RETRIBUTION

DANIEL SMALL

ABSTRACT

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

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

II. THE RETRIBUTION DEBATE

A. Necessary Context

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

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

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

6. *Exodus* 20:13

B. Historical Perspectives on Retribution

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

The first known formal conception of retributive justice dates back nearly 4,000 years. Around 1754 BCE, the Babylonian king Hammurabi had 282 laws etched into a 7.5-foot stone. One of these laws declared: "[i]f a man put out the eye of another man, his eye shall be put out."[8] Another proclaimed: "[i]f a (0.0h)-4k(o)7(he)7(e)6(b)-13(h,.0000a0nd TJET-187(da)-1n equal, his teeth shall be knocked out." Centuries later, this exact notion of justice was adopted in the ancient Jewish tradition, wherefrom originated the more concise and famous articulation: "[e]ye for eye, tooth for tooth."[9] Both Hammurabi's Code and the Mosaic Law operate according to the 6123on co84nBT/F1 11.52 Tf-20(e)6(x(ne)7( )-1(t)7l-41(a)6(r-41(m)0 1 325.8 519.9

2020

2020

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

of crime spawned the rehabilitative theory of criminal justice. In tan-

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

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

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

63.

construction to those that did.[71] A couple of years later, after a mere

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

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

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

78. Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for Ang his personC3(u)-13(t) Tm61.355513 Tm0 g0 G[(-)]TJET*

E.

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

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

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

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

---

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

100. *Id.*

101. Labutta, *supra* note 78.

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

103. Thompson, *supra* note 82.

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

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

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

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

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

106. SNELL, *supra* note 66.

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

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

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

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

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

C. Defenses of Deontology

Proponents of deontological ethics typically respond to the above criticisms with two arguments: one easily dismissible, and one quite challenging. The first response posits that teleological ethics, without certain inviolable rules, could be used to validate essentially any level

2020

2020

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

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

B. Substantive Due Process

A less conventional constitutional attack on retribution can be

Colorado constitutional amendment prohibiting laws designed to protect LGBTQ citizens was struck down by the Court for failing rational basis.[140]

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

C. The Establishment Clause

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

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

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

147. *Id.* at 157.

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

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

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

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

152. *Id.*

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

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

goodness and virtue for their own sakes.

2020

previously are a clear example of this; skin color has no connection to moral culpability, and yet it clearly has been a factor in retributive sentencing. Moreover, in *Mccleskey,* the majority explicitly admitted that arbitrary variables such as physical attractiveness might factor into the jury's decision-making process.[176] A 2014 study on the Connecticut death penalty confirmed the arbitrariness of jury sentencing, showing that there 7(e)6 Tf1 0 0 1 14(re)6(t)7(ri)7(but)t13(i)7(t)r76

into a pocket sized, *vade mecum* 'system of metrics.'"[185] Thus, the in-

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

188. *Id.* at 339.