

# OPTIMIZING DEATH TO EFFECTUATE DETERRENCE

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*“Where then does wisdom come from?  
Where does understanding dwell?  
It is hidden from the eyes of every living thing,  
concealed even from the birds in the sky.  
Destruction and Death say,  
“Only a rumor of it has reached our ears”  
God understands the way to it  
and he alone knows where it dwells,  
for he views the ends of the earth  
and sees everything under the heavens.  
When he established the force of the wind  
and measured out the waters,  
when he made a decree for the rain  
and a path for the thunderstorm,  
then he looked at wisdom and appraised it;  
he confirmed it and tested it.  
And he said to the human race,  
“The fear of the Lord—that is wisdom,  
and to shun evil is understanding.”<sup>1</sup>*

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1. *Job* 28:20–28 (NIV).

## ABSTRACT

This Note reviews and discusses the merits of the deterrence policy and further probes into understanding death's province in human thought, instinct, wisdom, and understanding. Using this foundation, it proposes and explores a thought experiment on how capital punishment may be reworked and "optimized" to facilitate its greatest deterrent potential.

The death penalty has persisted and will foreseeably persist in the United States. Any punishment requires a justification, but death requires a particularly good one. It may be tempting to advocate for the death penalty for its supposed deterrent benefits. Nonetheless, criminologists have consistently observed that the death penalty's American implementation presently does not appear to deter crime meaningfully. This observation, or lack thereof, has scant countervailing challenges. Ostensibly, this dearth of evidence suggests the hypothesis is no more than academic posturing, unsubstantiated by empirical authenticity. I question this conclusion. Desert-based retributive justifications for capital punishment may be simpler to advance than deterrence-based, utilitarian ones; empirical evidence is typically necessary for the latter, while the former primarily wrangles with moral intuition. The United States appears to favor a retributive justification, but other countries cherish their punitive, deterrence-informed death penalty policy. Some may boast deterrent outcomes, perhaps suggesting death's potential to work as a deterrent meaningfully. Criminal law and sentencing necessarily assume humans to be rational actors. A sensible person responds to negative incentives, including normative and capital punishment. Traditional deterrence theory suggests that rational actors are deterred by considering the (1) certainty, (2) severity, or (3) celerity of punishment. The certainty of punishment offers the most deterrent promise.

Drawing inspiration from this observation and others, I argue reworking and optimizing death as a deterrent warrants a special consideration: "proximity." Humans are responsive to incentives they appreciate as carrying natural, inevitable, and immediate consequences, and our innate survival instincts elicit a uniquely powerful aversion to death. To theoretically deter crime optimally, the death penalty would harness this instinct by placing prospective offenders within as close of proximity to death as reasonable but not exceeding the greater good. Marrying capital punishment and proximity would upset American jurisprudence, asking us to uproot a significant sum of law, policy, and practice. Greater emphasis on deterrent outcomes requires greater overhauls, and optimal deterrence would deleteriously deracinate cherished American liberties. No matter the kind, criminal punishment requires a fair justification. Therefore, confronting all capital punishment proponents is a trilemma: (1) fully concede concerning alterations and implement an optimized death penalty deterrent regime notwithstanding consequences, (2) "cherry-pick" amenable alterations, embracing consequences whilst potentially but suboptimally furthering deterrent objectives, or (3) supporting capital punishment principally on its retributive merits. This trilemma reveals that retribution is the safer, more reasonable, and reliable justification for capital punishment in the United States.

## I. INTRODUCTION

The authority of criminal punishment is inextricably tied to the duty to intentionally or strategically inflict pain.<sup>2</sup> Humankind's proclivity to execute this authority is conventional knowledge. Apprehending and viewing punishment adversely—especially death—is natural human wisdom. But how ought we understand punishment? We also recognize it is human nature to be skeptical of government,<sup>3</sup> yet the state is typically gifted exclusive authority and solely tasked with administering criminal punishment or sanctions. Often, we do not question the state's province of criminal punishment. This dissonance is suspect at first blush: why do we amenably concede this extraordinary imbalance of relative state-to-individual power? Particular opinions diverge, but every answer has an identical genus: we delegate to the state such duty and authority because criminal punishment—and the state's dominion over it—is justified. One may argue this justification with retributivism, utilitarianism, or a mixed theory of punitive thought.<sup>4</sup> No matter one's justification of choice,

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2. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 4–5 (1968).

3. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . .”); Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006); John Greco, *Introduction*, in THE OXFORD HANDBOOK OF SKEPTICISM 3, 3–7 (John Greco ed., 2009).

4. Throughout this Note, I frequently reference these sentencing philosophies and their respective terms. I write presupposing that they are already understood. For a discussion of these schools of punitive thought, contemporary and historical views, and partial definitions see *infra*, Subsection II.A. For an overview of contemporary deterrence thought and outcomes, see *infra*, Subsection II.B; To provide explicit definitions for those unfamiliar: “utilitarianism” refers to the “ethical theory that judges the rightness or wrongness of actions according to the pleasure they create or the pain they inflict and recommends whatever action creates the greatest good for the greatest number of people.” *Utilitarianism*, BLACK’S LAW DICTIONARY (12th ed. 2024). To reiterate, utilitarian arguments can be rooted in pragmatic motivations. They can also stem from moral beliefs; punishment ought to serve the most people possible, for that is the right thing to do. It is a sentencing philosophy that focuses on consequence. *Compare id. with Consequentialism*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“An ethical theory that judges the rightness or wrongness of actions according to their consequences. One of the best-known types of consequentialism is utilitarianism.”). “Retribution” has many meanings, but I use this term in a neutral criminal law context: That punishment should proportionately represent “just[] deser[t]; [a] repayment [or] reward.” *Retribution*, BLACK’S LAW DICTIONARY (12th ed. 2024). The “law of retaliation” (*lex talionis*) has been practiced since biblical times. See *Exodus* 21:23–25 (NIV) (“[Y]ou are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”). It is invariably a form of retribution, but all modes of retribution do not invariably fall under the law of retaliation. *Compare Retribution, supra, with Lex Talionis*, BLACK’S LAW DICTIONARY (12th ed. 2024). Conceiving retribution as proportionate punishment or sentencing only what is deserved, the retributive approach to punishment is advocated for by the ethical theory of “retributivism.” Retributivism is not invariably consequentialist, but it can be. It can even be informed by utility or consequentially invite utilitarian outcomes. See *Retributivism*, BLACK’S LAW DICTIONARY (12th ed. 2024) (noting “negative retributivism . . . [the] theory that justifies punishment in terms of its good consequences but

the rationale, righteousness, or necessity of delegating the state punitive authority holds steady: unlike the everyday person, a government is a centralized authority, aspirationally representative of its constituency, and possesses resources sufficient to dispatch punishment in ostensible or actual service of the people's interests. This authority is not in name alone; it is not a privilege reserved but perhaps an obligation to act. A vigilante scheme of pure interpersonal accountability is undesirable; it is not manageable or economical. An aversion to this mode of "justice" was a nodal point raised in the landmark case *Furman v. Georgia*. As Justice Stewart explained: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."<sup>5</sup> In name and practice, it logically follows that the state must be the community's disciplinarian. Exemplary of this, in the United States—a nation founded upon respecting the self-evident truths of individualism and personal autonomy<sup>6</sup>—we, the people, beg the presiding judge to punish pursuant to our cause. And sometimes, we, the people, call for the criminal's death.

Like all punishments, death requires a fair justification. Unlike other punishments, however, justifying capital punishment demands a unique set of considerations; it is an inherently different punishment in character. Capital punishment's unique, stern, and communicative nature has always invited constitutional challenges. This chief uniqueness was at issue in *Furman*, where Justice Stewart, as mentioned above, also explained:

The penalty of death differs from all other forms of criminal punishment, not in degree but in *kind*. It is *unique* in its total irrevocability. It is *unique* in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is *unique*, finally, in its absolute renunciation of all that is embodied in our concept of humanity.<sup>7</sup>

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maintains that it is unjust to punish persons in the absence of their ill-desert or in excess of their ill-desert"). Retributivism, utilitarianism and the more inclusive consequentialism capture most—if not all—contemporary philosophies of criminal punishment. However, they need not be considered mutually exclusively. See *Mixed Theory of Punishment*, BLACK'S LAW DICTIONARY (12th ed. 2024). The United States Sentencing Commission promotes a mixed theory of punishment in its federal guidelines. See U.S. SENT'G GUIDELINES MANUAL §§ 1A–B1.1 (U.S. SENT'G COMM'N 2024) ("The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation . . . [for] the federal sentencing process.").

5. *Furman v. Georgia*, 408 U.S. 238, 306, 308 (1972) (Stewart, J., concurring).

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.).

7. *Furman*, 408 U.S. at 306 (emphasis added). For more on the unique nature and justifications of punishment, see *infra*, Section II.A. For more on the unique nature of death, see *infra*, Section III.A.

Capital punishment's controversial nature should elicit no surprise. Its persistence, however, could be described as puzzling—Western legal and academic intellectuals have decried the punishment's barbarity, prophesying its supposed inevitable demise for two and a half centuries.<sup>8</sup> This spelled fate has not come to fruition in the United States. Instead, American abolitionists face cyclical bouts of optimism and disappointment.<sup>9</sup> At the very least, this exhausting routine warrants skepticism that the result of contemporary abolition pushes will be any different.<sup>10</sup>

Still, the death penalty's sparse, if not arbitrary, contemporary application in practice represents no insignificant victory for abolitionists. The death penalty's usage is declining in the United States, nearing historic lows.<sup>11</sup> Merely four states comprise over three-fourths of the nation's total executions, yet the punishment's usage is declining in these retentionist states nonetheless.<sup>12</sup> Even when presented with undisputed facts, juries have spared particularly cruel offenders death sentences in recent high-profile cases.<sup>13</sup> Capital punishment is blatantly spoken of as a formality, acknowledging the government's non-existent intention to carry out the executions offenders are sentenced to.<sup>14</sup> Before leaving office, then-President Joe Biden commuted the sentences of thirty-seven of the forty inmates on federal death row.<sup>15</sup> Had he and his allies remained in the White House, the remaining three would have presumably been "relegated to living under a death sentence that the government doesn't plan to carry out . . ."<sup>16</sup>

Even if the modern abolitionist movement represents a turning point, the call for change has been placed on hold. Biden's White House exit may have

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8. Craig S. Lerner, *The Puzzling Persistence of Capital Punishment*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y 39, 40–42 (2024).

9. *Id.* at 43–47. Throughout this Note, I use the term "abolitionist" exclusively to describe a position that promotes the death penalty's abolition.

10. *See id.* at 80, 85.

11. *The Death Penalty in 2024*, DEATH PENALTY INFO. CTR. (Dec. 19, 2024), <https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2024> [<https://perma.cc/9VC8-7TUD>].

12. *See, e.g., id.*; Ken Camp, *Death Penalty Diminishing in Texas but Disparities Remain*, BAPTIST STANDARD (Dec. 19, 2022), <https://www.baptiststandard.com/news/texas/death-penalty-diminishing-in-texas-but-disparities-remain/> [<https://perma.cc/5PYK-D4BS>].

13. *See, e.g.,* Patricia Mazzei & Nicholas Bogel-Burroughs, *Gunman Who Killed 17 in Parkland is Spared the Death Penalty*, N.Y. TIMES, <https://www.nytimes.com/2022/10/13/us/parkland-trial-verdict-gunman.html> (last updated Oct. 14, 2022).

14. *See, e.g.,* Tyler Olson & Bill Mears, *Boston Bomber: Barrett Asks DOJ Lawyer Why Biden Admin Wants to Reinstate Death Sentence Amid Execution Pause*, FOX NEWS (Oct. 13, 2021, 1:33 PM), <https://www.foxnews.com/politics/barrett-doj-lawyer-execution-moratorium-boston-bomber-supreme-court>.

15. DEATH PENALTY INFO. CTR., *supra* note 11.

16. Kevin Breuninger, *Supreme Court Hears Death Penalty Arguments for Boston Marathon Bomber Dzhokhar Tsarnaev*, CNBC, <https://www.cnbc.com/2021/10/13/boston-marathon-bomber-supreme-court-to-consider-death-sentence-for-dzhokhar-tsarnaev.html#> [<https://perma.cc/E9FH-GWLW>] (last updated Oct. 13, 2021, 1:06 PM).

been characterized by clemency, yet President Donald Trump oversaw thirteen executions upon concluding his first term.<sup>17</sup> He condemned Biden's pardons with particular ferocity,<sup>18</sup> and especially with his Republican-controlled House and Senate,<sup>19</sup> it is unlikely that nationwide abolitionist aims will be advanced during his second term. Practice notwithstanding, Biden's refusal to pardon select death row sitters demonstrates that, even in his view, death sentences are warranted for some particularly egregious offenders or politically high-profile cases.<sup>20</sup> If we are not to do away with capital punishment, we are necessarily tasked with advancing a fair justification; death's irrevocable, stern qualities demand a particularly strong one.

Typically advanced for the death penalty are retributive justifications: "The instinct for retribution is part of the nature of man."<sup>21</sup> This justification is succinctly explanatory of capital punishment's not-so-puzzling persistence.<sup>22</sup> Such an instinct is materially visible; psychologists have empirically observed a neurological association between perceived punishment and the brain's pleasure centers.<sup>23</sup> Moreover, evolutionary biologists have made a similar observation: a near totality of pre-history civilizations surveyed were found to have some fashion of institutionalized vehicle to satisfy "blood feuds" or "revenge."<sup>24</sup> Retributive considerations need not be divorced from other sentencing philosophies, yet this retributive, psychologically embedded punitive proclivity does not appear to be relevantly motivated by utilitarian or consequentialist concerns.<sup>25</sup> This evidence may be persuasive for the retributivist—especially a natural law proponent seeking evidence for retribution's objective righteousness<sup>26</sup>—but retribution's place in human

17. *Id.*

18. Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Dec. 25, 2024, 2:43 PM), <https://truthsocial.com/@realDonaldTrump/posts/113715169361854155> ("[T]o the 37 most violent criminals, who killed, raped, and plundered like virtually no one before them, but were just given, incredibly, a pardon by Sleepy Joe Biden. I refuse to wish a Merry Christmas to those lucky 'souls' but, instead, will say, GO TO HELL!").

19. *2024 Election Highlights: Republicans Win Senate Majority*, AP NEWS, <https://apnews.com/live/senate-house-election-updates-11-5-2024> (last updated Nov. 6, 2024, 10:12 PM).

20. See *FACT SHEET: President Biden Commutes the Sentences of 37 Individuals on Death Row*, THE WHITE HOUSE (Dec. 23, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/23/fact-sheet-president-biden-commutes-the-sentences-of-37-individuals-on-death-row/> [<https://perma.cc/D6BE-YTG6>].

21. *Furman v. Georgia*, 408 U.S. 238, 306, 308 (1972) (Stewart, J., concurring).

22. See Lerner, *supra* note 8 at 39–40, 77–80 ("If Justice Stewart is right about the 'nature of man' . . . it is not at all puzzling that capital punishment persists. What is puzzling is . . . regard[ing] its demise as imminent.").

23. Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 NEW CRIM. L. REV. 477, 483 (2015).

24. MARTIN DALY & MARGO WILSON, *HOMICIDE* 226 (Routledge 2017) (1988).

25. Lerner, *supra* note 8 at 77–78.

26. See, e.g., Vernon J. Bourke, Note, *Two Approaches to Natural Law*, 1 NAT. L.F. 92, 95–96 (1956).

instinct would mean little to certain detractors. It may be argued that law and legal institutions ought to be constructed within the boundaries of human nature.<sup>27</sup> Conversely, intellectuals have rejected this interpretation since the Enlightenment; human nature—and deference to it as a self-evident authoritative source—can be a frail, primitive constraint on humankind’s progress.<sup>28</sup> The United States and many other countries are retentionist nonetheless.<sup>29</sup> Accepting this reality, would it be possible to advance a death penalty justification for utilitarian proponents? A deterrence-based rationale would be, essentially, the sole remaining option.

Being such an extraordinarily unique punishment, it stands to reason that death may also be an equally unique tool. I examine this question. This Note is a thought experiment on reworking the death penalty as a general deterrent: capital punishment’s theoretical utility in “optimally” deterring crime. When speaking of “optimized” or “optimal” deterrence, I refer to an unburdened deterrence-based policy scheme, which theoretically facilitates the “greatest” possible crime deterrent outcomes. As a sanction perhaps designed to serve our retributive impulses, the death penalty debate is inherently charged with moral and emotional weight. However, the calculative nature of consequentialism or utilitarianism offers a new lens for viewing the conversation. As we will discuss, retributive considerations are inherently abstract: they typically rely on mental intuition, contrary to empirics, justifying punishment by proportioning desert to the culpable act. Conversely, utilitarianism usually straddles with metrics. Forward-looking, consequentialist arguments may cite empirical evidence and data to further their justifications. I pursuantly inform my proposal with primarily empirical observations. We will use this approach for our thought exercise before revisiting retribution.

Section II begins our exercise by reviewing two questions: What are the death penalty’s underpinning characteristics that lawmakers traditionally harness when considering punitive policy? (Subsection II.A). And does normative or capital punishment contemporaneously deter crime? (Subsection II.B). Section III discusses how our capital punishment law, policy, and practice would have to be reworked to realize and optimize its theoretically latent deterrent properties. This discussion includes an analysis of human nature, arguing that human beings uniquely perceive death with a degree of commonality that generally supersedes idiosyncrasy; notwithstanding deviations in reasonableness, the criminal law correctly assumes that humans are rational actors responsive to negative incentives. (Subsection III.A). Pursuantly, I argue that death cannot optimally deter crime unless the

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27. *Id.*

28. *See id.*; CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 86 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., 2008) (1764). Notably, Beccaria’s work inspired many of the Founding Fathers and their rationale behind the Eighth Amendment’s prohibition on cruel and unusual punishment. *See* Kathryn Preyer, *Cesare Beccaria and the Founding Fathers*, in BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER 239, 243 (Mary Sarah Bilder et al. eds., 2009).

29. *Death Penalty*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/death-penalty/> [<https://perma.cc/K4CD-HQ8P>].

punishment is viewed to be within “proximity”; rational actors are deterred by negative incentives they closely appreciate as natural and inevitable. Proximity requires reworking the traditional criminological deterrence framework, modeled after the findings presented in the preceding section and subsections. However, the framework would present many incompatibilities with American jurisprudence. (Subsection III.B). Section IV concludes by reviewing the content and questions raised throughout this Note and discussing the implications that we can draw from contemporary literature and our hypothetical deterrence-optimized capital punishment approach. We infer a trilemma such difficulties create for death penalty retentionists. (Subsection IV.A). We finish with a recap and a reevaluation of the competing two justifications for capital punishment: retribution and deterrence. I argue retributivism prevails as the more sensible justification. (Subsection IV.B).

## II. THEORETICAL BACKGROUND AND LITERATURE REVIEW

### A. Traditional Justifications of Punishment

Society punishes criminals because it perceives specific behavior as worthy of punishment and believes such punishment to be just. As previously discussed, this is a bizarre arrangement.<sup>30</sup> If we were to surmise that criminal or deviant behavior warrants punishment because it is injurious or inflicts pain upon others,<sup>31</sup> intentionally inflicting retaliatory pain upon the offender—in the form of punishment—is an odd way to express condemnation; we seem to condemn by stooping to the level of the condemnation-worthy. Yet throughout history, the righteousness of punishment as a concept has been universally confirmed and appraised.<sup>32</sup> Punishment is our answer to the more significant

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30. See HART, *supra* note 2.

31. The term “‘victimless’ crime[s]” is often used to refer to “illegal act[s] that [are] consensual and lack[] a complaining participant.” Louis Veneziano & Carol Veneziano, *Are Victimless Crimes Actually Harmful*, 9 J. CONTEMP. CRIM. JUST. 1, 1 (1993). The aforementioned suggestion, therefore, would presume that these crimes are not actually “victimless,” for they are injurious to the public health or tranquility. Singapore is a country with a uniquely punitive stance on “victimless” crimes and expounds this interpretation. See CENT. NARCOTICS BUREAU, COMMEMORATIVE BOOK 18–19 (2021), [https://www.cnb.gov.sg/docs/default-source/pdfs/a\\_mha\\_cnb\\_commemorativebook\\_r6\\_fa\\_r1\\_lowres.pdf](https://www.cnb.gov.sg/docs/default-source/pdfs/a_mha_cnb_commemorativebook_r6_fa_r1_lowres.pdf) [<https://perma.cc/YB8V-8XYR>] (“[If] ensnared by drug dependence, the[] [people] will no longer be productive digits contributing to our economy and social progress. They will not be able to carry on with their regular jobs. . . . [A]s a developing country, our progress and very survival will be seriously threatened. . . . We are tough on drugs as we are tough on crime and we are not apologetic about it.”).

32. See, e.g. DALY & WILSON, *supra* note 24 (discussing the existence and observation of punishment and blood-feuds since pre-history). See also sources cited, *supra* note 4 and accompanying text (defining contemporary punitive terms). Organized religions outline sentencing guidelines, albeit with varying force: Judaism, Christianity, and Islam all speak of *lex talionis*. See *Exodus* 21:23–25 (NIV); *Qur’an* 5:45 (Sahih Int’l). But cf. *Matthew* 5:38–48. Reconsider Justice Stewart’s words through this context, which I will frequently quote throughout this Note: “The instinct for retribution is part of the nature of man.” *Furman v. Georgia*, 408 U.S. 238, 306, 308 (1972) (Stewart, J., concurring). Consider also that these theologies unanimously agree “God



question of how we ought to rectify wrongs: After an injury is inflicted, punishment is the extent of what criminal law, or the law itself, can do to make the person or community whole.<sup>33</sup> Nobody can dial the clock back or undo the injury. There is no winning or losing; society is tasked with damage control, which is what punishment is.

At this point, legal philosophers diverge in perspective. If punishment is a mechanism of “damage control,” where should punishment look, and what should punishment look like? Although the answers need not be mutually exclusive, they can look in two directions: Punishment can be forward-looking—designed to elicit desirable outcomes—or backward-looking—designed to reflect what the offender justly deserves.<sup>34</sup> Backward-looking punishment is retributive, while forward-looking punishment is consequentialist.<sup>35</sup> Yet the penalty of death, being irrevocable, implicitly rejects several conventional punitive and penological considerations.<sup>36</sup> Doing so upsets how we ought to apply traditional justifications for punishment.

### 1. Retribution: Punishment as a Moral Obligation

As I raised in Section I, retribution typically arises as the principal consideration for capital punishment. It is an instinct believed to bind the faculties of man,<sup>37</sup> its need for satiation empirically and historically visible,<sup>38</sup> and presumably powerful enough to abrogate concerns about death’s chief uniqueness as an irrevocable punishment.<sup>39</sup> Even opponents to the death penalty recognize the existence of this retributive human instinct, expounding and enacting abolitionist policy notwithstanding most laypeople’s retentionist wants or interests.<sup>40</sup>

An intellectually honest position would not deny the existence of the retributive instinct, although opponents could argue that it is a savage one we must overcome.<sup>41</sup> This position is precisely what Enlightenment-spawned intellectuals subscribe to: that human nature is a constraint on progress, and

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created man in his own image” (*Genesis* 1:27). Lastly, consider how humans are neurologically wired to be pleased by observing just punishment. See Fondacaro & O’Toole, *supra* note 23.

33. See U.S. SENT’G GUIDELINES MANUAL §§ 1A–B1 (U.S. SENT’G COMM’N 2024) (“[O]bservers of the criminal law agree that [its] ultimate aim . . . of punishment in particular . . . is the control of crime.”).

34. See sources cited *supra* note 4 and accompanying text.

35. Utilitarian thought is arguably the most notable or popular form of consequentialism. Although retributivism is backward-looking it can be consequentialist too. See *id.*

36. See *Furman*, 408 U.S. at 306 (1972) (Stewart, J., concurring).

37. *Id.* at 308 (1972) (Stewart, J., concurring).

38. See *id.*; sources cited *supra* note 32 and accompanying text.

39. See *Furman*, 408 U.S. at 306 (1972) (Stewart, J., concurring).

40. See Lerner, *supra* note 8 at 64 (quoting Justice Minister Thomas Dehler, unapologetically imposing his abolitionist views on the great majority of Germans, who, in fact, supported the death penalty: “I say in all clarity: I do not care about the ‘people’s conviction’, that is, the opinion of the man on the street”).

41. See *id.* (observing how elite-driven rejection of capital punishment has gradually cultivated common consensuses that death is improper as a punishment).

unquestionable adherence to it invites error.<sup>42</sup> Notwithstanding the objections such perspectives may contend, the seemingly unanimous acceptance of mankind's naturally retributive instinct, wants, and ethos—and the aforementioned corroborative research—serves as the retributivist's empirical scaffolding. Man yearns for retribution; we are cognizant of this want and can observe it, test it, and appraise it, so the retributivist presupposes its goodness.

Retribution is not necessarily an ethical concept liberally implemented into law and public policy. In its earnest form, retribution is moderated with aspirational aims of fairness and just deserts: Retributivism and retributive justice are pursuantly underscored by proportionality principles.<sup>43</sup> The nodal importance of proportionality has been heeded at least since Biblical times,<sup>44</sup> evolving from the law of retaliation (a “life for a life, eye for eye,” etc.) into a task of proportioning “abstractions.”<sup>45</sup> Death may be perceived as the “summit”

42. See CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 106 (Edward D. Ingraham trans., Stanford, Ca.: Academic Reprints 1953) (1819) (Beccaria was a particularly influential Enlightenment-era criminologist, and famously described “[t]he history of mankind” as “an immense sea of errors, in which a few obscure truths may here and there be found.”); see also sources cited *supra* note 23 (observing Beccaria's influence). Heeding our supposed archaic impulses is a primary criticism of retributivism. See, e.g. James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003). Granting the government privilege to act upon these “unexpectedly savage and vindictive impulses” are argued to exacerbate these issues. *Id.* at 106. Beccaria rested his arguments upon a similar conclusion. See BECCARIA, *supra* note 28.

43. See *Retributivism*, *supra* note 4 and accompanying text. Cf. *Lex Talionis*, *supra* note 4 and accompanying text.

44. See *Exodus* 21:23–25 (NIV).

45. *Id.* I speak of “proportioning abstractions” to refer to punishment different in form but designed to be conceptually equal in severity. There is a point to be made about what “proportionality” entails, and why many are not amenable to perceive this raw form of retaliation (*lex talionis*) as “proportionate” sentencing. The Eighth Amendment's prohibition on cruel and unusual punishment has developed into a narrow but necessary principle of proportionality. See sources cited *infra* note 53 and accompanying text. Upon passing its historic Universal Declaration of Human Rights (UDHR), the international community made firm censure of punishment deemed inhuman, tortuous, cruel, or degrading. See G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948). The prevailing interpretation appears to suggest it is a prohibition on certain modes of punishment, notwithstanding proportionality, as reaffirmed in subsequent treaties. See, e.g., U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, No. 24841, 1465 U.N.T.S. 85 (entered into force Jun. 26, 1987). The International Criminal Court appears to heed mind to retributive and consequentialist considerations: a mixed theory of punishment. See *About the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/C5RQ-2YN5>] (“[T]he Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.”). In doing so, and respecting the UDHR, any retributive-informed sentence is inherently limited by what *modes* of punishment are available for use. Were, for example, a defendant to be punished for lashing his victims, corporal punishment would not be an available sentence. In one advocate's words: “[the] shameful recourse to using torture—in the form of caning—to punish crimes . . . is indicative of a blatant disregard for international human rights standards.” See Rujun Shen, *Two Germans to be Caned, Jailed for Singapore Train Graffiti*, REUTERS (Mar. 5, 2015, 4:24 AM), <https://www.reuters.com/article/world/two-germans-to-be-caned-jailed-for-singapore-train-graffiti-idUSKBN0M10DK/> (quoting Phil Robertson, Director of

of severity—rendering no other punishment proportionate—but the use of abstracted punishments for proportionate sentencing carries unique benefits. For example, macro-scale or “victimless” crimes that are not punishable with an identical retaliation can be proportionately punished in the abstract nonetheless.<sup>46</sup> And if an offender commits a particularly foul offense, the state need not decline to the offender’s level by retaliating in an identical nature, communicating similar savagery in the process.<sup>47</sup> Rather, the state can serve a more palatable desert—typically incarceration—to abstractly match the offense’s severity.<sup>48</sup> It is theoretically a way to fulfill a moral obligation to the community—to repay what is justly deserved—without compromising its legitimacy, but this concept is not without issues.<sup>49</sup>

This distinction is how retribution contrasts with vengeance. Retributive justice weighs proportionality principles to deliver the punishment justly deserved. Conversely, vengeance is “[p]unishment inflicted by victims to whatever degree will *satisfy* them.”<sup>50</sup> This difference indicates that proportionality requires a form of restraint. An unreasonable appeal to kindness or vengeance can inflict a level of punishment in *excess* of what is deserved or *short* of what is deserved.<sup>51</sup> There is a just equilibrium that the offender upset, and it needs rectification: “Justice—that is punishing such individuals—restores

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Human Rights Watch’s Asian Division). Therefore, sentencing a characteristically cruel, inhuman, torturous, or degrading crime punish abstractly or defer to consequentialist objectives. Amnesty International has committed to the interpretation that capital punishment is similarly inhuman or cruel, warranting its prohibition. *See* AMNESTY INT’L, *supra* note 29. This raises a few difficult questions: If humans are able to subject one another to harm so barbaric that identical retaliation would be disproportionate punishment, how could a permissibly “humane” or “compassionate” punishment be proportionate, just desert? If life imprisonment is a permissibly humane punishment, how could it be proportionate or adequate for the crime of murder, when death is never permissible? It appears at odds with retributivism and does not suggest consequentialist gains beyond respecting the offender’s right to life, despite not his or her taking of the victim’s. I further explore this discussion in the Note’s conclusion, Subsection IV.B.

46. To elaborate on this example with more detail, substance abuse is described as a “victimless” crime. *See* Veneziano, *supra* note 31 and accompanying text. Some interpret its harm and criminality to be rooted in the large-scale, community damaging consequences of substance abuse and addiction. *See, e.g.*, CENT. NARCOTICS BUREAU, *supra* note 31. An imaginative sentencing philosopher might disagree, but it is difficult to imagine how such an offense can be punished in equal retaliation.

47. Punishment is how society communicates condemnation of a crime, and society has a right to do so. *See* *Graham v. Florida*, 560 U.S. 48, 71 (2010). This does not mean it is always permissible. *Id.* at 68 (“Community consensus, while “entitled to great weight,” is not itself determinative of whether a punishment is cruel and unusual.”). Then, the task for society becomes communicating its condemnation and righteousness in tandem.

48. *See, e.g.*, sources cited *supra* note 45 and accompanying text.

49. *Id.* A government requires legitimacy to exert authority. *See generally* ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 124 (1971); MAX WEBER, *Politics as a Vocation*, in *WEBER SELECTIONS IN TRANSLATION* 212 (W. G. Runciman ed., Eric Matthews trans., 1978).

50. Jeffere G. Murphy, *Retribution*, 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 1, 11 (Erik Luna ed., 2017) (emphasis added).

51. *Id.*

the equilibrium of benefits and burdens . . . .”<sup>52</sup> In other words, contemporary retributive justice can call for *sufficient* punishment, but it invariably sets a baseline of *necessity*. The Supreme Court has recognized the existence of such a baseline—a narrow principle of proportionality considered compulsory—as a constitutional right.<sup>53</sup>

In evaluating abstractions, retributive justice becomes abstract to argue per se. If viewing punishment as a moral obligation, reasonable minds can diverge on what is “proportionate” or “justly deserved.” Academics have identified common considerations in proportionate sentencing,<sup>54</sup> and the Supreme Court has established guidelines of its own.<sup>55</sup> Nonetheless, backward-looking sentencing typically requires human actors to weigh intangible considerations. Humans are also error-prone; a mistaken retributive calculus or a poorly designed sentence can contravene retributive goals.<sup>56</sup> Importantly, these pitfalls seemingly do not apply to the death penalty—especially when

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52. Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 477–78 (1968).

53. See *Solem v. Helm*, 463 U.S. 277, 284, 288 (1983) (unequivocally declaring that the Eighth Amendment “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed”); U.S. CONST. amend. VIII; *Robinson v. California*, 370 U.S. 660 (1962) (incorporating protection from cruel and unusual punishment to the States via U.S. CONST. amend. XIV, § 1); *Weems v. United States*, 217 U.S. 349, 381 (1910) (kickstarting this interpretive trend in Eighth Amendment jurisprudence). Compulsory consideration of retributive justice in sentencing has faced criticism from other Justices. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Scalia, J., dissenting) (“[T]he Eighth Amendment does not mandate adoption of any one penological theory . . . federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”).

54. Generally, there are four considerations: (1) The greater the harm an offender causes, the more culpable he or she is; (2) the more dangerous an offender’s conduct is—the harm’s likelihood and severity—the more culpable he or she is; (3) the more intentional the offender’s harm is—acting with purpose, knowledge, or other ill conscious awareness—the more culpable he or she is; and (4) the greater the offender’s justification is—the presence or perception of countervailing benefits, or an excuse—the less culpable he or she is. Michael M. O’Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability and Environmental Crime*, 95 *J. CRIM. L. & CRIMINOLOGY* 133, 156–59 (2004); see also HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 77–82 (1979) (the original four-factor model O’Hear drew inspiration from).

55. These guidelines for judging proportionality are: “[1] The gravity of the offense and the harshness of the penalty; [2] the sentences imposed on other criminals in the same jurisdiction; and [3] the sentences imposed for commission of the same crime in other jurisdictions.” *Solem*, 463 U.S. at 292 (1983). See also *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The retribution rationale [requires] that a criminal sentence must be directly related to the personal culpability of the criminal offender.”).

56. See generally sources cited, *supra* notes 4, 47–55 and accompanying text (outlining retributive considerations and limitations).

used as an equal retaliation.<sup>57</sup> A murder is equal in gravity to a death sentence<sup>58</sup>: It is the greatest harm, the ultimate danger, and an intentional killing.<sup>59</sup> The penalty of death identically matches the crime in culpability and mode.<sup>60</sup> With this inherent showing of proportionality, the problematic part of retributivism is shed. All that is left is to act upon moral obligation. Still, others may disagree with this backward-looking justification on a fundamental level.

## 2. Consequentialism: Punishment as Utility

Justice Stewart wrote that the death penalty is unique, in part, for its innate rejection of basic purposes of criminal justice.<sup>61</sup> As previously discussed, retribution is not such a purpose. Inversely, death accentuates it. Despite retributive justice and proportionality being a baseline, compulsory sentencing consideration,<sup>62</sup> it is not the only one at play: deterrence, incapacitation, and rehabilitation were historically and are contemporarily considered during sentencing.<sup>63</sup> As they are forward-looking, these considerations are all

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57. Capital punishment is not always used retributively as an equal, identical retaliation. Singapore, for example, has expounded a retributive rationale for executing drug traffickers. See MustShareNewsSG, *Lee Kuan Yew Explains Death Penalty for Drug Traffickers in Singapore*, YOUTUBE (Nov. 9, 2021), <https://www.youtube.com/watch?v=-PXAOZwv04> [https://perma.cc/C9MV-7ADR] (“In Singapore before you land, the air hostess or the steward will announce that there are very heavy penalties if you are found with . . . certain prohibited drugs. And if you still come in with a few kilos of them—which will destroy hundreds, thousands of families—one death is too kind. Because you are killing that family every day, for years, and years, and years, when the daughter or the son is an addict.”). I have previously argued that although this punishment was perhaps not *conceived* with a retributive justification, Singapore’s successful, by-and-large expungement of illicit substances transformed its zero-tolerance, deterrence-based sentencing policy into a retributive one. See Lucas Brolin, Punishment in “Disneyland”: A Magical Review of Singaporean Sentencing Law, Policy, and Practice, 15 NOTRE DAME J. INT’L & COMPAR. L. (forthcoming 2025) (manuscript at 52), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5130277](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5130277) (“[S]entencing drug traffickers to death is (1) proportionate, for death as a punishment is of the same kind and gravity as the culpable act’s deadly consequences, (2) deserved, for the defendant demonstrated culpability in disregarding the consequence of mass death and suffering for his or her uniquely personal or generally selfish interests, (3) no more punishment than necessary, for “one death is too kind” yet the “ultimate punishment” nonetheless, and therefore (4) justified, for these three reasons, Singapore’s virtuous protection of its community, and the inherent nature of retributive philosophy. . . . In Singapore, retribution is calibrated to the importance of the community’s foremost position and desire to preserve good outcomes . . . [and] the drug trafficker . . . [created] the opportunity of [harm] by introducing illicit substances into the stream of commerce.”).

58. See *Solem*, 463 U.S. 277 at 292 (1983) (naming the first consideration as “the gravity of the offense [matches] the harshness of the penalty”).

59. See sources cited *supra* notes 54–55 and accompanying text.

60. See *Tison*, 481 U.S. 137 at 149 (1987) (requiring such considerations).

61. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

62. See *Solem*, 463 U.S. 277 at 288 (1983).

63. See U.S. SENT’G GUIDELINES MANUAL §§ 1A–B1 (U.S. SENTENCING COMM’N 2024); *Harmelin*, 501 U.S. at 999 (1991) (Scalia, J., dissenting) (“[F]ederal and state criminal systems have

consequentialist. The most popular consequentialist approach is utilitarianism, the philosophy that punishment is justified by how it serves others.<sup>64</sup> In the criminological and penological sphere, the often-cited Cesare Beccaria is seen as the theory's modern progenitor, famously advocating for "the greatest happiness shared among the greatest number."<sup>65</sup>

Detering crime's commission, incapacitating dangers, and rehabilitating those amenable are all vehicles to do good; the need for damage control prompts a duty to repair. Despite crime and punishment being both negative and adverse experiences, utilitarianism proposes that we seize the opportunity to create a net positive. After a crime is committed and harm is done, the "bad" can be offset by forward-looking punishment, if not transformed into a net "good." With deterrence, for example, it would be a net positive for one crime to be opportunistically used to prevent many others from later occurring. In this sense, deterrence—and optimizing capital punishment for deterrence—is justified if it generates a net good.<sup>66</sup> Just deserts are seen as a moral obligation by retributivists. Still, a utilitarian may argue it is a moral obligation to create the most good among the greatest number of people. Were we to rework and create an optimized deterrence scheme that *fails* to serve the common good, it also fails to advance a justification for punishment. Such deterrence policy would not find moral obligation in serving human wants or in generating a net positive.<sup>67</sup> Although it would not be impossible, it would be bizarre to argue deterrence is a moral obligation *per se*.<sup>68</sup>

Indeed, consequentialism is forward-looking, as is its division of utilitarianism and further subdivisions of deterrence, incapacitation, and rehabilitation. Death, for its "total irrevocability" upsets many of these forward-looking considerations.<sup>69</sup> Utilitarianism, although looking at the larger picture, does not ignore evaluating the punished person's happiness. Creating the maximum happiness for all would include assessing the offender. In viewing capital punishment as a utility, however, it can only be forward-looking for society's remainder; the individual only "looks forward" to oblivion. Any rehabilitation interest is renounced;<sup>70</sup> you cannot rehabilitate the dead. Specific deterrence interests—"having a particular conviction and sentence

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accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.").

64. See sources cited *supra* note 4 and accompanying text.

65. BECCARIA, *supra* note 28, at 9.

66. The deterrence hypothesis was a principal emphasis of Beccaria's writings. See *id.* at 49–51.

67. To provide another example: imagine what "optimal incapacitation" would look like. It could be argued that if all would-be criminals magically sequestered away, society would benefit with a net positive. However, were we to pursue the greatest incapacitation outcomes, notwithstanding the greater good, the simplest and ostensibly "optimal" way to accomplish total incapacitation would be human extinction. This would not serve the greater good for the greatest number.

68. See Lerner, *supra* note 8, at 78.

69. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

70. *Id.*

discourage the offender from committing crimes in the future; [an] individualized prevention of recidivism”<sup>71</sup>—are renounced; the dead cannot recidivate or reoffend. Although death is the ultimate form of incapacitation, in most respects, it is functionally identical to life imprisonment as an incapacitation mechanism.<sup>72</sup> If a unique punishment like death warrants a unique justification, incapacitation cannot be it. Theoretically, this leaves general deterrence—“[t]he societal goal of having a specific conviction and sentence discourage [other] people from committing crimes”<sup>73</sup>—as death’s sole, tenable utilitarian justification.<sup>74</sup> Perhaps utilitarian justifications are most persuasive for demonstrating tangible empirics, so what outcomes does the deterrence hypothesis boast?

### B. *Deterrence: Does It “Work?”*

In the preceding section and subsection, I mentioned the dissonance between retributive and utilitarian justifications: retributive-based sentencing typically wrangles with abstractions, mentally calibrating desert to culpability and often reliant on moral intuition. Conversely, utilitarianism’s consequentialist, forward-looking nature permits empirical citations, advancing its justification upon tangible data and outcomes. Although no silver bullet, the virtue of being provable often renders utilitarian-based justifications easier to argue than their immaterial, retributive counterparts. For deterrence—especially death as a deterrent—it is ironic that retributive arguments suddenly become the more straightforward argument to make. Indeed, an argument made from abstractions may be trickier to communicate than one made from empirics. Yet the total dearth of evidence for the deterrence hypothesis renders it remarkably unpersuasive. Throughout this Note, I presuppose the failures of contemporary American deterrence policy and outcomes. Such a supposition is empirically supported. This subsection serves as a brief literature review of where the deterrence hypothesis stands.

#### 1. Deterrence at Large

As a theory of punishment, utilitarianism speaks of deterrence, presupposing it would, in fact, “work.” This flaw in reasoning is not only seen in utilitarianism—I believe it is the nature of theory and, to its benefit, to be

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71. *Deterrence*, BLACK’S LAW DICTIONARY (12th ed. 2024).

72. Unlike life imprisonment, death would prevent an offender from committing crimes in prison and nullify the possibility that he or she could reoffend outside of prison, should he or she benefit from clemency, a shortened sentence, parole, or a successful escape. An earnestly upheld life sentence would have no meaningful incapacitation difference besides the former point. A solitary confinement would further erode the existence of such a difference.

73. *General Deterrence*, BLACK’S LAW DICTIONARY (12th ed. 2024).

74. That is, the sole utilitarian justification for death that other punishments cannot advance. This is notwithstanding its incapacitation functions. Although it would be difficult, it would not be impossible to argue death’s utility as an incapacitation tool over life imprisonment. However, we will presuppose the need for a unique justification: as a unique punishment, does death have unique deterrent effects?

divorced from practice. However, if the deterrence hypothesis produces non-existent results, it would contravene the theoretical underpinnings that grant utilitarianism value. If deterrence does not “work” and cannot be justified beyond its utilitarian functions, strictly deterrence-informed punishment would lack a justification<sup>75</sup>; it would be punishment without a moral obligation and punishment that creates no greater good, and all punishment necessitates a justification.<sup>76</sup> Even if aspirationally rectifying a wrong, it would add unjustified pain—or an unjustifiable dearth of pain—upon existent damage. The muddy, uncertain status of deterrence’s contemporary efficacy exacerbates this concern.<sup>77</sup>

Contemporary deterrence theory primarily reflects Beccaria’s writings, focusing on three considerations: “[P]unishment ought to be swift [“celerity”], certain [“certainty”], and proportionate to the crime [“severity”] in order to appropriately deter individuals from violating the law.”<sup>78</sup> Measuring deterrence’s efficacy looks to these three metrics and data at large; one consideration’s demonstrated importance warrants heightened emphasis in law, policy, and practice.<sup>79</sup> Recent papers propose new concepts, including punishment “avoidance,”<sup>80</sup> “deterability,” “defiance,” and informal factors; however, additional research is needed to determine the merit of these innovations.<sup>81</sup>

In general, deterrence theory supposes that the threat of punishment deters would-be criminals from offending. If contemporary deterrence policy presupposes it does so in practice, this would be a questionable assumption.<sup>82</sup> A global meta-analysis of deterrence outcomes and studies found that the hypothesis is moderately confirmed but weakly supported by the large data

75. The hypothetical I surmise here assumes a justification that exclusively considers deterrent objectives, notwithstanding other justifications that are incidentally advanced. Today, a mixed approach to punishment largely prevails. See U.S. SENT’G GUIDELINES MANUAL §§ 1A–B1 (U.S. SENT’G COMM’N 2024). The thought experiment this Note proposes places the achievement of utilitarian deterrence outcomes as its nodal focus. See text *infra* Subsection III.B.

76. See discussion *supra* Section I.

77. See Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROBATION 33, 37 (2016) (“In sum, the state of deterrence theory is still confusing.”).

78. *Id.* at 33–34.

79. See *id.* at 37 (suggesting the necessity of additional research to appraise new concepts, models, and ideas).

80. “Avoidance” is a relatively new concept in contemporary deterrence thought. The greatest crime deterrents appear to be “non-legal factors, such as marriage, employment, peers, morality, disapproval from loved ones, ostracism, and shame, having a more significant impact on conformity than do sanction threats.” *Id.* Avoidance takes cognizance of this by evaluating how offenders substitute criminal activities for legal activities, or vice versa. For more on punishment avoidance, see Jacob Nussim & Avraham D. Tabbach, *Deterrence and Avoidance*, 29 INT’L REV. L. & ECON. 314 (2009).

81. Tomlinson, *supra* note 77, at 37. Later in this Note, I propose a similarly new concept, “proximity.” Evaluating its precise worth would be difficult. See discussion *infra* Subsection III.B.

82. See Dieter Dölling et al., *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL’Y RES. 201 (2009).



sample's averages and estimations.<sup>83</sup> However, the merit of broader conclusions is inherently rickety.<sup>84</sup> The effectiveness of deterrence is nuanced and varies significantly depending on the jurisdiction's law, policy, and practice, the type of crime committed, and the method of study researchers employ.<sup>85</sup> In particular, research methods significantly affect results.<sup>86</sup> In the meta-analysis, studies were categorized by the nature of the crime ("minor" and "major") and punitive variables ("certainty" and "severity"), and sampled across over five decades.<sup>87</sup> Of these, minor crimes, administrative offenses, and infringements of informal social norms showed punishment's most significant deterrence effects.<sup>88</sup> "Major" crimes, such as homicide, particularly concerning the death penalty, showed that punishment had few to no substantial deterrent effects.<sup>89</sup> The meta-analysis showed "certainty" to have more promise than "severity" as a deterrent consideration.<sup>90</sup> Of the publications incorporated into the meta-analysis, studies investigating the former had 83% of authors conclude the deterrence hypothesis has merit, as opposed to studies investigating the latter, where 57% of authors concluded it has merit.<sup>91</sup> Although it is likely the most comprehensive study available, the meta-analysis concluded that it is nonetheless incomplete; a highly differential model—one that takes stock of the many and multi-layered variables radically affecting empirical results—and more research are necessary to assess deterrence policy and outcomes adequately.<sup>92</sup>

## 2. Specific, General, and Deadly Deterrence

Though many unknowns plague deterrence research, there is at least one constant: Certainty is a more potent deterrent than severity.<sup>93</sup> Although severity-focused deterrence proponents have supposedly found success before,<sup>94</sup> this is ironic, as criminologists once believed it to be the key to deterrence: "[T]he more severe the consequence for law-breaking, the less

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83. In other words, it is likely that deterrence exists, but unlikely that its implemented influence is especially meaningful. *See id.* at 221–23.

84. *Id.*

85. *Id.*

86. *Id.* at 201–02, 223.

87. *Id.* at 201–06.

88. *Id.* at 201–02, 215.

89. *Id.* at 201–02, 219–20. *See also* text *infra* Subsubsections II.B.ii–iii (discussing death as a deterrent and conducting a brief comparative analysis).

90. Dölling, *supra* note 82 at 201–02, 221–23.

91. *Id.* at 221.

92. *Id.* at 222–23. This conclusion is shared by other authors writing on the modern state of deterrence theory. *See, e.g.,* Tomlinson, *supra* note 77, at 37 (concluding with a subtle critique of traditional deterrence theory and emphasizing the need for a reconceptualization that acknowledges crime, punishment, and deterrence's complex relationship).

93. *See* Dölling, *supra* note 82, at 201–02, 221–23; Tomlinson, *supra* note 77, at 33–36.

94. Specifically, I am referring to Singapore. For a brief discussion of this, *see infra* Subsection II.B.iii.

likely an individual is to commit a crime.”<sup>95</sup> Despite this past amenability to punitive practice, severity-informed policy typically failed to deliver satisfactory results or be corroborated by empirical tests.<sup>96</sup> Specifically, severity has been rendered questionable for its *specific* deterrent effects, while its exact *general* deterrent effects remain unknown.<sup>97</sup> Research demonstrated that offenders punished more severely engaged in more crime upon release; the explanation hypothesized was that particularly severe punishment or lengthy incarceration periods weakened social bonds and created a chain reaction of socioeconomic troubles, informal considerations perhaps more important to crime deterrence.<sup>98</sup>

Although empirical evidence surrounding certainty’s efficacy varies—and, indeed, it is a fact that studies’ results will wildly differ depending on the research method, author, and how he or she considers the many multi-faceted factors at play<sup>99</sup>—certainty is best observed as a *general* deterrent, opposed to a *specific* deterrent.<sup>100</sup> This observation is corroborated by three others: The observations that (1) a primary function of law is to reflect morality, working as a mode of informal social control—previous offenders, by nature, have already demonstrated disagreement or apathy toward these morals; (2) crime can deter some people more successfully than others—previous offenders necessarily have shown an inability to be deterred on at least one prior occasion; (3) the certainty of punishment may primarily deter those with “higher-risk-sensitivity” and fail to deter those with “lower-risk-sensitivity”—previously committing an offense is likely correlated with a lower sensitivity to risk.<sup>101</sup> These observations show certainty’s merit as a general deterrent but can also suggest its shortcomings. Specifically, its shortcomings in deterring certain crimes: “[E]xpressive crimes’ such as drug use, murder, or sex offenses are less deterred when compared to ‘instrumental crimes’ or economic crimes.”<sup>102</sup> One

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95. Tomlinson, *supra* note 77, at 34.

96. *Id.*

97. *Id.*

98. *Id.* (“[R]esearch showed that people who had been punished more severely actually engaged in more crime; this could be due to the punishment creating a chain reaction of other events which reduce individuals’ opportunities for conventional behavior (e.g., stable employment, close family ties) and weakening of social bonds.”) (citing Anne L. Schneider & Laurie Ervin, *Specific Deterrence, Rational Choice, and Decision Heuristics: Applications in Juvenile Justice*, 71 SOC. SCI. Q. 585 (1990)).

99. See sources cited *supra* note 92 and accompanying text.

100. See Tomlinson, *supra* note 77, at 35–36 (“Some studies indicate perceived certainty of sanction threats has very little effect on re-offense rates, whereas other research claims it does have an effect on some people but not others.”) (citations omitted).

101. *Id.*

102. *Id.* at 35 (citing William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703). See also Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41(3) AM. SOC. REV. 442 (1976) (cited by Tomlinson, *supra* note 77, at 35 for finding “that certainty of punishment was differentially affected by the type of crime committed”); Michael Geerken & Walter R. Gove, *Deterrence, Overload and Incapacitation: An Empirical Evaluation*, 56 SOC. FORCES 424, 426 (1977) (showing similar findings). In respect to certainty, the introduction

can infer how particularly severe offenses might require a strong renunciation of morals and a lower sensitivity to risk, contributing to weaker deterrent effects.

In many ways, contemporary standard deterrence consensuses—although not unanimous and admittedly ambiguous in crucial respects—vindicate Beccaria’s assumptions, opinions, and writings. On punishment, utilitarianism, and deterrence, erring on the side of leniency was his focal policy consideration.<sup>103</sup> For several reasons, he was particularly critical of policy with too great of a focus on severity, as opposed to certainty.<sup>104</sup> The available literature corroborates his skepticism,<sup>105</sup> and the Supreme Court has echoed some of his arguments.<sup>106</sup> The Department of Justice reported the same conclusion: “The certainty of being caught is a vastly more powerful deterrent than the [severity]. Increasing the severity of punishment does little to deter crime.”<sup>107</sup> In all respects, the death penalty is a severe, if not the most severe, punishment. Legitimate concerns about the futility of severity upset capital

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of closed-circuit television (CCTV) surveillance moderation in private establishments and public settings is a fascinating development for the deterrent hypothesis. CCTV systems have proven particularly effective in deterring auto theft. See Eric L. Piza, *The Crime Prevention Effect of CCTV in Public Places: A Propensity Score Analysis*, 41 J. CRIME & JUST. 14 (2018); Joel M. Caplan et al., *Police-monitored CCTV Cameras in Newark, NJ: A Quasi-experimental Test of Crime Deterrence*, 7 J. EXP. CRIMINOLOGY 255 (2011). Although car parks curiously boast the best outcomes, overall deterrent outcomes are primarily modest. See Brandon C. Welsh et al., *Public Area CCTV and Crime Prevention: An Updated Systematic Review and Meta-Analysis*, 26 JUST. Q. 716 (2009). In general, the efficacy of CCTV surveillance largely depends on the culture, country, and context of implementation. See Amanda L. Thomas et al., *The Internationalization of CCTV Surveillance: Effects on Crime and Implications for Emerging Technologies*, 46 INT’L J. COMPAR. & APPLIED CRIM. JUST. 81, 102 (2021). For example, street-level violent crime may not benefit from CCTV deterrence as an exclusive tactic. See Piza, *supra*, at 14.

103. See BECCARIA, *supra* note 28 (arguing severity must be justified by its service for the common good, and arguing punishment should only be “[absolutely] necessary [and] the minimum possible in the given circumstances . . .”).

104. Beccaria argued severity may (1) create a perverse incentive to commit additional, perhaps worse crimes to avoid apprehension, (2) lead to reduced enforcement of the law out of discomfort for bringing about sentences unfairly harsh, and (3) would eventually see diminishing returns as a deterrent, hypothesizing that people would become accustomed and desensitized to harsh punishment. In many respects, he believed it would compromise interests surrounding certainty. See *id.* at 50–51.

105. Both meta-studies I cited in this note and the bulk of literature cited therein observe certainty to be of greater importance than severity. See generally Dölling, *supra* note 82; Tomlinson, *supra* note 77.

106. See, e.g. Kennedy v. Louisiana, 554 U.S. 407, 445 (2008) (“[T]he victim and the victim’s family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting . . . [D]eath may remove a strong incentive for the rapist not to kill the victim.”).

107. NAT’L INST. JUST., FIVE THINGS ABOUT DETERRENCE 1–2 (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> (citations omitted). Note, however, that this report “do[es] not necessarily reflect the official position or policies of the U.S. Department of Justice.” *Id.* (emphasis added).

punishment's chief gimmick: "the ultimate punishment."<sup>108</sup> If we reserve death for the "ultimate crimes"<sup>109</sup>—and indeed, there are cognizable deterrence interests in doing so<sup>110</sup>—death's deterrent qualities become further elusive: The more "severe," "expressive" offenses in the death penalty's province are seemingly more difficult to deter.<sup>111</sup>

Although the available data is incomplete, it is clear that the death penalty's American implementation presently—and historically—has appeared to serve as no meaningful deterrent to crime.<sup>112</sup> Capital punishment is a practice observed throughout American history, from the colonial era to independence and up until the modern day.<sup>113</sup> Throughout this time, American criminologists have pondered if the death penalty would serve as a deterrent to crime. Nonetheless, studies in the 18th, 19th, 20th, and 21st centuries have all failed to show that capital punishment—as implemented—meaningfully deters crime in the United States.<sup>114</sup> Ironically, states that do practice capital punishment, on average, have higher homicide rates than those that do not.<sup>115</sup> So, is the science settled? Must it be that the death penalty cannot uniquely serve as a deterrent to crime?

### 3. Analysis and Comparative Review

Not necessarily; this would be a fallacious conclusion to draw. A critical difference exists between hypothetical policy and policy implemented in

108. See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662–69 (1986) (arguing that death's existence as "the ultimate punishment" renders it the only fitting retribution for heinous murders).

109. See *Kennedy*, 554 U.S. at 407 (holding capital punishment is not available for non-homicide offenses, including child rape); *Newlon v. Missouri*, 459 U.S. 884, 891 n.4 (1982) (mem.) (Marshall, J., dissenting) (quoting the prosecutor, who argued: "If somebody is guilty of capital murder, the ultimate crime, why should they get anything other than death?" (alteration in original)).

110. See, e.g., sources cited *supra* notes 104, 106 and accompanying text.

111. See sources cited *supra* note 102 and accompanying text.

112. See sources cited *infra* notes 113–15 and accompanying text.

113. See generally BRYAN VILA & CYNTHIA MORRIS, *CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY* (1998) (recounting the death penalty's historical framework in the United States in time periods: Colonial Era to Independence, years 1800–1917, 1918–59, 1960–76, and 1977–89).

114. See *Furman v. Georgia*, 408 U.S. 238, 354 (1972) (Marshall, J., concurring) ("In 1793 William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect but that more evidence was needed. Edward Livingston reached a similar conclusion with respect to deterrence in 1833 upon completion of his study for Louisiana. Virtually every study that has since been undertaken has reached the same result." (citations omitted)); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 217–20 (2013).

115. *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states> [<https://perma.cc/97AY-JBXX>]. This need not suggest that capital punishment *increases* the homicide rate, however, proponents of the "brutalization hypothesis"—that capital punishment normalizes the killing of adversaries—may subscribe to such an interpretation. See generally William Bowers & Glenn Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 1980 CRIME & DELINQUENCY 453.

practice. Indeed, attempts to develop a working formula have failed, but this does not mean one does not exist. Still, many American and international abolitionists seem to suggest or proclaim that the death penalty cannot serve as a unique crime deterrent.<sup>116</sup> Some suggest this may be a widespread consensus; indeed, the Equal Justice Institute has argued that “[d]eclining use of the death penalty stems in part from a growing recognition that it is a failed [deterrent] policy.”<sup>117</sup> Perhaps of relevant note is the size and influence of abolitionist groups. The Equal Justice Institute’s funding and assets are one-hundred times greater than the most prominent pro-death penalty American entity.<sup>118</sup> More brazenly, Amnesty International boasted that this is a “FACT. Evidence from around the world has *shown* that the death penalty has no unique deterrent effect on crime.”<sup>119</sup> Amnesty International reports holding more than fifty-million pounds in total assets.<sup>120</sup> Encouraging then-President Biden’s eventually performed clemency grants, Human Rights Watch wrote to the President: “Numerous studies have consistently *established* that the death penalty does not deter crime or make communities safer.”<sup>121</sup> The nonprofit generates more than eighty-million dollars in income and owns more than two-hundred-million in assets.<sup>122</sup>

I do not make this observation to suggest these groups hold poor intentions or are conspiring to disseminate disinformation. Rather, I raise it to highlight their breadth and influence on public policy: “There are two things that are important in politics. The first is money, and I can’t remember what the second

116. See, e.g., sources cited *infra* notes 119, 121, 124.

117. *Racial Disparities are Increasing as the Death Penalty Declines*, EQUAL JUST. INITIATIVE (Dec. 6, 2019), <https://eji.org/news/racial-disparities-are-increasing-as-the-death-penalty-declines/> [https://perma.cc/9NWD-297L] (quoting Liliana Segura & Jordan Smith, *Counting the Condemned*, THE INTERCEPT (Dec. 3, 2019), <https://theintercept.com/2019/12/03/death-penalty-capital-punishment-data/> [https://perma.cc/U5B5-2VEL]).

118. See Lerner, *supra* note 8, at 70. *Compare Equal Justice Initiative*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/631135091/202200109349300935/full> [https://perma.cc/239F-UM2J] (declaring \$293,662,827 in total assets in 2020), with *Criminal Justice Legal Foundation*, PROPUBLICA, [https://projects.propublica.org/nonprofits/display\\_990/942798865/download990pdf\\_03\\_2022\\_prefixes\\_86-95%2F942798865\\_202107\\_990\\_2022030219676440](https://projects.propublica.org/nonprofits/display_990/942798865/download990pdf_03_2022_prefixes_86-95%2F942798865_202107_990_2022030219676440) [https://perma.cc/86JN-HAMA] (declaring \$2,294,749 in total assets in 2020).

119. *Does the Death Penalty Deter Crime?: Getting the Facts Straight*, AMNESTY INT’L (June 2021), <https://www.amnesty.org/en/wp-content/uploads/2021/06/act500062008en.pdf> [https://perma.cc/F7CU-P7LA] (emphasis added).

120. *Report and Financial Statements for the Year Ended 31 December 2021*, AMNESTY INT’L at 14, 31, 57–58 (Jan. 2023), <https://www.amnesty.org/en/wp-content/uploads/2023/01/FIN4063852022ENGLISH.pdf> [https://perma.cc/AY5W-FDW8].

121. *Human Rights Watch Urges President Biden to Commute Federal Death Row*, HUM. RTS. WATCH (Dec. 9, 2024, 10:23 AM), <https://www.hrw.org/news/2024/12/09/human-rights-watch-urges-president-biden-commute-federal-death-row> [https://perma.cc/ZZ9V-LAUJ] (emphasis added) (citing *Deterrence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/deterrence> [https://perma.cc/S834-HPYF]).

122. *Charity Review: Human Rights Watch*, GIVE.ORG, <https://give.org/charity-reviews/civil-rights/human-rights-watch-in-new-york-ny-3452#> [https://perma.cc/N5A9-YTWD].

one is.”<sup>123</sup> Perhaps academics have informed their primarily pessimistic opinions on the available data, or lack thereof.<sup>124</sup> If the public holds defeatist attitudes toward the death penalty’s deterrent qualities,<sup>125</sup> it would be unsurprising why this is. It is perplexing, however, that the public’s persistence in retaining capital punishment nonetheless.<sup>126</sup> It is equally perplexing how pushes for “top-down” policy reform (i.e., elite-declared abolition maneuvers made notwithstanding popular opinion) appear to be the most promising and straightforward abolition approach.<sup>127</sup> Still, were the death penalty without deterrence utility, it would require a particularly fierce retributive instinct for the public to retain it with such adamance.<sup>128</sup>

The rhetoric of Amnesty International and like-minded peers would suggest that there is evidence that unequivocally and empirically shows the death penalty’s inability to deter crime. Justice Thurgood Marshall shared a similar sentiment, writing that “[i]n light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.”<sup>129</sup> However, as it stands, no published studies *actively* boast empirics persuasive enough to render this insinuation invariably tenable. Although authors of some deterrence studies have opined that the death penalty does not deter crime, their conclusions are

123. Emily J. Charnock et al., *Money and the Financing of Campaigns*, CIV. POL., <https://www.civilpolitics.org/money-and-financing-campaigns/> [<https://perma.cc/R25C-VQQN>].

124. See generally Michael Radelet & Ronald Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1 (1996) (showing a majority consensus among criminologists that executions do not lower homicide rates).

125. See EQUAL JUST. INITIATIVE, *supra* note 117. Public perception of the death penalty varies greatly depending on the generation and time. Generally, its favorability is declining. See *NEW POLL: Overall Support for the Death Penalty Remains at Five-Decade Low as Opposition to the Death Penalty Grows Among Younger Generations*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/new-poll-overall-support-for-the-death-penalty-remains-at-five-decade-low-as-opposition-to-the-death-penalty-grows-among-younger-generations> [<https://perma.cc/5QDN-H4RM>] (last updated Mar. 14, 2025).

126. See Lerner, *supra* note 8, at 70.

127. See *id.* at 63–65. Professor Lerner observed the elite-driven abolition approach in Western Europe, quoting the forthright German Justice Dreher: “‘I say in all clarity: I do not care about the ‘people’s conviction’, that is, the opinion of the man on the street.’ . . . [P]olls suggested that seventy-four percent of Germans supported capital punishment . . . . Dehler discounted these polls, observing that those who favored the death penalty did so because of “genetically inherited” dispositions. Likewise, in France, several politicians outspokenly promoted the abolitionist cause, despite the absence of any popular support, and they prevailed . . . .” Professor Lerner compared this to the popular American opinion on same-sex marriage, which was unpopular initially, but suddenly became widely accepted after *Obergefell v. Hodges*, 576 U.S. 644 (2015): “[T]he legalization of same-sex marriage suggests a plan for the gradual—and then sudden—abolition of capital punishment.” *Id.*

128. Professor Lerner’ concluded that the death penalty’s “puzzling persistence” is because of this strong, naturally held retributive instinct. See *id.* at 39–40, 84–85.

129. *Furman v. Georgia*, 408 U.S. 238, 354 (1972) (Marshall, J., concurring). Justice Marshall arrived at this conclusion despite agreeing that “convicted criminals fear death more than they fear life imprisonment.” *Id.* at n.125. This issue is considered *infra*, Subsection III.A.

persuasive at best and certainly not an infallible authority. Indeed, these studies are subject to the same biases that seemingly trouble all deterrence literature.<sup>130</sup> Instead, the weight of the evidence mutually demonstrates an *omission* of evidence in support of the deterrence hypothesis.<sup>131</sup> There is a meaningful difference between irrefutable evidence (evidence *actively* shown) and refutable evidence (evidence *suggestively* shown). A dearth of evidence for the deterrence hypothesis is not an active showing of its impossibility or nonexistence.

In the preceding subsection, I asserted that the death penalty's *American implementation* presently *appears* to serve as no *meaningful* deterrent to crime. This assertion does not contradict the position that capital punishment can function as a crime deterrent. It should highlight the death penalty's curious potential. Some argue that "the presence or absence of a deterrent effect of the death penalty is [un]likely to be demonstrable by statistical means," leaving supporting deterrence arguments or countervailing objections grounded in uncertainty.<sup>132</sup> The omission of evidence suggestively shows this assertion's truth. Many multi-layered factors frustrate deterrence research as is,<sup>133</sup> but macro-level statistical data cannot capture an individual's internal dialogue or subconscious underpinnings—informing his or her decision to offend or not. Moreover, as previously mentioned, the crime's death is an available penalty for are seemingly more difficult to deter.<sup>134</sup> This interference complicates the search for deterrence evidence as well. Indeed, the *relationship* between the offender and punishment escapes empirics. However, particular *outcomes* are measurable to varying extents. If capital punishment in the United States were successfully implemented as a deterrent, it could be that its individual victories and precise scope would be unknown. Yet one could be all but sure that we would see different outcomes than we presently do; the outcomes today cannot suggest a working formula.<sup>135</sup>

In theorizing how the death penalty may be reworked or optimized as a deterrent, at least two elements would be conducive to examine. The first element is this aforementioned relationship between death and man. This is explored in Subsection III.A. The second element to look to are comparative outcomes. We have reviewed American and global outcomes to a general extent, but an international, comparative approach would be conducive to our analysis. Indeed, it is helpful in many respects but flawed in others. It is essential to heed caution when proclaiming a policy's successes or failures,

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130. See Tomlinson, *supra* note 77, at 37; Dölling, *supra* note 82, at 201–02, 221–23.

131. See Tomlinson, *supra* note 77, at 37; Dölling, *supra* note 82, at 201–02, 221–23; NAT'L INST. JUST., *supra* note 107; sources cited *supra* note 114 and accompanying text.

132. Ernest van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 141, 146 (1969). Rather, Professor Ernest van den Haag instead informed his argument—that the death penalty is a unique deterrent—on the basis of human psychology and common sense. See generally *id.*

133. See Tomlinson, *supra* note 77, at 37; Dölling, *supra* note 82, at 201–02, 221–23.

134. See Tomlinson, *supra* note 77, at 35–36 (citing Chambliss; Silberman; Geerken & Gove, *supra* note 102).

135. See sources cited *supra* notes 113–15 and accompanying text.

especially when concluding upon wholly correlative evidence. This difficulty is our first of note: lower crime rates do not necessarily prove the efficacy of deterrence policy. Inversely, higher crime rates do not necessarily disprove the efficacy of deterrence policy. The fact renders the overly confident, seemingly popular conclusion that capital punishment *cannot* deter crime particularly concerning.<sup>136</sup> A correlation, however, can be a persuasive argument for causation. Moreover, without any correlation, there cannot be causation. In other words, a correlation is necessary but insufficient for a causation showing. Concerning these considerations, looking elsewhere to outcomes and policy can be persuasive in showing the death penalty's deterrent potential or at least a starting point.

An additional difficulty in conducting a comparative analysis is finding a retentionist country sufficiently analogous for comparison. From a researcher's perspective, the sample size is small: Eighty-eight of countries around the world are retentionist, but in differing capacities.<sup>137</sup> Of these, nine are "abolitionist for ordinary crimes," and twenty-three are "abolitionist in practice."<sup>138</sup> Subtracting these leaves fifty-six "retentionist" countries, including the United States.<sup>139</sup> Although fifty-five countries are technically useable for comparison, few are particularly useful. Socioeconomic factors are observed and hypothesized to be one of, if not the most critical pieces in the deterrence and crime control puzzle.<sup>140</sup>

Therefore, comparing the United States with a country whose citizens live under relatively similar socioeconomic conditions would be ideal. Admittedly, general indexes are imperfect metrics for socioeconomic health. Still, the most

136. See, e.g., Radelet & Akers, *supra* note 124.

137. AMNESTY INT'L, *supra* note 29. The word "countries" is loosely used above, and by the original source. It includes certain boundaries or jurisdictions in dispute at "countries."

138. "Abolitionist for ordinary crimes" refers to countries that "retain[] the death penalty only for serious crimes, such as those committed during times of war." "Abolitionist in practice" refers to states that "retain[] the death penalty in law, but ha[ve]n't executed for at least [ten] years." The United States is not included in either of these groups but categorized as "retentionist." *Id.* Considering that the United States, for example, generally forbids capital punishment for non-homicidal crimes (See, e.g., Kennedy v. Louisiana, 554 U.S. 407) (2008)) homicide is categorized by this metric as an "ordinary crime." Some American states would be categorized as wholly abolitionist or abolitionist in practice if individually placed into these categorizations. See generally *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-landing> [https://perma.cc/8QLG-KJSQ]; *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/database/executions> [https://perma.cc/FX5E-XSP7]. This method of classification places the United States in the same category as, for example, Singapore, India, and Japan, but also China, Libya, Iran, North Korea, and the Hamas-governed Gaza Strip. See AMNESTY INT'L, *supra* note 29. Russia is classified as "abolitionist in practice." *Id.* This is done "apparently on the premise that as long as enemies of the state are pushed out of windows without trial, the prohibition against capital punishment has been observed." Lerner, *supra* note 8 at 55 (citing Elaine Godfrey, *Sudden Russian Death Syndrome*, THE ATLANTIC (Dec. 29, 2022), <https://www.theatlantic.com/ideas/archive/2022/12/russian-tycoon-pavel-antov-dies-putinukraine/672601/> [https://perma.cc/5PYY-WEP6]).

139. But see sources cited *supra* notes 137–38 and accompanying text.

140. See Tomlinson, *supra* note 77, at 34 (citing Schneider & Ervin, *supra* note 98).



recent Human Development Index (HDI) shows all but two retentionist countries score lower than the United States (rank 20): Singapore (rank 9) and the United Arab Emirates (rank 17).<sup>141</sup> The vast majority of retentionist countries are below America's peer group ("very high human development"), many of which rank among the lowest groups.<sup>142</sup>

Reporting issues further constrain our sample size. China, for instance, could be a wealth of data given its great population size. However, its government is particularly elusive with its execution statistics.<sup>143</sup> Religion and culture may also complicate comparisons if we aim to discover policy implications. For example, the vast majority of the Islamic world is retentionist, and just two Muslim countries (Iran and Saudi Arabia) carried out eighty-nine percent of the world's reported executions.<sup>144</sup> However, Islamic countries justify punishment with radically different considerations than other lawmakers, criminologists, or penologists.<sup>145</sup> Although we need not wholly preclude the influence of "secular" retributive or utilitarian considerations,<sup>146</sup> it is unlikely

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141. Compare AMNESTY INT'L, *supra* note 29 with UN. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2023/2024 at 274–77 (2024), <https://report.hdr.undp.org/> [<https://perma.cc/9MQF-689U>]. For context, the aforementioned three countries (Singapore, the United Arab Emirates, and the United States) are "very high human development" retentionist countries. Others include Japan (rank 24), Saudi Arabia (rank 40), and Belarus (rank 69, albeit by a 0.002 margin). *Id.* at 274. Some "high human development" retentionist countries include China, Iran, Egypt, and Lebanon. *Id.* at 275. Some "medium human development" retentionist countries include Iraq, India, and Zimbabwe. *Id.* at 275–76. Some "low human development" retentionist countries include Nigeria, the Congo, Yemen, and Somalia, while North Korea is unranked. *Id.* at 276.

142. See sources cited *supra* note 141 and accompanying text.

143. See AMNESTY INT'L, *supra* note 29 (concluding "thousands" of executions are "likely" annually performed). China wholeheartedly declined to alter its death penalty practices pursuant to United Nations recommendations. See THE RTS. PRAC., UN UNIVERSAL PERIODIC REVIEW OF CHINA MID-TERM REPORT 3 (Nov. 2021), [https://www.ohchr.org/sites/default/files/2021-11/TheRightsPractice\\_UPR\\_of\\_China\\_Mid-term\\_Report\\_November2021.pdf](https://www.ohchr.org/sites/default/files/2021-11/TheRightsPractice_UPR_of_China_Mid-term_Report_November2021.pdf) [<https://perma.cc/35W3-C2RH>]. Fascinatingly, China is a signatory to treaties restricting certain punitive tactics. See, e.g. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, No. 24841, 1465 U.N.T.S. 85 (entered into force Jun. 26, 1987). Notable international human rights advocates hold that the death penalty is a cruel, inhuman, or degrading punishment. See, e.g. AMNESTY INT'L, *supra* note 29.

144. There is a degree of subjectivity in regard to which countries are "Islamic." Hereinafter, I refer to "Islamic countries" as those with Islamic law. However, consider that Turkey and Djibouti are abolitionist. AMNESTY INT'L, *supra* note 29. See also Lerner, *supra* note 8, at 60–61.

145. See generally MOHAMAD S. EL-AWA, PUNISHMENT IN ISLAMIC LAW (Am. Trust Pub. 1993) (overviewing the Qur'an (the key religious text of Islam, believed to be the direct, uncorrupted word and commands of God in written prose), hadith literature (purported suggestions made by the Islamic prophet Muhammad), and sunna (traditions and practices the Islamic prophet Muhammad demonstrated that Muslims consider a model to follow), and their intersections with punishment).

146. I use "secular" here to refer to a justification made from moral intuit, opposed to direct, divine commandment. See *Secularism*, BRITANNICA, <https://www.britannica.com/topic/secularism> [<https://perma.cc/Q89K-BDKR>] ("The worldview or political principle that . . . [places] greater emphasis on nonreligious aspects of human life . . . separating religion from the political realm.").

that deterrence interests principally motivate Islamic capital punishment. Instead, it is better explainable as being derived from sharia (Islamic law) and faith; Muslims believe the Qur'an to be the direct, infallible, uncorrupted word of God, and it explicitly promotes—if not commands—the use of death as a punishment.<sup>147</sup> Our vast divide in jurisprudential differences would likely render a comparative policy analysis hapless beyond observing outcomes at the surface level.

Then, is Japan a promising example of a country that implemented a functional death penalty deterrent? Executions are regular in Japan: the typical annual execution rate is approximately three persons, but as many as fifteen sentences are performed annually.<sup>148</sup> Its homicide rate is shockingly low, annually hovering between 0.2 to 0.3 persons per one-hundred-thousand and on a steady decline.<sup>149</sup> Compare this to the United States, with twenty-five executions conducted in 2024,<sup>150</sup> yet a homicide rate that generally hovers between 4.8 to 6.8 persons per one-hundred-thousand.<sup>151</sup> With a homicide rate greater by roughly twenty-fold,<sup>152</sup> Americans would certainly stand to benefit from Japan's crime deterrent secrets—or deterrent death penalty policy—

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Cf. *Naturalism*, BRITANNICA, <https://www.britannica.com/topic/naturalism-philosophy> [<https://perma.cc/B8QD-F6E7>] (“[The] theory that relates scientific method to philosophy by affirming that all beings and events in the universe (whatever their inherent character may be) are natural . . . fall[ing] within the pale of scientific investigation.”).

147. *Qur'an* 5:33 (Sahih Int'l) (“[T]he penalty for those who wage war against Allah and His Messenger and . . . [cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off . . . or that they be exiled . . .”). The law of retaliation (*lex talionis*) is present in the Qur'an. *Qur'an* 5:45 (Sahih Int'l) (“We ordained for them therein a life for a life, an eye for an eye . . . is legal retribution.”). Interpretations of the Qur'an and the Islamic prophet's teachings differ among Muslims. It has been argued that the death penalty—especially as a deterrent—is incompatible with the Islamic faith. See, e.g. Naima Asif, *An Introduction to Sharia Law and the Death Penalty*, OXFORD FAC. L. BLOGS (Jan. 26, 2021), <https://blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2021/01/introduction-sharia-law-and> [<https://perma.cc/Y32S-PGMH>].

148. See *Capital Punishment in Japan*, NIPPON (July 27, 2022), <https://www.nippon.com/en/features/h00239/> [<https://perma.cc/QR8Q-XZUM>] (noting number of executions performed in 2012, 2013, and 2018 were inflated by cultists who organized a deadly gas attack).

149. *Japan Murder/Homicide Rate 1990–2025*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/countries/jpn/japan/murder-homicide-rate> [<https://perma.cc/9S3Q-ZFCD>] (citing and compiling data from *World Development Indicators*, WORLD BANK, <https://datatopics.worldbank.org/world-development-indicators/> [<https://perma.cc/PT4L-MSU9>]).

150. *The Death Penalty in 2024*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2024/executions> [<https://perma.cc/3EQV-JM7F>] (reporting similar figures from 2023).

151. *U.S. Murder/Homicide Rate 1990–2025*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/countries/USA/united-states/murder-homicide-rate> [<https://perma.cc/8HPK-965X>] (citing and compiling data from *World Development Indicators*, WORLD BANK, <https://datatopics.worldbank.org/world-development-indicators/> [<https://perma.cc/4TEN-HYQK>]).

152. Compare sources cited *supra* note 149 with sources cited note 151.

should it have implemented a working formula. Comparing Japanese cities with American examples echoes this exponentially large dissonance; violent and property crimes are mind-bogglingly lower in Japan.<sup>153</sup> However, recall that informal social norms and bonds appear to facilitate some of the observable greatest crime deterrent effects: “[T]he empirical evidence points toward non-legal factors, such as marriage, employment, peers, morality, disapproval from loved ones, ostracism, and shame, having a more significant impact on conformity than do sanction threats.”<sup>154</sup> Yes, Japan is an ardently retentionist society correlatively boasts spectacularly low homicide and crime rates. However, it is also a highly conformist, collectivistic, shame-based society<sup>155</sup>—a stark contrast to the United States’ declared individualistic character.<sup>156</sup> Hong Kong, an abolitionist country,<sup>157</sup> is underscored by social values and crime rates similar to Japan’s.<sup>158</sup> If informal social incentives are a promising crime deterrent in individualistic societies—like the United States and, generally, Europe<sup>159</sup>—it is reasonable to suggest, if not conclude, that collectivistic cultures would dramatically accentuate these crime deterrent outcomes. If American deterrence failures are but for a dearth of ostracism and shame, the extra stock Japanese culture grants these non-legal factors would explain its success. Perhaps one need not be deterred from fear if he or she feels pressure to respect and maintain strict social norms in all facets of life. So, what is the

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153. See Chang Hwee Yin, *Crime in Singapore: A Statistical Comparison with Major Cities*, 17 STAT. SING. NEWSL., (Oct. 1994), <http://www.singstat.gov.sg/pubn/papers/people/crimeinspore.html> [<https://web.archive.org/web/20071225092334/http://www.singstat.gov.sg/pubn/papers/people/crimeinspore.html>].

154. Tomlinson, *supra* note 77, at 37.

155. Marlies de Groot et al., *Group-Based Shame, Guilt, and Regret across Cultures*, 51 EUR. J. OF SOC. PSYCH. 1198, 1201 (2021) (“[S]hame and guilt are encouraged within Japan (and therefore more prominent), because these emotions are in line with the cultural emphasis on maintaining social harmony as they can motivate actions that help repair social relationships.” (citing Kitayama et al., *Cultural Affordances and Emotional Experience: Socially Engaging and Disengaging Emotions in Japan and the United States*, 91J. PERSONALITY & SOC. PSYCH. 890 (2006))).

156. See *id.*; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (highlighting the individual’s central place in American society and governance).

157. AMNESTY INT’L, *supra* note 29.

158. See generally Yin, *supra* note 153 (comparing crime rates in Hong Kong, Singapore, Japanese, and American cities); J.J. WOO, THE EVOLUTION OF THE ASIAN DEVELOPMENTAL STATE HONG KONG AND SINGAPORE (Taylor & Francis, 2018) (exploring political ideology and social values in Hong Kong, Singapore, and East Asia); S. Lau, *Collectivism’s Individualism: Value Preference, Personal Control, and the Desire for Freedom Among Chinese in Mainland China, Hong Kong, and Singapore*, 13 PERSONALITY & INDIVIDUAL DIFFERENCES 361 (1992).

159. See Groot et al., *supra* note 155 (comparing cross-cultural differences among countries); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); 2016 O.J. (L 202) TOC (“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity . . . plac[ing] the individual at the heart of its activities . . .”). See also Dölling et al., *supra* note 82, at 201–02, 215; Tomlinson, *supra* note 77, at 37 (both observing that social incentives are perhaps a more meaningful crime deterrent than punishment, and both analyzing studies that gathered data from Western countries).

more likely story? That Japan has harnessed death as a deterrent, or that its outcomes are a product of culture? If the latter, it would not be ripe for comparison.

Perhaps no country is perfect for a comparative deterrence study. Nonetheless, Singapore appears to offer promise. At a bare minimum, it is a fascinating example of deterrence and sentencing policy.<sup>160</sup> The nature of its history and institutions also render it prime for study. Like the United States, Singapore is a multiracial country built upon common law and a shared British progenitor.<sup>161</sup> It gained independence relatively recently,<sup>162</sup> and was built upon a “blank slate” poor in natural resources.<sup>163</sup> Nonetheless, across a few short decades, it walked an expedited path to prosperity, “from Third World to First.”<sup>164</sup> Fascinatingly, it illiberally centralizes power into a single party and its Prime Minister.<sup>165</sup> The People’s Action Party (PAP) has controlled Singaporean lawmaking throughout its modern history.<sup>166</sup> The party and country’s founding Prime Minister, Lee Kuan Yew, closely observed Singapore’s development for decades.<sup>167</sup> He was known for being particularly blunt with his political beliefs and policy intentions,<sup>168</sup> and the expounded ideology of the PAP reflects his views.<sup>169</sup> Because of these factors, drawing

160. I previously wrote a review of Singaporean sentencing, and will be partially reiterating the arguments, observations, and conclusions I drew hereinafter. Publication is forthcoming but prospective. For more on Singapore and related punitive topics, see Brolin, *supra* note 51.

161. LIBR. OF CONG., SINGAPORE: A COUNTRY STUDY 9, 52–53, 78 (Barbara Leitch LePoer ed., 2d ed. 1991). *See also* The Transfer of Singapore to East India Company Act 1824, 5 Geo. IV c. 108 (Eng.).

162. LEE KUAN YEW, FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY, 1965–2000 3–9 (2000).

163. *Id.* (“We faced tremendous odds with an improbable chance of survival. Singapore was not a natural country but man-made. . .”).

164. *See generally id.*; Zarina Hussain, *How Lee Kuan Yew Engineered Singapore’s Economic Miracle*, BBC NEWS (Mar. 24, 2015), <https://www.bbc.com/news/business-32028693> [<https://perma.cc/9N5B-HTPY>]; Andreas Paleit & Jennifer Hughes, *From Third World to First: Lee Kuan Yew’s Legacy in Charts*, FIN. TIMES (Mar. 23, 2015), <https://www.ft.com/content/f902856e-d126-11e4-86c8-00144feab7de>.

165. Richard John Spencer, *Lee Kuan Yew: A Model for the New Authoritarians or a One-off Genius?*, TELEGRAPH (Mar. 23, 2015, 8:33 AM), <https://www.telegraph.co.uk/news/worldnews/asia/singapore/11489273/Lee-Kuan-Yew-a-model-for-the-New-Authoritarians-or-a-one-off-genius.html>; HUSSIN MUTALIB, PARTIES AND POLITICS: A STUDY OF OPPOSITION PARTIES AND THE PAP IN SINGAPORE 20 (2004).

166. *See* sources cited, *supra* note 165.

167. YEW, *supra* note 162, at 644–53 (recounting his tenure as Prime Minister and involvement in politics).

168. *See, e.g.*, Sing. Ministry of Foreign Affs., *The Statesman Who Talked Tough* (Mar. 24, 2015), <https://www.mfa.gov.sg/Overseas-Mission/Abu-Dhabi/Mission-Updates/2015/03/the-statesman-who-talked-tough-> [<https://perma.cc/W9B6-MFW2>].

169. *Compare Shared Values Should Help Us Develop a Singaporean Identity*, STRAITS TIMES, Jan. 16, 1991, at 16, <https://eresources.nlb.gov.sg/newspapers/digitised/article/straitstimes19910106-1.2.21.8>, with LEE KUAN YEW, THE WIT & WISDOM OF LEE KUAN YEW 140 (Douglas Amrine & Lindsay Davis eds., 2013).

casual links between policy and outcomes—particularly the death penalty and deterrence—is far less tenuous. Singapore has achieved its desired success,<sup>170</sup> and it correlates with policy explicitly designed and implemented to accomplish these precise outcomes.<sup>171</sup> Unlike some retentionist countries aforementioned, Singapore is forward with its execution figures,<sup>172</sup> justifies capital punishment with normative arguments,<sup>173</sup> and although it exhibits communitarian values similar to Japan,<sup>174</sup> it does share notable social, historical, legal, and cultural similarities with the United States.<sup>175</sup>

Although Lee Kuan Yew claims to oppose any particular “ideology,” he developed Singapore with a strictly pragmatic form of consequentialism: Policy that reflects whatever works in practice.<sup>176</sup> He developed this approach living under Japanese occupation, which gave him “vivid insight into the behaviour of human beings and human society, their motivations and impulses.”<sup>177</sup> He became an adamant believer in severe criminal punishment and swore by its deterrent effects:

The Japanese Military Administration governed by spreading fear. It put up no pretence of civilised behaviour. Punishment was so severe that crime was very rare. . . . [I]t was amazing how low the crime rate remained. . . . As a result I have never believed those who advocate a soft approach to crime and punishment, claiming that punishment does not reduce crime. That was not my experience in Singapore before the war, during the Japanese occupation or subsequently.<sup>178</sup>

Pursuantly, deterrence influences much of Singaporean law, policy, and practice. For example, it promotes certainty through a comprehensive system of CCTV moderation, which will soon increase to two-hundred-thousand cameras across the tiny city-state.<sup>179</sup> It promotes severity through corporal

170. See sources cited *supra* note 164.

171. *Id.*

172. Samuel Devaraj, *11 Judicial Executions in 2022; None in Previous Two Years*, STRAITS TIMES (Nov. 22, 2024, 04:23 PM), <https://www.straitstimes.com/singapore/courts-crime/11-judicial-executions-in-2022-none-in-previous-two-years> [<https://perma.cc/9QTW-2BKK>].

173. See, e.g., LEE KUAN YEW, *THE SINGAPORE STORY: MEMOIRS OF LEE KUAN YEW* (1998) (suggesting a utilitarian, deterrence-based justification); MustShareNewsSG, *supra* note 57 (suggesting a retributive justification for capital punishment).

174. Differing from Japan, these values were perhaps developed intentionally and are adamantly reinforced by policy. See STRAITS TIMES, *supra* note 168.

175. See LIBR. OF CONG., *supra* note 161 (i.e., Singapore and the United States are English speaking, multiracial, common-law countries, and were formerly British colonies).

176. See generally WOO, *supra* note 158 (explaining Lee Kuan Yew’s rejection of a particular ideology, instead informing his policy on strict pragmatism.); YEW, *supra* note 163 (recounting his approach to policy throughout Singapore’s development and life story).

177. See YEW, *supra* note 173, at 44–83 (1998).

178. *Id.*

179. Domnic Dass, *The Watchful Protectors: Find Out More About the PolCam System and How Assistant Watch Officers Use It to Fight Crime!*, SING. POLICE FORCE (Dec. 12, 2023),

punishment, notably caning: a common criminal sanction for first-time or repeat offenders, discretionary or compulsory for dozens of offenses.<sup>180</sup> Capital punishment is justified on deterrence considerations as well, but not only for homicide; although subject to international controversy, the death penalty is permitted for offenses Singapore classifies as “drug trafficking,” and over eighty percent of Singaporeans believe it works as a deterrent.<sup>181</sup> The death penalty is mandatory for offenders who “traffic” specific drugs into Singapore, but it assumes those merely in *possession* of specific drug quantities—which are exceedingly low—held an intent to traffic and receive a compulsory death sentence.<sup>182</sup> This “zero-tolerance” deterrence policy was implemented amid a heroin epidemic in the 1970s, when over three percent of young Singaporean men were ensnared by addiction.<sup>183</sup> It quashed this heroin crisis shortly after implementing its Misuse of Drugs Act, and Singapore has remained essentially drug-free to this day.<sup>184</sup>

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<https://www.police.gov.sg/Media-Room/Police-Life/2023/12/The-Watchful-Protectors> [https://perma.cc/5DVF-4F6M].

180. See, e.g., Vandalism Act 1966, § 3 (Sing.) (punishing vandalism with at least three and no more than eight strokes); Dangerous Fireworks Act, §§ 4, 6 (Sing.) (punishing offenses related to fireworks with at least one and no more than six strokes); Immigration Act 1959, §§ 6, 11A, 15, 57(c), (e) (punishing various immigration offenses with at least three and no more than twenty-four strokes); Penal Code 1871 (Sing.) (outlining various offenses that carry a mandatory or discretionary punishment of caning, including robbery (§§ 392, 394–97), rape (§§ 375–76), attempted murder (§ 307), manslaughter (§§ 299, 304), and many others). Singaporean lawmakers are adamant about preserving their caning practice. See *Singapore Parliamentary Debates, Official Report*, vol. 20, cols. 291–305 (Aug. 26, 1966) (Lee Kuan Yew) (In support of the Vandalism Act 1966, § 3 (Sing.) Lee Kuan Yew argued vandals would be deterred by caning, stating: “know[ing] he is going to get three of the best, I think he will lose a great deal of enthusiasm, because there is little glory attached to the rather humiliating experience of having to be caned.”); *Conversation with LKY (CCTV) Part 1/2 (June 2004)*, YOUTUBE, at 20:00 (Oct. 7, 2011), <https://www.youtube.com/watch?v=evs9Qxwwhwh> [https://perma.cc/HX5A-S6G4] (Lee Kuan Yew also argued caning is a better specific deterrent than prison: “[If] you put a person in a prison, it makes no difference. He will not change. . . . But if you cane him, and he knows he will be given six of the best on his buttocks, and it will hurt for one week that he can’t sit down comfortably, he will think again.”); *We Posed the Same Questions to Two Singapore Democratic Alliance Candidates*, THE NEW PAPER, Apr. 12, 2006. (arguing that “caning serves as a deterrent . . . I would not change a winning formula”).

181. Anu Lall, *Singapore’s Zero Tolerance for Drugs and Its Traffickers*, THE DAILY GUARDIAN (Apr. 27, 2023, 11:14 PM), <https://theguardian.com/singapore-zero-tolerance-for-drugs-and-its-traffickers/> [https://perma.cc/2RTN-YQLW] (quoting the Ministry of Home Affairs, who described the punishment as a “serious deterrent,” and citing a recent survey that suggests 83.2% of Singaporeans believe the death penalty deters drug trafficking).

182. See Misuse of Drugs Act 1973, §§ 2, 17, 33(1),(3), 33(3B), 33(4D), 33B(1) (Sing.) (prescribing, for example, that offenders in possession of fifteen grams (0.07 pounds) of cannabis will be assumed to have an intent to traffic, and if in possession of five-hundred grams (1.1 pounds), receive a mandatory death sentence).

183. W.H. MCGLOTHLIN, THE SINGAPORE HEROIN CONTROL PROGRAMME, UNODC 1–13 (Jan. 1, 1980), [https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1980-01-01\\_1\\_page002.html](https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1980-01-01_1_page002.html) [https://perma.cc/T7QA-XTQ7].

184. See *id.*; CENT. NARCOTICS BUREAU, *supra* note 31, at 68.

Singapore regularly performs executions; it holds the highest per-capita rate of executions in the world.<sup>185</sup> In 2022, Singapore dispatched eleven executions, most of which were for drug offenses.<sup>186</sup> It has executed over sixty people since 2007,<sup>187</sup> and upwards of four-hundred people between the years 2004 and 1991.<sup>188</sup> Despite its population of roughly five and a half million people<sup>189</sup>—an exponentially smaller population than the United States—the two countries annually execute a similar number of people.<sup>190</sup>

Yet Singapore's crime rate is tremendously low: It is regarded as one of the world's safest cities<sup>191</sup> and has received accolades as the safest country worldwide.<sup>192</sup> Figures show that its crime rate is lower than, for example, the also-low crime rates in Japanese cities like Osaka and Tokyo, and over ten times less than Philadelphia's crime rate.<sup>193</sup> The supermajority of crimes that do occur are non-violent offenses, but these, too, are exceptionally rare.<sup>194</sup> In 2021, its homicide rate was 0.1 per one-hundred-thousand people.<sup>195</sup> Its already low crime rate has consistently been on the decline.<sup>196</sup>

Evidence for the death penalty's deterrent effects remains uncertain,<sup>197</sup> but Singapore sheds valuable insight on the question. The exact extent to which

185. AMNESTY INT'L, SINGAPORE: THE DEATH PENALTY: A HIDDEN TOLL OF EXECUTIONS at § 5 (2004).

186. Devaraj, *supra* note 172.

187. *Id.*

188. AMNESTY INT'L, *supra* note 185, at § 8.2.

189. Although a minority, this includes foreign nationals within Singaporean borders. SING. DEP'T STATISTICS ET AL., POPULATION IN BRIEF 2022 5–6, <https://www.strategygroup.gov.sg/files/media-centre/publications/population-in-brief-2022.pdf>. A sizable number of Singapore's executions are foreign nationals. See Carolyn Hoyle & Jocelyn Hutton, *National Sovereignty Versus Universal Human Rights: Drugs and the Mandatory Death Penalty in Singapore*, 2024 AMICUS J. 37, 39 (“48 percent of the executions in Singapore during the five years between 2016 and 2021 were of foreigners, 67 percent of them for drug offenses.”).

190. Compare, e.g., Devaraj, *supra* note 183 with TRACY L. SNELL, CAPITAL PUNISHMENT, 2021 – STATISTICAL TABLES, (Nov. 2023), <https://bjs.ojp.gov/document/cp21st.pdf>.

191. See THE ECONOMIST INTEL. UNIT, SAFE CITIES INDEX 2021 at 1–3, 11–12, <https://impact.economist.com/projects/safe-cities/safe-cities-2021-whitepaper/> (ranking Singapore as the world's third “safest” city, formerly the second, but basing its holistic ranking on considerations of digital health, infrastructure, personal security, environmental security, and partially, crime).

192. See GALLUP, GLOBAL LAW AND ORDER 3 (2022), [https://www.gallup.com/file/analytics/403964/2022\\_Global\\_Law\\_and\\_Order\\_Report](https://www.gallup.com/file/analytics/403964/2022_Global_Law_and_Order_Report).

193. Yin, *supra* note 153.

194. *Id.* See also Uptin Saiidi, *Singapore's Crime Rate Is So Low That Many Shops Don't Even Lock Up*, CNBC (Jan. 16, 2018), <https://www.cnbc.com/2018/01/16/singapores-crime-rate-is-so-low-that-many-shops-dont-even-lock-up.html>.

195. *Singapore Crime Rate & Statistics 1990–2024*, MACROTRENDS (last accessed Jan. 17, 2025), <https://www.macrotrends.net/global-metrics/countries/sgp/singapore/crime-rate-statistics> (citing and compiling data from *World Development Indicators*, WORLD BANK, <https://datatopics.worldbank.org/world-development-indicators/>).

196. *Id.*

197. See sources cited *supra* notes 75–115 and accompanying text.

capital punishment drives Singapore's persuasive outcomes is unknown. However, at the very least, it suggests there may be potential deterrence value in an uncompromising yet carefully crafted policy scheme that takes stock of severity and certainty. In particular, Singapore's successful use of the death penalty with mandatory minimums and non-homicide offenses—both practices deemed unconstitutional by the United States<sup>198</sup>—creates some incentive to reinvestigate our capital punishment jurisprudence. Of course, Singapore's high-conformity, collectivist culture may amplify its crime-deterrent outcomes.<sup>199</sup> American law and culture foundationally differ concerning their individualistic focus.<sup>200</sup> Nonetheless, if we are to rework and optimize death as a deterrent, taking stock of Singapore's model and successes does shed light on where to look. Given that Lee Kuan Yew informed his pragmatic approach to the realities of human nature, motivations, instinct, and society,<sup>201</sup> taking a deeper probe into these facets would be our starting point.

## II. REWORKING DEATH AS A DETERRENT

### A. *Dissecting Death: Where Does Wisdom Come From?*

It is challenging to describe what makes death “unique.” To some degree, death is idiosyncratically perceived across individuals, cultures, and faiths.<sup>202</sup> Yet all conceptions of death are underscored by a common denominator: actual ignorance. Although different in degree, one could reasonably say that both naturalistic and Judeo-Christian perspectives concede this futility. Human understanding is inherently limited to existence; without divine wisdom, we cannot grasp nonexistence: “Death and destruction say, ‘Only a rumor of [wisdom] has reached our ears.’”<sup>203</sup> In other words, humans cannot find divine wisdom within the mortal coil. It is not visible above the highest clouds, nor beneath Earth's deepest depths, nor sequestered in any of its corners. Only God knows where wisdom comes from: the same Lord who created life and appraised goodness holds all existential answers in his exclusive province. Death is life's foil and would be the sole avenue for humans to meet their Maker. It would be the next closest place to find wisdom. Still, death is intimidating, irreversible, and incomprehensible to the living. Pursuantly, as we will discuss, embedded in humankind's design is a nigh insurmountable instinct to survive.

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198. See sources cited *infra* note 234 and accompanying text. See also discussion *infra* Subsection III.B (raising further issues in translating Singaporean-inspired policies and practices in the American legal landscape).

199. See Lau, *supra* note 158; YEW, *supra* note 169; Groot et al., *supra* note 155.

200. See Groot et al., *supra* note 155; THE DECLARATION OF INDEPENDENCE para. 2. Consider also how the Bill of Rights exists to guard individual liberties. See U.S. CONST. amends. I–X, XIV § 1.

201. YEW, *supra* note 178.

202. See generally Robert Kastenbaum & Paul T. Costa, *Psychological Perspectives on Death*, 28 ANN. REV. PSYCH., 225 (1977) (reviewing different perspectives on death between people, noting cultural and faith-based differences); Jonathan Jong et al., *The Religious Correlates of Death Anxiety: A Systematic Review and Meta-Analysis*, 8 RELIG., BRAIN, & BEHAV. 4 (2017).

203. Job 28:22 (NIV).



Despite comprehending neither life's purpose nor the universe's complexities, we embrace existence nonetheless. Indeed, this will never be expressly told or known because divine wisdom is not revealed to the living. That does not mean, however, that these answers are wholly unknown. Someone holds divine wisdom and an explanation for all queries. So, human wisdom is trusting the One who does. By heeding our instinct to live, we implicitly demonstrate this trust.

This conception is one way to dissect death, but there may be no “right” or “wrong” way to answer cosmic questions. Nonetheless, if death cannot hold unique qualities as a deterrent, this reality would be bizarre. Not uniquely perceiving and responding to the prospect of death would be an odd demonstration of one's survival instinct. This issue demands a deeper understanding of the relationship between human behavior and death. We will observe that even if we divorce ourselves entirely from metaphysical philosophy, concluding that death cannot hold unique deterrent qualities would contradict material observations. Similar problems emerge when analyzing the American legal tradition. Natural law's toolkit is especially conducive to our analysis, given the legal philosophy's focus on absolute truths, morality, and human nature. Specifically, a naturalistic-compatible understanding of “the process of working out rules of human behavior from the data of human experience, using the ordinary rules of logic and scientific method.”<sup>204</sup> In other words, law is not “created” but “discovered” through material observations or reason.

Suppose death cannot serve unique deterrent functions. With this supposition, at least one of the two assumptions must be true: (1) People do not uniquely respond to death, or (2) human beings are not rational actors. Both assumptions are false. For its quasi-abstract nature—asking us to discern death's province in the human experience—the first assumption is difficult to prove or disprove. Still, there are sources to turn to. I argue that human instinct and cognition are the most relevant realms to observe, as they are tangible faculties inextricably intertwined with death. In addition to material observations, we will look to relevant law, which I argue reflects humankind in history and prose. Examining the “rules of behavior” appraised by Anglo-American law can reveal the “human experience” it seeks to moderate.

### 1. Human Nature and Legal Tradition

The self-evident human instinct to live needs no explanation or empirical observations to be known as true;<sup>205</sup> humankind would not exist today

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204. Bourke, *supra* note 26, at 95–96.

205. To paraphrase a satirical point humorously circulated: “The best way to refute a nihilist is to kill him.” For one physiological example of this instinct, see Howard E. LeWine, *Understanding the Stress Response*, HARV. HEALTH PUBL'G (Apr. 3, 2024) <https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response> [<https://perma.cc/2T83-ZUHR>] (“[T]he amygdala, an area of the brain that contributes to emotional processing, sends a distress signal to the hypothalamus . . . communicating with the rest of the body through the nervous system . . . to fight or flee.”).

otherwise, and apathy towards death would not make for a conducive evolutionary trait.<sup>206</sup> It is a given that humans fear death to some extent.<sup>207</sup> Suicidal ideation is classified as “disorderly” precisely because it deviates from ordinary sensibilities,<sup>208</sup> and even those who claim to desire death fear it themselves.<sup>209</sup> Suicide attempts often fail due to a person’s tenacious survival instinct, thwarting the attempt during its commission,<sup>210</sup> or impulsively saving his or her life after a failed but injurious suicide attempt.<sup>211</sup> This impulse is no secret. Humankind has an obsession with conquering death, an obsession that extends to some of man’s earliest literature and persists with contemporary transhumanism research.<sup>212</sup>

Humans are more amenable to “poor existence” than “nonexistence.” Whether in abject poverty or sentenced to life behind bars, humans are observed to become acclimated to their circumstances and find meaning in life, ostensibly against the odds.<sup>213</sup> Researchers have observed that seemingly adverse

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206. See generally CHARLES DARWIN, ON THE ORIGINS OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE (London, John Murray 1859).

207. Jong et al., *supra* note 202, at 5.

208. AM. PSYCH. ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 822–23 (5th ed., 2022).

209. See Jong et al., *supra* note 202, at 4–7 (evaluating the relationship between death anxiety and religiosity). See also Amanda Bower, *A Survivor Talks About His Leap*, TIME (May 24, 2006, 12:00 AM), <https://time.com/archive/6919647/a-survivor-talks-about-his-leap/> [<https://perma.cc/297Z-9A3H>] (quoting suicide survivor and famous activist, Kevin Hines, who recounted his experience jumping off the Golden Gate Bridge: “When my hands left that rail—and my legs curled over—as soon as I left the bridge, I thought, ‘I don’t want to die.’ It’s a four-second fall, and in those four seconds I said, ‘God, please save me.’”).

210. See, e.g., Bower, *supra* note 209 (“At that moment, I said. . . . ‘I might as well just let go.’ But I went down in the water, and I hated that drowning feeling. I thought, ‘No, I can’t drown, that’s just horrible, I’m alive.’”).

211. *Id.* (“I couldn’t move my legs . . . I swam with my arms to surface . . . took a big gasp of air, and begged God to save me.”).

212. See Kastenbaum & Costa, *supra* note 202, at 225 (“[I]t is difficult to find a more ancient topic [than the psychology of death]”).

213. JOHN BRONSTEEN ET AL, HAPPINESS AND THE LAW 15–19 (2015). This presents a challenge for sentencing policy. Many incarcerated offenders come from poor living conditions, dangerous neighborhoods, and face a litany of health issues. Alex Resney, *Mass Incarceration in the United States*, BALLARD BRIEF (Jan. 2019), <https://ballardbrief.byu.edu/issue-briefs/mass-incarceration-in-the-united-states> [<https://perma.cc/7P3V-2W2U>] (citing the median annual income as \$19,185 prior to conviction). If people become acclimated to their living conditions, it could be argued that the jump from “life in poverty” to “life in prison” would be less profound than an offender who came from a “life of luxury.” Notwithstanding the quality, those unable to afford healthcare or meals, for example, would be making a so-called “upwards” adaptation in this respect, opposed to a “downward” acclimation to worse conditions. Although a relatively happy person could proclaim to perceive the prospect of capital punishment as equally dreadful to life imprisonment, if not merciful, the laypeople are a vastly different demographic than people at risk of offending. These experiences alter perception and cost-benefit analysis. See sources cited *infra* notes 217, 219 and accompanying text. It would not matter whether or not a law-abiding person would be deterred by capital punishment. Optimizing deterrence only requires we deter people who

consequences expected to affect long-term happiness, in actuality, affect joy much less than anticipated.<sup>214</sup> This “science of happiness” has challenged how legal academics and lawmakers perceive punishment—“hedonic adaptation.”<sup>215</sup> Man can expound his professed wants or preferences, but he cannot grasp the complexities of himself or his existence.<sup>216</sup> Indeed, even when people engage in conscious deliberation, they unknowingly are informed by deeper considerations of habit, thought, and instinct.<sup>217</sup> Yet instinct and action speak louder than words: If mankind genuinely perceives life imprisonment and death as experiences equally adverse, then throughout all human history, we have kept this subliminal belief impossibly elusive.

Humanity’s innate drive to live and its aversion to death are not always quietly or subliminally held. It is professed and apparent, incorporated into laws and institutions: When affirming life’s sanctity, the United States is blatantly a preservationist society.<sup>218</sup> Humans craft legal institutions to effectuate human objectives, and when they observe the rule of law, these institutions treat their subjects as rational actors.<sup>219</sup> In other words, the rule of law treats people with “formal fairness, that is, in a rational and predictable way . . . [they] are confronted by a state which treats them as rational agents due some respect as such. It applies fairly whatever standards of conduct and of judgment it applies.”<sup>220</sup> Identifying these “human objectives” effectuated by law and its institutions will, of course, vary depending on the idiosyncratic interpreter and his or her subject. One perspective is that law generally exists as a reflection of morality;<sup>221</sup> an enshrinement of believed goodness into written prose. All sound

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will actually commit crimes. I argue that the existence of capital punishment *can* deter such people if they perceive death within their proximity. For more on this, see discussion *infra* Subsection III.B.

214. BRONSTEEN, *supra* note 213.

215. *Id.*

216. See discussion *supra* Subsection III.A. The Book of Job, for example, tells the story of a man who overcame his longing for death and nonexistence. See *Job* 3:1–16 (NIV). See also Bower, *supra* note 209.

217. See 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 24 (1914) (“[W]e find ourselves automatically prompted to *think, feel, or do* what we have been before accustomed to think, feel, or do, under like circumstances, without any consciously formed *purpose* . . .”) (quoting WILLIAM B. CARPENTER, *PRINCIPLES OF MENTAL PSYCHOLOGY* 344 (London, H.S. King & Co. 1876)).

218. See sources cited, *infra* notes 222, 233, 235–38. I use the term “preservationist” to describe a position that promotes the preservation of human life.

219. This notion is derived from jurisprudential observations. See, e.g., MacCormick, *infra* note 220. Rational choice has a particularly critical role in its enshrinement in criminal law and punishment. See Eric A. Johnson, *Habit, Crime, and Culpability*, 113 J. CRIM. L. & CRIMINOLOGY 35, 38 (2023) (“[R]ationality, as embodied in the criminal law’s wrongdoing component, is about the downstream risks and benefits of the actor’s conduct under ‘the circumstances known to him.’” (citing MODEL PENAL CODE § 2.02(2)(c), (d) (AM. L. INST. 1985)).

220. Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 105, 123 (Robert P. George ed., 1992).

221. This creates a dual-pronged rationale for legal obedience: (1) The law as an economical, extrinsic motivator—people abide by the law because there are incentives in doing so; (2) The law as a moral, intrinsic motivator—people abide by the law because they believe in its

people have an instinctive proclivity to live; humans implicitly presume the goodness of their survival.

If the rule of law reflects human virtue, and survival is a basic virtue, our legal institutions would reflect as much. And if the rule of law formalizes fairness, these preservationist protections would extend beyond self-preservation: All lives are protected, albeit within the bounds of rationality. Indeed, the United States itself was founded upon a respect for life and liberty.<sup>222</sup> To preserve life and shun death, this is embodied by the Anglo-American legal tradition. Little needs to be said for the latter; as the “ultimate punishment,” it is explicitly reserved for society’s “ultimate crimes.”<sup>223</sup> Yet how is it that a so-called preservationist legal tradition grants the state authority to kill? Because our legal tradition believes “[t]he instinct for retribution is part of the nature of man.”<sup>224</sup>

In other words, “[t]he simple answer to the puzzle of capital punishment’s persistence is that the desire to execute the worst of criminals is rooted in human nature.”<sup>225</sup> Some crimes are perceived as so egregious that no other punishment could adequately shun the offense, forcing the community’s hand in making its “absolute renunciation of all that is embodied in our concept of humanity.”<sup>226</sup> It communicates an “apologetic ritual”;<sup>227</sup> society believes death in such circumstances to be the only appropriate, vindictive vehicle to restore moral balance: “[R]epentance, reform, and reciliation”<sup>228</sup> between the offender and society. In this sense, retribution has utilitarian functions embedded within it. It serves the community by repairing morale and strengthening informal social ties.<sup>229</sup> Ironically, it serves the offender as well, offering him “an institution that respects his choices.”<sup>230</sup> It recognizes he, too, is a member of the community, bound to the same values that society requires to function.<sup>231</sup> Seemingly

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legitimacy. See Becky Beaupre Gillespie, *Why Do People Obey the Law?*, UNIV. CHI. NEWS (Jan. 13, 2015), <https://www.law.uchicago.edu/news/why-do-people-obey-law> [<https://perma.cc/63YW-VSGM>] (citing RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015)).

222. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The right to life was understood by the drafters as an unalienable, God-given natural right. *Id.* at paras. 1–2 (speaking of rights entitled by “the Laws of Nature and of Nature’s God” and holding life’s goodness to be a “truth [that is] self-evident”).

223. See sources cited *supra* note 109.

224. *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

225. Lerner, *supra* note 8, at 77.

226. *Furman*, 408 U.S. at 306 (Stewart, J., concurring) (explaining how the death penalty differs from conventional punishment).

227. R.A. Duff, *Punishment, Communication, and Community*, in *STUDIES IN CRIME AND PUBLIC POLICY* 114, 123 (Michael Tonry & Norval Morris eds., 2001).

228. *Id.* at 115.

229. Paul H. Robinson, *Empirical Desert*, in *CRIMINAL LAW CONVERSATIONS* 29, 30 (Paul H. Robinson, Stephen P. Garvey & Kimberly Ferzan eds., 2009).

230. Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 476, 486 (1968).

231. R.A. Duff, *Responsibility, Restoration, and Retribution*, in *RETRIBUTIVISM HAS A PAST; HAS IT A FUTURE?* 63, 72–73 (Michael Tonry ed., 2011).

paradoxically, we shun death as a society by using it to appreciate life.<sup>232</sup> Therefore, we condemn individuals who do not care for life's sanctity;<sup>233</sup> the greatest evil is rectified with the same "evil"—as if two negatives make a positive.

The death penalty is not unrestricted. Indeed, its breadth has been challenged and has shrunk by Supreme Court precedent.<sup>234</sup> However, not only death finds special treatment in the law. Indeed, its foil has run into equal controversy. To the frustration of many, American law's zealous respect for protecting *life* has, historically, sternly abrogated proposed rights. That is, liberties—typically but not necessarily advocated for by political progressives—perceived to terminate life or otherwise be at odds with its place in the American legal tradition. *Washington v. Glucksburg* brought this observation to the forefront, unequivocally rejecting assisted suicide as an unenumerated constitutional right:

[O]pposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages. More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide . . . [and] we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."<sup>235</sup>

Similarly, the decision in *Dobbs v. Jackson Women's Health Organization* was relevantly informed by *Glucksburg*'s observations and reasoning:

[A]ny [unenumerated] right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.<sup>236</sup>

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232. For more on this argument, see 28 John Stuart Mill, *Capital Punishment*, in COLLECTED WORKS 270–71 (J. Robson & B. Kinzer eds., 1988).

233. See *id.*; Ernset van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in THE DEATH PENALTY IN AMERICA 323, 331 (Hugo Adam Bedau ed., 3d. ed. 1982) ("The life of each man should be sacred to each other man," the ancients tell us.).

234. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (capital punishment rendered impermissible for non-homicide crimes); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (capital punishment rendered impermissible as a mandatory minimum).

235. *Washington v. Glucksberg*, 521 U.S. 702, 711, 720–21 (1997) (citations omitted).

236. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231 (2022) (citing *Glucksberg*, 521 U.S. at 702, 720).

Of course, declaring that *Dobbs* and *Glucksberg* are identically analogous is a precarious assertion; equivocating prenatal and postnatal life is a moral question the court suggested reasonable minds can disagree upon in good faith.<sup>237</sup> Still, the *Dobbs* majority observed that “[t]here is ample evidence that the passage of [anti-abortion] laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point.”<sup>238</sup>

I write about the Anglo-American preservationist tradition to argue that it is evidentiary of human nature: A uniquely resilient aversion to terminate life. The law and its institutions did not fall from the sky or wash upon the shore. Although impossibly complex to perfectly trace, it is developed, discovered, tested, appraised, and altered by man; it represents the series of evolutionary trends, assumptions, values, and ideas it was shaped by; it reflects the people who made it, and when the rule of law holds, law mirrors its constituency. Through its steadfast emphasis on preserving life, our law and institutions are a living example of how death perturbed us to such a grave extent that averting it is a nodal policy consideration. Life and death are topics specially integrated into the law because they elicit a uniquely intense human response. The humans who developed the law are of the same genus as those who partake in it, criticize it, and deviate from it, lawmakers and constituents alike.

## 2. Rational Actors and Negative Incentives

Of course, no two people are the same.<sup>239</sup> However, humans are generally underscored by specific values, tendencies, faculties, limitations, and instincts. Some are present in our biology,<sup>240</sup> while others can be discovered by studying the human experience.<sup>241</sup> It is evident that one commonality man shares is a shared understanding of death’s particular severity: We are cognizant of death’s unique, foreboding existence and are programmed to avert it.<sup>242</sup> Perhaps abolitionist advocates and organizations realize this too, despite their apparent or implied position that death cannot boast unique deterrent qualities.<sup>243</sup> Like all others, they understand the death penalty as the “ultimate, irrevocable

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237. The *Dobbs* majority was careful to make no statements suggestive of the two’s equivocation; it believed state constituencies should advance this debate independently. *See id.* at 254–55.

238. *See id.* at 254 (citations omitted); *id.* at 242 (The court recounted the history of abortion’s criminalization in the Anglo-American legal tradition, looking back as far as the thirteenth century. Abortion was considered homicide in some forms or jurisdictions and a misdemeanor on other occasions, yet it was spoken of with particularly harsh vocabulary. The word choice of commentators and jurists suggest they categorized prenatal humans as “life” in an identical or similar sense to postnatal humans.).

239. Tomlinson, *supra* note 77, at 37 (“Some individuals are ‘deterrable,’ while others are not . . . the research also shows that in *some* cases *some* criminals do act rationally . . .”).

240. *See, e.g.,* LeWine, *supra* note 205.

241. Bourke, *supra* note 26, at 95–96.

242. *See, e.g.,* LeWine, *supra* note 205.

243. *See, e.g.,* AMNESTY INT’L, *supra* note 119.

punishment.”<sup>244</sup> This perception does not end where deterrence begins; such a fervent human aversion could soundly be channeled into deterrence outcomes. Such a proposal is contingent, however, on humans being rational actors. Another commonality of man is our proclivity towards reason and cost-benefit—the criminal law correctly assumes we are rational actors.<sup>245</sup>

A negative incentive is a consequence (i.e., a penalty) designed to discourage people from performing certain behaviors.<sup>246</sup> A positive incentive is a consequence (i.e., a reward) designed to encourage people to perform certain behaviors. Generally speaking, studies suggest negative incentives are the more powerful motivator, especially in deterring larger groups of people.<sup>247</sup> This phenomenon is due to the psychological principle known as “loss aversion.”<sup>248</sup> Similarly explanatory is the existence of a human “negativity bias,” where losses are perceived to be more significant than equivalent gains.<sup>249</sup> So, it is implied that humans implicitly or explicitly conduct some form of cost-benefit analysis.<sup>250</sup> These observations are relevant to constructing law and policy: Criminal punishment can be just deserts, but it can also be an incentive to deter criminal behavior. Criminal punishment is a general threat the

244. AMNESTY INT’L, *supra* note 29. *See also*, *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

245. Indeed, some individuals may be more deterrable than others, and the intercorrelation between mental illness, crime, and deterrence are complexities much unaddressed. *See* Tomlinson, *supra* note 77, at 37. This subsection’s observations may not apply to particularly unreasonable persons, and it would be bold to assume that all persons share an equal propensity to commit crime and be deterred. *Id.* Instead, I argue in this subsection that capital punishment’s unique qualities, if adequately harnessed, can extend deterrence’s breadth beyond normative punishment. Biology is a strong force, and death is a consequence we are uniquely, specifically averse to by virtue of our humanity.

246. *See, e.g.*, Kelly Goldsmith & Ravi Dhar, *To Motivate, Better to Take Away Than to Give*, KELLOGGINSIGHT (Oct. 7, 2013), [https://insight.kellogg.northwestern.edu/article/to\\_motivate\\_better\\_to\\_take\\_away\\_than\\_to\\_give](https://insight.kellogg.northwestern.edu/article/to_motivate_better_to_take_away_than_to_give) [<https://perma.cc/LSM5-BMAB>] (discussing consequences and the task of managing others with negative incentives); James Bellerjeau, *Do Positive or Negative Incentives Work Better?*, MEDIUM (Dec. 19, 2022), <https://medium.com/greener-together/do-positive-or-negative-incentives-work-better-2a4a81287ab5> [<https://perma.cc/YZ7Y-QTAJ>] (explaining the difference as “appeal[ing] to people’s better nature” or “threaten[ing] people with punishment” and arguing that “the incentives we pick make a big difference”).

247. *See* Pamela Oliver, *Rewards and Punishments As Selective Incentives for Collective Action: Theoretical Investigations*, 85 AM. J. SOCIO. 1356 (1980); Kelly Goldsmith & Ravi Dhar, *Negativity Bias and Task Motivation: Testing the Effectiveness of Positively Versus Negatively Framed Incentives*, 19 J. EXPERIMENTAL PSYCH: APPLIED 358 (2013).

248. *See* Sanjay Goel et al., *Can Financial Incentives Help with the Struggle for Security Policy Compliance?*, 58 INFO. & MGMT. 1, 3–6 (2021).

249. *See generally* Goldsmith & Dhar, *supra* note 247 (discussing the existence of negativity bias and its role in motivation and decision making).

250. Johnson, *supra* note 219, at 38–39 (“To decide whether the actor’s conduct is wrongful, the factfinder applies a criminal law variant of the so-called Hand formula . . . [but e]verybody realizes, of course, that actors rarely if ever engage in the sort of full-blown deliberation that i[t] presuppose[s] . . . . In reality, some or all of this idealized deliberative process usually will be preempted by the actor’s habitual ways of thinking, feeling, or behaving.”).

community places upon itself, and it is underscored by proportionality.<sup>251</sup> Then, the existence of negativity bias would suggest equal, proportionate punishment or greater is *perceived* as *more* severe than any possible gains from a culpable act. As the ultimate punishment, death, would perceivably outweigh any possible gain. Notwithstanding negativity bias and perception, it logically can be reasoned to outweigh any gain; there is no gain in life that death does not strip.

Implicit in my reasoning, however, is an assumption that people believe in punishment or death's inevitability. Given that crime is, indeed, committed by rational actors, this assumption is not invariably true. In this respect, it's unsurprising why studies propose certainty is the dominant force in deterrence.<sup>252</sup> In reworking and optimizing death as a functional crime deterrent, a rational actor would need to be convinced of its certainty. Otherwise, it is not death itself weighed against possible gains—it is the *possibility* of loss weighed against these gains. Then, the perceived significance of death—its aversion inextricably coded into human nature<sup>253</sup>—would likely diminish correlatively to the possibility of execution. Deterrence theory appears to presume equal rationality among people, which is a problematic, if not incorrect, assumption.<sup>254</sup> Perhaps some people are superior at conducting cost-benefit analyses than others, intentionally and habitually. However, in a sense, the biologically engineered aversion to death forces humans to perform this cost-benefit analysis and pursue survival.<sup>255</sup> One such function is an active avoidance instinct, which is triggered when danger is perceived to be sufficiently proximate and inevitable.<sup>256</sup> It explains why offenders threatened with capital punishment plead for a life sentence in lieu and tirelessly appeal when sitting on death row<sup>257</sup>: Perhaps in the act of commission, the offender insufficiently perceived death; his or her avoidance instinct did not “activate.” Yet after apprehension or incarceration, death became proximate, thus “activating” the avoidance instinct. This “activation” need not be in a literal sense. Even if not perpetually afflicted with the physiological and psychological processes that the avoidance instinct spawns (e.g., heart rate

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251. See sources cited, *supra* note 4 and accompanying text.

252. Tomlinson, *supra* note 77, at 37; Dölling, *supra* note 82, at 201–02, 221; NAT'L INST. JUST, *supra* note 107.

253. See, e.g., LeWine, *supra* note 205.

254. Tomlinson, *supra* note 77, at 37.

255. See, e.g., Julia Wendt et al., *Active Avoidance and Attentive Freezing in the Face of Approaching Threat*, 158 NEUROIMAGE 196 (2017).

256. *Id.* (observing the relation between defensive behaviors, avoidance, and the perceived proximity of threats, as well as attendant physiological and psychological processes).

257. Ten percent of offenders on death row do not pursue appeals or give up. *Death Penalty*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/death-penalty/> [https://perma.cc/UM7X-3R64]. Nineteen-year-old Nikolas Cruz, perpetrator of the Parkland school shooting, successfully pursued a life sentence in lieu of execution. Mazzei & Bogel-Burroughs, *supra* note 13.



acceleration and certain inhibitions),<sup>258</sup> subliminal habit and thought inform how humans make active decisions.<sup>259</sup>

The notion that “the death penalty has no unique deterrent effect on crime” is questionable but worth discussing. However, it is a remarkable overstep to state this as a “fact” substantiated by “[e]vidence from around the world.”<sup>260</sup> It is fair that abolition advocates view the dearth of evidence in a light most favorable to their cause. Yet many researchers suggest the same fallacious conclusion.<sup>261</sup> This position requires a sizable asterisk. Concerningly, it invites a flawed assumption that the death penalty cannot deter crime *by nature*. This position would presuppose that criminal law does not assume humans to be rational actors or that people do not uniquely appreciate, understand, or respond to the threat of death. Of these two conditions, neither appears to be true. Preserving one’s life is a human instinct.<sup>262</sup> Anglo-American law reflects as much.<sup>263</sup> Also reflective of this is how death is a particularly unique punishment.<sup>264</sup> As we discussed, people respond to negative incentives.<sup>265</sup> Death is uniquely appreciated, understood, and responded to by people who apprehend it.<sup>266</sup> Pursuantly, criminal law and sentencing properly presuppose the rationality of man—being uniquely intelligent creatures, we perform innate cost-benefit calculations.<sup>267</sup> Defendants do not idly accept capital punishment without contest but overwhelmingly contest it.<sup>268</sup> Were death wholly un-unique or unremarkable, why pursue a life sentence in lieu? Perhaps when committing his respective crime, the offender did not consider the prospect of death. Yet when his freedoms are stripped, and he is at the people’s whim, he is cognizant

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258. Wendt, *supra* note 255.

259. Johnson, *supra* note 219, at 38–39.

260. AMNESTY INT’L, *supra* note 119.

261. See Radelet & Akers, *supra* note 124; Dölling, *supra* note 82, at 220 (noting a dominant rejection among researchers of the death penalty’s deterrent effects). Further, it would be wrong to describe deterrence itself as “questionable.” See, e.g., *id.* at 201. Existent in any rule or law is an implicit deterrent effect not to break it, whether a stigma of deviance or the threat of punishment. See generally RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015). Legislation itself would be rendered without purpose if deterrence does not “‘work.’ If a legislature declares that a given act is a crime, we can normally expect that the act will be performed less frequently in the future.” WAYNE A. LOGAN & MICHAEL M. O’HEAR, *SENTENCING LAW, POLICY, AND PRACTICE* 6 (2022). Rather, it is the correctness of the theory that *contemporary deterrence law, policy, and practice* deters potential criminals that is questionable. The former conclusion would suggest deterrence as a general or penological concept is questionable, a statement overly pessimistic or untrue.

262. See, e.g., LeWine, *supra* note 205.

263. See sources cited, *supra* notes 222, 233, 235–38.

264. *Furman v. Georgia*, 408 U.S. 238, 306–08 (1972) (Stewart, J., concurring).

265. See sources cited, *supra* notes 246–48.

266. See discussion and sources cited *infra* Subsubsection III.A.i.

267. Johnson, *supra* note 219, at 38–39.

268. EQUAL JUST. INITIATIVE, *supra* note 257.

of death as a real possibility. The key difference is *proximity*: When an offender apprehends imminent death, he rationally conducts himself to avert it.<sup>269</sup>

### B. Proximity

Then, the death penalty's contemporary failures in deterring crime are an issue of *implementation*, as opposed to the punishment's nature. We previously discussed how the death penalty generally requires legal academics to recalibrate normative sentencing philosophy and punitive considerations.<sup>270</sup> In recalibrating justifications to suit capital punishment, deterrence warrants the same attention to detail. We also discussed deterrence theory and its three traditional considerations: certainty, severity, and celerity.<sup>271</sup> However, these traditional deterrence considerations criminologists advance are not explicitly tailored to death as a deterrent, perhaps bottlenecking its utility and outcomes. Drawing on available knowledge of crime and punishment, deterrence theory and studies, and comparative outcomes, how can we rework death to effectuate deterrence? It requires policy that matches its uniqueness: This is the importance of "proximity." Reworking death as a deterrent requires policy that is responsive to human considerations. It must be an institutional mirror reflective of how we, as rational actors, appreciate death, harness man's generally ubiquitous survival instinct, and channel it into policy. Then, how do we *optimize* death to effectuate deterrence? We remove all legal and institutional barriers that impede proximity, only constrained by the greater good.

Imagine standing on a cliff's edge, overseeing a vast canyon or chasm. It elicits a peculiar, foreboding feeling that humans inherently share: "a call [from] the void."<sup>272</sup> So, you step back. Some are implicitly cognizant of this feeling, perhaps explicitly conducting their behavior to avoid cliffs pursuantly.<sup>273</sup> This is exemplary of the proximity consideration. It could be surmised that a sensibly risk-averse person would experience similar fear, for example, if carrying illicit drugs in Singapore's borders.<sup>274</sup> Ideally, a similar aversion to death would spawn among offenders contemplating or attempting an offense in the United States. Thus far, we have reviewed the building blocks of this framework. Our examination would suggest that a human of ordinary sensibilities—and not of

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269. See, e.g., LeWine, *supra* note 205.

270. See discussion *supra* Subsection II.A.

271. See discussion *supra* Subsubsection II.B.i.

272. See Crystal Raypole, *Demystifying the Call of the Void*, HEALTHLINE (Jan. 14, 2020), <https://www.healthline.com/health/call-of-the-void> [<https://perma.cc/8K6N-6LAD>].

273. See Johnson, *supra* note 219, at 38–39 ("deliberative process[es] usually will be preempted by the actor's habitual ways of thinking, feeling, or behaving").

274. The vast majority of Singaporeans believe capital punishment deters drug offenses. Lall, *supra* note 181. Although it need not be so, one could reasonably infer that many people who believe capital punishment deters crime believe they too would be deterred themselves. In other words, it is likely that many Singaporeans would be afraid to traffic drugs in Singapore.

exceedingly abnormal ones<sup>275</sup>—who apprehends death will conduct oneself accordingly. When individuals apprehend death, their biology commands them to live.<sup>276</sup> If individuals apprehend death as an imminent consequence of crime, appropriately adjusting their behavior becomes the expected outcome. Death’s severity speaks for itself. Then, our focus turns to certainty and celerity. Celerity (the swiftness of punishment) has been proposed as integral “for punishment to keep its superiority over the profit of the offense,” but its utility in deterring crime remains unappraised.<sup>277</sup> Conversely, recall that certainty appears to offer greater promise for crime deterrence.<sup>278</sup> Its role in proximity is pursuantly relevant: Anticipating the death penalty requires a particular amount of certainty that it will be executed. As I will argue, reworking death as a deterrent requires a nodal focus on such certainty.

When then-President Biden granted his controversial series of pardons,<sup>279</sup> retentionists failed to recognize his “4D-chess” level stratagem<sup>280</sup>: In granting clemency to thirty-seven of America’s “most violent . . . kill[ers], rap[ists], and plunder[ers],”<sup>281</sup> but not three, politically relevant, and similarly culpable others,<sup>282</sup> he demonstrated the death penalty’s contemporary arbitrariness. This criticism of capital punishment is a common one, in addition to concerns about racial biases and innocence.<sup>283</sup> Such arbitrariness also communicates low certainty to the public: Given that Nikolas Cruz, who slaughtered seventeen people at a high school, was spared the death penalty,<sup>284</sup> yet Dzhokhar Tsarnaev, who abetted his brother’s bombing plot that killed three, was not (yet he presently is alive),<sup>285</sup> how could a potential offender expect death to be a certain punishment, let alone comprehend when it is applied?

Then, consistency is required to maximize certainty and, therefore, proximity. Several hurdles emerge in the pursuit of consistent application of

275. See Tomlinson, *supra* note 77, at 37 (raising a concern of the unexplored area of deterrence and mental illness).

276. See, e.g., Bower, *supra* note 209.

277. Tomlinson, *supra* note 77, at 36.

278. See *id.* at 33–36; Dölling, *supra* note 82, at 201–02, 221–23; NAT’L INST. JUST., *supra* note 107, at 1.

279. Elizabeth Pritchett, *Biden Commutes Sentences of 37 Federal Death Row Inmates in Final Month of Presidency*, FOX NEWS (Dec. 23, 2024, 3:40 PM), <https://www.foxnews.com/politics/biden-commutes-sentences-37-federal-death-row-inmates-final-month-presidency> [<https://perma.cc/NL98-E6K8>]; Trump, *supra* note 18.

280. Although the term has relatively common use in the United States and global politics, just in case, see *4D Chess*, WIKTIONARY, [https://en.wiktionary.org/wiki/4D\\_chess](https://en.wiktionary.org/wiki/4D_chess) [<https://perma.cc/56QZ-UZKM>] (“[U]sually ironic[ally] [used] a sophisticated strategy that is far beyond the comprehension of others, in which apparent blunders are simply indicators of yet-to-be-understood brilliance.”).

281. See Trump, *supra* note 18; THE WHITE HOUSE, *supra* note 20.

282. See Pritchett, *supra* note 279 (discussing some of the men on or spared from death row); THE WHITE HOUSE, *supra* note 20.

283. See, e.g., Camp, *supra* note 12; EQUAL JUST. INITIATIVE, *supra* note 117.

284. Mazzei & Bogel-Burroughs, *supra* note 13.

285. Pritchett, *supra* note 279.

the death penalty. The death penalty not being mandatory for the offenses it binds inherently invites some degree of variability. Not all states practice capital punishment. Most retentionist states require a unanimous jury to deliver a death sentence, yet a judge can abrogate, under certain conditions, in others.<sup>286</sup> Inversely, in Singapore, jury trials were abolished altogether in 1970.<sup>287</sup> It also applies death as a mandatory minimum for most offenses it applies to.<sup>288</sup> Of course, doing away with the right to a jury trial would require amending a constitutional guarantee.<sup>289</sup> Similarly, the practice of death as a mandatory minimum has been rendered unconstitutional by the Supreme Court,<sup>290</sup> this precedent would have to be overruled.

“Optimization” is our thought experiment, but any attempt by the federal government to mandate nationwide conformity, as true optimization would require—including discharging juries, imposing the death penalty uniformly, in the same manner, and as a mandatory minimum—would violate the foundational principles of federalism on which our union was built.<sup>291</sup>

Although consistent punishment would improve the death penalty’s certainty, this would mean little in a vacuum. Specifically, prospective offenders must *perceive* the death penalty to be imminent for it to be proximately apprehended. Singapore’s robust CCTV implementation,<sup>292</sup> for example, would not reap deterrent effects if its citizens were unaware they are moderated. Understandably, Singapore publicly communicates its CCTV program’s existence and wide, ever-increasing breadth with clarity.<sup>293</sup> Similarly, the death penalty’s frequent and consistent application would have to be publicly communicated for it to be imminently apprehended and deter crime. It need not be explicitly told, nor advertised through showy, savage public executions; Beccaria suggested that desensitization to severe punishment could diminish its deterrent effects.<sup>294</sup> Yet the human instinct to live is uniquely indomitable<sup>295</sup>; If Beccaria’s suggestion applies to death, an especially strong stimulus would have to be perceived to diminish or abrogate it. Nonetheless,

286. See *When Jurors Do Not Agree, Should a Death Sentence Be Imposed?*, DEATH PENALTY INFO. CTR. (Sept. 13, 2023), <https://deathpenaltyinfo.org/when-jurors-do-not-agree-should-a-death-sentence-be-imposed> [https://perma.cc/FHH7-AHDP].

287. Andrew B.L. Phang, *Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution*, 251 MALAYA L. REV. 50 (1983). See also Criminal Procedure Code (Amendment) Act 2019, § 2 (Sing.).

288. See generally Penal Code 1871 (Sing.) (prescribing criminal offenses and punishment). See also Misuse of Drugs Act 1973, §§ 2, 17, 33(1), (3), 33(3B), (4D), 33B(1) (Sing.). (outlining punishment and mandatory death sentences for particular drug offenses).

289. See U.S. CONST. amend. VII; art. III, § 2, cl. 3.

290. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

291. See generally THE FEDERALIST NO. 1 (Alexander Hamilton) (introducing and outlining the concept of federalism, a share of power between national and state governments).

292. See Dass, *supra* note 179.

293. See *id.*

294. See BECCARIA, *supra* note 28, at 50–51.

295. See, e.g., Bower, *supra* note 209.

enhancing publicity to communicate imminent capital punishment adequately would be inherently achieved, quite simply, by conducting more executions. Although Singaporean executions are not public,<sup>296</sup> they are well-reported internationally,<sup>297</sup> and the country has the highest reported per-capita execution rate in the world.<sup>298</sup>

Permitting more crimes to be punishable by death would reasonably increase the number of death sentences. In conventional deterrence vocabulary, this is severity's role in our proximity framework. However, the question of "what" crimes to extend the death penalty to becomes a subjective utilitarian balancing act. Although subject to being tested under strict scrutiny,<sup>299</sup> the Supreme Court has repeatedly reinforced its conclusion that the prohibition on cruel and unusual punishment suggests a narrow principle of proportionality.<sup>300</sup> Pursuantly, it has repeatedly held that it is unconstitutional to execute offenders of non-homicide crimes.<sup>301</sup> Optimizing proximity would ask us to unwind this precedent, too. Although increasing the number of death sentences and ensuring their consistent application would aid prospective offenders in appreciating the imminence of a death sentence, it would not necessarily suggest the imminence of death itself. Prosecutors blatantly speak of the death penalty as a formality.<sup>302</sup> The average time offenders spend on death row before execution has continually increased, newly peaking at twenty-four years in 2024.<sup>303</sup> For twenty consecutive years, the national death row population has declined—not necessarily because of executions, but because sentence reversals and deaths by other causes outpace new death sentences.<sup>304</sup> Fewer than one in

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296. Executions are done by long-drop hanging on prison grounds, under the supervision of prison staff. See Criminal Procedure Code 2010, §§ 313, 316 (Sing.).

297. See, e.g., Ivan Watson et al., *Exclusive: Inside the Prison that Executes for Supplying, CNN* (Oct. 20, 2024, 10:07 PM), <https://www.cnn.com/2024/10/19/asia/singapore-changi-prison-drugs-war-intl-hnk-dst/index.html> [https://perma.cc/Y4LL-2HB4]; *Singapore Hangs Drug Trafficker, Third Such Execution in a Week*, ALJAZEERA (Nov. 22, 2024), <https://www.aljazeera.com/news/2024/11/22/singapore-hangs-third-drug-trafficker-in-a-week> [https://perma.cc/6BU5-ZPBJ]; Derek Cai, *Singapore Executes Woman for the First Time in 20 Years*, BBC (July 27, 2023), <https://www.bbc.com/news/world-asia-66333776> [https://perma.cc/XSG8-ZULR]; Agence France-Presse, *Singapore Hangs Its 12th Prisoner in a Year: Countries that Continue to Have the Death Penalty*, FIRSTPOST (Apr. 26, 2023, 4:50 PM), <https://www.firstpost.com/explainers/singapore-hangs-its-12th-prisoner-in-a-year-countries-that-continue-to-have-the-death-penalty-12510322.html> [https://perma.cc/MP7N-LNV3].

298. See AMNESTY INT'L, *supra* note 185.

299. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

300. See sources cited *supra* note 53 and accompanying text.

301. See *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

302. See Olson & Mears, *supra* note 14.

303. See *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [https://perma.cc/6BVT-V9DA].

304. See *Death Row Overview*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> [https://perma.cc/FT6F-X8GW].

six death sentences result in an execution.<sup>305</sup> Oddly, we are supposed to expect capital punishment to deter rational actors, yet a rational person can blatantly see death's minuscule certainty. Indeed, criminal law assuming its constituents conduct themselves *irrationally* would be a curious new development.

If we are to publicly communicate that death is a consistently, uncompromisingly applied penalty—perceivably imminent and proximate—we would be required to *use* the death penalty. Then—within the bounds of the greater good—optimizing it would ask us to erode any barriers to its expedient dispatch. Many of the aforementioned executory delays can be credited to post-conviction remedies, particularly the multi-layered habeas corpus appeals process.<sup>306</sup> Although called the “Antiterrorism and Effective Death Penalty Act” (AEDPA),<sup>307</sup> its restrictions on habeas corpus were a hapless effort in effectuating the speed of executions.<sup>308</sup> In addition to hampering its consistency, jury trials similarly bottleneck its celerity: For example, the aforementioned Nikolas Cruz’s trial—despite him conceding guilt—screened 1,200 potential jurors before selection, only to restart the process,<sup>309</sup> screening 1,800 more candidates in the many more months to follow.<sup>310</sup> Our list of obstacles grows the further we sink into the weeds; I cannot raise them all. It is rational *per se* to perceive the death penalty as an exceedingly distant, uncertain consequence. Yet if we hope to rework the death penalty to be the best deterrent it can feasibly be, we ought to recognize how repudiating this laundry list of laws, legal procedures, and institutions is a prospect equally distant.

### III. IMPLICATIONS & CONCLUSION

If we know one thing from the literature, deterrence is a mess. It is muddy, confusing, and frustrating; searching for evidence remains elusive. The margins are typically small, and studies show highly differential outcomes at odds; one study shows deterrence, and the other refutes it.<sup>311</sup> The existence of a deterrent crime-control effect is a heated debate. Both sides of the aisle can sensibly

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305. *Death Penalty Census Key Findings*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/key-findings> [https://perma.cc/5S46-FX2M].

306. *See generally* 28 U.S.C. § 2254 (provisions on state custody, exhaustion, and the availability of federal remedies).

307. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended 28 U.S.C. §§ 2244, 2253–55).

308. Inversely, it has been criticized for creating greater delays in “all types of post-conviction cases, whether capital or not . . . .” *See* Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal* 107 CORNELL L. REV. 1739, 1743 (2022).

309. *See* Associated Press, *Parkland’s Shooter’s Jury Selection to Restart After Judge’s Error*, AP NEWS (Apr. 25, 2022, 6:08 PM), <https://www.wtsp.com/article/news/crime/judgeparkland-school-shooters-jury-selection-to-start-over/67-20ea8e8e-57ee-433e-a46f-ffc5b75cef94> [https://perma.cc/NZ9F-JEUD].

310. *See* Taylor Lang, *Full Recap: Jury Sworn in to Sentencing Trial for Parkland High School Shooter*, ABC 25 WPBF NEWS, <https://www.wpbf.com/article/florida-parkland-nikolas-cruz-trial-jury-attorneys-delay/40207816> (last visited June 30, 2025).

311. Tomlinson, *supra* note 77, at 37; Dölling, *supra* note 82, at 201–02.

contend that the other needs to show the burden of proof. The deterrence skeptic ought to demonstrate how this negative incentive fails to function, seemingly contrary to criminal law's foundational assumptions about human nature. Or, the deterrence proponent ought to show empirical results, as consequentialist or utilitarian arguments generally do. Concerning capital punishment and deterrence, skepticism or denial is the larger consensus.<sup>312</sup> Even still, contradictory findings—albeit sparse—show the death penalty's deterrent effects nonetheless.<sup>313</sup> Perhaps most problematic is how the hapless hunt for evidence has led to fallacious assumptions—deterrence is naught more than a brainchild of criminologists, academics, or lawmakers. Yet a blanket denial of deterrence, even death as a deterrent, includes a repudiation of many foundational assumptions criminal law rests upon or observable qualities of human instinct and nature. Although I argue weaving the so-called “proximity” consideration into a death penalty deterrent framework is our best shot at eliciting optimal outcomes, it remains theoretical. Even if persuasive, it relies on the same empirical uncertainty that may forever plague all deterrence policy.<sup>314</sup> More troubling are the great difficulties and concerns arising in its implementation; many sacrifices would have to be made.<sup>315</sup> It begs the question of whether pursuing a working death penalty deterrence framework is a worthwhile endeavor in the first place.

#### A. *Remaining Justifications for Capital Punishment*

The consequences and demands of a deterrence-optimized approach to American capital punishment are not for the faint of heart; it requires a high-total upheaval of our appraised institutions and the American legal tradition. Reasonable minds can disagree upon its ethics, but to widely repudiate insurmountable volumes of Supreme Court precedent and jurisprudence, many amendments, articles, and clauses of the constitution, habeas corpus and the appeals process, and the very principles of Federalism that thread our union together is nothing short of deleterious.<sup>316</sup> The potential policy and ethical issues with flagrantly disrespecting established, often unchallenged liberties, procedures, judicial precedent, and laws are twofold. It is arguably bad policy or ethics per se and an offensive precedent to set; taking these bold implemental steps would communicate disrespect and skepticism of law's authoritative spirit, tradition, and force. Then, what options remain for the death penalty and deterrence?

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312. Radelet & Akers, *supra* note 124; Döling, *supra* note 82, at 220.

313. See, e.g. Hashem Dezbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortality Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (concluding each execution saves eighteen lives on average); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004).

314. See van den Haag, *supra* note 132.

315. See generally *supra* Subsection III.B.

316. See generally *id.*

A trilemma emerges for retentionists. The first option is to concede these consequences and attempt to optimize the death penalty to deter crime. Perhaps America's crime rate and the consequences it spawns are sufficiently undesirable for us to relook our punitive approach and related institutions.<sup>317</sup> Some may want to "burn it all down."<sup>318</sup> The utilitarian argument would be that forgoing these liberties, protections, and institutions would be for the community's greater good. It would be somewhat reminiscent of the successful Singapore, a country that supposedly makes the sacrifices required for the common good. Like Singapore, liberally applied capital punishment may be best complemented by other harsh, deterrence-informed punishments for lower offenses for punitive consistency. However, even those amenable to "burning it all down" to pursue lower crime rates (and this would be a somewhat extreme reaction to attempt my humble, theory-based policy proposal) must acknowledge the deleterious task presented: a menacing, goliath-scaled gauntlet of challenges for lawmakers. Our contemporary legislature can barely pass a bill,<sup>319</sup> yet it is expected to co-sign on a series of foundational overhauls, culminating in a holistic legal rework? More than deleterious, it is functionally impossible.

The second option is to concede some consequences in pursuit of deterrence outcomes but refuse to implement others. That is, to "cherry-pick" alterations to American death penalty policy. For example, perhaps habeas corpus could go, but the prohibition on mandatory minimums must stay. Doing so would likely be a suboptimal implementation of the death penalty as a crime deterrent. In fact, this flavor of reform has made the death penalty *less* effective when attempted before.<sup>320</sup> If the death penalty's unsatisfactory contemporary deterrence outcomes are but a failure to make offenders apprehend death, reworking it as a deterrent would be best achieved by covering all bases. Many procedural steps, institutions, and constitutional protections make capital punishment a distant, abstract, or non-apprehensible possibility for offenders.<sup>321</sup> There are no empirics that suggest what alterations to our sentencing law, policy, and practice would be necessary, helpful, or superfluous. Moreover, the relationship between humans and death—including internal dialogue or deeper programming associated with negative incentives—cannot be measured by

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317. See, e.g., Heather Stern Little, Opinion, *Bring Back the Birch*, USA TODAY, Apr. 5, 1994 (arguing "[w]e need harsher, swifter sentencing and more appropriate [criminal] penalties").

318. See, e.g., *id.* ("Americans need to rethink the value of a system commandeered by sociologists and bureaucrats."); Ed Koch, Opinion, *Bring Back Caning in U.S.*, STRAITS TIMES, Apr. 21, 1994 ("[C]ivil society has broken down in America . . . the freedom of the individual has become so inviolable as to be elevated to a 'dogma' at the expense of society . . .").

319. See, e.g., Moira Warburton, *Why Congress is Becoming Less Productive*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/> [<https://perma.cc/LCP6-NKWH>] ("Congress isn't working. The simplest expression of this is the number of bills passed by Congress. Just twenty-seven bills were passed last year—a record low—but even before that, the number of bills signed into law by the president has been falling.").

320. See Garrett & Phillips, *supra* note 308.

321. See generally *supra* Section III.B.



empirical means or statistical trends. This option would add more uncertainty to an already persnickety theory.

The third and final option is to embrace retributivism as the principal justification for capital punishment. Deterrence considerations need not be ignored here; a barrier to crime deterrence can mutually be a barrier to just deserts. However, this would require an embrace of retribution as the nodal, necessary explanation for retaining the death penalty. Some consequentialists believe retribution is inherently twisted or flawed.<sup>322</sup> Were a pure consequentialist to embrace this option, he or she would have to subscribe to a mixed theory of punishment—meaning he or she is not a pure consequentialist, and that retribution is not invariably incorrect—or be an abolitionist, as the utilitarian pioneer Beccaria was himself.<sup>323</sup> Reviewing what we have discussed and developed, our conclusion ends with a re-cap and re-evaluation of the retributive justification.

#### *B. Revisiting Retribution: Where Does Understanding Dwell?*

So, where can wisdom be found, and where does understanding dwell? Although we can search for wisdom, we will never find it. Rather, it is “[t]he fear of the Lord—that is wisdom, and to shun evil is understanding.”<sup>324</sup> Our search for deterrence and the death penalty’s deterrent effects has been similarly hapless. Yet, this verse is a surprisingly useful literary tool in dissecting death and explaining human nature. The ostensible non-explanation of God’s ways explains many facets of life and death; humans cannot know divine wisdom, for we can never fully grasp the world’s complexities. Yet we, as humans, are unquestionably bound to heed biological commands. These instincts make us rational actors: man’s quiet ability to conduct cost-benefit analysis, how man responds to negative incentives, and man’s indomitable will to live. Perhaps, in part, this is human wisdom.

Yes, perhaps not every person conducts him or herself rationally or with reasonable care, and some make senseless decisions. Yet the criminal law takes stock of this; the people appropriately punish their deviance with condemnatory force. Notably, the breach of rational, reasonable behavior is deemed culpable. An implicit but powerful exemplification of how criminal law expects us to behave, an acknowledgment of humanity’s rational nature, and the ordinariness of cost-benefit analysis. It is understandable why some are optimistic about deterrence and wish to reap its benefits. It is equally understandable why others are not. Yet it is not necessarily for its nonexistence that we have not reaped deterrent benefits; it is likely but for our improper, suboptimal implementation of deterrence policy. Theoretically, by reaping all the deterrence benefits that death can elicit, an optimally tailored proximity framework would invite different results. Still, theory is not always practical or suitable for public policy. As we discussed, implementing this optimized deterrence scheme in the United States requires great compromise. Yet punishment requires justification

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322. See sources cited *supra* note 42 and accompanying text.

323. BECCARIA, *supra* note 28, at 50–51.

324. *Job* 28:28 (NIV).

nonetheless, and we have insistently preserved America's death penalty institution. If deterrence and other utilitarian considerations are null, retribution remains capital punishment's principle, implementable justification. Then, what is culpability? More than a mere deviation from a reasonable *choice*, particularly wicked crimes (i.e., warranting capital punishment) require a similarly significant deviation from *moral* reason. For the death penalty proponent, this ought to be sufficient.

In our pedantic search for deterrence, we have missed an answer in plain sight. Crime-deterrent outcomes may be a welcome side-effect of punishment, but it need not be the justification we require. As we are tasked with navigating the dubious, emotional, and complex waters of the capital punishment conversation, retributivism offers retentionists a valuable vessel: a justification with clarity and moral purpose. The persistent human instinct for retribution, evidenced by psychological studies and history, cannot be ignored. The death penalty's uniquely irrevocable nature permits a potent expression of societal condemnation for the most egregious crimes. In seemingly paradoxically reaffirming the value of life through death, it maintains moral equilibrium and strengthens social bonds. Ironically, it is forward-looking and utilitarian in this respect. Conversely, a purely consequentialist approach risks reducing complex moral issues to simplistic cost-benefit analyses, failing to adequately capture the nuanced relationship between crime, punishment, justice, and humanity. We see this failure in the highly differential data on crime deterrence. And it is not immune to many of retributive justice's abolitionist criticisms, such as innocence possibilities, arbitrariness, and racial bias. Crime deterrence indeed remains a legitimate aim of any penal system. Yet the moral nature of the death penalty suits a justification made from a moral imperative. The death penalty represents a response to more than a specific crime. It seeks to satisfy the broader human need to shun affronts to goodness. God is all-knowing and omnibenevolent, so reverence and love for Him is wisdom. Then where does understanding dwell? Evaluating culpability, proportioning it to desert, and selecting death as the necessary condemnation—this is shunning evil in substance and form. And to “shun[] evil is understanding.”<sup>325</sup>

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325. *Id.*