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The Ultimate Hypocrisy

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An abstract of
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Abstract

The Ultimate Hypocrisy

By David Gern

My thesis asserts that using the death penalty to respond to a crime of 1st degree murder is a fallible, hypocritical, and vengeful form of punishment that hinders an offender's capacity to help repay or restore the victim and society in the aftermath of a crime.

In Chapter 1, I examine the six primary ethical approaches to the death penalty. I find that as a response to 1st degree murder, the hypocrisy of the death penalty manifests itself in consequentialism, rights based ethics, and natural law theory.

In Chapter 2, I explore the terms revenge and justice within the context of the death penalty as a response to 1st degree murder. I find that the notion of justice as balance cannot be achieved through revenge.

Finally, in Chapter 3, I argue that if the purpose of punishment is to uphold both punitive and restorative justice, the death penalty does not serve as the optimal form of punishment.

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The Ultimate Hypocrisy

By David Gern

Chapter 1

The needle is in. Its contents flood the veins as it penetrates the body. It is over before I finish writing these few sentences. That is the how. But what just happened? Who did it happen to? Where? When? Why? The first four questions yield fairly straightforward responses. The death penalty, in the form of lethal injection, has just been applied to an individual convicted of 1st degree murder in the United States in 2012. So the key question then becomes why? In philosophical terms, after weighing the primary ethical approaches to the death penalty in the context of 1st degree murder—Consequentialism, Kantian Ethics, Natural Law Theory, Virtue Ethics, Prima Facie Ethics, and Rights Based ethics—what makes this punishment morally permissible? Many maintain strong opinions about such permissibility based on some or all of these six ethical concerns. However, no one who currently holds such strong opinions has ever directly experienced the death penalty. Many have seen it or written about it. Some have been related to the individual undergoing the death penalty. Still others have been related to the victim(s) of the murder that the death penalty offender is being punished for. Finally, many have either directly administered this punishment, ordered it, and/or approved of it. But again, no living individual can ever truly claim that they have experienced the death penalty. And therefore, one's capacity to make a full and unbiased ethical assessment may be mitigated by a lack of experience and understanding. Having acknowledged this limitation, I shall attempt to show why, in the case of 1st degree murder, the death penalty is ethically problematic. To be clear, by 1st degree murder, I am referring to an "unlawful killing that is both willful and premeditated" (Findlaw.Com) But more than that, I hope to provide viable alternatives that will

not only punish the individual responsible for the murder, but will also promote a degree of restoration for the victim and for society in the aftermath of the crime.

In order to fulfill this calling, it will be necessary to explore both the theoretical and practical goals of moral theory with respect to a 1st degree murder punishment (Timmons, 3-4). As for the theoretical goals, I believe that the consequentialist, natural law, and rights-based moral theories best demonstrate the immorality of the death penalty in the context of 1st degree murder. Furthermore, from a practical standpoint, by using examples such as the South African Truth and Reconciliation Commission, I hope to demonstrate that justice can be punitive as well as restorative (Duff, 43). Accordingly, I submit that using the death penalty to respond to a crime of 1st degree murder is a fallible, hypocritical and vengeful form of punishment that hinders an offender's capacity to help repay or restore the victim and society in the aftermath of a crime.

Thus, in order to determine the theoretical aspects of death penalty ethics corresponding to a crime of 1st degree murder, I must point out the "underlying features" that render the death penalty right or wrong (Timmons, 3). I will therefore explore the six main ethical theories that are most relevant to a theoretical ethical assessment of the death penalty. After examining each theory individually, I hope to find the most convincing arguments regarding the ethical permissibility of the death penalty in response to a crime of 1st degree murder.

Accordingly, the first ethical theory I will address is the consequentialist perspective. As its name suggests, the consequentialist moral theory solely emphasizes the consequences of a given course of action. More specifically, it is a value based moral theory that seeks to find and approve of consequences that stem from an intrinsic value. In the case of utilitarianism, a sub-

category of consequentialism, the target of this intrinsic value is happiness or the good.

Therefore, as John Stuart Mill and Jeremy Bentham argued, utilitarianism promotes actions that are moral if and only if they produce the greatest good for the greatest number of individuals (Ibid, 7-8). Moreover, in the case of consequentialism and utilitarianism, it is necessary to treat both as comparative moral theories such that the consequences and inherent value of any course of action must be set against the consequences and inherent value of alternative courses of actions (Ibid, 7). In other words, consequence-based courses of action are only inherently valuable insofar as they outweigh the inherent value of alternative courses of actions.

Furthermore, these courses of action must aim at optimal consequences rather than simply favorable consequences. With that in mind, my earlier use of the phrase “course of action” can refer to two distinct versions of consequentialism. The first is act consequentialism (Ibid, 9). This version holds that consequentialism must be applied to specific actions and the consequences of performing one action versus another action (Ibid, 9). However, the second version known as rule consequentialism maintains that the moral “rightness or wrongness of an action depends on whether it is required, permitted, or prohibited by a rule whose consequences are best” (Ibid, 9). So for example, a doctor’s commitment to the rule of his profession to “first do no harm” would be evaluated based on the consequences of respecting or rebuffing this rule. The extent to which this doctor is prepared to accept such a rule is known as acceptance value (Ibid, 9) Thus, for rule consequentialism, the effect of obeying, disobeying, or attempting to change this rule would be based solely on consequences. A final point about consequentialist moral theory in general is that it applies to every individual who may be affected by an action or rule (Ibid, 9). A critical sub-condition of this point is that each and every individual affected is valued equally. Therefore, a family member carries no more ethical weight than a stranger halfway around the world. Having

outlined the basic definition of consequentialism within the context of moral theory, I will now attempt to apply it to the death penalty.

From a consequentialist perspective, the death penalty must be evaluated within the framework of all possible alternatives and based on a comparison of these alternatives. Initially, this appears to be fairly straightforward. All one would need to do would be to list the possible positive and negative consequences that would stem from applying the death penalty in response to a 1st degree murder conviction versus other forms of punishment such as life in prison. Indeed, the attraction of this moral theory is that it focuses on achieving the best possible results. And surely, results can be an incredibly potent indicator of success in moral theory. Yet will we allow for these results to be achieved by any means necessary? In addition, how can one be absolutely sure of the consequences of imposing any form of punishment until such consequences are actualized? All are open questions. But all render consequentialism a less straightforward and potentially less attractive moral theory. For in some cases, the end may feel justified regardless of the means. After all, the means do not matter in the case of utilitarianism so long as the results satisfy the greatest good for the greatest number of individuals. But in others forms of consequentialism, this may not be the case. Furthermore, even after tremendous thought and research is conducted, one cannot perfectly predict what the consequences will be in the aftermath of instituting the death penalty or spending the rest of one's life in prison. This lack of certainty would then make it very difficult to compare the positive and negative effects of the death penalty to an alternative form of punishment. Thus, when a consequentialist moral theory is applied to 1st degree murder and the death penalty, possessing foresight is a sufficient condition for correctly weighing the best possible outcomes. So even though one may choose to rely on educated guesses and probabilistic claims regarding these outcomes, there is no guarantee

that one will be able to predict the optimal course of action. In this way, consequentialism seeks a degree of certainty and a justifiability of ends that complicates one's capacity to make moral judgments regarding the death penalty as a response to 1st degree murder.

However, for the purpose of understanding the consequentialist perspective and the death penalty more fully, let us suppose that the consequences of each alternative form of punishment can be successfully predicted. Hypothetically, we can begin with a basic scenario of a man who has been convicted of a single count of 1st degree murder. Although there may be other possible forms of punishment, let us suppose that this man can either spend the rest of his life in prison or be killed as soon as possible via the death penalty. In the case of life in prison, this man can live out the rest of his days in prison. Yet he can also escape and murder more people. Meanwhile, if he is given the death penalty, he cannot escape nor kill anyone. Looking solely at these potential consequences, the death penalty seems like a more finalizing and safer option. Indeed, in his defense of the death penalty, Ernest van den Haag asserts a retributivist defense such that the "finality" of the punishment mimics the finality of the murder (Van Den Haag, 489). After all, the consequences seem equal in that death occurs both in the crime of murder and in the death penalty as punishment. And thus, the punishment seems to perfectly fit the crime in the mold of the proverbial notion of "an eye for an eye." But, as Stephen Nathanson points out, this would mean that a state should also "rape rapists, torture, torturers, and burn arsonists." (Nathanson, 482) In all such cases, the punishment fits the crime in the sense that it mimics the crime. So why are these punishments any more or less morally permissible than killing a killer? And yet, in all these cases, there is a consequential hypocrisy built within the punishment. For example, if the act of killing refers to the taking of a life, it is hypocritical that the death penalty is a punishment that mimics the initial crime of murder in terms of the consequences of taking a life. By

hypocritical, I am referring to “a feigning to be what one is not or to believe what one does not” (Merriam-webster.com). This definition of hypocrisy is directly applicable given that the death penalty punishes a killer by killing that individual. For if one “believes” the crime of killing is deemed illegal and worthy of punishment, the corresponding punishment cannot mimic the crime. I grant that the intention, method, and/or legal grounds for the death penalty versus the initial crime of murder may differ. But from a consequentialist perspective, the taking of a life remains the same in both cases.

However, we still have not foreseen all the potential consequences of the death penalty versus life in prison in response to 1st degree murder. Suppose that an individual actually murders ten people instead of one. In that case, the death penalty would no longer be a punishment that perfectly fits the crime because a killer cannot be killed more than once. Thus, in consequential terms, the death penalty not only is a potentially hypocritical form of punishment, but it also may fail to actually mimic the crime that was committed in terms of equating the number of victims with the number of times a murderer can be killed. Meanwhile, another potentially significant consequence of the death penalty may be that it will deter others from committing murder. Yet as Justice Thurgood Marshall so eloquently puts it in his dissenting opinion for the case of *Gregg v. Georgia*, “It is inconceivable that any individual concerned about conforming his conduct to what society says is ”right” would fail to realize that murder is “wrong” if the penalty were simply life in prison” (Jacoby, 250) In other words, an individual who respects society’s laws would still recognize that murder is wrong even if the punishment were life in prison instead of the death penalty. Life in prison, after all, still represents a red light with respect to murder. One might argue, however, that the death penalty presents a brighter red light.

Indeed, in his defense of the death penalty, Ernest van den Haag points out that while “the lives of the victims who might be saved are valuable, that of the murderer has only negative value, because of his crime. Surely the criminal law is meant to protect the lives of potential victims in preference to those of actual murderers” (van den Haag, 489). Evidently, van den Haag believes that one should value and preserve the life of a “potential victim” through the death penalty’s deterrence rather than preserving the life of an “actual murderer.” However, he operates under two assumptions. Firstly, in hypothetical terms, he suggests that the death penalty has the potential to deter an individual who would otherwise have committed murder had it not been for the death penalty. Van den Haag recognizes that such deterrence cannot be proved with certainty. Nevertheless, he assumes that the mere possibility of deterrence is convincing enough. Alan Brudner responds to this claim by arguing that in this deterrence model, “The criminal is sacrificed, or used, as a means, to the welfare of the majority, so that punishment becomes indistinguishable from the criminal use of force” (Brudner, 341). In fact, such use “as a means to the welfare of the majority” takes place with no guarantee that the majority will actually benefit. As for van Den Haag’s second assumption, he claims that the law is not meant to protect “actual murderers.” Albert Camus disagrees point by arguing that, “The most sweeping uncertainty in this case authorizes the most implacable certainty” (Camus, 194). Namely, the “uncertainty” surrounding deterrence has motivated society into imposing the most finalizing form of punishment that exists. For perhaps the most significant consequence of instituting the death penalty in response to 1st degree murder is the possibility that newly discovered evidence fully exonerates the so-called “actual murderers.” This is why the phrases “reasonable doubt” and “found guilty” are used to characterize a criminal’s state of innocence or guilt in a court of law. After all, these phrases do not mean that one is absolutely guilty or innocent. There is room for

uncertainty. Accordingly, if an “actual murderer” had been sentenced to life in prison and is later found innocent, he/she can be swiftly released and given monetary compensation for the years he/she lost. In contrast, if he/she were given the death penalty, he/she cannot be brought back to life. Thus, in consequential terms, life in prison allows for the possibility of both error as well as the capacity to partially rectify such error. Yet, as a response to 1st degree murder, the death penalty imposes a consequential finality that is certain and irrevocable. Meanwhile, the guilt or innocence of the criminal as well as the deterrent value of the death penalty remain uncertain.

Now let us turn to the Kantian perspective on the death penalty as a punishment for 1st degree murder. To begin with, Immanuel Kant’s position is based off of his categorical imperative (Timmons, 16). Kant’s Humanity formulation of this imperative states that human beings must be treated “as ends in themselves” (Ibid, 16) In other words, Kant discourages the human capacity to use people and treat them as means to one’s personal ends. Instead, he advocates treating human beings with “dignity” (Ibid, 16) By this he may mean that one must treat other human beings as having value independent of one’s own desire to interact with them. A person’s worth should not be entirely predicated upon another individual’s needs or desires. For Kant, each person has an individuality and “dignity” that must be inherently respected. Furthermore, Kant’s categorical imperative also calls for the universal law formulation. For Kant, an action is morally permissible only if “one could consistently conceive and will that the maxim of one’s action become a ‘universal law’ governing everyone’s behavior” (Ibid, 17). So for example, if one steals, one should be prepared to will that it is morally permissible for everyone else to steal. Moreover, in Kantian moral theory, no exceptions can be made to lessen the stringency of this universality formulation. This would set the universal precedent that exceptions must be made for everyone. It is also worth noting that Kant is not arguing that

stealing is wrong because the consequences of allowing everyone else to steal would be chaotic and dire (Ibid, 19). Rather, it is a question of one's duty to respect others (Ibid, 19). One cannot act in one way and expect or will that others act differently. According to my earlier definition, this would be hypocritical and would also set a precedent that one can be held to a lesser moral standard than others.

With that in mind, I will now explore Kantian moral theory in the context of the death penalty in response to 1st degree murder. Beginning with his "principle of equality," one may find Kant's argument in favor of the death penalty both fair and viable (Kant, 479). He emphasizes a right of retaliation by stating that, "if you strike another, you strike yourself; if you kill another, you kill yourself" (Ibid, 479). This point aligns itself with the universal law formulation of the categorical imperative in that "if you kill another," you not only will that same fate upon yourself, but you also set the universal precedent that it is acceptable for others to kill as well. Thus, Kant is essentially arguing that you should be prepared to do unto others as you would have others do unto you. This point encapsulates the notion of an "eye for an eye" that I shall discuss throughout this essay. Furthermore, Kant argues that this "is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and quantity of a just penalty" (Ibid, 479). Kant's position does seem quite fair given that an individual found guilty of 1st degree murder should be subjected to the same punishment he/she subjected someone else to. And after all, why should that individual have to endure anything more or less than what he/she did to someone else? Thus, for Kant, the punishment must mirror the crime. And yet, if the crime of murder is equated with the punishment of murder in terms of the end result being death for both the initial victim(s) and the killer, Kant's universality formulation of the categorical imperative may not hold. After all,

society is essentially willing that everyone else can take a life because it has chosen to take a life through the death penalty. Kant might respond to this objection by arguing that the crime and punishment of murder are mutually exclusive and cannot be equated. For even if the end result of death for both parties remains the same, the will and motivation behind an act of 1st degree murder differ from the will and motivation behind the death penalty. In the initial murder, the murderer may have been motivated by greed or anger. Meanwhile, the state may be motivated by the desire to preserve order, find an adequate punishment for the accused, and/or to deter others from killing. Thus, for Kant, the universality formulation must not be held to the potential hypocrisy of the consequences of an action but rather to the potential hypocrisy of the intentions behind an action. I would respond by arguing that the consequential hypocrisy of the death penalty is still problematic even if the initial motivations behind the crime and corresponding punishment are in fact different.

Still, Kant firmly maintains that the punishment must fit or match the crime based on the differences in intentions and motivations. Even if one accepts this, Stephen Nathanson's argument that we would have to "rape rapists, torture torturers, and burn arsonists" still holds up (Nathanson, 482). For in all these cases, the punishment directly corresponds to the crime that was committed. In the case of murder and the death penalty as the corresponding punishment, the act of killing or inducing death remains the same. And by killing a murderer, one has recreated and thereby validated that murderer's crime. Kant responds to this objection by contending that, "There is no *likeness* or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal" (Kant, 480). Like van den Haag, Kant sees distinctions between murdering an "innocent" individual and murdering a convicted

murderer. He sees these as completely different acts of violence. Specifically, they differ in terms of “what is judicially accomplished by the execution of the criminal.” The death penalty is not a crime in the same way that murder is for Kant. For Kant, a murder victim is considered innocent while a murderer who is given the death penalty is considered guilty and criminal. But what if the initial murder victim had murdered someone as well? The punishment of the death penalty in response to these 1st degree acts of murder would merely continue this vicious cycle of killing. In doing so, it would place an even greater emphasis on the question of guilt and innocence when such a question is already difficult to parse. Indeed, it seems that the only difference for Kant between the death penalty and the initial act of murder lies in the guilt or innocence of the person being murdered. As such, he sets a precedent that killing is permissible so long as the individual being killed is guilty of murder. He again aims at the different motivations behind these two acts of killings. And yet, whether or not the aims, methods, and legal basis behind these acts of killing differ, it does not change the fact that the consequence of taking a life is applied in both cases. To put it another way, suppose a parent tells his/her child not to hit others. Sure enough, the child disobeys the parent and proceeds to hit another child. The parent then hits his/her child both as a punishment and to hopefully keep the child from hitting again. But how can a parent teach a child not to hit by hitting the child? It not only sets a poor example but it is also consequentially hypocritical. The parent has told her child not to hit and has then hit that child as punishment for disobeying the order not to hit. Yet the parent has done the very thing that it told the child not to do. As a result, the parent holds himself/herself to a different moral standard than his/her own children. And although the stakes are far lower, this example is really no different from 1st degree murder and the corresponding punishment of the death penalty imposed by the state.

Another ethical perspective on the death penalty stems from natural law theory. This theory is based on St. Thomas Aquinas's conceptions of the four basic intrinsic goods—human life, procreation, knowledge, and sociability (Timmons, 12). Natural law theory holds that if any of these intrinsic goods are “directly violate[d],” that action is deemed morally wrong (Ibid, 12). Many would agree with Aquinas in that the four main intrinsic goods and particularly the good of human life must be respected. The good of human life, after all, seems self-evident. However, the objection can be raised as to who determines whether something is truly an intrinsic good and on what basis? Moreover, could there be additional intrinsic goods other than the ones Aquinas argues for? Thus, any argument that takes a natural law approach to the death penalty can be undermined by such questions. Nevertheless, one can immediately see that, as a response to 1st degree murder, the death penalty severely and directly undercuts the intrinsic good of human life. One might contend that the murderer committed this same violation and must therefore receive that same punishment. But in that case, the killing of this murderer would only continue the vicious cycle of violating the intrinsic good of human life. On the other hand, one could argue that this intrinsic value of life must be respected in everyone by virtue of his or her humanity. Therefore, the fact that an individual found guilty of 1st degree murder failed to respect such an inherent value in another human being, presents a strong argument in favor of taking away the inherent value of that murderer's life. After all, an ethical theory that holds individuals accountable for the value of a human life must not fail to punish an individual who blatantly fails to respect such a value in another human being. Nonetheless, there is still a failure to respect the intrinsic good of human life by using the death penalty as the corresponding punishment for 1st degree murder. In this way, the hypocrisy of the death penalty as a response to 1st degree murder manifests itself once again.

The next ethical approach to the death penalty is virtue ethics. Virtue ethics and its stance on moral permissibility are fittingly inscribed by the terms virtue and vice. In short, virtue ethics addresses what kind of person you are based on certain character traits. Each of these traits is deemed either a virtue or a vice. According to Timmons, a virtue “is central in the positive evaluations of persons” while a vice “is central in the negative evaluations of persons” (Ibid, 25, 26) These positive or negative traits cause individuals to act in certain ways that are evidence of their moral or immoral character. For example, the virtue of justice will incite very different and morally permissible actions than its corresponding vice of injustice. Initially, this also appears to be a fairly straightforward approach to ethics and the death penalty. Actions and the characters of individuals reflected by those actions are either deemed to be examples of virtue or vice. However, when applying this to the death penalty and to other moral dilemmas, it can be difficult to characterize an action entirely as a virtue or entirely as a vice. Furthermore, even if one is able to make such a clear characterization, it remains to be seen whether that will actually facilitate informed moral choices.

Accordingly, when applying virtue ethics to the death penalty and 1st degree murder, it must be determined whether the initial act of murder and the corresponding punishment of the death penalty are evidence of virtues or vices. For instance, perhaps a woman committed a murder in order to acquire more money from her husband. This would be an act of greed that would be deemed a vice. Therefore, according to virtue ethics, it is morally impermissible. But it is only morally impermissible insofar as it is a demonstration of greed as a vice. The act of killing is not deemed a virtue or vice. The act may stem from a vice. But it is not a vice in and of itself. Thus, working within the framework of virtue ethics, the woman should have exercised the virtues of temperance or forgiveness in guiding her actions. On the other hand, suppose that an

individual killed out of loyalty to a cause, idea, or out of duty to serve his country. In a war for example, an individual might kill in service of his country. This shows tremendous loyalty and respect for one's country. Therefore, this act of killing would likely be deemed virtuous. Indeed, in accordance with the laws of war, one can either kill or be killed. But where there is no immediate threat and/or the threat is neutralized, such killing may no longer be deemed a virtuous act in accordance with the laws of war. Thus, in a virtue ethics approach to the death penalty as punishment for 1st degree murder, would an executioner be considered virtuous for his loyalty in carrying out the duties ascribed to him by the state? After all, he/she is in a sense doing the state's bidding. But what if instead of doing the state's bidding, this executioner stood up against the death penalty by refusing to carry out the will of the state. This could be considered an act of courage and therefore an act of virtue. As a result, it might be deemed a virtuous act of loyalty to carry out the orders of the state just as it might be a virtuous act of courage to disobey such orders. As another example, a suicide bomber's act of terrorism could be deemed an act of courage and therefore an act of virtue. But it could also be deemed a vice based on the selfishness of valuing one's personal beliefs over the lives of innocent civilians. Thus, applying virtue ethics to the death penalty and other ethical dilemmas is far more complicated than it initially appears. After all, multiple virtues and vices manifest themselves in many of the above examples. And having to balance these competing virtues and vices in order to determine moral permissibility can be extremely difficult. Ultimately, part of the difficulty of doing so stems from the fact that virtue ethics focuses so heavily on judging character traits revealed by certain actions without focusing on the actions themselves or the consequences of those actions. So while the courage of the suicide bomber may be commendable, should the act of killing or the consequences of killing millions of innocent people still be morally upheld? I am not suggesting

that one should ignore and dismiss virtues such as courage or the virtue ethics approach as a whole. I am also not suggesting that we should base our actions entirely upon the consequences. Nevertheless, it is critical that we be aware of the limitations of each ethical approach before we allow a single one to completely dictate our moral choices.

With that in mind, the next ethical approach, ethics of prima facie duty, may account for some of the limitations that the other ethical approaches fail to account for. After all, another name for prima facie duty is situational ethics because it calls upon individuals to carry out certain actions that may at some point be “overridden” by a duty to perform an alternative course of action as dictated by circumstance (Ibid, 27). Thus, our duty must be given toward the first course of action unless or until another duty overrides that first duty. As a result, prima facie duties are comparative and must be weighed against one another when deciding the best course of action in a particular circumstance. So for instance, suppose one offers to help a friend move into a new apartment. This would be the prima facie duty of “beneficence” according to W.D. Ross (Ibid, 28). However, that individual soon realizes that he/she initially promised another friend that they would meet for lunch. Thus, the individual had already committed to the prima facie duty of “fidelity” according to Ross (Ibid, 28). And breaking that fidelity in favor of beneficence to another friend would be violating the prima facie duty. One is bound to that initial duty of fidelity unless or until something supersedes it. In this instance, the beneficence demonstrated by helping a friend move may not supersede the prima facie duty of fidelity because it does not clearly outweigh or override the initial duty. The basic idea is that prima facie ethics calls upon us to weigh multiple duties when performing certain actions rather than relying on a single moral principle (Ibid, 28).

Therefore, in applying this ethical theory to death penalty and 1st degree murder, judgment is required in order to ascertain the duty that is most “stringent” and worthy of being of respected (Ibid, 28). Thus, given the topic of the death penalty, suppose that the prima facie duty will be “nonmaleficence” such that one must refrain from harming others (Ibid, 28). This duty must be upheld unless or until another duty overrides the capacity to avoid harming others. Accordingly, a given murderer would apparently fail to adhere to this prima facie duty because he/she chose to fatally harm another. Yet it is possible that one was attempting to save twenty other individuals from being killed. Therefore, one acted such that one’s duty of beneficence and desire to save many others trumped one’s initial duty to avoid harming a single person. However, if no one else is saved or prevented from harm by the act of murder, than that murderer violates the prima facie duty of nonmaleficence.

It therefore seems that an ethics of prima facie may be a promising ethical approach because it calls for a duty to one’s initial choices as determined by circumstances as well as by certain ideals such as beneficence or fidelity. And yet, who determines these ideals, how should they be followed once they are determined, and is there a universal database of moral ideals? We encountered a similar problem in Aquinas’s natural law theory. Moreover, there is no hierarchy to help us decide which prima facie duties hold the most weight and should therefore be respected more heavily than others. After all, fidelity may hold more weight than beneficence but perhaps not as much as nonmaleficence. Perhaps the answer to this problem is that it depends on the circumstances. Some may be inclined to view such circumstantial ethics as inconsistent casuistry in response to a fear of establishing an all or nothing approach to ethics. But this is not necessarily a criticism. Making ethical decisions on a case-by-case basis seems more logical and more specific than universally applying one all-encompassing ethical theory to each case. Sure

enough, many would argue that when it comes to the death penalty and 1st degree murder, agreement or disagreement with it varies depending on the case at hand. Perhaps serial killers deserve the death penalty but a woman who murders her unfaithful husband does not. One argument would be that a serial killer poses a far greater threat to society than the woman who killed her husband. Therefore, perhaps just the serial killer should receive the death penalty. Then again, neither would be threats to society if the death penalty were imposed on both. So the key question for situational ethicists who support the death penalty in certain instances is where should the line be drawn? Perhaps if an individual is convicted of just one count of 1st degree murder, then the death penalty can be ruled out. However, I still maintain that, as a response to 1st degree murder, the death penalty cannot be morally upheld given its consequentialist, natural law, and rights-based hypocrisy.

Indeed, I will now attempt to explore a rights-based ethical perspective on the death penalty. A “right” according to Mark Timmons can be best defined as an “entitlement” that gives someone the capacity to take a certain course of action (Ibid, 20). And without that right, they would not have the claim or backing for such a course of action. Rights can also differ greatly in content and in strength depending on what is being claimed (Ibid, 21). Therefore, an important distinction must be made between a negative right and a positive right (Ibid, 21). This distinction will directly impact the moral assessment of the death penalty from a rights-based perspective. With that in mind, a negative right is a right of “noninterference” (Ibid, 21). For instance, individuals have the right not to be touched by others against their will. A positive right on the other hand, signifies a right that another party must provide to the rights holder (Ibid, 21). For example, once I pay my tuition to Emory University, I have the legal right to attend class. By contrast, if I fail to pay my tuition, I do not possess such a right. However, for the purposes of

this essay, I will be discussing moral rights rather than legal rights. A moral right is not based upon any legal system and it can therefore be difficult to trace the source of such a right given that there is not a unified method of enforcing it. Nevertheless, having issued this caveat, J.L. Mackie asserts that rights are a way for individuals to “choose how they shall live” (Ibid, 24). Although this is a very broad statement, it endows individuals with tremendous freedom and power. However, individuals only have such power to the extent that it does not infringe upon the rights of others. Ultimately, perhaps the greatest difficulty of adhering to a rights-based moral theory occurs when there are competing rights. In these cases, it can be difficult to weigh, judge, or apply such rights in a mechanical and absolute fashion. Yet in that sense, it is no different from all other ethical theories.

Accordingly, I submit that a rights-based approach to the death penalty as a response to 1st degree murders undermines the moral permissibility of such a punishment. Stephen Nathanson, for instance, presents a strong rights based argument against the death penalty. But in certain areas, he does not use it as powerfully or as convincingly as he could. In his essay, he stresses the “sanctity” of human life and dignity (Nathanson, 485). For him, the right to life is “in some sense, untouchable” (Ibid, 485). In other words, it trumps all other considerations and can be designated as a right of non-interference and therefore, a negative right. In addition, Nathanson emphasizes the Kantian concept of human dignity in his attempt to criticize the death penalty. For by killing a killer, Nathanson argues that society fails to respect the dignity of a human being. However, as we have seen, Kant supports the use of the death penalty because he thinks that a murderer brings the same penalty of murder upon himself/herself. And in the process, he/she effectively surrenders his dignity as a human being. Nathanson disagrees and thinks that such people “do not forfeit all their rights. It does not follow from the vileness of their

actions that we can do anything whatsoever to them” (Ibid, 484). Evidently, one cannot subject a criminal to cruel or inhumane treatment because he/she is still “a human being, and we think that there is something in him that we must continue to respect in spite of his terrible acts” (Ibid, 484). In other words, Nathanson believes that a criminal still maintains his dignity and right to life despite all that he has done to jeopardize such rights. Camus agrees and asserts that, “such a right to live, which allows a chance to make amends, is the natural right of every man, even the worst man” (Camus, 221). I initially found these points very attractive. After all, preserving human life seems to be an altruistic and worthy cause that gives every individual the chance to atone for what he/she has done. However, from the standpoint of a death penalty defender, one could make a strong case against Nathanson and Camus by arguing that one should not respect the rights of an individual who clearly did not respect those rights in the individual he/she murdered. Nathanson’s and Camus’ arguments can only answer by saying that this particular right must be universally and inherently respected. This point may be correct. But it is difficult to prove. Indeed, who or what deems life sacred and worthy of being inherently respected if the individual in question did not respect that right in someone else? We encountered this problem earlier in natural law theory. I do not necessarily disagree with Nathanson, Camus, or even Aquinas in their esteem for human life. I too believe human life is sacred and should not be taken as a form of punishment. But this is simply a belief that stems from personal convictions just as it does for Nathanson, Camus, and Aquinas. We all have such convictions. But personal convictions are not the most verifiable or convincing ways to argue against the death penalty.

As an alternative to the arguments of Nathanson, Camus, and Aquinas, the Supreme Court asserts a defense of the death penalty in its 1976 decision *Gregg v. Georgia*, by citing the very same notion of human dignity cited by Nathanson and Kant. The Supreme Court argues that

retribution is “neither a forbidden objective nor one inconsistent with our respect for the dignity of man” (Jacoby, 6). Evidently, the Supreme Court does not find the concept of retribution taboo or against the interests of a human being’s “dignity.” Accordingly, they do not see the death penalty as a direct violation of the very dignity that Nathanson advocates. In this sense, the Supreme Court’s position is similar to that of Kant’s in that he too believes in the dignity of mankind. Yet he believes a murderer forfeits such dignity and a right to life.

Nonetheless, I still maintain that a right’s based approach is still a profoundly convincing theory for arguing against the death penalty as a response to 1st degree murder. My argument stems from the fact that even if we accept Kant’s argument that a killer has forfeited his own moral right to life by the very act of killing another, society does not have the positive moral right to take that killer’s life if he/she no longer presents a threat to society. In other words, even if one believes that a killer, as a result of his actions, has forfeited the negative right to stay alive and not be interfered with, this does not necessarily imply that the state has the positive right and claim to take that killer’s life. To do so would be hypocritical. A state asserts that a man cannot claim the positive right to another’s life. But then the state claims a positive right to that killer’s life. Accordingly, the only causal connection between forfeiting the negative right to life and receiving the positive right to take that same individual’s life is based on the vengeful and hypocritical premise that a state has the right to take a killer’s life without being punished. Meanwhile, a killer does not have the right to take someone’s life and remain unpunished. A killer has already demonstrated the positive right to another’s life. And if one deems such an action morally impermissible and worthy of punishment, one cannot logically argue that it is morally permissible to then assert the positive right over that killer’s life.

There are several ways to respond to my argument. One response might be that the initial victim(s) has not forfeited his negative right to life while the killer now has forfeited his negative right to life through his act of killing. As a result, society can claim the positive right to the killer's life. But if one accepts that a killer does not have the positive right to his victim's life, how can one assert that society has a positive right to the killer's life without violating the same right that the killer violated? By killing, a killer asserts the positive right to take his/her victim's negative right to life. And in punishing this act, if society claims the positive right over a killer's life, society has asserted the same positive right that it sought to condemn. In short, just because the killer asserted such a positive right, it does not follow that society can assert such a positive right. The very fact that one is attempting to punish the killer for the assertion of this positive shows that society does not wish to give the killer this positive entitlement. Susan Jacoby astutely points out that, "Although even the most grievous criminal acts do not strip an offender of his or her humanity, they do shift the burden—and the right—of determining the offenders fate from the individual to society's representatives" (Ibid, 288). As a result, they do not forfeit "all of their rights, but they do lose the freedom to choose their own destinies" (Ibid, 288). For Jacoby, killers forfeit their capacity to determine their own fate when they elect to take this capacity away from their victims. After all, if society allowed killers to determine their own fate, those killers would possess the very power and autonomy that they took away from they victim. Essentially, she recognizes that killers have forfeited the negative right to control their destiny and right to life. Instead, she thinks society now controls that destiny. Although I agree that society controls this destiny, this does not imply that it has the positive right to impose the same fate and claim to a life that a killer imposed on a victim. This would mean that society could assert the same right as a killer while remaining free from punishment. Therefore, society's

representatives can theoretically determine the fate of killers so long as they do not assert the same positive right to a killer's life that the killer asserted over his/her victim.

To be clear, my contentions of the death penalty's hypocrisy as a response to 1st degree murder in consequentialist, natural law, and rights-based terms are not evidence of a pacifistic argument. I do recognize that in a war effort for example, when a soldier on one side attempts to kill a soldier on another side, the concept of self-defense renders the killing of the attacking soldier morally permissible. For during war, the threat of being killed is clear and immediate and killing is necessary for the preservation of one's own life. However, working within the framework of 1st degree murder, when the threat of a criminal can be neutralized through incarceration, the need to kill to preserve one's own life and the safety of others no longer holds. By supporting and carrying out the death penalty in a 1st degree murder context, a given society thereby claims that taking a life is morally permissible while simultaneously attempting to show that taking a life is not morally permissible by punishment of death. The taking of a life manifests itself in both cases and one is viewed as morally permissible and the other not. Yet the act of taking a life remains the same. I do agree that in order to show that taking a life is not morally permissible, punishment is necessary. But by instituting the very same punishment as the initial crime, society demonstrates its approval of the moral standards maintained by the very killer that it seeks to punish. Moreover, just as a society sinks to the same low moral standards of a murderer, that society simultaneously sends the hypocritical message that it's own actions and low moral standards can go unpunished.

In the end, I do not mean to dismiss the other ethical approaches entirely or even to accept the consequentialist, natural law, and rights based approaches in their entirety. Each of the six ethical approaches to the death penalty has their merits and their deficiencies. Therefore, it

would be dangerous to follow and apply a single one of these ethical approaches without at least considering what other approaches have to offer when it comes to moral permissibility.

Nevertheless, I believe the consequentialist, natural law, and rights based approaches are the strongest theoretical ways to argue against the moral permissibility of the death penalty in the context of 1st degree murder.

Chapter 2

However, a theoretical rights based, natural law, and consequentialist attack of the death penalty as a response to 1st degree murder may not be sufficient to prove the immorality of the death penalty. But perhaps the practical demonstration of this punishment as a form of revenge will help underscore its immorality in the context of 1st degree murder. By the term “revenge,” I am referring to an action that reciprocates an earlier action. It involves “retaliating in kind or degree” for the purpose of “get[ting] even” (Webster’s Ninth New Collegiate Dictionary, 1009). The words “in kind” and “degree” manifest themselves through a punishment that mimics the crime in consequential, natural law, and rights based terms. Accordingly, in this chapter, I will attempt to show that such retaliation cannot be morally upheld in the interests of justice.

As a punishment for a crime of 1st degree murder, the death penalty remains a potent example of revenge and retaliation “in kind or degree.” After all, the response of taking a life and a right to life as punishment for the initial crime of taking a life and a right to live demonstrates a reciprocity and retributivism that renders the punishers little different from the punished. As Susan Jacoby points out, “One could easily construct an argument in which society’s deep emotional need for retribution can only be satisfied by subjecting murderers to precisely the same torments they inflict on their victims” (Jacoby, 6) In this way, Jacoby perfectly captures the hypocrisy of the death penalty’s retributivist demands in response to a crime of murder. In doing so, she also elucidates the connection between retributivism arising out of a practical and “deep emotional need” for payback. Yet in carrying out these retributivist demands, I still do concede

that differences may lie in the intentions, alleged guilt of the parties, and/or legal basis for taking such a life and right to life.

Nonetheless, by practically applying the term revenge through the killing of a killer, the state sinks, in consequential, natural law, and rights based terms, to the level of the criminal it seeks to punish. Many would argue that killing a serial killer or single murderer would provide justice for the victims. But by disposing of killers just as the killers disposed of their victims in consequential, natural law, and rights based terms, society does a disservice to such victims. Although the killers did so in different ways and with far less altruistic motives, the taking of a life and the right to live remains the same in all cases. Most, myself included, will not mourn the death of such killers much less want them to live. But as long as they no longer present a threat to others by virtue of incarceration, they must not be killed using the death penalty. In his essay on the death penalty, Richard Lempert points out that retributivists “direct most of their attention to the question of whether murderers deserve to die. While an affirmative answer to this question is necessary to justify capital punishment, it is not sufficient. There remains the...question of whether the *state* should be allowed to execute murderers.” (Lempert, 1181) Lempert recognizes that deserving to die is a necessary condition for the death penalty. Yet it is not a sufficient condition because the state’s attempt to bring about such death is another necessary condition for imposing the death penalty. Thus, whether or not a murderer deserves to die, the state’s right to take a life remains an open question. I believe it must remain an open question because the effect of taking a life and the taking of the right to life remain the same whether the state takes Jeffrey Dahmer’s life or whether Dahmer cannibalizes another victim. One seems far more morally permissible than the other. But in either case, the act of taking a life cannot be morally

permissible given its consequential, natural law, and rights-based hypocrisy as well as the practical demonstration of revenge.

So although I have previously used the phrase “an eye for an eye” as a theoretical construct in order to demonstrate the consequential, natural law, and rights based hypocrisy of the death penalty as a punishment for 1st degree murder, this phrase can also be used to underscore the death penalty as a basic manifestation of revenge and retribution. For according to the definition of revenge, the retaliation “in kind” takes place in the initial crime and the corresponding punishment. To be clear, from here on, I will use the terms retribution and revenge interchangeably. For as Susan Jacoby puts it, although “the very word ‘revenge’ has pejorative connotations. Advocates of draconian punishment for crime invariably prefer ‘retribution’—a word that affords the comfort of euphemism although it is virtually synonymous with ‘revenge’” (Jacoby, 4). So while society may use the word “retribution” in order “to blur the outlines of its evil deeds,” both retribution and revenge practically manifest themselves in the same ways within the context of 1st degree murder. With this in mind, the death penalty serves as a practical demonstration of the desire for revenge. I recognize that these claims of revenge or retribution are predicated upon equating the killing of an allegedly guilty man to the murder of allegedly innocent individuals. But again, I am only equating them with respect to act of taking a life and right to life that occurs place in both instances. I am not necessarily equating the death penalty to the initial murder(s) in terms of the guilt or innocence of the respective parties, the method of killing, or in terms of the legal basis for either action. I am simply arguing that the act of killing or causing death remains the same in both cases. The term revenge captures this idea effectively because, in its most basic form, it calls for reciprocal actions. And as a result, when applied to a 1st degree murder conviction, the death penalty is a force of revenge that equates the

initial crime of murder with the punishment of murder. Hiding this consequential, natural law, and rights-based hypocrisy under the guise of such terms as deterrence, justice, safety, and/or retribution does not change the fact that the death penalty requires a society to vengefully impose the very same crime of murder that it desperately seeks to punish and do away with.

In her critique of the death penalty, Susan Jacoby clarifies the notion of vengeance built into the death penalty. She argues that, “The death penalty is not merely legalized vengeance but vengeance taken to its extremity” (Ibid, 235). The ultimate punishment is used for the ultimate crime. Whereas if society were to propose robbing a robber as a form of punishment, Jacoby would deem this legalized vengeance but not yet taken to its extremity given that 1st degree murder is treated as a more serious offense than robbery. She then expresses her disagreement with the death penalty by appealing to Cesare Beccaria’s book *On Crimes and Punishment*. He writes, “to me it appears absurd that the laws, which are the expression of the public will which detest and punish murder, should themselves commit a murder” (Ibid, 237). Evidently, both thinkers show an appreciation for the vengeful, “absurd,” and hypocritical nature of the death penalty. One might respond to Beccaria by arguing that he misuses the term “murder” by calling the death penalty an act of murder. But while it may not be an act of murder in terms of intent or legal backing, it is certainly an act of killing and a taking of life. Therefore, the reciprocity that characterizes the term vengeance still manifests itself in the crime of 1st degree murder and in the death penalty as punishment. Another response to Beccaria’s argument might be that the public does not in fact detest murder quite so strongly and therefore, it would be morally permissible to commit murder as punishment. But if the first part of the previous statement were in fact accurate, there would be no need for “vengeance taken to its extremity.”

Nevertheless, both Jacoby and Beccaria clearly avail themselves to the fact that the death penalty demonstrates just how seriously society takes the crime of murder. It forces criminals to experience “some measure of the ultimate horror they inflicted on others” (Ibid, 240). But the key phrase here is “some measure.” As we have seen, such horror cannot always be fully experienced in the case of multiple killings. Moreover, such horror may not even be similarly experienced in that the death penalty does not call upon a state to kill a criminal in precisely the same way a criminal disposed of his/her victim(s). Yet, without the death penalty, experiencing any such harm would be impossible. It is only through the death penalty and the reciprocal nature of vengeance that a killer can practically experience “some measure” of his crime. Jacoby thus points out a counter argument such that “there is no way of making you suffer in any way comparable to the way you have made others suffer. All the same, we will do the worst within our power. We will kill you. You can’t die more than once, but you can at least die once” (Ibid, 284). In short, society may be so hungry for revenge that it is willing to settle even for an incomplete form of vengeance that often cannot measure up to the murder that was committed. This argument even hints at the prospect of killing someone more than once (if that were ever possible) so as to make up for some or all of the murders. However, Jacoby points out that this argument “ignores the unique impact of revenge by death not on the criminal but on society in its role of avenger” (Ibid, 284). For in order to fulfill its role of avenger, society is forced to reciprocate the taking of a life with its own act of taking a life.

In exclusively logical terms, such vengeance makes sense. Jacoby observes that,

On a practical level, the human desire for retribution requires no elaborate philosophical rationalization. A victim wants to see an assailant punished not only for reasons of pragmatic deterrence but also as a means of repairing a damaged sense of civic order and personal identity (Ibid, 9).

Although Jacoby is right to suggest that the rationale and motivation behind the concept of revenge is clear and logical, this does not make revenge morally permissible. After all, the logic behind the notion of revenge and an “eye for an eye” seems so basic. Yet its simplicity is what makes this concept so dangerous. One man kills another. That man must now be killed. It seems only fair and makes basic logical sense. But does killing that man practically solve the problem of the initial killing? On the one hand, the killer will not be able to kill again. Moreover, perhaps killing him/her will result in “pragmatic deterrence” and rehabilitate the “damaged sense of civic order and personal identity.” But in order to do so, one must mimic the act that caused the problem in the first place. As a result, the problem of killing only manifests itself again. And although this example of killing is only serving as a response to the initial killing, the taking of a life and right to life remains ubiquitous. Therefore, what makes the concept of an “eye for an eye” so dangerous is that it recreates and perpetuates the initial wrongdoing. So not only does it fail to solve the problem of the initial murder, but it also reinforces it simultaneously. Ultimately, if the goal of punishment is indeed vengeance, then the death penalty does fill that void albeit somewhat imperfectly. However, if the goal of punishment is justice, the death penalty may not stand as the optimal course of action.

Indeed, the term “justice” is often confused with the terms “retribution” and “revenge” with regard to its practical demands. For in accordance with the proverbial image of justice as a set of scales, death penalty defenders argue that the crime of murder should be balanced or offset by the punishment and retribution of murder. Yet the problem with an exclusively retributivist model of justice is that it would call for all punishments to mimic the crime. Nathanson’s arguments would be cashed out in practical terms such that an arsonist would be burned and a rapist would be raped (Nathanson, 482). This would be in strict accordance with the balancing

image of justice. However, can this strict characterization of justice as retribution be continuously and practically upheld? As we have seen, in the case of multiple murderers for example, strict adherence to retribution may never achieve full balance. And perhaps, no punishment can perfectly balance out any crime. Thus, the assertion that justice must be entirely retributivist cannot be practically maintained in all cases.

Indeed, another way in which the retributivist model fails lies in the sheer fallibility of the death penalty. Richard Lempert argues that, “however good a justice system and however much such a system demands the death penalty, the philosophy of retributivism apparently forbids the sacrifice of innocent lives as a condition for the maintenance of such a system” (Lempert, 1183). Lempert accounts for the possibility that the death penalty can claim innocent lives. Unlike an alternative form of punishment such as life in prison, the retributivist-based model of justice put forth by the death penalty calls for certainty and finality. Any instance in which the death penalty is applied to an innocent individual represents a catastrophic failure of the retributivist model of justice. Nowhere is this more of a failure than in the case of the death penalty. For even if a retributivist model is applied in the case of robbery such that the state incorrectly orders the robbery of a thief, such a retributivist punishment would not be as severe as killing an innocent individual. After all, no one can be brought back to life and any money taken from a thief could be returned if they were later found innocent. Sure enough, if a murderer is sent to prison for life, failure to convict the guilty party could still be partly remedied by releasing the accused and providing compensation for his/her trouble. Therefore, as Lempert also recognizes, “Although it may be a comfort not knowing what lives will be mistakenly taken, nothing about retributivism allows us to sacrifice the lives of unknown innocents in the interest of just vengeance” (Lempert,

1183). Ultimately, he raises the question of whether society should apply a retributivist model of justice when such a model requires a certainty of guilt that would be nearly impossible to uphold.

But even if such a retributivist model of justice could be perfectly carried out, would a retributivist model of justice still be the optimal course of action? The institution of a punishment that, in consequential, natural law, and rights-based terms, mirrors the initial crime establishes a model of “justice” that allows the state to behave in the same way as the criminal while remaining free from punishment. In this way, the very people who claim to be in a position to judge the initial action as criminal, wicked, and unlawful, merely perpetuate the wrongdoing and thereby pervert the notion of justice they seek to uphold. But while many of the great philosophers have been quick to comment on what justice is not, they have experienced difficulty articulating exactly what justice is.

In Plato’s *The Republic* for example, Socrates devotes much of his efforts toward finding out what justice is and why it should be sought after. In order to accomplish this, he attempts to examine the large-scale practical implications of a just society before examining the small-scale implications of a just individual. Initially, Socrates begins by debating Cephalus, Polemarchus, Simonides, and Thrasymachus. Each of these men proposes a unique definition of justice. But rather than proposing his own definition, Socrates first elects to question and refute the definitions put forth by the other men. Accordingly, after refuting Cephalus, Polemarchus, and Simonides’s unique definitions of justice, Thrasymachus proposes his definition of the term. He believes that justice refers to “nothing else than the advantage of the stronger” (Plato, 12). As with the others, Socrates goes through the same arduous process of questioning Thrasymachus and engaging him in a dialogue. Ultimately, he disagrees with Thrasymachus on the grounds that, given the choice, everyone would elect to have something good happen to them rather than

to make something good happen for someone else. Therefore, he continues to press Thrasymachus further and eventually they conclude together that justice is “excellence of the soul” while injustice is “vice of soul” (Ibid, 27). This becomes Socrates’s small-scale definition of justice.

But in order to clarify this point, Socrates constructs a large-scale definition of justice that he hopes will enable him to construct a more complete small-scale definition of justice. Socrates affirms that the idea of job specialization is the defining feature of a just society. It therefore follows that injustice in society occurs when this social hierarchy is disrupted. Thus, Socrates concludes that, “when each group is performing its own task in the city...it is justice and makes the city just” (Ibid, 99). If this is not done, the city cannot be just. I disagree with the notion that job-specialization is a sufficient condition for a just city. After all, a system for practically maintaining and punishing breaches of such job-specialization would need to be put in place as well. Instead, Plato and Socrates adopt the roles of teachers rather than just punishers with respect to injustice (Jacoby, 140). They wish to re-educate the souls of the citizens that motivated the unjust actions rather than simply instituting punishments based on the consequences of such actions (Jacoby, 141). Nonetheless, both emphasize the critical presence of balance and harmony in a large-scale definition of justice.

And sure enough, Socrates also appreciates the importance of these concepts within the framework of a small-scale definition of justice. Like the three-class system of the city, Socrates claims that there are three key parts that make up an individual’s soul. There is a rational part of the soul, a part for spirit, and a part for appetites and desires (Ibid, 103-104). Socrates emphasizes that “...each one of us within whom each part is fulfilling its own task” (Ibid, 105). Thus, when these three aspects of the soul work in concert, a just individual will be produced.

And like the large-scale justice of the city, Socrates avers that each part of the soul must not hinder or prevent the other parts of the soul from performing their respective tasks. Socrates compares this to a “musical scale” such that a man “does not allow each part of himself to perform the work of another, or the sections of his soul to meddle with one another” (Ibid, 107). In this way, Socrates portrays the three parts of the soul as mutually exclusive. And in order to remain a just soul, one part must not interfere with another. This results in injustice. Ultimately, towards the end of Book IV, Socrates maintains that the proper or improper structuring of the soul will also mirror the way in which an individual practically behaves. (Ibid, 108) Thus, a person with a just soul will act justly and vice versa. Moreover, the concepts of harmony and balance manifest themselves in small-scale justice as well.

Like Socrates, Aristotle also makes it a priority to define the concept of justice in his *Nicomachean Ethics*. However, his approach is somewhat different than that of Socrates. He does not use Socrates’s method of debate and dialogue. Instead he focuses on his own viewpoints instead of initially trying to probe others for their perspectives on the concept of justice. He begins by referring to two distinct types of particular justice. The first is distributive justice. Distributive justice aims at what is “proportionate” (Aristotle, 125). It is comparative in nature and aims at a balance, equality, or mean between two sides. By contrast, injustice in this particular sense would involve whatever fails to balance out this proportion. Aristotle then goes on to discuss the notion of justice within the context of the law and committing a crime. He calls this corrective justice. He asserts that, “...it matters not whether a good man has robbed a bad man, or a bad man a good man...the law looks to the difference of the hurt alone, and treats the persons as equal” (Ibid, 126) Thus, within the context of the death penalty, it does not matter whether a murderer murders a good or bad person. What matters is the harm inflicted by the act

of murder. Therefore, according to Aristotle's view, it would be inconceivable to see an initial murder as any less hurtful than a punishment that similarly calls for an act of killing such as the death penalty. After all, the amount of harm is the same in both cases. Aristotle further points out that "when one kills and the other dies, the suffering and the doing are divided into unequal parts; but then [a judge] endeavours by means of punishment to equalize them, by taking somewhat away from the gain" (Ibid, 126). Aristotle is then quick to define his use of the word "gain" as referring to the individual who kills. The opposing force of "loss" refers to the individual who is killed and his loss of life. Thus, through punishment, the judge attempts to reconcile the loss and gains in effort to reach the mean or "the equal, which we call the just" (Ibid, 126). Based on this line of thinking, it could be argued that Aristotle's notion of equality should be reached through a retributivist model of justice.

For in order to find equality, it would make logical sense to offset or balance the crime of murder with a punishment of murder in the form of the death penalty. However, upon examining Aristotle's language more closely, he recognizes that a judge attempts to equalize by "taking somewhat away from the gain." He does not say to take the same away from the gain as was taken from the loss in the mold of an "eye for an eye." He says "somewhat." This term is rather vague for it does not tell us how much to punish or take away from an individual for his gain. Nevertheless, "somewhat" also does not necessarily mean the same exact and perfectly equalized conception of justice that Aristotle initially proposes. Accordingly, the problem with Aristotle's characterization of justice is that it offers very little insight into how we punish crimes other than trying (perhaps in vain) to equalize the punishment with the crime. And as we have seen in the case of the death penalty, how do we equalize more than one murder? Furthermore, would it still be just to retaliate for the sole purpose of equalization?

Sure enough, in his chapter *Of Retaliation*, Aristotle attempts to answer these questions by exploring the law of retaliation known as “lex talionis” (Ibid, 129). He dubs this kind of “eye for an eye” justice “commutative justice” (Ibid, 129). Aristotle asserts that, “in the intercourse of exchange, such a notion of justice as retaliation, if it be according to proportion and not according to equality, holds men together” (Ibid, 129). Evidently, Aristotle sees a distinction between proportion and equality. It seems that a punishment or retaliation must be proportionate to the initial harm done but not necessarily equal to it. By extension, a punishment need not perfectly fit the crime but it must attempt to balance it out. Yet earlier in his ethics, Aristotle defined proportion as “an equality of ratio” (Ibid, 124). The term “equality” is embedded within his definition of proportion. Nonetheless, he still sees a distinction between the two terms. And it is this distinction that renders retaliation just or unjust for Aristotle. He recognizes that with regard to exchanges of money and goods, retaliatory and balanced dealing are key components of maintaining such a system. But it still remains unclear whether the killing of a 1st degree murderer would be an act of justice or injustice for Aristotle.

Indeed, part of the problem for some of the early philosophers lies not in their own understanding of the terms justice and injustice, but in their ability to clearly convey the meaning of the various other terms they use to define justice. For in a pragmatic vein, Charles Sanders Peirce avers that the clarity of a definition is dictated by the spelling out of its actual or possible effects (Peirce, 132). Yet in Aristotle’s definition of the terms retaliation and justice, he reverts back to the terms proportion and equality. But he does not define how the important distinction between proportion and equality cashes itself out. For instance, does it mean that when someone kills, that individual must be killed as a proportionate or equal punishment? Aristotle’s definition does not clearly answer this question. That does not mean that Aristotle’s definitions of the terms

“justice,” “proportion,” and “equality” are wrong. It just means they lack clarity with respect to their effects and how these effects might manifest themselves in a punishment such as the death penalty.

Therefore, in order to find a different rendering of justice, revenge, and the law, it is worth examining the work of Albert Camus. Camus writes,

A punishment that penalizes without forestalling is indeed called revenge. It is a quasi-arithmetical reply made by society to whoever breaks its primordial law. That reply is as old as man; it is called the law of retaliation. Whoever has done me harm must suffer harm; whoever has put out my eye must lose an eye; and whoever has killed must die. This is an emotion, and a particularly violent one, not a principle. Retaliation is related to Nature and instinct, not to law. Law, by definition, cannot obey the same rules as nature. If Murder is in the nature of man, the law is not intended to imitate or reproduce that nature. It is intended to correct it. Now, retaliation does no more than ratify and confer the status of a law on a pure impulse of nature (Camus, 194-195).

At the very beginning of this passage, Camus clearly states what he means by the term revenge—“a punishment that penalizes without forestalling.” He then recognizes the “quasi-arithmetical” nature of revenge such that if A hits B, B hits A in response and without delay. In this way, he gives a concrete example of the way revenge practically manifests itself. Yet perhaps his most important point is that this demonstration of “an eye for an eye” “is an emotion...not a principle.” In other words, it is a natural human response to retaliate in this way. This mirrors Jacoby’s earlier point regarding “society’s deep emotional need for retribution” (Jacoby, 6). Yet for Camus, the law and *lex talionis* must hold itself to a higher standard and “cannot obey the same rules as nature.” For the law “is intended to correct” these natural human impulses and not “to imitate or reproduce them.” Indeed, that is precisely what the death penalty fails to do in its capacity to punish 1st degree murder. It makes no attempt to correct the crime and human impulse demonstrated by such an act of murder. It merely recreates that very crime in consequential, natural law, and rights-based terms. In doing so, it renders the punishers and their natural impulses little different from those they seek to punish. Ultimately, if the goal of the

punishment is to mimic the crime that was committed, the death penalty can attempt to accomplish this with the clear exception of multiple murders. However, if the goal of punishment is correction, then the death penalty falls short of the intended goal.

Moreover, Camus recognizes something about justice that both Socrates and Aristotle may have overlooked. He recognizes its “frailty” (Camus, 217). So despite the proportionate and balanced vision of justice portrayed by the other two iconic philosophers as well as by the image of justice as a set of scales, Camus avers that justice is not perfect and far from it. Camus wonders, “Must we therefore conclude that such frailty authorizes us to pronounce an absolute judgment and that, uncertain of ever achieving pure justice, society must rush headlong, through the greatest risks, toward supreme injustice?” (Ibid, 217). Indeed, “if justice admits that it is frail, would it not be better for justice to be modest and to allow its judgments sufficient latitude so that a mistake can be corrected?” (Ibid, 217). Camus understands and respects the potential and often actualized fallibility of justice systems. In practical terms, the failures of such justice systems have already manifested themselves and will only continue to manifest themselves.¹ In Aeschylus’s *Oresteia*, Athena even warns us to, “Count the pebbles you’ve shaken out of the vote-pots/ Make sure there are no mistakes in your tally./ The slightest error could lead to disaster” (Aeschylus, 172) Both Athena and Camus recognize that justice systems are instituted and overseen by fallible human beings. This is not to say that such justice systems should shy away from perfection. Nevertheless, “The science that claims to prove innocence as well as guilt has not yet reached the point of resuscitating those it kills.” (Camus, 214) Accordingly, human beings must not give into the illusion that justice is currently capable of upholding scientific infallibility.

Ultimately, these questions of justice and revenge have been debated throughout the history of philosophy. For Socrates, Aristotle, and for the image of justice as a set of scales, justice calls for harmony and balance. Yet for Camus, this balance cannot be reached by recreating the initial crime. The human impulse of revenge cannot be mistaken for justice or law. Moreover, justice may never reach the pinnacle of perfect balance and harmony despite all our hopes and efforts to make it so. After all, justice is not imposed through the exactness of a mathematical equation. It is imposed by fallible and emotional human beings. But the key question then becomes, given our inherent fallibility and if not through revenge, how do we achieve the balance and harmony in response to the crime of 1st degree murder? Susan Jacoby appreciates that “religion and modern psychiatry” often maintain “that one must abandon the drive toward vengeance in order to attain emotional peace. But we also believe in the importance of retribution to civic and moral order, and this sense of rightness is violated by the taboo attached to revenge” (Jacoby, 59). Jacoby points to the incredibly difficult balance between finding emotional peace without seeking revenge while still imposing an adequate form of punishment. With that in mind, I believe part of the solution stems from a critical distinction made by Robert Bohm in his book *Deathquest III: An Introduction to the Theory and Practice of Capital Punishment*.

Bohm recognizes a significant difference between what he terms “just deserts” and “revenge.” (Bohm, 343) For Bohm, the former occurs when an offender repays society for his crime while the latter occurs when society pays back the offender for his crime (Bohm, 343). Initially, there seems to be no practical difference between the two. Yet if the purpose of punishment is to adhere to Bohm’s “just deserts,” the death penalty fails to give the offender a chance to pay back society. After all, even leading up to the execution and certainly once the

offender is dead, there is neither an incentive nor a live possibility for the criminal to attempt to pay back society for what he/she has done. As such, the death penalty is simply a way for society to pay back the offender through revenge. I recognize that, according to Bohm's distinction, any payback from the criminal cannot make up for the crime that was committed. The victim cannot, after all, be brought back to life. Yet any payback that society forces upon the criminal also fails in this capacity. Accordingly, I find the revenge aspect of punishment to be a deeply problematic course of action in response to a crime of 1st degree murder. However, I hope to show in chapter three that the opportunity for repayment on the part of the offender can provide concrete punitive and restorative value in the aftermath of a crime.

Chapter 3

In order to ensure that justice and punishment are upheld and remain sources of strength rather than frailty, the balance and harmony spoken of by Socrates and Aristotle must be reflected by the punitive as well as the restorative elements of the term “justice.” And although there is no guarantee, a combination of punitive and restorative justice may result in repayment on the part of the criminal well as emotional peace for the victim and society. New York University Law Professor Bryan Stevenson writes that, “The human condition requires that individuals be guided by laws that transcend the weakness of anger, fear, and human emotion. Punishment must be rooted in a vision of justice that inspires, rehabilitates, and esteems humankind” (Stevenson, 24). Stevenson recognizes that punishment must be inscribed by a clear intended purpose. If that purpose is to express “human emotion” and seek revenge, the death penalty may indeed serve as an acceptable form of punishment in response to 1st degree murder. However, if the purpose of punishment is to “inspire, rehabilitate, and esteem humankind” as well as for the offender to repay society for his crime, the death penalty may not in fact serve as the best option.

For in a pragmatic vein, in order to decide which form of punishment is best, the question is, for what purpose? Why does a state punish and what are the goals of such punishment? By first answering these questions, I hope to show that the death penalty and a punitive model of justice in which society pays back an offender, not only fails to account for the impact of a heinous crime on a victim, their family, and even society as a whole, but it also does not allow the offender to pay back society for his/her crime. In the aftermath of a crime, I submit that the focus should be on the criminal paying back society and the victims for what he/she has done. For as we have seen, when society pays back the offender, punishment is in danger of becoming

vengeful and retributive. To be clear, this is not a cure-all solution. Such a solution would entail bringing the victim of 1st degree murder back to life. Yet a form of justice that allows a guilty party to pay back society, and looks out for the interests of the victim, can aim at “repairing a damaged sense of civic order and personal identity” (Jacoby, 9). In doing so, justice may be able to achieve its goal of maintaining balance and harmony with respect to the victim as well as the offender.

In critiquing the concept of punishment and its aims, it will be helpful to begin with a basic definition of the term “punishment.” According to Joel Feinberg, “punishment is defined in effect as the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command)” (Feinberg, 95). Essentially, it is a method of holding an individual accountable for breaches of “a rule or command.” If that individual were not punished, he/she might assume that breaking “a rule or command” has no adverse consequence. So even if one knows that breaking “a rule or command” is wrong, without suffering “the infliction of hard treatment,” there is nothing stopping or discouraging them from breaking this rule again. Indeed, without “the infliction of hard treatment,” there is no incentive to uphold a rule. Accordingly, there seems to be aspects of condemnation and deterrence built within the concept of punishment. And together, they are aimed at holding an individual responsible for what he/she has done.

Although Feinberg does not directly address the deterrent aspect of punishment, it is certainly important that punishment metaphorically serve as a red light with regard to breaking laws. But then the question is, what forms of punishment represent a bright red light and which form of punishment represents a more opaque red light or perhaps a yellow light? What this question really aims at are the motivations of a criminal and whether a criminal would commit or

not commit a crime based on the punishment he would receive. So for example, if the death penalty were a punishment for stealing, it seems likely that far fewer people would steal. Yet the death penalty is not usually imposed for such a crime because stealing is not seen as an offense that merits such a serious punishment in order to discourage it. However, in the case of the death penalty as a punishment for 1st degree murder, the offense seems serious enough that in order to discourage it, the most severe form of punishment is necessary. Yet for Thurgood Marshall, any individual who wishes to align his conduct with “what society says is “right”” would clearly recognize that murder is wrong given that the alternative punishment, life in prison, is also extremely harsh and would convey the same message. However, one could still argue that a killer would be deterred from killing if he/she knew that the death penalty would be the punishment. And that same killer would not be deterred from killing if he/she knew that life in prison would be the punishment. Nonetheless, to threaten killing and carry out such a killing in order to deter the same consequential act of killing, is a hypocritical model of punishment.

Having addressed the deterrent aspect of punishment, Feinberg argues that there is also a condemnatory aspect of punishment. Such condemnation has a specific purpose. Feinberg asserts that punishment has a “certain expressive function” and “symbolic significance” “...for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation” (Ibid, 98). Evidently, the condemnatory aspect of punishment is a way of practically demonstrating feelings of anger, frustration, and disgust in response to the “infraction of a rule or command.” Thus, it is an emotional way of conveying “disapproval” and “judgment” “...of what the criminal did” (Ibid, 100). Feinberg distinguishes this kind of punishment from responses to minor infractions that he calls “penalties” (Ibid, 96). A parking ticket, for example, represents a far less emotional response than a punishment for rape or for murder. After all,

although they all involve breaking a law, parking in a loading zone is not an infraction that deeply harms other human beings. On the other hand, the 1st degree murder of another human being is a deleterious infraction. Accordingly, Feinberg argues that a punishment in response to such a crime “is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment” (Ibid, 100). The state, as a representative of society, attempts to forcefully punish in such a way that the criminal can feel the resentment and antipathy of society. This point aligns itself with Bohm’s characterization of revenge in which the state repays the offender instead of the other way around. Nevertheless, Feinberg’s astute observations regarding the expressive nature of serious punishment in contrast to mere penalties, may help trace the source of society’s desire to express “legitimized vengeance” through its punishment (Ibid, 100).

However, Feinberg does not necessarily support the expressive function of punishment. He argues that this is simply what punishment does. Feinberg grants that, “The condemnatory aspect of punishment does serve a socially useful purpose: it is precisely the element in punishment that makes possible the performance of such symbolic functions as disavowal, nonacquiescence, vindication, and absolution” (Ibid, 115). In other words, punishment serves the “socially useful purpose” of conveying the collective sentiment of society in response to a crime such as 1st degree murder. However, he observes that, “The problem of justifying punishment, when it takes this form, may really be that of justifying our particular symbols of infamy” (Ibid, 115). Evidently, Feinberg recognizes the potential danger in allowing our emotions and “symbols of infamy” to dictate how we respond to a crime. In short, punishment can be emotional and not necessarily rational or logical. Inevitably, heinous crimes such as 1st degree murder produce emotional responses such as anger and sadness on the part of victim’s family and friends as well as society as a whole. But should those feelings be channeled through punishment and

retaliation? Punishment must be governed by the rationality and logic of laws in order to prevent the very “symbols of infamy” that Feinberg is so wary of from taking effect. Otherwise, what would prevent one man from killing another man who stole his car? The man who stole the car must be punished to be sure. But that punishment must be based on the offender paying back the victim and the state for his crime. In addition, punishment is governed by courts of law and systems of justice to inhibit any emotional responses of anger and resentment that such a crime would naturally incite in a victim. Having these emotions is not wrong. But using punishment as a means to channel those emotions is dangerous and misguided. Moreover, I submit that through the concept of restorative justice, these emotions can still be considered and expressed in ways that may not only help a given victim and society heal, but also may elicit remorse and regret as forms of repayment on the part of the criminal.

In South Africa for example, the response to the heinous offenses that took place during Apartheid as a result of discrimination and racial prejudice were addressed through the concept of restorative justice. Under the leadership of bishop Desmond Tutu and the President of South Africa, Nelson Mandela, the Truth and Reconciliation Commission (TRC) was established in order to address many of the human rights violations that took place during the period of racial segregation known as Apartheid (Gibson, 410). Again, the goal was a restorative form of justice rather than a punitive one. According to the TRC’s final report,

Restorative justice can be broadly understood as a process which:

- a. seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings, as injury or wrong done to another person;
- b. is based on reparation: it aims at the healing and the restoration of all concerned—of victims in the first place, but also of offenders, their families and the larger community
- c. encourages victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators;
- d. supports a criminal justice system that aims at offender accountability, full participation of both victims and offenders and making good or putting right what is wrong (Van der Merwe, 27).

In other words, the TRC's sought to reunite a fragmented nation in the aftermath of severe human rights violations. Yet this process of effecting cohesion entailed treating these human rights violations "as violations against human beings" rather than as "offences against a faceless state." As such, its goal was "the healing and restoration of all concerned" and not necessarily punishing the guilty parties. More specifically, the TRC endeavored to fulfill this goal by

- (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;
- (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
- (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them; (Promotion of National Unity and Reconciliation Act 34 of 1995, 4).

The key facet of the TRC, highlighted in (a), was that although the commission was intended to target "violations of human rights," it was not a traditional court of law overseen by judges and a jury in which the accused was placed on trial. Rather, in this model of justice, "the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violation" were taken into account via hearings. Thus, the goal was not to determine the guilt or innocence of an accused party. Instead, the TRC sought to expose the truth of what occurred through investigation and testimony. In a traditional court of law, a judge and jury would make similar attempts to uncover such truth. However, this information would only be used to convict or exonerate the accused. In contrast, the TRC concerned itself with the prospect of "restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation." This was where the concept of restorative justice manifested itself. The focus was on victims, their

accounts of what happened, and how they related to their perpetrators instead of being a battle between attorneys. In this way, both the victims and perpetrators were asked to participate and take ownership over the process of reclaiming their “human and civil dignity.” So while there were similarities between this kind of restorative justice and more traditional forms of punitive justice, the personal and direct interaction between victims and perpetrators was unique and allowed for an unfiltered rendering of events that had the potential to heal and unite rather than promote further discord.

In order to actualize the specific goals of restorative justice, the TRC established several sub-committees. There was a committee solely focused on Human Rights Violations, a committee on Amnesty, and a committee on Reparation and Rehabilitation (Ibid, 5). Together, they worked to gather evidence, information, and testimony regarding the “gross violations of human rights” (Ibid, 5). These violations may have been perpetrated by a specific individual or they may have been perpetrated by a political party (Ibid, 6). And in response to any and all findings made, the TRC prepared reports and advised the President of South Africa on the “measures [that] should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims” as well as the “measures [that] should be taken to grant urgent interim reparation to victims” (Ibid, 6). In addition, the TRC made “recommendations to the President with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights” (Ibid, 6). In other words, the TRC was consistently looking to repair a divided society in the aftermath of human rights violations that only encouraged further fragmentation. But more than that, the TRC exposed the need for “administrative and legislative

measures” that would “prevent the future violations of human rights” (Ibid 6, 5). In this way, the TRC engaged with past events through current testimony and information gathering in an effort to promote “a stable and fair society” in the future (Ibid, 6).

As I alluded to, another key aspect of the TRC in its pursuit of restorative justice, involved granting amnesty to offenders of human rights violations. At the discretion of the TRC and in exchange for full and truthful confessions, offenders could remain free from any punitive measures. Over 7000 offenders applied for such amnesty and by the time the TRC released its final report, roughly 150 had been granted amnesty (Thompson, 275). As a result, “many killers and torturers walked free for talking about their crimes, and victims received little compensation from the reparation committee” (Ibid, 278). Again, however, this was done in the interests of restorative rather than punitive justice. Evidently, in some cases, the TRC felt that the offender’s admission of guilt and willingness to take responsibility for his/her crime, offered enough concrete value to the victim and to South African society such that no punitive measures were needed. This notion of amnesty was also intended to provide an incentive for truth telling, admissions of guilt, and for engaging in a dialogue with victims. Still, just because punitive justice may not have been needed in the eyes of the TRC, this does not mean an offender did not deserve punitive justice. So even if a society or victim did not wish to seek revenge and pay back the offender, the offender must still repay society and the victim for his crime in the mold of Bohm’s “just deserts.” After all, in the aftermath of Apartheid, the fact that any killer or torturer was allowed to ever escape such repayments remains deeply troubling. However, the question is, how much should the killer repay? Depending on the seriousness of the offense, such repayment can come in the form of jail time, an admission of guilt, perhaps monetary compensation or some combination of these. Accordingly, I submit that without any such repayment, the perpetrators of

heinous crimes against humanity not only fail to be held accountable, but they also fail to be deterred from recommitting such atrocities. Thus, with respect to Feinberg's two sub-conditions of punishment, accountability and deterrence, the TRC needed to address both. And it is not clear that it consistently addressed both given that, in some cases, simple admissions of guilt and telling the truth were deemed enough of a repayment and a deterrent in response to crimes of murder.

But before completely passing judgment on the TRC or the concept of restorative justice, it is worth examining what actually took place during TRC hearings. Although they varied on a case-by-case basis and a full account of what occurred would take up its own thesis, in general, the TRC focused on witness testimony and evidence gathering. Through witness testimony, the TRC wished to have an open forum of communication between victims, outside witnesses, and the perpetrators. The witness testimony was not mitigated by any accusatory tactics or strategizing on the part of attorneys as might happen in a traditional court of law. Accordingly, the TRC was also not hindered by legal constraints such as hearsay or spousal communication. It was intended to be an unfiltered rendering of events that gave all parties the opportunity to give full accounts of what happened in an effort to reach national reconciliation. Some witnesses embraced this pursuit of restorative justice while others were more concerned with retribution and making sure the state paid back the offender (Van der Merwe, 31). For example, one witness asserted, "I really am requesting. I am not satisfied. Even Samson got his eyes gouged out. These people's eyes must be gouged out" (Van der Merwe, 33). Through this biblical reference, the witness demonstrated a clear desire for payback on the part of society rather than repayment by the victim. However, many other witnesses expressed different desires. For instance, another witness stated, "I'd gladly love to know the murderers of my husband and they should also come

to the fore and tell their story and the reason why they committed such brutal action, and I think, in order to be able to achieve, what we are all hoping for, justice should prevail, the law should take its course” (Van der Merwe, 32). In contrast, to the first witness, this witness expressed a desire for the identity of the perpetrators, accountability, and an explanation of why the perpetrator chose to carry out his crime. This reflected the witness’s desire to interact with the perpetrator and to gain restorative value out of that interaction. However, the witness also referenced the concept of law suggesting that she believes some repayment from the offender was warranted as well. Ultimately, witnesses voiced a broad spectrum of concerns and desires with regard to how the TRC should approach the concept of justice.

As for the TRC, it consistently responded to the concerns of the victims with a restorative rather than an exclusively punitive approach to justice. For example, Mr. Ntsebeza, as a representative of the commission, asserted during a session that,

The only thing that the Commission wants—it is not to press charge against people that is not our duty, this is not a court of law. We are not placing any charge against any one. The only thing that the Commission wants as we are being asked by the country, is to help to investigate the truth. We don’t just investigate the truth, want it to make this country a reconciliated one. In so much that we can all live together in peace whether we like it or not. (Chapman, 49)

Mr. Ntsebeza made it clear that the TRC was not a court of law and was therefore not in a position to impose punitive measures upon offenders. Its purpose was “to investigate the truth.” However, perhaps the most important part of the above statement was the phrase “we are being asked by this country...to help investigate the truth.” Mr. Ntsebeza may have been correct in pointing out that the TRC was responding to the orders of the country. Yet the goal of restorative justice outlined by the TRC itself was, as cited earlier, to restore and respond to “...the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.” Accordingly, the process of restorative justice and investigating the truth was

an attempt to respond to the desires and concerns of these victims. The state and its governing bodies were not the victims. Therefore, a victim and not the state's desire to hear the truth should be the primary basis for the TRC's desire to facilitate restorative justice. However, Mr. Ntsebeza was right to point out that the TRC was not a court of law and therefore could not respond to a victim's request for punitive measures. These punitive measures had to be the exclusive responsibility of a court of law. In this way, the TRC did recognize its limitations as it embraced a restorative model of justice.

Nonetheless, the TRC encounters a great deal of criticism. And many of the concerns raised have legitimacy. As I mentioned earlier, the prospect of granting amnesty to killers and offenders in general was certainly one issue. There was also the problem of truth telling. Witnesses could lie or embellish with no risk of a legal charge such as perjury. Along the same lines, some "perpetrators were often unwilling to acknowledge the complete range of their activities even when applying for amnesty" (De Gruchy, 158). Moreover, even if a witness was attempting to tell the truth, there may have been a discrepancy between what happened and how witnesses perceived and talked about what happened (Ibid, 155). In short, different perspectives yielded different renderings of events. Other witnesses simply had trouble remembering certain aspects of an event (Ibid, 157). And from a more philosophical standpoint, the truth is a concept that can always be sought after, but attaining it in its complete form may be impossible. As the philosopher William James once wrote, "Truth's fullness is elusive; ever not quite, not quite!" (James, 347) Thus, any expectation of achieving the "whole truth and nothing but the truth" may not have been fully met (De Gruchy, 159). Accordingly, the TRC's mission to find a full and unbiased rendering of the truth may have been an intriguing and worthwhile goal but not necessarily an achievable one.

One of the most outspoken critics of the TRC, Wole Soyinka, argues something quite different. In his book entitled *The Burden of Memory, the Muse of Forgiveness*, Soyinka contends that, “The risk-free parade of villains, calmly...recounting their roles in kidnapping, tortures, and murders, and mutilation, at the end of which absolution is granted without penalty or forfeit is either a lesson in human ennoblement, or a glorification of impunity.”ⁱ He thinks that without imposing any sanctions or negative consequences, the TRC either celebrates wrongdoing or buttresses human suffering. Soyinka asserts that the key element missing from the TRC was the capacity for remorse (Soyinka, 31). For “justice is not...served by charging the guilty without evidence of mitigation—or remorse” (Ibid, 31). Rather justice, for Soyinka, is about “assigning responsibility.” In linking these two ideas, it follows that remorse would be one way for a given perpetrator to show that he/she is willing to accept a measure of responsibility for what he/she has done. The perpetrator must sacrifice something as payment in the mold of Bohm’s “just deserts.” Otherwise, the vision of a balanced system of justice advocated by some of the earliest philosophers cannot be reached or maintained. For Soyinka, the goal should be to restore the “violated integrity” of society (Ibid, 30-31). He thinks this is what restorative justice aims at. And in the absence of remorse, the TRC fails to fully uphold the concept. After all, “Truth alone is never enough to guarantee reconciliation” (Ibid, 81). Moreover, “it should not be beyond the indicted group itself to respond to the heroic latitude of the victims by an equally heroic act of remorse...Neglect of such a course provokes interpretation as vindication of the crime” (Ibid, 82-83) Essentially, any exoneration of an offender must take place only after repayment and responsibility has been undertaken. In addition, having recognized that he himself had not witnessed a TRC hearing directly, Soyinka states that based on the reports of many observers from a variety of backgrounds, there was little evidence of remorse at the TRC hearings (Ibid,

35). Ultimately, Soyinka's criticism of the TRC is provocative and incisive. He recognizes that for justice to carry the most restorative weight, remorse and accountability on the part of a perpetrator must balance out the harm he/she imposed on a victim. Yet this does not mean the TRC's efforts carried no restorative weight. Reforms were indeed made and much of the truth about what occurred did come out. However, I do agree with Soyinka in that remorse would have been a key component to maximizing the goal of restoring the "violated integrity" of the victims.

Nevertheless, my issue with Soyinka's argument also concerns the concept of remorse and how it should practically manifest itself in the TRC. After all, compelling remorse or shame as a form of payment for the "violated integrity" of society would cheapen and undermine these concepts as voluntary and cathartic demonstrations of regret. And if such remorse and shame are indeed voluntarily demonstrated in specific cases, what would a given perpetrator's inability to express such sentiments practically result in? Perhaps a lack of amnesty would be one option. And surely, one could imagine that a lack of remorse on the part of a perpetrator would not have been favorable toward such an amnesty petition. Then again, the prospect of amnesty could also incite phony displays of regret and shame in an attempt to gain the backing of the TRC. Perhaps Soyinka recognizes this because he readily admits that remorse is a "nebulous" concept in that it can only be "observed" and it is "impossible to tell" whether such remorse is "genuine" (Ibid, 34). In contrast, truth claims made in front of the TRC regarding what happened have the potential to be verified through evidence gathering and confirmation by other witnesses. I am not arguing that remorse should be ignored by the TRC or that the truth is completely verifiable. But given that remorse is an affective response that can be purposely called forth, it would be difficult and perhaps fruitless to compel or police it.

In the end, I believe Soyinka's argument does demonstrate that the TRC was certainly not a

perfect system of restorative justice in which every truth was uncovered and every victim felt as though they had been made whole by a shame-filled confession from a perpetrator. Like Soyinka, I too find the lack of remorse and the issue of accountability deeply problematic. As Scott Vollum puts it in his book *Last Words and the Death Penalty*, “For the restorative process to be successful, the offender must own up to their actions and the harms they have caused” (Vollum, 62). The offender must pay back society through Bohm’s “just deserts.” I do not believe, however, that the deficiencies of the TRC should take away from its tremendously important achievements or its attempt to uphold critical aspects of restorative justice. Many truths were indeed uncovered and recorded. And thus, the memory of what happened remains alive. In addition, victims such as the woman who wished to uncover the identity of her husband’s murderers also had positive responses to the TRC and its mission to uncover the truth.

Yet, even if one finds that the TRC’s problems outweigh its positive effects, the value of restorative justice as a concept still cannot be ignored. The TRC was merely one example of it. But more generally, the process of allowing victims, perpetrators, and witnesses from the community to participate in uncovering the truth allows for all parties to voice their concerns in an environment free of formal legal constraints. In addition, the stronger police protection combined with the institution of more stringent legal measures are equally important aspects of restorative justice. For by uncovering the truth of the past and enhancing a society’s capacity to mete out justice in the future, the goals of restorative justice can be realized. The focus shifts from entirely dwelling on a past crime and punishing such breaches of law to ensuring that future crimes are reduced and hopefully eliminated entirely. On the other hand, returning to the subject of the death penalty, many may argue that reducing future crimes can be accomplished solely through the deterrent value of the death penalty and punitive justice rather than through

restorative justice. But as I have shown, attempting to justify the taking of a life through the alleged deterrent value of the death penalty is deeply problematic given that society has attempted to discourage the taking of life through its own act of taking a life. Deterrence is a key aspect of both restorative and punitive justice to be sure. But it should be aimed at in other ways, such as tightening legal measures, lengthening prison sentences, and/or strengthening the protective forces within society.

Accordingly, how does the concept of restorative justice directly address the crime of 1st degree murder? The TRC, after all, was just one example of restorative justice. It is not necessarily a rubric for how restorative justice should be conducted in response to all crimes. In Howard Zehr's *Changing Lenses: A New Focus for Crime and Justice* for example, he outlines the differences between justice as seen through a retributive and punishment-based system versus justice in a restorative framework. He recognizes that in a retributive context, the offense is based on a "violation of rules" whereas in a restorative context, the offense is "defined by harm to people and relationships" (Zehr, 184-185). In the former, the state is treated as the victim and in the latter, individuals are treated as the victims (Ibid, 184-185). Zehr also makes several additional and more controversial distinctions between the two forms of justice. He contends that in its retributive form, the "victims' needs and rights [are] ignored" and "the interpersonal dimensions are irrelevant" (Ibid, 184-185). Firstly, it is important to note that in the case of the death penalty as a response to 1st degree murder, the term victim can extend to the families of friends of the murdered individual(s). In critiquing Zehr, I do appreciate his initial distinctions between the two forms of justice and I believe that restorative justice does indeed target the harm done to victims and their families in response to a heinous crime such a 1st degree murder. However, I think it is overly strong to assert that in punitive justice, "interpersonal relationships

are irrelevant” and that the “needs and rights [of victims are] ignored.” They may not be the primary focus in a punitive system of justice. And they may be a primary element of a restorative system of justice. But that does not mean that they are “ignored” or “irrelevant” in a retributive system. Victims and their families are, after all, allowed to present their testimony and views to attorneys during a formal trial in a court of law.

However, I believe the primary practical difference between a death penalty trial and a TRC hearing on the death penalty lies in Bohm’s distinction between “just deserts” and “revenge” (Bohm, 343). In a TRC hearing, there is a unique capacity for a victim to engage with an offender and for the offender to payback the victim through an admission of guilt and to payback society with productive prison time (the 150 cases of granted amnesty notwithstanding). Firstly, I recognize that such prison time could be interpreted as society paying back the offender. But at least for Bohm, payback refers to a specific form of punishment—revenge. It does not refer to all types of punishment. Thus, prison time would not be understood as payback because it does not call for a reciprocal action that mimics the crime that was committed in the mold of “an eye for an eye.” Furthermore, I believe prison time gives an offender the chance to work on improving and paying back the society whose code of law he/she so egregiously violated. Secondly, I recognize that in the case of the death penalty as a response to 1st degree murder, the victim’s family and friends rather than the victim would have to engage with the perpetrator. Accordingly, restorative justice may provide the victim’s family and friends with an opportunity to “engage in a dialogue” with an offender through a process that Scott Vollum calls “Victim Offender Mediation” (Vollum, 66). In this process, a mediator facilitates the engagement by meeting with both parties separately and then together (Ibid, 66). Thereafter, “The actual mediated encounter begins with each [party] sharing their experiences of the crime

and the aftermath of the crime” (Ibid, 67). According to Vollum, victim offender mediation “...is intended to repair the harm caused by crime and restore those impacted by cooperatively and peacefully determining the best resolutions for everyone” (Ibid, 67). In other words, the goal is to reconcile the desires of the victims with the offender rather than the desires of the state.

I do not pretend that this process would be as smooth or as easy as it initially appears. For it would be incredibly naïve to neglect the possibility that the victim’s families might wish to respond to the 1st degree murder offender with anger, hatred, and even violence rather than through peaceful and rational compromise. The friends and families of the victim may want nothing to do with the offender and/or they may want him to be killed as swiftly as the offender may have killed the victim. These reactions are profoundly and understandably human in response to such a personally harmful crime such as 1st degree murder. Moreover, one could easily argue that if restorative justice looks out for the interests of the victims, why should it not grant the victim’s family’s desire for the death penalty if that is indeed their wish? This, I believe, is the greatest weakness of restorative justice as a concept. By shifting the focus from the state to the victims, restorative justice opens the door for victims and their families to express a wide range of emotional responses that may be cashed out through an unchecked desire for vengeance and violence.

Having recognized this possibility, I believe restorative justice should not replace punitive justice as a response to 1st degree murder. It should supplement it. Indeed, this sentiment is echoed by many of the witnesses who testified before the TRC. Many victims solely sought the truth and admissions of guilt from the perpetrators. Yet others wished to see a concrete form of punishment and in some cases outright vengeance. Vengeance, as we have seen, is understandable though morally impermissible. Nonetheless, any response to a crime of 1st degree

murder must first be governed and overseen by the punitive form of justice in which an offender pays back society through prison time or monetary compensation as determined by a court of law. However, I also think the future value of restorative justice and its capacity to heal and discourage future crime can be used in combination with the repayment of society on the part of the offender. I believe such a combination represents a deeply promising and balanced approach to the institution of justice as a whole.

For in the end, perhaps the reason Wole Soyinka had such difficulty accepting the TRC's mission and process was that it was too forgiving and compromising with regard to how a given perpetrator paid for his crimes. A system of justice that calls for punitive as well as restorative elements has the potential to account for the value of Soyinka's claims, the desires of the victims, as well as the TRC's search for the truth. Solely requiring a perpetrator to tell the truth, confess, and engage with the victim through "victim offender mediation" is not enough. This does not adequately hold the perpetrator accountable for his/her crimes. And as Soyinka recognizes, this accountability is a key component of justice. Yet a punishment of the death penalty or even life in prison is also not enough. Society must also ask the question, how did this heinous crime of 1st degree murder happen? It must then ask, what can be done to help the victim's family and all others affected recover from this tragic event? And finally, how can a society prevent this crime from occurring in the future? In response to the atrocities committed during Apartheid, South Africa's answer to these questions was the TRC. And as we have seen, although the TRC was not a perfect example of restorative justice, its accomplishments are well documented. Finally, I do recognize that the TRC was not always responding to a crime of 1st degree murder. Nevertheless, I think it serves as a concrete and useful example for the introduction of restorative justice as a supplement to punitive measures.

For according to Antony Duff, restorative justice need not be at odds with punitive justice. In his essay, "Restoration and Retribution," Duff asserts, "...restorative theorists are right to insist that our responses to crime should seek 'restoration,' whilst retributive theorists are right to argue that we should seek to bring offenders to suffer the punishments they deserve; but...both sides...are wrong to suppose that these aims are incompatible" (Duff, 43) I agree with Duff in that the individual aims of each individual form of justice may be compatible. But in response to a crime of 1st degree murder, how exactly do Antony Duff or I propose to practically unite the punitive and the restorative into an effective and enduring system of balanced justice? For Duff, the key point is that "...any talk of 'restoration' in the context of crime must be sensitive to the fact that the victim of crime has been not just harmed, but *wronged*" (Ibid, 46) But such wrongs must be redressed on an individual level as well on a societal level. Duff argues that these wrongs "...are 'public' in the sense that, while they are often wrongs against an individual, they properly concern 'the public'—the whole political community—as wrongs in which other members of the community share as fellow citizens of both victim and offender" (Ibid, 47). And this is where both restorative and punitive justice come into play. So while restorative justice can aim at individual victims and their families, punitive justice aims at "a law-governed polity" responsible for maintaining civic order and punishing individuals for any breaches of such order. For Duff, the key distinction lies between justice for the victim versus justice for the state.

Thus, in order to account for the restorative and the punitive, Duff proposes four critical steps in a process he calls "criminal mediation" (Ibid, 54). Firstly, "the procedure consists in communication between victim and offender about the crime's implications, as a wrong against the victim; the reparation the offender undertakes communicates to the victim and others an apology for that crime" (Ibid, 54). In this, way it becomes "a process of *punitive* communication"

such that the perpetrator has the opportunity to clearly and concretely demonstrate a willingness to pay for his crimes (Ibid, 54). Therefore, the process becomes more than just truth-telling lip service in which a perpetrator communicates his crime without receiving any formal punishment and accountability. Secondly, the mediation targets what the perpetrator deserves to suffer for the crime he/she has committed. The concept of remorse manifests itself here because “what [a perpetrator] deserve[s] to suffer is not just ‘pain’ or a ‘burden,’ but the particular kind of painful burden which is integral to the recognition of guilt” (Ibid, 55). The third aspect of criminal mediation for Duff involves the guilty party receiving a punishment characterized by “hard treatment” and as “a vehicle through which he can strengthen his own repentant understanding of the wrong he has done” (Ibid, 55). Thus, not only must a criminal be forced to suffer remorse, but he/she also must be prepared to endure more than the proverbial “slap on the wrist.” He/she must pay for the crime in such a way that the punishment reminds him/her of just how wrong and intolerable the crime was. Finally, criminal mediation is also directed at the future through its deterrent value (Ibid, 55). Accordingly, any repentance is intended to demonstrate “why [a criminal] should not commit such wrongs in the future” (Ibid, 55). Together, these four features of criminal mediation still account for Feinberg’s two key elements of punishment—accountability and deterrence—while also incorporating restorative components.

However, even in this new kind of penal system, Duff recognizes that this criminal mediation cannot be applied in every single case. For instance, it is contingent on the victim and the offender agreeing to participate in the process (Ibid, 56). Without such agreement, the restorative elements carry no weight. If the offender refuses to consent, he/she will not be forthcoming and remorseful about his/her crime. And without consent from the victim, the victim will not be swayed or aided by any such expressions of guilt on the part of the offender.

Yet for Duff, if there is indeed agreement, a court of law should then serve as the mediator between the two parties. Thereafter, according to Duff's model, the four steps in the process are instituted in proportion to the crime that was committed (Ibid, 57). Thus, in the case of a serious offense such as a 1st degree murder, the punishment as well as the restorative elements of remorse and repentance must be taken equally seriously.

Nonetheless, Duff's model still presents some problems. For instance, a court and punitive justice is mediated by a judge who is well schooled in the law. But that same judge may not be as capable of regulating and overseeing the presence (or lack) of remorse and penance stemming from restorative justice. In other words, judges are trained to administer punitive justice and not restorative justice. Duff proposes that they be prepared to administer both. And while I do agree with Duff's claims in principle, I think he has overlooked some of the practical implications raised by this new form of justice in contrast to traditional forms of punitive justice.

Furthermore, Duff neglects to point out that this punitive justice must be governed solely by a court of law rather than by the interests of the victims and/or their families. The emotional responses of the victims may be helpful to realizing a restorative form of justice. But the law, as Aristotle asserts, "is wisdom without desire" (Aristotle, 265). Therefore, in punitive justice, courts, judges, and juries are to remain impartial and independent of such personally emotive responses. In contrast, the victim's family's desire for the death penalty can be mitigated by their understandably emotional reaction to such a personally injurious crime. Accordingly, punitive justice must remain the sole responsibility of the courts. And the task of meting out restorative justice must be undertaken by a mediator who is capable of assessing the restorative value of the interactions between victims and offenders.

Ultimately, the taking of a life through the death penalty may prevent Duff's process of

criminal mediation and restorative justice from taking full effect. The possibility for the perpetrator to appreciate his own guilt and to continue to make amends for his/her crime is prevented by the fact that he/she is no longer alive. As a result, the drawn out mediation process between a victim and offender cannot be fully realized. I recognize that this assertion presupposes a belief that the offender is indeed willing to make amends and that a victim is willing to allow the perpetrator to do so. However, Duff too recognizes the voluntary and consensual nature of the restorative process. Indeed, his argument for his mediation is predicated upon both parties working together toward restoration in the aftermath of a heinous crime such as 1st degree murder. Duff understands that perhaps neither party may desire this. Consequently, victims and their families should not be forced to engage with a killer if they do not wish to. Moreover, to force a criminal to make hollow amends to victims does not provide any concrete restorative value. So despite the fact that a consensus might be in the best interests of a balanced system of justice, restorative justice looks out for the interests of the victims and their relationship to the offenders. And as such, restorative justice must respect a lack of consensus with regard to participation in the restorative process. In contrast, the offender's obligation to pay back society for his crime must always be present in order to preserve civic order, to hold individuals accountable for the wrongs committed, and to deter future wrongdoing. Nonetheless, with the consent of both parties, restorative justice can be used in conjunction with punitive justice to achieve balance and harmony for society.

In the end, it is Richard Goldstone's essay entitled "Advancing the Cause of Human Rights: The Need for Justice and Accountability" that succinctly captures the value of restorative justice and truth commissions in balancing out exclusively punitive responses to crime. He begins by citing several key contributions of restorative justice. Firstly, "the public exposure of

the perpetrator's deeds affords important acknowledgment for the victim, and the public admission of criminal conduct by the perpetrator is a significant punishment" (Goldstone, 203). Thus, admitting one's guilt and taking responsibility in a public forum not only serves to aid the victim but it also serves as its own form of punishment. In this sense, Goldstone is alluding to the presence of shame brought about by the public nature of confession. For Goldstone, having to endure such shame is its own form of punishment. Yet in a private forum, this sense of shame would not be as strong given that fewer people would be able to listen and judge the offender. I agree that such shame contributes to the offender's efforts to pay back society and the victim's family and friends. However, an expression of shame, by itself, is not enough. After all, as I pointed out in response to Soyinka's argument for remorse, such an emotion can be faked and therefore, it does not constitute a concrete and verifiable form of payment. A prison sentence could fulfill the need for such a payment.

On the other hand, Goldstone also recognizes that a truth commission, as a vehicle of restorative justice, "gives victims the opportunity to articulate their own experiences, thereby making others understand what they have suffered" (Ibid, 204). And by promoting awareness of what these victims endured, the potential for "engender[ing] collective action against such human rights abuses or even collective moral condemnation...constitutes an important element of justice" (Ibid, 204). In other words, hearing such testimony has the potential to incite "collective action" to prevent such violations from reoccurring. And by uncovering exactly how these violations happened, governments have the opportunity to use this information to "identify and dismantle the criminal institutions" that engendered such violations in the first place. Finally, if nothing else, the truth commissions provide the opportunity to record the events in an effort to preserve the memory of what occurred (Ibid, 205). Accordingly, Goldstone concludes that

“justice, in whatever form, has much to do with retribution and the past, but to be really just, a process also must help secure lasting peace for the future.” It is this prospect of securing lasting peace that restorative justice aims at. Given the imperfections of any system of punitive or restorative system of justice, there is no guarantee that such peace will come to fruition.

However, a civilized society should still strive to uphold both the punitive and the restorative aspects of justice. Ultimately, I grant that the imperfections of restorative justice might make a society hesitant to apply it. But the imperfections of punitive justice and the death penalty in particular are no less grave. For as Camus reminds us, “. . .no one should be punished absolutely if he is thought guilty, and certainly not if there is a chance of his being innocent” (Camus, 210).

In summary, there are several key features of restorative justice that may account for the deficiencies of an exclusively punitive model of justice in response to a crime of 1st degree murder. Firstly, restorative justice provides the opportunity for a criminal to admit his wrongdoing and take responsibility by telling the truth about his crime. Secondly, the capacity for the victim’s supporters and the general public to hear this admission of guilt allows for public shame and remorse, the recognition of the harm done, as well as for the prospect of catharsis and healing to take effect. Thirdly, the institution of legal reforms, stronger police protection for civilians, and any other preventative measures represent invaluable aspects of restorative justice that may go a long way toward deterring future crime. Fourthly and finally, the restorative process as a whole allows for the memory of what happened to endure. And this memory may also provide deterrent value by reminding us of events that must not be repeated. It is these four aspects of restorative justice in conjunction with the prison time necessary to pay back society for an offense of 1st degree murder that I believe are missing from the retributivist model of justice put forth by the death penalty. I do recognize the four key features of restorative justice

are merely potential and may never be actualized. And yet, even partial actualization of these restorative and forward looking aspects of justice may provide concrete value for the families and friends of the victim, the offender, as well as for society in the aftermath of a heinous crime such as 1st degree murder.

To conclude, I have tried to give an account of the various ways in which the death penalty does not function as an optimal vehicle for balanced justice in response to a crime of 1st degree murder. Instead, it functions as a vengeful and hypocritical form of punishment that ignores key aspects of restorative justice. By taking the life of an individual convicted of 1st degree murder, the taking of a life manifests itself in both the initial crime as well as the corresponding punishment. Both parties have ultimately had their right to life as well as their actual lives taken away from them. And as such, a state's choice to punish in this way reflects a verification and endorsement, in consequential, natural law, and rights based terms, of the very act of taking a life that it seeks to condemn. Moreover, as Susan Jacoby puts it, the death penalty is "vengeance taken to its extremity." As a response to a crime of 1st degree murder, the death penalty exponentially amplifies my earlier example of a parent who tells his or her child not to hit someone and then hits that child as payback when that child does indeed hit someone. The punishment merely reaffirms the very crime in consequential, natural law, and rights based terms. And such reciprocal action represents a vengeful and hypocritical form of punishment in which a society pays back a murderer for his crime rather than the other way around.

In contrast, life in prison for example, does not give into the same vengeance and hypocrisy that the death penalty calls for. Furthermore, it upholds Joel Feinberg's two key

conditions of punishment—accountability and deterrence. However, a punishment such as the death penalty or even life in prison as a response to 1st degree murder still does not incorporate key aspects of restorative justice such as admissions of guilt, the institution of preventative legal measures, and the value of preserving the memory of what happened. And for a full and balanced form of justice to be realized, a punitive model of justice should allow for the prospect of these restorative elements to supplement it subject to the consent of the offender and the victim's family and friends. For those who remain unconvinced by my specific arguments against the death penalty, I do believe my plea for supplementing the punitive with the restorative represents a balanced model of justice that a civilized society can hopefully strive for. In the end, William James once characterized philosophy as “the habit of always seeing an alternative” (James, 4). Ever the meliorist, James understood that philosophy provides each of us with the opportunity to always strive for better. It is my profound hope that we will endeavor to fulfill this high calling in our ongoing pursuit of justice.

Endnotes

¹ According to the following study, <http://www.deathpenaltyinfo.org/node/523>, roughly 6,000 people have been sentenced to death in the United States of America dating back to 1973. 69 have been released from death row “with substantial evidence of their innocence.” Many more have likely been wrongfully killed and we simply do not know given the lack of ongoing investigations. Such studies are not exempt from criticism. The claim that there is “substantial evidence of their innocence” appears subjective after all. Nevertheless, the death penalty has clearly proved fallible at times. And thus, there is clear evidence to show that it is not a foolproof form of punishment.

Works Cited

- Aeschylus. *The Oresteia*. Trans. Tony Harrison. Faber and Faber: London, 2004.
- Aristotle. *The Nicomachean Ethics*. Trans. R.W. Browne. George Bell and Sons: London, 1889.
- Aristotle. *Politics*. Trans. H. Rackham. Harvard University Press: Cambridge, Massachusetts, 1977.
- Bohm, Robert. *Deathquest III: An Introduction to the Theory and Practice of Capital Punishment*. Matthew Bender & Company: Newark, NJ, 2007.
- Brudner, Alan. "Retributivism and the Death Penalty." *The University of Toronto Law Journal* 30.4 (Fall, 1980): 337-355.
- Camus, Albert. *Resistance, Rebellion, And Death*. Trans. Justin O'Brien. Modern Library: New York, 1960.
- Chapman, Audrey. "The TRC's Approach to Promoting Reconciliation in the Human Rights Violations Hearings." *Truth and Reconciliation in South Africa*. Ed. Audrey Chapman and Hugo van der Merwe. University of Pennsylvania Press: Philadelphia, 2008.
- De Gruchy, John. *Reconciliation: Restoring Justice*. SCM Press: London, 2002.
- Duff, Antony. "Restoration and Retribution." *Restorative Justice and Criminal Justice*. Ed. Andrew Von Hirsch, Julian V. Roberts, Anthony Bottoms, Kent Roach, Mara Schiff. Hart Publishing: Portland, Oregon, 2003.
- Feinberg, Joel. "Doing and Deserving." *Essays in the Theory of Responsibility*. Ed. Joel Feinberg. Princeton University of Press: Princeton, New Jersey, 1970.
- FindLaw. "First Degree Murder Definition." *FindLaw*. Findlaw, 2012. Web. 10 March 2012 <http://criminal.findlaw.com/criminal-charges/first-degree-murder-definition.html>
- Gibson, James L. "The Contributions of Truth to Reconciliation." *The Journal of Conflict Resolution* 50.3 (June, 2006): 409-432.
- Goldstone, Richard. "Advancing the Cause of Human Rights: The Need for Justice and Accountability." *Realizing Human Rights*. Ed. Samantha Power and Graham Allison. St. Martin's Press: New York, 2000.
- "Hypocrisy." Def. la. *Merriam-Webster Free Online Dictionary*. 2012. Web.

-
- Jacoby, Susan. *Wild Justice*. Harper & Row, Publishers: New York, 1983.
- James, William. *Essays in Philosophy*. Harvard University Press: Cambridge, Massachusetts, 1978.
- James, William. "Philosophical Conceptions and Practical Results." *The Writings of William James*. Ed. John J. McDermott. University of Chicago Press: Chicago, 1977.
- Kant, Immanuel. "Punishment and the Principle of Equality." *Disputed Moral Issues*. Ed. Mark Timmons. Oxford University Press: New York, 2011.
- Lempert, Richard. "Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment." *Michigan Law Review* 79.6 (May, 1981): 1177-1231.
- Nathanson, Stephen. "An Eye for an Eye?" *Disputed Moral Issues*. Ed. Mark Timmons. Oxford University Press: New York, 2011.
- Peirce, Charles Sanders. "How to Make Our Ideas Clear." *The Essential Peirce: Selected Philosophical Writings Volume I*. Ed. Nathan Houser and Christian Kloesel. Indiana University Press: Bloomington, Indiana, 1992.
- Plato. *The Republic*. Trans. G.M.A. Grube. Hackett Publishing Company: Indianapolis, 1974.
- "Revenge." Def. 1a. *Webster's Ninth New Collegiate Dictionary*. 1983. Print.
- South Africa. South African Parliament. *Promotion of National Unity and Reconciliation Act 34 of 1995*. South Africa: 1995.
- Soyinka, Wole. *The Burden of Memory, The Muse of Forgiveness*. Oxford University Press: Oxford, 1999.
- Stevenson, Bryan. "Crime, Punishment, and Executions in the Twenty-First Century." *Proceedings of the American Philosophical Society* 147.1 (March, 2003): 24-29.
- Timmons, Mark. *Disputed Moral Issues*. Oxford University Press: New York, 2011.
- Van den Haag, Ernest. "A Defense of the Death Penalty." *Disputed Moral Issues*. Ed. Mark Timmons. Oxford University Press: New York, 2011.
- Van der Merwe, Hugo. "What Survivors Say About Justice: *An Analysis of the TRC Victim Hearings*." *Truth and Reconciliation in South Africa*. Ed. Audrey Chapman and Hugo van der Merwe. University of Pennsylvania Press: Philadelphia, 2008.
- Vollum, Scott. *Last Words and the Death Penalty: Voices of the Condemned and their Co-Victims*. LFB Scholarly Publishing LLC: El Paso, Texas, 2007.

Zehr, Howard. *Changing Lenses: A New Focus for Crime and Justice*. Herald Press: Scottsdale, Pennsylvania, 1990.