

Retribution and the Limits of Justice:*

Religious and Ethical Reflections on Capital Punishment

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Abstract

The United States and Taiwan are among a dwindling group of democratic polities that still retain capital punishment. While support for the death penalty remains strong in Taiwan, American support has declined in recent years, for both moral and practical reasons. Religious reflection has been instrumental in shaping public opinion on both sides of the U.S. debate. So, it is valuable to consider the religious underpinnings of key moral arguments for and against capital punishment. This article critiques certain religious positions that either exceed the limits of justice or fail to achieve the central purposes of punishment. Between these two poles, I chart a middle path called *limited justice* that takes seriously retentionist arguments about retribution

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while considering death penalty opponents' concerns about errors in the capital justice system. Limited justice presumes that capital punishment is neither morally required nor morally prohibited. Drawing upon an account of general retribution—an approach in which society as a whole, not the individual victim or offender, takes center stage—limited justice considers how a political society compels an offender to pay a “tribute” for his or her crimes. In so doing, society itself honors and reaffirms its defining values such as its commitment to human dignity, which exceptionally heinous crimes violate. I conclude that, under limited circumstances, capital punishment can be a compelling means for vindicating such public values. To make this argument, the article draws upon several Protestant perspectives and theological ideas, critiquing certain approaches while affirming others. This approach offers a case study of how religious reasoning and ethical reflection can inform and enliven public debate about this vexing moral issue.

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I. Introduction

Taiwan shares with the United States the dubious distinction of being one of the few remaining democracies that still practices capital punishment. Abolished throughout much of the world, the practice is retained in only sixty or so nations, which places the United States and Taiwan in a dwindling and unenviable lot among authoritarian countries such as China, Iran, and Saudi Arabia.¹ Nevertheless, the United States—and any democratic country that practices capital punishment—should be distinguished from these death penalty countries by its strong commitments to human rights and the rule of law, an independent judiciary, an extensive appeals process, and overall transparency surrounding the practice. Another distinction crucial to democratic societies is that controversial practices are accompanied by open dissent and vigorous public debate, facilitated by a free press and other independent institutions of civil society. To be sure, the debate over capital punishment within the United States is very much alive, making it a pertinent case to explore in the context of the debate about capital punishment in Taiwan.

Americans' support for capital punishment has varied over the last seventy-five years. It has been as high as 78% in the 1990s and as low as 42% in the 1960s. In 1936, it was about the same as it was in 2010 with

¹ Other democratic countries that retain the death penalty include India, Indonesia, Iraq, Japan, Malaysia, and Nigeria. According to Amnesty International, three countries—Iran, Pakistan, and Saudi Arabia—report carrying out the greatest number of executions in 2015. China still carries out thousands of executions every year—more than any other country—but does not make its records public. See AMNESTY INTERNATIONAL, *DEATH SENTENCES AND EXECUTIONS 2015*, at 3-4 (2016), <https://www.amnesty.org/en/documents/act50/3487/2016/en/>.

about 60% of Americans supporting capital punishment for persons convicted of murder. In 2016, though, only 49% of Americans supported the practice, and 42% opposed it.² In Taiwan, by comparison, support is on the rise with about 80% of Taiwanese citizens favoring the death penalty (up 10% from 2012).³ As of May 2017, capital punishment was legal in thirty-one U.S. states as well as the U.S. military and federal justice system; it has been outlawed in nineteen states and Washington, D.C.⁴ In spite of consistent American support for capital punishment, there has been a steadily growing and rather strong movement against capital punishment. This opposition movement has been fueled by a good number of religious individuals, groups, and denominations, including Catholics and evangelicals, many of whom have been rethinking and revising their traditionally retentionist views on the practice in recent years.⁵

The entire debate over capital punishment in the United States (and

2 See *Public Opinion on the Death Penalty*, PEW RES. CTR. (Sept. 23, 2011), <http://pewforum.org/Death-Penalty/Public-Opinion-on-the-Death-Penalty.aspx>; Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RES. CTR. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

3 See Owen Bowcott, *A Fight to the Death: Stopping the Death Penalty in Taiwan*, THE GUARDIAN (Oct. 3, 2016), <https://www.theguardian.com/world/2016/oct/03/death-penalty-capital-punishment-taiwan>; Cindy Sui, *Death Penalty Dilemma Dividing Taiwan*, BBC NEWS (June 4, 2012), <http://www.bbc.com/news/world-asia-18202396>.

4 *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (May 17, 2017), <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

5 For a careful, highly detailed, though not unassailable, articulation of Catholic opposition to capital punishment, see E. CHRISTIAN BRUGGER, *CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION* (2003). For evangelical abolitionist perspectives, see, e.g., GLENN H. STASSEN & DAVID P. GUSHEE, *KINGDOM ETHICS: FOLLOWING JESUS IN CONTEMPORARY CONTEXT* (2003); Michael L. Westmoreland-White & Glenn H. Stassen, *Biblical Perspectives on the Death Penalty*, in *RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING* 123, 123-38 (Erik C. Owens, John D. Carlson & Eric P. Elshain eds., 2004).

Western history more broadly) is informed by profound religious concerns as they intersect various moral, political, and practical considerations.⁶ Twenty percent of Americans cite religion as the most important factor influencing their views on capital punishment. About one-third (32%) of death penalty opponents cite religion as the chief reason for their views. By contrast, only 13% of those who support capital punishment do so primarily for religious reasons.⁷ Death penalty proponents often point to scriptural passages (e.g., Romans 13) and longstanding moral tradition as evidence that the practice is consistent with religious teachings—morally permitted or even authorized by God. Opponents, meanwhile, appeal to forgiveness, mercy, and a reticence to judge. After all, isn't that what Jesus did (e.g., John 8) and asked his followers to do likewise? While some have suggested that capital punishment is more at home in religious than in secular societies, current U.S. views also show that strong religious commitments are no guarantee of support for the death penalty.

In this essay, I consider some of the religious reasoning behind each side's perspective in this debate, attending to key moral concerns they bring to light as well as problems with certain positions. Mindful that this article appears in an Asian law journal, I should clarify that when I speak of *religion*, I will not be discussing Daoism, Buddhism, Confucianism or other religions prominent in Asia that have not figured centrally in death penalty debates in the United States. Perhaps, however,

⁶ For a comprehensive and monumental treatment of religion and the death penalty, see JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

⁷ See, e.g., *Few Say Religion Shapes Immigration, Environment Views*, PEW RES. CTR. (Sept. 17, 2010), <http://www.pewforum.org/2010/09/17/few-say-religion-shapes-immigration-environment-views/>.

the approach and model of civic reflection I offer here may have utility for those wishing to bring the resources, practices, or lessons of Asian religions to bear on death penalty questions in Taiwan. In this article, my discussion of “religion” will center on different Christian (especially Protestant) perspectives on capital punishment. Perhaps more importantly, my scholarly use of, and approach, to religion demonstrates the value of tradition-informed reasoning that can be found not only among Christians in the United States but in Judaism, Islam, and other religious traditions. Finally, while I will focus on religious arguments, they should be viewed as analogues to, or even variants of, secular moral reasoning. As there is often considerable continuity and overlap, it can be difficult—perhaps impossible and even unnecessary—to draw bright lines that separate religious from secular forms of ethical reflection. Even citizens who hold diverse religious commitments can find wisdom in one another’s moral traditions and reasoning.⁸

Two central moral concerns I explore in this article—the retributive function of capital punishment and the possible execution of innocents—are neither distinctly secular nor religious concerns. What is crucial for moral debate on the death penalty—and to ethically informed reflection on political life generally (whether “religious” or “secular”)—is the task of sketching out certain parameters of debate. Thus, I will circumscribe some limits to justice and punishment—moral limits we do well to discern and heed—before exploring a middle path that I call *limited justice*, which draws upon religious traditions and ideas to inform and

⁸ For an array of different Christian, Jewish, and Muslim positions that showcases the diverse ways that religion informs death penalty perspectives, see, e.g., ERIK C. OWENS, JOHN D. CARLSON & ERIC P. ELSHTAIN EDS., *RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING* (2004).

advance the contemporary debate. I then offer an abbreviated defense of the communal dimensions of retribution, situated under the rubric of limited justice. As retribution offers the sturdiest justification for capital punishment, this principle becomes the basis for retaining or retiring the practice.

II. Thinking through the Concrete

Rather than diving headfirst into the deep end of the theological pool, so to speak, let me wade in gradually by offering some context and preliminary discussion to acclimate readers, especially those outside the United States, to some of the moral arguments over capital punishment. Abstract philosophies of punishment are helpfully clarified when grounded in concrete circumstances. I begin, then, with a widely publicized case in the United States that displays some practical concerns relevant to the moral debate over the death penalty. The example also reveals how religion, particularly a Judeo-Christian backdrop, sets the social and political context. The case involves the Petit family of Cheshire, Connecticut whose home was invaded one morning in 2007. The two intruders carried out egregious acts of breaking and entering, armed robbery, extortion, and kidnapping. These transgressions—serious violations in their own right—were just the beginning, and they pale in comparison to the physical violence the offenders carried out against the victims. They beat the father with a baseball bat; raped and strangled the mother; tied the two daughters (ages 11 and 17) to their beds, sexually assaulting and then photographing the youngest; and, finally, doused the victims and their beds with gasoline before setting fire to them to destroy the evidence of

their horrible misdeeds. The father, William Petit, was left for dead. He managed to escape only to learn later that his whole family had died—a fate he claimed was worse than death. If there were prizes for the greatest number or severity of different crimes committed in a single spree, the offenders in this case would be record-earners. Indeed, the crimes were so gruesome, the evidence before the court so ghastly, that, for the first time in its history, the state offered counseling services to jurors struggling with post-traumatic stress resulting from the trial itself.⁹

The jury concluded that these odious crimes merited the “ultimate punishment,” an apt colloquialism for the most serious and completely irreversible sanction available under the U.S. Constitution and practiced in the State of Connecticut’s penal system. This was a decision, polls suggest, that most Americans would support. Religious sentiments appear frequently in capital cases such as this (notwithstanding the legendary separation of church and state that defines the American legal system), and they serve to reinforce the moral authority and gravamen of the proceedings. When the jury handed down its verdict to the first defendant in the Petit slayings, the father averred, “I believe God’s will has been done.”¹⁰ In the second trial, Mr. Petit located capital punishment within a vaster context: “This is a verdict for justice The defendant faces far more serious punishment from the Lord than he can ever face from mankind.”¹¹ Even the judge’s words to the defendant

9 Randall Beach, *Conn. Judicial Branch Offers Hayes Jurors Post-Trauma Assistance*, NEW HAVEN REGISTER (Nov. 10, 2010, 12:00 AM), <http://www.nhregister.com/news/article/Conn-judicial-branch-offers-Hayes-jurors-11601181.php>.

10 William Glaberson, *Death Sentence for 2nd Man Brings Gruesome Connecticut Murder Case to a Close*, N. Y. TIMES, Dec. 10, 2011, at A19.

11 William Glaberson, *Death Penalty for a Killer of 3 in Connecticut*, N. Y. TIMES (Nov. 9, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9E0CE7DF1139F93AA35752C1A9669D8B63>.

suggests that death row serves as a kind of antechamber to some other realm not fully of this earth: “This is a terrible sentence, but it is in truth a sentence you wrote for yourself in flames Your fate is now in the hands of others. May God have mercy on your soul.”¹²

Interestingly, however, just months after this high-profile trial, voters in Connecticut voted to abolish capital punishment. What kind of reasoning was behind this decision? Were the citizens of Connecticut insufficiently outraged by the Cheshire killings to retain this instrument of justice? Were they no longer convinced that their state should be an agent of God’s justice? Did the threat of “ultimate punishment” somehow suddenly seem to tread upon or transgress citizens’ views of the limits of justice? It seems that the people of Connecticut actually made their decision on rather modest, prudential grounds involving the significant expense, lengthy appeals process, and general “unworkability” of the state capital justice system.¹³

This case raises intriguing concerns about weighing practical versus moral-philosophical rationales for retaining or abolishing capital punishment. Specifically, what is the proper relationship between ethics and pragmatism? Should one trump the other? It is worth noting this confluence of pragmatic and moral concerns have been part of the death

12 William Glaberson, *I Destroyed Innocent Lives, Cheshire Killer Says*, N. Y. TIMES (Dec. 2, 2010), <http://www.nytimes.com/2010/12/03/nyregion/03cheshire.html>.

13 Governor Dannell Malloy cited “unworkability” as the reason for the voters’ decision to outlaw it. “In the last 52 years, only two people have been put to death in Connecticut—and both of them volunteered for it,” Malloy said. “Instead, the people of this state pay for appeal after appeal, and then watch time and again as defendants are marched in front of the cameras, giving them a platform of public attention they don’t deserve.” See David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012), <http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed/>.

penalty debate in the United States for many years. Death penalty critics have pointed to racial discrimination, unfair trials, and coerced confessions as leading reasons for ending the practice or at least imposing moratoria. Most recently, the shortage of drugs used in lethal injections has delayed executions and encouraged states to experiment with alternatives that can cause considerable pain and suffering.¹⁴

There are clearly moral implications to all of these practical concerns, for they erode the putative justice that criminal trials and sentencing pledge to offer. But they are not primarily arguments about the moral justifiability of capital punishment in principle; that is, effective reforms could address many practical objections that leave the moral questions unresolved.¹⁵ The reality is that the overwhelming majority of Americans who support capital punishment do so for one simple moral reason—because, they say, it is the appropriate punishment that offenders deserve for the grave crimes they have committed. Similarly, many abolitionists oppose capital punishment in all cases even when the system proves to be fair. This suggests that many Americans still believe that moral arguments outweigh pragmatic concerns.

As a scholar of religious and political ethics, I focus here on the moral debate, leaving prudential considerations to journalists, lawyers,

¹⁴ See, e.g., Erik Eckholm & John Schwartz, *Timeline Describes Frantic Scene at Execution*, N. Y. TIMES, May 2, 2014, at A1; Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N. Y. TIMES (July 23, 2014), <https://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html>. Adam Liptak, *Arkansas's Legal Saga Illustrates Problems with Death Penalty*, N. Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/us/arkansas-death-penalty-executions.html>.

¹⁵ Of course, practical considerations can cut the other way, too. Consider the 15% of American retentionists who support the death penalty for fiscal reasons—because they think prisons are too expensive or overcrowded.

activists, and those who study the criminal justice system. But I do not claim that deep moral reasoning should serve as the *exclusive* basis for settling whether capital punishment is retained or abolished. I say that because, having studied the problem carefully, I have come to the view that capital punishment is neither morally required nor morally prohibited. So, does this mean that prudence alone ought to carry the day? Not exactly. But just as practical considerations can and should shape the deliberative and decision-making process, there also should be strong moral arguments that underwrite or accompany these prudential judgments. To abdicate either prudential reasoning or deep moral analysis denies crucial features of what make us human—enduring facets of our nature as well as evolving aspects of our cultural contexts.

So, what are the arguments for and against the death penalty? That is question to which religious and secular traditions of moral reasoning have provided a range of answers. I take up below two significant moral concerns shaping contemporary debates about the death penalty.

III. Individual Desert and Retribution

Among religious and secular viewpoints alike, retribution remains the most common and perhaps compelling reason to support capital punishment. Fifty-three percent of retentionists claim that the death penalty is the appropriate, fitting, and deserved penalty for severe crimes such as murder.¹⁶ Execution is a forceful way for a polity and people to

¹⁶ Pew Research Center, *Continued Majority Support for Death Penalty: More Concern among Opponents about Wrongful Convictions* (Jan. 6, 2012), at 2, <http://www.people-press.org/files/legacy-pdf/1-6-12%20Death%20penalty%20release.pdf>.

articulate its commitment to justice—to doing what justice requires. But what does this mean exactly? The idea that justice *requires* someone to be punished simply begs the question: In what (or whom?) does justice consist that makes punishment a moral requirement? Is justice like God or a god who, by divine edict, commands punishment in order to be placated? Or, to put this into a secular frame, why exactly *must* the scales of justice be balanced?

Usually, the retributive rationale goes something like this: An individual who has committed a terrible evil deserves to be punished; retribution compels an offender to repay the debt he or she owes to society. In cases of heinous crimes—premeditated homicide with exceptional cruelty, mass murder, or terrorism—a sentence of death seems richly deserved or even necessary. But if punishment is primarily a matter of desert—of strictly rendering one one’s due—then death by, say, lethal injection actually might be *less* than what is deserved for the cruelties carried out by those such as the Cheshire killers. To balance the scales, shouldn’t these criminals experience greater suffering before being put to death, perhaps closer to the kind they inflicted on their victims? What of infamous mass murderers or terrorists such as Oklahoma City Bomber Timothy McVeigh whose 1995 attack killed 168 people, including 19 children? Or Khaled Sheikh Mohammad who planned the attacks of September 11, 2001 that killed thousands and brought down the World Trade Center? Or white supremacist Dylann Roof who during a 2015 prayer service killed nine people in an African American church in Charleston, South Carolina. How can the death of one heinous perpetrator possibly “repay” a debt or be considered just recompense for the awful deaths of so many innocent victims? The sentence of a comparatively more painless death seems quantitatively

and qualitatively unsatisfying. Perhaps a society hell-bent on exacting the *lex taliones* would propose bringing an offender to within a breath of his life only to revive him or patch him up so that he can be nearly put to death again—a process that could be replayed for each victim.

Thankfully, most readers do not live in societies bent on creating hell out of their judicial systems through cruel forms of punishment. We understand that “an eye for an eye” is a call for proportionate—not equivalent—punishment. We use the scales of justice as a symbol—an ideal—not an actual working instrument by which we measure out flesh by the pound. Moreover, we recognize that retribution in civil societies entails more than simply individual desert. Retribution gives the offender what he or she deserves as a means of acknowledging, restoring, reinforcing, and honoring the moral values of the community that the offender’s crime has violated. The community compels the offender to pay tribute to these values, but in so doing the community also pays tribute to them.

Justice and punishment also entail weighing multiple, at times conflicting, goals and concerns: concerns for public safety, moral rehabilitation, and the chance to make amends; checks and protections that limit the arbitrary power of the state or that correct for judicial systems that err; values such as human dignity, moral equality, and fairness for all; and sentencing limits that preserve the humanity of victims, offenders, corrections officials, and citizens alike. Ordering and negotiating these different aims is something undertaken by the community not simply for the sake of the offender or victim but for all its members. In other words, punishment is never simply about the individual offender getting what he or she deserves (or about the individual victim or family member “getting justice”) but about the

community that punishes: the values it cherishes, the virtues and dispositions it instills within citizens, and the institutions by which those values and virtues are manifested and preserved. These moral goals and values are paid a tribute and vindicated in the course of punishing others.

When individual desert becomes an over-determined reason for punishment, its moral justification becomes self-referential, often fostering excessive zeal. The desire to punish someone because “he needs to be punished” collapses into the desire to punish someone severely “because he needs to be punished severely.” But why does someone *need* to be punished at all, let alone severely? To punish someone “because he deserves it”—absent a deeper understanding of the communal dimensions of punishment (especially of retribution)—devolves into shorthand for desiring an offender to suffer. As Jean Hampton notes, “traditional retributivists have insisted that retribution is an idea which does have justificatory force in and of itself: that wrongdoers deserve to suffer is supposed to be a good *reason* for inflicting harm.”¹⁷ There is good reason to worry that this retributive approach—in which the simple duty to punish exists apart from the moral ends it achieves—verges too closely upon revenge. Drawing on Kant’s concern about the “inner viciousness” that can lurk even within morally upright souls, moral philosopher Jeffrie Murphy warns “that it is probably wise not to be too charmed by such retributive slogans as ‘giving them what they deserve’ and not to be too enthusiastic in the belief that one is on a righteous retributive crusade.”¹⁸ In sum, then,

17 This quote is taken from Jean Hampton’s classic discussion of “the retributive idea” in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 118 (1988).

18 See, e.g., Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 80(2) *PROC. & ADDRESSES AM. PHIL. ASS’N* 45, 59 (2006).

giving the offender what he deserves does not explain why a particular punitive sanction *must* be delivered as part of what justice requires or how this differs from revenge.¹⁹

To be clear, individual desert remains an indispensable requirement of punishment that is central to a community's commitment to justice. To punish someone who is undeserving is the consummate injustice. But a singular, overly moralistic emphasis upon individual desert yields a very partial conception of punishment and inadequate defense of capital punishment. When propped up by religious tradition, such thinking may reinforce a facile divine command ethic in which God's justice can only be satisfied through execution. Reducing justice and punishment to desert also neglects other goals and goods of punishment that a more thoroughgoing communal account of punishment recognizes. I will return later to offer a sturdier account of retribution, which remains the most compelling defense of capital punishment. For now, suffice it to say, individual desert is a necessary but insufficient rationale for punishment generally and the death penalty in particular.

¹⁹ Hampton, for her part, distinguishes vengeance—a retaliatory act that elevates a *victim's* status in order to show the inferior status of the offender—from retribution that represents the *community's* symbolic annulment of the offender's act (not the offender himself). Retribution serves as an expression of moral truth not simply about the victim but about the equality of human worth of *all* members of society (victim, offender, and other citizens). On this account, revenge undermines the human worth of the offender, just as a crime undermines the victim's worth. Punishment, however, seeks to extend "equal justice" and equal worth to all.

To that end, retribution militates against some persons being treated as having less worth than others. For example, crimes should be punished equally regardless of the victim's race. Even the evil actions of offenders does not degrade their worth as human beings, thus protecting them against certain abhorrent practices. In annulling the crime—not the offender—retribution differs from revenge by upholding equal human worth as an underlying principle. See MURPHY & HAMPTON, *supra* note 17, at 122-43.

IV. Human Fallibility and Judicial Error

Perhaps the strongest reason for opposing capital punishment in the United States today is the potential for executing an innocent—a mistake the state can never adequately correct. While some may view this as a practical matter, it is central to the moral debate as well. Many death penalty abolitionists (16%) claim that the most important reason they oppose capital punishment is an unwillingness to render a judgment that, they believe, belongs to God. This view lines up alongside another growing reason for opposing capital punishment: over the last decade, the number of people who believe that playing God has landed innocents on death row has risen from 11% to 27%. Depending upon how one factors in other concerns about fairness in capital cases, some 46% of opponents worry that the state is exceeding its mandate—whether in theory, in theology, or in practice.²⁰ Exhibit A is the State of Illinois where widespread errors plagued the capital justice system at the turn of the century, resulting in a 50% reversal rate. In the governor's own words, "[T]he chance of executing the wrong person in Illinois was like the flip of a coin."²¹ Thus before leaving office, Governor George Ryan pardoned four innocent death row inmates and concluded he had no choice but to impose a moratorium on the death penalty and commute 164 sentences to life imprisonment, effectively emptying death row. Several years later, under a different governor, Illinois formally abolished capital punishment altogether.

20 This total does *not* include another 27% of opponents who simply believe it is immoral or "not our right" to execute someone. See Pew Research Center, *supra* note 16.

21 See George H. Ryan, *Reflections on the Death Penalty and the Moratorium*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 221, 226 (Erik C. Owens, John D. Carlson & Eric P. Elshtain eds., 2004).

More recently, high profile cases in Georgia, Texas, and other states have raised serious questions among citizens as to whether the state actually has executed innocent men. If true, such a consummate injustice would be the ironic outcome of the sublime pursuit of justice—of giving society’s worst offenders what they deserve. In one columnist’s words, “Opposing the death penalty is not rooted simply in the pursuit of justice but, perhaps more firmly, in understanding the world’s fundamental injustice and the ease with which an attempt to permanently balance the scales ultimately imbalances them further.”²² To my knowledge, no U.S. state or federal government entity has offered conclusive evidence that innocents actually have been executed—at least nothing that compares with the high profile case of 21-year old Chiang Kuo-ching who was wrongly accused and executed in Taiwan in 1997 for raping and killing a five-year-old girl. Nevertheless, it could have happened in the United States, too. No society should be complacent about carefully investigating, reforming, and where necessary suspending or even abolishing the death penalty when such errors occur and erode the public’s trust. If innocents are languishing on death row—or even widely and credibly thought to be—it threatens the moral authority and integrity of the legal process, undermining even the strongest moral arguments for capital punishment.²³

22 See, e.g., Ta-Nehisi Coates, *The Haunting of Rick Perry*, N. Y. TIMES (June 22, 2011), <http://www.nytimes.com/2011/06/23/opinion/23coates.html>.

23 Despite stark battle lines in the American death penalty debate, there have been successful initiatives in recent years in which death penalty opponents and supporters worked closely on practical measures to bring needed changes to the capital justice system. Such reforms included recording interrogations; more carefully reviewing evidence that is admitted at trial (DNA evidence, testimony of jailhouse snitches, etc.); and regulating the quality of defense attorneys. This is an area where real cooperation and progress can and should continue by those on fundamentally different

It may be tempting to conceive errors in the justice system or needed reforms as matters of technical implementation. But we should remember there are deep moral dimensions to these practical concerns as well. We know that human knowledge is frail and that human reasoning can be flawed. For these reasons, societies retaining the death penalty are obliged to adhere to higher standards of *moral certitude* than “beyond a reasonable doubt”—a level of confidence on which we would be willing to risk not simply someone else’s life but perhaps even our own. When reviewing the cases involving innocents on death row, it is clear that somewhere, something—or someone—went deeply wrong. This demonstrates that those participating in the justice system can be wrong even when they honestly believe and claim to be right. This is to say nothing of cases involving misconduct or malfeasance as also has occurred. These realities owe to human finitude—the limits of knowledge, failures of the will, and the tendency to rationalize human action by deceiving oneself and others—in other words, problems that can only be described adequately in moral-anthropological terms.

Having said all that, it also must be noted that in the case of the Petit Family killers, there never were any credible doubts about the offenders’ guilt. As with many high profile cases, such as the Cheshire killings, the Charleston church shootings, and the Oklahoma City bombing, the accused themselves did not deny their crimes. Some

sides of this issue. See THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY (2001), <http://www.constitutionproject.org/wp-content/uploads/2012/08/MandatoryJustice.pdf>; THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT (2014), http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf.

reports claim they even welcomed their sentences.²⁴ At best, then, concerns about moral certitude proffer reasons to restrict capital punishment to very limited cases—not to eliminate it altogether.

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This discussion has shown that moral deliberation on capital punishment entails both philosophical and practical concerns that, at times, mingle freely together. Both sets of concerns should be integrated into this fraught debate. At some point, though, the value of pragmatic concerns comes up short, whereupon we must tap into conceptual resources of moral philosophy, theological ethics, and political theory to deepen our civic reflection. Consideration of retribution, on one hand, and human fallibility and judicial error, present what I take to be the most crucial moral concerns that ought to frame conceptual deliberations about the future of the death penalty. These concerns reemerge in the religious positions I explore below as well as the argument I ultimately put forward myself—a position that requires supplementing these initial discussions of desert and individual retribution with a more organic and communal account of general retribution.

I also have suggested and will show further how religious forms of reasoning can inform secular debate on this issue. The governor of Illinois appreciated the moral and religious dimensions of his office when, in imposing a moratorium on capital punishment, he cited Exodus 23:6-7, wherein God tells Moses “You shall not pervert justice . . . do not kill the innocent and those in the right for I will not acquit the guilty.”

²⁴ See, e.g., Associated Press, *Killer of Mom, 2 Daughters Gets Death Sentence*, NBC NEWS (Nov. 8, 2010, 5:49:48 PM), http://www.nbcnews.com/id/40071693/ns/us_news-crime_and_courts#.VsIqEq32app.

This is not to say the governor's policy was driven only or primarily by religious concerns. As in many cases, religious and secular arguments about capital punishment (and other issues) often overlap and complement one another. Religious ideas suffuse secular reasoning as much as secular ideas invite religious interpretations.²⁵ Compatibility between these different forms of moral reasoning can be revealing and instructive—a view that challenges rigid secularists who presume that religious perspectives should be sidelined from public or political debate.²⁶

I turn now to some religious thinkers whose positions provide poles between which we can chart a middle path that advances the death penalty debate. Working through these arguments and limit cases, I come to a position called *limited justice* that can be defended on both religious and secular grounds.

V. The Moral Limits of Justice and Punishment

One way of charting a path forward on a controversial topic is to establish some perimeters of moral debate. I draw here from an approach

25 My colleague Jeffrie G. Murphy reminds us, “When a person brought up a Christian becomes an atheist, he tends to become a Christian atheist. The questions he chooses to make central and many of the answers that tempt him are framed, even if he does not realize it, by the very set of beliefs he claims to reject.” Murphy also speaks out of his experience as an atheist-turned-believer in defense of Christian concepts of neighbor love. See Jeffrie G. Murphy, *Christian Love and Criminal Punishment*, in *CHRISTIANITY AND LAW: AN INTRODUCTION* 219 (John Witte, Jr. & Frank S. Alexander, eds. 2008).

26 For an extended consideration of this topic, see John D. Carlson, *Defending the Secular from Its Secularist Critics: Albert Camus, Saint Augustine, and the New Atheism*, 97 *SOUNDINGS* 50, 50-74 (2014).

developed more fully elsewhere as the upper and lower limits of justice.²⁷ This necessarily abridged discussion explores illustrative configurations of how the upper and lower moral limits of punishment can be conceived and how the intermediary terrain between excess and deficiency might be negotiated. Specifically, this argument navigates between those who say capital punishment is a moral imperative—something we *must* do under certain circumstances—and those who conversely claim that capital punishment is morally impermissible, something we *cannot* do under any circumstance. I begin with an illustration of the former position, what I will call *ultimate justice*.

A. Ultimate Justice

Religious Americans who support capital punishment may find compelling the views of a Christian evangelical scholar who makes a retributivist argument grounded in the bible. Drawing upon the universal covenant that God establishes with Noah after the flood, Daryl Charles proclaims, “An assault on human life is comparable, as it were, to an assault against God.”²⁸ Invoking Gen 9:6 (“Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image.”), Charles reasons, “It is precisely *because* the human being is the image of God that one who purposely sheds the blood of another must die.” There is no ambiguity here: “The core of the covenant with Noah is a moral imperative formulated in no uncertain terms, namely the institution of a life-for-life policy in the case of premeditated murder.”²⁹

27 See John D. Carlson, *Human Nature, Limited Justice, and the Irony of Capital Punishment*, in *RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING* 158 (Erik C. Owens, John D. Carlson & Eric P. Elstain eds., 2004).

28 See, e.g., J. Daryl Charles, *Crime, the Christian, and Capital Justice*, 38 *J. EVANGELICAL THEOLOGICAL SOC'Y* 429, 440 (1995).

29 J. Daryl Charles, *Outrageous Atrocity or Moral Imperative? The Ethics of Capital*

Capital punishment on this reading serves to defend, vindicate, or restore the image of God and the God-bestowed human dignity that is besmirched by murder: “desecration of life’s sanctity should be—indeed must be—visited by divine judgment in the present life.”³⁰ It should be noted that the offender, too, is endowed with God’s image and the dignity this image bestows. But such dignity as the offender possesses entails not only great worth but also free will, responsibility, and the duty to obey the moral law.³¹ Thus when offender violates a victim, it is the violation of the moral law and the desecration of human dignity that cries out for a response: punishment as a way of reaffirming or restoring the human dignity the offender has assaulted.

I dub this position “ultimate justice” for two reasons. First, it captures the position’s own terms and aspirations, which holds that the law must retain “what only a conviction of ultimacy can bestow.”³² Charles avers that “atonement for capital crimes is not pushed off into the *eschaton*. Rather, criminal justice is to serve as a (present) shadow of eternal punishment.”³³ From a Christian theological point of view, though, such claims seem problematic. Charles surely does not presume to know whether someone—even a heinous murderer—is destined for eternal punishment. Nor does the legal system presume to know that criminal punishment foreshadows eternal punishment or damnation, hence the judge’s ambivalent words that attend the sentencing: “May

Punishment, 6(2) *STUD. CHRISTIAN ETHICS* 1, 11 (1993).

³⁰ *Id.*

³¹ Animals, in contrast to human beings, are not punished. They may be put down to prevent further harm, but they do not violate some dignity-endowing feature that is essential to the moral essence of their nature.

³² See Charles, *supra* note 29, at 5.

³³ See Charles, *supra* note 28, at 435 n.20.

God have mercy on your soul.” Indeed, it may very well be that a just execution (ultimately) ushers in a forgiven criminal’s salvation. If, though, as Charles suggests, God means for society to execute criminals as atonement for their crimes, this claim raises other theological questions. Some may understandably ask, For what reason, then, did Christ die upon the cross? In the words of New Testament scholar Christopher Marshall, “It is one thing to see capital punishment as a debt owed to human society; it is another to see it as an atonement offered to God for a sin already atoned for at the cross and freely forgiven by God.”³⁴ Within the frame of ultimate justice, whether execution brings about an offender’s eternal punishment or salvation, the earthly sentence of capital punishment accrues moral justification for its relation to, and initiation of, divine activity.

There is a second reason the label *ultimate justice* is warranted. In the moral imperative to execute offenders who kill with premeditation, one sets in place an absolute ideal that may become difficult to apply to the murky particulars of everyday life. In state penal systems, ultimate justice more readily gives way to errors like those discussed above. In his response to concerns about possibly executing the innocent, Charles is too quiescent: “If the argument based on the potential for an innocent execution is to proceed in all honesty, one will be forced to concede that innocent deaths resulting from released or paroled criminals are far more frequent (and tragic) than the rare instance of an innocent convict dying [W]hy not devise the system so as to place potential and convicted murderers, not society, at risk?”³⁵ But such a proposal

³⁴ See, e.g., CHRISTOPHER D. MARSHALL, *BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT* 222 (2001).

³⁵ See Charles, *supra* note 29, at 13.

unnecessarily risks executing the innocently condemned as an acceptable cost of saving other innocents. This scenario could be avoided altogether by sentencing someone to life in prison without the possibility of parole instead of capital punishment. This alternative ensures the state leaves room for wrongful convictions to be discovered and amended without jeopardizing public safety. In short, ultimate justice becomes an ironic position when, in the sublime effort to vindicate God's law or a transcendent moral order—to render to one what he or she ultimately deserves—a political community risks committing a life-ending injustice against an innocent.

While some may find ultimate justice too extreme to take seriously as a compelling rationale for capital punishment, it should not be dismissed out of hand. It offers a robust biblical defense of retribution, which is but a more sharply stated account than the views of other distinguished ethicists and theologians who ground their accounts of retributive justice and justifications for capital punishment in the Noahic covenant.³⁶ Even if others view capital punishment as morally permissible—rather than required, as Charles argues—their efforts to vindicate human dignity and their appeals to a classical and morally authoritative source in Hebrew and Christian scriptures place them on the same retributive spectrum as Charles, albeit on a less extreme point than the one he defends.

³⁶ See OWENS, CARLSON & ELSHTAIN, *supra* note 8; see especially Avery Cardinal Dulles, S.J., *Catholic Teaching on the Death Penalty: Has It Changed?*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 23, 23-30 (Erik C. Owens et al., eds., 2004); David Novak, *Can Capital Punishment Ever Be Justified in the Jewish Tradition?*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 31, 31-47 (Erik C. Owens et al., eds., 2004); and Gilbert Meilaender, *The Death Penalty: A Protestant Perspective*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 48, 48-56 (Erik C. Owens et al., eds., 2004).

Moreover, while ultimate justice is discussed here in a religious frame, there are certainly secular forms of retributivism that are equally unrelenting in demanding capital justice—including other views that are insufficiently concerned about the potential plight of innocent inmates on death row. One recalls here the stern words of recent Texas governors defending capital punishment³⁷ even as others decried “The Grisly Folly of Texas Justice” and allege that the state “may well have executed an innocent man.”³⁸

Finally, it is worth noting that ultimate justice has the virtue of being a thoroughgoing, comprehensive theory of punishment that is attentive to the different purposes that punishment serves. Charles locates retribution as his central moral concern but also discusses deterrence, public safety, and the rehabilitative purposes of punishment. Though I remain critical of this approach, I contrast it with an anemic or minimalist view of criminal justice articulated by those who sidestep these crucial facets of punishment, particularly retribution.

B. Nominal Justice

The converse of ultimate justice, turning now to the lower limits of justice, is a position I call *nominal justice*, so labeled for the idea that it

³⁷ Responding to a question about capital punishment during a presidential debate, Texas Governor Rick Perry assured the audience that he never struggled to sleep at night at the prospect that an innocent person might have been executed under his watch. The crowd applauded loudly at the moderator’s mere mention of the 234 inmates executed under Perry’s watch. The audience erupted in cheers as Gov. Perry went on to say “in the state of Texas, if you come into our state and you kill one of our children, you kill a police officer, you’re involved with another crime and you kill one of our citizens, you will face the ultimate justice in the state of Texas, and that is, you will be executed.” See Peter Catapano, *They Messed with Texas*, N. Y. TIMES (Sept. 9, 2011), <http://opinionator.blogs.nytimes.com/2011/09/09/they-messed-with-texas>.

³⁸ See Coates, *supra* note 22.

is justice in name only. It lacks substantive moral and religious grounding, especially for an account of retribution. Indeed, the moral and religious underpinnings of punishment are most noticeably absent when crime becomes relegated to a form of cultural sickness and psychological disease. One religious voice representing this view, T. Richard Snyder, cites the “punitive spirit” of his own Protestant heritage and its beliefs about divine punishment, which have unduly influenced American culture and its justice system. Perhaps the aforementioned account of ultimate justice is the kind of account Snyder has in his sites. Nominal justice tends to be suspicious of retributivism, which reduces the death penalty to a grand form of “payback” or collective revenge.

To be sure, Snyder rightly worries that punishment can be driven by cruelty and vengeance. But rather than offering a corrective to retribution, he offers a different theory of punishment altogether. Punishment, he maintains, should be restorative, oriented to “the health and healing of criminals.” Such an approach requires forgiveness—a crucial concept for Christians—and lots of it. Indeed, forgiveness must be extended far and wide. In Snyder’s words, “Certainly the one who has committed a crime is in need of forgiveness But so too is the society in need of forgiveness for having created and permitted crime-generative communities to exist.”³⁹ In this rendering of the problem, though, forgiveness and moral accountability for crime are shared and distributed *so* widely—between society and the wrongdoer whose crimes society has helped to create—that accountability and forgiveness become so diffuse as to be meaningless. One might ask, Are there not certain crimes of such a grave nature that forgiveness and reconciliation

³⁹ T. RICHARD SNYDER, THE PROTESTANT ETHIC AND THE SPIRIT OF PUNISHMENT 110-11 (2001).

cannot put them right? Snyder seems undaunted. He concludes by calling to abolish capital punishment altogether because it “eliminates the possibility for transformation, forgiveness, or reconciliation” for families, victims, and the larger community.

To be fair, there is more to this approach to punishment than can be explored here. Scholars such as Snyder are rightly concerned to redress wide-scale social problems such as poverty, crime, and high incarceration rates that plague too many communities in the United States, especially those with significant low-income and minority populations. Beginning with wide-scale protests in Ferguson, Missouri in 2014 and spreading to many other cities across the country, the United State has experienced significant unrest over, and renewed attention to, the excesses of the criminal justice system, involving police abuse and brutality, racial prejudice and unequal treatment, and wide-scale distrust between law enforcement officials and the citizens they are charged to protect. No one should deny the need for reforms to certain law enforcement practices and criminal justice systems, some of which Snyder outlined long ago.

President Obama, along with public officials and groups of various political persuasions, called for and worked toward reforms to the criminal justice system that included rescinding mandatory sentences for non-violent offenders, addressing overcrowded jails, reducing recidivism, and helping former offenders reintegrate into society.⁴⁰ Some

⁴⁰ See Barack Obama, *Remarks by the President on Criminal Justice Reform*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 2, 2015, 4:15 PM), <https://www.whitehouse.gov/the-press-office/2015/11/02/remarks-president-criminal-justice-reform>. This effort has been imperiled in the administration of President Trump whose pledge to restore “law and order” has prompted Attorney General Jeff Sessions to roll back bipartisan-backed prison reform at the federal level. See Rebecca R. Ruiz, *Sessions to*

communities also have experimented with efforts to reshape criminal justice systems by using innovative restorative justice programs, especially for nonviolent and youth offenders. Such programs seem promising and may require other ways of thinking about punishment—of the kind Snyder commends. All that said, advancing a vision of restorative justice that *supplants* rather than *supplements* retributive justice fails to provide a sufficiently comprehensive conception of punishment, which is especially needed to address egregious forms of violence. Focusing only on healing and therapeutic aims, at the expense of other vital retributivist goals, leaves us with an incomplete moral theory of punishment.

C. Charting a Middle Path

Between these two alternatives, can we find a middle path—a morally delimited approach to punishment? That is, are there comprehensive conceptions of punishment that take stock of the multiple purposes of punishment, retribution especially, that nominal justice overlooks? Yet, can a *via media* at same time avoid the excessive retributive zeal of ultimate justice, which overshadows and jeopardizes a polity's broad commitments to justice? A comprehensive account considers and balances the different rationales that have traditionally informed western criminal justice systems: retribution, deterrence (individual as well as general), and rehabilitation.⁴¹ The more limited

Toughen Rules on Prosecuting Drug Crimes, N. Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/jeff-sessions-sentencing-criminal-justice.html>.

⁴¹ I focus in this essay on retribution, which is the most contested and least well understood reason for punishment, especially compared to the others on which greater consensus exists. I describe nominal justice as a minimalist or insufficient approach that lacks an adequate appreciation of retribution. I would say, though, that a penal theory that neglects the place of, say, rehabilitation also is wanting.

approach to justice that I propose also needs to take seriously, and correct for, the errors that human institutions commit.

Just as religious ideas inform the upper and lower limits of punishment explored here, my corrective account also is theologically informed. Legal scholar John Witte reminds us that traditional purposes of punishment underwriting Anglo-American criminal law have clear antecedents in Protestant thought, including in Protestant notions about different “uses of the law.” The *civil use* of law deters crime and promotes public safety; the *theological use* of the law “convicts” offenders of their violations as a necessary precondition for repentance and rehabilitation; and the *educational use* of the law teaches and preserves morality, which serves vital retributive purposes by affirming the moral order of the community as enshrined in the law.⁴² This is an oversimple description, which I unpack further in the next section. For now, Witte’s historical retrieval shows the religious roots of modern notions of punishment.⁴³

Some might affirm—even as others decry—the religious underpinnings of secular penal theory and practice. Yet, Witte shows that these religious antecedents can be located and translated in modern legal systems through secular analogues that do not rest exclusively or explicitly upon theological ideas. Witte does, though, conclude his essay

42 The civil and theological uses of the law are central to the thought of magisterial reformers Martin Luther and John Calvin. The educative function of the law is more unique to Calvin, which may explain why Reformed thinkers who link retribution to education are either staunch retributivists (such as Charles) or alternately discomfited by the “punitive spirit” they observe in their own religious traditions (as Snyder seems to be).

43 Witte’s argument is well worth reading in its entirety. See JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITIONS* 263-92 (2006).

with a critique of contemporary secular approaches to law and punishment that have abandoned vital ideas once central to religious accounts of punishment: a theory of objective or natural moral law (as opposed to the prominent secularist view that morality is relative to time and place); a moral theory of government based upon transcendent authority, not simply the popular will; and, perhaps most importantly, a moral anthropology or view of the human person that is attuned to the wide arc of human beings' propensities for good and evil. The human capacity for both sin and redemption requires balancing retribution and rehabilitation, respectively, as part of a thoroughgoing moral theory of punishment. Those who dwell solely on human depravity—as is prominent in ultimate punishment—overstress retributive approaches to punishment; those who understate the potential for grave evil (as in nominal justice) or highlight the inherent goodness of human nature tend to favor rehabilitative approaches. We need not choose one over the other, however. Being simultaneously saint and sinner, as Witte suggests, requires unifying and integrating the different purposes of punishment, the conceptual achievement of which is made possible through Protestantism's different uses of the law. (It is worth noting that Catholicism and other religious traditions also share some of the same purposes and theories of punishment found in Protestant thought.⁴⁴) This traditional approach provides a comprehensive conception of punishment that addresses both the retributive dimension that nominal justice overlooks as well as the rehabilitative dimensions that ultimate justice understates. Significantly, in navigating between the upper and

⁴⁴ For a Roman Catholic defense of overlapping religious and secular purposes of punishment, including the implications for capital punishment, see Dulles, *supra* note 36.

lower limits of justice, a richer and suppler understanding of retribution than found in ultimate justice emerges.

VI. Retribution and the Moral Order of Political Life

Where the retributive focus of ultimate justice often abets or is abetted by the momentum of vengeful motives, nominal justice couples the case for rehabilitation with a forgiving or merciful attitude that often entails leniency or pardon. Justice entails navigating between the moral limits of vengeance on one hand and forgiveness *qua* moral leniency, on the other.⁴⁵ Interestingly, both vengeance and forgiveness, for all their differences, tend to frame the matter similarly such that justice and punishment become overly concerned with the individual offender: the sentence deserved or the path required to secure forgiveness. The individual victim—whether in factual or fictional crime stories—also occupies a prominent place in such discussions. The spotlight turns to those such as Mr. Petit whenever a judge’s verdict is handed down or a sentence is carried out; they are asked if they experience closure or if they feel justice has been served. Yet, by focusing intensively on the individual (whether offender or victim), we can lose sight of the collective dimensions of justice and retribution. Let me illustrate this

⁴⁵ Forgiveness is a rich and necessary moral transaction, the power of which should not be impugned. The concern I have in mind here entails a kind of sloppy presumption that forgiveness and retribution are mutually contradictory: that to forgive entails leniency or requires forgoing punishment. To the contrary, an offender who has been forgiven by his or her victims may still justly be punished by the state, just as criminal punishment can work in parallel with victims who wish to forgive their offenders. The film *Dead Man Walking* (1995) goes even further by offering a depiction of how capital punishment can contribute constructively to securing forgiveness.

concern by turning to another prominent Christian thinker.

In his famous essay “The Humanitarian Theory of Punishment,” so titled for the target of his ire, Christian author C.S. Lewis takes aim at a position that bears similarities to nominal justice. Writing in 1949, Lewis is deeply concerned about the creeping influences of secularism and modern psychology on penal theory and the cultural erosion of Christian moral traditions. According to Lewis, “The Humanitarian theory removes from Punishment the concept of Desert” by reducing sin and crime to a psychological and social illness. “But the concept of Desert,” he goes on, “is the only connecting link between punishment and justice.”⁴⁶ Lewis contrasts the secular humanitarian approach to a traditional approach he calls the Christian Retributive theory of punishment, rooted in the concept of individual responsibility and desert.

There is much to redeem in Lewis’s moral framework and critique. I worry, though, that, in his desire to distinguish Christian from secular principles of punishment, he overextends his focus on retribution and individual desert as the only measure of justice. For example, in asking whether punishment deters other crimes or reforms the criminal, he notes that “neither of these two last questions is a question of justice.”⁴⁷ But certainly that cannot be true. Lewis misses the mark here on two related points: first, he denies that deterrence and rehabilitation are important to Christian theories of justice and punishment; and second, he misses how these rehabilitative and deterrent features of punishment, furthermore, are related to traditional understandings of retribution,

46 C.S. Lewis, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 287, 288 (Walter Hooper ed., 1994).

47 *Id.*

which involve the entire community, not simply the victim and offender.

On the first point, I noted earlier how Protestant thought, going back to Luther and Calvin, has long presumed that the civil use of the law seeks to preserve order and restrain human wickedness—a goal that modern criminal law translates through idioms of deterrence and public safety. Certainly, a government’s efforts to deter and prevent the commission of future crimes and injustices—sins, to use the language of Christians—is intimately tied to the public’s concern with justice. As well, other functions of the law such as the theological use of the law to convict an offender of his sin—so as to induce repentance and rehabilitation (including through capital sentences that induce an offender to seek forgiveness) enjoy a long history in traditional Christian thought.

Secondly, in addition to conceiving deterrence and rehabilitation as distinct from Christian conceptions of justice and punishment, Lewis’s account isolates them from his chief moral concern about individual desert and retribution. Witte’s account of punishment, though, suggests how the different “uses” of the law mutually overlap and reinforce one another, imparting an overarching scope and underlying unity to Protestant accounts of punishment. Crucial to Witte’s framework is his concerted effort to preserve the collective (as well as individual) dimensions present in these different uses of the law and different purposes of punishment. For example, deterrence, as is well known, entails both the effort to prevent an individual offender from committing further crimes as well as collective efforts to discourage others from carrying out similar offenses (i.e., general deterrence). Similarly, traditional efforts to teach the individual offender right from wrong are related to the educative use of the moral law found in Protestant thought,

yet there is a more public or communal dimension as well. Witte explains that the educational dimension of “criminal law serves to restore in the community knowledge of, and respect for, the requirements of moral law.”⁴⁸ It teaches and reinforces among citizens the basic norms and expectations of public morality, codifying moral values and enabling the community to coalesce around them. In Henry Fielding’s words, crime “tears both the moral fiber and the social fiber of the community; criminal punishment serves to mend that tear.”⁴⁹ Punishment crucially serves to educate (or reeducate) the public by vindicating and reaffirming the values transgressed by crime.

Punishment, then, is not just about individual desert. In classical Protestant thinking about punishment, there is no sharp separation between the community and the individual or between the public and the private; nor are the different purposes of punishment or the different “uses” of the law neatly segregated. They are all interwoven, together contributing to a coherent and comprehensive view of justice that can be broadly construed as the moral order of social and political life. These different goals and facets of punishment, when collectively conceived and underwritten by different uses of the law, are what a political community undertakes (or should undertake) through the institutions of its justice system.

This is the backdrop against which I suggest Lewis overstates the matter when he claims that “take away desert and the whole morality of punishment disappears.”⁵⁰ If by this claim Lewis means (as I suspect he

48 See WITTE, *supra* note 43, at 284.

49 Quoted in *id.* at 282.

50 See Lewis, *supra* note 46, at 291.

does) that desert is a necessary precondition of punishment, then his point is undeniably true. We can never punish innocent people by using them as a means to other ends, whether to slake the thirst for revenge or deter future crimes or rehabilitate so-called deviants. (It is worth recalling here that Lewis worried Christians could someday be targeted as the very deviants that humanitarian theories of punishment wish to cure or correct.) But in the course of making his argument for the necessity of desert, he overlooks the insufficiency of desert to a broader retributive theory of punishment and justice. For there are significant moral dimensions to punishment and justice—specifically general retribution—that are as important as giving any individual her due. Let me gesture to the communal or collective dimensions of retributive justice and to the role the death penalty might play within such an account.

* * * * *

Punishment is fundamentally a form of judgment: “an ‘expressive’ act, telling the truth about an offense” as theologian Oliver O’Donovan describes it. “The core of the retributive idea is the thought that in punishment something which the offender has put forth comes back.” The judgment, articulated in the form of a criminal sentence, is “not an echo but an answer.”⁵¹ As O’Donovan affirms, retributive punishment reflects the community’s judgment and response *not* to let the crime stand or be the last word. Retribution involves communication about the values that a community holds in common.⁵² Just as there are specific

⁵¹ OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT* 110 (2005).

⁵² This is not to overlook how a community can communicate its values to the offender through other means as well, such as through rehabilitation—a topic to which I return at the end. Again, the different purposes of punishment reinforce one another.

(i.e., individual) and general (i.e., communal or collective) components of deterrence, there are individual and general (i.e., communal or collective) dimensions of retributive justice. On one hand, retribution assigns responsibility to the individual offender for his or her transgressions against the moral order. When the community “answers” the offender’s crime, the offender is the most immediate audience. But, the collective dimension of retribution also involves a polity’s and a people’s obligations to acknowledge, uphold, and reinforce the community’s moral norms quite apart from what the offender deserves.⁵³

Retribution, as the word suggests, entails efforts to pay tribute to the community—to its moral order and the values on which its laws are based. The prefix “re-” actually suggests the paying of an additional tribute, beyond, say, mere restitution. Restitution, a significant part of punishment, requires that the offender return to the immediate victim what has been wrongly taken—restoring what is due or belongs to another. An offender who has stolen something is expected to return the stolen item or compensate its lost value. (When what has been taken cannot be returned—for example, the victim has been injured or deprived of her livelihood—the offender makes recompense for what the victim has lost through the crime.) Retribution, however, involves an added penalty beyond restitution, best conceived as the “tribute” an offender pays not to the individual victim but to the wider community whose values the offense has violated.

A public authority represents the community when it administers

⁵³ I use the terms *individual* and *collective*—rather than private and public—because all matters involving retributive justice should be carried out on by a public authority on behalf of the community. In this way, retribution differs from revenge that is carried out by private individuals or mobs.

and enforces not only restitution to the victim but the tributary process for the community as well. In earlier times, an offender paid tribute to a king or ruler, in the form of a fine, imprisonment, or even corporal or capital punishment. In modern times, such tributes are paid to a public authority. For democratic societies, where the government embodies and represents the citizenry, citizens should apprehend that the additional tribute is being paid to them as members of the collective. Through its public authorities and institutions, a community participates in the retributive process by compelling offenders to pay tribute to the communal norms and values they violate. Retribution affirms (or re-affirms in the wake of a breach) those values such as human dignity and worth that citizens collectively cherish and rely upon to sustain life in common and to hold their community together. Whereas the *individual* dimension of retribution educates or re-educates the offender, there is a *collective* or general dimension as well: the education (or reeducation) of a community. Retribution is the public vindication of the law. Compelling a tribute is the process by which a citizenry, through its public authority, understands and expresses the moral order and reaffirms its guiding values and laws. This rationale explains why punishment is a public good, which should not be secretive. For when the community is absent or detached from punitive proceedings, there is no one present to hear the “answer” of judgment, to recall O’Donovan’s metaphor, that responds to the offender’s crime. There is no public to receive the offender’s tribute. Retribution, then, depends upon openness, transparency, and civic engagement so the public understands what is being carried out in its name.

A modern account of general retribution should resist privately oriented therapeutic ideas of punishment—especially as a defense of

capital punishment. That is, executions should not be imposed for the rehabilitative purpose of healing offenders or promoting their repentance. But nor should capital punishment be implemented for the sake of bringing “closure” or satisfaction for victims of crimes or their loved ones. On this reasoning, it would be similarly inappropriate to privilege the wishes of victims’ families who *oppose* capital punishment and do not want execution to be carried out “in their name.” For the “tribute” in retribution is rendered not to individual victims, but to the community as a whole, as acknowledgment of its collective values that the offender has transgressed. Here it is worth noting that some condemned to Death Row, including those who carried out the Cheshire slayings, report consenting to their “tribute.”

The account of general retribution I am proposing here is not exactly what C.S. Lewis or what most citizens in liberal, individualistic societies understand by the term *retribution*. Indeed, it probably seems strange or sounds insensitive not to privilege victims’ voices such as William Petit’s given the terrible tragedies and inconsolable pain they have experienced. But this shift away from the primacy of the victim is not unprecedented.⁵⁴ As Harold Berman explains, “In the United States the retributive theory has often been associated with the avenging of the victim rather than the avenging of the law—which is quite another matter.”⁵⁵ What I am calling general retribution or what Berman dubs

54 Oliver O’Donovan lifts up the classical Christian notion in which “the victim’s benefit was removed from consideration [of punishment] . . . [A]ny satisfaction a victim might take in punishment of the offender could be no more than personal vengeance.” See O’DONOVAN, *supra* note 51, at 115-16. The view is also found in Kant, O’Donovan notes.

55 HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION* 183 (1983).

“avenging the law” also can be described as vindicating the moral order of the community and the values on which its laws and practices are based. This approach expands the communicative dimensions of retribution and reinforces the “educative use” of the law.⁵⁶ Retribution becomes more than simply communicating to an offender by rendering what he or she deserves (although it is also always that), or satisfying a victim’s need for justice (which *may* attend as a secondary effect), but more importantly, about reaffirming to the citizenry as a whole the values that represent their polity and that sustain the civic bonds among them. Indeed, the primary value of general retribution lies in the power of symbolism as a form of moral education. Retribution becomes a way of ordering society in its pursuit of justice and of restoring order to society following injustice. Through penal institutions and practices, retribution concretizes as it symbolizes the order of justice that defines a community.

Some might see in this account of general retribution an overly ritualistic or even sacrificial quality.⁵⁷ Indeed, punishment often entails a carefully prescribed civic ritual if its purpose is to achieve the ends

⁵⁶ “As both the Protestant Reformers and classical jurists understood, the retributive function of criminal punishment underscores and reinforces the societal condemnation of morally abhorrent behavior, especially when the punishment fits the crime, when the serious offenses are met with serious punishments. Conversely, the failure to impose suitable penalties for serious violations undermines and corrodes the moral belief of citizens by suggesting that their moral beliefs are wrong, that this conduct must not be so bad after all. By permitting wrongdoers to profit by their wrongs, the failure to punish demoralizes the law-abiding.” See WITTE, *supra* note 43, at 291.

⁵⁷ For a well-developed purgative defense of capital punishment, see MATTHEW H. KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (2011). Retribution, however, is different from purgation, which I find to be problematic and inconsistent with limited pursuits of justice and punishment.

discussed here: compelling the offender to make a tribute that vindicates the moral order of community. But this is very different from a sacrificial rite to appease an angry god or to bring sun or rain for the growing season. General retribution certainly entails *using* a person for the good—or better—for the justice of the community. But it is not an unjust or inappropriate use of a person.⁵⁸ Here recall Lewis’s insight about the indispensability of individual desert. The offender, after all, has brought the sentence upon him or herself and deserves the punishment he or she receives. No one is proposing the sacrifice of innocents or scapegoats to satisfy some larger divine or communal purpose. Nor can substituting an innocent for the guilty contribute in the same way (or in *any* way) to “the diminution of crime” or the vindication of justice since executing an innocent is the consummate injustice.

But, to the extent that one who is punished deserves to be punished, a person can rightly be used for retributive purposes so long as he or she is not misused or exploited (i.e., made a victim of others’ vengeful motives; subjected to inhumane treatment beyond what is strictly necessary for the offender to make adequate tribute; designated as someone who lacks human dignity or whose dignity can be violated). Indeed, the same value of human dignity and worth that was violated in the victim is also what instills dignity in the offender and prohibits his exploitation. This same account of dignity and worth also makes it possible to “use” the guilty offender for the retributive purpose of

⁵⁸ Sydney Smith famously proclaimed, “When a man has been proved to have committed a crime, it is expedient that the society should make use of that man for the diminution of crime; he belongs to them for that purpose.” See WITTE, *supra* note 43, at 281.

reaffirming those values. Without the values of dignity and worth, the moral authority of general retribution collapses. At the same time, this defense of human dignity becomes the reason to honor moral prohibitions against cruelty, which stem from these values. To paraphrase ethicist Paul Ramsey's moral defense of military force, that which justifies punishment also limits it.⁵⁹ That is, punishment cannot vindicate human dignity if it violates the very principle that justifies it.

But does capital punishment transgress the moral limits of punishment? Does it violate the value of human dignity that it seeks to vindicate? This returns us to the still unresolved question of retaining or abolishing the death penalty with which this essay began. Let me close with some thoughts about how death penalty supporters and opponents might move forward together within a shared framework.

VII. Limited Justice and Limited Punishment

What course should be undertaken when a community is divided over its means of punishment, as the United States and Taiwan seem to be about the death penalty? I have proposed that one way to advance this debate is by achieving greater clarity and consensus about the purposes, goals, and limits of justice and punishment. In examining the limits of debate through a religious lens, I have considered advocates of ultimate justice who conceive capital punishment as mandatory—a moral imperative under certain circumstances. Advocates of nominal justice (as I've called this position) claim the death penalty interferes with the

⁵⁹ See PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* 143 (1983).

process of forgiveness and reconciliation, which, they argue, offers a higher form of justice. As different as these positions are, both view the value of punishment with respect to the individual, whether the offender who is punished or forgiven or the victim who is healed and reconciled.

Punishment at best offers a limited means of restoring justice after a rupture in the moral order. For many a victim of crime, the status quo ante can never be fully restored; even the memory of a grave transgression leaves scars. Recovering the collective dimensions of retribution as a central purpose of punishment and mode of ordering the moral life of a community serves, then, as a reminder that the individual parties (whether victim or offender) are but members of the wider political collective that defines itself by how it punishes. The community's pursuit of justice must always be tempered, its means of punishment limited as well. To ask that punishment satisfy the desire of victims, given the inconsolable grief they have suffered, is to ask more of an institution than it can be reasonably expected to provide. Whether a victim opposes or supports the death penalty, the community should not be expected to privilege his or her wishes. It is appropriate and reasonable, however, for a victim to expect the larger community of which she is a part to affirm the values the offender has violated at her grievous expense. Given these values that unite the community, a victim should be able to expect solidarity from one's fellow citizens including those in public authority who, on behalf of the community, pronounce judgment and exact a tribute from the offender.

Within such a framework that conceives justice as limited, capital punishment is neither absolutely prohibited, as nominal justice declares, nor a theological imperative, as ultimate justice insists. Rather, it remains a tenable yet still morally delimited form of punishment that, if carried

out, serves as a finite means of vindicating the shared values of human dignity that citizens collectively esteem. One limit and precondition to using capital punishment as a form of tribute requires redressing the public's lack of confidence in the capital justice system. A society that cannot adequately discriminate between the guilty and the innocent is not fit to keep capital punishment on the books. Addressing this concern requires giving excruciatingly close attention to reforms that would ensure the essential goals of due process such that there is no realistic chance of executing the innocent. For without such reforms, the death penalty can degenerate into a ghastly ritual sacrifice of innocents.⁶⁰ Such reforms are needed to shore up the confidence of the growing number of Americans who oppose the death penalty for its perceived unfairness and injustice. In order to remain a measure of limited justice, then, the death penalty may only be carried out when there is a level of moral certitude that obviates public doubt over such an awesome decision—one for which the state, should it err, can never make adequate amends.

Elevating the standard of moral certitude may entail reducing significantly the number of crimes and cases subject to the death penalty. I argued earlier that practical concerns should be coupled to deep ethical reasoning. In this case, fewer executions actually could reinforce the moral principle of general retribution. For when the strongest form of penalty is reserved for the severest crimes, the tribute a community exacts in those comparatively fewer circumstances becomes that much stronger. A society in which “ordinary murder” accrues the same penalty

⁶⁰ See, e.g., THE CONSTITUTION PROJECT, *supra* note 23, especially its most recent report, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT.

as exceptionally heinous murders and terrorist attacks puts all these crimes on the same par. As the severest penalty, capital punishment should be used sparingly, reserved to distinguish the community's response to the category of crimes that most egregiously violates its moral order. How else can a community differentiate common murderers from the Eichmanns, McVeighs, and bin Ladens of the world?

One might ask whether the Petit murderers belong among the abominables mentioned above. In the Petit case, where the guilt of the offenders was *not* in doubt, capital punishment seems, in my view, a fitting form of tribute for offenders to render (and for a public authority to compel) so as to vindicate the community's commitment to human dignity that these exceptionally cruel murders violated. So, does that mean that the State of Connecticut's decision to end capital punishment (thereby commuting the Petit murderers' sentences to life in prison) undermines the principle of general retribution on which, I've argued, the decision to execute should be made? That is, has the community effectively failed to enforce a proper tribute to the deeply cherished values of human dignity that underwrite its laws?

Not necessarily. Capital justice, whether it is retained or abolished, must itself be understood as a form of limited justice. Within this framework, citizens face the prospect that criminals who seemingly deserve the death penalty—or worse—or who might in other eras have received it, could still be sentenced to a lesser punishment (e.g., life imprisonment without parole). This does not in and of itself undermine the principle of general retribution, provided that the community compels a tribute that, in its view, adequately vindicates the moral order that crime has violated (as I think life imprisonment can do). This rationale is strengthened, however, by preserving a still higher standard

for capital offenses—in other words, keeping capital punishment on the books even if it is rarely, if ever, imposed; for against such a higher standard, lesser tributes remain appropriate for lesser crimes, however cruel and heinous they may be (as those committed against the Petit family surely were).

Finally, whether the worst offenders die tomorrow on the execution table or from natural causes decades from now in their jail cells, even limited justice never gets the last word—at least when conceived within a religious frame. As the judge and victims in the Petit case made clear, those who believe that more severe punishments await another time can take solace that a fuller measure of ultimate justice, not of this world, is yet to come.

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In a memorable passage from his famous essay questioning the death penalty, “Reflections on the Guillotine,” Albert Camus wonders how, given human frailty, society can ever be authorized “to pronounce an absolute judgment . . . [that is] uncertain of ever achieving pure justice If justice admits that it is frail,” he continues, “would it not be better for justice to be modest and to allow its judgments sufficient latitude so that a mistake can be corrected?”⁶¹ Following Camus, limited justice should be concerned to leave latitude to make amends for errors in the justice system—a concern that must be balanced with a commitment to retribution. This tension actually raises a question that points in a different direction involving another way of conceiving retribution.

⁶¹ Albert Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 173, 216-17 (Justin O’Brien trans., 1960).

Though Camus maintained at various points that the death penalty could be morally justified, he took seriously the principle of “making amends,” which, like other principles of punishment, entails both public and private dimensions. The notion of making amends applies to a society’s criminal justice system and to the offender as well. Picking up on a theme St. Augustine had articulated centuries earlier, Camus propounds, “Deciding that a man must have the definitive punishment imposed on him is tantamount to deciding that man has no chance of making amends.”⁶² But why does Camus, an unbeliever, share with St. Augustine this concern for the offender to make amends? Augustine was foremost concerned with the state of the offender’s soul and the need to repent to avoid eternal punishment. Though capital punishment could have the effect of inducing a personal confession and divine forgiveness, it is also possible that execution, rather than life in prison, cuts short the time for one to reconcile with one’s maker in advance of a final meeting. In any case, this is not a secular rationale for retaining or abolishing capital punishment that would have swayed Camus. And as I argued above, when pursued for the purpose of prompting the individual offender to seek redemption, capital punishment lacks a sufficiently public justification (especially within societies without established religions).

But Camus’s concern for an offender to make amends opens up another possibility. Society, for its part, might consider whether an offender who *publicly* repents and renounces the evil of his crimes contributes in some measure to reaffirming the moral order he has violated. Within the retributive framework I have offered, an offender’s

⁶² *Id.* at 220.

public confession of guilt and lived forms of contrition (within the confines of prison) could be construed as a form of tribute to the community and to the order of justice that has been violated. Such tributes, in their own way, serve to vindicate the community's most cherished values; after all, it is the offender, who having challenged and transgressed these values by his or her crimes, now acknowledges and helps restore them through a public tribute in the form of accepting guilt for violating them. Such a public confession or apology might serve a measure of limited justice that, when coupled with a sentence of life imprisonment, preserves the communal goals of retribution—of vindicating the moral order. On this alternate formulation of retribution—enabling an offender's public contrition from prison to serve as a form of tribute—society might decide to forswear capital punishment, reasoning that, in addition to foreclosing the state's ability to make amends should it err, the state hastens or forecloses the possibility for an offender to make amends and affirm the order of justice he has violated.

A public statement of contrition alone does not pay adequate tribute to the values of human dignity that egregious crimes transgress, but when combined with life imprisonment, some communities might find it sufficient. If Eichmann and McVeigh had lived long enough to render such a tribute on their own volition—to make amends as Augustine and Camus say—would their public confessions from prison have been more meaningful tributes than being compelled by the community to pay tribute with their lives? I myself am not convinced that public confessional tributes should trump or exclude other tributes enforced by the community, including capital punishment. Yet, because making tribute by making amends holds promise for lesser crimes as a way of

vindicating the moral order of the community, I remain open in principle to the argument, whatever my doubts.

Wherever one comes down on particular applications of capital punishment, it remains an always limited form of punishment that achieves, at best, a finite measure of justice for a given political community here on earth. In sketching out the position of limited justice, I have explored the conceptual parameters, principles, and priorities that guide religious as well as secular arguments over the morality of capital punishment. The insights of limited justice show why moral reflection on punishment should be foremost grounded in the principle of retribution, yet also chastened by the propensity for human error, and committed to preserving latitude to make amends. Within the United States and perhaps other countries such as Taiwan, future death penalty debates—and debates about the future of the death penalty—would be well-served if focused accordingly.

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應報與正義的限度

—— 死刑的宗教與倫理反思

*John D. Carlson**

摘要

美國與臺灣都屬於一個逐漸凋零的，由保留死刑的民主國家所組成的社群。儘管支持死刑的民意在臺灣仍然堅強，但美國支持死刑的民意近年來卻逐漸下滑。在美國，宗教上的省思對於塑造公眾意見論辯的雙方有一定的影響力。因此，針對支持和反對死刑之關鍵道德論證的宗教基礎加以省察，是很有價值的研究。本文批判特定的宗教立場，這些立場若非高估了正義而無視其內在的限制，就是無法有效達成刑罰的中心目的。在兩個極端中間，我提出一條中間的道路，稱為「有限正義」。此立場一方面認真看待存死論者對於應報的主張，另一方面也考量到廢死論者對於刑事司法體系之錯誤的憂慮。有限正義論主張死刑既非在道德上是必須的，亦非被禁止的。此論建立在一套一般性的應報理論之上，此論的核心視野並非個人而是社會整體。有限正義論主張一個政治社會可以強制犯罪者為其犯罪行為付出「代價」。當一個社會這麼做的時候，這個社會彰顯並且確認其核心的社會價值，比如嚴重犯罪行為所侵犯的人性尊嚴。我的結論是，在有限的情況下，死刑是彰顯這些公共價值的重要手段。為建立此論證，本文批判幾種新教觀點與神學思維，並肯認其他。本文的取徑也可視為宗教思維與倫理省思如何在棘手的道德議題上活化公共論辯的案例研究。

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