

# Expert Opinion

**To:** The Second Simulated Constitutional Court of Taiwan

**From:** Michael Davis, Illinois Institute of Technology, Chicago

**Re:** The Death Penalty

**Date:** April 7, 2015

## Introduction

I am a philosopher, not a lawyer, and certainly not a lawyer familiar with the details of Taiwan's constitution and criminal law. My expertise is in the evaluation of arguments, especially moral arguments. I have been evaluating arguments concerned with the death penalty for more than thirty years.<sup>1</sup> I have also written a good deal about the justification of punishment in general. As far as I can tell, today's arguments for abolition are (more or less) what they were thirty years ago. They are much the same in South Africa as in the US, much the same in Taiwan as in Britain. Everywhere the legal arguments for abolition are general moral arguments cast in local terms. There seem to be only four major arguments: 1) the argument from no deterrence; 2) the argument from insufficient reason; 3) the argument from inhumanity; and 4) the argument from irrevocability.<sup>2</sup>

What I propose to do here is summarize my conclusions about punishment in general and these four arguments in particular in a way I hope will be helpful to the Court. This summary is, in part, a negative defense of the death penalty, that is, an explanation of why none of the usual arguments claiming to show it to be immoral succeed in showing that. While fending off arguments against the death penalty, I shall also offer a positive defense of the death penalty, though one contingent on the particulars of the system of criminal justice a country happens to have. This positive defense is broadly retributive. I offer both the negative and positive defense regretfully because I personally favor abolition, though on practical rather than moral grounds, grounds appropriate for a legislature, not a court, to consider in its deliberations.

## 1. Two kinds of retribution

Today the death penalty typically exists within a system of laws, officials, facilities, and punishments we call “criminal justice”. This system typically works in cooperation with other systems of social control: mental health, armed forces, markets, social pressure, religion, family, and so on. What distinguishes criminal justice from these other forms of social control is a certain structure. We might summarize that structure in this way. There are:

1. Rules (and principles for interpreting them) capable of guiding ordinary conduct, what we may call “primary rules”;
2. Rational agents, that is, beings capable of following the primary rules or not as they choose, capable of choosing on the basis of reasons, and capable of treating the prospect of an undesirable consequence, “a harm”, even one distant in time, as a reason against doing an act (to be weighed with other reasons for and against);
3. “Secondary rules” designed to connect (and generally succeeding in connecting) failure to follow primary rules with specified harms (“penalties”);
4. Conventional procedures for imposing penalties upon rational agents in accordance with the secondary rules;
5. A justified presumption that both primary and secondary rules (especially rules setting penalties) are generally known to those subject to them; and
6. A practice of justifying imposition of a penalty (in part at least) by the fact that the individual upon whom it is to be imposed, though (more or less) rational, failed to follow the appropriate primary rule.<sup>3</sup>

Many discussions of the death penalty begin with a misunderstanding of retributivism. So, I would like to dispose of that misunderstanding now. While most critics of retributivism recognize that the literal form of *lex talionis* (“an eye for an eye”) is not a popular position even

among staunch retributivists, they nonetheless assume that *all* forms of retributivism must proportion punishment to harm done (at least for the major intentional crimes). The retributivist must (it is said) seek to inflict on the criminal that morally permissible punishment most like the harm the criminal inflicted on her victim. This is the “moral equivalence” or “commensurate” form of *lex talionis*.

The characteristic that all forms of *lex talionis* share is using the harm the crime actually did as a major component when determining punishment. All forms of *lex talionis*, therefore, have trouble with the enormous variety of crimes in any sophisticated legal system. Too many crimes do no harm to others—in any useful sense of “harm to others”. Instead, they merely offend others, risk harm to them, inflict harm on the criminal himself, or the like. Any plausible retributivism must be able to assign penalties to many “harmless” crimes, everything from attempted murder to reckless driving, from failure to place a tax stamp on a liquor bottle to conspiracy to commit embezzlement.<sup>4</sup> For that reason, some retributivists (I among them) have tried to understand punishment as *taking back* (or annulling) the unfair advantage the criminal gets from the crime as such (or, at least, the value of that unfair advantage) rather than as returning something like the harm the criminal did. Here is an example of the method by which that sort of retributivism would assign penalties to crimes:

1. Prepare a list of penalties consisting of those harms (a) which no rational person would risk except for some substantial benefit and (b) which may be inflicted through the (relatively just) procedures of the criminal law.
2. Strike from the list all inhumane penalties.
3. Type the remaining penalties (by harm imposed), rank them within each type (by amount of that harm), and then combine rankings into a scale.
4. List all crimes.
5. Type the crimes (by interest protected, such a property or life), rank them within each type (by degree of protection, such as preventing direct harm or merely preventing risk of that harm), and then combine rankings into a scale.
6. Connect the greatest penalty with the greatest crime, the least penalty with the

least crime, and the rest accordingly.

7. Thereafter: type and grade new (humane) penalties as in step 3 and new crimes as in step 5, and then proceed as above.

The harm that a crime actually does plays no part in this assignment of (maximum) penalties. Only the harm-in-prospect (harm from the legislature's point of view) has a part, but one constrained by considerations of type and grade. Type and grade are what structure a system of criminal justice. A criminal court begins with the statutes already enacted, the penalties already set, and a crime already committed (its harm no longer in prospect).

While there is much to explain both about how this method works and why it apportions punishment to criminal desert, I shall not do that here, having done it elsewhere on the scale required.<sup>5</sup> What is important now is intuitive enough. Criminal justice presupposes potential criminals approximating the economist's rational person. Respecting the human dignity of such a person consists (in large part at least) in respecting her choices. Insofar as she chooses an act known to have a penalty attached, she should, all else equal, be treated as if she chose the penalty too. When criminal justice punishes a criminal, it respects her rationality. When a particular criminal is found not to be rational, or at least not rational enough, criminal justice does not punish her. She is transferred to a hospital where her choices matter less even as her suffering matters more.<sup>6</sup>

The list of penalties attached to crimes should therefore consist of just what no rational person subject to the system of criminal justice in question would risk except for some substantial benefit. Nothing less would be persuasive. The list may vary somewhat from society to society (depending on what technology makes available and culture understands as serious harm). But deterrence of a sort, the dissuading of rational persons, is a fundamental feature of any system of criminal justice, whatever one's theory of justification, function, or aim. A system of criminal justice that did not dissuade ("deter") at all would be a waste of resources impossible to justify. This very rough deterrence is common ground between retributivists and deterrentists (though few seem to appreciate its import).<sup>7</sup>

In a society much like yours or mine, the *initial* list of penalties typically includes: death;

loss of liberty (e.g. imprisonment, house arrest, or other constraints on movement); pain (e.g. torture, caning, hard labor); loss of property (e.g. fine, confiscation, temporary impoundment); loss of opportunities (e.g. revocation of franchise, driver's license, or parental rights); mutilation (e.g. cutting, scarring, amputation); and shame (e.g. having to post a sign in front of one's house saying "sexual offender"). These are *potential* penalties in a society much like ours because they are what a rational person in a society much like ours typically finds persuasive. Which potential penalties are in fact used will depend in part on step 2 and in part on custom, what the society can afford, and similar practical considerations.

Given this way of understanding penalties in a system of criminal justice, it follows that if, as abolitionists agree, death is a more severe penalty than any other on the list, it must, all else equal, be a better deterrent than any other penalty on the list. That is a conceptual truth. The only question left open is an empirical one: *how much better* a deterrent death is in practice than any other penalty on the list? So, the argument from no deterrence is refuted.

## **2. Severity versus inhumanity**

An abolitionist need not object to the seven-step method I have just described. She can restate her arguments in its terms: For example, she can restate the argument from inhumanity in this way: Death cannot pass the test set by Step 2—or, at least, cannot if torture fails the test of humanity (as almost everyone now seems to agree it does). Death must fail to be humane if torture fails because (the abolition can say) torture is not as severe a penalty as death. Since Step 2 excludes death if it excludes torture (and it does exclude torture), the death penalty cannot be justified (or, at least, is no more justifiable than torture is).

If this is a fair restatement of the argument from inhumanity, all we need do to refute the argument from inhumanity is provide one plausible example of a jurisdiction where death can be justified as a penalty even though torture cannot be.

Consider, then, a jurisdiction like my home state of Illinois, where the statutory penalty for armed robbery, aggravated arson, and similar serious non-lethal crimes is 6-30 years

imprisonment; where the statutory penalty for simple first-degree murder is 20-60 years imprisonment; and where the statutory penalty for multiple murders is life imprisonment without parole. We may, I think, agree that someone who commits several first-degree murders on one occasion *in an exceptionally brutal way* deserves a penalty significantly more severe than the penalty for simple multiple murder (assuming the more severe penalty is both possible and otherwise permissible). That is, there is enough difference between these two categories of crime (simple multiple murder and aggravated multiple murder) that we should (if possible and permissible) assign the more serious a substantially higher penalty. We want to give the potential criminal a reason not to be brutal even if he is going to murder several people, a reason that—as a rational person—he should find significant. Death is such a penalty.<sup>8</sup>

But (an abolitionist might respond) you have not yet explained why we should not choose life-imprisonment-with-torture instead of death. Any rational person should consider torture-added-to-life-imprisonment a significant reason not to do what he might do if the penalty were only life imprisonment. If the retributive argument that I am defending justifies the use of torture, it is (presumptively) refuted, since everyone agrees that torture is not justified. If, on the other hand, the argument cannot justify torture, how can the argument justify the more severe penalty of death without begging the question of death's moral permissibility?

The reason why the argument cannot justify the use of torture instead of death is, of course, that torture has been struck from the list of available penalties as inhumane. But, in order to explain why death is not also off the list, the argument needs a theory of inhumane penalties (one that does not beg questions about the death penalty's moral permissibility). There is such a theory, one that explains why penalties can be morally permissible at one time and not another, why death can be humane today even if torture clearly is not, a theory general enough not to beg our question.<sup>9</sup>

### **3. A theory of inhumanity**

We do not object to a penalty (such as torture) as inhumane simply because of its severity.

Some penalties, such as whipping or branding, though relatively mild and once considered humane, are now generally considered inhumane. We also do not object to a penalty as inhumane merely because of what we are unwilling to suffer. We are sometimes willing to suffer inhumane penalties ourselves (for example, a few hours of torture to avoid long imprisonment). We seem to object to a penalty as inhumane only when use of that penalty on anyone, especially someone else (against his will), shocks us; when, that is, we cannot comfortably bear its general use.

Shock (a spontaneous negative judgment combined with great mental discomfort) is neither rational nor irrational. The person who does not find shocking what everyone else does is eccentric, insensitive, or callous. He is not necessarily irrational. We think he needs to let go more, to feel more, or to live better, not to be cured or caged. Shock at this or that is not a basic evaluation all rational persons must share; nor is it the inevitable consequence of what all rational persons do share. For example, much that might turn most of us pale does not bother a surgeon or butcher. What shocks us seems to be a consequence of how we live, of what we are used to.

Though I may say a penalty is inhumane because it shocks me, a penalty is not inhumane just because it shocks me. To say a penalty is inhumane is to claim much more than that one is shocked by it. If I think a penalty is inhumane, I expect you to be as shocked by it as I am. I expect everyone to be. I am surprised, even bewildered, if I find my expectation disappointed. We expect our feelings, especially the strongest and least self-interested, to be like those of others. If those near us share such a feeling, we expect everyone to. So, a penalty is inhumane (in a particular society) if its use shocks all or almost all; humane, if its use shocks at most a few; and neither clearly humane nor clearly inhumane if its use shocks many but far from all. We suppress inhumane penalties (in part at least) because we do not want to be shocked by their use.

But shock as such is morally indifferent while humaneness seems to be morally important (as the appeal to "human dignity" that often accompanies appeal to humaneness testifies). What is the connection between shock and morality? The connection seems to be this: If we treat someone in a way we generally find shocking, we do not treat her as a person. We bring upon her something that does not usually happen to persons we know, something so bad the sight (or perhaps even the contemplation) of it makes us uncomfortable. To treat a person in a way we generally find shocking is, then, to treat her as we ourselves do not want to be treated, as we

would not treat most other persons, as we may not even be willing to treat an animal. It is, in short, to degrade her, to treat her as less than a person. If morality requires us to treat each person as a person (and that, it seems, is relatively uncontroversial), then we do something (at least presumptively) morally wrong if we inflict on a person (against her will) a penalty we find shocking.

#### **4. How is a common standard of humanity possible?**

Making humaneness a function of shock in this way may seem puzzling. Shock, I said, is neither rational nor irrational. If what is inhumane depends upon most of us agreeing about what shocks us, how does it happen that there is so much agreement about what is inhumane when reason does not bring us together?

The puzzle is not hard to solve. A certain way of life shapes our sensibilities in a certain way. A shared way of life, because it shapes a common sensibility, forges a standard of humaneness too. We are made to agree. Caning does not shock a society in which parents beat their children, masters beat their servants, and everyone beats an animal. In such a society, caning is not inhumane. On the other hand, imprisoning someone for months or years would shock most people in a society of nomads; and, in such a society, even house arrest for a month or week may be inhumane. Imprisoning does not shock us, I am suggesting, only because we are every day penned in homes, workshops, and offices for many hours at a time and often spend years in the same city or town. So, though we admit imprisonment to be a great harm (even apart from its perversions), we do not think it an inhumane punishment.

There is then some relationship between “progress” and what is or is not inhumane. Insofar as technological progress has meant the disappearance of certain harms from daily life, it has meant as well a change of sensibility and so a change in what society should lay aside as inhumane (“cruel *and unusual*”, as American courts have to say). Public executions came to shock our humanity about the time it became rare for ordinary people to die in the street. During the last few decades, most of the US’s death-penalty states switched from execution by (private)



hanging, gassing, or electrocution to execution by (private) lethal injection. Why? Perhaps because death by injection is more like the hospital death to which we are now accustomed (hanging, gassing, and electrocution resembling more the industrial accidents that, happily, have become relatively rare).

What then of the death penalty itself? If what I have said so far is right, the death penalty will shock enough of us only when it becomes rare enough for people to die unwillingly before old age (such an early death being the harm the death penalty seems to impose).<sup>10</sup> How rare is “rare enough”? That is an empirical question. What is clear, I think, is that early death is not rare enough in the US today to make the death penalty as shocking as it needs to be to be inhumane here. Certainly, death by lethal injection does not, as such, shock most Americans in the way even fifty lashes with a whip would.<sup>11</sup> Are things much different in Taiwan?

## **5. An objection considered**

I have admitted that criminal desert (relative proportion between punishment and crime-in-prospect) is not the only constraint on how we can justifiably punish. Humaneness is another. I do not regard this reliance on a second “side constraint” as a weakness of the retributive theory just presented even though some may think otherwise. Retributivism, as I understand it, is primarily about moral constraints on revenge, deterrence, reform, incapacitation, or whatever other aim a state might pursue when making acts criminal, an upper limit on punishment. Desert is one moral constraint; humaneness, another. Each constraint does add to the complexity of the theory, but there can be no objection to complexity that pays for itself by capturing otherwise hard to capture features of how we should punish (for example, the fact that we now think it all right to lock up a criminal for ten years as punishment but not to parade him for even a few minutes naked in the streets or beat him for half an hour with a stick).

Nonetheless, this complexity may seem to have opened the theory to an objection from “human dignity”. Since retributivists generally consider human dignity important, they must take this objection seriously. Consider a club in which membership requires giving up one of one’s

two working kidneys to a member of the club in need should one's number come up in the club's lottery. Suppose someone whose number has come up refuses to give up one of his kidney even though he could. Would we not object to *forcing* him to give it up even though that violation of bodily integrity is necessary to make the club's version of social insurance work and he voluntarily entered an agreement to do exactly that?

I agree that we would object. We should not require specific performance even if we are willing to enforce the contract by assessing damages for a failure to perform. What I deny is the relevance of this example to the death penalty. The death penalty does not involve the same violation of bodily integrity as does forcibly removing a human kidney. Death by lethal injection is much closer in this respect to forced medication (something that does not shock us) than to the forced mutilation of taking a kidney from an unwilling patient (something that admittedly does shock us). In any case, our intuitions here rest on the same sensitivities that our intuitions of humaneness do. Our intuitions of humaneness need not make sense according to some abstract theory of what resembles what. They are what they are, and that is the end of it—until they change.

Someone making this objection might respond that we should nonetheless reject the death penalty whenever a less severe penalty is available. Torture is a less severe penalty. Therefore, we should reject the death penalty.

To this last (desperate) argument, I would respond that torture is not available—for the reasons already given. It is inhumane—even though less severe. Humaneness is, in large, a variable independent of severity.

But is there an alternative to the death penalty, a penalty significantly more severe than life imprisonment without parole but not inhumane? Some of the other penalties on our original list— all those that do seem a significant addition to life imprisonment without parole (torture, caning, and so on)—also seem to be inhumane (and so, are not available). The remainder of the list, though available, do not seem a significant addition to life imprisonment without parole. So, for example, revocation of the criminal's franchise, driver's license, or parental rights does not, when added to life imprisonment without parole, seem to make the penalty significantly more severe. Why should someone contemplating brutally murdering several people care whether, in

addition to life imprisonment without parole, her punishment would include loss of her right to vote, her driver's license, or her parental rights?

If the death penalty is the only penalty a state has that is both humane and significantly more severe than life imprisonment, that state is left with the death penalty as the only way to provide a persuasive reason to prefer lesser forms of multiple murder to aggravated multiple murder. Since we have good reason to want to proportion punishment to criminal desert (guiding potential criminals to a less serious crime), the state has a retributive justification to use death as a penalty, the markedly greater criminal desert of aggravated multiple murder. The argument from insufficient reason is refuted.

Note: This refutation does not rely on the empirical claim that the death penalty will significantly reduce the rate of aggravated multiple murders but on the *conceptual* claim that, given the presuppositions of criminal justice (especially, the rationality of potential criminals), the death penalty provides a good reason for potential criminals to avoid aggravated multiple murders they would otherwise commit.

This refutation presupposes that the statutory scheme in question is otherwise (relatively) just and that the state cannot achieve the distinction between aggravated multiple murders and lesser crimes by reducing the penalty for lesser crimes. Though I believe that the statutory scheme of my own state, while otherwise relatively just, is too severe overall, its being so does not matter here. Even if Illinois' penalties are too severe overall, nothing in the abolitionist's arguments, or in the retributive method outlined here, rules out the possibility that a statutory scheme like Illinois' might be justified somewhere sometime. If lesser penalties will not preserve enough order, the legal system will either have to impose more severe penalties overall or, after trying to improve enforcement or otherwise reduce crime, subside into disorder. Which scheme of penalties is enough to preserve order is not something to be settled by an abstract argument such as the abolitionist's argument from inhumanity. It is a difficult empirical question best left to legislative experiment—except when the system of penalties is obviously too severe to most of the society.

This refutation of the argument from inhumanity presupposes that the death penalty is carried out in a humane way. I do not consider the death penalty to be carried out in humane way

if, for example, it includes making the condemned wait for years in solitarily confinement in a cell three meters long and two meters wide, without books, computer, television, weights, or other ways to fill the time. Such a narrow and impoverished confinement is, I think, shocking enough to be inhumane.

## **6. The argument from irrevocability**

But, it may be objected, I have overlooked an important difference between death and the other penalties on the list, even torture. Death is irrevocable (or “irreversible”); the others are not. To this argument, I respond that the death penalty is no more irrevocable than many other penalties, including imprisonment, *as long as like is compared to like*. So, for example, there is nothing in the death penalty as such ruling out correcting errors once discovered, even if the sentence has been completed. The dead can be exonerated just as can a living criminal who has served his sentence before being proved innocent. There is a death-penalty case like that every few years. For example, in 2014, the conviction of George Stinney, Jr. was vacated seventy years after his execution.<sup>12</sup> The death penalty is also no more adverse to the convict, upon exoneration, walking out of prison *before his sentence is complete* than is a term of imprisonment. Generally, the sentence of death is not carried out the minute it is imposed. There is enough time between the sentence of death and its completion for the sentence to be vacated or commuted or the convict pardoned. True, once the sentence of death is complete, the life taken cannot be returned. But that is also true of a life-sentence-without-parole once completed. A natural death is still death. Indeed, even much shorter sentences are irrevocable in this respect. Consider a sentence of one year imprisonment. Once the sentence is completed, that year cannot be returned. The sentence has become irrevocable. Exonerated after he has served his sentence, the convict is left only with the rest of his life and whatever compensation the state pays him for its error.<sup>13</sup>

Nor is a mistaken sentence of death, once completed, any less compensable than a mistaken sentence of life-imprisonment-without-parole, once completed. Dead is dead. More important, a mistaken sentence of death, even once completed, is compensable much as any other wrong is. For example, there is no reason why the State of South Carolina cannot pay

compensation for the wrong done to him to the estate of George Stinney or to his descendants. Such posthumous compensation is a characteristic of successful suits for wrongful death. If the dead lack all legal rights in a particular society, that is a moral failing of that society, not a fact about the dead as such.

## 7. Conclusion

There are, I agree, many good arguments against the death penalty. It is expensive, contributes little or nothing to controlling crime, tends to distort judicial procedure, and so on. All I have argued here is that there is no *decisive* moral argument for abolition of the death penalty—or, at least, there are no arguments popular with the abolitionists strong enough to justify ruling the death penalty unconstitutional without ruling many now common statutory penalties unconstitutional as well.<sup>14</sup>

### NOTES

1. My first publication on that subject was: “Death, Deterrence, and the Method of Common Sense”, *Social Theory and Practice* 7 (Summer 1981): 145-177.
2. I shall ignore the argument from arbitrariness here both because it seems less important and because it does not fit with the others, not because I have nothing to say about it. For what I have to say about it, see “The Justification of Arbitrary Death”, *International Journal of Applied Philosophy* 11 (Winter/Spring 1997): 1-6.
3. This description of criminal justice is often called the “Flew-Benn-Hart definition” because Stanley Benn, Anthony Flew, and H.L.A. Hart all defended (something like) it more or less independently at about the same time. See A.G.N. Flew, “The Justification of Punishment”, *Philosophy* 29 (October 1954): 291-307; Stanley I. Benn, “An Approach to the Problems of

Punishment”, *Philosophy* 33 (October 1958): 325-34; and H.L.A. Hart, “Prolegomenon to the Principles of Punishment”, *Proceedings of the Aristotelian Society* 60 (1960):1-26.

4. Michael Davis, “Harm and Retribution”, *Philosophy and Public Affairs* 15 (Summer 1986): 236-266.

5. I first offered, explained, and defended this procedure in “How to Make the Punishment Fit the Crime”, *Ethics* 93 (July 1983): 726-752. I have made minor improvement since.

6. For more on this, see Herbert Morris, “Persons and Punishment”, *Monist* 52 (October 1968): 475-501.

7. See my *To Make the Punishment Fit the Crime* (Westview Press: Boulder, CO, 1992), esp. Ch. 3. Since the unfair-advantage theory claims that the penalty so generated is what the criminal *deserves* for his crime, it is a form of retributivism. Michael Davis, “Punishment Theory’s Golden Age: A Survey of Developments from (about) 1957 to 2007”, *Journal of Ethics* 13 (March 2009): 73-100.

8. Or, at least, *was*. Illinois abolished the death penalty in 2011 by legislation after a study of 26 pre-DNA-testing cases for which DNA evidence was available showed that, though all 26 had been sentenced to death, 13 were innocent. The risk of executing an innocent person suddenly seemed too high even for many strong defenders of the death penalty.

<http://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty> (accessed March 23, 2015).

9. I first proposed this theory in “Death, Deterrence, and the Method of Common Sense”. A fuller statement can now be found in *Justice in the Shadow of Death* (Rowman & Littlefield:

Lanham, Maryland, 1996). The theory is broadly sociological or historical, something I would regret were it not for the fact that our sense of inhumanity certainly does seem to change over time. Even a philosopher who prefers conceptual arguments must take account of facts like that.

10. For those who think the relevant harm is being killed before old age (rather than dying before hold age), I would say, first, that they may be right. What the relevant harm we are accustomed to is is an empirical matter. But, second, I would say that the form of death suggests that my position gives the better view—at least in the US. Most Americans who are killed die by a bullet wound or automobile accident. Yet, execution by firing squad is rare and execution by automobile crash unknown. Taiwan's use of shooting as a form of execution may, therefore, raise an issue of humanity even if the death penalty as such does not.

11. I am, of course, assuming the injection is done properly. We have recently had a number of bungled injections—which were shocking enough to raise doubts about the humanity of that form of execution.

12. Julia Dahl, "S.C. boy executed for 1944 murder is exonerated", *CBS News*, <http://www.cbsnews.com/news/south-carolina-boy-executed-for-1944-murder-is-exonerated/> (accessed March 22, 2015).

13. For more on this point, see my "Is the Death Penalty Irrevocable?" *Social Theory and Practice* 10 (Summer 1984): 143-156.

14. An earlier version of this argument can be found in my "A Sound Retributive Argument for the Death Penalty", *Criminal Justice Ethics* 21 (Summer/Fall 2002): 22-26.