

# Constitutional, philosophical and historical perspectives of the capital punishment debate in Australia and the United States

**Gabriël A. Moens**

JD, LL.M., PhD, GCEd, MBA, FCI Arb, FAIM is Professor of Law and Pro Vice Chancellor at Murdoch University. He also serves as Deputy Secretary General of the Australian Centre for International Commercial Arbitration (ACICA) and as Director, College of Law Western Australia  
g.moens@murdoch.edu.au

**A. Keith Thompson**

LLB (Hons), MJur, PhD, IMD Hons, ACI Arb works as Special Counsel at Taylor and Whitty, a regional law firm with offices in New South Wales and Victoria, Australia. He also lectures in Constitutional Law at the University of Notre Dame Australia School of Law, Sydney

**Abstract:** *Capital punishment has been abolished in all Australian States. However, public demands for the reintroduction of the death penalty continue to be heard intermittently in Australia, especially after a gruesome murder or other atrocity. A discussion of the appropriateness and desirability (as opposed to the legality or illegality) of the death penalty is never completely removed from the Australian and American political agenda. An objective observer cannot fail to notice that, in general, such discussion is often carried on by people who have preconceived and inflexible views. An inevitable result is the polarisation of the capital punishment debate. In these circumstances, an insistence on cogent reasoning is clearly warranted.*

**Key words:** *death penalty, life imprisonment, cruel, inhuman and unusual punishment, discriminatory penalty, reciprocity, proportionality.*

## Introduction

Capital punishment has been abolished in all Australian States. However, public demands for the reintroduction of the death penalty continue to be heard intermittently in Australia, especially after a gruesome murder or other atrocity. In contrast, in 1976, the Supreme Court of the United States decided in *Gregg v. Georgia*[1] that the death penalty did not constitute “*cruel and unusual punishment*” and, therefore, was not prohibited by the Eighth Amendment to the United States Constitution[2]. This case settled the legal status of the death penalty in the United States and limited further capital punishment litigation to a discussion of the finer points of constitutional law. For example, is it permissible to impose the death penalty for crimes other than murder, or on juvenile or mentally handicapped defendants?[3]. Is an indigent death row inmate entitled to counsel in post-conviction clemency hearings?[4]. Is it constitutional to exclude from juries persons who are implacably opposed to the death penalty? Is mandatory capital punishment for some crimes constitutionally permissible? Is the lethal injection protocol constitutional?[5]. Is it acceptable for juries in capital punishment cases to hear evidence about the victim’s family?[6].

Thus, the public debate in the United States has largely shifted away from “the broader question of whether the death penalty should be permitted at all”[7]. In this context, it is interesting to note that the constitutional status of capital punishment has been settled despite the dogmatic insistence of Associate Justices Marshall and Brennan that capital punishment in all circumstances constitutes cruel and unusual punishment. George C. Smith, reflecting on the approach of these judges, remarks that ‘at the highest

level', death penalty cases "are never decided by an objective and fairly constituted tribunal" which is one of the prerequisites of judicial fairness[8].

A discussion of the appropriateness and desirability (as opposed to the legality or illegality) of the death penalty is never completely removed from the Australian and American political agenda. An objective observer cannot fail to notice that, in general, such discussion is often carried on by people who have preconceived and inflexible views. An inevitable result is the polarisation of the capital punishment debate. In these circumstances, an insistence on cogent reasoning is clearly warranted.

The American philosopher Hugo Adam Bedau noted in a perceptive essay that current arguments on the death penalty concentrate on "trying to answer various disputed questions of fact"[9]. These include, for example, the question whether the death penalty has a deterrent effect and whether non-white offenders are more likely to be executed than white offenders. He argues that "*even if everyone agreed on these answers, this would not by itself settle the dispute over whether to keep, expand, reduce or abolish the death penalty*", and that arguments "*intended to recommend continuing or reforming current policy on the death penalty must include among its premises one or more normative propositions*"[10]. Bedau's comments imply that exclusive concentration on factual issues and utilitarian arguments is unsatisfactory, but has to be complemented by an examination of moral principles, some of which may act as constraints on the implementation of the death penalty. In this article, we focus on two salient utilitarian arguments which are regularly heard in the capital punishment debate, namely the deterrence and discrimination arguments. But heeding Bedau's timely advice, we also propose to assess some moral principles which may mandate the conversion of the death penalty to life imprisonment.

### **1. The deterrence argument**

One of the salient utilitarian arguments often invoked in favour of the death penalty holds that the justification for capital punishment lies in its ability to deter hardened criminals from committing serious crimes. James Fitzjames Stephen nicely expresses the belief that capital punishment is an efficient deterrent when he says that the proposal that capital punishment "deters men so effectually from committing crimes ... is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them"[11]. However, despite Stephen's confident assertion, the value of capital punishment as a deterrent is very much in doubt. Philosophers and lawyers point to evidence which indicates that the death penalty does not deter criminals. For example, an American lawyer, Arthur Koestler, reminds us that, whilst in the 19<sup>th</sup> century, executions were carried out in England for picking pockets, pickpockets "gathered their richest harvest among the crowds" [12] during the execution of their colleagues. Perhaps these instances of baffling courage could be explained by the expectation of offenders to get away with their anti-social behaviour when nobody expected it to happen. Another explanation is offered by the 19<sup>th</sup> century Italian lawyer, Cesare Beccaria, who surmises that criminals are not so much deterred by the intensity of the punishment as by its duration "for our sensibility is more easily and more permanently affected by slight but repeated impressions than by a powerful but momentary action"[13]. Beccaria advances this explanation in the context of the development of an argument against the introduction of capital punishment. Nevertheless he unwittingly offers a strong argument in favour of the retention of the death penalty. Indeed, subject to the validity of Beccaria's argument, it may be argued that life imprisonment, which involves a lifetime deprivation of an offender's personal freedom, is a less "humane" punishment than the death penalty.

John Stuart Mill admitted that the death penalty does not deter hardened criminals. He remarked that those "*whose habitual way of life keeps them, so to speak, at all times within sight of the gallows, do grow to care less about it*"[14]. Understandably, it is difficult in such a sensitive area to compile persuasive statistical data which would prove that hardened criminals are indeed indifferent to capital punishment. But if so, the deterrence argument would no longer be compelling. Even a proposal to reserve capital punishment for those offenders who commit heinous, atrocious and cruel crimes could not

be made forcefully. Indeed, underlying such a proposal is the expectation that capital punishment serves as an effective deterrent to those contemplating such serious crimes. But, as indicated above, it could reasonably be argued that criminals, who knowingly and willingly commit the most heinous, atrocious or cruel crimes, are also likely to be indifferent to the death penalty for the reason offered by Mill, namely that they are in constant sight of the gallows[15]. Thus, the rationale for retaining capital punishment for these atrocious crimes (and by implication, for less serious crimes) is deficient.

It is sometimes argued that the effectiveness of capital punishment as a deterrent must be measured by those who refrain from committing serious crimes because of the existence of the death penalty. The proponents of this argument, while conceding that the death penalty does not deter habitual criminals, maintain that an assessment of its usefulness should include an examination of its effect on *potential* offenders. Researchers may glean information on the value of capital punishment as a deterrent by comparing two contiguous states with similar economic and social conditions. One state enforces the death penalty; the other has no such penalty on its statute books. Research undertaken in some American contiguous states has shown that homicide rates remain the same over a long period of time regardless of whether the state has or has not the death penalty. With regard to the evidence thus far accumulated, it could be argued that there is no significant correlation between capital punishment and a decrease in violent crimes such as murder. Thorsten Sellin summarises the research[16]:

*Regarding deterrence, it is well established by statistical studies that: (1) when comparisons are made between contiguous States with similar populations and similar social, economic and political conditions - some of these States lacking and others retaining capital punishment - homicide rates are the same and follow the same trend over a long period of time; (2) the abolition, introduction or reintroduction of this penalty is not accompanied by the effect on the homicide rates that is postulated by the advocates of capital punishment; (3) even in communities where the deterrent effect should be greatest because the offender and his victim lived there and trial and execution were well publicized, homicide rates are not affected by the execution; (4) the rate of policemen killed by criminals is no higher in abolition States than in comparable death penalty States. Capital punishment, then, does not appear to have a specific influence on the amount ... of crime it is supposed to deter people from committing.*

## **2. Is the death penalty inherently discriminatory?**

Another argument often advanced against the execution of convicted offenders concerns the allegedly inherently discriminatory nature of the death penalty. According to this argument, statistics show that capital punishment is more often enforced against the poor, members of racial minorities and the uneducated, especially if a 'white' victim is involved. This argument is important. Indeed, if it were possible to prove, by way of statistical evidence, that convicted offenders who belong to certain sections of the population are more likely than others to be executed, then the implementation of the death penalty may be said to be discriminatory. Associate Justice Douglas of the United States Supreme Court has argued that the discriminatory imposition and execution of the death penalty is sufficient proof of its inherent unfairness[17]:

*A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which, in the overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same. Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.*

However, Douglas's argument is not an argument against capital punishment. Proponents of this argument can only claim that in some (perhaps many) cases the criminal process leads to the conviction and execution of criminals who belong to vulnerable sections of the population. However, this 'injustice' may be remedied by the impartial administration of justice, thereby obviating the claim that the death penalty is a convenient means to perpetuate racial and other forms of discrimination. A criminal process which is free from discrimination would also be in accord with Article 6(1) of the International Covenant on Civil and Political Rights which declares that a person's right to life shall be protected by law and that "No one shall be arbitrarily deprived of his life."

### 3. A cruel and inhumane way of dying?

The deterrence and discrimination arguments concern questions of fact. The answers to these questions, however, cannot conclusively determine whether the death penalty, using the language of Article 7 of the Covenant, constitutes "cruel, inhuman or degrading treatment or punishment." In any event, as Bedau reminds us, "*it is not possible to deduce a policy conclusion (such as the desirability of abolishing the death penalty) from any set of factual premises, however general and well supported, and therefore an argument intended to recommend continuing or reforming current policy on the death penalty must include among its premises one or more normative propositions*"[18]. Many such propositions have been debated since World War 2. One of the most salient of these propositions involves the claim that the death penalty is a particularly cruel and inhumane way of dying, which forfeits the human dignity to which all persons, including convicted criminals, are entitled. The proposition that no one shall be subjected to cruel and inhumane punishment has been put strongly by Associate Justice Brennan of the United States Supreme Court. He stated that death is today "an unusually severe punishment, unusual in its pain, in its finality and in its enormity"[19] He expressed the same sentiments a few years later when he said that "*For me, arguments about the 'humanity' and 'dignity' of any method of officially sponsored executions are a constitutional contradiction in terms*"[20].

Nevertheless, it is possible to defend capital punishment on the very ground on which Associate Justice Brennan attacks it, namely on the ground that this punishment is humane (as opposed to inhumane). Specifically, opponents of the death penalty invariably contend that life imprisonment is a more 'humane' punishment than death. However, it could well be plausibly argued that life imprisonment is a less humane punishment because it involves a life without some of the major pleasures such as 'personal freedom'. This point was made by John Stuart Mill[21]:

*What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards - debarred from all pleasant sights and sounds and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?*

If Mill is correct, then his argument casts doubts on the familiar proposition that capital punishment is much harsher than life imprisonment. Why is it, then, that many commentators consider this proposition as self-evident? Mill speculated that it is propagated because life imprisonment does not contain an element which is feared by many, namely the unknown. Nevertheless, he insisted that there "is no human infliction which makes an impression on the imagination so entirely out of proportion to its real severity as the punishment of death"[22]. Mill also bolstered his argument by emphasising that the most a state can do in the matter of death is to hasten it. People die anyway and it could be expected that in many cases, the process of ageing and the suffering associated with serious illnesses cause more bodily suffering than an execution. It may even be argued that Mill's argument is more powerful now than in his time because science has devised methods which guarantee an almost painless death.

Of course, when Mill wrote in 1868, prisons were not 'pleasant' places. Indeed, the prison hardships of his day may well have contributed to his belief that capital punishment is a more 'humane'

punishment than life imprisonment. Although modern amenities are now routinely available in prisons, at least in the Western world, Mill's argument may still have some validity in view of the fact that it cannot be denied that one's 'personal freedom' remains severely curtailed in prisons. Mill wrote at a time when 'life imprisonment' often involved the incarceration of convicted criminals for the duration of their natural lives. His argument is, however, somewhat weakened if, as in modern times, criminals are released after ten to twelve years of imprisonment. The enjoyment of 'personal freedom' often compensates for the misery and problems experienced by people. The loss of 'personal freedom' may explain why some 'hardened' criminals prefer execution to imprisonment[23]. Indeed, the expressed wish of some criminals to be executed conflicts with the demands of abolitionists. For these criminals, it is not so much the capacity 'to live' that is important but the ability to live in freedom. While capital punishment reduces the duration of one's existence, life imprisonment may well be regarded by them as condemning a person to live a life without purpose. As Mill remarked rhetorically, "For what else than effeminacy is it to be so much more shocked by taking a man's life than by depriving him of all that makes life desirable or valuable? Is death, then, the greatest of all earthly ills?"[24]. Thus, subject to the validity of our argument, opponents of the death penalty insist that society refrain from using an instrument of punishment which, using the language of Mill, "effects its purposes at a less cost of human suffering than any other; which while it inspires more terror, is less cruel in actual fact than any punishment that we should think of substituting for it"[25].

An argument often heard in favour of the abolition of capital punishment is that occasionally an innocent person is executed and that, at least for such a person, the death penalty could never be regarded as a humane way of dying. If a prison sentence or fine had been imposed, an innocent person could have been rehabilitated and compensated. This argument has historically been a very powerful one. Mr. Gilpin, who was a member of the English Parliament, used it to support his major point that courts should hesitate to impose such an irrevocable verdict[26]. His particular concern seems to have been premised in the faith that all human beings, even criminals, can be improved and rehabilitated given sufficient care. The death penalty curtails that possibility and when it is imposed, society is the loser.

However, in developing his argument, Gilpin surely assumes the absence of a miscarriage of justice. His point is that the execution of even correctly convicted criminals results in society's inability to rehabilitate these criminals. Hence, Gilpin's point does tell against capital punishment because the administration of criminal justice, even in an ideal world, is unlikely to be perfect because it is managed by humans who, by their nature, are fallible. Therefore, the likelihood that an innocent person is executed, whilst remote, is nevertheless real. Gilpin's argument would be even stronger if criminals were incorrectly convicted as a consequence of the utilisation of deficient or incorrect criminal procedures.

In contrast, international lawyer, Igor Primorac, attempts to argue in favour of capital punishment by concentrating merely on incorrectly convicted people when he points out that conviction following the utilisation of incorrect procedures "does not tell against capital punishment itself, but against something else: the existing procedures for trying capital cases". He says[27]:

*Miscarriages of justice which result in innocent people being sentenced to death and executed can and do happen, even in the criminal law systems in which greatest care is taken to ensure that it never comes to that. But this is not something that stems from the intrinsic nature of the institution of capital punishment; it results from deficiencies, limitations, imperfections of the criminal law procedures in which this punishment is meted out. So these errors of justice do not demonstrate the need to do away with capital punishment; they simply make it incumbent upon us to do everything possible to improve even further the procedures of meting it out.*

#### **4. Proportionality or reciprocity?**

In his article, Primorac proceeds to discuss the redistributive theory according to which capital punishment is an appropriate and proportionate response to the willful and illegal taking of a life. He

argues that, if capital punishment for killing a person were abolished, then any other punishment for killing a person would no longer be proportionate to the crime. He opines that “this demand to do away with capital punishment altogether ... is actually a demand to give a privileged position to murderers as against all other offenders, big and small”[28]. He continues[29]:

*For if we acted upon the demand, we would bring about a situation in which proportionate penalties would be meted out for all offenses, except for murder. Murderers would not be receiving the only punishment truly proportionate to their crimes, the punishment of death, but some other lighter, and thus disproportionate, penalty. All other offenders would be punished according to their deserts, only murderers would be receiving less than they deserve. In all other cases of the gravest of offenses, the crime of murder, justice would not be carried out in full measure. It is a great and tragic miscarriage of justice when an innocent man is mistakenly sentenced to death and executed; but systematically giving murderers advantage of this kind over all other offenders would also be a grave injustice.*

In addition, Primorac’s point could be strengthened by arguing that capital punishment, rather than indicating disrespect for life, shows regard for human life because criminals are executed for inflicting ‘suffering’ on others and for violating one’s bodily integrity. Just as imprisonment for stealing does not show want of respect for ‘personal freedom’ in general, so capital punishment does not denigrate the importance of life when someone is executed following a final judgment rendered by a competent court. Indeed, it shows that society regards ‘life’ as extremely valuable by adopting the rule that he who willfully violates the right to life of another, forfeits it for himself.

Nevertheless, Primorac’s argument that “proportionate penalties would be meted out for all offenses, except for murder”[30] overlooks the criteria or standards by which it is possible to ascertain ‘proportionality’. Indeed, by what standard is it proportionate that a thief or rapist be punished with imprisonment rather than some more ‘reciprocal’ punishment? Similarly, imprisonment as a punishment for murder is no less proportionate than imprisonment for theft or rape, or any other crime, with the possible exception of kidnapping which deprives the victim of freedom in a reciprocal manner. Thus, one may well disagree with Primorac when he states that the death penalty is “the only punishment truly proportionate” to the crime of murder.

Primorac’s point, that capital punishment is the only truly proportionate punishment for the crime of murder, is not really an argument about proportionality at all. Proportionality is a matter of judgment and what is proportional will vary according to the social expectations within a society. It is also difficult to see how the death penalty is any more proportional as a punishment in the case of murder than is a term of imprisonment in the case of rape. It is possible that Primorac does not mean that the death penalty is a proportionate punishment in the case of murder. Rather, the reason that the death penalty seems to fit the crime of murder is because it is a punishment that fits the crime according to the principle of reciprocity.

The death penalty is reciprocal in the case of murder because the life of the murderer is taken as a matching exchange for the life of the victim. Of course, there can be no exact match if the murderer had more than one victim, but the match between the crime and the punishment is rational according to the principle of reciprocity which also underlies the concept of just restitution. But while the idea that the state is justified in taking the life of a murderer as a reciprocal punishment in the case of the crime of murder, the reciprocity logic breaks down in the case of other crimes. While perhaps imprisonment as a punishment for kidnapping has appeal according to the reciprocity principle, the idea that the state might confiscate the goods of a thief is unappealing where the thief is penniless and it would be revolting to the sensibilities of many to suggest that the rape of a rapist is the appropriate reciprocal punishment for that crime. Still, the idea of reciprocity which underlies the idea of restitution does explain, at least to some extent, why the possibility of reinstating the death penalty in the case of some violent and premeditated murders is never completely extinguished.

## **5. Cruel and unusual punishment**

We referred earlier to Associate Justice Brennan's idea that capital punishment is always inhumane. His underlying argument against the death penalty was that it was unconstitutional because the imposition of the death penalty is unusually severe and its infliction is painful. Because the death penalty is severe and painful, it is also cruel. The death penalty is said to be unusual because it is more final than any other punishment imposed by courts in the United States. But Associate Justice Brennan did not fully support his conclusions about the unusualness and cruelty of the death penalty. He left those reading his judgments to accept that these characteristics of the death penalty were either self-evident or a reasonable conclusion when the death penalty was compared with other penalties ordinarily imposed under criminal laws in the United States. However, the validity of both of these conclusions is questionable.

The two words upon which Associate Justice Brennan relied to conclude that the death penalty was unconstitutional in the United States were, again, the words 'cruel' and 'unusual'.

Both of these words are adjectives. They describe the characteristics a punishment must have to be prohibited under the Eighth Amendment to the United States Constitution. Because they are adjectives which describe the characteristics a punishment must have to be unconstitutional, they necessitate the making of a judgment and the process of judging requires the judge to weigh or balance a punishment against something else. In this regard, Associate Justice Brennan's conclusion fails to explain what the death penalty should be compared with in order to determine that it is 'cruel' and 'unusual'. He weighed this punishment against the value and dignity of every human life, and particularly the life of the would-be victim of the death penalty. His justification for weighing the cruelty of the death penalty against the value of any human life was grounded in the value of every human life implicit in the United States Constitution and reiterated in modern international human rights law, including Article 6(1) of the International Covenant on Civil and Political Rights according to which "Every human being has the inherent right to life". But is it self-evidently obvious that the value of every human life is either the only valid subject for this comparison or indeed, the right subject for this comparison?

There are a number of other possible ways to judge whether the death penalty is cruel and unusual and those other ways do not depend on the imputation of an absolute and irrevocable value for every human life as seems implicit in Associate Justice Brennan's argument. Other possible ways to judge whether a punishment is cruel or unusual include weighing the use of the death penalty in other jurisdictions, including other jurisdictions in the United States; weighing the death penalty against decisions that the murderer took in his own life in accordance with the reciprocity principle; and weighing the life of the victim against the life of the murderer, similarly in accordance with the reciprocity principle. If these other ways of judging, whether the imposition of the death penalty is relatively cruel and unusual, are applied, it is difficult to accept Associate Justice Brennan's conclusion. Indeed, his conclusion seems to require the placement of an absolute or infinite value on each human life, including that of a convicted murderer. While international human rights instruments certainly do place a high value on human life, it is not self-evidently clear that any existing human society accepts that human life has an absolute value. Two simple examples drawn without elaboration from tort law and the international law relating to just war demonstrate that point quite simply. For if human life did have an absolute value, tort law would not make distinctions between the earning capacities of different victims and there would be no justification in international law for the taking of even one life in any war, whether that war was objectively adjudged just or not.

If it is accepted that human life does not have an absolute value under most legal systems, then the death penalty can only be adjudged cruel and unusual if it is compared with alternative penalties that might be imposed. The examples for comparison which we suggested above included the weighing of the value that the convicted murderer himself places upon human life as demonstrated in his actions in committing a particular murder, or the value which is placed upon the life of a murderer in another jurisdiction.

The first example clearly invokes the reciprocity principle. If the convicted murderer has been adjudged to have committed a particularly brutal and uncompassionate murder, the reciprocity principle suggests that it is difficult for that murderer to complain of cruel or unusual punishment if his own life is taken, especially if the sentence of death is carried out in a more humane way than was the murder. If other states in the world or in a federal jurisdiction like the United States routinely carry out the death penalty, it also seems difficult to argue that such punishments for the crime of murder are unusual. Yet, this logic does not explain why there remains a sense that reciprocity and commonality alone are not enough to justify the imposition of the death penalty. What explains this residual idea that the death penalty is still cruel and unusual punishment, even if it is accepted that human life does not have absolute value and that the death penalty can be justified on grounds of reciprocity and commonality? In our opinion, the reason for this reservation has to do with the abundant examples of untrustworthy murder convictions that have come to light since the advent of DNA analysis in forensic pathology.

## **6. Untrustworthy murder convictions**

DNA proof, that a particular individual did not commit a crime for which he was convicted, has demonstrated that the best criminal justice system man can devise is less than perfect[31]. In these cases, the fact that a judge or jury was satisfied beyond any reasonable doubt of the accused's guilt is no consolation at all. Indeed, most people are revolted by the idea that an incorrect criminal conviction should stand once it has been disproved. Many times, the reciprocity principle discussed above has resulted not only in the prompt release of someone unjustly convicted, but in the payment of state compensation to the victim for loss of quality of life and income suffered by the imposition of the punishment. But such restitution to the victim of a state mistake is not possible in cases where the death penalty has been carried out. Because we cannot ever be certain completely that there has been no mistake behind any conviction, can so final a punishment as the death penalty ever be justified?

Solutions to this remaining objection to the death penalty are not readily forthcoming. The suggestion that the death penalty should only be imposed when the circumstances of the murder were particularly aggravated is unhelpful since it does not answer the heart of this residual objection, for the aggravation does not rebut the possibility that the conviction may later be proven to be incorrect. And the suggestion that the death penalty should only be carried out in cases where the conviction relied on eye witness testimony, rather than circumstantial evidence is not helpful either since many studies have demonstrated that eye witness testimony is no more reliable than any other testimony. Perhaps this leaves those cases where the convicted murderer has confessed the crime or, without confession, expresses the wish for execution to end the hopelessness he feels in life imprisonment. But even these cases do not provide a complete answer to the quandary since the confession or hopelessness do not remove the possibility of later proof that this conviction was an error.

Do these objections finally determine that the death penalty can never be justified? The answer is 'no' and the reason for this negative answer again rests in the underlying value which we place upon human life. If, like Associate Justice Brennan, we place an absolute value upon human life, then even the smallest possibility that a conviction might be later proven incorrect demands that the death penalty not be imposed. But if our law does not accept the proposition that human life has absolute value, then we can justify the death penalty if we have followed our criminal procedures as carefully as we can. Perhaps we will feel it is more justified if it is delayed for a period of time to allow an independent post-conviction exploration of the possibility of error in the conviction. But even without such a delay, our law can justify final punishment so long as it accepts that no human life has absolute value.

## **7. The death penalty in Australia**

Although Australia has progressively abolished the death penalty as a form of punishment available for any crime[32], that legal mindset is not technically irrevocable. For though the last death sentence in Australia was carried out in Victoria in 1967 [33] and the theoretical availability of the death penalty as a punishment for any crime in any federal jurisdiction was abolished in 1973 [34], public sentiment in favour of the death penalty still resurfaces from time to time when atrocious crimes take place. Cases in point include the Milat Backpacker Murders, the Martin Bryant Port Arthur massacre and the publicly expressed opinion of two Australian Prime Ministers in connection with the Bali Terrorist Bombing in Indonesia [35]. But even these cases have not generated enough favourable public sentiment to generate a bill in any legislature even proposing the resurrection of such penalty[36]. So why does this theoretical possibility still interest the media and academic commentators, and does Australian constitutional law countenance that possibility?

While Australia has declined to introduce a Bill of Rights most recently in 2010, that apparently American formulation against ‘cruel and unusual punishment’ still has constitutional provenance in Australia. For that language formed part of the English Bill of Rights in 1689, at the same time as the wars of religion were settled in that country with the introduction of a primitive form of constitutional religious toleration. And the English Bill of Rights still governs both succession to the throne of the United Kingdom and the thrones of the other Commonwealth countries which recognise the English sovereign as their monarch, including Australia. But it is Australia’s ratification of a number of international law instruments rather than the statutory obligation to avoid ‘cruel and unusual punishment’ which has created legal obligations in Australia to abolish the death penalty. For as explained above, and as is demonstrated by the retention of the death penalty in many United States jurisdictions, reliance on the old 1689 legislation and language does not prevent the death penalty from being carried out.

While the statutory abolition of the death penalty in Australia began with Queensland’s *Criminal Code Amendment Act* in 1922, Australia’s endorsement of the Universal Declaration of Human Rights in 1948, its signature and ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1985 and 1989 which obliged signatories to formally abolish the death penalty, and its signature of the Second Optional Protocol to the International Covenant on Civil and Political Rights in 1990, arguably consummated its commitment, despite long delays in implementing those commitments and the swings in public opinion in the meantime. More recent measures that will make it extremely difficult to resurrect the death penalty in Australia include *The Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act* 2010 (Cth) and the issue of new Australian Federal Police guidelines which require Ministerial approval before the Australian Federal Police can cooperate with overseas police agencies in cases where the death penalty could result.

Can Australia still resurrect the death penalty? In theory, the penalty can be reintroduced because of the existence of the doctrine of the sovereignty of Parliament and the absence of any entrenched Bill of Rights. But the fact of Australia’s many international law commitments to abolish the death penalty forever, alongside the failure of Australian public opinion in favour of such resurrection to move beyond a bare majority even in the face of terrorist atrocities like the Bali bombing, indicate there would have to be a sea change of moral sentiment in Australia before that could happen.

## **Conclusion**

In general, debate about the death penalty in Australia and the United States has failed to consider rationally (as opposed to emotionally) arguments adduced by proponents and opponents of this penalty. Although the issue in Australia is currently moot because of Australia’s commitment to international human rights instruments, even in the United States, where there is some residual debate about constitutional issues relating to capital punishment, substantive reasoned debate has effectively ceased.

Why then has this paper considered the issue anew? This is because, in the absence of hysteria and dogmatic positions that take centre stage when the issue is hot and topical, there is merit in reviewing dispassionately the factual, legal and philosophical issues that should guide debate when the issue does arise for rational consideration in the future. These issues relate to the deterrence theory, alleged discrimination, arguments about cruelty and inhumanity and involve questions about reciprocity and, more recently, proportionality.

For the authors of this paper, dispassionate analysis suggests that the argument that the death penalty is inhumane can be distilled down to an argument that human life has absolute value despite dismissal of that idea in many other legal contexts. Unless that core value is recognised and addressed, all other debate is necessarily misdirected and sterile.

## References

[1] *Gregg v. Georgia*, 428 U.S. 153 (1976). This decision, in effect, overturned *Furman v. Georgia*, 408 U.S. 238 (1972) in which the Supreme Court held that the imposition of the death penalty constitutes ‘cruel and unusual’ punishment.

[2] The Eight Amendment reads as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

[3] *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (the Eight Amendment to the United States Constitution prohibits the imposition of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the child’s death); *Roper v. Simmons*, 543 U.S. 551 (2005) (the imposition of the death penalty on offenders under the age of 18 when the crimes were committed is unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (reversal of the imposition of the death penalty on a mildly mentally retarded murderer); *Coker v. Georgia*, 433 U.S. 584 (1977) (the death penalty is an excessive penalty for rape).

[4] *Harbison v. Bell*, 556 U.S. 180 (2009) (indigent death row inmates sentenced under state law have a constitutional right to federally appointed and funded counsel to represent them in post-conviction state clemency proceedings, when the state has denied such counsel).

[5] *Baze v. Rees*, 553 U.S. 35 (2008) (the injection protocol is substantially safe from wanton and unnecessary infliction of pain, and is constitutional).

[6] *Payne v. Tennessee*, 501 U.S. 808 (1991) (the Eight Amendment does not prohibit a jury from considering ‘victim impact’ evidence, including evidence relating to the impact of the murder on the victim’s family).

[7] G.C. Smith, *Capital Punishment 1986: Last Lines of Defense*, Washington, Washington Legal Foundation, 1986, 2.

[8] *Ibid.*, 5.

[9] H. A. Bedau, ‘How to Argue about the Death Penalty’, *Facing the Death Penalty. Essays on A Cruel and Unusual Punishment*, Philadelphia, Temple University Press, 1989, 178.

[10] *Ibid.*, 9, 179-180.

[11] L. Blom-Cooper and G. Drewry (eds), *Law and Morality*, London, Duckworth, 1976, 51.

[12] A. Koestler, *Reflections on Hanging*, New York, The Macmillan Company, 1957, 53.

[13] C. Beccaria, *On Crimes and Punishment* (translation by Henry Paolucci), Indianapolis, The Bobbs-Merrill Company, 1963, 46-47.

[14] J. S. Mill, ‘Speech in Favour of Capital Punishment’ (1868), in J. Feinberg and H. Gross (eds), *Philosophy and Law*, Encino, California, Dickenson Publishing Company Inc., 1975, 620.

[15] *Ibid.*, 14.

[16] T. Sellin, ‘Capital Punishment’ in *Encyclopaedia Britannica*, 1965 ed, vol 4, 848-849.

[17] *Furman v. Georgia*, 408 U.S. 238 (1972), 256-257.

[18] H. A. Bedau, 'How to Argue about the Death Penalty', *Facing the Death Penalty. Essays on A Cruel and Unusual Punishment*, Philadelphia, Temple University Press, 1989, 180.

[19] *Furman v. Georgia*, 408 U.S. 238 (1972), 287.

[20] *Glass v. Louisiana*, 471 U.S. 1080 (1985), 1093-1094.

[21] J. S. Mill, 'Speech in Favour of Capital Punishment' (1868), in J. Feinberg and H. Gross (eds), *Philosophy and Law*, Encino, California, Dickenson Publishing Company Inc., 1975, 620.

[22] *Ibid.*, 21.

[23] For example, in 1977 Gary Mark Gilmore demanded that his death sentence be carried out. He was executed by firing squad on 17 January 1977.

[24] J. S. Mill, 'Speech in Favour of Capital Punishment' (1868), in J. Feinberg and H. Gross (eds), *Philosophy and Law*, Encino, California, Dickenson Publishing Company Inc., 1975, 621.

[25] *Ibid.*, 24.

[26] "Speech Against Capital Punishment" (1868), in J. Feinberg and H. Gross (eds), *Philosophy and Law*, Encino, California, Dickenson Publishing Company Inc., 1975, 617.

[27] I. Primorac, "On Capital Punishment", *Israel Law Review* 133 (1982)

[28] *Ibid.*, 27.

[29] *Ibid.*, 27, 145-146.

[30] *Ibid.*, 27, 145.

[31] For example, Nicholas Cowdery AM QC, the retiring New South Wales Director of Public Prosecutions at a Public Defenders Criminal Law Conference in February 2011 said: The criminal justice system is not perfect and never will be. It is designed and operated by humans and we cannot get everything right for all time and we do make mistakes. Trial and error still have a place in human development and government, so we should keep on reforming. It is a bit like painting the Harbour Bridge, a never-ending job – but one about which many people might argue, for example in the case of the Bridge, about the shade of the paint, its consistency, the kinds of brushes and rollers to use, the starting point < <http://www.odpp.nsw.gov.au/speeches/Public%20Defenders%202011.pdf>> site visited on 28 September 2012. Note similar comments from the South Carolina District Attorney John Justice in 1999 < <http://www.theatlantic.com/past/docs/issues/99nov/9911wrongman2.htm>> site visited on 28 September 2012.

[32] The legislation which has been passed to abolish the death penalty in Australia is: *Criminal Code Amendment Act 1922* (Qld); *Crimes (Amendment) Act 1955* (NSW); *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW); *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW); *Criminal Code Act 1968* (Tas); *Death Penalty Abolition Act 1973* (Cth); *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*; *Crimes (Capital Offences) Act 1975* (Vic); *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA).

[33] Ronald Ryan was hanged at Pentridge Prison at Melbourne on 3 February 1967 following conviction for killing a prison officer when making his escape. Doubts remain about his guilt ([www.ronaldryan.info/](http://www.ronaldryan.info/)), site visited on 24 September 2012.

[34] *Death Penalty Abolition Act 1973* (Cth).

[35] Professor George Williams of the University of New South Wales has noted that both Prime Minister John Howard and the current Opposition Leader Tony Abbott have tried to have it "both ways" where the death penalty is concerned < [www.smh.com.au/opinion/politics/no-death-penalty-no-shades-of-grey-20100301-pdgo.html](http://www.smh.com.au/opinion/politics/no-death-penalty-no-shades-of-grey-20100301-pdgo.html)> site visited on 28 September 2012. In a paper dealing with the Guidelines governing the cooperation of Australian Federal Police with foreign police agencies in cases which may involve the death penalty, The Public Interest Law Clearing House noted similar inconsistency from Kevin Rudd as Prime Minister < [www.reprieve.org.au/.../Death\\_-\\_Review\\_Guidelines\\_-\\_Rep](http://www.reprieve.org.au/.../Death_-_Review_Guidelines_-_Rep)> site visited on 28 September 2012.

[36] For a review of the movement in Australian public opinion where the death penalty is concerned, see the background paper on the death penalty produced by the New South Wales Council of Civil Liberties on 29 March 2005 <[www.nswccl.org.au/docs/pdf/bp3%202005%20dp%20paper.pdf](http://www.nswccl.org.au/docs/pdf/bp3%202005%20dp%20paper.pdf)> site visited on 28 September 2012.