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THE DEATH PENALTY, RETRIBUTION AND PENAL POLICY

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No special training in psychology is required to infer that Supreme Court Justices have agonized a great deal over the death penalty in recent years. They are badly split on the issue, and it would be difficult to exaggerate the importance of the rationale that some of the Justices have offered for not rejecting capital punishment as unconstitutional.¹ The rationale is not a belief in the deterrent efficacy of capital punishment. To the contrary, there is appreciable consensus among the Justices that evidence of deterrence is far too inconclusive to justify the death penalty. Yet, some of the Justices are willing to entertain a distinctly different argument—that retribution is a sufficient justification for legal executions—and the retributive doctrine is currently receiving support from numerous prominent scholars.²

RESURRECTION WITHOUT A CORPSE

Although the seeming resurrection of the retributive doctrine at the highest judicial level may appear to be the ultimate manifestation of the national clamor for "law and order," that interpretation is a gross oversimplification. For one thing, a resurrection requires a corpse, and the retributive doctrine was never truly buried in the cemetery of ideas. To be sure, a host of critics have condemned retribution as barbaric, thereby creating the impression that the doctrine is an anachronism.³ That is all the more the case because prominent critics of the retributive doctrine have been truly educated individuals. Hence, the tacit suggestion is that the doctrine was invented and is now perpetuated by "rednecks." Yet two great names in the history of philosophy, Hegel and Kant, were uncompromising retributivists.⁴ For that matter,

philosophers did not succumb to the anti-punitive orientation that swept the social and behavioral sciences between 1938 and 1968,⁵ and thus one finds the staunchest defenders of the retributive doctrine among contemporary philosophers.⁶ Needless to say, whatever their moral or intellectual defects may be, those philosophers are hardly rednecks.

Returning to the main argument, if Supreme Court Justices have come to a reconsideration of retribution, the impetus was not their sensitivity to public opinion but, rather, their doubts about deterrence and recognition that the idea of rehabilitating criminals has fallen into disrepute. To be sure, even now there is no truly conclusive evidence that rehabilitation programs in criminal corrections have failed to check recidivism, but those who demand conclusive evidence before reshaping penal policy may well wait forever. In any case, those who have marshalled the evidence—such as Kassebaum and Lipton—are not all retributivists.⁷

Perhaps the rehabilitation programs were doomed to fail because of limited financial support and the custodial context in which many of those programs were implemented. Be that as it may, the Supreme Court cannot direct revenues into rehabilitation programs or eliminate prisons with a view to furthering rehabilitative programs.

ALTERNATIVES TO RETRIBUTION

As previously suggested, the retributive doctrine is now being revitalized not only because its chief contender—rehabilitation—no longer commands a strong following, but also because of the unconvincing evidence generated by deterrence research.

⁵ Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & C. 338 (1975); Johnston, *Punishment of Human Behavior*, 27 AM. PSYCH. 1033 (1972); Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405 (1970).

⁶ See H. Fingarette, *Punishment and Suffering*, Presidential Address, Fifty-first Annual Pacific Meeting of the American Philosophical Association (March, 1977).

⁷ G. KASSEBAUM, D. WARD, & D. WILNER, *PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT* (1971); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

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¹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality and concurring opinions); *Furman v. Georgia*, 408 U.S. 238 (1972).

² See, e.g., G. NEWMAN, *THE PUNISHMENT RESPONSE* (1978); E. VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* (1975); A. VON HIRSCH, *DOING JUSTICE* (1976).

³ See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* 190 (1968).

⁴ See G. HEGEL, *PHILOSOPHY OF RIGHT* (T. Knox trans. 1952) and I. KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans. 1887).

The evidence concerning the deterrence efficacy of the death penalty is particularly unconvincing,⁸ and hence it is largely by an elimination of contenders that retribution has come to be revitalized.⁹ In that connection, human beings have not been imaginative when it comes to a rationale for penal policy. As already indicated, there are only three principal contending doctrines (retribution, deterrence and rehabilitation) and that limited number is conducive to a cyclical trend in penal policy.¹⁰ The trend can be broken, not by an assessment of one of the principal contending doctrines, as when one sets out to refute the deterrence doctrine; but rather by the creation of new doctrines, or simply new strategies in crime prevention. The only candidates on the horizon are incapacitation and "behavior modification."

Incapacitation

It is most unlikely that Americans are willing to bear the cost of preventing crimes by incapacitating potential recidivists. Moreover, while car thieves cannot practice their craft in prison, all manner of crimes can and do occur in prison. Indeed, only execution incapacitates absolutely (regardless of the type of crime); but incapacitation is a dubious rationale for the death penalty, for there is no compelling evidence that the execution of all convicted murderers would reduce the murder rate appreciably. Indeed, the repetitive rate for murderers appears to be very low.¹¹ Hence it could be that the murder rate would be reduced appreciably only by the prevention of first offenses. So, paradoxically, while the death penalty incapacitates

absolutely, its effect on the crime rate *through incapacitation* may be inconsequential.

Nonetheless, considerable significance attaches to the fact that the death penalty is the only absolutely effective means of realizing incapacitation. Yet, with seemingly endless appeals of death penalty sentences, executions are perhaps even more costly than life imprisonment.¹² In any case, a penal policy based on incapacitation is bound to be incomplete, for it would pertain only to felonies. No one is likely to advocate the prevention of misdemeanors through incarceration or executions. Legislators and laymen simply do not perceive misdemeanors as serious offenses; and, if realists, they recognize that the incapacitation of misdemeanants would be extremely costly.

Another strategy

An assessment of the other prospective strategy in crime prevention—behavior modification—is difficult because it is so new that an assessment cannot rise above speculation.¹³ While the principles and techniques of operant conditioning or aversive conditioning are distinct from traditional rehabilitative programs in criminal corrections (e.g., vocational training, counseling), essentially the same doubts as to feasibility can be raised.¹⁴ Briefly, it is difficult to imagine an inexpensive but effective behavioral modification program. This is largely because behavioral modification programs are likely to require professional personnel, and most of the techniques require the "treatment" of one individual at a time rather than a mass application.

While the punitive quality of a custodial context may defeat rehabilitative efforts, that quality would not necessarily preclude a successful behavioral modification program, aversive conditioning

⁸ See Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317.

⁹ Some scholars are evidently now willing to entertain retribution only because they view it as the "best of a bad lot." L. Wilkins, in A. VON HIRSCH, *supra* note 2, at 177-79, is remarkably candid in expressing that rationale.

¹⁰ Of course, one could add a fourth doctrine—social defense—but even after elaborate attempts to state the doctrine it remains a hodge-podge. See M. ANCEL, *SOCIAL DEFENCE: A MODERN APPROACH TO CRIMINAL PROBLEMS* (1965). The social defense doctrine would be distinctive and coherent only if it were limited to the prevention of crime through incapacitation, but that is clearly not the case.

¹¹ See, e.g., Waldo, *The 'Criminality Level' of Incarcerated Murderers and Non-Murderers*, 61 J. CRIM. L.C. & P.S. 60 (1970). However, figures pertaining to the repetition of murder are limited to official statistics (re-arrest and re-conviction) that do not clearly distinguish first-degree murder from criminal homicide in general. Hence, some doubts about the seemingly low repetitive rate for murder must be entertained.

¹² The author has been unable to find a study of the relative monetary costs of "life imprisonment" and "execution"; therefore, the statement is based on a general observation by Justice Marshall in his concurrence in *Furman v. Georgia*, 408 U.S. at 357-58 (1972) (Marshall, J., concurring).

¹³ It may well be that the effectiveness of behavioral modification programs in criminal corrections cannot be evaluated readily. In any case, there has been little progress in that direction since publication of U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *DEVELOPMENT AND LEGAL REGULATIONS OF COERCIVE BEHAVIOR MODIFICATION TECHNIQUES*, PUB. NO. 73-9015 (1971).

¹⁴ Rehabilitation is often defined so broadly that "behavioral modification" is not different from rehabilitation. Rather, it is a relatively new direction in the way of rehabilitative techniques.

in particular. However, there are doubts as to whether a conditioned response established in a custodial context will actually prevent crimes outside that context. To illustrate, confronting an incarcerated rapist with pictures of women who have been physically assaulted and shocking him would undoubtedly have some physiological or neurological consequence, but whether it would prevent his repetition of the crime on release is another matter. Indeed, even if no rapist recidivates after undergoing such "therapy," the same consequence might ensue from shocking alone, which is to say that it may be difficult to distinguish the effects of aversive conditioning from specific deterrence. In any case, as long as the public demands protection from convicted felons through incapacitation, no behavioral modification program is likely to be accepted as a substitute for custody.

The point takes on special significance in recognition of what is perhaps an exaggerated fear—that murderers will kill again if released from prison. So, even ignoring the constitutional and ethical issues raised by behavioral modification programs in criminal corrections,¹⁵ it is most unlikely that any of those programs will be considered as an alternative to the death penalty.

THE MERITS OF THE RETRIBUTIVE DOCTRINE

Only in the context of the foregoing issues and problems can one appreciate the merits of the retributive doctrine and see the reason for its "staying power." For one thing, whereas a custodial context may thwart efforts at rehabilitation or render behavioral modification ineffective, incarceration can be construed as the "just desert" for the violation of any criminal law and, hence, entirely consistent with the retributive doctrine. The general point is that the question of effectiveness haunts all penal doctrines except the retributive. If the business of criminal justice is to punish the guilty because, and only because, they deserve it, jurists or legislators need not be concerned with problematical consequences of punishment.

Whereas the death penalty is the very contradiction of rehabilitation and behavioral modification, there is ample room for it in the doctrine of retribution. Like it or not, no one is truly startled by the argument that some crimes are so abominable that the perpetrator deserves death. The incapacita-

tation realized through the death penalty serves no purpose if the deceased would not have repeated the crime, but that poses no problem for the retributive doctrine, according to which any legal punishment should be an end in itself.

Finally, given the emphasis in the retributive doctrine on prosecuting individuals charged with a crime as "morally responsible beings," retributivists need not be ambivalent when it comes to granting the relevance of insanity pleas, an issue that is likely to be intensified by the reintroduction of the death penalty. The doctrine even provides a firm basis for an unequivocal return to the classical legal criterion of insanity. If the defendant knew what he or she was doing in committing the act, and knew it was wrong, the defendant was sane on committing the act. That criterion can be applied only through inferences, but it is hardly more difficult to discern than judging whether or not an individual acted in the grips of an irresistible impulse or a mental disease. Indeed, the retributive doctrine offers a distinct alternative to those who are weary and wary of "psychiatric justice."

The retributive doctrine is not haunted by these problems as much as contending doctrines largely because it is not *utilitarian*. Since its goal is "doing justice" rather than the prevention of crimes, it makes no instrumental claims. Perhaps most important of all, in comparison with contenders, the retributive doctrine is the least conducive to the subversion of accepted principles of justice. In particular, the deterrence doctrine could encourage the punishment of the innocent because, with a view of promoting *general* deterrence, it is the publication of punishments and not the guilt of those punished that is essential. That criticism of the deterrence doctrine is not thwarted by the utilitarians' reply that an innocent person cannot be *legally* punished. The reply is a play on words, and it would be a cruel joke for anyone who sits on death row because of a judicial error. In any case, the deterrence doctrine does not preclude the execution of hostages to secure compliance with military law in an occupied country, vicarious punishments (as when the relatives of the alleged perpetrator of a criminal act are executed), or false publicity of punishments (to further general deterrence).

The alleged dangers of a rehabilitative penal policy are more difficult to describe, largely because critics have introduced such a diverse range of issues. Nonetheless, the criticisms reduce to two major arguments: first, that advocates of rehabilitation call for a great deal of discretion both in sentencing and selecting "treatment modes" for

¹⁵ See N. KITTRIE, *THE RIGHT TO BE DIFFERENT* (1971); J. MITFORD, *KIND AND USUAL PUNISHMENT* (1973); J. MURPHY, *PUNISHMENT AND REHABILITATION* (1973).

offenders; and, second, that such discretion is inherently dangerous. The debate hinges largely on the second argument. That is the case because the warrant for discretion—that it is benign and exercised only to realize socially useful ends—is disputable. Indeed, so the criticism goes, there are conceivable means to rehabilitation, such as psychosurgery,¹⁶ that cannot be justified by appealing to social ends.¹⁷

Unlike advocates of rehabilitation, retributivists are under no burden to demonstrate that a retributive reaction to crime is benign. No less important, since the means-ends distinction is minimized in the retributive doctrine, retributivists are less open to the charge of allowing the ends to justify the means.

QUESTIONS LEFT UNANSWERED BY THE RETRIBUTIVE DOCTRINE

In assessing the retributive rationale for the death penalty, Justice Marshall rejected in *Furman* the argument that "retribution for its own sake" is a defensible principle.¹⁸ Justice Marshall has, however, committed himself to a questionable strategy in seeking to refute the retributive doctrine. As suggested previously, the principle merit of the retributive doctrine is that it makes no utilitarian claims; accordingly, Justice Marshall's tacit demand for a utilitarian rationale is contrary to the retributive doctrine, and the demand does not strike at the central defect of the doctrine. That defect can be described succinctly. The doctrine leaves so many questions about legal punishments unanswered that it cannot serve as a basis for a penal policy.

What is retribution?

Although an army of distinguished scholars has written about the retributive doctrine, explicit and ostensibly complete definitions of retribution are simply alien to the literature. What appear to be definitions have a curious metaphysical quality about them. Consider, for example, Ernest van den Haag's statement: "Retribution is to restore an objective order rather than to satisfy a subjective craving for revenge."¹⁹ The statement has only one merit. It emphasizes the point that a retributive

punishment is not private or otherwise uncontrolled vengeance; rather it is punishment prescribed and administered in accordance with law, which is to say a legal punishment. The importance of that point could not be exaggerated, though it is seemingly lost on critics of retribution, who dismiss the doctrine as a barbaric cry for vengeance. Nonetheless, van den Haag's statement scarcely speaks to this question: Of all punishments prescribed and administered in accordance with law, what distinguishes retributive punishments? Surely van den Haag does not presume that all legal punishments are retributive or more broadly, that all punitive penal policies are necessarily retributive;²⁰ but, just as surely, he does not answer the question by offering an explicit, ostensibly complete definition. Following tradition, his conceptualization of retribution is vague and discursive; and in an even more recent defense of the retributive doctrine, Newman also follows that tradition.²¹

Thus, critics of the retributive doctrine have no choice but to formulate their own definition of retribution, and in this case it is: The legal punishment of an individual, with the punishment prescribed by law solely for the reason that those on whom it is to be inflicted deserve it. This definition touches on some considerations that should be made explicit. The foremost consideration is that while retributivists rightly emphasize the necessity for punishments to be prescribed and administered in accordance with law, that emphasis does not truly distinguish them from advocates of other doctrines. Specifically, granted that in attempting to further deterrence legal officials may be prone to employ "illegal" practices, the deterrence doctrine in itself is not a rejection of principles of legality. Hence, the distinctive character of the retributive doctrine reduces to the statement that criminals should be legally punished only because they deserve it. That statement does not distort the retributive doctrine,²² but it does suggest the doc-

²⁰ That is all the more the case since van den Haag argues for a penal policy based on both the retributive doctrine and the deterrence doctrine. For that reason alone, a careful and systematic conceptualization of retribution is needed to distinguish it from deterrence.

²¹ G. NEWMAN, *supra* note 2. The conceptual problem is manifested in Von Hirsch's abandonment of the term "retribution," even though making what appears to be the conventional arguments for a retributive penal policy (at least as regards incarceration), A. VON HIRSCH, *supra* note 2, at 45.

²² The statement is consistent with all manner of statements by Newman, van den Haag, and Von Hirsch. Moreover, it will not do to describe the retributive doc-

¹⁶ See Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CALIF. L. REV. 237 (1974).

¹⁷ See generally J. RAWLS, *A THEORY OF JUSTICE* 3-4 (1971).

¹⁸ 408 U.S. at 342-45 (1972) (Marshall, J., concurring).

¹⁹ E. VAN DEN HAAG, *supra* note 2, at 11.

trine's fundamental shortcoming. Briefly, once a retributivist has made that statement, he or she really has nothing more to say. While brevity is all too rare in the history of ideas, the brevity of the retributivists' argument precludes answers to questions that must be answered if a complete penal policy is to be realized.

What is the appropriate punishment for a given type of crime?

Assuming that criminals should be punished because they deserve it (and perhaps for that reason alone), the retributive doctrine does not specify the appropriate punishment for all types of crime. It would be grossly unrealistic to demand such specificity from any penal doctrine. However, a doctrine is not a complete basis for a punitive penal policy unless it at least *implies* an answer to this question: For the type of crime under consideration, what is the appropriate punishment? Unless one is willing to accept "whatever is a just desert," the retributive doctrine implies no answer.

This point takes on special significance in considering the apparent willingness of American jurists to accept retribution as a sufficient justification for the death penalty. They should be confronted with the question: What are the premises of the retributive doctrine and rules of logic by which those premises imply that execution is the appropriate punishment for first-degree murder? The conventional response of the retributivists—*lex talionis*—is far less compelling than it appears. Executing a convicted murderer may appear to be entirely consistent with the principle of an-eye-for-an-eye, but *lex talionis* is not really a premise in the retributive doctrine because the doctrine is not limited to murder. When an attempt is made to apply the *lex talionis* principle to the range of crimes in Anglo-American jurisdictions, the limitations of the principle becomes obvious. Any doubts as to those limitations should be resolved by contemplating what punishment would suit treason, smoking marijuana, speeding, and homosexual acts. Contemporary retributivists come no closer to a defensible answer than did Kant, who recognized

the problem but offered no more in the way of a solution than his illustrations of castration for rape and pederasty and "expulsion from civil society" for bestiality.²³ The illustration itself is puzzling, and it surely does not give rise to a general principle. So *lex talionis* is little more than an *ad hoc* justification of the death penalty.²⁴

Contemporary retributivists are prone to admit that the retributive doctrine does not speak effectively to the question of "appropriate punishments."²⁵ Ernest van den Haag, for example, goes so far as to point out that even Hegel was at a loss to provide an answer.²⁶ Such candor is admirable, but it admits far too much. Indeed, once penal policy abandons the rehabilitative ideal, nothing, other than legality itself, is more important than criteria to determine appropriate punishments for particular crimes.

Seriousness of crimes

While contemporary retributivists understandably avoid pretending that their doctrine identifies appropriate punishments for particular crimes, they have set forth principles for such identification. The most common principle is that the punishment should be such that the pain or suffering inflicted by it is in keeping with the gravity of the offense.²⁷ The key term, gravity, is troublesome, because retributivists persist in using it as though it denotes some objective, obvious property of a crime. Even so, the present wording of the principle is surely less ambiguous than other phrases that retributivists commonly employ, such as making the punishment "fit the crime" or "resemble the offenses both in quality and quantity."²⁸ A far more empirically applicable criterion reduces to the formula that the severity of legal punishment

²³ I. KANT, THE PHILOSOPHY OF LAW 243-44 (W. Hastie trans. 1887). Contemporary retributivists evidently have abandoned such attempts to make the punishment "fit the crime." For example, van den Haag makes reference to *lex talionis* but only to say: "Punishments do not and cannot match in kind the crime for which they are inflicted." E. VAN DEN HAAG, *supra* note 2, at 193.

²⁴ At the same time, however, it is difficult to imagine any version of the retributive doctrine that would be an effective argument against the death penalty. The point is that capital punishment will be a major issue as long as the retributive doctrine commands a following. By contrast, it is conceivable that advocates of the deterrence doctrine will be driven to abandoning the death penalty in the face of evidence that its application is most uncertain.

²⁵ See note 2 *supra*.

²⁶ E. VAN DEN HAAG, *supra* note 2, at 194.

²⁷ See note 2 *supra*.

²⁸ G. NEWMAN, *supra* note 2, at 198.

trine as incorporating a justification of legal punishment beyond "dessert." To be sure, retributivists are preoccupied with attempting to explain why "criminals should be punished because they deserve it;" but as Fingarette's survey clearly shows (H. Fingarette, *supra* note 6), retributivists have offered all manner of justifications. Hence, there is no indisputable basis for stating the doctrine in such a way that it comprises a particular justification of punishment beyond the notion of dessert.

for a crime should be proportionate to the seriousness of the crime. However, the term "seriousness" suggests (erroneously) an objective property of a crime, and hence it would perhaps be better to speak of the "extent of social (public) disapproval of the crime." Yet, "seriousness" appears to be more conventional, and an appeal to public opinion poses an horrendous problem for anyone, retributivist or otherwise, who is genuinely concerned with legality.

Needless to say, the foregoing gives rise to a question of how the seriousness of a crime is to be judged. One answer hinges on the assumption that legislators, jurists, or scientists can somehow make such judgments by objective criteria. It is true that crimes can be distinguished in terms of at least some typologies. Thus, no one is likely to deny that agreement can be realized as to whether a particular crime resulted in or involved (1) a physical injury to a victim, (2) loss of money or property by a victim, or (3) deception. Yet it would be difficult to extend that list, and without extension it would be impossible to distinguish among various types of crimes, especially among crimes without victims. It is doubtful that purely qualitative distinctions would suffice, but quantitative distinctions, such as the extent of physical injury or mental anguish, are difficult to judge. In any case, the whole enterprise of assessing the seriousness of crimes is a study in quantitative distinctions, for it is inconceivable that all relevant features of a crime (*e.g.*, those having to do with harm and culpability) can be assigned the same "weight." These difficulties are compounded by recognition that the assessment of particular crimes and the assessment of *types* of crimes cannot be equated. In either case, the ultimate problem is the inevitability of subjectivity. Even if jurists, legislators, or criminologists should realize absolute agreement in their assessments of the seriousness of crimes (particular instances and/or types), they will have nonetheless surely ignored several properties and given more weight to some properties than others. Hence there is a crucial question: Whose standards are decisive in assessing seriousness? The question is all the more important because there is scarcely a basis for assuming no divergence in the criteria of jurists, legislators, criminologists, laymen, and particular divisions of the lay public (*e.g.*, blacks and whites in the United States).²⁹ If there is substantial divergence, then the

political implications of criminal law are accentuated all the more. Far from speaking to the issue, statements of the retributive doctrine commonly create the impression that criminal law is somehow apolitical. To be sure, retributivists are sophisticated people, and hence their writing commonly bristles with references to Plato, Hobbes, Rousseau, and Locke. Their recognition of the political character of criminal law, however, stops short of mundane considerations. One such consideration is that time and again American legislatures have created capital crimes without the presence of one representative of a large black population, which is all the more significant since blacks are overrepresented on death row.

The severity of punishments

Even if the seriousness of crimes could be judged in terms of objective criteria, and even if there were consensus as to the relevance and appropriate weight of each such criteria, it is pointless to assume that the *severity* of legal punishments can be judged objectively. For example, while the presumptive severity (magnitude) of ten years of imprisonment is twice that of five years, there is no basis for assuming that the public perceives relative severity in terms of such ratios.

When it comes to what are qualitatively different punishments, presumptive severity is truly a meaningless notion. That is especially obvious when neither of two types of punishment can be described in terms of any metric. Such is the case in contemplating execution and life imprisonment, the two principal contenders in the case of what have been capital crimes in the past.

Public opinion

The only solution of the foregoing problems is to accept the idea that the seriousness of crimes and the severity of punishments can be judged only subjectively in terms of *perceived* seriousness and *perceived* severity. That idea is all the more feasible since during recent years there has been considerable progress in the social and behavioral sciences toward perfection of techniques for the numerical expression of perceived magnitudes.

Yet retributivists have not seen fit to restate their doctrine in terms of perceived severity and per-

quency, 66 J. CRIM. L. & C. 173 (1975). However, the fact that two individuals assign the same value to a particular type of criminal or delinquent act is not proof that they employ the same criteria in judging seriousness. For that matter, the substantial agreement reported is *proportionate* agreement (*i.e.*, correlation) and not anything approaching identical values (*i.e.*, absolute agreement).

²⁹ The argument may appear to be inconsistent with reports of substantial agreement among various divisions of the United States population in the assignment of "seriousness" values to types of criminal or delinquent acts. See generally *Symposium on the Measurement of Delin-*

ceived seriousness. As a case in point, van den Haag is aware of recent attempts to express the seriousness of crimes by reference to the judgment of members of the public, but he seems to reject that procedure.³⁰ Yet, he does not propose an alternative procedure, nor does he acknowledge that identifying the appropriate punishment for a type of crime in accordance with some formula would require not only a perceived seriousness value for the crime, but also a perceived severity value for each of various types of punishments.

Most importantly, even if all such perceptual values are absolutely precise, there is no obvious basis for deducing the appropriate perceived severity value of the punishment from the perceived seriousness value. To illustrate, a sample of Tucson residents were asked a question something like this: "If 100 represents how much you disapprove of petty theft, what number would you give to represent your disapproval of first-degree murder?"³¹ The median value of the responses is 1,000. Then another sample of Tucson residents were asked a question something like this: "If 100 represents the severity of one year in the county jail, what number would you give to represent the severity of the death penalty?" The median of the responses is 10,000. Hence, by what rules of logic can one deduce from these findings that the death penalty is the appropriate punishment for first-degree murder? Nothing is gained by arguing that the value for murder and the value for the death penalty are not comparable. Even so, that argument only gives rise to a difficult problem of how perceived seriousness values and perceived severity values may be made comparable and hence potentially equatable. Advocates of the retributive doctrine simply do not speak to such problems; but, until they do, no particular implications follow from what appears to be a retributive principle—that the severity of the punishment should be proportionate to the seriousness of the crime.

The only obvious alternative to a purely legislative determination of legal punishments on an *ad hoc* basis is to solicit public opinion of the appropriate punishment for a particular crime. Protag-

onists in the debate over the death penalty have appealed to public opinion polls on the subject, but the findings of those polls have proven to be most controversial. For one thing, the exact wording of an attitudinal question about capital punishment is crucial, but it is by no means obvious what that wording should be. Surely one can doubt the significance of any response, be it affirmative or negative, to such a question as: "Do you favor the death penalty?" The question does not stipulate any particular type of crime, and even that stipulation would not insure an *informed opinion* on the part of respondents, not even as to prospective instances of the designated type of crime.³² For example, if the type of crime is designated as first-degree murder, should the respondents be informed as to whether or not that type encompasses euthanasia, infanticide, and felony murders? Clarification of such legal terminology would surely influence the percentage of respondents who endorse the death penalty. The same is true when it comes to information on the administration of the death penalty (*e.g.*, the certainty of its application) or the identity of the perpetrator and the victim (*e.g.*, age, sex).

The problem in assessing public support of the death penalty is not purely technical. This is because the *legal* relevance of public opinion about criminal sanctions is disputable, and the retributive doctrine offers nothing whatever to resolve that dispute. The major term in that doctrine, "just desert," suggests that criminals should not be punished capriciously. Yet the retributivists fail to stipulate who is to determine the just desert for a particular type of crime, and there are all manner of reasons for not appealing to public opinion, as it would give rise to some horrendous issues.

Most obvious among these issues is the improbability of consensus in public opinion as to the appropriate punishment for any type of crime. Thus, defenders of the death penalty have tried to make much of the fact that over recent years the majority of respondents in American public opinion polls have endorsed the death penalty. However, the majority commonly has been far less than two-thirds,³³ and opponents of the death penalty

³⁰ E. VAN DEN HAAG, *supra* note 2, at 192-93. By contrast, Von Hirsch evidently accepts the idea of equating the seriousness of crimes and the severity of penalties in accordance with some formula; but he says nothing specific as to how seriousness values are to be computed, and also as to how the two kinds of values are to be equated. Newman largely ignores the problem.

³¹ This research was conducted by Maynard Erickson, Jack Gibbs and Gary Jensen. Space limitations preclude a description of the procedure and the sample.

³² For a treatment of the importance of the "informed opinion argument," see Sarat & Vidmar, *Public Opinion, The Death Penalty, and The Eighth Amendment: Testing the Marshall Hypothesis* in H. BEDAU & C. PIERCE, *CAPITAL PUNISHMENT IN THE UNITED STATES* 190 (1976).

³³ Erskine, *The Polls: Capital Punishment* 34 *PUB. OPINION Q.* 290 (1970); Vidmar & Ellsworth, *Public Opinion and the Death Penalty* in H. BEDAU & C. PIERCE, *supra* note 32, at 125.

could argue that capital punishment is not justified unless it is acceptable to the overwhelming majority. Indeed, a stringent criterion of "overwhelming" support has an advantage that is seldom recognized in that it promotes confidence that informed individuals do not oppose executions.

Determination of *effective* consensus is not the only issue. Additionally, one must confront the distinction between "structural" consensus and "individual" consensus. That distinction can be illustrated by considering the outcome of an opinion poll in which, say, seventy-five percent of the respondents voiced support of the death penalty. Now suppose that the percentage of those endorsing the death penalty varies enormously from one ethnic, racial, or occupational division of the population to the next, with overwhelming opposition to the death penalty voiced in some of those divisions. Surely such *structural dissensus* cannot be dismissed as irrelevant, but just as surely there is no accepted principle that would resolve the issue. Moreover, the possibility of individual consensus but structural dissensus is not just a theoretical possibility. Public opinion polls in the United States clearly indicate much more support for the death penalty in some social divisions of the population than in others, and the contrasts along racial lines are quite large.³⁴

The most controversial issue has to do with the proper functions of criminal law. A host of distinguished figures in the history of legal philosophy have argued that one essential function is protection of those accused of a crime from the uncontrolled passions of the public for vengeance. Ordinarily, one thinks of those passions as prompting the citizenry to "take the law into their own hands," but allowing public opinion to dictate statutory penalties or judicial rulings is not an altogether different matter. If nothing else, there is ample evidence that statutory penalties would have to be altered frequently to be consistent with trends in public opinion. Figures from opinion polls concerning the death penalty suggest considerable short-run fluctuation in that support,³⁵ and no accepted principle of legality can be reconciled with the prospects of allowing the fate of a convicted murderer to be determined by the impact of the most recent opinion poll. The point is not that the retributive doctrine calls for "justice through public opinion polls". Rather, retributivists side-

step the issue by leaving "just desert" as an essentially metaphysical notion.

Discretion

In American jurisdictions there is a definite trend toward the reduction of discretion in all stages of the enforcement of criminal law, and that trend is conspicuous in recent opinions of the United States Supreme Court on the death penalty.³⁶ The rulings of the Court are clearly in the direction of rejecting absolutely mandatory death sentences but at the same time imposing rigorous controls on procedures in sentencing and precluding unlimited discretion. What the Court appears to be calling for is something akin to the statutory recognition of mitigating and aggravating circumstances. There is no doubt that *some* relevant circumstances can be described in objective terms (*e.g.*, whether the murder victim was a prison guard acting in the line of duty); hence, a statutory designation of them may be feasible. However, the kinds of circumstances that courts will accept as reasonable and justifiable remain to be seen, and the retributive doctrine scarcely speaks to the question. For that matter, insofar as advocates of the doctrine speak to the issue of discretion at all, they appear badly divided.³⁷

The dissensus among retributivists with regard to discretion is puzzling, because once it is accepted that the severity of punishment should be proportionate to the seriousness of the offense, there is nothing that precludes considerable discretion by a judge or jury in sentencing. To be sure, the statutory prescription of a mandatory, definite sentence may appear to insure equity in punishment and hence be more consistent with the retributive doctrine. Yet, statutory penalties are prescribed for particular types of crimes (*e.g.*, first-degree murder, aggravated assault, burglary), and it would be ludicrous to assume that all instances of any type of crime are equally serious or heinous. Hence, if

³⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

³⁷ Some contemporary retributivists, *e.g.* G. NEWMAN, *supra* note 2, at 200, admit the dissensus on the subject of discretion. However, the dissensus among contemporary retributivists is not limited to discretion in sentencing; they also differ (*inter alia*) as to whether the statutory penalty for a type of crime should be less severe on a first conviction. Compare G. NEWMAN and A. VON HIRSCH, *supra* note 2.

³⁴ *Id.*

³⁵ *Id.*

the severity of punishment is to be proportionate to the seriousness of the offense, alternative statutory penalties (*e.g.*, no less than two years imprisonment nor more than five years and/or a fine of not less than \$20,000 nor more than \$100,000) appear the only way by which that principle can be applied in particular instances.

The point is that alternative statutory penalties (including indefinite or indeterminate prison sentences) are no more consistent with a rehabilitative penal policy than a retributive penal policy. Those penalties would serve a *purely* retributive function only if magistrates were instructed by the criminal code to judge the seriousness of each offense and to select the sentence within the stipulated statutory range of possibilities such that its severity is proportionate to the seriousness of the offense.³⁸ In the case of a prospective capital sentence, the judge or the jury can choose between imprisonment and death by reference to circumstances that make the offense more or less heinous. As already indicated, the trend in the rulings of the United States Supreme Court is in the direction of a statutory stipulation of relevant circumstances,³⁹ but it remains to be seen (by a retrospective case-by-case analysis) whether the relevant circumstances can be reduced to statutory prescriptions.

The foregoing argument stops short of alleging that the retributive doctrine requires or tacitly endorses discretion in sentencing. Yet it is not clear that the retributive doctrine calls for a mandatory, definite statutory penalty for each type of crime. The ambiguity simply reflects the fact that contemporary retributivists cease to speak in unison when confronted with specific questions about legal punishments.

CONCLUSION

Although jurists, legislators, laymen and scholars appear to be increasingly inclined to accept the retributive doctrine over either the rehabilitative or deterrence doctrines, they have done so without recognizing that the retributive doctrine really does

not resolve a host of issues in penal policy.⁴⁰ Those issues reduce to the following questions: How are the seriousness of offenses and the severity of punishments to be judged? Who is to make such judgments? In what way if any is public opinion relevant in justifying punishments? Finally, should discretion in sentencing be eliminated?

Those issues have been analyzed here largely in connection with the death penalty and murder, but they are no less salient for other types of punishment or other types of crime. Indeed, the issues expand when contemplating noncapital crimes. As a case in point, no one is likely to entertain the idea that restitution is appropriate for murder, but whether or not restitution is appropriate for other crimes is an issue. It may appear that there is nothing in the retributivists' statements about "just desert" that would preclude restitution as a criminal sanction, but such a punishment is hardly an end in itself.

To conclude, Justice Marshall notwithstanding, the fundamental shortcoming of the retributive doctrine is not that it seeks to justify a legal punishment as an end in itself; rather, the doctrine offers no solutions to the specific problems that haunt the criminal justice system. Putting the criticism more bluntly, the retributive doctrine is attractive precisely because it is little more than an empty formula. That characterization is not a tacit belittlement of the perennial efforts of retributivists to justify legal punishments. Nonetheless, the justification of legal punishments in general is not a justification of the death penalty, let alone a penal policy.

⁴⁰ Needless to say, neither the deterrence doctrine nor the rehabilitative doctrine provides an answer to all important questions touching on penal policy (far from it); but that recognition hardly eliminates the defects of the retributive doctrine. For that matter, advocates of the rehabilitative doctrine appear to be much more unified when it comes to endorsement of discretion in sentencing. As for advocates of the deterrence doctrine, they can at least argue that the appropriate statutory penalty for a particular type of crime can be treated as a scientific question. By contrast, empirical findings would aid retributivists in their attempts to identify appropriate penalties only if retributivists grant the relevance of public opinion in the determination of criminal sanctions. Even so, it is difficult to imagine any empirical finding that would promote consensus among retributivists as to discretion in sentencing and the relevance of previous convictions in setting statutory penalties.

³⁸ Yet the sentence in each particular case would have to be *definite* (*e.g.*, 10 years' imprisonment) rather than *indefinite* (*e.g.*, not less than two years); otherwise, a "retributive" sentence would not be distinguishable from those preferred by advocates of rehabilitation.

³⁹ See note 36 *supra*.