

5-2017

A Defense of Retributivism as a Theory of Punishment

Samantha Kim
College of William and Mary

Follow this and additional works at: <http://publish.wm.edu/honorsthesis>



Part of the [Philosophy Commons](#)

Recommended Citation

Kim, Samantha, "A Defense of Retributivism as a Theory of Punishment" (2017). *Undergraduate Honors Theses*. Paper 1108.
<http://publish.wm.edu/honorsthesis/1108>

This Honors Thesis is brought to you for free and open access by the Theses, Dissertations, & Master Projects at W&M Publish. It has been accepted for inclusion in Undergraduate Honors Theses by an authorized administrator of W&M Publish. For more information, please contact wmpublish@wm.edu.

A Defense of Retributivism as a Theory of Punishment

A thesis submitted in partial fulfillment of the requirement
for the degree of Bachelor of Arts in Philosophy from
The College of William and Mary

By

Samantha Kim

Accepted for _____
(Honors, High Honors, Highest Honors)

Dr. Christopher A. Freiman, Director

Dr. M. Victoria Costa

Dr. Christine Nemacheck

Williamsburg, VA
May 3, 2017

Table of Contents

Introduction	1
Part I: What is Punishment?	3
1.1 Defining Punishment	3
1.2 Functions of Punishment	5
Part II: Introduction to Theories of Punishment	8
1.1 Utilitarianism	8
1.2 Retributivism	8
1.3 Dualist Theories	11
Part III: Failures and Objections	16
1.1 Failure of Utilitarianism	16
1.2 Objections to Retributivism	25
1.3 Failure of Dualism	31
Part III: Retributivist Problem of Proportionality	36
1.1 Problem of Proportionality	36
1.2 Hard Cases for Retributivism	37
Part IV: Solution to Problem of Proportionality	43
1.1 Solution to Problem of Proportionality	43
1.2 Society R Thought Experiment	43
1.3 Solution to Hard Cases	48
1.4 Justification for Cruel and Unusual Punishments	55
1.5 The Death Penalty	63
Concluding Remarks	75
Bibliography	76

Introduction

Theories of punishment seek to validate the use of punishments and maintain societal order. These theories can be divided into two general philosophical camps, retributivism and utilitarianism. Retributive justice relies on the principle of *lex talionis*, which requires imposing punishments onto a wrongdoer identical to the one imposed on the victim, to restore and respect the basic moral rights of all citizens. Utilitarianism condones punishment only when it maximizes benefits for society. Much debate surrounds which of these two camps is most justified in its determination of legal punishments. Although both retributivism and utilitarianism seem intuitive and compelling, continuous applications of both theories result in several unavoidably uncomfortable conclusions for utilitarianism.

Despite its apparent flaws, close analyses of both theories reveal that retributivism most closely aligns with our intuitions for appropriate punishments. Retributivism provides a basis for assigning punishments that aligns with our common sense intuitions of morality and prescribes objective guidelines for determining types of punishments. As appealing as the utilitarian's appeal to maximizing benefits may be, closer analyses reveal certain uncomfortable implications that have detrimental consequences for utilitarianism as a feasible theory of punishment. The first part of my work focuses on highlighting some of the most troubling conclusions that could result from implementing utilitarianism as a theory of punishment. I also examine certain dualist theories, which attempt to combine elements of retributivism and utilitarianism, into a single theory of punishment. Examination of dualist theories reveals certain illogical conclusions that result from an attempt to reconcile two widely conflicting theories. Retributivism escapes many of these troublesome implications of utilitarianism.

Retributivism is certainly not without its flaws, but closer inspection reveals that most objections resolve themselves through clarification of terms used in describing retributivism. Other objections to retributivism reveal issues that are at least as problematic for the utilitarian. Although these objections are worthy of eventual consideration, it is outside the scope of this work as solutions to these problems are not necessary to prove the strength of retributivism over utilitarianism. One glaring objection to retributivism that must be resolved before it is worthy of consideration and implementation as a feasible theory of punishment is the existence of hard cases, such as rape and mass murder, where direct application of the *lex talionis* principle seems difficult.

The requirement of proportionality has some uncomfortable implications for the type of punishments deemed acceptable in a retributivist theory of justice. Certain forms of punishment, such as capital punishment and torture, are often unappealing and as such it may feel immoral to condone such punishments even for the most egregious moral actions. Although punishments like these may seem unacceptable, a closer look at the reasons for our revulsion reveal issues related to policy implementation and changing social constructs. Policy implementation and changing social constructs are certainly important considerations for policymakers who may wish to implement a system of punishment. However, political and social considerations are outside of the scope of philosophy and as such are irrelevant to the philosophical feasibility of retributive justice as a theory of punishment.

By pointing to the unacceptable consequences of other moral theories, offering a solution to the most glaring objection to retributive justice, and giving justification for the certain punishments that proportional punishments require, I seek to prove that retributive justice alone remains a functional theory of justice.

Part 1: What is Punishment?

1.1 Defining Punishment

Before embarking on a defense and discussion of retributive justice, it is necessary to define exactly what it is I mean by “punishment”. I intend to adhere to Feinberg’s definition of “punishment” as outlined in his work “The Expressive Function of Punishment” as the basis of my defense and discussion. I chose Feinberg’s definition of punishment due to his relatively critical but neutral stance on both retributivism and utilitarianism in order to start from an objective stance.

Feinberg asserts the conventional definition of punishment “the infliction of hard treatment by an authority on a person for his prior failing in some respect” falls short of actually including the elements critical to punishment.¹ Feinberg explains that the conventional definition of punishment is too broad and must be narrowed in order to identify a distinction between punishments and what he calls “penalties”.

Feinberg defines “penalties” as “price-tags” in the form of hard treatment for behavior that is generally undesirable but still lacks the quality of being morally reprehensible. Some actions that are often subject to penalties include parking violations, failing grades, and disqualifications. Although penalties do possess the qualities of hard treatment for prior failing, Feinberg says they otherwise possess “miscellaneous character” and lack in moral value. According to Feinberg, we use the word “punishment” too loosely in our daily lives. For instance, when we say, “we punished the dog” we really mean that we penalized the dog. Animals are not moral agents and therefore cannot be punished as humans can. As a result no

¹ Joel Feinberg, “The Expressive Function of Punishment”, in *The Monist* (Oxford, United Kingdom; Oxford University Press, 1965), 397

matter how harsh the hard treatment of animals may be, animals can only be subject to penalties, not punishments

Quite distinct from penalties, Feinberg asserts that punishments have moral symbolic significance with a purpose of expressing resentment, indignation, and judgments of disapproval. Feinberg explains punishments require two distinct qualities penalties lack.² The first quality requires that punishments possess both the hard treatment aspect of punishments and a reprobative symbolic function of condemnation for correcting a moral wrongdoing. Punishments must be given individual moral reasons for being administered in each case. If these moral reasons are not given then punishments completely fail to possess the moral elements that make it distinct from penalties. The second qualification requires that the reprobative symbolic function of a specific hard treatment actually provide justification for the punishment that is administered. The moral reason must in turn justify the type of punishment administered so that no immoral act is punished either too harshly or too leniently. These two qualifications are significant because when administering punishments we must give moral reasoning that explains the adequacy of the hard treatment in question.

These qualifications requires moral justification for hard treatment and further shows that moral wrongdoing itself must give grounds for a specific type of punishment. The following example shows the two qualifications in application and further distinguishes punishments from penalties. Think of a situation where a man goes into a store and steals a pack of cigarettes and a case of beer. Instinctively we feel inclined to say that the man has committed some moral wrong and it is justifiable to punish him. This instinct is in-line with the first qualification. However, we would also feel the punishment is not justified for this crime if we chose to punish the criminal

² Ibid., 400

by subjecting him to death. The second qualification requires that the moral reasoning give grounds for the punishment in question. In this case, moral reasoning does not justify punishing the man by subjecting him to death. The second qualification aligns with our instinct and calls for a lighter punishment that is more suitable for the crime in question.

Feinberg uses these two qualifications in order to determine four functions of punishment that presuppose a reprobative symbolic function of punishment. By straying away from a literal interpretation of *lex talionis*, I offer a feasible solution for these hard cases so that a system of proportional punishments can remain intact even in these cases.

1.2 Functions of Punishment

Feinberg acknowledges that deterrence and reform are of great debate when it comes to functions of punishment.³ Feinberg does not seek to answer the complex question of whether punishment aids or hinders deterrence and reform. Instead, Feinberg simply states that there are four undeniable functions of punishment that are often overlooked but are in fact implied by the reprobative symbolic function. These four functions of punishment include Authoritative Disavowal, Symbolic Non-Acquiescence, Vindication of the Law, and Absolution of Others.

Authoritative Disavowal is an expression of disapproval from the state that thereby condemns a certain act. In order to illustrate Authoritative Disavowal as a function of punishment, Feinberg gives an example of a rogue fighter pilot whose national authorities punish him for an unauthorized attack against another nation. By punishing the rogue pilot, the nation condemns the attack and thereby disavows the act.⁴

³ Ibid., 404

⁴ Ibid., 405

Symbolic Non-Acquiescence is the state's refusal to condone certain actions. The need for Symbolic Non-Acquiescence arises when certain action is condoned by the state simply because a system does not exist for the action to be punished. Feinberg gives the example of the Texas paramour killings as an example of this. During the time of the paramour killings, murdering ones wife for committing adultery was considered morally justifiable. Because Texas did not have a system in place for punishing the husbands that killed their wives, the state in effect condoned these murders. Had the state implemented a system to punish the husbands who committed the paramour killings, Texas would have effectively shown that such acts were condemnable and expressed the state's refusal to condone certain actions.⁵

Vindication of the Law is the idea that punishment only functions if the state makes the efforts to enforce the punishment it sets for certain unforgivable acts. In order to illustrate how this function could fail if vindication of the law is not enforced, Feinberg gives the example of killings of black men in Mississippi. By the 1960s, killing a black man was by law just as illegal killing of a white man. However, because juries rarely convicted murderers of black men by white men, this act was essentially condoned. This fourth qualification is distinct from Symbolic Non-Acquiescence because Vindication of the Law requires that the state has already acknowledged that a certain act is morally egregious and acts upon this acknowledgment to punish those who commit these acts. Symbolic Non-Acquiescence only requires that we have a system in place that punishes the morally egregious act, but does not require that we act in accordance with this system. Vindication of the Law requires that the state actually carry out the punishments for these morally egregious acts already recognized as such under Symbolic Non-

⁵ Ibid.

Acquiescence. If punishments are not vindicated as written, then the punishable act becomes condonable and the reprobative symbol of punishment fails to serve its purpose.⁶

Absolution of Others requires that punishment clear others of crimes they have not committed. When something scandalous occurs there are often several suspects. The act of punishing absolves other innocent suspects from suspicion. In this way, punishment of the actual criminal has the function of both restoring moral balance to society and restoring dignity to the innocent suspects.

These four functions of punishment implied by the reprobative symbolism of punishment must be fulfilled for a system to qualify as a legitimate theory of punishment. Assuming Feinberg's definition of punishment holds true, some theories of punishment inevitably fail to meet this four function criteria and therefore fail to meet the standards required for punishment.

⁶ Ibid., 407

Part II: Introduction to Theories of Punishment

1.1 Utilitarianism

Slightly different variations of utilitarianism exist throughout political philosophy. Furthermore utilitarianism is often applicable in a variety of other philosophical theories apart from punishment. However, these other applications of utilitarianism are beyond the scope of this work so I will not delve into these at this time. In order to clearly define which interpretation of utilitarianism I intend to refute in this work, I will use Feinberg's summary of the utilitarian theory of punishment as defined in his work "The Classic Debate".

Feinberg summarizes the utilitarian theory of punishment with the following three propositions:⁷

1. Social utility (correction, prevention, deterrence, etc.) is a necessary condition for justified punishment. Social utility can roughly be defined as the act that creates the most aggregate benefit even at the expense of a few.
2. Social utility is a sufficient condition for justified punishment.
3. The proper amount of punishment to be inflicted upon the offender is that amount which will do the most good or the least harm to all those who will be affected by it.

1.2 Retributivism

Slightly different variations of retributivism also exist throughout political philosophy. All variations of retributivism most generally adhere to the principle of *lex talionis*, "eye for an eye, tooth for a tooth". *Lax talionis* says that one should be punished exactly to the extent that one harmed the victim. In order to clearly define what I mean by retributivism, I shall again use

⁷ Joel Feinberg, "The Classic Debate", in *Philosophy of Law* (Boston, MA: Cengage Learning, 2004), 627.

Feinberg's summary of retributivism as defined in his work "The Classic Debate". Feinberg summarizes the most popular variant of retributivism, called pure moralistic retributivism, in this work. Feinberg summarizes pure moralistic retributivism as follows:⁸

1. Moral guilt is a necessary condition for justified punishment.
2. Moral guilt is a sufficient condition ("irrespective of consequences") for justified punishment.
3. The proper amount of punishment to be inflicted upon the morally guilty offender is the amount, which fits, matches, or is proportionate to the moral gravity of the offense.

For the purposes of this work, I will assume that both negative and positive views of retributivism hold equal weight. The positive retributivist holds that wrongdoers deserve to be punished for their wrongful acts. According to the positive retributivist, the state has a duty to impose punishments on those who have committed wrongful acts. Immanuel Kant, the most widely known retributivist, endorses this view in *The Metaphysics of Morals* when he claims, "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself".⁹ Positive retributivism provides explanations as to what and why criminals deserve to suffer¹⁰ and why it is the state's role to inflict the suffering.¹¹ The negative retributivist holds that wrongdoers forfeit their right not to be punished. From this, the negative retributivist reaches another principle of retributivism, which states, "one who is guilty may be punished", but this

⁸ Ibid., 625.

⁹ Immanuel Kant, *The Metaphysics of Morals* (Cambridge, United Kingdom: Cambridge University Press, 1996), 6:332.

¹⁰ Lawrence H. Davis, "They Deserve to Suffer" in *Analysis* (Oxford, United Kingdom, 1972), 136.

¹¹ Ted Honderich, *Punishment: The Supposed Justifications Revisited* (London, United Kingdom: Pluto Publishing, 2006), ch. 2.

does not necessarily guarantee that the wrongdoer must be punished.¹² Together, these two views tell us that those who have done no wrong cannot be punished and furthermore wrongdoers cannot be punished beyond the extent of the moral gravity of their actions.

The retributivist believes that correcting for moral wrongdoing is necessary in order to offset the moral imbalance caused by the crime. Punishment serves as a way to effectively offset the immoral nature of crimes. In order to be effective, punishments must follow the principle of *lex talionis* and be proportional to the immoral act it is striving to offset.

Although not without objections, retributivism succeeds in fulfilling the four functions of punishment. Thesis 3 requires that retributivism fulfill the first qualification by guaranteeing hard punishment be inflicted on the perpetrators of an immorally wrong act. Thesis 1 and Thesis 2 guarantee the second qualification of punishment by necessitating that only the morally guilty are punished, providing a justification for the punishments. By satisfying these two qualifications of punishment, retributivism also succeeds in fulfilling the four functions of punishment.

This fulfillment of the four functions of punishment is significant because it shows retributivism provides concrete grounds for differentiating between penalties and punishments. A system with purely penalties is not feasible for achieving the justice that every theory of punishment strives to achieve because it lacks the moral qualification implied by the term justice itself. Justice implies that some sort fair treatment in response to some immoral action has been performed. With only penalties, such a moral response is not even feasible because penalties completely lack the quality of moral condemnation or response. A moral response required by justice can only be accomplished through punishments. Retributivism makes room for both

¹² J.L. Mackie, "Morality and the Retributive Emotions" in *Criminal Justice Ethics*, 3-10

penalties and punishments and in effect successfully fulfills the moral qualifications required by justice.

1.3 Dualist Theories

Despite strong immediate appeal, certain aspects of both retributivism and utilitarianism remain problematic. The appeal and problematic nature of both theories becomes even more apparent when the two theories are evaluated side by side as done above. In an effort to combat these problems while retaining the more positive aspects of both theories, dualist theories emerged. In the sections that follow I intend to prove that despite the efforts of dualists to reconcile both theories, dualist theories remain challenging and the problems remaining in dualism actually lend support for retributivism as the only viable method of punishment. Below I have provided explanations for the three major types of dualistic theories as a basis for my refutation to come later.

Split-Level Dualism

Split-level dualists believe that stages of forming and determining punishment are split into two distinct phases. The first phase consists of justifying the institution of punishment through utilitarian considerations. The second phase consists of determining the quality and quantity of punishments, which must be justified through retributive considerations. The actual determination of “particular action” within these practices should be given retributive considerations. The security guard’s dilemma explained below can be used to illustrate the reasoning required in split-level dualism.

Suppose a man steals \$100,000 from a bank. Suppose further that the money comes from

a safety box that no one has opened in twenty years. The owner of the safety box has since passed away with no known heirs. No one in the bank knows of the crime. The only person that knows of the crime is a lone security guard who catches the thief in the act. The thief offers to pay the security guard \$25,000 in exchange for his silence. Furthermore, the security guard is currently struggling to care for his four children and aging mother. The security guard is conflicted but must ultimately make a decision.

According to split-dualism, the security guard should first consider whether punishing the thief would be justified under utilitarian considerations. In the security guard's dilemma, the net pleasure from letting the thief go would result in a net increase in total happiness. Since no one else would know about the robbery and no one is entitled to the money in the box, the robbery would increase pleasure for both the security guard and thief. No one would suffer from the robbery since without the thief's interference the money would have been left untouched and of no use to anyone. The second phase becomes void in light of the consideration made in the first phase. There is no need for punishment in this case because utilitarian considerations of the scenario determine that punishment for the thief is unnecessary. In fact, punishing the thief would actually result in net loss of happiness due to the pain the thief will experience from the punishment.

Suppose the above dilemma were altered so that the cash box containing \$100,000 belonged to a prominent family who would reward the security guard the entire cash value for turning in the thief. Suppose still, this \$100,000 cash reward would bring the security guard's family so much happiness that it would outweigh the suffering felt by the punished thief. In this case, the security guard should elect to turn in the thief. The second phase would then come into consideration in order to determine the punishment proportionate to the thief's crime.

As the security guard's dilemma illustrates, split-level dualism incorporates both utilitarianism and retributivism respectively in order to determine first whether punishments should be administered and then to what degree a particular form of punishment is acceptable.

Integrated Dualist Theory

According to the integrated dualist, retribution is central to punishment. Some moral wrongdoing is required for administration of punishment and this punishment must be in some way proportional to the wrongdoing. Although retributivism is necessary for punishment, it is not sufficient. The integrated dualist claims it is overly idealistic to assume that retribution can be the sole justification for punishment. There must be some other role played by the punishment, namely deterrence. Only utilitarianism can give punishment this role and satisfy the requirement.¹³

Integrated dualism reverses the use of utilitarianism and retributivism in the two phases of consideration. The differences that result from the reversal of reasoning for the two phases are best illustrated by using the security guard's dilemma illustrated above for split-level dualism. Integrated dualism would require the security guard in the first phase to consider whether the thief's actions morally justify punishment. The above scenario justifies some form of punishment for the thief in phase one. The considerations in the first phase negates the security guard's ability to take the cash bribe because then he himself would be committing an act worthy of punishment under phase one. In phase two, the security guard must consider what the appropriate punishment for the crime is through utilitarian calculations. If under the utilitarian

¹³ David Wood, "Crime Reduction and Justification of Punishment" in *Oxford Journal of Legal Studies* (Oxford, United Kingdom, 2002), 307.

calculation it would bring the most pleasure not to punish the thief, then not punishing the thief becomes the optimal choice.

Integrated dualists make a moral wrongdoing a necessary condition for punishment but require utilitarian considerations in order to justify the actual punishment itself.

Mere Conjunction Dualism

Mere conjunction dualists attempt to change split-level dualism and integrated dualism theories in an effort to create a functional system of dualism that emphasizes retributivism and utilitarianism equally. Lacey does not believe that these other two conceptions of dualism are necessarily flawed, but simply incomplete. Lacey reconciles the two versions of dualism by introducing “two principal political values”, autonomy and welfare. Lacey explains that mere conjunction approach to dualism is a pluralistic approach that integrates justification for punishment and determines the nature of the actual punishments themselves in conjunction.¹⁴ Instead of valuing the utilitarian considerations and retributivist considerations in a certain order, the mere conjunctive dualist uses good judgment in order to weigh each consequence. Lacey says this conjunctive approach allows us to avoid the issue of utilitarianism considerations overriding retributivist considerations and vice versa. Lacey does not believe dualism necessarily requires a step-by-step procedure. Rather, Lacey says that both utilitarian and retributivist considerations should be made together in determining the reasoning for punishment and assigning the method of punishment.

Using the security guard dilemma, the mere conjunction dualist would take into consideration both the utilitarian consequences of accepting the bribe and the moral wrongness

¹⁴ Nicola Lacey, *State Punishment* (London, United Kingdom: International Library of Philosophy, 1988), 59.

of the thief's actions at the same time. After weighing these consequences together using his own good judgment, the security guard would use mere conjunction dualism to make what he feels is the right decision.

Part III: Failures and Objections

1.1 Failure of Utilitarianism

Although the three utilitarian propositions may seem relatively appealing upon first glance, further consideration makes it apparent that they are not sufficient to guarantee the four functions of punishment. These four functions of punishment must be satisfied in order to function as a theory of punishment. Unless utilitarianism can fulfill these four functions, it simply dissolves into a theory of penalties or undeserved hard treatments. As mentioned previously, justice possesses some sort of moral implications that must be fulfilled in any theory of punishment. A theory of strictly penalties without any punishment cannot function as a feasible theory of punishment because penalties fail to pose any moral weight in its hard treatments. Penalties are simply used in order to create a well-functioning society that indeed provides many benefits to those within it but lack the moral requirements for justice.

Perhaps the utilitarian accepts my objection as true and agrees that the hard punishments implied by the utilitarian theory adheres to neither Feinberg's definition of punishment outlined above nor to the four functions of punishment. Suppose the utilitarian also accepts that hard treatments backed by some moral reasoning is required for a theory of punishment. Still, the utilitarian can say that the hard treatments administered under the utilitarian theory can more adequately be called "bunishments", in which punishments do not necessarily have to adhere to the two qualifications or four functions of punishments. The utilitarian can go further and say "bunishments" do fulfill the requirements for morality but simply in a different way from punishments. "Bunishments" do not consider the traditional elements of morality considered in punishments. Instead, "bunishments" focus on producing the highest amount of benefit and in effect creating a maximally morally good state. For the utilitarian, a maximally morally good

state would be that which the aggregate benefit is the highest. In this way, “bunishments” fulfill the qualities of moral implications coupled with hard treatment that are required for a theory of punishment.

“Bunishments” seem to save utilitarianism from falling prey to a theory of penalties that does not satisfy the requirements of justice. However, even with “bunishments” the utilitarian cannot escape the fact that certain egregious moral acts, such as murder, could go unpunished. The possibility of condoning such extreme crimes under “bunishment” goes against basic ideas of justice and morality, making it difficult for utilitarianism to remain plausible. The morally contradictory implications of bunishments still remains problematic for the utilitarian and must be resolved before utilitarianism can be considered a feasible theory of punishment. The morally uncomfortable implications of bunishments can best be illustrated with the following example.

Suppose a man, Murderer, breaks into a home and brutally murders two young girls and their parents. Murderer does a remarkable job cleaning up so that no evidence of the crime remains in the house. Furthermore, Murderer expertly plants evidence around the house so that it looks as though the family simply moved away. This evidence leads friends and neighbors to believe that the family did indeed flee in the middle of the night. Furthermore, let us suppose that both parents were orphans and have no other family. The only record of the crime is a single recording with no other copies that is sent to the prosecutor’s personal secure email by Murderer himself. Prosecutor opens the video file and witnesses the murder. Let us assume Prosecutor has the distinct ability to read people’s thoughts and can discern from the video that Murderer will never commit another act like this again. Because the prosecutor knows that Murderer will never commit another crime like this and no loved ones or witnesses remain who could potentially become suspicious, Prosecutor must decide not to press charges against Murderer on utilitarian

grounds. Pressing charges would result in only increased suffering and no benefit for it will instill grief and fear in the neighbors and result in suffering in the form of punishment for Murderer. Even though pressing charges may increase aggregate suffering, something seems wrong about not pressing charges against and punishing Murderer. Our moral intuition tells us that Murderer must be held accountable in some way for his actions even though it may increase overall suffering.

The inadequate moral consideration that takes place before administering hard treatment through utilitarianism is definitely the utilitarian's biggest downfall. However, the three theses for utilitarianism cannot help but seem compelling when placed in succession as above. Closer inspection of the three theses, however, reveals additional unavoidable objections that must be resolved before the utilitarian theory can be validated.

Thesis 1 of utilitarianism states, "Social utility (correction, prevention, deterrence, etc) is a necessary condition for justified punishment." Thesis 1, though different from Thesis 1 of retributivists, also appeals to common sense intuitions of morality.¹⁵ For instance, if it were possible to reform criminals effectively without punishment then it certainly seems reasonable to use this method of deterrence instead.

Thesis 2 states, "Social utility is a sufficient condition for justified punishment". Thesis 2 proves more troubling for the utilitarian.¹⁶ If we were to follow the reasoning outlined in Thesis 2, it seems completely reasonable to punish the innocent in order to maximize social utility. Such punishments upon the innocent are abominations of morality and go completely against our common sense intuitions of justice. H. L. A. Hart defends this weakness in utilitarianism by

¹⁵ Joel Feinberg, "The Classic Debate", in *Philosophy of Law* (Boston, MA: Cengage Learning, 2004), 627.

¹⁶ *Ibid.*, 628

saying such an interpretation is an abuse of the definition of punishment. Hart calls this common abuse by the retributivist a “definitional stop”.¹⁷ According to Hart, guilt is implied in the very definition of punishment. Saying society condones “punishing the innocent” is just as problematic as saying “I allow you to fix something that is not broken”. Hart says the definition of punishment implies hard treatment is inflicted only on those who are guilty and does not in any way condone punishment of the innocent. In this defense Hart appeals to certain preconceived notions of punishment and fairness that do not necessarily have to hold true. The following scenario illustrates this fact.

Suppose a young child, Catherine, possesses the yearning and propensity for learning. Unfortunately for Catherine she has no access to school or a public library. Luckily, Catherine’s father possesses a large collection of books and a computer with Internet. In order to satisfy her urge to learn, Catherine spends much of her time reading and watching lectures online. However, whenever Catherine’s father catches Catherine learning he locks her in a small closet with no food or water for hours at a time. In such a case, it would be difficult to claim Catherine is not punished even though, as Hart would say, “nothing is broken”.

The utilitarian may defend himself by reasoning that Catherine’s father’s judgment is simply flawed and he is indeed correcting a perceived wrong, however wrong his perception may be. Catherine’s father wrongly believes it is harmful for his daughter to have such a strong desire for learning. However, let us suppose that Catherine’s father does not think this way. Suppose Catherine’s father believes it is completely acceptable for his daughter to have an inclination for learning and actually wishes to encourage such actions. Still, due to some unfortunate unexplainable circumstances of his psychology he feels justified in his harsh treatment whenever

¹⁷ H. L. A. Hart, “The Presidential Address: Prolegomenon to the Principles of Punishment” in *Proceedings of the Aristotelian Society* (Hoboken, New Jersey: Wiley Publishing, 1959), 5

he sees Catherine actively learning. Even in such a modified scenario, it remains difficult for the utilitarian to deny that Catherine is experiencing some form of punishment. In fact, defining Catherine's treatment as something other than punishment, however undeserved, seems difficult. This scenario proves that Hart's definitional appeal to the word "punishment" does not to provide an adequate defense for the objection to Thesis 2. As Catherine's father's treatment shows, although it may go against certain notions of fairness all forms of punishment do not result from moral wrongdoings

Thesis 3 states, "The proper amount of punishment to be inflicted upon the offender is that amount which will do the most good or the least harm to all those who will be affected by it." Thesis 3 proves even more problematic for the utilitarian. Thesis 3 goes against many common sense intuitions about punishment and proportionality. For instance, it seems radically unfair to punish a murderer with the payment of a mere two-dollar fine or imprison someone for life for a mere parking violation. However under utilitarian considerations such discrepancies between crime and treatment seem appropriate, such as in the case with Murderer above. Bentham attempts to answer this objection by stating that proper application of the utilitarian method would make such gross disproportionality impossible. According to Bentham, consequences resulting from acts of "mischief" have two dimensions. Bentham defines acts of mischief as any immoral act, such as rape, murder, robbery, etc. The first dimension of mischief, "the original", is the pain suffered by the victim of the mischief itself. The second dimension of mischief Bentham names "the derivative" is the secondary effects felt by those who learn of the mischief. Bentham says the derivative effects of mischief result in "alarm and danger". The alarm stems from those who are secondarily affected by the act. The danger stems from those who may not be directly effected by this particular act of mischief but who hear of the act and

feel a sense of danger at the prospect of becoming the victim of such mischief. Due to such unavoidable cases Bentham believes utilitarianism requires a system of punishment, which would put an end or at least seriously deter, mischief. Bentham believes that the punishment of a few offenders would likely curb the other would-be offenders from committing any future morally reprehensible acts. Furthermore, Bentham says if punishments for mischief fail to match the magnitude of the immoral actions to some degree, the temptation to commit acts of mischief would rise. This temptation would result in not only increases of original consequences but also increases in the derivative consequences. Derivative consequences would increase both due to the alarm experienced by those close to the victim and the elevated danger felt by potential victims who became aware that the proper measures for deterrence of such crimes did not exist.

Although Bentham's defense may seem to solve this objection to Thesis 3, further considerations make a gross injustice of proportionality still seems plausible under utilitarianism. Once again consider the case of Murderer outlined above. The two young girls and couple who were killed encompass the "original" dimension of suffering. This original dimension of suffering has already been experienced and no actions taken can minimize the magnitude of suffering felt by the murdered family. Therefore, the suffering felt by the family can be understood to be a kind of sunk cost in terms of suffering that cannot be undone. No actions from this point forward can undo the suffering felt by the victims of murder. Murderer's case seems to completely lack the derivative effects of "mischief" since no neighbors know what actually happened to the family and no family members who might become suspicious remain. The only other person who knows of the act, Prosecutor, does not feel as though he is doing anything immoral since he is simply applying the utilitarian standards for administering hard treatment. Furthermore, since Prosecutor knows that Murderer will not commit such egregious acts again,

utilitarian calculations require the Prosecutor refrain from punishing Murderer in any way. No deterrence of mischief can occur from punishing because no one knows of the moral offense and it is known for certain that Murderer will never commit such an offense again. Therefore, any act of punishment will only result in a decrease of aggregate benefit, contrary to the results that Bentham predicted would occur in every such case.

The Murderer case poses a serious problem for the utilitarian. The utilitarian could conceivably accept that certainly cases of unsolved and unpunished criminals exist, but still argue that the millions of dollars spent solving the cases could be better spent elsewhere. This result seems problematic because such leniency would increase the incentives for immoral acts for those who have the capacity to commit difficult-to-detect crimes or have the resources to acquire sophisticated attorneys who would make the investigation expensive. Such would imply that the capable and wealthy alone are justified in their immoral actions to others. Such a defense also goes against Bentham's defense of punishments, minimizing both the original and the derivative consequences of mischief. A policy that promotes difficult to detect and expensive crimes would promote greater consequences from mischief since many of these crimes could be performed on a wider or more harmful scale. Furthermore, this defense still does not justify failing to punish Murderer when the expenses for obtaining evidence and admittance of guilt are fairly low. In such a case, it seems both economically efficient and morally correct to administer punishment fitting of Murderer's crime. Unless utilitarianism can adequately provide an explanation for the objection to Thesis 3 illustrated through the Murderer case, it loses validity as an adequate theory of punishment.

Even if all of the theses held true, utilitarianism still fails to uphold the two qualifications and four functions of punishment. The first qualification requires that punishment include a hard

treatment coupled with a reprobative symbol of wrongdoing. Utilitarianism fails to meet this condition because it does not require hard treatments or reprobative symbol of wrongdoing of any kind if it does not provide increased social utility. Even in cases where punishments are administered, the utilitarian would condone punishments without reprobative symbol of wrongdoing, such as in the case with Catherine and her father. The second qualification that the reprobative symbol justifies the hard treatment cannot be satisfied without the fulfillment of the first qualification. It might be plausible to claim that social utility, rather than the reprobative symbol behind the hard treatment provides the justification for the punishment, but the utilitarian failure to defend social utility as the only required condition for punishment in Thesis 3 makes this claim difficult to defend. As a result of the utilitarian failure to adhere to these two qualifications, utilitarianism fails to meet the four functions of punishment implied by the very definition of punishment.

The utilitarian runs into the unresolvable problem of justifying punishing the innocent while allowing the guilty to walk free in many situations because of its faulty conception of good. The utilitarian defines “good” act as anything that maximizes some concept of utility, most commonly pleasure or happiness, while minimizing suffering. This concept of the good, although appealing at first, fails to encompass what is actually good. The following case proves that maximization of utility fails to encompass the multidimensional characteristic of the “good”.

Suppose there exists a society where murderers are only punished mildly for their crimes. These mild punishments result in very little suffering for the murderers of this particular society. Even though the suffering is mild, the punishment inflicted completely eliminates the desire to kill so that the murderers pose no further threat of suffering for others. Such is not necessarily a good world even though it certainly will provide the highest level of utility. In such cases we

cannot help but get the sense that even though it does not strictly maximize utility, adequately punishing the murderer is “good” in some other sense and not punishing the murderer seems wrong in some way. Even if we could completely eliminate every murderer’s inclination for killing, it seems problematic not to punish him and even seems contrary to commonly accepted beliefs about personal autonomy and individual choices. Simply eliminating the desires for killing implies that the performance of morally egregious actions is akin to suffering from a disease that can easily be cured.

This cavalier attitude towards choosing to commit murder completely disregards the inherent value of “good” apart from utility, such as personal autonomy and choice. Such flippant disregard for personal autonomy discounts the “good” that comes from human ability to make individual choices. Despite the moral wrongness of certain actions such as murder, most would agree there exists some “good” in human ability to exercise personal autonomy and such abilities should be encouraged overall. The inherent goodness of individual choices requires some sort of reaction to the results of these choices. Even if the reaction is in the form of punishment and does not maximize utility, it provides grounds for the inherent “good” in personal autonomy. The “good” in valuing personal autonomy and independent choices is a “good” that cannot be captured adequately by only striving to maximize total utility.

In this particular case, simply increasing utility by subjecting the murderer to only a little suffering would indeed maximize the utilitarian perception of “good”. Eliminating the ability to decide to murder and inflicting only a small punishment shows disregard for the “good” of personal autonomy. In this way, just deserts for morally egregious actions serves as a way to uphold the “good” in the ability to make individual choices while still condemning the wrongness of the killing.

Punishment through utilitarian ideals fails to serve the functions of punishment. This is problematic because utilitarianism does not appear capable of defending itself against its failure to adhere to the requirements of punishment even through some renewed classification of hard treatment. Furthermore, Thesis 2 and Thesis 3 completely go against intuitions of justice upon further analysis. Finally, the utilitarian concept of “good” proves problematic because it completely disregards the importance of other dimensions of “good” apart from utility. The failure of utilitarianism necessitates the existence of some better system of punishment that aligns with both the definition of punishment and our instinctual conceptions of justice.

1.2 Objections to Retributivism

Even though retributivism meets the qualifications and functions of a feasible justice system, objections still remain as to the validity of this theory. The first thesis certainly appeals to common sense intuitions of morality and fairness of punishment. It certainly seems rational to require moral guilt provide justification for the punishment administered. The other two theses are less apparent and thus remain problematic for the retributivist. However, further examination of these objections proves such objections are either misinterpretations of the thesis itself or objections that prove equally problematic for the utilitarian.

Thesis 2, which states that moral guilt is a sufficient condition for punishment, appears slightly problematic for the retributivist upon first glance because it allows for infliction of suffering on a guilty person even when no good comes of it. However, those who make this objection fail to grasp the retributivist conception of “good”. The utilitarian believes maximization of happiness or pleasure and minimization of suffering defines what is “good”. This forces the utilitarian to draw some uncomfortable conclusions regarding how we should act

in certain cases, such as in the punishment of an innocent person. The retributivist avoids this problem by defining “good” as a kind of absolute adherence to morally right actions.¹⁸ Unlike the utilitarian, the retributivist is not concerned with maximizing something as simple as “happiness” or “pleasure”. As appealing as these simplifications may be, happiness and pleasure fail to fully encompass what most people think when they think of a “good” life. In fact, people often advocate foregoing happiness and pleasure in order to ensure basic moral rights remain respected. The retributivist perception of the “good” requires that punishment must be administered even when utility is not maximized in order to align with moral rightness. The case below illustrates the reasonableness of administering punishments even when net pleasure and happiness may decrease as a result.

Imagine a case where a grown man constantly inflicts physical discomfort and pain onto a small child. Let us further suppose that even though the baby is currently experiencing pain, by the time he is old enough to form long-term memories of the abuse, the abuser will cease inflicting pain and the baby will suffer no adverse future physical or psychological consequences. The level of pleasure the man experiences from inflicting pain far exceed the level of pain felt by the baby. In this case, happiness and pleasure may see a net increase. Even though the baby experiences the suffering now, he will not remember it in a few years time while the joy felt by the abuser will endure far beyond a few years. Still, we feel inclined to say that the abuser is acting unjustly. We do not believe that maximizing pleasure justifies inflicting physical harm on the infant. We can rationally explain the injustice of the man’s actions by appealing to the idea that the infant’s basic moral rights to his body were violated exclusively for the pleasures of the abuser. Furthermore, we cannot help but reason that the man must be punished in some way

¹⁸ John Rawls, “A Kantian Conception of Equality” in *Cambridge Review*, IV.

for his actions. Restoring and respecting the infant's basic moral rights calls for punishing the man even if no additional utility may come from the punishment. Moral goodness requires foregoing the man's pleasure to preserve the infant's moral rights even at the expense of utility. Failure to forego certain pleasures in certain cases in effect disregards the moral rights of others. Because we feel inclined to respect everyone's moral rights to some extent, condoning physical discomfort and pain for the sake of maximizing utility or failing to punish the man because it may decrease overall utility feels instinctively wrong.

Just as the above case illustrates, happiness and pleasure instinctually lose their positive value when maximizing happiness result in unjust consequences. By defining the "good" as a kind of adherence to moral rights, the retributivist escapes this utilitarian problem. The retributivist view of the "good" allows for cases where morality calls for taking actions that may not necessarily maximize pleasure. The retributivist view of the good also allows us to conclude that actions that have adverse consequences for utility can still have positive value if its purpose is to preserve moral rights. In order to correct for certain imbalances of morality and basic rights as in the above case, punishments become necessary to restore moral balance even if it decreases net happiness.

Here, many the utilitarian may object that the instinct to adhere to moral rights and restore morality comes from nothing more than human desire for vengeance. The view that retributivism ideas stem from vengeance misunderstands the core principle of retributivism. Retributivism necessitates punishment for morally egregious actions not out of vengeance but rather as a desire to restore negative moral imbalances and respect basic moral rights for all parties involved. Punishment is simply an effective instrument used to restore this moral balance, much like teachers use grades as an instrument to evaluate academic performance. When

teachers assign low grades to students, it is rarely the result of some lust for vengeance. Rather, grades assignments are determined “with eyes firmly fixed on past performance”.¹⁹ Even when feelings of vengeance arise, it is nothing more than an unfortunate byproduct of society’s attempt to restore moral balance. It would be incorrect to conclude that vengeance is a primary motivator for punishment simply because it exists in certain instances where punishment is necessary. Although not an intended consequence of retributivism, it is also worth acknowledging that by guaranteeing that appropriate punishments will be administered to restore moral rights could actually work to combat vengeance by preventing victims from taking actions in their own hands.

Even when certain individual forms of punishments for morally offensive actions do not necessarily seem beneficial from the outset, societal betterment results from the restoring of moral balance from an otherwise immoral position. The consistent application of punishment is critical in order to ensure that the balance of morality remains. Allowing for exceptions will inevitably result in moral balance being shifted towards the morally unacceptable. Exceptions also create room for uncertainty about the moral detriment of certain actions. Furthermore, the consistent application of punishment provides objective standards for determining the degree of moral reprehensibility of the punishable actions. It also provides guidelines for determining exactly what actions must be taken to restore moral balance. These objective standards reassure those who live within the system that violations of moral rights will indeed be adequately restored.

In this way, retributivism provides grounds for a more justifiable theory of punishment than utilitarianism. Retributivism reassures citizens that any morally wrong action will be

¹⁹ Joel Feinberg, “The Classic Debate”, in *Philosophy of Law* (Boston, MA: Cengage Learning, 2004), 626.

restored and punishments will not be inflicted for any other reason. As long as citizens live without violating the rights of others, they exist comfortably with the knowledge that no punishments will befall them. Contrary to this, utilitarianism creates an underlying fear where each citizen worries whether he must sacrifice his own well being for the betterment of others. Although this is an unintended byproduct of the retributivists, whose chief aim is to ensure that moral balance is restored, the benefits from consistent application of retributivist principles secures its benefits over utilitarian even in this regard. Thesis 2 ensures that punishments will consistently be administered in order to restore moral balance and result in an overall betterment of society.

The utilitarian could say that utilitarianism remains justifiable and could actually provide more aggregate benefit for those living within its system if only those who were responsible for doling out the hard treatments were the ones who knew the reason for the application of hard treatments. In this application of utilitarianism, all other citizens, except those directly on a need-to-know basis, would be oblivious to all disproportionately lenient or grossly over exaggerated hard treatments. Although this revision may solve some of the utilitarian's problems, the very fact that the utilitarianism requires concealing the reasons for the benefits of hard treatment in certain cases cannot not help but feel instinctively immoral and unjust.

Thesis 3 states that the proper amount of punishment to be inflicted upon the morally guilty offender is the amount, which is proportionate to the moral gravity of the offense. Thesis 3 proves to raise the most difficult questions for the retributivist and is in need of the most thorough defense.²⁰ First, it seems impossible to punish an offender without causing harm to loved ones or dependents. Second, the aim of proportioning punishment to gravity of offense

²⁰ Ibid.

would require punishing trivial offenses, like rudeness, rather harshly and in some cases require these trivial offenses to be punished more than more serious offenses. Third, there is the problem of determining the correct type and amount of punishment for offenses. Solving this problem would require an individual assessment of each offender's character and thorough understanding of the magnitude of the moral wrong committed. The assessment would require determining the degree of suffering that would be felt by an offender for each form of punishment in order to determine which would be most applicable given the specific circumstances. Application of pure retributivist theory would therefore require abandonment of fixed punishments with fixed crimes and substitution of individual punishments based on character evaluations that seem to go against our common sense intuitions of proportional punishment.

The first two questions raised by Thesis 3 are relatively easy to refute. The first consequence of harming loved ones and dependents are indeed unfortunate byproduct of restoring moral balance but simply unavoidable if the reprobative symbolism of punishment is to be realized and the four functions fulfilled. Here, it seems necessary to delineate the difference between general suffering and suffering through punishment. General suffering results from no particular immoral act but rather a byproduct of ones surroundings or natural composition. Instances of general suffering include mental illnesses, physical ailments, and the consequences of having to watch a loved one suffer. All of these circumstances, though certainly unfortunate, do not result from the infliction of an immoral act onto the sufferer. Therefore, general suffering cannot be taken into consideration when determining the morality of certain actions. Conversely, suffering through punishment results when the sufferer has committed an immoral act and therefore has given up his right not be punished. In these cases, suffering is necessary in order to restore moral balance and fulfill the functions of punishment. The suffering felt by those who care for the receiver of

punishment is another case of general suffering that does not hold moral weight but is simply an unfortunate byproduct of balancing morality.

The second question raised by Thesis 3 can be completely dismissed by the fact that trivial offenses, like rudeness, would not be subject to punishments but rather penalties under the retributivist theory. Rudeness, although undesirable, does not hold the moral gravity of other more serious crimes that would actually offset a moral balance in society. Because of this, hard treatments for rudeness are simply the result of administering penalties in order to maintain societal order and lack the moral reprobative function required for punishment.

The third question raised by Thesis 3 is much more difficult to refute. As such, the third question requires a much more lengthy defense that I will seek to provide in the sections following the failure of dualist theories.

1.3 Failure of Dualism

Split-Level Dualism

By requiring that the first phase of punishment be determined by utilitarian calculations, split-level dualism fails as an adequate alternative theory of punishment because it faces the same problems as Thesis 2 of utilitarianism. Under this two-step approach, it does not seem implausible to imagine a system where rules or practices are set in a way that punishing of the innocent is indeed permissible if it were to benefit the rest of society. Split-level dualism also justifies, and actually seems to require, that more crimes be committed if it nets greater happiness. For instance, in the security guard's dilemma, split-level dualism justifies the security guard taking the bribe from the thief if it will net to greater happiness. Both of these possible

conclusions cannot help but result in absurd moral judgments that completely go against our intuitions of justice.

Furthermore, the second layer of the split-level dualism may prevent those who adhere to this theory of punishment from allowing Murderer, in the above case, to completely get away with murdering the family. However, the first-step requiring utilitarian considerations trump retributive considerations, will almost make certain that Murderer will not be subject to the proportional punishments that align with his actions. Using the split-level dualist's logic, we would have to conclude in the first step that punishing Murderer will not bring a net increase in happiness for society as a whole since no one has knowledge of the acts or any personal connections to Murderer's victims. Such a result completely goes against our intuitions of proper punishments for murder and does not bring about an acceptable result compatible with our conceptions of justice.

Integrated Dualism

Integrated dualism remains problematic as a theory of punishment because it seems to justify over punishing for small crimes. For instance, if utilitarian considerations for deterrence were so heavily weighted a system could be put in place so that the punishment for bicycle theft is death. Such a system would indeed successfully deter future bike thieves but the gross disproportionality of the punishment to the wrongdoing would make such punishments unacceptable. As the case illustrates, it does not seem that utilitarian function of deterrence is necessary for punishment. Even if the bike thief were to steal another bicycle again, common sense intuitions tell us that killing the bike thief for a relatively small crime is unjust and unnecessarily disproportionate to the crime committed. However, adhering to utilitarian

calculations would make such a punishment conceivable and quite possibly even necessary in order to ensure deterrence.²¹

Even if the integrated dualist were to concede that using this particular two-step method could result in gross disproportionality, he could still reason that such an act is still acceptable because the value from the future deterrence would outweigh the consequences from severely punishing one criminal. However, the utilitarian justification for punishment would also allow for criminals to walk away unpunished even for some of the most heinous crimes.

Suppose I were to track down a Nazi war criminal in Argentina who has not yet been punished for his crimes. Because of his vast worldwide connections and power in Nazi Germany, he has been able to escape prosecution all these years. Suppose still, he does not feel any remorse about his participation in acts like the Holocaust and feels the movement was justified. However, because of his old age and years of anonymity, he can no longer do any harm nor does he intend to. The first step of integrated dualism would require we make retributivist calculations to determine whether the Nazi war criminal deserves punishment. Given he was an active participant in the Holocaust and still does not feel remorse, it certainly seems justified to punish the Nazi war criminal under retributivist justifications. The second step requires giving utilitarian consideration for the actual hard treatment that should be administered as punishment for these crimes. Utilitarian considerations seem to suggest we are not justified in administering any form of punishment since doing so would only decrease the Nazi war criminal's utility. Administering punishment would fail to increase utility for other groups since the criminal lives a life of anonymity and is no longer in a position to harm others. However, allowing the Nazi to go

²¹ David Wood, "Crime Reduction and Justification of Punishment" in *Oxford Journal of Legal Studies* (Oxford, United Kingdom, 2002), 309.

unpunished strikes most as unjust and rather unfair especially in light of the heinous crimes he committed.

As the above cases show, integrated dualism cannot help but land the integrated dualist into some troubling moral outcomes in many cases and therefore cannot hold as an acceptable moral theory.

Mere Conjunction Dualism

Upon first glance, mere conjunction seems to solve the problem faced by the other two forms of dualism. However, Lacey's emphasis on adhering to benefits in accord with both utilitarianism with retributivism results in conflicting outcomes. Utilitarian considerations may quite conceivably call for not punishing or inflicting a lesser penalty on the offender in cases where it can be sure that the offender will not attack again. However, the retributivist consideration for punishment would call for punishing the offender to the full extent of his actions in order to restore the victim's rights and balance morality regardless of how the offender is likely to act in the future. It seems we would have to determine which reaction is more suitable based on our judgment of the immoral action at hand. We cannot help but feel that this is problematic.

Determining reactions to individual immoral actions should not be based on our judgment alone. Our judgments cannot be trusted to always make the right decision in every case for they are often subject to flaws, inconsistencies, and prejudices. A feasible system of punishment serves as a mechanism for eliminating problems that may arise from using our judgment alone. Mere conjunction dualism does not provide such a mechanism and therefore cannot be considered a feasible system of punishment. A collaborative system required by mere

conjunction dualism requires appealing to our intuition in particular cases rather than some objective principle. Systems of punishment must obviously adhere to our judgments and intuitions to some extent but must ultimately have some objective prescription for coming to decisions. Mere conjunction dualism fails to provide an objective prescription.

The unsatisfactory results from the application of mere conjunction dualist prevent it from succeeding either utilitarianism or retributivism as an optimal method of punishment.

Part III: Retributivist Problem of Proportionality

1.1 Problem of Proportionality

Determining the adequate proportionality of punishment is the most difficult problem for the retributivist. Differences in physical and mental characteristics may result in certain offenders experiencing greater or lesser degrees of suffering from the exactly the same kinds of punishment. These differences in degrees of suffering felt by a punishment could quite feasibly result in unintended consequences for the moral balance. The example that follows serves to illustrate the varying degrees of moral retaliation felt by receivers of the same punishment.

Suppose two people, Jack and Jane, independently broke the arm of two children. Jack broke the left arm of a nine-year old boy with a baseball bat. Jane broke the left arm of another nine-year old boy with a baseball bat. Let us suppose that both boys are otherwise unharmed and except for the minor inconveniences of not being able to use both arms for a period of a few weeks. Strict application of *lex talionis* requires both Jack and Jane each get their left arms broken with a baseball bat. Aside from this one attack on a nine-year old boy, let us further suppose that Jack is otherwise a normal man who makes his living as a mid-level office employee. Other than the initial minor inconveniences of not being able to use both arms and type with both hands in the weeks it takes his arm to recover, Jack will remain otherwise unaffected. Unlike Jack, Jane will be severely affected from a break to her arm. Due to an accident she suffered as a child, Jane only has the use of her left hand without which she cannot work nor take care of her child and elderly mother who depend on her solely for their livelihood. Let us further suppose that because of a rare bone disorder, Jane's arm will not recover fully if it is broken. In such a case, breaking Jane's arm seems too harsh even given the morally wrong magnitude of Jane's actions. Although required by a strict adherence to *lex talionis*, breaking

Jane's arm seems to result in taking away more of her rights than required to restore moral balance in this particular case. As such, we feel inclined to propose an alternative punishment for Jane that more effectively aligns with the moral magnitude of the situation. In this case, the punishment may simply be putting some sort of restraints on one of Jane's limbs in and keeping her from using it for the same duration of time it takes for the boy's arm to recover.

These difficulties in adequate proportionality of punishment as illustrated by the case above seem to require the retributivist examine each person, crime, and situation individually rather than strictly apply *lex talionis* to each situation. However, a practice that requires determination of punishment on a case-by-case basis cannot help but seem highly subjective and therefore unfeasible as a method of punishment.

A system that so uniquely tailors to each unique moral violation threatens retributivism's classification as a plausible theory of punishment. Due to the numerous threats the feasibility of proportional punishment poses for the retributivist, I have chosen to focus the following sections on providing an adequate solution to this problem. However in order to fully comprehend the feasible solution to the proportionality problem, it is critical to understand the difficulty in applying *lex talionis* even if we were to assume that physical and mental characteristics of all offenders were relatively similar.

1.2 Hard Cases for Retributivism

The retributivist faces difficulties arising from the applications of *lex talionis* for certain unique moral wrongdoings where the "eye for an eye, tooth for a tooth" principles cannot strictly apply. This principle proves problematic for the retributivist in assigning punishments for certain hard cases where exact proportionality of punishment for moral wrong is difficult. In this section,

I will provide particular instances of hard cases that seem particularly problematic for the retributivist given the reliance on *lex talionis*. The particular instances of these hard cases I will describe include rape, child molestation, mass murder, and repeat offenders.

Rape

Rape is perhaps the most widely discussed hard case for retributivism. In such a case *lex talionis* requires us to rape the rapist. However, we cannot help but feel uncomfortable with such a proposition. Furthermore raping a rapist does not seem to align with our intuitions of morality and punishment. Kant himself acknowledges that strict application of *lex talionis* in this case is problematic because repeating the act is “itself a punishable crime against humanity”. Kant says instead that the appropriate punishment for a rapist is castration.²²

Two problems arise in Kant’s defense. First, the principle of *lex talionis* itself often requires us to perform actions that go against humanity in order to correct moral balance. The act of killing is certainly a crime against humanity and a moral crime Kant himself says must be punished by applying *lex talionis*. However, application of *lex talionis* requires us to kill the criminal and commit the punishable crime ourselves. Kant believes that in this case strict application of *lex talionis* is indeed acceptable and actually necessary in order to restore morality. On principle, this seems no different from raping the rapist for this too would simply be the act of duplicating the morally wrong action in order to correct moral imbalance through proportional punishment. Second, Kant’s solution of castrating the rapist does not seem proportional. As heinous and traumatic as rape may be for the victim, in most cases the physical

²² Immanuel Kant, *The Metaphysics of Morals* (Cambridge, United Kingdom: Cambridge University Press, 1996), 6:357.

effects caused by rape are not permanent. In this way we could say that castration is worse than rape because it results in a permanent irreparable condition.²³ Some victims of rape may experience permanent psychological trauma. However, castration could quite feasible result in permanent psychological trauma for the rapist. In such a case, castration seems more traumatic for the rapist than for the victim since the punishment inflicts both permanent psychological and physical trauma.

I concede that raping a rapist is an unacceptable form of punishment, but not because rape as a form of punishment is immoral in itself. I simply do not believe raping a rapist fully captures the moral gravity of the offense and as a result fails to establish moral proportionality required by retributivism. Even if we were to grant that we must rape the rapist in order to comply with the strict application *lex talionis*, it would quickly become apparent raping the rapist still fails the test of proportionality. Raping a rapist fails the test of proportionality because it fails to capture the full extent of the psychological trauma experienced by the victim. In such a case, the rapist would presumably know beforehand the punishment that he is to receive whether because a judge told him so in court or because he knows the consequences of such a crime in a system of punishment based on the *lex talionis* principle. This prior knowledge of the rape provides the rapist a level of psychological solace that his victim, who was not given such a warning, did not have. This prior knowledge allows the rapist time to mentally prepare for the punishment and prevents him from experiencing the psychological trauma from the rape to the same extent as the victim.

²³ Chad Flanders, "Can Retributivism be Saved?" in *BYU Law Review*, 16.

Child Molestation

Although rape is the most widely discussed hard case for the retributivist, certain cases appear even more problematic for the retributivist. Child molestation is one such case. Child molestation seems most problematic for the retributivist because it is a case where *lex talionis* is impossible to apply. Even if the physical acts of the offender were applied exactly onto the offender, the offender would not experience the same physical pain or long-term psychological effects of the abuse. Direct application of the principle would require the offender himself to be turned into a child and grow up with the psychological and physical harms of the abuse in order to fully experience the extent of his abuse.²⁴ Obviously such hard treatment is not feasible and as such designating appropriate punishments for child molesters becomes problematic for the retributivist.

Mass Murder

Mass murder proves to be another hard case for the retributivist where full application of *lex talionis* seems impossible. Unlike in the child molestation case above, direct duplication of the offender's acts towards his victims is possible. For instance, if a mass murderer killed ten victims by shooting them on the back of the head, then it is certainly possible to kill the mass murderer by shooting him on the back of his head. Even though the punishment does align with the morally wrong nature of the offender's actions, the punishment fails the proportionality test required by *lex talionis*. If a mass murderer kills ten victims, then it seems only fitting that ten lives must also be taken in order to restore balance of morality. However, because it is

²⁴ Ibid., 324

impossible to kill a mass murderer ten times, it becomes impossible to establish a punishment that aligns with the proportionality requirement for *lex talionis*.

The issue illustrated by the mass murderer hard case poses a deep problem for the retributivist. A large part of the appeal of retributivism stems from the idea that administration of proportional crime results in a rebalancing of moral scales. However, the mass murderer case shows there exist certain situations where the crime is so bad that there is no feasible way of balancing moral scales. The capacity to balance moral scales is a critical component of retributivism. Failure to concretely define a method through which this moral balance can be achieved through administration of punishment implies a failure in a critical requirement of retributivism. Unless such an alternative method for administering proportional punishments in these particularly heinous cases is devised, retributivism cannot help but fail as a feasible method of punishment.

Repeat Offenders

Repeat offender cases prove uniquely problematic for the retributivist. Repeat offenders can be defined as people who have committed the same moral wrong again after already being punished for a previous moral wrong of the same nature. In such cases, we cannot help but instinctually feel as though an offender should be punished more harshly for repeating a moral wrong than he was in the first time. However, the application of *lex talionis* seems to require that we do not punish the offender any more harshly for repeating the same moral wrong a second, third, fourth, or even tenth time. In such a case the moral offender has already been punished for his previous acts of the same moral wrong and thereby moral balance for those previous acts have already been achieved. Harsher punishments for repeat offenders cannot help but seem

unfair to the offender himself who has already been adequately punished for previous crimes and now only has moral imbalance resulting from the current moral violation remaining. Any additional punishment can easily appear to come out from vengeance or some consequentialist desire, both of which the retributivist must stay committed to avoiding.

Part IV: Solution to Problem of Proportionality

1.1 Solution to Problems of Proportionality

Lex talionis is not an idea that should be taken literally. It simply makes the most logical sense to define *lex talionis* as “eye for an eye, tooth for a tooth” but this simply implies that punishment should be proportional enough as to correct for moral imbalance, not that it must match exactly with what the wrongdoer took from his victim. This broader interpretation implied by *lex talionis* saves the retributivist from the burden of assessing each situation on a case-by-case basis and allows for a range of acceptable punishments just as long as it effectively captures the magnitude of the moral wrong. Under the broader interpretation of *lex talionis*, it becomes possible to take into account differences in the individual offender circumstances and moral appropriateness of certain forms of punishment. The retributivist requirement for proportionality through the modified form of *lex talionis* can still be satisfied as long as it prescribes punishments that match the moral gravity of offense at hand and effectively restores the balance of morality.

In the following section, I will illustrate how the broader interpretation of *lex talionis* can be incorporated into the retributivist theory of punishment. In order to illustrate the potential feasibility and effectiveness of modified *lex talionis* for the retributivist, I have devised a thought experiment among a group of peoples I refer to as Society R.

1.2 Society R Thought Experiment

I would like to make clear that my only intention in creating the Society R thought experiment is to show that an extended interpretation of *lex talionis* allows retributivism to

function as a feasible method of punishment. I will not delve precisely into the kinds of punishments that Society R administers or even discuss specifically all of the morally egregious acts encompassed by Society R's system of punishment. Specific punishments and categories will undoubtedly continue to evolve in Society R as time progresses and therefore are of no relevance to the defense of the theory at hand.

Imagine a Society R where a system of punishment is based entirely on punishing the morally guilty in order to restore the moral balance of its peoples. Like all civilizations, Society R also administers penalties, such as parking and speeding tickets, but do not consider parking for three hours in a two hour parking zone or speeding immoral. Rather, penalties are viewed as necessary in order to allow society to function smoothly and raise revenues beyond tax collection. These penalties differ from actual punishment by not carrying the reprobative function or moral condemnation underlying punishments. In order to guarantee proportional punishments for all crimes and avoid overly lax or harsh hard punishments, Society R has devised a system of punishment that is fair to all citizens and aligns with retributivist ideas of punishment.

The system of punishment classifies everyone within Society R as belonging to one of five different categories of circumstances: men, women, the mentally ill, children, and repeat offenders. Each group of people is administered slightly differing punishments for the similarly morally egregious crimes due to the unique mental or physical differences of their societal category. These differences in punishments fully take into account the differences in mental and physical states of the offenders and recognize differing levels of suffering that may occur for the same punishments. Society R chooses punishments for particular crimes within these categories by taking input from and examining firsthand large cross-sections of people within the state.

Those who fall into the “men” category include those who are adult males aged eighteen and over. In order to fall into this category these men must not possess any physical or mental disabilities that would hinder them from receiving the kind of punishments deemed acceptable for men.

The “women” category include adult females aged eighteen and over. In order to fall into this category these women must not possess any physical or mental disabilities that would hinder them from receiving the kind of punishments deemed acceptable for women.

“Children” include all non-adult females and males below the age of eighteen. In order to fall into this category, these children must not possess any debilitating physical, mental, developmental abnormalities that might hinder the child from receiving punishments in the same way as normal children.

The mentally ill include those who would fall into the above three categories were it not for some psychological condition that hinders them from perceiving punishments the same way as other men, women, and children. The punishments for those with mental illnesses include a larger array of options than those normally prescribed for men, women, and children due to the variety of different mental ailments that prevent some normal forms of punishment from being acceptable.

Repeat offenders include those who have committed the same or similar types of offenses more than once. Repeat offenders have failed to comply with the punishments from their previous offenses and as a result must be punished for this failure as well as for the repeated offense itself. The system of punishment for repeat offenders will vary in severity depending on the moral gravity of the offense being considered. For instance, repeat offenses for stealing from

candy from a convenience store will not be treated as severely as repeat offenses for rape or murder.

Society R recognizes that it is necessary to constantly review the relevance of the categories given the current state of society. For instance, if a new kind of people were to emerge such that they needed their own group Society R would need to devise adequate punishments for this group. In order to adapt to these changes, Society R constantly examines the potential need for new categories by maintaining awareness of changes in social tides and anticipating the necessity for such changes.

Within each of these categories are five levels of different punishments viewed as acceptable for different kinds of immoral acts. The different levels of punishments include Level-1, Level-2, Level-3, Level-4 punishments, and Level-5 punishments. Each level of punishment is prescribed with a list of crimes for which the particular level's punishments are intended.

Level-1 Punishments are punishments for the most egregious acts of immorality. These include crimes effecting a large number of people such as mass acts of terror, human trafficking, mass child abduction. Level-2 Punishments are punishments for crimes that are still incredibly egregious but less so than for those that merit Level-1 Punishments. Acts that warrant Level-2 Punishments could include punishments like rape, intentional murder, severe torture, and child molestation. Level-3 Punishments are punishments for crimes that that are less severe than for Level-2 Punishments. These include crimes such as unintended murder, severe assault, and extreme child neglect leading to physical, mental, or developmental harm. Level-4 Punishments are punishments for acts of immorality less severe than the other three levels. Crimes that are classified under Level-4 Punishments include armed robbery, embezzlement, and forgery of

valuable work. Level-5 Punishments are punishments for the least morally egregious crimes of the five levels. Crimes that are punishable under Level-5 punishments include such things as illegally obtaining monthly welfare checks by exaggerating paperwork, stealing small amounts of merchandise from stores or personal residences, and engaging in prostitution.

It is true certainly true that at times unusual moral offenses may occur such that there does not yet exist a classification level for the given offense. In such cases it becomes necessary for society to be presented with the given facts and give input into which category the act belongs. Suppose still Society R is a rather efficient society where such facts can be laid out and all input from citizens given within the hours following a verdict. The inputs can then be tallied and summarized to determine which level of punishments the unusual moral offense belongs.

Within these levels of punishment, the actual hard treatments administered differ based on category. For instance, those who fall in the “men” category will receive harsher treatments for the same acts against morality than those who fall in the “children” category. These differences occur because it is assumed that certain categories feel the adverse effects of hard treatment to a greater degree than others. In-line with the above example, those who fall into the “children” category undoubtedly more impacted by the moral consequences of a ten-year prison sentence than those who fall in the “men” category. Those who fall into the “children” category are just starting out their lives and as a result, a ten-year prison sentence can carry more moral gravity to the child who may miss out on critical developmental experiences such as sitting in a normal classroom and experiencing the love and support from one’s parents. As a result, the trauma and psychological damage that may result from child’s ten-year prison sentence will likely be greater than that experienced by an adult. Although a ten-year prison sentence for those who fall in the “man” category is still a hefty punishment, the moral gravity and consequences of

a ten-year sentence for men will unlikely be as high as it is for a child. Therefore, in Society R a ten-year sentence for a child will most likely be administered for a relatively more egregious crime while a ten-year sentence for a man will likely be doled out for relatively less egregious crimes. These differences in moral gravity of the same punishment felt by those belonging in different categories must be taken into account when assigning proportional punishments to levels of crimes. By effectively utilizing the broad interpretation of *lex talionis*, Society R assumes that all punishments within each level play the same role in balancing for immoral acts. All Level-1 Punishments are equal for all crimes prescribed Level-1 punishments, all Level-2 Punishments are equal for all crimes prescribed Level-2 Punishments, and so forth.

In the following sections I will use my application of retributivist principles in Society R to prove retributivism can indeed provide adequate responses to “hard cases” where proper distribution of punishment seems problematic. I will also prove that retributivism provides morally justified answers to the most widely debated methods of punishment.

1.3 Solution to Hard Cases

The broader interpretation of *lex talionis*, which serves as a solution to the proportionality problem, provides the basis for solving the problems the retributivist faces with hard cases. When allowing for only a strict interpretation of *lex talionis*, the hard cases described above seem problematic because it appeared impossible to administer punishments for certain cases that capture both the moral gravity of the act and align with our intuitions of a morally acceptable form of punishment. I will now utilize the broader interpretation of *lex talionis* and the hypothetical Society R created with this broader interpretation in mind to explain how the retributivist can provide solutions to these hard cases. By providing answers to these hard cases

through application of retributivist ideals, I seek to prove retributivism's effectiveness and superiority as a functional theory of punishment.

Rape

Kant claims that rape itself is an unacceptable form of punishment for the rapist because the punishment itself is a "crime against humanity" and proposes castrating the rapist instead. I proposed that raping a rapist does not capture the full magnitude of moral gravity of the offense due to the advanced notice the offender will get of the punishment.

A broad interpretation of *lex talionis* can help solve both Kant's worries and my own. I remain unconvinced that rape as a form of punishment can really be classified as a crime against humanity when we condone committing many other morally egregious actions, such as murder, in order to obtain moral balance. It appears Kant is motivated more by the social constructs of his time that finds such punishments distasteful and unacceptable, rather than objectionable on retributivist grounds. However, the broad interpretation of *lex talionis* makes room for such disagreements while still allowing for adherence to the core principles of retributivism. Broader *lex talionis* allows Kant to adhere to his inclination that rape is a morally unacceptable form of punishment by providing an additional acceptable range of punishments he can choose from. A larger acceptable range of punishments also allows for a reevaluation of whether castration is an acceptable form of punishment. I am inclined to conclude that if wider choices of punishments became available, the grossly disproportionate nature of castration as punishment for rape will quickly become apparent.

Permitting a range of punishments also allows us to answer the worry that rape as a punishment itself does not capture the full magnitude of the moral gravity associated with the

crime. Under this revised interpretation, we can simply allow for a range of punishments that is morally proportional to rape and in effect successfully restores the balance of morality. Such a punishment would effectively capture the amount of physical and psychological suffering experienced by the victim. One such permissible form of punishment may include subjecting the rapist to years of hard labor that is both psychologically and physically traumatic. The rapist should not be released from this labor until both the psychological and physical trauma experienced by the victim has ended. As in Society R, it is quite likely that other feasible forms of punishments exist that function equally well to restore moral balance. I will not determine exactly what punishments may be included in this complete list of punishments at this time for devising such a list would require us to take into account a large number of considerations beyond the scope of this work. However, specific instances of acceptable punishments are not critical for solving the issues at hand. I must simply show that devising a system of proportional punishment to offset the moral offense of rape is conceivably feasible.

Child Molestation

Through the broader interpretation of *lex talionis*, the issue with child molestation seems much easier to solve. Although it is not possible to duplicate the moral wrong on the offender while capturing the level of psychological trauma of the inflicted children, the broad interpretation makes it possible to administer proportional punishment. The punishment itself and the type of psychological impact of the punishment will undoubtedly be different from the suffering felt by children, but under the broader interpretation it becomes possible to administer a punishment that at least encompasses the magnitude of the moral wrong. Encompassing the moral magnitude of the act serves to effectively restore moral balance and carry out the

retributivist function of punishment. Such an act may allow, and indeed even call for, a hard treatment that could be perceived as cruel and unusual punishment. An example of such a punishment could include repeatedly beating or violating the violator until it is deemed the level of psychological trauma experienced is equal to that of the violator's victim

Although punishments like the above may be unappealing to some, such is required for balancing morality and adequately obtaining justice. Unappealing hard treatments are not necessarily detrimental for the retributivist because hard treatments whether in the form of penalties or punishments are readily accepted as having an unpleasant nature. However, moral intuitions tell us that even though they are unpleasant there are times when hard treatments are still necessary. Such is no different with punishments perceived as cruel and unusual. The only difference is that the hard treatment itself invokes a kind of unpleasant nature because of the magnitude of moral wrong in question.

Repeat Offenders

More harshly punishing repeat offenders becomes defensible under the broad interpretation of *lex talionis*. This broader interpretation allows us to view repeat offenders, those who have committed the same or similar kinds of crimes, as more punishable than those who have only committed the crime once. Under this system, repeat offenders can be said to have performed a more egregious act on morality by committing same crime more than once. When a repeat offender chooses to commit the same act of immorality again he is showing society that he has "failed to organize his life in a way that reduces the risk of his reoffending".²⁵ Through this approach we can assume that every time an offender is punished for an act of egregious

²⁵ Youngjae Lee, "Recidivism as Omission: A Relational Account" in *FLASH* (Fordham Law School, 2008), 611

immorality, we add an additional unspoken punishment- an order for the offender to reorganize his life so that such incidents do not occur again in the future. Repeat offenses shows that the offender has failed to comply with this punishment and reorganize his life. Therefore, these offenders must be punished additionally in order to restore morality not only for the repeated offense itself but also for the offense of failing to comply with a previous punishment.

Mass Murder

Despite its obvious solutions to many of the other problems, the broader interpretation of *lex talionis* still does not provide an adequate punishment for mass murder. Mass murder somehow requires we capture the pain suffered by the number of people the offender put to death. This does not seem possible because a single offender only has one life to give. It is true that in such cases we cannot completely replicate the magnitude of wrongdoing in murder, however all the retributivist can do in such a case is punish the act to the fullest extent possible in order to capture the magnitude of the pain. The closest adequate replications may call for some forms of perceived cruel and unusual punishment that retributivism does indeed allow.

Some may object that this failure of the retributivist to account for mass murder proves retributivism failure as a theory of punishment. Although such an objection may seem compelling at first glance, upon closer inspection we find the objection holds no merit. The following case explains why failure of proportionality in the mass murderer case is not detrimental to retributivism.

Suppose a man, let us call him Mass Murderer, murders ten people by first torturing and burning them until they die. It seems plausible to say that in such a case the immorality suffered by any individual is unimaginably great. As a result, we can say that the degree of

immorality felt by each individual is equal to some inconceivably large number. Since this degree of suffering is so large, it seems quite feasible to say that this number is approaching something very close to infinity. The moral gravity of the act is not actually infinity but because the moral offense is so inconceivably great for all practical purposes we can assume that the gravity of the offense is at the level infinity. Because Mass Murderer committed ten of such egregious acts, the degree of suffering he committed can only be described as ten times infinity. However, nothing can actually be greater than infinity. Even though we might say it is ten times infinity in order to express the moral gravity of Mass Murderer's act, there is no possible way to express anything larger than infinity. The equations below illustrate the impossibility of expressing ten times an amount of suffering when the immorality of the act is inconceivably great.

Degree of pain felt by one victim of torture and murder = ∞

Degree of pain felt by ten victims of torture and murder = $10 \bullet \infty = \infty$

The equations above illustrate that even though mass murder seems impossible to punish proportionally from the outset, egregious crimes can be punished enough at least to adequately balance the immorality of the action. In Mass Murderer's case, the proportional punishment is anything that is at least equal to the unimaginable loss suffered by one victim. In order to fulfill the degree of proportional punishment, seemingly cruel and unusual punishments may be utilized.

One may reject my analysis and say that torturing and killing one person can never be equal to torturing and killing ten, fifteen, or even 10,000 people. Such an obvious and intuitive

objection should not be disregarded, but is still not completely detrimental for the retributivist. The equations posed above do not imply that the heinous murder of one person is completely akin to the heinous murder of ten people. It is simply saying that for the purposes of such proportional punishment, the differences between the two can be disregarded because the moral gravity of just one instance of torture and murder is already so inconceivably great. However, since it cannot be completely disregarded that there does exist some difference I will pose another method of determining punishments for Mass Murderer such that proportionality is not completely achieved but feasible enough to save retributivism from complete downfall.

In order to pose a different solution to the Mass Murder case described above, I will begin by describing a less extreme moral crime from which we can draw certain relevant analogies. Think of a case where a man, let us call him White Collar Criminal, embezzles millions of dollars from his company. White Collar Criminal is eventually discovered and found guilty of these crimes. Obviously, the morally right punishment would be for White Collar Criminal to return the embezzle millions. However let us suppose that at this point White Collar Criminal lacks the adequate funds or capital to repay the company for the embezzled millions. In this case, it seems White Collar Criminal should be required to repay the company as much as he possibly can. Although the amount paid and amount stolen will never be equal and therefore not exactly proportional in such a case, this is quite conceivably the most that can be done.

Much like White Collar Criminal above, Mass Murderer cannot be punished to the full extent of his crimes. As much true adherence to retributivism seems to require Mass Murderer be killed ten times, such treatment is simply not feasible. The closest we can get in such a case is to torture and kill Mass Murderer in the most grossly heinous way possible. Such a punishment may include something like water boarding Mass Murderer fifty times before finally subjecting

him to death by eating alive by insects. Given the harsh nature of the hard treatment inflicted on Mass Murderer, it would be difficult for anyone to say that we are valuing Mass Murderer's rights above those of his victims. Even though such a hard treatment may still fail to meet the morally egregious magnitude of murdering ten people so we cannot say that morality has been perfectly balanced, we can still say that morality has been adequately rebalanced.

1.4 Justification for Cruel and Unusual Punishment

In many of my solutions to hard cases, retributivism endorses seemingly cruel and unusual punishment as a plausible method of punishment and in some extreme cases even require it in order to meet the level of proportionality retributivism strives towards. I acknowledge that this view is controversial among modern policy makers who must make laws that adhere to certain social trends in order to gain approval from constituents. I further acknowledge that due to the complexities of implementing policy, considerations for punishment must go beyond strictly proportionality. Due to the complicated nature of policy, policy-making is beyond my area of expertise so I will not delve into it any further at this time. My goal is to prove that at times punishments considered cruel and unusual must be administered in order to adhere to the retributivist ideals of proportionality. Furthermore, I seek to prove that categorizing certain punishments as cruel and unusual is a gross misnomer of certain punishment when administered in response to certain heinous crimes and when no other proportional punishments are conceivable.

To begin, let us assume that there exists such a things as cruel and unusual punishments. These punishments can include the vast array of punishments often considered unjust, such as quartering and starvation. These punishments are indeed displeasing to hear about and might

defy certain common sense humanitarian notions we have about justice, but are necessary given the moral requirements of retributivism. For instance, imagine a scenario as in the case with Mass Murderer above where he first tortures and kills his victims. Suppose the torture includes starvation and tearing of limbs before burning. In such a case, it does not seem adequate to humanely kill Mass Murderer by subjecting him to some kind of ordinary method of killing like lethal injection or even the electric chair. The suffering experienced through lethal injection does not fully encompass the moral gravity of his actions and will thereby fail to balance morality in the way that retributivism requires. In fact, humanely killing Mass Murderer arguably is morally objectionable because it seemingly values Mass Murderer's life over that of his victims. In order to align with retributivist ideals and respect the moral rights of his victims, Mass Murderer must also be painfully tortured and kill.

Some may say that it is this characteristic of allowing for cruel and unusual treatment that proves detrimental for retributivism as a feasible theory of punishment. These detractors will say that a system that subjects its citizens to such objectionable hard treatments is itself immoral. Despite the compelling nature of this argument, it fails because of its subjective nature. Classifying certain punishments as cruel and unusual and others as not leads us down a slippery slope. Due to the evolving nature of society, it is certainly conceivable that we may reach a point where all punishments are considered cruel and unusual. At what point is a punishment cruel and unusual and at what point is it acceptable? Punishments go in and out of favor constantly as a result of evolving social climate within societies. This is to be expected in practice. However, we must not let these evolving opinions on hard treatments themselves effect our respect for the absolute moral rights. Since utilitarianism proves implausible and dualist theories continue to remain problematic, we can only conclude that retributivist ideals of punishment must remain

intact unless another more plausible theory of punishment can be formulated. Formulating another theory of punishment seems unlikely at best given the multifaceted requirements of punishment and morality that only retributivism has successfully reconciled thus far.

Furthermore, a closer analysis of what it means for something to be cruel and unusual prove that referring to any kind of proportional punishment as a cruel and unusual punishment is a misnomer in itself.

It is certainly true that some punishments may not seem appealing and we would not wish such a treatment on anyone. However, this alone is not enough to classify punishments as cruel and unusual. For a punishment to be truly cruel and unusual, it must be valued in relation to the crime the punishment strives to balance. It is only when the punishment grossly exceeds the magnitude of the crime that the punishment can be classified as both cruel and unusual.

To explain why the term “cruel and unusual punishment” is a misnomer when the particular punishment is administered for an equally heinous crime, we must accurately define the words “cruelty” and “unusual”. “Cruelty” is “callous indifference to or pleasure in causing pain and suffering”.²⁶ “Unusual” simply that something is “not habitually commonly occurring or done”.²⁷

Punishment completely lacks the characteristics of cruelty outlined in the definition above. For the retributivist, punishment is not administered with indifference or pleasure. As the case with Society R and broad interpretation of *lex talionis* illustrate, careful considerations are made in determining punishments for morally egregious acts. Far from being indifferent, the work required devising a feasible system of punishments through retributivism like in Society R that is sensitive to both the moral rights of the victims and certain limitations of the moral

²⁶ Merriam-Webster online

²⁷ Ibid.

wrongdoers. These punishments are not administered for pleasure but rather out of necessity to respect the rights of victims and restore moral imbalance. Punishments are not intended to bring pleasure to those administering them. Punishments cannot be considered cruel in themselves because they are merely moral responses that are morally equivalent to the moral wrongness it restores. Punishments can only be considered cruel when they are grossly disproportionate to the immoral act that it is trying to offset. In these cases, the degree of over-punishment may indeed be motivated by callous indifference or pleasure in causing suffering. However, punishing criminal beyond the extent of the moral wrongdoing is not permissible through retributivism. Because punishments fail to meet the definitional requirements to be considered “cruel”, referring to even the harshest form of punishment under retributivism as such is a misnomer that does not accurately describe the nature of punishment.

I will grant that certain punishments under retributivism can be described as unusual. Certain punishments will obviously not be administered very often because certain moral wrongdoings are not committed very often. Therefore, the punishments for these moral wrongdoings would logically only be given out in very few cases and must meet the threshold of being “unusual”. Administering “unusual punishments” for “unusual crimes” seems to make logical sense to meet the requirements of proportionality for retributivism.

Classifying punishments as cruel and unusual simply by the nature of the punishments alone is an oversimplification of the requirements and misunderstands the nature and function of punishment as illustrated through clarifying the definitions for cruel and unusual. Still, some dissenters may say that cruel and unusual punishment has its own implications beyond simply the definition of the words “cruel” and “unusual” considered separately. These dissenters could say that because the term “cruel and unusual punishment” has been widely used, it possesses a

definition distinct from the meanings of the words taken separately. I concede that this may indeed be true, but even still does not pose any problems for the retributivist. For the remainder of the section I seek to define the phrase “cruel and unusual punishment” and show that retributivist punishments escape this classification.

Numerous definitions for cruel and unusual punishment exist, perhaps contributing to the confusion of exactly what constitutes as cruel and unusual punishments. Raging debates exist as to which definition of cruel and unusual punishment is correct, as anyone who has skimmed over the numerous court rulings on the Eighth Amendment can attest. Attempts to reconcile the vague wording of the Founding Fathers in the Eighth Amendment have resulted in rulings that only agree, “revolving standards of decency mark the progress of a maturing society”.²⁸ Attempts to encompass all of the punishments that may be considered cruel and unusual have all failed. Often, society finds reasons to add more punishments to this list or take some off the list and reinstate it as an acceptable form of punishment. Such differences must be accepted in a reality where ideas and practices must constantly evolve. However, logically there must be a way to define exactly which characteristics make a certain method of punishment cruel and unusual. Despite the differences in practice, all attempts at defining cruel and unusual punishments generally agree that it includes “punishments that are very harsh and too severe for the crime”.²⁹ Since there seems to be little consensus beyond this, I will use the criteria outlined in this definition as the basis for my reasoning that punishment by itself cannot be cruel and unusual.

Punishments are composed of both the hard treatment aspect of punishment and have a reprobative symbolic function that condemns certain actions. A punishment fails when one or

²⁸ “Cruel and Unusual Punishment” in *The Journal of Criminal Law, Criminology, and Political Science* (Northwestern School of Law), 485.

²⁹ Merriam-Webster Online

both of these functions are not met. Usually, we think these functions are not met when the punishment is not harsh enough to match the crime. However, we often fail to consider that these punishments also fail when they exceed the level we consider acceptable.

Consider once again the case where we sentence a bike thief to death. This grossly punishes a relatively petty crime and fails to correctly offset the imbalance of morality. Sentencing the bike thief to death would directly go against the goals of retributivism by offsetting the balance of morality too far. This gross over punishment of the bike thief would result in a paradoxical scenario where the punishers themselves would have to be punished in order to correctly restore the balance of morality. Due to the harshness and severity of the punishment compared to the crime, the sentencing of the thief to death is considered a cruel and unusual punishment in this case. It is not that the punishment of sentencing to death is cruel and unusual in itself, but when applied to this particular case the punishment reaches beyond the severity of the crime.

It is quite plausible that dissenters will object to my line of reasoning by holding onto the idea that certain hard treatments are completely unacceptable forms of punishment no matter the crime. Saying punishments cannot be considered cruel and unusual in themselves do not align with our usual beliefs on the absolute nature of any kind of hard treatment. Most hard treatments can be judged on the basis of its moral consequences on the inflicted. However, punishment cannot be valued in this way because it is a different type of hard punishment. Although absolute classification as cruel and unusual is acceptable practice for most types of hard treatment, this does not hold true for punishment. Punishment is not simply a hard treatment in itself. It is a response to a certain action performed by the receiver of the treatment. Therefore, in order to judge the true nature of punishment we must mirror it to the hard treatment performed by the

receiver of the punishment on his victims. The purpose of the hard treatment through punishment is to mirror the full extent of the heinous or immoral nature of the act in question. Therefore, if retributivism is correctly applied it will ensure that the punishment is never too severe for the immoral action in question. The application of this idea to Society R below illustrates the injustices and inconsistencies that result from not performing certain hard treatments as punishments.

Suppose there are two criminals awaiting punishments in Society R. Let us call them Killer 1 and Killer 2. Killer 1 killed his wife in a blind rage by strangling her when she threatened to leave him for another man. Killer 2 is a different kind of criminal. Killer 2 is a serial killer who preys on children. Before his arrest, Killer 2 preyed on children who were left temporarily unsupervised in playgrounds. Killer 2 then tortured the children for a period of five days. After the five days, Killer 2 put each child in an enclosed box filled with flesh-eating insects where they were slowly eaten to death.

Both Killer 1 and Killer 2 are murderers. However, one cannot help but get the sense that Criminal 1's crime of passion is less heinous than Killer 2's torture and murder of children. Due to these differences, Killer 1's actions would most likely be given a Level-2 punishment and Killer 2's actions would likely be given a Level-1 punishment. When describing Level-1 and Level-2 punishments, I did not include exactly the types of punishments that could possibly fit into these two levels of punishment. Such differences were not relevant in order to comprehend the functions of *lex talionis*. Explaining modified *lex talionis* only requires understanding that some difference exists between these two levels of punishment in order to capture the differences in moral gravity of more heinous crimes from less heinous ones. However in order to more

comprehensively illustrate the significance of these crimes, I will assign hypothetical punishments for each level.

For Killer 1, the appropriate Level-2 punishment is rather obvious. Because he took a life by strangling his wife, it only makes sense to take his life by some method of asphyxiation or through some other method that would generate a comparable level of suffering. Such an act would effectively achieve justice and restore the balance of morality. For Killer 2, the punishment seems much more complex. Observation of *lex talionis* requires a punishment harsher than the one administered to Killer 1. However, if one were to adhere to the notion that torture is a cruel and unusual treatment that cannot be used by society as a form of punishment, the closest we could get to balance morality for Killer 2's crime would be to find some humane way to end Killer 1's life. However, such treatment fails to capture the magnitude of Killer 2's crime and does not adequately differentiate his actions from Killer 1's actions. Administering a similar punishment for Killer 2 as for Killer 1 would certainly fail to effectively offset immorality and achieve justice for Killer 2's actions. Killer 2 did not simply intentionally murder one person. He tortured and painfully took the lives of innocent children. In order to restore morality and justice, Killer 2 must be punished to the fullest extent as to encompass the severe moral magnitude of his crimes. Common sense tell us that Killer 2 must be punished beyond the extent Killer 1 is punished in order to effectively adhere to *lex talionis*. However, the gravity of Killer 1's crime calls for him to be killed. Therefore, Killer 2's punishment must include an element of punishment beyond simply being killed. In order to go beyond this threshold, *lex talionis* calls for some other action that can only be satisfied through some form of torture or prolonged punishment before death. In such a case, the hard treatment of torture is not a form of cruel or unusual punishment. Rather, torture acts as a necessary balancing instrument for

carrying out the fundamental requirements of punishment. Torture cannot be considered cruel in this case because it does not come from indifference or desire for pleasure, but rather as a necessary means for achieving proportionality.

Clarifying the requirements for cruel and unusual punishment allows retributivism to administer hard treatments that adhere to *lex talionis*. As an application of the thought experiment Society R shows, not allowing for hard treatments simply due to evolving societal constructs results in an unavoidable inadequacy of punishments that at times fail to correctly carry out justice and balance morality.

1.5 The Death Penalty

It is impossible to give an explanation for cruel and unusual punishment without following up with a defense of the death penalty. The death penalty has a prominent role in the discussion of cruel and unusual punishment and is largely debated among theorists and policy-makers alike. Justice, however, requires the death penalty remains a suitable means of punishment under *lex talionis*. A proportional system of punishment presupposes the existence of the death penalty. Without being able to utilize the death penalty, it becomes impossible to adhere to any version of *lex talionis*, which requires that the punishment fit the crime.

Some may say that life in prison is functionally equivalent to the death penalty with the absence of the inherently unpleasant associations often present when taking away a life. However, life in prison does not capture the full moral wrongness of murder. The very fact that we naturally feel less revulsion at the prospect of life in prison than subjecting a criminal to death illustrates this fact. Our discomfort in taking away one's life speaks to the reason we feel that murder itself is such an egregious moral wrong. We are more comfortable with permanent

imprisonment because it is instinctively not as morally egregious. In almost all circumstances, continuing to life is preferably to dying because as long as a person continues to exist he or she still preserves some hope and potential for a valuable future.

The numbers of death row inmates who seek to overturn their sentencing through appeals or other legal methods prove the preference of life over death even in the most extreme circumstances. From 1973 to 2013 8,466 death sentences were imposed across the United States. Of these sentences, 6,432 death sentences were overturned for various reasons, most commonly through appeals.³⁰

Some staunch opponents of the death penalty may reasonable conclude that the objectionable nature of capital punishment alone creates an unresolvable problem for the retributivist. Without the death penalty, punishment for murder like those committed by both Killer 1 and Killer 2 become nearly impossible to punish in accordance with *lex talionis*.

Bedeau attempts to salvage retributivism from this problem by accepting that absolute proportionality of punishments for crimes may not be feasible when dealing with morally egregious acts such as murder. Bedeau claims this does not pose a serious threat to retributivism, however, as long as we allow for relative proportionality where the most heinous crimes are still punished more than less morally objectionable crimes. This proposed modified system requires “crimes other than murder be punished with terms of imprisonment or other deprivations less severe than those used in the punishment of murder”.³¹ Although such a compromise is indeed compelling, it still fails to adhere to the fundamental nature of *lex talionis* that requires criminals

³⁰ Frank R. Baumgartner, “Most Death Penalty Sentences are Overturned. Here’s why that Matters” in *The Washington Post*, 2015.

³¹ Hugo Adam Bedau, “The Case Against the Death Penalty” in *ACLU Capital Punishment Project*, 1984), 3.

be punished to the exact extent they violate morality. Modifying the system the way Bedeau proposes leads the way into a system of punishment that is too lenient on offenders and thereby fails to correctly counterbalance the immoral nature of not just the most egregious crimes involving murder but all immoral acts in general. Accepting Bedeau's proposed modifications would result in a complete failure of the basic goals of retributivism that strive to restore moral balance to society. The application of Bedeau's ideas to a hypothetical case illustrates the absurdity of Bedeau's proposed modification.

Let us once again consider the case of Killer 1 and Killer 2 described in the previous section. This time, we will prescribe punishments for these two moral wrongdoers using Bedeau's restrictions for administering punishment, which no longer allows for the death penalty or application of *lex talionis* and only concerns itself with relative proportionality. In line with these new restrictions, Killer 2 is sentenced to one year in prison and Killer 1 some less amount, say three months in prison. Also waiting to be sentenced in the same room as Killer 1 and Killer 2 is Kidnapper. Kidnapper has been convicted of kidnapping a girl at the age of five and held her captive until she turned eighteen. Other than the fact that he did not let her out of the boundaries of his large estate, he did not treat his victim poorly. The girl was well fed, educated, and properly cared for. Despite the lack of physical discomforts, the girl knew and understood her predicament and wished for freedom. Kidnapper is sentenced to one month in prison.

In the above example, the punishments do appear relatively proportional. Killer 2 faces a longer prison sentence than Killer 1 and faces a longer prison sentence than Kidnapper. However, despite this adherence to relative proportionality we cannot help but get the sense that a gross injustice still remains. It goes against common sense intuitions of justice to allow Killer 2, who brutally tortured and killed children, to only be sentenced to one year in prison. Similarly,

it seems unjust to punish Killer 1 with only three months in prison for killing his wife. In both Killer 1's and Killer 2's cases we cannot help but feel that the immorality of the crime has not been offset and justice has not been served. Furthermore, due to the gravity of the acts committed by Killer 1 and Killer 2 we are forced to administer a punishment for Kidnapper that is less severe than the punishment for the other two crimes. Although relative proportionality may seem appealing the way it is proposed by Bedeau, it has some uncomfortable implications for punishment. By accepting a modified notion of retributivism that denies the acceptability of the death penalty, we end up with a system of punishment that does not punish criminals enough given the extreme immoral nature of certain acts.

I acknowledge that the above example is rather exaggerated and the punishments are absurdly lenient given the heinous nature of the crimes described. However, such an exaggeration proved necessary in order to effectively communicate the absurdity of eliminating the death penalty. When the primary goal of punishments is to effectively restore imbalances in morality due to the nature of heinous crimes, we cannot simply eliminate a primary method of restoring immorality. Doing so would lead us into a position like the one above where crimes are constantly under-punished and moral balance is not restored.

Thus far, I have proven that any feasible system of retributivist justice must allow for capital punishment. This still does not prove that capital punishment is not in itself a form of cruel and unusual punishment. Unless I can prove that capital punishment is itself a morally acceptable form of punishment, the retributivist reliance on capital punishment to fulfill specific criteria for *lex talionis* becomes problematic. In order for retributivism to remain a feasible and just method of punishment, I must prove capital punishment in itself cannot be considered cruel and unusual when applied to the right circumstances. For the remainder of this section I will

outline some common objections to the death penalty. I will then show that despite the compelling nature and accuracy of some of these objections, they still fail to prove that capital punishment is a cruel and unusual method of punishment in all circumstances.

Although dissenters may disagree on specific details, they generally oppose capital punishment for two overarching reasons. First, dissenters oppose capital punishment because they believe that it does not effectively deter crime. Second, dissenters believe that the death penalty is uncivilized in theory and unfair and inequitable in practice.³² These two overarching objections certainly hold some validity. However, we can disregard certain elements of these objections right away due to its relevance only in application. Although these considerations are important for the implementation of capital punishment, many are of no relevance when only considering the logical and moral nature of the retributivist method of punishment. Certain elements of the two main objections to capital punishment are more problematic and must be given further explanation to show that although these weaknesses in capital punishment may in fact exist, it still fails to prove capital punishment is a type of cruel and unusual punishment in itself.

Some compelling reasoning supports the dissenters' objection that punishments do not effectively deter crime. Bedeau reasons that in order for punishment to serve as an effective deterrent, the punishment must consistently be applied in every case.³³ However, currently only one percent of homicides known to the police are sentenced to the death penalty. Such an inconsistent application cannot possibly serve to effectively deter potential murderers when there is only a one percent chance of being sentenced to death upon conviction. Although this

³² Hugo Adam Bedau, "The Case Against the Death Penalty" in *ACLU Capital Punishment Project*, 1984), 3.

³³ *Ibid.*

argument does provide support for the ineffectiveness of capital punishment, this only proves that our current implementation of the death penalty contains flaws. In theory, retributivism requires that moral imbalances be corrected in order to accurately offset any imbalances in morality so that such inconsistencies like the one mentioned do not occur.

Bedeau also states capital punishment's failure of deterrence arises because murder is usually either extensively premeditated or arise from crimes of passion. Bedeau argues that murderers who extensively premeditate their actions will not be deterred for they will take measures to escape detection. Those who commit crimes of passion will also not be deterred from the threat of punishment because such crimes only result when logical thinking has been suspended and therefore consequences of such actions are not taken into account.³⁴ Bedeau also states that if excessive punishment were to result in deterrence then long prison sentences must be just as effective as capital punishment.

Bandeau states that long-term punishments rather than capital punishment would actually more effectively deter crime for it would eliminate crimes by those who hope for "suicide-by-execution".³⁵ Bandeau describes suicides-by-executions as circumstances in which people wish to die but fear taking their own lives. Therefore, in order to fulfill their wishes, they take the lives of others in hopes that society will execute them. The inefficient nature of deterrence for capital punishment is indeed concerning for policy-makers who strive to reap the most positive benefits from punishment as possible. However, retributivism's goal in administering proportional punishment is not deterrence. Rather, its goal is to strictly offset imbalances in morality by administering punishments proportional to the crime. Any unintentional benefit, such as deterrence, from obtaining such a goal is simply a fortunate byproduct but bears no significance

³⁴ Ibid., 4.

³⁵ Ibid., 5

for retributivism. Retributivism's only goal is to administer punishments that correct match the magnitude of the crime at hand. If the punishment that most appropriately matches the moral gravity of the crime happens to be the death penalty, then such a punishment must be administered in order to effectively offset the immorality of the wrongdoer's actions.

The apparent failure of capital punishment as an effective method of deterrence does not provide sufficient evidence that the death penalty is a form of cruel and unusual punishment. Rather, it simply shows that as it has been implemented thus far the death penalty does not function as a punishment that encourages deterrence among murderers. However, the above reasoning offers no evidence that suggests that capital punishment when correctly administered is too severe for the given crime. Therefore despite the compelling evidence that proves deterrence may not be an objective of capital punishment, this argument fails to prove that capital punishment is itself is a cruel and unusual punishment that cannot be used in order to meet the requirements of proportionality for retributivism.

Bedeau also says capital punishment should be outlawed due to its unfair and barbaric nature. I will first delve into Bedeau's reasoning for the unfair nature of capital punishment. Bedeau reasons that when it comes to irreversible and serious punishments, such as capital punishment, the sentencing must be conducted with fundamental fairness. Bedeau cites data showing trends of disproportionately large numbers of African Americans on death row relative to their fraction of the total population. Bedeau cites more data showing gender also plays a role in sentencing with women who commit murders are much less likely to face execution. Finally, Bedeau provides evidence suggesting that capital punishment is disproportionately sentenced to the poor with 90 percent of those on death row unable to afford a lawyer. Bedeau does not believe that such instances of unfairness can ever be completely eliminated due to the potential

for biases that exist every step of the way right up until execution. The prosecution might choose to try for a lesser crime. The court may be unwilling to accept or reject a guilty plea. The jury may choose to convict for manslaughter or second-degree murder rather than capital murder. The jury or judge may question the defendant's sanity.³⁶ These factors are just a few of the complex dimensions leading up to a death row sentence.

Once again, I believe that Bedeau does indeed bring up several compelling objections to retributivism. In current practice, unavoidable prejudices certainly exist throughout the entire justice system. These prejudices may result unfair discrimination for disproportionate number of people from certain groups. However, this still does not prove capital punishment itself is an unfair, inappropriate, or cruel and unusual punishment. It simply shows that policymakers must improve the justice system so that capital punishment is applied consistently for crimes where this punishment is appropriate. More lenient sentencing for certain groups does not prove that capital punishment itself is unfair or unnecessarily cruel. In fact, in some cases capital punishment may still be the fairest punishment and these other more lenient sentences could actually be more representative of unfit punishments. The following example illustrates how more lenient sentences are not always indicative of a fairer sentencing.

Let us think of a case where Driver 1 and Driver 2 are both driving 40 mph on a road with signs indicating the speed limit is 25 mph. Driver 1 is driving a red car and Driver 2 is driving a black car. The police officer assigned to the area is distracted when Driver 2 drives by and Driver 2 continues speeding down the road without facing any penalties. The officer catches a glimpse of Driver 1 as he is driving by and notices he is speeding. The officer pulls Driver 1 over and Driver 1 is given a speeding ticket.

³⁶ Ibid., 8.

In the case above, it would seem strange to say that Driver 1 was unfairly ticketed just because Driver 2 was not ticketed. Driver 1 was clearly speeding and the ticket was well deserved. If caught, Driver 2 should also have been given a ticket but due to the inconspicuous color of Driver 2's car and the distracted officer, Driver 2 was not given a ticket. The unfairness of this situation stems from systematic problems that exist in implementation. These systematic problems resulted in Driver 2 escaping a ticket he actually deserved. Here, Driver 2 received unfair favorable treatment as a result of this failure of implementation. Driver 1 actually received the proportionally correct penalty for speeding. Improvements in implementation so that the penalties for speeding are more fairly administered across the board would be beneficial for this particular system in practice, however the penalty itself for speeding still seems appropriate.

Just as a speeding ticket penalty for Driver 1 above is not an unfair penalty, capital punishment for specific heinous crimes is not an unfair, disproportionate, or cruel form of punishment. Capital punishment is indeed an appropriate sentencing for murder convictions. Disproportionate sentencing for certain groups simply indicates a failure in implementation. Those who are sentenced to death for murder are not being treated unfairly. Rather, those who are not sentenced to the death penalty are being treated unfairly leniently. This inappropriate lenient sentencing for certain groups over others is an implementation error that must obviously be rectified. However, this is an issue for policymakers. Such problems with implementation pose no threats for the retributivist theory of punishment. As long as capital punishment meets the criteria of *lex talionis* proportional punishment relative to the immoral action at hand, problems with implementation remain of no relevance to the retributivist.

Bedeau also mentions the inevitability of error with the death penalty.³⁷ In practice, no system is perfect and there are certainly cases where innocent people are often convicted of crimes. Due to the irreversible nature of the death penalty, allowing for this form of punishment creates situations where society cannot correct for these inevitable mistakes in conviction. Again, this is an issue for policymakers. Policymakers must strive to limit the instances of error. For the retributivist, problems of implementation are of no concern as long as the punishments meet the appropriate criteria for retributivism. Since this objection would not hold true if a perfect system of retributivism were to be devised, the inevitability of errors associated with the death penalty in practice is of no concern for the retributivist.

Other issues of the death penalty related strictly to policy and not retributivist theory include the financial costs, public opinion, and abolition trend of this form of punishment in many developed nations.³⁸ Optimal theories of punishment may in reality result in heavy financial burdens on nations that attempt to put the theory into practice. Public opinion due to the changing social trends may indeed lean towards abolishing death penalty. These same social trends may call for governments to abandon punishment by law in the future. These financial and social barriers are indeed concerning but are the issues of policy and do not have to be taken into consideration when formulating a theory of punishment.

Bedeau's expresses his concern with the barbaric nature of capital punishment. There is no denying that certain method of fulfilling the death penalty can indeed be perceived as barbaric. However, barbaric treatment is not forbidden under the retributivist method of punishment as long as the barbaric form of hard treatment does not exceed the level of a suffering the criminal inflicted upon his victims. Critics argue that allowing for such harsh hard

³⁷ Ibid.

³⁸ Ibid., 15.

treatments proves retributivism itself is barbaric and may not function as a feasible system of punishment. These same critics argue that advocating for suffering that comes from these particularly harmful punishments, as a method of restoring the good, is in itself barbaric.³⁹

In order to evaluate the validity of these worries, we must first consider how we classify certain acts as barbaric. By definition, the term “barbaric” implies that something is primitive or uncivilized. The standards of exactly what is considered primitive and civilized changes as time progresses and cultures change. As time and culture progresses certain acts that were once considered normal or acceptable by society become tabooed. Likewise, certain actions that were once considered particularly abhorrent or unacceptable become acceptable. In order for a system of punishment to remain feasible it must extend across all cultural and time barriers.

Retributivism succeeds in this goal by requiring that all immoral actions be punished in a way that balances the immoral action even in cases when the punishment must be extreme. Therefore, although the Tadros’ worries are appealing they too do not apply to retributivism because retributivism is a theory of punishment is not limited to certain notions of barbarism. It is not possible to create a system of punishment around what is or what is not considered barbaric because of the fickle nature of barbaric punishments. Therefore, it only makes sense to set a system of punishments that ignores the nature of punishments itself and focuses instead on the functions and reasons for punishments.

I acknowledge that certain methods of capital punishment could indeed be construed as barbaric no matter what the time period or culture. However, barbaric hard treatments would only be permissible in cases where the criminal himself performed barbaric actions. In these

³⁹ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press., 2011), 63.

cases, barbaric treatment is not only a feasible method of punishment but is also arguably a necessary method of punishment. In order to fully balance morality as retributivism requires barbaric immoral acts must be balanced with barbaric hard treatment punishments that have the power to balance out the magnitude of these actions. Under retributivism, punishment is not administered to those who perform only morally good or morally neutral acts. Punishments are only administered to those who have performed morally questionable acts. Because barbaric treatments are only administered to certain barbaric perpetrators, the barbaric punishments do not normalize the nature of the barbaric treatment. Conversely, barbaric punishments highlight the unacceptable nature of treating others

By analyzing the most prominent reasons for abolishing the death penalty, I prove that most of the problems arise from issues in implementing policy and evolving social constructs rather than from moral considerations relevant for the retributivist. Through this reasoning, I prove that the death penalty is not morally objectionable in itself as a form of punishment. Because the death penalty has a unique moral capacity that cannot be satisfied by any other form of punishment, it is a necessary punishment in any feasible application of retributivism.

Concluding Remarks

In this work, I seek to provide an explanation for the superiority of retributivism over utilitarian and dualist theories. The troubling and inescapable conclusions implied by both utilitarian and dualist theories leave retributivism as the only functional theory of justice. By addressing and correcting some of the most glaring objections to retributivism, I work to strengthen my position that retributivism exists as the most feasible and just system of punishment. My intention in this article is not to prove that retributivism is an impeccable theory of punishment. I acknowledge that more work must be done before retributivism can be acknowledged as the optimal form of punishment. My only intention with this work is to solve some of the most glaring problems with retributivism in order to highlight retributivism's potential as the most effective and morally attuned theory of punishment.

Bibliography

- Baumgartner, Frank R. "Most Death Penalty Sentences are Overturned. Here's why that Matters." *The Washington Post*, March 17, 2015.
https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/?utm_term=.ed2ba68e0622.
- Bedeau, Hugo Adam. "The Case Against the Death Penalty." *ACLU Capital Punishment Project*, 1984. <https://www.aclu.org/other/case-against-death-penalty>.
- "Cruel and Unusual Punishment." *The Journal of Criminal Law, Criminology, and Police Science*63, no. 4 (1972): 484-92. <http://www.jstor.org/stable/1141799>.
- Davis, Lawrence H. . "They Deserve to Suffer." *Analysis*32, no. 4 (March 1972): 136-40.
<http://www.jstor.org/stable/3327911>.
- Feinberg, Joel. "The Expressive Function of Punishment." *The Monist*49, no. 3 (July 1965): 397-423. http://www.jstor.org/stable/27901603?seq=1&cid=pdf-reference#references_tab_contents.
- Feinberg, Joel. "The Classic Debate." In *Philosophy of Law*, 766-70. Boston, MA: Cengage Learning, 2004.
- Flanders, Chad. "Can Retributivism be Saved?" *BYU Law Review*2014, no. 2 (May 31, 2014): 309-62. <http://digitalcommons.law.byu.edu/lawreview>.
- Hart, H. L. A. "International Library of Philosophy." *Proceedings of the Aristotelian Society*60 (1960): 1-26. <http://www.jstor.org/stable/4544619>.
- Honderich, Ted. *Punishment: The Supposed Justifications Revisited*. Pluto press, 2006.
<http://www.jstor.org/stable/j.ctt183q5s8>.
- Kant, Immanuel. *The Metaphysics of Morals*. Edited by Mary Gregor. Cambridge Texts in this History of Philosophy.
- Lacey, Nicola. *State Punishment: Political Principles and Community Values*. London: International Library of Philosophy.
- Lee, Youngjae. "Recidivism as Omission: A Relational Account." *FLASH: The Fordham Law Archive of Scholarship and History*, 2008, 571-622.
http://ir.lawnet.fordham.edu/faculty_scholarship.
- Mackie, J. L. "Morality and the Retributive Emotions." *Criminal Justice Ethics*1, no. 3 (1982): 3-10. HeinOnline.

Merriam Webster Online. Accessed September 24, 2011. [http:// www.merriam-webster.com/dictionary/citation](http://www.merriam-webster.com/dictionary/citation).

Rawls, John. "A Kantian Conception of Equality." *Cambridge Review* 94, no. 9 (1975): 6-20. <http://contemporarythinkers.org/john-rawls/essay/kantian-conception-equality/>.

Tadros, Victor. *The ends of harm: the moral foundations of criminal law*. Oxford: Oxford University Press, 2013.

Wood, David. "Crime Reduction and the Justification of Punishment." *Oxford Journal of Legal Studies*, 2nd ser., 22 (2002): 301-21. http://www.jstor.org/stable/3600555?seq=1&cid=pdf-reference#references_tab_contents.