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The Rights of the Guilty

Punishment and Political Legitimacy

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In this essay I develop and defend a theory of state punishment within a wider conception of political legitimacy. While many moral theories of punishment focus on what is deserved by criminals, I theorize punishment within the specific context of the state's relationship to its citizens. Central to my account is Rawls's "liberal principle of legitimacy," which requires that all state coercion be justifiable to all citizens. I extend this idea to the justification of political coercion to criminals qua citizens. I argue that the liberal principle of legitimacy implicitly requires states to respect the basic political rights of those who are guilty of committing crimes, thus prohibiting capital punishment.

Keywords: *punishment; legitimacy; contractualism; criminal justice; rights*

Although normative inquiry into justifications of punishment has been extensive, it has largely been pursued from the perspective of moral philosophy.[1] Much of this literature is concerned with the rightness or wrongness of punishment from the perspective of utilitarian or retributive moral theory considered in isolation from the political question of legitimacy. However, the problem with a moral as opposed to a distinctly political inquiry about punishment is that it addresses only the punishment deserved by criminals and ignores the particular context involved when the state is doing the punishing.

In contrast to a broadly moral theory of punishment, a theory of punishment within the confines of political morality should address not only what is deserved but also which punishments the state rightly metes out. In other words, a political theory of punishment is concerned not only with *how* and *when* to punish but also with the question of *who* is administering a punishment. Such an inquiry would concern not just the issue of desert but, more fundamentally, that of the political legitimacy of *state* punishment.[2] In this essay, I attempt to develop and defend a theory of punishment within a wider conception of political legitimacy.

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In developing my theory, I turn to the "contractualist" work of John Rawls and T. M. Scanlon. I draw in particular on Rawls's "liberal principle of legitimacy," which states that "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason."[3] I argue that justifying political coercion to those who are guilty of crimes is central to this principle.

My extension of modern contractualism to encompass the political justification of punishment sets this theory apart from other prominent theories of the social contract. Hobbes, for instance, thought of criminals as having violated the social contract and hence as "enemies" of the polity. Consequently, he saw no need for the state to extend justification to them.[4] In a retributive account of punishment, by contrast, the state merely serves as a means to enforce the punishment required by natural law. Both of these theories contain important alternatives to the contractualist account of punishment that I propose. After developing the basic framework for my contractualist account, I address some potential objections raised by these theories. I then go on to discuss the implications of my account, focusing specifically on the limits on punishment that it would require. After examining several easy cases, I employ the insights developed to argue that contemporary contractualism cannot justify capital punishment.

It is important to note that this article is not intended as a broad defense of contractualist theory but as an application of the contractualist framework to the question of punishment. As both a moral and a political theory, contemporary contractualism has had a slew of defenders and critics from a variety of perspectives.[5] This is not the place to offer another general defense of contractualist theory. Rather, I hope to remedy a gap in the literature in regard to the application of contractualism to punishment. I begin the next section by examining some theoretical reasons why such a gap might exist.

Contractualism and Punishment

One possible objection to formulating a contractualist theory of punishment concerns the criterion of reasonableness implicit in what Rawls calls the liberal principle of legitimacy.[6] For contractualists, coercion is only justifiable when all reasonable citizens can accept it. However, one problem here is that criminals who are guilty of violating the most fundamental just laws in our society, for instance, by intentionally committing violent

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crimes, have proven themselves unreasonable in Rawls's sense of the term. A reasonable member of a polity, Rawls suggests, should pursue her interests only in a way consistent with others' status as free and equal, a norm that violent criminals obviously violate. It is tempting, therefore, to suggest that contractualist justification should not apply to criminals who have proven themselves unreasonable.

The objection described above seems to support the conclusion that contractualism cannot theorize justifications of punishment; however, this conclusion rests on a flawed understanding of what it means to justify laws and institutions to all reasonable citizens. In making the case for a contractualist account of punishment, it is therefore sensible to begin by clarifying what contractualist justification entails—especially as it concerns those guilty of violent, and, I will stipulate, unjust crimes. I draw from the work of contemporary contractualists such as Rawls and T. M. Scanlon in articulating such an account of justification. Once contractualist justification—and the liberal principle of legitimacy upon which it is based—is understood as not requiring the actual endorsement of all persons, we can better examine whether and how it properly applies to issues of punishment.

A contractualist theory of political legitimacy requires asking how a polity reasonably can balance societal and individual interests, with an aim to make laws and institutions justifiable to all. Crucial here is the question of whether a particular criminal sanction respects each individual's status as a free and equal citizen. Institutions that trample on the freedom and equality of a portion of the citizenry in favor of a ruling elite fail this basic test of legitimacy. At the same time, however, a legitimate polity will employ legal constraints in the form of criminal law to curb destructive or antisocial behavior, so that some citizens do not violate others' basic interests, such as security. Constitutional rights and criminal law thus provide two means of protecting citizens' autonomy and equality. The problem for contractualist theory is to weigh competing claims in a way that takes seriously the legitimate interests of all citizens. However, this cannot be accomplished by looking to which policies citizens *actually* endorse. Given the opportunity, criminals simply might veto their own punishments. Rather, contractualism posits an ideal of inclusion that mandates justification to all free and equal citizens.

In elaborating this ideal, a political version of the "contractualist" test implicit in John Rawls's liberal principle of legitimacy and explicit in T. M. Scanlon's account of moral justification is helpful.[7] If we want to know whether a particular instance of coercion is justified, that is, treats all citizens as free and equal, we should ask, Given a motivation to reach universal agreement, could citizens who view themselves as free and equal *reasonably*

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reject such an instance of coercion? It is stipulated here that citizens will be motivated to engage in a good-faith effort to find a legitimate balance between rights against coercion and the need to fulfill social goods such as security. This dialogue between competing claims, and the requirement that citizens be able to justify their political positions to one another, embraces what Rawls calls the principle of reciprocity.[8] Citizens treat each other reciprocally insofar as they recognize that each person has equally valid interests to consider in the process of public justification and that to a reasonable extent they should treat their fellow citizens as autonomous, rather than imposing one-sided, exploitative duties on them. Because these requirements—equality, autonomy, and reciprocity—are central to a contractualist account of justification, I refer to them as the "core values." It is important to clarify that this ideal of justification to free and equal citizens is a normative standard rightly extended to all who are subject to coercion. It is not a legal ideal of citizenship defined by state claims about who is and who is not a full member of society. Moreover, I want to clarify the distinction between my use of the terms *citizen* and *person*. I use *citizen* as an ideal in contractualist justification and *person* as a value-neutral description of actual individuals.

To begin to sketch how a contractualist political theory might extend to state punishment, consider an easy case in justifying punishment. Richard has assaulted multiple people at random on the grounds that this constitutes his "fun" or conception of the good, and he announces at trial that he has no intention of changing his behavior. At sentencing, however, he suggests that any punishment would deny his status as a citizen. Such a claim is paradigmatic of an unreasonable argument, because it asserts a one-sided claim to freedom without recognizing the need to respect the free status of others. Hence, it fails as a legitimate contractualist reason. Any reasonable agreement among citizens must include a basic respect for the right of persons to live their lives free from coercion and harm. Although Richard also asserts his freedom from coercion, it is incompatible with others' fundamental, legitimate need for protection against assault. Therefore, although Richard rejects his punishment, some state coercion to protect other citizens would clearly be justifiable to him were he motivated to seek a reasonable agreement with the rest of society. Richard's personal conception of the good might lead him to a life of crime, but his conception is clearly unreasonable in his capacity as a citizen in a polity. Note that this account does not take a stand on Richard's behavior with reference to a "true" moral theory but rather emphasizes that laws should be justifiable to free, equal citizens of potentially diverse reasonable points of view. The emphasis here is on the political status of individuals rather than on moral correctness, or,

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in Rawls' terms, on the "political conception of the person" as opposed to a comprehensive doctrine.[9] Such an account of justification is inclusive in its respect for all citizens' status as free and equal and avoids the aristocratic or sectarian problems that would arise from basing justification on one particular theory of general moral truth. In this sense, I have argued elsewhere that contractualist justification is a democratic account of legitimacy.[10]

We are now in a better position to frame how contractualist justification applies in issues of punishment. The issue for contractualist thinkers is not whether criminals, given their empirical disposition (or lack thereof) toward reasonableness, would actually accept a punishment or not. Rather, the issue is whether a particular criminal who has committed a particular act could *reasonably* accept a given punishment. In other words, contractualist justification is concerned with punishment addressed to the criminal *qua* citizen and whether those who have committed crimes could reasonably accept such punishments. The goal is not to legitimize only those punishments that criminals would actually accept but rather to assess which punishments a criminal might reasonably accept were she motivated to find universal agreement about how to balance her interests with the interests of others. This attempt to consider the interests both of the individual and of society might also be called *mutual justification*. Given such a motivation, I am also concerned to identify those punishments that citizens could reasonably reject. My aim is thus to use contractualist justification to rule out certain punishments as inconsistent with legitimate state coercion. It is important to note that on at least some issues of punishment, for instance, regarding crimes for which there are incremental differences between possible punishments, there will be reasonable disagreements about which punishments are legitimate. I do not take up these harder cases; instead, I focus first on showing that contractualism can generate at least minimal standards for punishment.[11]

In the following two sections I address two potential challenges to the contractualist extension of mutual justification to criminals. First, I examine a contention that while contractualist justification might be a good way to examine political legitimacy, extending it to criminals is a mistake. Criminals, on this view, have proven themselves unworthy of such an account of justification. I take Hobbes's concept of the criminal as "enemy" as paradigmatic of this view. Second, I examine the view that punishment is a matter of what is deserved, independent of political justifications. This contention is consistent with retributivist theories that define just punishment in terms of moral truth. After discussing these two challenges, I will be in a position to elaborate on the requirements and implications of a contractualist notion of punishment.

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The Need for Justification to Criminals *qua* Citizens

A challenge from within the social contract tradition to the notion of justifying punishment to criminals *qua* citizens is rooted in the work of Thomas Hobbes. For Hobbes, the state is justifiable in the first place because it preserves the lives of its subjects more effectively than they themselves could in the state of nature. The desire for security, Hobbes thinks, would compel rational actors to give up the liberty of nature for the security guaranteed by his account of the Leviathan state.

This theory, however, presents a complication. To provide security successfully, Hobbes thinks the state must retain the institution of capital punishment. Capital punishment, however, is a denial of self-preservation, and thus it dissolves the social contract between the criminal and the state.[12] Hobbes therefore recognizes that at the moment the state seeks to execute an individual, it no longer exists in a contractual relationship with that individual. Such a person would gain nothing from the state and therefore would lack any moral obligation to obey a death sentence.[13] For Hobbes, the state's relationship to violent criminals is characterized not by the metaphor of contract but by that of a war between an "enemy" and the state.[14] Hobbes claims that the state can justify execution to society as a whole on security grounds, but he recognizes it has no justification for capital punishment that can be addressed to or that is acceptable for the condemned.

Although Hobbes clearly does not endorse the notion of justifying punishment to criminals *qua* citizens, he does suggest that the state exists in a type of rights-based relationship with my account of individual criminals—the same relationship that exists among persons in the State of Nature. Namely, the condemned retain rights to self-defense that conflict with the state's right to defend itself. This account sharply contrasts with my account of contractualism, which posits that criminals remain citizens within the contractualist framework of justification. On my account, even those guilty of the worst crimes are not exiled from the contractualist framework. Rather, the points of view and reasonable interests of all criminals are accommodated as a requirement of political legitimacy.

Any reasonable citizen would recognize that convicted murderers must forfeit some rights of citizens in a scheme of contractualist justification. However, on my view, it is too extreme to claim that they must forfeit all of their rights associated with political legitimacy. For example, it is plausible to maintain that murderers should give up the right to travel about freely because a society should be able to protect citizens by restraining those who are unwilling to respect their fellow citizens' rights. This recognition does not entail that such persons should lose their status as citizens. The goal of restraint is compatible

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with the idea that some punishments are unreasonable because they are entirely inconsistent with the requirements of contractualist justification to citizens. In contrast to Hobbes's idea that many crimes require an alienation of citizenship, I contend that a good political theory of punishment will uphold the state's right to punish those who violate the core values yet still justify punishment in a way consistent with those values. Thus, the contractualist approach to punishment can be clarified by contrast to the Hobbesian "contractarian" approach. Whereas Hobbes labels criminals "enemies" outside the social contract, contractualist justification views even the worst offenders as citizens and requires that the coercion they face be reasonably acceptable to them.

It is important to note that this contrast between the Hobbesian and contractualist approaches is one of justification, not obligation. There is not space in this article to extend my claim about the legitimacy of punishment in contractualist justification to the question of whether citizens are *obligated* to consent to even the most severe punishments. It often is contended that Hobbes's account of legitimacy does not generate obligations for "subjects."[15] I do not claim here that in contrast to Hobbes's view contractualism provides an account of why the guilty are obligated to comply with legitimate law in all instances. There is a vast literature that suggests to the contrary.[16] Some argue that because contractualism is not a theory of actual consent but an account of justification to reasonable people, it cannot make a claim about obligation.[17] Given space constraints, I bracket this contested question of whether the contractualist account of justification to criminals also generates obligations of the guilty to consent to their own punishments.

A potential response to the contractualist approach to punishment is that regardless of its position on obligation, it still overextends its account of justification. One could argue that citizens are entitled to procedural guarantees that ensure that only the guilty are punished, but that they "forfeit" a right to contractualist justification once their guilt has been determined. On this line of argumentation, those who have flouted the most basic requirements of the social contract do not deserve to be treated according to it. Furthermore, one could contend that nothing in this view entails that such criminals have *no* rights. Rather, one might reconstruct the Hobbesian view to explain the practice of extending rights to the guilty (e.g., in the Eighth Amendment to the U.S. Constitution) on the basis of natural law or other metaphysical accounts of human dignity.[18] In sum, this objection follows Hobbes in arguing that criminals retain natural rights while not retaining all contractual rights, but it breaks from Hobbes in defending a broader set of natural rights than those he identifies in the state of war.

Although this reconstructed approach is perhaps more compelling than a pure Hobbesian account of punishment, I believe that the contractualist theory

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should resist this view; in fact, it would fail in its most basic ambition if it were to concede that criminals forfeit their right to justified punishment. Contractualism aspires to be a theory of legitimate coercion. Never is the state more coercive than when it punishes. Therefore, if punishment is a paradigmatic example of coercion, and contractualism hopes to justify coercion, it must explain how punishment can be justified within the contractualist framework. If it cannot, this speaks ill of contractualism's core ambition. Indeed, the need for a theory to extend to those who do not comply with its dictates is not peculiar to contractualism. Most moral and political theories aim both to give an account of ideal action and to offer principled responses to those who fail to live up to this ideal. Such is the requirement of any theory that is not purely utopian and that aims to take "men as they are and laws as they might be."[19] For instance, Kant's categorical imperative need not be abandoned when persons fail to treat each other as ends. Rather, it suggests how to act in the face of such flouting of the categorical imperative. If contractualism is to provide an account of political legitimacy, therefore, we should inquire into its account of treatment for those citizens who flout its most basic requirements.

It is important to note that nothing in the argument for extending contractualist justification to criminals entails that natural law or metaphysical dignity-based understandings of human rights are either false or incompatible with contractualism. Rawls is clear that contractualism should be a "wide view" that allows for the reinforcement of reasonable positions on the justification of coercion through comprehensive doctrines. In this way, the account respects "reasonable pluralism," incorporating a plurality of reasonable comprehensive conceptions, arguments, and traditions.[20] Therefore, while contractualist justification rules out natural law or human dignity-based arguments incompatible with contractualism, nothing prevents such accounts from reinforcing the contractualist arguments I make here.[21] At the same time, a reasonable pluralism is not *any* pluralism of doctrines or positions on policy. The challenge in applying contractualism to punishment is to use particular examples to work out which positions, such as those endorsed by various comprehensive doctrines, are reasonable and which are not.

State Punishment as an Issue of Political Morality: Punishing Criminals *qua* Persons versus Criminals *qua* Citizens

The previous section elaborated on the contractualist view that justifications of state punishment should take seriously the interests of criminals

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qua citizens. This section examines which theory of punishment offers the best form of justification. Traditional retributive accounts of punishment suggest two ways in which to take the interests of criminals seriously. First, they require that punishment be given only to those who are morally guilty of crimes. Second, they require that the amount of punishment be proportional to the crime committed.[22] Unlike Hobbes's war-like account of punishment, retributive theories do not abandon the need for justifications of punishment but instead couch all criminal justice questions within the framework of moral justification. However, I will argue that while a moral account of when and how criminals should be punished is important to any theory of criminal justice, retributive theories that focus on broad questions of moral desert must be narrowly tailored to reflect the unique political questions raised by *state* punishment.

Traditional retributive accounts of punishment differ from contractualist justifications most significantly in terms of the context within which they frame the problem of punishment. Retributive accounts focus on the moral worth of either the criminal or the criminal's particular action in isolation from his relationship with the state. In this sense, they justify punishment for persons, not punishment for citizens. The apolitical nature of these accounts is demonstrated by the priority they give to the question of what is deserved by the criminal *qua* person rather than the question of what punishment the state can rightfully mete out.

To highlight the problem with an apolitical account of state punishment, consider the following example: suppose a child molester and murderer is sentenced to death. Assume, for the sake of argument, that the punishment is justified. While on Death Row, the child molester is killed by a fellow inmate who is outraged by his crime. In some sense, the child molester received what he "deserves." We have stipulated that the appropriate punishment is death, and that is what he receives.[23] However, this "vigilante" approach is problematic because of who inflicts the punishment. An apolitical theory of punishment fails to recognize that legitimate governments have a distinct authority in punishing that private individuals do not. Central to the rule of law and in particular to criminal law is the notion that crimes against particular individuals are offenses against society.[24] This notion is reflected in the many legal systems in which crimes prosecuted by the state are considered to be controversies between "the people" and the accused individual. This practice suggests that legitimate states coerce on behalf of society as a whole in a way that private individuals cannot. The notion that state punishment has a distinct justification is reflected in the contractualist approach to punishment. This approach manifests the

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distinctness of the state's authority to punish in its requirement that punishments be justifiable to all reasonable citizens. In contrast, retributive accounts cannot acknowledge a moral distinction between state punishment and private punishment carried out in the same manner because they focus exclusively on what criminals *qua* persons deserve, not what they deserve *qua* citizens.[25]

Retributivists' apolitical accounts of punishment are also problematic because their focus on criminals' moral worth as persons is too ambitious. Moral judgments of this kind are grounded in a comprehensive moral code, rather than a narrower conception of politically legitimate actions. As such, they risk privileging one particular viewpoint over other reasonable viewpoints held by citizens of a polity. According to contractualist thinkers, this reliance on comprehensive conceptions undermines citizens' status as free and equal.

The virtue of a contractualist account over the traditional retributivist view is that it can explain why state punishment is justifiable within a political theory that recognizes persons' status as citizens. Although contractualism grants the state certain powers that are not justifiable to private persons, such as the seizure of property or the imprisonment of citizens, the legitimate state is limited by its need to respect the status of citizens. To illustrate why the punishment that criminals deserve *qua* persons is distinct from the punishment that is justifiable to them *qua* citizens, consider a contemporary example in which moral desert and state legitimacy conflict: the theoretical punishment of terrorist Osama bin Laden. In a televised debate between the candidates for the 2004 Democratic presidential nomination, Senator John Kerry challenged his opponent, Governor Howard Dean, over his comment that he would give bin Laden a fair trial for his crimes if he were captured alive. Kerry responded with moral outrage, asking, "What in the world were you thinking?" Dean's reply was paradigmatic of the distinction between moral desert and legitimate state conduct:

> As an American, I want to see Osama bin Laden get what he deserves, which is the death penalty.
>
> But . . . a candidate for president of the United States is obligated to stand for the rule of law . . . if I was the president and the troops had Osama in their sights—we would shoot to kill. But the fact is, if we captured him alive, we have to stand for the rule of law.
>
> I have no doubt that if we capture Osama bin Laden, he will end up with the death penalty. But as president of the United States, I'm obligated to stand for the rule of law.[26]

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A private person might well believe that a mass murderer such as bin Laden deserves brutal, spontaneous, even bizarre retribution, perhaps at the hands of the victims of his attacks.[27] However, legitimate state conduct, Dean suggested, implies a commitment to the rule of law, in particular to the institution of a fair trial. Of course, the point here should not be limited to a claim about fair procedures. If the state were to administer a ghastly death to bin Laden, even with procedural due process, it would not behave legitimately, although it might satisfy most people's sense of what bin Laden deserves. Whatever the moral qualities of a particular individual, a state acts legitimately when it treats individuals as rights-bearing citizens.

The distinction between the punishment that a criminal deserves and the punishment that the state is legitimately authorized to carry out can be developed by examining the principle of *lex talionis*. A literal interpretation of the principle "an eye for an eye and a tooth for a tooth" demands not only that punishments be deserved but also that they match the crime. Those who are assaulted, for instance, might think it appropriate to assault their attackers in retribution for their crimes. Again, the principle does not seem obviously wrong as a response from a victim. However, a state that physically assaults criminals in exactly the same manner in which they assaulted their victims is rightly regarded as morally suspect. Such a state would clearly engage in cruel and unusual punishment because of its deliberate infliction of pain. This example suggests that a legitimate state's approach to punishment should be substantively distinct from private approaches to punishment.

However, without more precise guidelines, it is difficult to determine which punishments should be prohibited in a legitimate state and which are acceptable. Contractualism suggests the means by which this can be accomplished. In a broad way, contractualism can rule out reasons for punishment based on the Hobbesian concept of the criminal *qua* enemy who has no rights. The Hobbesian notion stands in direct contrast to the ideal of treating those subject to coercion as citizens because it rejects the idea that criminals have any entitlement to justifiable treatment, much less the right to be treated as free, equal citizens. At the same time, we can rule out the overly ambitious concern of retributivists to give a person what he deserves. It might be the case that, morally speaking, criminals deserve a range of punishments from humiliation to pain. That particular criminals might be loathsome enough to "deserve" cruel punishment, however, is insufficient to show that the state should routinely administer violent retribution against its prisoners. Questions of desert should be bracketed in favor of a more specific question regarding which punishments are appropriate to the legitimate state.

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Contractualism as a theory of political legitimacy potentially rectifies both of these flaws. On one hand, its requirement of justifying punishment to criminals *qua* citizens respects the ideal of extending citizenship to all persons. Moreover, because it is framed as a theory of state legitimacy, contractualism avoids any reliance on a true theory of general morality and appeals instead to the reasonable views of all citizens. Now that I have distinguished the contractualist approach from Hobbesian and retributivist approaches to punishment, I turn to the more specific contractualist concern of justification to criminals *qua* citizens to distinguish between punishments that are legitimate because they are reasonably acceptable to citizens and those that are illegitimate because they are reasonably rejected by citizens.

Contractualism and Legitimate Punishment

Having rejected the metaphor of war in thinking about punishment and clarified the need for a political theory of state punishment, we can begin to explore the limits on specific punishments required by contractualism. If those who have committed crimes were to think of themselves as citizens who accept others' status as free and equal and were motivated to reach universal agreement, which punishments could they or could they not reasonably accept? As I have emphasized, such contractualist justification does not comment on what criminals would actually accept if asked but rather suggests a way of theorizing which punishments are appropriate for criminals in a legitimate regime.

The interests at stake for criminals subject to punishment include the interests not to be harmed and not to have their freedoms unreasonably restricted. Yet contractualism does not directly translate every interest of criminals into a right; rather, it asks which interests are reasonable. From this perspective, criminals *qua* citizens should accept some restrictions on their freedoms and some punishment because they are motivated to come to an agreement that respects the equal and opposing interests of their fellow citizens.

We can imagine that at the moment of sentencing, the judge agrees to hear the defendant make arguments about his or her reasonable interests.[28] However, those arguments should acknowledge that the interests of his or her fellow citizens also have weight in determining the answer to this question. The judge acts as a representative of the community by recognizing the reasonable interests of the victims and potential victims and balancing them with those of the defendant when formulating the sentence. All must

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be included in determining which sentence is compatible with mutual justification. This process models reciprocity because the defendant gives reasons designed to be reasonably acceptable to the judge (as a representative of the community). Likewise, the judge engages in a form of justification aimed at being reasonably acceptable to the criminal.

Before I elaborate on how contractualist justification rules out certain punishments, it is important to discuss why the theory is compatible with some forms of punishment and to articulate how, within this theory, such punishment is justified. Part of this task involves establishing the type of justification for punishment that is reasonably acceptable on a contractual account.

We have already discussed the easy case of justifying some form of incarceration for Richard, the criminal who assaults his victims purely for fun. Richard's conception of the good clearly violates others' basic need for physical safety, and hence the reasons for his punishment are compelling. *Qua* citizen, that is, as a responsible member of society motivated by respect for others' status as free and equal and a desire to justify his conduct to the community, Richard should recognize the need for the state to rule out wanton violence. A harder case arises if we alter the hypothetical and remove the need for incapacitation. Imagine that rather than being devoted to a life of crime, Richard is contrite during sentencing. He acknowledges the need to criminalize wanton assault but still suggests that he can reasonably reject any punishment. He claims that while he has done wrong, his contrition should be enough and he no longer poses a danger to society. Aside from the empirical problem of verifying the veracity of his statement, there is still a good reason to punish in this case. By acknowledging the need for laws against wanton assault, Richard should also see that there is a need for these laws to be effective. Part of their effectiveness relies on the deterrent effect of a threat of punishing those who fail to abide by them. This deterrent effect would not work, however, if some offenders could be let off simply for being contrite. Reasonable citizens, therefore, should recognize that the state must punish even contrite criminals if it is to deter crime effectively.[29]

Clearly, then, a contractualist account of punishment that addresses criminals *qua* citizens is potentially consistent with a range of punishments administered to individuals guilty of violent or otherwise antisocial behavior. A theory of punishment should not follow Hobbes in banishing the criminal from the social contract and placing the realm of punishment outside that of citizenship.

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Although contractualism is compatible with some punishments, it suggests that certain rights of criminals should never be abridged. In determining the contours of these rights, we should ask what forms of punishment a rightly convicted criminal *qua* citizen could reasonably accept or reject. Although contractualist justification cannot resolve every hard case, it can point to several types of punishment that should be ruled out and some basic rights that even the worst criminals should retain.

What punishment can a violent criminal, thinking of herself as a citizen, reasonably accept? I have suggested that restraints on criminals' freedom of action are legitimate if they respect criminals' continued status as citizens to the greatest extent possible. Punishments that deliberately inflict pain without regard for both the interests of the criminal and the interests of society are reasonably rejected. Such punishments are inconsistent with the reasons why persons are rightly imprisoned in the first place. Violent crime is a legitimately prohibited act in a democracy. However, guards' wanton infliction of pain on prisoners merely repeats this same offense at the hand of the state.

While wanton violence is an easy case of illegitimate coercion, a harder case could arise in which a guard has reason to act violently, but not a reason that is justifiable to prisoners *qua* citizens. For instance, suppose a guard believes that extremely violent responses to prisoners' minor misbehavior will help to preempt more violent misbehavior or attacks. Such an approach, it might be argued, is justified on the grounds that guards should protect themselves at all costs. Although this is arguably a "plausible" reason for the guard's violent action, such an approach should be rejected as inconsistent with legitimate punishment when forming state policy for how to treat prisoners. It is not enough that public policy be based on "plausible" reasons; rather, contractualism specifically demands reasons that uphold the values of free and equal citizenship. It follows that policy should respect the reasonable interests of all citizens, not just the interests of specific individuals or groups. In this case, policy should reflect the interests of both guards and prisoners, not merely those of the former. Although a policy that allowed guards to defend themselves from violent prisoner attacks certainly would respect the interests of all, a policy allowing guards to commit extremely violent acts in response to minor infractions would ignore the possibility that prisoners might comply with prison rules and refrain from violence against guards as a result of other means. This policy clearly would serve the interests of the guards at the expense of those of the prisoners. Thus, it should be dismissed as inconsistent with contractualist justification.

When carried out properly, imprisonment balances the need for incapacitation of criminals with a respect for their status *qua* citizens and the

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maintenance of some rights. If we want to know which rights should be retained by criminals, we would do well to begin with one of the most paradigmatic rights held by those outside prisons and ask whether it can be reasonably retained by criminals *qua* citizens. Free speech, according to John Rawls and T. M. Scanlon, is a paradigmatic contractualist right that is required for the state to respect "the free public use of [citizens'] reason," their ability to listen to those they disagree with, and in general, to respect the freedom of thought that is inherent in the status of free and equal citizenship.[30] But should such a paradigmatic contractualist right be extended to prisoners in a legitimate society?

Prisons are primarily responsible for preventing criminals from harming their guards, society, and one another; thus, it follows that prison guards should prevent speech that could serve to coordinate an escape attempt or to provoke violent riots. Such an argument, however, does not explain why prisoners should not retain some free speech rights. For instance, prisoners could retain a right to communicate with those outside prison walls without necessarily posing a security threat. Given that this aspect of free speech still must be balanced with security, there is reason to think prisoners' right to communicate with those beyond the prison walls should be retained in some form. Another means of honoring prisoners' free speech rights would be to offer them a forum for civic dialogue, in particular about their own imprisonment, to compensate for the abridgement of their rights.[31] In general, prison policy should provide for restrictions on prisoners' rights that infringe as little as possible on the legitimate exchange of ideas, especially in their communication with the outside world.[32]

Another case to consider through the lens of contractualism concerns criminals' right to vote. Several states deny felons the right to vote even after they are released. Such a policy could be justified on the grounds that because citizens have violated the rights of others, they should forfeit their most basic rights of citizenship, including this fundamental democratic right. This interpretation of reciprocity, however, mistakenly extends the idea that citizens surrender some of their rights when they violate their duties as citizens to conclude that they give up all of their rights and their status as citizens. Requiring lifelong disenfranchisement even for those who have completed their punishment would create a group of second-class citizens who are not treated as free and equal.[33] Thus, according to contractualism, those who have served their time could reasonably reject attempts to deny them the franchise even after they are released from prison.

A much harder case concerns whether citizens should be allowed to vote while in prison. There are clearly good reasons to disenfranchise imprisoned

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felons, particularly in local elections, to keep them from exerting political influence to secure a pardon or other potentially improper changes in the law. A reasonable criminal would recognize that a balance must therefore be struck that protects prisoners' continued status as citizens while denying them the power to undermine the effectiveness of legitimate criminal laws. One possibility might be to deprive prisoners of the right to elect the local sheriff while preserving their voting rights in national elections, in which their votes would not pose a threat to prison security.

Society's interest in security legitimizes punishments that restrict criminals' freedom of action, but legitimate punishment also requires a commitment to preserving criminals' moral status as citizens. This requirement entails limiting cruel and unusual punishments and preserving democratic rights to the greatest extent possible.

Capital Punishment

Some limitations invoked by a contractualist theory of punishment are relatively easy to justify, but there are, as we have seen, harder cases. Broadly, on my view, justification to criminals implies a substantive limit on any form of punishment that undermines their status as free and equal citizens. In this section, I suggest that the practice of capital punishment is inconsistent with respect for the status of criminals *qua* citizens. Contractualism requires a right not to be executed, even for the worst offenders.

In contemporary political theory, those condemned to death are often extended certain rights against state coercion. But the arguments in this tradition have often focused on the "inherent dignity" retained by even the worst offenders, dignity that is violated when the state kills.[34] For defenders of this view, my argument seems backward: I attempt to argue against capital punishment from a political conception of the citizen when the problem with the practice is that it robs *persons* of their humanity. Certainly, the worst thing about being executed by the state is not that one has lost one's political status as free and equal; it is that one is dead.[35] However, from the point of view of contractualism, justifying punishment is not about the moral desert of persons. It is, rather, about how to punish in a way consistent with the ideals of free and equal citizenship.[36] Capital punishment is entirely inconsistent with this ideal. There are two main arguments for this point.

The first argument stems from the nature of the state as a fallible agent. Ideally, a democratic state would never punish the innocent. But institutions are not ideal. They are made up of individuals who make mistakes and

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mechanisms that sometimes simply do not work. As recent DNA evidence has pointed out, the state makes mistakes even when it sanctions the most severe punishment, death.[37] The most obvious necessary condition for justifying punishments to criminals *qua* citizens is that they must be guilty. Therefore, the actual innocence of individuals, despite the Rehnquist Court's recent rulings, should be grounds for an appeal.[38] The state's fallibility necessitates that democratic procedures always allow the innocent to prove that they have been wrongly punished, and this is only possible if they are alive.[39]

It is easy to see how this guarantee can be made consistent with life imprisonment. Persons in prison have the option to try to prove their innocence through appeal, and many have done so successfully. Yet this right of appeal is denied to prisoners after they are executed. While the family of an executed prisoner might be able to prove his or her innocence post mortem in cases in which a mistake was made, the state cannot make amends to the wronged party directly. In contrast, imprisonment does not cut off the possibility of some rectification to an unfairly convicted individual. If such an individual can prove that he is innocent, the possibility exists for recognizing the illegitimacy of his punishment.

According to this argument against capital punishment, a procedural right to appeal presupposes an appellant who is alive. Therefore, the procedural right demands a more fundamental right: the right to life. Many opponents of capital punishment could object to this line of reasoning because it suggests that the more fundamental substantive right of life associated with human dignity depends on a less fundamental procedural right. But nothing in the nature of contractualist justification necessitates that we always appeal to the inherent value of life or indeed to any metaphysical argument when seeking to limit state punishment. The issue here is not divine or even moral justice in general but the specific dynamic between citizen and state within a politically legitimate society. While death may be a just punishment for certain offenses in the pure theory of moral desert, this does not legitimize a penal institution that puts individuals to death without certainty that they have actually committed a crime. The fallibility of the criminal justice system suggests that what is deserved by criminals and what constitutes legitimate state conduct are distinct questions. Because state institutions do not perfectly administer justice, they should embody reasonable balances between the interests of society and those of the accused. Since capital punishment deprives individuals of the ability to prove their innocence in a judicial system that frequently makes mistakes, it is reasonably rejected by convicted criminals.

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Some have argued that courts will get better and better at proving guilt with the improvement of DNA evidence and other criminal justice techniques, such that the possibility of mistaken convictions will no longer be cause for concern. Although the possibility of reaching this level of sophistication is unlikely in the near future—especially given the corruption and inequalities of representation in many criminal justice systems—it is worth asking whether, even given an infallible state, capital punishment would ever be justifiable in a democracy. I contend that the answer is no.

Consider a second distinct argument, which appeals directly to the contractualist notion of citizenship as an ideal of justification. Rousseau offers a famous argument that because the death penalty would be agreed to when persons consider what the general will requires of them as citizens, the person convicted of a capital crime would have to acknowledge that she should consent to her own death. As a theory of what actual criminals will, this view is implausible. Namely, Rousseau's flaw might be labeled *false attribution* because he conflates a claim about what citizens should consent to with a claim about to what persons actually do consent.

However, the implausibility of Rousseau's view is not its only problem. Fundamental to contractualism and central to my rejection of the Hobbesian notion of punishment is the right of each person to have coercion justified to him or her *qua* citizen. This right is so fundamental that it should be considered inalienable. Moreover, citizenship presupposes a person who can be treated in accordance with the core values. Thus, the very idea that citizens would ever have reason to submit to their own destruction is problematic because such an act destroys their personhood and so violates their inalienable right to be treated as citizens.

This argument from citizenship against capital punishment also has roots in constitutional law. Writing for the majority in *Trop v. Dulles,* Chief Justice Earl Warren held that it was never constitutional to strip persons of their legal citizenship as a punishment because to do so would be cruel and unusual punishment, insofar as it would deny them any political identity.[40] Several years later, in an opinion in *Furman v. Georgia*, Justice Brennan drew on this reasoning to suggest that if citizenship could not be stripped as a punishment, it followed that the death penalty could never be justified.[41] In short, he thought it was impossible to execute persons without thereby stripping them of their citizenship.

As a moral ideal, citizenship should frame all acts of coercion. Drawing on the Warren/Brennan reasoning, my own theory suggests that the need to always justify coercion to persons *qua* citizens presupposes their existence and therefore protects them from execution by the state. Because of its

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finality, capital punishment would prevent consideration of citizens' reasonable interests—or indeed of any interests at all. The state's fallibility is one justification for the protection from capital punishment; because the state never can be sure that the person it would execute is guilty, it must leave some room for correction. However, a deeper justification stems from the value of never terminating the relationship between citizens and the legitimate state, a relationship that itself is the foundation for the state's authority.

In this regard, Rousseau's account of capital punishment actually might work against his conclusion in support of the death penalty. Although Rousseau agrees that citizenship should never be revoked, his support of capital punishment leads him to adopt a counterintuitive position. On one hand, the condemned citizen recognizes that she must will her own death because the death penalty is justifiable. In Rousseau's words: "Whoever wills the end also wills the means."[42] On the other hand, Rousseau argues that one's status as a citizen, and in turn as an essential part of the general will, is inalienable. Thus, he claims that one dies not as a citizen but as an "enemy" at war with the state. In his words: "Thus one of the two must perish; and when the guilty party is put to death, it is less as a citizen than as an enemy."[43] Rousseau argues that because citizenship is an inalienable part of the general will, the citizen cannot be banned from the social contract. Given this justification of the death penalty, however, the actual person who has committed a crime should die. The result is the strange conclusion that citizenship cannot be alienated and that one cannot be killed *qua* citizen but nonetheless can be killed *qua* person. On my account, citizenship is a moral ideal distinct from personhood, but it still presupposes the existence of a flesh-and-blood person. By contrast, Rousseau's account borders on versions of idealism, in which an individual can continue to exist *qua* citizen without being a person.

One objection to my argument against capital punishment is that the state does place citizens in life-threatening situations when, for instance, it conscripts soldiers and sends them to war. However, in these cases, the state does not directly act to kill the soldiers, nor does it demand they take their own lives. The difference is one of intention. The aim of sending citizens to participate in a just war is to defend their nation, a regrettable result of which is that they often die in the process. However, such soldiers are rightly treated as citizen heroes. In the case of capital punishment, the clear intention and goal is to end the life of the condemned. Moreover, Socrates notwithstanding, it is hard to say those condemned to death are regarded as heroes.

A related question concerns whether my account of democratic limitation on capital punishment should also limit citizens who want to take their own

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lives.[44] Here it is important to acknowledge the difference between a state granting a right to suicide and requiring a prisoner to submit to capital punishment. If the state were to grant a right to suicide, it would not by any means force citizens to exercise this right. When the state metes out capital punishment, however, it gives no such choice to persons. Thus, there is a distinction between granting permission to kill oneself, which demands no action from citizens and arguably enhances their autonomy, and a requirement that is enforced through the coercive institution of capital punishment.

Conclusion

Properly understood, constructualism implies specific limitations on state punishment, rejecting the view that criminals who have committed certain offenses no longer deserve to have acts of coercion justified to them. In contrast to accounts of punishment that ignore the interests of criminals, I suggested a way of understanding justifications of punishment as addressed to criminals *qua* citizens. Here, the contrast between a general moral account of punishment and a specifically contractualist theory of state punishment is essential. Although general retributive theories try to account for what criminals deserve, some punishments justifiable on retributivist grounds are inconsistent with criminals' status as free and equal citizens because they take as criteria for punishment what is morally deserved by criminals rather than how the state rightly treats them.

My specific concern to elaborate a contractualist theory of punishment is connected to a deeper need in the literature for a distinctly political theory of punishment. While the issue of just or deserved punishment remains an important one for moral theorists, those concerned with state action in the contemporary world would do well to evaluate punishment in the context of theories of political legitimacy. The issue here is not so much what is deserved by criminals but rather what punishments the state can rightly mete out in a way consistent with our general ambition to distinguish legitimate state action from brute power, or in other words, political power from "the gunman writ large."[45]

Notes

1. Joel Feinberg, "The Classic Debate," in *Philosophy of Law*, 5th ed., ed. Joel Feinberg and Hyman Gross (Belmont, CA: Wadsworth, 1995).

2. For a democratic approach to this question from a jurisprudential and cultural perspective, see Austin Sarat, *When the State Kills* (Princeton, NJ: Princeton University Press, 2001).

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3. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 137.

4. For a discussion of Hobbesian "contractarian" theories of the social contract versus contractualist accounts, see Cynthia Stark, "Hypothetical Consent and Justification," *Journal of Philosophy* 97, no. 6 (June 2000): 313-34.

5. An important recent contribution to this literature is Christian List, "The Discursive Dilemma and Public Reason," *Ethics* 116 (January 2006): 362-402. List observes that the demands of integrity (consistency), pluralism (the inclusion of all possible individual judgments), and responsiveness to the majority cannot simultaneously be satisfied in certain decision processes. It could be argued that this difficulty is potentially damaging to contractualism because of contractualism's emphasis on ensuring pluralism. List nevertheless reveals possible "escape routes" that might be useful for contractualist theorists, each weakening one leg of the triad of constraints. In particular, his remarks about "relaxing" the pluralism demand are potentially helpful. In line with his suggestion, I argue that contractualism is not a theory of pluralism generally but rather of "reasonable pluralism," which does not honor justifications hostile to or incompatible with reasonable interpretations of the values of freedom and equality. Another challenge to contractualism is Sophia Reibetanz's "Contractualism and Aggregation," *Ethics* 108, no. 2 (January 1998): 296-311. Reibetanz suggests that contractualism is particularly weak at distinguishing among small degrees of harm. In this essay, however, I am not concerned to use contractualism to distinguish "degrees" of punishment—such as whether a punishment of three as opposed to four years in prison is justifiable—but rather to carve out a set of general rights of the guilty that constrain legitimate state punishment. In the next section, I clarify that my ambition is to rule out certain unreasonable punishments, not to deny that contractualism will face some hard cases in which there is reasonable disagreement about what constitutes legitimate punishment.

6. Rawls has written on punishment, but that work preceded both *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) and *Political Liberalism*, the texts currently associated most closely with contractualist thought.

7. Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 1998). A debate exists over whether there is a distinction between reasonable rejection and reasonable acceptance by agents. For a good discussion of Scanlonian justification in the context of democratic theory, see chapter 6 of Simone Chambers, *Reasonable Democracy* (Ithaca, NY: Cornell University Press, 1996). For a good discussion of contractualism in a political context, see Donald Moon, *Constructing Community* (Princeton, NJ: Princeton University Press, 1993).

8. Rawls, *Political Liberalism*, xliv.

9. Ibid., 29-35.

10. Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton, NJ: Princeton University Press, 2007).

11. For a discussion of reasonable disagreements, see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press of Harvard University Press, 1996). Also see my discussion of Reibetanz in note 5.

12. "There be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to ayme thereby, at any Good to himselfe." Thomas Hobbes, *The Leviathan* (Amherst, NY: Prometheus Books, 1988), 68.

13. "Tis one thing to say, Kill me, or my fellow, if you please; another thing to say, I will kill my selfe, or my fellow." Hobbes, The Leviathan, 114.

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14. Among others who commit capital crimes, the traitor "suffers as an enemy" when he or she is executed. Moreover, such persons are to be regarded as outside the law, so their treatment is not considered "punishment." Hobbes, *The Leviathan,* 166. It is hard to see references to enemies without thinking of the Bush administration's position that those prisoners accused of terrorism held at Guantanamo Bay are "enemy combatants" not subject to limits of law. For an argument against this categorization, see David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003), especially "The Bill of Rights as Human Rights," 211-27. Although part of his argument rests on an account of inherent dignity, mine rests on a specifically moral conception of citizenship, a position he does not address.

15. Thomas Nagel argues that Hobbes does not give an account of moral obligation but of self-interested motivation. See "Hobbes' Concept of Obligation," *Philosophical Review* 68, no. 1 (January 1959): 68-83. In contrast, Steve Beackon and Andrew Reeve argue that Hobbes does offer a theory of obligation but concede that Hobbesian obligation is contingent on rationality—obligation exists if and only if it tends to self-preservation. See "The Benefits of Reasonable Conduct: The Leviathan Theory of Obligation," *Political Theory* 4, no. 4 (November 1976): 423-38.

16. See A. J. Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979); Christopher Wellman, "Toward a Liberal Theory of Political Obligation," *Ethics* 111, no. 4 (Jul 2001): 735-59; and William Edmunson, "Legitimate Authority without Political Obligation," *Law and Philosophy* 17 (1998): 43-60.

17. This is what some say distinguishes contractualism from contractarianism, namely, that it focuses on hypothetical rather than actual consent. Stark, in "Hypothetical Consent," argues that hypothetical consent is not a proxy for the consent of actual citizens but shows that political principles are justified according to the standard of free and equal citizenship. I need not contest this thesis here given my ambition to use contractualism to develop an account of the limits of legitimate punishment, not an account of obligation.

18. George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Ithaca, NY: Cornell University Press, 1992), 4-5, 201; Kateb (2000), "What Do Citizens Owe Their Constitutional Democracy?" (delivered at the Center for Human Values 20th Anniversary Celebration, unpublished). For a criticism of the idea of inherent dignity, see Hugo Adam Bedau, "Abolishing the Death Penalty Even for the Worst Murderers," in *The Killing State: Capital Punishment in Law, Politics, and Culture*, ed. Austin Sarat (New York: Oxford University Press, 1999).

19. Jean-Jacques Rousseau, "On the Social Contract," in *Basic Political Writings: Discourse on the Sciences and the Arts, Discourse on the Origin of Inequality, Discourse on Political Economy, on the Social Contract*, trans. and ed. Donald A. Cress (Indianapolis, IN: Hackett, 1987), 141.

20. See John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard University Press, 1999), 152-56.

21. One argument for the compatibility of natural law and contractualist justification is found in David Carlson, "Jurisprudence and Personality in the Work of John Rawls," *Columbia Law Review* 94, no. 6 (October 1994). Carlson contends that the ideal of free and equal citizenship can be justified by reference to both natural law and contractualist accounts. Samuel Freeman usefully suggests how natural law views, such as those of John Finnis and Robert George, are distinct from but still reinforce contractualist accounts to the extent that they affirm public reason. See "Deliberative Democracy: A Sympathetic Comment," *Philosophy and Public Affairs* 29, no. 4 (Autumn 2000): 371-418.

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22. Feinberg, "The Classic Debate," 614; Herbert Morris, "Persons and Punishment," *The Monist* 52, no. 4 (October 1968): 475-501. For an attempt to formulate retributivist responses to death penalty cases, see Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy and Public Affairs* 14, no. 2 (Spring 1985): 115-48. For an elaboration on the relationship between desert and retributivist theory, see Corey Brettschneider, *Punishment, Property and Justice: Philosophical Foundations of the Death Penalty and Welfare Controversies* (Burlington, VT: Ashgate, 2001).

23. This stipulation aside, my view, developed at the end of this article, is that there is no legitimate justification of capital punishment.

24. Retributivists might draw on Locke, who suggests pragmatic reasons for the state, rather than individuals, to punish. This argument refers to the coordination problems (including the inability of the weak to punish the strong) that come from allowing private individuals a right of punishment. But while these arguments suggest part of the reason why the state exists in the first place, they do not fully capture the moral distinction between punishment by private individuals and legitimate state punishment as a collective enterprise with distinct limits. See John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1988), 351.

25. In "Beyond Retribution" (unpublished, 6), Erin Kelly points to another key problem for punishment based on desert: that of "scaling" or "proportionality." She argues that because of a distinction between culpability and blameworthiness, retributivists would determine the punishment that a person deserves on the basis of her moral worth instead of the moral worth of the action committed.

26. "Transcript: Democratic Presidential Debate in Iowa," *The Washington Post on the Web*, January 4, 2004. http://www.washingtonpost.com/ac2/wp-dyn/A54363-2004Jan4?language=printer.

27. Some might believe that bin Laden merits the Hobbesian "enemy" label, especially since he is not a U.S. citizen. For the purposes of the argument here, however, I follow contractualists such as Rawls in referring to a moral ideal of citizenship that suggests a way of treating all persons subject to state control. Another project could offer a defense of this use in relation to noncitizens.

28. My aim is to use this hypothetical to make an argument about legitimate punishment. A separate procedural question concerns whether judges should ask for such arguments in actual courtrooms. A further complication arises when judges are not given discretion in sentencing. These topics are outside the scope of the present discussion.

29. It might seem that this reasoning regresses into a utilitarian account of punishment. According to such an account, all that is needed to justify punishment is a demonstration that society as a whole benefits. Such accounts of punishment are commonly attacked on the grounds that they cannot explain why the innocent should not be punished if doing so would deter future crime. My account is distinct in that I do not regard the need to deter as the sole justification for punishment. Rather, I have suggested that deterrence is a legitimate reason that is not reasonably rejected in the context of a criminal's punishment for a particular offense. This reason, however, is not a sufficient condition for punishment.

30. Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Policy* 1 (Winter 1972): 204-26. Rawls, *Political Liberalism*, 348.

31. By allowing prisoners to reflect on their punishment, such forums would treat them as reasonable moral agents capable of seriously assessing the legitimacy of their punishments. For justifications of punishment that stress the importance of moral reasoning by the criminals themselves, see Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy and*

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Public Affairs 13, no. 3 (Summer 1984): 208-38, and R. A. Duff, "Penal Communications: Recent Work in the Philosophy of Punishment," *Crime and Justice* 20 (1996): 1-97.

32. Similar reasoning could justify the idea that prisoners should retain rights to free exercise of religion. Joshua Cohen, for instance, has argued that given reasonable religious disagreements, no state can claim the right to coerce citizens concerning their religious beliefs: "Procedure and Substance in Deliberative Democracy," in *Democracy and Difference: Changing Boundaries of the Political*, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996), 103. Such coercion would betray the ideal that coercion originates in a respect for citizens' common status. Restrictions on religion within the prison walls can be reasonably rejected because they fail to respect this status.

33. One possible consequence of such disenfranchisement is that, without this basic right of citizenship, former prisoners might feel no reciprocal obligation to respect the basic requirements of law.

34. See note 22.

35. I thank Gilbert Harman for discussion on this point.

36. For a detailed examination of the relationship between my argument and the older tradition of opposing capital punishment, see Corey Brettschneider, "Dignity, Citizenship, and Capital Punishment: The Right of Life Reformulated," *Studies in Law, Politics, and Society* 25 (2002): 119-32.

37. For instance, the American Civil Liberties Union claims that from 1976 to April 2005, 119 prisoners convicted of capital crimes were found innocent and released from death row. American Civil Liberties Union, "National Death Penalty Fact Sheet," 2005. http://www.aclu.org/capital/facts/10593res20050216.html (June 23, 2006).

38. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court found (roughly) that the possibility of actual innocence does not constitute grounds for an appeal if procedural rules have been followed.

39. In *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), District Court Judge Jed S. Rakoff invoked a version of the fallibility argument when he suggested that the danger of executing innocent people made the death penalty unconstitutional. In Rakoff's words: "Given what DNA testing has exposed about the unreliability of the primary techniques developed by our system for the ascertainment of guilt, it is quite something else to arbitrarily eliminate, through execution, any possibility of exoneration after a certain point in time. The result can only be the fully foreseeable execution of numerous innocent persons." The decision was reversed on appeal.

40. 356 U.S. 86 (1958).

41. 408 U.S. 238 (1972).

42. Rousseau, "On The Social Contract," 159.

43. Ibid.

44. I thank Austin Sarat for discussion of this point.

45. John Austin, *The Province of Jurisprudence Determined,* ed. W. Rumble (Cambridge: Cambridge University Press, 1995).

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Outcomes within Democratic Theory: Core Values and Judicial Review," in *Political Studies* (2005) and "The Value Theory of Democracy," in *Politics, Philosophy and Economics* (2006). Other publications include articles on capital punishment and the role of rights in Marxian thought. He is the recipient of a fellowship from the Safra Center for Ethics at Harvard University, the Cornell University Young Scholar Award, and a Mellon Foundation fellowship from the American Council of Learned Societies. He is currently developing a project that suggests why political liberalism should incorporate the concerns of feminist theory. The first article of this project is "The Politics of the Personal: A Liberal Approach," in the *American Political Science Review* (2007).

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