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Corresponding Author	Family Name	Yost
	Particle	
	Given Name	Benjamin S.
	Suffix	
	Division	
	Organization/University	Cornell University
	Address	Ithaca, NY, USA
	Email	benjamin.yost@cornell.edu

Abstract	<p>This chapter offers a proceduralist argument against capital punishment. More specifically, it contends that the possibility of irrevocable mistakes precludes the just administration of the death penalty. At stake is a principle of political morality: legal institutions must strive to remedy their mistakes and to compensate those who suffer from wrongful sanctions. The incompatibility of remedy and execution is the crux of the irrevocability argument: because the wrongly executed cannot enjoy the morally required compensation, execution is impermissible. Along with defending his key premises, Yost explains the complicated role that sentencing uncertainty plays in the argument. He concludes by noting some of the flaws in substantive consequentialist and retributivist justifications of capital punishment.</p>
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The Impermissibility of Execution 2

Benjamin S. Yost 3

I will start with a confession. Although I am revolted and outraged by the death penalty, I am not entirely sold on arguments for its intrinsic immorality. I find it hard to draw any firm conclusions one way or the other, as so much depends on one's core intuitions, preferred balancing of competing moral values, and the like. I also suspect that some retributivist arguments in favor of capital punishment are stronger than many of my abolitionist comrades appreciate.¹ But while I demur on whether executions violate some fundamental principle of morality, my reticence does not alter my conviction that the death penalty contravenes important principles of political morality. In my view, the death penalty is wrong because it violates mid-level moral principles that flow from liberal norms governing the criminal justice system—one important example being the principle of remedy, which states that legal institutions must fix their mistakes. This chapter will show how these principles of political morality ground an argument for death penalty abolition.

Here is my argument in a nutshell. When sentencers have, or should have, some uncertainty about which penalty is precisely proportionate to an offense,

¹ I have reconstructed one of these in Yost (2010) and analyzed others in Yost (2019).

B. S. Yost (✉)
Cornell University, Ithaca, NY, USA
e-mail: benjamin.yost@cornell.edu

20 they have a duty to err on the side of leniency. This is especially the case when
21 the punishment in question is irrevocable, or incapable of remedy. Because
22 unjust custodial sanctions can be compensated for, they are subject to a less
23 stringent demand for leniency: the possibility of revoking wrongful punish-
24 ment counterbalances some of the risk of wrongful overpunishment.
25 Execution, on the other hand, is irrevocable—the dead cannot be compen-
26 sated. In capital cases, the risk of overpunishment goes unmitigated. Because
27 all capital cases are characterized by uncertainty, or so I will argue, capital
28 sentencers must always err on the side of leniency. Sentencers are thus barred
29 from choosing execution as a punishment. For this reason, capital punish-
30 ment is impermissible.

31 1. Preliminaries

32 Before elaborating and defending these claims, I want to make some prelimi-
33 nary clarifications. First, my strategy is a procedural one. It is procedural in
34 that it takes no stand on the intrinsic morality of execution. Although I invoke
35 substantive moral principles, these apply to institutional practices and indi-
36 viduals in their official capacities. Many friends of the death penalty believe
37 that if they can show execution to be morally permissible *in principle*, they
38 have succeeded, even if they must concede that the death penalty is permis-
39 sible only in jurisdictions with just penal institutions (and so might not pass
40 muster in the U.S.). But this belief is mistaken. The death penalty's putative
41 intrinsic moral permissibility does not entail permissibility all things consid-
42 ered, even in the context of reasonably just legal regimes. Indeed, I will argue
43 that capital punishment is morally forbidden for reasons pertaining to its
44 implementation. I am not hanging my hat on the familiar assertion that exe-
45 cution is prohibited in careless or discriminatory legal systems. I am defend-
46 ing a stronger claim: *even in legal institutions that are as fair and rigorous as can*
47 *be expected*, capital punishment violates principles of political morality.

48 Second, I assume that states are permitted to punish criminal offenders. I
49 am aiming at an argument for the abolition of capital punishment that does
50 not entail the abolition of legal punishment whole cloth.² I have doubts about
51 the morality of punishment, but I do not want my criticisms of capital pun-
52 ishment to depend on them. This is because I want to immunize my proposal
53 against the common objection that anti-death penalty arguments require the

²An example of such an argument is the hard determinist claim that people lack free will and thus cannot deserve execution, or any other punishment.

rejection of punishment as such. For many, this consequence would be a bridge too far. 54
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Third, I endorse a sentencing framework with at least some important retributivist commitments. While I take no stand on the best justification of the institution of punishment, I am committed to the idea that sentencing ought to aim for proportionality. 56
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2. A Proceduralist Argument against Capital Punishment 60 61

Stated a bit more formally, my argument runs as follows: 62

1. Sentencers must risk underpunishment by n units rather than risk overpunishment by n units and the failure to remedy said overpunishment. 63
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2. Wrongful execution cannot be remedied. 65
3. Jurisdictions with the death penalty preclude the possibility of revocation in capital cases. 66
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4. The death penalty must be abolished in all jurisdictions. 68

The rest of this section will be devoted to defending the first two premises, which is where all the excitement happens. I will start with the second, because it is the least complicated. 69
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2.1 The Irrevocability of Execution 72

Most people I have queried agree that death penalty is irrevocable. The common intuition seems to be that revocation involves compensation, and that wrongfully executed people cannot be compensated because they are dead. But some philosophers dissent from this position, so I want to explain why we should endorse it. First, I need to clarify the notion of irrevocability. Confusion here can lead one to think that no *custodial* punishment is revocable. After all, we cannot return the days stolen from the wrongly imprisoned person any more than we can revive the dead. If punishment as such is irrevocable, and if irrevocability is a reason to discard a punishment, then we have a problem: *all* punishments need to be foresworn. Irrevocability abolitionist arguments would thus be hitched to wholesale abolitionism. 73
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But this overlooks the crucial distinction between what Michael Davis calls absolute and substantial revocability (1984, 145). Absolute revocation would 84
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86 return the wrongly punished person back to the very same conditions they
87 were in before their punishment. If we understand revocability to be absolute
88 revocability, all serious punishments are irrevocable, small fines excepted.
89 However, there is ample reason to reject this conception. No moral wrong is
90 absolutely revocable, yet we frequently, sincerely, and intelligibly talk about
91 fixing our mistakes or undoing the wrongs we have committed. We believe
92 many wrongs to be revocable, even though they are not absolutely so. The
93 absolute conception thus should be discarded as objectionably revisionary.

94 Substantial revocability counts compensation of the wrongly punished per-
95 son as a (potentially) sufficient remedy. On this conception, a state can fix its
96 mistakes by financially compensating an injured party or otherwise advancing
97 their interests. Clearly, appropriate compensation must be roughly commen-
98 surate to the wrong incurred; an innocent person imprisoned for ten years
99 would *not* be compensated by a payment of \$25,000.³ I will borrow Davis's
100 criterion for substantial revocation, which is that "we do all in our power to
101 compensate the convict (and what we do is far from negligible) or that we do
102 enough so that he would say, 'that would make [the wrongful punishment]
103 worth it'" (1984, 150).⁴ Because wrongful custodial sentences are substan-
104 tially revocable, rejecting irrevocable punishments does not imply the total
105 abolition of punishment.

106 The question before us now is whether the death penalty is substantially
107 irrevocable. (The following discussion will be brief; interested readers can find
108 a more detailed account in Yost [2019, ch. 3]). As I noted earlier, execution
109 appears to be substantially irrevocable in that the wrongly executed person
110 cannot receive compensation. However, if sufficient compensation can be
111 *posthumously* granted, the death penalty is not irrevocable.

112 The prospect of compensating the dead might sound absurd. So consider
113 the following scenario: a single parent has devoted his life to one purpose,
114 ensuring that his daughter enjoys something better than his meagre financial
115 prospects. He works two menial jobs in the doomed hope that she can afford
116 to attend college. Unfortunately, he is diagnosed with an incurable disease,
117 and he scrubs dishes knowing he will die in a few years' time. Then the man
118 is convicted of, and executed for, a crime he did not commit. After his execu-
119 tion, his innocence is discovered. The state exonerates him and publicly clears
120 his reputation. The state also deposits \$1,000,000 into his estate, which his
121 daughter inherits. Here the father's most important goals are posthumously
122 advanced. Had he been offered a choice between living the rest of his life or

³This is the statutory cap on compensation for wrongful imprisonment in Wisconsin.

⁴Davis adopts the substantial conception of revocability but denies the irrevocability of execution.

being executed and richly compensated, choosing execution would not be irrational. Even if he decided to live, he would certainly consider the alternative of execution “worth it” in some important sense. This is because the money posthumously advances his interests to a significant degree, far more than he could himself. Examples like this suggest that one’s interests can be posthumously advanced; one can be the recipient of posthumous benefits; and a wrongly executed person can be compensated after his demise. So, there are grounds for denying the irrevocability of capital punishment.

Now that we see why execution might be revocable, let us see why it is not. My main contention is that the conception of revocation as compensation is incomplete.⁵ While compensation might be necessary for revocation, it is not sufficient. Another necessary component is that the state return to the wrongly punished person control over their life. I do not mean anything extravagant by this. Someone has control over their life to the extent that they can self-reflectively guide their actions in light of their aims and desires. So long as we have a generous set of desires, we do not normally lack the ability to direct our lives. This metaphysical modesty should not obscure the phenomenon’s importance. Control over one’s life is an intrinsic good: we give meaning to our existence, in part, by striving for goals that emerge from our notion of the good life. It is also a basic good: it is good for someone regardless of their particular conception of the good life. Because control over one’s life is a basic, intrinsic good, any plausible political morality will bar states from unjust dispossessions thereof. It follows that when the state divests citizens of such goods for no reason, as in cases of wrongful punishment, it must immediately return or restore them.⁶

So, returning the wrongfully punished person’s control over their life is a nonnegotiable part of revocation. Penalties that foreclose this possibility are irrevocable. Clearly, legal authorities *cannot* return control to the wrongfully executed, even if they can somehow issue posthumous compensation. The death penalty is irrevocable, despite claims to the contrary.

⁵ The preference theory of well-being that secures claims about the possibility of posthumous compensation is fairly controversial, but I will set that issue aside.

⁶ We can arrive at this duty from a different route. For mainstream liberal political thought, one of the central aims of legitimate legal and political institutions is to ensure that citizens have the maximum amount of control compatible with other citizens’ control over their lives. This aim is shared by a variety of normative political philosophies, including Nozickian libertarianism, which interprets control as sovereignty over one’s personal moral sphere; Pettitian non-domination theory, which construes control as thoroughgoing freedom from arbitrary interference; as well as a Rawlsian egalitarianism, which conceives of control as a positive capacity to accomplish one’s ends regardless of one’s draw in the natural lottery. On all these views, states must protect and enhance individuals’ ability to control their lives. Accordingly, unjust state interference with that ability must be immediately discontinued and remedied.

153 **2.2 The Principle of Remedy**

154 Unfortunately for abolitionists, one cannot repudiate capital punishment by
155 gesturing toward the irrevocability of execution and calling it a day. This is
156 because it is eminently reasonable to demand an explanation of *why* irrevocable
157 punishments must be abjured. Irrevocability is just one of the moral
158 considerations bearing on the legitimacy of capital punishment, so the abolitionist
159 owes an argument establishing its priority. Only then will irrevocability
160 ground death penalty abolitionism.

161 The most important execution-friendly consideration issues from the
162 retributivist commitment to proportionality. This commitment generates a
163 pro tanto reason to inflict the full amount of deserved punishment: when
164 punishment p is proportionate to a crime, selecting a sanction lighter than p
165 violates proportionality. Abolishing capital punishment thus seems to create
166 retributive injustice, insofar as it causes the underpunishment of all those for
167 whom execution is proportionate.⁷ This line of reasoning, which I will call the
168 “retributivist challenge,” poses a challenge to any irrevocability argument for
169 abolition.

170 My first step in meeting this challenge develops a point made previously. It
171 is a fundamental principle of political morality that legal institutions must
172 remedy their mistakes. In the criminal justice context, this means that legal
173 authorities must furnish a remedy to those who are improperly punished, a
174 class that includes both those innocent of wrongdoing and those punished
175 more harshly than their offense merits (e.g., someone convicted of, and executed
176 for, first-degree murder who is actually guilty only of manslaughter).

177 To defend the principle of remedy, I will first register the uncontroversial
178 claim that liberal states are committed to refraining from unjustly coercing
179 their citizens. Roughly speaking, an unjust exercise of coercion is one that
180 violates citizens’ basic rights, is more injurious than necessary, or unduly burdens
181 citizens without providing a counterbalancing benefit. The bar on unjust
182 coercion correlates with a requirement to try to *alleviate* the illicit burdens the
183 state imposes. A commitment to averting unjust coercion is meaningless
184 unless it is accompanied by a state’s attempt to rectify its unjust coercive acts.
185 To fail to try to put things right evinces an objectionable insensitivity to injustice.
186 In liberal societies, then, government actors must endeavor to undo
187 wrongful interferences in citizens’ lives.

188 Support for the principle of remedy comes from other quarters. Some philosophers
189 contend that conformity to the principle is a constitutive condition

⁷I am assuming that execution might be proportionate to some murders. For more on this point, see §3.2.

of legal legitimacy (Fuller 1969, 81). And legal scholars are virtually unanimous in the view that error correction is one of the essential functions of appellate courts (Shapiro 1980; Resnick 1984; Dalton 1985; Shavell 1995; Oldfather 2010; Primus 2010). The principle of remedy is also embedded in retributivist theories of punishment. If the central aim of sentencing is to tailor penalties to offenses, a good retributivist system will institute legal mechanisms geared toward discovering and correcting error (Davis 1984, 149; Berman 2008, 282; Schedler 2011, 254; Simons 2012, 70).

The principle of remedy explains why legal systems should look upon irrevocable punishments with deep suspicion—irrevocable punishments cannot be remedied. But it does not yet demonstrate the priority of irrevocability. Two additional steps are key to this effort. The first is to show that all capital cases are shot through with uncertainty. The second is to argue that, for retributivism, broadly construed, sentencing under uncertainty is governed by a rule stating that it is better to risk underpunishment than to risk overpunishment and the impossibility of revoking the unjust punishment. In all capital cases, then, it is better to opt for a life sentence (risking underpunishment) than execution (risking overpunishment).

2.3 Sentencing Uncertainty

Uncertainty and certainty name different levels of confidence one has in one's beliefs. Sentencing uncertainty occurs when judges distrust their ability to proportionately sentence wrongdoers. (In what follows, I will employ an idealization whereby judges are rational, and admit uncertainty whenever they ought to. This is just to simplify the exposition; a token judge's irrational confidence poses no problem for my view.) I will stipulate that certainty involves a degree of belief of 0.9 or greater; anything less is uncertainty.⁸ So, sentencing uncertainty occurs when a judge is not certain that a sentence is proportionate to an offense, or when they have a < 0.9 credence in the sentence's proportionality. Sentencing uncertainty has both evidential and moral sources. An example of the former can be found in a judge who doubts that

⁸Certainty is not a legal concept, although it does have a kinship with the beyond-a-reasonable-doubt standard of proof, the standard of proof that imposes the greatest epistemic burden on the prosecution. Standards of proof are supposed to provide practical guidelines that inform judges and jurors when their confidence in a legal proposition is sufficiently likely to meet whatever epistemic standard (from mere belief to justification to full-blown knowledge) renders the proposition in question valid, such that acting on the basis of this confidence is permissible and blameless (see Walen 2015; see also Laudan 2006). U.S. courts have not specified the degree of belief needed to place a legal proposition beyond reasonable doubt, though scholars usually venture 0.9 or 0.95.

220 the evidence offered at trial properly establishes the elements of an offense.
221 Even if a judge finds the evidence sufficient, they might still harbor moral
222 uncertainty, or uncertainty about how to establish the duration of incarceration
223 appropriate to the offense.

224 To move forward, we must distinguish between first-order uncertainty and
225 what I call higher-order uncertainty. First-order uncertainty involves moral or
226 epistemic misgivings about the reasons supporting the conviction or sentenc-
227 ing of the accused. Are murderers like Robert Alton Harris, who suffered from
228 horrific child abuse and was then thrown into a hellish juvenile criminal jus-
229 tice system where he was repeatedly raped and beaten, fully culpable for their
230 crimes? Should someone accused of murder be convicted solely on the basis of
231 eyewitness testimony, in the absence of any corroborating evidence or plausi-
232 ble motive? If you are skeptical, it is because you think such cases are marred
233 by first-order uncertainty. But it seems likely that not all trials are marked by
234 first-order uncertainty. Sentencers would not have been subject to any first-
235 order reasons for doubt had Hitler, Goebbels, Mengele, and Heydrich been
236 tried at Nuremburg (Kramer 2011, v).⁹ Procedural abolitionism thus cannot
237 be built on this brand of uncertainty. If uncertainty is to play a role in an anti-
238 death penalty argument, it has to be present in all capital cases.

239 Higher-order uncertainty, unlike first-order uncertainty, is universal.
240 Higher-order uncertainty is constituted by our inability to distinguish between
241 cases in which first-order uncertainty is warranted and those in which it is
242 not. My claim is that all capital trials feature higher-order uncertainty, even
243 when sentencers are, with good reason, utterly confident in their determina-
244 tion. This is owing to the lack of any secure way to draw the line, at the time
245 of sentencing, between instances in which judges' and juries' findings track
246 the truth and instances in which their decision to convict is epistemically
247 justified, given the factual and normative information available to them, but
248 wrong all the same. Notably, asserting the pervasiveness of higher-order
249 uncertainty is consistent with acknowledging that some trials are free from
250 first-order uncertainty. The only problem is that we have no criteria for iden-
251 tifying which they are!

252 Let me say a bit more about the universality of higher-order uncertainty.
253 Higher-order uncertainty is the product of what epistemologists call unelim-
254 inated error possibilities. These are potential grounds for error that have not

⁹I will consider one objection to this claim below.

been satisfactorily ruled out; some examples are false or coerced confessions,¹⁰ 255
 judicial misconduct,¹¹ and tainted laboratory data.¹² Another prominent 256
 source is jurors who misapply the beyond a reasonable doubt standard of 257
 proof.¹³ Higher-order uncertainty is pervasive because some legally salient 258
 possibilities cannot be eliminated at trial, at least given the economic and 259
 human resources we are willing to spend. One obvious reason for this is that 260
 technicians who tamper with lab results, detectives who coerce confessions, 261
 and judges on the take try hard to hide their misdeeds. And jurors who misap- 262
 ply the beyond a reasonable doubt standard are unaware of their mistakes. 263
 Because judges, jurors, and defense counsel cannot know what they cannot 264
 know, cases in which uneliminated error possibilities undermine the verdict 265
 cannot, at the time of the proceeding, be reliably distinguished from those in 266
 which they do not. 267

Probably the most significant cause of higher-order uncertainty is the combi- 268
 nation of forensic technological limitations and the potential for progress. 269
 Since 1989, 375 wrongly convicted persons in the U.S. have been exonerated 270
 by DNA evidence, twenty-one of whom were on death row (Innocence 271
 Project 2022). Notably, more than half of those wrongly convicted of murder 272
 confessed! In fact, the first DNA analysis employed at law was used to exclude 273
 the testimony of an English teenager who falsely confessed to rape (Innocence 274
 Project 2018). But exoneration statistics drastically understate the importance 275
 of forensic DNA. In the U.S., tens of thousands of people suspected of, or 276
 charged with, serious criminal offenses have been shown to be innocent 277
 through DNA evidence presented prior to conviction. Because DNA finger- 278
 printing did not exist until 1984, all criminal proceedings concluded prior to 279
 1984 are saturated with higher-order uncertainty. But this source of 280

¹⁰ Confessions are surprisingly easy to coerce; detectives have well-known ways of persuading the accused that they are guilty, even when they are innocent (Davis and Leo 2012). Basically, investigators present the accused with fabricated evidence of their guilt, induce a dissonance between their belief in their innocence and their belief in the investigators' truthfulness, then suggest to them that they suffered momentary unconsciousness or are repressing the memory.

¹¹ In 2011, Mark Ciavarella and Michael Conahan were convicted of taking kickbacks from a private prison developer in repayment for sending minors to the developer's for-profit juvenile detention center.

¹² Annie Dookhan, a chemist for a Massachusetts state drug lab, was sentenced to three years in prison for tampering with more than 60,000 drug tests, skewing them in favor of the prosecution. Another Massachusetts lab employee performed thousands of tests while under the influence of cocaine, ecstasy, and LSD (Lithwick 2015).

¹³ In a criminal trial, jurors are supposed to convict only if they believe beyond a reasonable doubt that the defendant displays the *mens rea* and *actus reus* belonging to the offense. Mock jury studies suggest that this standard is rarely met. Jurors often interpret the beyond a reasonable doubt standard as permitting conviction when there is, objectively speaking, only a preponderance of the evidence for the defendant's guilt (Walen 2015, 375). That is, they misunderstand, and thus misapply, the basic epistemic criteria governing their deliberation. They thus render verdicts that fail to meet those criteria.

281 higher-order uncertainty persists into the present. Many states restrict access
282 to DNA testing, and only in the past few years have all fifty states even autho-
283 rized post-conviction DNA analysis. Although these institutional problems
284 could be remedied immediately, there are also deficiencies in the technology
285 itself. DNA samples degrade over time, and small samples are inhospitable to
286 accurate analysis, if not downright useless. Researchers are working to over-
287 come these issues, as well as develop new forensic applications, like DNA
288 phenotyping, which will predict donor appearance. Importantly, the inevita-
289 bility of such forensic advances means that some offenders who are not cur-
290 rently exonerated by DNA analysis will be exonerated in the future. But we
291 have no idea who these people are, or what totally novel technology might
292 come on the scene. Criminal trials are thus saturated with higher-order
293 uncertainty.

294 The epistemic optimist might push back on this insistence, doubling down
295 on the existence of legal proceedings which appear to lack any uncertainty.
296 Here is a fictional example of such a case. A school shooter's slaughter of thirty
297 children is recorded on security camera in grisly detail. Investigators uncover
298 a video the shooter posted to social media detailing his plan. He voluntarily
299 confesses, is of sound mind, and is otherwise responsible for his deed. Do
300 such examples undermine assertions of universal uncertainty? No. Presenting
301 scenarios with a baked-in absence of first-order uncertainty does not mean
302 that such scenarios can be identified in practice, or that legislators can write
303 statutes that reliably guide jurors to identify them.

304 Consider how we would generalize from this specific example to a legal rule
305 defining death-eligible offenses. We would say that the only death-eligible
306 offenses are those where (a) thirty or more people are murdered, (b) the mur-
307 ders are captured on video and corroborated by a multitude of reliable wit-
308 nesses, (c) the murderer confesses, and (d) the murderer is of sound mind. The
309 first and fourth criteria might seem to dispose of moral uncertainty, the sec-
310 ond and third its epistemic variant.

311 The problem for the optimist lies with (d), or more precisely, with its appli-
312 cation. Moral responsibility is a nonnegotiable feature of death eligibility for
313 most theorists, because responsibility is a condition of moral desert and crimi-
314 nal liability. However, the more severe the crime, the more we are warranted
315 in doubting that the criminal is of sound mind and believing that they suffer
316 from psychopathy. As recent empirical work suggests, psychopathic offenders
317 are not culpable for their misdeeds (Levy 2007), so the properties of heinous-
318 ness and egregiousness that place an offender's crime in the ranks of the
319 execution-worthy also suggest their inculpability, or at least hinder juries from
320 ruling it out. There are other epistemic problems here, having to do with

vigorous disagreement among psychological experts regarding the impact of mental illness, cognitive disability, and childhood abuse on moral responsibility, that will also often come into play.¹⁴ Expert dissensus indicates that accurately assigning moral culpability is a confounding task, at least in the case of extraordinarily heinous offenses. And if *experts* disagree, how can jurors be confident in their assessments of culpability? And even if the jurors themselves are confident, how can a judge share that confidence? (The two juries that tried Andrea Yates, who drowned her five children to deliver them from Satan, reached opposite verdicts on her sanity.) To sum up, the more clearly an offense escapes moral uncertainty, the murkier attributions of responsibility become. And uncertainty returns.

2.4 The Principle of Expanded Asymmetry and the Retributivist Challenge

The final part of my argument aims to show that, when sentencers are confronted with uncertainty, they must err on the side of leniency. This leads to my abolitionist conclusion: because capital sentences are pervaded by uncertainty, sentencers may not impose the death penalty and must settle on a lesser sanction.

The demand for leniency in the context of uncertainty issues from what I call the *principle of expanded asymmetry*:

Principle of expanded asymmetry (EA): It is better to underpunish P by n units than to overpunish P by n units.

Obviously, EA does not apply when the precisely proportionate sentence is known. A commitment to proportionality precludes intentionally overpunishing or underpunishing. But when a sentencer is *uncertain* about the proper punishment for an offender, EA says to risk underpunishment rather than overpunishment. Owing to the uncertainty in capital trials, sentencers must thus risk underpunishment (a custodial sanction) instead of risking overpunishment (execution).

¹⁴ Steiker (2015) discusses these points more carefully than I can do here. One might wonder if I am letting Nazis off the hook by raising questions about their mental fitness. This is a difficult question, but my sense is that people do not care if Nazis and other genocidaires are of sound mind, and are happy to execute them regardless. In other words, I suspect there is a threshold of evil above which the retributivist insistence on culpability is no longer thought to apply. But if this is so, whatever justification vindicates the execution of horrible but inculpable evildoers will not support the death penalty as practiced today.

350 Expanded asymmetry is a modified version of the *asymmetry principle*. In its
351 canonical form, the asymmetry principle holds that punishing an innocent
352 person for crime *c* is worse than letting someone guilty of *c*-ing go free. The
353 best-known expression of the principle is William Blackstone’s estimation
354 that “the law holds it better that ten guilty persons escape, than that one inno-
355 cent party suffer.” Some might quibble with this ratio—especially the stingi-
356 ness of the antecedent term—but the underlying idea is virtually undisputed.

357 The basic commitments of canonical asymmetry can be used to support an
358 expanded version of the principle. Consider the beyond a reasonable doubt
359 standard of criminal conviction and the legal presumption of innocence. Both
360 express the view that trial procedures should lower the risk of punishing the
361 innocent even if it increases the risk of letting the guilty off the hook. This
362 judgment implies that we should reduce the chances of punishing too harshly
363 (i.e., punishing the innocent) at the cost of punishing some offenders too leni-
364 ently (i.e., failing to punish the guilty). Expanded asymmetry seems to follow
365 from asymmetry.

366 Because expanded asymmetry is more controversial than asymmetry, a
367 more robust defense might be in order. My brief for EA relies on an uncon-
368 controversial principle of liberal political morality.

369 **Minimal invasion principle (MIP):** When faced with alternative means of
370 achieving a legitimate political or legal aim, and when one alternative is clearly
371 less invasive than the other, authorities must choose the less invasive means.¹⁵

372 I characterize a liberal state as one in which interferences in, or domination
373 over, citizens’ lives must be justified. This justificatory burden will be high,
374 regardless of whether one prefers a libertarian, neo-republican, or egalitarian
375 framework. When fundamental rights are at stake, discharging the burden
376 will be almost impossible. We thus find within liberalism a second-order prin-
377 ciple mandating minimal invasion of citizens’ liberties. Because freedom is a
378 value of paramount importance, officials cannot justify infringing on citizens’
379 liberty any more than they must. Of course, abrogations of freedom are some-
380 times necessary to achieve a sufficiently important political purpose. In such
381 cases, authorities have a duty to adopt the least invasive policy available. In
382 other words, if the state is faced with two different policies that (legitimately)
383 infringe on freedom, both of which target the same end, only the least inva-
384 sive can be permissibly pursued. MIP thus applies to all instances of political

¹⁵I borrow this moniker from Bedau (2002), although my formulation of the principle differs slightly from his.

coercion, including policing, trials, and legislative deliberation regarding criminalization and sentencing. 385
386

Here is the argument for EA: 387

1. Overpunishing P by n units for c is wrong. 388
2. Underpunishing P by n units for c is wrong. 389
3. The wrong of overpunishing P by n units for c = the wrong of underpunishing P by n units for c . 390
391

These three premises simply state the importance of proportionality. Now let's put MIP on the table. 392
393

4. When faced with alternative means of achieving a legitimate political or legal aim (here, retributive justice), and when one alternative is clearly less invasive than the other, authorities must choose the less invasive means. 394
395
396
5. Underpunishing P by n units is less invasive than overpunishing P by n units. 397
398
6. Overpunishing P by n units violates MIP. 399

From (1) and (6) an intermediate conclusion can be drawn: 400

7. Overpunishing P by n units is a retributive wrong and a violation of MIP. 401

(7) expresses the key insight that overpunishment encompasses two wrongs, the violation of MIP and the wrong of disproportionate punishment. 402
403

8. The cumulative wrongs of overpunishing P by n units for $c >$ the cumulative wrongs of underpunishing P by n units for c . 404
405

The principle of expanded asymmetry follows. 406

9. It is better to underpunish P by n units than to overpunish by n units. 407

Therefore, it is better to risk underpunishment than overpunishment. 408

It is important to reiterate that EA applies only under conditions of uncertainty. If offenders' just deserts are known, they must be punished to that extent. Punishing them any less would violate proportionality. However, in conditions of uncertainty, *two (or more) sanctions of different severity count as alternate means to the end of proportionality*.¹⁶ If, despite their best efforts, 409
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¹⁶For a detailed explanation of how this works, see Yost (2021).

414 judges cannot determine which of two or more sanctions is more proportion-
415 ate, the sanctions must be deemed equally choiceworthy. In such circum-
416 stances, MIP requires judges to risk underpunishment rather than
417 overpunishment. Notice that the retributivist challenge is now met. Because
418 the less severe punishment cannot be characterized as less proportionate,
419 imposing it does not count as a retributive injustice.

420 But now we have ourselves a problem: this argument for leniency can be
421 reiterated. If it is better to sentence a carjacker to ten years than twelve on the
422 basis of higher-order uncertainty, it seems to be better to sentence them to
423 eight rather than ten, and then six rather than eight, and then five rather than
424 six, and so on. It thus seems impossible to keep the consequences of higher-
425 order uncertainty in check and to satiate the demand for leniency. Accordingly,
426 EA under higher-order uncertainty appears to mandate that all offenders go
427 free. This conclusion is implausibly strong and might seem to revive the
428 retributivist challenge, insofar as the offender is not to be punished at all.

429 Worries along these lines can be disposed of rather easily. The conclusion of
430 the argument for EA does not express the full range of considerations relevant
431 to sentencing. Earlier, I explained that reasonably just legal institutions adhere
432 to the principle of remedy. Sentencers can thus anticipate the possibility of
433 compensating overpunished offenders. To capture the principle of remedy's
434 normative impact on the criminal justice system, we need a new premise.

435 10. It is better to risk underpunishment of P by n units than to risk overpun-
436 ishment of P by n units and potential remedy for said overpunishment.

437 With this amendment, the threat recedes. The inclusion of the possibility
438 of remedy blocks a total abolitionist conclusion. Under higher-order uncer-
439 tainty, it is *not* obviously better to refrain from punishing an offender than to
440 risk overpunishment. This is because officials can undo errors that come to
441 light. Accordingly, there is far less downward pressure on sentencing than
442 there would be if there were no possibility of remedy. In a manner of speak-
443 ing, the principle of remedy serves as a release valve enabling a legal system to
444 honor proportionality's demand to punish as much as deserved. It keeps the
445 downward normative pressure of EA from overwhelming proportionality and
446 instigating a slide to wholesale abolition.¹⁷

¹⁷Calculating the consequences of EA is easier in capital cases than in noncapital ones. For some discus-
sion of the impact of EA on noncapital sentencing, see Yost (2021).

2.5 The Argument for Abolition

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Although accounting for higher-order uncertainty does not entail eschewing punishment altogether, it does bear striking consequences for the legitimacy of capital punishment. Because no remedy for a wrongful execution exists, capital sentencers may not risk terminal overpunishment. They must instead risk underpunishment by selecting a custodial sanction.

Here, again, is my procedural abolitionist argument in all its glory:

1. Sentencers must risk underpunishment by n units rather than risk overpunishment by n units and the failure to remedy said overpunishment.
2. Wrongful execution cannot be remedied.
3. Jurisdictions with the death penalty preclude the possibility of revocation in capital cases.
4. The death penalty must be abolished in all jurisdictions.

We can now see how all the pieces fit together. The higher-order uncertainty endemic to capital trials subjects capital sentencers to the expanded asymmetry principle. The irrevocability of execution makes capital sentencing especially sensitive to EA's demand for leniency. Because legal institutions must ensure that wrongful penalties can be remedied, and because it is impossible to remedy wrongful executions, the countervailing upward pressure exerted by proportionality is overcome. Although the value of giving offenders their just deserts may count as a reason to refuse leniency in noncapital proceedings marked by uncertainty, this is so only because the punishments in question are revocable. If financial or custodial punishments turn out to be wrongful, the victims of injustice can be compensated and returned control over their lives. This remedial option is not available in capital contexts. So even if a sentencer is confident in their proportionality analysis, the sentencer must choose to (potentially) underpunish a convicted murderer rather than foreclose the possibility of revocation. Because execution is never choiceworthy, the death penalty must be discarded.

3. Substantive Objections to Capital Punishment

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Although my strategy is a procedural one and is designed to succeed regardless of the merits of pro-death penalty arguments, I want to say a few words about the substantive defects of the latter. The main consequentialist justifications can be disposed of rather easily, while retributivist justifications are a harder

481 nut to crack. Regarding the latter, I will limit myself to a criticism of Edward
482 Feser's efforts, as it will likely be most interesting for readers of this volume.

483 3.1 Consequentialist Justifications

484 Consequentialism is a big tent, but the most common consequentialist justifi-
485 cations of punishment are utilitarian. These state that the harms and costs
486 associated with punishment are permissibly imposed because they are out-
487 weighed by the positive social benefits of deterring crime or incapacitating
488 dangerous malefactors.¹⁸ I doubt that utilitarian justifications of punishment
489 succeed. My misgivings center on the implications of these theories for con-
490 viction and sentencing: utilitarianism appears to license the punishment of
491 the innocent and the disproportionate punishment of the guilty.¹⁹ But let us
492 imagine that these worries can be ameliorated. Does utilitarian sentencing
493 theory license the death penalty?

494 It does not. Utilitarian sentencing deliberations are governed by the prin-
495 ciple of parsimony, which requires sentencers to impose the least costly sanc-
496 tion (in terms of money or well-being) that will serve the purposes of
497 punishment (Morris 1974, 59).²⁰ Parsimony bars sentencers from using a
498 more costly punishment than is needed to achieve the aims of the penal sys-
499 tem. This means that the death penalty cannot be employed unless its benefits
500 outweigh its costs, which, in economic terms, are far higher than life in prison.
501 The social goods that are thought to outweigh execution's significant costs are
502 its deterrent and incapacitative effects. But neither suffices to vindicate capital
503 punishment. Execution cannot be justified in terms of incapacitation, because
504 in contemporary supermax prisons like ADX-Florence (home to El Chapo,
505 Ted Kaczynski, and others), murderers are incapacitated to a similar degree as
506 they would be were they to be executed. The case for deterrence is also quite
507 frail. Note that the point to be established is not just that the death penalty
508 deters, but that it deters *more* than life in prison, and that it deters *so much*
509 *more* that it is worth the additional cost. There is no reason to believe in a

¹⁸ Specific deterrence aims at deterring an offender from committing a more serious offense or from reoffending. General deterrence aims at deterring the general public from committing crime.

¹⁹ For a lucid overview of these problems, see Boonin (2008). Two-level theories justify the institution of punishment in consequentialist terms and sentencing in retributivist terms (see, e.g., Rawls 1955; Hart 1968). These proposals fare somewhat better, insofar as they are specifically aimed at countering the innocence and disproportionality objections. Ultimately, though, two-level theories turn out to exhibit serious shortcomings of their own, as clearly explicated in Primoratz (1989).

²⁰ Richard Frase develops the principle of parsimony into what he calls the "alternative means" principle of proportionality (2020, 105–6). Both are straightforward applications of a utilitarian efficiency principle.

marginal deterrent effect. The National Research Council assembled a Committee on Deterrence and the Death Penalty to examine four decades of studies on deterrence and capital punishment. The Committee's report concluded that the research "is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates" (Nagin and Pepper 2012, 2). One of the major problems identified by the Committee is that no study identifies or accounts for the deterrent level of carceral sanctions for murder. Clearly, the marginal deterrent effect of execution can be measured only after identifying the baseline effect of a custodial sanction. Absent such a baseline, any measured deterrent effect could just as well derive from the prospect of life in prison. Since all studies fail to establish the baseline, their estimations of the deterrent effect of capital punishment (which are all over the map in any case) are simply guesswork. Given the available research, deterrence theorists must conclude that the death penalty may not be utilized.

In short, the principle of parsimony commits the consequentialist to justifying costlier courses of action in terms of their counterbalancing contribution to the social welfare. But there is no evidence that execution comes with incapacitative or deterrent benefits. Because there are no benefits, as far as we can tell, we do not need to take the next step and weigh the benefits of execution against the costs. The consequentialist justification of the death penalty fails to get out of the gate.

3.2 Retributivist Justifications

There are a wide variety of retributivist attempts to vindicate capital punishment (van den Haag 1986; Sorell 1987; Pojman and Reiman 1998; Yost 2010). Space precludes even a cursory examination of these efforts.²¹ I will instead briefly assess the retributivist views of Edward Feser, author of the companion chapter in this volume.

At the heart of Feser's project is an argument that is quite popular among friends of the death penalty (including all those just cited), one which can be stated without recourse to Aristotelian or Thomistic premises. The basic contention is that the permissibility of execution is baked into the notion of proportionality. If you value proportionality, the argument goes, you must admit that death is a proportionate punishment for some offense or other. As Feser puts it:

²¹ For a comprehensive overview of retributivist justifications, see Kramer (2011).

- 544 1. Wrongdoers deserve punishment as a matter of retributive justice.
545 2. The more grave the wrongdoing, the more severe is the punishment deserved.
546 3. Some crimes are so grave that no punishment less than death would be
547 proportionate in its severity.
548 4. Therefore, wrongdoers guilty of such crimes deserve death (???).²²

549 (1) indicates an allegiance to a desert-based retributivist theory of punish-
550 ment. (2) expresses the uncontroversial requirement of ordinal proportional-
551 ity. An ordinally proportionate sentencing scheme is one in which crimes and
552 punishments are properly ranked: the most trivial crimes are attached to the
553 most trifling punishments—fines, probation, and so on—and the gravest
554 crimes are attached to the most severe punishments. Intermediate crimes are
555 then ranked in order of seriousness and attached to intermediate penalties
556 which are likewise ranked. I am happy to accept (2); in fact, I think it is more
557 or less conceptually contained within retributivism. (3) and (4) are where the
558 rubber hits the road, and those will be the focus of my remarks.

559 (3) is a dense and complex premise, so I will spend some time unpacking
560 it. As Feser notes, (3) assumes that that severity of punishment should fit the
561 gravity of the crime. This assumption is utterly anodyne within the context of
562 desert-based retributivism, and I am happy to accept it. To hold that the
563 amount of hard treatment inflicted on an offender must fit the gravity of the
564 offense is to insist on cardinal proportionality (sometimes dubbed “commen-
565 surability”). To illustrate the distinction between ordinal and cardinal propor-
566 tionality, consider a sentencing scheme that assigned ten days in jail to murder,
567 five days to sexual assault, and no penalty at all to a variety of lesser offenses.
568 This scheme would be ordinally, but not cardinally, proportionate. A murder-
569 er deserves more than ten days in jail, so this sanction would be disproportion-
570 ately lenient in a cardinal sense. (Feser does not distinguish between
571 ordinal and cardinal proportionality, but as we shall see, this conflation
572 obscures a problem with his argument.)

573 So far, so good. But (3) also makes a substantive judgment of cardinal pro-
574 portionality. It claims that execution is the sole cardinally proportionate pun-
575 ishment for some crimes.²³ For these crimes, a sentence less than death is said
576 to be disproportionately lenient. Determining the absolute amount of

²²Page numbers for Edward Feser’s “The Justice of Capital Punishment” refer to page numbers in this volume.

²³Some believe that life in prison is just as severe as execution, if not more so, but I will set this debate aside. John Stuart Mill’s 1868 speech contends that life in prison is worse than death (1988), but most proponents of the death penalty claim the opposite (van den Haag 1986, 1662; Pojman and Reiman 1998, 30–31; Oderberg 2000, 161–62; Feser 2011). A few retentionists, like Sorrel, claim the two types of harm are equivalent (1993, 209).

punishment deserved is certainly within the purview of cardinal proportionality. However, to simply assert that some criminal acts merit *execution* is to beg the entire question at issue. The retributivist controversy over the permissibility of the death penalty is in large part a controversy about whether any offender in fact deserves death, and there are plenty of philosophers who answer in the negative.²⁴ So this part of (3) is massively controversial.

Feser's chapter contains a couple strategies for defending his key premise. To my mind, the strongest one occurs in the following passage:

To claim that there is *no* crime for which death would be a proportionate punishment—to claim, for instance, that a cold-blooded, genocidal rapist can never *even in principle* merit a greater punishment than the lifelong imprisonment that might be inflicted on, say, a recidivist bank robber—is implicitly to give up the principle of proportionality. For to agree that genocide is a far worse offense than bank robbery while maintaining that genocide cannot in principle merit a punishment worse than the punishment for bank robbery is implicitly to deny that a punishment ought to be proportionate to the offense. (???)

Feser emphasizes that without the death penalty, a state cannot punish the worst of the worst (the genocidal rapist) more than the very bad (the recidivist bank robber). Given our intuitions about ordinal proportionality, we are meant to find this intolerable—the worst of the worst surely *should* be punished more than the very bad. Accordingly, if the very bad are punished with life in prison, as they tend to be, honoring ordinal proportionality means that we must punish the worst of the worst more harshly by executing them. As Feser puts it, the idea is to derive (3) from the concept of proportionality: “if punishment ought to be proportionate to the gravity of the crime, then it seems absurd to deny that there is *some* level of criminality for which nothing less than capital punishment would be proportionate” (???). More specifically, the goal is to squeeze substantive judgments of cardinal proportionality out of our intuitions about ordinal proportionality.

To show how this attempt falls short, consider the following thought experiment. Let us assume that some wrongdoers deserve death, and let us set the threshold of death eligibility at the murder of ten people. Accordingly, Alabamian Michael Kenneth McClendon would have gotten his just deserts had he been executed (he committed suicide before he could be apprehended). But a decade later, Patrick Wood Crusius murdered twenty-three people in an El Paso Walmart. Crusius's crime was clearly more heinous, so in a strict sense,

²⁴A partial list of objectors includes Dolinko (1986), Nathanson (2001), Bedau (2002), Finkelstein (2002), Roberts-Cady (2010), and Kramer (2011).

613 ordinal proportionality would have been violated had both been executed.
614 Ordinal proportionality would have been violated because crimes of different
615 moral gravity would have been sanctioned almost identically.

616 Should we have spared McClendon and only executed Crusius? This would
617 be an odd result for the desert-based retributivist. And it would only displace
618 the problem, because no matter how bad a crime, someone can commit one
619 that is worse. It looks like the attempt to respect ordinal proportionality
620 requires that we never execute anyone.

621 Here is the takeaway: ordinal proportionality is always imprecise at the top
622 (and bottom) of a sentencing scheme. The fact that our penal techniques are
623 not infinitely gradated means that the class of death-worthy crimes will be
624 internally differentiated in terms of desert: some members of this class will be
625 significantly morally worse than others. At the same time, all of those who
626 commit the crimes contained in this set will be punished exactly the same—
627 with death. When architects of genocide and first-degree murderers are exe-
628 cuted, they are punished almost identically, even though the former is guilty
629 of a more heinous offense. And so ordinal proportionality is *guaranteed* to be
630 imperfectly realized, unless one maintains that only the absolute worst possi-
631 ble crime, whatever it is, deserves punishment by death. But this latter pro-
632 posal is not Feser's, and if it were, it would not justify executing anyone, much
633 less any existing capital sentencing scheme. Ultimately, then, the death pen-
634 alty does not fulfill Feser's promise and secure ordinal proportionality. Because
635 it does not do so, the key premise in Feser's argument goes unsupported.

636 I have argued that both noncapital and capital schemes display the same
637 defect of ordinal proportionality, so they are on a par in this respect. Feser
638 might reply that a death penalty regime boasts a *comparative* superiority. Here
639 the claim would be that a schedule of sanctions omitting execution is more
640 homogenous and suffers from ordinal imprecision to a greater degree. Even if
641 no scheme perfectly reflects ordinal proportionality, it might be thought that
642 a capital scheme does so better than a noncapital one. But this response does
643 Feser no favors. Imagine a jurisdiction that executes the most deserving first-
644 degree murderers. During an official review of sentencing policy, authorities
645 grow concerned about the prospect of a domestic terrorist killing hundreds of
646 innocents. And they worry that such an offender would be punished no more
647 than first-degree murderers. So they entertain a new penalty: torture followed
648 by execution.²⁵ (The torture will be inflicted by a machine, so that no person

²⁵In medieval England, those convicted of high treason were dragged to a gallows, hanged almost to the point of death, revived, then emasculated, eviscerated, beheaded, and posthumously quartered. A slightly relaxed version of this practice continued into the early 1800s.

bears the moral and psychological cost of carrying out the sentence.) Clearly, this torture-execution scheme is more finely differentiated than an orthodox capital punishment regime, and better respects ordinal proportionality. Feser's line of argument suggests that the torture-execution system is more just. But should we draw this conclusion?

Many retributivists would refuse to do so for the following reason: torture-executions violate moral constraints on the types of punishment that may be employed. So, torture-executions may not be used, even if they better accomplish ordinal proportionality. The lesson here should be clear: if there are retributive prohibitions against torture, there may be retributive prohibitions against execution! To assert that execution does not run afoul of any such restrictions again begs the question at issue. And death penalty proponents bear the burden of proof here, on the same moral ground that generates the initial need to justify punishment: the intentional infliction of harm is wrong, unless there are reasons that render the type of harm permissible. To justify legal punishment, one must supply such reasons. A parallel burden applies in disputes about the kinds and amounts of punishment that may be imposed. A successful justification of punishment does not permit a state to impose any punishment for any offense. Retributivists are thus tasked with sorting out which types of punishment are permissible and which are not. So, retributivist friends of capital punishment must affirmatively demonstrate the permissibility of executing a wrongdoer.²⁶

In sum, Feser fails to establish that proportionality requires execution. This should not be surprising, given that many other retributivist justifications of the death penalty have tumbled over the same hurdle. Of course, even if Feser's retributivist argument were unimpeachable, his conclusion would still fall prey to my proceduralist argument.

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²⁶The easiest way to do this is to endorse a literal "eye for an eye" version of the *lex talionis*, which prescribes that the punishment be exactly the same as the offense. But this view has many fatal flaws. A salient one is that some literally fitting penal techniques (e.g., torture or rape) are morally impermissible, either owing to their intrinsic wrongfulness or the wrongfulness of their extrinsic effects, such as the brutalization inflicted on the agent of punishment (Waldron 1992, 38). Few retributivists subscribe to this atavistic view, much less defend it, and Feser is not one of them. If he did endorse a strict interpretation of the *talion*, he would not need the argument I have been analyzing, but he would be in even hotter water.

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