

Retribution, Punishment, and Death*

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The justifications of punishment that most thoughtful people accept are insufficient to justify capital punishment. Utilitarian theorists are incorrect in arguing that crime control is the primary justification for punishment and that retribution applies only to limit allocation of punishment to criminal offenders. Instead, individual desert is the primary justification; utilitarian concerns provide secondary limits on the infliction of punishment and cannot justify capital punishment. Although some retributive theorists favor capital punishment because the worst murderers deserve to die in retaliation for killing others, retribution requires that the offender experience and even accept punishment as her just deserts. Because of its unique finality, death cannot be experienced in that way. Thus, neither retributive nor utilitarian theories can justify the imposition of capital punishment.

INTRODUCTION

One persistent argument against capital punishment is that death, unlike other punishments, is irrevocable; we can never make amends to the individuals we kill in the name of justice. Some commentators link this argument with the assertion that due process, as guaranteed either by the fourteenth amendment or by notions of justice and fair play, requires progressively greater safeguards as the contemplated punishment ascends the scale of severity, culminating in death.¹ Thus, because death is the severest possible punishment and because sentencing mistakes cannot be rectified, the process due is substantially greater than

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¹ For a recent example of unquestioning acceptance of the need for greater due process in capital cases, see generally Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984) [hereafter Special Project]. For a thoughtful discussion of the issue, see Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). For an argument that this view is not inevitably correct, see *infra* notes 151-59 and accompanying text.

that preceding any other form of punishment. Carried to its furthest extension, the procedural protection required is so great that a society of fallible institutions and fallible human beings cannot provide it. Therefore, the only proper moral and constitutional recourse is the abolition of capital punishment.²

Although this argument is persuasive and important, it is flawed because it evades the central issue: whether the justifications of criminal punishment that are generally acceptable to most thoughtful people also specifically justify punishment by death. This Article suggests that society should take a particular pluralistic view of punishment and its justifications and that, from this perspective, capital punishment cannot be justified.³ This Article restructures the irrevocability argument to demonstrate that death is not morally acceptable as a means of inflicting sanctions upon even the most culpable killers and argues that capital punishment cannot be justified by any aim of punishment other than retribution. It concludes that, because of death's finality, even retribution cannot justify capital punishment.

Discussion of capital punishment inevitably occurs in a particular social, political, legal, and moral context. This Article relies on several assumptions derived from an assessment of this context, while rejecting other traditional foundations for the discussion. It seems correct to say that most people believe that punishment requires both definition and justification.⁴ We want to derive tentative moral answers to questions

² See, e.g., C. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 29-36 (1st ed. 1974); Satre, *The Irrationality of Capital Punishment*, 6 SW. J. PHIL., Summer 1975, at 75, 85.

³ This Article may therefore be viewed as an example of what has been called argument "by appeal to the nature of an institution." Scanlon, *Due Process*, in NOMOS XVIII: DUE PROCESS 93, 103 (J. Pennock & J. Chapman eds. 1977). For example, Scanlon says, one may argue in favor of academic freedom by appealing to the nature and purpose of academic institutions (the pursuit and teaching of truth about academic subjects). *Id.* at 103-04; cf. Atkinson, *Interpreting Retributive Claims*, 85 ETHICS 80 (1974) (Author distinguishes "between critical and conventional roles of moral principles" and explains that "[a] principle fulfills a critical role when it is appealed to as a test of proposed solutions to moral questions. In its conventional role it is merely a part of the given phenomena which help define the problem and its context.").

This Article may also fit into the category of "committed argument" rather than "detached observation," in the terminology of George Fletcher. See Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981).

⁴ In a representative democracy, which postulates the political equality of its members, an important social institution that enables some members to exert significant power over others is required to have a public rationale. Cf. Scanlon, *supra* note 3, at 102 (dominant conception of an institution must be coherent, consistent with other important social values, and be able to account for its legitimacy to the public).

about capital punishment by reference to shared standards for moral debate, though not necessarily to shared abstract moral values.⁵ This

⁵ In arguing about capital punishment, one cannot confidently cite agreement on abstract fundamentals and then proceed to compel consensus about the concrete specifics. The debate about the death penalty is analogous to the debate about abortion. One person "knows" that abortion is murder; another "knows" that it is not. The former knows that capital punishment is morally justifiable; the latter knows that it is not. A seemingly inconsistent pattern of beliefs — that those who favor abortion by individual choice of the prospective mother often also oppose capital punishment, and that those who oppose abortion by choice also favor capital punishment — is not uncommon. Thus, no simplified moral slogan, such as "reverence for life" or even "destroying a potentially valuable human life is wrong," can be readily translated into specific opinions on even the most basic moral issues. A moral proposition stated with the abstract universality that guarantees nearly universal acceptance, at least in this sensitive area of human values, tends merely to submerge genuine sharp divergences on the jaggedly factual disputes that life is forever turning up.

It could be argued, of course, that the solution to this particular dilemma is easy. An alternative dichotomy ends the inconsistency: killing "innocent" life is wrong; killing "guilty" life — or, to be more precise, taking the lives of those whom the state has determined, through appropriate process, to be sufficiently morally culpable not to deserve to continue to live — is not only morally correct but morally necessary. *But see* Young, *What is So Wrong with Killing People?*, 54 PHIL. 515, 519-22 (1979) (formulating an account of what makes it morally wrong to kill people on certain occasions, but also contending that acceptance of his analysis does not compel any conclusion about the morality of capital punishment).

Disagreements on precise moral principle probably cannot be resolved. Ingenious attempts have been made to argue or redefine them out of existence; sometimes empirical investigation has reinforced the persuasive contention that the deep structures of our beliefs about values are more congruent than our surface disagreements indicate. Justice Marshall, reaffirming his unconditional opposition to capital punishment in 1976, predicted that "the American people, *fully informed* as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable." *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (dissenting opinion) (emphasis added); *see also* *Furman v. Georgia*, 408 U.S. 238, 360-69 (1972) (Marshall, J., concurring). Marshall's hypothesis has some empirical validity. *See* Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 141; Vidmar & Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CAN. J. CRIMINOLOGY 43 (1981); Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974) (finding that support for the death penalty decreased among research subjects after they were given relevant facts about capital punishment). *But see* Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005 (1977) (finding substantial support for capital punishment and criticizing Marshall's hypothesis as subjective and tautological).

For two discussions of the difficulty of translating abstract moral propositions into specific opinions on moral issues, see Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 45-49 (1978); Satre, *supra* note 2, at 76. If this Article focused primarily on constitutional doctrine,

principle complicates any discussion of capital punishment because we have not yet arrived at a moral consensus on capital punishment.⁶ We are not willing to accept as definitive any external, superhuman source of moral rules or moral law.⁷ We are similarly uneasy about relying on

another reason for avoiding an appeal to shared values would arise. See Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 294 n.77 (1975) (describing the Constitution as "in large part a pact of limitation — protecting minorities from precisely the shared values of majorities in the society").

For a summary and critique of various theories of judicial review in relation to their acknowledged and unacknowledged sources of values, see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

⁶ Although approximately 73% of nearly 1600 adults recently polled said they supported the death penalty, Granelli, *Justice Delayed*, 70 A.B.A.J., Jan. 1984, at 50, 51, public opinion polls cannot be accepted as evidence of moral consensus, for at least three reasons. First, the exact structure and wording of the questions can markedly affect the result. See M. WHEELER, LIES, DAMN LIES, AND STATISTICS: THE MANIPULATION OF PUBLIC OPINION IN AMERICA 7 (1976). Second, people do not necessarily tell the truth to poll takers. *Id.* at 101 (citing evidence of lies). Third, similar to Justice Marshall's contention, uninformed public opinion, informed public opinion, and public opinion based on the necessity of taking personal action (such as voting for the death penalty in a particular case) are probably three different things. Cf. Bedau, *American Attitudes Toward the Death Penalty*, in THE DEATH PENALTY IN AMERICA 68 (H. Bedau 3d ed. 1982) ("[T]here is no evidence that the two-to-one majority in favor of the death penalty for murder is also a two-to-one majority in favor of executing right now the hundreds of persons currently under death sentence.") [hereafter THE DEATH PENALTY IN AMERICA]. Finally, even a 27% dissent is significant to refute any contention that public opinion in the United States has reached a consensus on the moral appropriateness of capital punishment per se. *But cf.* L.A. Times, Apr. 4, 1985, Pt. 1, at 3, col. 5 (83% of those responding to California Poll favor the death penalty, the highest percentage since the pollster began asking the question in 1956).

⁷ This Article takes a philosophical stance of ethical relativism, recognizing that human societies have been unable to identify objective conditions for a true answer to moral questions. See Fletcher, *supra* note 3, at 974 ("No one has the authority to declare what is historically true, morally right, beautiful, or even efficient. These are matters that admit only of evidence and reasoned debate."). Fletcher distinguishes between declarations, or "acts that have force by virtue of the authority of the declarant," and assertions, or claims that derive their force from assent in the course of reasonable debate. *Id.* at 973-74.

Whether they would stress the relative constancy or the constant relativity of majoritarian or authoritative morality in various human societies, ethical relativists concede the absence of any transcendent law that can prescribe single, simple, direct moral rules. No such law can clearly identify fundamental social values and individual rights and either resolve all specific conflicts between these rights and values or create enduring rules for choosing among them when they do conflict. If a coherent system of natural or divine law does exist, there is perhaps no more to be said about capital punishment; we will have either to await revelation or to accept it as having already occurred.

the United States Constitution as a final repository of moral values,⁸ although we recognize its legal and political authority and its foundation upon moral principle.⁹ Because of this ambivalence, and for other reasons,¹⁰ neither the discussion of punishment nor that of capital pun-

Our reluctance to do so emerges in our continuing secular political and philosophical disputes over the contents of a true morality and in the unabated debate over the acceptability of punishment by death.

⁸ The United States Supreme Court has provided confusing, conflicting, and shifting accounts of the eighth amendment in relation to capital punishment. *See infra* note 10. The death penalty is now legal in the United States, and has been for all but four years of our history. The gap persisted from June 1972, when the Supreme Court declared that the penalty as then inflicted was unconstitutional, in *Furman v. Georgia*, 408 U.S. 238 (1972), until July 1976, when the Court approved some but not all state legislative attempts to restore death to the acceptable array of authorized punishments, in *Gregg v. Georgia*, 428 U.S. 153 (1976). As the difficulty in deciphering federal constitutional commands may suggest, neither the Constitution as written, nor the Constitution as interpreted, is an ultimate source of moral values. Constitutional revision (in both senses of the word, change and reseeing) has been almost completely silent on the ultimate moral question: whether it is just for a democratic society to consign the worst of its criminals to death. *See Bedau, The Death Penalty: Social Policy and Social Justice*, 1977 ARIZ. ST. L.J. 767, 768-69 (although moral arguments about the death penalty are often phrased in constitutional terms, the set of moral principles in the Constitution is not coterminous with "what philosophers would regard as sound principles of social justice"). Appeal to the Constitution is not necessarily a political error; within our system of government, the Constitution and its interpretations by the judiciary clearly are the political authority of last resort for those who have failed to persuade the legislature of their views.

⁹ *See* J. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 223 (1979):

[I]f one can mount a good argument that to treat a person in a certain way is gravely unjust or would violate some basic human right of his, this is also and necessarily a good argument that it is unconstitutional to treat him in this way. The Constitution is a document of moral principle and is in this sense anti-democratic.

See also Tribe, *supra* note 5, at 293 (contending that the Constitution is most plausibly read "as a mandate for a process that seeks to incorporate evolving visions of law and society into constitutional principle"); *id.* at 294 n.77 (suggesting that "some constitutional provisions such as the prohibition against cruel and unusual punishments may make little sense other than as mandates for the reflection in the fabric of legal institutions of evolving moral and social ideas").

¹⁰ Much philosophical speculation about punishment by death has foundered on the rocks of specific constitutional interpretation. For example, Californians were subjected for nearly a decade to a morally unilluminating debate over whether the state constitution's prohibition of "cruel or unusual" punishments, CAL. CONST. art. I, § 17 ("Cruel or unusual punishment may not be inflicted or excessive fines imposed.") (emphasis added), was to be read as a mere replication of the federal constitutional ban on "cruel and unusual" punishments, U.S. CONST. amend. VIII (emphasis added), or whether the disjunctive connection allowed judges greater latitude for striking down unduly

harsh or bizarre punishments. See *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972); *cf.* *District Attorney v. Watson*, 381 Mass. 648, 411 N.E.2d 1274 (1980) (death penalty held unconstitutional under similarly disjunctive prohibition contained in state constitution).

The United States Supreme Court's inability to provide consistent constitutional limitations on the death penalty is illustrated by a short history of its modern decisions. In *McGautha v. California*, 402 U.S. 183 (1971), the Court decided that the fourteenth amendment permits juries to exercise unfettered discretion in imposing the death penalty. One year later, in *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), the Court, writing nine separate opinions, apparently determined that the eighth amendment forbade such discretion, thereby implicitly overruling *McGautha*. See Special Project, *supra* note 1, at 1146. The confusion engendered by the different rationales propounded in *Furman* led state legislatures to adopt two conflicting approaches to restoration of the death penalty: either providing juries with guided discretion or refusing to allow them any discretion at all by making capital sentences mandatory in certain cases. *Id.* at 1147. Four years later the Court ruled that the death penalty does not *per se* violate the eighth and fourteenth amendments, *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), and upheld statutory schemes that offered guidelines for juries to follow in capital cases. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg*, 428 U.S. at 153. At the same time, the Court determined that mandatory death sentences, even for first-degree murder, violate the eighth and fourteenth amendments. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

The modern statutory approach to capital punishment identifies "aggravating" and "mitigating" factors that must be considered by the sentencing authority in deciding whether the state should kill any particular killer. See, e.g., CAL. PENAL CODE §§ 190.2-190.5 (West Supp. 1985); MODEL PENAL CODE § 201.6 (1980); *id.* 201.6 (Proposed Official Draft, 1962); *McGautha v. California*, 402 U.S. 183, 202-03, 205-06 (1971) (citing the 1959 tentative draft); *id.* at 222-25 (appendix) (providing the 1962 revision in full). The *Gregg* set of cases seemed to decide that the eighth and fourteenth amendments require reasonable fairness and consistency in the imposition of the death penalty. See also *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); Special Project, *supra* note 1, at 1137. However, later cases have considerably blurred the picture. As early as 1978, the Court undercut its allegiance to guided discretion by ruling that Ohio could not foreclose juries from considering any mitigating circumstances that the defense might choose to offer. *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); see also *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Later cases also have diluted any implied requirement that sentencing authorities strictly interpret statutory aggravating circumstances that permit the imposition of death. In *California v. Ramos*, 103 S. Ct. 3446, 3456 (1983), the Supreme Court recently held that if at least one statutory aggravating circumstance is found, the jury is then "free to consider a myriad of factors to determine whether death is the appropriate punishment." The Court also held that a jury instruction that life sentences without parole may be commuted to permit parole does not violate any constitutional guarantee. See also *Barclay v. Florida*, 103 S. Ct. 3418 (1983) (trial judge may reject jury recommendation of life imprisonment and impose death penalty on the basis of personal experiences); *Zant v. Stephens*, 103 S. Ct. 2733 (1983) (death sentence is constitutional even though jury relied upon a constitutionally impermissible aggravating circumstance as well as two constitutionally permis-

ishment will be phrased in constitutional terms.¹¹ Part I constructs a general theory of criminal punishment that describes the nature of punishment, examines *prima facie* justifications for its role in the criminal justice system, and argues that even though crime control may be a primary purpose of punishment, only retribution can ultimately justify punishment. Part II describes possible justifications for capital punishment and argues that capital punishment cannot be justified according to the *prima facie* case, because death conflicts with the goals of retributive punishment.¹²

sible ones in voting for death). *But see* *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) (death sentence held unconstitutional because prosecutor encouraged jury to believe that appellate court was ultimately responsible for determining appropriateness of executing defendant).

In *Pulley v. Harris*, 104 S. Ct. 871 (1984), the Court abandoned its earlier suggestions that the eighth and fourteenth amendments require appellate certification that similarly situated capital defendants have usually also been put to death before any particular defendant may be executed, *see, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 195, 204-06 (1976) (plurality opinion), by ruling that the amendments do not compel the states to provide comparative "proportionality review" of death sentences. *Cf. Barefoot v. Estelle*, 103 S. Ct. 3383 (1983) (permitting federal courts of appeals to use summary procedures for federal habeas corpus in capital cases because delay impedes the allegedly ameliorative social effects of capital punishment).

¹¹ In rejecting shared moral values, transcendent law, and the Constitution as final sources of moral wisdom, this Article suggests that disagreement about capital punishment evidences disagreement about the nature, meaning, and even the existence of these sources. This connection between beliefs may be empirically verifiable although it is, of course, not logically compelled. It is conceivable that as a nation we might be able to reach consensus on the nature, meaning, and consistency of all three sources, holding as a group that the Constitution, shared moral values, and transcendent law all require the continuance or the abolition of the death penalty. The question might nonetheless be open: our consensual interpretation of all three sources might be wrong in some sense — inaccurate, unprincipled, subversive, or archaic. It might also be possible to argue that none of these sources, even if they are all consistent, can provide an authoritative answer to the question whether to punish by death, contending instead that each potential situation in which the death penalty might be appropriate must be resolved on its own facts.

¹² The general theory of punishment that this Article describes is pluralistic and intuitionist rather than single-minded or logically impelled; neither pure utilitarians nor pure retributivists (much less strict logicians) should expect to be satisfied with it. For another pluralistic approach, see H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-70 (1968). *But see* Hospers, *Punishment, Protection, and Retaliation*, in *JUSTICE AND PUNISHMENT* 26-28, 31-35 (J. Cederblom & W. Blizek ed. 1977) (arguing that pluralistic theories of punishment are incoherent because, when applied to the same offense, different justifications will often support different results: the punishment someone "deserves" may differ from that which will best protect society by deterring others, and both may differ from that which is most likely to rehabilitate the

I. A GENERAL THEORY OF PUNISHMENT

A. A Definition of Punishment

To determine whether capital punishment is legitimate and justifiable, it is necessary first to define punishment and its relationship to due process. At the outset, the legal notion of punishment must be distinguished from more expansive usages of the term. As H.L.A. Hart has noted, there are secondary, substandard cases of punishment that occur outside the formal legal system.¹³ There are also tertiary cases, in which the term "punishment" indicates retaliatory sanctions that occur outside any legal system and are inflicted by those who seek authority or legitimacy through using the term "punishment."¹⁴ This Article is concerned only with criminal punishment within the formal legal system, consisting of painful or other unpleasant consequences carried out by authorities within that system and intentionally inflicted upon an offender because of her voluntary offense against the positive criminal law.¹⁵ The definition of punishment used in this Article requires the

offender) [hereafter JUSTICE AND PUNISHMENT]; White, *Making Sense of the Criminal Law*, 50 U. COLO. L. REV. 1, 5 (1978) (criticizing most discussions of criminal punishment as internally inconsistent).

The term "pluralistic," as used in this Article, refers to the philosophical theory that reality may have several true explanations. In this view, social institutions are generally the result of complex and multiple causes, and "different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment." See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3, 10 (1968). The term "utilitarianism" refers to the doctrine that the value of social institutions is determined by their usefulness in furthering the interests of society. Generally, utilitarians would like to produce the greatest happiness in the greatest number of people. See Rawls, *Rule Utilitarianism*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 82, 84-85 (G. Ezorsky ed. 1972) [hereafter PHILOSOPHICAL PERSPECTIVES].

¹³ H.L.A. HART, *supra* note 12, at 5 (1968). Substandard cases include punishment within a family or punishment administered by other than governmental officials or their delegates. *But see* Wasserstrom, *Some Problems with Theories of Punishment*, in JUSTICE AND PUNISHMENT, *supra* note 12, at 173, 175 (arguing that these cases of punishment are not secondary and must be considered in constructing a viable theory) [hereafter Wasserstrom, *Theories*]. For a revised and expanded version of this article, see Wasserstrom, *Punishment*, in PHILOSOPHY AND SOCIAL ISSUES 112 (1980) [hereafter Wasserstrom, *Punishment*].

¹⁴ For example, supporters of the equal rights amendment to the United States Constitution used to say that they were "punishing" nonratifying states by boycotting conventions held in those states; United States officials have frequently described actions designed to disadvantage one nation or another as "punishment" for what is seen as those nations' misbehavior.

¹⁵ Cf. H.L.A. HART, *supra* note 12, at 4-5; H. PACKER, *supra* note 12, at 18, 21;

infliction by the state of suffering or deprivation of liberty to enforce the criminal law.

The purpose behind the state's act in imposing unpleasantness upon someone because she has committed a particular criminal offense is irrelevant to its classification as punishment.¹⁶ It is immaterial whether the state intends to give the offender her deserts,¹⁷ deter her or others from repeating criminal behavior, incapacitate her from doing further harm, or provide her with treatment, job training, or a period of reflection in which to repent. A penalty meets the formal definition of punishment when it is inflicted upon one who has been found guilty, and in response to the offense of which she has been found guilty.¹⁸

A. VON HIRSCH, *DOING JUSTICE* 35 (1976); Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 604-05 (1978) (discussing the relationship between definitions and theories of punishment); Primorac, *On Some Arguments Against the Retributive Theory of Punishment*, 56 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 43, 45-46 (1979) (punishment by definition must be undertaken by those formally authorized to inflict it; retributive punishment differs from revenge partly because "the judge, the jailer, and the executioner are not the ones to whom evil has been done"). *But cf.* Wasserstrom, *Theories*, *supra* note 13, at 176; Wasserstrom, *Capital Punishment as Punishment: Some Theoretical Issues and Objections*, 7 MIDWEST STUD. IN PHIL., SOC. & POL. PHIL. 473, 475-76 (1982) [hereafter Wasserstrom, *Issues and Objections*]. Wasserstrom finds the definition of punishment circular because it includes the notion of an offense that can itself only be defined by reference to the notion of punishment. Yet, without the notion of an offense, the definition would be incomplete. It seems possible to define offenses as intentional misdeeds that, whether morally culpable (wrong in themselves) or not (regulatory offenses), sufficiently violate a set of social norms that legislators have agreed to be sufficiently important to stigmatize the violations as criminal. Unless stigma and punishment are identical, this definition does not seem circular. *But see* Wasserstrom, *Theories*, *supra* note 13, at 177-78. This definition thus excludes secondary and tertiary punishments, *supra* notes 13-14 and accompanying text, as well as civil sanctions that may otherwise appear virtually indistinguishable from criminal punishment. Although the chosen form of punishment may be compensation, as when an offender is ordered to make restitution for goods stolen or destroyed, compensation would not invariably count as punishment.

¹⁶ This point is more controversial than it may seem. *Compare* A. VON HIRSCH, *supra* note 15, at 36 (definition of punishment is independent of its purposes) *with* Bedau, *supra* note 15, at 606 (definition of punishment may include reasons for imposing it and thus is not independent of its justifications).

¹⁷ As used in this Article, the term "desert" refers to personal moral desert and specifically to the treatment that a person deserves from others because of her conduct. *See generally* J. FEINBERG, *DOING AND DESERVING* 55-94 (Princeton Press 1974). In this sense, desert is primarily nonutilitarian, or even anti-utilitarian insofar as it may conflict with social utility. *Id.* at 80-83, 94.

¹⁸ This principle of legality limits proper punishment. *See* H. PACKER, *supra* note 12, at 35-36, 79-80 (conduct may not be treated as criminal unless previously so defined by the appropriate legal authority); D.A.J. RICHARDS, *THE MORAL CRITICISM*

The part of the definition of punishment that focuses on the offender who will receive punishment and on the offense for which the punishment may be inflicted implies a rudimentary notion of due process.¹⁹ Perhaps covert appeals to procedural regularity should have no place in the definition of punishment, although they may be necessary for its justification.²⁰ However, the removal of the due process component from the definition of punishment presents some difficulties. To define punishment as state infliction of unpleasantness upon a person subject to the state's legal authority is too sweeping a definition. The state may inflict a wide array of legal annoyances and deprivations that do not fit the definition of punishment: for example, vehicle speed limits, license requirements, taxes, property seizures, and military conscription.²¹ These state actions are characterized appropriately as harms or interferences rather than punishment.

One important distinction between harms and punishments lies in the different reasons for their imposition. The state imposes certain burdens in the name of social welfare with indifference to their effects on individuals. Taxes are necessary to fund social programs; although a tax deprives a particular individual of money, this harm is not usually the primary purpose of the tax. A harm ostensibly qualifies as a punishment only when imposed because it is a harm.²² Moreover, the core

OF LAW 195-96 (1977) (principle is a "fixed feature of criminal jurisprudence").

¹⁹ To ensure that the principle of due process is observed, the state announces some form of penalty schedule against which we can compare the law broken and the penalty inflicted, and provides the offender with a trial, at which it is determined that she in fact committed the offense to which the penalty inflicted is a known possible response. Procedural due process refers both to constitutional norms and to general notions of fundamental fairness. Any carelessness in ascertaining facts or adhering to standards of legality undermines the definition of punishment by weakening the causal connection between crime and punishment.

²⁰ But see H. PACKER, *supra* note 12, at 36 (describing punishment to include the trial itself, the finding of guilt, and even "the formal announcement of a criminal conviction"); see also *id.* at 62 ("It is a necessary but not a sufficient condition of punishment that the person on whom it is imposed is *found* to have committed an offense under circumstances that permit his conduct to be characterized as blameworthy.") (emphasis added); cf. Rawls, *supra* note 12, at 89 (defining punishment explicitly to require a violation of law "established by trial according to the due process of law"); Black, *Reflections on Opposing the Penalty of Death*, 10 ST. MARY'S L.J. 1, 6-7 (1978) (stressing the importance of process in criminal law). For a schematic definition of punishment relying expressly on the rationality of offenders and impliedly on procedural regularity, see Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726, 728 (1983).

²¹ Cf. Wasserstrom, *Theories*, *supra* note 13, at 175.

²² See, e.g., D.A.J. RICHARDS, *supra* note 18, at 236 (losses count as punishment

idea of criminal punishment requires a trier of fact to find that the recipient of the harm has broken the criminal law. The harm is inflicted in response to that particular instance of lawbreaking. Both these requirements can be met only if the state provides basic guarantees of procedural due process.

An alternative view of the relationship between punishment and due process is implied in the first paragraph of this Article. Punishment begins where due process ends. Due process necessarily precedes the infliction of punishment, since we must first properly identify an offender with an offense and provide notice of the harms that may be inflicted following conviction of that offense. In this view, punishment itself is merely the sentence — the response to the offender's commission of the offense.

Both these views of punishment and due process seem correct. The former definition of punishment focuses on the continuity of the sentence with the processes of criminal justice that precede or follow it. The importance of each element varies with the individual offense, the individual offender, and the precise purpose in speaking of punishment on any particular occasion. The latter definition focuses on the sentence itself and deemphasizes sequence and context in favor of a precise reference to the nature of the harms that the state inflicts upon the offender.

Our common terminology surrounding the death penalty reflects the usefulness of both these views of punishment. When we wish to focus on the harm inflicted, we say that the prisoner has been "sentenced to death"; when we mean to discuss the legal sequence that produced the sentence, we talk about "capital punishment." The term "death penalty" may occupy a middle ground. Although its primary meaning seems to be the death sentence, it also implicates the legal system. A "penalty" rather than a mere "harm" can be inflicted only by a recognized authority,²³ and imposing death as a penalty is reserved to the state alone.

only when "inflicted as a form of condemnation for the failure to observe applicable standards of conduct"); Wasserstrom, *Retributivism and the Concept of Punishment*, 75 J. PHIL. 620, 621 (1978).

²³ But see J. FEINBERG, *supra* note 17, at 95-97 (distinguishing "mere" penalties, defined to include parking tickets, flunking, and disqualifications of various sorts, from punishment in "a narrower, more emphatic sense," such as imprisonment at hard labor). Feinberg states: "On this view, penalties are in effect licensing fees" in some instances, though not others, while punishment carries "a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation." *Id.* at 97, 98.

B. Purposes and Justifications of Punishment: A Summary of Six Aims of Punishment

Although the formal definition of punishment does not depend upon the purposes we intend it to serve or the justifications we offer for inflicting it,²⁴ the moral legitimacy of punishment does derive from these considerations. State infliction of punishment for no purpose partakes of cruelty. In democratic theory, the state should promote individual as well as social welfare. Therefore, both the institution of punishment and the state's punishment of particular individuals demand justification.

Discussion of the major purposes that punishment is designed to serve often blurs the distinction between purposes and justifications.²⁵ This elision probably results from the close relationship between purposes and justifications. If punishment serves an important social purpose without significantly dis-serving other important purposes (including other purposes of the criminal law), and does not transgress limitations such as due process or independent individual rights, punishment is justified. This description applies to specific forms of punishment and to punishment in general. Thus, if capital punishment serves some important purpose of the criminal law, does not significantly disserve other social purposes, and does not overstep any applicable moral and legal limitations, then it is justified.

When described in this way, justification is pluralistic; all of the purposes of punishment must be considered in deciding whether punishment can be justified.²⁶ The traditional accounts of punishment provide at least six separable aims of punishment: (1) incapacitation or restraint of the offender, during which she cannot repeat or continue her

²⁴ See *supra* text accompanying note 16.

²⁵ Cf. H.L.A. HART, *supra* note 12, at 8-9 (lamenting the failure of other theorists to distinguish "[r]etribution as a General Justifying Aim from retribution as the simple insistence that only those who have broken the law — and voluntarily broken it — may be punished"); Bedau, *supra* note 15, at 603-05 (discussing H.L.A. Hart's model of retributive theory). However, this approach itself may confuse purposes with justifications. Even if deterrence is the primary purpose of punishment, it still may not adequately justify the deliberate infliction of harm on criminal offenders.

²⁶ Cf. H. PACKER, *supra* note 12, at 36-37 (discerning "only two ultimate purposes to be served by criminal punishment: the deserved infliction of suffering on evildoers and the prevention of crime," but contending that both are critical to an understanding of its nature and justification). See H.M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (referring to the importance "of the priority and relationship of purposes as well as of their legitimacy" and the need for "multivalued . . . thinking").

criminal behavior;²⁷ (2) special deterrence of the offender, so that when she is released into the community after her punishment, she will have been discouraged through fear of punishment from committing further offenses;²⁸ (3) general deterrence of others, to discourage potential offenders;²⁹ (4) rehabilitation or reform of the offender;³⁰ (5) denunciation or condemnation, which expresses society's revulsion against crime, permits the discharge of the victim's and society's anger and desire for revenge, marks the criminal as a social outcast, and reaffirms society's commitment to obedience to law;³¹ and (6) retribution, giving the offender her just deserts, sometimes described as paying the offender back or requiring the offender to pay society back for having broken the implied social compact to obey the criminal law.³²

None of these aims is in itself a complete explanation of the institution of punishment. They cannot account, either individually or in com-

²⁷ For discussions of incapacitation, see, e.g., H. PACKER, *supra* note 12, at 48-53; H.M. Hart, *supra* note 26, at 401; White, *supra* note 12, at 4.

²⁸ For discussions of special deterrence, see, e.g., H. PACKER, *supra* note 12, at 45-48; A. VON HIRSCH, *supra* note 15, at 38; F. ZIMRING & G. HAWKINS, *DETERRENCE* 224-34 (1973) (the term "special deterrence" is misleading; those who, after punishment, become more responsive to threats of punishment may react in a variety of complex ways, among them greater fear of the law or greater callousness towards it, less favorable attitudes towards lawbreaking or rationalized desires to engage in it more successfully, greater respect for social norms or more hostility towards them, and increased capacity to function in society (e.g., because of job training in prison) or decreased capacity to function in society because of social stigma and punishment-induced habits of dependency).

²⁹ For discussions of general deterrence, see, e.g., H. PACKER, *supra* note 12, at 39-45; A. VON HIRSCH, *supra* note 15, at 37-38; F. ZIMRING & G. HAWKINS, *supra* note 28, at 1-4; Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 181-90 (1952); Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV. 537 (1971) [hereafter Andenaes, *Deterrence*]; White, *supra* note 12, at 3-4.

³⁰ For discussions of rehabilitation, see, e.g., H.L.A. HART, *supra* note 12, at 24-27; H. PACKER, *supra* note 12, at 53-60; White, *supra* note 12, at 4. It is possible to distinguish between rehabilitation, which focuses on external effects such as job training, and reform, which focuses on internal effects such as renunciation by the offender.

³¹ For discussions of denunciation, see, e.g., J. FEINBERG, *supra* note 17, at 100-04; H.L.A. HART, *supra* note 12, at 235; Gibbs, *Preventive Effects of Capital Punishment Other Than Deterrence*, 14 CRIM. L. BULL. 34, 40-42 (1978); H.M. Hart, *supra* note 26, at 404-05.

³² For discussions of retribution, see, e.g., H. PACKER, *supra* note 12, at 37-39; A. VON HIRSCH, *supra* note 15, at 45-55 (rejecting the term "retribution" in favor of "desert" because the former is too "narrow," wrongly relies on "this notion of requital-of-evil," and is historically "burdened with pejorative associations"). Cf. J. FEINBERG, *supra* note 17, at 71-72.

bination, for the contemporary social acceptance of certain types of punishment (incarceration, fines, probation with certain conditions, and, perhaps, death) in cases where they are thought to be appropriate, and the simultaneous rejection of other types of punishment (torture, dismemberment, whipping, exile, or expatriation) regardless of the crime. Indeed, it has been argued that the six listed aims of punishment are incoherent in the aggregate, providing at best an internally inconsistent and unstructured set of criteria to confuse social theoreticians and individual decisionmakers. Proponents of this view have argued that we should rely instead upon the moral blameworthiness of the offender, both to justify punishment and to determine the proper allocation of individual punishments.³³

The familiarity of each of the six goals testifies to their importance; these aims, or some combination of them, are regularly cited as reasons why we may, or even should,³⁴ punish offenders. To discard the stated purposes is to ignore beliefs that have deep roots. However, it seems equally important to analyze and question these purposes, to categorize them as utilitarian or retributivist in hopes of understanding them, and finally to ask whether they are legitimate and workable. The relationship between efficacy and legitimacy is obvious; purposes that are negated by the facts we know about crime can scarcely justify the infliction of criminal punishment in the real world, whatever their philosophical attractions may be.

C. *The Legitimacy of the Five Utilitarian Aims of Punishment*

On the utilitarian view,³⁵ incapacitation, special deterrence, general deterrence, rehabilitation, and denunciation all share the same central

³³ Hospers, *supra* note 12, at 26; White, *supra* note 12, at 5-8; see also J. FEINBERG, *supra* note 17, at 101. In this view, since there is no way to make or explain choices between one purpose and another, or one subset of purposes and another, or even one hierarchy of purposes and another, either in general or in specific cases, the only solution is to disregard purposes as guides to action and focus solely on the offender's blameworthiness. See White, *supra* note 12, at 24-25. Thus, attempts to categorize purposes as retributive or utilitarian would be beside the point, because this tells us nothing we need to know to justify punishment in general, particular forms of punishment, or the allocation of particular punishments to particular crimes or criminals.

³⁴ It is possible to distinguish between "strong" and "weak" forms of retributivism. In the former view, punishment is morally compelled as a social response to criminal behavior. In the latter view, punishment is morally appropriate, but may be overridden by other social needs. See Wasserstrom, *Theories*, *supra* note 13, at 191; Wasserstrom, *Punishment*, *supra* note 13, at 135-36; *infra* text accompanying notes 77-79.

³⁵ It should be evident to the reader of the above list that, unlike some theoreticians

rationale of crime prevention or crime reduction. Each of these utilitarian aims of punishment is well established³⁶ and accepted in an abstract sense.³⁷ Moreover, they overlap and reinforce each other. Incapacitation, which most often takes the form of incarceration,³⁸ not only isolates the offender from most or all of her potential victims, but provides time for reflection and repentance, thus serving the goal of rehabilitation. Imprisonment symbolizes the offender's temporary or permanent exile from society, furthering the purpose of denunciation.³⁹ Individual and general deterrence may contribute indirectly to denunciation, pushing potential offenders back into the social milieu and encouraging reaffirmation of the rule of law. Rehabilitation may be seen

of punishment, I consider all but the explicitly retributivist notion of desert as primarily utilitarian, and not merely consequentialist. Distinguishing between utilitarian and consequentialist views preserves the difference between regarding the net social gains from an action, such as punishment, as the major justifications for engaging in it, and regarding such gains as consequences, which are to be weighed but do not provide sufficient justification on their own. Under this definition, most retributivists are probably consequentialists. Cf. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFAIRS 217, 220 (1973). Some philosophers use the term "consequentialism" to mean something quite different, namely the theory that "an act is morally permissible if and only if it has better consequences than those of any available alternative act." Kagan, *Does Consequentialism Demand Too Much? Recent Work on the Limits of Obligation*, 13 PHIL. & PUB. AFFAIRS 239 (1984); see also Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFFAIRS 134, 148-60 (1984). The definition used in the text here nonetheless seems more consistent with common word usage, as in the phrase "we ought to consider the consequences," which usually implies a weighing or balancing process rather than submission to a perceived moral imperative.

³⁶ But see *infra* note 41.

³⁷ Abstractly, punishing criminals to deter other crimes is legitimate because there is a fair relation between means and ends. We punish criminals, rather than some other set of people, because their punishment is the punishment that could serve as an incentive to them and to others to obey the criminal laws. We punish, rather than taking some other action, because punishment imposes certain sorts of harms in response to and because of certain sorts of criminal offenses, and because we believe that the pains of punishment either nullify or redeem individual guilt or produce an aggregate social benefit, such as prevention or reduction of future crimes. Of course, the abstract purposes of punishment do not certify themselves against the possibility of abuse. Cf. H.L.A. HART, *supra* note 12, at 25 (proportionality principle necessary if incapacitation is to be morally right); Primorac, *supra* note 15, at 51 (gravity of punishment is not justified if it exceeds the gravity of the crime).

³⁸ Other forms of punishment can also incapacitate an offender. Fines, for example, may deprive her of the funds necessary to carry out her criminal plans. Further, public exposure as a criminal may effectively prevent recidivism, at least until her crimes fade from public consciousness.

³⁹ See W. MOBERLY, *THE ETHICS OF PUNISHMENT* 205 (1968).

as a special, morally elevated form of individual deterrence.⁴⁰ Denunciation serves both individual and general deterrence, and may lead to rehabilitation of the individual offender through repentance and rededication to the social good.⁴¹

⁴⁰ Arguably, the purposes of individual deterrence and rehabilitation, though consequentialist, are not really utilitarian, because their true primary focus is not the social good of crime reduction, but the individual good of making the offender into a better person. The short answer to this point is that we seek to improve the offender's character and behavior not from disinterested altruism but from the desire that she cease preying on the rest of us. The individual good in such cases is socially defined; the offender's own interest in being a better, more law-abiding person is not the major reason for criminal punishment. Further, if individual good were defined in terms of the offender's own wishes, as a true utilitarian might say it must be, an extra complication is added; we cannot know with any certainty that criminals wish to be deterred and rehabilitated, and statistics indicate that many of them do not. *Cf.* H. PACKER, *supra* note 12, at 54. Packer also states:

People who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided. They ordinarily take care to avoid being caught. If arrested, they ordinarily deny their guilt and otherwise try not to cooperate with the police. If brought to trial, they do whatever their resources permit to resist being convicted.

Id. at 149. This common pattern of response may correlate with a lack of interest in being deterred from committing future offenses or in being rehabilitated for past ones. *See also* Bedau, *Concessions to Retribution in Punishment*, in JUSTICE AND PUNISHMENT, *supra* note 12, at 51, 61 [hereafter Bedau, *Concessions*].

⁴¹ *See* W. MOBERLY, *supra* note 39, at 209-10. *But see* J. FEINBERG, *supra* note 17, at 101 (evidence not clear whether denunciation helps or hinders deterrence and rehabilitation).

Some punishment theoreticians contend that denunciation is more retributive than utilitarian in character. On this view, society punishes the offender to express its moral outrage at her offense. The expressive function of punishment is not a means to an end, but an end in itself. It is directed at the offender because of her offense; it arises solely because of the offense, and is extinguished through punishment. It is thus retributive; it looks backward at what the offender has done rather than forward at her future or that of society as a whole. *See* H.L.A. HART, *supra* note 12, at 235; H. PACKER, *supra* note 12, at 37; Hospers, *supra* note 12, at 22. Even if denunciation does not serve utilitarian goals, either having no effect on future behavior or even encouraging further crime by deepening the isolation of offenders and potential offenders from the law-abiding, denunciation is still a purpose and a justification of punishment.

Persuasive though this version of denunciation may be, it seems inaccurate. Most defenders of denunciation bolster its legitimacy with utilitarian arguments. For example, in addition to the arguments stated earlier, they contend that formal, official denunciation through punishment is important because it takes the place of, and thus deters, private vengeance. *See, e.g.,* A. VON HIRSCH, *supra* note 15, at 52.

Social control through stigmatization of wrongdoers still seems to be the primary basis for denunciation. One reason for this utilitarian focus may be the recognition that stigma is difficult to apportion in strict relation to offenses committed, and to the pun-

1. Incapacitation

The legitimacy of incapacitating past offenders to prevent future crime depends almost entirely on the relationship between past and fu-

ishments prescribed for those offenses. Cf. H.L.A. HART, *supra* note 12, at 170-73 (criticizing Lord Denning's implied assumption, in remarks to the Royal Commission on Capital Punishment, that most people would agree on "judgments of the relative seriousness of different crimes" and questioning the association of the claim that justice requires treating like cases alike with the "search for a penalty the severity of which, like a gesture, will aptly express a specific feeling of revulsion or moral indignation"). But see J. FEINBERG, *supra* note 17, at 118; A. VON HIRSCH, *supra* note 15, at 71-73, arguing that punishment can and should be apportioned according to the perceived seriousness of offenses. von Hirsch contends that the "seriousness" of a crime is correctly measured by "the harm done (or risked) by the act and [by] the degree of the actor's culpability." *Id.* at 69. Therefore, virtually all mentally capable, wilful offenders who commit the same category of offense and endanger roughly the same number of people in the same way, should receive the same punishment or the same measure of denunciation. However, we know that in fact this is not the way public opinion works. A criminal whose life style or political opinions excite a mixture of envy, resentment, fascination, and repulsion is usually both more publicized and more condemned than her more colorless counterparts. When the rich and famous are accused of crimes, the public response often swings back and forth unpredictably between sympathy and anger. The psychological processes at work in such cases are beyond the scope of this discussion, but public condemnation does not seem nicely proportionate to the actual gravity of the offense as it might be viewed by a detached observer.

For example, a criminal who terrifies the public for symbolic reasons unconnected, or only loosely connected, with the actual gravity of her offense, may be stigmatized accordingly, without much regard for proportion between punishment and offense. By contrast, a criminal who captures public or judicial sympathy, perhaps because she seems so fundamentally decent and remorseful or because she resourcefully fulfills some of our fantasies, may be stigmatized far less than a simple comparison of her offense with others would suggest. If punishment must be graded according to degrees of public moral revulsion, it may not also be inflicted in proportion to the gravity of the offense committed — a requirement of most desert- or retribution-based theories of punishment. There is simply no guarantee that the two scales will match, and considerable evidence shows that in practice they will not.

Nor is there any reliable method for determining the amount of moral revulsion that the public actually feels. We cannot simply assign this task to the jury as a representative cross-section of the community without explaining the source to which the jury should look for enlightenment. Some jurisdictions assign the sentencing function (and thus the final determination of criminal punishment in the narrow sense) to the judge or the penal bureaucracy, in the recognition that the allocation of punishments in individual cases is not altogether compatible with the jury's primary role. See, e.g., CAL. PENAL CODE § 1170 (West Supp. 1985) (sentencing power in noncapital cases rests with judge); FLA. STAT. ANN. § 921.141 (West Supp. 1985) (sentencing power in capital cases rests with judge; jury sentence is advisory only); *id.* § 921.18 (defendant convicted of noncapital felony may, at court's discretion, be sentenced to custody of Department of Corrections for up to maximum sentence prescribed for that felony).

ture offenses for individual offenders. Empirical data interfere with

Other jurisdictions bifurcate the guilt and sentencing phases of trial, at least in capital cases, to permit the same or another jury to receive additional information relevant to sentencing and to focus its attentions on the law of punishment only after the question of guilt has been resolved against the defendant. As of mid-1984, the 36 states with death penalty statutes all provided for bifurcated proceedings. Special Project, *supra* note 1, at 1224. The list included Massachusetts, whose capital punishment statute was subsequently invalidated on state constitutional grounds by the Massachusetts Supreme Judicial Court. *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984); *see also* *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984) (state's mandatory death sentence for murder by person serving life sentence violated federal Constitution because statute did not provide for consideration of all relevant individual circumstances), *cert. denied*, 105 S. Ct. 1226 (1985).

However, even in those jurisdictions, the suggestion is seldom openly made that the evidence appropriate for the sentencing jury to consider may include either its own opinion or public opinion polls concerning the defendant's relative moral depravity. *But see* *California v. Ramos*, 103 S. Ct. 3446, 3456 (1983) (if at least one statutory aggravating circumstance exists, jury may consider "a myriad of factors"); *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (plurality opinion) (it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision"). In context, however, both of these cases stopped short of authorizing the jury to consult public opinion in setting the death penalty.

The judge as trier of fact or acceptor of a guilty plea is also not permitted to consult her own feelings or to discern a public consensus in sentencing. *See In Re Fain*, 139 Cal. App. 3d 295, 188 Cal. Rptr. 653 (1983) (parole decision may not be based solely on public outcry). The court held that "[p]ublic opinion plays a fundamental role in our democratic society, but its role is limited to the formulation of rules, not their application in particular instances It would offend our most basic concepts of justice . . . if the decision of guilt or innocence of the accused, or the length of his sentence, were allowed to depend upon public reaction in a particular case." *Id.* at 306, 188 Cal. Rptr. at 660-61. *But see* *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (plurality opinion) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)):

The jury also is a significant and reliable objective index of community values because it is so directly involved The Court has said that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system."

(citation omitted) (brackets in original). Nonetheless, these comments in context seem merely to mean that current jury willingness to inflict the death penalty "in appropriate cases," *id.*, as well as legislative enactments and statewide referenda reinstating it, count as evidence that capital punishment in general is morally and socially acceptable. *See also* *Wainwright v. Witt*, 105 S. Ct. 844, 871 (1985) (Brennan, J., dissenting) (quoting *Spaziano v. Florida*, 104 S. Ct. 3154, 3174 (1984) (Stevens, J., concurring and dissenting)) ("the decision that capital punishment is the appropriate sanction in extreme cases [may be] justified because it expresses the community's moral sensibility — its demand that a given affront to humanity requires retribution"); *Spaziano*, 104 S. Ct. at 3178 (Stevens, J., concurring and dissenting) ("[Death] is the one punishment

philosophical tidiness, since the recurrence of certain types of petty criminality is most predictable, while the recurrence of serious personal violence is least predictable.⁴² Jailing petty criminals for life while releasing murderers might be a rational response to empirical data if we viewed the primary purpose of punishment as incapacitation.

However, some murderers do kill more than once, even after legal conviction and punishment, and recidivism is a fact of criminal life.⁴³

that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage — its sense that an individual has lost his moral entitlement to live"); L.A. Times, Sept. 22, 1984, Pt. 1, at 3, col. 1 (In response to public outcry, judge increases sentence for wealthy defendant convicted of rape from chemical castration and five years' probation to five to fifteen years in prison, observing, "I strongly suspect that people in this community have in large part already determined what an appropriate sentence should be.").

One may argue that public response is a legitimate factor to consider in ascertaining the seriousness of any particular offense. However, the argument seems philosophically suspect because it makes an individual's moral culpability depend in part upon the whims of others rather than on the nature of her acts. Moreover, it suggests that moral culpability may change in unpredictable ways after the offense has been completed, and thus introduces an unwarranted element of uncertainty. For example, William and Emily Harris, two of the kidnapers of Patricia Hearst, were viewed by the public with the same degree of moral outrage and revulsion as many mass murderers. Brief for Appellants at 83, 97-102, *People v. Harris*, 2d Crim. 29985 (Cal. App. 1979) (quoting compilation of news reports and experts' studies) (copy on file with *U.C. Davis Law Review*). Prior to the Harris' conviction of any offense, close to 40% of a random sample of registered voters in Los Angeles County believed they should be punished with death or life imprisonment. *Id.* at 101a; cf. Adelstein, *Informational Paradox and the Pricing of Crime: Capital Sentencing Standards in Economic Perspective*, 70 J. CRIM. L. & CRIMINOLOGY 281, 284 (1979) ("[T]he outrage created by a given act is sensitive to the identity and social status of both the victim and offender and the particular circumstances under which the crime was committed."); see also *id.* at 297-98 ("Insofar as class, income, social status, religious conviction, and simple bigotry all may be significant determinants of the moral cost associated with given activities of specific individuals, it is clear that every scheme of retributive justice is built upon and reinforces a particular scheme of distributive justice.").

If the standard is the moral revulsion that the public ought to feel, rather than that it in fact feels, the jury is no better register. The only reliable references appear to be the nature of the offense committed, the victim's role in the offense, and the degree of the offender's culpability — which lead us directly back into the original dilemma, that denunciation is not ordered or proportioned in a strict relation to any intelligible order of offenses, or even of offenses modified by consideration of the offender's blameworthiness in the particular case. See *infra* notes 118-23 and accompanying text.

⁴² See H. PACKER, *supra* note 12 at 50, 52-53; A. VON HIRSCH, *supra* note 15, at 169; Hospers, *supra* note 12, at 32.

⁴³ But see Bedau, *Recidivism, Parole and Deterrence*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 6, at 173-81 (statistics show that vast majority of released mur-

Therefore, there is at least a *prima facie* case for the legitimacy of some incapacitation of some convicted criminals. In particular instances, this case could be rebutted by showing that a particular criminal is unlikely to commit future offenses.⁴⁴

2. Special Deterrence

Special deterrence may be condemned as psychologically questionable, since it rests upon postulates about human nature and behavior that are frequently disproved in practice. Rather than foster an eager desire to conform to law, punishment may produce anger, resentment, and a determination to reject the values of a society whose authorities have inflicted pain on the offender.⁴⁵

Empirical data are relevant in determining the legitimacy of special deterrence. If statistics demonstrated unequivocally that all forms of punishment were criminogenic for the individual punished,⁴⁶ special deterrence would be disproved. Indeed, data show that the more severe forms of punishment now employed, such as long incarceration in unpleasant institutions, may encourage recidivism for certain kinds of offenders.⁴⁷ However, it also remains both intuitively and empirically probable that many rational criminals are deterred from committing future offenses by the fear of further punishment.⁴⁸

derers do not commit another murder).

⁴⁴ See H. PACKER, *supra* note 12, at 52 (suggesting that certain types of crimes and criminals simply are not punished either for the purpose of incapacitating them or in the belief that incapacitation is an appropriate or relevant justification for the punishment imposed).

⁴⁵ See F. ZIMRING & G. HAWKINS, *supra* note 28, at 224-34. Special deterrence assumes a rational offender as the subject of punishment. If the offender cannot link her punishment to her crime as effect and cause, special deterrence is irrelevant in her case. Special deterrence also assumes that crimes will be detected and that criminals will be apprehended and punished. One possible attack on special deterrence would be to show that arrest and conviction rates for certain crimes are so low as to preclude a rational fear of getting caught. This Article assumes that our society has not yet reached this level of criminality.

⁴⁶ Cf. B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 4, 14 (1963).

⁴⁷ See Morris, *Punishment and Prisons*, in JUSTICE AND PUNISHMENT, *supra* note 12, at 157 (imprisonment is often criminogenic); Book Review, 81 MICH. L. REV. 1219 (1983) (reviewing J.H. Abbott, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (1981)). Jack H. Abbott, a talented writer who captured the attention of novelist Norman Mailer by writing him letters from prison, was released on June 5, 1981. Six weeks later Abbott committed his second homicide, thereby demonstrating "a bitter but essential lesson for penal policymakers: Do not confine whom you would not destroy." *Id.* at 1219.

⁴⁸ See, e.g., H. PACKER, *supra* note 12, at 41-43, 46-47. But see F. ZIMRING & G.

Although punishment may encourage greater cunning and prudence on the part of determined criminals, special deterrence cannot be discredited on this basis. We may prefer that criminals be overt, inept, and rash, so that law enforcement agencies will be more likely to outwit and capture them. However, as special deterrence merges with general deterrence in the overall purpose of crime prevention, we may instead prefer that criminals be covert, capable, and careful, so that their work will be less known and less likely to inspire others. In sum, special deterrence may have some force and thus qualifies as a legitimate reason for punishment.

3. Rehabilitation

Rehabilitation is closely linked with special deterrence. From the vantage point of the statistician, criminal wish as well as the criminal act. The truly would lead criminally blameless lives, perhaps even contributing positively to social welfare. By contrast, the truly specially deterred seem more likely to contribute to social unhappiness and unrest. One imagines them sullenly skirting the edges of criminality, longing to snatch a purse or strike an unpleasant acquaintance, but drawing back just in time because they fear further punishment, not because they desire to obey the law. Rehabilitation is desirable because it positively promotes law-abiding behavior; therefore, if it can be achieved, it is a legitimate goal of punishment.

Unfortunately, society's attempts at rehabilitation through punishment or through coercive treatment have largely failed.⁴⁹ Once we realize that we do not know how to rehabilitate criminals, the use of punishment for this purpose becomes questionable; rehabilitation looks less like a genuine purpose of punishment and more like an open-ended social experiment with the lives of criminal offenders.⁵⁰ Given the po-

HAWKINS, *supra* note 28, at 29 (empirical studies show that "level of punishment is not the major reason why crime rates vary").

⁴⁹ See H. PACKER, *supra* note 12, at 55; A. VON HIRSCH, *supra* note 15, at 14-18 (results of rehabilitation programs are disappointing); Wilson, *The Political Feasibility of Punishment*, in JUSTICE AND PUNISHMENT, *supra* note 12, at 111-12. See generally F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975); see also H. PACKER, *supra* note 12, at 256-57, 268-69 (treatment often turns out to be punishment in disguise and is generally ineffective in controlling crime).

⁵⁰ Cf. H. PACKER, *supra* note 12, at 56 (until we better understand who is likely to commit crimes and why, "punishment in the name of rehabilitation is gratuitous cruelty"); Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J.

tential importance of rehabilitation, and the possibility of social progress toward understanding crime and criminals,⁵¹ rehabilitation should not be rejected altogether as a desirable by-product of punishment. However, it cannot be cited as a general justification for punishment.

4. General Deterrence

Most rational people consider unpleasant consequences as reasons not to perform any particular voluntary action.⁵² As with special deterrence, one can imagine the rational potential offender checking local police clearance rates for a particular offense and determining to commit it if the risk of apprehension seems sufficiently low and the gain sufficiently certain.⁵³ Even if most criminals do not consciously engage

CRIM. L., CRIMINOLOGY & POLICE SCI. 226 (1959). Over the course of a four-year study from 1971 to 1975, the Committee for the Study of Incarceration noted an institutional "shuffling" between justifications: "Confront an administrator with the fact that his institution is not rehabilitating, and he would tell you he was confining dangerous people; tell him that not everyone inside the walls was dangerous, and he would respond that his was a therapeutic effort designed to rehabilitate the offender." The Committee became skeptical about the "social function" of rehabilitation. Gaylin & Rothman, *Introduction*, in A. VON HIRSCH, *supra* note 15, at xxxii-xxxiii.

⁵¹ Packer finds the rehabilitative ideal questionable partly because it rests on the erroneous assumption that the processes and institutions of the criminal law are an appropriate place to begin the overwhelming task of improving society and human behavior in society. H. PACKER, *supra* note 12, at 55; cf. Murphy, *supra* note 35, at 232-43 (arguing that the problems posed by crime in an unjust society differ philosophically from those it might present in an ideally just one). Murphy's argument focuses on retributive justifications for punishment but seems to apply to rehabilitative ones as well, at least where rehabilitation involves serious interventions in the offender's life. Cf. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1182 n.14 (1981) ("We know from the research of economists on the theory of the second best that a system which maximizes justice in an ideal world is not necessarily the most just system in an imperfect society.").

⁵² See, e.g., Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649, 664 (1970).

⁵³ One can also imagine a less conscious and probably more common thought process — a recognition that the crime contemplated is widespread, easy to commit (or even, easier to commit than not to commit under certain circumstances), unlikely to lead to serious consequences if detected, and overtly or covertly sanctioned by one's social group. Minor offenses related to drugs and alcohol, minor tax evasions, traffic offenses, and archaic sexual crimes might all belong in this category. Moreover, it is disquietingly easy to think of cases in which a criminal of some public stature, such as a public official or business executive, may have calculated correctly (if not altogether rationally) that even if apprehended, tried, and convicted, she would obtain a fairly light sentence. It may be fair to see in such individual breakdowns of general deterrence — the recog-

in risk-benefit analyses, it seems probable that rational, reflective, prospective perpetrators of major violent crimes are at least momentarily checked by considering the potentially severe punishment that would likely follow capture and conviction.

Neither the existence of crime nor the persistence of recidivism disproves general deterrence.⁵⁴ Even though most violent criminals seem unreflective and irrational, the institution of harsh punishment may still generally deter them.⁵⁵ We do not know how many more violent criminals there would be if no punishment or only light punishments were the general response to violent crime. For some nonviolent crimes, statistical evidence suggests that deterrence is a reality.⁵⁶ There is no proof that rates of violent crimes would not change if punishment were removed.

The socialization processes,⁵⁷ which include the internalization of a society's moral norms and prohibitions, undoubtedly play a role in general deterrence. Similarly, the institution of criminal punishment, which uses sanctions to reinforce legal commands, may become a part of the developing individual self that judges one's own conduct. Individual conscience arguably develops only in the gap between felt moral transgressions and applied social sanctions.⁵⁸ However, that reasoning strengthens rather than weakens the argument that some, but not inevitable, punishment is necessary to encourage individuals to control their

dition by certain criminals that the rules of punishment, or at least the most stringent rules, are unlikely to apply to *them* — a perverse reflection of the general though imperfect efficacy of general deterrence.

⁵⁴ H. PACKER, *supra* note 12, at 39; A. VON HIRSCH, *supra* note 15, at 38-39, 41-42 (decreases in criminal behavior immediately after enactment of criminal penalties and increases in crime during periods of suspended law enforcement provide evidence of general deterrence).

⁵⁵ See H. PACKER, *supra* note 12, at 40. The argument that most violent criminals are irrational may also indicate naivete. For some persons, such as purse snatchers on ghetto streets, crime may be the most rational way to acquire money. Indeed, the rationality of such crime may be why the state seeks to deter it.

⁵⁶ See H. PACKER, *supra* note 12, at 44; A. VON HIRSCH, *supra* note 15, at 39; F. ZIMRING & G. HAWKINS, *supra* note 28, at 333-34. See generally Andenaes, *Deterrence*, *supra* note 29.

⁵⁷ H. PACKER, *supra* note 12, at 42.

⁵⁸ If social or legal guilt were assigned for every action defined as antisocial by the law, it can be argued, we would never develop a conscience at all, or no more than a rudimentary one. There may be no felt need for internal controls on behavior when external controls are imposed in every instance of social transgression. The development of ego-identity and superego controls, of morality itself as experienced by the individual, may occur only when the individual experiences a gap between perceived misbehavior and the application of sociolegal sanctions.

own antisocial impulses. If punishment followed every transgression, a person might never develop an internal conscience. External controls would invariably restrain or allow immediate expiation of guilt producing behavior.⁵⁹ However, if punishment seldom followed upon what the individual's conscience tells her is misconduct, that conscience might attenuate. The message from society would be that one had overestimated the possibility of requital for harm done and thus overestimated the importance of the harm.

Most rational criminals appear eager to avoid punishment.⁶⁰ Even if some murderers kill to commit state assisted suicide,⁶¹ most do not. Most intentional, malicious killers kill for private gain, for the gratification of emotions like hatred, anger, or jealousy, from indifference to taking life, or because they enjoy destroying others. Any system of punishment designed to intimidate such potential criminals seems fully justified. However, this argument tells us nothing about the severity of punishments required, beyond the general intuition that reasonably severe punishments may be necessary to deter potential crimes that spring from deep indifference or hostility to other human lives. Moreover, even if deterrence is a legitimate purpose of punishment, it still may not be a morally sufficient justification of punishment.⁶²

5. Denunciation

Punishment may arguably be justified as an emphatic community condemnation, or denunciation, of criminal conduct.⁶³ This theory tends

⁵⁹ Freud suggested that, at least in some instances and for some persons, a free-floating sense of guilt, the actual sources of which are hidden in the unconscious mind, finds relief in the doing of a forbidden act. He speculated that this kind of causation may produce crime because in comparison with "the two great criminal intentions" of parricide and maternal incest, which he viewed as the most likely sources of the obscure sense of guilt (Freud was, of course, speaking about men rather than women here), the crimes committed to attach guilt to something are inevitably lesser. Freud, *Criminals from a Sense of Guilt* (1916), reprinted in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 220 (1967).

⁶⁰ E.g., H. PACKER, *supra* note 12, at 149.

⁶¹ Gary Mark Gilmore, whose execution on January 17, 1977, ended a ten year moratorium on executions in the United States, expressed a determination to die at the hands of the state. Schwarzschild, *In Opposition to Death Penalty Legislation*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 6, at 364, 367. Many defendants executed after Gilmore also fought others' attempts to prevent their executions. Foley, Book Review, 19 HARV. C.R.-C.L. L. REV. 245, 252 n.27 (1984).

⁶² See *supra* notes 25-26 and accompanying text.

⁶³ Although the notion that denunciation is intrinsic to punishment has a long history, see J. FEINBERG, *supra* note 17, at 96 n.3, some theoreticians have been reluctant

toward a nontraditional utilitarianism, justifying punishment as public condemnation because it encourages the offender's repentance and rehabilitation and reinforces society's moral and legal norms.⁶⁴

From a utilitarian viewpoint, the "expressive function" of punishment is twofold: it incorporates formal community disapproval and "a kind of vindictive resentment."⁶⁵ The community discharges its anger, reiterates its moral judgments, and reinforces its own continuity as a moral and legal authority. The victim's and the public's possible appetites for revenge are appeased, and blame is affixed on an identifiable and culpable agent while other, unblamed agents,⁶⁶ including the society itself, are absolved from implication in the harm done by the criminal offense.⁶⁷ By denunciation of crime through punishment, the society renews and reasserts itself, knitting up the crime-caused rents in the social fabric of authority, legitimacy, and control, and reestablishing the mythology of the consent and consensus of the governed in the laws that bind them.⁶⁸ In employing severe sanctions such as incarceration or death, the society sends the renegade who violated the myth of consent into moral and physical exile.⁶⁹ By breaking the offender's tie to the ongoing social, political, and legal community, punishment reminds the law-abiding of the strength and importance of their own ties to the community, even as it warns them that such ties can be broken if community norms are flagrantly violated.

Yet, community denunciation of crime through punishment does not unambiguously serve the ultimate utilitarian goals of crime prevention

to accept denunciation as a legitimate justification. See H.L.A. HART, *supra* note 12, at 170-72 (moral indignation cannot justify punishment because society is morally pluralistic; mere expression of feeling is ancillary to justifying punishment). *But see id.* at 235 ("In its most interesting form modern retributive theory has [focused upon] the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offence.").

⁶⁴ H.L.A. HART, *supra* note 12, at 235.

⁶⁵ J. FEINBERG, *supra* note 17, at 100; *see also* W. MOBERLY, *supra* note 39, at 209.

⁶⁶ *See* J. FEINBERG, *supra* note 17, at 105.

⁶⁷ *Id.* at 101-04.

⁶⁸ *See* Conrad, *Things Are Not What They Seem: The Ontology of Criminal Justice*, 10 U. TOL. L. REV. 334, 366-67 (1979) (condemning symbolic punishment as inherently unjust); *cf.* W. MOBERLY, *supra* note 39, at 209-10 ("The object is that society should first make alive and deepen in itself, and secondly should convey to all its members, including the wrongdoer, a vivid sense of the wicked and destructive character of the wrongful act.").

⁶⁹ *See* W. MOBERLY, *supra* note 39, at 205-06 (capital punishment indicates unsuitability for "membership of society").

and reduction. Instead of publicly canceling "moral damage to the community,"⁷⁰ publicizing crime may merely inform the law-abiding of the widespread existence of crime and spread contamination to those who would not hesitate to act once assured that a countercommunity of criminals flourishes.⁷¹ Even if the potential offender is not spurred to imitate criminal acts, she may be impressed by the state's role in punishment as the inflicting agent and be swayed not to do what the state says (obey the law) but do what the state does (inflict harms upon persons who fail to conform their conduct to its will). In denouncing criminals the state may send out a double message — not only that crime is wrong, but that the infliction of suffering on those who disobey or displease us is a positive moral good.⁷²

From a nonutilitarian viewpoint, denunciation does not seem like a true justification for punishment. If we punish only or even primarily to condemn publicly, why does punishment take the form of harms formally announced in courtrooms that only occasionally attracts sustained public attention to a particular offense? Commercial advertising offers another, more effective model for true public denunciation of crime — one which might involve punishment only in the sense that the stigma arising from public identification as a criminal may be counted as part of the criminal punishment.⁷³

⁷⁰ See *id.* at 220 (moral damage to society needs to be cancelled by repudiation).

⁷¹ Occasional reports of criminals imitating publicized crimes or televised fantasies of crime suggest that emulation is a possible response to publicity, no matter how condemnatory, about criminal offenses.

⁷² This reading of the state's message ignores the important differences between public and private authority, but it is scarcely an improbable response. As Justice Brandeis observed, government is "the potent, the omnipresent teacher" by example. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). See generally Jones & Potter, *Deterrence, Retribution, Denunciation and the Death Penalty*, 49 UMKC L. REV. 158, 167 (1981).

⁷³ One partial answer to this objection may be suggested by considering the underlying, long-term effects of commercial advertising in relation to our daily experiences with the commodities advertised. Just as we learn to discount and distrust commercial advertising claims, so we might soon come to distrust advertisements denouncing crime as well. Yet, the core of the objection remains untouched. If punishment is merely a ritual of condemnation, why not focus on the ritual, encourage greater social participation in it, and structure punishment itself in a more dramatic and cathartic manner? Cf. J. FEINBERG, *supra* note 17, at 115-16; Bedau, *supra* note 15, at 618. To answer that only the dreary reality of specific harms inflicted upon specific offenders can ultimately persuade is to collapse denunciatory theory into general deterrence. If the legal system announced punishment but did not inflict it, denunciation would be served as long as the public remained unaware of the discrepancy between official words and deeds. Although one might argue that general deterrence would be equally well served

Another challenge to the utility of denunciation in preventing crime stems from its diversion of public attention to the relatively unproductive drama of crime and punishment and away from more positive social goals such as cooperation, education, and participation. A significant increase in respect and community interaction among various social groups might do more to reduce crime than would public rituals of denunciation.⁷⁴ Though punishment undoubtedly serves an expressive function, the legitimacy of denunciation to justify punishment remains an open question.

D. *The Sixth Aim of Punishment*

1. An Account of Retribution

Retributive punishment theories look backward at the offense committed, rather than forward at the prevention of future crime.⁷⁵ Retribution focuses not on improvement of society but rather on just treatment of the individual. Unlike utilitarianism, retribution does not accept the notion that punishment can be justified by its effect on the lives of persons other than the offender. Retributive punishment proceeds from the deeply rooted and widely shared moral intuition that criminal punishment is and should be inflicted on criminal offenders because they deserve it. Punishment is blame manifested, and criminal punishment is the formal structure for incorporating legal judgments about certain kinds of serious moral blameworthiness into the sociolegal system.⁷⁶ In this view, punishment is the institution through which we

in such cases, deterrence seems less dependent upon publicity than denunciation. Private fears of punishment that emanate from private knowledge of its genuine potential would serve deterrence but not denunciation. Cf. J. FEINBERG, *supra* note 17, at 99; Jones & Potter, *supra* note 72, at 161-62.

⁷⁴ Cf. Murphy, *supra* note 35, at 234-43.

⁷⁵ Hospers, *supra* note 12, at 22; see also Wasserstrom, *Theories*, *supra* note 13, at 187, 191; Wasserstrom, *Issues and Objections*, *supra* note 15, at 477 (making the larger claim that punishment itself, "in a quite important respect, is essentially backward looking"); Schedler, *On Telishing the Guilty*, 86 ETHICS 256, 260 (1976):

The institution of punishment . . . is retributive not only in the sense that the rules provide penalties only for those who are guilty of violating the rules specifying the offenses and that officials endeavor to punish only the guilty, but that they *never* adopt the view that the guilty are to suffer solely for the sake of greater deterrence.

(emphasis in original).

⁷⁶ See Wasserstrom, *Theories*, *supra* note 13, at 189 (standard case punishment is limited to blameworthy acts). But see H.L.A. HART, *supra* note 12, at 223 (distinguishing between moral and legal responsibility); Wasserstrom, *Theories*, *supra* note

make blame effective in the lives of those we consider deserving of unpleasant consequences because of something wrong they have intentionally and willingly done. Retribution explains not only why we punish but how we come to view legal authorities as morally licensed to inflict harms on criminal offenders.

There are at least two aspects of retribution, weak and strong. Weak retributive theory postulates that justice *permits* punishment of the guilty; strong retributive theory holds that justice necessarily *requires* punishment of the guilty.⁷⁷ Kant, a strong retributivist, argued that before dissolving a society, its members must punish the last murderer remaining in their prisons or "be regarded as accomplices in this public violation of legal justice."⁷⁸ A weak retributivist would contend that justice would be sufficiently served if the last murderer were punished, not

13, at 178 (some acts count as crimes even though they do not involve seriously morally blameworthy conduct); Harward, *The Bitter Pill of Punishment: Retribution*, 10 J. VALUE INQUIRY 199, 202 (1976) (violation of just law imposing strict liability for sale of liquor to minors is not universally accepted as morally blameworthy). Hart argues directly and Harward indirectly that crimes based upon strict or vicarious liability exemplify the notion that one can be legally responsible without being morally blameworthy. See also H. PACKER, *supra* note 12, at 13. This contention seems at least partially inaccurate, since the reasons for imposing strict or vicarious liability often include the belief that the offender could and should have controlled the behavior of another, or inquired further into the facts before undertaking a particular, often high-risk activity and is, in some indirect way and to some extent, morally culpable for not doing so. See generally H.M. Hart, *supra* note 26, at 415-25. But see Bedau, *Concessions*, *supra* note 40, at 52 (contending that desert is not unique to retributive theory and does not explain or limit "the criteria in terms of which deserving one thing rather than another is established"); Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 239 (1979) (desert theory is not necessarily retributive at all). Bedau's argument is intelligible because it makes sense to assert, pursuant to a utilitarian theory of punishment, that an offender "deserves" punishment because punishment deters crime and that this particular punishment is the right amount to maintain deterrence. But see J. FEINBERG, *supra* note 17, at 81 (this approach misuses the word "desert"). Further, Bedau trivializes the meaning of "desert" in retributive theory by leaving out the essential component of moral blameworthiness. Similarly, Cottingham chooses to ignore the probable (if not compelled) connection between punishment and desert, in that punishment justified because it is in response to moral wrongdoing is retributive in nature. Cf. Primorac, *Is Retributivism Analytic?*, 56 PHIL. 203, 206, 210-11 (1981) (attempting to demonstrate that the retributivist justification of punishment "is a genuine ethical judgment, and not an analytical statement in the guise of an ethical one").

⁷⁷ See Wasserstrom, *Theories*, *supra* note 13, at 190-91.

⁷⁸ Quoted in J. MURPHY, *supra* note 9, at 82; see also Kant, *Justice and Punishment*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 12, at 107, in which apparently the same phrase is translated as "be regarded as participants in the murder as a public violation of justice."

that the society's members must necessarily carry out the punishment themselves.

These polar positions scarcely exhaust the possible theories of retribution. The decision whether and how much to punish could be modified by appeals to values other than justice, such as mercy or even practicality. Assuming that execution was the only possible punishment, if the executioner had already left Kant's society, one can also imagine the society's remaining members deciding that none should be invested with so distasteful a task. Arguably, one justice-based claim — that the murderer should be punished by the only means available — conflicts with another justice-based claim — that no individual member of the dissolving society should be forced to take upon herself the burden of individual guilt for killing another person, since none of the remaining members had ever consented to be an executioner.

This last example is not really a case of either strong or weak retributivism. The members of the postulated society believe not only that it is just to punish the guilty but also that, unless other more important considerations intervene, justice requires the punishment of the guilty. These middle-tier or rational retributivists recognize that although retribution is central and important to an explanation of punishment, it cannot always tell the whole story. In considering whether death is an appropriate retributive punishment, this Article returns to this distinction.⁷⁹

Modern Kantian theories of retribution depend upon a reciprocal description of political obligation.⁸⁰ Each member of the society owes to the other members her obedience to the laws that govern them all. By obeying criminal laws, each member carries a burden of voluntary self-restraint for which the consideration given is the bearing of a similar burden by others. When someone disobeys, she gains an unfair advantage; she is free from the burden while benefiting from continued restraint by others. Criminal punishment takes away the criminal's unjust enrichment and restores the proper moral and legal order by imposing a burden on the person who disturbs this balance.

As commentators point out, this vision of retribution bears little rela-

⁷⁹ See *infra* text accompanying note 168.

⁸⁰ Morris, *Persons and Punishment*, in ON GUILT AND INNOCENCE 31, 33-34 (1976). For several descriptions of Kantian and similar theories, see J. MURPHY, *supra* note 9, at 77-92; Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 202-04 (1982); Davis, *supra* note 20, at 742-43; Wilson, *Vengeance and Mercy: Implications of Psychoanalytic Theory for the Retributive Theory of Punishment*, 60 NEB. L. REV. 276, 281-84 (1981).

tionship to the ways in which we customarily think about serious crimes.⁸¹ Most of us do not consider it a burden to refrain from murdering, mutilating, or raping others. We feel no desire to engage in these acts; our desires have been successfully sublimated, or we find the moral objections sufficiently overwhelming that we would not engage in such conduct regardless of whether the criminal law forbade it. Thus, we do not feel burdened by the criminalization of these acts. Conversely, when a murderer kills her victim, we do not view her as the beneficiary of our abstention from intentional killing. Indeed, we have some trouble thinking of the murderer as having benefited at all. Even when she kills for pleasure, or for pecuniary gain, we would hesitate to describe her as having morally benefited in such a way that punishment is required to recoup the moral benefit in the name of society.⁸² Similarly, we do not think that punishment will restore the moral order in such cases. Neither incarcerating the offender for twenty years nor taking her life will revive the victim, compensate the victim's family, or ameliorate the wrongfulness of the murder. If such things were possible, the purpose would be restitution not punishment.⁸³ Moreover, the idea of restoring the moral order seems more metaphorical than real; this order is an ideal that does not correspond to actual experiences.⁸⁴

⁸¹ *E.g.*, Wasserstrom, *Theories*, *supra* note 13, at 193; *cf.* Murphy, *supra* note 35, at 240.

⁸² It can be argued, of course, that the burdens and benefits explanation is general, rather than specific in nature; each of us, in fairness to others, must refrain from whatever criminal or morally wrongful acts we may wish to do. But the benefits and burdens, though mutual, seem grossly unequal and morally perverse. The self-restrained potential multiple killer suffers an arguably greater "burden" than the self-restrained potential tax evader or multiple overtime parker and "benefits" less from their self-restraint than they do from her. *Cf.* W. MOBERLY, *supra* note 39, at 186-98; Wasserstrom, *Theories*, *supra* note 13, at 193 (this approach is too far removed from our basic intuitions about the nature of justice to be satisfactory). *But see* Burgh, *supra* note 80, at 203 n.18 ("So long as there are some people who, though they have the inclination to commit murder, do not commit murder, with respect to those people the murderer creates an inequitable distribution of benefits and burdens."). For an interesting argument, see Harward, *supra* note 76, at 201 (this approach does not uniquely support retributivism, because it centers on the effects of punishment in maintaining the social order; this theory could be satisfied if authorities lead others to believe that offenders are punished regardless of whether they actually are punished).

⁸³ *See* W. MOBERLY, *supra* note 39, at 189; Hospers, *supra* note 12, at 39.

⁸⁴ Hospers, *supra* note 12, at 22-23. T.S. Eliot once described the world's great literature as a single entity, always whole yet constantly changing as new works appeared and old ones were reconsidered. If there is a moral order, it seems more likely to resemble Eliot's metaphor than the closed circle of the neo-Kantians: an infinitely, or at least indefinitely, expansive wholeness rather than a system of finite resources in which

The modern Kantian model also fails to capture the essence of the criminal law as prohibitive.⁸⁵ The model's analogue is the guilt-free economic transaction of contract law, in which the legal system both encourages the transaction and stands more or less indifferent to the contents of the bargain.⁸⁶ By contrast, the criminal law actively opposes every criminal transaction. The criminal exchange of benefits and burdens is blameworthy and punishment provoking not because the transaction has collapsed or gone wrong, but because the transaction itself is wrong.

Deserved treatment, or desert, provides a firmer basis for retributive theory.⁸⁷ This approach avoids contract mythology and justifies punishment not by reference to implied consent to social institutions but by our intuitions about the appropriate bases for various responses, formal and informal, to the actions and characteristics of others. Retributive theory identifies the idea of desert as one important way in which we evaluate each other. Desert helps us determine both how we will treat each other and how we account to ourselves for that treatment. The linguistic connection is obvious; retribution begins with the recognition that we punish criminals at least partly because we believe that they

every occurrence shifts some benefit or burden away from one or more persons and to one or more others. Eliot, *Tradition and the Individual Talent*, SELECTED ESSAYS 3 (1950). Eliot wrote that

[W]hat happens when a new work of art is created is something that happens simultaneously to all the works of art which preceded it. The existing monuments form an ideal order among themselves, which is modified by the introduction of the new (the really new) work of art among them. The existing order is complete before the new work arrives; for order to persist after the supervention of novelty, the *whole* existing order must be, if ever so slightly, altered; and so the relations, proportions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new. Whoever has approved this idea of order . . . will not find it preposterous that the past should be altered by the present as much as the present is directed by the past.

Id. at 4-5 (emphasis in original).

⁸⁵ Bedau, *Concessions*, *supra* note 40, at 69; Fingarette, *Punishment and Suffering*, 50 PROCEEDINGS & ADDRESSES AM. PHIL. A. 499, 502 (1977); Murphy, *supra* note 35, at 228. *But see* Burgh, *supra* note 80, at 203-04 n.18 (a criminal act unbalances the distribution of benefits and burdens "precisely because" the criminal law is prohibitive).

⁸⁶ *See* H.L.A. HART, *supra* note 12, at 10-11 (legal institution of contracts enables individuals to create reciprocal duties, but also sets limits to protect them).

⁸⁷ *See generally* J. FEINBERG, *supra* note 17, at 55-93. *Cf.* H.L.A. HART, *supra* note 12, at 182-83 (stressing the importance of voluntariness to the principle of responsibility).

"deserve" punishment.⁸⁸

Desert is more than eligibility for punishment. Any adult with the opportunity and the capacity to conform her conduct to law is "eligible" to become a criminal offender. If she chooses instead to disobey the law, she now "qualifies" (has met the conditions necessary) for punishment.⁸⁹ However, the criminal could argue that she does not "deserve" punishment,⁹⁰ perhaps because she acted with legal justification or because the law she disobeyed is one we consider transcended by other positive laws or by strong claims of extralegal morality.⁹¹ For this reason, notions of desert cannot be strictly confined by rules and regulations.⁹² Deserving punishment is therefore inevitably indeterminate, at least in the sense that it cannot be ascertained by resorting to any particular set of criteria. Perhaps the conditions beyond legal guilt required for deserving punishment may be the private standards or principles of a sensitive juror or judge.⁹³ This idealized juror or judge sees clearly, evaluates wisely, and acts free of any misconceptions or prejudice. She punishes only to do justice.

This analysis of punishment as deserved treatment may seem to conflict with the earlier contention that criminal punishment incorporates legal judgments about blameworthy conduct.⁹⁴ However, our legal system entrusts jurors and judges with guided discretion to dispose of individual cases. The system thus attempts to accommodate private standards of conduct if they are controlled by an understanding of the law

⁸⁸ Insofar as the core notion of desert is positive rather than negative, it must be altered to provide a persuasive account of punishment. *See infra* notes 89-93 and accompanying text; *cf.* Atkinson, *Justified and Deserved Punishments*, 78 MIND 354, 370 (1969) (providing an essentially utilitarian account of distinctions among deserved, justified, and just punishment).

⁸⁹ *Cf.* H.L.A. HART, *supra* note 12, at 181 (offenders should not be punished unless they have the capacity to obey the law).

⁹⁰ For another example, any natural-born United States citizen over the age of 35 is "eligible" to become President; she "qualifies" by winning a majority of the electoral votes for the office. But "[i]t is often plausible and always intelligible to say that the [person] in fact elected President did not deserve to be." J. FEINBERG, *supra* note 17, at 57. If appropriate reasons are not present, the principle of desert has been violated even if all of the formal qualifications required have been fulfilled.

⁹¹ *See supra* text accompanying note 79.

⁹² *Cf.* J. FEINBERG, *supra* note 17, at 57.

⁹³ This description has the virtue of institutionalizing the practice of jury nullification (the refusal to convict a legally guilty defendant on grounds of private or community principle), but it seems to neglect our legitimate distrust of that practice as open to abuse (for instance, when white juries in the southern United States regularly acquitted whites accused of crimes against blacks, regardless of the evidence).

⁹⁴ *See supra* note 76 and accompanying text.

and either shared by a significant number of other jurors or filtered through the law-respecting conscience of the judge. Retribution may similarly incorporate private standards in its theory of morally deserved treatment.

2. The Legitimacy of Retribution

The question remains whether retribution is a “general justifying aim” of punishment.⁹⁵ The legitimacy of retributive theory described here depends upon our intuitions about the importance of desert to punishment and in relation to utilitarian goals of punishment. H.L.A. Hart believes that retribution applies only to the distribution of punishments, restricting the potential utilitarian desire to punish whenever it will be socially effective by limiting punishment to offenders and for offenses.⁹⁶ Retribution thus explains the utilitarian refusal to punish nonoffenders, even though punishing them may effectively deter others because it demonstrates the state’s seriousness about crime prevention by inflicting harms on persons chosen for their usefulness as examples. Retribution similarly explains why we should not punish noncriminals to denounce their potential criminality, rehabilitate them before they commit offenses, or incapacitate them on mere suspicion that they soon will join the ranks of criminal offenders.

One possible problem with this limited view of retribution and desert is that retribution is not really necessary to explain why we restrict punishment to proven offenders. Although broad punishment strategies may appear utilitarian at first glance, reflection suggests that they might well be counterproductive. If we punish entirely without regard to criminality, people need not check their antisocial tendencies. If a person’s chance of receiving punishment does not relate to her own conduct, she has no incentive to forego the possibility of any perceived gain that might accrue from breaking the criminal laws. The argument applies even if we punish only persons who would make good examples or those with a personal characteristic that suggests potential criminality. Although it might be argued, by analogy with first amendment “chilling effect” doctrine, that casting a wider criminal net will cause some people to “steer far wider of the unlawful zone” of conduct,⁹⁷ one

⁹⁵ H.L.A. HART, *supra* note 12, at 8-9.

⁹⁶ See generally *id.* at 9-13 (importance of retribution in distribution of punishment).

⁹⁷ Cf. *Speiser v. Randall*, 357 U.S. 513, 526 (1958):

[W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all liti-

can easily strike the balance the other way. If all those hovering on the brink of criminality are subjected to punishment regardless of actual commission of specific prohibited acts, they too have no incentive to abstain. When certain facts about criminal behavior are also considered, such as the correlation between poverty and crime, a social policy that sweeps criminal associates or potential offenders into the ambit of criminality seems particularly unwise. An overly broad policy may push this marginal class of persons, who may have the least reason to resist criminal behavior and the highest costs in refraining from it, toward the abandonment of self-restraint. Thus, even using purely utilitarian calculations, criminal punishment should be limited to offenders and based upon specific criminal offenses.

The foregoing discussion, however, does not account for our intuition that it is not merely imprudent but wrong to use criminal sanctions against those who have not committed criminal offenses. That distinction is the reason for the introduction of retribution. Retributive theory insists that the individual is the true focus of criminal punishment, and thus limits the utilitarian assumption that aggregate social good is punishment's ultimate justification.⁹⁸ However, the retributivist intuition is not so easily removed from the utilitarian preserve. Once one acknowledges the force of moral objections to the punishment of the innocent, the next logical step is to recognize that moral constraints may not only commend but sometimes require the punishment of the guilty. The worst crimes and their progenitors seem to demand punishment for reasons that transcend utilitarian explanations.⁹⁹ Even ordinary crimes may provoke a similar response.

Desert is centrally important in answering not only the secondary question, "whom may we punish?" but also the primary questions, "why do we punish?" and "why is it (if it is) moral or just or right for us to do so?" To answer these questions, consider an intoxicated college official who commits vehicular manslaughter, or a movie executive who forges a large check.¹⁰⁰ Society views neither as very likely to commit

gation — will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear those burdens.

⁹⁸ See, e.g., H.L.A. HART, *supra* note 12, at 77-78 (utilitarian theories cannot explain why people should be punished only when they have broken the law); Jones & Potter, *supra* note 72, at 163-65.

⁹⁹ See Wasserstrom, *Theories*, *supra* note 13, at 189-91.

¹⁰⁰ These two examples are drawn from crimes that actually occurred in Southern California and were widely reported in the media at the time. See generally, e.g., D.

further offenses, thus making incapacitation, special deterrence, and rehabilitation irrelevant. Both crimes are widely publicized and condemned, so that denunciation is accomplished.¹⁰¹ Of the utilitarian aims of punishment, only general deterrence would still demand punishment. But assume that we also know that very few other highly visible, successful, and respected professionals are likely to engage in similar criminal conduct, or, if they are, that the possibility of discovery and concomitant loss of status is a sufficient deterrent. Thus, little is left of the utilitarian justifications for punishment. Yet, most people feel that the college official and the film executive should still be punished because they deserve punishment. Indeed, it is the implied disregard for desert, not for general deterrence, that seems to arouse public anger and dismay when such criminals receive light sentences for major felonies. Such responses are often described as demands for "equal justice" for rich and poor, with the emphasis on the notion of equality. However, the demand is also for justice, and the underlying belief seems to be that justice is served by punishment.

This recognition leads us towards the ultimate question: whether individual desert alone can justify criminal punishment. Proof of this proposition has so far evaded moral philosophers.¹⁰² Even for those who accept the importance of retributivist intuitions, the usual move has been in the direction of contract theories of social cohesion, which explain the state's "right" to inflict punishment on the criminal by resorting to her implied consent to the rules of society.¹⁰³ The political order

McCLINTOCK, INDECENT EXPOSURE (1982).

¹⁰¹ See *supra* text accompanying notes 65-68.

¹⁰² Some philosophers think they have been successful. See, e.g., Berns, *The Morality of Anger*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 6, at 333; van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 6, at 323. But see Jones & Potter, *supra* note 72, at 165:

The *Old Testament* formula of "an eye for an eye, a tooth for a tooth and a life for a life" perhaps was founded on the idea that the offender is fully responsible for his actions. Only if such an assumption is made is there any intuitive appropriateness to the formulation. Only if the offender is fully responsible does he carry the full blame for the action, and thus only then is it appropriate to inflict a punishment equal in weight to the offense. . . . [M]ost murderers are from poor and deprived ranks of society, . . . many murderers are psychologically disturbed and . . . many have subnormal intelligence. One or more such characteristics apply to *most* murderers; only rarely is a murderer fully responsible.

(emphasis in original) (footnotes omitted); see also Lempert, *supra* note 51, at 1181-84; Murphy, *supra* note 35, at 242.

¹⁰³ E.g., Morris, *supra* note 80, at 31-57; Satre, *supra* note 2, at 80-81.

thus respects the individual's rational self. A rational individual engaged in the design of a social and political system under which she would be required to live would recognize the necessity for the institution of punishment "as the most rational means of dealing with those who might break the other generally beneficial social rules that had been adopted."¹⁰⁴ Therefore, it is said, she has consented in advance to be punished if she breaks the criminal law.

This argument is, however, essentially circular. It states that punishment is rational because rational individuals would agree to it in forming a rational society. Yet, to know whether rational individuals would agree to it, we must know whether or not punishment is a rational response to crime. To know that, we must know why we design a response to crime and whether or not those purposes can be morally justified. In short, we are back where we started.

Consider instead a different line of argument. Suppose that utilitarian theorists wrongly view retribution as a limit on utilitarian theories because they have inverted the relationship between deterrence and desert. If desert is central to punishment,¹⁰⁵ displacing utilitarian justifica-

¹⁰⁴ Murphy, *supra* note 35, at 230; see Satre, *supra* note 2, at 80.

¹⁰⁵ This simple insight, which consistently eludes the utilitarians, can be traced to Immanuel Kant, among others. Kant, *supra* note 78, at 103-04; see Conrad, *supra* note 68, at 357 n.60. For an often-quoted statement by a nonretributivist describing the retributive view, see Rawls, *Two Concepts of Rules*, in *THE PHILOSOPHY OF PUNISHMENT* 107 (H. Acton ed. 1969).

The version of retributive punishment described in this Article must be distinguished from another pluralistic approach, which has been named "teleological retributivism." See Ezorsky, *The Ethics of Punishment*, in *PHILOSOPHICAL PERSPECTIVES*, *supra* note 12, at xi:

Teleological retributivists pay their respects to a plurality of principles. Thus, they share with utilitarians the notion that penal laws should yield some demonstrable beneficial consequences. Justice is not served by the infliction of deserved suffering for its own sake. But they derive the following view from retributivism: justice is served if teleological aims are held in check by principles of justice, e.g., that the suffering of punishment should not exceed the offender's desert.

See also Commentary, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification*, 34 OKLA. L. REV. 567, 574-75 (1981). This approach seems to differ only superficially, if at all, from the type of utilitarianism that H.L.A. Hart espouses. See *supra* note 96 and accompanying text; see also Commentary, *supra*, at 578, 604 (teleological retributivism "requir[es] criminal desert as a necessary, albeit insufficient, condition of punishment"). The theory offered here contends that criminal desert is both necessary and sufficient, but also that punishment may be withheld when other claims of social utility or justice so indicate. See *infra* notes 106-11 and accompanying text.

tions, then crime prevention or deterrence may occupy the position that utilitarians have assigned to retribution, setting secondary limits upon the infliction of punishment both in general and in individual cases. In this view, we may properly punish those who are legally guilty and who have fulfilled the quantum of blameworthiness necessary to deserve punishment, unless the legitimate utilitarian aims of punishment counsel us to refrain from punishment. Even if an individual deserved punishment, we might decide not to punish her, because her punishment would interfere with other important purposes of the criminal law.

The set of possible limitations on deserved punishment is not exhausted by reference to the utilitarian aims of punishment. Criminal punishment is only one of many overlapping social institutions that may or may not be consistent with each other. The other institution most obviously relevant to criminal punishment is civil compensation. For example, restitution to the victim is sometimes explicitly made a condition for the remission or reduction of criminal punishment.¹⁰⁶

¹⁰⁶ Punishment is sometimes withheld because the offender is regarded as having compensated society by compensating the victim. Especially when compensation costs the offender more than it is worth to the victim, as when a poor person pledges half a year's wages to pay for the rich person's stolen car, we may consider punishment as such to be unnecessary. The offender, we may say, has "suffered enough"; she has undergone a surrogate punishment.

Civil disobedience may present a hard case for retributivists. If the civil disobedient's appeal to moral principle is sufficiently compelling, she arguably does not deserve to be punished even though she is morally blameworthy for violating (let us say) a generally just and useful law and causing just the harm that it was enacted to avoid, in order to draw attention to her moral claim. *Cf.* *Walker v. Birmingham*, 388 U.S. 307, 327-34 (1966) (Warren, C.J., dissenting) (civil rights demonstrators who violated a constitutionally questionable injunction should not be punished even though in general the legal rules requiring appeal rather than violation of such injunctions may be justifiable). A distinction can be made between rule retributivism (criminal desert is necessary and sufficient for punishment because following that set of rules or criteria for punishment will contribute most strongly to doing justice in general) and act retributivism (criminal desert is necessary and sufficient for punishment because it will do justice in this case). However, the problem remains that two distinct, perhaps equally weighted moral claims oppose each other. *Cf.* Brandt, *Rule Utilitarianism*, in *PHILOSOPHICAL PERSPECTIVES*, *supra* note 12, at 93, 99 n.4, arguing that

a tenable theory of punishment must approve of punishing persons who are *morally* blameless. Suppose someone commits treason for moral reasons. We may have to say that his deed is not reprehensible at all, and might even (considering the risk he took for his principles) be morally admirable. Yet we think such persons must be punished no matter what their motives; people cannot be permitted to take the law into their own hands.

In addition, institutions and values that relate only indirectly to punishment set limits upon it. As suggested earlier, we may withhold punishment because our notions of due process have not been satisfied and because we view strict adherence to these notions as more important to preservation of social values than strict application of deserved punishments.¹⁰⁷ We may also view individuals as endowed with certain political or moral rights that certain punishments may violate so severely as to render punishment, though deserved, inappropriate.¹⁰⁸ Finally, we may be concerned about preserving our society from some harm that the infliction of deserved punishment may render more likely to occur.¹⁰⁹

(emphasis in original). Suppose, however, that the civil disobedient's claim not to be punished (or, similarly, the claim of Brandt's traitor) is altered from "she does not deserve to be punished" to "although she deserves to be punished, on balance she ought not to be." Retributivism then remains at the core of punishment but is limited by appeal to other moral principles (in this instance, not necessarily utilitarian ones). See *infra* note 109 and accompanying text.

¹⁰⁷ See H. PACKER, *supra* note 12, at 156-57, 163-69; Grey, *Procedural Fairness and Substantive Rights*, in NOMOS XVIII: DUE PROCESS, *supra* note 3, at 187 (principles of due process operate as an external moral or legal check on existing decision procedures). Grey argues that due process protects the individual's interest in not being punished unless guilty. The system of due process then must protect the general interest in not punishing those who are not guilty (or not properly found to be guilty), as well as other social interests, including freedom from certain kinds of invasions of privacy whether or not one is guilty of crime. Due process also presumably protects the individual and social interests in not punishing excessively, inequitably, or cruelly, or in any other way that violates the legitimate purposes of punishment.

¹⁰⁸ See generally Wasserstrom, *Punishment*, *supra* note 13 (concluding that no account of punishment yet provided is morally sufficient to justify harms that it inflicts).

¹⁰⁹ For example, we might justifiably refuse to punish an offender who had committed a popular crime — such as intentionally killing a tyrannous criminal racketeer whose own crimes were violent, numerous, and well-known — because the killer's punishment would set off violent street riots sure to kill many innocent persons. For another example, we might refuse to punish a parent who acceded to a dying child's wish to disconnect a life support system, because punishing the parent would bring the criminal law into disrepute by equating acts of mercy with wanton murders. This view of the relationship between retribution and crime prevention is, however, subject to serious challenge. The failure to punish a criminal because her punishment would cause others to violate the criminal law may seem like a concession to injustice in the name of practicality rather than a respectable principle of impartial justice. The determination to withhold punishment from the mercy killer may be an instance in which legal guilt does not really satisfy our intuitive standards for deserved punishment rather than one in which utilitarian principles set limits upon punishment that is genuinely deserved. See J. FEINBERG, *supra* note 17, at 60 ("[A] person's desert of X is always a reason for giving X to him, but not always a conclusive reason, [because] considerations irrelevant to his desert can have overriding cogency in establishing how he ought to be

All of these notions could be described as fundamentally utilitarian reasons to circumscribe or forego deserved punishment. Yet, they do not discredit the intuition that punishment is the complementary response to crime. Crime and punishment make up a moral unity, not just a dramatic or aesthetic one.¹¹⁰ The utilitarian goals of punishment are both legitimate and peripheral: they set boundaries to the infliction of harm upon the legally blameworthy. Retributive theory tells us that it is just to punish the guilty, and that the guilty should be punished unless other important moral or social considerations outweigh the desert-based argument for punishment. Utilitarian theory tells us to balance individual justice with social justice, remembering that although positive individual rights may often outweigh social convenience, negative individual deserts may often be counterbalanced by social costs.¹¹¹ Democratic political theory requires that we weight these scales in favor of individual freedom, and against the state's coercive powers.

3. Proportional Punishment

Most retributive theories are concerned not only with the justification of criminal punishment but also with the amount and kind of punishment inflicted. Retributive punishment must be proportionate to the

treated on balance.”); *see also* Bedau, *supra* note 15, at 610-11 (discussing different possible meanings of desert and arguing that it is impossible to ascertain what deserved punishment is or why it is deserved).

¹¹⁰ For a well-known literary exposition of this point, *see* F. DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Vintage Books ed. 1954). The murderer and central character Raskolnikov is punished, not to deter others but, because his crime morally demands punishment. *See* Simmons, *Introduction*, in *id.*, at § 5 (quoting from letter Dostoyevsky wrote to his publisher while planning novel).

¹¹¹ *Cf.* H.L.A. HART, *supra* note 12, at 236-37 (some modern retributivists would decide whether to punish those who deserve it “by reference to the effects which punishment is likely to have on the offender or on the fabric of law and morality in general”). Hart suggests that even retributivists may concede that criminal punishment should be justified and measured by utilitarian considerations when the offenses involved are defined by “variable and disputable conceptions of social and economic policy” and sufficiently disconnected from ordinary morality. *Id.* at 236. *But cf.* A. VON HIRSCH, *supra* note 15, at 53-55 (deserved punishment should not be inflicted unless the punishment, by deterring other crimes, prevents more misery than it inflicts and redistributes suffering more justly by preferring victims to offenders). For von Hirsch, then, the retributivist core of punishment is tightly confined within strict utilitarian boundaries; without some proof of deterrent effects, even punishment of the morally blameworthy is not justified. If this theory of retribution were stringently applied to capital punishment, only a clear showing of deterrent effects over and above those provided by long-term prison sentences would appear to permit a society to impose it, even on those most deserving of it.

moral gravity of the offense committed, requiring an assessment of both the objective severity of the offense itself and the subjective culpability of the offender committing it.¹¹²

The argument for proportional punishment is usually proposed after the notion of *lex talionis*, or punishment equivalent to the offense committed, has been rejected. Most theorists agree that even if there is an intuitive moral fit in taking an eye for an eye, or a life for a life, the principle of equivalence breaks down when we consider a rape for a rape and collapses completely by the time we reach a perjury for a perjury, or a tax evasion for a tax evasion.¹¹³ The progressive unintelligibility of these equivalences destroys any general theory of punishment that seeks to incorporate equivalent punishments. Nonetheless, equivalence seems valid when it remains intelligible, as when society repays the murderer by killing her.¹¹⁴

Perhaps the key to rejecting equivalence lies in focusing on its primitiveness. We might then exclude it as too uncivilized to fulfill "the evolving standards of decency that mark the progress of a maturing

¹¹² Cf. J. FEINBERG, *supra* note 17, at 117-18; H.L.A. HART, *supra* note 12, at 80, 233-34 (authorities must punish morally similar crimes in parallel fashion and morally dissimilar crimes differently); A. VON HIRSCH, *supra* note 15, at 79.

The Supreme Court has acknowledged that severe punishment disproportionate to the category of crime committed violates constitutional commands as well as moral norms. *Enmund v. Florida*, 458 U.S. 782 (1982) (retributive justification for death penalty depends on offender's degree of moral culpability); *Coker v. Georgia*, 433 U.S. 584 (1977) (death is excessive punishment for rape); *Weems v. United States*, 217 U.S. 349 (1910) (15 years of hard labor in chains, accompanied by civil interdiction, lifetime surveillance, and perpetual absolute disqualification from voting rights, retirement pay, and other benefits, is excessive punishment for trying to embezzle funds from the government by falsifying public records).

¹¹³ See, e.g., H.L.A. HART, *supra* note 12, at 161, (punishing crimes by perpetrating equivalent crimes on the offender is absurd); Primorac, *supra* note 15, at 50-55.

¹¹⁴ If the real problem with equivalence is not its moral illegitimacy but its practical unworkability, certain violent crimes may constitute a subset of offenses for which equivalent punishments rather than merely proportional ones are appropriate. Even if we calibrate punishment to inflict "a degree of suffering equivalent to the degree of the offender's wickedness," H.L.A. HART, *supra* note 12, at 233, taking the life of one who has intentionally and maliciously taken the life of another may seem satisfactory — a specific instance in which the general principle, though it may not always apply, does produce what intuitively seem like correct results. Blackstone pointed out that one life is scarcely the equivalent of another, but that undisputed truth does not vitiate the recognition that retaliation in kind is a means of punishment that accords with primitive notions of justice. *Id.* at 161 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. I, II.3 (life of aristocrat not equivalent to life of "needy decrepit assassin"))).

society.”¹¹⁵ Retaliation, at least in its simplest formulation of “a life for a life,” cannot incorporate the complexity of modern criminal law, with its focus on degrees of intent and on matters of mitigation and excuse. Simple equivalence is thus a morally unacceptable approach to the allocation of punishments in relation to crimes.¹¹⁶

Even assuming rejection of the principle of equivalence as either too uncivilized or too incapable of generalization,¹¹⁷ most retributive theorists defend the notion that both crimes and punishments may be located on vertical scales of moral gravity and severity. Although some dispute exists regarding a proper hierarchy of crimes,¹¹⁸ we can construct a rough scale with minor traffic offenses at the bottom and first-degree murder at the top. The trouble arises when we consider the almost infinite array of criminal possibilities. A perjury that intentionally leads to the conviction for murder of an innocent person may seem very serious indeed; a perjury that is intended to protect and results only in protecting the lying witness from disclosure of personal secrets tangentially relevant to some portion of the case seems much less grave. However, even if the scale of moral gravity of offenses can account for such differences, suppose the intents are reversed but the results are the same. What criteria do we use to decide which perjury is more serious?

Retributive proponents of proportional punishment do not offer much help in determining criteria, requiring only, for example, that the punishing authority consider both “the harm done (or risked) by the act and . . . the degree of the actor’s culpability.”¹¹⁹ Yet, as the perjury

¹¹⁵ The quotation is from the plurality opinion in *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see also *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting).

¹¹⁶ Cf. H.L.A. HART, *supra* note 12, at 164-65 (discussing the variety and complexity of penal institutions and the historical development of individualized sentencing).

¹¹⁷ Perhaps if retaliation in kind is inappropriate for most crimes, it is still appropriate for the worst murders. On this view, our inability to design equivalent punishments for lesser crimes should not prevent us from applying the principle in this case. Because the answer to this contention is similar to the answer to the argument that death is an appropriate retributive punishment, it will be deferred until the final section of this Article; see *infra* notes 133-41 & 160-70 and accompanying text. The point for now is merely that retaliatory ideas about punishment may be both more stubborn and less easily discredited than their detractors suppose.

¹¹⁸ See, e.g., H.L.A. HART, *supra* note 12, at 161-63; A. VON HIRSCH, *supra* note 15, at 77-88. But see Bedau, *Concessions*, *supra* note 40, at 64-65 (criticizing von Hirsch’s analysis).

¹¹⁹ A. VON HIRSCH, *supra* note 15, at 69; see also H.L.A. HART, *supra* note 12, at 234. But see Primorac, *supra* note 15, at 57 (suggesting that otherwise comparable crimes may be judged as intrinsically more or less serious based upon the offender’s motives and regardless of the actual consequences); Commentary, *supra* note 105, at 595 (concluding that because individuals are inherently unequal in intelligence, percep-

example illustrates, the difference between harm achieved and harm risked or intended may be enormous, and the actor's culpability may not directly relate to the amount of harm intended, risked, or achieved.¹²⁰

Even if we could construct moral orders of criminal offenses and criminal culpability, we might still have difficulty in composing a similar scale for the severity of punishments. Although punishments seem intuitively easier to grade, three years in prison being clearly three times greater than one year, and a \$10,000 fine ten times as severe as a \$1000 fine,¹²¹ there is no clear equivalence between one type of punishment and another. Moreover, perceptions of the severity of punish-

tion, self-control, childhood conditioning, and life experiences, responsibility eludes assessment: "Because the degree of resistance a particular person would have to exert against an immoral choice cannot confidently be measured, it is not possible accurately to measure moral culpability.").

¹²⁰ Alternatively, it may be argued that the criminal's "culpability" itself can be determined only by reference to some formula involving intent, risk, and accomplishment, as well as capacity for taking moral responsibility, and is therefore not an independent criterion at all.

Yet another difficulty arises if punishment is viewed from a psychoanalytic perspective. See Wilson, *supra* note 80, at 302:

To affix a constant penalty to a specific behavior (*e.g.*, burglary, auto theft, assault, etc.) without regard to the actual injury inflicted by the act, violates the basic principle of retribution: equating the punishment with the injury. Standard sentences are unsupportable in a retributive framework because: (1) the response of victims to a crime (in terms of the injury suffered) is inconsistent among victims due to a variety of psychological factors influencing the individual's initial response to the loss, and (2) the passage of time following an injury decreases a victim's desire for vengeance as psychological processes mitigate and eventually dissipate the effects of the loss. To impose set sentences inequitably distributes punishment because cases of both overpunishment and underpunishment will result.

The short answer to this may be that retribution and vengeance are not the same thing. Regardless of the victim's feelings, the state has suffered measurable injury and the offender has acted with a degree of culpability. Because the state cannot take into account in advance the victim's particular strengths and vulnerabilities in responding to the personal losses inflicted by crime, it must determine what losses any particular crime is likely to entail and design a system of punishments that will allow justice to be done to the offender in the individual case. The problem with this short answer is that it does not really respond to the implied argument that justice is done to criminal offenders only if they are punished in direct relation to the subjective psychological harms they have actually caused in individual cases.

¹²¹ Even this simple intuition is probably wrong, however, because the marginal utility of money and time differ so widely from one individual to another, and even from one occasion to another in the life of any particular individual.

ments are likely to vary with the socioeconomic status and personal characteristics of the individual. For example, a \$50 fine for driving over the speed limit is no more than a minor nuisance to the affluent offender, but may inflict genuine misery on the poor offender who will have to sacrifice basic necessities.

Finally, even if we manage to construct acceptable scales of moral gravity for offenses, offenders, and punishments, there is no principle that correlates one with the others. There is no fixed starting point to match offenses and offenders with appropriate punishments,¹²² no fixed interval between offenses comparable to that between punishments of the same type (moral gravity, unlike time and money, cannot be measured in standard units), and no fixed standard for converting punishments of one type into punishments of another.

One principle that may help solve these problems is a principle of parsimony that limits punishments to the least restrictive sanction possible and requires the state to prove why the offender deserves a particular punishment.¹²³ However, the idea of parsimony does not explain how we discern the dividing line between enough punishment and too much or too little punishment. Without some criteria for judgment, parsimony is no more certain a guide than is the demand for proportional punishment.

The inability to articulate any clear definition of proportional pun-

¹²² See H.L.A. HART, *supra* note 12, at 162; Bedau, *Concessions*, *supra* note 40, at 64; Pincoffs, *Are Questions of Desert Decidable?*, in JUSTICE AND PUNISHMENT, *supra* note 12, at 83. But see Burgh, *supra* note 80, at 204 (contending that criminal laws create particular spheres of noninterference, and that each sphere "can be ranked in terms of value"); Davis, *supra* note 20, at 736-42 (arguing not only that crimes and penalties can be typed (ranked) and combined into scales, but also that the two scales can be easily connected in a "more or less mechanical" way).

¹²³ The least restrictive sanction is selected because punishment requires moral justification and because more punishment than necessary to the purpose of retribution is not justifiable. No doubt our general intuitions about justice in interactions between the individual and the democratic state support the preference for the least burdensome punishment. The formal criminal justice system, with its high standard of proof and other constraints such as due process, implies that freeing a guilty person is better than risking punishment of an innocent person. Thus it is better to punish the guilty as much as or less than they deserve rather than too harshly. A. VON HIRSCH, *supra* note 15, at 5; see also *id.* at 91, 136. A number of scholars simply assume the principle of parsimony without discussing it. E.g., Jones & Potter, *supra* note 72, at 162; cf. Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 273, 286 (1982) (describing Jeremy Bentham's utilitarian principle of economy in punishment, under which punishment is justified only if the harm to the criminal is less than the harm avoided by inflicting the punishment).

ishment may discredit retributive theory. Yet, the failure to advance much beyond the original insight, that more serious crimes require more severe punishments, may be a tribute to the complexity of practical retribution rather than a sign of its theoretical inadequacy. Utilitarians do not abandon their insistence on the amount of punishment necessary to fulfill social goals, despite our present incapacity to determine how much punishment is required to deter how many people from committing which crimes. This Article assumes that retribution similarly survives our failure to construct an adequate account of proportional punishment.

E. Summary

This section has presented a *prima facie* case for justifying punishment through retribution, or deserved treatment. Although punishment may prevent crime, utilitarian concerns alone cannot justify punishment. Instead, they limit the infliction of deserved punishment. This Article has largely omitted discussing other possible limitations such as due process or individual rights.¹²⁴ The final section will consider the legitimacy of capital punishment only in relation to the *prima facie* justification of punishment. The question is whether capital punishment can be shown to be unjustified by referring to the internal requirements of the general theory of punishment outlined above. This Article next contends that even retribution cannot justify death's finality.

II. THE JUSTIFICATION OF CAPITAL PUNISHMENT

Capital punishment, it has been suggested, is justified if it serves some important purpose of the criminal law, does not significantly disserve other social purposes, and does not transgress whatever moral and legal limitations we determine to be applicable.¹²⁵ Capital punishment would not be justified if it failed to fulfill any portion of this tripartite test. This Article does not address external moral and legal limitations, except insofar as they overlap with the question of disserved purposes of the criminal law. Moreover, to focus the argument that follows, this

¹²⁴ In addition, this Article has not given an account of important social purposes that punishment disserves, even though such an account may show it to be unjustified. *See supra* text accompanying notes 25-26. Consideration of the myriad possible ways in which punishment may damage society is a philosophical and empirical inquiry well beyond the scope of this Article.

¹²⁵ *See supra* text accompanying note 106.

Article concedes that capital punishment may serve some important purposes, subsumed under the utilitarian objective of crime prevention. However, retribution, or the notion of desert, has been identified as the central justification of criminal punishment. If death cannot serve the primary purpose of retribution, its efficacy in preventing crime cannot justify it. Although utilitarian goals may set limits upon punishment, they cannot authorize it.¹²⁶ Thus, a punishment that is justified only as utilitarian is not a justified punishment. The following discussion not only rejects utilitarian justifications as insufficient, but also argues that retribution is not achieved by capital punishment.

A. *Death and the Utilitarian Aims of Punishment*

1. Incapacitation and Special Deterrence

Death as a punishment incapacitates offenders from committing further crimes and specially deters them, since a dead offender commits no more crimes.¹²⁷ However, death is unnecessary to achieve either of these goals. Incarceration for life, at least under highly restrictive conditions, would also specially deter and incapacitate an offender; thus, death is not parsimonious.¹²⁸

2. Rehabilitation

Unless repentance, remorse, or reform in contemplation of approaching death constitutes rehabilitation through capital punishment, death does not rehabilitate offenders. Renunciation of crime based upon the offender's reflections on death does not resemble rehabilitation. In true rehabilitation, a live, reformed offender refuses criminal temptations. Moreover, a criminal who reforms because of the fear of approaching death has been rehabilitated, not by death itself, but by her advance reactions to the punishment before it has been inflicted.

3. Denunciation

Defenders of denunciation as an important purpose of capital punishment sometimes contend that death is necessary to denounce murder,

¹²⁶ See *supra* note 105 and accompanying text.

¹²⁷ To say that death incapacitates is of necessity to employ irony, defining the more encompassing truth by means of the less encompassing one. Cf. Bartels, *Capital Punishment: The Unexamined Issue of Special Deterrence*, 68 IOWA L. REV. 601 (1983) (discussing "the effect of the death penalty on recidivism").

¹²⁸ See *supra* note 123 and accompanying text.

or at least the most serious murders. Failure to impose capital punishment against such murderers is, on this view, a failure by society to demonstrate that it seriously condemns the unlawful taking of another's life.¹²⁹ To show our respect for the sanctity of human life, we must kill the murderer. Denunciation proponents argue that capital punishment sends a message more deeply believed than any verbal response or ritual display could ever be. Capital punishment, unlike many other punishments, engages public attention.¹³⁰ No other means could be as effective in denouncing murder and reinforcing the social norms that prohibit it.¹³¹

The answer to this argument customarily has been that by taking life, the state does not demonstrate respect for that life, but rather contempt for it. The state tells potential murderers that killing to accomplish one's own purpose is permissible behavior. Indeed, the state follows, and by implication exhorts others to follow, the principle that society may discard one individual to set an example for others.¹³²

This debate over the contents of the denunciatory message probably cannot be resolved. Perhaps the mere existence of the debate shows that the state's message is dual and ambiguous. However, if capital punishment serves both to denounce unlawful killing and to encourage it, the overarching utilitarian goal of crime prevention does not seem well served. The state could demonstrate a superior level of moral concern by seeking forms of denunciatory punishment that more explicitly embody the state's alleged devotion to the sanctity of life.

¹²⁹ *E.g.*, van den Haag, *supra* note 102, at 332 ("Never to execute a wrongdoer, regardless of how depraved his acts, is to proclaim that no act can be so irredeemably vicious as to deserve death — that no human being can be wicked enough to be deprived of life. Who actually believes that?"); *cf.* Berns, *supra* note 102, at 339 ("Capital punishment . . . serves to remind us of the majesty of the moral order that is embodied in our law, and of the terrible consequences of its breach.").

¹³⁰ Attention wanes, however, as capital punishment becomes more common. Probably every reader of this Article can name the first person executed after the 10-year national hiatus from 1967 to 1977 (Gary Mark Gilmore, executed in Utah January 17, 1977). Probably very few Americans can name the forty-seventh person executed (Henry Martinez Porter, executed in Texas July 9, 1985). See NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 3 (Aug. 1, 1985) (unpublished compilation).

¹³¹ If the principle of parsimony applies to denunciation, one may contend that killing murderers to denounce their crimes is not the least burdensome or the least painful way of informing the public that murder is wrong.

¹³² See Amsterdam, *Capital Punishment*, in THE DEATH PENALTY IN AMERICA, *supra* note 6, at 346, 353.

4. General Deterrence

Most utilitarians support capital punishment primarily because they believe that the death penalty deters those who might otherwise commit first-degree murders.¹³³ The debate over the deterrent effects of capital punishment will not be reiterated here.¹³⁴ However, the resolution of

¹³³ Although early studies showed no relationship between the presence or absence of capital punishment and the homicide rate within a jurisdiction, some more recent studies purport to show that the threat of capital punishment deters some murders more effectively than the threat of life sentence or other long periods of incarceration. For studies refuting deterrence, see T. SELLIN, *THE DEATH PENALTY* (1959); T. SELLIN, *THE PENALTY OF DEATH* (1980); Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 *CRIME & DELINQ.* 453 (1980) (capital punishment may increase the homicide rate); Kaplan, *The Problem of Capital Punishment*, 1983 *U. ILL. L. REV.* 555, 555-62 (death penalty may encourage some murders while discouraging others; net deterrent gain or loss is unknown and probably unknowable); Lempert, *supra* note 51, at 1196-1206.

For studies alleging that capital punishment deters criminals more effectively than imprisonment, see, e.g., Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 *J. POL. ECON.* 741 (1977); Ehrlich, *The Deterrent Effect of Capital Punishment: Reply*, 67 *AM. ECON. REV.* 452 (1977); Ehrlich, *Deterrence: Evidence and Inference*, 85 *YALE L.J.* 209 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *AM. ECON. REV.* 397 (1975); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 *J. LEGAL STUD.* 35 (1977); Ehrlich & Mark, *Fear of Deterrence*, 6 *J. LEGAL STUD.* 293 (1977). For studies criticizing Ehrlich's work, see Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 *YALE L.J.* 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 *YALE L.J.* 187 (1975); Glaser, *Capital Punishment — Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 *U. TOL. L. REV.* 317 (1979); Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in *DETERRENCE AND INCAPACITATION* 336 (A. Blumstein, J. Cohen & D. Nagin eds. 1978); Lempert, *supra* note 51, at 1207-24; McGahey, *Dr. Ehrlich's Magic Bullet: Economic Theory, Econometrics, and the Death Penalty*, 26 *CRIME & DELINQ.* 485 (1980); Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 *SUP. CT. REV.* 317.

The Supreme Court, while acknowledging the inconclusiveness of deterrence studies, relied on them to bolster its revival of capital punishment in 1976.

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent.

Gregg v. Georgia, 428 U.S. 153, 185-86 (1976) (footnote omitted).

¹³⁴ If we do not know whether capital punishment deters murder more effectively

this dispute is not necessary to the central argument of this Article. Even if general deterrence mildly supports capital punishment, that support does not sufficiently overcome death's failure to fulfill the requirements of retributive punishment.

B. Death and Retribution

To some theoreticians, death is the paradigm of retributive punishments.¹³⁵ Even under the theory of retribution provided above,¹³⁶ death may be one means of giving a murderer her just deserts. If a killer is a murderer, both the preliminary necessary conditions — opportunity and capacity to conform to law — and the preliminary sufficient condition — legal guilt — have been met. Moreover, under a common legal pattern approved by the United States Supreme Court, a jury must consider the presence of aggravating factors or the absence of mitigating ones to determine whether each particular offender “deserves” death.¹³⁷ Such factors may correlate with “desert bases”;¹³⁸ by weighing them, the decisionmaker implies reasons for inflicting or withholding the death penalty based on whether the offender objectively deserves it. Further, death satisfies proportional punishment because we do not inflict upon the offender more harm than she inflicted upon the victim.¹³⁹

than long prison sentences, we may be forced to support it on the grounds that fewer innocent lives are risked if we inflict death on murderers than if we do not. It may be argued in reply that support based on so scant a foundation should not be viewed as a sufficient justification for state infliction of death on anyone, even intentional, reflective killers. See Goldberg, *Does Capital Punishment Deter?*, in TODAY'S MORAL PROBLEMS 538 (R. Wasserstrom 2d ed. 1979); van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 141, 146-47 (1969). But see Schedler, *Capital Punishment and Its Deterrent Effect*, in TODAY'S MORAL PROBLEMS, *supra*, at 552.

¹³⁵ E.g., Berns, *supra* note 102, at 333 (“We punish criminals principally in order to pay them back, and we execute the worst of them out of moral necessity.”).

¹³⁶ See *supra* notes 87-94 & 106-09 and accompanying text.

¹³⁷ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 193-98 (1976).

¹³⁸ Cf. J. FEINBERG, *supra* note 17, at 58.

¹³⁹ It may seem so at first glance. Yet if the murderer (a skilled physician or musician, perhaps) is more socially valuable than her victim (a medical charlatan, a mediocre musical talent, or even a lawyer) or perhaps ended a life nearing its close at the beginning of her own, we have to rely on moral intuitions concerning the basic equality of lives (or at least the sense we each have that our own lives should not be treated by others as of less value to us than any other person's life is to her) in order to view the harm as equivalent. In fact, juries may regularly adjust punishment in light of their evaluations of the relative moral or social value of the offender's and the victim's lives. Cf. H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 442-45 (1966); Bedau, *Criminal Justice and the Capital Offender*, in *THE DEATH PENALTY IN AMERICA*,

The harm intended, risked, and achieved, as well as the offender's degree of culpability are all balanced. The death penalty is not imposed unless all four are at the top of any scale of severity.

The unique character of death as a punishment and its relationship to other important values that might outweigh the reasons for inflicting punishment may counter this apparent retributive justification of capital punishment.¹⁴⁰ In discussing these issues, this Article returns to the argument against capital punishment described at the outset: because capital punishment is irrevocable and uncompensable, and because its infliction requires a standard of due process society cannot provide, it cannot be justified.¹⁴¹ However, this section argues that these aspects of the death penalty do not alone prevent death from being justified under retributive theory. The next section contends that the unique aspect of death that prevents it from being justified is its finality.

1. The Uniqueness of Death

a. Irrevocability, Instancy, and Finality

Those who argue that death is uniquely irrevocable are usually also willing to admit that other punishments are also irrevocable, although in some less important sense than death.¹⁴² Prison terms and even fines cannot be effectively and entirely undone. However, the acknowledgment is grudging and the argument tends to move rapidly off onto other tangents. Mere imprisonment offers the state and the prisoner herself opportunities to redetermine her fate: the state may reconsider her crime or her sanity and transfer her to another, "better" institution, or even release her; the criminal may repent, or otherwise become rehabilitated. This focus on "chances for change" and "windows of hope"¹⁴³ for the incarcerated is related to revocability only in the sense that imprisonment, unlike death, extends over time. Until the day of unconditional release, the sentence has not been fully carried out, and some portion can be abrogated. Until the last day is served, a portion of the punishment is revocable.

supra note 6, at 187-89; Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 467-68 (1981).

¹⁴⁰ For a discussion of the role of rational retributivism, see *supra* text accompanying note 79.

¹⁴¹ See *supra* notes 1-2 and accompanying text.

¹⁴² Ernest van den Haag captures this distinction by describing punishments other than death as "merely irreversible;" death alone then is "irrevocable." van den Haag, *supra* note 102, at 330.

¹⁴³ C. BLACK, *supra* note 2, at 32.

Death is not revocable in this sense of the word. If the sentence is death, it is carried out all at once. The temporal interval between alive and therefore unpunished, and dead and therefore punished, is customarily quite brief.¹⁴⁴

Death is not subject to remission after partial infliction. However, this all-or-nothing characteristic of death is not accurately described as irrevocability. A better term might be finality, or even instant finality.¹⁴⁵ Death is the end for the offender: the end of her own experience

¹⁴⁴ It may be argued that a death sentence is in reality a sentence to serve some indefinite amount of time in prison prior to death, in addition to death, but this argument does not lead to the determination that a portion of the death penalty is revocable. Most opponents of capital punishment are not contending that murderers should be freed at once, or that the time they serve in prison prior to death is immoral or unconstitutional in the same way that death is. The most that has been urged is that the anticipation of death that accompanies time spent on death row is a form of mental torture that no civilized society should permit. *See, e.g.,* *People v. Chessman*, 52 Cal. 2d 467, 499, 541 P.2d 679, 699 (court rejected defendant's claim that mental suffering was cruel and unusual), *cert. denied*, 361 U.S. 925 (1959); Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 173, 199-205 (J. O'Brien trans. 1961). This seems to be an argument against the death penalty itself. Even if it is not, the abolition of capital punishment would also include the abolition of time spent in prison in contemplation of death. *See* *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari). *But see* Abbott, *The Condemned* (review of *SLOW COMING DARK: INTERVIEWS ON DEATH ROW*, by Doug Magee), in *The New York Review of Books*, Mar. 5, 1981, at 6, 9:

But the death sentence is not really a *prison* sentence — in many states death row is not even housed in a prison. Death-row inmates are *exempt* from the prison convict milieu. They are condemned to die, not to serve so much as a day as a prison convict. They do not think or behave as convicts and they are not treated as convicts are in prison.

(emphases in original). The author of those lines is the same Jack H. Abbott described *supra* note 47. A similar argument has been made against the forms of capital punishment that are not physically instantaneous; under this view the time (if any) that a capital offender lives in conscious agony after being shot through with electricity, struck by bullets, lethally drugged, or otherwise assaulted by the state in its role as killer, is a variety of immoral and unconstitutional torture. This problem, like that of mental agony, is resolved if the death penalty is abolished.

¹⁴⁵ *See infra* notes 160-73 and accompanying text. Whether the instantaneity or relative instantaneity of death as punishment is unique is open to question. A fine paid all at once or a one-day incarceration is the rough equivalent in instantaneity to a death sentence. The money changes hands immediately; the complications of the legal bureaucracy virtually ensure that a sufficiently short jail sentence, though less instant than death by electrocution or firing squad or money transfer by cash or check, once begun will be finished before any realistic opportunities for partial revocation can be implemented.

In certain respects, instantaneity is not necessarily a corollary of capital punishment. The Supreme Court ruled 38 years ago that a state that had tried once but failed to execute a prisoner could constitutionally try again, implying that immediacy is not required.

of consciousness and individuality, and the extinction of her status as a human being.¹⁴⁶ Of all other punishments, only torture or forceful mental reconditioning that obliterates the offender's identity even approaches finality in this sense. Significantly, both types of punishment

Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). Even if this ruling would not survive modern tests of cruelty and unusualness under the eighth and fourteenth amendments, it may suggest that capital punishment does not necessarily include instantaneity of infliction, once the physical process of killing has actually begun. More recently, the Supreme Court found no reason to prevent the execution in Texas on March 14, 1984 of James Autry, who had previously been reprieved temporarily just 31 minutes prior to his originally scheduled execution date. Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177, 183 (1984); NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., *supra* note 130, at 3. Second, if the prisoner's contemplation of approaching death is regarded as an ineluctable part of the death sentence, *see, e.g.*, Camus, *supra* note 144, at 200-01, the history of prisoners who have spent years on death row only to lose their lives to the executioner in the end provides empirical evidence that although physical instantaneity is customary, psychological instantaneity (a relatively short temporal lapse between the knowledge that one is going to be put to death and the carrying out of the sentence) is neither required nor customary. *See, e.g.*, *People v. Chessman*, 52 Cal.2d 467, 341 P.2d 679 (11-year detention pending execution does not constitute cruel or unusual punishment prohibited by California or United States Constitutions), *cert. denied*, 361 U.S. 925 (1959).

The opponents of capital punishment generally do not contend that psychological instantaneity is required because the principle of psychological instantaneity directly contradicts the principle of greater due process. If the state must kill murderers immediately after sentencing, there will be no time for the extended advocacy and painstaking judicial review that are central to greater due process.

¹⁴⁶ *Cf. van den Haag, supra* note 102, at 330-31 ("Death is an experience that cannot actually be experienced and ends all experience.").

The Supreme Court and various Justices have recognized, though not always clearly, that finality is what makes death as a punishment both unique and uniquely troublesome. *E.g.*, *Coleman v. Balkcom*, 451 U.S. 949, 955 (1981) (Marshall, J. & Brennan, J., dissenting from denial of certiorari); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)); *Lockett v. Ohio*, 438 U.S. 586, 605 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (reference to "severity and irrevocability"); *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); *id.* at 346 (Marshall, J., concurring). As Justice Stevens recently observed,

In the 12 years since *Furman v. Georgia*, every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 104 S. Ct. 3154, 3167 (1984) (Stevens, J., concurring and dissenting) (citation and footnote omitted).

currently are rejected as morally wrong.¹⁴⁷ Although there may be no moral consensus to explain the rejection of such punishments, death is the only punishment our society accepts that fails to recognize a basic human right to continue to exist. Thus, the element of finality that distinguishes death from all other punishments begins to explain why death is not an appropriate retributive punishment.

b. Incompensability

Death is unique, it has been argued, not only because it is irrevocable but also because, being irrevocable, it is "totally incompensable."¹⁴⁸ However, this contention can be undermined from two perspectives. First, prison terms are almost as incompensable as capital punishment. Second, tort law has tried to make death compensable in much the same way as other irrevocable injuries.

A wrongly imprisoned or fined individual can be compensated at a later date when the wrong is discovered; the wrongly executed individual cannot. However, there is surely a serious question concerning how far society will go in paying for consequential damages, such as illness, disability, physical abuse, or psychological injuries that stem from incarceration.¹⁴⁹ Assigning monetary value to such losses is not easy. Thus, when examined closely, long prison terms look little more compensable than death.

Moreover, in tort law, death is now compensable not to the individual, but to the individual's estate and relatives through the wrongful

¹⁴⁷ See J. MURPHY, *supra* note 9, at 227 (everyone agrees that torture and mutilation are cruel and unusual punishments banned by the eighth amendment); Kelly & Schedler, *Capital Punishment and Rehabilitation*, 34 PHIL. STUD. 329 (1978) (medical techniques that destroy a person's identity without killing her are immoral and cannot be justified).

¹⁴⁸ J. MURPHY, *supra* note 9, at 241; see also Satre, *supra* note 2, at 78.

¹⁴⁹ Wrongful prison terms, especially long ones, could become very expensive if lost business and educational opportunities were considered, not to mention personal and social losses such as emotional distress, damage to reputation, or deprivation of the opportunity to marry or have a normal marital relationship and raise a family, to make and spend time with friends, to participate in culture or politics, sports or art. See Quade, *Innocents in Jail*, 70 A.B.A. J., June 1984, at 34 (reporting that although some wrongfully convicted and incarcerated defendants have received compensatory awards up to \$1 million, states that allow such awards often limit them to relatively small amounts). Isidore Zimmerman, who died just four months after receiving his \$1 million from the New York Court of Claims, in recompense for more than 20 years of imprisonment for a murder he did not commit, remarked at the time: "I lost so much that can never be replaced. I would have had children. I would have cherished someone calling me 'Daddy.'" *Id.*

death cause of action.¹⁵⁰ Death as a punishment is only different if compensation to one's estate or to close personal relatives is less legally or morally satisfactory for wrongful capital punishment than for wrongful death due to negligence or intentional tort. If the reply is that capital punishment of the wholly or partially innocent, or of those who do not meet the state's criteria in addition to legal guilt, is "unfair," the question becomes why accidental death is somehow more fair than death by capital punishment. Arguably, a killer who receives a full trial and appeal and is then put to death has been treated more fairly than the blameless bystander who dies at the hands of a reckless driver.

Of course, capital punishment differs from accidental death because the state has inflicted death by design and with premeditation. However, this distinction, although it may increase the resentment and anger of the capitally punished individual's relatives and friends, does not seem relevant to compensability. Like the difference between an intentional tort and a negligent one, it bears no necessary relationship to the nature and magnitude of the loss.

c. *The Requirement of Greater Due Process*

Opponents of capital punishment have also contended that greater due process — so great it is impossible to achieve — must accompany the infliction of punishment by death.¹⁵¹ This demand characterizes the death penalty as unique. However, the supposed requirement of greater due process is open to question on several grounds.

If the rationale is the special importance of life, the question arises why, in so many other areas of the law, life-and-death decisions do not require equally stringent measures to protect the potential victims. In cases concerning welfare,¹⁵² disability benefits,¹⁵³ and medical treat-

¹⁵⁰ *E.g.*, CAL. CODE CIV. PROC. § 377 (West Supp. 1985); CAL. PROB. CODE § 573 (West Supp. 1985). Of course, compensating the executed person's family or estate is not the same as compensating the person herself. Satre, *supra* note 2, at 79. But proponents of incompensability must explain why the substitution is morally unsatisfactory rather than merely announcing that the difference exists.

¹⁵¹ See *supra* notes 1-2 and accompanying text.

¹⁵² See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (approving state imposition of maximum ceiling on welfare grant regardless of family size even though "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings").

¹⁵³ See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (evidentiary hearing not required prior to termination of Social Security disability payments even though recipient's physical condition and dependency on benefits may mean that erroneous termination will cause him substantial hardship). *But see* *Goldberg v. Kelly*, 397 U.S. 254, 264

ment¹⁵⁴ or other public services that may be necessary to life,¹⁵⁵ the courts have set differing standards of due process, permitting governmental authorities to decide against protecting life in some instances without even providing a prior hearing to the individual whose life is involved. In private decisionmaking, due process has little or no relevance. For example, the decision to manufacture an automobile so unsafe that a minor accident risks major injuries to its occupants is completely insulated from due process. Of course, the withholding of electricity from those who do not pay, even in subzero weather, is not intended or certain to produce their death, and the company officials who approve an unsafe car design no doubt do so hoping that none of the risked deaths will ever occur. By contrast, when the state inflicts death as a punishment it deliberately puts a particular individual to death.

The failure to provide greater due process in all cases involving life-and-death consequences may not discredit the argument in favor of such process in cases of capital punishment. It may be morally wrong but socially practical for us to limit stringent due process to the most important instances of state deprivation of life. However, the inconsistency with which we treat various public and private life threatening decisions may suggest that a general principle requiring greater due

(1970) (evidentiary hearing required prior to cutting off welfare assistance because "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits") (emphasis in original).

¹⁵⁴ See *Harris v. McRae*, 448 U.S. 297, 338-40 (1980) (Marshall, J., dissenting) (federal legislation upheld by majority denies federal funding to poor women for abortions "even when severe and long-lasting health damage to the mother is a virtual certainty" and even when abortions "are necessary to protect the health and sometimes the life of a mother").

¹⁵⁵ Cf. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18-19 (1978) (due process prevents a municipal utility from terminating service without giving customer a fair opportunity to pay a disputed bill or question its accuracy since "[u]tility service is a necessity of modern life," but implying that even necessary services such as heat and water may be cut off for nonpayment of bills regardless of customer's ability to pay or physical hardship). In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court upheld a state's requirement that a tenant pay or provide for payment of rent to avoid eviction even when the lessor had failed to maintain the premises in habitable condition, observing that the challenged statute "potentially applies to all tenants, rich and poor" alike. *Id.* at 70. The "need for decent shelter" and "right to peaceful possession of one's home" cannot be recognized as constitutionally fundamental interests. *Id.* at 73-74. The majority ignored Justice Douglas's contention that since the tenants were "destitute," the summary procedures approved "will mean in actuality no opportunity to be heard." *Id.* at 83, 85 (Douglas, J., dissenting in part).

process when life is at stake has not been fully incorporated into our common moral perceptions.

In addition, the demand for greater due process in death penalty cases may indicate a confusion between two types of procedural justice. In instances of pure procedural justice, we have no independent criterion for judgment, and if the specified procedures are properly followed, any outcome may be described as just. In instances of imperfect procedural justice, we have an independent criterion for judgment but there is no feasible means for guaranteeing a just outcome even though the specified procedures are properly followed.¹⁵⁶ Criminal trials, including sentencing, are instances of imperfect procedural justice. Elevating the standards of due process by requiring strict adherence to numerous safeguards may make just outcomes more likely, but it cannot ensure them. There is no point at which imperfect procedural justice attains the exact match between procedural stringency and perceived justice that pure procedural justice invariably provides.

Finally, if procedural justice is a finite commodity, depending on limited resources of time, energy, intelligence, and money, perhaps it should not be concentrated on so few offenders. Instead, the available resources should be allocated more broadly among the many who are charged with lesser offenses.¹⁵⁷ Factual and legal errors are no less likely to occur in lesser cases. Indeed, they may be more likely, because the judge or jury is less awed by the gravity of the task. Misdemeanors are still more common than felonies, and lesser felonies more common than greater felonies.¹⁵⁸ If more due process were accorded at the bottom of the scale of criminal offenses, it would reach a larger number of criminal defendants who are arguably more worthy of saving from possible injustice.¹⁵⁹ Striking the moral balance, between very strict due

¹⁵⁶ See J. RAWLS, *A THEORY OF JUSTICE* 85-86 (1971).

¹⁵⁷ A similar argument is made by those who object to direct or indirect public financing of extraordinary medical services such as organ transplants for the few, especially when their chances of significantly prolonged survival or mental functioning are slight, while refusing to provide routine medical care for the many who cannot afford it but would almost certainly benefit from it.

¹⁵⁸ See *Mayer v. City of Chicago*, 404 U.S. 189, 197-98 (1971) (important to have just proceedings in inferior courts because they deal with much larger numbers of people than do the higher courts).

¹⁵⁹ If any unjustly inflicted legal penalty produces social alienation and anger in the victims and those who are informed of their mistreatment, then a utilitarian might argue that it makes better sense to provide as much justice as possible for the largest number, even if the arithmetic turns out to disfavor greater due process for those persons charged with the most serious criminal offenses. Even if one is not a utilitarian, it may be argued that those who have committed the least serious crimes are the most

process for the few who face capital punishment and somewhat better due process than we have now for the many offenders who do not, is not necessarily an easy decision.

2. Finality and Retribution

Even if capital punishment is not unjustifiable because it is irrevocable, or uncompensable, or requires greater due process than we can provide, it may be unjustifiable because of its finality. The finality of death is the single characteristic that separates it most undisputably from any other form of punishment.¹⁶⁰ Yet many descriptions of it as punishment evade this simple truth. If final punishments, which permanently deprive the offender of identity and consciousness, do not accord with our ideas about retribution, then retributive theory shows capital punishment to be unjustified.

At first glance, retribution does not eliminate finality in punishment. Retribution looks backward at the offender's offense rather than forward at the social efficacy of punishment.¹⁶¹ However, perhaps we may fairly revise the model of retributive theory. Both retributive punishments and utilitarian ones are designed to have consequences. The two differ because utilitarianism accepts consequences in others' lives as a justification for punishment, while retributive theory rejects any such justification. Retribution keeps the individual offender at the center of the institution of punishment. The consequences that make punishment legitimate must occur in the life of the individual offender. There is no other way in which the offender can experience "just deserts." Retributive punishment inflicts harms or deprivations that respond to our perceptions of the gravity of the criminal offender's act and the moral blameworthiness of her conduct. Yet, if at the instant of the infliction of the punishment the offender is rendered forever unable to appreciate the justness of her punishment, much if not all of its moral force is lost. The possible effect of capital punishment on society as a whole is almost beside the point. Justice is to be done to the offender. This individual focus is the central explanation and justification of punishment.¹⁶²

morally deserving of due process.

¹⁶⁰ See *supra* notes 145-47 and accompanying text.

¹⁶¹ See *supra* note 75 and accompanying text.

¹⁶² Cf. Gerstein, *Capital Punishment — "Cruel and Unusual"? A Retributivist Response*, 85 *ETHICS* 75, 77-78 (1974):

[The offender] is not to be treated as an object or even as an enemy. Our duty to treat him justly is no less stringent than that which we have to-

It is important to distinguish this argument from similar arguments

ward any other member of the community

. . . . This is not to say that we may not cause him pain, and even very great pain. To say that punishment is justified is to say that a man with the capacity for a sense of justice ought to feel guilty and recognize that he should suffer for what he has done. . . . An affliction which undermines a man's self-respect rather than awakening his conscience, which impairs his capacity for justice rather than stimulating it, could not serve as just punishment.

See also *Furman v. Georgia*, 408 U.S. 238, 272-73, 286-91 (1972) (Brennan, J., concurring) (punishment cannot be just if it degrades human dignity); Satre, *supra* note 2, at 76-77 (although it cannot easily be shown that capital punishment violates human dignity, it "denies [the person executed] any further right to have rights and thus denies to him any further due process of law").

These explanations of why death is improper punishment all seem partially illuminating but ultimately unsatisfactory, perhaps because they appeal so directly to supposedly shared moral values without reexamining the writer's assumptions either about the content of those values or about their general acceptance by others. Some philosophers and judges, after all, are equally certain that capital punishment enhances human dignity. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 184 (1976); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 950, 967 (1966); Berns, *supra* note 102, at 334. Some philosophers argue that capital punishment may even constitute a right not only of society but of the executed offender himself. *E.g.*, Hegel, *Punishment as a Right*, in *PHILOSOPHICAL PERSPECTIVES*, *supra* note 12, at 107; *see also* Bedau, *Concessions*, *supra* note 40, at 60.

A more promising approach, although set in a utilitarian framework, maintains that punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong [This] view maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for *choosing* not to perform an offense. Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 212-13 (1984) (emphasis in original). "Given that the goal of punishment . . . is the offender's (as well as other potential offenders') realization of an action's wrongness," *id.* at 213, capital punishment cannot be justified because it always functions to prevent the offender from realizing the wrongness of her action rather than encouraging or providing opportunities for her to do so. Hampton further writes,

The moral education theory . . . does not sanction the use of a criminal for social purposes; on the contrary, it attempts to justify punishment as a way to benefit the person who will experience it, a way of helping him to gain moral knowledge if he chooses to listen Instead the moral good which punishment attempts to accomplish within the wrongdoer makes it something which is done *for* him, not *to* him.

Id. at 214 (emphases in original). A "moral education" theory of punishment generates upper limits on punishment, rejecting any type of punishment that negates the offender's "autonomy" or "freedom of choice" and thus ruling out both forceful mental reconditioning and capital punishment. *Id.* at 222; *see* Kelly & Schedler, *supra* note 147, at 329-31. For similar but distinct "moral education" theories, *see* W. MOBERLY,

that focus on the offender's alleged right to moral amelioration through punishment. The contention that final punishments, which obliterate identity and consciousness, are not truly retributive does not rest on unprovable assertions about human dignity or even moral autonomy. Instead, the argument is that retribution itself has a moral content inconsistent with final punishments; that is part of what distinguishes retribution from revenge. Retribution appeals to nothing more than the stark right to continue to exist, to experience the pain, duration, and consequence of punishment. These characteristics describe all punishments except those that extinguish consciousness and life itself.

Another approach is to reflect again upon what it means to say that death is unique because it is final. All other punishments must then be nonfinal. Yet in what characteristics does their lack of finality manifest itself? First, and most obviously, no punishment other than death directly aims at and achieves the permanent extinction of the punished individual. Although some other punishments, such as incarceration under unpleasant and dangerous circumstances, may sometimes result in death, that is not their primary goal. Second, all other punishments

supra note 39, at 207-10 (shock of punishment forces wrongdoer to reflect on wrongness of her act); J. MURPHY, *supra* note 9, at 242-43 (capital punishment is unjustified because death "represents *lost opportunity* of a morally crucial kind" precluding offender's possible "change of heart") (emphasis in original).

If this theory is stripped of its forward-looking utilitarianism and perhaps also of its ambiguous reference to "benefit," it supports the argument made in the text. Because punishment by death at the instant of its infliction extinguishes consciousness, it can never morally educate the offender except prior to its infliction. That moral education, however, occurs (if at all) not through the punishment itself but through anticipation of it, and therefore cannot be used to justify it. See *supra* text following note 128. Moreover, because the moral education derived from anticipation of death can be obtained by threatening death without actually inflicting it (provided that the offender and others believe that the death will in fact occur), under the principle of parsimony in punishment, *supra* note 123 and accompanying text, capital punishment is unjustifiable for a second reason. Though it may be difficult to sustain public belief in the reality of capital punishment without producing, at least from time to time, a dead offender as proof of execution, governmental ingenuity may be equal to this deceptive task. Indeed, considering the large number of potential candidates for the death penalty in the United States (all those convicted of capital offenses), the much smaller but still significant number of those actually sentenced to death, and the still smaller fraction (though growing) actually executed in the nine years since the Supreme Court reconstitutionalized capital punishment, it can be argued that the system just described mirrors (though distortedly, because some executions do occur) the real world. See Greenberg, *Capital Punishment Considered Concretely*, HARV. L. SCH. BULL., Spring 1983, at 17 (predicting that the system will continue to operate in this manner indefinitely); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 926-28 (1982).

except death have duration as one of their properties.¹⁶³

To recognize the importance of duration as a characteristic of retributive punishment is not to argue that retribution covertly merges with deterrence theory. Utilitarians make the offender suffer to discourage her or others from committing further offenses.¹⁶⁴ Retribution embraces the infliction of suffering, not to improve the offender's conduct or to deter others, but to fulfill her negative deserts.¹⁶⁵ The ultimate value to be served is not social utility but rather individual justice. Even though retribution appeals indirectly to law-abiding members of society who witness that justice was done to the offender, retribution's direct appeal is to the offender's consciousness.

In one sense, then, retribution is psychologically naive; it proceeds on the assumption that without formal punishment, the offender will not suffer harms sufficient to provoke her to realize the wrongfulness of her criminal acts. Yet, in another sense, retribution is psychologically sophisticated; it recognizes that we inflict punishment not merely to denounce criminal offenses,¹⁶⁶ but to displace from our collective conscience opposing crime and implant into the offender's conscience the blame that justly attaches to her conduct. To give someone her just deserts implies her recognition that those deserts are just. Thus, we consider it both wrong and useless to punish those, such as the insane, who lack the capacity for that recognition. The prevailing consensus, that it is unjust to execute the insane even though they may have been sane when their crimes were committed and otherwise deserve execution,¹⁶⁷ may stem from a partial if largely unconscious acknowledgment

¹⁶³ Punishments may extend over time both directly and indirectly. The notion of indirect duration requires some reconsideration of the concept of instance discussed above. A fine paid all at once, or a short period of imprisonment, may be functionally equivalent to death in instance. However, unlike death, both those punishments have indefinite and open-ended consequences in the life of the offender. The effects of paying a fine or serving a day in jail continue after the event itself. Unless the punishment is death, punishment remains indefinitely operative in the offender's life.

¹⁶⁴ See *supra* notes 35-74 and accompanying text.

¹⁶⁵ See *supra* notes 75-94 and accompanying text.

¹⁶⁶ See *supra* notes 63-74 and accompanying text.

¹⁶⁷ See generally *Caritativo v. California*, 357 U.S. 549, 556 (1958) (Frankfurter, J., dissenting); *Sollesbee v. Balkcom*, 339 U.S. 9, 16-22 (1950) (Frankfurter, J., dissenting); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980). The traditional rationale for prohibiting the execution of mental incompetents is "that it takes advantage of the prisoner's mental disorder to foreclose his right to challenge his sentence." *Id.* at 794. Yet this reason seems clearly insufficient for those prisoners who were sane and capable of assisting in their own defenses and post-conviction remedies. The reason suggested in the text — that we

that it is important for the offender to realize that punishment is the effect of crime. Yet, when punishment is both instant and final, that realization can never occur as a consequence of punishment. Any remorse the offender experiences after sentencing but prior to punishment as she awaits death focuses on the anticipation of punishment, not on punishment itself. Since the harm that death as a punishment inflicts at least partially precludes the achievement of retributive goals, death is not an appropriate retributive punishment.

Even if we are unwilling to accept this argument against final punishment as inflicting the wrong kind of harm or suffering to accomplish retributive goals, it may still be possible to show that death is unacceptable because it is final. Suppose we are rational retributivists who take a multifaceted approach to justifying punishment.¹⁶⁸ Even if we first determine that justice requires capital punishment of the worst murderers, because death is the only punishment adequate to give them their just deserts, we may nonetheless refuse to inflict it if other important values counterbalance the arguments in favor of death. One important retributive value that may outweigh the *prima facie* justification of capital punishment is the recognition that punishment is intended to make blame effective in the life of the offender, and to demonstrate her blameworthiness, not just to others but to her. The importance of the offender's experience of her own punishment may be seen as a justice-based claim that conflicts with capital punishment, but not with other familiar forms of punishment such as fines or incarceration.

The principle of proportionality in the allocation of punishments would not prevent this rejection of capital punishment because proportionality has no fixed starting point and implies no particular form of punishment. If the worst murderers receive the worst punishments, such as life imprisonment without possibility of parole, proportionality is satisfied. Moreover, if one accepts that a murderer should experience her just deserts, the argument for death as an equivalent and therefore appropriate punishment for the worst murderers is undermined. In the view of retribution here described, final punishments cannot be justified.¹⁶⁹ The notion of equivalence is discredited, because it ignores the

believe punishment appeals, whether successfully or not, to the offender's consciousness and conscience — may help explain our moral distaste for killing those who cannot understand either what we are doing or why we are doing it.

¹⁶⁸ See *supra* note 79 and accompanying text.

¹⁶⁹ Of course, it may be argued that this way of looking at punishment by death is too unfamiliar to be acceptable; if there were anything to it, either retributivists or opponents of capital punishment would have pointed it out long ago. However, until recently retributive theorists have generally fit the retaliationist mold, and have directed

importance of giving the offender her just deserts and favors retaliatory vengeance. Perhaps the difference, or a salient difference, between retribution and revenge lies in the former's insistence on the necessity of a genuine attempt, not merely to harm the offender in return for harm done, but to harm her to bring her to a realization of the harm she has done. Retribution focuses on the offender's deserved punishment; revenge focuses on retaliation and tries to satisfy the victim's or society's desire "to strike back at the criminal."¹⁷⁰

3. Restructuring the Original Argument

The question remains whether the argument stated at the outset of this Article can be restructured in light of the recognition that death as a punishment is unique, not because it is irrevocable, but because it is final. Perhaps we can substitute the latter contention for the former and then continue with the familiar argument: because death is the most severe punishment possible, it requires more process than we can provide. However, this formulation assumes that death is the worst of all possible punishments because it is final. Nonfinal punishments such as torture and physical mutilation have long been rejected by modern democratic societies as punishments worse and more painful than death.¹⁷¹ Even punishment by loss of citizenship has been held to violate

their efforts towards increasing rather than limiting the severity of punishments. And opponents of capital punishment, as the opening paragraph of this Article suggests, have expended their efforts on contending that death is an illegitimate punishment because it is irrevocable and uncompensable, and because the process due before death can be justified is impossible for human institutions to provide.

¹⁷⁰ Cf. Atkinson, *supra* note 88, at 355 ("Arguments based on vengeance [sic] or revenge characteristically . . . fail to distinguish the description of a natural reaction to evil conduct from a justification for permitting it."); Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 72 (1980) ("While retribution focuses on the criminal's wrong, retaliation focuses on the impulse . . . to strike back at the criminal.").

¹⁷¹ Proponents of the death penalty often brush this fact aside as unimportant, thus suggesting that it does not matter whether severe corporal punishments other than death have been abandoned by most civilized systems of criminal justice. Yet the reasoning behind this de facto abolition seems worthy of investigation. It seems intuitively likely that if corporal punishment less than death is now socially and morally unacceptable, punishment by death should also be renounced unless serious, justice-based reasons can be given for making it an exception. Presumably the social and economic costs of having to see the victims of mutilation and thus acknowledge the cruelty of such punishments, to deal with the mutilated offenders' anger and resentment, and to support them if the physical punishment proves incapacitating, do not count as such reasons. See Wolfgang, *The Death Penalty: Social Philosophy and Social Justice Research*, 14 CRIM. L. BULL. 18, 20 (1978) (arguing that it is illogical to accept

the eighth amendment.¹⁷² The state, as a state and personified through its judges, may view loss of citizenship as a political death worse than physical death. Nonetheless, it seems unlikely that a majority of criminals, each required to lose a hand, her citizenship, or her life, would choose the latter. The legal perception of degrees of severity in punishment seems counterintuitive and therefore open to question.

Moreover, punishments like mutilation and expatriation may be disallowed on grounds other than impermissible severity. We may believe that these punishments are somehow different in kind from fines, incarceration, and death — too “primitive,” as the Supreme Court has suggested,¹⁷³ or historically discredited, or otherwise distasteful. The due process argument can be restructured: of all punishments now permitted, the death penalty is the most severe because it is the only one that is final. Whatever the merits of this argument may be, it seems stronger than the argument that death is too severe because it is irrevocable, a characteristic it shares with such permissible punishments as fines and imprisonment.

CONCLUSION

This Article has argued that retribution occupies a central place in the justification of criminal punishment and that capital punishment is

punishment by death but reject punishment by mutilation, without discussing possible psychological bases for this pattern of punishment); *cf.* Wasserstrom, *Issues and Objections*, *supra* note 15, at 478 (arguing that because of the severity of capital punishment, “the burden of proof as to the moral justifiability” of it falls upon its proponents); *id.* at 500 n.7:

I do not know how to decide whether there are deprivations more serious than death. If we concentrate upon the production of pain or suffering, there are probably any number of things more painful than execution If we concentrate upon how much the person is being deprived of, execution seems the most severe or extreme deprivation in the sense that it is the way in which all the person's interests are permanently and completely extinguished.

See also Gerstein, *supra* note 162, at 79 (“It is not the degree of suffering which might lead the retributivist to regard capital punishment as cruel and unusual, but its dehumanizing character, its total negation of the moral worth of the person to be executed.”). *But see* J. MURPHY, *supra* note 9, at 237 (although torture is necessarily degrading, death may be inflicted in a humane manner that shows respect for the executed person).

¹⁷² *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (depriving a native of her citizenship, at least as a punishment for military desertion, is “more primitive than torture,” because “the expatriate has lost the right to have rights”).

¹⁷³ *Id.* at 101.

unjustified because it partially disregards the retributive goal of giving the offender her just deserts. This Article relegates utilitarian theories of punishment to a secondary and limiting role, rather than the primary, justifying role accorded them in many accounts of crime and punishment. Due process and the complexity of its relationship to the justification of punishment have been discussed primarily in connection with the definition of punishment. However, just as due process may be built, by implication, into the description of justified punishment, notions of individual rights may be inextricably intertwined with the concept of just deserts. A full account of deserved punishment may require a more complete and structured analysis of retribution as constrained by individual rights. If so, capital punishment must be reviewed in light of the relationship between retribution and rights. Yet whatever direction further inquiry takes, it will be important to recognize that death is different from all other punishments that our society currently authorizes because it is unchallengeably final.

