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# Cruelty and Original Intent: A Socratic Dialogue

KENT GREENFIELD\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

was widely practiced in the United States at the time of the ratification of the Constitution.<sup>13</sup>

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

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

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

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

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

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

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

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

16. See *id.*

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

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

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

*Euthyphro:* No doubt that is quite true, Socrates.

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

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

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

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

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

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

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

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

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

*Euthyphro*: So there are.

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

*Euthyphro*: Yes, I do.

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

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

*Socrates*: That is how I want it.

*Euthyphro*: Very well, then: as a constitutional matter, what was thought by the Framers<sup>18</sup> to be cruel is cruel, and what was thought by them not to be cruel is not cruel.

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

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

*Euthyphro:* Certainly.

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

*Euthyphro:* Yes, it is.

*Socrates:* And the definition seems satisfactory?

*Euthyphro:* I think so, Socrates.

*Socrates:* Do you think that the Framers were all of one mind as to what was cruel and what was not cruel?<sup>19</sup>

*Euthyphro:* I think it unlikely.

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

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

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

*Euthyphro:* Apparently.

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

*Euthyphro:* Perhaps so.

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

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

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

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

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

*Euthyphro:* What is there against it, Socrates?

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

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

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

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

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

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

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



*Euthyphro*: Yes, I think I understand.

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

*Euthyphro*: No, the reason is just that.

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

*Euthyphro*: Certainly.

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

*Euthyphro*: Yes, I do.

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

*Euthyphro*: Certainly.

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

*Euthyphro*: Yes, that must be so.

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

*Euthyphro*: Yes.

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

*Euthyphro*: No, because they are cruel.

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

*Euthyphro:* It seems so.

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

*Euthyphro:* Of course.

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

*Euthyphro:* How do you make that out, Socrates?

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

*Euthyphro:* Yes.

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

*Euthyphro:* That is true.

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

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

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