A CASE AGAINST THE KANTIAN RETRIBUTIVIST THEORY OF PUNISHMENT: A RESPONSE TO PROFESSOR PUGSLEY

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As recently as the early years of the nineteenth century, legal punishment was thought of as justifiable vengeance by society.¹ The guiding principle of punishment was *lex talionis*,² which required that the punishment duplicate the exact manner and degree of the crime.³ Revenge took the form of corporal and capital punishment and included such practices as flogging, mutilating, burning and beheading.⁴

By the mid-nineteenth century, however, thanks to the works of Beccaria⁵ and Bentham,⁶ the utilitarian approach to punishment⁷ replaced this retributivist attitude. Punishment began to be seen not as a means of exacting retribution, but as a deterrence to future crime both by exemplifying to others the price they would pay for criminal activity and by rehabilitating the criminal to become an acceptable member of society.⁸ Prisons came to be seen as rehabilitation centers,⁹ while sentences consequently became indeterminate to allow persons incarcerated to be freed once they were rehabilitated.¹⁰

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⁴ H. Barnes & N. Teeters, supra note 1, at 291.

⁵ Id. at 290-93.


⁸ See infra notes 29-35 and accompanying text.


¹¹ Dershowitz, Indeterminate Confinement: Letting the Therapy Fit the Harm, 123 U.
Within the last twenty-five years a number of philosophers and legal scholars have revived retributivism as a theoretical basis for criminal punishment. The focus of their revival lies in shifting the justification for retributivist punishment from the victim’s and society’s right of revenge to the criminal’s rightful claim that society is obligated to punish him because he is a free agent responsible for his actions. The present retributivist position follows the thinking of Immanuel Kant, who held that only a retributivist theory is properly responsive to the criminal’s dignity as a rational agent capable of moral conduct, a dignity which he retains despite his commission of a legal offense. On the other hand, the utilitarian theory of punishment is seen by Kant and his recent followers as ignoring the criminal’s dignity by sacrificing his interest for the public good.

The Kantian retributivist theory seems attractive both because it disassociates the concept of retribution from revenge and because of its emphasis on the dignity of the criminal. Nevertheless, I find Kantian retributivism to be theoretically unacceptable; its adoption by legislators and judges would result in undesirable practical

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The resurgence of the idea of just deserts among the general public might be interpreted simply as a reaction to the increase in crime. . . . But among scholars, the renewed interest in retributivism is surely not the result of anger over crime. One suspects rather that it results from a confluence of factors such as the growing documentation of the failure and abuse of rehabilitation programs, the general decline in respectability of utilitarianism (the chief rival of retributivism among philosophic theories of punishment), and the rise of contractarian and natural rights theories which might serve as an underpinning for a retributivist approach to punishment.


13. Id. at 100.
consequences.

As the means for stating my objections to the Kantian position, I have chosen to criticize two recent articles in this journal by Professor Robert A. Pugsley. I chose Pugsley’s presentation because, like Kant, he accepts a pure retributivist theory in that no utilitarian considerations play a part in his justification of punishment. Following Kant, Pugsley argues that any use of the principle of utility in the area of punishment will lead to unjust treatment of a person accused of a crime. Further, Pugsley adopts both Kant’s justification of punishment—that the criminal as an agent capable of acting morally deserves to be punished—and the principle of lex talionis as a guide for just sentencing.

Pugsley’s disagreement with Kant is over the issue of capital punishment. Kant held that the principle of lex talionis obligated the state to execute a murderer. Pugsley, on the other hand, contends that the Kantian respect for the criminal as an agent capable of morality dictates that even a murderer should not be executed. Thus, Pugsley argues that on the issue of capital punishment Kant failed to draw the implications of his own insight. But this disagreement between Kant and Pugsley does not reduce the effectiveness of Pugsley’s writings as a vehicle for this critical essay since, unlike utilitarianism, neither Kant’s retributivist theory of punishment...
nor Pugsley's reading of Kantian retributivism provides a criterion by which it is possible to settle the issue of the acceptability of capital punishment.22

This article is divided into three sections. In the first, I examine Pugsley's charges that the utilitarian theory of punishment requires the government to treat the criminal as a means and not as an end in himself and that this theory grants the government the moral right under certain circumstances to punish the innocent. My intention in this section is to demonstrate that Pugsley's criticisms fail to undermine the utilitarian position. In the second section I present my criticisms of Pugsley's reading of Kantian retributivism both as a theory for the general justification of punishment and as a just basis for sentencing. The final section examines Pugsley's inadequately supported claim that, whereas utilitarianism requires the use of capital punishment, Kantian retributivism entails its abolition.

Note that my defense of utilitarianism should not imply that I accept this theory of punishment. I do not believe that there currently exists a fully satisfactory theory that both justifies punishment and provides a basis for just sentencing. Since, however, there are two ways of criticizing a theory—by showing its internal inconsistencies or by showing that there are better theories available—I employ both methods in this paper. I try to show that Pugsley's Kantian theory has internal difficulties and also that it is less desirable than either utilitarianism or the partially retributivist theory that I outline in my concluding remarks.23

I. THE INADEQUACIES OF PUGSLEY'S KANTIAN ARGUMENTS AGAINST THE UTILITARIAN THEORY OF PUNISHMENT

Pugsley's argument24 that utilitarianism cannot justify the use of punishment rests in part on the following quotation from Kant:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself [—rehabilitation—] or for civil society [—deterrence and incapacitation—], 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. . . .25

22. See infra text accompanying notes 135-49.
23. See infra text accompanying notes 150-55.
25. Pugsley, A Just Basis, supra note 14, at 399 (emphasis added) (quoting I. KANT,
The italicized passage, which is a premise for Kant's conclusion, is exposed to criticism by counter example.\footnote{26} Suppose Jones is my loyal and efficient employee and I raise his salary, not because he deserves it, but for the sole purpose of encouraging other employees to imitate him. I am using Jones as a means—as an object and not as a subject. But obviously I have done nothing wrong; and while my motive does not warrant praise, neither does it warrant condemnation, for my intention was to do the appropriate thing—to give Jones a raise.

There is a method in which the Kant-Pugsley premise can be properly narrowed so that it can both serve as a criticism of the utilitarian theory and concurrently evade my criticism by counter example. Instead of focusing on the manipulation of one human being for the benefit of another, the principle can be formulated to state that it is wrong to \textit{harm} a person for the sole purpose of benefiting another.\footnote{27} Construed broadly, the principle states: It is wrong to harm a person for the sole purpose of benefiting another, unless the interest of the person harmed is given at least equal weight with the interests of each of the beneficiaries. However, this broad construction is not violated by the utilitarian position;\footnote{28} the classical utilitarian position indeed employs this broad construction.

The classical utilitarian\footnote{29} employs two maxims of conduct: The first is that one should always choose to perform only those actions

\begin{quote}
\textit{supra} note 12, at 100).
\end{quote}

\footnote{26. Pugsley's statement of this premise—"the offender must be treated as a subject, not an object"—is exposed to the same criticism. Pugsley, \textit{A Just Basis}, supra note 14, at 399. A criticism by counter example is the use of an example to challenge a generalization.}

\footnote{27. Karl Marx expressed a similar perspective: "Now what right have you to punish me for the amelioration or intimidation of others." Marx, \textit{Punishment and Society}, in \textsc{Philosophical Perspectives on Punishment} 358 (G. Ezorsky ed. 1972). For an excellent discussion of Marx's approach see Murphy, \textit{supra} note 11, at 218-43. A view similar to that of Marx is taken in Delaney, \textit{Towards A Human Rights Theory of Criminal Law: A Humanistic Perspective}, 6 \textsc{Hofstra L. Rev.} 831, 835 (1978). H. Rashdall sees the issue of human dignity differently than did Kant and his followers. He writes:

\begin{quote}
The retributive view of punishment justifies the infliction of evil upon a living soul, even though it will do neither him nor any one else any good whatever. . . . \textit{It is the retributive theory which shows a disrespect for human personality by proposing to sacrifice human Well-being to a lifeless fetish styled the moral law. . . .}
\end{quote}
\textsc{Rashdall, Punishment and the Individual}, in \textsc{Philosophical Perspectives on Punishment} 64, 65 (G. Ezorsky ed. 1972) (emphasis added).

\footnote{28. See \textit{infra} text accompanying notes 29-33.}

\footnote{29. The classical utilitarian position is associated with a number of classical works in moral philosophy. They are: J. Bentham, \textit{supra} note 6; J. Mill, \textit{Utilitarianism} (S. Gorovitz 7th ed. 1971); H. Sidgwick, \textit{The Methods of Ethics} (1907). "Classical utilitarianism is often called Hedonistic Utilitarianism . . . because it holds that pleasure alone is good as an end." D.D. Raphael, \textit{Moral Philosophy} 35 (1981).}
that maximize pleasant experiences and minimize painful ones;\textsuperscript{30} the second is that each person affected by these actions, regardless of his social status, his deeds, or his character, is to count as one, and no person is to be counted as more than one.\textsuperscript{31} Given these two maxims, it follows that the criminal, by virtue of his offense and when considered without regard to the actual or possible causal consequences of his offense, alienates none of his rights or privileges, because his interests continue to be given equal weight with those of his fellow citizens. Consequently, punishment that abridges or eliminates one or more of the criminal's rights is an undesirable occurrence, or what Bentham calls "a mischief."\textsuperscript{32}

What, then, justifies the imposition of this mischief? The classical utilitarian answer is that the authorities have no right to leave all the criminal's rights intact when the mischief done to other persons, due to the absence of punishment, exceeds the mischief of punishment done to the criminal.\textsuperscript{33} For to abstain from punishing in this case would give the criminal the privileged status of counting as more than one, and correspondingly the victims of crime would count as less than one.\textsuperscript{34} Thus, if we were to accept the narrow construction of the principle and refuse to harm any person for the sake of benefiting others, we would, by refusing to limit the rights of criminals, ignore the legitimate interests of their victims. The claim made by Kant and Pugsley that utilitarianism would harm the criminal for the sole purpose of benefiting another can be shown to be unfounded once the principle of utility is used to justify the criminal justice system as distinguished from its use in justifying specific acts of punishment.\textsuperscript{35} What the following argument will demonstrate is that both criminals and noncriminals are benefited by a decent criminal justice system.

Imagine\textsuperscript{36} a situation where the state does not exist and the only

\textsuperscript{30} J. Bentham, \textit{supra} note 6, at 11-12.
\textsuperscript{31} See \textit{id.} at 39-40.
\textsuperscript{32} See \textit{id.} at 158.
\textsuperscript{33} \textit{Id.} "[A]ll punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." \textit{Id.}
\textsuperscript{34} See generally \textit{id.} at 175-86 (Bentham's calculus for determining the appropriate punishment).
\textsuperscript{35} See J. Austin, \textit{The Province of Jurisprudence Determined} 32-35 (1970); R. Brandt, \textit{Ethical Theory} 490-95 (1959). The theory that the principle of utility is used only to justify rules and institutions is called "rule utilitarianism."
\textsuperscript{36} The issue as to whether there ever existed the kind of situation (i.e. a state of nature) the reader is being asked to imagine has no bearing on the strength of the argument. For
institution is the family. Further, assume that the persons involved have a concept of morality and a primitive system of property relations.\textsuperscript{37} When a person in this "state of nature" commits a violent act, the victim, his family, and the public have a right to self-help. This right exists not because it is a legitimate outlet for the public's moral outrage, as Professor Berns contends,\textsuperscript{38} but rather because of the reasonable fear that unless morally decent people resort to self-help they will, because of their moral scruples, become a victimized and oppressed class subject to the arbitrary whims of those who would not fail to use violence to gain their ends. The rationale for self-help in the state of nature, like that of punishment in political society, is to burden the criminal class,\textsuperscript{39} thus precluding it from becoming a class with the freedom to invade the interests of others. To quote Locke, "the law of nature—would, as all other laws that concern men in this world, be in vain if there were nobody that, in the state of nature, had a power to execute that law, and thereby preserve the innocent and restrain offenders."\textsuperscript{40}

There are good utilitarian reasons, including the protection of the rights of the accused, for preferring a political state over a state of nature.\textsuperscript{41} However, in order to be able to perform its various essential functions such as maintaining order, providing a currency of exchange, and regulating commerce, the political state must acquire a monopoly on the legitimate use of violence (with a few exceptions such as the individual's defense of his life and property). Consequently, the state, as a necessary condition for its continued existence, must forbid self-help.\textsuperscript{42} But persons entering political society and surrendering their legitimate right to self-help have a claim on the government to replace this right with some form of coercive sanctions—not necessarily punishment—against the criminal which would achieve the same end as that accomplished by the use of self-

\textsuperscript{38} See W. Berns, For Capital Punishment 143-52 (1979).
\textsuperscript{39} The term "criminal" is used broadly here to signify the immorally violent as well as those who breach statutory prohibitions.
\textsuperscript{40} J. Locke, supra note 37, at 6.
\textsuperscript{41} Id. at 102-06.
\textsuperscript{42} R. Nozick, supra note 36, at 108-10.
The institution of punishment is thus the price that the state pays the public in order to acquire a monopoly in the legitimate use of violence.

A beneficiary of this trade-off between the government and the public is the person accused of crime. Through its institution of punishment, the state provides him with an impartial third party to try his case and procedural rules to protect his interests. And if he is found guilty, his punishment cannot exceed the maximum penalty assigned to the crime. These and other protections provided in the interest of the accused by a decent criminal justice system are absent where the retaliatory agencies are the victim, his family, or the public. Thus, the criminal benefits from a decent criminal justice system and is not, as Kantian retributivism maintains, sacrificed for the welfare of others.45

Telishment46

The most celebrated criticism of the utilitarian theory of punishment is presented by Pugsley in the following passage:

The essence of deterrence is publicity: making known the infliction of pain on one person to inhibit others from committing similar acts. The desired effect could be achieved by punishing either an innocent or a guilty person. The critical factor is what the public believes the person did, and is being punished for, not what the person actually did.47

43. See id. at 88-119.
44. I. KANT, supra note 12, at 100.
45. My position in this argument differs from the utilitarian “safety valve theory” which is ably defended by Perkins, supra note 15. The safety valve theory justifies the institution of punishment because the vindictive feelings of the victim of crime, his family (or his clan) against the criminal often leads to excessive violence. On the one hand, legal punishment is seen both as an outlet for these violent feelings, because of the public satisfaction that action is being taken, and as a means for eliminating internal feuds. On the other hand, I claim that what justifies the criminal justice system is that in the absence of government, people would be justified in resorting to self-help; Perkins based her justification of the criminal justice system merely on the fact of the existence of self-help in the absence of the system. Id. at 56.
46. I have borrowed the term “telishment” from John Rawls. Rawls, Two Concepts of Rules 64 Phil. Rev. 3 (1955).

Try to imagine, then, an institution (which we may call “telishment”) which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interests of society.

Id. at 11.
47. Pugsley, A Just Basis, supra note 14, at 393. A similar criticism is found in Pugsley, Capital Punishment, supra note 14, at 1510.
AGAINST RETRIBUTIVIST THEORY

The standard utilitarian reply to Pugsley's criticism is that a system that **openly** punishes the innocent would fail to deter people from committing crimes, since they would realize that they could be exposed to punishment whether or not they committed a crime. Therefore, for punishment to effectively deter, statutes would have to publicly state the nature of the offenses and their corresponding penalties, and if the authorities are knowingly to punish an innocent person for the purpose of deterrence, they would have to do it in secret and contrary to their publicly announced system of punishment.

The utilitarian, then, will argue that the undesirable features of telishment outweigh its benefits since, while to telish the innocent could possibly eliminate a crime wave, there is the likelihood of detection by the public which would result in three undesirable consequences: First, telishment would fail to deter because the link between crime and punishment would be broken, and thus a needless infliction of suffering would take place; second, the public will lose respect for the law, diminishing its future deterrent value; and third, telishment will generate feelings of apprehension and insecurity since no person can feel confident that he might not be randomly chosen to be harmed.

Pugsley faults this standard utilitarian reply for two reasons. First, he contends that "in extreme cases (e.g., ones involving national security) where the utilitarian cost-benefit calculus tips heavily in favor of sacrificing the innocent the utilitarian could consistently opt for sacrificial, illegal, and undeserved punishment." The principle that an innocent person should not be sacrificed for the social good is not, however, absolute. There could be situations in which an innocent person might have to be harmed in order to avoid a grave disaster. The authorities would perform this task whether they were utilitarians or retributivists. In the latter case, the moral principle that an innocent person should not be harmed would be sacrificial.
ficed; in the former case the penal laws which publicly claim that punishment will be applied only to those who breach the laws would be sacrificed.

Pugsley's second criticism of the standard reply is that those who operate such a system (telishment) would take precautions against having the injustice discovered in order to preserve its efficacy. But even if this is true, the utilitarian defense is not based solely on the impossibility of adequate precautions; for a system of telishment to function, the authorities, who promulgate and enforce criminal laws, must occasionally form conspiracies to breach them. Such a system not only encourages abuse of power, but, in order for the authorities to keep their right to telish from public view, could not tolerate a free inquisitive press or allow representative government, since such a system requires a legally accepted forum where public issues are solicited and debated. Thus, assuming there are good utilitarian reasons for a free and open society, then telishment, a practice that must at all times be hidden from the public, has to be rejected on utilitarian grounds.

The above argument, while it is an adequate answer to Pugsley's criticism, is nevertheless exposed to a further criticism: The utilitarian defense shows only that there will be no occasion for utilitarian authorities to knowingly exercise acts of telishment. The defense fails to show why an act of punishing an innocent person, which results from an excusable mistake and has a balance of desirable over undesirable consequences, should not, in accordance with the utilitarian theory, be an act of justice. A utilitarian has to accept that harming an innocent person in this instance is an act of justice.

In American jurisdictions, in order to punish a person accused of a crime, the state must charge that person with the breach of a clearly defined and properly promulgated rule. In addition, the following three conditions must be satisfied: First, the state must comply with the procedural safeguards that protect the accused; second, the state must present sufficient evidence to warrant the

55. Id.
56. Pugsley, Capital Punishment, supra note 14, at 1510 n.59.
57. See W. LaFAve & A. Scott, HANDBOOK ON CRIMINAL LAW 83-98 (1972).
58. This involves not only the due process protections of the fourth, fifth, sixth and eighth amendments which apply to the states by virtue of the fourteenth amendment, but also any due process protections of a particular state which go beyond the federal constitutional protection. See G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 646-47 (10th ed. 1980).
conclusion that the accused committed the crime; and third, the accused must have committed the crime.

Suppose only the first and second conditions are satisfied, but the accused, nevertheless, is convicted. The state should not be accused of acting unjustly, since the proper use of the term “injustice” requires that the action fail to conform to a just standard and that this failure merits condemnation. Having acted on sufficient evidence, the state should not be condemned even though the accused was innocent. It should not be complimented, however, for behaving justly, since punishing an innocent person could not possibly be an action in accordance with a just criterion. The state has an excuse but not a justification. The utilitarian, however, must claim that the state’s action is just since the interests of the guilty have to be given equal weight with those of the innocent; the criminal thus alienates none of his rights by merely committing an offense. Punishment, in this instance, serves the state’s purpose of deterrence by illustrating that a person who is proved beyond a reasonable doubt to have committed a crime will be punished. Consequently, if the first two conditions above are satisfied, the state, according to the utilitarian, is justified in punishing the accused regardless of whether he is guilty or innocent.

The utilitarian can meet the above objection if the principle of utility is not held to be directly applicable to specific actions, but is employed instead to grade institutions and character traits. According to this broad utilitarian position, the most fundamental prob-

59. This requires not only that there be sufficient evidence presented at trial, but also that no evidence be presented that ought to have been legally excluded, for example, by the hearsay rule. See McCormick’s HANDBOOK OF THE LAW OF EVIDENCE 579-613 (E. Cleary 2d ed. 1972).

60. I have omitted the term “intentionally” from the third requirement to allow for the possibility of the validity of strict liability criminal statutes. See Wasserstrom, Strict Liability in the Criminal Law, 12 STAN. L. REV. 731 (1960).

61. The requirement that the failure merit condemnation is demonstrated by the following example: A merciful act is one that does not conform to a just standard. That is, the same act cannot be both just and merciful. Nevertheless, since we do not wish to condemn a merciful act, we do not call it “unjust.”

62. The difference between an excuse and a justification is as follows: If Joan killed her husband because she mistook him for a murderous rapist, then she is excused, but if she killed a murderous rapist who was about to commit his crimes then she has a justification. In the former case, though excused, she did the wrong thing. In the latter case, though she regretfully had to kill a man, she did the right thing. See generally J. Austin, PHILOSOPHICAL PAPERS 176-204 (J. Urmson & G. Warnock eds. 1970) (discussion of excuse and a clarification of the distinction between excuse and justification).

63. See supra note 35.
lem in which the principle of utility—maximizing desirable and minimizing undesirable consequences—is employed is in the choice of basic institutions. Should we, for instance, choose a free market economy or a socialist system? Once our institutions are chosen, we ask: What rules are necessary and what character traits should we encourage in order for the chosen institutions to function well? Actions are subsequently judged in accordance with these chosen rules and character trait models.

Regardless of the political and social order chosen, there will be people who will disrupt its peaceful functioning. We must therefore determine what system will best minimize the disruption. Should we adopt a system whose sole function is to compensate the victim? Should we adopt a system of telishment, one of punishment, or perhaps a clinical system? This is an external question; once it is answered and a system is chosen, then questions within the framework of the chosen system—internal questions—must be addressed. Questions about guilt, about what evidence is permissible or what penalty is appropriate exemplify internal questions because they presuppose the existence and validity of the institution of punishment.

Certain external questions appear to be internal. For example, is a neutral party required to judge innocence or guilt? The reason this question is external is that such neutrality is definitional of an institution of punishment. Thus, when someone deliberates whether to

64. In all likelihood even if a system other than punishment is preferable, see, e.g., Laster, Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness, 5 U. Rich. L. Rev. 71, 80 (1970); Silving, Compensation for Victims of Criminal Violence, 8 J.Pub. L. 236 (1959), punishment for contempt of court may be required in order to enforce equitable or compensatory relief.

65. The utilitarian argument against punishing innocent people provides a reason why persons organizing a social order would not choose telishment. See supra notes 48-52 and accompanying text.

66. By a clinical system I mean one in which a criminal is declared sick and forced to undergo treatment to be cured of his criminal disposition.

67. At no point in this article do I reach the conclusion that a system of punishment is preferable to other possible systems of coercion. If the intent of this article was to argue for the truth of the utilitarian theory of punishment, I would logically be required to reach that conclusion, but since my purpose is the more modest one of demonstrating the superiority of a broadly based utilitarian theory over Kant's and Pugsley's retributivism, the above task is not required of me.

68. I borrowed the distinction between external and internal questions from Rudolph Carnap who used it to distinguish conceptual from empirical questions. See Carnap, Empiricism, Semantics and Ontology, Revue Internationale De Philosophie, reprinted in, Semantics and the Philosophy of Language 209-10 (L. Linsky ed. 1952).

69. On the definition of punishment, see Baier, Is Punishment Retributive? in Philo-
adopt that institution of punishment, he is also deliberating whether
to adopt the neutrality of a judging agent. This same analysis is ap-
plicable to the question of whether guilt is a necessary condition for
the imposition of sanctions. This question is external because the
guilt requirement is necessarily involved in a system of punishment
in contrast to a system of telishment. In other words, when the exter-
nal question is considered, the interests of all parties are given equal
weight—each criminal as well as each noncriminal counts as one and
no one counts as more than one. But once the institution of punish-
ment is adopted, the legal criterion for the justification of punish-
ment, as a result of having been justified by utilitarian considera-
tions, becomes the moral criterion of justice as well. Consequently,
in conformity with this criterion, once a person commits a crime, and is both afforded due process protection and faced with sufficient evidence to convict him, his interests are no longer given equal weight with the innocent for he has forfeited certain rights as prescribed by law. Thus, the usual retributive and utilitarian answers given as the state's moral justification for punishment (i.e., deterrence, rehabilitation, retribution, or revenge) rest on the mistake of dealing with an internal question as if it was external. The proper response regarding the state's moral justification for punishment is that the conviction in question satisfied all three of the above conditions.71

In accordance with this position, the state can never acquire the right to punish the innocent. Within the context of the institution of punishment, the state not only must satisfy the due process and sufficiency of evidence conditions in order to have a moral right to punish, but the convicted party must also have committed the crime. Consequently, a justifiable mistake in punishing an innocent person, no matter how useful the punishment is for deterrent purposes, cannot, according to the utilitarian position under consideration, constitute an act of justice.

The Logic of Deterrence

An adequate theory of punishment must not only provide a justification for the state's right to punish, but must also provide a just criterion for sentencing. Pugsley's first two arguments were intended to show that the utilitarian theory of punishment fails as a theory justifying punishment. His final argument is designed to demonstrate that it also leads to unfair sentencing. Pugsley contends that "the fundamental injustice inherent in deterrence theory is that it permits a particular offender to be more severely punished, for purposes of example than his or her deserts merit. Indeed, the logic of deterrence suggests that this is the inevitable result . . . ."72 Apparently, "the logic of deterrence" refers to Bentham's principle of economy in punishing,73 which states that a penalty is justified if and only if the mischief to the criminal is less than the mischief that is avoided by the infliction of punishment,74 and there is no lesser penalty that

71. See supra text accompanying notes 58-60.
72. Pugsley, A Just Basis, supra note 14, at 393 (emphasis added).
73. See J. Bentham, supra note 6, at 158-64.
74. Id. at 158. See supra text accompanying notes 30-34.
would bring about the desired result. Pugsley finds that this principle can lead both to a great disparity between the nature of a crime and the penalty assigned to it, and to a radical disparity in penalties so that a milder penalty is given for a worse crime. For example, suppose reliable studies reveal that the lowest penalty that can achieve a maximum of deterrence for premeditated murder is four years imprisonment; the same study also reveals that the incidence of death in automobile accidents would be greatly reduced by a four year confinement in prison for persons who violate safety rules and cause accidents. Thus, according to the logic of deterrence, the same penalty is meted out for premeditated murder and accidental killing.

Bentham fashions a response to this criticism: There is a strong moral aversion against certain crimes (i.e., murder) while there is virtually none against others (i.e., speeding). A person is therefore disinclined to murder unless he is greatly tempted; little temptation, however, is needed in order to speed. Consequently, a heavy penalty is required to offset the temptation to murder. Otherwise, the penalty will seem to the prospective killer to be a license to be paid for the privilege of committing murder, while merely changing the statute pertaining to speeding from a traffic infraction to a minor crime would sufficiently deter. The logic of deterrence, contrary to Pugsley's claim, appears to lead to the conclusion that the worse the crime the greater the penalty required for deterrent purposes.

The principle of economy in punishment is, for a utilitarian, only a first step in determining the proper penalty for a crime. Under utilitarian theory, one must also consider the side effects of assigning a particular penalty. This will lead to the discovery that where there is a disparity between the offense and the penalty, the

75. See J. Bentham, supra note 6, at 165-67.
76. See Pugsley, A Just Basis, supra note 14, at 393-94.
77. I have used an extreme example, extreme in the sense that it is improbable. (A less extreme example would have provoked disagreement over whether the penalty is unjust). The thrust of the retributivist argument is that an adequate theory must preclude the possibility of a clear case of unjust punishment, even though improbable as in the present instance.
78. J. Bentham, supra note 6, at 167.
79. "The greater the mischief of the offence, the greater is the expence, which it may be worth while to be at, in the way of punishment." Id. at 168 (footnote omitted).
80. The premise that the greater the offense, the greater is the temptation needed to commit it, does not apply universally. There are exceptions, such as the motivation of pathological persons or crimes committed as a result of rage. Thus, the explanation at this stage is not totally adequate.
81. See J. Bentham, supra note 6, at 171-72.
side effects are likely to be undesirable. To illustrate, heavy penalties for serious accidents resulting from traffic violations can lead to a diminished use of the automobile which in turn would harm the automobile industry and the economy. Further, since such statutes would be at odds with the tolerant moral attitudes towards traffic violators, state witnesses would be reluctant to testify, juries would tend not to convict, and so on. In contrast, since the slight penalty for premeditated murder is radically at odds with the moral condemnation of murder, juries would be more prone to convict and judges would tend to ignore mitigating circumstances. Therefore, adverse side effects can, on utilitarian grounds, constitute a barrier to instituting penalties that diverge significantly from the moral offensiveness of the criminal act.

II. PUGSLEY'S KANTIAN JUSTIFICATION OF PUNISHMENT

I shall now develop my arguments in opposition to Pugsley's Kantian theory. First, I will show that the Kantian theory fails to provide a justification for punishment. I will then show that this theory also fails to provide a proper criterion for assigning penalties.

Pugsley's position is that when a person commits a crime, the state, without considering other contingencies, not only has the right and the justification to punish the person, but is morally obligated to do so. Pugsley constructs the following argument to support this
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conclusion: When a criminal commits a crime, he expresses his moral depravity for which he deserves to be punished. Retributivism, Pugsley argues, "is concerned with the assessment of moral culpability as the basis for legally imposing condign punishment, which the offender deserves due to past criminal conduct." But Pugsley's comment merely shows that there is a justifying reason for punishing; it does not show why the state is morally obligated to punish. The latter is provided by the Kantian sense of justice which is expressed as "reestablishing moral equilibrium by repaying criminal offenses with deserved punishment." When a criminal act is performed and the criminal is not punished, there is, according to Pugsley's reading of Kant, a moral disequilibrium between the criminal's status, which is his freedom to exercise the same rights as the innocent, and what he merits. Punishing the criminal restores the moral equilibrium by establishing an appropriate correspondence between what the criminal merits and his status as a criminal. Unlike Bentham, Pugsley does not perceive punishment as a necessary mischief (evil). Rather, "the delivery of deserved punishment is itself a moral good," and the state has the obligation to bring about this good by restoring the moral equilibrium.

But if, as Pugsley claims, failure to punish the criminal creates this disequilibrium, the same disequilibrium should result when a person commits an immoral noncriminal act (i.e., spreading malicious gossip or ignoring a stranger when one is in a position to save to interfere with his smoking. Having a right, however, does not entail having a justification; for while I have a right to smoke, I do not have good reasons for smoking. Conversely, I may have good reasons without being obligated. Thus, I may have good reasons for taking dance lessons, but I have no obligation to do so. See generally Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913) (providing detailed analysis of judicial concepts including rights, obligations and privileges).

The position that the state has a right, but no justification or obligation to punish a person simply because he committed a crime was adopted by H.L.A. Hart. See H.L.A. Hart, supra note 52, at 2-13. Hart distinguished the general justification of punishment which is based on utility, from a restriction in its pursuit, which involves the distributive principle that only because someone committed a crime does the state have the right to punish him.

87. Pugsley, A Just Basis, supra note 14, at 398 (emphasis omitted) (footnote omitted).
88. Id. at 381-82; see also Pugsley, Capital Punishment, supra note 14, at 1513: "The only basis of justification for imposing criminal punishment according to retributivism is moral desert: that which can be said to have been earned or merited by the willed behavior of a responsible individual." Id.
89. See Pugsley, A Just Basis, supra note 14, at 400; Pugsley, Capital Punishment, supra note 14, at 1511; infra note 97.
90. Pugsley, Capital Punishment, supra note 14, at 1507 (footnote omitted). Pugsley characterizes this position as a "genuinely retributivist idea." Id.
91. See Pugsley, A Just Basis, supra note 14, at 381-82.
his life without any personal risk) and is not deservedly punished or made to suffer in any way because of his offense. In accordance with Pugsley's concept of moral desert, the disequilibrium is the same in both cases, since in both there is a responsible moral agent who failed in his duty and, therefore, merits harm because of his offensive behavior. It follows then that if the state has an obligation to restore the moral equilibrium by punishing the criminal, the state also has an obligation to place under criminal sanction all immoral activity, unless overriding considerations would preclude imposing such sanctions. This issue involves two different ways of regarding the criminal law. For the utilitarian, the purpose of mandating certain actions and prohibiting others is to assure "the smooth functioning of society and the preservation of order." Laws for the protection of health and the collection of revenues are examples of the former, while laws against rape and arson illustrate the latter. Immorality is not an acceptable reason for legally prohibiting a particular activity unless that activity is also an obstacle to implementing either of the two accepted purposes of the criminal law. In contrast, for the Kantian retributivist, given his concept of just desert, immorality is a sufficient reason for legally prohibiting an activity, unless there are overriding reasons for not doing so. (Two examples of such reasons include unenforceability, and fear that the side effects of enforcement would lead to more serious crimes).

The acceptance of the retributivist approach has negative practical consequences, particularly with regard to those moral issues on which the members of the community differ. For example, should our jurisdiction have a law prohibiting homosexual activity? For the utilitarian, the burden of proof is on those who would prohibit this activity; they must demonstrate that homosexual activity is either conducive to social disorder or that it thwarts some of the basic policy goals of government involving the health, welfare and economic well-being of the community. If the burden of proof is met, then the burden shifts to those who would tolerate homosexual activity to

92. P. Devlin, The Enforcement of Morals 5 (1965). The phrase is borrowed from Lord Devlin: 

_The smooth functioning of society and the preservation of order_ require that a number of activities should be regulated. The rules that are made for that purpose and are enforced by the criminal law are often designed simply to achieve uniformity and convenience and rarely involve any choice between good and evil.

_Id._ (emphasis added).

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show either that a statute forbidding it is unenforceable or that it would have intolerable side effects, such as a radical increase of blackmail. If, on the other hand, we adopt a retributivist position, given the majority's attitude toward homosexual activity, a statute forbidding it should be passed unless those who are against adoption of such a statute can present overriding considerations. The retributivist position thus leads to the use of the criminal law to impose the values and practices of the majority on the minority. Of course, a retributivist need not agree that homosexual activity is immoral; the issue then becomes whose moral beliefs are to be used for the purpose of having the criminal law mete out just desert. Should the beliefs of a Platonic philosophical elite prevail, or that of Skinnerian social engineers? Any answer would simply amount to pleading one's own privileged status of knowing moral truths to which others are morally blind.

Another criticism of Kantian retributivism centers on the three previously presented conditions essential to the state's moral and legal right to punish a person accused of a crime. Suppose Tom is

94. See PLATO, 1 THE DIALOGUES OF PLATO 737 (B. Jowett trans. 1937).
95. See B. F. SKINNER, WALDEN TWO (1948).
96. I am not claiming that there are no objective moral beliefs, only that it is highly unlikely that, in any jurisdiction in the Western world, there would be unanimity on moral beliefs, particularly with regard to the areas of sex and marriage.
97. There is a passage in which Pugsley uses punishment as restoring moral equilibrium which is not exposed to the stated objection.

If an individual's behavior violates another's rights, the transgressor has thereby gained an unjust advantage at the expense both of the victim and the community as a whole. This creates a moral disequilibrium, an imbalance in the scales of justice which must be rectified by imposing a corresponding disadvantage on the offender. Pugsley, Capital Punishment, supra note 14, at 1511 (footnote omitted).

The disequilibrium here is not based on the absence of proper desert, but on the unjust enrichment of the criminal. The remedy for this equilibrium ought not to consist in punishing the guilty, but rather in divesting him of his unjust enrichment and if possible, making the victim whole. Such a position is not retributivism but a theory of a restitution.

An alternative interpretation of Pugsley's quote is that if crime was left unpunished, the criminal would be in the privileged position of having rights that obligate other persons, while remaining free to invade the interests of others; whereas law-abiding persons would pay the price for their rights by refraining from invading other persons' interests. This is a situation of moral disequilibrium which is cured by instituting a system of punishment, and thus burdening the criminal by having him pay for the privilege of invading the interests of others. Thus, the moral equilibrium of the correspondence of rights and burdens is restored.

The above is not the desert theory; the criminal is not being punished because he deserves it but to prevent the existence of a class with rights but with no limitations on their freedom of action. I used this argument to support a right to self-help in a state of nature. See supra text accompanying notes 37-40.
98. See supra text accompanying notes 58-60.
punished for committing armed robbery and the second and third conditions are satisfied, namely, Tom committed the crime and the state had sufficient evidence to convict him. The first condition, however, was not satisfied since he was not afforded adequate due process protection. A Kantian retributivist who accepts our system of constitutional restraints or one similar to it (I am assuming that Pugsley fits this characterization) is faced with the following dilemma: As a retributivist, he believes that the commission of a crime gives the state a moral right to punish the criminal. Since, in Tom's case, the state had sufficient evidence that he committed the crime, the state had a moral obligation to punish Tom in order to restore the moral equilibrium. The Kantian retributivist, however, insofar as he accepts the doctrine of constitutional restraints, also believes that the absence of procedural safeguards in Tom's case deprives the state of the legal right to punish him. Consequently, Tom has a moral claim on the state that it not punish him.

The retributivist cannot solve the above difficulty in the same manner as the utilitarian. He cannot use the internal-external distinction since for him the state has an obligation to punish the guilty. The possibility of a system preferable to punishment is, therefore, eliminated. Nor can the retributivist free himself from this dilemma by claiming that the failure to provide Tom with legally adequate procedural safeguards overrides the state's obligation to punish him. This defense would be purely ad hoc since there is nothing in the retributivist theory that would justify elevating procedural safeguards above the mandatory justice of punishing the criminal.

Finally, suppose Tom was erroneously convicted of rape and served ten years in prison. After being released, he rapes a woman. If Tom was again confined for ten years, he would undeservedly suffer ten years of imprisonment. This, on retributive grounds, would be an injustice; the fact that his deserved punishment for rape took

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100. See Pugsley, Capital Punishment, supra note 14, at 1511; Pugsley, A Just Basis, supra note 14, at 381-82.
101. See supra notes 67-71 and accompanying text.
102. The term "ad hoc" is used in this context to signify the introduction of a proposition to save a theory which is not otherwise entailed by the theory. See I. Copi, INTRODUCTION TO LOGIC 488-94 (6th ed. 1982).
103. The retributivist can evade this criticism if he can devise, in accordance with his position, a criterion by which he could demonstrate that only certain individual rights have a priority over the government's obligation to punish the criminal. See Pugsley, A Just Basis, supra note 14, at 381-82 & n. 12; Pugsley, Capital Punishment, supra note 14, at 1511.
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place before he committed the crime should not matter. While there was originally ten years of undeserved suffering, Tom's subsequent commission of rape rendered this punishment deserved. The ledgers marked offense and punishment have become properly balanced, and to imprison Tom for another ten years would imbalance the ledgers at his expense. Yet, contrary to this retributivist position, a court, for a good utilitarian reason, will send Tom to prison for another ten years—unless Tom is again confined or given some equivalent punishment, any person who is undeservedly punished will have the legal right to commit a crime.

Pugsley's Retributivist Doctrine of Proportionality

The principle of retribution, Pugsley writes “‘stems from a view that because man is responsible for his actions and for the behavior he chooses, he should receive punishment for his wrongdoing proportionate to that which he has inflicted upon society.’” He adds that “Kant’s approach is to make the kind and degree of punishment approximate as closely as possible the offender's culpability and the harm resulting from the offense, since the object is to restore, as carefully and completely as possible, the moral equilibrium which the offender's action has disturbed.”

These passages present two principles of proportionality: First, punishment ought to be proportionate to the degree of the offensiveness of the criminal act. I will refer to this principal as the offensiveness of the act criterion. Second, punishment ought to be proportionate to the degree of the culpability of the criminal for performing the criminal act. I will refer to this principal as the culpability criterion.

These two criteria are not identical, and they can lead to the assignment of contrary penalties. For example, Tom intends to kill his wife in order to inherit the money from her insurance policy, but due to a defective gun, fails to accomplish his intent. On the other hand, Dick, having been tortured by a nagging cruel wife, kills her out of desperation. If the offensiveness of the act criterion is applied, then Dick ought to be punished more severely than Tom, since Dick

105. Id. at 400 (emphasis added) (footnote omitted).
106. See supra text accompanying note 104.
107. See supra text accompanying note 105.
brought about the death of a human being while Tom merely exposed a person to the possibility of imminent death. If, however, we apply the culpability criterion, Tom ought to be more severely punished than Dick, since Tom sought to kill for monetary gain, while Dick killed out of desperation.

While Pugsley fails to confront the problem that this distinction presents, he does seem to suggest a manner in which both criteria can be utilized to devise a single adequate criterion for sentencing:

Retributivism affirmatively supports determinate sentencing schemes because articulable, narrowly drawn sentencing ranges can be derived from ascertaining what an offender deserves for committing a particular type of offense. It also suggests that specified aggravating or mitigating circumstances be taken into account as criteria in support of sentences which are set above or below the desert-based presumptive punishment for a particular offense.\(^{108}\)

Pugsley’s phrase, “ascertaining what an offender deserves for committing a particular type of offense,” is ambiguous, in that it is not clearly attributable to either criterion. Since, however, we are seeking an adequate retributivist criterion, it would be more in line with this purpose\(^ {109}\) to consider this passage to be Pugsley’s representation of the offensiveness of the act criterion. Thus, the retributivist position is that the legislature, in assigning “narrowly drawn sentencing ranges,” considers only the wrongness of the act. Therefore, if Tom is charged with attempted murder and Dick with second degree murder (or at a minimum, intentional manslaughter), Dick’s crime will carry a heavier penalty. The judge in turn will consider the mitigating circumstances, which will be taken into account in determining the proper sentence. In this example, Dick’s wife’s persistent nagging is a mitigating circumstance, while Tom’s motive to kill his wife for monetary gain is an aggravating circumstance.

The flaw in using both criteria for determining a just standard for sentencing is that both cannot be valid. They exclude each other, and therefore cannot function as mere considerations to be taken into account for just sentencing. Suppose, for example, that as a result of applying both criteria, Dick is punished more severely than Tom. If Pugsley accepts the culpability criterion, he is forced to con-

109. The reason that the culpability criterion cannot be used for legislative assignment of “narrowly drawn sentencing ranges” is that there may be many different motives for an identical type of crime.
clude that an injustice was done to Dick since he was more severely punished despite a lesser degree of moral culpability. If, on the other hand, Tom is more severely punished than Dick, Pugsley, by accepting the offensiveness of the act criterion, is forced to conclude that an injustice was done to Tom since Tom’s act caused little or no harm while Dick unjustifiably brought about the death of a human being. A little reflection will show that the same difficulty arises if Tom and Dick receive the same punishment.

Nor can Pugsley devise a valid criterion for sentencing by accepting the offensiveness of the act criterion and rejecting the culpability criterion or the converse. If he does the former and we modify the above example by allowing Tom to murder his wife, then the same or a relatively similar sentence will be meted out to Tom and Dick. This seems unjust. Suppose, on the other hand, Pugsley accepts the culpability criterion and rejects the offensiveness of the act criterion; this would create the possibility of light penalties for serious crimes such as a fine for murder. Pugsley recognizes this problem and notes that “[t]o truly determine the moral desert of the offender . . . one would further have to be prepared to accept light penalties for serious crimes, in specific cases, as a result of any attempt to totally individualize moral culpability and desert.” More-

The “principle of equality” demands rigid application of the *lex talionis*, a part often mistaken for the whole of retributivism.

There are convincing arguments for the impossibility of achieving anything close to such a finely calibrated punishment scheme. In order to determine truly the moral desert of the offender, one would have to reconstruct his biography, and be privy to the complex of motives which resulted in the offense for which he has been convicted.

This concern, however, does not lead Pugsley to reject the principle of equality, but rather to adopt the position that the state ought to strive in punishment to approximate it as near as possible. He contends:

[O]ur inability to attain such finely calibrated metaphysical congruence hardly constitutes grounds for abandoning either desert as

the basis for punishment or the goal of obtaining roughly equal punishments for roughly equal offenses. Energy must simply be channeled in those directions most likely to produce a result which, though it may fall short of Kant's sensitive balancing scales, is still essentially just...  

Still, Pugsley's use of the term "roughly equal punishment for roughly equal offenses" creates further conceptual problems. Suppose Tom threatens Mary with a gun and forces her to give him a hundred dollars. A roughly equal punishment for Tom's offense would be duplication of this crime against Tom. Such punishment would only be roughly equal because one can never be certain that Tom would feel as threatened as Mary. Pugsley cannot, however, actually employ a "roughly equal punishment for roughly equal offenses" theory given the kinds of punishment that he or an American court would tolerate. The only punishment Pugsley considers for serious crimes is imprisonment. But, what meaning can be given to the statement that a twenty-year prison term would be roughly equal to Tom's crime, or that it would be more equal than a ten-year term?

Elsewhere, Pugsley refers to Feinberg's "expressive function of punishment" and contends that "[the] degree of disapproval would 'fit' the crime in rough fashion: The more serious crimes would receive more serious disapproval..." This language does

112. Pugsley, A Just Basis, supra note 14, at 401 (emphasis added).
113. J. FEINBERG, DOING AND DESERVING 95-118 (1970). Feinberg contends that an act of punishment involves not only the hard treatment meted out to the convicted, but a condemnatory aspect as well. The harsher the treatment, the greater is the expression of condemnation. "Pain," he writes, "should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation." Id. at 118.
114. Pugsley, A Just Basis, supra note 14, at 401; Pugsley, Capital Punishment, supra note 14, at 1513, 1522.
115. Pugsley, Capital Punishment, supra note 14, at 1522. In discussing the standard by which offensiveness would be measured, Pugsley refers to Feinberg, who writes: "[T]he seriousness of the crime [is] determined by the amount of harm it generally causes and the degree to which people are disposed to commit it." J. FEINBERG, supra note 113, at 118. Pugsley overlooks the fact that considering the disposition of persons to commit certain crimes in devising proper penalties is a utilitarian device to minimize the future incidence of crime, and should play no part in a desert theory.

As for the other standard for seriousness—"the amount of harm it generally causes"—despite Feinberg's use of the term "generally," I cannot see how this recommendation could be followed without assigning different penalties to different categories of theft, such as theft from a wealthy person, a middle class person or a poor person. If, on the other hand, we speak of the harm to the social body, we are then falling back on utilitarian considerations.

Feinberg's expressive function of punishment was anticipated by Bentham:

A punishment may be said to be calculated to answer the purpose of a moral lesson, when, by reason of the ignomy it stamps upon the offence, it is calculated to
not, however, give useful meaning to "roughly equal punishment for roughly equal offenses," since a one year imprisonment for murder, a month for armed robbery and a ten dollar fine for embezzlement would satisfy the above characterization.\textsuperscript{116}

In contrast, a utilitarian can give meaning to Pugsley's use of the phrase "roughly equal punishment for roughly equal offenses."\textsuperscript{117} The fundamental concept of punishment which does not roughly equal the offense must first be employed. Suppose, for example, Tom's punishment for armed robbery was a month in prison. We could then meaningfully and correctly state that his punishment does not roughly equal his offense, since such punishment would not adequately threaten prospective criminals. The penalty would thus place the criminal in a privileged position, as very little would be required from him as payment for indulging in the profitable practice of armed robbery. The morally good people would shortly discover that their moral sentiments have become burdensome and that they had better turn to crime themselves, or resort to self-help. Moreover, since armed robbery is a vastly more offensive crime than petty larceny or price fixing, and given the penalty assigned to the former, the penalties for the latter crimes would have to be merely nominal.

On the other hand, suppose that Tom is executed as punishment for armed robbery. Here, again, we could meaningfully and appropriately state that his punishment does not roughly equal his offense, since the punishment is more excessive than is needed for deterrence purposes, and because the crime of premeditated murder, a crime more offensive than armed robbery, could not be assigned a more serious penalty. In sum, this analysis can be applied to any punishment, giving the utilitarian a meaningful use for the term "the punishment which is roughly equal to the crime." It signifies any punishment that does not fall into either of the above extremes, which characterizes a punishment that is not roughly equal to the crime.

\textsuperscript{116} The absurdity would only follow if we used "the more serious crimes would receive more serious disapproval" criterion for assigning penalties. It must be used in conjunction with another standard, such as one assigning minimum sentences if we are to have a proper criterion for sentencing. \textit{See supra} text accompanying notes 78-81 & 85.

\textsuperscript{117} \textit{See J. Bentham, supra} note 6, at 168-69.
III. CAPITAL PUNISHMENT

Pugsley contends that Kantian retributivism entails the abolition of capital punishment, whereas utilitarianism favors it. With this contention, he seeks to supplement his general position that Kantian retributivism is a humanistic doctrine that seeks to elevate the status of a person, even if that person is a murderer, while utilitarianism treats a person as a thing to be sacrificed for the public welfare. In this section I shall demonstrate that Pugsley’s contention is not correct, and he, therefore, fails in his attempt to muster support for his general position. Further, in the course of my criticism, I also seek to highlight one of the weaknesses of Kantian retributivism, namely, the constant need to appeal to dubious intuitions.

In constructing his argument that utilitarianism favors capital punishment, Pugsley refers to the plurality opinion in Gregg v. Georgia:

118. Pugsley, Capital Punishment, supra note 14, at 1510-23.
119. Id. at 1508-10.
120. Id. at 1515-20.
121. Id. at 1508-10; Pugsley, A Just Basis, supra note 14, at 391-97.
122. An intuition is an “intellectual seeing.” Rationalist philosophers first used the term “intuition” philosophically for the understanding of self-evident truths in logic and mathematics. The use of the term was then extended to certain moral principles on the ground that they are analogous to the self-evident truths of mathematics. See D.D. Raphael, supra note 29, at 43. A person appeals to intuition when he not only claims that what he intuits is true, but that it requires no argument to establish its truth. Thus, an appeal to intuition is contrasted with reasoning to a conclusion, i.e., with presenting an argument. Where there is a shared conviction about a moral intuition (e.g., promises ought to be kept), then an appeal to intuition appears to have some plausibility. On the other hand, where there is no agreement about a moral intuition (e.g., it is wrong to execute a murderer) then the intuition is dubious, not in that the claim grounded on it may not be true, but that any claim for its truth on the basis of intuition is inappropriate. There is no ground for accepting one person’s appeal to intuition over that of another’s. Once an argument is given for accepting one person’s intuition, one is no longer basing the claim on an appeal to intuition, but on the ground of a valid inference from true premises to a true conclusion.
123. 428 U.S. 153 (1976) (plurality opinion). Justice Stewart’s opinion advanced two standards for determining whether the challenged punishment was violative of the eighth amendment ban against cruel and unusual punishment. First, is the death penalty in accordance with the “evolving standards of decency that mark the progress of a maturing society?” Id. at 173 (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Second, “the Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment.” Id. at 182 (plurality opinion) (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).

Applying these standards the Court concluded that the death penalty does not under all circumstances violate the eighth and fourteenth amendments, see id. at 187 (plurality opinion), and that “the concerns expressed in [Furman v. Georgia, 408 U.S. 238 (1972)] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a care-
Justice Stewart’s plurality opinion in *Gregg* found capital punishment to be, in part, “an expression of society’s moral outrage at a particularly offensive conduct,” and described the social channeling of the “instinct for retribution [which] is . . . essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”

Pugsley correctly points out that the term “instinct for retribution” should not be confused with his retributive theory. He also concludes, agreeing with Justice Marshall, that this position (the safety-valve theory) is essentially utilitarian and not truly retributive.

Justice Stewart’s remarks appear to reflect two possible situations. The first is the not uncommon occurrence of public pressures for heavier penalties and for legislative classification of certain actions as criminal. On utilitarian grounds, the legislator ought not to satisfy public opinion in this matter. For if the death penalty has no greater deterrent value than long-term imprisonment, executing the criminal would be needless, and a utilitarian legislator should resist public pressure for implementing capital punishment. The second possible situation is that the public, because of the failure of the criminal justice system to satisfy its outrage, is prepared to resort to self-help and thus undermine the system. I believe that the legislator in this case, whether he is a utilitarian or a retributivist, confronts the same dilemma: Either he will allow the breakdown of the criminal justice system or institute needlessly severe penalties. Assuming that neither the utilitarian or retributivist has surrendered his common sense to abstract theory, the response will be the same: The injustice of excessive penalties will be legislated in the face of brutal necessity. However, Justice Stewart’s fear that unless capital punishment is instituted people will resort to self-help is groundless;

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125. Id. As Pugsley correctly indicates, Justice Stewart failed to realize that the “safety-valve” theory, see *supra* note 45, is not a retributivist position. That Justice Stewart made this error is seen from his statement following his description of the “safety-valve” theory: “Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.” 428 U.S. at 183 (plurality opinion) (footnote omitted).


127. 428 U.S. at 183-84 (plurality opinion).

128. *See supra* text accompanying notes 53-55.
while the public appears to favor the death penalty, there is no evidence that they are likely to resort to self-help if they are not satisfied in this matter.

Pugsley looks for additional support for his contention that utilitarianism favors the death penalty to the inconclusivity of the statistical evidence regarding the deterrent value of the death penalty. Pugsley contends that the plurality in Gregg and those on the Supreme Court that emerged as the "hard liners" in the Gregg line of cases, "find warrant for continued imposition of the punishment" on the ground that the burden of persuasion rests with the abolitionists. These Justices in turn claim that the abolitionists have failed to meet their burden because of the uncertainty of the evidence. This analysis, Pugsley concludes, is in accordance with the utilitarian position: "Naked utilitarian calculus . . . assumes the morality of the death penalty, and insists upon that distribution of the burden of persuasion." Pugsley's argument confuses the task of a Supreme Court Justice with that of a utilitarian legislator. In exercising proper judicial restraint, the Supreme Court defers to the state legislature unless there is a manifest violation of the eighth amendment, such as a penal statute which provides for excessive punishment. The Gregg plurality held that statistical attempts to evaluate the death penalty as a deterrent have been inconclusive. The Court, however, seems to deny this claim when it asserts: "We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent." Rather, the court merely deferred to the state due to considerations of federalism and due to their belief that a legislature knows the consensus of its own constituency and can better gauge the social utility of the death penalty as a sanction. The inquiry into excessiveness, as relevant to the eighth amendment prohibition, was first made a central issue in Weems v. United States, 217 U.S. 349 (1910). The nature of the analysis was explained by the Gregg plurality: "[T]he inquiry into 'excessiveness' has two aspects. First the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."
plurality correctly placed the burden on the defendant to show that the death penalty was excessive punishment, and since the evidence for this proposition is inconclusive, the defendant failed to satisfy its burden. Thus, the Supreme Court had no basis for finding that capital punishment is violative of the eighth amendment. The utilitarian legislator, on the other hand, in contemplating whether to institute or continue the death penalty, requires positive evidence of the added deterrent value of capital punishment over long periods of imprisonment. Since, however, the inconclusiveness of the evidence prevents an advocate of the death penalty from demonstrating the greater deterrent value of the death penalty, capital punishment on utilitarian grounds, contrary to Pugsley's claim, has to be rejected.

Retributivism and the Death Penalty

The death penalty has always been considered a standard example of retributivist justice; there is no other punishment that can be inflicted on a murderer that could possibly be proportionate to his crime. Pugsley, however, argues that a Kantian retributivist, contrary to Kant's insistence, should be against the death penalty. His conclusion is not based on the principle of desert: "The argument here is not that the murderer may not justly deserve to die." Nor does Pugsley argue for an absolute right to life: "There would be nothing in principle contradictory about an anti-capital punishment retributivist qua retributivist engaging in a just war or procuring, performing or undergoing an abortion." Rather, Pugsley's conclusion is based on the premise that executing a criminal, even for murder, would degrade his human dignity as a moral rational agent. In contrast, Kant argues that execution itself does not degrade the murderer; rather, the manner of its performance is the critical factor: "[T]he death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity re-

428 U.S. at 173 (citations omitted).
134. See 428 U.S. at 174-75. "But while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. . . . Therefore in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity." Id.
135. See I. KANT, supra note 12, at 102-03.
137. Id. at 1520.
138. Id. at 1521.
139. Id. at 1516-22.
siding in the person suffering it."\textsuperscript{140}

Obviously, this issue cannot be settled by appeal to moral intuition, for there is no reason for preferring Pugsley’s moral intuition over Kant’s.\textsuperscript{141} Yet, close inspection of the following passages reveals that Pugsley’s apparent argument against the death penalty is actually an appeal to intuition through the employment of persuasively emotive language:

In addition to the individual’s capacity for morality which Kant emphasizes, Rawls maintains that, at least theoretically, a convict retains the capacity for justice . . . . This capacity, shared by all members of the community, is another of the bonds that require maintenance in the face of a violation of the community’s rights. Whether a community suspends observance of these values as to a murderer—who clearly presents the ultimate provocation and the strongest inducement to such suspension—might almost be regarded as a test of the community’s commitment to these values and its estimation of their true worth.\textsuperscript{142}

. . . .

Even if [the murderer] is sentenced to a life term without possibility of parole he retains his membership in the community . . . . His formal bond with the community is the punishment bond. It is that which signifies the community’s recognition of him as a responsible moral agent and deserving of its respect, expressed of necessity through penalty and censure.\textsuperscript{143}

Instead of speaking of a criminal who retains his capacity for morality and justice, Pugsley speaks of the criminal’s capacities as a bond between him and his community. And instead of saying that the criminal, because of his capacity for morality and justice, must not be executed for his crime, Pugsley speaks of maintaining the bonds that the criminal shares with his community as an expression of his community’s respect for him as a moral agent. However, according to his Kantian approach, the ground for any punishment is the community’s respect for the criminal as a responsible moral agent.\textsuperscript{144} It would appear to follow that, since a murderer deserves the death penalty, as Pugsley readily acknowledges,\textsuperscript{145} executing a murderer would be an act of respect for him as a responsible moral agent.

\begin{itemize}
\item \textsuperscript{140} I. KANT, supra note 12, at 102.
\item \textsuperscript{141} See supra note 122.
\item \textsuperscript{142} Pugsley, Capital Punishment, supra note 14, at 1517.
\item \textsuperscript{143} Id. at 1519 (emphasis added).
\item \textsuperscript{144} See id.
\item \textsuperscript{145} See supra note 137 and accompanying text.
\end{itemize}
Pugsley contends, however, that allowing the murderer to live, though locking him up for life, shows respect for him by maintaining the bond with his community. This response begs the issue, since a pro-capital punishment retributivist could argue that it is precisely because of the murderer’s bond with his community, at the time he committed murder, that his community is obligated to execute him.

Moreover, consider Tom killing Dick in a just war. Tom necessarily severed the bonds that Dick shares with all the members of his community by virtue of his capacity for morality and justice. Did Tom therefore violate Dick’s dignity as a moral agent? If the answer is no, then severing a person’s bonds with his community does not necessarily violate his dignity. Why then, should executing a deserving murderer violate his dignity? If, on the other hand, Tom did violate Dick’s dignity, then why is this violation morally proper in the case of a just war and improper in the case of just punishment? It appears to me that the reason Pugsley never confronted these questions is that a Kantian retributivist, once he abandons the strict application of *lex talionis*, as in fact they all do, can have no objective criterion for settling the capital punishment issue. His only recourse is to appeal to his moral intuition. But, given the conflicting intuitions concerning this issue, this appeal cannot provide a Kantian retributivist with grounds for his position. Utilitarianism, on the other hand, as previously demonstrated, does provide an objective criterion for settling the issue.

IV. CONCLUDING REMARKS

Pugsley’s Kantian retributivist theory can be viewed in three ways, all of which fail to stand up to criticism. First, it can be viewed as a theory that justifies punishment as an expression of respect for the criminal, who is a responsible agent capable of acting morally. In this respect, Kantian retributivism ignores both the potential victims of crime and the public as parties to the justification of punishment. Moreover, it ignores the actual victim whose rights were unjustly invaded, and who, in the absence of legal punishment, might be said to have the right of retaliation. The victim’s vengeful act proclaims to the criminal and to the world that his dignity as a person will not be outraged with impunity. Why should punishment

146. See *supra* text accompanying notes 142-43.
147. See *supra* text accompanying note 138.
148. See *supra* note 122.
149. See *supra* text accompanying notes 117-18.
be implemented for the sake of the criminal's dignity, as the Kantian claims, and not for the victim's? Why not look upon punishment as the government's way of redeeming the dignity of the victim by serving as an act of vengeance for the victim or his family?

Pugsley's Kantian retributivist position can also be viewed as a partial application of a general principle of justice, namely, that burdens and benefits are to be distributed to each person proportionate to his good or evil conduct, with punishment serving as the burden portion of the principle. This principle might have been acceptable if all humans were clones of each other and were brought up under identical conditions. This, of course, is not the case. Consider, for instance, a person who spent his youth circulating among foster homes, reached manhood in a crime-infested area, and yet committed no crime more serious than embezzlement. On the other hand, consider a person who, despite his excellent family and social background, turned out to be a law-abiding scoundrel. How are we to apply the general principle of desert in these cases? Moreover, since the general principle of desert applies both to the wicked and to the morally virtuous, why not organize our political and social institutions to benefit the morally virtuous? Why do we have an obligation to burden the wrongdoers without the corresponding obligation to benefit the good?

Finally, Pugsley's Kantian retributivism can be viewed from a

150. For a similar position, see Hegel, Theory of Punishment, 6 INT'L J. ETHICS 482 (1896).

151. We can have no such obligation because a social system that distributes wealth in accordance with virtue would encourage virtue and not production; consequently, the most virtuous persons in such a system would likely end up with less of the good things of life than they would under a system like our own. The point is that you can not have a viable economic market where a bungling, unproductive saint makes far more money than a lecherous, enterprising physicist. Nor can one reasonably claim, that given the above, rewarding persons for virtuous actions is not a valid principle of justice; but burdening those who perform morally offensive action is. Both involve the concept of moral desert; and it is one criterion that involves a continuum from the most virtuous to the most wicked.

Moreover, a full and consistent application of the principle of applying sanctions to those who behave wickedly would lead to intolerable conditions; for, by equalling moral condemnation with the criminal sanction, freedom would be greatly curtailed and the invasion of privacy would be rampant. Kantian retributivists, such as Pugsley, seek to justify punishment by moral desert, but they fail to realize how selectively they apply the principle; for once the principle is seen as broadly applied, its inapplicability as a principle of justice becomes manifest.

I do not wish to imply that there is no principle of moral desert, but only that it is not a principle of distributing benefits and burdens. Moral desert involves approval and condemnation; wickedness deserves condemnation and virtue, praise. This does not belittle the importance of moral desert with respect to directing human conduct, but its role and purpose in the social system is very different from that of punishment.
natural rights perspective: Each human being has certain rights, such as life, liberty and property. He has these rights not by virtue of contract, custom, judicial decision or statute, but solely because he is human. These rights—even those of a criminal—are constraints on a state's formulation of policies in that they cannot be overridden for utilitarian purposes. It follows then that if we accept a natural rights position we must reject the utilitarian theory of punishment. We need not, however, necessarily adopt Pugsley's Kantian theory. In fact, there is a partial retributivist position which is not exposed to most of the criticisms directed at Pugsley's Kantian theory. According to this position, when a criminal invades the rights of others he implicitly claims the right to harm any person, should he so desire. But insofar as the criminal is a moral agent, he cannot deny that if he has this right, others have it as well. Hence, he willfully universalizes his maxim of conduct and acknowledges the right of others to invade his interests. Thus, the criminal, merely as a consequence of committing a crime, forfeits his claim to the status of having all his rights intact.

Yet, just because the state had acquired the right to punish the criminal as a result of his crime, it does not follow that the state has good reasons for doing so. These good reasons are supplied by utilitarian considerations. Thus, this partial retributivist position differs from Pugsley's Kantian retributivism in that the criminal's forfeiture of a right as a result of committing a crime is not a sufficient justification for the state to punish him. Moreover, the partial retributivist position does not, as does Pugsley's theory, employ the concept of desert; rather, it uses the concept of forfeiture of a right. Consequently, this partial retributivist position can evade the objections presented in this paper against the desert theory. Further, this position differs from utilitarianism since no utilitarian reasons can con-

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152. For a recent excellent work on this subject, see R. TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979).
153. To quote Hegel: The injury [the penalty] which falls on the criminal is not merely implicitly just—as just, it is eo ipso his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established within the criminal himself, i.e., in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and that implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right. HEGEL'S PHILOSOPHY OF RIGHT 70 (T. Knox trans. 1952).
154. See supra note 86.
155. See supra text accompanying notes 86-116.
stitute a right to punish a criminal. Utilitarianism offers only good reason for punishment once the criminal, by virtue of his crime, had forfeited his own rights.