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In Favor of Capital Punishment: A Blending of Philosophical Perspectives

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IN FAVOR OF CAPITAL PUNISHMENT: A BLENDING OF PHILOSOPHICAL PERSPECTIVES

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ABSTRACT

IN FAVOR OF CAPITAL PUNISHMENT: A BLENDING OF PHILOSOPHICAL PERSPECTIVES

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There has been little intellectual support for the average American's view of the proper relationship between crime and punishment. This text is an effort to philosophically define and defend this view. Chapters one and two deal with teleological theories and justification for systems and rules of practices. I first discuss the historical relationship of man to the state, showing the necessity of and providing a basis for civil authority and law and showing both to be based on social utility. This accomplished, a teleological justification of a system of punishment is presented. Chapter three discusses retribution as the deontological justification of particular actions. I argue that the only just system is a retributive one. Chapters four and five show that a retributive system of punishment is unable to conform to justice without the inclusion of the death penalty.

To my parents who have over the years supported my every effort and to Vickie Patsell for her tireless love and devotion.

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CHAPTER I

OVERVIEW: PUNISHMENT AS A RETRIBUTIVE SYSTEM IS JUSTIFIED TELEOLOGICALLY

This paper is written in support of capital punishment. It is meant to provide intellectual support to the ordinary American whose moral indignation towards murderers and their crimes has not been diminished by those who wish to abolish capital punishment. Nietzsche foresaw this condition into which society has today fallen when he wrote:

> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him undangerous? Why still punish? Punishing itself is terrible."[1]

Others, too, have recognized the growing interest in the needs of the criminal and a corresponding decrease of interest in the crimes they have committed. It is in this atmosphere that I write what I know will be an intellectually unpopular paper.

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[1]Friedrich Nietzsche, Beyond Good and Evil, trans. Walter Kaufmann (New York: Vintage, 1966), p. 114.

Before I speak of capital punishment in any depth, it is necessary to introduce the reader to the concept of punishment in general. This includes introductory material needed to proceed to the next level in the discussion of punishment. This is necessary because the very idea of punishment as an institution is questioned by many.

Some question the source of authority to establish an institutional system which prescribes and deliberately inflicts pain or deprivation. Still others question why such a system is needed. Lastly, some question the need for specific forms of punishment. These topics will be dealt with in subsequent chapters.

Let me briefly familiarize the reader with the ideas which the word punishment is to convey within this text in general, what makes punishment punishment.

1. Punishment is usually unpleasant, but need not be considered as personally unpleasant by the wrong-doer.

2. It is deliberately imposed by and upon a human being.

3. It is imposed by an agent authorized by the system of rules against which the offense has been committed.

4. As three suggests, punishment refers to desert. Punishment is inflicted then at least in part, because the individual is believed to have committed some violation of a legal rule.

5. Punishment is a purposive activity and as such, it may be either autotelic or heterotelic, that is, either performed for its

> own sake or for the accomplishment of some other end.[2]

Several things should be clear from the criteria used to define punishment within this text. First, the concept of punishment is strongly dependent upon the notion of legitimacy. Punishment must be meted out by judges and executors who act within a system of rules which have been formulated by a duly constituted legislative body.

Secondly, although it is quite proper to speak of punishment as coming from some abstract entity or from the state, the system of rules is formulated to guide the individuals upon whom the responsibility for punishment ultimately falls in distinguishing between justifiable and unjustifiable ends and methods of punishment. Justifiability also raises many questions about the responsibility of the offender. For legal responsibility, the minimum requirement is that the offender's act be a voluntary one. Such a legal requirement brings with it the question, Can an act be voluntary? This is precisely the point of confrontation between the determinist and the free-willists.

Determinism as a doctrine in its extreme form is more properly termed hard determinism. This doctrine contends that all facts in the physical universe, human history among them, are absolutely dependent upon and conditioned by that which caused them. In its more modern soft

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[2]E. H. Sutherland and D. G. Cressey, Principles of Criminology (New York: Lippincott, 1955), pp. 256-259.

form, determinism sees the universe guided entirely by laws, and hence, human actions are predetermined, not free.

Free will also has a moderate and extreme form. The extreme free-willists contend that one can be held responsible for choices only to the degree that those choices were undetermined. A person can choose freely only when nothing determines his/her choice, when it is free of any influences which might destroy freedom in connection with such choosing. The more moderate free-willists present the view that we are completely free to choose between several alternatives which present themselves in any situation. Among these alternatives, we can and do choose the one we prefer. It is in this moderate doctrine that we can speak of choice as the freedom of rational motivation; we are free to choose but within limits.[3] It is to this rational freedom which the present day legal concept of mens rea is connected. The phrase mens rea is sometimes translated as "a guilty mind," but is more properly seen as a certain mental state or mental elements present in the offender which are required to prove criminal responsibility and hence determine the justifiability of punishment. In simplistic terms, guilt stemming from choice can be spoken of both in

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[3]Charles A. Baylis "Immorality, Crime, and Treatment," in Philosophical Perspectives on Punishment, eds. Edward H. Madden, Rollo Hardy and Marvin Farber, (Springfield: Charles C. Thomas, 1968), p. 40. (Philosophical Perspectives on Punishment, hereafter cited as Perspectives).

moral and legal terms as a choice to do wrong by a person who has equally the freedom to choose between doing right and doing wrong. This is the concept accepted by the ordinary man, that punishment depends on guilt, and guilt depends on freedom.

Now that the general denotation of punishment has been established, the main problem of punishment as an institution should have clearly presented itself as concerning different justifications of punishment. For although numerous and varied arguments have been presented, none has gained any real general acceptance.

This paper is meant to reconcile the conflict between the two main justifications of punishment: that of the teleologists or utilitarians and that of the deontologists or retributionists. This will be done first by showing that utilitarianism is the only justification for a state and its civil laws and for a system of punishment in general. Secondly, that once the system is established, its founding principle of utility should not be used within it as a justification for the assignment of particular punishments. Decisions about particular cases must instead be made on retributive grounds. To establish that this is true, I will attack several proposed grounds for assigning individual punishment, including utilitarian grounds. This is in no way meant to invalidate utility as the justification for civil authority and the systems it establishes,

one of these being the system of law and punishment.

This basic division between justifying the practice of punishment as a whole and justifying a particular punishment falling under it is basically that described by the prominent contemporary legal philosopher, John Rawls in his article entitled, "Two Concepts of Rules":

> One must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fill the application of particular rules to particular cases.[4]

It is on this basic distinction that I hope to philosophically legitimatize capital punishment within this text. The sectional divisions of the text will also correspond to the two areas created by this distinction. The logic for this arrangement is to be found in the same Rawls article quoted above. This distinction is important not only as a justification for the present textual arrangement but because it points out the importance of looking at systems of practices defining rules or law and their corresponding philosophical basis in any attempt to justify capital punishment.

Rawls emphasizes the primordial nature of practices by stating that "rules of practices are logically

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[4]John Rawls, "Two Concepts of Rules," The Philosophical Review 64 (1955):4.

prior to particular cases."[5] The clarification of this comes in the statement that "given any rule which specifies a form of action, . . . a particular action which would be taken as falling under this rule . . . would not be described as that sort of action unless there was the practice."[6]

That punishment presupposes practice can be seen from the fact that those things which constituted the definition of punishment within this text could not "exist outside the elaborate stage-setting of a legal system"[7] which defines practices. Rawls reemphasizes this same point by defining punishment as being "a move in an elaborate legal game [one which] presupposes the complex of practices which make up the legal order."[8] Hence, whether one hopes either to challenge or defend a particular action such as capital punishment which is defined by a practice, "there is nothing one can do but refer to the rules."[9] So the logical place to start my defense is with the philosophical basis for the system of practices we know as the state and the authority for creating and enforcing law which stems from it.

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[5]Ibid., p. 25.

[6]Ibid., p. 25.

[7]Ibid., p. 31.

[8]Ibid., p. 31.

[9]Ibid., p. 27.

Before I continue, a stylistic point should be made. Within this text, there is frequent use of short quotations from and references to prominent moral and legal thinkers of the past and present. These quotations and references are not an attempt to justify or give authority to any views expounded, but merely to present the presence of an historical precedent for an idea or concept.

CHAPTER II

THE BASIS OF CIVIL AUTHORITY: COMPLEX SOCIETIES CANNOT EXIST WITHOUT IT

This chapter begins with a broad overview of the development of the western ideas of man and society, from the early Greeks to the present. It is in no way meant to provide a detailed analysis of the philosophical systems contained, only to acquaint the reader with them in order to provide a sense of history in connection with the subject. Within this western tradition, there are a variety of justifications and theories for the formation and preservation of the governmental and cultural unit which has come to be known simply as the state. Inexorably tied in with such theories and justifications are those for civil authority and law.[1] Civil authority can be said to be the basis of systems which have as their goal the preservation of the state, and law with its imperative is the means by which this goal is accomplished. These three elements form the indispensable initial component of the teleological

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[1]The term "state" is not used by the authors quoted in this section. It is used uniformly within this text to represent the idea of the socio-political grouping, and all the systems that it includes.

half of a coherent justification of capital punishment. The state holds a unique place in the justification of capital punishment for from this initial fundamental association of persons stems the authority for all systems, rules, offices, duties, and actions falling under each.

In my view, any justification of a state must refer back to the purpose and meaning of the system of law and punishment by which it defines itself. A political authority which attempts to justify the laws it promulgates by appealing to values which are inappropriate or irrelevant to that system of authority will cause fundamental confusion amongst its members. To avoid this confusion, the law itself "should manifest a reason for being what it is, that it should evidence observable and verifiable factual grounds for the command it attempts to exercise."[2] For it should be obvious to the casual observer of political reality that different kinds of authority are distinguished by the values which they seek to realize. It is a lack of reference to these core values which will be a part of my case against several of the prominent theories of justification. My

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[2]Glenn Negley, Political Authority and Moral Judgement (Durham: Duke University Press, 1965), p. 6. Later, on page 114, he points out that in political philosophy one "cannot expect to achieve the precision of judgement possible in descriptive enterprise which can minutely limit and freely manipulate their data; but this is not an excuse for political philosophy to abandon factual analysis in an indulgence of fantasy." Political philosophy here refers to the origin, essence and values of the state.

claim is that they are inadequate to the task of providing a justifiable basis for a state.

Concepts of nature, man, and the state in the ancient world

One of the primordial justifications for a state is an appeal to nature or what is natural. Although the oldest justification, its use in one form or another permeates almost the entire history of the efforts to justify a state and will be seen throughout this chronological discussion of the western tradition concerning the state. In the form in which "nature" was first used, to act "naturally" was to avoid offending the natural world and thereby avoiding its revenge.[3] The "natural" next became associated with the customary or conventional and came to be known as natural law.[4] It was sometimes conceived to be of divine origin but was always seen as a higher moral principle which bound individuals together.[5] Among the Greeks, the customary or conventional had such a connotation. When the early Greek unwritten customs and laws could no

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[3]Janet Radcliffe Richards, The Sceptical Feminist (Boston: Routledge and Kegan Daul, 1980), p. 51.

[4]Ibid., p. 45. Here this association is pointed out as a deliberate confusion of the customary with the natural.

[5]An example of this position can be seen in the Hebrew belief that Moses received written laws from Jehovah or Yahweh.

longer regulate the intercourse between men, Lycugus compiled and wrote them down; thus, they became codified as law. To early Greeks supremacy of the state and its continuance necessarily meant that the individual was subordinate. This basic view was held by both Pythagoras and Democritus of Abdera.[6] Individualism gained a growing voice some time after the Persian Wars (492 to 479 B.C.) and the Sophists, through their teaching of rhetoric, sought to provide the individual with the skills to use the law and other people for his own gain. In contrast, certainly no clearer example of the belief that the state is rightfully superior to the individual can be found than in the person of Socrates. Even though he claimed never to have wronged another and did not believe he deserved any evil or punishment when the Athenian court as representatives of the Athenian government condemned him to death, he accepted its right to sentence him and drank the poison hemlock.[7]

In Socrates' pupil Plato, nature or the natural took on a new dimension. Plato asserted that individuals

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[6]Pythagoras (c. 572-497 B.C.) was one of the earliest to formulate elementary mathematical principles and methods principally in the field of geometry. The goal of his ethics and politics was to restore the harmony he believed disrupted and confused by the individual's senses. Democritus (c. 460-360 B.C.) was the first to teach that all substance is made up of atoms. More importantly for the purpose of this text, he was the first to form a materialist philosophy of nature.

[7]Reginald E. Allen ed., Greek Philosophy: Thales to Aristotle (New York: Free Press, 1966), p. 92.

were best suited by nature for specific vocations, and it was this natural ordering within society and the systems it produced which were natural and must be adhered to. He saw the state as necessary if man were to develop to his fullest. Plato along this line saw that there was no place in nature or what is natural for a concept like justice, for it arises out of the free association of individuals in a group. Plato also made the distinction between the law giver and the guardian of law.[8] Plato saw individuals as entering into a covenant with the law to obey the commands which the law set forth. Although this is not a contract proper, and despite the fact Plato rejected the contractarian standpoint as a basis for the state, it shows his limited use of the concept in an attempt to explain the imperative of law.

Aristotle was a pupil of Plato, and it is therefore not surprising that he held some similar views on the subject of the state. Aristotle saw the state as being more than individuals banding together in one place for the sake of protection and exchange of goods. He believed the state to be an association with a moral character, whose purpose was to allow the individual to develop the

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[8]Negley, Political Authority and Moral Judgement, p. 117.

highest faculties and to live the good life.[9] The individual's nature was thus not to be identified with what similarities there are with lower animals; it was rather to be identified with those ideas which are peculiarly human. These ideas can only flourish in a state and thereby necessitate a political life.[10] The holding of property is used by Aristotle in his Politics, Book II, as an example of something peculiarly human which required "good customs and a good legal system."[11] These humanly constructed systems were no less natural because they were created by humans. For nature compels the individual to act in a certain manner as part of the necessity which "governs and orders all things."[12] Nature is still very much in command; although it may act through human reason or another human attribute, it nevertheless is the hidden driving force behind human actions.

The time after the death of Aristotle in the year 322 B.C. until sometime after the third century of the

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[9]Justin D. Kaplan, ed., The Pocket Aristotle, trans. W. D. Ross (New York: Washington Square Press, 1963), pp. 305-307.

[10]The Philosophy of Aristotle, trans., A. E. Wardman and J. L. Creed, with an Introduction and Commentary by Renford Bambrough (New York: Mentor Books, 1963), p. 392. In Book II of Politics, the political life is referred to as a political partnership.

[11]Ibid., p. 397.

[12]Jason L. Saunders, Greek and Roman Philosophy after Aristotle (New York: Free Press,1966), p. 2.

Christian era, is most commonly referred to as the Hellenistic Age. Hellenism was a new culture that resulted from the imitation of Greek customs and ideas by those cultures conquered by Greece. It differed from the Hellenic cultures because many of the elements of the conquered cultures were retained. Thus, Hellenism is a synthesis of cultural ideas which were furthered by trade and the growing use of a common language known as Koine.[13]

The glory that was once Greece would fall victim to the Romans in their attempt to conquer and organize the known world. Almost two hundred years before the birth of Christ, the Mediterranean would become a "Roman lake". Some fifty years later, Greece would become a protectorate of Rome; though Greece had lost its political power, it gained stability and tranquillity in compensation for its loss. During this Hellenistic Age, individualism was on the rise embodied in the two main philosophies of the day, that of the Stoics and that of the Epicureans, both of which were spreading throughout Greece. Stoicism was akin to the individualism of the Sophists which had been so prevalent in the fifth century before the birth of Christ. The Stoic maxim was "live according to nature" but here again human nature was to be found in reason. Thus the Stoic universal law of nature was a law of

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[13]Koine (coy-NAY) was the type of Greek into which the Old Testament was translated during the third century B.C. and in which the New Testament would later be written.

reason.[14] This Stoic sense of reason was to be a guide for the conduct of the individual. Once more, the old idea is echoed that the individual has a natural impulse towards a social life and thus is inclined to accept duties and obligations within society. The Stoic ideal was that of a universal brotherhood which the stoics believed would arise from a state whose laws would follow the universal natural laws and would be created for the good of all. In conflicts between the state and the individual, the individual must yield in order to help preserve the state.

In the Epicurean philosophy, we see a radically different individualism. To the Epicureans, social life was merely a convenience to be entered into because it offered the individual a greater chance of self-aggrandizement and afforded protection. Society, so seen, was based upon self-interest and thus negated the possibility of any natural rights or laws. Laws are human conventions to regulate social life and the individual must be willing to accept them in order to live within society. This view is not as idealistic as Stoicism and has the advantage of founding society firmly on an earthly footing which would be lost with the growing belief in the religious significance of human existence and human history. The schools of religious philosophy were now absorbed in their attempt

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[14]J. W. Gough, The Social Contract: A Critical Study of its Development, 2nd. ed.,(London: Oxford University Press, 1957), p. 15.

to reconcile their religious beliefs with the Greek concept of reason. This attempt to reconcile reason and faith started before the birth of Christianity with the Jewish theologian and Neoplatonic philosopher Philo Judaeus of Alexandria (c. 20 B.C.-50 A.D.). He believed much of the Greek thought to have been borrowed from Mosaic teachings and therefore accepted the use of Greek philosophy (and the doctrine of reason which it contained) as a tool to aid in interpreting the scripture as justifiable. It was through the scriptures and the denial of self that the individual would reach his highest state in a direct contract with the supreme being.[15]

Philo, along with the great Greek philosophers, clearly influenced the ideas of Clement of Alexandria (150-217 A.D.) who attempted to elevate faith to the level of knowledge. He did this by making Greek philosophy the handmaid of theology and held that philosophical truths were a "divine gift to the Greeks."[16]

Early Christians would also see their beliefs as distinct from the ideas of both the Greeks and the Jews. This separatism can be seen in the words of Paul, that Jews

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[15]Here we see the main elements which will characterize much of early Christian thought: a denial of self and a denial of earthly rule of any sense of supremacy.

[16]Clement of Alexandria, The Stromata, Book I, chapter 2, quoted in Jason L. Saunders, ed., Greek and Roman Philosophy after Aristotle (New York: Free Press, 1966), p. 305.

demand signs and Greeks seek wisdom, but Christians preach Christ crucified.

The Hellenistic period, with its individualism, openness to new ideas, and the use of the language of Koine, provided fertile ground in which Christianity could grow. Although Christianity was against most of what the age stood for, the inquisitive spirit of the age almost guaranteed that Christianity's early teachers would be heard. This is not to suggest that early Christianity had nothing in common with older ideas, for it did. Early Christianity saw nature as the expression of the decisions of God who had a man-like image. This view is essentially that of older primitive religions. Its founding idea is that all of creation was designed for a specific purpose and humankind is a part of, and must act according to, this natural scheme. If one does not act in accordance to nature then the purpose for which one was created will not be fulfilled and the wrath of God will soon follow.[17]

As Christianity grew, it became more political in the sense of being anti-political and less accommodating to the old Greek ideas. This new relationship of Christianity to earthly politics can be seen by examining the writings of the Catholic theologian St. Augustine (354-430 A.D.), who found precious little to praise in the secular monarchy of his day. In his view, the state was an artificial

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[17]Richards, The Sceptical Feminist, p. 51.

construction rooted in sin with laws that were inferior to those of God, to which earthly laws must conform. But he lessened the force of such ideas by stating that the state is primarily an ethical community with its principal end being the happiness of humankind.[18] Though God is supreme, Augustine recognizes the peculiar and inalienable legitimacy of both person and nature "in questions concerning human existence."[19] In the Augustinian view, the Pope is the infallible representative of God and therefore has the power to depose an unrighteous king and excommunicate him, absolving all Christians from their allegiance to him. Augustine thus recognizes the power and legitimacy of a righteous ruler.[20]

The Middle Ages: man versus the state a struggle continued

In the Ancient world we saw the concepts of the individual as superior to the state and of the individual as subordinate to the state alternately dominant the period. In the Middle Ages we will see these schools of thought formalized into Realism and Nominalism. The Middle Ages

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[18]For Augustine the monastic life was an ideal, but he realized few could attain it, so for the vast majority membership in the temporal state was the next closest thing.

[19]Robert Meagher, Augustine: An Introduction, with a Forward by William Barrett (New York: Harper Colophon Books, 1978), p. 134.

[20]Gough, The Social Contract, p. 15.

sees the beginning of efforts to separate ecclesiastical political authority. This is important because it allows secular justification of civil authority and its systems.

The deposition and exile of Romulus Augustulus in 476 A.D. is said to mark the end of ancient history. With this fall of Rome in the fifth century, the period known as the Middle Ages begins and continues until about the fifteenth century, or somewhat earlier in some parts of Europe. It was during this period that the Greek idea of individualism was completely conquered by the view of the individual as being almost completely dominated by the state. The individual regained identity in the growing realization of the mutual ties between subject and ruler. There is much evidence to suggest that the contract theory (though far from its present meaning as social contract) was the basis of theories of government in the Middle Ages. The contract theory can be seen in the "election and coronation ceremonies of medieval kings and emperors, the conception embodied in feudalism, of law as anterior to the state, the examples of covenants in the Bible, the interpretation of Roman Law which attributed the source of political authority to the people--and from time to time the result was the actual use of the term contract (pactum, foedus) itself."[21]

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[21]Ibid., p. 34.

Included among the most prominent political thinkers of the Middle Ages were figures like St. Thomas Aquinas (1225-1274), John Duns Scotus (1264-1308), William of Ockham (1285-1349), and Dante Alighieri (1265-1321). These men, as well as others, will next be compared. When contrasting philosophical theories, the problem of grouping always arises. There are two major lines upon which to divide the present group. One possibility is to divide Scholasticism into Thomism and Scotism. The second possible method of division is upon extremist lines, grouping thinkers into Realists and Nominalists. The Realists held the state to be the only meaningful reality with individuals holding none of their own. The Nominalists believed the exact opposite. For them, the individual was the meaningful reality and the state had no reality apart from the individuals which comprise it. Both divisions will be used in order to provide a direct contrast of philosophical systems.

The Realist position was first expounded by Johannes Scotus Erigena (c. 810-unknown) who has been acclaimed to be "the one important philosophical thinker . . . in Latin Christendom between Augustine in the fifth century and Anselm in the eleventh."[22] The Realist tradition was continued by St. Anselm of Canterbury (1033-1109) and also by Roselin (1045-1120). The Nominalistic position would

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[22]The Encyclopedia of Philosophy, reprint ed., (1974), s.v. "John Scotus Erigena," by Eugene R. Fairweather.

not be adequately expressed until William of Ockham (1285-1349), who will be treated after Aquinas and Scotus.

Although there is no detailed political philosophy in the writings of the Catholic theologian and philosopher, St. Thomas Aquinas, he is nonetheless an important figure in the historical development of political philosophy since Thomism is one of the two major philosophical orientations in Scholasticism. He combined the Aristotelian concept of human kind, as being naturally political, with the doctrine of natural law. Individuals, he felt, had natural inclinations, one of which was to use reason in seeking out universal goods. The individual seeks membership in society because reason shows it to provide temporal peace and welfare. Aquinas taught that the monarchy with its centralized rule was the most likely governmental system to be able to provide for the good of a group. The monarch and the state were, in his view, inferior to the church and therefore must obey the church. As long as the ruler did obey the church's laws there could be no justification for rebellion, for such a state was of divine origin, receiving its power over individuals from God, through the church, to whom the individual was ultimately responsible. The individual must therefore obey the state since its power is ultimately derived from the church. If the monarch abuses power, the people have the right to regulate or abolish the power of the monarch through legal means. If such legalistic means are

unavailable, then the matter must be left to God.[23]

The other major philosophical orientation in thought was Scotism. Its founder, John Duns Scotus, believed society itself to be of God's creation. God, in his view, was free to create any form of society but chose freely to create a certain type. Such a society would have right laws and therefore the individuals must obey these laws or suffer divine punishment. The imperative to obey, in this view, is from God but God does have the ability to exempt the individual from those natural laws concerning his fellow individuals. In this way, Scotus would seem to allow for civil rebellion. His theory is also important in that it gives individuals back the intellectual power to directly gain intuitive knowledge of the earthly world which was lost in the Thomistic doctrine which held that the individual could only gain such knowledge indirectly by reflecting upon its images. Scotism would not reach its pinnacle until the sixteenth and seventeenth century and would decline, as Scholasticism itself would, in the eighteenth century.

William of Ockham is representative of the Nominalistic position. He was one of the major critics of the church of his time. Ockham asserted that the state should be free from church dominance since it was a temporal institution whose power and authority he believed to be derived

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[23]St. Thomas Aquinas, Treatise on Law, with an Introduction by Stanley Parry (Chicago: Gateway, 1969), pp. 88-104. See fifth and sixth articles.

from the individuals governed by the state. His radical empiricist view elevated the individual to still greater heights making individual direct experience the basis of all knowledge concerning particular things and events. By this individualistic theory of the basis of knowledge, Ockham sought to resolve the paradox inherited from the Greek philosophical tradition, "that the objects of thought are universal, whereas every thing that exists is singular and individual."[24]

The thoughts of Dante Alighieri coincide with the realist tradition in the sense that the state holds great significance and possesses an intrinsic value of its own. In De Monarchia, he provides an eloquent defense of world monarchical rule.[25] Dante first tries to show that world monarchical rule is necessary for temporal affairs because it is the only system capable of providing the peace necessary for the individual to reach the highest degree of intellect. He sought a separation between the temporal and spiritual worlds, thus freeing the Emperor from constraint by the Pope. In Dante's view, such interference in temporal matters would not be needed because the Emperor like the Pope derives his authority directly from God. Dante's

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[24]The Encyclopedia of Philosophy, reprinted ed., (1974), s.v. "William of Ockham," by Ernest A. Moody.

[25]Dante's defense was for world monarchical rule by the Roman emperor.

strong support for temporal rule should not leave the impression of spiritual deprivation on his part, for he believed in the superiority of the contemplative spiritual aspects of human existence. Dante wished only that the temporal not be interfered with by the spiritual.

The Renaissance and Reformation: a new beginning and the reemergence of state dominance

The efforts which began in the Middle Ages to separate the church from the political state gained a new momentum due in part to the church's drift towards disunity during this time. This was accompanied by a rise in theories which once again claimed the state as the dominant component in society. During this time the contract theory was first formally used to account for the origin of the state.

The fourteenth century saw a reappearance of classicism in both the arts and letters. The Renaissance or rebirth had arrived. The Renaissance is often spoken of as a period of transition between the medieval and modern times, and is also used as a term to describe the intellectual spirit that brought the Middle Ages to a close.

In the fifteenth century, the worldliness of the priest, bishops, and the pope himself were the subjects of severe criticism and often open opposition.[26] Such attacks

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[26]With the victory of the Ottoman Turks over Constantinople in 1453, Modern History is usually accepted to have begun. But such a concrete distinction of historical periods is not necessary to the stated purpose of

were considered heresy and the heretics who gave expression to such ideas left themselves exposed to severe punishment. The Catholic Church, during this period, was the official state religion of nearly all Europe, and therefore heresy was a crime against the state as well as the church.

By the sixteenth century, the church had drifted towards disunity and the time of the Reformation had begun. It was during this Reformation that the church would come under new attack in an effort to loosen its nearly complete dominance over the state. The attacker was the Italian politician and political thinker Niccolo Machiavelli (1469-1527). Due to the political turmoil which was so much a part of his time, with the overthrow of the Medici family and their later reinstatement, his political career was to rise, decline, and slightly rise near its end. It was during the period following the return of the Medici to Florence that Machiavelli would turn to writing political literature in an attempt to enhance his value as a politician. It was with this in mind that The Prince and the The Discourses were written. The Prince puts forth the view that the ancient and medieval standards for a ruler--one who must embody the highest virtues--makes an unreasonable demand upon a ruler. He felt that the ruler should not even consider whether his actions would be viewed as being

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providing a brief historical understanding of the relationship of the individual and the state.

virtuous. It was on these grounds that he sought to reject the validity of both moral philosophy and theology in political actions and decisions. He thought history should be the guide to a political system and the actions it takes on behalf of those it rules over. The ruler must use all the weapons at his disposal because he has only a limited chance to accomplish his goals. This does not imply that the ruler is to be cruel or unjust all the time; he should be so only when such actions are the most expedient. Machiavelli does carry over into his political thinking the familiar doctrine of the laws of nature. He does this by making the political organization conform to natural law in that it follows a natural life cycle. A state is born, it lives and matures, it declines and finally it dies.[27] Although Machiavelli's The Prince is interesting due to its open approval of force and even cruelty, it is nevertheless not very analytical and is really very much like so many Medieval works written to advise a ruler of the proper course or reason for action.

Another early sixteenth century Italian political thinker, Marius Salamonius, saw the state very differently than Machiavelli. Salamonius believed the state to be founded in a civil contract uniting individuals. In his theory of the state, one can find "all the essential

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[27]Gough, The Social Contract, p.67.

elements of a social contract"[28] present.

The Counter-reformation and the Enlightenment: a new age of political contract theories

During these periods natural law once again remerges along with theories which link the state and its laws to those of God. Arguments about the powers of the state come to be couched in terms of the degree to which rights were believed given up by individuals in their "contract" which formed society.

The seventeenth century can be viewed as the time of two major cultural developments: the Counter-reformation and the Enlightenment. The Counter-reformation sought to eliminate the more pagan elements of the Renaissance and raise Catholicism to new heights in its bid for the souls and minds of individuals. The European enlightenment had its beginnings in the works of Thomas Hobbes and John Locke; it would continue as a cultural movement until the nineteenth century. Philosophically, the movement was characterized by rationalism, a spirit of skepticism, an impulse towards learning, and by empiricism in political and social thought. It was in the middle seventeenth century and throughout the eighteenth century that the study of political theory would shift northward and be carried out by

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[28]Marius Salamonius, De Principtu libri septem, quoted in J. W. Gough, The Social Contract, p. 47.

"German and Dutch Universities who comprised the school of natural law."[29]

The Dutch jurist, statesman and natural law philosopher Hugo Grotius (1583-1645) carried on the Absolutist view of unrestricted sovereignty located in the ruler, which Machiavelli had expressed earlier. The basis of his political philosophy rested on history, which also meets the criterion established by Machiavelli. Grotius realized that the warring condition of Europe was due to the fact that society had not created new rules "appropriate to the emerging society of sovereign nations."[30] Grotius viewed the Thirty Years' War which was devastating Europe at that time as proof of the lawlessness caused by such a deficiency--lawlessness which was caused by the imperative void created by the loss of the dual authority base of the Middle Ages: the "ecclesiastical authority of the Church of Rome and the political authority of the emperors."[31] This loss can be viewed in philosophical terms as the gradual demise of the old Aristotelian theory of man as naturally suited and fixed in society, which the church had used as its naturalistic foundation. The way was now open to divorce the church from political theory and replace it with secular humanism.

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[29]Gough, The Social Contract, p. 67.

[30]The Encyclopedia of Philosophy, s.v. "Hugo Grotious," by Wolfgang Friedmann.

[31]Ibid., p. 393.

It was this period of growing individualism, capitalism, and social mobility which would mold the political thoughts of Grotius. In his philosophy of natural law, Grotius followed the lines set forth by the Stoics. Natural law is a law of reason and it is rooted in the very nature of the individual who is social, altruistic and above all a rational being. Grotius believed that with natural law so rooted, not even God himself could destroy or even change it. He went so far as to say that natural law would exist even if there were no God. By his association of natural law with the rational principles of the individual and the state or society, he departed from the metaphysical conception of the law of nature held by the Stoics. But natural law could be restricted by positive laws which are created by the authority which grows out of the social contract. Grotius believed the social contract to be an actual historical fact. Though the ruler was originally given his power by contract, once the government was established and power transferred to it, the power of that government became absolute from that time forward.

The same historical time and therefore the same historical conditions existed for the English philosopher Thomas Hobbes (1588-1679), as did for Grotius. Hobbes believed that the natural condition of humankind is one in which there are no common standards to support such distinctions as that between right and wrong, and justice and

injustice. There is no common power, hence no common law, and where there is no law there can be no justice or injustice. Such a state was to be characterized as one of perpetual war.[32] Because there can be no law in this state of nature, what individuals call natural law is really that which has been dictated by reason. But reason is a natural part of human nature and natural law can be said to be a product of the art of reasoning or in Hobbes' term, right reasoning, but it is no less natural for its having been so created.[33] Peace was seen as being endangered by doctrines which allow the individual to be the judge of the merit of his or her actions in terms of good and evil. It was because of this belief that Hobbes set as his object to show the mutual and reciprocal relationship between protection and obedience, a relationship which required absolute submission by the individual to the sovereign. But Hobbes' sovereign was different; his great "leviathan" was to be viewed as a mortal God who received his power from the Immortal God to whom mortal individuals owed their obedience.[34]

The sovereign or the sovereign government provides the individual commands which are laws by which the individual may judge his actions. It is the sovereign alone who,

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[32]Gough, The Social Contract, pp. 19, 105.

[33]Negley, Political Authority and Moral Judgements, p. 50.

[34]The Encyclopedia of Philosophy, s.v. "History of the Philosophy of Law," by M. P. Golding.

by law, establishes what is to be conceived as being just and unjust, right and wrong.[35] But these laws are not merely guides, for the law presents tangible sanctions which are reflective of the divine providence by whose authority they enforce these laws. The sovereign's laws are thus a reflection of divine power and rid the individual of the unreasonable fear of what Hobbes termed 'spirits invisible.'[36] It was the clergy who used these invisible spirits as weapons to hold power over individuals. As long as the clergy held this power, individuals would only offer a partial or conditional obedience to the sovereign. The dogma of the church was to be viewed as a threat to civil peace because it gives "rise to dissensions, then to quarrels, and finally to wars."[37] It was for this and other reasons that Hobbes held the clergy in such distaste.

Hobbes believed the purpose of law was to order the institutional structure of society in such a way as to provide the individual with the instruments of living. In order for such ordering to take place, humankind must give up the dream of a total divine correlation between reason, morals

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[35]Emile Brehier, The History of Philosophy: The Seventeenth Century, 2th ed., trans. Wade Baskin (Chicago: The University of Chicago Press, 1968), p. 157.

[36]Walter Berns, For Capital Punishment: Crime and the Morality of the Death Penalty, (New York: Basic Books, 1979), p. 84.

[37]Emile Brehier, The Seventeenth Century, p. 58.

and law for all time.[38] Hobbes also provided an additional source of obligation to obey in the social contract. To Hobbes the social contract represents an unqualified surrendering of all individual rights to the sovereign at the time of its making. Hobbes believed that individuals obey because they identify such obedience with self-interest. But self-interest is not to be pursued in a manner forbidden by law and it is punishment which must demonstrate and convince the individual of the danger of such pursuit.[39] Due to Hobbes' awareness of self-interest, he did allow the individual the right to change allegiance when the sovereign could no longer provide protection. In allowing for such shifts in allegiance, "Hobbes admits that there is a insoluble conflict between the rights of the sovereign (who represents the will of all) and the natural right of the individual to self-protection."[40]

Philosophical influences on American political thought

In the United States the social contract was the dominant political theory. The conflict between the state and its laws as being either benevolent or alienating

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[38]Negley, Political Authority and Moral Judgements, pp. 52-53.

[39]Ibid., pp. 52-53

[40]Ibid., pp. 20-21.

continued as it does to this day. One of the philosophical influences which affected American thought was a shift away from attempts to discover the origin of the state to instead focus upon its operation. This shift as we shall see was made possible by accepting the state as an objective reality. This change away from philosophical considerations would be accelerated by the rise of political science and sociology. It would be these two "new" sciences that proposed the then new theories on the relationship of man to the state.

The next political theoretician, John Locke, had a profound effect on American political ideas in general and upon those very ideas expressed in the Constitution of the United States. It is with Locke that this section will depart from its overall survey of western political ideas to narrow its focus to those political theoreticians whose ideas most directly affected, or now affect, American political thought.

In the thoughts of the British moral and political philosopher John Locke (1632-1704), we see an almost total reversal of the doctrines held by Hobbes. If we speak of Hobbes as a supporter of authoritarianism, we may view Locke as a exponent of liberal thought. Locke's political ideas were contained in his Two Treatises on Government which were meant to serve both as a guide for, and as justification of, the Glorious Revolution of 1688.

The first of the two treatises sought to base political science on reason rather than on theology. To do this, Locke attacked the idea that the sovereign's power was spiritual as well as temporal, a power which had allowed him the the right to impose state worship. This destruction of the theological basis of power also served to negate the divine right of kings to wield absolute power.[41]

The second treatise begins with an analysis of the individual removed from society and placed in a state of nature. Locke did this because he believed that in order to understand political power, one must consider it at its source: the individual in a state of nature. The natural state of Locke could not have been more different from that of Hobbes. Locke's state of nature is one governed by the laws of nature which ultimately rest upon God and are discovered by reason. These laws obligate individuals to preserve the peace, which is the state of nature, by respecting the life and property of others. By interjecting reason into the state of nature, Locke eliminates the problem of how individuals, in the Hobbesian state of war, could join to form a political society by the use of a social contract.

Locke's social contract did not create new rights for the individual but sought to preserve the rights held

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[41]Emile Brehier, The Seventeenth Century, p. 269.

in the state of nature.[42] Among these rights, which Locke held to be inalienable, were life, liberty, the possession of property, and punishment of those who transgress against any of the rights which the individual possessed. Hobbes' contract was one between ruler and ruled, whereas the individuals who enter into Locke's contract were freely consenting equal individuals possessing rights. A government so created has no sovereignty apart from that of the individuals in whom it ultimately remains.[43] The rights of a government are then an extension of the rights of the individual, not something alien to the individual. Government's true function is, not to create or impose laws, but to discover what the laws of nature are. Society in this view is "a stabilizing force effective in repressing infractions of the law."[44]

Locke was among the first to put forth the theory of separation of powers. Locke's divisions of power were the legislative, executive, and the judiciary, all of which were established by the individuals who comprise a society. The powers of the executive and legislative branches include the "right of making laws with penalties of death, and

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[42]Ibid., p. 270.

[43]The Encyclopedia of Philosophy, s.v. "John Locke," by James Gordon Clapp.

[44]Emile Brehier, The Seventeenth Century, p. 270.

consequently all less penalties."[45] They also include property rights and common defense of the state. It is the legislative and executive rights of nature which individuals must give up in their social contract. The continuation of such transfer of power is contingent on their proper use by the state. This allows for the dissolution of a government that comes to act in ways contrary to natural law. Locke sought to make it clear that by dissolving government one does not dissolve society but merely seeks to change the guardianship of natural law.

Locke envisioned the constitutional monarchy as providing the most promising potential for society. The monarch would hold executive and judiciary powers with the legislative power possessed by a popularly elected parliamentary assembly.[46] These elections, like all such popular decisions, would be by majority rule because Locke realized that no action taken by society could be taken by unanimous decision.

The political thoughts of Jean-Jacques Rousseau (c. 1712-1778) are sometimes said to have influenced American political thought. I can find little in them which is reflected in the present American political reality or in its development. Rousseau's work is strictly theoretical,

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[45]The Encyclopedia of Philosophy, s.v. "John Locke," by James Gordon Clapp.

[46]Ibid.

taking individuals as they are and projecting them into government as it should be. His non-liberal view of the relationship of individuals to the state presented no new ideas. Nothing new can be found in Rousseau's view of the individual as progressing from a natural state to the more developed social state in which is reached the status of moral being through the exercise of freedom.[47] Neither is there anything new in his insistence that the social compact or contract is the only legitimate basis for the existence of a political society and the concept of personal obligation to obey.[48] Rousseau sees the compact, political society, and law as expressions of the personal will exemplified in the general will which is always directed towards the general good and which the individual recognizes as his own.[49] The general will is in possession of "strength beyond the power of any individual will."[50] Like most of those who believe in social utility, he believed the individual to be naturally good and a rational being. But Rousseau saw the individual as controlled by appetites until freed from them

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[47]Gough, The Social Contract, p. 167.

[48]Ibid., p. 171.

[49]Berkley B Eddins, "Punishment and its Mythological Context," in Perspectives, p. 133.

[50]Emile Brehier, The History of Philosophy: The Eighteenth Century, 2nd ed., trans. Wade Baskin (Chicago: University of Chicago Press, 1971), p. 163.

by an intelligent submission to the law.[51] Paradoxically, Rousseau believed such a submission would liberate the individual. Rousseau drew a distinction between the sovereign, who in his political scheme are also the subjects, and the ruler or government which is the executive agent of the individual. Sovereignty, then, remains with the individuals at all times and can never be given up or taken from them.

Adam Smith (1723-1790), the Scottish political economist, had the effect of legitimizing if not glorifying the capitalist system. Though his work, An Inquiry into the Nature and Cause of the Wealth of Nations (1776), was more of a history of European economics than a guide to the new nation of America it contained principles which would find a firm footing there. Smith believed the best state could exist only when individuals were permitted to compete unrestricted by the state in pursuit of their enlightened self-interest.[52] The state would only intervene where its own welfare was at stake. Any other interference would work contrary to the general welfare; this is of course the

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[51]The Encyclopedia of Philosophy, s.v. "Jean-Jacques Rousseau," by Ronald Grimsley.

[52]The Encyclopedia of Philosophy, s.v. "Adam Smith," by Elmer Sprague. Note that Smith was greatly affected by his extensive reading of the works of David Hume. Hume believed there was no good argument for the existence of God. The reading of Hume may, in part, account for Smith's lack of any reference to ecclesiastical authority in his relationship of man to the state.

doctrine of laissez faire. The true wealth of nations is to be found in consumer goods which the capitalists produce. In producing these goods for their own profit, they contribute to the general welfare.[53]

In Smith, the elements of capitalism and private ownership of property with its corresponding laws of property were expressed as legitimate, and the interference in the commerce of America by England conversely was illegitimate.

Cesare Bonesana Beccaria (1738-1794) was an Italian criminologist, propagandist of penal reform, and exponent of the theory of enlightened selfishness.[54] Beccaria was a firm believer in the promise of the Enlightenment, that in the discoveries and techniques of modern science a solution to human problems could be found.[55] Beccaria believed America, the new nation founded on new principles, to be the ideal place for the enactment of his own philosophical principles. Beccaria began his philosophy by dividing virtue and vice into three classes: the religious, the natural, and the political or conventional. The political he believed to be derived "from the expressed or tacit compact of men."[56] Individuals entered into this compact for the Hobbesian reason of protection and in

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[53]Brehier, The Eighteenth Century, p. 111.

[54]Gought, The Social Contract p. 175.

[55]Berns, For Capital Punishment, p. 41.

[56]Ibid., p. 18.

order to preserve most of their liberty by surrendering a portion of it to the sovereign, a doctrine belonging to Rousseau. Individuals possessed rights in the state of nature but they were uncertain due to the war-like state of everyone for himself. To secure these rights in any meaningful sense required the peace which only government could provide.[57] Beccaria, like Hobbes, provides the sovereign the power to create laws and to enforce them by punishing infractions.[58] But Beccaria hoped that the Enlightenment would force individuals to remember the terror which the state of nature held with its constituent state of war. If individuals remembered this, then they would see the necessity of obeying the laws of the sovereign in order to secure the continuance of society.[59]

The surrender of liberty is only partial for Beccaria. Law, he believed, should only possess the power given it by the expressed or tacit compact between individuals. The only solid foundation for law was the self-interest that the compact represented. With the limits of law so set on a compact of self-interest, Beccaria could refuse any law and corresponding punishment he thought to be beyond such compact. It was on the grounds of its inconsistency to self-interest that Beccaria opposed capital

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[57]Ibid., p. 84.

[58]Ibid., p. 20.

[59]Ibid., p. 132.

punishment in his famous work, Of Crimes and Punishment. No individual, he thought, could wish to leave the choice of killing him in the hands of another. It was not reasonable then to presume that any individual included the right to allow themselves to be executed in the social contract.[60] If one accepts Beccaria's limits of the state, and views civil society as being founded on the natural right of self-preservation, then it is logical to assume such a limit to the powers of the state in punishing individuals.

As many authors within this section have pointed out, society is more than a mere contract.[61] Beccaria himself seemed to acknowledge this in pointing out the necessity of punishing to insure that the law be obeyed. Can the individual be thought to include in the social contract every punishment short of death? If death is excluded, then why not other punishments? What limit can rationally be set upon government? Beccaria attempted to reinforce his removal of severe legal sanctions by arguing that it was not cruelty of the punishment but its swift and infallible commission that would prove useful.[62] Beccaria did not believe the law was to be an expression of utility, for the law represents present morality. Utility, in his view, caused

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[60]Mitchell Franklin, "The Contribution of Hegel, Becarria, Holbach and Livingston to General Theory of Criminal Responsibility," in Perspectives, p. 94.

[61]See Immanuel Kant, page 43 this text.

[62]Berns, For Capital Punishment, p. 113.

the individual to strive for future goals at the expense of present ones.

The German moral philosopher Immanuel Kant (1724-1804) has been called the "most severe moralist" in the western philosophical tradition.[63] Kant's importance to this text is mainly in his ideas concerning the origin of the social contract and the legal imperative to obey. Kant's inquiry into the origin of political society in some ways resembles that of Rousseau's in its condemnation of the outlook of the Enlightenment.[64] It is also similar in that Kant attempted to explain the authority of the state partly by general will and partly by the use of original contract.[65] Kant started his inquiry into the state, and how it justifies the scope of its involvement in the individual's life, by looking at the individual in a state of nature. But this state of nature was never an historical reality. "It is just a logical abstraction from the state of society, reached by imagining man stripped of everything which he owes to society."[66] Kant believed it impossible to discover the point in history where civil society had its

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[63]Negley, Political Authority and Moral Judgement, p. 58.

[64]Brehier, The Eighteenth Century, p. 234.

[65]The Encyclopedia of Philosophy, s.v. "Immanuel Kant," by W. S. Walsh.

[66]Gough, The Social Contract, p. 182.

beginning. In this way, he freed political philosophy from the necessity of explaining the origin of the state, and this in turn would allow those later philosophers like Hegel to concentrate on the problem of political obligation.[67] The origin of the state did not matter to Kant, for the civil state is an objective reality the necessity of which he strongly believed in.[68] For him, the inquiry must begin rationally with the idea of a state of society not yet regulated by right. Kant believed the idea of an original contract was the basis upon which all lawful governments were formed. To Kant this original contract consisted in the act of individuals leaving the state of nature to form a civil state and obey its civil laws. But this leaving behind of nature did not consist of surrendering only a part of individuals rights in order to gain protection. Kant's move from nature consisted in a total abandonment of the wild lawless freedom, which nature contained, "in order to find all his proper freedom again entire and undiminished, but in the form of a regulated order of dependence, that is, in a Civil State regulated by laws of Right."[69] In this way, Kant disposed of Beccaria's argument that capital punishment is wrong because it

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[67]Gough, The Social Contract, p. 183.

[68]Negley, Political Authority and Moral Judgement, p. 60.

[69]Gough, The Social Contract, p. 183.

exceeds the rights, given up by the individuals, contained in the original contract. As stated earlier, Kant was a moralist which required him to believe in the power of practical reason which the individual possessed. It was this individual reason which would provide the moral law, the famous, categorical imperative: act only according to that maxim which you can at the same time will that it should be a universal law. If we add to this Kant's other famous moral saying--treat others as ends, not as means to an end--a view of Kant's philosophy as one of mutual respect emerges. As a moralist, Kant saw duty as an absolute. He held legal obligations to be a subspecies of moral obligation; this removed them from dependency on force or commands of God.[70] Civil law was to be distinguished from moral law by the fact that civil laws "regulate external conduct irrespective of its motives."[71]

How much influence Kant's theories had in directly affecting American political doctrine is admittedly very little. But his importance in changing the premise of the original contract, with the corresponding destruction of the arguments of Beccaria against capital punishment, is significant to the justification of civil authority and punishment.

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[70]The Encyclopedia of Philosophy, s.v. "Immanuel Kant," by W. H. Walsh.

[71]The Encyclopedia of Philosophy, s.v. "The History of Law," by M. P. Golding.

Edmund Burke (1729-1797), Irish-born antirationalist philosopher, member of the Whig party, and noted orator, was an outspoken opponent of the manner in which the English were attempting to handle the problems in America. The question to Burke was not whether England, as the legitimate government in the American colonies, had the right to enforce its will and make the people miserable, but whether it was not in the interest of government to make them happy. Political problems, to Burke, were mainly matters of good versus evil. "What in result is likely to produce evil is politically false; that which is productive of good politically true."[72] Burke, years after the successful revolution in America, would voice the opinion that it had been "within the historical tradition by which democratic constitutions had evolved."[73] He believed government and all its officials to be trustees for the people "because no power is given for the sole sake of the holder."[74] The institution of government itself was of divine authority, yet its earthly form and offices originated from the people. A down-to-earth approach and awareness of the basic relations of the civil state are evident in Burke's statement

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[72]Edmund Burke, Reflections on the Revolution in France, quoted in J. Bronowski and Bruce Mazlish, The Western Intellectual Tradition (New York: Harper & Brothers, 1960; reprinted, New York: Harper & Row, 1975), p. 427.

[73]Ibid., p. 421.

[74]Ibid., p. 421.

that:

> The moment you abate anything from the full rights of men each to govern himself, and suffer any artificial, positive limitation upon those rights, from that moment the whole organization of government becomes a consideration of convenience. This it is which makes the constitution of a state, and the due distribution of its powers, a matter of the most delicate and complicated skill. It requires a deep knowledge of human nature and human necessities, and of the things which facilitate or obstruct the various ends which are to be pursued by the mechanism of civil institutions.[75]

Although written in reference to the wars and revolution in France, it is true of all popular civil governments.

For Jeremy Bentham (1748-1832), the focus of inquiry was upon the operations of a state or laws and not upon their origin. The purpose of this focus was to justify equality among individuals in the governmental system of a representative democracy. The guide to actions of the state that Bentham would propose went back to ancient times, to the writings of Epicurus; this guide was the theory of utility. The most immediate influences on Bentham were David Hume (1711-1776) and Cesare Beccaria (1738-1794), from whom he took the theory of utility and transformed it for the specific purpose of viewing political systems. Bentham thought the term 'utility' not to fully express his meaning. He preferred to use "the principle of the greatest happiness of the greatest number." This principle was to

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[75]Ibid., p. 428.

be the basis of morality, of government and its legal system, and also serve as a measure of each. Thus the state becomes a means to supply the greatest number under it with the greatest happiness. Such a principle, he recognized, disregards motives for actions and views only the consequences as being morally relevant. Bentham also dealt with the problem of justifying his own justification. The view he put forth was that utility as a principle was beyond proof. In Bentham's own words:

> Is it susceptible of any direct proof? It should seem not: for that which is used to prove everything else, cannot itself be proved: a chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needless.[76]

Bentham's views on sanctions and punishment will be covered in the chapter to follow; it should suffice for now to say that he believed them to be necessary evils.

In the philosophical thoughts of Georg Wilhelm Friedrich Hegel (1770-1831), we find the state considered as the highest form of collective. There are other collectives, such as the family and civil society, each a dialectical necessity. Each of the lower collectives becomes a component of the next higher one. Thus the family, though not a permanent collective, is a component of civil society. Civil society encompasses the institutions of economics and those of the legal systems and penal systems. But

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[76]Jeremy Bentham, quoted in Bronowski and Mazlish The Western Intellectual Tradition, p. 435.

a legal system is impossible without a state within which it functions, so the state becomes the supreme collective. For Hegel, the state was the collective in which universal reason reached its height in the individual's abandonment of particularity, with its individual reason. This allowed the individual to become truly free as part of the state. Hegel thought history to be progressing towards the perfect state: one in which the individual's will so homogenizes with the will of the state that the will of the whole becomes that of that individual. To Hegel, the best form of state was a monarchy. In this collective or corporative state, participation in the affairs of government by the individual are by virtue of their being a member of the "corporative bodies of civil society rather than as individuals, is more rational than representative democracy, in which individuals are represented merely as individuals."[77]

With the political evolutionary theory of the English philosopher Herbert Spencer (1820-1903), the plunge into the twentieth century finally arrived. His principal work on government was Man Versus the State, published in London in 1884. In brief, Spencer's view was a recognition of the right of self-preservation held by the individual. But this right was contained within a Darwinian system of survival of the fittest. The fittest individuals are not

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[77]The Encyclopedia of Philosophy, s.v. "History of Political Philosophy," by Paul Edwards.

measured in terms of strength but in how well they assimilate into a collective life. In Spencer's view, even the strongest and most intelligent of individuals would perish if completely separated from others. Society then is an essential necessity. Social life itself necessitates the restriction of individuals, but just enough to maintain the state. The highest or best life is one in which individuals would be permitted to compete in the laissez faire atmosphere contained in a system of minimum state interference. Spencer's thoughts are of limited importance but have been included because they incorporate a Darwinian evolutionary view.

In the late nineteenth century and throughout the twentieth century, there was a decline in major systematic treatises in Anglo-Saxon countries. The works of traditional political philosophers, like those contained in this text, have gone into sharp decline with the corresponding rise in political science and sociology. It is these disciplines which now propose the tentative truths about the relationship between the individual and the state.

Sociological theories of the twentieth century tend to see the expansion of the state with its increase in influence as promising individual as well as social welfare. Their mainly empirical method and outlook lead to differing views on the purpose of the state and its laws. Where some view the state and its laws as benevolent, or

at least reflective of dominant interest, others see them as alienating. Let it suffice to say that the twentieth century has produced very few truly original theories. Most of the theories are but variations on the themes which have already been presented in this text.

Closing remarks

Besides an outline of the philosophical tradition of the relationship of the individual to the state, what have the last forty pages provided in terms of the quest for a justification of the state and some explanation of the obligation to obey? Very little if the search is limited to a single theory or author. For in nearly all these theories, certain aspects of the broader subject have been overemphasized; the result is a narrow approach to a wide subject. For the most part, their theories--divine right of kings, feudal orders, ecclesiastical rule, unrestricted capitalism, and so on--are fixed in the historical circumstances of a time period and do not transfer well into the present. There was too often a tendency to draw relationships along the lines of law and morality and law and sheer force.

If we look at the question of whether humans lived alone as individuals before they lived in groups either semi-organized or organized, we find a question which philosophy had spent much time in trying to solve until

Kant eliminated the problem as far as he was concerned. But it is a question which lingered on afterwards in the reappearance of natural state theories. There is of course no definite evidence as to the origin of society. But if one looks at the primates and other animals, it would seem that some form of elementary social grouping existed long before human beings.

In justifying the already existing state and its laws, many authors display a heavy dependence upon fictitious natural law and in so doing defeat whatever truth their theories held. For "like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature."[78] But a proliferation of use is not necessarily synonymous with being fictitious. For one of the main components of the majority of the state theories presented in this text is that the foundation of a state is utility in one of its various forms. This utility is reflected in the social institutions which are the expression of the fundamental interests and activities of the individuals. Whether one wishes to limit the state's essential purpose to providing temporal peace and welfare (Aquinas), defines individuals as only being human in belonging to a social state (Aristotle), or judges the survival of the fittest in terms

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[78]Alf Ross, On Law and Justice, p. 261, as quoted in R. M. Hare, Applications of Moral Philosophy (Berkely: University of California Press, 1973), p. 97.

of the individual's ability to be assimilated into the social collective (Spencer), the fact remains that in all the views presented the state is an essential good.

If one still doubts that utility is the underlying foundation of any reasonable justification of our present state, one need only look at the example of legislators who commonly seek opinions on how much "happiness" or "unhappiness" a proposed piece of legislation would cause before voting on it. This decision process, which is based on utility, is the purpose of legislative hearings.[79] Examples are all that I can offer in the way of a proof since, as Bentham pointed out, that which is the justification and measure of all else must itself be beyond proof.

If one accepts civil society as an essential good, as anyone who by virtue of their social training can read this text must, then one also must see that civil society or the state implies the system of law as well as the means to compel obedience. Law can only be seen as a means by which the state provides the utility which is its purpose. Whether law is viewed as the result of divine inspiration, a mirror of natural laws or wholly artificial in construction does not matter. It is still at present the only means to the essential good of the state and as such is itself an essential good. Laws command and any command requires

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[79]Bronowski and Mazlish, The Intellectual Western Tradition, p. 436.

compliance or sanctions for non-compliance. It matters little to the final outcome if we obey out of self-interest (Hobbes), view the law itself as providing the obligation to obey (Locke), or whether the obligation to obey is seen contained in the original contract by whose authority civil laws are created (Kant). All that need be realized is that if the state is to accomplish its stated purpose of utility it is necessary that there be a system of laws and that these laws be obeyed. Compliance must be compelled by whatever means is socially and morally acceptable to the society in which that system functions. For without the means to assure compliance, the law would not function and the chances of the state fulfilling its function of utility would be negated. This is not dissimilar to Hobbes' view of the relationship between benefits of the state and obedience to its laws, for one can scarcely exist without the other. The means by which compliance is instilled or guaranteed, to whatever degree such compliance can ever be guaranteed, is itself a philosophical question which will be addressed in the next chapter. But whatever the means to this compliance is, this means then becomes the last link in the chain of essential goods, being itself one, because the existence of law and the state depend upon the state's ability to compel individuals to obey.

CHAPTER III

THE JUSTIFICATION OF A SYSTEM OF PUNISHMENT: CIVIL AUTHORITY CANNOT EXIST WITHOUT IT

This chapter will continue to show that the principle of utility justifies a system of compliance; it will also show that certain subspecies of utility--reform, deterrence, therapy are individually inadequate justifications.[1] In the closing pages of Chapter 2, I attempted to point out many forms of belief in utility as the justification for a state, civil authority, and law. I also showed each of these to be an essential good in themselves. This essential goodness stems from their having all been brought into existence as a means to the general good of all in society. Law was shown to be directly linked to a means to assure compliance with its commands. This chapter is meant to establish that only utility, as a general theory and not limited or fixed to any specific form, justifies a system of compliance.

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[1]Please note that within this chapter I will use the phrases "system of compliance" and "legal coercion" to replace the word punishment at certain points. This is because the subspecies of utility to be treated do not really contain systems which conform to the definition of punishment given on page two of this text. In contrast utility in its general form does accept punishment as the primary means to assure compliance.

Utility provides the criterion or principle by which it can be deduced whether a system and its aims are morally right or morally wrong. Utilitarian wisdom consists of the knowledge of what in a given social reality would on the whole produce the greatest amount of good for the greatest number.[2] The Utilitarian moral philosophy, "locates the primary justification of punishment in its social utility."[3] They ask whether legal coercion will serve either to deter, incapacitate, reform individuals or benefit society with less evil than good?[4] Seeing these proposed aims for a system, it should be apparent that the Utilitarians would question the very idea of punishment as an institution which involves deliberately inflicting pain or deprivation. The Utilitarians insist that legal coercion can be justified only if it has beneficial consequences that outweigh the intrinsic evil of inflicting suffering on human beings. The Utilitarians state: if legal coercion is to be admitted it is because it promises to exclude a greater evil. Emphasis on the consequence of legal coercion is of primary importance to the Utilitarians. It is with this

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[2]C. J. Ducasse, "Philosophy and Wisdom in Punishment and Reward," in Philosophical Perspectives on Punishment, eds. Edward H. Madden, Rollo Hardy, and Marvin Farber (Springfield: Charles C. Thomas, 1968), p. 8.

[3]Thomas A. Mappes and Jane S. Zembaty, eds., Social Ethics (New York: McGraw-Hill, 1977), p. 81. See the introduction to the section on this page by the editors.

[4]Jeffrie G. Murphy, Punishment and Rehabilitation (Belmont: Wadsworth Publishing, 1973), p. 8.

view of consequences in mind that Bentham in The Principles of Morals and Legislation says:

> The case is, that it (the crime) never does stand alone; but is necessarily followed by such a quantity of pain . . . that the pleasure in comparison of it, is as nothing: and this is the true and sole, but perfectly sufficient, reason for making it a ground for punishment[5]

As stated earlier, there are those Utilitarians who point to only one kind of beneficial consequence--deterrence, or reform, or therapy--and claim that it, by itself, justifies punishment. I argue below that none of these consequences is an individually adequate justification.

The justification of punishment is not deterrence alone

Beccaria was the first important thinker to devote himself to the study of crimes and punishment. He reduced all punishment to deterrence by using imprisonment as the sole punishment if any punishment was needed. But it has been many years since the hopes of Beccaria that the education of the Enlightenment would deter crimes. But the question still remains for proponents of this theory: what will deter the individual from committing a crime? The basic idea of deterrence then is assumption that individuals act on the basis of rational self-interest. Will the

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[5]Jeremy Bentham, An Introduction to The Principles of Morals and Legislation, in Approaches to Ethics, eds. W. T. Jones, Fredrick Songtag, Morton O. Becker and Robert J. Fogelin (New York: McGraw-Hill, 1977), p. 499. (Approaches to Ethics hereafter cited as Approaches)

deterrence theory work? Dostoyevsky saw the very idea as ridiculous. Consider the following quotation.

> But these are all golden dreams. Oh, tell me, who was it first announced, who was it first proclaimed, that man only does nasty things because he does not know his own interests; and if he were enlightened, if his eyes were open to his real normal interests, man would at once cease to do nasty things.[6]

Dostoyevsky was not the first to raise objections to the deterrence theory. Rousseau thought that there were those who would see the advantages of others obeying the laws while they disobeyed them. But even these criticisms would seem to accept the premise that individuals act out of rational self-interest, a fact I am unwilling to accept. In order for deterrence to work, the criminal must rationally think out the crime before committing it. The criminal must think not only of the possible gain but also of the possible penalty. This I believe in most cases is never done. Violent crimes, for example, are often crimes of passion, and this passion renders the criminal incapable of any rational calculation of the kind deterrence would require.

Another major criticism of deterrence is that it looks not at what legal coercion is appropriate for a certain crime, or what form and length of coercion is deserved by the criminal, but looks to what degree of severity of

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[6]Fyodor Mikhailovich Dostoyevsky, Notes from the Underground, Poor People, and The Friend of the Family, trans. Constance Garnett (New York: Dell, 1969), p. 41.

coercion will deter the criminal and others from committing similar crimes.[7] The deterrent theory can be criticized as immoral precisely because it does not consider desert, it treats individuals as things and not as persons. In Kantian terms, individuals are not treated as ends in themselves but as means to an end.[8] To be justified, legal coercion requires a looking back to determine the degree of the crime and the appropriate coercion, not looking forward with the idea of deterring others. Since the deterrence theory does not consider desert and responsibility and does not allow for the consideration of settling of old scores or the righting of the unbalanced scales of social justice, it is difficult to see why only the guilty should be coerced. For deterrence, at least, it is quite obvious that legal coercion, usually in the form of punishment, of the innocent will work very well. This punishing of the innocent will deter if the public is led to believe the person being punished did commit the crime in question. It is true that very few utilitarians, if any, would support such a thing but it is herein used to show the abuse potentially contained in such a system. These potential abuses can come about because deterrence make "moral judgements into a

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[7]Walter Berns, For Capital Punishment: Crime and the Morality of the Death Penalty, (New York: Basic Books, 1979), p. 84.

[8]Mitchell Franklin, "The Contribution of Hegel, Beccarria, Holbach and Livingston to General Theory of Criminal Responsibility," in Perspectives, p. 101.

sub-class of psychological or sociological judgements,"[9] not considering if these judgements conform to justice. Punishment, though, should not be given strictly to deter; no man should be deprived of his life, his liberty, or his property simply in order that others might be deterred from committing a crime sometime in the future. The deterrence argument depends on certain a priori assumptions about criminal behavior that may be entirely false. The deterrence theory frames its judgements of value on the basis of consequences derived from the conclusions of scientific models of human behavior.[10] But, these models of behavior may be totally false. There are other abuses to which deterrence is open. One can point out that the punishment of everyone would serve to prevent crime since having experienced punishment each would be less likely to commit a crime than if each had never had such an experience with punishment. Further, it would not be inconceivable that punishing a criminal's family and friends, or what sociologists refer to as the primary group, would be used to deter since this would bring direct personal and social pressure to bear upon the criminal. This might even be viewed as having the advantage of making all those touched by this punishment less likely to commit such a crime themselves.

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[9]Alfred Jules Ayer, "Language, Truth, and Logic," in Approaches to Ethics, p. 422.

[10]Ibid., p. 370.

The last criticism is based on the fact large numbers of criminals go unpunished, and so the deterrent value of punishment is very little. Some have put the percentage of those serious crimes which go unpunished as high as 98.3 percent. To them "the question is not why so many persons commit crimes but why so many persons do not commit crimes."[11] Deterrence, then, fails on several grounds: practically speaking, there is nothing to prove it works, and morally speaking, when applied as the justification for a system of punishment, it cannot meet the criteria of justice.

The justification for punishment is not reform alone

The reform theory is not new. As early as the eighteenth century, great thinkers like Benjamin Rush were proposing that the first purpose of punishment was to reform those it is inflicted upon. During this early period of the penitentiary system, there was an absolute confidence in the "right of society to punish and through punishment reform."[12] "Penitentiary" implies repentance and through repentance reform; but there were many who saw the system doing little of either. Charles Dickens in the mid-nineteenth century wrote that the penitentiary system was

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[11]Berns, For Capital Punishment, p. 52.

[12]Ibid., p. 112.

inflicting immense amounts of agony with no discernible benefit. He could not find one person whom he believed to have repented or been reformed within the walls of any penitentiary.[13] Reform is the basis for sentencing a criminal to imprisonment in "an attempt to manipulate him psychologically for the good of society."[14]

Inexorably tied in with the modern notion of reform is rehabilitation; the two having very similar goals, the general public considers them as one and the same. Where reform can be spoken of as possible by self-effort, rehabilitation implies programs. It is possible then to view reform as the initial personal stage of a rehabilitative effort. But whether they are viewed as component parts or separate entities matters little to the consequences of using them as the basis for justifying a system of legal coercion. Indeed, neither of them is a system of punishment, but a system of treatment.[15] This treatment approach allows these theories to avoid the question of moral responsibility and also avoid the question of what the criminal

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[13]Ibid., pp. 55-56.

[14]C. J. Ducasse, "Reply to Comments," in Perspectives, p. 33.

[15]See criteria for conceiving an act as punishment on page two of this text. Indeed the terms "punishment" and "treatment" imply very different ideas. The former suggests retribution but at the least implies the deliberate infliction of suffering or deprivation. The latter seeks to reform and rehabilitate, using suffering and deprivation only insofar as they aid in the realization of their final goals.

deserves. Reform and rehabilitation avoid all this by asking not what punishment is justifiable but what treatment is needed to rehabilitate the offender. For this reason, these systems are open to the same abuses pointed out under the deterrence system. If forms of psychological manipulation which do not require conscious participation by the criminal (such as electro-shock and lobotomy) are excluded, as I believe they must be because they do not conform to justice, then a great contradiction arises in these reformative theories. This contradiction is that in order to be reformed or rehabilitated the recipients of treatment must acknowledge that they are law breakers and that the state has the right to inflict this "punishment" on them. But these very systems, which require a free rational choice to admit their transgression deny them their very existence as rational beings possessing free will to determine their life's course. Here, when I speak of will, I use it in a Kantian sense of being "practical reason"[16] and because individuals are seen as possessing this rational will they "can never be manipulated merely as a means to the purpose of someone else."[17] As stated, these systems would deny that individuals have the ability to judge what is right or wrong for

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[16]Epicurus, "Letter to Herodutus," in Approaches, p. 75.

[17]Robert S. Gerstein, "Capital Punishment-'Cruel and Unusual'?: A Retributivist Response," Ethics 85 (1974): p. 77.

themselves. Instead, these systems would reprogram individuals because such rational judgements may come into conflict with the aims and goals of society. Can we deny the dignity of the individual as a rational being in an attempt to resocialize or correct some perceived maladjustment? Can we further still hope that these systems of treatment will produce the god-like individuals Benjamin Rush hoped for? Are we willing to go so far as Ramsey Clark, attorney general of the United States under Lyndon Johnson, and say that with rehabilitation as the goal of modern corrections we could reduce recidivism by fifty percent and moreover, prevent nearly all crimes now occurring in America?[18] But when data of nearly 231 studies which dealt with hundreds of thousands of individuals were analyzed and evaluated for the city of New York they showed that "nothing works." These studies "give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation."[19] It is not uncommon to hear of brutality within prisons. When prison is said to be a brutalizing, crime-breeding environment, it is not the institution which causes these conditions but the inmates. With these conditions, the institution can not rehabilitate and was never designed to do so. Another tendency which reform and

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[18]Berns, For Capital Punishment, p. 65.

[19]Robert Martinson, "What Works?-Questions and Answers about Prison Reform," The Public Interest (Spring, 1974): 49 quoted in Berns, For Capital Punishment, p.67.

rehabilitation have is their dependence on the social sciences to discover "what punishments, if any, are effective as reformatory . . . devices."[20] Here is the trend to turn over to the so called experts the handling of criminals. This tendency towards expertise will be covered in the next subsection.

The justification for punishment is not therapy alone

Plato said that it is as expedient that a wicked man be punished as that a sick man be cured by a physician, for all chastisement is a kind of medicine. Those who believe in therapeutic rehabilitation could not agree more with Plato. A therapy system rests on the kind of belief in modern sciences that was spoken of earlier in connection with Benjamin Rush. Indeed it is Rush's portrait that is a part of the seal of the American Psychiatric Association.[21] Those who support therapy as the overall justification for a system of punishment believe that imprisonment for the purpose of punishment is totally misguided and that what the convicted need is treatment. In the therapeutic view, the convicted are mentally or psychiatrically ill. The same needs and drives which stimulate others to socially

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[20]Richard A Koehl, "Professor Baylis and the Concept of Treatment," in Perspectives, p. 50.

[21]Berns, For Capital Punishment, p. 50.

positive actions lead them to anti-social actions, so something must be wrong with the individual. Since these individuals can not function in society in this condition of sickness, it is the duty of society to subject these individuals to treatment. Those supporters of therapeutic rehabilitation would go so far as to suggest that the entire penal structure could be done away with. Their hope for the future is that the "guard and the jailer will be replaced by the nurse, and the judge by the psychiatrist, whose sole attempt will be to treat and cure the individual."[22] The proponents of therapy tell themselves that their "treatment" is not punishment. They do this by differentiating between punishment and hardship for some other purpose. But is not the end result the same? Indeed, to the individual whose body and psyche are to be interfered with without his consent, there will seem little difference. The plain truth is there can never be a complete dichotomy between punishment and treatment. Although the psychoanalyst would prefer to label this suffering as "self inflicted" or "internal punishment", it is nevertheless punishment without the proper justification.[23]

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[22]Benjamin Karpman, "Criminality, Insanity, and the Law," Journal of Criminal Law, Criminology and Police Science 30 (January-February, 1949): 605 as quoted in Berns, For Capital Punishment, p. 69.

[23]These ideas are found under several authors. See Perspectives, pp. 29, 31, 52, 56.

The system is a mass of potential misuse and would be a massive destroyer of the legal system and its safeguards. It invites preventive and indefinite detention and conflicts with individuals' liberty and due process.[24] This is because one may be held until he is "cured" or until he is no longer considered a menace to the safety of others.[25] Many psychiatrists even feel the system dangerous. Thomas Szasz maintains "that the rehabilitative ideal is politically dangerous (potentially totalitarian) because the notion of 'mental illness' on which it rests is an expression of evaluative preferences (moral, political, and ideological)."[26] But these are not the only dangers of such a system, for if therapy were adopted as the sole motivation of the criminal system, at least three major dangers would exist as pointed out by Morris:

> 1. In a preventive and curative ideology, there would be less reason to wait until symptoms manifest themselves in socially harmful conduct.
>
> 2. The law (in the case of jury trials) would be taken away from the people and given to the "experts" who would make the determination of disease and treatment.
>
> 3. All those principles of our own (present) legal system that minimize the chances of punishment of those who have not chosen to do acts violative of the rules tend to

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[24]Murphy, Punishment and Rehabilitation, p. 12.

[25]Ibid., p. 15.

[26]Ibid., p. 11.

> lose their point in the therapy system for, we respond to the symptoms he has manifested not to what he has chosen.[27]

There are other dangers in addition to those pointed out by Morris. One was pointed out by professors Barzun and Hook, that there are many who commit crimes and some who do not who would and must be labeled as "incurables."[28] Rehabilitative treatment would see nothing wrong in giving individuals with bad characters severe courses of treatment for trivial offenses, if they would be better for it in the end. Treatment also denies individuals the ability to choose, by free will, the course of their lives. The concept of pathology precludes any respect for the right of individuals to retain their judgements. Furthermore, under such a therapy system, "we could take credit for nothing but must always regard ourselves--if anyone is left to regard once actions disappear--as the fortunate recipients of benefits or unfortunate carriers of disease who must be controlled."[29] Even if these dangers and others did not exist, there is no proof that the therapeutic techniques of today are even close to adequate.[30]

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[27]Herbert Morris, as quoted in Murphy, Punishment and Rehabilitation, pp. 49-50.

[28]Hugo Adam Bedau, "Death as Punishment," in Social Ethics, p. 104.

[29]Murphy, Punishment and Rehabilitation, p. 50.

[30]Mappes, Social Ethics, p. 80.

The difficulties of the therapeutic rehabilitation system go to its very foundation. At present, "there is no objective standard of mental health available to serve as a measure against which behavior may be identified as deviant or normal."[31] Indeed, there "is no reason to believe that psychiatrists can determine who is 'mentally ill' or predict who requires involuntary care and treatment any more reliably and accurately than they can make other diagnoses and predictions."[32] The supporters of therapy seek to present it as an improvement by use of the suggestive analogy with medical treatment and subsequent placement of criminal behavior in the category of disease.[33] But this illusion of improvement vanishes when we consider that the system denies the normality of crime and the normality of a very high percentage of those individuals who commit them. As an example of this, Adolf Eichmann was examined by several psychiatrists and was pronounced, "according to the best scientific standards, completely normal."[34] Yet who

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[31]Koehl, "Professor Baylis and the Concept of Treatment," in Perspectives, p. 52.

[32]Bruce J. Ennis and Thomas R. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," California Law Review 62 (1974): 701-2, 713, 748, as quoted in Berns, For Capital Punishment, p. 71.

[33]Koehl, "Professor Baylis and the Concept of Treatment," in Perspectives p. 51.

[34]D. Bush, Engaged and Disengaged (Cambridge: Harvard University Press, 1966), pp. 224-5 as quoted in Perspectives, p. 92.

among us would deny him to be a criminal? Being normal, would Eichmann have gone free under a system of therapy? Indeed he would, for if we are to have only a system of therapy, we must concede to it "the right to decide by empirical test what the psychological and social consequences"[35] of release or non-treatment would be. Being normal Eichmann would go free.

In concluding this subsection, I must state as others have that "no legal rule should ever be phrased in medical terms [and] no legal decision should ever be turned over to the psychiatrist."[36] Treatment denies the individual is a rational being capable of making decisions, and denies the concept of measure or proportionality of social reaction in relationship to the individual's committed offense.

The justification of punishment is more general: the state cannot exist without it

In this chapter, I first endeavored to continue to to show the meaning of the general concept of utility. Next, I tried to show those subspecies of utility, which I covered, to be inadequate to the task of justifying a system of insuring compliance. I strongly believe that only

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[35]Peter H. Hare, "Should We Concede Anything to the Retributivist?," in Perspectives, p. 85.

[36]Ennis and Litwack, "Psychiatry and the Presumption of Expertise," in Berns, For Capital Punishment, p. 695.

utility as a general principle can provide the necessary justification for the only system of insuring compliance that meets our present social and moral reality. That system is one of punishment based on the notion of justice. Only the general precepts of utility are flexible enough to provide justification for such a system while allowing individual cases to be decided by concepts which recognize the dignity of the individual. Only it fits well with our social notion of justice. Other more specific forms of the principle (deterrence and reform) would lead to a system which is unjust on the one hand and impractical on the other. In the next chapter, I will attempt to show why we use punishment as a response to particular cases of criminal violations.

CHAPTER IV

ONLY A RETRIBUTIVE SYSTEM OF JUSTICE WILL MEET THE PRACTICAL AND MORAL NEEDS OF THE STATE

Within this text, I have endeavored to show the need for the law to promote the good of, and provide for the protection of, society and those individuals which comprise it. But what do we do to those who have been found guilty of acts in violation of the law? We punish them.

> But why? To rehabilitate them? The very idea is absurd. To incapacitate them? But they represent no present danger. To deter others from doing what they did? That is a hope too extravagant to be indulged."[1]

As for myself and anyone else who believes that they should be punished, the answer must be to pay them back for their offense. The system which philosophically represents this common sense idea of punishment is the theory of retributive justice.

A further discussion of the other alternative theories of why we punish will not to any real degree be included within this chapter. The arguments seen in the previous chapter and those I will present in chapter six

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[1]Walter Berns, For Capital Punishment: Crime and the Morality of the Death Penalty, (New York: Basic Books, 1979), p. 8.

cover the shortcomings of these other theories. I will then limit my area of concern within this chapter to the principles represented within the definition of retribution and to the discussion of it as a theory for the justification for particular actions taken under a system of legal coercion. This discussion will consider some of the problems and advantages the retributive theory has over other possible theories as a justification for individual acts of punishment. It is my belief that the sum of these advantages shows that particular decisions about punishment must be based upon the retributive theory in order to satisfy justice. I believe that if one were to disregard all the by-products or benefits I shall show retribution to have, it would still be the only viable justification for particular acts of punishment. This viability stems from the fact that it is a good-in-itself to punish those who have committed a crime, such punishment being a species of justice.

A retributive system allots proportional punishment for their actions

The retributive theory is often thought of as having its origin as a justification for punishment by which the laws are enforced. But in reality, it is a concept which predates law or even governments. Originally retribution referred to acts taken by one individual upon another. This basic view of punishment was outlined in the Old Testament concept of lex talionis or the law of talion.

The Bible outlines to us that " . . . he who kills a man shall surely be put to death."[2] The Biblical idea of inflicting exactly the same harm or loss can be seen in the statement "if a man causes disfigurement in his neighbor, as he has done, so shall it be done to him; fracture for fracture, eye for eye, tooth for tooth [and loss for loss] a son for a son, a daughter for a daughter, slave for slave, ox for ox."[3] The law of talion served not only the primitive sense of justice of our ancient ancestors but was also effective in dispelling the personal, family, and social rage created by an offense. It is this ancient meaning of retribution which has brought the criticism that it is merely a fancy word for revenge. Gerstein argues that this mistake of seeing revenge and retribution as the same is a natural one or at least made "understandable by the fact that there are connections, historical and conceptual, between the two ideas."[4] But it is mistake to view these two as the same because one "misses the enormous and crucial differences between them."[5] Gerstein further states:

> Vengefulness is an emotional response to injuries done to us by others: we feel a desire to injure those who have injured us. Retributivism is not the idea that it is good to have

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[2]Leviticus. 24:17.

[3]Leviticus. 24:19, 20.

[4]Robert S. Gerstein, "Capital Punishment-"Cruel and Unusual"?: A Retributive Response," Ethics 85 (1974): 76.

[5]Ibid., p. 76.

> and satisfy this emotion. It is rather the view that there are good arguments for including that kernel of rationality to be found in the passion for vengeance as part of any just system of law.[6]

The kernel of rationality which Gerstein refers to is that in punishment the general public finds both the satisfaction of their desire for revenge and the displacement for their feelings of anger. Both of these are important considerations for any legal system which hopes to eliminate the feeling that personal revenge is necessary. So in retribution we find the much earlier notion of punishment directed in part to the public concern about the seriousness of offenses. Such an accounting is necessary if law is to be enforceable. For law which is too far ahead of the general public's sense of morals will lack their support. Law must reflect what the public thinks and feels. Historically it appears that retributivism has always been the major concept behind any system of legal coercion. We must therefore concede that retributivism in its various historical forms has always conformed to the feelings of the majority of the general public. But it is a mistake to believe that retributivism must stick to the law of talion or any of the other narrow historical interpretations. The quotes from Gerstein above should have been a clue that the ancient concepts are no longer at the heart of retributive theory. Current retributive theories have replaced

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[6]Ibid., p. 76.

the law of talion with the concept of legal proportionality. What this means is that there must be proportionality between the severity of the punishment and the severity of offense committed.[7]

The ultimate foundation of all modern retributive theory is that there can be no other justification for allotting particular punishments than that a person has committed an offense and is deserving of the punishment. The retributive system allows only for the punishment of those who either with mens rea or through neglect have committed a crime and is opposed to punishing the individual who commits an offense through ignorance or accident. This opposition advanced by the modern retributivist is in contrast to views like that of Hobbes when he states:

> It is reasonable to punish a rash action, which could not be justly done by man to man, unless the same were voluntary. For no action of a man can be said to be without deliberation . . . because it is supposed he had time to deliberate all the precedent time of his life, whether he should do that kind of action or not and hence it is, that he that killeth in a sudden passion of anger, shall nevertheless be justly put to death, because all the time wherein he was able to consider whether to kill were good or evil . . . and consequently the killing shall be judged to proceed from election.[8]

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[7]The concept of proportionality is found in the works of several authors, see Edward H. Madden, Rollo Hardy, and Marvin Farber, eds., Philosophical Perspectives on Punishment, (Springfield: Charles C. Thomas, 1968), pp. 13, 24, 66.

[8]Thomas Hobbes, "My Opinion About Liberty and Necessity," in Approaches to Ethics, eds., W. T. Jones, Friederick Sontag, Morton O. Becker and Robert J. Fogelin

The modern retributivist demands that those punished meet the terms of legal guilt. These conditions would afford some protection to those who commit an act which can be classified as any of several crimes depending on the degree or amount of guilt. Such a distinction Hobbes would not seem to allow.

Now that the core definition of retributive justice is known to the reader, I may proceed to survey some of the problems and also some of the benefits produced by the use of the retributive theory as a justification for particular acts of punishment within a system of legal coercion. Such a survey is important because in looking at any proposed justification for particular acts of punishment, it is nearly impossible to separate the justification from the beneficial consequence which accompany its use. These benefits I feel must be considered in any decision to support a theory of punishment in relationship to particular cases. In every case except that of the retributive theory, such beneficial consequences are the main justification for their existence. Only retribution seeks to justify punishment in particular cases upon guilt and desert. The following subsections will look at the problems and benefits of the retributive theory. This will be done in terms of both the theory itself and those beneficial consequences stemming from its use.

(New York: McGraw-Hill, 1977), p. 187.

Retributivism holds offenders responsible for their actions

Some see a problem in retribution's reliance upon the concept of guilt as a criteria for punishment. The critics of the retributive theory claim that no one can even judge their own guilt, so how can they be expected to measure out punishment upon the guilt of others? They further criticize that guilt hinges upon what a person knows, or what society believes every person should know. The anti-retributivists say we can never be clearly sure that an offender knew what we supposed him to have known at the time of the offense.[9] The concept of guilt is now and has always been an integral part of the retributive theory. It must be admitted that guilt is not always easy to prove, but it is far from impossible as the critics of retribution would have us believe. We have been socially raised to recognize guilt both in ourselves and in others. This social education is a fact so elementary to the readers of this text as to be, in my opinion, undeniable. The necessary connection between punishment and guilt was dealt with by F. H. Bradley in his essay entitled Ethical Studies:

> Punishment is punishment only where it is deserved. We pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying

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[9]Brand Blanshard, "Retribution Revisited," in Perspectives, pp. 78-79.

> injustice, an abominable crime, and not what it pretends to be.[10]

The retributive concept of criminal responsibility or guilt recognizes self-determination. This recognition allows the offender to be a subject of the law and not an object of the law.[11] This concept of the offender as a subject of the law constitutes an important moral advantage because it recognizes the dignity and rationality of the offender. This recognition allows, among other things, that we may speak of punishment as the criminal's right and hence by being punished the criminal is honored as a rational being.[12] It also allows the retributivist to speak of punishment as being indirectly willed by the offender. In Kantian terms, what the offender wills is a punishable action. In effect, the offender voluntarily commits a crime which has attached to it punishment. The criminal therefore can be regarded as rationally willing though not

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[10]F. H. Bradley, Ethical Studies (Chicago: Clarendon Press, 1927), pp. 26-27.

[11]Mitchell Franklin, "The Contribution of Hegel, Beccarria, Holbach and Livingston to General Theory of Criminal Responsibility," in Perspectives, p. 95. Note this principle is basically one-half of Hegel's dialectic of human responsibility. Hegel saw responsibility as both self- and other-determined due to the alienation caused by the system of private property. This alienation does not effect legal responsibility within this text and will not be dealt with further.

[12]Georg Wilhelm Friedrich Hegel, Philosophy of Right, ed., T. M. Knox (Oxford: Clarendon Press, 1942), sec. 100.

empirically choosing of the punishment.[13]

A concept of punishment based upon guilt also has the advantage of making offenders see themselves as they are: transgressors against a system of laws upon which they themselves have to and do depend.[14] This social theory of obligation can be found in the works of Immanuel Kant, John Rawls, Herbert Morris and other legal thinkers. It basically consists of the assertion that in order to receive the benefits that the social and legal systems make possible, each individual must be willing to make the sacrifice of obeying the law even when it seems not in his interest to do so.[15] The benefits of noninterference are conditional upon the assumption of both legal and social burdens. Retributive punishment provides protection for those who do not voluntarily renounce the burdens that society requires all to assume. This justification, which contains guilt, thus conforms to and reaffirms the concept of fairness or justice. For it is fairness which dictates that the social system equally distribute and prevent maldistribution of its benefits and burdens. Only this type of system would provide each individual with a sphere of interest immune

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[13]Jeffrie G. Murphy, Punishment and Rehabilitation, (Belmont: Wadsworth Publishing, 1973), pp. 35-38.

[14]The importance of this recognition will be made clear in the up-coming subsection on general prevention.

[15]Jeffrie G. Murphy, "Three Mistakes about Retributivism," Analysis (April 1971), p. 166.

from the interference of others. Simply restated, justice or fairness requires that those who cause an unfair distribution of benefits and burdens by committing a crime be punished. Punishment restores the balance by either assigning additional burdens, denying benefits to the offender or by doing both.

Retributism recognizes the rights of offenders

Retributivism is seen by myself and others as providing a variety of safeguards or rights. Because of these safeguards or rights provided to individuals, in order that they may be treated as truly rational human beings, it is possible to speak of punishment as a right of the offenders. A proponent of this view, Herbert Morris breaks the right to punish down into four reasons:

1. That we have a right to punishment.
2. That this right derives from the fundamental human right to be treated as a person.
3. That this fundamental right is . . .[an] inalienable and absolute right.
4. That the denial of this right implies the denial of all rights and duties.[16]

Morris, like Kant, Hegel, and myself, argues that the criminal has the right to be punished. By this it is meant that a person has a right to all those institutions and practices linked to the present retributive system of punishment. A

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[16]Murphy, Punishment and Rehabilitation, p. 41.

person has the right to the institutions that respect his or her choices. The retributive system does; reform, deterrence and therapeutic rehabilitation do not. In a system of retributive justice, individuals who commit crimes may argue that they have done the right thing. Retributive justice makes them pay the penalty for their actions but respects their right to maintain their judgement. This reaffirms them as being rational beings even though they are in violation of the law. A further example of this treatment of individuals as rational beings can be seen in the fact that in a retributive system there is a far greater ability to predict what will happen to offenders on the occurrence of a criminal conviction. This, in sharp contrast to the other proposed systems, would allow the potential criminal to weigh the cost of his actions against the gain. The recognition of such ability to choose once again confers upon the individual the rational ability to decide his or her own life's course.

A retributive system safeguards and affirms social values

The current reinforcement of society and its values no longer depend upon the fear of God. Instead modern man must fear a more present danger: punishment. It is punishment which philosophers like Beccaria and Hobbes believed must "provide the moral education that the law itself may

not provide."[17] It is this burden of "providing or promoting the moral or civil training"[18] which the law and punishment are an essential part of. Such a goal of education can not be totally dependent upon the fear of punishment. Punishment and the law today do more; they must teach members of society not to indulge themselves at the expense of others. The capability of law and punishment to accomplish this goal of education is referred to as "general prevention."

General prevention is not deterrence; it functions "rather by inculcating law-abiding habits."[19] A Norwegian criminal lawyer, Johannes Andenaes, is the most noted exponent of general prevention. Andenaes speaks of the punishment within this theory as being "a concrete expression of society's disapproval of an act."[20] Such disapproval "helps to form and strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime."[21] But in order for punishment to accomplish the goal of general prevention,

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[17]Berns, For Capital Punishment, p. 141.

[18]Ibid., p. 143.

[19]Ibid., p. 143.

[20]Johannes Andenaes, "General Prevention- Illusion or Reality?" Journal of Criminal Law, and Police Science 43 (July-August 1952), p. 179. as quoted in Berns, For Capital Punishment, p. 143.

[21]Ibid., p. 143.

punishment must be seen as conforming to the principles of justice. We have seen that only the theory of retributive punishment meets this conformity requirement. If punishment is given for any other reason than that it is deserved, it has no chance of strengthening the habit of law-abidingness.

Related to general prevention is Hegel's view of punishment as necessary to annul the wrong done by criminals. These criminals have upset the balance of moral order, which can be restored only by their being made to suffer legal punishment. In terms of the dialectic, crime is a negation of right and as such a nullity; punishment negates the negation, thus reaffirming the right. Hegel plainly refers to "reaffirming the right." This, to me, refers to showing other members of the society what is expected of them so they, as free rational beings, are able to choose between obeying the law and doing anything else they may wish to do. Here I believe Hegel is speaking of instilling values or internalizing the seriousness of crime.[22] This is precisely what general prevention is meant to accomplish. Lord Justice Denning saw punishment as the emphatic denunciation by society of a crime. So in this view also, punishment reinforces the community's respect for its legal and moral standards, which criminal acts would

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[22]Steven Goldberg, "On Capital Punishment," Ethics 85 (1974): 70-71.

undermine if they were not denounced by punishing the guilty. Punishment, in terms of these views supporting general prevention, can be seen as serving two ends: it punishes the criminal and rewards the law-abiding by satisfying their anger. This rewarding also teaches or reinforces law-abidingness. Whether one views punishment in terms of negation of wrong or social denunciation does not change the fact that these aims can only be accomplished if the punishment is seen as being deserved because of guilt, and is proportional to that guilt, and for no other reason.

Closing remarks

In this chapter, I have tried to inform the reader that the term "retributivism" has been attached to a variety of theories during the course of history. Theories of this type have only one key similarity: each claims that the only justification for punishment on an individual basis is that a punishable offense has been committed. The advantages of retributivism as a theory conforming to the principles of justice were pointed out in order to reestablish that retributive punishment is a subspecies of justice because it is a good-in-itself that the guilty should be punished. I have explained what retributivism means; defended it against the charge that its centeral concept, "guilt", is unusable; showed that its use reinforces a

system of rights; and that it is a form of respecting persons as persons.

Further arguments for the use of retributivism will be contained in both chapters five and six, where retributivism will be dealt with in relationship to the inflicting of the death penalty.

CHAPTER V

A RETRIBUTIVE SYSTEM MUST INCLUDE THE DEATH PENALTY

In this chapter I will first present a brief outline of the history of the death penalty. This will be done in an effort to show that its imposition has changed during history to reflect the conditions and capabilities of society. This discussion will merge into a brief look at a few key figures in the early abolitionist movement and their views moving forward to the basic views of the present. Next, I will discuss the necessity for the inclusion of the death penalty in a retributive system of punishment, having shown in chapter four that only a retributive system is justified.

The death penalty has been widely used throughout history

In viewing ancient literature, I am led to believe that the origins of the death penalty are as old as those of society.* From the beginning of recorded history to the present, the vast majority of socio-political orders have utilized the death penalty as their ultimate response to criminal offenses. Historically, the death penalty or

capital punishment grew out of various philosophical and religious concepts, for example, the retributive theory of punishment. It was the primitive cousin of this theory, revenge, which we saw in chapter four to be the main purpose behind the imposition of the death penalty in ancient cultures. In the land of our western heritage, Europe, we can easily view the changing role of the death penalty. In the early Middle Ages, the redress for crime was mostly by the imposition of fines. In the late Middle Ages, one can see a rise in use of the death penalty to annul crime. By the fifteenth century, there had been a vast increase in the number of poor and propertyless and with them an enormous increase in crime and a new problem. The problem was that the previous systems of fines would no longer work. This new social need led to the imposition of the death penalty for a wide variety of crimes. Indeed, during the fifteenth century there is good cause to believe it was the most used of all punishments.

The coming of the sixteenth century did little to change the situation. In England during the reign of Henry VIII, over 70,000 convicted thieves were hung. During the reign of Elizabeth I frequent use of the death penalty continued. It was imposed on thousands for crimes ranging from murder to being a person of no wealth, no property, and no job, a vagabond.* These were times of superstition and magic in which the death of the criminal was believed to appease

evil spirits. The main thrust of punishment during this time of widespread poverty was not to deter crime but was to eliminate criminals. The penalty was carried out in public during this time but is believed to have had little effect in deterring crime.

Near the end of the seventeenth century with the advent of the first penal facilities came the initial questioning of the morality of the death penalty. Before the advent of these facilities designed to secure a criminal for indefinite periods of time, there had been no real alternative to the death penalty and hence few questions about its validity. When questions did arise in Europe they did not totally stem from the new humanism of the time but in part grew out of several quite unhumanistic factors. The potential labor force prisoners could become was one of these reasons. The decrease in population in Europe and the need for individuals to send to the American colonies were others. But there were voices raised against the death penalty on religious and moral grounds as well. In the works of the Quaker George Fox, Thomas More, Montesquieu and Voltaire can be seen some abolitionist doctrines.

The publication in 1764 of Cesare Beccaria's On Crimes and Punishment, to many historians, marks the true beginning of the abolitionist movement. In one chapter of that work, Beccaria put forth a view of the death penalty which was in tune with the new Enlightenment. This

Enlightenment, he believed, would produce a liberal state where there would be no need for the death penalty. The main thrust of Beccaria's argument was that the death penalty was unnecessary and inappropriate, mainly because it did not deter crime.[1] To support his conclusion, Beccaria cites as evidence that in countries where the death penalty was not imposed there was, in his belief, no increase in the murder rate. He looked to the Enlightenment and its new sciences not to control anger and the desire for retribution but to eliminate them.[2]

In America, the movement to abolish the death penalty was spearheaded by Dr. Benjamin Rush. Rush is also credited with being responsible for the movement which led to the establishment of the first American penitentiary in 1790. Rush, like Beccaria, believed the Enlightenment would transform human society and eliminate the need for capital punishment. To him, criminality was a disease which could be treated and cured in the new penal

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[1]Arguments, like those of Beccaria, based on the lack of deterrent value found in the death penalty comprise the first of two major categories into which nearly every argument against the death penalty may be put. The second of these categories contains all arguments based upon the belief that the death penalty is outdated, uncivilized, cruel and unusual, in general that it does not reflect the present stage of social development with its increase in humanity.

[2]Walter Berns, For Capital Punishment: Crime and the Moralty of the Death Penalty (New York: Basic Books, 1979), pp. 41, 113.

institutions through the process of reform.

In 1791, France was the site of what can perhaps be called the first formal debate of the merits of the death penalty. It was followed many years later by similar debates in other European countries.[3]

It would take some sixty years for the efforts of American abolitionists to make themselves seen in any real concrete way. Finally, in 1846, Michigan abolished the death penalty for all crimes except treason. In 1852 Rhode Island, and Wisconsin in 1853 became the first states to totally abolish the death penalty. In the latter half of the nineteenth century many European and Scandinavian countries would either abolish it or severely limit its use.[4]

In America during the twentieth century several states would abolish the death penalty, but many of these would within a few years reinstate its use. The net outcome of this seesawing today leaves only about ten states without laws authorizing the death penalty. The abolitionist movement in Europe during this time was also having its effects. By 1957 Britain, who as we saw once executed criminals for nearly any crime, reduced to five the number of crimes for which the death penalty could be imposed. But the worldwide efforts of the abolitionist movement were far from

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[3]Finn Hornum, "Two Debates:France,1791, England, 1956," as quoted in Capital Punishment, ed. Thorsten Sellin (New York: Harper & Row, 1967), pp. 55-76.

[4]Sellin, The Death Penalty, pp. 138-156.

being successful. In the early 1960's, the death penalty could still be judicially imposed for major felonies in some 128 countries throughout the world.[5]

Nihilist objections to the death penalty are self-refuting

In 1960, the French essayist and novelist Albert Camus published his essay entitled Reflexions sur la peine capitale (Reflections on the Guillotine). This essay against capital punishment was a continuation of his attack against the social concepts of justice and guilt which are used to make moral distinctions in regard to legal matters. He had dealt with what he believed to be the impossibility of human value distinctions in The Stranger. In The Stranger, his nihilistic attitude towards social values is openly present up until the closing of the novel when the morality he has denied comes pouring forth. Camus argued against the death penalty because he believed society had lost "truth": the one principle that was superior to man by which the penalty could have been justified.[6] To him, the penalty tore at the very principle which binds individuals into a society, their solidarity against death.[7] Camus' arguments can, in my opinion, be eliminated by

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[5]Stephen Schafer, Introduction to Criminology (Reston: Reston, 1976), pp. 196-197.

[6]Berns, For Capital Punishment, pp. 7, 160.

[7]Ibid., p. 161.

forcing him to adhere to his own theory which denies moral indignation to individuals.[8] Also, without an awareness or the possession of "truth" how can Camus criticize the death penalty in a universe which he defines as benignly indifferent to the values of human kind? Despite the possible objections to it Reflections on the Guillotine had wide social impact and was acclaimed and recognized by receiving a Nobel prize.

One of the most ardent of the modern abolitionists is Thorsten Sellin. For over 25 years he has written in an attempt to have the death penalty abolished in America. His arguments stem from both the major categories and many of them will be dealt with in the next chapter. Two of his major works, The Death Penalty and The Penalty of Death, present a less passionate case against the death penalty than Camus. Sellin, unlike Camus, attacks retribution as the justification for punishment. This, added to his extensive use of statistics to prove the death penalty is not effective as a deterrent, produces a somewhat convincing argument to the non-retributivist.

Other abolitionist objections fail to acknowledge human psychological reality

I am not convinced by any of the arguments of Sellin or any of the other abolitionists because I find their

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[8]Ibid., p. 161.

arguments detached in that they fail to give the proper weight to human psychological reality towards actions in relationship to events. The reader may know this by the more common and over-used phrase "human nature." Retributive punishment reflects human nature by recognizing anger. This approach further recognizes that individuals "have the capacity to be moral beings and, in so doing, acknowledges the dignity of human beings."[9] The importance of anger or resentment and its appeasement in our legal system is too often overlooked or attacked by the abolitionist. As we saw, Camus and others denied the very legitimacy of anger or resentment. In opposition to this, I believe as Thomas Carlyle in "revenge and the natural hatred of scoundrels, and the ineradicable tendency to revancher oneself upon them, and pay them what they have merited; this is forever intrinsically a correct, and even a divine feeling in the mind of every man."[10] To what degree human beings have feelings of revenge and resentment is indeterminable. What is certain is that the accompaniment of these feelings, to what ever degree, with violent crimes is inevitable. Any system which does not account for these feelings is deficient. I strongly feel that in the case of murder and other

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[9]Berns, For Capital Punishment, p. 154.

[10]Thomas Carlyle, quoted in Brand Blanshard, "Retribution Revisited, in Philosophical Perspectives on Punishment, ed. Edward H. Madden, Rollo Hardy, and Marvin Farber (Springfield: Charles C. Thomas, 1968), p. 70.

horrendous crimes only the death penalty can displace these feelings.

The death penalty is neither cruel nor unusual

I find the argument against the death penalty which points to its "cruel and unusual" nature to be groundless. In reviewing history, I believe the imposition of the penalty and the methods by which it was carried out were viewed as suited to the historical realities then present. As stated, there was little questioning of the death penalty until the advent of the penal system because of the limited alternatives to the death penalty before it.[11] It was this alternative punishment which would usher in the era of questioning the ethics of the death penalty which continues today. But what of this questioning? Is the death penalty "cruel and unusual", or contrary to our legal or moral heritage? The Constitution of the United States would seem to imply it is not. In the Fifth, Eighth and Fourteenth Amendments, capital punishment is acknowledged and given legitimacy. In the 1958 Supreme Court case of Trop v. Dulles, the court held that the meaning of cruel and unusual depends on "the evolving standards of decency that mark the

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[11]Banishment and mutilation had been used during history as alternatives to capital punishment but these lost favor in western cultures shortly after the fall of Rome.

progress of a maturing society."[12] It was this belief, that American society had matured to a point where the death penalty did not conform to human dignity, which lead the Supreme Court in Furman v. Georgia[13] and Gregg v. Georgia[14] to declare the then present system of capital punishment to be cruel and unusual. While declaring the system of capital punishment then in place void, these cases did uphold the right of the people to pay back the criminal. This reaffirmation of the principle of retribution is very important. Important because these same individuals whom the court had declared to have the right to pay criminals back would pass new laws which today impose the death penalty in 40 states. The new social morality the court had felt itself qualified to interpret had answered the court. But what is this morality? What belief forms the basis of support for the inclusion of the death penalty in our system of punishment? It is the belief that our present retributive system of punishment requires this inclusion in order that just retribution can be extracted as is demanded by justice.

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[12]Trop v. Dulles, 356 U.S. 44 (1958) quoted in Berns, For Capital Punishment, p. 32.

[13]Furman v. Georgia, 408 U.S. (1972)

[14]Gregg v. Georgia, 96 S. Ct. (1976)

Only death is proportional to death

But why can this justice only be extracted by the death penalty? Kant spoke of a blood guilt that must be erased. The condemned must be killed, he said, to cancel this guilt. The guilt must be condemned and the sentence must be carried out. If not, the people who do not carry out the just sentence may be regarded as accomplices in this public violation of legal justice.[15] Kant went on to say that those who have committed murder must die. In these cases, there are no substitutes that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable of conditions. Consequently, there is no equality between the crime and the punishment unless the criminal is judicially condemned and put to death.[16] In other words, since the only penalty "bad" enough to equal the "worst" crime is death, and since justice requires that the criminals receive just retribution for their past crimes, and since it is right to do what justice requires, capital punishment is right in these cases.[17]

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[15]Jeffrie G. Murphy, Punishment and Rehabilitation, (Belmont: Wadsworth Publishing, 1973), p. 37.

[16]Ibid., p. 37. See also Gerstein, "Capital Punishment- 'Cruel and Unusual'?: A Retributive Response," Ethics 85 (1974): 78.

[17]Steven Goldberg, "On Capital Punishment," Ethics 85 (1974): 72-73.

As a further argument in favor of the death penalty, it seems that there are cases in which no other measure could be used to assure that a criminal act would not be done or to prevent its repetition.[18] These cases involve the theory of deterrence not as a justification of capital punishment but as a practical consideration in relation to its possible imposition. For the first example of this type of case, let us consider persons already serving life sentences who wish to kill a guard or fellow inmate. Since they are already serving the maximum penalty (if one excludes capital punishment), what reason would this person have not to commit the murder in question? My second example is that of revolutionaries who kill dozens of the "enemy" (perhaps you and me) and willingly go to prison thinking that soon the noble revolution will win them their freedom and they shall all be heroes of the new government.[19] It is also hard to find any justification for thinking that imprisonment would deprive criminals of their unfair gain in the cases of murder and rape. I believe this unfair gain, no matter small, can only be erased by the imposition of capital punishment. I feel not only that the gain cannot be erased in these cases, but that society will

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[18]Ernest van den Haag, "On Deterrence and the Death Penalty: A Rejoinder," Ethics 81 (December 1970): 74.

[19]Hugo Adam Bedau, "The Death Penalty as Deterrent: Argument and Evidence." Ethics 80 (April 1970): 208.

feel that it lacks any means of self-defense against such offenses without the death penalty. I, like Conway, am "worried about the sheer lack of personal safety in our society."[20] It is hard to see how in cases which are so threatening to the principles upon which society is founded that they could either be balanced under the principles of justice or deterred without the use of the death penalty.

Given the reasons above for those cases, why cannot life in prison be an acceptable alternative to the death penalty in other cases? First, only the death penalty can assure non-repetition of a criminal act. It is by definition the one final solution to crime. Secondly, life sentence is rarely for the length of one's natural life. The convicted may also escape mental punishment in thoughts of expectation of eventually securing freedom. Today prison life is far from imposing suffering. When prison life is compared to the suffering of the victims, their families and friends, it seems not enough to meet the requirements of justice. Only the death penalty seems to hold the same proportion of loss or suffering. I view imprisonment, for however long, as being inadequate to counterbalance the effects of capital crimes. Justice does not require that criminals suffer as much as possible; it requires that they

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[20]David Conway, "Capital Punishment and Deterrence: Some Considerations in Dialogue Form," in Social Ethics, eds. Thomas A. Mappes and Jane S. Zambaty (New York: McGraw-Hill, 1977): 107.

suffer in proportion to the social and personal harm their crime has caused. I must again insist that this can only happen if, for those most horrible of crimes, the death penalty is imposed.

CHAPTER VI

COMMON ARGUMENTS AGAINST THE DEATH PENALTY FAIL

There are many arguments which over the years have been raised against the death penalty. Within this section, I will outline the arguments and attempt to dispel them. My counterarguments will take into account both the benefits and goals of the system of punishment as well as those of the death penalty as a particular act of punishment. The arguments which appear listed below will serve to further the case presented within this text for utility as the basis of a system of laws and for retribution as the justification for particular actions taken to enforce them. These arguments are also meant to further illustrate why the death penalty is a needed means of punishment.

Argument one: the death penalty is not a reformative measure

A frequent argument leveled against the death penalty is that it is not a reformative measure. What this means is that it does not rehabilitate the criminal. True, it does not, but the laws were not created for the reform of the criminal offender but for the protection of society. This protection of society was shown in chapter two to be

a higher value than rehabilitation. Rehabilitation as explained in chapter three is a concept whose central focus is upon reeducating or adjusting law breakers so that they become law abiding members of society, whether they believe in its laws or not. The damage or cost of their crime is not to be considered, nor should society's natural inclination for vengeance. Only what is good for individual offender should be considered. A common sense answer to this argument was provided by M. A. Cohen when he noted that no matter how we may wish that reform be a viable alternative to the death penalty, human beings are not like putty; they cannot be remolded at will no matter how benevolent the intentions. Even if reeducation were possible, could society afford the cost of real rehabilitation?, a cost for which no real statistical information exists today. Compared to the cost of the present system of mere confinement, the cost of rehabilitation would be enormous. And there are few who would dare to suggest that the present system of incarceration is reformative. Such a suggestion is not practical given the percentage of returnees who, after release, committed in many cases the same offense. Also, would not and could not this reeducation be seen as a reward for criminal behavior? In many cases such reeducation of criminals would include formal education and or vocational training; both of these methods to personal improvement and personal gain would, if sought by the

law-abiding general public, cost them thousands of dollars to acquire themselves.[1]

Argument two: the death penalty is not a deterrent

This second argument against the death penalty is that there is no evidence that it provides a significant deterrent force. In chapter three, the concept of deterrence was shown be incompatible with the self-dignity or self-worth and with concepts upon which both society and it laws are founded because it uses the individuals to influence the behavior of others. But let us forget this for a moment and look only directly at the problem posed by the argument. If we limit the search for proof of the deterrent value of the death penalty to simple cross-state studies like those of Sellin or simple cross-society studies, there are so many factors which cannot be controlled that reliable evidence for either side is unattainable. Even the very criminal statistics upon which such studies are based are unreliable due to the amount of discretion which police and prosecutors have in reporting them. If we forget the statistics and look at the issue with a common sense approach, we may see some plain truth about deterrence appear. First of all, who would argue that if those crimes which now carry a penalty of death were not

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[1]M.R. Cohen, "Moral Aspects of the Criminal Law," Yale Law Journal 49 (1940): 987-1014.

punished in any way that their frequency of occurrence would not rise? No one would; so some perceived hardship can be said to deter. Such a simple argument would seem to destroy the arguments of abolitionists like Hugo Adam Bedau whose arguments are based on the assumption that no punishment can deter criminal acts of personal violence.[2] If we admit that hardship does deter, as I think we must, can we therefore not find further reason to believe that the greater the hardship the stronger its deterrent force? There will almost certaintly be a difference in reaction to punishment of a single day in prison than to punishment of 50 years. We do not know with certainty that life sentences deter less death sentences; but neither do we know the contrary with certainty. The true effectiveness of the death penalty is yet to be put to a proper test in this country, at this time because most of those who commit capital offenses are not executed. And studies of other countries, or of this country at other times, cannot be applied with certainty to our present society. Too many variables intrude.

This is not to suggest that the death penalty even under the most optimum conditions could ever deter everyone. For as Ernest van de Haag points out, not every one responds to punishment. He classified possible offenders into three

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[2]Walter Berns, For Capital Punishment: Crime and the Morality of the Death Penalty (New York: Basic Books, 1979), pp. 89-91.

groups:

> non-responsive persons may be (a) self-destructive or (b) incapable of responding to threats (or even of grasping them). Increases in the size, or certainty, of penalties would not affect these two groups. A third group (c) might respond to more certain or more severe penalties.[3]

It is this third group to which I feel all laws are directed. This group contains the rational majority who make up our society. I admit also that the death penalty would have to be infallible to deter the more imaginative.[4]

In the first lines of this subsection, I mentioned the cross-state studies of Sellin. These studies have the same shortcomings as do cross-society studies. First, these arguments fail to look at the plain truth that there are many factors which effect the frequency of capital offenses.[5] Further, these arguments fail to see that the death penalty might still be a factor even in those states which do not practice it. Such deterrence can stem from ignorance of whether one's state does or does not use the death penalty. It can also arise out of contact with media information about convictions and executions in other states. Cross-society studies are even less reliable than

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[3]Ernest van den Haag, "On Deterrence and the Death Penalty," Ethics 78 (july 1968): 282

[4]Jacques Barzun, "In Favor of Capital Punishment," in Social Ethics, eds. Thomas A. Mappes and Jane S. Zembaty (New York: McGraw-Hill, 1977), p. 90.

[5]Hugo Adam Bedau, "The Death Penalty as a Deterrent: Argument and Evidence," Ethics 80 (April 1970): 212.

cross-state studies. The effect of cultural heritage cannot be over stressed in regard to the rate of capital offense committed within a given society.

Is it possible to know with absolute certainty that the death penalty is a deterrent? Not really, but this does not exclude the evidence and common sense suggestions presented here to show that it is a deterrent. Can we afford not to use every possible means to combat capital offenses? If we are not certain then whatever we do we take a risk: the risk of "unnecessarily" executing the the criminal, or that of failing to deter further murders. Whose life should we be more concerned with, the murderers or his potential victims? In my judgement the murderer finishes a very distant second.

Argument three: a disproportionate number of poor and blacks are executed

The third argument against the death penalty is that the poor and underprivileged blacks are executed far more often in percentage than either upper or middle class whites. This argument is not against the death penalty but against what is perceived by many to be an unjust and inequitable distribution of penalties by the courts.[6] In all likelihood every punishment is inflicted unfairly in

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[6]Charles L. Black Jr., Capital Punishment: The Inevitability of Caprice and Mistake (New York: W. W. Norton, 1974), pp. 86-87.

a racist society. This objection does not weigh more heavily against the death penalty than against any other form of punishment. The argument's point is that the institutions must be reformed, not that they must be eliminated.

Argument four: irrevocable punishment; the innocent person argument

This argument states that as long as the death penalty is imposed, there is always the possibility that an innocent person may be sentenced to death and this sentence when carried out will be irrevocable. An innocent person may suffer the penalty by mistake or as a result of persecution for his or her political or religious views. The two most often cited examples of the two latter reasons are the deaths of Jesus and Socrates--both cases in which all the legal rules of their day were followed, yet whose trials resulted in a miscarriage of justice. I must admit that that even the best legal safeguards cannot realistically prevent an error from ever occurring. But because of the sanctity attached to human life in our legal system, judges and juries are exceptionally cautious in such cases, tending to give the defendants the benefit of doubt as far as possible. I feel that this is as it should be, for there is no way to restore a life lost but neither is there an equal compensation which can be offered to a person who spends years in prison knowing himself to be innocent. No punishment is revocable once suffered. Those who point to

the death penalty as if it were the only irrevocable punishment merely cloud the issue. The death penalty is uniquely irrevocable in that it is final but if one believes as Aristotle that only the good life is worth living then death may be thought, in some ways, to be preferable to life in prison.

It is this point of irrevocability which Justice Charles L. Black addresses when he speaks of punishment's connection with "mistakes of law" and the "uncertainty of law." [7] Black's arguments against the death penalty are based upon the Fourteenth Amendment. Black states "that there is not enough 'due process of law' in our system to make it an acceptable instrument for the deprivation of life."[8] Black speaks of the several stages or choices which must be made along the line to finally convict a person of a capital crime. What Justice Black fails to realize from his own statements is that the chance of mistakes taking place at so many points by so diverse a group as will be making them is very small indeed. Judicial errors are rare in capital cases because lacking such legal substantiation as eye witnesses to the crime or a freely given confession of guilt very few persons are sentenced to death.

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[7]Black, Capital Punishment: The Inevitability of Caprice and Mistake, p. 75. See also Mappes and Zembaty, eds., Social Ethics, p. 77.

[8]Jacques Barzun, "In Favor of Capital Punishment," in Social Ethics, p. 94.

Therefore, Black's criticism of choice is a destruction of his own argument against the "arbitrariness and mistake" in the judical system.[9] Our legal system has recognized the "special irrevocability" of the death penalty and has provided additional checks to safeguard the innocent at every step in the process leading to conviction.

I must again try to emphasize that one must realize that not only is the death penalty or the "hell of prison" irrevocable but all punishment is irrevocable.[10] I believe "that it is better to kill without causing suffering than it is to cause suffering without killing"[11] if it would be of the duration necessary to protect society from murders. Society must protect itself with a punishment that will prevent the reoccurence of murder by punishing offenders in a way that will not allow them to repeat their crimes. This can only be done, at present, by use of the death penalty. The goals and results of the death penalty as a punishment far outweigh the slim chances of its imposition upon an innocent person.

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[9]Ibid., p. 18.

[10]Ibid., p. 89.

[11]Albert Camus, Reflections on the Guillotine: An Essay on Capital Punishment, trans. Richard Howard (Michigan City: Fridtjok-Kalay Press, 1959), p. 15.

Argument five: the use of the death penalty diminishes the value that is placed upon human life

It is true that there may be harmful effects brought about by the sensational media coverage of the trials and executions of the more notorious criminals. It is also true that this type of media action is deplorable. But criticism of the death penalty on the grounds of media coverage is urging for a responsible press and the education of the citizens as a whole in the essence of what criminal law is and is meant to accomplish. It is not an argument for revision of criminal punishment. The present forms of execution which are "solemnly witnessed and carried out are not barbaric, on the contrary, they enhance the awesome dignity of the law and the moral order it serves and protects."[12] Our moral order believes in the value and dignity of human life; society must therefore punish murder by use of the death penalty which is the only punishment which fulfills the requirements of justice and thereby reaffirms the value placed upon human life.

Argument six: that judges and juries are less likely to convict a person of a capital offense and would strain the evidence and the law to acquit those accused

This is again an argument which is not against the death penalty but is an argument for a better educated

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[12]Berns, For Capital Punishment, p. 188.

public. The answers which were given in argument four also apply here and the reader may wish to review them. The legal system works in a fairly set manner; attorneys present evidence to the courts and judges hand down sentences. But the responsibility for punishment ultimately falls upon the citizen juror who must return proper verdicts. Whether juries will in fact return guilty verdicts depends not only on their view of the penalty, but their attitude or reaction towards the crimes committed.[13] If either the citizens, courts, or lawyers fail to do their duty, we can not blame this upon the laws or any actions falling under them.

Argument seven: the right to life cannot be legitimately taken away from a person

I feel that to answer this argument the reader should look back to chapter two which dealt with civil authority. This chapter contains a lengthy discussion of theories concerning the limits of civil authority and the justification for laws and punishment. This looking back should reaffirm that no state has ever denied that it had the right to demand the lives of its citizens to assure its own perpetuation.

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[13]Ibid., p. 136.

Argument eight: the death penalty brutalizes human nature

I feel that the opposite of this is true. It is those crimes which we punish by death and the ones who commit them who brutalize human nature, not the penalty for their perpetration. It is this range of crimes which, if not punished by the death penalty would cheapen human life beyond recognition.[14] Here again we must ask the question "Do we not care about the lives the murderer's future victims?"[15] If we profess to care about human nature and life, then we must respect the claim of possible future victims not to be brutalized or at the worst lose their very lives. Is it possible that we fail to see the potential social destruction which these crimes represent? This was spoken of as early as during the time of the ancient Greeks: that one unpunished crime "infests a whole city."[16] Is it not the political and social structures which protect human dignity? Can we then not claim that in punishing crime we reinforce and reinstate human dignity and respect for life? Yes, we can make such a claim and I feel it is the only

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[14]Hugo Adam Bedau, The Death Penalty in America (Chicago: Aldine Publishing, 1964), p. 137.

[15]Epicurus, "Letter to Herodotus," in Approaches to Ethics, eds. W. T. Jones, Frederick Sontag, Morton O. Becker and Robert J. Fogelin (New York: McGraw-Hill, 1977), p. 95.

[16]Camus, Reflections on the Guillotine: An Essay on Capital Punishment, p. 39.

realistic one which can be made out of this argument. Here again then the death penalty has been reaffirmed.

Argument nine: the cost of executing a capital offender exceeds that of a life in prison sentence

Justice Marshall and others have raised this objection to the death penalty but provide little if any proof to support such a claim.[17] Viewing this lack of proof, I choose to accept the view of several other authors which have pointed out that severity of punishment does not cost anything additional and may in many cases even lower the cost of a penal system.[18] It is not the level in severity of punishment which adds additional cost on to the penal system but the level of security. This is a widely recognized fact which can easily be seen to be true by looking at the differences in cost between a maximum and minimum security prison. I have seen estimates of the difference which range from one-third to four times more expensive for maximum security. At no time did I see any author claim that minimum security costs more then maximum security. I can therefore see no claim to this argument which would

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[17]Justice Thurgood Marshal, "Dissenting Opinion in Furman v. Georgia," in Social Ethics, eds. Thomas A. Mappes and Jane S. Zembaty (New York: McGraw-Hill, 1977), p. 85.

[18]Bedau, "The Death Penalty as a Deterrent: Arguments and Evidence," pp. 207, 215. See quotation on next page under argument ten.

have us believe that death penalty raises the cost of the prison system.

Argument ten: the death penalty is only revenge

If we look at the three measures of non-deterrent utility which Bedau outlined, we may see further examples than those already seen that the death penalty is much more than revenge.

> One measure of non-deterrent utility of the death penalty derives from its elimination (through death of known criminals) of future possible crimes from that source, another arises from the elimination of the criminal's probable adverse influence upon others to emulate his ways, another lies in the generally lower budgetary outlays of tax moneys needed to finance a system of capital punishment as opposed to long term imprisonment.[19]

Revenge is an important consideration in connection with the death penalty. This importance stems not from the legal imposition of the death penalty but from consideration of possible actions should it be removed from the legal system. Cohen points out that if the public sees no recourse within the criminal justice system they will perhaps take the law into their own hands. Vigilance committees, and lynch mobs would once again be inflicting punishment outside the legal system.[20] If this type of punishment became a reality, we would have good reason to hold the

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[19]Ibid., p. 207.

[20]Cohen, "Moral Aspects of the Criminal Law" pp. 1012-1014.

fear of mistakes spoken of in argument four. It is only the retributive legal system which provides safeguards for the accused. Within these legal safeguards, it is obvious that many innocent people would be mistakenly punished. If, as a result of the imposition of the death penalty, the feelings of anger and revenge found in the general public are satisfied, this is all the more reason to impose the penalty.

Argument eleven: that the death penalty does not cause the criminal to suffer enough

To those so used to seeing the death penalty referred to as brutal, horrible, inhuman and all the other terms used to express moral disapproval, this argument will seem a bit strange. An argument can be made that there is no proof that the forms of execution used today produce any suffering. There is of course the mental suffering involved once the appeals process has been exhausted, but there still remains the chance of a reprieve. One can argue that in contrast a life sentence is punishment which must be lived and endured for many years. But is this really the truth? A life sentence is rarely for the length of one's natural life. The convicted may always escape into the expectation of eventually securing freedom. I must admit that the day-to-day prison life may hold elements of violence, sadism, degradation, possible diminishment of identity, and of course separation from one's family and friends.

Only the death penalty seems to hold the same proportion of loss. Any other punishment is inadequate to counterbalance the effects of capital crimes. It is not the attainment of the maximum degree of suffering that should be of primary concern, but that the suffering is to the best of our knowledge proportional to the crime.

Argument twelve: the death penalty cannot be "tailored" to fit the crime as incarceration can be

It is true that the death penalty cannot be individualized to suit each case. It is also true that there is little need for this type of "tailoring". Unlike other crimes where differing degrees of guilt are evident, as in the difference between letting the air out of a car tire and stealing the tire, those crimes for which the death penalty are given do not vary so widely. The victim, for whatever the reason behind the crime, is usually dead. There is therefore little reason for the degree of individualization of punishment which the realm of lesser offenses requires to meter out justice. But in many ways, the idea of a justly "tailored" system of punishment is itself a fiction. For an individual in one case may receive ten years for auto theft, while another receives the same sentence for manslaughter. While serving these sentences they are both treated as inmates serving ten years. But does society see these crimes as morally or

socially equal in their effects upon each? I believe they are viewed as very different, and they should be. So the tailoring of sentences is to some degree a myth and a harmful one if it is allowed to lure us away from the true aims of punishment.

Argument thirteen: the public wishes to abolish the death penalty

The aftereffects of particularly brutal crimes is evidenced by the public outcry to avenge the innocent victim. This, some say, is only temporary and that under normal circumstances the general public is opposed to the death penalty because it is inhumane. No matter how we choose to to view the humanity of the human race, in recent years poll after poll in the United States, Canada, and England have shown the public in favor of either returning the death penalty or keeping it in use. There is a trend to see those who support the death penalty as insecure or even socially maladjusted but this form of attack holds little weight. In the case of Canada, some 80 percent of the population favor bringing back the death penalty for those crimes for which it was formerly imposed.[21] A 1975 field poll in California found 75 percent of the population to be in favor of the death penalty.[22] Nationwide Gallup polls

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[21]Berns, For Capital Punishment, pp. 37-38.

[22]New York Times, 26 March 1975, p. 47. as quoted in Berns, For Capital Punishment, p. 192.

have repeatedly shown a steady increase in the percentage of the general population in favor of the death penalty. A recent Harris poll reports 59 percent of the general population of the United States supports the death penalty.[23] If we look at the world situation today with terrorism becoming an ever more present reality, it is likely that the percentage of those in favor of the death penalty will climb. Because of the extreme indifference to human life and the use of violence against innocent persons, terrorism must be answered by the imposition of the death penalty. This is necessary not only to satisfy the public's sense of rage, but to keep others from becoming the victims of the imprisoned terrorist's confederate's efforts to secure his or her release by intimidation by force. For these and other reasons, like the general disbelief and lack of trust in the goals of long term imprisonment, I feel the ratio of those in favor of the death penalty will soon climb to as much as 75 percent of the general population in the United States.

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[23]Berns, For Capital Punishment, p. 192.

CHAPTER VII

CONCLUSION: A RETRIBUTIVE SYSTEM WHICH INCLUDES THE DEATH PENALTY IS MORALLY JUSTIFIED

In the scope of this text, I have endeavored in a limited space to bring together a great many concepts to which whole volumes have been devoted. It has been my desire to show society to be a legitimate entity which is charged with, among other things, the protection and overall welfare of its members. It is therefore our right to demand that society afford us with the best possibility of living our lives free of harm from others. Society attempts to accomplish these ends by the use of law and punishment. I feel this dual demand for protection and welfare (or the greatest possible happiness) cannot be met without the inclusion of the death penalty within the system of punishment. I came to this conclusion by answering the question: What, given the circumstances of our present society, would be the wisest way to punish those who commit capital crimes against it given those means which are available to it?[1] Limiting the possibilities to exclude utopian fantasy, I

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[1]J. R. Pratt, "Professor Ducasse and the Meaning of 'Punishment'," in Philosophical Perspectives on Punishment, eds. Edward H. Madden, Rollo Hardy, and Marvin Farber (Springfield: Charles C. Thomas, 1968), p. 20.

have endeavored to show that in the case of capital crimes there is only one possible punishment which can conform to justice and serve the ends of society, this punishment having only one true justification for its imposition. The punishment is the death penalty and the justification is the retributive theory of punishment. It was the demand for justice from which modern punishment grew. Today the demand is continued by those morally indignant members of society who can still be angry and see their own interests being destroyed by crime. I stated in the introduction that these were the people whose views I support. If society is to insure the sanctity of human life and promote the general welfare, then its members must all be willing to accept social controls. Such controls would not be complete without capital punishment. For even Camus admits that when society punishes it does not take revenge, society merely protects itself.[2] The killer is himself killed in order to protect others.[3] Capital punishment affords this protection. It is, as I have shown, a wise bet to hold that it does exactly that. "In common terms, failure to take a

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[2]Albert Camus, Reflections on the Guillotine: An Essay on Capital Punishment, trans. Richard Howard (Michigan City: Friftjok-Kalay Press, 1959), p. 25.

[3]Jacques Barzun, "In Favor of Capital Punishment," in Social Ethics, Thomas A. Mappes and Jane S. Zembaty (New York: McGraw-Hill, 1977), p. 89.

wise bet is sometimes 'gambling'."[4] The fact that some forty states have chosen not to gamble and have statutes authorizing capital punishment illustrates the felt needs of a population under attack by violent criminals.

I feel that if we as a society are to appease anger, provide punishment to fit the crime, prevent potential forms of legal abuse, praise the opposite of what we condemn, preserve morality, protect society, and promote justice, our justification for particular acts of punishment must be retributive and one of the punishments imposed must be the death penalty. "As in all great questions, the moralist must choose, and choosing has a price."[5] The price we who choose to support the death penalty pay is promoting what may be seen by others to be an inhumane punishment. But we must ultimately choose it because we believe it to be less inhumane and of greater social value than alternative systems.

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[4]Conway, "Capital Punishment and Deterrence: Some Considerations in Dialogue Form," in Social Ethics, p. 112.

[5]Barzun, "In Favor of Capital Punishment," in Social Ethics, p. 90.

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