82]. This made his conception of rights follow more the approach of the will theories. To be specific, Hart defined a right as a free choice [68], [83], which confers the holder with the ability to choose between whether to ask the obligator to perform the obligation or exempt him from that obligation, whether to file a lawsuit against the obligator when he failed to perform that obligation, and whether to exercise or waive the right to remedy following that lawsuit [68], [84]. His theory of rights thus is referred to as 'the Choice Theory'.

Raz, MacCormick and Lyons all followed Hart's legal positivism to a large extent [85], [86], but they conceived slightly different versions, which resulted in their further divergence from Hart, as well as from each other on the conception of a right, but similarity with the Benefit Theory. Raz viewed legal rules as unique second-order reasons for actions that are different from moral rules [87]. He thus insisted an exclusive legal positivism, which excludes morality in determining the existence of the law. However morality is still important in ensuring the authority of the law. In a right, this importance presents as an interest that is a sufficient reason to ground the duty of the obligator [88]. MacCormick defined the law as a matter of institutional facts [89] and his legal theory is considered as an institutional legal positivism. Those facts are again necessarily connected with moral beliefs, which makes him viewing a right as an interest conferred by legal rules that could benefit a particular person under common circumstances [70]; while Lyons expanded Raz's moral concern in the authority of the law, and further believed that citizens do not have a duty to obey immoral laws [90]. A right thus ought to be directly intended by the law to benefit its holder [91]. In this sense, the nature of a right must be a special interest in Raz's, MacCormick's and Lyons' views. Their theories of rights are the modern and developed version of the interest theories and are referred to as 'the Interest Theory', since they are devoted to confine the scope of the interest.

#### IV. THE INTERPRETATIONS OF RIGHT TO LIFE

In the two traditional approaches, right to life could be seen as a will, a choice, a benefit or an interest. Interpreted as different concepts, the right's answers to the legitimacy of capital punishment are different.

##### A. *Right to Life as a Will*

If right to life is Willkür on the ground of Wille, the attitude toward capital punishment must be retention. If right to life is a universalizable choice, then murder, which is taking someone's life, must be inuniversalizable. Retribution, in the occurrence of a murder, thus, is key to restore the universalizable situation. Capital punishment, in this sense, is required by Kant's categorical imperative that lies in the concept of right to life.

The Will Theory's justification of capital punishment is obviously a deontological one. The first argument it refuses, then, is justifying capital punishment on its deterrent effect or consequentialism. As already been argued by Kant and Hegel, lying the legitimacy of punishment on the ground of deterrence or other consequences treats the criminal as a means rather than an end [7], or a rational being [10], which is exactly the opposite of that nature. For Kant, if everyone subjects himself to serve as a tool to another, there will be no one left to use that tool. Therefore, treating humans as means is not acceptable because it does not meet the demand of universality [7]. The similar universal essence of spirit in a Hegelian sense could not be maintained either, since the criminal has already been viewed not as having a free will [10].

Secondly, some points in the first five-fold refute, as mentioned earlier, is refuted by the Will Theory as well. Regarding revenge, it is not a reason disguised by retribution. Rather, retribution is the requirement of the nature of a right. Kant considered capital punishment as the natural deduction of right to life. It has nothing to do with the 'vicious' [92] idea of revenge. While Hegel admitted that although punishment is primarily revenge, it could only be justified through the immediate of an abstract right [10]. Without the existence of a universalizable will, there would only be wrongful revenge that needs to be further negated by punishment [93].

As to the unique application, even though the Will Theory seems to demand the strict law of retribution in Kant's system, it could still be mitigated to value-equalizer as believed by Hegel. In the latter sense, retribution is actually similar to the principle of proportionality [94] between punishment and crime as insisted in modern penology. Both of them could be applied generally. What unique in capital punishment is the equalizer is life rather than property or freedom, but not retribution itself. More than that, if the life of the criminal is the only thing that is proportionate to the life he/she has taken, life imprisonment with or without possibility of parole would not be a just punishment. The more suffering it brings about will become new wrong that needs to be negated, while the less will leave the restoration of the righteous situation incomplete. Summing those points up, the Will Theory convinces us that the 'unique' death penalty is the exclusively

just punishment that ought to be executed on murders (and maybe other capital crimes as believed by Kant), no matter it deters future crimes or not. However, does it mean in real governance, we must retain capital punishment and therefore abolishing it is wrong?

The answer seems to be a surprising 'no'. Thirdly, the Will Theory implies that the person who is punished must be a criminal [3]. Punishing an innocent person could not be universalized. Therefore if one did nothing wrong, the punishment becomes a wrong that needs to be negated, for example through compensation. However, life is improbable to bring back, which means once an innocent man has been executed; the rightful situation will never be restored. When the deterrent effect that may be derived from punishing an innocent person has already been dismissed as a possible justification for the death penalty, the inevitability and irreversibility of wrongful killing seems to be a reliable reason to oppose its application in legal practice.

Meanwhile, a further problem of unfairness reveals that since there are innocent persons being executed, there must be criminals spared. Even the chance of a judicial mistake may be controlled to be extremely low through more complicated procedures and high level requirements on evidence, and may result in longer waiting time on death row. It will worsen the situation of 'double punishment' that has already appeared to be an excess than what is demanded by retribution. In real life, the mandate of only punishing crimes and punishing fairly seems to be contradictory to punishing justly. Then, which side to choose?

It looks like Kant was suggesting that we depend on public opinion. Kant argued that in a state where there is no capital punishment, the murderer could claim legitimately not to be executed by death, since the state should not refute itself [3]. In this sense, whether a state incorporates capital punishment is subject to the common will within that state during a certain period of time; for the modern world, that will is presented by the public opinion. Therefore, what the majority says becomes the ultimate justification for or against capital punishment. If this is the case, then although the Will Theory provides solid support for the legitimacy of death penalty, it only works on the theoretical level. For practice, no determined attitude could be generated; this means it may not be able to serve as a good account. While, how about we presume the nature of right to life as a benefit or an interest?

#### *B. Right to Life as a Benefit*

If right to life is a benefit in Bentham's or Mill's sense, it means that on one hand, this right has no substantial difference from other sensible pleasures. Although it is established by the law and guaranteed by a duty, it motivates one's behaviour in the same way as the latter; their distinction only exists quantitatively. On the other hand, its exercise needs to adhere to the consequentialist concern on utility [95]. Whether to protect it or not does not depend on the criminal or a past crime, but rather, it is determined by whether it or sacrifice of it could best augment the overall happiness. Therefore, if a pain that takes a life, i.e., capital punishment wants to be

justified, it must be able to bring more benefit than it [77], [95]. In this sense, the attitude we ought to hold on capital punishment relies on the following two queries: the first, whether death penalty could bring benefit; the second, if it could bring, how much weight does the benefit carry. If capital punishment brings nothing or the benefit it brings is lighter than that of a life, right to life should prevail and execution by death should be abolished. While, if it is highly beneficial and surpasses the pleasure one has in his/her life, the right ought to sacrifice to realize the benefit in the practice of the punishment. However, the pleasures and pains regarding capital punishment are not confined to the value in life. According to the arguments previously discussed, the deterrent effect, expenditure and irreversibility again ought to be taken into account. If this is the case, then capital punishment could only undoubtedly be rejected when the evidence shows it has no deterrent effect, costs more and inevitably, involves wrongful killing. While if there is evidence that proves just the opposite, does it mean the death penalty should be allowed or not? There seems no easy answer. Two sides and several kinds of values need to be compared: When only deterrence is considered, one side is the life of the convicted, and the other is social security and other persons' lives it may spare by declining desires of killing. When thinking about the possibility of executing the innocent and leaving criminals unpunished, the life of the convicted may be a life of the criminal or a life of the innocent. The same goes with other lives saved. Therefore, both sides may involve not only lives, but also condemned as well as cherished lives. Moreover, expenditure might add a value of money-saving to either side. After all, those two sides and four values — life of the criminal, life of the innocent, social security and money-saving, together with the possible results of evidences, could be presented in a chart, as in Table I.

It is first obvious in the table that the situation of ③ is similar to ①. No matter whether the life taken by capital punishment belongs to a criminal or an innocent person, there are benefits involved. Compared to the second column with nothing, the first always weighs more. The value of money-saving adds more weight to it. In this situation, the death penalty ought to be abolished.

Second, if there is still no need to consider social security or other lives, how to weigh life of the convicted and money? Normally, the life of an innocent person is considered as more valuable than money. Therefore, when there exists the possibility of a wrongful killing, as in ③, most people would disregard the pleasure brought by cash and support abolition of death penalty. However, what if the money saved is a large amount and could be used to rescue more innocent lives? Could we still convincingly claim that benefit in life is more than that of money?

Beyond that, what if the life sacrificed is only a criminal's as in ④? This reduces the number of lives involved, but does it mean one life is less in value than money? Or is a life of a criminal different from that of an innocent therefore may make it less in value than money? Bentham seemed to believe there

is no such difference when he said that ‘everybody to count for one and nobody for more than one’ [96].

TABLE I  
VALUES UPHELD IN INFLECTING CAPITAL PUNISHMENT AND NOT ACCORDING TO DIFFERENT RESULTS OF EVIDENCES

Results of Evidences	Values Upheld	
	Not Inflict Capital Punishment	Inflict Capital Punishment
① No D, E, I	Life of the criminal; Life of the innocent; Money-saving.	Nothing.
② D, E, I	Life of the criminal; Life of the innocent; Money-saving.	Social security; Other lives of the criminal; Other lives of the innocent.
③ No D, No E, I	Life of the criminal; Life of the innocent.	Money-saving.
④ No D, No E, No I	Life of the criminal.	Money-saving.
⑤ No D, E, No I	Life of the criminal; Money-saving.	Nothing.
⑥ D, No E, I	Life of the criminal; Life of the innocent.	Social security; Other lives of the criminal; Other lives of the innocent; Money-saving.
⑦ D, E, No I	Life of the criminal; Money-saving.	Social security; Other lives of the criminal; Other lives of the innocent.
⑧ D, No E, No I	Life of the criminal.	Social security; Other lives of the criminal; Other lives of the innocent; Money-saving.

‘D’ means having deterrent effect. ‘No D’ means no effect. ‘E’ means spends more. ‘No E’ means spends less. ‘I’ means there are wrongful executions of innocent persons. ‘No I’ means there is no wrongful killing.

Notwithstanding, in regard to their value on a collective level, differences are inevitable. Viewing from the surface, the former does seem less valuable than the latter since a criminal must have done something bad to others and the society. Notwithstanding, it is still possible that an innocent is a homeless, who brings no harm but of little benefit; while the criminal is a prominent scientist who will make great contribution to the whole world. Then does it mean we could execute death penalty unevenly between a scientist and a homeless person, or even further a white and an African-American? If this is unacceptable, then should the life of the convicted prevail despite of whether that person is innocent or not? Even so, the money-saving-lives problem comes in again. Both ③ and ④ seem to be unable to generate a certain attitude on capital punishment.

Third, when death penalty has a deterrent effect, the second column is full of ‘social security’, ‘other lives of the criminal’ and ‘other lives of the innocent’, will the result be clear? In this case, ⑥ seems to be the most promising situation here. On one hand, there is only the life of the criminal to be compared with all the other values. Regarding types of pleasure, the first column is apparently weak. On the other, even if we solely consider lives on both sides, the second column still wins with the number of people affected. Anyway, the number of people being punished must be less than that of the unpunished. When money-saving value and social security is further added, capital punishment seems ought to be retained. However, could life be valued by number? Are two lives more valuable than one? Besides, what if the first column contains extra life of the innocent as in ⑥? Does it still mean if the number of lives in the second column is larger than it, death penalty should again be allowed? This has triggered worries that it

may lead to allowing punishing the innocent for deterrent effect [97]. Although the Benefit Theory may contend that we need not only take the number of people into account, but also think about the value of each life, then how we again choose between a scientist and a group of homeless people? Further, if all of those could not be determined, could the concern on social security triumph the life of a criminal or an innocent once for all? These problems remain in ⑥ and ⑦, with a situation even more complex when they move the money value to the other side.

In the eight situations discussed above, the Benefit Theory seems incapable of providing us with a determined attitude on capital punishment, unless there is proof supports exactly the situation of ⑥ or ⑦. However, even we could tell that we are in those two situations, if we take the proposed substitute punishment into consideration, the answer will still become obscure. This substitute, as believed by Bentham, Beccaria and many other scholars, is permanent imprisonment. Since it takes no life, it is able to uphold the most significant value in the first column. Although the freedom of the convicted will be lost, compared to death, this pain is much less severe and therefore more justified [77]. While Mill seemed to disagree [98], when he gave the highest rank to liberty, he implied that it is more valuable, even than life. Life imprisonment thus will actually take away a larger part of happiness than execution by death [98]. According to the principle of utility, the punishment that ought to be applied is the latter rather than the former. In this sense, it seems that even capital punishment brings no benefit, it is not necessary to be abolished. Further comparisons between it and alternative punishments are needed, which again, a convincing answer is still difficult to achieve.

Summing up the above points, viewing the right to life as a benefit will subject it to evaluation and comparison with other kinds of pleasure. This is a task which is hard to complete [99] when the other pleasure is uncertain as different situations may occur, the task becomes even harder. A determined answer therefore seems unlikely to be obtained by the Benefit Theory. Then what if right to life is a type of particular interest that is distinct from other benefits?

### *C. Right to Life as an Interest*

Different from Bentham and Mill, modern interest theorists tend to see a right as a unique interest. This interest ought either to be an enough reason for a duty and relate to the core of the right, to benefit a particular person under common circumstances, or to be directly connected with the obligation and intended by the law to benefit a subject. In right to life, life could be considered as such a unique interest.

#### 1) Individual Right to Life and Public Benefits

If right to life is a unique interest, it seems that this interest ought to be able to weigh down other consideration on benefits. For example, it should be taken as more important than the value of money-saving. Compared to life, expenditure on punishment is not enough to hold another under a duty; although it may benefit a person under common circumstances, it does not point to a particular person; it is even not directly related to an obligation. In this sense, saving money could not qualify as a right that may rival with right to life. It is merely a kind of public benefit, or what MacCormick called as the 'common good' [71]. When the criminal is considered to have possessed this right as other human beings, the concern on money value appears to be insignificant. Capital punishment thus seems wrong and ought to be abolished; irreversibility and the possibility of executing the innocent further echoes with this opinion. However, when we again take deterrence effect and social security into consideration, the answer is again no longer that simple. First, social security could qualify as a right and has been incorporated as one in UDHR. According to Article 22, everyone 'has the right to social security'. This right not only intends to benefit a particular individual and will benefit him/her in most circumstances, but also inflicts duty on states and international organizations regarding that benefit. If so, then the interest in social security is again a unique interest similar to the interest in life.

Problems come instantly: when those two kinds of interest conflict, which one ought to prevail? Comparing the amount or the weight of the interest seems impossible as shown above in the Benefit Theory. Then is it probable that different rights or interests actually lay in a ranking system, and therefore, their significance has already been set? Raz seemed to suggest this solution with his practical justificatory nexus of core rights and derivative rights. Since the core right is the origin of the derivative right, it is certainly broader and more important than the latter [100]. In this sense, if right to life could be seen as the core right, while right to social security as the derivative, a determined answer is able to be achieved that

capital punishment is wrong since it violates the more important right to life [101].

From the surface, the right to social security derives from right to life, since it is the protection of human life that requires a safe social environment; however, their relationship does not necessarily to be so. As noted above, social security could be considered as other persons' lives as well. Therefore, when it conflicts with the criminal's right to life, the rights that actually clash are different individuals' right to life. Then could we still stick to the protection of the criminal's right to life? Or, could we be sure that the larger number of people whose right to life may be influenced, the more protection ought to be granted? If the possibility of executing the innocent exists, does it tilt the scale? This seems to lead us into the impossible comparison as what has happened in the Benefit Theory again.

Even if we take social security as another type of public benefit, and therefore not a right, the criminal's right to life still may not dominate. The stability of a society has been incorporated by international covenants to serve as exceptions in the protection of right to life as well. For instance, the ECHR states that one's right to life could be lawfully deprived when it is necessary to prevent prison break, quell a riot or insurrection, or maintain the life of a nation in a war. This means that although the interest in a life takes a form of a right, it is never absolute. It always needs to be balanced with the public benefit of social security. This still will subject the attitude on the legitimacy of capital punishment to the dilemma of comparison.

In a conclusion, viewing right to life as an individual's special interest in life is unable to provide us with a determined answer either. However, it does not mean the Interest Theory must face the same failure with the Benefit Theory. Rather, different from the latter, the former leaves the possibility of a state right to life open, which gives it a second chance to solve the problem.

#### 2) A State Right to Life

The Benefit Theory only believes in an individual right [70], [77]. While Interest Theorists believed differently. As to the latter, the interest does not equal to pleasure but is something that will usually benefit someone [71], [92], [101]. The person who is intended by the law to be benefited by a duty, thus, is not confined to a natural person with sensation [102], [103]. A legal person still meets the requirement and is able to have a right. Modern laws' inclusion of man-made persons, such as corporations and associations, as right holders seems to echo with this view.

In the case of capital punishment, the state is the most important legal person that may have a right to life according to the Interest Theory. Regarding the fact that each state is composed basically by citizens, the life of an individual not only is important to the person, himself/herself, but also relates to the wellbeing of the state. The state's interest in its citizens' lives is firstly enough to inflict a duty of not to kill on other persons; secondly, it normally brings good to the state; thirdly, it is closely connected with that duty and is intended



by the law. In this sense, the state could be seen as having a right to its citizens' lives.

If one has a right, it means that individual is entitled to take any measure to exercise that right. When the life of a citizen is the object of a right which belongs to a state, then it seems the former would totally be at the mercy of the latter. Therefore, whether to allow and how to apply capital punishment depends absolutely on the decision of the state. This explains well the current situation of capital punishment among states — some states refuse to apply it, while others support it. However, the notion of a state right to its citizens' lives sounds strange to our normally shared view about rights. How could one's choosing to live or to die be determined by another? This is exactly in confliction with the idea that right to life, as a human right, is inalienable.

Even if we disregard the character of inalienability, a state right to life still could not tell whether the state ought to execute serious criminals or not. Considerations on expenditure, social security and the possibility of wrongful killing again exist. Moreover, they could exist in the form of rights as well. A state not only has interest in its citizens' lives, but also will be benefited by money-saving, social stability and less loss of innocent lives. Those interests put the government and its officials under the duty not to misuse the tax, and impose citizens with the obligation not to carry out criminal actions or kill another. In this sense, the right to life could not allege supremacy above them straight away. Comparison is once more inevitable, and once more, it is extremely difficult, if not impossible.

Besides that, even a state is able to compare and reach a conclusion on which side of interest is greater, its decision on capital punishment may still not be easy to attain. When the state has a right to its citizens' lives, the fact which could not be denied is that each citizen also has their own a right to life at the same time. If the two rights conflict — for instance, if the state finds it in the best interest to execute a criminal, while it is best for him/her to be alive, which one should be overridden? The state's right or the individual's right? It is still hard to answer. The right to social security that belongs to both of them, together with other possible state owned rights regarding expenditure and irreversibility, even blurs the scene.

Viewing the dilemma in this way, the Interest Theory inevitably subjects to the same problem of impossible comparison with the Benefit Theory. Although the former has confined the realm of interest and improved the particularity of the right, it still focused on benefits, which makes it unable to break away from counting and balancing. A determined answer to whether to allow death penalty, therefore, is once again unable to be achieved. Then how about we presume right to life as a choice?

#### *D. Right to Life as a Choice*

In the last, we may presume a right to life as a choice in a Hartian sense as well.

#### 1) Could Right to Life be a Choice?

As noted above, if a right is a choice, it ought to be able to confer the right holder an ability to control the action of the obligator. The right holder presents their will within the realm of the right, and the obligator must respond [80]. As mentioned previously, the control mainly contains six aspects. However, right to life seems to lack some of those aspects; one is the ability to exempt the duty. It has been widely accepted that killing another is a crime, even with his/her consent [104]. Therefore, the holder of the right in fact does not have the option to allow the obligator to disrespect his/her life. The other is that the right holder still could not choose not to sue the violator of his/her life. Murders, as regulated by most criminal laws, are crimes prosecuted by the state. The victim and their relatives have no determinate control over the procedure. As long as a murder occurs, the perpetrator must be charged, no matter what the right holder's wish is. In this sense, regarding life, the holder could only choose to ask the obligator to fulfil the duty, to request the help of state force and to ask for or waive compensation. Lacking the ability to waive the duty, not to sue the obligator when the duty has not been properly performed, seems to disqualify 'right to life' as a right. However, the case is not necessarily so, when Hart admitted that an incomplete choice could still qualify a right. As he pointed out, though a right ought to include all the six aspects, not all rights could meet this requirement. The right that enables its holder with all abilities is the one with complete choice, while those who lack some of them would be ones with incomplete choice. The latter are rights under certain restrictions, but they could not be denied their status as rights, as long as they are not short in all the opposite options. After all, the right holder, at least, has some bilateral control over the performance of the duty [68]. Right to life could be seen as such a kind of right [105]. It contains all the aspects demanded by the Choice Theory except the ability to waive the duty and not to sue the life-violating behaviour.

#### 2) Right to Life as a More Complete Choice

If right to life is a choice, it is on one hand possessed by individuals, rather than the state. According to Hart, the state does not have the ability to express a concrete will or exert concrete control; it therefore could not be seen as having a right. The inalienability of right to life is maintained. On the other, no consequentialist concern needs to be brought in, and no interests or benefits (or other interests or benefits if considering a choice as a type of benefit as well) will require it to be balanced with. Since a choice emphasizes the full control and freedom of the holder, as long as such a right exists, it will be given priority [106], [107]. Public interest will give way to the right, and the right holder's own well-being will again subject to the choice of his/her own. Moreover, the Choice Theory may make right to life a more complete right. For example, the right holder could be seen as waiving his/her right to life and exempt others from the duty to respect his/her life when he/she chooses to taking another one's life illegally. Since the criminal act was chosen by the right holder, the result of the act — waiver of the right to life — is actually

chosen by him/her as well. This seems to be able to explain the institution of self-defence: if one tries to kill me, then that individual has chosen to waive their right to life; therefore, it is legal for me to take it.

If the right holder is conferred with the ability to waive the right as suggested here, the Choice Theory would appear to share the same argument as Locke and other scholars raised as mentioned above. That is when the right holder commits a serious crime, especially threatens the life of another, that individual will lose their right to life. In addition, the Choice Theory explains why and how an individual loses the right — he/she waives it by his/her own choice, rather than being compelled by any other. In this sense, if we employ the choice to interpret right to life, it must generate the same result with those scholars as well, which is a retentionist attitude to capital punishment. However, although the right holder gains the ability to waive the right to life and exempt another from the duty not to kill him/her, he/she still could not decide determinatively whether to sue the obligator or not. The choice he/she owns is still an incomplete choice.

#### V. CONCLUSION

Drawing my argumentation to an end, in all the possible explanations of the concept of right to life, only the Choice Theory is able to provide a determined answer to the issue regarding the legitimacy of capital punishment. The Will Theory is subjected to the weakness of inconclusiveness, which means that the theory could not reach a definite and decisive conclusion on the legitimacy of an issue. While the Benefit Theory or the Interest Theory both suffer from the problem of uncertainty, which means that the evidence the theory relies upon is uncertain.

When considering a right to life as *Willkür* on the ground of *Wille*, the counter argument proposed on concerns upon deterrent effect or consequentialism is ruled out. Critiques, such as capital punishment's similarity to revenge, its unique application of retribution, and the suggestion of an alternative punishment — life imprisonment with or without possibility of a parole — are refuted as well. Therefore theoretically, the Will Theory could support the retention of death penalty with determination. However practically, it could not allow the existence of wrongful killing, and were prone to leave the decision to the attitude of public opinion. This makes the theory inconclusive and could not serve as the best account of right to life.

Neither could the consequentialist concern on the right. Either interpreted as presuming a right to life in the Benefit Theory or the Interest Theory, they are prone to view this right as a kind of benefit that needs to be compared with all other kinds of benefit, or, although a unique interest, but again, it requires balancing against public benefits or other unique interests. The underlying justification is clear: the side with more benefits or interests wins. The problem of uncertainty comes in as a result, since the outcome of comparison is hard to achieve. Firstly, evidences that demonstrate the benefit are uncertain. On one hand, conflicting evidences exist, such as those reveal the deterrent effect. On the other, evidences are

even lacked, for example, for justifying expenditure of the substitute punishment — permanent imprisonment.

Secondly, even if we have obtained enough and consistent evidences, its evaluation still remains difficult. How much weight should we assign to a certain value or right? There is no widely shared answer, as noted above. A certain conclusion of the comparison again is improbable.

The only chance lies with viewing a right as a choice. If right to life could be seen as an incomplete choice that endows the holder with all the ability to choose, except the one not to sue the obligator who has not performed his/her obligation properly, the holder will be able to waive his/her right. The action of taking another's life and other serious crimes could exactly be taken as a person's choice to waive his/her right to life. By waiving the right, others will be exempt from the duty not to kill the person. The institution of self-defence therefore will be justified, as well as capital punishment. On this ground, viewing right to life in the Choice Theory is the only way that could give us a determined answer to which attitude we should embrace capital punishment, and its attitude is retention.

Notwithstanding, this determining theory and its conclusion are only preferred when we consider the issue of capital punishment from the perspective of right to life through the two main approaches and four theories. If we take another perspective, the answer may not necessary be so.

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