

The Irrevocability of Capital Punishment

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Introduction

One of the many arguments against capital punishment is that execution is irrevocable. At its most simple, the argument has three premises. First, legal institutions should abolish penalties that do not admit correction of error, unless there are no other sufficiently similar penalties. Second, irrevocable penalties are those that do not admit of correction. Third, execution, and the harm or loss that it causes, is irrevocable. If it is true that sufficiently similar penalties to execution exist, it follows that states should abolish capital punishment.¹ Those who press this argument usually assume that a lengthy period of incarceration is sufficiently similar to execution to make the argument go through.

In its strongest and simplest form, the irrevocability argument is a conceptual one. It holds that the death penalty is necessarily irrevocable, not just that it is often irrevocable.² One could construct a rather complicated abolitionist argument based on the *rarity* of revocability—for example, something along the lines of “even one instance of an irrevocable punishment is morally repugnant enough to prohibit the punishment”—or an argument that cites the rarity of revocability as one reason among others to abolish capital punishment. This means that if the conceptual irrevocability argument fails, the abolitionist need not give up on irrevocability altogether. However, if it were granted that the death penalty is sometimes, even if very rarely, revocable, the abolitionist would have a much more difficult row to hoe. She would have to explain why we should not affirm retentionist policies that would restrict the death penalty to those types of cases in which it is revocable. Moreover, a modified irrevocability argument would lack much of the rhetorical bite of the conceptual versions. If it is granted that the death penalty is sometimes revocable, then courts would have to decide on an individual basis whether the case at hand is one that falls within the ambit of revocability. And friends of the death penalty would find ways to argue in the affirmative in every instance. So there are very good reasons for the abolitionist to want the stronger argument to succeed.

If the strong irrevocability argument is to work, it must show not only that execution is in principle irrevocable, but also that incarceration is in principle *revocable*. If incarceration were irrevocable, the alternative to execution would also be prohibited, and the abolitionist argument would face an extremely high burden. It would have to show that the irrevocability of execution is a sufficient

reason to prohibit the penalty even in the absence of acceptable penalties that achieve similar deterrent and retributive effects. Furthermore, if incarceration were shown to be irrevocable, the abolitionist argument would slide into a radical argument for the abolition of prisons, an argument that most death penalty abolitionists do not want to defend. In sum, the concept of irrevocability needed for the strong irrevocability argument must be one that extends to all cases of execution but not to ordinary incarceration. This paper will argue that execution is always irrevocable. Although this supports the strong abolitionist argument, I will not defend that argument here; I will instead adopt the narrower task of defending the irrevocability of execution.

To be sure, many think that the irrevocability of execution is self-evident. It appeared this way to Justice Brennan, who wrote in *Furman v. Georgia* that “the finality of death precludes relief” (201). But in his paper “Is the Death Penalty Irrevocable?” Michael Davis argues that the death penalty is *not* irrevocable.³ While Davis’s argument is itself somewhat compelling, it receives additional support from work in the metaphysics of death, specifically the literature on posthumous harm. Thus strengthened, the argument deserves careful consideration. My consideration of this larger argument proceeds in a fairly straightforward fashion. I begin with a quick sketch of Davis’s argument, then, turning to the literature on posthumous harm, I show how the Pitcher–Feinberg theory of posthumous harm enables a more robust argument against the irrevocability of capital punishment. The crucial point here is their claim that the thwarting of posthumous interests counts as harm. The Pitcher–Feinberg theory of harm can be easily converted into a theory of posthumous benefit, which in turn supports Davis’s claim that the dead can be compensated. After establishing the plausibility of this notion of posthumous benefit, I conclude by arguing that the robust argument fails to make the case against irrevocability, insofar as it ignores the full set of practical requirements incumbent on legal institutions that wrongly punish someone. (By wrongful punishment I mean both punishment of the innocent as well as improper punishment of the guilty.)

The Revocability of Capital Punishment

Davis’s basic argument is that if we understand revocability properly, we will see that capital punishment is no less revocable than any other kind of punishment. His first move is to draw a distinction between two types of revocability, which he calls “absolute” and “substantial” revocability.⁴ Absolute revocability names the type of revocability that would return a person wrongly subjected to a legal penalty back to the *very same* condition she was in before she suffered the penalty. Now, the death penalty is obviously irrevocable in this sense: we cannot raise the dead. But other forms of punishment are *also* irrevocable in this sense. We cannot reverse time any more than we can raise the dead; a month in prison can change someone’s life in a way that cannot be undone, and there is no way that the wrongly imprisoned person can be given back his life as it was before the

wrongful imprisonment. So if we understand revocability to be absolute revocability, execution and many other types of serious punishment are equally irrevocable. As a result, the abolitionist cannot employ this sense of revocability to argue that the death penalty should be abolished, at least not without endorsing the view that *all* serious punishments should meet the same fate. Since most death penalty abolitionists are not advocates for the wholesale abolition of punishment, the revocability at issue in the irrevocability argument is substantial revocability.⁵

For Davis, substantial revocability counts compensation of the wrongly punished person as a revocation of her punishment. The idea here is that the state pays the person for the wrong done, and in so doing, makes it up to her. But not just any compensation counts: substantial revocability entails a generous conception of compensation. Although both the advancement of minor interests, and the minimal advancement of major interests are compensation in some weak sense, neither of these amount to the revocation of punishment. A wrongly punished person let out of jail after twenty years would feel insulted rather than compensated if the state handed him a bag of nickels. Davis's criterion for substantial revocation is "either that we do all in our power to compensate the convict (and what we do is far from negligible) or that we do enough so that he would say, 'that would make it worth it.'"⁶ He bases this formulation in the moral reason we have for compensating wrongly punished people in the first place. The reason is that we should "make up as best as we can for any wrong we do another."⁷

Clearly, imprisonment is substantially revocable, even in Davis's sense. I would venture that most people would trade a wrongful arrest followed by two days in jail for one hundred thousand dollars and an energetic, widespread public announcement of their innocence. (I would gladly make such a trade.) Again, the one hundred thousand dollars does not *undo* the time spent in jail—it does not return the wrongly punished person to the state she was in before the punishment—but it does pay back the wrongly punished person in a way that is satisfactory to her.⁸ Davis contends that execution is *also* revocable in this sense, and that the third premise in the abolitionist argument is false. If Davis is right, and the death penalty and imprisonment are not distinguishable in terms of substantial revocability, the abolitionist argument fails.

At first glance, many are likely to think that the death penalty *is* distinguishable from punishment in this sense. Almost everyone I have surveyed, both philosophers and nonphilosophers, thought as much. The intuition here seems to be that since a wrongfully executed person is dead, he cannot be the recipient of compensation. And since he cannot receive compensation, execution is not substantially revocable. But, Davis points out, this view presumes that compensation must be given during the wrongly punished person's lifetime. And this presumption needs to be argued for.⁹

Davis admits that there is an obvious argument at hand. The argument, as he puts it, is that "death completes one's biography, terminates one's interests, and so makes compensation impossible by making it impossible for anything more to happen to one."¹⁰ In short, the dead person doesn't exist, nothing left of him exists,

and so nothing can happen to him. But Davis identifies what he sees as a serious problem with this line of argument: it equates peoples' biography with their biological existence. As such, this view conflicts with an intuition about death that finds expression in everyday practice and can be traced back to Aristotle.¹¹ The intuition here is that our biographies do outlive our lives; this is why we buy life insurance and recycle. More specifically, our biography is partly composed of our settled goals and interests, and these have a type of existence that continues after our death. Our biographies outlive our lives in the sense that our interests can be posthumously advanced or thwarted. For example, with the passage of health care reform, it made sense to say that a part of Ted Kennedy's biography was written.

For Davis, this intuition tells against the temporal coextensiveness of biography and biological life. And if our biography, in the form of our interests, can persist beyond our biological lives, death does not put us "beyond all benefit and harm."¹² If dead people can be recipients of benefits, in the sense that their interests can be advanced after their deaths, then wrongly executed people can be compensated after their deaths. Take the following example (which is my own, as Davis doesn't provide one): a single father works two factory jobs to ensure that his daughter can afford college. This labor reflects the fact that he has devoted his life to one purpose: making sure that his daughter has a life better than his own. Unfortunately, he has an incurable disease and knows he will soon die. Then the father is charged with, found guilty of, and executed for a murder he did not commit. After his execution, his innocence is discovered. The state exonerates him and proclaims his innocence in every media market, securing his reputation. The state then pays the man's daughter one million dollars.

In this example, it is hard to argue that the interests most important to the father are not *better* served by his execution and subsequent compensation than they would be by his continued existence. If the father had been given a choice between living the rest of his life as it would have been had he not been executed, and being executed and compensated in this way, it's plausible to think that the father would have *chosen* to be executed. Even if he would not have made this choice, he certainly would have felt that his execution was "worth it" in some important sense. If this is the case, then the state has compensated the wrongly executed man, so long as we accept Davis's account of compensation.

This example is admittedly quite specific, but all Davis needs to make his argument is for us to find it plausible that *someone* could be compensated for wrongful execution. It does not matter whether most, or even many, wrongfully executed people could be compensated. This is because the argument he is opposing is, as I mentioned above, committed to the view that the death penalty is always irrevocable. So if any persuasive example can be provided, the consequences for the irrevocability argument are fatal: if dead people can be compensated for their wrongful execution, the death penalty is substantially revocable, and the irrevocability argument fails.

The problem here is that Davis does not do much to develop his central claims, outside of invoking the intuition that our biography outlives our physical

existence and opposing it to the intuition that the dead cannot be harmed or benefited. And there are two important theoretical objections to his view—defended at length in the literature on posthumous harm—that he must overcome.¹³ First, it seems impossible to identify anyone who is benefited by the compensation. A dead person is dead. Since they no longer exist, there seems to be no subject who can receive benefits. (This objection stems from Epicurus's famous argument that a person cannot be harmed by her death.¹⁴) Now, perhaps there *is* a subject who is benefited by the compensation. As I will discuss below, one might argue that the subject benefited by compensation is the wrongly executed person as she exists before her execution. But this solution to the problem of the subject raises a second objection. Such compensation seems to imply backward causation. Acts of posthumous compensation by definition occur after the wrongly punished person has died. If this compensation benefits that person, it will have to affect them at some time. Since the only time it can affect them is in the past, compensation looks like it has to work backward. And this implication is one that few philosophers would countenance.

But the same literature contains a strong *defense* of the existence of posthumous harm, and by extension posthumous benefit. The most influential is found in the work of George Pitcher and Joel Feinberg.¹⁵ (Pitcher explicitly notes that his argument applies to posthumous benefits as well as posthumous harms.¹⁶) Following Taylor, I will call this the Pitcher–Feinberg account of posthumous harm.¹⁷ To get clear on the merit of Davis's argument, we must explore this debate in some detail, as Davis's conception of well-being seems to be the same as Pitcher and Feinberg's. If Pitcher and Feinberg carry the day, Davis's argument is vindicated. If they fail, then we have good reason to suspect that Davis's argument fails as well.

Pitcher's defense of posthumous harm begins with the standard appeal to intuition, suggesting that intuition sides with the view that the dead can be harmed. To capture this intuition, Pitcher develops an example of a philosopher who has spent his life working on an elaborate metaphysical system. In the example, the philosopher dies before his work sees the light of day. Pitcher then asks us to consider two possible worlds. In the first, the philosopher's system is posthumously promulgated, and after a period of dissemination it is widely acclaimed as one of the greatest achievements in the history of philosophy. The second possible world is exactly the same as the first, except that a disgruntled neighbor burns down the philosopher's house, destroying his manuscripts before anyone can read them. Pitcher thinks it obvious that the philosopher is better off in the first world, and worse off in the second. Since it is the malicious neighbor who causes the philosopher to be worse off, the neighbor's actions in the second world harm the philosopher.

There is also a moral type of intuition that is worth mentioning here. Many people would agree that it is wrong for doctors to harvest a newly deceased person's organs against that person's wishes, when those wishes are known to the doctors.¹⁸ But this view is hard to make sense of unless we admit the possibility of posthumous harm. If we did not believe that the dead person was harmed by the

harvesting of her organs, why else would we say that the doctors did something wrong?

Pitcher admits that such intuitions, while compelling, still leave us with a puzzle: the dead, if they exist at all, are mere piles of dust. How can piles of dust be harmed? The puzzle can be solved, Pitcher thinks, by showing that it is not the dust that is harmed, but rather the dead person. To clarify this point, Pitcher distinguishes between two ways one can describe a dead person. First, one can describe her as she was *before* she died—this is to describe her as an “*antemortem*” person. Second, one can describe her as she is now, after her death—this is to describe her as a “*post-mortem*” person.¹⁹ The second description applies to the dust in the grave, but the first does not. Pitcher goes on to say that only *antemortem* persons can be harmed.²⁰ It is the *living* philosopher, not the dead one, who is harmed by the neighbor’s actions.

Now at first, this claim appears unacceptable, insofar as it seems to solve the problem of the subject at the cost of endorsing backward causation. But Pitcher denies this.²¹ He thinks that all we need to deflect the charge of backward causation is the proper conception of harm. He defines harm as the hindering or thwarting of someone’s important interests or desires. In other words, Pitcher assumes a preference theory of well-being.²² As I noted above, it is this theory of well-being with which Davis’s views seem to be most naturally at home. Even though Davis never endorses a specific theory of well-being, the congruence of his argument with preference theories can be seen when he says “our interests exceed bodily survival. Our biography could have a happy ending even if we died sad.”²³

To defend this conception of harm, Pitcher presents another example. A man’s son dies in a plane crash thousands of miles away, unbeknownst to the father. Most people would say without hesitation that the son’s death harms the father. Yet, Pitcher points out, this claim does not entail action at a distance—“the plane crash sending out infinitely rapid waves of horror, as it were, diminishing [the father’s] metaphysical condition.”²⁴ There is no physical causality here, nor any alteration of the father’s metaphysical state (what more recent literature usually calls “intrinsic states”), yet many would say that the crash harmed him, and did so at the very moment that it happened, even though he was completely unaware of it. Davis thinks that this view is true, and it is true because the father’s interests in his son’s well-being are damaged. That is, this example is meant to show that harm can occur even when it does not directly affect the harmed person, but affects only his interests. If this conception of harm is persuasive, if harm can occur without incurring any changes in a person’s intrinsic state, then harm can befall *antemortem* persons without causing any change in their intrinsic state. So understood, posthumous harm does not entail backward causation.

What posthumous harm does entail is the view that the occurrence of a harmful event “makes it true that during the time before the person’s death, he was harmed.”²⁵ Here the sense of “makes true” is, Pitcher asserts, intuitive and devoid of mystery. To modify the example he uses to support this point, if an asteroid were to destroy the world sometime during the presidency after Barack Obama’s,

this event would make it true *today* that Obama is the penultimate president of the United States. There is clearly no backward causation at work here; we have only the posthumous ascription of a property to Obama. Just like post-presidency events can make it true that Obama is the penultimate president, so too, Pitcher says, posthumous events can make it true that an *antemortem* person's interests are thwarted during her lifetime. To precisify an earlier example, the malicious neighbor's arson makes it true that that philosopher's interests are thwarted during his lifetime. It is the fact that the statement "the philosopher's interests are going to be defeated" is true that harms him while he is alive. As Feinberg puts it, at the time of the arson it does not suddenly "become true" that the *antemortem* philosopher was harmed—rather, "it becomes apparent to us what was true all along," namely that the philosopher's interests are doomed.²⁶ The living philosopher is the subject of interests that are *going* to be defeated, even though he doesn't know it, and will not be around to witness it.

With this account in hand, and replacing the notion of harm with benefit, one could respond to the objections leveled against Davis. When Davis says that our biographies extend beyond our lives, this means that the terrain of benefit and harm extends beyond a person's biological life, and is occupied in part by interests that can be thwarted or advanced after she is dead. Posthumous compensation is possible because someone's interests can be advanced after she is dead.²⁷ With the Pitcher–Feinberg account in hand, Davis can show that this compensation benefits the *antemortem* person—answering the problem of the subject—and does so without violating the ban on backward causation—answering concerns related to the timing problem. And if posthumous compensation is possible, the death penalty is revocable. Let me return to the example of the wrongly executed father. If the state gives this man's daughter one million dollars, the state benefits him by advancing his interest in his daughter's well-being. The state makes it the case that, while the father is alive, the statement "the father's interests in his daughter's well-being are going to be satisfied" is true. In significantly advancing the man's most important interests, the state compensates him for his wrongful execution.

The Plausibility of Posthumous Harm

Of course, the Pitcher–Feinberg account of posthumous harm and benefit is not immune to criticism. In this section, I will explore what I think are the most powerful objections to the view.²⁸ If these objections succeed, then Davis's argument is on shaky ground, insofar as it relies on the Pitcher–Feinberg theory of well-being.

James Stacey Taylor provides two arguments that revive and strengthen the accusation of backward causation. Taylor first attacks the Obama analogy, pointing out that the property of being "the penultimate president of the United States" is a sequential property, a property someone possesses at a particular point in a sequence.²⁹ But harm is not a sequential property; it is not ascribed to someone on the basis of being in a particular position in a certain sequence. Because of this

disanalogy, the fact that posthumous events can result in the ascription of sequential properties to an antemortem person does not support the claim that harm can be ascribed to an antemortem person. Taylor's second line of attack is a generalization of the first. Taylor argues that *all* analogies presented by philosophers trying to ward off the charge of backward causation fail in the same way. In none of the analogies is harm the same type of property as the properties that can be retroactively ascribed in an unproblematic fashion (i.e., ascribed in a way that avoids backward causation). Most important for our purposes is his attack on the "thwarted interest" group of examples. Taylor agrees that it is uncontroversial to say that a future event can make it true that a person's current interest is thwarted.³⁰ And he agrees that this claim does not entail backward causation. But Taylor argues that this does not prove that *posthumous harm* does not entail backward causation. After all, it *is* controversial to say that thwarting a dead person's interests harms the antemortem person. It is controversial because it is not clear that posthumous harm does not involve backward causation.

Taylor's argument is not immediately perspicuous, but I understand it to go as follows. Pitcher and Feinberg's examples are supposed to convince us that the animal called posthumous harm, with its suggestion of backward causation, is really less dangerous than it appears. To do so, Pitcher and Feinberg trade on the uncontroversial point that when a future event thwarts a current interest, the current interest is thwarted. But *that* does not yet show that the ascription of posthumous harm would not require backward causation, insofar as "interest-thwarting" and "harming" are two different things. To put it more technically, what Pitcher and Feinberg must show is that "harm is the same type of property as those whose retroactive ascription to persons is metaphysically unproblematic."³¹ So Taylor's objection is that Pitcher and Feinberg have not met their argumentative burden—since posthumous harm is controversial, they must show that the property of being harmed can be ascribed in the same way as the property of being the penultimate president of the United States and the property of being thwarted, that is, without implying backwards causation. But the examples do *not* show this, and so Pitcher and Feinberg assume what they must prove. Of course, Pitcher and Feinberg could respond that their conception of harm as the thwarting of interests *does* show that the properties are of the same kind. But Pitcher and Feinberg can't simply assume the truth of this conception, as this would leave them open to charges of begging the question. That is, since Pitcher and Feinberg argue for their conception of harm by way of examples against which Taylor offers some fairly persuasive criticism, this conception seems vulnerable to Taylor's main argument, and so they cannot marshal it in defense of their position.

While Taylor argues that posthumous harm proponents cannot solve the timing problem, Walter Glannon argues that they cannot solve the problem of the subject. Glannon stresses what he sees as the inadequacy of the posthumous harm proponents' conception of harm. Glannon contends that any conception of harm, and any larger theory of well-being, must account for the fact that harm is something that makes someone actually worse off by "causing adverse changes in

his body or mind.”³² More technically, Glannon claims that harm must involve changes to someone’s intrinsic properties. (Intrinsic properties are properties that something has in virtue of what it is in itself. Extrinsic properties are relational; they are properties that something has in relation to things that are not itself.³³) In other words, Glannon advances a mental-state conception of harm. Glannon thinks this conception is the proper one because it captures two basic intuitions: harm must be experienced in order to exist, and harm must harm the actual person.

Now, if we build a theory of harm on these intuitions, we will have to give up the view that extrinsic or relational harm is really harm. Changes in relational properties “do not imply any genuine changes in persons,” any more than (citing Geach) “‘Socrates could change posthumously . . . every time a fresh schoolboy came to admire him.’”³⁴ And if we deny the existence of extrinsic harm, we will have to deny the existence of posthumous harm. While Glannon agrees with Pitcher that it makes sense to predicate interests of antemortem persons, Glannon’s mental-state conception of harm leads him to draw a distinction between personal and impersonal interests.³⁵ I have a personal interest when I have an interest in a state of affairs that directly affects me. I have an impersonal interest when I have an interest in a state of affairs that does not directly affect me. Glannon contends that all interests that survive a person’s death are impersonal ones; they must be impersonal, because all personal interests—interests that directly affect the person—cease to exist when a person dies. Personal interests cannot survive death, Glannon claims, because there is no one left to be directly affected. Since both the subject and the object of personal interests, the person herself, cease to exist at death, the interest ceases to exist. But the object of *impersonal* interests (a good philosophical reputation, for example) does not cease at death, and so these sorts of interests survive.³⁶ That surviving interests are all impersonal means that the thwarting or fulfilling of posthumous interests does not actually affect the antemortem person. While we can predicate these interests of the antemortem person who is their subject, we should not be misled by this capability. As Glannon puts it, “not every change in the truth value of a predication about a person implies a genuine change in that person.”³⁷

In short, Glannon, like Taylor, accuses posthumous harm proponents of begging the question. Glannon argues that defenses of posthumous harm based on examples like Pitcher’s unfortunate philosopher assume what they are supposed to prove, “namely, that certain mind- and body-independent facts *about* persons can also be bad *for* them in the sense presupposed by harm.”³⁸

So are Taylor and Glannon correct in denying the existence of posthumous harm? It would help the irrevocability argument if they were, but I am not sure that they are. Taylor and Glannon argue that Pitcher and Feinberg fail to defend their preferred theory of harm, and assume what they need to prove, but we could turn the same charge back at Taylor and Glannon. While Glannon claims that intuition is on his side, he never does argue for the view that we should understand harm as a change in one’s intrinsic properties, nor does he argue for the view that it is most plausible to understand a harming relation as a causal relation. (In my view,

Taylor's objections assume that harm must alter someone's intrinsic properties, and that he is therefore vulnerable to the same charge as Glannon, but I will not argue that point here.³⁹) So it seems to me that the nature of harm is still an open question, and that one's view on this matter will depend on privileging one of our conflicting pretheoretical intuitions. Since one's stance on posthumous harm will derive from one's conception of harm, the existence of posthumous harm must also remain an open question.

But the defender of Davis has one final tactic that may lead to a conclusive result, one that rests on Shelly Kagan's distinction between persons and lives.⁴⁰ Kagan adopts a roughly mental-state theory of well-being, but argues that a person has a *life* that can be made better or worse off in virtue of extrinsic facts about her. If Kagan's conception of this distinction and his claim that changes in the quality of a person's life are morally salient are coherent, then we have a theory that seems to accommodate the intuitions of both mental-state and preference theories of well-being. In Kagan's hands, the sorts of intuitions invoked by the preference theorist are used not to defend a preference theory of well-being, but to articulate and defend the existence of a life that merits our concern and respect even though it is distinct from the existence of a person. It will turn out that someone's life can be made better or worse after she is dead.

So let us turn to Kagan's distinction. For the sake of this paper, we will assume Glannon's definition of a person as a unity of body and mind, the latter maintaining psychological connectedness between the person's past and future mental states.⁴¹ (Kagan's account of the person is slightly more modest.) Kagan argues that changes in well-being must be a matter of changes to intrinsic states of the person.⁴² His view differs slightly from mental-statism, insofar as he holds that changes affecting only the body, and having no effect on mental states, can make a difference in one's well-being, but since this difference is not relevant to the issue of posthumous compensation, we can ignore it. Life means "biographical life," "personal history," or the set of facts in which a person figures as a subject.⁴³ A person's life includes more than just facts about his body and mind, it also includes extrinsic facts, facts about his reputation, the well-being of his children, the fate of his projects, and so on.⁴⁴

Kagan's main argument is that unlike changes in well-being, changes in how well a person's life is going need not (though they may) involve changes in the intrinsic states of a person; how a person's life is going is independent of a person's level of well-being. This is because lives involve extrinsic facts about the person. But the argument does not rely only on the metaphysical distinction between persons and lives. It gets much of its force from the way it accommodates the type of intuition that preference theorists use to defend their theory of well-being. Kagan's favorite example is that of a businessman who dies happily convinced that his wife loved him and his business was successful; in Kagan's example, the man is seriously deceived. Kagan thinks that most of us would feel confident in stating that something went wrong with the man's life, even though nothing went wrong in terms of his intrinsic states, and he was never aware of the deception. What went

wrong was a matter of extrinsic facts about the businessman, facts that constitute part of his history, and are therefore intrinsic to his life.⁴⁵ Kagan agrees with the preference theorist that our intuitions are correct when they tell us that *something* has gone wrong here. Kagan differs from the preference theorist in claiming that what has gone wrong has no effect on the man's well-being.

If Kagan's argument works, it supports Davis's conclusion while freeing his argument from a commitment to a preference theory of well-being. (It is hard to know what Kagan himself thinks of posthumous harm or benefit, since he never discusses the issue.) As I noted above, Davis appears to endorse a preference theory: all of his examples of posthumous compensation involve the furthering of impersonal interests and affect only extrinsic properties of the deceased.⁴⁶ While this leaves his argument open to objections to the preference theory, his conclusions still seem to go through if we grant the validity of the distinction between persons and lives. Even those holding a mental state view of well-being can admit that *lives* can be made better or worse absent any change in the internal states of the person whose life it is, which means that mental-state theorists can agree that a person's life can be made better or worse after they are dead—which means that mental-state theorists can agree that a wrongfully executed person can be compensated. However, there is one serious objection to Kagan's theory. It may be argued that compensation must *benefit* the wrongly punished person, contributing positively to her well-being, if it is to do the moral work it is meant to do. By Kagan's own lights, posthumous compensation does not affect the wrongly executed person's well-being, since the person no longer exists. So bettering someone's life does not entail benefiting them. The objection would argue that if this is the case, then no one is compensated when the state improves the wrongly executed person's life. This objection seems to restate one of the standard mental-state objections to preference theories of well-being, but it does not: it is not about what counts as well-being, but about what counts as compensation. Exploiting the gap between persons and lives, it contends that enabling a life to go better does not count as compensation, since it does not benefit the wrongly executed person.

Since Davis employs a preference theory of well-being, he thinks that posthumous compensation *does* benefit the wrongly executed person.⁴⁷ But it is unclear whether he thinks that benefit is a necessary part of the concept of compensation, and so it is unclear whether he could respond to this objection without recourse to a preference theory of well-being. Nevertheless, I think this objection can be addressed fairly simply. Why should we think that compensation must affect well-being? People often value the advancement of interests pertaining to their lives over the advancement of interests pertaining to their well-being. Take the case of someone who is strongly committed to eradicating breast cancer, and volunteers tirelessly for a breast cancer research fundraising organization. The fundraiser would likely choose a world in which a donor gives three million dollars to the organization on the condition that the volunteer remain ignorant of this gift to a world in which the donor gives thirty thousand dollars to the organization with the

fundraiser's full knowledge. In the first world, the fundraiser's well-being is unchanged; in the second world, it is augmented. Yet the fundraiser would prefer the second world. If it is the case that people often prefer the success of their projects to increases in their well-being, it is reasonable to say that a person can be compensated even when her well-being cannot be augmented, and therefore to say that she can be compensated after her death.⁴⁸ After all, compensation is the attempt to make up for a wrong done to someone, and when compensation addresses the interests that are the most important to the person who has been wronged, it makes sense to think that the person has been compensated.⁴⁹

Irrevocability Vindicated

What I have argued so far is that Davis's argument against irrevocability is, in some sense, quite powerful. If one accepts that compensation is sufficient for revocation, and if one accepts that it is possible to further a wrongfully executed person's interests, then the death penalty is revocable. Those who endorse a preference theory of well-being and those mental-statists who find Kagan's argument convincing have reason to hold that it is possible to further a wrongfully executed person's interests, and therefore have reason to agree with Davis.

I will now show why this expanded revocability argument fails. The problem is that it gets something wrong about revocation: revocation is not, as the argument presupposes, reducible to compensation. In developing this objection I will in fact remain agnostic about whether wrongful execution is compensable. Now, I certainly agree that when someone is wrongly punished, the state ought to compensate her. The state ought to make up for the wrong it has done, and the worse the wrong done, the more the victim ought to be compensated. These statements are true even if the state cannot fully compensate—that is, compensate in a way that satisfies the requirements of substantial revocation—the wrongly punished person for the wrong done to her. However, compensation is not the only form of redress the state ought to be concerned about.⁵⁰ The real failure of the expanded irrevocability argument lies in the fact that it does not take into account the complete package of practical requirements that bind legal systems responsible for undeserved punishments.

Before moving to the substance of that argument, I want to make a clarification. My argument is meant to be a conceptual one, in the sense that it is supposed to show that execution is necessarily irrevocable. This argument is meant to defeat Davis's claim that according to the concept of revocability, execution is not necessarily irrevocable. However, these arguments are "conceptual" in a rather loose sense. The concept of the revocation of wrongful punishment is something close to "putting things aright" or "undoing and making up for" the wrongful punishment. (The literal meaning of revocation is annulment, but as we have seen in the discussion of absolute revocability, punishment cannot be annulled.) Now, this concept does not admit of practical employment without further determination. To use an earlier example, handing a wrongly imprisoned person a bag of

nickels does not count as undoing and making up for the punishment. So what we need is a more specific *conception* of revocation. Davis's conception is that "we do all in our power to compensate the convict (and what we do is far from negligible) or that we do enough so that he would say, 'that would make it worth it.'"⁵¹ My argument is this conception is incomplete, and that when we fill it out, when we specify the complete package of practical requirements involved in revocation, we discover that execution is irrevocable.

Part of the complete package of practical requirements is the requirement that the state cease the unjust treatment visited upon the wrongly punished person.⁵² This general requirement generates more specific requirements: if a paroled sex offender is found to have been wrongly punished, the state must change his legal status from "guilty" to "innocent," remove his monitoring bracelet, delete his name from the registry of sex offenders, restore his right to vote if it has been taken away, and so on. If an incarcerated thief is found to have been wrongly punished, the state must change her legal status, restore her right to vote if it has been taken away, and let her out of jail. It is important to note that while these requirements are part of any conception of revocation, they are not part of the concept of compensation: a state *could* conceivably compensate a wrongfully incarcerated person, all the while keeping him in jail. So Davis's conception of revocation as compensation is insufficient.

It is important not only to notice the existence of these requirements, but also to see where they come from. They do not derive solely from the moral principle to which Davis appeals, the principle that we ought to make up for the wrongs that we do to others. Take, for example, the requirement to restore the wrongly punished person's legal status. Restoring the wrongly punished person's legal status is not (or not just) a matter of morality. Another important reason for restoring this status derives from the concept of a legitimate legal institution. For many political and legal philosophers, a legitimate legal institution is one that punishes only the guilty. This means that a legal institution ought to correct any mistaken determination of guilt. If a legal institution does not make such a correction, and refuses to declare a wrongly convicted person innocent, it undermines its own legitimacy. So there is a requirement to declare the wrongly convicted person innocent, at least for those officials who think the law ought to be legitimate. In other words, what is at stake in revocation is not just the status of the wrongly punished person—as Davis would have it—but also the status of the institution that issued the punishment.

Obviously, the requirement to restore legal status provides no help to the abolitionist. This is because the requirement can be met after the wrongly punished person has died. But there is another requirement belonging to the overall package that *cannot* be fulfilled in the case of wrongful executions: the requirement to return to the wrongly punished person control over her life. It is this requirement that enables a revised irrevocability argument, the success of which does not depend on the outcome of the debate over posthumous compensation. The argument goes as follows: the revocation of wrongful punishment requires the

return of control over one's life, and this requirement cannot be met in the case of execution.

What I mean by control over one's life is metaphysically modest. Someone has control over her life to the extent that she is free, in at least a compatibilist sense, to consciously direct her actions and affect her environment so as to achieve her aims and desires. To be sure, control comes only in degrees. Complete control over one's life is impossible: we can never accomplish everything that is important to us. And as long as we have a sufficiently capacious set of desires, we do not completely lack the ability to guide our lives in important ways.

Control over one's life is an intrinsic good, insofar as people give meaning to their existence by accomplishing plans they have developed in accordance with a substantive conception of the good. When someone is free from external interference and able to express her will in the world, she can live a properly human life. Control over one's life is also a basic good: it is good for someone regardless of whatever else she thinks is good for her. After all, even devotees of Dionysus will need the means to achieve sufficient levels of intoxication, and to recover thereafter.

Because control over one's life is a basic, intrinsic good, to undo punishment or to set things aright is to return to the wrongly punished person control over her life. It is a principle of any reasonable political philosophy and sound common sense that states should not deprive citizens of such goods without a very good reason. It follows that when the state deprives someone of such goods without any reason or for the wrong reasons, as is the case with wrongful punishment, it should give them back immediately. Again, this is not just a point about how the wrongly punished person ought to be treated. As is the case with the requirement to restore the wrongly punished person's legal status, the requirement to return control of the wrongly punished person's life is a matter of ensuring the legitimacy of legal institutions. For many non-consequentialist legal theorists, and for many mainstream liberal political theorists, one of the main reasons, if not the main reason, to have legal institutions is to ensure that each citizen has the maximum amount of control over his or her life compatible with other citizens' control over their own lives.⁵³ From this broad conception of law, one can extract an account of the purpose of legal coercion: legal coercion is meant to promote people's control over their lives. By extension, one can construct an account of the legitimacy of legal coercion: legal coercion is legitimate so long as it promotes people's ability to control their lives. (Of course, legal coercion in the form of punishment need not secure the *wrongdoer's* control over her life. Punishment abrogates that control in order to ensure the freedom of law-abiding citizens. So the fact that punishment infringes on the *wrongdoer's* control over her life cannot be turned into an argument against punishment.)

This is a very general account of the purpose of legal institutions and the legitimacy of legal coercion, but it is meant to be so: I want it to reflect the variety of more specific, and more developed, theories of legal legitimacy that give an important place to the notion of control over one's life, as well as its more robust relative, autonomy.⁵⁴ For example, this account should be able to incorporate a

Nozickian libertarianism that interprets control as sovereignty over one's personal moral sphere, as well as a Rawlsian egalitarianism that understands control as a positive capacity to accomplish one's ends regardless of one's draw in the natural lottery. It should also be noted that the concept of control is itself quite general, and more specific conceptions of control will feature in different domains of the legal system (criminal law, constitutional law, administrative law, and so on). Finally, some of these domains will have other conditions for legitimacy. For example, it seems right to say that the criminal law needs to have fair procedures in order to be legitimate. So the requirement to promote control should be understood as stating a necessary but not sufficient criterion for legal legitimacy.

We can take a step back on the path of the argument for irrevocability by noting that depriving innocent people of control over their lives undermines the goods that legitimate legal institutions are supposed to promote. And insofar as the unwarranted deprivation of control undermines the goods that law is supposed to promote, there is a kind of institutional irrationality in wrongly imprisoning or wrongly executing people, an irrationality that renders the punishment illegitimate so long as it persists.⁵⁵ So if legal institutions are to exercise legitimate coercion, they must return control to the wrongly punished person. It is due to this point about legitimacy that a satisfactory conception of revocation includes the requirement of returning control: setting things aright means undoing an illegitimate punishment by returning control to the wrongly punished person. Again, the connection between the concept of revocation and the concept of legitimacy is that revocation is given content both from basic moral principles and from basic principles of legal legitimacy. Since one of the basic requirements of legal legitimacy is that states promote citizens' control over their lives, and since control is abrogated in wrongful punishment, revocation requires the return of that control.

Now, it is obvious that while the state can return control to the wrongly imprisoned, it *cannot* return control to the wrongfully executed, at least until technological advances enable us to raise the dead. It is this point that underlies my irrevocability argument. Even if we admit, *arguendo*, that the wrongfully executed person can be compensated, he cannot be given back control over his life. So if the state wrongly executes someone, it renders itself incapable of meeting one of the most important requirements incumbent upon it; the state renders itself incapable of doing what it ought to do for the executed person. Since revocation involves meeting this requirement, execution is irrevocable.

Davis would probably not be impressed by the argument just presented. He exhorts his readers not to make "too much of the mere fact of walking about, doing day labor, or falling asleep in a dingy room just because there are no bars or guards."⁵⁶ (This bit about the "dingy room" suggests that Davis is imagining someone imprisoned for a long enough time that their friend and family relationships have deteriorated, and their skills have atrophied to the point where they must resort to low-paying jobs.) Davis's claim here is that merely letting the wrongly punished out of prison does not always sufficiently pay them back for the wrong done to them.⁵⁷ With this I certainly agree. But his larger point is that what

does compensate them is the advancement of their interests, and he thinks that the interests of the wrongfully executed can be advanced just as well as those of the wrongfully imprisoned. So, he concludes, the death penalty is no less irrevocable than imprisonment. The fatal flaw in this argument is that it ignores the value of control over one's life. It is the fact that return of control is an essential part of revocation that renders the death penalty irrevocable.

I would like to close with two comments. First, the reader has probably noticed that the normative force of the requirements under discussion depends on the normative pull of the idea of legal legitimacy. So if you don't care about legal legitimacy, you will be skeptical of the stringency of these requirements. While this might seem to constrain the reach of my argument, I think it is safe to assume that most people who are concerned about revocability and the moral principles that underwrite its importance will also find persuasive the claim that law ought to be legitimate.⁵⁸

Second, as I mentioned at the beginning of this paper, the irrevocability of execution plays a crucial role in an argument for the abolition of capital punishment. Although I am not defending that argument here, I want to conclude by making some remarks about one of its key premises. I have stated the premise in question as "imprisonment is revocable." Imprisonment is clearly revocable under any conception of revocability discussed in this paper, other than the "absolute revocability" rejected by both Davis and myself. Some may want to reformulate this premise to state that *all* punishments other than execution are irrevocable, thereby asserting a unique status for execution. However, I do not think this view is correct. There are punishments other than execution that irrevocably destroy one's ability to control one's life. Someone who undergoes extended periods of solitary confinement interrupted only by torture and a minimum of sustenance may suffer so much psychological damage that he can no longer live his life in any self-directed way. For example, a forensic psychologist said after examining Jose Padilla for twenty-two hours that what happened to him was "essentially the destruction of a human being's mind."⁵⁹ But the existence of other irrevocable punishments should not alarm abolitionists. While this means that execution is not the only punishment that must be abolished, the list of other irrevocable punishments is surely rather short. (And if the argument from irrevocability manages to show that the U.S. government should not have done what it did to Jose Padilla, this should count in the argument's favor.) The conclusion to draw is that the abolitionist argument from irrevocability does not slide into an argument for the wholesale abolition of punishment, and ordinary imprisonment remains a legitimate tool of the state.

Notes

¹This is an important argument for various reasons that I discuss elsewhere. Notably, its success is independent of the debate over the morality of execution. While the first premise contains a normative element, it is a relatively uncontroversial one, at least insofar as one believes that legal

institutions ought to punish only the guilty. Furthermore, the premise in question gets its normative force from principles of *legal* justice.

²To say “punishment X is irrevocable” is shorthand for saying that the harm or loss incurred by the punished person is irrevocable. The *practice* of a specific kind of punishment is always revocable, so the death penalty is clearly revocable in the sense that U.S. legal institutions could decide to forbid it.

³This essay can also be found in Michael Davis, *Justice in the Shadow of Death: Rethinking Capital and Lesser Punishments* (Lanham, MD: Rowman & Littlefield, 1996).

⁴Davis, “Is the Death Penalty Irrevocable?,” *Social Theory and Practice* 10, no. 2 (1984): 143–56, 145.

⁵For an American argument for wholesale abolition, see Angela Davis, *Are Prisons Obsolete?* (Open Media, 2003). Total abolitionists are found somewhat more readily in Europe. For a good sampling, see *Contemporary Crises: Law, Crime, and Social Policy* 10, no. 1 (1986), as well as Nils Christie, *Crime Control as Industry: Towards Gulags, Western Style*, 3rd ed. (London: Routledge, 2000).

⁶Davis, “Is the Death Penalty Irrevocable?,” 150.

⁷*Ibid.*, 149.

⁸Of course the two days spent wrongfully imprisoned might carry the risk of losing something worth more than one hundred thousand dollars, such as finding the love of one’s life. In *this* case, imprisonment might not be substantially revocable. But it does not follow that imprisonment is, in principle, substantially irrevocable.

⁹Davis, “Is the Death Penalty Irrevocable?,” 146.

¹⁰*Ibid.*

¹¹Aristotle, *Nicomachean Ethics*, bk I, ch xi. This intuition also finds expression in practices of posthumous punishment. The first-century Roman emperor Domitian was seen by his countrymen as a spectacular failure. As a result, the Senate destroyed all the records of his reign, and effaced inscriptions that carried his name (Valerie Hope, “The City of Rome: Capital and Symbol,” in *Experiencing Rome: Culture, Identity and Power in the Roman Empire*, ed. Janet Huskinson [London: Routledge, 2000], 82). Both the Catholic Church and the Church of England posthumously punished heretics by disinterring and burning them (Christine Quigley, *The Corpse: A History* [Jefferson, NC: McFarland & Company, 1996], 281).

¹²Davis, “Is the Death Penalty Irrevocable?,” 146.

¹³More objections can be raised. For a comprehensive list, see Stephen Luper, “Death,” retrieved July 26, 2011, from <http://plato.stanford.edu/archives/sum2009/entries/death/>.

¹⁴For more on this argument, see *ibid.*

¹⁵George Pitcher, “The Misfortunes of the Dead,” in *The Metaphysics of Death*, ed. John Martin Fischer (Stanford, CA: Stanford University Press, 1993), 159–68; Joel Feinberg, “Harm to Others,” in *The Metaphysics of Death*, ed. John Martin Fischer (Stanford, CA: Stanford University Press, 1993), 171–90.

¹⁶Pitcher, “The Misfortunes of the Dead,” 160.

¹⁷James Stacey Taylor, “Harming the Dead,” *Journal of Philosophical Research* 33 (2008): 185–202, 185.

¹⁸Pitcher discuss an example in which a son promises his dying father that he will bury him in the family plot, but sells his corpse to medical researchers instead. The moral issues in Pitcher’s example are more complex, insofar as promises are involved, and so his example does not make the case as clearly as the one I have chosen.

¹⁹Pitcher, “The Misfortunes of the Dead,” 161.

²⁰*Ibid.*, 162.

²¹*Ibid.*, 164.

²²A theory of well-being is a theory of what makes our lives good for us. I am here using the division of theories of well-being standard in the Anglo-American literature (Roger Crisp, “Well-Being,” retrieved July 26, 2011 from <http://plato.stanford.edu/archives/win2008/entries/well-being/>). Mental state theories of well-being hold that well-being is a matter of having the right mental

states, hedonism being the most common mental state theory. Preference (or desire) theories hold that well-being is a matter of the satisfaction of one's preferences. Objective list theories hold that well-being consists in a list of intrinsically valuable things such as friendship or autonomy.

²³ Davis, "Is the Death Penalty Irrevocable?," 146.

²⁴ Pitcher, "The Misfortunes of the Dead," 165.

²⁵ *Ibid.*, 168.

²⁶ Feinberg, "Harm to Others," 185. Feinberg provides additional support for Pitcher's account of posthumous harm by means of a comparison between cases in which a person's interests are thwarted during his lifetime but unbeknownst to him, and cases in which a person's interests are thwarted after his death (Feinberg, "Harm to Others," 181–82). For example, imagine that the arson occurred when the philosopher was alive, but taking a few years away from philosophy to sail around the world. Feinberg thinks we would find it obvious that the philosopher was harmed by the destruction of his papers, even though he was unaware of the arson (Feinberg uses a different example, but it is similar in all important respects). If we can be harmed by the unknown thwarting of our interests, we can also be harmed by the posthumous thwarting of our interests. In both cases, the same interests are harmed to the same extent, and the philosopher is harmed unbeknownst to him. The only difference is in the reason for his ignorance. But this difference is irrelevant to whether he is harmed or not, and so we should accept the existence of posthumous harm (Feinberg, "Harm to Others," 182). Feinberg acknowledges that in the posthumous arson case, there might seem to be no one subject to the harm, and he responds to this objection by appealing to Pitcher's notion of *antemortem* persons.

²⁷ Feinberg calls these "surviving interests": "a person's surviving interests are the ones that we identify by naming *him*, the person whose interests they were. He is of course at this moment dead, but that does not prevent us from referring now, in the present tense, to his interests, if they are still capable of being blocked or fulfilled, just as we refer to his outstanding debts or claims, if they are still capable of being paid" (Feinberg, "Harm to Others," 176).

²⁸ For an overview of the objections to the posthumous harm thesis, as well as a defense of the thesis against those objections, see Taylor, "Harming the Dead."

²⁹ James Stacey Taylor, "The Myth of Posthumous Harm," *American Philosophical Quarterly* 42, no. 4 (2005): 311–322, 314.

³⁰ *Ibid.*, 315.

³¹ *Ibid.*

³² Walter Glannon, "Persons, Lives, and Posthumous Harms," *Journal of Social Philosophy* 32, no. 2 (2001): 127–42, 132.

³³ Glannon, following Feldman, distinguishes between intrinsic harm, which is harm we experience, and extrinsic harm. Extrinsic harmful events are those whose occurrence makes us worse off than we would otherwise be (*ibid.*, 127). It is a bit odd that Glannon adopts these terms, since he must think that extrinsic harm is not really harm at all.

³⁴ *Ibid.*, 134.

³⁵ *Ibid.*, 137.

³⁶ *Ibid.*, 138.

³⁷ *Ibid.*

³⁸ *Ibid.*, 134.

³⁹ It should be noted that Taylor's objections do not rely only on a mental-state theory of well-being. He also develops an argument on the basis of the principle of parsimony: "if one can account for one's intuitions without having to develop a sophisticated philosophical framework to do so, then one should accept the simpler account that is available to one" (Taylor, "The Myth of Posthumous Harm," 315). In short, Taylor contends that the intuitions central to the Pitcher–Feinberg account can be explained in ways that do not require us to posit a complicated and controversial theory of posthumous harm, and that therefore we ought not to endorse such a theory. I think this strategy fails on two counts. First, Taylor never provides an alternative explanation for the intuitions pumped by Pitcher's "father harmed by his son's unknown death" example ("The Myth of

Posthumous Harm,” 317). Taylor simply denies that this is a problem; he denies that the father is harmed. But for this denial to be anything more than an assertion, it must rely on a mental-state theory of well-being. Second, while Taylor does provide an alternative account of the intuitions pumped by Pitcher’s “philosopher harmed by the defeat of his project” example, this attempt falls short insofar as it accounts only for the wrong done to the philosopher, not for the harm. I want to thank an anonymous reviewer for reminding me of the importance of Taylor’s use of the principle of parsimony.

- ⁴⁰Shelly Kagan, “Me and My Life,” *Proceedings of the Aristotelian Society* 94 (1994), 309–24.
- ⁴¹Glannon, “Persons, Lives, and Posthumous Harms,” 128.
- ⁴²Kagan, “Me and My Life,” 316.
- ⁴³*Ibid.*, 319–20.
- ⁴⁴For more on this, see Glannon, “Persons, Lives, and Posthumous Harms,” 128–30; James Rachels, *The End of Life: Euthanasia and Morality* (Oxford: Oxford University Press, 1986), 24–27. For objections to Kagan’s use of this distinction, see Taylor, “Harming the Dead,” 196–98. Glannon agrees with Kagan’s distinction, and one of his main criticisms of the proponents of posthumous harm is that they confuse the two metaphysical types. He thinks that all of the intuitions marshaled by proponents of posthumous harm can be shoved into the category of “life.” Posthumous events, he contends, can make a person’s *life* worse off, but, for reasons canvassed above, they cannot make that *person* worse off (Glannon, “Persons, Lives, and Posthumous Harms,” 128).
- ⁴⁵Kagan, “Me and My Life,” 320.
- ⁴⁶Davis, “Is the Death Penalty Irrevocable?,” 151.
- ⁴⁷*Ibid.*, 146.
- ⁴⁸It may be controversial to claim that people *often* value their projects over their well-being. While I believe this is true, I will not argue for it here.
- ⁴⁹This means that the state cannot compensate wrongly executed people whose only goal in life is to increase their well-being. However, as I have stressed above, the argument against irrevocability needs to show only that *some* wrongly executed people can be compensated.
- ⁵⁰More governments *ought* to be concerned about compensation. According to the Innocence Project, only twenty-seven states, the District of Columbia, and the federal government have compensation statutes. In the other twenty-three states, wrongfully punished people must lobby for a private compensation bill (“Compensating the Wrongly Convicted,” The Innocence Project, retrieved July 26, 2011 from http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php). I want to thank Jill Graper-Hernandez for bringing this point to my attention.
- ⁵¹Davis, “Is the Death Penalty Irrevocable?,” 150. Davis himself does make use of the concept/conception distinction.
- ⁵²Indeed, what is *most* important in situations of unjust punishment is that the state cease perpetuating injustice on the innocent person. Dave Eggers’s *Zeitoun* movingly illustrates this point.
- ⁵³Many legal positivists have rejected the idea that law has a point or purpose, or at least any purpose more substantive than merely guiding conduct. Engaging in the debate between legal positivists and natural lawyers is beyond the scope of this paper, but suffice it to say that in recent years well-respected positivists have conceded that it makes philosophical sense to inquire into law’s purpose. For example, Leslie Green writes that “evaluative argument is . . . central to the philosophy of law more generally. No legal philosopher can be *only* a legal positivist” (Leslie Green, “Legal Positivism,” retrieved July 26, 2011 from <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>).
- ⁵⁴Immanuel Kant works out such a view in the *Rechtslehre* of the *Metaphysics of Morals*. Rather surprisingly, H.L.A. Hart adopts this view of the point of law in his later work: “whatever other purposes laws may serve, they must, to be acceptable to any rational person, enable men to live and organize their lives for the more efficient pursuit of their aims” (H. L. A. Hart, *Essays in Jurisprudence and Philosophy* [Oxford: Oxford University Press, 1983], 113). While John Finnis sees the ultimate purpose of law as something much more substantive, he often states one of the purposes of law is to enable people to pursue their aims in an efficient manner; see for example

John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), 268–69. Dworkin claims that legality is the point of law (Ronald Dworkin, *Justice in Robes* [Cambridge, MA: Belknap, 2006], 169–71), but one of the reasons why legality is important is that it enables legal subjects to plan their lives around law’s commands. For Rawls, coordination and efficiency are two of the social problems to which law is an answer (John Rawls, *A Theory of Justice*, Revised Ed. [Cambridge, MA: Harvard University Press, 1999], 5); furthermore, primary social goods are those goods that enable people to have control over their lives (Rawls, *A Theory of Justice*, 54); finally, Rawls’s main problem with social inequality is that it imposes undeserved hindrances on people’s ability to live their life as they see fit.

⁵⁵The determination of legitimacy gets more complicated when legal officials are unaware that a particular punishment has been wrongfully applied. An answer to the question would depend in part on strength of the state’s procedural safeguards, as well as appellate courts’ enforcement of those safeguards. The stronger the safeguards, the less the wrongful punishment would seem to undermine the law’s legitimacy.

⁵⁶Davis, “Is the Death Penalty Irrevocable?” 153.

⁵⁷One might press Davis’s point even further to argue that in some cases, regaining control over one’s life is not just worthless, but worse than remaining in prison. Someone who has spent most of their life in prison and is then thrown on the streets may find their freedom an unbearable burden, and may view prison as a desirable place to be (think of Red in *Shawshank Redemption*). Such cases surely exist; they are probably even common. But I would respond that if the person in question has been wrongly imprisoned, the state has a burden it does not have with respect to other inmates. The wrongly punished person’s compensation should include therapy, job training, and whatever is required to put the person aright. It might also be argued that it is *easier* to control one’s life while one is in prison. In fact, some political prisoners in Soviet labor camps were hesitant to be released because they found it easier to adhere to their political values within the camps (Flint Schier, “The Kantian Gulag,” in *Virtue and Taste: Essays on Politics, Ethics and Aesthetics*, ed. Dudley Knowles and John Skorupski [Oxford: Blackwell, 1993], 2). Since my argument applies only to states in which there is an attempt at some liberal form of legitimacy, no such tyranny would confront the incarcerated.

⁵⁸I noted above that the irrevocability argument will be persuasive only to non-consequentialists. This, too, should not be construed as a weakness, insofar as consequentialism is not overly concerned with revocability in the first place. One can imagine cases where considerations of utility demand that the state respond to wrongful punishment by hiding the injustice rather than compensating for it. And insofar as consequentialism would be concerned with revocability, revocability would feature only as one consideration weighed against others. In short, the targets of revocability arguments are non-consequentialists.

⁵⁹This quotation comes from an interview with *Democracy Now* “An Inside Look at How U.S. Interrogators Destroyed the Mind of Jose Padilla,” *Democracy Now: The War and Peace Report*, retrieved April 25, 2010 from http://www.democracynow.org/2007/8/16/exclusive_an_inside_look_at_how. Dr. Hegarty’s affidavit can be found at <http://cryptome.org/padilla/padilla-695-3.pdf> (last accessed April 25, 2010). Although Padilla is a U.S. citizen, President Bush designated him as an enemy combatant, leaving him bereft of constitutional protection. Padilla was incarcerated for almost two years before he was allowed to see anyone other than prison staff and his interrogators. Eventually the United States handed him over to the federal court system, where he was convicted of criminal conspiracy. During Dr. Hegarty’s attempt to determine his mental fitness, Padilla admitted to being subjected to sleep deprivation, extreme temperatures, and something he calls “the cage,” but the full extent of his torture may never be known, as he adamantly refused to say anything more about the interrogation methods used on him.