

CAPITAL PUNISHMENT, RETRIBUTION, AND EMOTION: AN EVOLUTIONARY PERSPECTIVE

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This article explores the emotions behind the retributive urge as it applies to the death penalty in the United States. It is argued that the retributive urge is so strong because it engages the most primitive of our emotions, and that these emotions served adaptive purposes over the course of human evolution. Many scholars offended by the retributive instinct insist that we must put emotions aside when discussing the death penalty, even as jurors in death penalty cases, and rely on our rationality. To ask this is to ask what almost all normal people find impossible because the emotions evoked in capital cases (disgust, anger, sympathy for the victim, desire for justice) evolved for the purpose of maintaining group stability and survival by punishing freeloaders. Modern neuroscience has destroyed the traditional notion that rationality and emotion are antagonists. Brain imaging techniques show that they are fully integrated in our brain wiring, and both are engaged in decision making, but when reason and emotion yield conflicting judgments, the latter almost always triumphs. The

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evolutionary rationales for why emotions conducive to punitive responses for wrongdoers exist are examined.

Keywords: *capital punishment, emotion, evolution, limbic system, retribution*

INTRODUCTION

In *Punishment and Culture*, Philip Smith (2008) wrote, “Punishment is a deeply meaningful activity that still needs to be interpreted if it is to be understood” (p. 187). This article offers an interpretation of punishment by exploring the neglected role of emotion in the retributive urge that keeps the death penalty alive in the United States. Emotion is a neglected area in law, criminology, and criminal justice discourse in general, although punishment scholars are paying increasing attention to it (Canton, 2015). The criminal justice community would be well served to explore the concept of retribution and its moral account for justifying punishment because the death penalty debate is primarily a moral debate. The importance of this observation is that brain imaging studies have shown that the foundation for morality is far more emotional than rational (Haidt, 2012), and as Moore (1987) maintains: “emotions are our main heuristic guide to finding out what is morally right” (p. 189).

The urge to punish wrongdoers is listed by anthropologists as a common denominator in all cultures in the ethnographic literature (Brown, 1991), yet few of us give much serious thought to why the urge to punish is so universal and strong. The question of why we punish is no longer limited to philosophy, law, religion, or psychology because there is increasing evidence from the biological sciences that natural selection formed our brains with default settings moving us to punish wrongdoers. Furthermore, the settings that prime the punishment urge are complementary to those that make us presumptively cooperative and rule-abiding.

The issue of why we punish is couched in terms of the death penalty in this article because it is the ultimate punishment and because it is the punishment most in need of justification. However, this is not an attempt to justify the death penalty; it is an attempt to understand it in terms of the emotions involved in the punitive response and the evolutionarily adaptive functions they serve. It is argued that the ultimate reason we have the urge to punish is because wrongdoing engages some of our strongest emotions, and

that these emotions served adaptive purposes. This requires examining evolutionary rationales for why emotions conducive to the punishment response exist. We also examine the notions that our emotions animate the continued level of support for the death penalty among the majority of Americans, and that emotions cannot and should not be denied or ignored in capital punishment discourse.

I. THE POWER AND PRIMACY OF EMOTION

Philosophers have traditionally damned actions based on “primitive” emotions. The great philosopher of reason, Immanuel Kant, called emotions “pathological,” and the eminent calculator Gottfried Leibniz called them “confused passions” (cited in Walsh, 2014, p. 85). Perhaps subconsciously influenced by Descartes’ mind/body dualism (mind = rationality; body = emotionality), many philosophers view rationality is the exercise of reason, and emotions as feelings inimical to it. On the other hand, David Hume championed emotions over rationality as guides to human action in his famous claim that “reason is, and ought only to be the slave of passions, and can never pretend to any other office than to serve and obey them” (Hume, 1738/1978, p. 462). Hume considered our species to be *Homo emovere* (“emoting man”), not *Homo sapiens*, with our reason providing *post hoc* rationales for our actions. That is, we perceive a situation, emote, pass judgment on the situation based on the emotions it evokes, and then provide reasons for our judgment. Modern biology supplies voluminous support for this ancient claim.

The notion that rationality and emotion are polar opposites is no longer viable. It has long been known in neuroscience that cognition is always suffused with emotion and emotion with reason (Nowak & Sigmund, 2005). Neural network research has shown that emotion and reason are fully integrated in the lateral prefrontal cortex (LPFC): “the convergence of both cognition and affective/motivational information enables the LPFC to dynamically weigh multiple lines of information in guiding action” (Pessoa, 2008, p. 154). Although emotion and rationality are two inseparable components of all that we think and do, neuroscience informs us that when the two are in conflict, emotion typically triumphs over reason (Verweij, Senior, Dominquez, & Turner, 2015).

Emotions are situated in a set of brain structures called the limbic system, which is a system of functionally and anatomically interconnected

nuclei and cortical structures that serves to regulate behavioral response to stimuli. It is instructive that the evolution of this system predates the evolution of the structures where our reasoning power is housed by at least a million years (Suwa et al., 2009). As Douglas Massey (2002) notes, “Emotionality clearly preceded rationality in evolutionary sequence, and as rationality developed it did not replace emotionality as the basis for human interaction. Rather, rational abilities were gradually added to pre-existing and simultaneously developing emotional capacities” (p. 15). Jonathan Haidt (2001) puts it even more strongly: “It [emotion] comes first in phylogeny, it emerges first in ontogeny, it is triggered more quickly in real-time judgments, and it is more powerful and irrevocable [than rationality] when the two systems yield conflicting judgments” (p. 819).

II. EMOTION AND THE RETRIBUTIONIST JUSTIFICATION FOR PUNISHMENT

The primacy of emotion over rationality is not a notion welcome by most criminologists, who see it leading to irrational and barbaric punishments. They may note that retribution is most often offered as a rationale by supporters of the death penalty (Bohm, 2012), and they abhor retribution as little more than state-sanctioned revenge (Rosebury, 2009). This position carries the unspoken assumption that the emotions behind the retributive urge immoral and antisocial. Other scholars see things differently. Far from being immoral, Canton (2015) insists “the emotions of punishment are distinctly *moral* emotions. They are emotions of judgment, of righteousness and reprobation” (p. 59). In other words, people feel these emotions on behalf of victims they have never met, and are therefore deeply prosocial emotions linked to concern for others and aimed at righting a wrong. A purely rational response to cruel murder in a far-off place would be a disinterested one since it did not affect the responder’s life in any way.

Such a response would be that of a callous psychopath. Those who believe in the moral superiority of “civilized” rationality over “primitive” emotion should note that the defining neurobiological feature of psychopaths is their inability to tie the rational and emotional functions of the brain together (Raine, 2013; Wiebe, 2011). This inability has been examined using brain imaging techniques such as EEG, PET, fMRI, and even at the molecular level by diffuse tensor imaging (DTI) that tracks the movement

of molecules along white matter tracts to and from the “rational” prefrontal cortex and the “emotional” limbic system (Walsh & Bolen, 2012). Psychopaths are perfectly able to understand the moral norms of society rationally; it is their lack of understanding of their moral implications supplied by the social emotions of guilt, shame, empathy, and embarrassment that explains their activities. The psychopath knows the rational words of the moral song but not its emotional music. This results in an entirely utilitarian, rational, and self-centered pattern of behavior (Jorgensen, Anderson, & Barnes, 2016). Psychopaths certainly feel the more primitive, primary emotions such as anger and fear, but due to the relative lack of connectivity between the limbic system and the prefrontal cortex, they are not guided by rational considerations, just as their rational considerations are not guided by the social emotions. Thus the psychopath’s emotions often are “confused passions” and “pathological.”

A retributive punishment justification is the only justification associated with deep emotions related to social concern. When people hear of some vicious criminal act, they become angry, outraged, and disgusted, and their first inclination is to want to exact some sort of retribution; it is highly unlikely that their first thoughts should be of deterrence or rehabilitation. This retributive emotional urge often tends to be damned as “irrational,” “uncivilized,” and entirely inappropriate because retribution is punishment for its own sake from which nothing good can come. Wanting something good to come from punishment is a utilitarian or consequentialist position by which the only justification for punishment is its alleged positive consequences.

Retributionists see this as hypocritical since no objections to emotional outrage are offered when it is aimed at unjust punishment. Most people are emotionally disturbed when they perceive innocent people are being punished, even if it may result in positive consequences such as a general deterrent. Why then do many consider it barbaric when the same emotional outrage is aimed at the acts of guilty people, even if no observable positive consequences issue from the punishment? If the moral judgment in the first instance is virtuous, then it is also virtuous in the second instance. The retributionist would say that if you demand a positive outcome from punishment for its own sake, then that outcome would be that justice has been done. The retributionist would also say that punishing the innocent, regardless of what positive consequences may come from it (such as general deterrence), is impermissible and unjust.

III. KANT'S MORAL REASONING FOR RETRIBUTION

John Mackie (1982) believes there is a paradox inherent in retribution because it “cannot be explained or developed within a reasonable system of moral thought, while, on the other hand, such a principle cannot be eliminated from our moral thinking” (p. 3). This paradox is only a paradox if one assumes that rational deliberations about strong moral issues can take place without involving the emotions, which, as we have seen, neuroscientists tell us cannot be done. *Star Trek's* Mr. Spock could do it, computers can do it, and psychopaths can do it to a certain extent, but humans with normally functioning brains cannot. Contrary to Mackie's belief that retribution cannot be defended morally, it has been justified rationally and morally by the greatest of moral philosophers and its most famous adherent, Immanuel Kant. Kant's justification of punishment is completely retributive, although he acknowledged that retribution carries a message to the public of moral disapproval of criminals and their acts, and therefore conveys a de facto general deterrent effect. He simply argues that this effect serendipitously rides on retribution's coat tails, and cannot itself be a moral justification for punishment.

Retribution is morally justified by Kant in terms of the value, dignity, and agency of human beings. Kant's retributionism is undergirded by his idea of duty and beliefs in human reason and autonomy. Human beings, says Kant, are different from other animals because they are guided by reason, and it is from reason that we derive all duties and obligations. Humans have a duty to act out of reverence for moral law, which Kant conceived of as a set of categorical imperatives. A categorical imperative is a moral duty to be discharged regardless of any further end. A categorical imperative says “Do this,” not “Do this *if*.” Any action consistent with this is good (moral), says Kant, regardless of its consequences. Kant saw categorical imperatives as universal laws that guide humans toward their duties in the following way: “Act as if the maxim of your action were to become through your will a universal law of nature” (1785/1964, p. 89).

In his *Groundwork of the Metaphysics of Morals*, Kant (1785/1964) says that a categorical imperative should be grounded in something that should be an “*end in itself, and an absolute value.*” He finds this grounding in “man,” who “exists as an end in himself, not merely as a means for arbitrary use for this or that will” (p. 95). “Man,” in all his actions, must always be regarded as an end in himself regardless of whether his actions are directed

at himself or at others. Based on this, Kant arrives at a final definition of a categorical imperative: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end” (p. 96).

Respecting humans as ends in themselves, and not as means to some other end, leads logically to a retributionist justification of punishment. From this viewpoint, punishing criminals for instrumental reasons such as deterring others or subjecting them to rehabilitative treatment is morally wrong because it treats them as *means* to an end, not as *ends in themselves*. As Kant phrased it in *Groundwork of the Metaphysics of Morals* (1785/1964):

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else . . . He must first of all be found to be deserving of punishment before any consideration is given of the utility of his punishment for himself or his fellow citizens. (p. 331)

According to Kant, criminals are ruled by reason, just as everyone else is, and thus live in accordance with maxims—universal moral standards (“Act as if the maxim of your action were to become through your will a universal law of nature.”). If criminals harm others, they are violating the autonomy of others, and by doing so are endorsing criminal acts as universal laws, and thus in effect they are saying that others should act similarly. By punishing criminals, the state is treating them in accordance with their own maxims, that is, how they think others should be treated. The state is thus allowing criminals to decide how they will be treated, and by doing so it is respecting their judgment and autonomy. Thus Kant says of the criminal: “His own evil deed draws the punishment upon himself” (cited in Rachels, 1986, p. 123). Retribution is a “just deserts” model demanding that criminals be punished in proportion to the harm they have inflicted on their victims, thus death would be a proportional punishment for someone who has taken the life of another with full *mens rea*. Logan and Gaes (1993) claim that this is the most honestly stated justification for punishment because it taps into our punitive urges and posits no secondary purpose for it, and they mirror Kant in writing that only retributive punishment “is an affirmation of the autonomy, responsibility, and dignity of the individual” (p. 252).

IV. EMOTION AND CAPITAL PUNISHMENT DECISIONS

Serving on a jury in a case for which the prosecutor is seeking the death penalty and knowing that you and eleven other jurors must vote for life or death must be extremely daunting. On what does one base one's vote? Assuming that the trial is over and that the defendant is guilty beyond a reasonable doubt, "When asked to determine what sort of punishment heinous murderers deserve, people consult their moral, ethical, and religious beliefs. They consult their emotional reactions—their empathy, disgust, and moral outrage" (Bandes, 2008, p. 493).

Bandes (2008) goes on to note, "The capital system is built upon choices among competing emotional claims—some acknowledged and others not" (p. 495). The competing claims are evident in capital trials. In a capital case, prosecutors play on the jury's fear, disgust, anger, and sympathy for the victim, and ask that the defendant "pay in full" for what he or she has done. Similarly, defense attorneys ask juries to consider the humanity of the defendant, try to evoke sympathy by conveying his or her terribly abusive childhood, or some other mitigating factor that may tug on jurors' hearts, and plead for mercy. If the jury's verdict is guilty, the very emotional testimony of the families of both the victim and the defendant at the sentencing phase follows. The judge may instruct the jury to set their emotions aside and decide the defendant's fate by a rational deliberation of the law and the facts before them, but we know that they cannot.

Both the prosecution and defense obviously make reasoned arguments about the facts of the case and pertinent law, but "Reasoned argument has limited effect because it is not reasoning that prompts the judgment" (Canton, 2015, p. 68). Furthermore, there are those who believe that not only can jurors not eliminate emotion, but also that they should not: "Perhaps it is not so much that emotion is a key to normative judgment as it is a key to important and effective normative judgment, normative judgment that gets our attention and gets translated into action, either with respect to our own conduct or to the reward or punishment of others" (Goodenough & Prehn, 2004, p. 1717). We should expect emotions to render the most effective moral judgements, given their long evolutionary history as the only basis for hominid social interaction prior to the evolution of our vaunted rationality. If these "effective moral judgements" are more often than not retributive when it comes to moral decisions about punishing transgressors, one may wonder why Kant's proportional retribution is often

viewed so negatively. Even a scholar such as Mike Materni (2013), who does not like the idea of retributive justice or capital punishment, nevertheless writes:

[M]aybe Nietzsche was right when he quipped, “A little revenge is more human than no revenge.” Moreover, given the fact that our retributivist instincts run so deep and may even play a part in our evolution, we may not—probably, even, should not—completely ban retribution from the realm of criminal punishment, if we want the criminal law and the criminal justice system to be respected and supported by the very society it was created to protect and serve. (p. 288)

Rob Canton (2015) offers us a smorgasbord of social emotions and how they engage the retributive urge. All of these may come into play in jury deliberations in death penalty cases. Starting with care and compassion, Canton remarks that “retributive emotions reflect a decent compassion for a victim’s (or survivor’s) distress and a virtuous expression of solidarity with members of our community” (p. 62). He next focuses on the deep instinct of fairness, and asserts that retribution “restores a balance: the offender’s unjust profit or gain from the crime must be redressed or annulled . . . The retributivist does not hit, but *hits back*” (p. 63). The urge to punish, he says, can be seen as loyalty to the group and an expression of commitment to it. Offenders are subconsciously viewed as traitors and enemies of the group—“not one of us”—which serves to neutralize our feelings of care and compassion for them (p. 64). Canton also engages the social contract notion of the authority of the law. By their crimes offenders have demonstrated a lack of respect for authority, which represents the possibility of the breakdown of the social contract. This possibility generates anxiety among those who have a deep respect for authority and social order. Finally, most crimes for which the death penalty is sought evoke a deep sense of negative emotion, especially when multiple victims, children, and/or torture are involved. We often hear metaphors for such criminals as “filth” or “scum” and their punishment described as an act of “cleansing” (p. 66).

V. THE CO-EVOLUTION OF PUNISHMENT AND SOCIAL COOPERATION

Canton provides us with deep insights into the punishment urge, but not how those urges burrowed their way into the human psyche. Mackie (1982)

solves the puzzle he posed earlier by asserting, “The paradox of retribution ceases to be puzzling when . . . we make the Humean move of saying that moral distinctions are founded on sentiment, not reason” (pp. 7–8). If this is the case, he avers, we should look to biology and ask, “Why do we have an ingrained tendency to see wrong actions as calling for penalties and good actions as calling for rewards?” (p. 80. This section of the paper attempts to answer this question.

In his concurring opinion in *Furman vs. Georgia*, in which the Supreme Court invalidated Georgia’s death penalty statute in 1972, Justice Stewart wrote:

I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law. (p. 26)

What did Justice Stewart mean by locating the “instinct for retribution” in the “nature of man”? All early legal codes—such as the Code of Hammurabi, the Code of Ur-Nammu, the Laws of Eshnunna, and the Twelve Tables—were strongly retributive, and the universality of such sentiments in criminal codes tends to support Justice Stewart’s contention that the retributive instinct “is part of the nature of man.” If it is a part of human nature, how did it get there, and why?

The evolutionary goal of all living things, including human beings, is survival and reproduction. It is important for animals to be motivated to do things that are vital in the pursuit of these goals, and to provide this motivation nature has provided us with neural mechanisms that reward us with pleasurable feelings when we do things that aid in achieving these goals. These pleasurable feelings arise from the neurotransmitter dopamine bombarding the nucleus accumbens, the brain’s major pleasure center (Walsh, Johnson, & Bolen, 2012). Each surge of dopamine reinforces the behavior because it makes us feel good and thereby motivates us to repeat it. This is why we feel so good when we satisfy urges to eat, drink, and have sex, which are the most obviously requirements for survival and reproduction.

Given that the urge to punish wrongdoers is strong and considered universal by ethnographers (Brown, 1991; Penney, 2012), punishment must have played a role in helping our distant ancestors to survive and pass on their genes. The survival and reproductive function of punishment is not at all as obvious as are the roles of food, drink, and sex. Punishment only indirectly helps to achieve evolutionary goals via its function in reinforcing group stability and cohesion. There is little doubt, however, that we find pleasure when wrongdoers are punished, which provides us with a strong clue of its adaptive benefits. Brain imaging studies have shown increased blood flow to the nucleus accumbens when subjects witness the punishment of those who have wronged them (de Quervain et al., 2004; Klein, 2012). Blood flow to reward centers has also been observed when people are punished who have harmed others, and the strength of the pleasure response is proportional both to the harm done and to the level of the offender's culpability (whether the act was purposeful, knowing, reckless, or negligent) (Buckholz & Marois, 2012). These imaging studies provide us with some compelling evidence that the urge to punish must be an adaptive feature of human nature, and a possible explanation for the old saying, "Vengeance is sweet."

Although brain imaging studies and evolutionary logic tell us there must have been good adaptive reasons why our reward centers fire up when we punish or witness the punishment of wrongdoers (vicariously or otherwise), they do not tell us *why* punishment was so vital to our distant ancestors. We may approach the question by noting that *Homo sapiens* is an ultrasocial species that alone among all animals live in groups consisting overwhelmingly of non-kin. We live under an implied social contract by which we surrender some of our freedoms to do as we please. A vital part of the contract is the agreement not to harm others, and if we do, that the state has the legitimate right to punish us, or as Kelly McBride (2007) avers: "Punishment is the midwife in the birth of the social contract" (p. 122). Central to the social contract is social integration and social order based on the strongly *felt* norms of right and wrong among its members. Moore (1987) quotes famous British jurist Patrick Devlin, "No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law," and adds, "In this view, the emotions of a people constitute moral truth" (p. 199).

Humans have evolved strong norms of cooperation and feel Devlin's "intolerance, indignation, and disgust" when those norms are contravened.

These moral feelings result in a demand for punishing the miscreant. Natural selection for altruism is adequate to understand cooperation among close kin, but it does not explain cooperation extended to non-kin such that breaching norms of social cooperation would evoke moral condemnation. Cooperation among non-kin is explained by reciprocal altruism—the extending of a benefit to another with the unspoken expectation of obtaining a like benefit from the recipient at some later date. Social animals cooperate because they can achieve more as a groups than they can individually, and we feel good about ourselves when helping others. We are also rewarded by reciprocal behavior in the future, but even if the person we help is a stranger we are unlikely to meet again, we still receive a shot of dopamine that make us feel good (Brunero, 2002).

A population of cooperators provides a target-rich niche for people who cheat on the social contract and seek to gain resources at zero cost. Defectors or cheats (we call them criminals) prosper in a population of unconditional cooperators (biologists call them “suckers”) and would soon drive them to extinction. It has been repeatedly shown in computer simulation games (e.g., the prisoner’s dilemma) that in a mixed population of cooperators and cheats, cheats always do better than cooperators in the absence of punishment (Klein, 2012; Nowak, 2006). Most humans are not suckers, however; they are what evolutionary biologists call “grudgers” (conditional cooperators). Grudgers can be cheated because they abide by the norms of mutual trust and cooperation, and expect the same from others. Unlike suckers, once cheated, grudgers will react differently, perhaps punitively, to cheaters in the future (Wiebe, 2011).

It is a central tenet of evolutionary theory that anyone stealing or attempting to steal resources and sexual mates constituted a severe threat to everyone in social groups relying on strong norms of reciprocity, and thus would have generated feelings of anger, outrage, and a desire to punish: “A taste of revenge is the other side of the coin of reciprocity” (de Waal, 1996, p. 160). Victims feel angry and hurt when treated unfairly, and confusion and frustration at losing the expectation of predictability (“I scratched your back, but you didn’t scratch mine!”). The sum of these evolved emotions is moral outrage. Without moral outrage there would be no motivation to react against those who violate the norms of reciprocal cooperation, cheats would have thrived without the threat of punishment in our ancestral environments, and we would have evolved as a quite different species of animal (Haidt, 2012; Nowak, 2006).

But natural selection does not pass judgment on emotions, or even on the behaviors they motivate if those behaviors do not result in enhanced reproductive success. Natural selection operates on the *consequences* of the behavior motivated by the emotion (Massey, 2002; Walsh, 2006). It is no use feeling angry and hurt when victimized if those feelings do not generate behavior designed to prevent it occurring again. Negative feelings accompanying victimization are lessened by punishing violators because punishment signals the restoration of fairness and predictability (the perception that cheaters may be less likely to cheat in future, and that potential cheaters may be deterred). The positive feelings accompanying the punishment of those who have wronged us, coupled with the reduction of negative feelings, provide powerful reinforcement for punitive responses and explain why we see increased blood flow to the brain's reward centers when wrongdoers are punished.

VI. SECOND- AND THIRD-PARTY PUNISHMENT

It is not always possible to punish those who harm us, and we must turn to others to carry the burden. Among primates, particularly among chimpanzees, alpha males take on the role of what is called "control behavior," which includes the punishment of troop members who bully and exploit others (de Waal, 1996). This is a costly and risky role, but it confers a number of benefits on the punisher. As an arbiter, alpha males typically show a preference for the weaker party in most disputes. This not only develops support among the weaker rank and file, it also serves to level the hierarchy and thereby increases the gap between the alpha male and the more powerful members of the group who might seek to replace him (de Waal, 1996). Numerous computer simulation studies of human altruistic punishment (punishment on behalf of others) have conclusively shown that the punisher receives many benefits, including an increased likelihood of receiving future benefits, with enhanced status in the group being the most valuable because it leads to enhanced fitness (Ule, Schram, Riedl, & Cason, 2009). Dos Santos, Rankin, and Wedekind (2011) remark that "reputation is the key to the evolution of punishment, and that simple reputation games can explain the high preservation of punishment in humans" (p. 376).

In modern societies, punishment is meted out by third-party punishers who are individuals not directly harmed and who will not directly benefit

(like the second-party alpha male chimps) from meting out punishment. Third-party punishers in modern societies are the agents of the state operating in accordance with law. Numerous experiments have shown that third-parties will punish cheats at a cost to themselves. A study involving 1,762 subjects from five continents found that in all populations, people are willing to punish defectors who have harmed unknown others (Henrich et al., 2006). This study also found that “societies with high degrees of punishment will also exhibit more altruistic behavior” (p. 1770). This tends to suggest altruism and punishment coevolved in the sense that “[t]hird-party punishment of norm violations (‘I punish you because you harmed him’) seems especially crucial for the evolutionary stability of cooperation and is the cornerstone of modern models of criminal justice” (Buckholz & Marois, 2012, p. 655).

VII. FROM PRIMITIVE VENGEANCE TO MODERN LAW

Just as we can become alcoholics, obese, and sex addicts partaking too freely of what is good, or even vital, in the right proportions, punishment can overstep its optimum and become dysfunctional. In the imaging studies showing blood flow to the brain’s pleasure center, when people witness the punishment of those who have harmed them, the punishment is proportional to the harm caused. Only a callous sadist would take pleasure in seeing grossly disproportionate punishment imposed. Punishment that exceeds just and reasonable boundaries induces disgust and repugnance, and many people feel that the death penalty is one such excessive punishment.

Even given the well-founded evolutionary reasons for retributionist feelings, we must reflect on the propriety of acting on them completely. Just because these feelings are natural, it does not mean that we should act on them and ignore rational, consequentialist considerations. If the primitive desire to “get even” is left untamed, it can tear a social group apart by generating a cycle of tit-for-tat blood feuds, which have smeared human history (Boehm, 2011). It has been estimated that approximately 30 percent of adult male deaths among the Yanomamo of South America are related to revenge feuds, which expand the very injustice that “righteous” revenge was supposed to assuage (Chagnon, 1988). As Susan Jacoby (1983) put it:

The struggle to contain revenge has been conducted at the highest level of moral and civic awareness at each stage in the development of civilization.

The self-conscious nature of the effort is expectable in view of the persistent state of tension between uncontrolled vengeance as destroyer and controlled vengeance as an unavoidable component of justice. (p. 13)

Just as evolutionary scientists view cheating and punishment as vital to the evolution of cooperation, French sociologist Émile Durkheim saw it as necessary for maintaining social solidarity, and that it does so by reaffirming the justness of the social norms. He recognized that the urge to punish is inherent in human nature and that it serves an expiatory role, but he also recognized that we can temper the urge with sympathy. Over the course of human history, Durkheim noted, many societies have moved from retributive to restitutive justice. For Durkheim, retributive justice is driven by the natural passion for punitive revenge that “ceases only when exhausted . . . only after it has destroyed” (1893/1964, p. 86). Restitutive justice, on the other hand, is driven by simple deterrence, and is more humanistic and tolerant, although it is still “at least in part, a work of vengeance” since it is still “an expiation” (1964, pp. 88–89). Although both forms of justice satisfy the human urge for social regularity, Durkheim believed that retributive justice sometimes oversteps its adaptive usefulness and becomes socially destructive, whereas restitutive justice offers a rational balance between calming moral outrage on the one hand, and engaging empathy and sympathy on the other.

Culture may engage or neutralize the emotions that temper punishment with mercy or allow vengeance to run wild. The lasting influence of Cesare Beccaria rests on his recognition that the brutal acts of retribution common in the eighteenth century resulted in general distrust and social alienation rather than altruistic cooperation. Many of Beccaria’s recommended criminal justice reforms were implemented throughout much of Europe within his lifetime (Durant & Durant, 1967). Such radical and rapid change suggests that Beccaria’s ideas tapped into and broadened other evolved emotions among the European elite such as sympathy and empathy. We tend to feel empathy for those whom we view as being “like us,” and empathy often leads to sympathy, which may translate the vicarious experiencing of the pains of others into an active concern for their welfare, even if they are wrongdoers. Vignette studies have shown that people tend to recommend more lenient punishment for criminals whom they perceive to be similar to themselves (reviewed in Miller & Vidmar, 1981), and the march of democracy has drawn more people into the circle of people we consider “us.”

VIII. LOCAL DEMOCRACY AND THE RETENTION OF THE DEATH PENALTY IN THE UNITED STATES

Given the strong evolutionary push to punish in proportion to the harm done, the question arises, why does the United States, alone among all Western democracies, retain the death penalty? Is the leadership in this country more vindictive, or is it more responsive to the wishes of the people than is the leadership in other Western democracies? Support for capital punishment waxes and wanes in the United States with crime rates, especially violent crime rates. Varying levels of support for the death penalty may serve as a proxy for the number of times public emotions have been engaged by stories of senseless killings and general mayhem. For instance, public support was at its lowest at 42 percent in 1966, when the violent crime rate was 200 per 100,000 population, and at 80 percent in 1994, when the violent crime rate peaked at 713.6 per 100,000 (Hatch & Walsh, 2016, pp. 110–111).

A politician's public support for capital punishment carries the message that he or she is "tough on crime," and that carries favor with the electorate. This reasoning should also apply to other democracies if public support for capital punishment is higher than non-support, yet no other Western democracy has retained the death penalty. This is not because the political elite in those countries are following the lead of the people, because there are indications that public support for capital punishment in some of these democracies is higher than opposition to it. For instance, in Canada support for the death penalty hovers around 60 percent (Correctional Services Canada, 2015), and about two-thirds of the British public want to see it restored there (Angus Reid Public Opinion, 2012). This begs the question of why public opinion is an important consideration in the United States, but not in other Western democracies. David Garland (2012) answers this question by appealing to the tension between liberalism and democracy in centralized unitary countries versus federated countries such as the United States where local and state democracy enjoys a great deal of independence from centralized government:

Liberal democracies—unlike authoritarian or theocratic nations—are committed to limiting government power and protecting individual liberties. The result is that the death penalty has been used less often, eventually disappearing throughout most of the democratic world. But each nation works out the practical balance between "liberalism" and "democracy" for itself.

America's distinctive emphasis on the value of local popular democracy— together with the Supreme Court's interpretation of the meaning of liberty— explains why the United States still has capital punishment.

IX. RATIONAL EXCEPTIONS TO THE RETRIBUTIVE URGE

Any debate on the merits of retribution must take into account degrees of offender culpability. Few would revel in prescribing retribution to those lacking the capacity to fully understand and appreciate the consequences of their actions. Retribution has little meaning, for example, when we consider offenders who suffer from severe cognitive impairments. Such impairments mitigate moral and legal blameworthiness. Although no firm statistics on the percentage of capital defendants with mental illness are available, a 2015 report by the Charles Hamilton Houston Institute for Race and Justice at Harvard University found that 14 of the 28 individuals executed in 2015 suffered from serious mental illness, serious intellectual impairment, or brain injury. More conservative estimates claim that 5 to 10 percent of death row inmates suffer from serious mental illness (Mental Health America, 2016). Given the intellectual constraints on the ability of such people to form a Kantian “categorical imperative,” they should logically and morally be excluded from retributionist punishment.

It is axiomatic that the law necessarily involves a commitment to Jeremy Bentham's hedonistic calculus. That is, individuals must have the capacity to freely exercise their rationality as the criterion for holding them morally responsible for their actions. Those who enjoy this capacity can appreciate that punishment is a possible consequence of their behavior, and are thus thought to deserve punishment in proportion to the heinousness of their criminal acts. If a person lacks this capacity because of some obvious mental disease or defect, then a retributive response is inappropriate, as the Supreme Court of the United States ruled in *Ford v. Wainwright* (1986).

Writing the majority opinion in *Ford*, Justice Marshall provided a history of this issue from English common law: “We know of virtually no authority condoning the execution of the insane at English common law” (p. 477). Quoting Blackstone, Justice Marshall noted that execution serves no purpose in these cases because madness is its own punishment. Justice Marshall also noted other commentators who opine that “the community's

quest for ‘retribution’—the need to offset a criminal act by a punishment of equivalent “moral quality”—is not served by execution of an insane person, which has a ‘lesser value’ than that of the crime for which he is to be punished” (p. 409). The Court thus questioned the retributive value of executing a person who has no comprehension of why he has been punished. Such an execution has questionable retributive or deterrence value, and signals only mindless revenge because Ford did not have “the mental capacity to understand the nature of the death penalty and the reasons why it was imposed” (p. 404). In other words, persons must be aware of the punishment they are about to suffer and why they will suffer it, and if they do not, society’s retributive goals are not met.

There are still issues with executing people with mental problems that give retributionists reason for pause. Although the Supreme Court ruled in *Atkins v. Virginia* (2002) that the *mentally deficient* may not be executed, the legal injunction that a *mentally ill* person should not be executed applies only at the time of planned execution, not at the time of the crime. The cases of two serial killers illustrate the difference between the two conditions. Unknown to one another, both men kidnapped, raped, and tortured women in the same neighborhood in Philadelphia and were arrested five months apart in 1987. The first killer, Gary Heidnik, had an extensive history of mental illness (schizophrenia), and the second, Harrison Graham, was mentally deficient (Branson, 2013). Despite having killed five fewer women than Graham, Heidnik was sentenced to death and executed in 1999. Graham was effectively sentenced to life without possibility of parole.

The logic behind this is that mental disability (defined as an IQ of 70 or below) is permanent, unalterable, and cannot be faked because there is a lifetime history of the condition dating back to early childhood, whereas mental illness is alterable and can be faked. Rarely, if ever, are mental illnesses such as schizophrenia cured, but like any other chronic disease, it can be managed with medication. In other words, adhering to a correctly prescribed medical regimen, most mentally ill individuals can be restored to sanity.

In *Jackson v. Indiana* (1972), the Supreme Court ruled that it is not constitutionally permissible to commit a defendant for an indefinite period of time based on his or her incompetence to stand trial, and that such defendants must either be civilly committed by a non-criminal court or be released from criminal detention. This forced the states to undertake strenuous efforts to restore competency at a time when effective psychotropic

drugs were becoming available. The law on competency and execution is murky and in need of further clarification, but at present it boils down to the fact that a defendant can be executed as long as he or she demonstrates a “rational understanding” that he or she is about to die and the rational reason why. Thus, if someone is deemed currently incompetent to be executed because of mental illness, that person can be rendered competent with medication. As Justice Powell Jr. noted in *Ford*, the state had a valid interest in executing Ford if he could be rendered sane: “My point is only that if petitioner is cured of his disease the state is free to execute him” (p. 477). We hazard a guess that few of even the most ardent retributionists would put their stamp of approval on forcibly medicating an insane person—constitutionally permissible under *Washington v. Harper* (1990)—“if the inmate is dangerous to himself or others,” so that he or she may be executed.

X. RETRIBUTION DOES NOT JUSTIFY OVERPUNISHING

There is a widespread misunderstanding of retribution. It is often caricatured to mean lock up all miscreants who have harmed others for as long as possible, and execute all murderers. However, retribution is about proportionality and has no inherent tendency toward severity. It limits as well as justifies punishment, and offers no moral basis for overpunishing. Leniency in punishment is neither incompatible nor inconsistent with the retributivist position. To the contrary, penal leniency is “internal to the moral universe of their (retributivist) desert-based theory” (Duus-Otterstrom, 2013, p. 461). Retributivists feel a moral obligation to give an offender what is deserved, but as Beccaria strongly urged, punishment is only just if it matches the crime. The problem is that we do not always agree on what punishment is most deserving for a particular offense or offender, but what is clear is that retributivists wish to protect against underpunishment and overpunishment. Underpunishing would mean that an offender is not being held as accountable as he or she ought to be, and thus not receiving their just deserts. Overpunishing would mean that the offender receives more than just deserts, which would result in an injustice. Duus-Otterstrom argues that when we have a range of sentencing punishments to choose from, and when there is some question about what is deserved, the retributivist must choose the more lenient option(s) because this will

guarantee that the punishment an offender receives is deserved, whereas choosing the stronger punishment runs the risk of an offender receiving more than he or she deserves.

In a case in which the prosecutor is asking for the death penalty, there are really only two sentencing options open to jurors—life imprisonment or death. Jurors are tasked with the difficult decision of deciding which of the two is most deserved. Perhaps they may decide that a child murderer with mental health issues or a traumatic childhood might deserve life rather than death after the defense presents mitigation that helps them to understand how the killer could have become depraved. On the other hand, perhaps they decide that this person deserves death because he has preyed on a vulnerable child. The reality is that there is almost always uncertainty or some question about whether an offender truly deserves death. In the face of this uncertainty, and the possibility of a wrongful conviction, Duus-Otterstrom's penal leniency argument maintains that the retributivist position would be best served by choosing the lesser punishment of life in prison. This choice would ensure that the offender receives punishment and society would be protected. An additional benefit of this is that jurors would not run the risk of overpunishing by handing down a death sentence, and thereafter being haunted by the fact that they have been instrumental in taking the life of another human being, even if they believed the offender deserved that fate.

CONCLUSION

The argument advanced here is that human emotion drives the continued practice of capital punishment in the United States, and that this fact should not be ignored in a futile pursuit of a system of pure rationality. Because the urge to punish those who default on the social contract appears to be hard-wired into all humans as a social stabilizing feature, it serves as a normative justification for the state's right to punish. Rationally endorsed moral systems such as the law must be compatible with our evolved emotional systems if they are to be effective. At its core, capital punishment is meant to be a punishment, and punishment is the notion of amending a wrong (albeit, imperfectly). The idea of righting a wrong goes to the heart of human intuitions of fairness and justice, which is why emotion plays such a large part in the criminal justice system. The intense emotions of

anger, disgust, and sympathy when we hear of a victim's unjust suffering play strongly into our processing of a heinous murder, and these are intensely pro-social emotions that have evolved as the glue that holds society together. This is particularly true of a child rape/murder, multiple murders, or murder involving torture in which victims are robbed of innocence, dignity, and life. Additionally, many people feel that capital punishment eliminates a threat to the safety of decent members of society with finality.

Although the necessity of the death penalty will likely always be debated, we should acknowledge that to understand punishment, we must understand the role of emotions in the decision-making process. As a species, our emotions have served adaptive purposes and governed our sense of right and wrong. Our desire to punish is one that cannot and should not be ignored or labeled as irrational and set aside. Emotional reactions to various behaviors of others evolved and have been preserved because they served vital evolutionary goals. Egregious harm done to others, especially murder, evokes the strongest of emotions designed to make it known that such behavior cannot and will not be tolerated. Thus retribution has always served both symbolic and cathartic functions for individuals and society. Americans have a long history of supporting capital punishment, not because they are irrational and evil, but because they, along with all other humans, are hard-wired to deeply abhor those who commit the ultimate crime and to feel with their deepest emotions that they deserve the ultimate penalty. As central to our humanity, the punitive emotions deserve our respect in capital punishment discourse. They are not a set of atavistic and immoral urges that a decent society should strive to eliminate, as those who oppose capital punishment charge and recommend. On the contrary, and as we have shown, they signal a concern for our fellow humans that is absent in the worst of its members: emotionally bereft psychopaths.

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