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Consequentialist Retribution's Real-World Ramifications and How It Impacts Judicial Credibility

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CONSEQUENTIALIST RETRIBUTION'S REAL-WORLD RAMIFICATIONS AND HOW IT IMPACTS JUDICIAL CREDIBILITY

ABSTRACT

Crime and punishment have always gone together. There are infamous novels, movies, and maxims about crime and punishment. Two of the most well-known theories of punishment, retributivism and consequentialism, have been traditionally viewed in conflict with each other. Retributivism conforms with retaliation and aligns with the biblical phrase "an eye for an eye," while consequentialism rationalizes punishment based on what will produce good consequences. However, as Professor Ken Levy justified in his law review article, Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System, these two theories of punishment need each other. This note explains the validity of Professor Levy's explanation, and subsequently analyzes real-world ramifications of a consequentialist understanding of retributivism and how it impacts the credibility of the judiciary.

INTRODUCTION

Retribution has been defined in terms of community outrage,[1] and is one of the most well-known and legitimate goals of punishment.[2] It could also be regarded as consequentialist if the action was generally accepted in the community as the best consequence, therefore, making the punishment morally right.[3] The community's confidence in the judiciary has always been a broad concern of the Supreme Court because it is critical to the functioning of democracy that the public places trust and confidence in the judiciary.[4] Few public policy issues have inflamed passions as consistently or as strongly as death penalty policy debates.[5] The idea of capitulating to lynch mobs is tied up in the credibility of the judiciary since after lynching attracted national condemnation after the 1920s, it was replaced with capital punishment to achieve the same result.[6] The Court made it clear the death penalty was essential because otherwise, the community would turn to "self-help, vigilante justice, and lynch law."[7] Since reinstating the death penalty, capital punishment has been described as a system of "legal lynching,"[8] and the two are "as connected as the intertwined ropes of the lynch-man's noose."[9] Thus, keeping the death

1. Chad Flanders, *Time, Death, and Retribution*, 19 U. PA. L. CONST. L. 431, 456 (2016); Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("[C]apital punishment is an expression of society's moral outrage.").

2. Furman v. Georgia, 408 U.S. 238, 394 (1972) (Burger, C.J., dissenting).

3. Robert Hoag, *Capital Punishment*, INTERNET ENCYCLOPEDIA OF PHIL., https://iep.utm.edu/cap-puni/ [https://perma.cc/A26K-Z7FJ] (last visited Dec. 2, 2022).

4. Natalie Anne Knowlton, *Trusting the Public's Perception of Our Justice System*, INST. FOR ADV. OF THE AM. LEGAL SYS. BLOG: UNIV. DENV. (Aug. 27, 2020), https://iaals.du.edu/blog/trusting-public-s-perception-our-justice-system [https://perma.cc/R93B-RRF7]; *See* Mary Wood, *Unpacking the Supreme Court Leak*, UNIV. VA. NEWS & MEDIA (May 3, 2022), https://www.law.virginia.edu/news/202205/unpacking-supreme-court-leak [https://perma.cc/LHK6-UV47] (The leak of a draft of the *Dobbs v. Jackson Women's Health Organization* means going forward for the Court, "[t]here will no doubt be trust issues").

5. David Masci & Jesse Merriam, *An Impassioned Debate: An Overview of the Death Penalty in America*, PEW RSCH. CTR. (June 26, 2008), https://www.pewforum.org/2007/12/19/an-impassioned-debate-an-overview-of-the-death-penalty-in-america/ [https://perma.cc/4E32-9TAC].

6. Jennifer Rae Taylor, *A History of Tolerance for Violence has Laid the Groundwork for Injustice Today*, 44 A.B.A.: HUM. RTS. MAG. (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/tolerance-for-violence/ [https://perma.cc/MDC8-DWYK].

7. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

8. Hugo Adam Bedau, *Racism, Wrongful Convictions, and the Death Penalty*, 76 TENN. L. REV. 615, 618 (2009).

9. William J. Barber, *Released from death row, then returned – forced to prove race discrimination a second time*, USA TODAY (Aug. 23, 2019), https://www.usatoday.com/story/opinion/policing/2019/08/23/death-row-discrimination-policing-the-usa/2003334001/ [https://perma.cc/2SSJ-F2R3].

penalty alive is essentially instructing the criminal justice system to continue carrying out the same job once left to lynch mobs.[10]

The non-consequentialist, retributive theory of punishment ideology maintains punishment is warranted if a crime was committed *because* it is a "fair/just repayment."[11] However, this non-consequentialist take on retribution is incorrect. Professor Ken Levy makes a strong argument as to why retribution needs consequentialism.[12] I agree with Levy that there needs to be a consequentialist understanding of retribution because retribution alone seems deficient. There are real-world ramifications for this idea of supplementing the two apparent contrasting theories, which cut in favor of the consequentialist understanding of retribution.[13]

In this article, I explain three real-world ramifications which bolster Levy's position as to why we need a consequentialist understanding of retribution and how it impacts the judiciary's credibility. In Part I, I begin by illustrating Immanuel Kant's strong showing of retribution as an ultimate dead-end, while emphasizing Levy's compelling case for purposes of consequences and why we punish. In Part II, I introduce a real-world ramification regarding the credibility of the judiciary. I emphasize the idea that politicizing the judiciary endorses retribution, and therefore, is connected to real-world consequences like community outrage. In Part III, I describe a second real-world ramification, which is on the community. I focus specifically on retaliatory homicides, connecting low closing rates of crimes with how racial bias is likely to be the cause. Lastly, in Part IV, I set out a third real-world ramification, which relates to the modern death penalty law. I highlight the Court's two-prong test stating the Eighth Amendment analysis whether a punishment is cruel and unusual should be predicated on the evolving standard of decency of maturing society.

I. CONSEQUENTIALIZING RETRIBUTION AND REAL WORLD RAMIFICATIONS

Crime and punishment have outwardly always gone together.[14] When the law is broken or harm occurs, punishment appears to be the normal involuntary response.[15] Punishment represents the wish to inflict adverse treatment deserved

10. *Id.*

11. Stefan Sencerz, *Extended Examples: Capital Punishment*, TEXAS A&M U.–CORPUS CHRISTI, https://philosophy.tamucc.edu/people/faculty/sencerz/ethics/extended_examples_capital_punishment [https://perma.cc/NRW5-6VN7] (last visited Dec. 2, 2022).

12. *See generally* Ken Levy, *Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System*, 66 RUTGERS L. REV. 629 (2014) (arguing why retribution needs consequentialism).

13. *Id.* at 633, 636.

14. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 852 (2002).

15. *Id.*

on the person for their rebarbative acts.[16] It is evil, painful, and coercive,[17] but is condemning a person to death a morally justifiable response to murder?[18] The main concern in criminal law and punishment is to protect people against deliberately inflicted public harm as opposed to private wrongs.[19] Laws against crimes such as murder are implemented for this reason.[20] Nevertheless, there is a public misconception that punishment is traditionally how to deal with offenders[21] and to communicate social disgust and scorn for the immoral acts committed.[22]

In modern law, the death penalty is presumptively cruel and unusual if it serves no legitimate penological goal.[23] The moment the death penalty ceases to further the purpose it was deemed to serve, it is considered a violation of the Eighth Amendment.[24] In capital cases, deterrence and retribution have long been the primary goals.[25] The deterrent value of the death penalty has been credibly attacked, but non-consequentialist (or Kantian retribution) is by definition invulnerable to attack. Retributionists say punishment is required, regardless of any real-world effects, which is a position that is not amenable to debate. Deterrence has been undermined and is not worth much now.[26] Further, while retribution is still a valid penological goal,[27] it "is no longer the dominant objective" of criminal punishment.[28]

A. Kantian Retribution is a Closed Door

Immanuel Kant was a retributivist and emphatically favored the death penalty for murder.[29] He is well known for saying:

16. Benjamin L. Apt, *Do We Know How to Punish*, 19 NEW CRIM. L. REV. 437, 441 (2016).

17. Louis H. Swartz, *Punishment and Treatment of Offenders*, 16 BUFF. L. REV. 368, 369–70 n.4 (1967).

18. Hoag, *supra* note 3.

19. Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1065 (2007).

20. *Id.*

21. Swartz, *supra* note 17, at 369–70; Christopher, *supra* note 14, at 853 n.40 ("A Punishment, is an Evill inflicted by publique Authority") (quoting THOMAS HOBBES, LEVIATHAN 164 (1976)).

22. Apt, *supra* note 16, at 441.

23. Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring) ("A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.").

24. Graham v. Florida, 560 U.S. 48, 71 (2010).

25. *Id.*

26. *Id.* at 72; *See* discussion *infra* Part IV, Section B.

27. Glossip v. Gross, 576 U.S. 863, 932 (2015) ("Retribution is still a valid penological goal.").

28. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (quoting Williams v. New York, 337 U.S. 241, 248 (1949)); *see* discussion *infra* Part IV, Section B.

29. Nelson T. Potter, *Kant and Capital Punishment Today*, 36 J. VALUE INQUIRY 267, 267 (2002).

> Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in the prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[30]

In summary, even if a society were to dissipate the next day, Kant's belief was the community "must still execute the last murderer."[31] This position on the death penalty is thought of as a paradigm of retributivism and a rationale favoring capital punishment.[32] Retribution justifies looking back at the crime and focusing on the wrongfulness of the act committed.[33] This theory appeals to the principle of *lex talionis*, or the law of retaliation,[34] which aligns with the biblical phrase "an eye for an eye."[35] Kant's overall retributive ideology purports that punishment ought to be proportional to the crime.[36] His perception was clear on capital punishment: murderers must die for their offenses, social consequences are irrelevant, and the basis upon which to link the death penalty to the crime is the law of retribution which is rooted in the principal of equality.[37] Essentially, the purpose of this Kantian school of thought was that only retribution, as a legal framework, could determine the kind and degree of punishment, so if a person has committed a murder, they must die.[38]

Retributivists believe it is acceptable to hate and be resentful towards those they punish.[39] This encompasses a philosophy of punishment by explaining that blameworthy acts must be punished because they are blameworthy, and they must be punished in proportion to their blameworthiness.[40] The logic is that if intentional bad acts are not condemned, there will be no distinction between good and bad acts.[41] Logically, that outlook is flawed because that viewpoint inhibits retributivists from being able to know which acts require condemnation and which do not.[42] Additionally, it puts the punisher (i.e. society) on the same

30. *Id.*
31. Flanders, *supra* note 1, at 477.
32. Potter, *supra* note 29, at 267.
33. Apt, *supra* note 16, at 440.
34. Hoag, *supra* note 3.
35. *See* Yehuda Shurpin, *What Does 'Eye for an Eye' Really Mean?*, CHABAD, https://www.chabad.org/library/article_cdo/aid/479511/jewish/What-Does-Eye-for-an-Eye-Really-Mean.htm [https://perma.cc/R7GM-TKC7] (last visited Dec. 2, 2022).
36. Chad Flanders, *Can Retributivism Be Saved*, 2014 BYU L. REV. 309, 317 (2014).
37. Hoag, *supra* note 3.
38. *Id.*
39. Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 100 (2010).
40. Apt, *supra* note 16, at 443.
41. *Id.* at 442.
42. *Id.* at 443.

level as the offender without addressing why the same action is considered wrong when a person commits it, but not wrong when the punisher commits it because it is in the form of punishment.[43] Blameworthiness of different acts can also change over time.[44] The community could become placated by forgetting about the prisoner after they were sentenced to death, or if someone kills a disfavored member of the community there likely will be minimal or no community outrage.[45]

Kantian retribution appears attractive, but it is theoretically unacceptable.[46] Retribution knows nothing about punishment other than suggesting reasons for punishment.[47] Retribution is silent regarding American harshness, and the theory is too abstracted from the realities of punishment.[48] A popular response by theorists, therefore, is to criticize and reject Kantian retribution,[49] because, by itself, Kantian's retributive theory of punishment appears to be a closed-door and a dead end. There is a need to further explain retribution as a valid stand-alone theory of punishment.

B. Like Levy Said, Retribution Needs Consequentialism

Consequentialism is forward-looking and rationalizes punishment depending on what will produce good consequences.[50] Retribution is typically contrasted with consequentialism, but Levy argues three main reasons as to why retribution and consequentialism work well together and should therefore supplement each other.[51] First, retribution and consequentialism involve desert.[52] Desert is a philosophical concept meaning "justly deserved" and can be applied to both positive and negative behavior.[53] Positive deserts are deserving something desirable, while negative deserts are deserving something undesirable.[54] In the criminal justice system, it is mostly applied to negative behavior and criminal acts.[55] Levy explains it is not often enough that we hear

43. *See id*.

44. *Id.*

45. Flanders, *supra* note 1, at 456, 461; *see also* Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("[T]he longer the delay, the weaker justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes.").

46. Leon Pearl, *A Case Against The Kantian Retributivist Theory or Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 273, 274 (1982).

47. Apt, *supra* note 16, at 444.

48. Flanders, *supra* note 39, at 97.

49. Potter, *supra* note 29, at 271.

50. Nicholas L. Sturgeon, *Anderson on Reason and Value*, 106 ETHICS 509, 511 (1996).

51. Levy, *supra* note 12, at 633, 636.

52. Apt, *supra* note 16, at 442.

53. Mark Said, *The Law of 'Just Deserts'*, TIMES MALTA (Oct. 25, 2013), https://timesofmalta.com/articles/view/The-law-of-just-deserts-.491968 [https://perma.cc/RP55-5AAC].

54. J.L.A. Garcia, *Two Concepts of Desert*, 5 LAW & PHIL. 219, 222 (1986).

55. Said, *supra* note 53.

about meritorious awards because the system is not set up for the exceptionally virtuous to receive their positive deserts in the form of praise or reward.[56] Countless meritorious or charitable acts occur daily, but instead, the State's two options for community members are to follow the law or arrest violators.[57] Since retribution alone is not focused on gratitude and reward, the prominent concern is for wrongdoers to receive their negative desert in the form of criminal punishment.[58] Retributivists' failure to explain why the state should be more concerned with inflicting negative over positive desert is the first reason why retribution needs consequentialism.[59]

Second, a common link between retribution and consequentialism is revenge.[60] Once a person is harmed and is overcome with emotional agony, the retributivist thought is to immediately punish the wrongdoer by giving the negative desert to restore emotional equilibrium.[61] Aside from deterrence, inflicting the deserved pain and punishment on the wrongdoer, however, is motivated solely by consequentialist thought and the expected good consequences of the punishment.[62] Fulfilling the need to inflict punishment as a consequence to restore the community's emotional equilibrium is thus, a consequentialist goal,[63] and the second reason why retribution needs consequentialism.

Third, the difference in punishment for misdemeanors versus felonies is based on the concept of proportionality.[64] Retributivists rely on proportionality to guide how severely a particular crime should be punished.[65] Punishing all the remaining non-risky harmless crimes is consequentialist ideology.[66] For example, in a drug possession case, possessing drugs is not what justifies being punished, but rather, it is the risk of harms that drug possession can lead to.[67] There is no explanation why the drug violator should be punished though, so the violator's act of possessing drugs is not what is motivating punishment like

56. Levy, *supra* note 12, at 649.

57. *Emerging Findings*, VERA, https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings [https://perma.cc/Y3X3-443Y] (last visited Dec. 2, 2022) (noting an arrest occurs every three seconds in the United States).

58. Levy, *supra* note 12, at 649.

59. *Id.* at 650.

60. *Id.* at 683.

61. *Id.*

62. *Id.* at 653.

63. *Id.* at 683–84.

64. Apt, *supra* note 16, at 446.

65. *Id.* at 445.

66. Levy, *supra* note 12, at 680 (Harmless crimes or acts that do not cause harm, but are still criminalized are split into two categories: (a) acts that increase the risk of causing serious harm, like inchoate crimes of attempt or reckless endangerment, and (b) acts that do not increase the risk of causing serious harm, like possession of drugs).

67. *Id.* at 681.

murder does.[68] The real motivator to punish the drug violator's act, then, cannot be retribution alone to give the violator what they deserve, and is rather a consequentialist idea to minimize the risks and dangers of drug use.[69] Therefore, with retributivists giving just deserts and consequentialists contributing to the enforcement of the law, this is the third reason why retribution needs consequentialism.[70]

II. CONSEQUENTIALIST RETRIBUTION ENHANCES JUDICIAL CREDIBILITY

Judicial review is the Court's greatest power.[71] It is critical to the functioning of democracy that the public places trust and confidence in the judiciary.[72] The Court's method of giving detailed reasons for its conclusions, the relationship the Court has with the opinions it writes, and the way the justices interpret the opinions is what helps provide credibility and enhance its legitimacy.[73] "The Court's credibility is a product of the correct perception that it decides cases" as a product of reason and not acts of will.[74] Producing a large number of unpopular rulings over time, could harm the Court and its credibility could suffer.[75]

A. Confidence Game

A non-political Court is favored, and the public's confidence in the judiciary is greater when the public believes the justices are acting apolitically.[76] "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[77] The price of the country's loss of confidence in the judiciary "may be criticism or ostracism, or it may be violence."[78] "Traditional ideas of law hold judges and justices make decisions based on dispassionate application of law to the facts at hand, with no regard for political ramifications

68. *Id.*

69. *Id.* at 681–82.

70. *Id.* at 683.

71. *About the Supreme Court*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [https://perma.cc/DX7Q-JVWY] (last visited Dec. 2, 2022).

72. Knowlton, *supra* note 4.

73. Erwin Chemerinsky, *The Supreme Court, Public Opinion And The Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 947 (1999).

74. *Id.*

75. *Id.*

76. Rachel Sheldon, *The Supreme Court used to be openly political. It traded partisanship for power.*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html [https://perma.cc/KCZ8-XUBF].

77. Planned Parenthood v. Casey, 505 U.S. 833, 866 (1992).

78. *Id.* at 867.

of that decision."[79] There is no way around biases and opinion, however, because judges, like everyone else, are sentient human beings.[80]

Recently, the public's confidence in the Court has plummeted.[81] "[C]onservative justices [are] in the driver's seat,"[82] and it is no secret that politics in judicial decision making also plays a major role in contributing to trust in the judiciary.[83] The politicization of the judiciary has been all over the recent headlines,[84] for both political parties. The newest conservative justice, Amy Coney Barrett, spoke at a law school dedication event honoring Republican Senator Mitch McConnell and pushed back against the media's characterization that the Court's decision-making is politically motivated.[85] Ironically, McConnell was "the architect of the Senate's obstruction of the Garland nomination and a key supporter of Justice Barrett's confirmation."[86] For the liberal justices, Justice Stephen Breyer has commented that differences among the justices are doctrinal and based off of judicial philosophy, and that they are not political.[87] The late Justice Ruth Bader Ginsburg's well-known candor had been on display based on comments she made where many thought "she crossed

79. Andrew Breiner, *How did the Courts Become So Politicized?*, JOHN W. KLUGE CTR BLOG: LIBR. CONG. (Sept. 21, 2021), https://blogs.loc.gov/kluge/2021/09/how-did-the-courts-become-so-politicized/ [https://perma.cc/5VZC-8YHQ].

80. Hon. James M. Redwine, *You're biased, I'm biased. So what are we judges going to do about it?*, NAT'L JUD. COLL. (June 25, 2018), https://www.judges.org/news-and-info/youre-biased-im-biased-so-what-are-we-judges-going-to-do-about-it/ [https://perma.cc/2ZK9-K9PC].

81. Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP NEWS (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx [https://perma.cc/P4NG-8UXR].

82. Laura Bronner & Elena Mejia, *The Supreme Court's Conservative Supermajority Is Just Beginning To Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/ [https://perma.cc/EDJ9-R7CF].

83. *Public Trust and Confidence*, INST. FOR ADV. OF THE AM. LEGAL SYS. BLOG: UNIV. DENV., https://iaals.du.edu/projects/public-trust-and-confidence [https://perma.cc/PY8R-KUYA] (last visited Dec. 2, 2022).

84. James D. Zirin, *The Supreme Court's partisanship is becoming increasingly difficult to deny*, HILL (Oct. 4, 2021), https://thehill.com/opinion/judiciary/575076-the-supreme-courts-partisanship-is-becoming-increasingly-difficult-to-deny [https://perma.cc/3YU8-4LZL].

85. Ryan C. Williams, *Supreme Court justices say the institution must be non-partisan – but they make it political*, NBC NEWS (Sept. 19, 2021), https://www.nbcnews.com/think/opinion/supreme-court-justices-say-institution-must-be-nonpartisan-they-make-ncna1279280 [https://perma.cc/6KPG-YXRD].

86. *Id.*

87. Zirin, *supra* note 84.

the line."[88] She went point by point explaining President Trump was a "faker."[89] The Court's perceived partisan attitude has been noticed by Chief Justice John Roberts who fears that the more partisan the Court is perceived to be, the less public support it will have.[90] Most of the community perceives the justices as politicians who use law to achieve their goal of shaping the world to match their personal ideology.[91]

B. Look What is Happening Now

Having a trial overseen by an unbiased judge is central to the criminal justice system and is a basic requirement of due process.[92] The community's respect for case outcomes depends upon the "court's absolute probity" and therefore, "[j]udicial integrity is, in consequence, a state interest of the highest order."[93] The Court, however, has become accustomed to opaqueness and below are two types of examples: the first example focuses on recusals in apparent judicial bias cases, and the second example looks at recent death penalty cases involving death row prisoners' choice of religious cleric while in the execution chamber.

1. The Need for Public Confidence in the Judiciary

For United States Judges, the Code of Conduct "is a set of ethical canons that the Judicial Conference of the United States [] has adopted to promote public confidence in the integrity, independence, and impartiality of the federal judiciary . . . . however, it does not explicitly apply to Justices of the U.S. Supreme Court."[94] The Court does not have its own ethical code and currently, "no single body of ethical canons" exist with which the justices "must comply when discharging [their] judicial duties."[95] A recusal statute does exist however, requiring federal judges, including the Supreme Court Justices, to recuse themselves from a particular matter if they have a personal bias or prejudice concerning a party or a financial interest in the subject matter in controversy.[96]

88. Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN (July 13, 2016), https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html [https://perma.cc/PTZ3-9CYW].

89. *Id*. ("He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego . . . . How has he gotten away with not turning over his tax returns?").

90. Zirin, *supra* note 84.

91. Breiner, *supra* note 79.

92. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 183 (2011).

93. Republican Party v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

94. JOANNA R. LAMPE, CONG. RESCH. SERV., LSB10255, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 1 (2022).

95. *Id.* at 2.

96. *Id.*; 28 U.S.C. § 455.

Due to the widespread community outrage, "[s]ome observers maintain that 'Supreme Court justices should be bound by the same code of ethics that all other federal judges are required to follow.'"[97] In response, most recently, some members of the 117th Congress introduced the For the People Act of 2021, which would require a code of conduct to be applied to each justice.[98] The 117th Congress echo past congresses.[99]

2. Two Similar Religious Death Penalty Cases With Two Different Results

Below, I outline examples of recent cases that undermine judicial credibility. Capital punishment has been a continuously debated issue,[100] and the Court knows that the body of death penalty law is indecipherable.[101] Historically, the Court's decision making is inconsistent with no "brooding omnipresence in the sky" dictating a particular choice.[102] Further, the Court has never appeared to feel constrained to follow precedent when governing decisions are badly reasoned in constitutional cases.[103] Typically, the Court only hears two or three death penalty cases a year,[104] and is unfortunately only rarely known to grant stays of execution.[105]

Since February 2019, the Court has been infrequent and inconsistent[106] in religious freedom death penalty cases where the main question was whether to allow religious clerics of prisoners' religious choice to be inside the death chamber during their execution.[107] In 2019, during executions in the Alabama Department of Corrections, a Christian chaplain was allowed to be present in the death chamber.[108] Domenique Ray was a practicing Muslim and prisoner in the Alabama prison, and reasonably requested his personal Imam replace the

97. LAMPE, *supra* note 94, at 1.

98. *Id.* at 2.

99. *Id.*

100. Masci & Merriam, *supra* note 5.

101. Samuel R. Gross, *The Death Penalty, Public Opinion, and Politics in the United States*, 62 ST. LOUIS U. L.J. 763, 767 (2018).

102. Robert Davidow, *The Death Penalty and Due Process*, 2 GEO. MASON U. C.R. L.J. 297, 300 (1997).

103. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

104. Gross, *supra* note 101, at 769.

105. Matthew Tokson, *Supreme Court Clerks and the Death Penalty*, 88 GEO. WASH. L. REV. ARGUENDO 48, 48 (2020).

106. *See* Steven F. Shatz, *The American Death Penalty: Past, Present, and Future*, 53 TULSA L. REV. 349, 355 (2018).

107. *See* Cert. Granted at 50, Ramirez v. Collier, 142 S. Ct. 50 (mem.) (2021) (No. 21-5592) (the most recent case before the Court).

108. Jon Healey, *If You're a Non-Christian Facing Execution in Alabama, God Help You. Because the Supreme Court Won't*, L.A. TIMES (Feb. 8, 2019), https://www.latimes.com/opinion/enterthefray/la-ol-supreme-court-christian-execution-20190208-story.html [https://perma.cc/2AYT-JTL7].

prison's appointed Christian chaplain in the death chamber.[109] Alabama firmly stood by its protocol only allowing its approved Christian chaplain to be inside the death chamber during his execution.[110] Alabama and the Court failed to respect Ray's constitutional protections of free exercise of his Islamic faith,[111] and executed Ray in February 2019.[112] The Court's conservative justices commented that they were unimpressed with the timing of Ray waiting until ten days before his execution to raise the issue.[113] The Court's comment made everyone mad.[114] In the dissent written by Justice Kagan for all the liberal justices, she noted the Court has held "one religious denomination cannot be officially preferred over another," and yet, Alabama's policy did exactly that.[115] She further defended Ray, stating that he brought his claim in a timely manner because the relevant Alabama statute said that the prison's Christian chaplain and the prisoner's spiritual advisor may be present during execution, but made no distinction as to where—in the chamber or in the viewing room?[116] The Alabama prison failed to give Ray a copy of its procedures so there is no reason Ray should have known the prison would forbid his Imam from being with him.[117]

One month later in March 2019, the Court stayed the execution of Texas prisoner, Patrick Murphy,[118] whose plea was similar to Ray's.[119] Murphy is a practicing Buddhist and requested a Buddhist priest accompany him into the execution chamber, but Texas said no.[120] However, the Court barred the State from executing Murphy, unless he was allowed to have a Buddhist priest at his side.[121] Justice Brett Kavanaugh was the sole justice who wrote separately and

109. *Id.*

110. *Id.*

111. David French, *The Supreme Court Upholds a Grave Violation of the First Amendment*, NAT'L REV. (Feb. 28, 2019), https://www.nationalreview.com/corner/the-supreme-court-upholds-a-grave-violation-of-the-first-amendment/ [https://perma.cc/P9BT-6NG9].

112. Amy Howe, *Texas inmate seeks stay of execution over request for pastor to minister to him in final moments*, SCOTUSBLOG (Sept. 7, 2021), https://www.scotusblog.com/2021/09/texas-inmate-seeks-stay-of-execution-over-request-for-pastor-to-minister-to-him-in-final-moments/ [https://perma.cc/9DPA-FK5A].

113. Jessica Gresko, *2 death row inmates similar requests, but different results*, AP NEWS (Mar. 30, 2019), https://apnews.com/article/north-america-ap-top-news-courts-supreme-courts-politics-d317bc165ab24eacb73b6e63e6eeb070 [https://perma.cc/9EAF-SUZV].

114. *See* Matt Ford, *Domineque Ray Died So the Death Penalty Could Live*, NEW REPUBLIC (Feb. 12, 2019), https://newrepublic.com/article/153099/domineque-ray-died-death-penalty-live [https://perma.cc/X6UA-H6G4].

115. Dunn v. Ray, 139 S. Ct. 661, 661–62 (2019) (Kagan, J., dissenting).

116. *Id.* at 662.

117. *Id.*

118. Murphy v. Collier, 139 S. Ct. 1475 (2019).

119. Gresko, *supra* note 113.

120. *Id.*

121. Howe, *supra* note 112.

explained Murphy requested his Buddhist priest in a timely manner.[122] There is speculation it was more than just a timing issue for the Court.[123] Critics wondered whether the difference in the Court's decisions in *Murphy* and *Ray* was based on race and religion,[124] because Murphy is white and a Buddhist and Ray was black and Muslim. However, the Court has previously ruled in favor of Muslim petitioners,[125] and tends to rule in favor of religious claimants 81% of the time.[126] One thought is that the Justices received criticism both personally and as a Court, so when presented with the chance to correct their error, they seized the opportunity to assert that they will not tolerate religious discrimination in death penalty cases.[127]

The practice of lynching reached its peak in the late nineteenth and early twentieth centuries, but was an unofficial form of capital punishment.[128] This led to the current argument that the modern-day death penalty is like bringing lynch mobs into the courtroom.[129] There was a real concern that if there were no judicial executions, the community would practice extrajudicial executions by lynch mob.[130] In criminal law, the idea of the credibility of the judiciary is the underpinning of the penological goals at large.[131] This goes to show that if the community lacks trust and confidence in the judiciary, [132] there will be chaos within community streets.

III. A PROPER UNDERSTANDING OF RETRIBUTION CAN ADDRESS THE CYCLE OF VIOLENCE IN THE COMMUNITY

In 2020, the rate for solving homicides dropped to a historic low, with only about 50% of murders being solved.[133] Further, there is evidence that many of

122. *Murphy*, 139 S. Ct. at 1475–76 n.* (2019) (Kavanaugh, J., concurring).

123. Gresko, *supra* note 113.

124. Robert Barnes, *Brett Kavanaugh pivots as Supreme Court allows one execution, stops another*, WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-pivots-as-supreme-court-allows-one-execution-stops-another/2019/03/29/26b28b32-5245-11e9-88a1-ed346f0ec94f_story.html [https://perma.cc/S99D-YNC2].

125. *Id.*

126. Matt Williams, *Religion at the Supreme Court: 3 essential reads*, CONVERSATION (July 2, 2021), https://theconversation.com/religion-at-the-supreme-court-3-essential-reads-163712 [https://perma.cc/2FA5-CEWY].

127. Barnes, *supra* note 124.

128. Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 250 (2015).

129. Bedau, *supra* note 8, at 618.

130. Steiker & Steiker, *supra* note 128, at 250.

131. Gregg v. Georgia, 428 U.S. 153, 182–83 (1976).

132. Knowlton, *supra* note 4.

133. Weihua Li & Jamiles Lartey, *As Murders Spiked, Police Solved About Half in 2020*, MARSHALL PROJECT (Jan. 12, 2022), https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020 [https://perma.cc/2Z7K-Y3HK].

the homicides committed are retaliations for prior homicides, a deadly phenomenon known as "ping pong murders."[134] The game metaphor behind these retaliatory crimes is they take a shot, we take a shot, and so on.[135] What the community wants is accountability and for the wrongdoer to never cause harm to another family again,[136] so they take the law into their own hands because they have lost confidence in the system.

In criminal cases, who does the prosecution represent? Prosecutors do not directly represent victims because, under the American Bar Association, the prosecution does not act primarily on behalf of a particular victim and should act neutrally for all people.[137] Prosecutors do not directly represent the police, even though they have a close relationship, even though the majority of cases begin when an officer arrests a person for violating the law and presents the case to the prosecutor.[138] The defendant in a case is also not the prosecutor's client because, by the nature of the criminal justice system, the defendant and prosecutor are at opposite ends of the spectrum posing inherent conflicts.[139] The prosecution's client is also not the law because the law is inanimate and the lack of true communication from the law means it cannot properly be considered as the client.[140]

The most suitable candidate to serve as the prosecution's client is the *community*.[141] Prosecutors often refer to themselves as the "People" in criminal proceedings because most are elected by popular vote.[142] The community essentially "chooses" their prosecutors.[143] Efforts of community prosecution, which follows the general belief that crime is better handled when the community, police, and prosecution work together, are "more acceptable when there is a strong connection between the prosecution of criminal behavior and the public."[144] Consequently, when there is a lack of community prosecution and the judiciary fails to address crimes, the community could resort to retaliation

134. Thomas Hogan & Gary Tuggle, *Stop Retaliatory Homicides Before They Start*, CITY J. (June 15, 2021), https://www.city-journal.org/retaliatory-gang-violence [https://perma.cc/E2A2-VE2B].

135. *Id.*

136. Li & Lartey, *supra* note 133.

137. Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 898 (2018).

138. *Id.* at 899.

139. *Id.* at 903.

140. *Id.* at 904.

141. *Id.* at 900.

142. *Id.*

143. *Id.*

144. *Id.* at 900–01.

by seeking out the wrongdoer and enforcing its own punishment.[145] This is the last thing we want.[146]

Closing Rate of Homicides in Specific Areas Strongly Corresponds With Race

Another way to understand retribution and address wrongs in the community is to compare homicide clearance and race. The Marshall Project conducted a study looking at homicide clearance rates.[147] Generally, clearing a crime means at least one suspect was arrested or charged, or both.[148] In places where trust in the police is low, often in communities of color, homicide detectives struggle to speak with witnesses, and without useful leads, fewer of the murders in those communities are solved.[149]

Few people today would deny the risk of racial prejudice influencing the sentencing in the typical capital case: A Black defendant facing the death penalty for the murder of a white person who is prosecuted by a white prosecutor before a white judge and predominately white jury.[150] But, embedded racism "is evident through the history of the institution of slavery, legalized segregation, and persisting disparities in prosecutions and sentencing" for people of color.[151] Racial biases could also influence the Court, and judges are at risk of failing to recognize or correct racial discrimination.[152] Diversity on the Court has increased, but it is still overwhelmingly white,[153] and Black Americans today are, therefore, more distrustful of the courts and the judicial system.[154]

Prisoners on death row today are no different from those selected for execution in the past: the majority of prisoners are of a racial minority, are poor, and are sentenced to death for crimes against white victims.[155] When the death penalty was declared unconstitutional in 1972, it was due to its discriminatory nature against racial minorities.[156] One dissent in *Furman* erroneously dismissed the racial discrimination and discriminatory impositions of capital punishment

145. Flanders, *supra* note 1, at 458.

146. *Id.*

147. Li & Lartey, *supra* note 133.

148. *Id.*

149. *Id.*

150. Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 436 (1995).

151. Sara Campbell & Maxwell Tinter, *Implicit Bias Leaves a Lasting Mark on the Federal Judiciary*, LEADERSHIP CONF. ON CIV. & HUM. RTS. BLOG (Aug. 18, 2020), https://civilrights.org/blog/implicit-bias-leaves-a-lasting-mark-on-the-federal-judiciary/ [https://perma.cc/ENA2-RJZ4].

152. Bright, *supra* note 150, at 437.

153. Campbell & Tinter, *supra* note 151.

154. Knowlton, *supra* note 4.

155. Bright, *supra* note 150, at 433.

156. *Id.* at 433–34.

as being less likely today,[157] but from 1930 until *Furman* in 1972, 455 men were executed and nearly 90% of the men were black.[158] Four years later in 1976, the Court reinstated new death penalty laws designed to prevent arbitrariness and racial discrimination.[159] Instead of acknowledging the risk of racial discrimination, courts dodged the inquiry,[160] engaging in "'unceasing efforts' to eradicate racial prejudice" from the criminal justice system.[161]

Race and poverty continue to determine who dies since often the only minority participating in the criminal proceedings is the accused.[162] This disparate pattern of racial bias in capital sentencing is seen throughout the country.[163] The death penalty is none other than "a direct descendent of lynching and other forms of racial violence and racial oppression in America."[164]

IV. CORRECT UNDERSTANDING OF RETRIBUTION COULD LEAD TO FINDING THE DEATH PENALTY ITSELF UNCONSTITUTIONAL

The Court in 1958 first introduced the evolving standards of decency test as the primary standard to determine whether a punishment was cruel and unusual.[165] In saying the Eighth Amendment analysis should be predicated on the evolving standards of decency of maturing society,[166] there is a two-prong test. The first prong requires looking to objective indicia of a new national consensus,[167] and the second prong focuses subjectively on that it is cruel and unusual punishment unless it serves as a valid penological goal.[168]

A. Prong One: Focusing on a National Consensus Leading to Categorical Rules Against the Death Penalty and Geographic Location

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments,"[169] which "draw[s] its meaning from the evolving standards of

157. Furman v. Georgia, 408 U.S. 238, 450 (1972) (Powell, J., dissenting) ("The possibility of racial bias in the trial and sentencing process has diminished in recent years.").

158. Shatz, *supra* note 106, at 358.

159. Bright, *supra* note 150, at 434.

160. *Id.* at 438.

161. McCleskey v. Kemp, 481 U.S. 279, 309 (1981).

162. Bright, *supra* note 150, at 434, 443.

163. *Id.* at 434.

164. *Id.* at 439.

165. John F. Stinneford, *Evolving away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 87 (2010); *see* Trop v. Dulles, 356 U.S. 86, 101 (1958).

166. Stinneford, *supra* note 165, at 87.

167. Elizabeth Mosley, *A Test That Reflects the Evolving Standards of Decency: Protecting the Intellectually Disabled from Capital Punishment under the Eighth Amendment*, 57 U. LOUISVILLE L. REV. 411, 415 (2019).

168. Gregg v. Georgia, 428 U.S. 152, 183 (1976).

169. U.S. CONST. amend. VIII.

decency that mark the progress of a maturing society."[170] It requires looking at objective indicia which reflect the public's attitude about a specific punishment.[171] The public democratically elects its state legislatures, so the Court maintains that the moral values of the community are the legislature's responsibility.[172] While the Court upheld state death penalty statutes in 1976, it affirmed the importance of assessing the community's position on the proportionality of the punishment.[173] Punishment, therefore, is cruel and unusual—in violation of the Eighth Amendment—when it offends the evolving standards of decency and when a national consensus forms against it.[174]

With the death penalty being unique, several of the Court's rulings have narrowed the applicability of capital punishment based on categories.[175] In 1988, *Thompson* determined it was impermissible to execute any offender under the age of sixteen at the time of the crime because "it would offend civilized standards of decency."[176] However, one year later in 1989, the Court in *Stanford* concluded that executing juvenile offenders who murdered at the age of sixteen or seventeen was permissible because there was no modern societal consensus forbidding it.[177] The conclusion resulted in large part due to discrepancies over age in states permitting the juvenile death penalty.[178] Then in 2005, the Court in *Roper* determined *Stanford* should no longer be controlling because the objective indicia of consensus was obtained in 1989 and had since changed.[179] The Court further criticized the decision in *Stanford* and said that all non-death penalty states should have been considered as part of the consensus against capital punishment for juveniles because "a State's decision to bar the death penalty altogether demonstrates a judgement that the death penalty is inappropriate for all offenders, including juveniles."[180] While *Roper* ultimately

170. *Gregg*, 428 U.S. at 173 (quoting *Trop*, 356 U.S. at 101).

171. *Id.*

172. *Id.* at 175.

173. *Id.* at 173.

174. Corrina Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 3 (2007).

175. *Compare* Roper v. Simmons, 543 U.S. 551, 568 (2005) (juvenile offenders under eighteen at the time of the crime), *and* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult), *and* Enmund v. Florida, 458 U.S. 782 (1982) (petitioner did not commit murder himself), *and* Tison v. Arizona, 481 U.S. 137 (1987) (accomplices), *and* Atkins v. Virginia, 536 U.S. 304 (2002) (intellectual disabilities), *and* Kennedy v. Louisiana, 554 U.S. 407 (2008) (rape of a child where death did not occur and was not intended), *and* Graham v. Florida, 560 U.S. 48 (2010) (non-homicide offenses for juvenile offenders), *and* Miller v. Alabama, 567 U.S. 460 (2012) (invalidating mandatory sentences of life without parole for juvenile offenders).

176. Thompson v. Oklahoma, 487 U.S. 815, 830 (1988).

177. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

178. *Id.* at 370–71 (finding that, of the thirty-seven death penalty states, twenty-two states permitted death for sixteen-year-old offenders, and twenty-five states permitted death for seventeen-year-old offenders).

179. *Roper*, 543 U.S. at 574.

180. *Id.*

and correctly decided that death for juvenile offenders who were under eighteen at the time of the crime is forbidden, the Court *should* have based their national consensus on how many states banned the death penalty categorically for juveniles.[181]

The death penalty has also been discussed as becoming increasingly concentrated geographically.[182] As of 2021, twenty-seven out of the fifty states authorize capital punishment.[183] Wyoming is considered a death penalty state, although it has only performed one execution in the modern era, and currently has an empty death row after overturning the death sentence of the last person on its death row in 2014.[184] Similarly, New Hampshire and Colorado prospectively abolished the death penalty.[185] Missouri is a death penalty state, and over a nine-year span, no jury had imposed a death sentence.[186] Missouri's neighboring state, Kansas, is a death penalty state and yet has not had an execution take place since 1976.[187] Most recently, California's death row, the largest in the United States, will be dismantled within two years.[188]

The death penalty can also be viewed "geographically[,] [c]ounty-by-county" in the United States.[189] Right now, there are 3,243 counties.[190] Justice Breyer noted in *Glossip* "between 1973 and 1997, 66 of America's [then] 3,143 counties accounted for approximately 50% of all death sentences imposed."[191]

181. *Id.* at 559–60, 578.

182. Glossip v. Gross, 576 U.S. 863, 941 (2015) (Breyer, J., dissenting).

183. *States and Capital Punishment*, NAT'L CONF. STATE LEGIS. (Aug. 11, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx#:~:text=Capital%20punishment%20is%20currently%20authorized,government%20and%20the%20U.S.%20military [https://perma.cc/HDA4-J4EZ].

184. *Wyoming*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wyoming [https://perma.cc/8UXS-K9UZ] (last visited Dec. 2, 2022).

185. *States and Capital Punishment*, *supra* note 183 ("In Colorado, the governor commuted the sentences of those on death row, but defendants with pending cases at the time of abolition are still eligible for execution and the execution statute is still valid. In New Hampshire one individual remains on death row.").

186. *Judge Rejects Missouri's First Jury Recommendation of Death in Nine Years, Says Mitigating Evidence Requires Life Sentence for Marvin Rice*, DEATH PENALTY INFO. CTR. (May 25, 2022), https://deathpenaltyinfo.org/news/judge-rejects-missouris-first-jury-recommendation-of-death-in-nine-years-says-mitigating-evidence-requires-life-sentence-for-marvin-rice [https://perma.cc/8422-KACN].

187. Glossip v. Gross, 576 U.S. 863, 940 (2015) (Breyer, J., dissenting) (discussing eleven states that maintain the death penalty, but had not had an execution take place in at least eight years).

188. *California Governor Gavin Newsom Orders Dismantling of State's Death Row*, DEATH PENALTY INFO. CTR. (Feb. 1, 2022), https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row [https://perma.cc/7B6P-KRLN].

189. *Glossip*, 576 U.S. at 941.

190. STATES WITH THE MOST COUNTIES 2022, https://worldpopulationreview.com/state-rankings/states-with-the-most-counties [https://perma.cc/W4G2-PUJM] (last visited Dec. 2, 2022).

191. *Glossip*, 576 U.S. at 941.

Death sentences are overall declining, and within the most execution-oriented states the remaining sentences are largely concentrated in select counties.[192] Harris County in Texas and Maricopa County in Arizona disproportionately handed out death sentences within their geographic region.[193] Under Missouri's former prosecutor, St. Louis County carried out the second-highest amount of executions of all counties.[194] Since this data, however, St. Louis County has elected a new prosecutor who has chosen never to authorize a capital prosecution.[195] St. Louis County will fall from the top to zero executions, unless a future prosecutor resurrects the policy.

B. Prong Two: Subjectivity and Penological Goals Determining Whether Death is Cruel and Unusual Punishment

The second prong of the evolving standards of decency test involves the Court's subjective analysis of cruel and unusual punishment under the Eighth Amendment.[196] When capital punishment no longer serves a penological purpose, it is presumptively cruel and unusual.[197] The rationale for the death penalty was to serve community retribution and deterrence,[198] but these are improper forms of punishment,[199] and could fail on either ground.[200] A barrier to retribution is the demand for vengeance in the community against the person convicted.[201] Because retribution most often contradicts with the law's own ends when the law punishes by death, it risks the potential of brutality.[202] Yet, there is still a failure to explain why the community demands vengeance.[203] Despite exhaustive studies on deterrence, there is "no reliable statistical evidence that

192. *The Death Penalty in 2021: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2021), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report [https://perma.cc/S6JP-W29F].

193. *The 2% Death Penalty: Press Release*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/the-2-death-penalty-press-release [https://perma.cc/8K37-BNRD] (last visited Jan. 4, 2023).

194. DEATH PENALTY INFO. CTR., *supra* note 192.

195. *St. Louis County Prosecutor: Death Penalty is 'Ineffective, Racially Biased, Hypocritical, and Inhumane'*, DEATH PENALTY INFO. CTR. (Jan. 7, 2021), https://deathpenaltyinfo.org/news/st-louis-county-prosecutor-death-penalty-is-ineffective-racially-biased-hypocritical-and-inhumane [https://perma.cc/5Q7U-64N8].

196. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

197. Glossip v. Gross, 576 U.S. 863, 938 (2015) (finding over the past forty years there is a strong claim the death penalty violates the Eighth Amendment).

198. *Id.* at 930.

199. *See* Furman v. Georgia, 408 U.S. 238, 345–47 (1972).

200. *Coker*, 433 U.S. at 592.

201. *Furman*, 408 U.S. at 344.

202. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

203. Levy, *supra* note 12, at 650.

capital punishment in fact deters potential offenders."[204] Deterrence is not worth much now.[205] The theory was established by Cesar Beccaria and Jeremy Bentham in the eighteenth century in an attempt to prevent criminal acts through fear of punishment.[206]

To determine the effectiveness of deterrence, the proof was the evidentiary standard of either the decrease or absence of crime.[207] For example, imagine two people who intentionally kill: one is a mother who in anger kills the sexual abuser of her child, and the other is a humiliated man who kills his wife who asked for a divorce.[208] Would these two people who committed murder both receive death as a punishment under a theory of deterrence?[209] Like in cases with a hung jury,[210] the answer would likely be no because of the need to identify what value society gets from deterring these types of killings.[211] Are society members more or less disturbed by killings of wives or killings of child molesters?[212] Perhaps the community disvalues these killings equally, so the punishment for the wife and child molester should be equal, and they both receive death.[213] There is no way to know whether or not the community would come to a unanimous decision.

The person who commits murder often does not premeditate the crime, which makes it nearly impossible to imagine how the threat of capital punishment could prevent a person from committing the murder they did not plan.[214] Thus, outcomes of deterrent punishment cannot be demonstrated because they are difficult, if not impossible, to prove.[215] It is strictly speculative because one cannot know with certainty that a crime would not have occurred "but for" the sentence imposed for that particular crime,[216] but they will continue

204. Baze v. Rees, 553 U.S. 35, 79 (2008) (Stevens, J., concurring).

205. *Furman*, 408 U.S. at 368.

206. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766–67 (2010).

207. Apt, *supra* note 16, at 449.

208. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 426 (1999).

209. *Id.*

210. *What happens if there is a hung jury?*, FULLY INFORMED JURY ASS'N, https://fija.org/library-and-resources/library/jury-nullification-faq/what-happens-if-there-is-a-hung-jury.html [https://perma.cc/2FNW-KYR2] (last visited Jan. 4, 2023) (a "hung jury" occurs where the jury is deadlocked and cannot come to a unanimous decision).

211. Kahan, *supra* note 208, at 426.

212. *Id.*

213. *Id.* at 426–27.

214. Hugo Adam Bedau, *The Case Against The Death Penalty*, AM. C.L. UNION (2012), https://www.aclu.org/other/case-against-death-penalty [https://perma.cc/W4GK-AQFC]; *see* State v. Craig, 642 S.W.2d 98, 101 (Mo. 1982) ("Premeditation is present if the accused reflects on his act for any length of time prior to the act.").

215. Apt, *supra* note 16, at 449.

216. *Id.*

to learn about all of the deterrent failures.[217] There have been numerous serious errors in recent deterrent studies,[218] and "[t]hese flaws and omissions in a body of scientific evidence render it unreliable as a basis for law or policy that generate life-and-death decisions."[219] The death penalty is not consistently or promptly employed, so capital punishment cannot plausibly be a deterrent to capital crimes.[220]

It would favor the judiciary to say it is done with capital punishment in the courtroom since the closed-loop idea of "[r]etribution is no longer the dominant objective of the criminal law . . . ."[221] Reformation and rehabilitation,[222] or any other goal besides death, are more appropriate. The risk of considering victim impact evidence relating to a murder victim is not unconstitutional,[223] but it runs the risk of potential spikes in retaliatory crimes based on vengeful emotions.[224] Retributive punishment could be a false unfulfilled promise to families, leaving them "frustrated and angry after years of fighting in the legal system."[225] Death could come several decades after the crime is committed,[226] and what if the feelings of outrage have diminished?[227] While the death penalty has long stood to do justice and bring closure, many family members of victims have been outspoken in their opposition to the death penalty.[228] This sentiment is not universal, but many remain staunchly opposed to the death penalty because "[a]n

217. Furman v. Georgia, 408 U.S. 238, 347 (1972).

218. *Studies on Deterrence, Debunked*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/deterrence/discussion-of-recent-deterrence-studies [https://perma.cc/8P72-EVXQ] (last visited Jan. 4, 2023).

219. Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 261 (2006).

220. Bedau, *supra* note 214.

221. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (quoting Williams v. New York, 337 U.S. 241, 248 (1949)); *see supra* Part II.

222. *Williams*, 337 U.S. at 248.

223. *See* Payne v. Tennessee, 501 U.S. 808, 829–30 (1991).

224. *See* Levy, *supra* note 12, at 652.

225. *Victims' Families and Death Penalty Repeal Efforts*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/victims-families-and-repeal [https://perma.cc/N8NU-K7HD] (last visited Jan. 5, 2023).

226. Valle v. Florida, 564 U.S. 1067, 1067–68 (2011) (Breyer, J., dissenting from a denial of a stay of execution) ("The State of Florida seeks to execute Manuel Valle for a crime for which he was initially sentenced to death more than 22 years ago.").

227. Glossip v. Gross, 576 U.S. 863, 932 (2015) (Breyer, J., dissenting).

228. *Victims' Families*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/new-voices/victims-families [https://perma.cc/25WH-XBMP] (last visited Jan. 5, 2023) Beth Kissileff, the wife of a rabbi who survived the Pittsburgh's Tree of Life Synagogue shooting rampage explained although repentance is rare, there is always a chance for redemption. *Id.* But, calling for the death penalty would mean the shooter could not repent, change, or improve himself. *Id.*

evil deed is not redeemed by an evil deed of retaliation."[229] States that implement the death penalty might actually increase the rate of criminal homicides because "a return to the exercise of the death penalty weakens socially based inhibitions against the use of lethal force to settle disputes."[230] Instead, families should urge prosecutors to seek life imprisonment sentences because often times repentance and forgiveness can restore lives once ruined.[231]

CONCLUSION

In this article, I presented three real-world ramifications for why it is necessary to have a consequentialist understanding of retribution to protect the credibility of the judiciary. First, the idea of consequentialist retribution requires the public to place confidence in the judiciary to make apolitical rulings without appearances of impropriety. Second, understanding consequentialist retribution serves to help the community by solving and addressing crimes in ways other than penological death. Additionally, it addresses actual retribution instead of retributive punishment. Lastly, consequentialist retribution could pave the way to a categorical rule which would find the death penalty itself in violation of the Eighth Amendment.

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229. Bernice A. King, *Another View — Bernice A. King: NH can create a better world by ending state-sanctioned killing* (Jan. 21, 2014), https://deathpenaltyinfo.org/news/kings-daughter-says-death-penalty-perpetuates-cycle-of-violence [https://perma.cc/4KL3-8PFV].

230. Bedau, *supra* note 214.

231. *See Glossip*, 576 U.S. at 932–33.

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