TOO MUCH JUSTICE: QUESTIONING THE UNITED STATES' PURSUIT OF RETRIBUTION

DANIEL SMALL

ABSTRACT

What should be the goal of a criminal justice system? On the surface, the answer to this question is obvious: justice. However, this simple question has been the subject of rigorous debate for millennia. While the desirability of justice is obvious, the definition of justice is anything but. Justice is often depicted metaphorically as a properly balanced scale. Adopting this imagery, the philosophical debate concerning justice can be described as an argument about what the scale ought to measure. Retributivists assert that justice is the correct balancing of moral considerations, while consequentialists argue that only tangible outcomes ought to be measured. With a focus on the United States, this paper's unabashedly presumptuous aim is to put an end to this millennia-long dispute; specifically, by establishing that retributive moral balancing has no place in a criminal justice system. To that end, the following discussion entails: (1) an overview of the philosophical discourse surrounding retribution; (2) an examination of the United States' penal theory, both past and present; (3) a philosophical argument against deontological ethics; and (4) an examination of potential constitutional issues inherent in retributive government action.

I. INTRODUCTION

From toddlers to political leaders, the desire to repay harm with harm is an essentially ubiquitous aspect of the human experience. Views regarding the metaphysical significance of this desire, however, do not enjoy the same universality. Some argue that humanity's innate propensity for retaliation is nothing more than a biological predisposition, selected by the evolutionary process.[1] On the other end of the spectrum, many assert that the instinct towards vengeance is a reflection of an ontological moral code—a matter of cosmic balance.

Irrespective of its moral value, it is clear that some form of reprisal is essential to a well-ordered society; sovereigns have been implementing it for at least 3,700 years.[2] Thus, from a legal perspective, the question is not whether to punish, but how to punish. This is where the metaphysical debate becomes relevant: should the government administer punishments that lead to positive societal outcomes, or should it seek cosmic balance?

The field of study that addresses this issue is known as penology. Within the field, there are four commonly cited justifications for punishment.[3] Punishment inflicted for the purpose of cosmic moral balance is called retribution. The other three penal justifications are pragmatic rather than moralistic; deterrence seeks to reduce illegal conduct by disincentivizing it, incapacitation aims to forcefully prevent crime, and rehabilitation calls for corrective "punishments" that teach offenders to obey the law. The lively debate regarding the relative value of these theories has essentially existed as long as society has been administering punishments.[4]

---

1. Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 281 (2013).

2. Joshua J. Mark, *Hammurabi*, ANCIENT HISTORY ENCYCLOPEDIA (Apr. 16, 2018), https://www.ancient.eu/hammurabi/ (May 4, 2020).

3. Materni, *supra* note 1, at 264-265.

4. PLATO, PROTAGORAS 43 (Benjamin Jowett trans., Serenity Publishers 2009).

With a focus on the United States, this paper's unabashedly presumptuous aim is to put an end to this millennia-long dispute; specifically, by establishing that retributive moral balancing has no place in a U.S. criminal justice system. To that end, the following discussion entails: (1) an overview of the philosophical discourse surrounding retribution; (2) an examination of the United States' penal theory, both past and present; (3) a philosophical argument against deontological ethics; and (4) an examination of potential constitutional issues inherent in retributive government action.

II. THE RETRIBUTION DEBATE

A. Necessary Context

While this paper's central aim is to persuade rather than inform, in this case persuasion requires a great deal of context. Before condemning the United States' pursuit of retribution, the concept of retribution must first be thoroughly elucidated. By the same token, a robust examination of retribution is dependent on a rudimentary understanding of ethics.

At the highest level, ethical philosophy is divided into two camps: moral realism (asserting that morality is objective) and moral relativism (asserting that morality is subjective). Within the realm of moral realism, once again there are two theories: deontology and teleology (also known as consequentialism). Under deontology, absolute rules are used to distinguish right from wrong. Deontological rules—"categorical imperatives," as Immanuel Kant called them—are a good in and of themselves, meaning they must be followed regardless of the outcome.[5] For instance, if the biblical command, "thou shall not kill," is viewed as a categorical imperative, killing is wrong even when it saves the lives of millions.[6] Conversely, teleology judges the morality of an action by its outcome. Thus, under a teleological analysis, killing is immoral when it produces a bad outcome such as needless pain and suffering, but moral if it achieves a higher good such as saving lives.

5. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 31 (Allen W. Wood ed., John W. Semple trans., T. & T. Clark 1871) (1785).

6. *Exodus* 20:13

B. Historical Perspectives on Retribution

As was briefly stated above, retribution in its broadest sense, is punishment inflicted for the purpose of moral balance.[7] Within the framework of ethics, retribution is categorized as a deontological rule. This means that proponents of retribution view the repayment of harm with harm as an intrinsic good that is morally required, regardless of the outcome (at least when it is done correctly). Ascertaining when retaliation qualifies as proper retribution is the fundamental problem that retributive justice theorists face. Through history, leaders and philosophers have implemented a variety of formulations of retribution.

The first known formal conception of retributive justice dates back nearly 4,000 years. Around 1754 BCE, the Babylonian king Hammurabi had 282 laws etched into a 7.5-foot stone. One of these laws declared: "[i]f a man put out the eye of another man, his eye shall be put out."[8] Another proclaimed: "[i]f a man knock out the teeth of his equal, his teeth shall be knocked out." Centuries later, this exact notion of justice was adopted in the ancient Jewish tradition, wherefrom originated the more concise and famous articulation: "[e]ye for eye, tooth for tooth."[9] Both Hammurabi's Code and the Mosaic Law operate according to the principle of *lex talionis*, which asserts that the punishment must match the offense in kind and degree.[10]

While to some *lex talionis* may seem like a barbaric relic of antiquity, at least in terms of its acceptance, it has largely withstood the test of time. Millenia after his own death, and even the death of his empire, prominent philosophers continued to echo the principles laid out by Hammurabi. For instance, in 1797, Immanuel Kant expressed his formulation of justice simply, writing: "whoever has committed a murder must die."[11]

In his deeper explorations of *lex talionis*, Kant makes the deontological nature of retaliation explicit, arguing that "justice would cease to be justice if it were bartered away for any consideration whatever."[12] Applying this principle to the societal level, Kant contends: "[j]uridical

---

7. Materni, *supra* note 1, at 267

8. *The Code of Hammurabi*, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY, AND DIPLOMACY, https://www.avalon.law.yale.edu/ancient/hamframe.asp (May 4, 2020).

9. *Exodus* 21:24

10. *Lex talionis* is Latin for "the law of retaliation"

11. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 198 (William Hastie trans., T. & T. Clark 1887) (1797).

12. *Id.* at 196

punishments can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime."[13] To put this in the language used in this paper, according to Kant, the pursuit of moral balance is not merely *an* acceptable justification for the government to administer punishment, it is *the only* acceptable justification. Writing at roughly the same time as Kant, Georg Wilhelm Friedrich Hegel also believed that proper retaliation served a metaphysically significant purpose. In describing this purpose, Hegel introduced the notion that retribution is not only a moral good in that it leads to universal fairness, but also in that it "embod[ies] the criminal's own right" by honoring him "as a rational being."[14]

C. Contemporary Understandings of Retribution

While unfettered *lex talionis* is not prevalent among contemporary thinkers, viewing retribution as an intrinsically valuable deontological requirement is still commonplace. Igor Primoratz clearly draws from both Kant and Hegel in that he maintains that "the offense committed is the *sole* ground of the state's right to punish," and that by requiting evil with evil, "we treat [evildoers] in the way [they have] deserved."[15] However, by rejecting the literal and physical proportionality implicit in *lex talionis*, contemporary philosophers were faced with the task of developing a new method with which to distinguish morally appropriate retaliation—retribution—from objectionable retaliation—revenge. To this end, Robert Nozick offers five criteria by which to differentiate retribution from revenge: (1) retribution is imposed only for moral wrongs; (2) retribution is proportional; (3) retribution is impartial; (4) retribution seeks justice rather than pleasure; and (5) retribution is applied consistently.[16]

What some may (rightfully) find striking about the discussion of retribution up to this point, is that while a good deal has been discussed with respect to what retribution is, there has not been a single argument as to why retribution should be a deontological rule. This is no coincidence. The absence of any such argument is due to the fact that

13. *Id.* at 195

14. GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 100 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821)

15. IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT, 147 (1989).

16. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366-68 (1981).

arguments of that nature are logically incoherent. Within deontological philosophy, something either is a rule, or it is not. To argue that a rule *should* be held sacrosanct because doing so would have positive outcomes is a teleological assertion. With this, the only possible arguments in support of a deontological rule are arguments that tend to show that the rule is a metaphysical reality. Arguments of this kind are notably absent from the historical analysis above; metaphysical moral arguments, while perhaps not logically impossible, are exceedingly difficult to make. How can one prove that a moral rule is an objective reality?

In his book, "Placing Blame: A Theory of the Criminal Law," Michael Moore takes on this challenge.[17] In order to illustrate his central argument, Moore recalls the infamous tale from Fyodor Dostoevsky's novel, "Brothers Karamazov," in which a nobleman has his dogs brutally kill a young boy in front of the boy's mother. Moore then asks his reader to imagine these events occurring in two situations: one in which the reader himself is the nobleman, and another in which the nobleman is someone else.[18] He then asks his readers the following question: under both scenarios, should the nobleman be punished "even though no other social good will thereby be achieved?"[19] Moore assumes that for most people, "the retributivist's 'yes' runs deep."[20] From the universality of this deep seeded desire for retaliation irrespective of self-interest, Moore extrapolates the existence of an objective moral rule.[21]

On an instinctual level, Moore's argument may feel compelling. However, the instinctual nature of his argument is precisely what makes it fallacious. The obvious response to the thought experiment is that at the very most, it proves that humans desire retribution—an assertion that no one disputes. When attempting to prove the ontological significance of a human desire, using the existence of the desire as proof of its significance is a circular argument.

D. The Consequentialist Perspective

Critiques of retributive philosophy of this nature, and others, have a long history. Plato strongly condemned punishment for punishment's sake, describing it as "the unreasonable fury of beast[s]."[22] Instead of

17. MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 163 (2010)
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. PLATO, *supra* note 4.

"retaliat[ing] for past wrong[s] which cannot be undone," Plato argued that punishment ought to be rationally calculated to deter future wrongs.[23] Thousands of years later, in a political environment when such ideas were radical, Cesare Beccaria employed the same reasoning, suggesting that "the purpose of punishment…is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same."[24]

Adherents of teleological penology, such as Plato and Beccaria, expressly reject the notion that punishment is intrinsically valuable. In fact, under utilitarianism—a subcategory of consequentialism—all pain, no matter the cause, is objectionable. Working from this assumption, the goal of utilitarianism is to minimize all suffering in the world and maximize all positive experiences. As Jeremy Bentham proclaimed, "the greatest happiness of the greatest number is the foundation of morals and legislation."[25] Thus, at least from a utilitarian perspective, retribution is not only irrational, it is inherently immoral. Criminal law theorist, Sanford Kadish, expressed the teleological objection to retribution in this way:

> Why is it good to create more suffering in the world simply because the criminal has done so? How does the unlikely proposition that it is right to hurt a person apart from any good coming of it connect with other moral ideas in our culture that are worth preserving?. . .Doesn't it resemble too closely for comfort the despised practice of taking pleasure in another's pain?[26]

E. Further Penological Clarifications

In a later section, the philosophical merits of retribution and consequentialism will be explored more fully. However, before moving on to an examination of retributive policies and practices within the U.S. criminal justice system, there are a few more philosophical and penological points that ought to be clarified.

As mentioned previously, there are three commonly cited teleological theories of punishment: deterrence, incapacitation, and

---

23. *Id.*

24. CESARE BECCARIA, ON CRIMES AND Punishments 11 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press, 2008) (1764).

25. JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM; VOLUME 10 (John Bowring ed., Creative Media Partners, LLC 2019) (1843).

26. Sanford Kadish, *Foreword: Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 699 (1994).

rehabilitation.[27] While these theories appear straightforward, it is useful to be aware that they are often broken into subtypes. At least since Plato, it has been understood that punishment can deter crime in two ways: (1) making a specific criminal less likely to commit future offenses—because she remembers how unpleasant the punishment was; or (2) making the general population less likely to commit an offense—because they witness how unpleasant the punishment looks.[28] This reasoning has been embraced within contemporary penology, and thus deterrence is often separated into sub-theories: "specific deterrence" and "general deterrence."

Similarly, rehabilitation is divided into two schools of thought: individual rehabilitation and societal rehabilitation.[29] While both types seek to reduce the likelihood of future criminal conduct in individuals, they seek that goal through different means and for different reasons. Individual rehabilitation emphasizes the personal wellbeing of the offender, and thus seeks both a reduction in criminal behavior as well as positive social integration. Societal rehabilitation on the other hand, is primarily focused on society; its only concern is neutralizing the threat that the individual poses to the community.

Not only is it important to be aware that the prevailing consequentialist theories are nuanced but it is also vital to understand that teleological penology is not confined exclusively to them; the point is more than a mere abstraction. Montana's Constitution, for example, includes a nontraditional teleological purpose for punishment—" restitution for victims."[30]

Nevertheless, limiting teleological justice to deterrence, incapacitation and rehabilitation is a common mistake. For instance, retributivist theorist Gerard Bradley suggests that teleological justice is inadequate because it narrowly focuses on "seeking to discourage . . . criminal behavior" while failing to consider big picture considerations such as "societal balance."[31] Retribution, Bradley contends, is the "only appropriate moral justification for punishment" because its purpose is to "reestablish the balance of political society."[32] To put it bluntly, this

27. Robert McFatter, "*Purposes of punishment: Effects of utilities of criminal sanctions on perceived appropriateness*." JOURNAL OF APPLIED PSYCHOLOGY (1982).

28. Plato, *supra* note 4.

29. MICHAEL S. MOORE, LAW AND PSYCHIATRY 234 (1984).

30. MONT. CONST. art. I, §28.

31. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 30 (2003).

32. *Id.* at 29.

argument profoundly misunderstands both retribution and teleological penology. If the espoused goal of a punishment is anything other than the punishment itself—the balance of political society in Bradley's case—then the punishment is consequentialist rather than retributive.

Bradley certainly is not alone in this misunderstanding. Many (if not most) advocates of retribution support their position by asserting that retribution in some way maintains the moral quality of society. While on its surface this assertion appears consistent with retributivist philosophy, if "the moral quality of society" is defined by external outcomes—such as decreased crime, increased prosperity, or even increased overall happiness—the theory being advocated is not retributive. To quote Kant once again, "justice would cease to be justice if it were bartered away for any consideration whatever."[33]

While it is possible that some theorists commit exclusively to the commonly cited penal justifications, this paper takes no such position. In arguing that retributive reasoning has no place in the U.S. criminal justice system, the door is left open to all forms of outcome-oriented decision making.

III. RETRIBUTION IN THE UNITED STATES

Before making the case that the United States should not pursue retribution, it is logical to first demonstrate that it does in fact pursue retribution. With that goal, the following pages provide an overview of the United States' approach to punishment, from colonial times to the present day.

A. *American Penology Throughout History*

Prior to the American Revolution colonial society was primarily composed of small insular communities. As of 1760, there were only seven cities in the colonies with more than three thousand inhabitants.[34] These communities were chiefly organized around three institutions: community, family, and church.[35] Religion—specifically Christianity—affected all areas of society, including the administration of justice. The colonists made little distinction between societal law and the Christian concept of sin. Criminal codes existed, but even under those

33. KANT, *supra* note 12.

34. THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 12 (2nd ed. 2010).

35. *Id.*

codes the legality of behavior was highly contextual. Due to the near absolute homogeneity of values within colonial society, the legislators felt free to write broad statutes and allow the community to exercise discretion in administering criminal sanctions.[36] While traditionally criminal conduct such as theft and murder were criminalized, legal sanctions were also imposed for things like drunkenness, profanity, and even sarcasm in some instances.[37] This religious enforcement of morality is fully in line with the notion of retributive justice—where God's laws are violated, humans must be punished.

The American Revolution, while loosely tied to religious precepts, was largely informed by secular enlightenment ideals; the Founding Fathers were profoundly influenced by consequentialist philosophers like Beccaria and Bentham.[38] The inevitable result: post-revolutionary American society began to abandon religious moralism in favor of scientific reason, capitalism, and democracy.[39] With respect to crime, this meant that the religion-based understanding was replaced with one founded in reason. Instead of irredeemably depraved sinners, criminals began to be viewed as rational actors.[40] The unscientific retributive approach to criminal justice went out of vogue and the teleological goal of crime prevention took its place. According to Bentham, "[n]ature has placed mankind under the governance of two sovereign masters, pain and pleasure."[41] Accepting this utilitarian hypothesis, the key to deterrence was clear to early Americans: make crime more painful than pleasurable.[42]

Throughout the 19th century, as the enlightened fervor of the revolution faded, and idealistic notions of rationality proved unable to definitively end crime, American society's criminal justice approach began to change once again. Because the criminal life was rendered fundamentally undesirable and crime still persisted, it was reasoned that criminals must have some sort of sickness.[43] Because a disease cannot be dealt with through punishment or reason, this understanding

36. *Id.* at 16.

37. *Id.* at 14.

38. *Id.* at 29.

39. *Id.* at 32.

40. *Id.* at 29.

41. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (Clarendon Press 1879) (1789).

42. BLOMBERG, *supra* note 34, at 5.

43. THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 52 (1st ed. 2000).

of crime spawned the rehabilitative theory of criminal justice. In tandem with this philosophical shift, a social movement developed pushing for prison reform in accordance with rehabilitative principles.[44]

One aspect of this movement was the formation of the Pennsylvania Society for Alleviating the Miseries of Public Prisons. This excerpt from its constitution embodies the prevailing attitudes of the time:

> By the aids of humanity, [criminals'] undue and illegal suffering may be prevented . . . modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring or fellow creatures to virute and happiness.[45]

State constitutions from this time also reflect the prevalence of rehabilitative attitudes. Indiana's Constitution enacted in 1851, for example, declared that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."[46]

Rehabilitation continued to be the dominant penal theory in the United States well into the 1900s.[47] Despite a rise of urban problems due to increasing industrialization, the political climate in the early 20th century was characterized by optimism regarding the combined efforts of government and science.[48] Within the justice system, rehabilitative policies such as indeterminant sentencing—a prison sentence in which the prisoner's release is dependent on successful rehabilitation—became widespread.[49] This optimistic approach to social problems—referred to as progressivism—continued all the way through the 1960s.[50]

While rehabilitation was the most popular approach to criminal justice in this era, that is not to say that it was the only one; deterrence and incapacitation were never abandoned as state goals. Wyoming's 1890 Constitution provided that "[t]he penal code shall be framed on the humane principles of reformation and prevention."[51] Similarly, seventy years later, when Alaska attained statehood, its Constitution

---

44. *Id.* at 53.

45. DANIEL VAN NESS & KAREN STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 9 (Ellen S. Boyn ed., Anderson Publishing, 5th ed. 2014).

46. IND. CONST. art. I, §18.

47. BLOMBERG, *supra* note 43, at 63

48. *Id.*

49. *Id.*

50. Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 3 (Neil Hutton & Cyrus Tata eds., Taylor & Francis 2017).

51. WYO. CONST. art. I, §28 (1890).

proclaimed: "[t]he penal administration shall be based on the principle of reformation and upon the need for protecting the public."[52] Finally, the 1962 Model Penal Code, which was adopted by numerous state legislatures, stated that the purposes of its sentencing provisions were deterrence, incapacitation, and rehabilitation.[53] Significantly absent in these statements of purpose is retribution; at this time, America had lost its appetite for just deserts.

B. *The Failure of Criminal Reformation*

In the 1970s, crime rates began to rise and rehabilitation began to fall out of favor.[54] Social scientists criticized the rehabilitationist regime, questioning its cost-effectiveness and pointing out the lack of evidence for a reduction of recidivism.[55] The public latched on to these critiques; "nothing works" became a popular slogan, indicating the widespread frustration and disillusionment felt towards criminal reformation.[56]

It is worthwhile to briefly step away from the historical narrative and discuss the perceived failure of rehabilitative justice in the United States—for which there are a variety of explanations. For one, while rehabilitation was touted as the philosophical aim of the U.S. criminal justice system for centuries, the actual policies and practices during those years were often dramatically contrary to rehabilitative values. An obvious example of this stark inconsistency is the fact that thousands of people were executed by the states during the "rehabilitation" era.[57] Further, to describe U.S. criminal justice in the nineteenth and twentieth centuries as rational and rehabilitative is to entirely gloss over the country's shameful history of racism. In the wake of the Civil War, for instance, many southern states passed laws with the explicit intent of maintaining the subjugation of black Americans.[58] Laws of this nature are anything but rehabilitative.

---

52. AK. CONST. art. I, §12 (1959).

53. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. LAW REV. 1313, 1319 (2000).

54. Greene, *supra* note 50, at 4

55. *Id.* at 3

56. *Id.* at 4

57. EPSY M. WATT & JOHN O. SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608-2002: THE EPSY FILE 134 (4th ICPSR ed. 2004)

58. Gary Steward, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2258 (1998).

Even when the United States' policies were designed with rehabilitative intent, they were often woefully misguided. In treating crime as a disease, some of the predominant curative strategies were solitary confinement and manual labor.[59] After visiting a reformatory in Pennsylvania in the mid-1800s, renowned author Charles Dickens remarked:

> [I]n its intention I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers.[60]

In light of its inconsistent application and archaic methods, it is no wonder the results of the rehabilitation movement were unimpressive.

Finally, even if a rehabilitative justice system was completely and earnestly implemented, its success or failure would not be indicative of the validity or invalidity of teleological justice. In fact, to criticize rehabilitation for its failure to benefit society is to implicitly accept this paper's central argument—policies ought to be judged by their outcomes. Thus, understanding that the "failure" of rehabilitative philosophy is neither definitive, nor is it a victory for retributivists; examination of U.S. penal history may resume.

C. *The Return to Retribution*

By the mid-1970s, the progressive model was under fire from all sides. In 1974, President Nixon's Attorney General, William Saxbe, began to publicly decry judicial leniency. On the opposite end of the political spectrum, liberals spoke out against discretionary policies like indeterminate sentencing, criticizing the racial disparities they had caused.[61] In 1976, penal theorist Andrew von Hirsch released his book, "Doing Justice," in which he criticized the current state of criminal justice in the U.S. and argued for reform grounded in the principle of "just deserts."[62]

---

59. Carl Schneider, *The Rise of Prisons and the Origins of the Rehabilitative Ideal*, 77 MICH. LAW Rev. 707, 728 (1979).

60. CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 68 (Applewood Books 2007) (1842).

61. Greene, *supra* note 50, at 4

62. *Id.* at 5

Andrew von Hirsch's wish for retribution-based reform was granted. Over the 1970s and 1980s, a large number of states amended their penal codes so as to officially endorse retributive sentencing.[63] By 1985, not only was indeterminate sentencing widely abolished but the pendulum had swung all the way in the other direction and every single state had passed at least one mandatory minimum sentencing law.[64] The harsher sentencing policies adopted during this time were often related to the infamous "war on drugs." Between 1983 and 1992, the number of adults sentenced to prison for drug offenses more than tripled, and as a result, the actual imprisonment of drug offenders increased by 510%.[65] Finally, further demonstrating the retributive nature of this penal reform, starting in 1977, the number of annual state death penalty executions in the U.S. began to increase consistently and rapidly.[66]

President Reagan's administration was fully in sync with this retributivist movement; his violent crime task force was instructed to ignore the "so called root causes of crime,"[67] and in 1984 he signed off on the Sentencing Reform Act, which included "just punishment" as an objective of federal criminal sentencing.[68] Despite these dramatic shifts towards retributivism, in the early 1990s the country's desire for vengeance was still not satiated. At the end of George Bush's presidency, his administration was still waging a campaign for toughening penal policies. In 1992, the Department of Justice issued two reports titled: "Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice" and "The Case for More Incarceration," respectively.[69]

The nationwide "tough on crime" frenzy only escalated under the Clinton presidency. In 1993, Washington State passed the first "three strikes and you're out" law, which made life imprisonment mandatory upon the committing of three felonies.[70] Over the next two years, twenty-one other states adopted laws of this nature. Additionally, in the 1994 Crime Bill, the Federal Government adopted a three strikes law, expanded the federal death penalty, and encouraged states to adopt stricter sentencing laws by offering huge amounts of money for prison

63. Coton, *supra* note 53, at 1356

64. Green, supra note 50, at 9

65. *Id.* at 20 n.

66. TRACY SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 253060, CAPITAL PUNISHMENT, 2017: SELECTED FINDINGS 4 (2019).

67. Greene, *supra* note 50, at 15

68. Sentencing Reform Act of 1984, H.R. 5773, 98th Cong. (1983-1984)

69. Greene, *supra* note 50, at 20

70. *Id.* at 21

construction to those that did.[71] A couple of years later, after a mere two minutes of debate, the Senate passed the Personal Responsibility and Work Opportunity Act, which made felony drug offenders—and no other felons—ineligible for food stamps and other federal assistance programs.[72] In seeking reelection in 1996, President Clinton's official platform had a section which read:

> Tough punishment. We believe that people who break the law should be punished, and people who commit violent crimes should be punished severely. President Clinton made three-strikes-you're-out the law of the land, to ensure that the most dangerous criminals go to jail for life, with no chance of parole. We established the death penalty for nearly 60 violent crimes, including murder of a law enforcement officer, and we signed a law to limit appeals.[73]

D. *The Penology of the Present*

Over the past two decades, there has been a modest shift away from "tough on crime" policies in the United States. However, many of the retributive policies and attitudes of the 1990s still exist today. For one, the death penalty is still legal in the majority of states.[74] In the states where it is legal, 376 people have been executed in the past ten years.[75] Additionally, after a seventeen-year hiatus, the federal government has resumed executions.[76] Other "tough" policies, like mandatory minimums and three-strike-laws remain prevalent among the states.[77] Partially as the result of these sentencing policies, the United States has a prison population of 2.24 million, the largest of any country, and the

---

71. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1994)

72. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. (1996).

73. Gerhard Peters and John T. Woolley, *Democratic Party Platforms: 1996*., *Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT (Aug. 26, 1996), https://www.presidency.ucsb.edu/documents/1996-democratic-party-platform.

74. *State by State*, DEATH PENALTY INFORMATION CENTER (2020), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

75. *Executions by State and Region Since 1976*, DEATH PENALTY INFORMATION CENTER (2020), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

76. Office of Public Affairs, U.S. Dep't. of Justice, *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, THE UNITED STATES DEPARTMENT OF JUSTICE (July 25, 2019), https://www.justice.gove/opa/pr/federal-government-resume-captial-punishment-after-nearly-two-decade-lapse.

77. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC LAW REV. 113, 119 (2018).

largest per capita by a substantial margin.[78] A quarter of this population is made up of people incarcerated for drug offenses.[79] Even after release, the U.S. justice system continues to make life difficult for many convicts. 6.1 million felony offenders are currently disenfranchised by the laws of 48 states.[80] In twelve states, felony offenders are permanently deprived of their right to vote.[81] On top of that, nearly half of states continue to deny food stamps and other benefits to people with felony drug convictions.[82]

Most state constitutions and penal codes that previously called for non-retributive sentencing have since been amended.[83] In states where a rehabilitative approach remains the formal letter of the law, state supreme courts have interpreted the law in such a way so as to make room for retribution. In a particularly egregious display of judicial activism, the Indiana Supreme Court has interpreted the constitutional provision, "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice,"[84] as a mere "admonition to the legislative branch" [85] that "only applies to the penal code as a whole, not to individual sentences."[86]

The Supreme Court has explicitly held that retribution is a constitutional penological purpose.[87] Going further, the Supreme Court has asserted that "the primary justification for the death penalty is retribution."[88] Making his personal views even more explicit, during oral argument in *Miller v. Alabama*, Justice Scalia exclaimed, "Well I thought that modern penology has abandoned that rehabilitation thing, and they—they no longer call prisons reformatories or—or whatever, and

78. Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 EMORY INT'L LAW REV. 329, 333 *(*2017).

79. *Id.* at 335

80. Christopher Uggen, Josh Rovner & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

81. *Id.*

82. Darrel Thompson, *No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions*, CENTER FOR LAW AND SOCIAL POLICY (Mar. 2019), https://www.clasp.org/publications/report/brief/no-more-double-punishments.

83. Cotton, *supra* note 53, at 1357

84. IND. CONST. art. I, §18.

85. Williams v. State, 430 N.E.2d 759, 766 (Ind.1982).

86. Henson v. State 707 N.E.2d 792, 796 (Ind.1999).

87. Ewing v. California, 538 U.S. 11, 25 (2003).

88. Spaziano v. Florida 468 U.S. 447, 461 (1984).

punishment is the—is the criterion now. Deserved punishment for crime."[89]

While President Trump's views can oftentimes be difficult to ascertain, he is not shy about his love for retribution. In his book "The America We Deserve," he expressed his personal philosophy of punishment in the following way: "A life is a life, and if you criminally take an innocent life, you'd better be prepared to forfeit your own. My only complaint is that lethal injection is too comfortable a way to go."[90] Maintaining this bold stance, during his first presidential campaign, Donald Trump suggested that the U.S. ought to fight terrorists by targeting their families.[91] In a primary debate the following year, he promised to "bring back waterboarding" and "a hell of a lot worse than waterboarding."[92]

Beyond quotations that some may consider mere bravado, President Trump has also embraced retribution in his policies. As mentioned previously, his administration brought back the death penalty after it had been all but abandoned.[93] Additionally, Donald Trump's highly publicized zero tolerance immigration policy, which separated thousands of children from their families, had undeniable retributive undertones.[94] These undertones were made explicit when White House Press Secretary Sarah Huckabee Sanders defended the policy in a press briefing. Rather than arguing that the policy was pragmatically justified, she announced that "it's a moral policy to follow and enforce the law."[95]

With all three branches of the government consistently employing retributive reasoning, it is clear that retributive penology is alive and well in the U.S. today.

---

89. Materni, *supra* note 1, at 264.

90. DONALD TRUMP & DAVID SHIFLETT, THE AMERICA WE DESERVE 103 (1st ed., Renaissance Books 2000).

91. Ashley Ross, *ISIS: Donald Trump Says He'd 'Take Out' Terrorists' Families*, TIME (Dec. 2, 2015), https://time.com/4132368/donald-trump-isis-bombing/.

92. Jenna Johnson, *Trump Says* '*Torture Works,' Backs Waterboarding and 'Much Worse',* WASH. POST (Feb. 17, 2016),, https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html.

93. U.S. Dep't. of Justice, *supra* note 73.

94. COMM. ON OVERSIGHT AND REFORM, U.S. H.R., CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION 9-15 (2019).

95. Kyle Feldscher, *WH on Separating Undocumented Families: 'Very Biblical to Enforce the Law'*, CNN, (June 15, 2018, 8:31 PM), https://www.cnn.com/2018/06/14/politics/sanders-immigration-child-separation/index.html.

E. *Inferring Retributive Intent*

In the above historical analysis, there is a significant amount of evidence showing explicit retributive intent. Nevertheless, the extent to which "tough on crime" policies are retributive is debatable. Proponents of severe penalties may well justify their position on a theory of deterrence, arguing that the harsher the penalties are, the less crime will be committed. By the same token—and of specific relevance in the United States—harsh prison sentences have an obvious non-retributive potential purpose—incapacitation. Determining where teleological justifications end and retribution begins is not always easy. In establishing the prevalence of retribution in the United States, it is useful to further explore the intent behind the "tough on crime" movement.

One way to infer retributive intent is to examine whether a punishment furthers a teleological objective in actuality. Where a penal policy does not accomplish a measurable benefit, and the policy is maintained regardless, it is reasonable to assume that that policy is being implemented for a retributive purpose. Upon evaluating the effects of the U.S. penal reforms that began in the 1970s, their retributive purpose becomes more evident.

Despite the ever-harsher penalties and the massive growth of the prison population, between 1973 and 1991 crime rates in the U.S. increased by about 83%.[96] This at least seems to indicate that the continuous and enthusiastic adoption of tough policies during this time was not driven by successful results. On the other hand, between 1991 and 2001, crime in the U.S. decreased by 33%.[97] A study aimed at explaining this downward trend found that incarceration, larger police forces, a decline in the demand for crack, and the legalization of abortion were all statistically significant factors.[98]

While this may lead some to conclude that something in the Clinton administration's approach was fundamentally correct, there are several important caveats to these statistics. For one, during this time period violent crime rates also decreased in countries with different penal theories—albeit not as dramatically.[99] Further, even after the United

96. Steven Levitt, *Understanding Why Crime Fell in the 1990's: Four Factors that Explain the Decline and Six that Do Not*, 18 JOURNAL OF ECONOMIC PERSPECTIVES 163, 166 (2004).

97. *Id.*

98. *Id.* at 184.

99. *Intentional homicides (per 100,000 people) – United Kingdom, Germany, France, Netherlands, United States*, THE WORLD BANK | DATA (May 16, 2020),

States' historic drop in crime, its homicide rates were still substantially higher than those in many less retributive countries[100] that incarcerated far fewer citizens.[101] In light of this, arguments asserting a causal link between the United States' specific policies and the decrease of crime in the 1990s are tenuous.

Admittedly, this method of inferential reasoning is far from perfect. With a subject as complex as the behavior of hundreds of millions of individuals, extrapolations derived from a single-factor analysis ought to be viewed with a great deal of skepticism; it is theoretically possible for a nation to implement an objectively more effective crime prevention system and then see crime rates rise for unrelated reasons. However, that is not to say that inferences of this kind are worthless. In fact, the difficulty of determining the effectiveness of crime prevention strategies evidences the retributive impulses of those who push for more severe punishments. If the data does not conclusively support either harsh or lenient policies, advocating for harsh policies regardless implies an innate preference for them.

A more reliable method of exposing retributive intent is examining the scientific consensus regarding a punishment at the time it is adopted. If it is widely understood that a certain punishment does not serve any teleological purpose, and that punishment is adopted nonetheless, it is logical to conclude that the underlying justification is retribution; the United States' response to drug abuse is an excellent example. Evidence based neuroscience has long held that "punishment alone is a futile and ineffective response to drug abuse" and that "addiction is a chronic brain disease with a strong genetic component that in most instances requires treatment."[102] But still, in 2020, there are thousands of people suffering from drug addiction in U.S. prisons, not receiving treatment. Further, once released from prison, felony drug offenders are still uniquely deprived of government support. [103]

Another significant example is the death penalty. In 1996, 84% of experts did not believe that the death penalty had a greater deterrent

---

https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?end=2017&locations=GB-DE-FR-1W-NL&name_desc=true&start=1990.

100. *Id.*

101. Labutta, *supra* note 78.

102. Chandler Redonna, Bennett Fletcher & Nora Vokow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 JAMA 183, 189 (2009).

103. Thompson, *supra* note 82.

effect than a lifetime prison sentence.[104] In addition, it has long been the case that the death penalty costs more than lifetime incarceration.[105] Nevertheless, between 1996 and 2000, 370 people were executed by the states.[106] Today, the expert consensus on the death penalty is up to 88%.[107] This consensus is built on a large body of evidence. Since 1990, the murder rates in non-death penalty states have consistently been lower than death penalty states.[108] Similarly, a worldwide study compiling data from eleven countries that have abolished the death penalty found that on average, the murder rate of those countries significantly decreased in the ten years following the abolition.[109] And yet, the U.S. continues to execute people to this day. By responding to drug addiction, violence, or any other type of criminal behavior with punishments that are demonstrably ineffective, the government makes its desire for retribution readily apparent.

Finally, there is one punishment with which the government's retributive intent can be established without needing to resort to speculative inferences. In 1982, the Supreme Court reasoned that because the death penalty cannot deter murders motivated by spontaneous passion, retribution is the only acceptable justification for the death penalty in such cases.[110] Therefore, every person since 1982 who has been executed for a murder they committed in the heat of a moment has been executed solely for the purpose of retribution.

All this evidence of retributive intent does not mean that crime prevention was not a substantial piece of the United States' transition to the aggressive criminal justice approach in place today. Undeniably, many of those who advocated, and continue to advocate for harsher punishments do so from an earnest (albeit potentially ignorant) desire

104. Michael Radelet & Traci Lacook, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 487, 501 (2009).

105. Torin Mcfarland, *The Death Penalty vs. Life Incarceration: A Financial* Analysis, 7 SUSQUEHANNA U. POL. REV. 45, 46 (2016).

106. SNELL, *supra* note 66.

107. Radelet & Lacook, *supra* note 104.

108. *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFORMATION CENTER (2020), https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states#stateswithvwithout.

109. *Study: International Data Shows Declining Murder Rates After Abolition of Death Penalty*, DEATH PENALTY INFORMATION CENTER (2020), https://deathpenaltyinfo.org/news/study-international-data-shows-declining-murder-rates-after-abolition-of-death-penalty.

110. Enmund v. Florida, 458 U.S. 782, 799 (1982).

to deter crime. However, when the big picture of the past fifty years is considered, the severe sanctions, the righteous rhetoric, and the explicit statutory and judicial endorsements of "just punishment," it is also undeniable that something more than enlightened rationality is at play. The teleological philosophy, by which law abiding citizens hoped to "restor[e] [their] fellow creatures to virtue and happiness" is a thing of the past.[111] Justice Scalia was correct in saying that "punishment…is the criterion now. Deserved punishment for crime."[112]

IV. THE HARMFUL IRRATIONALITY OF RETRIBUTION

A. Justifying a Philosophical Analysis

In light of the pervasive and substantial consequences of American society's pursuit of retributive justice, the idea of retribution as a societal objective deserves close inspection. For a multitude of reasons, which the following pages examine, retribution simply does not stand up to scrutiny.

Demonstrating the philosophical inadequacy of retribution, unsurprisingly, requires an in-depth exploration of some of the most fundamental existential questions: What is true? What is good? Some might object to such abstruse issues being addressed in a legal context. Ironically, this objection assumes the very thesis of this paper; while the world of philosophy is nebulous and esoteric, the law ought to remain pragmatic. A deontological value like retribution is diametrically opposed to pragmatism. Thus, working from the assumption that the law ought to be pragmatic, the onus ought to be on retributivists to philosophically establish that retribution belongs in legal discourse. However, because retribution has already so comprehensively ensnared the U.S. legal system, the burden has been shifted onto retribution's detractors. This being the case, prohibiting detractors from implementing abstract reasoning in their efforts to rebut the arbitrary presupposition of retribution would be unfair and unreasonable.

B. The Obvious Shortcomings of Deontology

The central problems with retribution are the same as with all deontological rules. For one, deontological reasoning renders public discourse entirely impossible. As explained previously, the only valid

111. VAN NESS & STRONG, *supra* note 45.

112. Materni, *supra* note 1, at 264.

arguments in support of deontological rules are arguments asserting that the rules are a metaphysical reality. Moreover (also discussed above), evidence for the legitimacy of moral judgments is either non-existent or circular. It is possible to prove that many humans like the idea of retribution, or that many religious texts support it, but to infer objective moral reality from those observations is to beg the question. For this reason, there is no method by which deontological rules can be justified to those that do not already presuppose them.[113]

An easier way to conceptualize this problem is to imagine that someone asserts a deontological rule against wearing hats. According to that person, exposing your scalp is a categorical imperative. Another person might make the counterargument that hats ought to be allowed because they protect against the sun and provide an outlet for self-expression. However, the rule would be immune to these critiques—a deontological rule's legitimacy is not dependent on its outcomes. Now imagine that another individual proclaims a deontological rule against exposing your head. According to this person, the true categorical imperative is wearing a hat. If the two hypothetical individuals crossed paths there would simply be no way for them to reconcile their opposing perspectives. As philosopher John Rawls observed, it is impossible for citizens to "reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines."[114]

Furthermore, and perhaps of even more consequence, the inability to meaningfully choose between competing deontological rules opens up the door to some profoundly objectionable ethical positions. While a Kantian "thou shall not kill" may seem desirable, from a deontological perspective it is no more justified than a Nazi espoused "thou shall kill."[115] Neither command can be proven correct by evidence, and deontology does not permit an assessment of outcomes.

Finally, beyond these specific examples of social harm, it is a logical truism that pragmatic reasoning is better for society than deontological thinking. While deontological rules do not aim to achieve positive societal outcomes, there may be times when they incidentally do. However, when this occurs, the beneficial deontological rule would also be justified under teleology. Conversely, there will be times where

---

113. Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify As Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

114. John Rawls, *The Idea of Public Reason Revisted*, 64 U. CHI. L. REV. 765, 766 (1997).

115. Materni, *supra* note 1, at 273.

deontological rules conflict with society's best interest. In those cases, pragmatic reasoning would necessitate not implementing the rule. Therefore, as a matter of simple logic, it is indisputable that teleology will lead to more positive outcomes than deontology.

C. Defenses of Deontology

Proponents of deontological ethics typically respond to the above criticisms with two arguments: one easily dismissible, and one quite challenging. The first response posits that teleological ethics, without certain inviolable rules, could be used to validate essentially any level of cruelty. This classic argument was a central theme in Ursula Le Guin's 1973 philosophical short story, "The Ones Who Walk Away from Omelas."[116] Le Guin's story paints a picture of the fictional city of Omelas and its citizens that is absolutely utopian.[117] However, there is a dark philosophical twist: the society's magnificence is entirely dependent on a single child being trapped in misery and darkness.

Deontological ethicists often appeal to hypothetical scenarios such as this to demonstrate the inadequacy of teleology. However, this argument makes the same ironic mistake as Gerard Bradley's "societal balance" argument.[118] To say that a teleological system is unacceptable because it is conducive to objectionable societal outcomes is a teleological argument. The possibility of minority exploitation *is* a valid critique of utilitarianism—which seeks to maximize total happiness—but the broader field of teleology does not commit to a specific goal; it merely asserts that outcomes are the measure of morality.

This point leads into the more complex defense of deontology. While outcome-based reasoning is an excellent way to achieve a desired outcome, it cannot, in and of itself, determine what the outcome ought to be. Therefore, the argument goes, teleological goals are just as subjective as deontological rules. Building on this conclusion, if teleology is not justified by anything other than a presupposition, every argument for teleology made above is ultimately circular. To say that teleology is preferable to deontology because it leads to better outcomes is to arbitrarily presuppose teleological ethics, and then assess deontology under it.

---

116. URSULA LE GUIN, *The Ones Who Walk Away from Omelas* (1973), https://sites.asiasociety.org/asia21summit/wp-content/uploads/2011/02/3.-Le-Guin-Ursula-The-Ones-Who-Walk-Away-From-Omelas.pdf.

117. *Id.*

118. Bradley, *supra* note 31.

This is an extremely difficult philosophical conundrum. The morality of deontology or teleology cannot be assessed without presupposing one of them; in other words, it is impossible to determine what is ethical, without already knowing what is ethical.

Alternatively, is it possible to leave the field of ethics and instead assess which theory is metaphysically valid? Unfortunately, the answer is "no." As has already been pointed out more than once, empirical evidence cannot prove moral judgements. To venture even further into postmodern philosophy, even if there was empirical evidence on one side, who is to say that empirical evidence is the best way to ascertain objective truth? In order to determine which epistemology is objectively correct, it must first be known what objective truth is. By this frustrating but undeniable line of logic, philosophy ultimately leads to an "incredulity towards [all] metanarratives." [119]

D. The Rational Solution

Most philosophical evaluations of retribution, if they make it this far, stop here. Indeed, if the exclusive aim is determining retribution's objective morality or reality, postmodern subjectivity must necessarily be the end of the line. However, it is possible to discredit retribution without appealing to objectivity. Even while admitting that truth is ultimately subjective, there remains a meaningful decision that individuals must make: live rationally or live irrationally. Those that concede that rationality is preferable to irrationality ought to denounce retribution, which is by its very definition, irrational.

It is vital to understand there is no single life that constitutes *the* rational life. Rationality is not an end in and of itself, but a tool by which we pursue our desires. As David Hume put it, "reason is, and ought only to be the slave of the passions."[120] More specifically, rationality is a mode of thought, based in logic, that is employed in order to effectuate subjective intent. Rationality is so deeply ingrained within human consciousness that it is rarely explicitly pointed out. However, without rationality an individual's probability of achieving any goal is essentially zero. As an illustration of this, consider the subjective desire to lose weight. Those who are able to fulfill this desire either

119. JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE xxiv (Geoff Bennington and Brian Massumi trans. Manchester University Press) (1984).

120. DAVID HUME, A TREATISE OF HUMAN NATURE: TWO-VOLUME SET 266, (David Norton & Mary Norton eds., Clarendon Press, Critical ed. 2007) (1740).

consciously or subconsciously base their actions on the following syllogism:

1. I will make decisions that lead to weight loss
2. Exercising more and eating less leads to weight loss
3. I will decide to exercise more and eat less

This ability to logically derive a conclusion from a set of premises in the furtherance of a goal is the essence of rationality. Without rationality, a person seeking to lose weight would have nothing guiding their decision making; in pursuing their goal, they'd be as likely to choose to eat a cake as they would be to choose to go for a run.

When faced with this inescapable conclusion—that all desires are subjective, and rationality is nothing but a tool with which we pursue them—a retributivist might argue that their desire for retribution is as valid a subject for rational pursuit as anything else. However, while all desires (aka goals) are subjective, it is incorrect to say that they are all equally rational. Individuals have a near infinite number of goals, and those goals are arranged hierarchically. Returning to the above hypothetical, individuals who accomplish their primary goal of weight loss do so by adopting the secondary goals of exercising more and eating less. If in order to lose weight, an individual adopts the secondary goal of eating a cake every day, that secondary goal is irrational. By this reasoning, once a primary goal is ascertained, the rationality of every other goal may be measured against it. Thus, *the* rational life is simply a life where every decision or belief is oriented towards one's primary goal of existence. Equipped with this understanding, it is possible to deal a decisive blow to retribution and all other deontological rules with the following syllogism:

1. To be rational is to only do or believe things that are conducive to your primary goal of existence
2. To be deontological is to do or believe certain things regardless of their outcomes
3. Deontology is inconsistent with rationality

E. Final Philosophical Thoughts

While this explanation of the philosophical shortcomings of retribution is complex and perhaps esoteric, retribution's objectionable nature is apparent with mere common sense. Imagine what would happen if the United States routinely adopted policies that were not based on evidence and continued to implement them regardless of their outcome. It is only because of retribution's long history in criminal justice that the absurdity of it is not more potently felt.

Additionally, it is worth pointing out once again, that abandoning deontological reasoning does not mean abandoning all deeply held values. Rather, it simply means that societal values must be judged according to their outcomes. If an absolute commitment to human rights fosters a desirable society, that inflexible commitment is pragmatically justified. Admittedly, if a sufficient majority was to decide that such a society was not desirable, those rights might be taken away. However, that is simply an inherent aspect of any society; all "inviolable" constitutional rights are susceptible to violation by a constitutional amendment.

There are billions of people in the world, each with their own unique and subjective desires. Democratic society is nothing more than a rational agreement between these individuals, through which they each are rendered more able to accomplish their goals. Thus, when the United States makes decisions based on intrinsically irrational deontological rules, it is violating the very purpose for which society exits.

V. CONSTITUTIONAL CHALLENGES TO RETRIBUTION

Having established that retribution is not a desirable governmental objective, this final section presents four possible constitutional challenges to retributive policies. At the outset, it ought to be stated that the Supreme Court has explicitly held that retribution is a constitutional government purpose.[121] Thus, the following arguments all focus on areas where the Court's current stance on retribution is either inconsistent with other precedent or inconsistent with the principles underlying the Constitution.

A. Equal Protection

In light of the substantial racial disparities within the U.S. Justice System, the equal protection clause of the Fourteenth Amendment is a potential vehicle for a constitutional challenge to retribution. Generally, to establish an equal protection violation, a defendant must prove the existence of purposeful discrimination.[122] However, where a defendant is able to show: (1) that he is a member of "a recognizable, distinct class, singled out for different treatment;" (2) that the degree of differential treatment is substantial; and (3) that the discriminatory procedure is susceptible to abuse, a prima facie case of discrimination has

121. *See* Ewing, *supra* note 87.

122. Washington v. Davis, 426 U.S. 299, 239-40 (1976).

been established and the burden shifts to the government to rebut the presumption of discrimination.[123] In order to overcome a prima facie case, the State must demonstrate that the disparate treatment was due to "permissible racially neutral selection criteria."[124] Moreover, to rebut the presumption of unconstitutional discrimination, the State must offer more than "general assertions that its officials did not discriminate or that they properly performed their official duties."[125]

Applying this legal framework to retributive criminal justice policies, there is certainly a plausible argument to be made for a violation of equal protection. African Americans in particular have been disproportionately impacted by "tough on crime" policies to a shocking degree. While African Americans make up only about 12% of the national population, they account for almost 40% the United States' very sizable prison population.[126] In terms of actual numbers, there are roughly one million black prisoners, the majority of which committed non-violent offenses. Partially explaining this heinous disparity: on average African Americans are 21% more likely to receive mandatory-minimums and receive 10% longer sentences than white offenders convicted of the same crime.[127] These numbers are made even more troubling by the post-release policies discussed previously, which deny countless African Americans eligibility for social programs, and deprive them of their right to vote.[128] In addition to tragically unequal incarceration rates, it has also long been the case that the death penalty has not treated all races equally. In 1983, a sophisticated multiple-regression analysis of the death penalty in the State of Georgia found, among many other troubling statistics, that when the victim of a murder was white, the defendant was over four times more likely to get the death penalty then when the victim was black.[129]

These numbers, while far from a complete account of the racial injustices inflicted by retributive policies, ought to be sufficient to establish that a recognizable class was singled out for substantially

123. Castaneda v. Partida, 430 U.S. 482, 493-94 (1977).

124. Batson v. Kentucky, 476 U.S. 74, 94 (1986).

125. *Id.*

126. Ronnie B. Tucker, *The Color of Mass Incarceration*, 37 ETHNIC STUDIES REV. 135, 141 (2015).

127. *Id.* at 141-142

128. Thompson, *supra* note 82.

129. David Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 661, 709 (1983).

different treatment as is required under *Castaneda*. As for the final prima facie requirement—susceptibly to abuse—it is difficult to imagine something more easily abused than policies aimed at a completely unmeasurable goal. Thus, it appears very possible to establish a prima facie case that retributive government objectives violate the Fourteenth amendment. Moreover, because suggesting that these disparities are the result of "permissible racially neutral selection criteria" borders on preposterous, it seems as though the government would not be able to overcome the presumption of unconstitutional discrimination.

Unfortunately, the Supreme Court is very unlikely to accept this line of reasoning. In *Mccleskey v. Kemp*, the defendant—Warren Mccleskey—raised essentially this exact same argument with respect to his death sentence.[130] In fact, the 1983 study referenced above was the primary foundation of his case. The Court was not convinced, and Mccleskey was executed in 1991.[131]

B. Substantive Due Process

A less conventional constitutional attack on retribution can be made through the due process clauses of the Fifth and Fourteenth Amendments. These clauses guarantee that "no person shall . . . be deprived of life, liberty, or property without due process of law." While due process encompasses a variety of procedural concerns, the Supreme Court also interpreted it as guaranteeing certain substantive rights. For instance, as a general rule, no law may deprive a citizen of life, liberty, or property without at least passing what has become known as the rational basis test.[132] In order to pass rational basis scrutiny, a statute must be enacted for a legitimate government purpose and employ means that are reasonably related to that purpose.[133] Additionally, if a statute infringes on what Court precedent has deemed a "fundamental right," the statute must pass what is referred to as "strict scrutiny."[134] Under strict scrutiny, the government's purpose must be compelling and the means must be narrowly tailored to that purpose.

130. Mccleskey v. Kemp, 481 U.S. 279 (1987).

131. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, https://www.nytimes.com/1991/09/26/us/georgia-inmate-is-executed-after-chaotic-legal-move.html.

132. Nebbia v. People of New York, 291 U.S. 502, 525 (1934).

133. Reno v. Flores, 507 U.S. 292, 302 (1993).

134. *Id.*

For a variety of reasons, it seems reasonable to assume that the Court would consider the right to life and the right to bodily autonomy fundamental, and thus assess infringements of both under strict scrutiny. In *Screws v. U.S.*, the Supreme Court described the right to life as "the right which comprehends all others," and "the right to have rights." In *Foucha v. Lousiana,* the Supreme Court did in fact, declare that the right to be free from physical restraint was fundamental. Additionally, the liberty guarantee of due process has been liberally construed so as to grant numerous fundamental rights of less significance than life and basic autonomy, such as: the right to educate one's children, the right to marital privacy, and the right to use contraception.[135] Nonetheless, the Court has refused to apply strict scrutiny to criminal laws that deprive individuals of life and physical freedom.[136] This position is undeniably questionable; laws infringing on the right to refuse lifesaving medical treatment are subjected to strict scrutiny while laws infringing on the right to refuse life ending injections are not.[137] However, beyond pointing out that oddity, this paper will not go down that route.

At the very least, all criminal laws are subject to rational basis.[138] Thus, in order to pass constitutional muster, they must serve a legitimate government end through reasonably related means. Rational basis review is an extremely deferential standard, and precious few statutes have been struck down under its level of scrutiny. Nevertheless, it is certainly an argument worth exploring. As far as rational basis analysis of retribution is concerned, the "legitimate government end" requirement is controlling; if retribution is a legitimate purpose, it would be difficult to argue that retributive punishments are not reasonably related to that end.

The Supreme Court has not clearly outlined what constitutes a legitimate government end; however, it has addressed the legitimacy of morality as a government purpose. In *Bowers v. Hardwick,* the Court held that bare moral assertions are a legitimate government purpose, reasoning that "the law…is constantly based on notions of morality, and if all laws representing essentially moral choice are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[139] Despite this holding, ten years later, in *Romer v. Evans,* a

135. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

136. Chapman v. U.S., 500 U.S. 453, 465 (1991).

137. Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278 (1990).

138. *Chapman*, 500 U.S. at 136.

139. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

Colorado constitutional amendment prohibiting laws designed to protect LGBTQ citizens was struck down by the Court for failing rational basis.[140] The majority reasoned that the amendment was motivated by animus towards the queer community, which is not a legitimate government purpose. While this inference of hostility may well have been correct, Justice Scalia's dissent aptly pointed out that what some call animus, others call "moral disapproval."[141]

By 2003, it seems the liberal Justices felt comfortable with Justice Scalia's characterization of their reasoning in *Romer*. In *Lawrence v. Texas,* the Court officially overturned *Bowers*, striking down a statute criminalizing homosexual conduct.[142] Under the Court's post-*Lawrence* precedent, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[143] A dismayed Justice Scalia lamented this decision as "the end of all moral legislation."[144] While the rights of LGBTQ people have since been further expanded by the Court, Scalia's dramatic prediction has not fully come true.[145] In the 2007 case, *Gonzalez v. Carhart,* the Supreme Court upheld an abortion regulation, holding that the State has a legitimate interest in the moral value of human life.[146] Thus, some types of moral legislation still may pass rational basis.

Nonetheless, the Court's reasoning in cases like *Romer* and *Lawrence* is very promising for challenges to retributive statutes. Like anti-LGBTQ laws, retribution is grounded in nothing more than a bare moral assertion. Additionally, the desire to inflict punishment for no pragmatic reason is indistinguishable from animus, which the Court clearly will not tolerate. Furthermore, while Scalia and other proponents of moral legislation argue that all laws are equally reliant on deontological presuppositions, such arguments are without merit. As the previous philosophical discussion established, it is entirely possible for a society to commit itself to pragmatic objectives without forfeiting every deeply held value. As a practical example of this, while teleological reasoning invalidated the criminalization of homosexuality, the

140. Romer v. Evans, 517 U.S. 620, 632, (1996).
141. *Romer*, 517 U.S. at 644.
142. Lawrence v. Texas, 539 U.S. 558, 560 (2003).
143. *Id.*
144. *Id.* at 599
145. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
146. Gonzalez v. Carhart, 550 U.S. 124, 157 (2007).

moral interest in *Gonzalez* survived scrutiny.[147] Asserting the value of human life is easily distinguishable from condemning harmless sexual practices.

C. The Establishment Clause

The First Amendment, as applied to the States through the Fourteenth Amendment,[148] presents an opportunity for an even more creative challenge to retributive statutes. The establishment clause pronounces that "Congress shall make no law respecting an establishment of religion."[149] The Court has interpreted this as not only prohibiting the literal establishment of a government church, but also as preventing Congress from passing laws that aid all religions or prefer one religion over another.[150]

In *Lemon v. Kurtzman,* the Court laid out three criteria that statutes must fulfill in order to avoid violating the First Amendment.[151] The elements of the *Lemon* test are as follows: (1) statutes must have a secular legislative purpose; (2) statutes must not have a principal or primary effect of advancing or inhibiting religion; and (3) statutes "must not foster an excessive government entanglement with religion."[152] While the Court has not been entirely uniform in its application of the *Lemon* test, [153] it remains the primary means by which the Court assesses First Amendment challenges.

In order to determine whether retributive statutes pass the *Lemon* test, the Court's definition of "secular legislative purpose" must first be ascertained. The Court has not clearly defined religion in a First Amendment context, but it has discussed the nature of religious and secular beliefs at length in a line of cases related to conscientious objector statutes. Originally, the Supreme Court was rigid in its conception of religious belief.[154] As time passed, the difficulty of distinguishing between religious and secular convictions forced the court to adopt a more expansive understanding. In 1965, a conscientious objector to the Vietnam war justified his objections by "belief in and devotion to

147. *Id.* at 157.

148. Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 5 (1947).

149. U.S. CONST. amend. I.

150. *Everson*, 330 U.S. at 15.

151. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

152. *Id.*

153. *See* Lynch v. Donnelly, 465 U.S. 668 (1984). *See also* Lee v. Weisman, 505 U.S. 577 (1992).

154. *See* U.S. v. Macintosh, 283 U.S. 605 (1931).

goodness and virtue for their own sakes."[155] The Supreme Court decided that because his sincere belief "occupie[d] a place in [his] life…parallel to that filled by orthodox belief in God," he qualified for the statutory exemption.

Five years later, in *Welsh*, the Court made its position even more explicit, holding that "deeply and sincerely [held] beliefs which are purely ethical or moral in source and content…that impose upon [the possessor] a duty of conscience to refrain from participating in any war at any time," are definitively sufficient for conscientious objections.[156] This language alone could be read as suggesting that retribution is a religious value; it is purely moral in source and content. However, the *Welsh* opinion provides even more clarity, specifying that "considerations of policy, pragmatism or expediency" are not a valid basis for objection. Evidently, for the Court, secular and religious beliefs can be distinguished from one another according to their source: morally informed beliefs are religious while pragmatically oriented beliefs are secular. Under this reasoning, the pursuit of retribution is clearly "religious," and thus cannot pass the *Lemon* test, which forbids legislatures from pursuing religious objectives.[157]

To some, interpreting the establishment clause as prohibiting all moral legislation may seem absurd. Given the Founding Fathers' famous declaration that divinely endowed rights are self-evident, the argument that they were opposed to moral presuppositions is admittedly somewhat weak. That is not to say such an argument could not be made. For one, enlightenment philosophy—the inspiration for the American Revolution—is generally opposed to deontology. Moreover, the Framers were not nearly as spiritual as many sometimes suggest; Thomas Jefferson famously went through the Bible and removed all instances of miracles.[158] However, regardless of the Founding Fathers' views, it remains true that a belief in retribution is virtually indistinguishable from religious beliefs. A statute permitting jurors to sacrifice criminals to Yahweh would undeniably violate the establishment clause; there is no good reason why a statute permitting human sacrifice to the moral demands of the universe should not.

---

155. U.S. v. Seeger, 380 U.S. 163, 166 (1965).

156. Welsh v. U.S., 398 U.S. 333, 340 (1970).

157. *Lemon*, 403 U.S. at 612

158. Erin Blakemore, *Why Thomas Jefferson Rewrote the Bible Without Jesus' Miracles and Resurrection*, HISTORY, (Jul. 31, 2019,), https://www.history.com/news/thomas-jefferson-bible-religious-beliefs.

D. Cruel and Unusual Punishment

Finally, the Eighth Amendment, as incorporated to the States by the Fourteenth Amendment, [159] is a viable candidate for a constitutional challenge to retribution. The Eighth Amendment famously prohibits the infliction of "cruel and unusual punishment."[160] Under Supreme Court precedent there are two ways in which a punishment might be classified as cruel and unusual. First, a punishment can run afoul of the Eighth amendment by being "inherently barbaric."[161] More often however, a punishment is considered cruel and unusual when it is disproportionate to the offense.[162]

Within the Court's disproportionately analysis, it draws further distinctions between different types of Eighth Amendment challenges. When a particular sentence is challenged, the Court construes Eighth amendment proportionality more narrowly; to succeed, defendants must have been the victim of "extreme sentences that are grossly disproportionate."[163] When an entire category of sentence is challenged, the Court takes a different approach.[164] With respect to categorical challenges, the Court begins by considering "objective indicia of society's standards" to determine whether there is a national consensus against the sentencing practice being challenged.[165] Then, guided by its controlling precedent as well as its understanding of the Eighth amendment's text—history, meaning, and purpose—the Court exercises its own judgment as to whether the punishment violates the Constitution.[166] In exercising its judgment, the Court also considers the penological justifications behind the sentence. If a sentence is found to lack any legitimate penological justification, it is automatically considered disproportional, and thus unconstitutional.[167]

A challenge to retributive sentences is a categorical challenge. Therefore, under the aforementioned framework, Eighth Amendment inquiry into retribution must begin with "objective indicia of society's standards." The Court has held that "the clearest and most reliable

159. Robinson v. California, 370 U.S. 660, 666 (1962).
160. U.S. CONST. amend. VIII.
161. Graham v. Florida, 560 U.S. 48, 59 (2010).
162. *Id.*
163. Harmelin v. Michigan, 501 U.S. 957, 959 (1991).
164. *Graham,* 560 U.S. at 60.
165. *Id.* at 61.
166. *Id.*
167. *Id.* at 71.

objective evidence of contemporary values is the legislation enacted by the country's legislature."[168] As has been painstakingly demonstrated in the above pages, the United States legislature widely adopts retributive sentencing policies. Although community consensus "is not itself determinative of whether a punishment is cruel and unusual," there is almost no possibility that the Court would independently find that retributive sentences are constitutionally impermissible.[169] The Court has expressly held that retribution is a legitimate penological purpose on a variety of occasions.[170] Thus, it is clear that a precedent-based Eighth Amendment challenge to retribution would not succeed.

However, a compelling argument can be made as to why the Court's precedent is out of line with fundamental Eighth Amendment values. As the Court acknowledges, the principle of proportionality is central to the Eighth Amendment; specifically, it guarantees the right to be free from disproportionate punishments. The word "proportional" implies the balancing of two things. To say that a punishment is disproportionate is to say that, in some way, it is out of balance. The question then becomes, for Eighth Amendment purposes: what operates as a counterweight for punishment? What factor determines the level of harshness that is justified? Returning to the basic penological theories, there are two possibilities: moral considerations, and practical considerations.

Much to the chagrin of Justice Scalia, the Supreme Court takes a middle approach, balancing punishments against both pragmatic and ethical justifications.[171] In Scalia's opinion, the combined approach is disagreeable because "[i]t becomes difficult even to speak intelligently of 'proportionality' once deterrence and rehabilitation are given significant weight."[172] This paper agrees that a combined approach is disagreeable, but for the opposite reason—a proportionality analysis ought to exclusively consequential.

Because the philosophical argument against ethical penal justifications has already been made, for purposes of this Eighth Amendment discussion, it will be accepted that moral balancing is a valid government objective. However, even if the Eighth Amendment does protect against moral disproportionality, it does not necessarily follow that

168. Atkins v. Virginia, 536 U.S. 304, 312 (2002).
169. *Graham*, 560 U.S. at 67.
170. *Id.* at 71.
171. Ewing v. California, 538 U.S. at 31.
172. *Id.*

allowing the government to weigh moral proportionality is constitutionally acceptable. If it is proven that the government's pursuit of retribution inevitably leads to morally disproportionate punishments, then retribution ought not be constitutional.

In order to prove this point, it is first necessary to understand how the court defines moral proportionality. For instance, if the court defined moral proportionality according to the views of the national consensus, any justification for punishment would have the potential to be constitutionally valid. However, while the Court considers the community consensus in assessing disproportionality, it does not resign itself to following the subjective whims of the majority.[173] For instance, in *Furman v. Georgia*, the Court declared that "the high service rendered by the 'cruel and unusual punishment clause of the Eighth Amendment is to . . . require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."[174] In light of this, it is clear that the Supreme Court views moral disproportionality as an objective ethical concept.

The Court's views regarding the specifics of moral disproportionality are less obvious. However, one thing that is clear is that individual culpability is a requirement for valid retributive punishments. In *Graham*, the Court held that "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[175] Thus, where a punishment is imposed for reasons unrelated to personal culpability, it violates the Supreme Court's interpretation of Eighth Amendment moral proportionality. With this understanding, it is finally possible to measure the government's pursuit of retribution under Eighth Amendment principles.

If the Constitution demands that the severity of a punishment must not outweigh the offender's culpability, there are two ways in which a penal policy might violate the Constitution: (1) explicitly allowing factors other than culpability to serve as justifications for retributive punishments—which would constitute a facial violation; or (2) allowing factors other than culpability to serve a retributive justifications in practice—which would be an "as-applied" violation.

Beginning with an "as-applied" challenge, in practice retributive sentencing policies have definitively violated the principle of moral proportionality. The racial disparities in sentencing discussed

173. *Graham*, 560 U.S. at 67.

174. Furman v. Georgia, 408 U.S. 238, 256 (1972).

175. *Graham*, 560 U.S. at 71.

previously are a clear example of this; skin color has no connection to moral culpability, and yet it clearly has been a factor in retributive sentencing. Moreover, in *Mccleskey,* the majority explicitly admitted that arbitrary variables such as physical attractiveness might factor into the jury's decision-making process.[176] A 2014 study on the Connecticut death penalty confirmed the arbitrariness of jury sentencing, showing that there was very little difference between egregious murders that elicited death sentences, and those that did not.[177]

Turning to a facial challenge, imagine all prejudice and irrelevant factors could be completely eliminated from the minds of jurors. Would determining personal culpability become a hard science? The answer is a conclusive "no." The concept of culpability is incredibly complicated. Viewing criminal behavior primarily as a matter of moral character is incredibly naive and simply inconsistent with empirical findings. Drug use, for example, cannot easily be reduced to a moral decision. As mentioned previously, "addiction is a chronic brain disease with a strong genetic component that in most instances requires treatment."[178] From an even broader perspective, nature and nurture both have a profound statistical impact on a person's propensity toward crime.[179] Notably, neither nature nor nature are within the control of an individual. Even further, the very notion of freewill itself is not universally accepted within neuroscience.[180] Finally, the Supreme Court itself has acknowledged the contextual nature of culpability in several cases; the death penalty has been declared categorically unconstitutional for both minors[181] and the mentally disabled.[182]

Even if the possibility of objectively calculating moral culpability is conceded, the issue of moral proportionality is still nowhere near a science. By what metric can culpability be balanced against penal severity? Allowing retributive sentencing considerations necessarily allows all considerations because retributive moral balancing is an

176. *Mccleskey*, 481 U.S. at 317.

177. John J. Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are there Unlawful Racial, Gender and Geographic Disparities,* 11 JOURNAL OF EMPIRICAL LEGAL STUDIES 1, 59 (2014).

178. Redonna, Fletcher & Vokow, *supra* note 102.

179. Laura Wilson & Angela Scarpa, *Criminal Behavior: The Need for an Integrative Approach That Incorporates Biological Influences*, 28 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE (2012).

180. *See* SAM HARRIS, FREE WILL (2012).

181. Roper v. Simmons, 543 U.S. 551, 569 (2005).

182. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

entirely subjective endeavor; there is no means by which to distinguish valid retributive reasoning from invalid retributive reasoning. As the Court admitted in *Mccleskey*, "[i]individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'"[183]

If the concept of objective moral disproportionality exists, and is prohibited by the Eighth Amendment, allowing the government to administer punishments in an entirely arbitrary manner is a violation of the Constitution. Because this argument is somewhat complex, writing it in syllogism form is useful:

1. The Eighth Amendment prohibits morally disproportionate punishments
2. The arbitrary administration of punishments inevitably leads to disproportionate punishments
3. The Eighth Amendment prohibits the arbitrary administration of punishment
4. The government's pursuit of retribution necessarily involves arbitrary punishment
5. The Eighth Amendment prohibits the government's pursuit of retribution

In this way, retributive policies are facially violative of the Eight Amendment principle of moral proportionality. While this argument may appear abstract, once again it merely proves a point that ought to be intuitive. Because retribution is familiar and instinctual, it often insidiously bypasses common sense. Juries obviously should not be able to base their sentences on their gut-feelings. As Justice Breyer elegantly articulated in her *Glossip* dissent, "the arbitrary imposition of punishment is the antithesis of the rule of law."[184]

As a final point, the Court's acceptance of retributive sentencing also creates a troubling inconsistency within its precedent. In *Coker v. Georgia*, the Court declared that if a punishment "makes no measurable contribution to an acceptable goal of punishment," it is "nothing more than the purposeless and needless imposition of pain and suffering," and thus is barred by the Eighth Amendment. However, the Supreme Court does not even pretend to be able to measure a punishment's contribution to retribution. In his concurring opinion in *Glossip v. Gross*, Justice Scalia scoffs at the notion of "distill[ing] [moral philosophy]

183. *Mccleskey*, 481 U.S. at 311, *(quoting* Peters v. Kiff, 407 U.S. 493, 503 (1972)).

184. Glossip v. Gross, 135 S. Ct. 2726, 2759 (2015).

into a pocket sized, *vade mecum* 'system of metrics.'"[185] Thus, the indefensibly arbitrary nature of retributive punishment, is incompatible with both the core principles of the Eighth Amendment and the Supreme Court's precedent.

VI. CONCLUSION

The preceding three sections established the following: the United States criminal justice system is retributive, retribution is an objectionable societal goal, and there are several potential ways in which retribution might be constitutionally challenged. Of direct relevance to these points, there remains an important question that has yet to be addressed: what would it look like if the United States actually let go of retribution?

Warren Mccleskey made an Eighth Amendment argument similar to the one made above. In rejecting his argument, the Court somewhat flippantly dismissed the evidence establishing the arbitrary imposition of the death penalty in Georgia. Justifying its dismissal, the majority explained that accepting Mccleskey's argument would have serious implications on the very "principles that underlie our entire criminal justice system."[186] In that observation, the *Mccleskey* majority was not wrong. Taking seriously the fundamental and irrefutable unfairness of the United States criminal justice system would have profound implications, but that is not to say it should not be done. As Justice Brennan's dissent elegantly articulated:

> The prospect that there may be more widespread abuse than Mccleskey documents may be dismaying, but it does not justify complete abdication of our judicial rule. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by law.[187]

As Americans, our intense, instinctual, and irrational desire for revenge has had devastating effects on our country. Any coherent conception of justice demands that we finally put it behind us. Doing this would be monumentally difficult, however, we must not make the same

185. *Id.* at 2748.

186. *Mccleskey*, 481 U.S. at 314.

187. *Id.* at 339.

mistake as the *Mccleskey* majority. We must not be afraid of "too much justice."[188]

188. *Id.* at 339.