University of Dayton Law Review

Volume 29
Number 2 *Gilvary Symposium: Evolving Standards of Decency in 2003: Is the Death Penalty on Life Support?*

Article 10

12-1-2003

Retribution and the Death Penalty

Andrew Oldenquist
The Ohio State University

RETRIBUTION AND THE DEATH PENALTY

Andrew Oldenquist[*]

There are two main theories of punishment, the utilitarian which looks to the future and asks, "What good will a punishment do?," and the retributive which looks to the past and asks, "What do criminals deserve for what they did?" For utilitarians the good that can be done is preventing the criminal, by incapacitation, from committing future criminal acts, plus deterring other potential criminals, and minus the harm punishment does to the criminal; but what a criminal supposedly "deserves" is merely revenge and does no good. To retributivists prevention and deterrence are desirable byproducts of criminal punishment, but the punishment itself must be deserved, otherwise it is not really punishment but merely a case of using a criminal to scare other potential criminals. Immanuel Kant speaks of retribution as the right of requital, the *jus talionis*.[1] The retributivist view suggests to many "an eye for an eye," death for a murder, but this probably was the voice of the softhearted in Biblical times: one can take only one eye for an eye, only one life for a life (and not the criminal's family). However, taken literally, how would it apply; should rapists be raped, or swindlers swindled?

I shall offer two arguments regarding retributive punishment. The first aims to show that retribution is socially necessary as well as accepted by nearly everyone, the second attempts to explain the relation between revenge and judicial retribution. The death penalty and the Eighth Amendment's prohibition of "cruel and unusual punishments"[2] are then discussed in the light of these two arguments.

Human beings are innately social animals, not social by convention or a "social contract."[3] This is revealed by the biological evolution of the physical basis for cooperative social living including extended infancy, loss of estrus, and the structures needed for speech. Equally biological are evolved emotional predispositions such as parental love and romantic sexual love, the need to belong to a group and fear of banishment, and an emotional need for the socialization process. As the philosopher Mary Midgley put it, "[Man] comes half finished, [requiring] a culture to

---

[*] Andrew Oldenquist is Professor Emeritus of Philosophy at The Ohio State University. He now writes on social and political philosophy, European political problems, and philosophy of law.

[1] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (H. J. Paton trans., 4th ed., Harper Torchbooks 1964).

[2] U.S. Const. amend. VIII.

[3] Social contract theory originated with Thomas Hobbes in *Leviathan* (1651) and takes related forms in John Locke's *Second Treatise of Government* (1690) and Jean Jacques Rousseau's *The Social Contract* (1767). *See* Thomas Hobbes, *Leviathan* (E.P. Dutton and Co. 1950); John Locke, *Second Treatise of Government* (C. B. Macpherson ed., Hackett Publg. Co. 1980); Jean Jacques Rousseau, *The Social Contract and Discourses* (G. D. H. Cole trans., E.P. Dutton and Co. 1950).

complete him."[4]

In prehistoric times the social habits children needed for social living included honesty, fairness and keeping unwanted hands off other people's bodies and property. These social dispositions and inhibitions were reinforced by praise, blame, physical punishment and the threat of banishment; as reasons for conforming to them came to be given and words and expressions tailored to them came into use, they gradually turned into what we now call social morality and the clan became what we may call a moral community. A tribe or clan is an object of group loyalty and hence is of more than instrumental value to its members. They feel a need to belong and be accepted, their social identities derive from it, and they feel pride and shame for how they meet their group's expectations.

It is doubtful that members of a clan could possess common values and a common way of life if they were totally lacking in indignation and censure at threats and affronts to their way of life. Shaming and feeling shame within one's family, clan or tribe constitute the primordial, most basic manifestations of personal accountability.

We only feel anger and indignation, express blame and censure, when the offender is in some sense one of our own and therefore someone from whom we expect compliance and group regard; otherwise our thoughts do not go beyond defense and elimination of the danger. Only when we regard a group as our own are we capable of pride and shame and only within a group can we understand the notions of accountability and punishment. Group membership is revealed by who is affronted by insults to it, contributes labor, is blamed and criticized for behaving in harmful ways, and is capable of feeling pride and shame. I cannot be proud or ashamed of an iceberg or a park in Kabul if they are in no sense mine. I can be proud or ashamed of my family, city or country and I can be held personally accountable by others for doing harm only if I am considered to belong to it.

In modern society it follows that holding young delinquents personally accountable sends the message that they still belong, while never holding them accountable, never blaming and criticizing them but merely isolating, expelling or otherwise harming them further undermines their sense of social identity. Punishing persons because we believe they are personally accountable for some harm is punishing them because we believe they deserve punishment, hence it is punishing for retributive and not for utilitarian reasons. Criminal punishment that is not done on openly retributive grounds exacerbates a criminal's alienation from mainstream society. Retribution essentially is holding someone accountable for some

[4] Mary Midgley, *Beast and Man: The Roots of Human Nature* 286 (Cornell U. Press 1978).

harm and expressing the consequent anger and indignation by blaming, shaming, censoring, shunning, snubbing, cursing, ignoring, fining, attacking, imprisoning, or killing. Crime victims demand judicial retribution or seek private retaliation. But retributive responses are not peculiar to crime, but are manifested everywhere in society in our mutual accountability for meeting community and interpersonal expectations.

It makes no sense to claim people deserve good things—honors, rewards, praise—and do not deserve bad things—dishonor, punishment, blame. Most people who reject retribution nonetheless would be loathe to claim that saints, good Samaritans, and heroes should receive their praise, rewards, and medals only if these are positive reinforcements or good examples for others, and not because they deserve them. But we cannot have the one without the other; an asymmetry of positive and negative *desert* is incoherent.

Most people's reasons for capital punishment are retributivist; they talk about deterrence because it seems a respectable kind of reason that relies on crime statistics and they don't know what to say when told retribution is revenge. It isn't subjectively crucial whether capital punishment deters better than life imprisonment, which is why supporters of the death penalty are unfazed by the lack of evidence. The great majority of people are thorough retributivists, whether or not they know it and whether or not they support the death penalty. This becomes immediately clear when oneself or a loved one is a crime victim. We believe students *deserve* the grades they earn, courteous or kind people *deserve* courtesy or kindness in return, rude people *deserve* rudeness or abruptness, and most criminals deserve punishment.

Punishing is not simply harming, except in a morally alienated penal system in which shaming and disgrace are condemned as uncivilized and replaced by physical and emotional degradation in prisons. It is a mistake to put shame and censure on a list of harms, a mistake similar to the one John Stuart Mill made when he treated the "internal sanction" of conscience as a pain, like a toothache.[5] If bad conscience is merely a pain there ought soon to be a pill for it. You can harm an alligator or a mad dog, you can even deter it, but you cannot punish it because you cannot blame it and you cannot blame it because you cannot hold it accountable. To the extent that, in contemporary criminal justice, ritual censure is replaced by simply damaging someone–fining, confining, or killing–in order to achieve deterrent and preventive goals, the criminal is being treated like an alligator and not like someone who is a member of our moral community.

---

[5] Andrew G. Oldenquist, *Moral Philosophy Text and Readings* 263 (2d ed., Waveland Press, Inc. 1978) (quoting John Stuart Mill, *Utilitarianism*).

Without taking proportional retribution in grave cases a society undermines public confidence that it takes itself and its values seriously. In the words of the criminologist Martin Levin, "Our penal and judicial systems serve other goals than lowering the rate of recidivism. And the tension among these goals cannot be resolved on utilitarian grounds; one reason is that the punishment of criminals is, in part, a symbolic activity that expresses our ultimate values."[6] Think, for example, how women were made to feel when rapists were punished lightly or not at all. And think how most Israelis would feel, and be viewed by others, if the Israeli Court declined to punish Adolph Eichmann because his punishment would do no good, would not deter his kind of crime but merely do uncompensated harm to Eichmann. It would compromise the dignity and honor of the Israeli state, appear poor spirited, and citizens' sense of social identity would be diminished. The pursuit of Nazis in their dotage, tending their rose gardens in South America, makes no utilitarian sense whatever. They will not do their crimes again, nor will they be an example for others. On this issue the great majority of us find our God in the Old Testament, not the New, and that while retribution as a social practice is clearly useful, indeed, necessary for the existence of a community with a social morality, individual criminals are punished because they are felt to deserve punishment and only secondarily because it is useful.

However, while it often is easy to compare two crimes and judge one worse than the other, this says nothing about what punishment either warrants. Retributive justice has calibration problems: When we slide a scale of punishments past a scale of crimes, how do we know where to stop, that is, how do we know how much punishment fits a given degree of accountability? How, then, do retributivists know punishments shouldn't stop short of capital punishment? The only thing we can go by is our feelings after we inform ourselves about whatever we think is relevant. Do robbers guilty of felony murder deserve to die? Or people who kill police officers intentionally but without prior planning? How can one tell? In these kinds of cases all we can do is speculate about what would best deter similar future behavior and the speculative evidence for capital punishment is at best weak. Most of us do think we know what punishments are right or wrong in extreme cases, such as Adolf Eichmann's death sentence in Jerusalem in 1968[7] and hangings in nineteenth century England for stealing a shilling or more,[8] and our confidence about these cases has nothing to do

---

[6] Martin A. Levin, *Crime and Punishment and Social Science*, 24 Pub. Interest 96, 103 (1972).

[7] The Nizkor Project, *Adolf Eichmann*, http://www.nizkor.org/hweb/people/e/eichmann-adolf/ (accessed Feb. 17, 2004).

[8] The Proceedings of the Old Bailey, *Punishments at the Old Bailey*, http://www.oldbaileyonline.org/history/crime/punishment.html (accessed Feb. 17. 2004).

with deterrence. In one case a teenager was caught red-handed, but the jury claimed insufficient evidence and acquitted because they did not have the option of rejecting the punishment as too severe.

Retributivists can let usefulness set the degree of punishment in cases where their retributive feelings have nothing precise to say. This accommodation retains the idea that personally accountable law-breakers, and only these, may be punished, but allows the degree of punishment, between the extremes of too severe and too lenient, to be set by legislators reacting to how much they and the public fear the crime and how difficult it is to deter.

* * *

Utilitarian thinking tells us to punish criminals when it is useful. The revenge demanded by crime victims is familiar enough. But the notion of judicial retribution or *just desert*, when we think it has to be separate from both usefulness and revenge, is a phantom, getting what little sense it has from its secret association with the idea of revenge. I have proposed a chain of reasoning from evolved human sociality and the need to belong, to awareness of societal needs and censure and shame regarding what jeapordizes them, and hence to social morality, to accountability, to retribution, and I must add now that there is no doubt that retribution is revenge, both historically and conceptually. But can vengeance be a moral category or is it inherently barbaric, destroying the morality of whatever implies it?

The solution is to see that judicial retribution is not mere revenge but revenge that warrants its different name by satisfying certain social conditions. In simple revenge or retaliation, the victims (or their relatives) set and carry out the punishment, which is unpredictable from case to case, often fails because the victim isn't strong enough, and when successful is harsher than nonvictims think is fitting. Personal retaliation has no built-in mechanism for avoiding counter-retaliation and endless feud.

If revenge is the source of the passion and emotion behind our insistence on just punishment of criminals, it is impossible to eliminate it; we can only cleanse it, civilize it. As Susan Jacoby says,

> The taboo attached to revenge in our culture today is not unlike the illegitimate aura associated with sex in the Victorian world. The personal and social price we pay for the pretense that revenge and justice have nothing to do with each other is as high as the one paid by the Victorians for their conviction that lust was totally alien to

the marital love sanctioned by church and state.[9]

I suggest that when the following conditions are met, retaliation or "getting even," which is not a moral idea, simply turns into retributive justice, which is a moral and juridical idea. I call this *justice as sanitized revenge*:

(1) Punishment is applied by officials who are not friends or relatives of the victim or defendant;

(2) It is done consistently for similar cases and hence is predictable;

(3) It is determined in accordance with formally adopted and publicly promulgated procedures and penalties;

(4) It is decided and pronounced in a context of ritual and ceremony, thus conveying that a community or "the law" is speaking and not just an individual;

(5) It is decided after due deliberation and not in the heat of passion.

To say revenge simply turns into retributive justice when enough of these conditions are satisfied means there is no special additional ingredient, whether moral, metaphysical, or theological, that must be added. When revenge is transferred to the courtroom with its ritual procedures, the private indignation and actions of individuals become the moral actions of a collectivity. We do not take the revenge out of judicial retribution—that cannot be done—but circumscribing and institutionalizing vengeance turns it into a moral category. Justice is the blood descendant of vengeance.

* * *

It does not follow from the acceptance of retributive punishment that we must accept the death penalty. How much and what kind of punishment a person deserves doesn't automatically fall out of a retributive system. The only conclusions so far are that retributive justice is an essential part of a human community and that calling capital punishment "revenge" fails as an objection to it. But is it a "cruel and unusual punishment" banned by the Eighth Amendment to the United States Constitution? Well, it isn't unusual, although world-wide it is moving in that direction, which raises some practical and political problems, for example regarding extradition from countries that reject the death penalty.

Supreme Court justice Antonin Scalia and Oxford professor Ronald Dworkin offer contrary views about the application of the Eighth

---

[9] Susan Jacoby, *Wild Justice: The Evolution of Revenge* 12 (Harper & Row 1983).

Amendment. Justice Scalia says a judge should attend to "the original meaning of the text" and not to "what the original draftsmen intended,"[10] but then he goes on to say that what that text means for present day cases should be determined by how a reasonable person at the time of ratification would have interpreted it.

Reasonable eighteenth century people disagreed with each other as much as do reasonable people today such as Scalia and Dworkin. In any case late eighteenth century *opinions* are just that, opinions, they tell us what some people thought was or was not cruel; they are not a standard of what is cruel and they certainly do not tell us what the word "cruel" *means* anymore than contemporary opinions tell us what it means. We can disagree whether hanging, electrocution, and flogging are cruel punishments without having different meanings of "cruel," indeed, if we are using the word "cruel" with different meanings we are talking past each other and not disagreeing.

Scalia points out that the Framers didn't think capital punishment was cruel because they allude to it as an option in the same document in which they prohibit cruel and unusual punishments. But why does it matter whether they thought capital punishment was cruel? What should guide us is what they explicitly prohibit or mandate in the Constitution. And if the Framers' opinions about capital punishment do not count, surely neither do the opinions of late eighteenth century reasonable bystanders. Where is the evidence that the Framers intended that their own acceptance of capital punishment should determine our interpretation of the Eighth Amendment? And even if they, or the reasonable bystanders of the time, considered burying alive but not hanging to be cruel, it doesn't follow that this is what the Eighth Amendment means or implies. It certainly isn't what it *says*.

The Eighth Amendment means neither that the death penalty is cruel, nor that it is not cruel, because it says neither. It forbids what is *cruel* and therefore leaves it to us to decide what that is. Even if we supposed that the Framers' intentions in the Constitution were important, saying we must consult the Federalist Papers and other writings to determine these intentions is a mistake. Awe at writing a document to guide a new nation through future generations, together with respect for the judgment of future generations, may well have moved them not to want to restrict us by their personal opinions about what is cruel or what is an unreasonable search, and this awe and respect may account for the abstractness of much of the Bill of Rights.

An intelligent late eighteenth century person, equipped with the moral

---

[10] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Amy Gutmann ed., Princeton U. Press 1997).

standards of his or her time, magically re-materialized in the twenty-first century, and then asked about electrocution, life terms for third time felony offenders, long prison terms for first time crack cocaine offenders, and no criminal sanctions for fornicators, adulterers, and homosexuals, would be a poorer judge of these matters than we. If we suppose them informed about twenty-first century culture, why bother guessing what they would say? Just ask ourselves. If the Framers had wished to make a dated provision, that is, restrict judgments about twenty-first century matters to eighteenth century knowledge, they would have indicated this or provided a list of eighteenth century cruelties. It is far from obvious that the Framers wanted us to try to divine their opinions. Perhaps they wanted us to use our own judgment, bound only by what they *said* in the Constitution.

Dworkin, like Scalia, supports "semantic originalism," that is, we should attend to what the Amendment says and means; but for Dworkin this is not necessarily revealed by what the Framers believed was cruel or what a reasonable eighteenth century person would think is cruel. "Cruel," Dworkin says, means "punishments that are in fact—according to the correct standards for deciding such matters—*cruel*."[11] However, asking judges to attend to what in fact is cruel, or is a correct standard for determining cruelty, doesn't help them any more than it helps me. But if Dworkin means judges should use their best all-things-considered judgment in the light of what the Eighth *says*, it seems reasonable.

This controversy should be seen in light of the fact that the Framers' respect for the people was stronger than their desire to provide what is good for them. This is why the rights are abstract; for example, no "unreasonable" searches and seizures, leaving future generations to decide what is unreasonable. I believe the Framers meant ideas like liberty, justice, reasonable, cruel, etc., to be abstract and timeless, not shorthand for time-bound judgments. The Framers respected the people enough to sanction the judgmental discretion of future generations even though they knew many of these judgments would be mistakes.

The truly revolutionary aspect of government by the people, implicit in John Locke's writings, is that the purpose of government is to give the people what they want instead of what is good for them. This is required if they are to treat the people as autonomous beings instead of children. The Framers felt it their duty to trust the people, to leave detailed decisions and interpretations in our hands because respect for the people as rational, decision-making beings requires trust.

---

[11] Ronald Dworkin, *Symposium: Fidelity in Constitutional Theory: Fidelity as Integrity: The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev., 1249, 1252, 1256 (1997).

The Framers respected the people's judgment not because they thought it was likely to be correct;, they respected it because they respected the people whose judgment it was. They didn't give future generations this discretionary power because they thought they would make correct interpretations and define what (in Dworkin's words) "as a matter of fact"[12] is cruel punishment. They gave it to us because our right to make decisions—even to amend the Constitution—was more important to the ideal of rule by the people than was fear that, in Scalia's words, "[there] would be no protection against the moral perceptions of a future, more brutal, generation."[13]

There is no compelling reason that gives us reason-based certainty that the death penalty is or is not correct. We come closest with extreme cases, such as Eichmann and, perhaps, Timothy McVeigh, where one might argue that not executing them would demean our core values and exemplify what Aristotle called the vice of poor-spiritedness.[14] But America executes more people than any other Western country and this commitment to executions seems a matter of our tradition of violence as well as a desire to cope with our extremely high homicide rate. It could also be that our homicide rate, along with the constant portrayal of killings in films and on television, inures the public and the state to frequent death penalties.

There is no reason to believe that without the death penalty our homicide rate would be higher, and no way to prove which kinds of murderers, if any, deserve to die. But this was never a matter of proof. Our retributive urges may be as universal and as demanding as the sexual urge, but they are also as emotional and non-rational as the sexual urge. So it is a matter of accommodating and civilizing them, not of proving or refuting them. We have to do this even if we come to decide, with the Europeans, that the death penalty is an unacceptable level of retribution.

Deterrence has little or nothing to do with the potential justification of capital punishment. If, in a case where there is no chance of error and we are not misreading the statistics about the death penalty and deterrence, we find it acceptable, it is because taking ultimate retribution for a heinous murder is an indicator of collective self-respect, it is a ritualized expression of indignation at what was done to the victims and to the object of our group loyalty. I am inclined, however, to believe we should use the death penalty extremely sparingly.

---

[12] *Id.* at 1253.

[13] Scalia, *supra* n. 10, at 145.

[14] Oldenquist, *supra* n. 5, at 150 (referring to Aristotle, *Nicochamean Ethics*).