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A Retributivist Argument Against Capital Punishment

Robert A. Pugsley
A RETRIBUTIVIST ARGUMENT AGAINST CAPITAL PUNISHMENT

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The issue of capital punishment is with us still, indeed more than at any other time in the past decade. During the past four years, no one has abstracted the arguments surrounding this ultimate sanction from the reality that gives rise to them. Since January 17, 1977, death has been a fact of life for the men and women on death rows across this nation, as well as for their families, friends, keepers, and ultimately their executioners. The full range of passions, rhetoric, and reasoned arguments are renewed each time an execution is carried out. That is welcome, because death should never become routine. The real threat lies in ennui, some hint of which is already reflected in the mass media: News concerning impending and completed executions is beginning to move to the inside pages of the national dailies and into brief filler material on the networks' nightly news. These events serve to remind

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1. The execution of convicted murderer Gary Gilmore by a firing squad in Utah on that date was the first use of capital punishment in the United States in almost a decade. Since then, the ultimate sanction has been visited upon three other death row inmates: John A. Spenkelink, in Florida, May 25, 1979; Jesse Bishop, in Nevada, October 22, 1979; and Steven T. Judy, in Indiana, March 9, 1981. [1981] 1 DEATH PENALTY REP. (NCCD) 26.

2. The prisoner count on death row is 750, spread over 30 states and the U.S. military. Of this total, 742 are male, 8 are female; 250 are black, 396 are white. Id. at 27.

3. I predicted as much in an essay written on the occasion of Gilmore's execution. Pugsley, Reflections on January 17, 1977, 37 CHRISTIANITY & CRISIS 15-16 (1977). It should be noted, however, that if the death penalty continues to be employed with the relative infrequency that has characterized the past four years, indif-
all society that several important questions concerning the legality and morality of execution remain not merely unanswered, but inadequately explored. There are some arguments in support of the death penalty which should no longer hold sway, if they ever did—and others which, while plausible and superficially appealing, require closer inspection. It is to those related tasks that this Article turns its attention.

The Article will primarily address questions concerning the ethics of criminal punishment generally and of the death penalty—an obviously unique punishment—in particular. The first section suggests the central place such discussion occupies in the constitutional analysis of capital punishment, and the reasons a more thorough appreciation of these issues by both abolitionists and retentionists is therefore desirable.

The next section briefly considers the principal utilitarian claim on behalf of capital punishment, that of deterrence, and argues that it is both an empirically insufficient and theoretically unacceptable justification for the existence or imposition of capital punishment.4 I then review two reasons frequently offered in justi-

4. It is but one of utility's defects as a moral theory that, by its very terms, it is critically dependent upon empirical measurement of the immeasurable—of happiness or suffering, pleasure or pain—for its valid employment. In the realm of criminal punishment, utility's two principal manifestations are deterrence and rehabilitation: The former requires the calibrated estimation of fear; the latter, the determination that the offender has become certifiably "better." For a recent discussion of the shortcomings of both of these putative justifications for criminal punishment, see Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 Hofstra L. Rev. 379, 383-87, 391-97 (1979).
fication of capital punishment which are mischaracterized as retributive: the channeling of vengeance that would otherwise result in anarchy, and the demonstration and vindication of moral norms. While both are very desirable accompaniments of retributive punishment, neither states the essence of the retributive justification of punishment.

The main focus of the Article is the retributivist justification for criminal punishment. I will outline the classical Kantian formulation of retributivism and its traditional implication for capital punishment. I propose a wholly different retributivist conclusion concerning capital punishment: one founded upon Kant's insights concerning man's nature and fundamental worth, and arguably more consistent with these insights than Kant's own rigidly literalist approach to execution.

THE CONSTITUTIONAL FRAMEWORK

In the landmark case of Gregg v. Georgia, Justice Stewart's plurality opinion rearticulated the two-stage constitutional inquiry for determining whether the challenged punishment—execution—was per se violative of the eighth amendment's proscription against cruel and unusual punishments. First, is the death penalty compatible with "the evolving standards of decency that mark the progress of a maturing society?" Second and separate from the first, does the punishment "[comport] with the basic concept of human dignity at the core of the [Eighth] Amendment?"

The first question focuses upon available indicia of past and contemporary attitudes concerning the retention and application of a particular punishment. The plurality and "hard-liners" alike

5. In the course of this discussion there will be occasion to comment on a recent retributively inspired defense of the death penalty. See W. Berns, For Capital Punishment: Crime and the Morality of the Death Penalty (1979); note infra and accompanying text.
7. This position was initially adopted by the Court in Trop v. Dulles, 356 U.S. 86 (1958).
8. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
10. Id. at 182 (citing Trop v. Dulles, 356 U.S. at 101).
11. For use of this terminology in this context, see Criminal Law, 1977 ANN. SURVEY AM. L. 365, 366-67. The plurality, consisting of Justices Powell, Stewart, and Stevens, upheld the death penalty in some circumstances, Gregg v. Georgia, 428
refused to be bound by notions of what would count as "cruel and unusual" in 1787, but rather held that the eighth amendment must be "interpreted in a flexible and dynamic manner," so that the ban on barbarism "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." Such an approach certainly formed an important part of the bases on which Justices Brennan and Marshall in dissent found the death penalty unconstitutional per se.

Under such an analysis, a strong presumption of validity attaches to any legislatively prescribed punishment because "the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." This approach facilitates and endorses two different positions in support of capital punishment which will be considered in due course: the burden-of-proof argument advanced by certain proponents of deterrence theory; and the expression-of-community-moral-outrage argument advanced by certain modern retributivists who accept and endorse at face value what is self-described by the legislature as the considered moral consensus of the community.

The plurality asserted, however, that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" To this end, even widely popular punishments must be subjected to independent judicial scrutiny so as to insure that "the sanction imposed cannot be so totally without penological justification that it

12. The hard-liners, Justices White and Rehnquist, and Chief Justice Burger, upheld the death sentences in the entire Gregg line of cases. See cases cited note 28 infra.
13. 428 U.S. at 171.
14. Id. (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).
15. Id. at 228 (Brennan, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring)).
17. Id. at 175.
19. See note 42 infra and accompanying text.
21. Id. at 185.
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results in the gratuitous infliction of suffering." Human dignity is said to be offended when a punishment is "excessive," that is, when it involves "the unnecessary and wanton infliction of pain," or is "grossly out of proportion to the severity of the crime." These two aspects of the proportionality test are now constitutionally mandated and arguably apply to the amount of punishment, as well as to the kind of punishment. Courts must consider the punishment, in relation to the gravity of offense, in the abstract, and not with reference to its imposition on a particular defendant in a specific case.

This second line of inquiry, in which the Court explicitly undertakes to examine a given penalty within the framework of penological theory, offers ample opportunity for the kind of discussion that follows in this Article. In fact, the theory of retribution is erroneously characterized and inadequately considered by the plurality and the "hard-liners" alike. Justices Brennan and Marshall can hardly be described as sympathetic to retribution, yet in their respective opinions in Furman v. Georgia and Gregg both cap-

22. Id. at 173.
23. Id. (citations omitted).
25. Hart v. Coiner, 483 F.2d 136 (1973), cert. denied, 415 U.S. 983 (1974); In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). But see Rummel v. Estelle, 445 U.S. 263 (1980), where the Court held that, except in an egregious case, courts should defer to the legislature's judgment on sentencing, and affirmed, on eighth amendment grounds, a life sentence (with possibility of parole), pursuant to Texas' recidivist statute for three property felonies totaling $229.11.
27. 428 U.S. at 173.
tured more of the theory's nuances than their brethren, though each ultimately failed to see the identity of interest between the "essential dignity of man"32 on which they would strike down the death penalty, and the Kantian conception of individual worth on which a retributivist can also argue for the death penalty's elimination. At the least, both Justices concluded33 that execution is not required by retribution, the central thesis of this Article.

Justice Stewart's plurality opinion in Gregg found capital punishment to be, in part, "an expression of society's moral outrage at particularly offensive conduct,"34 and described the social channeling of the "instinct for retribution [which] is part of the nature of man"35 as "unappealing to many, but . . . essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."36 The plurality wrongfully assumed that retribution is an instinct and that its expression by the state is therefore the rationalized adoption of an unthinking impulse. If it were only that, it would be shameful to elevate it to the status of a "penological purpose" let alone a moral theory. As Justice Marshall argued in dissent, the "safety-valve" theory of punishment is not truly retributive but essentially utilitarian.37

The other related aspect of punishment which the plurality linked with retribution is the reinforcement of shared moral and social values.38 This goal of moral pedagogy is by no means incompatible with retributivism,39 but it is not—as Justice Marshall was

32. Id. at 229 (Brennan, J., dissenting).
33. Id. at 239-41 (Marshall, J., dissenting); 408 U.S. at 304-05 (Brennan, J., concurring).
34. 428 U.S. at 183.
35. Id. (quoting Furman v. Georgia, 408 U.S. at 308 (Stewart, J., concurring)).
36. Id. The debate over "human nature" would carry us well beyond the scope of this Article. It is sufficient to note here that one of the most distinguishing features about moral theories is their purposeful separation from blind or instinctual response to circumstance.
37. See id. at 238-39 (Marshall, J., dissenting).
38. Id. at 183.
39. Indeed, such reaffirmation of moral values and concomitant strengthening of social bonds should be a welcome effect of retributive punishment. See notes 64-66, 84-89 infra and accompanying text. But such results may not be regarded as, or substituted for, the retributive justification of criminal punishment, namely, a principled and proportionate response to the offender's deserts, without more. For a careful discussion of the differences between vindication of a rule (and the value it embodies), and retribution, see Mueller, Punishment, Corrections, and the Law, in THE TASKS OF PENOLOGY 47, 56-60 (H. Perlman & T. Allington eds. 1969). For a discussion of the "assurance problem" see J. RAWLS, A THEORY OF JUSTICE 270, 315 (1971).
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again the only member of the Court to point out—really retributivist. It is, in fact, deterrent in nature. As part of the theory best known to Europeans as “general prevention,” it is basically teleological (it purports to justify punishment as a means to a further end), and specifically utilitarian.

Because Justice Marshall implicitly accepted the conventional understanding of retribution’s harsh implications for criminal punishment, he explicitly rejected as violative of the Eighth Amendment the genuinely retributivist idea that a murderer could deserve death, and that the community might legitimately insist upon imposing it for that reason alone—because the delivery of deserved punishment is itself a moral good. As a retributivist, I (must) disagree with Justice Marshall’s rejection of this approach to punishment. With his specific conclusion that retribution does not in fact require the death penalty, however, I can and do agree. Further, I share his premise that, “[t]he mere fact that the community demands the murderer’s life in return for the evil he has done cannot sustain the death penalty” for reasons inherent in a moral theory of retributivism as well as in the standard of constitutional review proclaimed by the Court.

Justice Marshall stated that while retribution is important in deciding who should receive punishment (the desert principle as crucial link between punishment and justice), it is misplaced as a

42. 428 U.S. at 239-41 (Marshall, J., dissenting). Public opinion about the contemporary acceptability of the death penalty is appropriately though not exclusively used in the first stage of inquiry to assess whether execution meets “the evolving standards of decency that mark the progress of a maturing society.” Id. at 173 (quoting Trop v. Dulles, 356 U.S. at 101). If the same community opinion is then also uncritically employed to identify and define the content of the penological purposes according to which the Court must determine whether the death penalty “comports with the basic concept of human dignity at the core of the [Eighth] Amendment,” id. at 182—i.e., whether it is a barbarous type of punishment, or disproportionate in relation to the severity of the crime—then the second prong of the test will have been effectively stripped of its intended independence from the first, rendering its rearticulation by the plurality a hollow exercise. The plurality has unfortunately but obviously accepted this unreflective version of retributivism championed by, inter alios, Professor Walter Berns in his recent book. W. BEAUS, supra note 5. Berns’ work was critically reviewed in Hughes, License to Kill, 26 N.Y. REV. BOOKS 22 (June 28, 1979). See generally Correspondence, 13 THE AM. SPECTATOR 39 (June 1980).
43. Pugsley, supra note 4, at 395-97.
44. See notes 84-93 infra and accompanying text.
45. 428 U.S. at 240 (Marshall, J., dissenting) (emphasis added).
general justification for a system of punishment, and as a basis for general and specific determinations about the nature and degree of punishments that offenders should receive. He thus found retribution an inadequate basis on which to justify capital punishment.

The plurality's discussion of deterrence, the second major penal rationale in support of capital punishment, is also brief, but more cogent than its treatment of retribution. In sum, both the plurality and hard-liners found the evidence concerning the deterrent effect of capital punishment inconclusive, and for that reason found no basis on which to declare the death penalty unconstitutional. Justice Marshall, having spent considerable time analyzing the data unfavorable to the deterrence argument in Furman, in Gregg felt compelled to refute the more favorable study done by Isaac Ehrlich. Acute methodological criticisms of Ehrlich's work abound, and after reviewing them, Marshall concluded that "capital punishment is not necessary as a deterrent to crime in our society."

DETERRENCE

Concerning the utilitarian theory of deterrence, it is most reasonable to demur. The claims on behalf of execution's marginally superior deterrent value over other forms of criminal punishment have never been satisfactorily demonstrated, nor, for a variety of methodologically intractable reasons, are they likely to be. This

46. Id. at 237 (Marshall, J., dissenting); note 66 infra.
47. 428 U.S. at 184-87.
49. 408 U.S. at 347-54 (Marshall, J., concurring).
52. 428 U.S. at 236 (quoting Furman v. Georgia, 408 U.S. at 353 (Marshall, J., dissenting)).

[After all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be . . . .

The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific'—that is to say, a soundly based—conclusion is simply impossible,
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conclusion is shared by most thoughtful students of the subject on either side of the debate\(^{54}\) and is reflected most recently in both the plurality\(^{55}\) and hard-line\(^{56}\) opinions of the United States Supreme Court in the Gregg series of cases in 1976. But despite or because of such inconclusiveness, both groups of Justices and some commentators find warrant for continued imposition of the punishment. They thus accord constitutional sanction to the exchange of a known quantity—the life of the condemned—for what they themselves acknowledge to be a speculative return. To do so is to approve a starkly utilitarian stance whose logic places the collective interest above justice in the individual case and displays a willingness to employ even extreme and irrevocable measures to that end.\(^{57}\) According to this view, the burden of proof on the issue of deterrent value appropriately rests with the abolitionists, and thus the indefinite empirical uncertainty concerning deterrence forms the basis for continuing the practice.\(^{58}\) That is, any and all doubt must be resolved in favor of the state, not the individual. Only a moral theory which places no or negligible value on individual human life—albeit criminally guilty human life—could embrace such an upended starting premise. Naked utilitarian calculus fits that description, assumes the morality of the death penalty, and insists upon that distribution of the burden of persuasion. In such a construction of the argument, the abolitionists are predestined to lose; for, according to retentionists of this persuasion, deterrence is the primary justification for capital punishment, and the less that is known about its effects, the stronger the case for continued execution.

and no methodological path out of this tangle suggests itself.

\(\text{Id. at 25-26.}\)

\(^{54}\) The work of Isaac Ehrlich seems to be the only empirical defense of the proposition that execution—as distinguished from merely the latent availability of the death penalty—possesses marginally superior deterrent value over other severe punishments for murder. Ehrlich, supra note 50. Ehrlich's assumptions, analyses, and conclusions have all been attacked in a new round of critical literature sparked by publication of his article. See e.g., Bowers & Pierce, supra note 51; Passell, supra note 51. Only those utilitarian retentionists who were already committed to the idea of the death penalty's marginally greater deterrence now find their beliefs satisfactorily vindicated on the basis of Professor Ehrlich's studies. See, e.g., van den Haag, \textit{The Collapse of the Case Against Capital Punishment}, 30 \textsc{Nat'l Rev.} 395, 402-04 (March 31, 1978).

\(^{55}\) See cases cited note 28 supra.

\(^{56}\) See cases cited note 29 supra.

\(^{57}\) See, e.g., van den Haag, supra note 54.

\(^{58}\) See, e.g., van den Haag, supra note 18. Contra, Bedau, supra note 18.
Even if we could know with some degree of assurance that a particular and superior deterrent value could be obtained from executing rather than incarcerating, that would not settle the question for any but these committed utilitarians. The morally principled objection would remain that one cannot do that which is otherwise wrong merely to achieve a concededly worthy goal. More familiarly, the ends cannot justify the means. The limits to deterrence, and hence to the punishments that may be imposed on an individual criminal in order to achieve it, are highly elastic both in theory and practice. There is no a priori ceiling to the price that a utilitarian society would feel justified in exacting from a criminal if that price were thought to be capable of realizing the greatest amount of collective happiness (aggregate utility). Indeed, as commentators have pointed out, there is no requirement in deterrence theory that the person punished for purposes of example be guilty. It is enough if the public, to whom the deterrent message is being communicated, thinks him so. Thus justice and individual desert are at fundamental odds with utility and collective benefit.

**RETRIBUTIVISM**

Kant expressed his classical conception of retributivism in morally absolutist terms. His insistence upon the moral primacy of the individual forms the underlying basis for his subsequent discussion of the rights and duties of that individual in a moral community of fellow human beings. An individual’s dignity, according to Kant, derives from his or her capacity for rationality and its employment in the search for truth. The individual has, innately,
the freedom necessary for choice, and thus the responsibility for choices made rests properly with him. In this, he can be said to possess moral desert. This moral capacity, this freedom, makes of the individual a moral actor, a subject, an end in himself who may not justly be dealt with as merely an object or means to another's ends.63

With reference to the unique punishment of death, we are considering the sine qua non of "human dignity"—and of every other positive human quality—the continued existence of life itself. The very efficacy claimed for death as a punishment inheres in the importance we attach to life’s preservation. If there is a right to life (as I believe), it is certainly at stake in the argument over capital punishment. And if the Kantian notion of "human dignity" remains unsatisfactorily vague as an explanation for that asserted right’s preciousness, perhaps the purposes of this Article are sufficiently served by emphasis on that morally intuitive valuation of life itself which has traditionally been a shared societal value.

The individual has, in the community of her fellows, reciprocally corresponding rights and obligations of noninterference with the rights and freedoms of all others. This moral/political community (civitas) exists to provide a skeletal framework within which the collectivity of individual rights and freedoms can be protected. Law, for Kant, is the community’s unchangeable ordering mechanism; and the community’s legal apparatus, the state, is to be inflexible in its application. Positive law exists only as a partial embodiment of the moral law among human beings.64

If an individual’s behavior violates another’s rights, the transgressor has thereby gained an unjust advantage at the expense both of the victim and the community as a whole. This creates a moral disequilibrium, an imbalance in the scales of justice which must be rectified by imposing a corresponding disadvantage on the offender.65 In so doing, the community is penalizing conduct by which the individual has illegitimately threatened the consensual foun-

63. This account of Kant’s general approach to criminal punishment is drawn primarily from I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 98-109, 131-33 (J. Ladd trans. 1965). For an excellent and concise account of both Kantian and Hegelian classical retributivism, see E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 2-16 (1966).

64. I. KANT, supra note 63, at 98-109.

65. Morris, Persons and Punishment, 52 MONIST 475, 477-80 (1968). Of course, the disadvantage must not be incommensurately severe, or the scales of justice would be further imbalanced. See I. KANT, supra note 63, at 101.
dation of a rule and rule system which exists for the benefit of all community members, including the offender herself. Thus one of the premises of a humane retributive disadvantaging is the continuing relationship of the offender with her (offended) community.

The adjudication-and-disadvantaging process is, in the Kantian retributivist view, a good thing. Not only does it assign appropriate disadvantage to the offender, but it also reiterates her obligation to respect the rights of others. This moral component exceeds the re-

66. There is a distinction to be noted here. The formation and maintenance of a social order along the lines of moral contractarian principles is one thing, while the preservation and aggrandizement of any social order at whatever cost is another. See J. Rawls, supra note 39, at 251-57 for a suggestive interpretation of how Kant's autonomous and rational beings would freely will the principles of justice chosen by those in Rawls' original position. Contra, T. Hobbes, Leviathan 229-36 (M. Oakeshott ed. 1969). Though the system-stabilizing effects of deontological retributivism might resemble those of teleological deterrence, the substantive moral principles and procedures used to apply them will, or should, differ significantly.

The relevance of this point to criminal punishment, including capital punishment, is the following: While many grant retributivism a central role in deciding whom to punish (only the guilty), they refuse that theory any place in justifying the general institution and systematic practice of punishment, including the determination of kinds and amounts of punishment. Rather, they arrogate the latter function to the utilitarian theory of general prevention (deterrence plus normal socialization). H.L.A. Hart, supra note 59, at 2-13; Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955).

But utility tells us nothing about the kind of social order that is being protected, whereas the Kantian moral theory which informs retributivism does. The institution of criminal justice and its sanctions should be an integral part of the larger social order in which it operates, not divorced from or indifferent to the social, economic, or ethical values and practices of that society. See A. von Hirsch, Doing Justice 143-49 (1976); Marx, Capital Punishment, in Marx and Engels 485-89 (L. Feuer ed. 1959); Murphy, Marxism and Retribution, 2 Philos. & Pub. Aff. 217 (1973).

In short, advocacy of a retributivist justification for a system of criminal punishment as well as the imposition of particular punishments on specific offenders requires for consistency the evolution of a nonutilitarian social order. It may well be that efforts to achieve the part will result in the evolution of the whole: Criminal justice forging a link with the larger matrix of social justice is quite different from the unreflective use of state force to preserve an unjust status quo. While the function of any system of criminal punishment may thus at one level always appear to be consequentialist (conservative of social order), not every variant of consequentialism is utilitarian.

67. It should be made clear that this point, which is later developed at greater length in an analogy to civil disobedience, see note 74 infra and accompanying text, is my own, and represents a departure from Kant. Indeed, Kant has some very troubling things to say concerning the status of a convicted offender; statements that on the surface appear to contradict his assertions concerning the dignity of man and his admonition never to treat a human being merely as a means, but always as an end in his or her own right. For a discussion of these seeming inconsistencies, see id.
quirements of mere penalty (pragmatic disadvantage) and illustrates what Professor Feinberg terms "the expressive function of punishment." In this view, by definition, "punishment" adds to whatever penalty might be imposed, another, morally censorious element: social reprobation. Each of these analytically separable components raises justificatory questions for penal practice.

The only basis of justification for imposing criminal punishment according to retributivism is moral desert: that which can be said to have been earned or merited by the willed behavior of a responsible individual. The principle of desert provides a coherent, morally acceptable reason for responding to a committed offense with punishment. The behavior that warrants punishment is that which transgresses the morally informed positive law. The concept of desert is what critically distinguishes principled punishment from that imposed according to the dictates of utility. As C. S. Lewis has put it: "[T]he concept of desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust."

According to Kant, punishment cannot be inflicted for some questionable goal or to "promote some other good . . . for a human being can never be manipulated merely as a means to the purposes of someone else." This stricture raises immediate and obvious difficulties for a punishment scheme, namely, deterrence, grounded on utilitarianism, especially with reference to the death penalty. For it expresses fundamental objection to using the offender's situation as the opportunity for doing anything more (or less) than justice in his case. Justice is to be concerned exclusively with acts

68. I. Kant, supra note 63, at 99-102, 132 n.3; Pilon, Criminal Remedies: Restitution, Punishment, or Both?, 88 Ethics 348 (1978).

69. J. Feinberg, Doing and Deserving 95-118 (1970). Again, this moral condemnation explains what punishment does; it does not justify it. See note 42 supra and accompanying text. Further, this “expressive function” of punishment is more than, and different from, the unreflective acceptance of the society’s expression of will on the matter of appropriate punishment. See notes 38-40, 42-46 supra and accompanying text.

70. J. Feinberg, supra note 69, at 98.

71. I. Kant, supra note 63, at 100. This corresponds to the principle of legality cherished by most non-totalitarian legal systems; nullem crimen, nulla poena sine lege (no crime or punishment unless there has first been a transgression of a promulgated law).


73. I. Kant, supra note 63, at 100.
past, and it is on this basis solely that the individual could be judged and sentenced.

Revenge is clearly not the purpose of Kantian retributivism. Revenge is a blind, retaliatory urge to inflict pain for pain suffered. It respects neither persons nor principles, while retributivism respects both. Revenge seeks arbitrary enforcement of a private claim.\(^7\)

Retributivism assesses justice in the individual case and reaffirms the community's rights and rule system while so doing.

The kind and amount of punishment to be imposed are inextricably linked to penal purpose and have been the source of equal concern. What, specifically, of the death penalty under Kant's formulation of retributivism? Proceeding from the image of the imbalanced scales, Kant holds that the "principle of equality" determines both the kind and degree of punishment.\(^7\) As applied to murder, this principle requires that capital punishment be inflicted on the offender, because "[t]here is no sameness of kind between death and remaining alive even under the most miserable conditions."\(^7\)

This approach exemplifies Kant's ideal scheme of punishments—namely, that punishments be exactly proportioned to the gravity of the offense and the moral deserts of the offender. Based upon this same notion, retributivism would rule out capital punishment for any crime less than murder. The "principle of equality" demands rigid application of the *lex talionis*, a part often mistaken for the whole of retributivism.

There are convincing arguments for the impossibility of achieving anything close to such a finely calibrated punishment scheme. In order to determine truly the moral desert of the offender, one would have to reconstruct his biography, and be privy to the complex of motives which resulted in the offense for which he has been convicted. Professor Feinberg concludes:

Certainly, there is no rational way of demonstrating that one criminal deserves exactly twice or three-eighths or twelve-ninths as much suffering as another; yet, according to at least some forms of this theory [retributivism], the amounts of suffering inflicted for any two crimes should stand in exact proportion to the "amounts" of wickedness in the criminals.\(^7\)

\(^7\) See *id.* at 101.
\(^7\) *Id.* at 101.
\(^7\) *Id.* at 102.
\(^7\) J. Feinberg, supra note 69, at 117.
It would seem that Kant's own ambitious requirements for the practical determination of moral desert (including that, presumably, for murder) do not admit of being fulfilled.

The relevant distinction here is between adherence to the absolutist moral foundation of Kantian retributivism (as expressed in the Second Formulation of the Categorical Imperative), and the degree of latitude that should exist in the legislative and juridical spheres in determining the appropriate (just) punishment for a particular offense. The worth of a human life, based on the concepts of rationality, freedom, and human dignity, is absolute and unchanging. The approach of the positive law in reflecting these moral concepts, within limits that do not violate them, can change.

In the Kantian view of John Rawls, for example, the state (in the absence of a rigidly drawn blueprint) must accord superiority to the individual's most important rights—including, of course, the right to life—over the collective interests of the community. Professor Rawls states:

> Each person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.

This leads back to, and is connected with, a more complete consideration of Kant's valuation of the individual in his stricture against punishment that would violate that worth. In addition to rendering impracticable the determination of the exact penalty required, Kant's "principle of equality" would also frequently lead to unjustifiable results by having the punishment simulate the kind of offense for which it is being imposed. He himself acknowledges as much with specific reference to rape and pederasty because the punishments "would themselves be punishable crimes against humanity in general." These same considerations demand that even a convicted murderer not be subjected to any responsive treatment by society that would degrade his character as a human

78. I. Kant, supra note 61, at 96.
79. See note 91 infra and accompanying text.
80. B. Aune, Kant's Theory of Morals 160-69 (1979); I. Kant, supra note 61, at 41-42.
82. I. Kant, supra note 63, at 132.
One would thus be unjustified, presumably, in doing what the "principle of equality" would otherwise dictate: modeling a "cold-blooded" murderer's execution (assuming such were possible) on the exact lines of his victim's grisly death. Even the most humane execution imaginable cannot be viewed as anything but degrading. Yet Kant clearly insists upon death for murder, upon a literal operation of the biblical *lex talionis* in relation to that one punishment which uniquely threatens the offender as an end in himself and irrevocably eliminates the possibility of his human dignity.

In symbolic terms, capital punishment is ostracization to the ultimate degree. It not only emphatically transgresses the inviolability of the executed, but also insuperably destroys those bonds of community which criminal punishment should strive to reaffirm. Many have long recognized that the demoralization of the convicted awaiting execution is largely attributable to just this factor inherent in the death penalty. It should not go unnoticed by retributivists that some utilitarian advocates of capital punishment have recognized precisely this element as an argument in support of the death penalty.

The foregoing lines of objection already strongly suggest the form of an alternative retributivist conclusion regarding capital punishment. Chiefly, of course, there is the respect required for the individual's dignity and moral capacity (and, by logical necessity, his or her life). It is difficult in theory and impossible in practice to reconcile such respect with the practice of execution. Professor Gerstein has put it succinctly:

Perhaps the people involved in the ceremony surrounding the public beheading of a nobleman in the eighteenth century could continue to have profound respect for him as a moral being. [In fact, Kant used such an execution as an example in his work.] But ceremonial public executions would not be tolerated among us today. Given our surreptitious and mechanical approach to execution [a point taken up at length by Camus in his polemic, "Reflections on the Guillotine"], it is hard to see that the condemned are treated as anything more than 'objects to be . . . discarded.' . . . It is not the degree of suffering which might lead a retributivist to regard capital punishment as cruel and un-

83. *Id.* at 102.
84. *Id.*
usual, but its dehumanizing character, its total negation of the moral worth of the person to be executed.86

An alternative response to a convicted murderer, for example, would be to impose appropriately harsh punishment of definite duration (up to and including, possibly, a life term) as opposed to execution. In addition to the individual's capacity for morality which Kant emphasizes, Rawls maintains that, at least theoretically, a convict retains the capacity for justice notwithstanding its conspicuous absence at the time she committed her offense.87 This capacity, shared by all members of the community, is another of the bonds that require maintenance in the face of a violation of the community's rights. Whether a community suspends observance of these values as to a murderer—who clearly presents the ultimate provocation and the strongest inducement to such suspension—might almost be regarded as a test of the community's commitment to these values, and its estimation of their true worth. The French sociologist, Durkheim, told us that we need our criminals to reinforce our sense of right and wrong.88 We also need them to reinforce our principles of justice and our expressed ideals.

The maintenance of bonds which, in contradistinction to Kant,89

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89. Kant's own view of the offender's status during the time of his punishment is a conspicuous departure from the regard which he otherwise insists inures to the dignity of the individual person. The following passage thus merits quotation in full:

No human being in the state can indeed be without any position of dignity at all, inasmuch as he has at least that dignity adhering to a citizen. The only exception is someone who has lost it by his own criminal act, in which case, although he is allowed to stay alive, he is made into a mere tool of the will of someone else (either of the state or of another citizen). Such a person (and he can become one only through judgment and Law) is a slave . . . and is owned by someone else. . . . The latter is, therefore, not merely his master . . . but also his owner . . . being his owner, he can sell or alienate him as a thing, can use him as he pleases (but not for ignominious purposes), and can dispose of his abilities and energies . . . although not of his life or limbs.

I. KANT, supra note 63, at 98.

These views are difficult to reconcile with Kant's oft-quoted admonition not to treat the individual merely as a means to someone else's purposes, id. at 100, be-
is advocated here, might be likened to the relationship between the
described above, and the transgression there is principled,
true to the reformation or removal of
and the state under the classical understanding of civil
disobedience. Significantly, the transgression there is principled,
intentionally public, and dedicated to the reformation or removal of
the particular law(s) being broken—elements not present in a com-

cause "[h]is innate personality [that is, his right as a person] protects him against
such treatment, even though he may indeed be condemned to lose his civil per-
sonality." *Id.* at 100 (brackets in original). And they further appear at odds with his caution
to the authorities concerning the treatment even of one condemned to die: "But
the death of a criminal must be kept entirely free of any maltreatment that would
make an abomination of the *humanity residing in the person suffering it.*" *Id.* at 102
(emphasis added).

There is at least one other statement, pregnant with ominous possibility, that
comports with the dark views quoted at length above. That is: "[The offender] must
first be found to be deserving of punishment before any consideration is given to the
utility of this punishment for himself or for his fellow citizens." *Id.* at 100 (emphasis
added). The "before" hardly gives the offender distinctive assurance in any principl-
ed system of legal punishment. Only the behavioristic proposals of Lady Wooton
and those similarly committed to the vision of a therapeutic state would sweep away
the notion of moral/legal guilt before the full panoply of utilitarian goals and meth-
ods could be unleashed upon the individual. It is precisely at the moment of convic-
tion and thereafter that the offender is most in need of all the antiutilitarian force
that retributive punishment theory can provide. *Before* conviction, the state has no
warrant whatsoever to do anything to or with the defendant for its (or, allegedly, the
defendant's) benefit except to accord him or her due process in the investigation and
adjudication of the case. But this wide opening that Kant provides the state in the
passages quoted above, *id.* at 98, 100, respectively, is mirrored also in the very
wording of the admonition mentioned earlier: "[A] human being can never be ma-
nipulated merely as a means to the purposes of someone else..." *Id.* at 100 (em-
phasis added). Much could be done to an offender without running afoul of the pro-
scription contained in such a loose qualifier as "merely," and—if any reconciliation
at all is to be made between the opposing sets of passages above—it seems that that
word provides the path. Yet that is surely a technical and unsatisfying explanation for
what stands out as an inconsistency in spirit between Kant’s general notions of moral
valuation for the rational being and these prescriptions for the exercise of state
power, so as to undermine severely, if not entirely negate, the dignity and worth of
the individual convict.

Though a full exploration of these questions cannot, obviously, be pursued here,
I wish at least to renounce unequivocally the dehumanizing, crudely totalitarian im-
lications that one might read into the troubling passages quoted above. Instead, in
the text of this Article, I formulate my own implications of retributivist punishment
theory insofar as the offender's relationship to the society and its state are concerned.
And the appropriately modified analogy of the ordinary offender's status to that of a
principled civil disobedient is similarly my own. In addition to the passages above,
declaring the offender out of the community for the duration of his or her sentence,
Kant explicitly condemned the idea of civil disobedience. *Id.* at 138-41. The larger
political theory, of which I view retributivism as an important and legal component,
would not exclude such an important avenue for moral dissent against putatively un-
just positive law. The absence of such an avenue either conflates the realms of law
and morality, or renders impotent the objections of the latter to the perceived Injus-
tices of the former.
mon offense. Yet, while the authorities may, and morally should, take cognizance of the moral differences between civil disobedience and the common offense, they are officially obliged to notice only the illegality. This is not amiss in a generally democratic state, since a variable standard of cognizance might result in unjustifiably harsh treatment at the hands of authorities unsympathetic to the aims of the civil disobedients; and unjustifiably lenient treatment at the hands of authorities sympathetic to, say, wife-killing. Civil disobedients fully expect the appropriate punishment and endure it not only to validate thereby the moral basis of their claim, but also to give symbolic witness to their continuing relationship with the political community. Not only do the underlying bonds remain unbroken, they are actively reaffirmed: The offenders maintain their ties to the very community against which their transgressions were directed.

With appropriate modifications, a similar relationship can be seen in the case of a convicted murderer. Even if he is sentenced to a life term without possibility of parole, he retains his membership in the community, and has had that status reaffirmed by the process of adjudication and punishment. His formal bond with the community is the punishment bond. It is that which signifies the community’s recognition of him as a responsible moral agent and deserving of its respect, expressed of necessity through penalty and censure. He in turn accepts, if only tacitly, his punishment as justified; he acknowledges that he ought to feel guilty and suffer for his violative behavior. In the instance of the life term, particularly, there is this paradox: The community has “cared enough to give the very worst” punishment which, by abolishing the death penalty, it has permitted itself to impose.

It might be objected at this point that little if anything distinguishes the version of retributivism which I am proposing from the sanctity-of-life theory and its programmatic expression through pacifism. In fact, retributivism neither depends upon nor requires adherence to that theory, although it does not preclude it.

While retributivism is informed and limited by the need to protect life as the requisite for human dignity, it is at its core a theory of justice, a justification of penal practice, a coherent principle of judgment concerning the appropriate sanction of convicted criminals. Insofar as an argument can be made for systematically suspending imposition of death for capital crimes or eliminating the

90. Gerstein, supra note 86, at 77.
availability of the punishment altogether, it is made by appealing to a source more fundamental than retributivism's traditional system of reckoning. Rather, that argument appeals to retributivism's spirit and Kant's own system of moral theory, to its reservoir of moral intuition and sense of larger purpose not to violate but to transcend its own strict logic. It asks whether it is appropriate, in espousing human dignity and the value of life, to violate them—even if deservedly so. It suggests that maybe the only crime that could justify the death penalty is, under the only moral theory that could justify imposition of such a penalty, still not enough to bring such a terrible instrument into play. The argument here is not that the murderer may not justly deserve to die. Rather, the question is: Must the theory of just desert provide and deliver that unique, life-extinguishing punishment, even to the erosion of primary community values which it is assigned to protect?

91. There are textual bases in Kant's own work on which to base this departure from a literal application of the lex talionis. In the first place, his classification of the severity of particular forms of crime is, as would be expected in any formulation of positive law, temporal- and culture-bound. He specifically, for example, cites two types of murder "with regard to which it still remains doubtful whether legislation is authorized to impose the death penalty. . . . The first crime is infanticide 'of an illegitimate baby' at the hands of the mother . . . the other is the murder of a fellow soldier . . . in a duel." I. KANT, supra note 63, at 106 (parentheticals omitted). The essence of Kant's analysis is to pit the prevalent customary notions of individual honor against the claims of the categorical imperative concerning the legal justice of punishment for crimes that merit death. He concludes that while the imperative remains constant, the state of existing legislation will of necessity reflect society's imperfect sense of justice, as affected by competing ideas of personal honor. While Kant sees this as an imperfect and temporary situation, I argue that changing conceptions of human decency in the exercise of the state's undoubted authority to administer punishment ought to be reflected in our criminal-justice system and be susceptible of incorporation within the contours of retributivist theory. While Kant waited patiently for the societal attitude to encompass a greater range of capital cases, may we not, in a different era, note their steady constriction and hope for their eventual elimination?

In a later passage, Kant explains that the literal punishments for rape and pederasty would themselves be crimes against humanity in general and hence are inappropriate to impose. He concludes that section of his exposition with this suggestive statement:

The only time a criminal cannot complain that he is treated unjustly is when he draws the evil deed back onto himself [as a punishment] and when he suffers that which according to the spirit of the penal law—even if not to the letter thereof—is the same as what he has inflicted on others.

I. KANT, supra note 63, at 133 (brackets in original) (footnote omitted). At the very least, this seems to provide valid precedent, even within Kant's own strict system, for certain exceptions to a rule of literal equality between crime and punishment. The time has come when death should be counted among the ranks of proscribed
There would be nothing in principle contradictory about an anti-capital-punishment retributivist qua retributivist engaging in a just war; or procuring, performing, or undergoing an abortion. The respectively surrounding arguments of legitimate national defense, and the special nature of fetal existence as distinguished from an unquestionably recognizable human being with rights of autonomy (to name but two possible lines of reasoning) are not foreclosed to the retributivist on grounds of his or her retributivism.

These positions are off limits, however, to the strong sanctity-of-life theorist, for the core of his belief is the preservation and protection, under all circumstances, of human life at whatever stage. His primary agenda is life protection, not justice. The logic of his position could never consistently admit of or condone capital punishment. For the retributivist, biological existence is the floor of human dignity, not its ceiling. That existence, for the sanctity-of-life theorist, is everything.

How, it will be asked, will appropriate punishment be determined under the alternative retributivist system? What will substitute for the admittedly impracticable workings of the lex talionis? What is first needed is a broader understanding of the lex as guide, not calibrator. Various writers have suggested appropriate directions in which to proceed. One retributivist would draw the line against "cruel and unusual" punishment in terms of the kind of punishment and not (within rational limits) the degree.\(^{92}\) The logic of retributivism and the evolving standards by which the eighth amendment is interpreted would seem to require constraints on both.\(^{93}\)

Justice Brennan eloquently drew the nation's attention to the essence of the "cruel and unusual" concept in these excerpts from his concurring opinion in \textit{Furman}: 

\begin{quote} [Cruel and unusual punishments are those which] treat members of the human race as nonhumans; as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.\(^{94}\)\end{quote}

\(^{92}\) Gerstein, \textit{supra} note 86, at 78.

\(^{93}\) \textit{E.g.}, Gregg \textit{v.} Georgia, 428 U.S. at 173; Trop \textit{v.} Dulles, 356 U.S. at 101.

\(^{94}\) \textit{Furman v. Georgia}, 408 U.S. at 272-73 (Brennan, J., concurring) (emphasis added).
... The primary principle [by which we may determine whether a particular punishment is "cruel and unusual"] which I believe supplies the essential predicate for the application of the [other principles], is that a punishment must not by its severity be degrading to human dignity.95

... In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.96

Justice Brennan’s final remark raises again the value of an historical approach to law, one which permits and can constructively guide change that is morally desirable.

The expressive function of punishment generally suggests certain guidelines also. Professor Feinberg would thus replace the futile attempt at “equality theory” exactness with a theory of justice which “demands that the condemmatory aspect of the punishment suit the crime, that the crime be of a kind that is truly worthy of reprobation.”97 The degree of disapproval would “fit” the crime in rough fashion: The more serious crimes would receive more serious disapproval, with an offense’s seriousness measured by the nonmetaphysical standard of “[t]he amount of harm it generally causes and the degree to which people are disposed to commit it.”98

This reprobative approach has the not inconsiderable value of making the society reconsider its own estimation of the seriousness of certain behaviors and the declared severity of some punishments. Not everything that is immoral deserves to be made illegal; and not everything that is illegal deserves serious punishment. Deciding which conduct does puts both the authorities and all other community members on notice concerning the relative disapproval attached to various behaviors. And though in practice both the penalty and reprobation components of punishment are merged in a prison sentence (our society’s archetypal punishment), their separate consideration for analytical and policymaking purposes is most worthwhile.

The severity of the penalty for murder will, then, be propor-

95. Id. at 281 (Brennan, J., concurring) (emphasis added).
96. Id. at 291 (Brennan, J., concurring) (emphasis added).
97. J. FEINBERG, supra note 69, at 118.
98. Id.
tional to the gravity of the offense—in a reprobative way. The penalty need not (and in this example, should not) inflict the same physical suffering as the offense did. The quantum of condemnation must be commensurate with the offense; the actual penalty need not be exactly equal.

This approach comports well with Garofalo’s famous reminder that “[t]he mere deprivation of liberty . . . is undeniably punishment,” a sentiment heartily echoed by modern theorists of imprisonment in their call for humane conditions in which the convict might serve his time (undergo his deserved punishment).

If the version of retributivism which I am suggesting, and its conclusion regarding capital punishment cause injustice, then it is an injustice on the side of life, one which achieves the larger purposes of the very theory that might so label it. I do not believe, however, that the preservation of human life results in such injustice or contradiction.
