

COMMENTS

RESURRECTION FROM A DEATH SENTENCE: WHY CAPITAL SENTENCES SHOULD BE COMMUTED UPON THE OCCASION OF AN AUTHENTIC ETHICAL TRANSFORMATION

B. DOUGLAS ROBBINS[†]

INTRODUCTION

The stalwart second chance is an American institution within which we embed visions of our best future-selves. Americans believe they can and should strive further,¹ that failures of the fathers need not be indelible, and that each of us, at any time, can change and become better than we were before.² We believe in redemption.³ Our

[†] A.B. 1992, University of California at Berkeley; J.D. Candidate 2001, University of Pennsylvania Law School. I want to thank Professor Michael Moore for his encouragement and guidance on early drafts, my excellent Comment Editors Janice Cater and Garrett Broadrup, my superb Executive Editor Jennifer Zepralka, and, for much-needed help in researching the psychology of guilt and remorse, my friend Joe Walling.

¹ Since the beginning of the republic observers have commented that Americans, rich and poor, continually seek upward mobility. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 214 (Richard D. Heffner ed., Mentor 1956) (1835) (indicating that the rich and the poor both desire to expand their wealth).

² This kind of irrepressible American optimism, “the conviction that everyone . . . is a work in progress, able to change for the better,” is a notion often articulated by the most successful of our nation’s citizens. Barbara Allen Babcock & Thomas C. Grey, *Tribute: Paul Brest*, 52 *STAN. L. REV.* 261, 265 (2000) (conveying the lifelong philosophy of Paul Brest, the former dean of the Stanford Law School); see also DE TOCQUEVILLE, *supra* note 1, at 157 (“Although man has many points of resemblance with the brutes, one trait is peculiar to himself,—he improves The idea of perfectibility is therefore as old as the world . . .”).

³ See DE TOCQUEVILLE, *supra* note 1, at 158 (“Thus, forever seeking, forever falling to rise again,—often disappointed, but not discouraged,—[mankind] tends unceasingly towards that unmeasured greatness so indistinctly visible at the end of the long track which humanity has yet to tread.”); SALVATORE R. MADDI, *PERSONALITY THEORIES: A COMPARATIVE ANALYSIS* 56 (5th ed. 1989) (indicating that Freud “presents humans as fallible but also perfectible, a position deeply rooted in Western thought and religion”).

economic and social institutions reward it.⁴ But ours is also a nation invested in the philosophy of personal responsibility. The criminal law, for example, is an expression of our taking seriously the choices that individuals make, even if those choices are bad ones, based on ill-founded knowledge or derived from questionable thought processes. Between these two values—the possibility of a second chance and the demands of taking the first-time-around choice seriously—is typically strung an enormous tension.⁵ This tension is especially acute in the application of capital punishment. Here we must ask ourselves: are there occasions when justice is best served by weighing the value of personal responsibility against the vying value of human transformation and, as a result, commuting death sentences where desert is blunted by repentance? Or, at least at first, that seems like the right question to ask. But the ostensible tension between the first and second chance may turn out, in special cases, to be largely overestimated. Another way to look at the second chance is not as violative of the notions of personal accountability, but rather, when properly taken advantage of, as allowing for a deep acknowledgment of one's failures and an even deeper expression of personal responsibility for one's bad acts through the endeavor of making wrongs right.

The broadest possible articulation of this sentiment would seek to downgrade all corporal punishment⁶ where the wrongdoer has transformed his⁷ character, regardless of his crime. But, for reasons more

⁴ As a reflection of the importance of the endless American expectation of the rising lower and middle classes, the media is often fixated on issues concerning the average standard of living and the disparities between the rich and poor. See, e.g., Jacob M. Schlesinger et al., *Charting the Pain Behind the Gain*, WALL ST. J., Oct. 1, 1999, at B1 (relating that the Census Bureau reported a modest drop in poverty over the last decade but a widening of the gap between the haves and have-nots).

⁵ "In the United States, humanistic tenets have long vied with belief in social Darwinism and individual responsibility, one or the other gaining an edge at any given point." CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 15 (1997).

⁶ In this piece I use the term "corporal punishment" to mean "punishment that is inflicted upon the body . . . including imprisonment," BLACK'S LAW DICTIONARY 1247 (7th ed. 1999), but not including capital punishment. In all cases I mean to distinguish corporal punishment, or bodily imprisonment, from capital punishment, or death through "state-imposed" execution. *Id.* at 407.

⁷ I have chosen to use male pronouns to refer to "human kind" because the subject of this paper, the death penalty, disproportionately afflicts males. See RANDALL COYNE & LYN ENTIZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 33 (Supp. 1996-1997) ("Of the 3122 [death-sentenced] inmates known to [the NAACP Legal Defense Fund] as of April 30, 1996, 3073 (98.4%) are men and 49 (1.60%) are women."); see also John Monahan, *Causes of Violence*, in FOUNDATIONS OF CRIMINAL LAW 17, 18 (Leo Katz et al. eds., 1999) (indicating that close to 90% of people arrested for violent

clearly laid out below, this is not my argument.⁸ The focus here is exclusively on capital sentencing, as affected by its justifying agent, the theory of retributive justice. If character transformation is to effectuate a downward departure in death sentencing it must do so within the context of a theory of punishment that recognizes such a transformation and understands its meaning. Moreover, any honest attempt to dejustify the death penalty—not in general, but in a particular instance—must occur within the context of the theory of punishment that justifies the penalty to begin with. Fortunately, these two elements, recognizing character analysis and dejustifying capital punishment, coalesce in a single background theory: retributivism.⁹ Retributivism, and specifically character retributivism, unlike other theories of punishment, must necessarily recognize the positive effects of an ethical transformation. And the death penalty is unique among criminal penalties in that it most clearly finds its justification, presuming it can be found anywhere, within a retributive scheme.¹⁰ American values stand in opposition to the categorical denial of redemption,¹¹ and the broader claim that transformation can downgrade almost any sentence, capital or not, is defensible, but by narrowing the focus to capital sentences, the argument can be made more clearly and much more persuasively.

The structure of this Comment is as follows. Part I erects a skeletal review of retributive justice in general and a defense of character

crimes are male and that such number has held steady for as long as records have been kept).

⁸ *Infra* Part III.D.

⁹ After a long slumber, retributivism has enjoyed a renaissance in the last few decades. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 656 (1989) (discussing rekindled interest in the retributive theory of justice). See generally, e.g., GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 416 (1978) (noting rekindled interest in retributive theories of punishment); JOHN KLEINIG, *PUNISHMENT AND DESERT* (1973) (discussing approaches to punishment including retributivism); RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY & DESERT* (1979); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976) (documenting a study considering the future of an offender after conviction); J.B. Cederblom, *Introduction to JUSTICE AND PUNISHMENT* 1 (J.B. Cederblom & William L. Blizek eds., 1977) (commenting on the "revival of retributivism"); Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781 (exploring the recent shift towards retributivism); J.D. Mabbott, *Punishment, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 165 (Gertrude Ezorsky ed., 1972) (defending the retributive theory of punishment).

¹⁰ See *infra* Part I.C.

¹¹ Since the beginning of Western philosophy, the project of ethical human behavior has been inspired by "man's longing for salvation." LEON GRINBERG, *GUILT AND DEPRESSION* 29 (Christine Trollope trans., 1992).

retributivism specifically. It is the theory within which the Supreme Court and the public have embedded justifications for capital punishment and the only theory that sufficiently accords our intuitions with the law. Part II defines and explains the agents of change. Guilt, remorse, and penance (the "trilogy") are important emotional and normative mechanisms through which desert is either exhausted or bartered away and through which wrongdoers alter their central character. Part III is the heart of the argument: the Transformation Thesis argues for the dejustification of the death penalty under conditions when the trilogy changes the prisoner's character from empty and hollow to compassionate and empathic. Part IV argues for a legal application of the Transformation Thesis. Under the Eighth Amendment's proportionality doctrine, the transformed wrongdoer may have a controversial and untested constitutional right to habeas corpus relief. If not, an administrative solution is proposed to guarantee that only those deserving of capital punishment would, in fact, receive it.

It should be made clear up front what this Comment is not about. It is not about mercy. Alwynne Smart observes that there are two conceptions of mercy.¹² The first way to think about mercy is as a pressure release valve that helps to "avoid an unduly harsh penalty," in other words, "to avoid an injustice."¹³ This notion of mercy has been rightfully criticized as no mercy at all.¹⁴ Doing justice does not mercy make. The second way to think about mercy is as the benevolent enforcement of "less than the deserved punishment."¹⁵ This is more likely what we mean by mercy, and it is a notion not addressed here.¹⁶

¹² Alwynne Smart, *Mercy*, in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 212, 227 (H.B. Acton ed., 1969).

¹³ *Id.*

¹⁴ See Malla Pollack, *The Under Funded Death Penalty: Mercy As Discrimination in a Rights-Based System of Justice*, 66 *UMKC L. REV.* 513, 518-19 (1998) (arguing that Smart's first conception of mercy is merely justice in disguise).

¹⁵ Smart, *supra* note 12, at 227; see also Andrew Brien, *Mercy, Utilitarianism and Retributivism*, 24 *PHILOSOPHIA* 493, 503 (1994) (explaining that mercy involves people "receiving something less" than what they deserve); Claudia Card, *On Mercy*, 81 *PHIL. REV.* 182, 187 (1972) ("An offender is shown mercy when the penalty which he deserves for his offense, or which others have the right to impose for it, is reduced or suspended or waived . . .").

¹⁶ This articulation of mercy implicates an old issue that I do not intend to solve here:

Mercy is a virtue. Justice is a virtue. Justice involves giving persons in relevantly similar situations like punishments (or rewards). Mercy involves changing (tempering) the results reached through justice. Mercy must, therefore, be unjust or a subset of justice. Mercy, however, cannot be justice: justice is obligatory and requires equal treatment of like cases; mercy is supererogatory

This Comment does not argue for giving a wrongdoer anything except what he deserves. In discussing our response to remorse and ethical transformation, it should become clear why we have a duty under retributive *justice*, not soft-hearted, ungrounded absolution, to mitigate a sentence of death under certain special circumstances. A preliminary review of retributive justice will help us to better understand the terms of the debate and provide grounding for the Transformation Thesis.

I. RETRIBUTIVE JUSTICE

A. Moorean Theory and Negative Retributivism

Retributive justice is the theory that offenders should be punished "because and only because" they deserve punishment.¹⁷ The "correct" amount of punishment is that amount commensurate or "equal" to the "moral seriousness of the offense."¹⁸ Punishing wrongdoers may have certain side effects, such as provoking or deterring other criminal acts, but for the retributivist these effects are reasons for neither abstaining from nor applying punishment.¹⁹ Punishing those who deserve it is an intrinsic good, a good in and of itself.²⁰

Michael Moore helps to put a finer point on retributive theory by delineating what it is not.²¹ First, retributivism does not necessarily commit itself to *lex talionis*, or punishment meted out under the principle of requiring the blinding of those who wrongfully blind others.²² Neither does retributive justice necessarily mandate capital sentences: "It is quite possible," argues Moore, "to be a retributivist and to be

and cannot, therefore, *require* anything.

Pollack, *supra* note 14, at 516.

¹⁷ MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 153 (1997).

¹⁸ LOUIS P. POJMAN & JEFFERY REIMAN, *THE DEATH PENALTY: FOR AND AGAINST* 9 (1998).

¹⁹ See MOORE, *supra* note 17, at 153 (explaining that the collateral effects of punishment do not make the application of punishment just under a retributivist view).

²⁰ See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 231 (5th ed. 1984) ("[S]uffering for moral evil voluntarily done, is itself just or morally good."); MOORE, *supra* note 17, at 87-88 (explaining that whereas punishment is an instrumental good under utilitarian theories, for retributivism the application of deserved punishment is intrinsically good).

²¹ MOORE, *supra* note 17, at 88-91 (explaining qualities of punishment that are wrongfully identified as being retributivist).

²² See *id.* at 88 (arguing that retributivism is not itself an argument for a particular kind of desert).

against both the death penalty and *lex talionis*.²³ Why? Because to say that some punishment is deserved does not establish what kind of punishment is appropriate.

Second, Moore explains that retributivism is not the view that punishment is justified where it quenches victims' vengeful impulses, suppresses vigilantism, or otherwise satisfies the preferences of citizens at large.²⁴ The retributivist does not mind these kinds of socially useful side effects leeching from desert-based punishment, but they cannot be original justifications.²⁵ Nor is retributivism to be "confused with [a] denunciatory theor[y]" that justifies punishment "by the good consequences it achieves—either . . . psychological satisfactions, . . . the prevention of private violence, or the prevention of future crimes through the educational benefits of such denunciation."²⁶

Third, retributive justice does not dictate the shape of formal justice, or the principle of "treating . . . like cases alike."²⁷ Just because I am to be punished according to my desert, it does not follow that I should also be punished in a way and to the extent others in my predicament were punished in the past. Others like me may have accidentally been punished too lightly, or too harshly, in which case my punishment, were it to follow theirs, would clash with my desert.²⁸ "Equality," argues a noted death penalty theorist, "seems morally less important than justice. . . . Justice requires that as many of the guilty as possible be punished, regardless of whether others have avoided punishment."²⁹

²³ *Id.*

²⁴ *See id.* at 89-90 (distinguishing instrumental goods from desert).

²⁵ *See* J.D. Mabbott, *Punishment, in THE PHILOSOPHY OF PUNISHMENT* 39, 40 (H.B. Acton ed., 1969) ("The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with the just punishment alone.").

²⁶ MOORE, *supra* note 17, at 90. *But see* Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 397-423 (1965) (defending the denunciatory view of retributive justice).

²⁷ MOORE, *supra* note 17, at 90-91. *But see* H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *INQUIRY* 249, 260 (1965) (arguing that retributivism is a "particular application of a general principle of justice, namely, that equals should be treated equally and unequals unequally").

²⁸ This is true even in the context of capital punishment. Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 *U. PA. L. REV.* 795, 826 (1998) (arguing that in the context of capital punishment "the offender who warrants the death penalty and receives it does not warrant the penalty any less because some others who also warrant the death sentence escape it").

²⁹ Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 *HARV. L. REV.* 1662,

Last, unlike Moore,³¹ I will adopt a negative retributive theory:³¹ the guilty and *only* the guilty should be punished.³² Negative retributivism is a fuller account of punishment than Moore's alone, because it tells us how to treat not only the guilty, but the innocent as well.

Retributivism has been criticized as a notion too broad to be meaningful. Of course we should punish those who deserve punishment, but how do we know who deserves what? Without an explanation of desert, retributivism begins to resemble a mere tautology.

A death-penalty-focused desert analysis will often display at least five broad characteristics. First, desert presumes a moral universe in which individuals have a genuine opportunity to choose for themselves various courses of action³³ and consequently reap the benefits or detriments of that choice.³⁴ Second, as Moore explains, culpable wrongdoing powers desert.³⁵ Wrongdoing has a physical,³⁶ as well as a

1663 (1986).

³¹ See MOORE, *supra* note 17, at 88-89 (distinguishing negative retributivism from retributivism simpliciter).

³² John L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in PHILOSOPHY OF LAW 677, 677-84 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991); see also John L. Mackie, *Morality and the Retributive Emotions*, CRIM. JUST. ETHICS, Winter/Spring 1982, at 3, 4 (observing that the principle of negative retributivism is "widely, perhaps universally, felt to have . . . an immediate appeal").

³³ See POJMAN & REIMAN, *supra* note 18, at 9 (1998) (arguing that the traditional retributivist position requires that only the guilty be punished); A.M. Quinton, *On Punishment*, 14 ANALYSIS 133, 135-36 (1953) (arguing "that only the guilty are to be punished and that the guilty are always to be punished").

³⁴ See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 93 (1989) [hereinafter DEAN MOORE] ("A retributivist believes that there are genuine choices present in the world, that people can rationally choose among them, that people are capable of acting on their choices.")

³⁵ See NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 154 (1988) (explaining that retributive justice is grounded in liberal notions of autonomy and choice and that radical retributivism views the wrongdoer as not only deserving punishment, but having a right to be punished); POJMAN & REIMAN, *supra* note 18, at 13 ("Those who sow good deeds would reap good results, and those who choose to sow their wild oats would reap accordingly."); see also TOM SORELL, MORAL THEORY AND CAPITAL PUNISHMENT 147-48 (1987) (noting some difficulties with more radical notions of free will, but concluding that at the very least we will to be free). John Rawls has criticized the "as you sow so shall you reap" notion of desert by arguing that to the extent that none of us are responsible for our natural endowments, proclivities, and inclinations, having no part in choosing our parents, our bodies, intellect, or character, we cannot be held responsible for the good or bad outcomes of our acts. JOHN RAWLS, A THEORY OF JUSTICE 65, 86-93 (rev. ed. 1999).

³⁶ MOORE, *supra* note 17, at 168 ("To say that a person deserves punishment is to say that he has culpably done wrong . . .").

³⁷ Professor Leo Katz explains, "one of the most basic rules of the criminal law" is that "[o]ne is liable for [one's] acts." LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 208 (1996).

mental, component.³⁷ One must have done the wrong in a particular state of mind.³⁸ Third, desert for a retributivist is an objective notion.³⁹ No normative authority inheres in mere subjective claims that we can and should punish wrongdoers or that wrongdoers are required to submit to punishment simply because the majority wills it.⁴⁰ The fourth is a related point, namely, desert has qualities of a right.⁴¹ The state has a right to punish those who deserve punishment and, conversely, those who deserve punishment are obligated to submit.⁴² Fifth, punishment is proportional to desert, and desert is proportional to the severity of the wrong committed.⁴³ The more evil the act, the

³⁷ See *id.* at 213 (indicating that a crime “can be committed intentionally, knowingly, recklessly, or negligently”).

³⁸ See *id.* (indicating that the bad act must include an aspect of culpability).

³⁹ See POJMAN & REIMAN, *supra* note 18, at 13 (describing the concept of desert as presuming an “objective morality”). Moore, a staunch retributivist, has written extensively on the objective quality of “moral reality.” Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1154-56; Michael S. Moore, *Good Without God*, in NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 221 (Robert P. George ed., 1996); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2460 (1992).

⁴⁰ Absent independent truth to the desert claim, the state’s assertions of right become mere tyrannical force. In this way, under Lockean theory, a claim of desert may be thought of much like a claim of right. Where the state diverges from the natural law—an objective force—in applying punishment or in any other respect, it, by definition, engages in tyranny and thus “may be opposed as any other man who by force invades the right of another.” JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 101 (J.W. Gough ed., Basil Blackwell 3d ed. 1976) (1690).

⁴¹ John Locke found two fundamental qualities emanating from the “law of nature”—duties and liberties. *Id.* at 4-5 (“But though this be a state of liberty, yet it is not a state of license . . .”). Some believe that Locke emphasizes natural liberties over “natural duties or obligations.” LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 226-28 (1953). Others have advanced the opposite: “Law and duty, not right, is the foundation of Locke’s ethics.” David Gauthier, *Why Ought One Obey God? Reflections on Hobbes and Locke*, 7 CANADIAN J. PHIL. 425, 432 (1977). But the most plausible view marries the two aspects, liberties and duties. *E.g.*, Knud Haakonssen, *Divine/Natural Law Theories in Ethics*, in 2 *THE CAMBRIDGE HISTORY OF SEVENTEENTH-CENTURY PHILOSOPHY* 1317, 1348 (Daniel Garber & Michael Ayers eds., 1998) (“[N]atural rights are powers to fulfil the basic *duty* of natural law.” (emphasis added)). Duties and liberties are the two key qualities of any right.

⁴² See MOORE, *supra* note 17, at 154 (“[O]fficials have a duty to punish deserving offenders and . . . citizens have a duty to set up and support institutions that achieve such punishments.”); K.G. Armstrong, *The Right to Punish*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 136, 136 (Gertrude Ezorsky ed., 1972) (indicating that retributive justice “gives the appropriate authority the *right* to punish offenders”); see also David Dolinko, *Some Thoughts About Retributivism*, 101 *ETHICS* 537, 542 (1991) (naming “bold retributivism” as the punishment-obligating theory and contrasting “modest retributivism,” which only allows the state to punish). *But see* POJMAN & REIMAN, *supra* note 18, at 92 (arguing that it is the victim who holds the right to punish).

⁴³ See POJMAN & REIMAN, *supra* note 18, at 15 (arguing that the original action is

more intense the desert. The more intense the desert, the more egregious the punishment.⁴⁴ Much of the following discussion hinges upon this fifth general characteristic. As argued at length below, the proportionality aspect of desert mandates mitigating punishment when a wrongdoer undergoes an authentic character transformation. This is because character affects desert, and as the wrongdoer changes his character he necessarily changes the punishment he is owed.

B. Character Retributivism

Jeffrie Murphy explains that retributivism is the theory of punishment that confers upon wrongdoers what they deserve. He identifies at least five senses of desert, and thus at least five basic kinds of retributive justice: "desert as legal guilt; desert as involving *mens rea* . . . ; desert as involving responsibility . . . ; desert as a debt owed to annul wrongful gains from unfair free-riding (the Herbert Morris theory); and, finally, desert as involving ultimate character—evil or wickedness in some deep sense."⁴⁵ Murphy states that an analysis of desert embodied in the ultimate character of the wrongdoer is called character retributivism.⁴⁶ Immanuel Kant, Michael Moore, and even Murphy himself have sustained and defended this view.⁴⁷ Character retributiv-

the basis of evaluating the appropriate measure of desert); Nathan Brett, *Mercy and Criminal Justice: A Plea for Mercy*, 5 CANADIAN J.L. JURISPRUDENCE 81, 90 (1992) (indicating that Canada has formally recognized proportionality as a crucial element of desert). Kant understood that punishment was context-sensitive and agent-relative. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 141-42 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). A rich man, for example, is often poorly punished by a pecuniary fine, but might be more effectively retributed through public humiliation. *Id.*; see RALPH D. ELLIS & CAROL S. ELLIS, *THEORIES OF CRIMINAL JUSTICE: A CRITICAL REAPPRAISAL* 71 (1989) (discussing prorating punishment).

⁴⁴ For a discussion of the difference between ordinal and cardinal proportionality in desert theory, see Andrew Ashworth, *Sentencing Aims, Principles, and Policies*, in FOUNDATIONS OF CRIMINAL LAW 333, 342 (Leo Katz et al. eds., 1999). See also DEAN MOORE, *supra* note 33, at 98 (arguing that under proportionality, pardons are appropriate when "the offender has already suffered enough[,] . . . the offender stands to suffer too much because of special circumstances[, or] to relieve any punishment that is too severe").

⁴⁵ Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in THE PASSIONS OF LAW 149, 153 (Susan A. Bandes ed., 1999).

⁴⁶ For a detailed comparison between character retributivism and Herbert Morris's theory, see generally Jeffrie G. Murphy, *Repentance, Punishment and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143 (Amitai Etzioni & David E. Carney eds., 1997).

⁴⁷ See Murphy, *supra* note 45, at 153 (explaining that Kant defends character retributivism in *The Metaphysics of Morals*, Moore defends it in *Placing Blame*, and that the author himself has defended the view in *Forgiveness and Mercy*); see also KANT, *supra* note

ism, the notion that wrongdoers should be punished in proportion to their own inner wickedness, may be thought of as the kind of punishment "that God might properly administer, on that final Day of Judgment."⁴⁸ This particular strain of punishment is well known in the prosecution of capital crimes. Murphy writes:

In many American states, for example, capital murder's *mens rea* requirement of "malice aforethought" may be implied from recklessness if a killer is said to have the mental state or character defect variously described as "an abandoned and wicked heart," "a depraved heart," "a depraved mind," "wickedness of disposition, hardness of heart, recklessness of consequences and a mind regardless of social duty," "wickedness of heart or cruelty," or (in the Model Penal Code) "extreme indifference to the value of human life." Even when a concern with inner wickedness does not find its way into the definition of the crime, it often arises dramatically when character is considered for purposes of sentencing—particularly state level capital sentencing where such adjectives as "cruel," "heinous," and "depraved" loom large in characterizing aggravating factors.⁴⁹

Whatever can be said of this view of proper punishment, it cannot be accused of failing to attempt to fix itself upon the highest, most grand aspirations we have for justice. For a time Murphy concurred,⁵⁰ but as of late, he has come to change his mind.⁵¹ Interestingly, character retributivism's conceptual flaw seems to be that it is too grand, too ambitious.⁵² Murphy is troubled that in applying punishment we would be tempted to turn our contempt for the criminal, his crime, his sick inner character, into outright cruelty.⁵³ It is one short step away from viewing the wrongdoer's fundamental character as termi-

43, at 142; MOORE, *supra* note 17, at 104-52; JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 88-110 (1988).

⁴⁸ Murphy, *supra* note 45, at 153. Claudia Card has argued that cosmic justice, as suggested by Dante through his conception of Hell, involves an analysis of desert in terms of character. Card, *supra* note 15, at 185.

⁴⁹ Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 79-80 (1995) (footnote omitted) (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 461 (1991)).

⁵⁰ Murphy, *supra* note 45, at 154 (celebrating "the moral legitimacy of character retributivism" before qualifying that celebration).

⁵¹ *Id.* Murphy has long criticized character retributivism as in tension with the modern liberal state. Murphy, *supra* note 49, at 83-84. Facially I believe Murphy is wrong on this point as well, but this discussion is beyond my focus here.

⁵² Murphy, *supra* note 45, at 158-59 (warning against "overdramatizing and overmoralizing" a holy war of good against evil implied in viewing just punishment through the lens of character retributivism).

⁵³ *Id.* at 154-55.

nally rotten to outright and total condemnation.⁵⁴ Murphy's recent ruminations on Nietzsche⁵⁵ have convinced him that "the possibilities for self-deception" when evaluating the character of wrongdoers "are enormous,"⁵⁶ and our failure even to approximate accurate calibrations of punishment under this theory will, more often than not, result not in justice, but mere hard-heartedness. "Realizing that we might be motivated not by justice but by cruelty should make us pause before we confidently march forward under the banner of character retributivism."⁵⁷ But, in the end, Murphy's impassioned critique is not all that demanding and his concerns are not all that new. The difficulties involved in self- and other-knowledge are no bars, and certainly no unique bars to the conceptual application of character retributivism.

Murphy argues that deep cognitive obstacles exist in discerning accurate valuations of a wrongdoer's desert under character retributivism because it is difficult enough to know one's self, let alone another's deep character, the state of that person's heart, and the extent of his responsibility for his character.⁵⁸ But first, as Murphy readily admits, this is merely a reformulation of the long pondered problem of other minds: how do we know what we think we know about others' states of mind, their beliefs, dreams, knowledge, and intents? There is no sense in which character retributivism is uniquely hobbled by this problem more than any other notion that requires us to come to conclusions about others' states of mind. Love is a good example. The reductio of Murphy's other minds concern would vitiate the possibility of ever knowing, regardless of empirical data, that others love you. This cannot be right.

Second, the other minds argument in the context of a criminal trial proves too much. Murphy concedes that the very backbone of the criminal law, the mens rea requirement, faces "nontrivial cognitive problems" from an other minds charge. But no alternative to the investigation into a wrongdoer's guilty mind is offered, and none is self-evident. Giving up mens rea altogether is no better. Within the concept of mens rea are embedded all the assumptions of ourselves as

⁵⁴ *Id.*

⁵⁵ Murphy writes in a footnote, "Nietzsche is best known, of course, for his suggestion that the idea of just or deserved punishment may be a mask for cruelty, may turn us into the very kind of monsters we seek to punish." *Id.* at 167 n.37.

⁵⁶ *Id.* at 154.

⁵⁷ *Id.* at 155.

⁵⁸ *Id.* at 157.

autonomous agents, with normative capacity to choose among various better and worse alternatives—in short, beings who live in a world of ethical meaning. If the other minds critique is effective against character retributivism, it is equally effective against mens rea—neither is acceptable. Both must be rejected.

Third, a full-blown other minds argument cannot help but land us in solipsism. If we cannot know others, we cannot even be certain of their existence as human beings like ourselves. Solipsism ends not just the retributive project, in any of its flavors, but any kind of moral theoretics, including notions of compassion, justice, or kindness. For Murphy, a thinker first concerned with, at worst, accidental cruelty, this must be an unacceptable outcome.

Murphy may respond that his real concern is not other minds, per se, but the sort of cruelty born of self-delusion that we are likely to foist upon others in the name of character retributivism.⁵⁹ But it is unclear why we would assume that, left up to their own devices, individuals tend to be cruel, not kind. Murphy says that contempt turns to cruelty, but if this were ineluctably so, then Nietzsche (the thinker from whom Murphy seems to be drawing many of his assumptions about human nature) would not need to warn, as Murphy acknowledges in a footnote,⁶⁰ about the danger of society, tending toward forgiveness, becoming, over time, “soft, and tender.”⁶¹ Moreover, as others have argued,⁶² and as my argument below demonstrates,⁶³ no part of character retributivism demands cruelty of us. To the contrary, character retributivism is the mechanism through which a clear dejustification of the application of a capital sentence (in the particular case) may be demonstrated.⁶⁴ By any standard, the commutation of a death sentence cannot be characterized as cruel.

Murphy also argues that retributive judgments are subject to two moral obstacles. First, our unvirtuous judgments of others may involve hypocrisy, and second, they may be motivated by the base pas-

⁵⁹ Other analysts have likewise been concerned that retributive sentencing will often be inappropriately harsh. *E.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992).

⁶⁰ Murphy, *supra* note 45, at 167 n.37.

⁶¹ FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 114 (Walter Kaufmann trans., Vintage 1989) (1886).

⁶² Leo Katz et al., *Notes and Questions*, in *FOUNDATIONS OF CRIMINAL LAW* 348, 350 (Leo Katz et al. eds., 1999).

⁶³ See *infra* Part III (arguing that under certain circumstances character transformation dejustifies capital sentences in a retributive scheme).

⁶⁴ *Infra* Part III.

sions of envy, malicious hatred, and spite.⁶⁵ But if these are problems, they are not retributive problems. That is, we may be hypocrites, casting judgement upon others based upon low passions, but this does not necessarily make our judgments wrong. Second, these are not conceptual issues, but rather issues of application. They could very well be solved by striving to place the judgments of punishment in the hands of the least base and least hypocritical among us. If Murphy's deeper claim is that, when it comes to judging others, we are all base hypocrites, then this is likely an assumption, I would hope, not widely shared and facially counterintuitive. Third, to the extent that Murphy's concern here is sound, it would indict not just retributive justice, but likely all theories of punishment.⁶⁶ Estimations of psychological deterrent effects in deterrence theory or valuations of a wrongdoer's "criminality" in rehabilitation theory are both vulnerable to base emotional tampering, regardless of their claims to empirical or scientific objectivity.⁶⁷

Third, Murphy's deeper concern about our personal base hypocrisy is revealed in his defense of Christ's sermon on the mount.⁶⁸ In

⁶⁵ Murphy, *supra* note 45, at 157.

⁶⁶ Katz et al., *supra* note 62, at 350 (asking, rhetorically, if demands for knowledge of a wrongdoer's desert are any more difficult than demands for knowledge of net social utility in consequentialist sentencing).

⁶⁷ Presuming that soft sciences—such as the social sciences underlying utility calculus or psychology disciplines that undergird rehabilitation therapies—even resemble the hard sciences, there are at least three major ways in which a scientist's personal values enter into the scientific process:

First, scientific facts are not immanent in an objective reality waiting to be discovered by any scientists who look in the right place. Instead, they are constructed and validated through a social process dominated by those in the scientific community who possess authority to do so. Second, this validation process is itself shaped by the scientific paradigms, the shared assumptions and prejudices of the professional community that dominate the thought of a particular period. These paradigms hold sway for reasons that may have less to do with their intrinsic merit than with their support of existing social structures, including the scientific establishment. Third, the authority to validate science rests in part on boundary-drawing and other strategic behavior by scientific disputants, behavior that can effectively exclude their less influential competitors.

Peter H. Schuck, *Multi-Culturalism Redux: Science, Law, and Politics*, 11 YALE L. & POL'Y REV. 1, 15-16 (1993).

⁶⁸ "He who is without sin among you, let him throw a stone at her first." *John* 8:7. Christ's admonition against casting stones is not a warning about casting judgments whatsoever; at best it is a warning about the risks of judging others. Judging is not risk free. But failing to evaluate right from wrong and discern good from evil has costs too. Among them is a dangerous and ape-like quietism of hearing, seeing, and speaking no evil.

an effort to express greater “generosity of spirit,”⁶⁹ Murphy concludes that our judgments of others must occur only with “caution, regret, humility, and with a vivid realization that we are involved in a fallible and finite human institution.”⁷⁰ But here he has gone too far as well. He is right to say that moral judgments are difficult and that character retributivism demands that we, to some extent, risk hubris, self-involvement, hypocrisy, and, even at times, acting from cruelty and base viciousness. But this potential for fallibility does not damn the venture outright. As actors in a moral universe, our judgments are not supererogatory. Rather, we are required on a daily basis to discern, within ourselves and within others, good from bad and right from wrong. The possibility for abuse and self-deception is dazzling, but the possibility of moral quietism—in essence, opting out of the entire challenge for fear of belying our own sallow character, for fear of being perceived as playing “God”—is even more daunting.⁷¹ Eating of the tree of good and evil has cast us into the moral universe.⁷² Once there, it is our unique province not as gods, but as people, to denounce evil and to reject vice when we see it. Skepticism here about our ability to fulfil this mandate is a skepticism about our ability to be full human beings.

One last critique should be considered. Murphy’s more general grudge against character retributivism may be interpreted as against a noncharacter flavor of retributive justice. That is, retributive justice might be thought of exclusively as a backward-looking theory of punishment, examining the guilty mind and the bad act of the criminal at the time of commission. In that way, retributivism would leave no room for discussions of desert as determined by after-the-fact character analysis. Put simply, retributivism is in the business of punishing the act, not the man. But this is a very narrow conception of retributive justice.⁷³ There seems to be no apparent reason why retributivism would not or could not involve character analysis in desert determinations.⁷⁴ Objections, like Murphy’s, as to how character retributivism

⁶⁹ Murphy, *supra* note 45, at 162 n.5.

⁷⁰ *Id.* at 160-61.

⁷¹ *Id.* at 161.

⁷² *Genesis* 3:6-19.

⁷³ While discussing this issue, even Professor Michael Moore, a dyed-in-the-wool retributivist, described this particular concern as “semantic.” Interview with Michael Moore, Professor of Law and Philosophy, University of Pennsylvania Law School, in Phila., Pa. (Jan. 2000).

⁷⁴ See also Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 353 (1992) (“[T]here remains an

must be corrupt in its application, or conceptually overambitious, fail. Moreover, our analysis of desert in the current administration of American justice often examines the wrongdoer's character.⁷⁵ For example, we do not execute the insane, regardless of their mental state at the time of the murder.⁷⁶ This cannot be explained by rote recitation of the elements of the crime alone. And interestingly, the newly conceived three-strikes laws appear to take character quite seriously in meting out punishment.⁷⁷ Arguably, three-strikes laws have a deterrent effect, but equally arguably, a third-time felon would tend to deserve, in the language of character retributivism, more punishment than the first-time felon—not necessarily because the third crime was more egregious than the previous two, but because the wrongdoer has

argument against culpability as the sole focus of capital sentencing.”).

⁷⁵ Judge Noonan of the Ninth Circuit writes: “You can only be sentenced for committing a particular discrete act, but when you are sentenced you may be sentenced on how you have conducted all the rest of your life. [The] character-focused approach to punishment [was made central by] the California death penalty statute.” John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011, 1013 (1993).

Lockett v. Ohio and its progeny entitle the offender to introduce, and to have the sentencer consider as a basis for rejecting the death penalty, any evidence relating to the offender's character, record, or crime. 438 U.S. 586, 604 (1978) (Burger, C.J., alternative holding) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); see also *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (plurality opinion) (applying the *Lockett* Court's conclusion as a rule). Justice O'Connor has defined the inquiry into desert for capital crimes as including evidence about the defendant's background and character. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

⁷⁶ In *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), the Court held that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane,” because such an execution would be “savage and inhuman,” *id.* at 406 (internal quotation omitted), “a miserable spectacle, both against Law, and of extrem [sic] inhumanity and cruelty,” *id.* at 407 (internal quotation omitted), “cruel and inhumane,” *id.* at 408 n.1 (internal quotation omitted), and “abhorren[t],” *id.* at 409. If we were punishing merely the act and not the man, such a prohibition would be nonsensical. In addition, the Court's language here, discussing matters of cruelty and inhumanity, makes it fairly clear that in the execution of the insane, deterrence is a nonissue.

⁷⁷ Under most three-strikes schemes, a wrongdoer who has committed a third felony is not punished only for that particular crime, but bears an additional penalty for having failed to take the opportunity of his second and third chances, regardless of whatever debt the wrongdoer has already paid for his previous transgressions. See *Monge v. California*, 524 U.S. 721, 724 (1998) (“Under California's three-strikes law, a defendant convicted of a felony who has two qualifying prior convictions for serious felonies receives a minimum sentence of 25 years to life; when the instant conviction was preceded by one serious felony offense, the court doubles a defendant's term of imprisonment.” (internal quotation omitted)).

proven himself to be a person without a conscience, without genuine guilt or remorse, in short, a person of bad character. This is likely the intuitive appeal behind the three-strikes laws. Conceptually, there is no problem with examining after-the-fact character in a retributive scheme. Limiting such a consideration would only serve to truncate a fuller, more robust desert analysis.⁷⁸

C. *Justifying the Death Penalty*

Retributive justice,⁷⁹ more than any other theory of punishment, is central to discussions of the death penalty. Neither of the other two major vying theories, deterrence nor rehabilitation, sufficiently explains why we sometimes put prisoners to death.

Deterrence theory argues—from within a consequentialist framework⁸⁰—that since punishment (or, more precisely, the risk of punishment multiplied by its severity) outweighs the potential gains of criminal activity (or the likelihood of gains multiplied by its intensity), would-be criminals are deterred from violating the law.⁸¹ The death penalty, ostensibly, is the most effective deterrent available, because “people fear death more than anything else.”⁸² But empirical studies have never been able to establish what deterrent effects, if any, flow from capital sentencing.⁸³ In fact, a recent, well-lauded *New York Times*

⁷⁸ “An inference from the wrongful act to the actor’s character is essential to a retributive theory of punishment.” GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3.1 (1978).

⁷⁹ Hereinafter, all discussions of retributive justice are presumptively discussions of character retributivism.

⁸⁰ Ashworth, *supra* note 44, at 335.

⁸¹ See Karl F. Schuessler, *The Deterrent Influence of the Death Penalty*, in *THEORIES OF PUNISHMENT* 181, 182 (Stanley E. Grupp ed., 1971) (explaining that deterrence is based on a psychological hedonic calculus).

⁸² *Id.*

⁸³ At best, studies on the deterrent effect of the death penalty are confusing and contradictory. See generally Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* (James R. Acker et al. eds., 1998); Bijou Yang, *Economic Analysis of the Deterrent Effect of the Death Penalty*, in *THE DEATH PENALTY: ISSUES AND ANSWERS* 83, 83-105 (David Lester ed., 2d ed. 1998) (reviewing research on the deterrent effect of the death penalty from an econometric perspective).

Michael Ross, an inmate at the correctional institute in Somers, Connecticut, speaks from experience when he argues that deterrence has a negligible influence on the mind of a murderer:

What [deterrence theory] assum[es] is that a murderer thinks as rationally as [others] do.

....

study suggests that an inverse relationship may even exist between murder and the death penalty.⁸⁴ Capital punishment appears to accelerate homicide rates.⁸⁵ Certainly the great majority, sixty-seven percent, of law-enforcement officials "do not believe capital punishment reduces the homicide rate."⁸⁶ And, in the sentencing of capital offenders, utilitarian goals often make little difference to the public anyway. Citizens overwhelmingly believe that deterrent effects are really beside the point in the administration of the death penalty.⁸⁷

I have been incarcerated for more than 10 years now and I have yet to meet anyone who expected to be caught and punished for their crimes. Rather, they expect to get away with it because of good planning. There can be no deterrent value in a punishment that one does not ever expect to receive.

A second type of murder is equally unlikely to be deterred by capital punishment: the spontaneous, emotionally driven murder. Such a murderer doesn't . . . coolly consider the foreseeable consequences of their actions. . . .

Fear of death, in itself, will not prevent this type of crime.

Michael Ross, *Criminals Are Not Deterred by the Death Penalty*, in DOES CAPITAL PUNISHMENT DETER CRIME? 39, 41 (Stephen E. Schonebaum ed., 1998).

⁸⁴ "In a state-by-state analysis, The Times found that during the last 20 years, the homicide rate in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty." Raymond Bonner & Ford Fessenden, *States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1. The Times study further reports that "10 of the 12 states without capital punishment have homicide rates below the national average," and concludes "that the threat of the death penalty rarely deters criminals." *Id.*

⁸⁵ *Id.*

⁸⁶ *Death Defying*, SCI. AM., Feb. 2001, at 28.

⁸⁷ Interestingly, when asked in polls, citizens initially say deterrence is the most important element in their reasoning to support or oppose the death penalty. See, e.g., Dov Cohen, *Law, Social Policy, and Violence: The Impact of Regional Cultures*, 70 J. PERSONALITY & SOC. PSYCHOL. 961, 970 (1996) (discussing how people emphasized "protection" when supporting the death penalty); Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 145 (1983) ("[B]elief in the deterrent efficacy of the death penalty has generally been the rationale most frequently offered by Retentionists." (citation omitted)); see also Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21, 25 (1982) ("[W]hen self-reported motives for death penalty support have been measured in public opinion polls, the results usually suggest that deterrence is the major underlying motive for death penalty support."); Robert L. Jackson, *Study Assails Mandatory Drug Crime Sentences*, L.A. TIMES, May 13, 1997, at A14 ("The principal value of mandatory minimum sentences is the certainty of punishment and the deterrent message that that sends." (quoting the remarks of Rep. Bill McCollum)). Further questioning, however, belies this contention. Pollsters then ask whether conclusive proof of a deterrent's efficacy, or lack thereof, would affect the respondent's opinion. The great majority, ironically, indicate that such information would not be enough to change their positions. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 27, 32 (1994) (finding that people's attitudes toward the death penalty are not determined by their beliefs in its deterrent effectiveness); Tyler & Weber, *supra*, at 26 (finding that sixty-six percent of those who

The public does not like the idea of executing one person just because it may prevent some other person from committing a wholly unrelated crime in the future.

Rehabilitation, the second major theory of punishment, does no better in explaining capital sentencing. Whereas deterrence is grounded in consequentialism, rehabilitative theory is grounded in distributive justice,⁸⁸ the principle that we should make the "less well off better off."⁸⁹ Rehabilitation wants to portray criminals as acting not from volition but from a sort of affliction passed to them through their environment.⁹⁰ Much in the way that medicine seeks to cure a patient of disease, rehabilitation therapies attempt to cure the wrongdoer of his criminality.⁹¹ But rehabilitative theory can never justify the death penalty for the simple reason that execution is not a form of therapy and in no case will the criminal be better off for it. For whatever reason and under whatever justification the death penalty operates in America, it is not adequately explained by rehabilitation theory.⁹²

The most important point here is not, as some have argued, that retributive justice is, by a process of elimination, the best theory among three,⁹³ but that it is the primary principle under which the Court and our culture have justified capital punishment. Carol and Jordan Steiker have isolated four doctrines at the heart of the Court's

said they supported the death penalty indicated that they would still support it even if it had no deterrent value). This seems to argue for the conclusion that deterrence considerations in fact play but a minimal role in citizens' decisions to support or oppose capital punishment.

⁸⁸ The seminal proponent of distributive justice, John Rawls, has described his theory—justice as fairness—as based on "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association." RAWLS, *supra* note 34, at 10.

⁸⁹ Leo Katz et al., *Humanitarian or Scientific Alternatives to Punishment: The Rehabilitative Ideal*, in FOUNDATIONS OF CRIMINAL LAW 90, 90 (Leo Katz et al. eds., 1999).

⁹⁰ See B.F. Skinner, *Beyond Freedom and Dignity*, in FOUNDATIONS OF CRIMINAL LAW 94, 96 (Leo Katz et al. eds., 1999) ("It is the environment which is 'responsible' for the objectionable behavior . . .").

⁹¹ See Karl Menninger, *The Crime of Punishment*, in FOUNDATIONS OF CRIMINAL LAW 91, 94 (Leo Katz et al. eds., 1999) (arguing that psychiatry examines wrongdoers for a psychological condition, not a normative one).

⁹² In reference to the "most rehabilitated prisoner in America," Wilbert Rideau, the district attorney remarked, "In a murder case, I think rehabilitation is totally irrelevant." Royal Brightbill, *Why Does a Pardon Still Elude "the Most Rehabilitated Prisoner in America"?*, ATLANTA J. & CONST., Feb. 2, 1992, at M1.

⁹³ See MOORE, *supra* note 17, at 103 (arguing that "retributivism [is] the only remaining theory of punishment that we can accept").

post-*Furman* jurisprudence.⁹⁴ The first doctrine, proportionality, is an outgrowth of the Court's "concerns about 'desert' from a retributive perspective."⁹⁵ The other three doctrines, (1) fairness or equality of application in the administration of the penalty, (2) concern for individualized sentencing, and (3) heightened reliability, are arguably directed at ensuring judicious application of retributive principles.⁹⁶ Conspicuously absent from this list is a concern for the ends or values of deterrence or rehabilitation. And although the Court now permits the capital-penalty phase to serve nonretributive goals,⁹⁷ its language "seems to resonate most naturally with the language and rhetoric of retributivism."⁹⁸ I have chosen retributivism in which to embed my thesis,⁹⁹ partly because I believe it more accurately captures what we

⁹⁴ Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 371-72 (1995).

⁹⁵ *Id.* at 371.

⁹⁶ *Id.* at 371-72. Fairness (or equality) is not a retributive principle per se, but might be a useful metric by which to determine desert. For example, imagine that we measure Willow Rosenberg and determine that she is five and a half feet tall, and we do not know how tall Buffy Summers is, but we do know that she is the same height as Ms. Rosenberg. We can deduce that Ms. Summers is also five and a half feet tall. Likewise, if in the past we have determined that bad actor *A* deserved, say, ten units of punishment, we can know that bad actor *B*, if he is in all significant ways like bad actor *A*, also deserves ten units of punishment. That is, *B* does not deserve ten units *because A* deserved ten units, but rather as a matter of deduction, within a discipline fraught with uncertainty, we might calculate desert through comparative measurements. This is perhaps why the court has examined equality in the first place.

As to the other two elements, individualized sentences seem like a tip of the hat to character retributivism, and heightened reliability is clearly a retributive impulse because lower thresholds of reliability can still meet rehabilitative and, especially, (general) deterrent goals, but in no case would achieve the ends of retributive justice.

⁹⁷ See, e.g., *Harris v. Alabama*, 513 U.S. 504, 510 (1995) (holding that the purpose served by capital punishment should be left to the policy choice of the community).

⁹⁸ Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 992 (1996); see also, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (insisting that a death sentence should represent a "reasoned moral response" (citation and internal quotation omitted)). But see Garvey, *supra*, at 993 n.17 (listing articles that argue that retributive justice is incompatible with the death penalty). Going further, one theorist argues: "[T]he criminal justice system is based on the assumption that persons who commit particular offenses are deserving of punishment, and that it is possible to establish the particular punishment deserved by each offender based on the nature of her crime." Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 580 (1991) (citation omitted). The principles of "retributiv[ism] . . . of fairness and proportionality to our system of punishment" are central. *Id.* at 581.

⁹⁹ See *supra* notes 9-11 and accompanying text (explaining that this Comment begins with retributive justice because retributivism is the most nourishing theory in which to grow the Transformation Thesis).

mean when we argue about justice¹⁰⁰ and because I believe justice to be law's central theme.

II. THE TRILOGY: DEFINING AND EXPLAINING THE AGENTS OF CHANGE

This Part examines the effects of guilt, remorse, and penance on desert in a retributive scheme. Guilt, it turns out, is a disassociative emotion that serves as a gateway to remorse, but guilt alone fails to catalyze character transformation. Remorse, by contrast, serves as an expression of the rejection of the wrongdoer's bad act and the bad character that made such an act possible. Transformation begins here when remorse, harnessing emotional remonstrative force, breaks down the old self and aids in reconstructing a new one bearing a moral perspective. Penance finishes the process by exhausting guilt and remorse to make way for the newly autonomous, ethically transformed. Through guilt (initially), remorse, and penance the condemned's character is transformed.

This argument begins and is premised upon an emerging area of thought that views passions not simply as irrational and dangerous,¹⁰¹ but as indicative of deeply held beliefs and moral claims.¹⁰² Emotional epistemology, as it has been called, argues that passions have a cognitive structure that renders them, at least partially, subject to rational control and consideration.¹⁰³ This is not to say, however, that all pas-

¹⁰⁰ See generally 1 E. BRUNNER, JUSTICE AND SOCIAL ORDER 17 (M. Hottinger trans., 1945) ("From time immemorial the principle of justice has been defined as the *sum cuique*—the rendering to each man of his due."); AGNES HELLER, BEYOND JUSTICE 156-79 (1987) (arguing that retribution—the rendering to each offender her due—is the sole principle of punishment that can be called a principle of justice). Kathleen Dean Moore has argued, "One thing all retributivist theories have in common—and what distinguishes them from nonretributivist theories—is that they ground justifications in an overall view of justice." DEAN MOORE, *supra* note 33, at 93. Her conception of justice involves not only retributivism, but negative retributivism: "Punishing people who deserve punishment—and not punishing people who do not deserve punishment—is a kind of justice." *Id.* at 94.

¹⁰¹ See MURPHY & HAMPTON, *supra* note 47, at 4 (asserting that condemnation is not justified simply because certain passions may provoke dangerous conduct).

¹⁰² See *id.* at 5 (arguing that emotional states are, at least in part, states of belief).

¹⁰³ See *id.* at 5 n.7 (explaining that all negative emotions, such as guilt, shame, and resentment, "feel[] bad," such that the way in which they are distinguishable from one another is through the cognitive state that attaches to them). The notion that the way one feels is linked in essential ways to one's ethical and cognitive constitution has an impressive pedigree. See ARISTOTLE, SELECTIONS 359 (Terence Irwin & Gail Fine trans., Hackett Publishing Co. 1995) (n.d.) (indicating that the highest ethical condition, happiness, is that which is most pleasant). For Aristotle, happiness is itself an ethical condition. *Id.* at 355. Under an objective-oriented view of retributivism, how-

sions in all circumstances ought to dictate our moral judgments. Some emotions, such as those resulting from phobias, are entirely disconnected from the external events that trigger them.¹⁰⁴ Emotions of intense fear in the face of minimal danger or, conversely, deep pleasure in the face of ruin are irrational¹⁰⁵ and should not be considered when making normative evaluations. But within limits, emotions are useful in expressing cognitive appraisals.¹⁰⁶ Dan Kahan and Martha Nussbaum compellingly argue that emotions can inform the most “brutally and uncompromisingly” truthful ethical conclusions.¹⁰⁷ “The law is more likely to be just,” they explain, “when decision makers are forced” to use the “evaluative conception” in their decision calculus.¹⁰⁸

A. *The Gateway of Guilt*

Within a retributive framework, emotions do not justify punishment, but they are still strong indicators of desert.¹⁰⁹ Like a forest guide who knows how to read the terrain for signs of game or the imminent approach of predators, emotions read the ethical landscape and alert us to the indicators of good and evil.¹¹⁰ Moore, in the same

ever, emotional and cognitive states may be (at best) indicators of the right, not themselves the right. See MOORE, *supra* note 17, at 131 (maintaining that emotions are “heuristic guides to moral insight,” but are not the “experience out of which moral theory is constructed”).

¹⁰⁴ “[P]hobias are irrational fears in the sense that they are directed to an object that is not in fact dangerous or reasonably believed to be so.” MURPHY & HAMPTON, *supra* note 47, at 5-6 n.7.

¹⁰⁵ All emotions may be described as irrational, but healthy emotions are at least partially rational in this sense: they accurately reflect some aspect of the outside world that is attractive or repellent. “[I]rrational or destructive or self-demeaning emotions,” as Murphy says, do not induce an internal attraction to the good and repulsion to the evil, and thus make us “enslaved” by our own broken compass. *Id.* at 9.

¹⁰⁶ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 273 (1996) (“[E]motions express cognitive appraisals . . . [T]hese appraisals can themselves be morally evaluated, and . . . persons (individually and collectively) can and should shape their emotions through moral education.”).

¹⁰⁷ *Id.* at 274.

¹⁰⁸ *Id.* Paul Gewirtz finds in the Greek classic, *The Oresteia*, a deep and “haunting” understanding of the law: “[L]aw is not and cannot be an enterprise of reason alone; it includes the nonrational emotions as an essential and central ingredient. Law may be in part—perhaps in largest part—a process of reasoned judgment, but it also engages forces beyond reason, like most other things in life.” Paul Gewirtz, *Aeschylus’ Law*, 101 HARV. L. REV. 1043, 1049 (1988).

¹⁰⁹ See MOORE, *supra* note 17, at 131 (indicating that emotions are “heuristic guides to moral insight” but not themselves the “experience out of which moral theory is constructed”).

¹¹⁰ See *id.* at 116 (suggesting that emotions “generate moral insights”). Some phi-

vein as Kahan and Nussbaum, argues that the emotion of guilt may be helpful in determining desert.¹¹¹ He recounts the ugly tale of Richard Herrin, a Yale graduate student, who took a claw hammer to the back of his ex-girlfriend's head while she was asleep, bludgeoning her to death.¹¹² Moore asks us to put ourselves in Herrin's place.¹¹³ What would we feel, having just brutally murdered a former lover? Moore says, "[m]y own response, I hope, would be that I would feel guilty unto death. I could not imagine any suffering that could be imposed upon me that would be unfair because it exceeded what I deserved."¹¹⁴ Our own hypothetical feelings of guilt in this context are useful in determining what sort of punishment we would deserve: "to *feel* guilty causes the judgement that we *are* guilty, in the sense that we are morally responsible, . . . we deserve punishment . . . [and] *we ought* to be punished."¹¹⁵ If we have determined that, hypothetically, a certain amount of punishment is due us, then that same amount of punishment must, in actuality, be due Herrin.¹¹⁶ Personal (even if hypothetical) feelings of guilt, Moore concludes, can be used as an instrument in helping to determine the desert of others.¹¹⁷ But what exactly is meant by guilt?

Guilt is, primarily, a disassociative emotion. The guilty agent attempts to disconnect himself from the act at issue by suffering self-inflicted psychic punishment.¹¹⁸ Traditional psychoanalytic theory argues that we punish ourselves with guilt under these conditions in order to avoid the imminent wrath of the father. The logic here is that a just father exacts punishment commensurate with desert and does not punish redundantly for a wrong already self-retributed. Guilt, thus,

losophers have gone even further and argued that emotions are, in fact, the very grounds for our notions of desert. See generally HENRY SIDGWICK, *THE METHODS OF ETHICS* 264-94 (John Rawls ed., Hackett Publishing Co. 7th ed. 1981) (1907).

¹¹¹ MOORE, *supra* note 17, at 145 ("To the extent such outrage motivates the particular judgements that are our concern, its virtue evidences the truth of those judgements."); see also GRINBERG, *supra* note 11, at 28 (suggesting that guilt is intimately connected with the issues of what makes a good person, what makes a good society, and what is the very nature of good and evil).

¹¹² MOORE, *supra* note 17, at 145.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 147-48.

¹¹⁶ *Id.* at 148-49 (concluding that failure to use the same standard in evaluating desert for others that we use for ourselves is untenable elitism).

¹¹⁷ *Id.* at 148 (asserting that the guilt hypothetical may indicate desert).

¹¹⁸ See IRVING L. JANIS ET AL., *PERSONALITY: DYNAMICS, DEVELOPMENT, AND ASSESSMENT* 119 (Irving L. Janis ed., 1969) (describing guilt feelings as inflicted upon one's self "as a form of self-punishment").

acts as the internal, or psychic, counterpart to corporal, or bodily, punishment.¹¹⁹

Guilt alone, however, is insufficient for ethical transformation.¹²⁰ It does serve as a gateway to remorse, pricking our ears like an early warning signal of something gone awry,¹²¹ but as many of us can attest to in our personal experience, it is quite possible to feel guilty about what one has done and still fail to change, or even attempt to change, the underlying motivations, inclinations, desires, or beliefs, in short, it is possible to fail to change the character that caused the bad act to occur in the first place.¹²² This is because guilt is an instance-specific emotion.¹²³ The guilty wrongdoer may agonize over his bad act x and may even wish bad act x never occurred, but ironically will not necessarily be prohibited by that guilt from then seeking out and engaging in bad act y , even if bad act y is, in all important ways, identical to bad act x . Wrongdoers can go their whole lives feeling painfully guilty while still engaging in the wrongful behavior that produces that guilt.¹²⁴ This is because guilt is, first, instance-specific, and second,

¹¹⁹ The process is fluid not only in that internal punishment can offset external punishment, but also in that the reverse can occur as well. In this vein, Morris tells the story of a young boy who failed in his chores and thus sought punishment because “[i]t diminished the young boy’s guilt, diminished it in a way that it would not have been were the father merely to have” scolded the boy. Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 267 (1981). Here the suggestion is that external punishment can offset internal guilt and that sometimes the wrongdoer welcomes the trade.

¹²⁰ See Jeanne Shaw, *The Usefulness of Remorse*, 5 PSYCHOTHERAPY PATIENT 77, 80 (1988) (explaining that guilt alone obstructs change and “seduces one to stay the same, to fool oneself”); E. Mark Stern, *The Psychotherapy of Remorse*, 5 PSYCHOTHERAPY PATIENT 1, 1-2 (1988) (indicating that guilt is a narrow, “reactive,” and “short-lived” emotion that from a psychological perspective can never predicate any sort of authentic resolution).

¹²¹ See Frederic Feichtinger, *The Psychology of Guilt Feelings*, 8 INDIVIDUAL PSYCHOL. BULL. 39, 41 (1950) (describing guilt as an early warning “alarm signal” of our moral failures); see also Michael F. Hoyt, *Concerning Remorse: With Special Attention to Its Defensive Function*, 11 J. AM. ACAD. PSYCHOANALYSIS 435, 442 (1983) (“Remorse involves a sense of guilty and shameful condemnation . . .”).

¹²² See Feichtinger, *supra* note 121, at 41 (explaining that guilt does not preclude fixation on the guilt to the detriment of learning to “adjust, to adapt,” or in other words, to change one’s self).

¹²³ See Samuel Juni, *Remorse as a Derivative Psychoanalytic Construct*, 51 AM. J. PSYCHOANALYSIS 71, 72 (1991) (detailing various philosophers’ differentiation of guilt as referring only to “past activities” from “conscience,” which has the power to affect future acts).

¹²⁴ See Rudolf Dreikurs, *Guilt Feelings as an Excuse*, 8 INDIVIDUAL PSYCHOL. BULL. 12, 17 (1950) (indicating that guilt-bearers “do not necessarily refrain from misbehaving in the same way again”); Shaw, *supra* note 120, at 81 (suggesting that when guilt inspires one to apologize, “it is meaningless because the transgression will recur and

necessary, but not sufficient, for character transformation.

Guilt's effect on desert is likewise insubstantial. One psychology-based explanation of guilt is that the guilt-bearer believes that he is somehow better off by punishing himself rather than waiting for paternal reprimand. There is some sense of gaining the benefit of a bargain, of either getting off with less punishment than deserved or at least suffering equivalent actual punishment but dodging an associated indirect rebuke such as the disapproval of the father or the generalized (but real) fear of the unknown (in this case, the unknown punishment). This is why guilt alone has sometimes been criticized as a parsimonious and pusillanimous emotion.¹²⁵ Moreover, since a guilty conscience fails necessarily to implicate character transformation, it is subject to two additional criticisms. First, nontransformative guilt calls its own sincerity into doubt. After all, how meaningful is it really for a wrongdoer to wish the wrong had not been done if the wrongdoer is willing to commit a similar wrong in the future?¹²⁶ Second, nontransformative guilt may be attacked as ultimately superficial. If the force of guilt-inspired immolation is insufficient to reforge the wrongdoer's character such that the wrongdoer would prefer, all in all, to suffer similar guilt for similar wrongs in the future rather than stomach the additional toil of shifting his character perspective, then perhaps guilt is not as deeply wounding as we imagine it to be. For these reasons, guilt alone fails to affect substantially the wrongdoer's character and thus has little to say as to his proper desert.

To explore how this dissection of guilt fits in with Moore's, reconsider his well-known guiltless criminal. After three years in prison, Herrin remarked to an interviewer that he thought his eight- to twenty-five-year sentence "was excessive" and that a one- to two-year sentence would have been more appropriate.¹²⁷ Moore upbraids Her-

both parties know this").

¹²⁵ See Friedrich Nietzsche, *The Origin of Guilt*, in *GUILT: MAN AND SOCIETY* 27, 58 (Roger W. Smith ed., 1971) (describing guilt as a strange tool with which Christians institute degrading policies of self-imposed cruelty); Richard D. Parsons, *Forgiving-Not-Forgetting*, 5 *PSYCHOTHERAPY PATIENT* 259, 261 (1988) (indicating that guilt is "a destructive, dysfunctional state").

¹²⁶ The person who really regrets what he has done, because of his lack of understanding of himself and the situation, will not be satisfied with a "bad" conscience and feeling of guilt, but he will shoulder the responsibility for his deed and learn from it to do better. He will not hide behind guilt feelings for things past, but attempt to create an improved present.

Lydia Sicher, *Guilt and Guilt Feelings*, 8 *INDIVIDUAL PSYCHOL. BULL.* 4, 11 (1950).

¹²⁷ MOORE, *supra* note 17, at 146.

rin's "easily obtained self-absolution"¹²⁸ and further comments about how Herrin ought to feel: "[D]eep feelings of guilt seem to me to be the only tolerable response of a moral being."¹²⁹ When he reflects upon his own feelings, Moore's language takes on a self-flagellating aspect: "My own response, I hope, would be that I would feel guilty unto death. I could not imagine any suffering that could be imposed upon me that would be unfair because it exceeded what I deserved. . . . One ought to feel so guilty one wants to die."¹³⁰ The emotion Moore calls "guilt" appears to have at least three characteristics: (1) it is a deeply painful emotion; (2) it should be welcomed by the wrongdoer as a just punishment administered by, and upon, himself; and (3) it is connected to, or is a response from, his normative nature. But according to the definition set out above, guilt has few of these properties. It is painful at times, but often not painful enough to change future actions. It is administered by the wrongdoer upon himself, but sometimes unjustifiably so. For these reasons, its link to our personal ethical framework is dubious. Others have agreed and criticized Moore's description of guilt as an inaccurate epistemological indicator of desert: "We all know (even without reading Freud) that our guilts are often neurotic—misplaced and irrational and destructive."¹³¹ The force of retribution Moore expects from emotionality is not found in guilt, but in remorse. Were Moore to define the terms of his discussion as I have, he would, I believe, agree.¹³²

¹²⁸ *Id.* at 147.

¹²⁹ *Id.* at 145.

¹³⁰ *Id.*

¹³¹ Murphy, *supra* note 45, at 152.

¹³² The reasons why Moore has differed in his definition of guilt are likely threefold. First, the exact definitions of terms like guilt and remorse are no more certain than definitions of any emotional term. Guilt has been described as a concept with "blurred edges," with ideas from "sin, [and] punishment, [to] repentance, [and] purification," spinning in its penumbra. Roger W. Smith, *Introduction to GUILT: MAN AND SOCIETY* 17, 20 (Roger W. Smith ed., 1971). My definitions of guilt and remorse, admittedly, serve to advance my theory. That Moore did not happen to choose the same definitions to advance his, given the wide latitude of reasonable interpretation, is not surprising.

Second, Moore likely chose guilt, and not remorse, partly for its linguistic appeal. He writes, for example, that "to *feel* guilty causes the judgement that we *are* guilty." MOORE, *supra* note 17, at 147. The same argument would lose much of its self-evident ring if Moore chose the word remorse within which to embed all the exact same notions of self-remonstrations: imagine, "to feel remorseful causes the judgement that we are guilty." The powerful sense of apparent tautological veracity would have been lost. Cf. Dreikurs, *supra* note 124, at 13 ("At the root of the confusion lies a semantic problem. Guilt has little to do with guilt feelings. One may be guilty and not suffer from guilty feelings; conversely, one may feel guilty without being so.")

B. *The Force of Remorse*

Remorse¹³³ is similar to guilt, but subsumes it.¹³⁴ Like guilt, remorse also exhibits disassociative qualities.¹³⁵ But unlike guilt, the remorseful wrongdoer separates himself not only from the bad act, but from the bad actor and the character that inspired the act.¹³⁶ And, whereas guilt is instance-specific, remorse is universal: to feel remorseful about some specific wrongdoing means actively to avoid fu-

Third, the success of Moore's thought experiment depends upon the reader's ability to call upon his emotions in response to an anecdote. MOORE, *supra* note 17, at 145. Most of us would not have too much difficulty in summoning and then measuring our hypothetical guilt reactions, partly because guilt is somewhat of a shallow emotion, and partly because we often find ourselves feeling guilty for all sorts of inappropriate reasons, even when we have not done anything wrong. See MADDI, *supra* note 3, at 53 (indicating that guilt can allow mature people to "feel morally culpable even if they do not act on it"). Generating guilt for a thought experiment is not all that difficult. But try to substitute remorse. Most people, when asked to feel remorse, imagining they were Richard Herrin, would likely respond, "But I'm not Richard Herrin" or "I haven't done what he has done." Trying to feel remorse where it does not arise organically is much harder than trying to feel guilt because remorse runs deeper than guilt and has meaning and substance that guilt does not. Moore's demonstration would fail to get off the ground if he chose remorse instead of guilt for his central emotional heuristic. Perhaps this is why he avoided it.

¹³³ As a word, "remorse" derives from an experiential base stemming from a mind-body process, for it is a mental state, or mental act, if you will, cast in bodily terms, "the act of biting again" (ME, fr. MF *remors*, fr. ML *remorsus*, p.p. of *remordere*, fr. *re* + *mordere*, to re-bite). Etymologically and philologically, the word is very close to the word "smart," which in its preferred meaning is "to smart," which is "to pain" (OHG *smerzan*), "to bite" (L. *mordere*), and "to waste away" (Gk. *maraineia*). Remorse involves mentally and experientially chewing on the past in a way so painful and so protracted as to possibly cause one to waste away. It is to smart, re-bite the past, chew on it without mastication, or at least without digestion: repeat; repeat, ad nauseum.

James E. Dublin, *Remorse As Mental Dyspepsia*, 5 PSYCHOTHERAPY PATIENT 161, 165 (1988).

¹³⁴ See DAVID WECHSLER, MANUAL FOR THE WECHSLER ADULT INTELLIGENCE SCALE 99 (1981) (defining remorse as "a feeling of distress or regret caused by a sense of guilt"); Hugh Gunnison, *Rachel, Remorse, and Hypnotherapy*, 5 PSYCHOTHERAPY PATIENT 147, 148 (1988) ("Guilt becomes remorse when the feelings do not subside and go deeper, to touch the bone marrow of the person. There exists a sadness, a long-term mourning or grieving that does not appear in the more common and fleeting feelings of guilt."); Stern, *supra* note 120, at 2 (indicating that guilt forms the "latitude" to remorse and that remorse makes guilt "meaningful").

¹³⁵ See ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971) (indicating that remorse expressed through an apology "is a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict").

¹³⁶ See MURPHY & HAMPTON, *supra* note 47, at 26 (suggesting that true repentance is "the clearest way in which a wrongdoer can sever himself from his past wrong").

ture acts that resemble that wrongdoing.¹³⁷ Thus, genuine remorse is not only more powerful than guilt, but dimensionally different because of its transformative effects.¹³⁸ Remorse, as a concept, unlike guilt, cannot be attacked as insincere or insubstantial because it neither permits the wrongdoer to engage in similar behavior in the future nor can it be accused of failing to affect the wrongdoer's character logic.¹³⁹

Remorse's comparative dimensionality allows it to impact desert analysis in a way that guilt cannot. Remorse exacts a punishment within the wrongdoer,¹⁴⁰ much like guilt, but with greater force¹⁴¹ and of a quality that can have meaning in a retributive scheme.¹⁴² Perhaps this is why in almost every jurisdiction an expression of remorse for a violation of criminal law is treated as a mitigating circumstance.¹⁴³ A

¹³⁷ Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 291 (2000); Juni, *supra* note 123, at 79; see also JORAM GRAF HABER, FORGIVENESS 90 (1991) (describing repentance as the dual act of repudiating the wrong and vowing not to repeat it).

¹³⁸ "[R]emorse affects determinations of an individual's moral character and, thus, in all likelihood, perceived internalization of the group's moral code." Gold & Weiner, *supra* note 137, at 299.

¹³⁹ See Stern, *supra* note 120, at 10 ("The acceptance of remorse anticipates an enlarged moral-psychological landscape.").

¹⁴⁰ See Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in THE PASSIONS OF LAW 168, 169 (Susan Bandes ed., 1999) (describing remorse as self-punishment that includes sorrow and empathic pain).

¹⁴¹ See Dublin, *supra* note 133, at 165 (explaining that historically remorse was viewed as "a torture, a heavy punishment, the heaviest to which a person can be 'consigned'").

¹⁴² "[R]etributive goals of punishment" are achieved and "justice has been restored between the protagonists . . . [when a] confession that includes remorse as a critical component denotes that the transgressor has suffered because of his or her action." Gold & Weiner, *supra* note 137, at 291.

¹⁴³ See, e.g., *McGahee v. State*, 632 So. 2d 976, 981 (Ala. Crim. App. 1993) (noting that the "trial court found the existence of four mitigating circumstances," including "that the [defendant] has expressed some remorse for his actions"); *State v. Brewer*, 826 P.2d 783, 804 (Ariz. 1992) ("Remorse may be a mitigating factor if found to exist."); *Clark v. State*, 672 A.2d 1004, 1009 (Del. 1996) (noting that the defendant's "remorse" was a "mitigating factor"); *Parker v. State*, 643 So. 2d 1032, 1035 (Fla. 1994) (per curiam) ("Jurors also may consider remorse or repentance."); *Jackson v. State*, 684 So. 2d 1213, 1238 (Miss. 1996) (en banc) (holding that a "catch-all" instruction on mitigation was sufficient to encompass evidence of "extreme remorse"); *State v. Moore*, 553 N.W.2d 120, 142 (Neb. 1996) (noting that "expressions of remorse for the killings" were relevant mitigating evidence); *Echavarria v. State*, 839 P.2d 589, 596 (Nev. 1992) (per curiam) (noting that the common-law right of allocution entitles the defendant to "stand before the sentencing authority and present an unsworn statement in mitigation of sentence, including statements of remorse" (internal quotation omitted)); *State v. Loftin*, 680 A.2d 677, 709 (N.J. 1996) ("During allocution, a defendant is permitted

wrongdoer's desert can thereby be diminished through serving his sentence, not in a prison of the body, but through anguish of the mind.¹⁴⁴ The gold-in-the-bathtub metaphor is instructive here. Imagine that for every bad act done there is a bathtub full of desert. In the current administration of justice, desert is typically exhausted through bodily punishment: the wrongdoer immerses himself in the scalding liquid, the desert flows over the sides, and in time, even what remains evaporates entirely. Now imagine remorse as gold. Its equivalence to corporal punishment imbues it with displacing properties. If you put it in the bathtub, the desert spills over the sides and less remains. The wrongdoer suffers diminished corporal punishment, less scalding des-

to make a brief statement in order to allow the jury to ascertain that he or she is an individual capable of feeling and expressing remorse . . ." (internal quotation omitted)); *State v. Jones*, 451 S.E.2d 826, 847 (N.C. 1994) ("[T]estimony that the defendant was sorry for what he had done showed his remorse . . . [and was] relevant mitigating evidence."); *State v. Rojas*, 592 N.E.2d 1376, 1387 (Ohio 1992) ("[Defendant's] remorse and assistance to the police are mitigating factors."); *Malone v. State*, 876 P.2d 707, 719 (Okla. Crim. App. 1994) (noting that "mitigating evidence showed . . . [that the defendant] exhibited remorse for his actions"); *Commonwealth v. Holland*, 543 A.2d 1068, 1077 (Pa. 1988) ("[T]he demeanor of a defendant, including his apparent remorse, is a proper factor to be considered by a jury in the sentencing phase of a capital case."); *Ex parte Jacobs*, 843 S.W.2d 517, 520 (Tex. Crim. App. 1992) (noting that evidence of remorse was relevant but did not require special jury instruction); *State v. Pirtle*, 904 P.2d 245, 274 (Wash. 1995) (en banc) (noting that "remorse for the crime" is relevant mitigating evidence).

In some jurisdictions, mere lack of remorse is considered an aggravating circumstance. *See, e.g., United States v. Kikumura*, 918 F.2d 1084, 1099 (3d Cir. 1990) ("Because criminal statutes have never been . . . written with sufficient particularity to take all such factors into account, a system that metes out punishment solely on the basis of the offense of conviction—would necessarily abstract away considerations obviously relevant in determining an appropriate sentence."); *State v. Aragon*, 690 P.2d 293, 302-03 (Idaho 1984) (noting that evidence of the defendant's "utter lack of remorse" is relevant to determining whether the defendant "poses a continuing threat to society"); *Cudjo v. State*, 925 P.2d 895, 902 (Okla. Crim. App. 1996) (noting that a "defendant's . . . lack of remorse" is relevant to determining the statutory aggravating circumstance of being a continuing threat to society); *Chambers v. State*, 903 S.W.2d 21, 26 (Tex. Crim. App. 1995) (regarding evidence of lack of remorse as relevant to showing the special circumstance that the defendant would constitute a continuing threat to society); *Thomas v. Commonwealth*, 419 S.E.2d 606, 619 (Va. 1992) (noting that lack of remorse is relevant in determining "dangerousness" and "vileness"); *see also Jennings v. State*, 664 A.2d 903, 910 (Md. 1995) (holding that a remorseful defendant, having taken the first step toward rehabilitation by accepting responsibility for his crime, may receive a reduced sentence). *But see, e.g., Shellito v. State*, 701 So. 2d 837, 842 (Fla. 1997) (per curiam) ("[L]ack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing."); *State v. Price*, 388 S.E.2d 84, 100 (N.C. 1990) ("[R]emorselessness is not a statutory aggravating circumstance and may not be argued as such."), *vacated for reconsideration*, 498 U.S. 802 (1990), *reinstated*, 418 S.E.2d 169 (N.C. 1992).

¹⁴⁴ *Sarat*, *supra* note 140, at 169 ("[R]emorse at least seems to call for mitigation of punishment.").

ert, because remorse has displaced it.

Not crucial to this argument, but interestingly, the force of remorse has cross-theory appeal. Those who subscribe to rehabilitation theory like remorse because it affects character and heals the wounds of criminality. Deterrence theorists like remorse because it can expand the aggregate good by alleviating corporal punishment, a phenomenon of per se social disutility,¹⁴⁵ while decreasing the likelihood of recidivism.¹⁴⁶ Expressivists like remorse because the wrongdoer repudiates his wrong and rejects the very person who committed it.¹⁴⁷ Social contract theorists like remorse because it reaffirms the decision of the judiciary and thereby strengthens the legitimacy of the sovereign as a force in accord with natural law.¹⁴⁸ Existentialists and certain moral relativists approve of remorse because it allows the wrongdoer to rejoin the moral community, thereby creating meaning from brute existence.

Given this definition, Moore would now likely be revolted by Herrin's "shallow" self-forgiveness, not because it implicates an absence of guilt feelings—which are themselves potentially shallow and ephemeral—but because it has none of the qualities of an authentic psychic disassociation and self-flagellation¹⁴⁹ associated with remorse.¹⁵⁰ Remember, Herrin has neither separated himself from the brutal murder nor from the person who committed the brutal act.¹⁵¹ Herrin refuses to wear sackcloth,¹⁵² insisting that he has suffered enough.¹⁵³

¹⁴⁵ See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in FOUNDATIONS OF CRIMINAL LAW 65, 66 (Leo Katz et al. eds., 1999) ("But all punishment is mischief: all punishment in itself is evil.")

¹⁴⁶ See Gold & Weiner, *supra* note 137, at 291 (indicating that "remorse signals that the transgression will not be committed again").

¹⁴⁷ See NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 13 (1991) (indicating that expressions of remorse "unequivocally enunciate the existence and force of shared assumptions that authorize existing social arrangements and demarcate moral boundaries"); see also MURPHY & HAMPTON, *supra* note 47, at 25 (explaining that injuries from crime are moral ones and they carry "messages" of degradation).

¹⁴⁸ *Infra* notes 197-201 and accompanying text.

¹⁴⁹ See E. RICHARD GOLD, *BODY PARTS* 132-34 (1996) (explaining that religious traditions understand how self-flagellation cleanses sin and provokes an imminence with the divine).

¹⁵⁰ MOORE, *supra* note 17, at 145.

¹⁵¹ See also JOSEPH ANTHONY AMATO II, *GUILT AND GRATITUDE: A STUDY OF THE ORIGINS OF CONTEMPORARY CONSCIENCE* 5 (1982) (describing the "guiltless man" as one who is involved in immoral acts but has no empathy or conscience about them).

¹⁵² The metaphor of the sackcloth originates in the understanding that ascetic rituals may help to cleanse the conscience and drive away guilt. See JOHN CARROLL, *GUILT: THE GREY EMINENCE BEHIND CHARACTER, HISTORY AND CULTURE* 21-22 (1985) (indi-

Instead, Herrin has embraced the murder as his own and he is loathe to give it up. Deep feelings of remorse (not guilt), in fact, are the only tolerable response of a moral being. Herrin's nonvirtuous character vitiates any justifiable downgrading of his corporal sentence.

A useful mutation of Moore's thought experiment might ask the reader to put himself in the wrongdoer's place and imagine the extent of his remorse, rather than his guilt. It makes good sense to attribute increasing levels of our hypothetical remorse with actual levels of the wrongdoer's culpability or blame because remorse is the ethical perspective's native repulsion for bad acts, and it is the ethical perspective that properly values desert. This is, in essence, Moore's insight. But an additional useful feature of this revised exercise might be to then ask to what extent the criminal's actual remorse looks like our hypothetical remorse. A poor fit between the moral community's hypothetical remorse and the bad actor's real remorse would be indicative of the wrongdoer's vacant moral architecture, a powerful emotional heuristic for calibrating desert and thus determining downward or upward departures during a sentencing hearing.¹⁵⁴

Now consider the truly remorseful wrongdoer. In the fall of 1999, Anne Lamberson drove her ambulance at fifty miles per hour through a red light in Brooklyn, New York, striking another car and killing three children.¹⁵⁵ Prosecutors explained that, in violation of state law, Lamberson failed to slow down and check for crossing vehicles at a red-lit intersection.¹⁵⁶ For having killed three children, Lamberson was sentenced to five years probation.¹⁵⁷ Some may think that this sentence is far too light. But Angela Igwe, driver of the struck auto and mother of the slain children, did not see it that way. Igwe was convinced Lamberson would "suffer for the rest of her life [by] carrying the memory of her responsibility for the death of [the] children, and

cating asceticism "is both intended to prevent further sinning, and therefore guilt, and to serve as a punishment, an expiation, for past sins").

¹⁵³ MOORE, *supra* note 17, at 146 (conveying Herrin's feeling that two years in prison is sufficient punishment for Bonnie Garland's murder).

¹⁵⁴ See Sarat, *supra* note 140, at 178 (describing a function of remorse as involving the wrongdoer "coming to view his act as we view it and, in so doing, validating our response"); see also *supra* note 143 (indicating that remorse, in almost every jurisdiction, is a mitigating circumstance of criminal sentencing and that lack of remorse can, in certain jurisdictions, be an aggravating factor in sentencing).

¹⁵⁵ Joseph P. Fried, *Plea Lets Ambulance Driver Who Killed 3 Avoid Prison*, N.Y. TIMES, Oct. 13, 1999, at B4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

that [is] punishment enough.”¹⁵⁸ Lamberson’s sincere remorse, her willingness to take responsibility for the accident, and her willingness to plea convinced the parties involved that, “in the pursuit of justice,” five years of parole was an appropriate sentence.¹⁵⁹ While under Moore’s analysis our hypothetical guilt feelings would tend to implicate a significant reservoir of desert, itself demanding a much stiffer punishment for Lamberson than five years parole, what would be missing from the examination is an account of Lamberson’s remorse, which serves to offset initial gross calculations of desert. Because Lamberson’s remorse would look much like our hypothetical feelings of remorse, were we in Lamberson’s place, her moral architecture is likely structured much like ours, and her desert is affected accordingly. The current administration of justice reflects this insight in that the more remorse Lamberson expresses, the less punishment she is likely to suffer.¹⁶⁰ Remorse, or the lack thereof, has long been an important factor in calculating criminal sentences, especially capital sentences.¹⁶¹ In Lamberson’s case the people of New York, in fact, agreed to a lighter sentence than required, based largely on expressions of the wrongdoer’s remorse.¹⁶²

In circumstances markedly similar, Steven Allen Abrams “plow[ed] his car” into an Orange County “playground packed with

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Lamberson’s attorney explained that an additional reason for the defendant’s guilty plea was that Lamberson, having herself lost a four-year-old son, “didn’t want Ms. Igwe to have to [re-]live” the experience via trial testimony. *Id.*

¹⁶⁰ See *supra* note 143 (explaining that in nearly every jurisdiction remorse will serve to downgrade punishment in capital sentencing); see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that sentencers are allowed by the Eighth and Fourteenth Amendments to consider, as a mitigating factor, “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”).

¹⁶¹ In a study of what sort of factors cause juries to impose capital sentences, lack of remorse was found to be highly aggravating: “only the defendant’s prior history of violent crime and future dangerousness were more aggravating than lack of remorse.” Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561 (1998); see Chris L. Kleinke et al., *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525, 534 (1992) (reporting that in this study, as in previous ones, a wrongdoer’s expressed remorse produced leniency in the minds of the decisionmakers); see also, e.g., *United States v. Rosenberg*, 806 F.2d 1169, 1180 (3d Cir. 1986) (affirming the imposition of maximum terms of imprisonment totaling fifty-eight years for possession of firearms, explosives, and false identification documents based on the defendant’s lack of remorse and poor potential for rehabilitation).

¹⁶² Fried, *supra* note 155.

children," killing a three-year-old and a four-year-old.¹⁶³ Abrams was found guilty of first degree murder on both counts. In contrast to Lamberson, Abrams provided no explanation for the killing and, crucially, "showed no remorse."¹⁶⁴ Also unlike Lamberson, Abrams was sentenced to two life terms without the possibility of parole.¹⁶⁵ In retributive terms, Abrams's lack of remorse provides two reasons to punish. First, Abrams's endorsement of the act is additional evidence of his having purposefully chosen to commit it with the full force and intention of his will; this impacts on the culpability aspect of desert. Second, Abrams's vacant remorse looks nothing like our hypothetical remorse and this means that we cannot count upon his internal moral jurisprudence to impose any significant self-punishment. We must account for the difference by imposing additional external penalties; this impacts upon the proportionality aspect of desert.¹⁶⁶

Presuming that both Lamberson's and Abrams's outcomes were just, the best explanation for the difference in sentencing between them lies in their expressions of remorse, or lack thereof.¹⁶⁷ While Abrams's lack of remorse leaves his metaphorical bathtub full, Lamberson's remorse helps her to disassociate and distance herself from her bad act, reaffirm the norms of the community, and express her heartfelt pain for the harm she has caused others.¹⁶⁸ The very inten-

¹⁶³ Richard Marosi, *Driver Who Killed 2 Children Given 2 Life Terms*, L.A. TIMES, Dec. 16, 2000, at B4.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Abrams was also ordered to pay restitution for funeral expenses in the amount of twelve thousand dollars. *Id.*

¹⁶⁶ Some have argued that the "chief aim of retributive justice [is] the repudiation of the wrong done by the criminal." ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* 25 (1983). If this is right, then it makes good sense to punish more intensely those criminals who attach themselves to and continue to affirm their wrongful acts.

¹⁶⁷ We can distinguish between Lamberson and Abrams on other grounds, such as culpability and volition, if we assume that Lamberson was driving safely while Abrams was driving recklessly or with an intent to harm others, but at least as far as Abrams is concerned we do not know why he ran into the playground and we do not know what, if any, intent he had to harm others. An ambulance driver who accidentally runs a stoplight too fast facially appears less culpable than a driver who has a random off-road collision with a playground, but appearances can be deceiving and the validity of any analysis based largely on agnosticism is questionable. In contrast, the remorse issue is clear-cut. Lamberson expressed overwhelming remorse while Abrams expressed none at all.

¹⁶⁸ See Harvey Cox, *Repentance and Forgiveness: A Christian Perspective*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 21, 24 (Amitai Etzioni & David E. Carney eds., 1997) ("Remorse . . . implies a degree of empathic pain on the part of the one who has caused the fracture.").

sity of Lamberson's remorse, her self-punishment, is the gold that helps to displace desert from her tub, and offsets the need for corporal punishment. Since Lamberson's remorse matches the moral community's and Abrams's does not, we may further infer that Lamberson's interior jurisprudence is robust, while Abrams's is chilled, barren, and tending, as a matter of his fundamental character, toward cold-blooded acts.¹⁶⁹ Considering the difference in sentences, five years parole for having killed three versus two life terms without the possibility of parole for having killed two, the expression of remorse appears to be a very powerful signal indeed.

C. *The Power of Penance*

Penance is the last stage in the wrongdoer's ethical transformation. Whereas guilt and remorse were reactions to the wrongdoer's bad acts, penance is a reaction to guilt and remorse.

The internal immolation exacted by guilt (as a gateway to remorse) and remorse is not an end state.¹⁷⁰ High levels of intense guilt and remorse are unsustainable¹⁷¹ and, moreover, they are unhealthy.¹⁷² One of the primary lessons of the ethical perspective is that we ought to treat others as we expect to be treated. But if all we harbor for ourselves is unending, remorse-induced self-retribution, then in time, remorse's once-positive transformative qualities can easily be twisted into producing mere self-loathing, and the golden rule by which we determine how to treat others would be likewise warped and tarnished. This would not be a message of kindness and compassion, but one of cruelty and masochism. Self-loathing is antithetical to the ethical perspective, serving merely to obstruct any sort of genuine connection between people.

If remorse is to teach the wrongdoer the ethical perspective, it cannot do so by offering mere interminable suffering. Dante's Hell is

¹⁶⁹ See Edward P. Shafranske, *The Significance of Remorse in Psychotherapy*, 5 PSYCHOTHERAPY PATIENT 19, 31 (1988) ("The failure to experience remorse is significant [because] it may be an indicator of impairments in the patient's constituent abilities for empathy . . .").

¹⁷⁰ See Dublin, *supra* note 133, at 164 (arguing that "one should not have to dwell in remorse indefinitely").

¹⁷¹ See MADDI, *supra* note 3, at 57 (describing an event that produces strong guilt and anxiety and remarking that such a state is not maintainable without madness resulting).

¹⁷² See Feichtinger, *supra* note 121, at 41 (characterizing "the human being who carries the guilt like a cross, who cannot forget, who cannot forgive himself" as a person without a connection to fellow men).

adorned with a warning for all those who enter to abandon hope.¹⁷³ In contrast, remorse puts itself out as the agent of self-improvement, the champion of hope for a better, more virtuous self. Second, if remorse is to teach kindness, it cannot do so by teaching kindness for others but not the self.¹⁷⁴ Such hypocrisy would belie its ethical pedigree. Third, remorse offers the wrongdoer nothing at all if it cannot offer him a way out of darkness. The project of building for one's self a moral architecture is daunting, the process is painful, but if the end-state promises nothing more than unending psychological anguish, the wrongdoer's current misery would appear fairly attractive in comparison, and then only ascetics and masochists would ever be tempted to begin the journey. The ethical perspective, in fact, promises more than gloom and penance is the porthole.¹⁷⁵

Thus, penance is the ultimate process of exorcising the remorse and associated energy.¹⁷⁶ The wrongdoer will always experience a certain level of guilt and remorse his entire life, but self-forgiveness, after self-immolation, is crucial to moving beyond mere punishment into the new future.¹⁷⁷ Herbert Morris has described the process I am calling penance this way:

It is a moral good, then, that one feel contrite, that one feel the guilt that is appropriate to one's wrongdoing, that one be repentant, that one be self-forgiving and that one have reinforced one's conception of oneself as a responsible being. Ultimately, then, the moral good aimed at by [my theory] is an autonomous individual freely attached to that which is good, those relationships with others that sustain and give meaning to a life.¹⁷⁸

The ribcage-vault metaphor is instructive here. Imagine that in-

¹⁷³ DANTE ALIGHIERI, *INFERNO* 34 (Mark Musa ed. & trans., Ind. Univ. Press 1995) (1314) ("ABANDON HOPE, FOREVER, YOU WHO ENTER.").

¹⁷⁴ See Parsons, *supra* note 125, at 261 ("[T]he remorseful client might often consider hate and violence as undesirable and even immoral, yet fails [sic] to recognize that self-hate is no less undesirable or immoral. . . . [He should] recognize [his own humanity] and that the rules of charity and forgiveness [he] appl[ies] to others apply to [him] as well.").

¹⁷⁵ Aristotle's entire ethical project is predicated on the notion that the do-gooder is made happy through his virtue. ARISTOTLE, *supra* note 103, at 363 ("[H]appiness is an activity of the soul expressing complete virtue . . .").

¹⁷⁶ "Punishment, among other things, permits purgation of guilt and ideally restoration of damaged relationships." Morris, *supra* note 119, at 268.

¹⁷⁷ Thomas Moore, *Re-Morse: An Initiatory Disturbance of the Soul*, 5 *PSYCHOTHERAPY PATIENT* 83, 93 (1988) (suggesting that in the end remorse "blossoms in self-forgiveness").

¹⁷⁸ Morris, *supra* note 119 at 265.

side the ribcage of the wrongdoer is a vault full of coal. The coal is desert, and it pollutes the body's systems. The wrongdoer is not even aware of the existence of the coal until and unless he experiences guilt. Guilt is a self-reflective warning (not possessed by the nonaffected wrongdoer) of unspecified internal contamination often galvanizing psychological insights that may lead, eventually, to remorse.¹⁷⁹ Remorse, at this point, can occur in two kinds of people. The first prototype is Anne Lamberson, the New York ambulance driver, who is essentially good at heart, an individual who tries to follow the rules and who appears to have assumed a healthy moral architecture. In this sort of person, remorse takes on a heated aspect, burning away the coal, thereby downgrading her desert. This metaphor is substantively similar to gold-in-the-bathtub. By eliminating a certain amount of his desert the wrongdoer downgrades his punishment.

Remorse has a far more interesting story to tell in the context of affecting a second sort of wrongdoer, a person more like Richard Herrin, the murderer from New Haven, or Steven Abrams, the playground killer from Orange County, a person—initially—without a certain or firm moral perspective. If remorse arises at all, it does so in the manner of a dramatic and rare phenomenon. Remorse does not burn the fuel in the ribcage, but instead puts the vault under pressure, changing the coal slowly through pressure, and if successful, over time, the force of remorse turns the coal to diamond. The exertion of pressure over time, the predicate for any radical transformation, is painful and exhausting, but when complete, the diamond, in contrast to the coal, is nontoxic, beautiful, and has value in the moral economy—an interesting economy in which nothing is bought or sold but where transactions occur with no expectation of return. Remorse energy puts the coal under pressure; the diamond is the product of penance.

Another way of discussing this transformative process in the hard-hearted wrongdoer is to think of penance as self-forgiveness. Christians pay penance to be forgiven by the Church. Wrongdoers pay penance in order to forgive themselves. Self-forgiveness allows for the sort of total transformation, symbolized by the diamond in the rib-

¹⁷⁹ For a further discussion of the possible relationship between guilt and remorse see CARROLL, *supra* note 152, at 16-17 ("Moral guilt is diagnosed above all by a person feeling remorseful. Indeed to feel remorse is to be able to admit that I must have acted against my conscience."); GRINBERG, *supra* note 11, at 52 ("An expression linked with guilt feelings, which appears very often, is remorse." (emphasis omitted)).

cage, that accesses a sense of compassion for others¹⁸⁰ and giving of one's self, because as an inaugural member of the moral community, it is a joy to do so.¹⁸¹ In short, self-forgiveness confers upon the wrongdoer special insights into his identity as a complete human being, meaning a being bearing a moral perspective and an understanding that, in a deep sense, others are not to be hurt any more than, crucially, he is to hurt himself. Morris puts it this way: "The guilty wrongdoer is not viewed as damned by his wrongful conduct to a life forever divorced from others. He is viewed as a responsible being, responsible for having done wrong and possessing the capacity for recognizing the wrongfulness of his conduct."¹⁸² Penance gives the wrongdoer an opportunity to do just that.¹⁸³

Critics may wonder why penance is necessary at all, given that remorse has already downgraded much of the wrongdoer's desert and, apparently, catalyzed much of his transformation. This is a valid point. But there are a number of reasons, some of them tactical—that is, for the sake of the argument—and some of them conceptual, why penance is important to the Transformation Thesis. First, tactically, the Transformation Thesis is a far more powerful argument for dejustifying an individual's capital sentence and for establishing that he really is a "new man" if he has gone through penance than if he has not.¹⁸⁴ The contrast is far more striking; the change illuminates a

¹⁸⁰ See Morris, *supra* note 119, at 265 (explaining that punishment should allow the wrongdoer to come to appreciate the evil in his acts so that he cultivates empathy within himself).

¹⁸¹ It is important to understand that he is not paying back his debt to society or trying to make reparations with the living victims. Atonement, unlike penance, is the process of trying to right a wrong by paying the victim back that which was taken. Atonement's use of the creditor/debtor metaphor is inappropriate for capital crimes, Nietzsche has noted, because the creditor receives "pleasure" upon the repayment of the debt; the sense in which an execution confers pleasure is the black pleasure of witnessing the pain of another, and that is mere vengeance. Nietzsche, *supra* note 125, at 34 (indicating that the metaphor presumes that the creditor's "supreme pleasure" is that of making another suffer); see also K.G. Armstrong, *The Retributivist Hits Back*, in *THE PHILOSOPHY OF PUNISHMENT* 138, 151 (H.B. Acton ed., 1969) (arguing that retribution is not to be confused with restitution as, "[i]n the case of murder, restitution is clearly impossible—we cannot get back the life that was taken—but retributive punishment is still possible").

¹⁸² Morris, *supra* note 119, at 268.

¹⁸³ See MURPHY & HAMPTON, *supra* note 47, at 25 (indicating that true repentance is one way to divorce the self from an evil act). While actions are important manifestations of that changed character, they are not per se required in order to "be" penitent. See ARISTOTLE, *supra* note 103, at 376 (describing virtue as involving both "feelings and actions").

¹⁸⁴ See *infra* Part III.A for a discussion of how the status of the wrongdoer as a "new

bright line. Second, for epistemological reasons, penance serves as an excellent marker of a wrongdoer having experienced remorse. Penance allows us to distinguish the neurotically guilty from the genuinely remorseful because, unlike remorse, in no case do mere feelings of guilt alone segue into diamond-hearted transformation. Third, as discussed in more detail above, penance explains how and why the wrongdoer would not and should not suffer in perpetuity. Absent such an explanation, the Transformation Thesis might present itself as a scheme more cruel than the penalty it attempts to commandeer. And last, penance provides incentives for wrongdoers tempted to change themselves for the better, while simultaneously answering objections that rational actors would never choose transformation over nontransformation. Penance can explain why, in the long run, the sackcloths and self-reproach, the near-obsessive, masticating, reassessment of one's identity and relationship to others, and the apparently endless interior immolation, in the end, are worth it.

III. JUSTIFYING THE TRANSFORMATION THESIS

As a preliminary matter it may be useful to examine why the Transformation Thesis is, broadly speaking, so intuitively attractive. At the heart of Kantian theory is the idea that, as distinguished from mere "things,"¹⁸⁵ we should treat others as "persons"¹⁸⁶ with the respect and consideration due them.¹⁸⁷ Other people are, in their central beings, free acting agents exactly like ourselves.¹⁸⁸ Rawlsian ethical theory orbits around a similar premise. For Rawls it comes out "equal jus-

man" affects his proper desert.

¹⁸⁵ "Any object of free choice which itself lacks freedom is therefore called a thing . . ." KANT, *supra* note 43, at 50.

¹⁸⁶ A "person" is "a subject whose actions can be *imputed* to him," and a moral personality is "nothing other than the freedom of a rational being under moral laws." *Id.*

¹⁸⁷ See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 96 (H.J. Paton trans., Harper Torchbooks 1964) (1785) ("Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.").

¹⁸⁸ All external qualities including our "character," our "[p]ower, wealth, honour, even health," and our other virtues, such as "[m]oderation in affections and passions, self-control, and sober reflexion," are but baggage to our central autonomous selves, our "good will" as rational actors. *Id.* at 61. Furthermore, we are all identical in the ways that really matter: we are all bound by the same functions of moral duty, *id.* at 65, we are to treat each other identically in the kingdom of ends, *id.* at 101, and we all achieve or fail to achieve autonomy, *id.* at 98, and dignity, *id.* at 102, in the exact same way. And although we are unequal in our "possessions, power, . . . opportunities, . . . talent, industry, and luck," we should stand in exactly the same place with regard to our "legal rights." ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 256 (1989).

tice.”¹⁸⁹ By this he means that equality must be our paramount value¹⁹⁰ and we should treat each other, first and foremost, as human beings without regard to our inborn advantages, our native skills, our physical or psychological traits, or various other qualities that might make our passage in this world, in comparison to one another, easier or more difficult.¹⁹¹ Rawls wants to say that we cannot claim our characteristics and, by implication, we are not our characteristics.¹⁹² Instead, we are, in our central selves, but a pinpoint presence, a spot of pre-conscious sentience, and we are all identical and interchangeable in this way.

I believe Kant and Rawls got it right.¹⁹³ The important point here is not that we should reserve a second chance for the worst of our criminals because their rights as human beings stand in equality with those of noncriminals. Criminals, of course, do enjoy all the natural rights of all human beings, but this is no bar, necessarily, to their be-

¹⁸⁹ RAWLS, *supra* note 34, at 443.

¹⁹⁰ *See id.* at 10 (indicating that his theory of “justice as fairness” is predicated upon a thought experiment that sets the parameters of a fair society based on what decisions “free and rational persons” would make about the form of their government if they were thrust into “an initial position of equality”).

¹⁹¹ Rawls is fond of saying “[n]o one deserves his greater natural capacity nor merits a more favorable starting place in society.” *Id.* at 87. He suggests that we treat each other first as people and second as people with qualities, and furthermore, that we ought to construct a society that advantages the worse off in order to pay respect to this principle. *See id.* at 88 (“In justice as fairness men agree to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit.”).

¹⁹² We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit.

Id. at 89. In contrast, Rawls seems perfectly happy to give us credit for our virtue, or moral worth, which he correlates with “effort, or perhaps better, conscientious effort.” *Id.* at 274.

¹⁹³ Their premises may be distinguishable in some ways, but they are similar to at least this extent: our attitudes and positions relative to each other, and our obligations and rights, are perfectly reflective. Compare SULLIVAN, *supra* note 188, at 5 (explaining that Kant’s “moral law is objective and not person dependent; it holds universally, without regard for any contingent conditions that may subjectively differentiate one person from another”), with RAWLS, *supra* note 34, at 442 (indicating that the “basis of equality” resides in the condition of moral persons “capable of having . . . a conception of their good . . . and . . . capable of having . . . a sense of justice” and of applying the “principles of justice, at least to a certain minimum degree”). Whatever differences may exist between Kant and Rawls, it is enough for my purposes that both of these philosophers recognize the rich, abiding similarities, if not connections, among and between people.

ing denied a second chance, nor to their suffering a deserved execution.¹⁹⁴ The essential point, instead, is that underlying Kantian and Rawlsian theory is an observation about the nature of the individual self as being, when unadorned and undeveloped, identical to all selves, and, crucially, as forming the bedrock of autonomy and human dignity. Some have suggested that it is this ineluctable bedrock that forestalls the imposition of capital punishment upon even the most egregious of wrongdoers.¹⁹⁵ This argument is not entirely unattractive, but it is not mine. This bedrock, or “pinpoint” as I have been calling it, simply allows for the possibility of human dignity upon the manifestation of normative behavior. Kant specifically makes allowance for the possibility that our behavior, when atrocious enough, can snuff out the very dignity that identifies us as human, and would thereby justify our execution.¹⁹⁶ In other words, human dignity is not a perfectly durable atom, unbreakable as a metaphysical principle, always defeating any attempt to apply a justified capital sentence. We can, and sometimes do, turn ourselves into monsters. My view of the nature of the self, and the first principle of the Transformation Thesis, is simply that, when given the chance, we can also turn ourselves back.

While death penalty abolitionists might overestimate the durability of human dignity, death penalty advocates seem to underestimate dignity’s ability to awaken itself after a long slumber. Supporters of capital punishment appear to want to separate themselves from capital prisoners who are sometimes characterized as subhuman, or monsters, irredeemably evil, perhaps even born that way.¹⁹⁷ But, as against

¹⁹⁴ See van den Haag, *supra* note 29, at 1668 (arguing that outright rejections of the death penalty based on blanket notions of human dignity “can be neither corroborated nor refuted” but are “article[s] of faith”).

¹⁹⁵ See Morris, *supra* note 119, at 270 (articulating a “paternalistic” theory that answers the charge that a murderer “forfeit[s] his right to life by murdering” because “one’s status as a moral being” implies “non-waivable, non-forfeitable, non-relinquishable right[s]”); see also van den Haag, *supra* note 29, at 1668 (articulating and then answering the argument that all human beings have “an imprescriptible . . . right to life” that in every instance defeats the death penalty).

¹⁹⁶ Kant explains that “humanity . . . is the only thing which has dignity,” but only “so far as it is capable of morality.” KANT, *supra* note 187, at 102. He further explains that “every murderer . . . must suffer death” because “this is what justice . . . wills in accordance with universal laws.” KANT, *supra* note 43, at 143. Thus, murder is immoral and, presuming that universal laws are prohibited from executing rational agents acting in dignity, it stands to reason that a wrongdoer surrenders his dignity through killing.

¹⁹⁷ Camus suggests that executions are expressions by society that the criminal is absolutely and incorrigibly evil. ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 225-26 (Justin O’Brien trans., Alfred A. Knopf 1960) (1957).

the abolitionists, this view is equally flawed for at least two reasons. First, it denies the identical normative ontology in us all (pinpoint parallelism). Capital prisoners may have lost their way, but this is not to say that any one of us would not or could not have ended up in the same place, given a similar starting position and similar events. We are all born with the same pinpoint sentience, with the same capacity for good or evil, and, crucially, with parallel vulnerability to cosmic chance. Second, the death penalty advocate's view denies the plausibility of two-way transformation. Even presuming that expressions of criminality can change people into monsters, there appears no facial reason why countervailing expressions of compassion should not be able to turn monsters back into people. That criminality would be a one-way street fails to completely comprehend the full capacity of the human self. The Transformation Thesis is appealing as against these counterintuitive and, some might say, small-minded descriptions of the self and the human dignity within.

There are other, less abstract reasons why the Transformation Thesis, within the context of capital punishment in particular, is so attractive. First, as a social policy matter, a transformation symbolically¹⁹⁸ legitimizes the social contract. When a murderer concedes fault, he reaffirms the judgment of the judiciary.¹⁹⁹ This is no small matter. In South Africa, for example, Nelson Mandela helped to topple an entire government, at least partially, by rejecting the judgment of his nation's courts and maintaining constant opposition to the legitimacy of his imprisonment.²⁰⁰ Each prisoner's recalcitrance, in its own small way, calls into question the sovereign's right to rule²⁰¹ and,

¹⁹⁸ Symbols matter because "symbols and myths are an expression of man's unique self-consciousness, his capacity to transcend the immediate concrete situation and see his life in terms of 'the possible.' . . . [T]his capacity is one aspect of his experiencing himself as a being having a world." Rollo May, *The Meaning of the Oedipus Myth, in GUILT: MAN & SOCIETY* 171, 171 (Roger W. Smith ed., 1971).

¹⁹⁹ See WALTER MOBERLY, *THE ETHICS OF PUNISHMENT* 287 (1968) (indicating that it is not enough that we simply kill the body but that an execution seeks to extract remorse from the prisoner such that he would "realize that he had against him right as well as might").

²⁰⁰ The government continued to negotiate with Mandela for his release because his imprisonment had become more of a liability than a benefit. See NELSON MANDELA, *LONG WALK TO FREEDOM* 454 (1994) (noting that the rejection of violence as a political instrument formed one of the more important subjects of negotiation). From prison, Mandela negotiated with then-president F.W. de Klerk for his own release, the release of fellow political prisoners, and the dismantling of apartheid. *Id.* at 482-83. Eventually, he was successful on all counts. *Id.* at 539 (recapitulating the story of de Klerk's and apartheid's defeat in late 1992).

²⁰¹ Locke has argued that the sovereign loses his authority to command when he

conversely, when the prisoner retracts his complaint, the issue as to the moral validity of the law or legal process that condemns him is no longer at issue.²⁰²

Second, the way in which the sovereign responds to a wrongdoer's character conversion sends a message to its citizens as to its self-conception. When a wrongdoer, through sheer force of will, transforms himself, he can no longer be considered so worthless, so unredeemably evil that his execution would not thereby maculate the community.²⁰³ A death penalty carried out in the face of clear evidence of radical character transformation and associated penance is evidence of a society that does not expect, seek, nor value such a response from its wrongdoers.²⁰⁴ Such a society does not take seriously the personal autonomy required for such a transformation²⁰⁵ and is quick to execute even in the face of inadequate desert.²⁰⁶

Third, a prisoner's ethical transformation is often significant to the living victims. Sister Helen Prejean, for example, reports that Lloyd Le Blanc attended the execution of his son's murderer interested only in hearing an apology.²⁰⁷ This was more important to Le Blanc than the execution itself. Expressions of a murderer's guilt and

"endeavour[s] to take away and destroy the property of the people, . . . to reduce them to slavery under arbitrary power," or to otherwise destroy them. LOCKE, *supra* note 40, at 110. An execution, absent justification, is an exercise of that very sort of unauthorized power. A prisoner's resistance is one man's vote for having found the state to be acting as a mere tyrant. Where the state acts with justification, however, the execution serves to reject "apathy, disrespect, and violence[, the] means of social sabotage." Roger W. Smith, *The Political Meaning of Unconscious Guilt*, in *GUILT: MAN & SOCIETY* 185, 188 (Roger W. Smith ed., 1971). The execution of an unapologetic, unconverted prisoner may be understood as a society's legitimate attempt at self-preservation.

²⁰² See John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 125 (1999) ("In essence, though, natural law theory can be reduced to one central argument: morality is the watermark against which to assess any system of positive law.").

²⁰³ See WILLIAM TEMPLE, *THE ETHICS OF PENAL ACTION* 31-32 (1934) (arguing that it is immoral to treat a man as if he were "wholly identified with evil" unless he really is).

²⁰⁴ See VAN DEN HAAG & CONRAD, *supra* note 166, at 27 (arguing that execution expresses the ultimate rejection of reconciliation).

²⁰⁵ See Morris, *supra* note 119, at 266 (arguing that the goal of punishment must be to take seriously the notion of "morally autonomous individual[s] attached to the good").

²⁰⁶ Morris makes two important points on this issue. First, he explains that punishment where desert is absent only serves to "baffle our moral understanding and threaten what is so often already precarious" in our society. *Id.* at 268. Second, he argues outright that the death penalty is cruel because it destroys the character of an autonomous individual and thus "destroy[s] one's capacity for rejecting what is evil and again attaching oneself to the good." *Id.* at 270.

²⁰⁷ HELEN PREJEAN, *DEAD MAN WALKING* 244 (1993).

remorse appear to affect the living victims in far more salutary ways than the illusory closure of witnessing the execution.²⁰⁸ In another case, Prejean specifically discusses the empty pleasure of having witnessed the execution of a loved one's killer: "[W]ith [the killer,] Robert Willie[,] dead, [the victim's father] doesn't have an object for his rage. He's been deprived of that, too. I know that he could watch Robert killed a thousand times and it could never assuage his grief."²⁰⁹ Prejean writes, "[o]nly reconciliation . . . accepting [the victim's] death . . . can finally release [the family] to leave the past and join the present, . . . to rejoin the ranks of the living."²¹⁰ For the surviving family, a prisoner's ethical conversion, or at the very least, expression of remorse and penance, may be among the most reparative acts available.²¹¹

Finally, an ethical transformation reaffirms hope in us all.²¹² A scholar who once worked on San Quentin's (California's largest maximum security prison) death row writes, "[t]he whole enterprise of criminology must be based on the optimistic assumption that all of us, even the most vicious, can be improved. If we deny that assumption as to a few whose actions have especially horrified us, we call into question its applicability to everyone else."²¹³ It is, therefore, important to leave the possibility of change and redemption open to death row prisoners, not for their sakes, but largely for our own.²¹⁴ Moreover, a moral community only coheres to the extent to which it resists

²⁰⁸ Opposite to the principle of healing, some argue that the death penalty has a destructive effect. See, e.g., ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 119-20 (1989) (explaining that the brutalization hypothesis forwards that "the message given by executions stimulates, rather than inhibits, violence, and specifically condones killing as vengeance").

²⁰⁹ PREJEAN, *supra* note 207, at 226. Bud Welch, who lost his daughter in the 1995 Oklahoma City federal building bombing, requested that Timothy McVeigh not be executed because, as Archbishop Eusebius J. Beltran said, "the death penalty perpetuates a terrible cycle of violence, diminishes respect for human life and ultimately fails to ease the pain of those who grieve." *Catholics Speak Out Against Death for McVeigh*, NAT'L CATH. REP., July 4, 1997, at 9.

²¹⁰ PREJEAN, *supra* note 207, at 226.

²¹¹ See Gold & Weiner, *supra* note 137, at 293 (positing that a remorseful confession with relevance to victims is likely to be beneficial).

²¹² Winston Churchill expressed the hope as the possibility that there is a "treasure . . . in the heart of every man." Henry Weihofen, *Punishment and Treatment: Rehabilitation*, in *THEORIES OF PUNISHMENT* 255, 262 (Stanley E. Grupp ed., 1971).

²¹³ VAN DEN HAAG & CONRAD, *supra* note 166, at 43.

²¹⁴ One thinker has suggested that the way in which we deal with punishment as a culture is really about "humankind's fall from grace" and our success or failure here speaks to "our prospects for redemption." Sarat, *supra* note 140, at 171.

disconnecting itself from those who seek to reject its norms and laws.²¹⁵ It is our hope for the betterment of others that congeals our community.²¹⁶ To suggest that some are beyond hope and not worth saving is to suggest that hope and salvation are finite resources. Today there is not enough for them; tomorrow there will not be enough for us. It is our allowance for the transformation of the worst among us that increases the possibility for hope, as a community and as individuals, to be our best selves and to be better today than we were yesterday. Only within this context may we each flourish and develop personally and interpersonally.²¹⁷ And the mechanism of our own elevation is cheapened and corrupted when we believe it cannot extend, or we will not extend it, to those who need it most.

Dwelling for a moment on this last discrete issue, an important counterargument should be considered. Critics might argue that for all this zeal to rescue people who kill people, conspicuously absent is any palpable compassion or sympathy for the dead victim and his family. Why extend chance after chance to those who robbed their victims of any and every chance? This is perhaps one of the toughest concerns to answer, but the argument's flaw is in its dubious premise: we can go back. In fact, there is no going back. Every moral decision and every meaningful action must make do with the here-and-now, no matter how unpleasant.²¹⁸ Because the victim cannot be brought back, the here-and-now of a murder is something permanent and unfixable.²¹⁹ To suggest that we can somehow "get even" by taking a life for

²¹⁵ See VAN DEN HAAG & CONRAD, *supra* note 166, at 27 ("When that retaliation takes the form of execution, the community makes it clear that it expects neither atonement nor reconciliation."). An execution denies any connection between us and the wrongdoer, insisting that we are not equally "capable of veering" away from the good. *Id.* For that, "[w]e are all the losers." *Id.*

²¹⁶ Upon the commission of a crime it is the place of punishment to "weld a man back into the chain of eternal obligations which bind every human being to every other one." CARROLL, *supra* note 152, at 217. We make our community whole by giving the wrongdoer the opportunity to expiate his guilt. See *id.* (remarking that Raskolnikov need not be punished as he has found shame and guilt).

²¹⁷ Nicola Lacey argues that a society must be not only concerned about promoting the autonomy of its citizens but equally concerned about creating an "environment in which human beings may flourish and develop." LACEY, *supra* note 34, at 198-99. This notion is "central" to a successful theory of punishment. *Id.*

²¹⁸ See Raymond Studzinski, *Transcending a Past: From Remorse to Reconciliation in the Aging Process*, 5 PSYCHOTHERAPY PATIENT 207, 215 (1988) ("Hoping is not wishing that the past had been different. Rather, hope arises precisely in the face of the inalterability of the past.").

²¹⁹ See AESCHYLUS, THE ORESTEIA 260 (Robert Fagles trans., Penguin Books 1977) (458 B.C.) (explaining that "once the dust drinks down a man's blood, he is gone, once and for all . . . [and there is n]o rising back").

a life in some algebraic blood equation²²⁰ is to painfully misunderstand the permanence of death, and is furthermore to perpetuate an unhealthy, if not childlike, delusion of our own grandeur. To live in the here-and-now of a murder is not to ask ourselves how we might get even, but to ask ourselves how to best extract meaning from a senseless act and how to best honor the memory of an innocent victim.

Presuming we are in the presence of an ethically transformed wrongdoer, we have the opportunity to effectuate one of two worlds. In the first world, we can ignore the precepts of retributive justice and choose to kill yet again, marking the memory of the innocent with two bodies in the ground and blood on all our hands.²²¹ In the second world, we can take the opportunity of a murder to reaffirm our love for one another, as a community, and our abiding faith in the innate goodness of man—his ability to change, become better and rejuvenate. If we can look in the face of a murderer and recognize nascent humanity, then we truly have become a community that seeks nothing less than to live up to all of our highest values. In the first world we become our worst selves, in the second world we become our best. And considering that there is no getting even, there is no going back, choosing among the two should be easy.

This is not to say, of course, that the execution of a wrongdoer

²²⁰ *But see* KANT, *supra* note 43, at 142 (suggesting that there is a mythological significance to punishing wrongdoers and arguing that even if civil society were to be disbanded we would still be morally obligated to execute the murderer or be considered “collaborators in this public violation of justice”); *cf.* George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 60 (1999) (explaining that “blood guilt” is the biblical notion that the “ongoing disorder” in the universe caused by a crime can only be redressed through proper punishment).

Within a retributive scheme, the deep problem with blood guilt is that it smacks of vengeance. KANT, *supra* note 43, at 278 (explaining that “blood guilt” cannot be allowed to “come upon [the] land” because “[b]lood innocently shed cries out for vengeance [and c]rime cannot remain unavenged”). Vengeance, of course, runs entirely contrary to the central principles of retributive justice. MOBERLY, *supra* note 199, at 101-02 (distinguishing retributive justice from vengeance in that retributivism is (1) disinterested, “neither selfish nor malevolent,” and (2) impersonal, expressing “antagonism first and foremost towards the wrong as such and only indirectly and incidentally towards the person of the wrongdoer so far as he embodies the wrong”); *see also* MURPHY & HAMPTON, *supra* note 47, at 137 (distinguishing the “vengeful hater” who seeks to destroy the wrongdoer for personal satisfaction, and the retributivist who seeks merely to assert the moral truth of desert); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 307 (1998) (explaining that revenge is not a permissible reason for acting and that we should never “answer evil with evil”).

²²¹ Nietzsche recommends: “[L]et us not become darker ourselves on [criminals’] account, like all those who punish others and feel dissatisfied. Let us sooner step aside. Let us look away.” FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 254 (Walter Kaufmann trans., Random House 1974) (1887).

who deserves it would not be justified, but rather to take issue with exactly what is meant by “desert” in the first instance. Desert must not encompass only the specific instance of the crime, but it also must evaluate post hoc character as well. As argued more fully above, this is not only a well-entrenched aspect of current sentencing hearing procedure,²²² but the right thing to do.²²³ Moreover, as the above discussion illustrates, more than a few instrumental goods are advanced by recognizing character transformation: the legitimation of the social compact, expression of positive state self-conception, benefits to living victims, and the affirmation of hope. Instrumental goods are not independent reasons for embracing the Transformation Thesis, but might serve to tip the scale where one is in perfect equipoise between a character-driven and a non-character-driven theory of punishment. That is, if both theories seem perfectly and evenly plausible, then instrumental goods argue for the theory here.

It is from these intuitions that the Transformation Thesis grows. What follows is a structured argument for the notion that we should commute²²⁴ death sentences when a prisoner experiences an authentic ethical transformation (the “Transformation Thesis”). Given the framework set out in the above discussion, capital punishment cannot be deserved where the prisoner has undergone an authentic ethical conversion—as demarcated by remorse and penance—for three reasons: (1) as a “new man” the converted does not deserve the punishment prescribed to “another;” (2) the converted’s remorse and penance prorates the external punishment deserved; and (3) under the proportionality thesis, penultimate desert cannot justify the ultimate punishment.

²²² *Supra* note 143; see *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”).

²²³ See *supra* Part I.B.

²²⁴ For the sake of convenience, this Comment uses the language of “commuting” the death sentence, which tends to imply a sentence decrease to life imprisonment without the possibility of parole. In most cases, this would likely be a just outcome, but only a retributive analysis in any particular instance would be able to come to any grounded conclusions. For a more detailed analysis as to why life sentences are an acceptable alternative to capital punishment in the opinion of most Americans, and how such a system might be implemented, see David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 4-5 (1998).

A. *New Man*

Joram Haber describes the bad actor's character transformation using language with which we are all intuitively familiar: "[T]he wrongdoer can in some sense become a new person . . . [and] the person [he] was who committed the wrong [becomes] nothing more than a metaphysical shadow."²²⁵ Austin Sarat similarly describes the remorseful offender as "in an important sense, a changed, perhaps a different, person."²²⁶ Likewise, just prior to her execution, noted pickaxe murderer Karla Faye Tucker was described as "not the same person," having experienced her religious conversion.²²⁷ Strong language like this can be found in much of the literature about remorseful, penitent wrongdoers and cannot, I think, be simply dismissed as hyperbole. It reflects important intuitions about identity, responsibility,²²⁸ and the possibility for "moral rebirth" through the repudiation of past acts and past selves.²²⁹ Even Kant, the godfather of retributive justice, recognized that through repentance a new birth is in fact possible and that our new selves would not, largely, deserve punishment for the transgressions of our old selves.²³⁰

Think of Dostoevsky's Raskolnikov, a murderer who over time comes to regret what he has done, develops a sense of remorse, and changes his fundamental moral perspective.²³¹ The murderer begins

²²⁵ HABER, *supra* note 137, at 96.

²²⁶ Sarat, *supra* note 140, at 170.

²²⁷ BEVERLY LOWRY, *CROSSED OVER* 14 (1992); *see also* Mike Ward & Rebecca Rodriguez, *Tucker's Life Ends Amid Prayers for Forgiveness, Demands for Justice*, AUSTIN AM. STATESMAN, Feb. 4, 1998, at A1 (reporting that as far as George W. Bush and the parole board were concerned, conversion was not sufficient to prevent her execution.); *cf. Hannity & Colmes: Karla Faye Tucker Case* (Fox News television broadcast, Feb. 2, 1998), 1998 WL 29778459 ("[I]f anyone deserved to have her sentence commuted on the basis of mercy or rehabilitation, I believe she is the fit candidate.").

²²⁸ *See* A.C. EWING, *THE MORALITY OF PUNISHMENT* 97 (1929) ("It is generally admitted that recognition of one's sin in some form or another is a necessary condition of real moral regeneration . . .").

²²⁹ HABER, *supra* note 137, at 96; *see also* MURPHY & HAMPTON, *supra* note 47, at 25 (indicating that repentance is one way to divorce the self from an evil act).

²³⁰ IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* 64-65 (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1792).

²³¹ The hero, Rodion Romanovitch Raskolnikov, finds hope in the very suffering of his anticipated seven-year prison sentence: "[He] had seven more years before [him], and what unbearable sufferings and infinite happiness those years would hold! But he was restored to life and he knew it and felt to the full all his renewed being . . ." FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* 526 (Jessie Coulson ed., Oxford University Press 1995) (1866); *see also* Shafranske, *supra* note 169, at 31 ("[W]ithout remorse . . . the person is unable to become a new self and to transcend the limitations of past modes of being in the world.").

to see the murder not as a personal triumph but as the nexus of an intense shame.²³² In this story the crime *becomes* the punishment and a new man is born with a moral outlook entirely foreign to his former self.²³³ By the end of the novel the reader gains a sense of the wastefulness involved in Raskolnikov's punishment, a wastefulness that perhaps justifies his unusually short sentence of seven years,²³⁴ and perhaps explains why the reader does not feel that the sentence is too light. To the contrary, much like the New York ambulance driver, our sense is that the minimal sentence is more than offset by Raskolnikov's shame, remorse, and newfound compassion for others.²³⁵ In some ways we feel that Raskolnikov understands his desert and proper punishment on an order of magnitude many times greater than the state and its mechanically applied sentence ever could. With diamonds ensconced in the ribcage, his insights are those of a man who has seen darkness and then light, and knows, perhaps better than most, the difference between the two.

The technical retributive argument here is not too complicated and is concededly less illuminating than more impressionistic meditations on Raskolnikov's character shift, but it is as follows. Any analysis of desert begins with identity. The first question is, "to whom is the desert ascribed?"²³⁶ When identity changes through character transformation, the desert of the old man attaches less clearly, if at all, to the new man. Perhaps some desert gets lost in the transition, or perhaps desert is identity-specific. Perhaps we own, as Rawls says, only those attributes most closely related to our most willful attempts to act in viciousness or virtue²³⁷ and old nonvirtuous acts are no longer significant to individuals who no longer trace their connection, as selves,

²³² Raskolnikov expresses his revulsion for himself this way, "Finally, I am a louse because . . . I myself am, perhaps, even worse and viler than the louse I killed, and I *knew beforehand* that I should tell myself so after I had killed her! Can anything compare with such horror? Oh, platitudes! What baseness!" DOSTOEVSKY, *supra* note 231, at 264.

²³³ One theorist has described Dostoevsky's conception of remorse this way: "Dostoevsky's is a moral theory—it condemns the very readiness to 'step over the blood' and points to the moral and spiritual consequences of the crime as the worst punishment for the perpetrator." Vera Bergelson, *Crimes and Defenses of Rodion Raskolnikov*, 85 Ky. L.J. 919, 951 (1996-1997).

²³⁴ DOSTOEVSKY, *supra* note 231, at 513, 527.

²³⁵ "For centuries, the positive role of remorse in bringing about religious conversion has been recognized." Studzinski, *supra* note 218, at 212.

²³⁶ That "whom" would be our character. Aristotle argued that our characters make us who we are. ARISTOTLE, *supra* note 103, at 350-60.

²³⁷ RAWLS, *supra* note 34, at 274.

to them. Whatever explanation turns out to be true, the central point is the same: to the extent that the new man really is a different person,²³⁸ he should not be punished, in full, for the bad acts of the person he once was.²³⁹

B. *Remorse and Penance Downgrade Desert*

Jeffrie Murphy declares, "The repentant person has a better character than the unrepentant person, and thus the repentant person . . . simply deserves less punishment than the unrepentant person."²⁴⁰ Character retributivism calls for an examination of the convict's whole moral being in order to calculate desert properly. Desert, as we have discussed, is diminished or downgraded through remorse and penance. One way of dissecting this phenomenon is by thinking of remorse as gold that displaces the desert in the criminal's bathtub, in essence offsetting the need for corporal punishment though the grief- and anguish-producing aspects of authentic remorse. Punishment of the body, in a retributive scheme, is prorated by the wrongdoer's self-imposed punishment of the mind.

A second way of thinking about remorse's desert-diminishing qualities is by examining its effect on those individuals, like the New York ambulance driver, who have already adopted the moral perspective.²⁴¹ For these people desert is coal that can be, to some extent, burned away through the expression of remorse. On this account, part of what the wrongdoer "deserves" is to know the depth of his wrong through the condemnation of the moral community. Some felons suffer the full force of the moral community's condemnation and never acquire that knowledge. But if the wrongdoer, like the New York ambulance driver, has already acquired a deep understanding of the pain caused to others by his actions, and as a result of that wrongdoer's connection to the community feels that pain inside himself, then less desert remains than would otherwise. In this case remorse

²³⁸ See HABER, *supra* note 137, at 96 (indicating that one may experience "moral rebirth").

²³⁹ Of the transformed murderer William Neal Moore, a cellmate remarked, "[i]f you kill him today, you're killing a body, but a body with a different mind. It would be like executing the wrong man." Bill Montgomery, *Even Murder Victim's Kin Urge Mercy for Inmate*, ATLANTA CONST., Aug. 21, 1990, at A1.

²⁴⁰ Murphy, *supra* note 46, at 157.

²⁴¹ See Kenneth Gorelick, *Wielder of Many Swords: Remorse and Its Transmutations*, 5 PSYCHOTHERAPY PATIENT 219, 227 (1988) ("Remorse is an internalized feeling. It requires the development of the capacity to identify with a separate other as having the same worth and feelings as the self.").

does not transform the wrongdoer so much as reaffirm existing normative principles. Nonetheless, it is useful in explaining remorse's relationship to desert and as a contrast against the third method for thinking about remorse and penance's relationship to desert.

That third method is to think of remorse as exerting pressure on coal in the ribcage vault. Over time the desert is transformed and thereby diminished, while simultaneously providing the base substance for a change of heart. The process—what I am calling penance—of transforming one into an autonomous individual of compassion filled with diamond-like inner radiance instead of toxic blame, exorcises desert and thereby calls for a prorating of external punishment. A failure to readjust punishment of the body after a transformation of the mind would be a failure under retributivism's proportionality doctrine to punish according to, and in strict measure with, desert.

A nonfictitious example of remorse and penance is instructive here. Paul Crump killed a security guard during a bank robbery.²⁴² Over the course of his time on death row, Crump underwent a "character metamorphosis" working in the prison's convalescent hospital.²⁴³ According to one guard, Crump became "mother, father, priest and social worker" to fifty inmates, including problem prisoners and inmates who needed protection from other prisoners.²⁴⁴ This pattern is typical of the genuine penitent: he actually wants to affect the world positively by engaging in the force of creation instead of destruction.²⁴⁵ Two days before Crump's scheduled execution, Illinois Governor Otto Kerner was persuaded that Crump was not the man he once was and commuted the death sentence to 199 years imprisonment without the possibility of parole.²⁴⁶ Some might call Kerner's commutation an ex-

²⁴² See *People v. Crump*, 147 N.E.2d 76 (Ill. 1957) (per curiam) (affirming conviction and sentence upon retrial).

²⁴³ Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 37 (1998).

²⁴⁴ Ronald Bailey, *Rehabilitation on Death Row*, in *THE DEATH PENALTY IN AMERICA* 556, 561 (Hugo Adam Bedau ed., 1964).

²⁴⁵ In contrast, some argue that altruistic emotions are "intrinsically valuable, in the sense that they are morally good apart from whether they actually issue in beneficent action." JUSTIN OAKLEY, *MORALITY AND THE EMOTIONS* 73 (1992) (internal quotation omitted).

²⁴⁶ Michael B. Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHL-KENT L. REV. 13, 43-44 (1965). Other notable death row prisoners who have been transformed include Willie Lee Richmond, see *State v. Richmond*, 886 P.2d 1329 (Ariz. 1994) (modifying Richmond's sentence to life without parole for, among other reasons, his rehabilitation and religious conver-

pression of mere supererogatory mercy, but this underestimates the more basic, if not more subtle, truth that changed convicts like Crump deserve their reduced sentences.

C. *Penultimate Desert*

The death penalty is the ultimate sanction.²⁴⁷ The nature of the crime, the seriousness of the punishment, and our notions about personal responsibility demand that we apply the death penalty only under the most principled theory of punishment, retributive justice.²⁴⁸ This is not only a widely held belief, but an important feature of the Court's capital jurisprudence.²⁴⁹ With near exclusivity, the principle of desert articulated by retributivism justifies (if any principle can) the application of capital sentences upon the worst of our criminal offenders.²⁵⁰ If retributive principles fail to justify the death penalty in any particular application, no justification is sufficient. And as we have seen, the transformed prisoner downgrades his desert and changes his character in ways radical enough to call for the prorating of punishment under the maxim of proportionality. If retributivism, and only retributivism, justifies any given application of the ultimate punishment as a moral response to having committed the ultimate crime,²⁵¹ then when a significant portion of the criminal's desert is relieved or otherwise exorcised through transformation and its associated properties, no sufficient normative justification for the capital sentence any longer obtains.²⁵² Put another way, mere penultimate desert cannot justify the ultimate punishment.²⁵³

sion), and Caryl Chessman, *see* *People v. Chessman*, 341 P.2d 679, 684 (Cal. 1959) (affirming a conviction for crimes as the Red Light Bandit). Unlike Crump, Chessman was not so lucky. Despite a habeas appeal, he was executed in 1960. WILLIAM M. KUNSTLER, *BEYOND A REASONABLE DOUBT? THE ORIGINAL TRIAL OF CARYL CHESSMAN* 286-88 (1961).

²⁴⁷ *See* van den Haag, *supra* note 29, at 1662 (writing, in an article entitled *The Ultimate Punishment*, "[t]he death penalty is our harshest punishment").

²⁴⁸ *See supra* Parts I.B-C (describing retributive justice as the principal, if not sole, justification for the death penalty and character retributivism as the most powerful iteration of that theory).

²⁴⁹ *Supra* text accompanying notes 93-100.

²⁵⁰ *See* McCord, *supra* note 224, at 6 ("I believe [retributive justice] is a natural and acceptable justification for punishment—indeed, the most powerful justification in highest condemnation cases."); *supra* Part I.B.

²⁵¹ *See* McCord, *supra* note 224, at 22 (discussing the elements of a "highest condemnation case").

²⁵² "The deserts-limitation principle," as it has been called, "requires that those who do not deserve the sanction be spared." Howe, *supra* note 28, at 832.

²⁵³ *See* Steiker & Steiker, *supra* note 94, at 372 (describing the Court's "narrowing"

An additional important point is that the new man must not be disadvantaged just because he has come to his ethical awakening post-sentencing. Morally cognizant people, like Anne Lamberson, are, in a sense, advantaged twice for having expressed their sense of remorse before their capital sentencing hearing. First, were the law to recognize ethical transformations, Lamberson-like wrongdoers who are sentenced to life, not death, due to expressions of remorse at their sentencing hearings, avoid the hopelessness, despair, and anguish of death row converts who pray for commutation but may be cruelly disappointed. Second, again, were the law to recognize ethical transformations, Lamberson-like wrongdoers would, at a strategic level, have two bites at the apple. The first time around they would have an opportunity to exhibit remorse at their sentencing hearing. In cases in which the decisionmaker errs by failing to recognize authentic remorse, the Lamberson-like prisoner could then appeal to the mechanisms available to downgrade death sentences.

But perhaps the larger, more principled point here is that a post-sentencing awakening is far more impressive than merely expressing preestablished remorse before a judge and jury because it requires a change in consciousness, often cutting against the wrongdoer's entire life trajectory. A transformation is a significant moral event that should not be undervalued based on the somewhat arbitrary time framework within which the correctional justice system happens to have caught up with the defendant. If he were more fleet-footed, a criminal could have outrun the law up until the time at which he experienced his newfound compassion, and would thereby be, if caught, advantaged at his sentencing hearing. Slower criminals, more easily apprehended, have less time to come to the same sorts of moral conclusions, not guaranteed by, but often induced through, inevitable maturity. The difference between the slow and fast criminal is not morally significant. No clear conceptual rule aligned with retributive justice nor supported by other values protected by the criminal law (except, perhaps, the most brutal sort of efficiency) can explain why capital crimes would be legitimately mitigated at a sentencing hearing, but not at any time thereafter regardless of the sort of fundamental shift in character that a prisoner might experience during his incarceration.

doctrine, which holds that "only those who are most deserving of the death penalty are eligible to receive it").

D. Addressing Concerns and Counterarguments

The foremost question critics ask when presented with the Transformation Thesis is: How are we supposed to tell the difference between an authentic conversion and a fraudulent one?²⁵⁴ After all, of the many death row inmates who claim to have found God, some have, in a meaningful sense, and some have not. Since every "ought" implies a "can,"²⁵⁵ it is presumptively possible to set up a system that answers this concern. There is no reason to believe that establishing a process to verify transformation would be any more difficult than the establishment of any other legal process that attempts to distinguish among agents' states of intentionality²⁵⁶—such as proving malice aforethought in a murder trial,²⁵⁷ intent in a civil trial,²⁵⁸ or remorse at

²⁵⁴ See Amitai Etzioni, *Introduction to REPENTANCE: A COMPARATIVE PERSPECTIVE* 1, 9 (Amitai Etzioni & David Carney eds., 1997) ("How can one determine that remorse is true? Many people, when faced with the apologies of politicians, criminals, and even friends and spouses, have doubts as to the motivation behind such expressions.")

²⁵⁵ William K. Frankena, *Obligation and Ability*, in *PHILOSOPHICAL ANALYSIS: A COLLECTION OF ESSAYS* 148, 157 (Max Black ed., 1950) ("[M]any more philosophers . . . say, in one way or another that 'ought' implies 'can.' Indeed, if there is anything on which philosophers are agreed with plain men and with each other, and goodness knows there is very little, it is Kant's dictum, 'Du kannst, denn du sollst!'; see also MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 341 (1984) ("John Rawls, following Hart, regards [ought implies can] as the principle of responsibility from which more particular principles, such as those requiring actions, intentions, or reasons, may be derived."). See generally ALAN R. WHITE, *MODAL THINKING* 147-57 (1975) (discussing the modal verbs "ought" and "can").

²⁵⁶ Admittedly, this is a difficult task. The law requires that we discover a special sort of ultimately unverifiable knowledge. A previous editor of the *Law Review* has explained the tension this way:

First, one has no direct empirical or physical evidence and thus no direct knowledge of others' internal mental experiences; there is no accurate way, moreover, to infer such knowledge. (And even if such an inferential method were proposed, there would be no way to verify it.) Second, the criminal law and the Model Penal Code require such knowledge.

Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2080-81 (1994). But this is not a problem unique to the Transformation Thesis. It is a problem of the law generally, *id.*, and a philosophical quandary of other minds, see *supra* Part I.B (discussing the problem of other minds within the context of character retributivism).

²⁵⁷ See, e.g., *Schad v. Arizona*, 501 U.S. 624, 640-41 (1991) (briefly tracing the history of malice aforethought from England to Philadelphia and then to the state of the instant matter, Arizona).

²⁵⁸ See, e.g., *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955) (discussing the quality of intent required to find a cause of action for noncriminal battery); see also, e.g., *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (Ch. 1885) (presuming that states of intentionality are objective and can be known because "the state of a man's mind is as much a fact as the state of his digestion").

sentencing.²⁵⁹ Beyond this, given that the focus of this Comment is to prove that transformed death row prisoners *should* have their sentences commuted, the details of how precisely this is to occur are left to another day.²⁶⁰

The second concern is that the Transformation Thesis may prove too much. Under the analysis here, a fully transformed prisoner not only would escape execution, but may be justified in foregoing any and all state-sanctioned punishment. It must be conceded that this, at least conceptually, may be true. It is not impossible that, like Saul of Damascus, even a murderer might, at some point, achieve a level of ethical awareness and universal love justifying his release from prison altogether.²⁶¹ But a few caveats are in order. First, this sort of radical character transformation is eminently rare.²⁶² Second, if the Transformation Thesis is sound, then perhaps we should not be so afraid of such an outcome. After all, if Saul of Damascus (later Paul) were prosecuted for the murder of multiple Christians (Jews at the time) in modern-day America, he would likely receive the death penalty and no subsequent religious conversion, with or without God's help, would commute his sentence. All of us, not just Protestants, should be troubled by this. Third, at a specific deterrence level, if all murderers achieved Buddha-awareness and were freed from prison, it would be hard to explain how we would be worse off.

On a related note, critics might want to accuse the Transformation Thesis of accidental overambition. If transformation works to downgrade desert in the capital context, it ought to work even more effectively in the noncapital context. To some small extent the critics would be right. First, however, we should note that we already see this phenomenon in the status quo. Anne Lamberson, the New York ambulance driver, for example, could have been charged with second degree vehicular manslaughter,²⁶³ calling for a penalty far in excess of five years parole,²⁶⁴ but her remorse seems to have aided in success-

²⁵⁹ *Supra* note 143.

²⁶⁰ *See supra* Part III.C (outlining minor suggestions as to some of the criteria that might be used by a prison board examining for an authentic death row transformation).

²⁶¹ *Acts* 9:1-19 (recounting Saul's conversion to Christianity and God's prohibition against Saul's imprisonment).

²⁶² Nietzsche, *supra* note 125, at 48 ("True remorse is rarest among criminals and convicts: prisons and penitentiaries are not the breeding places of this gnawer.").

²⁶³ N.Y. PENAL LAW § 125.12 (McKinney 1998); *see also id.* § 125.15 (indicating that manslaughter in the second degree only requires reckless behavior).

²⁶⁴ Vehicular manslaughter in the second degree is a class D felony, calling for up

fully pleading to a lower sentence. Thus it appears that the criminal justice system already incorporates many of the principles advanced here, and without too much controversy.²⁶⁵ Second, the reason why the Transformation Thesis is especially effective in the capital context and less so in other areas of the criminal law is that nowhere else does retributivism command such a central and near-exclusive role. The Transformation Thesis, remember, is only effective to the extent retributive justice dictates and controls the terms of punishment. But other theories of punishment, rehabilitation, and especially deterrence, begin to exert increasing influence in much, if not all, of the remaining areas of criminal law. In other words, even if the Transformation Thesis were effective in downgrading noncapital punishments on retributive grounds, other theories would take up the slack, continuing to justify sentences in whole or in part. This is why the arguments for transformation are uniquely effective against capital sentences and less so against mere corporal²⁶⁶ ones.

IV. LEGAL RELIEF

Presuming that the Transformation Thesis is firmly grounded in retributive justice, how might it be implemented into law?²⁶⁷ The executive branch, while sporadically effective, cannot be counted on to make it work. The judiciary, at some point in the future, could protect the converted capital prisoner through habeas corpus relief, but at present is unlikely to do so. The new man's best hope for commutation is original legislation.

A. Executive Clemency

The executive's authority to commute death sentences to life without the possibility of parole, or any other alternate sentence for

to seven years imprisonment. *Id.* § 70.00(2)(d). Manslaughter is a class C felony, calling for no more than fifteen years imprisonment. *Id.* § 70.00(2)(c).

²⁶⁵ See *supra* note 143 (discussing the treatment of an expression of remorse shown by offenders as a mitigating circumstance in most jurisdictions).

²⁶⁶ See *supra* note 6 (distinguishing between corporal and capital sentences).

²⁶⁷ The following discussion, of course, is relevant only for states sanctioning capital punishment. To date, only twelve states—Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin—have abolished the death penalty. Bonner & Fessenden, *supra* note 84. In the remaining states, however, 3682 lives hang in the balance, not an insignificant number. Sara Rimer, *Life After Death Row: For These Men, Sentenced to Death and Then Freed, the Outside World Has Offered More Misery Than Happiness*, N.Y. TIMES, Dec. 10, 2000, § 6 (Magazine), at 100.

that matter, is a poor mechanism to implement the thesis advocated here. Clemency is a broad power that includes pardons, commutations, and reprieves.²⁶⁸ The executive may make all clemency decisions absent any legal—or even internally consistent—standards, has absolute discretion in its use, and the decisions cannot be reviewed by any other body.²⁶⁹ Thus the first problem is that clemency lacks the sort of inter-case fairness that we expect from our institutions of criminal justice. Second, executive clemency is rarely offered and its use is declining.²⁷⁰ Third, when it is used, a prisoner's character transformation (often articulated as his having been rehabilitated) is almost never considered as a primary criterion for commutation.²⁷¹ Many executions have gone ahead despite overwhelming evidence of a prisoner's transformation.²⁷² Fourth, because the executive is otherwise legally unconstrained, clemency decisions are subject to the vagaries of politics.²⁷³ This means that clemency often may be granted

²⁶⁸ See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 289 (1993) (explaining that pardons "invalidate both the guilt and the punishment of the defendant," reprieves "temporarily postpone the execution," and commutations "reduce the severity of punishment").

²⁶⁹ See Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 891 (1981) ("[E]xecutive authorities today exercise their power virtually free from procedural control by the courts."); see also Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 392 (1989) ("At present, of the states with the death penalty, twenty-two confer an exclusive clemency power on the governor, while fifteen use a pardon board or other body to check the executive."). In some states, such as Florida, the governor is not even required to state the precise reasons for clemency. Joseph B. Schimmel, *Commutation of the Death Sentence: Florida Steps Back from Justice and Mercy*, 20 FLA. ST. U. L. REV. 253, 264 (1992).

²⁷⁰ See generally Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-1991) (examining the declining use of executive clemency in capital cases nationally).

²⁷¹ See Radelet & Zsembik, *supra* note 268, at 303 (indicating that since 1972, of all capital defendants having had their death sentences commuted through executive clemency, only one was commuted primarily for reasons having to do with personal rehabilitation).

²⁷² For example, despite the near universal sentiment that Karla Faye Tucker "deserved to have her sentence commuted" based on her religious conversion, *Hannity & Colmes*, *supra* note 227, she was executed. *Date with Death: Texas to Snuff out Life of Hubby Killer*, EDMONTON SUN, Feb. 23, 2000, at 72.

²⁷³ "Clemency," as one deputy pardoning attorney puts it, is after all "unavoidably in some ways a political act." Kevin Krajick, *The Quality of Mercy*, CORRECTIONS MAG., June 1979, at 46, 52. "[W]hen the apparent reasons for pardons are sufficiently disliked, the executive may be rebuked—politically, even if not by the courts." Pollack, *supra* note 14, at 545 (citation omitted); see also, e.g., *Graham v. Tex. Bd. of Pardons & Paroles*, 913 S.W.2d 745, 749-50 (Tex. Ct. App. 1996) (noting that executive clemency is "notoriously susceptible to abuse by governors" and "greatly affected by public opin-

where under retributive principles it should not²⁷⁴ and, conversely, might not be issued where it clearly should.²⁷⁵ Clemency could, in the abstract, be used to achieve just deserts for transformed capital offenders,²⁷⁶ but largely due to a lack of consistently applied principled standards, far too often it is not.²⁷⁷

ion and political pressures"); Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177 (1993) (discussing the politics of executions from his perspective as Attorney General and former Governor of New Mexico); Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227 (1993) (discussing governors' political need to be able to explain clemency decisions to the public); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 349 (1996) (explaining that the foremost reason for the decline in grants of executive clemency is the political consequences to the executive); Editorial, *The Pardons Look More Sordid*, N.Y. TIMES, Feb. 9, 2001, at A22 (critiquing Bill Clinton's pardon of Marc Rich as "an inexcusable abuse of the president's absolute clemency power" because Clinton may have been influenced in his decision by political fundraising considerations).

²⁷⁴ See, e.g., DEAN MOORE, *supra* note 33, at 208 (arguing that pardons sometimes "take into account factors that arose since the case was tried" but that "what the offender deserves is the only consideration that has the moral credentials to justify granting or withholding a pardon").

²⁷⁵ An interesting anecdote is Keith Jackson's. In September of 1989, this nineteen-year-old high school student was arrested after selling cocaine in Lafayette Square, across the street from the White House. Tracy Thompson, *D.C. Student Is Given 10 Years in Drug Case*, WASH. POST, Nov. 1, 1990, at B11. Under the fairly draconian mandatory sentencing laws, this first-time offender received a ten-year sentence without the possibility of parole. *Id.* District court judge Stanley Sporkin, feeling that the sentence was enormously excessive, recommended appealing to then-President George H. Bush for a pardon. *Id.* But Bush had taken the opportunity of Jackson's arrest and conviction to make a finger-wagging, tough-on-drugs political speech, even going so far as to use the confiscated cocaine as a visual aid. Judge Sporkin conceded to Jackson: "[Bush] used you, in the sense of making a big drug speech." *Id.* Politics can, at times, soil the more noble aims of executive clemency authority.

²⁷⁶ See Kobil, *supra* note 98, at 571 ("[C]lemency can be used to achieve justice, by individualizing sentences and remitting undeserved punishment."). In the case of *Moore v. State*, 213 S.E.2d 829 (Ga. 1975), for example, clemency was granted by the Georgia Board of Pardons and Paroles citing William N. Moore's exemplary prison record, remorse, and religious conversion, among other factors. See Radelet & Zsembik, *supra* note 268, at 313 (listing the board's factors for commutation).

While governor of California, Pat Brown commuted twenty-three of fifty-nine death row prisoners. EDMUND G. (PAT) BROWN WITH DICK ADLER, PUBLIC JUSTICE PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH-ROW at xiii (1989). Remorse was an important factor in Brown's deliberations. *Id.* at 120.

²⁷⁷ In actual practice clemency is rare, Cobb, *supra* note 269, at 393 ("The exercise of executive clemency for capital defendants has fallen into desuetude since the death penalty was reinstated in the United States by *Gregg v. Georgia*[, 428 U.S. 153 (1976)]."), and in the post-*Furman* era, its application is "idiosyncratic at best, and arbitrary at worst," Radelet & Zsembik, *supra* note 268, at 305.

B. *Habeas Review*

Although the Court has never recognized ethical conversions as grounds for relief, a reinterpretation of constitutional mandates could conceivably offer the newly transformed offender some hope. A typical ethical conversion will take time. Absent a lapse of significant time between the commission of the crime and the trial,²⁷⁸ the converted wrongdoer will be forced to use collateral review as one of the only legal remedies available to him post-transformation. It is controversial as to whether the Constitution does or should embody moral law,²⁷⁹ but if an agreeable congruence is to be found, habeas review may provide it.

Briefly, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") set out new and highly restrictive rules governing habeas corpus.²⁸⁰ Section 2254 of the amended code mandates that the federal courts "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."²⁸¹ But further, relief

²⁷⁸ See, e.g., Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1572 (1998) (explaining that in one unusual case, the long delay between arrest and trial "provided the defendant with a valuable opportunity to present a convincing 'guilty but redeemed' case, which is difficult to present credibly when less time has passed between the commission of the crime and the trial" (citation omitted)).

²⁷⁹ Some scholars argue that the Constitution incorporates moral law. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 126-215 (1977) (indicating that the Constitution incorporates morality, not judges' personal opinions). Some think attempting to interpret moral law from the Constitution is dangerous. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting) ("Rigorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others."); Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2409 (1992) (asking the question central to Senator Biden's inquiries at Clarence Thomas's confirmation hearings: "Can the judge, if she thinks the law sufficiently immoral, substitute her views for the legal mandate?").

²⁸⁰ Pub. L. No. 104-132, 110 Stat. 1214 (1996); see also *Felker v. Turpin*, 518 U.S. 651 (1996) (discussing the AEDPA in the context of the history of habeas corpus and finding that the AEDPA does not violate article III, section 2 of the U.S. Constitution or the Constitution's ban on suspension of the writ pursuant to article I, section 9, clause 2).

²⁸¹ 28 U.S.C. § 2254(a) (1994). See generally *id.* § 2261 (Supp. IV 1998) (prescribing a capital offender's appeal due to appointment of counsel); *id.* § 2262 (prescribing mandatory stays of execution, describing the duration of and limits on stays of execution, and discussing the availability of successive petitions); *id.* § 2263 (describing the time requirements for the filing of habeas corpus applications and the tolling rules); *id.* § 2264 (delineating the scope of federal review and district court adjudication); *id.*

may be granted only where incarceration was a result of a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."²⁸² Review of federal decisions²⁸³ is no less restrictive, utilizing the same standard as articulated under § 2254.²⁸⁴ Thus, only those constitutional rights clearly delineated by the Supreme Court may provide grounds for habeas relief.²⁸⁵ The Eighth Amendment, arguably, is one of those rights.

"The Eighth Amendment, which applies against the States by virtue of the Fourteenth Amendment,"²⁸⁶ provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁸⁷ The Court has held over the years, in *Ford*, *Gregg*, *Trop*, and *Weems*, that this proscription is not static but rather reflects evolving standards of decency.²⁸⁸ In this context, the Court examined the issue of proportionality, determining whether the penalty ascribed was appropriate for the crime committed.²⁸⁹ In gen-

§ 2265 (delineating the application to state unitary review procedure); *id.* § 2266 (limiting the periods for determining applications and motions).

²⁸² *Id.* § 2254(d)(1).

²⁸³ A motion to vacate, set aside, or correct a sentence brought under § 2255, although similar in many ways, is not a petition for a writ of habeas corpus. *United States v. Hayman*, 342 U.S. 205, 220 (1952). Section 2255 is rather a statutory supplement to writ. *In re Hanserd*, 123 F.3d 922, 925 (6th Cir. 1997). Congress enacted § 2255 "to allow the court that imposed [the] sentence, rather than a court that happened to be near a prison [in which the person was incarcerated], to hear a collateral attack on that sentence." *Id.*

²⁸⁴ Although technically different, the standard for relief between § 2254 and § 2255 is identical. A § 2255 motion is the federal equivalent of a state habeas petition filed pursuant to 28 U.S.C. § 2254, and is intended to mirror § 2254 in operative effect. *Reed v. Farley*, 512 U.S. 339, 353-54 (1994). Thus, precedent under § 2254 and § 2255 may be used interchangeably. *See, e.g., United States v. Nahodil*, 36 F.3d 323, 327 (3d Cir. 1994) (applying precedent under § 2254 to a § 2255 proceeding); *United States v. Gutierrez*, 839 F.2d 648, 650 (10th Cir. 1988) (same).

²⁸⁵ *See Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997) ("[A] writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court."); *Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996) ("Federal Courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court caselaw.").

²⁸⁶ *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (citation omitted).

²⁸⁷ U.S. CONST. amend. VIII.

²⁸⁸ *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 373 (1910).

²⁸⁹ *See Hutto v. Davis*, 454 U.S. 370, 371-72 (1982) (discussing whether the lower court was correct in finding that possession with intent to sell a small amount of marijuana justified a forty-year prison sentence and a \$20,000 fine).

eral, the Eighth Amendment contains no proportionality guarantee.²⁹⁰ An exception is made, however, in the analysis of capital penalties. The Supreme Court first found in *Coker v. Georgia* that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”²⁹¹ Five years later the Court held that imposing the death penalty upon a participant in a felony murder without any inquiry into the participant’s intent to kill likewise violates the Eighth Amendment under the doctrine of proportionality.²⁹² In *Rummel* the Court established that Eighth Amendment proportionality analysis is unique to the review of capital cases,²⁹³ and in *Harmelin* it “reassert[ed]” that proposition.²⁹⁴ The Court spoke clearly on this issue: “Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”²⁹⁵

An untested application of the proportionality doctrine wed to the Transformation Thesis might argue as follows. Whereas the capital prisoner may have deserved the death penalty at one time, for the newly transformed, this is no longer true. Proportionality, as discussed above in greater length, is determined by properly matching the prisoner’s desert with his punishment.²⁹⁶ The wrongdoer has downgraded his desert first by changing his moral identity, by transforming into the new man.²⁹⁷ Second, through the remorse and penance, the new man has displaced and transformed his desert, and

²⁹⁰ See *Harmelin*, 501 U.S. at 965 (finding that the setting aside of a conviction based on proportionality analysis in *Solem v. Helm*, 463 U.S. 277 (1983), “was simply wrong”).

²⁹¹ 433 U.S. 584, 592 (1977).

²⁹² *Enmund v. Florida*, 458 U.S. 782, 788 (1982); cf. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (using a proportionality analysis to conclude that the Eighth Amendment does not prohibit imposing the death penalty where the defendant is a major part of a felony murder, and whose mental state is one of reckless indifference).

²⁹³ *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

²⁹⁴ *Harmelin*, 501 U.S. at 994.

²⁹⁵ *Id.*; see also, e.g., *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (providing special protection against a jury’s racial bias in capital trials); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring reviewing courts to examine all mitigating evidence); *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (advancing a unique rule for capital trials, namely, that the sentence of death may not be constitutionally imposed “after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict”).

²⁹⁶ See *supra* Part I.A (discussing how proportionality doctrine affects punishment).

²⁹⁷ See *supra* Part III.A (discussing how the new man is transformed into another person entirely).

joined the moral community as an autonomous human being.²⁹⁸ And last, since it can no longer be said that the transformed prisoner has committed the ultimate crime—unremorseful, cold-blooded intentional murder—he does not deserve the ultimate punishment.²⁹⁹ For all these reasons, the sentence of death no longer stands in proper proportion to the desert emanating from the prisoner and his crime.

Unfortunately, based on the Court's existing doctrine, this argument suffers from insuperable difficulties. The Supreme Court has never found a post hoc ethical transformation to be sufficient grounds for habeas relief, under proportionality or any other doctrine. Nor has the Court ever held remorse, penance, or character transformation to be cognizable habeas corpus claims. Further, habeas corpus relief traditionally has been granted only upon the finding of some error in the trial itself.³⁰⁰ Structural error, as such trial error has been called, is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process."³⁰¹ Habeas relief may be granted only in cases in which the constitutional claims of trial error resulted in "actual prejudice."³⁰² No mention is made of af-

²⁹⁸ See *supra* Part III.B (discussing how remorse and penance displace and barter away desert).

²⁹⁹ See *supra* Part III.C (discussing how the penultimate crime cannot justify the ultimate sanction).

³⁰⁰ See *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (indicating that structural error requires automatic reversal of conviction); *Chapman v. California*, 386 U.S. 18, 21-22 (1967) (same).

³⁰¹ *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); see also, e.g., *Brecht*, 507 U.S. at 630 (explaining that structural errors "infect the entire trial process"); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (finding structural error where there is a violation of the right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (finding structural error where there is deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 531-32 (1927) (determining that trial by a biased judge creates structural error); *United States v. Iribe-Perez*, 129 F.3d 1167, 1169 (10th Cir. 1997) (finding error where the trial judge informed a jury panel that the defendant would be pleading guilty and then failed to remove those panelists from the jury pool when the defendant changed his mind); *Sheppard v. Rees*, 909 F.2d 1234, 1237-38 (9th Cir. 1989) (finding error in the denial of the right to be informed of the nature and cause of criminal accusation).

Structural error is contrasted against harmless error, which does not require reversal. *Chapman*, 386 U.S. at 22 (indicating that nonreversible errors are those "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction").

³⁰² *Brecht*, 507 U.S. at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)); see also, e.g., *Fulminante*, 499 U.S. at 307-11 (holding that a coerced confession is an issue to be reviewed under the harmless error standard); *Satterwhite v. Texas*, 486 U.S. 249, 256-58 (1988) (reviewing the admission of psychiatric testimony under the

ter-the-fact error, as it might be called, where the new man who once deserved his punishment now does not.

In response, it may be argued that, while the Court has never predicated a grant of habeas relief on character conversion, it has determined that violations of the proportionality doctrine within the capital context are constitutional violations.³⁰³ The Court's silence here does not create a bar for the logical and ethically mandated extension of proportionality under the authority of transformative character theory. This follows not only from the precepts of character retributivism, which is the only theory of punishment that supports and makes sense of notions of proportionality in the first place, but also from Eighth Amendment proportionality jurisprudence, which delimits capital sentences in such a way as to preclude them from extending to mere penultimate agglomerations of desert. It must be conceded, however, that the Court has not spoken with any real specificity on this issue.³⁰⁴ But at the very least, the door is still open, even under the highly restrictive AEDPA rules, for the Supreme Court explicitly to find character conversion a proper predicate for habeas corpus relief under the Eighth Amendment's proportionality doctrine.³⁰⁵ The Court clearly may do so under the analysis articulated here.³⁰⁶ Were the Court to carve out a special exception in this respect for capital prisoners, it would not be the first time that the Court has recognized that "death is different."³⁰⁷

harmless error standard); *Buchanan v. Kentucky*, 483 U.S. 402, 425 n.21 (1987) (considering the use of psychological evaluations at trial according to the harmless error standard); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (reviewing identification testimony admitted without counsel present); *Hegler v. Borg*, 50 F.3d. 1472, 1478 (9th Cir. 1995) (applying the harmless error standard to trial testimony read back to the jury outside of the defendant's presence).

³⁰³ *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is disproportionate to the crime of rape).

³⁰⁴ 28 U.S.C. § 2254(d)(1) (Supp. IV 1998) (indicating that lower courts may not provide relief unless under authority of a "clearly established Federal law, as determined by the Supreme Court of the United States").

³⁰⁵ "The true Eighth Amendment value applicable to the selection process in capital cases, of course, is that only defendants who deserve the death penalty should receive that sanction." Howe, *supra* note 28, at 857 n.244. Negative retributive justice thus motivates the Eighth Amendment and explains the importance of the proportionality doctrine in this area.

³⁰⁶ *See supra* Part III (arguing that transformation is sufficient justification to downgrade desert and that under such circumstances proportionality mandates the alleviation of the death sentence).

³⁰⁷ *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). Where the death penalty is involved, the Court has typically demanded heightened reliability in conviction decisions. *See, e.g., Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (invalidating a death sentence as violative of the Sixth Amendment right to an impartial jury where a black de-

Thus, habeas corpus is a viable, although at present, exceedingly unlikely, avenue for relief. Currently, the best strategy still involves claims of ineffective assistance of counsel.³⁰⁸ Concomitant claims, as discussed here, might still be brought so that the issue would be preserved upon a writ of certiorari, and the Court could reconsider the Eighth Amendment analysis under a more clearly fleshed out analysis of proportionality, if not the quickly shifting standards of decency.

C. *Original Legislation*

The third branch of government, at the federal or state level, should act where the other two have failed. Legislation that protects the ethically transformed from execution might involve a tribunal, much like a parole or executive clemency board,³⁰⁹ reviewing evidence from the prisoner and others and determining whether an authentic ethical conversion has, in fact, taken place. The Transformation Board should be composed of individuals skilled in distinguishing real transformations from fake ones. The Board might very well model some of its procedures after those used in sentencing hearings, since the goal of considering mitigating and aggravating evidence is present in the two contexts. The two most important values in this decision process are accuracy and efficiency.

Of course, for the appellant, much is at stake, but endless and groundless appeals would mock the system and expend finite resources. Thus, for the sake of efficiency, after a prisoner receives a negative decision from the Board, he should first be required to wait at least a full year before re-applying for consideration. But, second, for the sake of accuracy, all prisoners within one week of execution

fendant charged with an interracial crime was not allowed to question potential jurors about their racial prejudices); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (invalidating a death sentence under the Due Process Clause because the state jury was not permitted to consider a verdict of guilt on a lesser included offense); *Gardner v. Florida*, 430 U.S. 349, 357-62 (1977) (invalidating a death sentence under the Due Process Clause based on the failure to reveal to defense counsel a pre-sentence report on which the sentencing judge purported to rely).

³⁰⁸ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (setting out the general standards for determining ineffective assistance of counsel).

³⁰⁹ A number of states have clemency boards. See, e.g., DEL. CONST. art. VII, § 1; DEL. CODE ANN. tit. 11, § 4302 (1999) (Board of Pardons); LA. CONST. art. IV, § 5; LA. REV. STAT. ANN. §§ 572-574 (West 1992) (Board of Pardons); OKLA. CONST. art. VI, § 10; OKLA. STAT. ANN. tit. 57, §§ 332, 332.1, 332.2 (West 1991) (Pardon and Parole Board); PA. CONST. art. IV, § 9; 71 PA. CONS. STAT. ANN. § 113 (West 2000) (Board of Pardons); TEX. CONST. art. IV, § 11; TEX. CRIM. PROC. CODE ANN. art. 48.01 (2000) (Board of Pardons and Paroles).

should be re-evaluated regardless of the timing of their last review. Third, because the process described here should not be used as another mechanism with which to stall the commission of a justified and constitutional capital sentence, condemned prisoners should be permitted to appeal to the Transformation Board only as time allows. Exempting the "last week review," no Board action shall otherwise stall the running of the prisoner's clock toward his execution date. Fourth, in order to make the prisoner's appeal meaningful within his limited time frame, the Board should make all decisions within one year of application for relief. Fifth, the Board should have authority within the "last week review" period to stay the execution long enough to come to a reasoned and informed decision as to the prisoner's state of transformation. But last, the Board's authority to stay—in the exercise of accuracy—shall itself be checked—in the interest of efficiency—by the court for abuse of discretion.

Ascertaining the sincerity of an individual who has nothing to lose and his life to gain simply by lying about the contents of his conscience is an exceedingly difficult task. The goal of this Comment is normative in nature. How to formulate and implement a policy to satisfy these moral claims is complex and beyond my central scope. That said, a few facial indicators of character transformation, associated remorse, and the penance that tends to distinguish metamorphosis from mendacity, come to mind. What follows is a nonexhaustive list of empirically or inferentially observable characteristics of the ethically transformed.

First, the transformed will admit fully his culpability.³¹⁰ Second, the transformed will be empty of all proffered excuses.³¹¹ Third, the wrongdoer will show proof of having internalized his sense of responsibility. It is common for the converted to experience tangible and

³¹⁰ A letter written by a sincerely penitent prisoner on death row is instructive here. He is unreserved in his admission of guilt: "I did it, I am guilty, and I am sorry." Anonymous, *Remorse, in WELCOME TO HELL: LETTERS AND WRITINGS FROM DEATH ROW* 208, 209 (Jan Arriens ed., 1997); see also Brett, *supra* note 43, at 90-91 (indicating that remorse is to be conceptualized in terms of acceptance of responsibility); Sundby, *supra* note 278, at 1590 (same).

³¹¹ The letter writer repeatedly reiterated, "none of what I say is intended as an 'excuse.'" Anonymous, *supra* note 310, at 212. Juries understand this principle; as one scholar advising attorneys trying capital murders has said, "[e]verything is lost if the jury (having just convicted the defendant of murder) interprets the use of mitigating material as an attempt to excuse the murder or evade responsibility." James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 439 (1996).

daily emotional pain over the wrong committed.³¹² Fourth, the prisoner will exhibit a sincere desire to undo what he has done³¹³ and will appreciate fully the harm wrought so as to avoid shallow remorse.³¹⁴ Fifth, an individual who has experienced an authentic ethical transformation will vow never to repeat the wrongdoing.³¹⁵ Sixth, there may be some extrinsic proof of shift in the prisoner's character orientation, his gestalt logic, from one philosophical perspective to another.³¹⁶ This shift may manifest itself in ways as simple as mere politeness, exhibitions of compassion, or genuine (in contrast to technical) religiosity. Last, it may be a useful heuristic to think of the prisoner's character like a character in a novel. Does it cohere? Does it make sense? Are his motivations credible, or do they appear contrived, mechanical, flat, containing unexplained gaps? The authentic transformation may distinguish itself from mere artifice through reference to these guidelines.

CONCLUSION

Emotional epistemology teaches us not only that a wrongdoer's guilt and/or remorse may be indicative of his culpability, but because remorse functions like gold in a bathtub, it may also help to alleviate desert. Alternate perspectives on the same phenomenon tell a different story with the same ending: in concert, remorse and penance confer the power to transform the criminal's heavy and toxic load of coal-like desert into the lighter, nontoxic, and far more valuable diamond-like virtue—a valuable commodity in the normative economy. The ethical transformation can provide the basis for at least three strong arguments for why a deserved death penalty should be down-

³¹² "There is not a day that goes by that I don't feel and agonize under the immensely heavy burden of what I have done." Anonymous, *supra* note 310, at 209.

³¹³ See, e.g., *id.* at 209 ("As God Almighty is my witness I swear to you, if my execution would bring your Grandpa back to life, I would willingly drop all my appeals this instant."); see also HABER, *supra* note 137, at 90 (indicating that regret, or wishing that the wrong had not been done, is an aspect of repentance).

³¹⁴ The letter writer explains that the photographs in his prison cell of the tombstones of those he has killed serve to remind him "of the true magnitude of what [he has] done and what [he has] taken from others." Anonymous, *supra* note 310, at 216.

³¹⁵ See HABER, *supra* note 137, at 90 (describing a wrongdoer's change of heart, "metanoia," as involving repentance, which itself entails a vow to abstain from future wrongdoing); see also GRINBERG, *supra* note 11, at 47 (noting that feelings of guilt tend to "have an inhibiting effect on the expression of hostile tendencies").

³¹⁶ See HABER, *supra* note 137, at 98 (indicating that when a wrongdoer repents he becomes a new person subscribing to a new "moral principle that the old person does not" subscribe to and thereby "denies identity with the wrongdoer").

graded to a lesser sentence. First, the new man is ontologically different from the wrongdoer who committed the original crime. A certain amount of desert is lost or metabolized in the character shift from a darker form to a lighter one. Second, the combination of remorse and penance affects desert through a psychological and spiritual barter system that at first exacts a toll on the prisoner, militating against desert, but then, in its last stage, moves beyond mere suffering into human dignity. Third, where the new man achieves a state of mere penultimate desert, we can no longer, in good conscience, enforce the ultimate sanction, under the principles of the only theory of punishment that justifies capital sentencing in the first place: retributive justice. These are the ways in which an authentic shift in a convict's ethical perspective defeats retributive justifications for the imposition of the death penalty upon culpable (in the sense of having the requisite *mens rea* and *actus reus*), but transformed, wrongdoers.

The themes of redemption, rebirth, and renewal are arguably just as important to us as notions of responsibility and strict, unflinching, unmitigated desert.³¹⁷ We believe in responsibility because we want to take the dignity of the individual seriously.³¹⁸ But there are special occasions, such as the ones discussed here, when redemption, far from existing in tension with values of personal accountability, actually augments and compliments those values. Moreover, redemption offers certain benefits that unsophisticated notions of responsibility, alone, cannot. With redemption there is hope that the worst of us can become better, that evil acts need not have an ineluctable and permanent hold upon the life of the actor, and that it is never too late to sweep away past mistakes and try again to be all the things that at an earlier time we hoped we could be. If there is any "getting even" for a murder, it is in turning a black act into an opportunity to expand and reaffirm the moral community. A personal resurrection implicates all of these possibilities. Perhaps most importantly, the wisdom of the old adage, *there but for the grace of God go I*,³¹⁹ exposes the fundamental

³¹⁷ See Sundby, *supra* note 278, at 1557 (suggesting that few notions "reverberate at the core of the human psyche as strongly" as those of redemption, expiation, and absolution).

³¹⁸ See van den Haag, *supra* note 29, at 1669 (noting the arguments of various philosophers that "execution, when deserved, is required for the sake of the convict's dignity").

³¹⁹ On seeing several criminals being led to the scaffold in the 16th century, English Protestant martyr John Bradford remarked: "There, but for the grace of God, goes John Bradford." His words, without his name, are still very common ones today for expressing one's blessings compared to the fate of an-

soundness of always leaving the door ajar for transformation. To regard some as separate from ourselves, as outside of the human family, as having no possibility of ever redeeming themselves, is to flirt with the danger of eroding the unity that gives such a family its cohesive force, its power to confer meaningful identity upon its brethren, and its moral authority to obligate peace and accord.

other. Bradford was later burned at the stake as a heretic.

ROBERT HENDRICKSON, *ENCYCLOPEDIA OF WORD AND PHRASE ORIGINS* 664 (1997).