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THE HIGHS AND LOWS OF WILD JUSTICE

Corinna Barrett Lain*

EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* (2013). Pp. 544. Hardcover \$ 17.95.

THANE ROSENBAUM, *PAYBACK: THE CASE FOR REVENGE* (2013). Pp. 328. Hardcover \$ 26.00.

*REVENGE is a kind of wild justice; which the more a man's nature runs to, the more ought law to weed it out . . . Certainly, in taking revenge, a man is but even with his enemy; but in passing it over, he is superior.*¹

A spate of botched executions by lethal injection has once again thrust the death penalty into the spotlight. In Arizona, the most recent state to botch a lethal injection, onlookers were sickened at the sight of a death row inmate gasping “like a fish on shore gulping for air” for two hours while the state put him to death.² But relatives of the victim had a different reaction, stating that the condemned inmate deserved everything he had coming to him.³ “All you people that think these drugs are bad,” one family member said in disgust, “[t]o hell with you guys.”⁴ To even question the execution meant there was nothing more to say.

Such is the state of the death penalty today. Opponents point to the inhumanity of it

* Associate Dean of Faculty Development and Professor of Law, University of Richmond School of Law. I thank Jim Gibson, Shari Motro, Andy Spalding, Mary Kelly Tate, Carol Brown, and Wendy Perdue for constructive comments on an early draft, and Cate Gray and Zack McDonald for their excellent research assistance along the way.

1. FRANCIS BACON, *Of Revenge*, in *ESSAYS, CIVIL AND MORAL, AND THE NEW ATLANTIS; AREOPAGITICA AND TRACTATE OF EDUCATION; RELIGIO MEDICI*, VOL. III, PART IV (Charles W. Eliot ed., 2001) (1909).

2. *Don't Botch Executions. End Them*, BLOOMBERG (Aug. 5, 2013, 11:53 AM), <http://www.bloombergview.com/articles/2014-08-05/don-t-botch-executions-end-them>. One reporter counted 660 gulps and gasps for air. See Mauricio Marin, *Witness to a 2-Hour Arizona Execution: Joseph Wood's Final 117 Minutes*, THE GUARDIAN (July 24, 2014, 7:35 AM), <http://www.theguardian.com/commentisfree/2014/jul/24/witness-arizona-execution-joseph-wood-died>. It later came to light that the state had administered fifteen doses of the lethal injection protocol in its efforts to execute the inmate. See Cindy Carcamo, *After First Drug Dose Failed to Kill Arizona Inmate, Logs Show 14 More*, L.A. TIMES (Aug. 2, 2014, 9:46 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-arizona-botched-execution-15-doses-20140801-story.html>. The State of Arizona maintains that the execution was not botched. See Michael Kiefer, *Arizona Officials Deny Execution was Botched*, AZ. CENTRAL (July 25, 2014, 9:09 AM), <http://www.azcentral.com/story/news/arizona/politics/2014/07/25/arizona-officials-deny-execution-botched/13145329/>.

3. See Michael Kiefer and Mariana Dale, *Execution of Arizona Murderer Takes Nearly 2 Hours*, THE REPUBLIC (July 23, 2014), <http://archive.lohud.com/usatoday/article/13071211> (“‘This man deserved it,’ said the victim’s daughter, adding, ‘[a]nd I shouldn’t call him a man. He deserved everything he had coming to him.’”).

4. *Id.* (quoting victim’s son-in-law).

all.⁵ Defenders point to the victims' families.⁶ And victims' families seethe at the public outcry over botched executions of condemned killers—a seemingly sick twist in light of the death those killers' victims received.⁷

It was with this backdrop in mind that I agreed to review Evan Mandery's *A Wild Justice: The Death and Resurrection of Capital Punishment in America*,⁸ and Thane Rosenbaum's *Payback: The Case for Revenge*.⁹ Mandery's book is the story of the Supreme Court abolishing the death penalty in 1972's *Furman v. Georgia*,¹⁰ and then legitimizing it four years later in *Gregg v. Georgia*.¹¹ Rosenbaum's book is an argument for revenge as an operative principle in our criminal justice system. In this review, I consider each book on its own terms. Mandery sets out to tell a story, and does it exceedingly well. Rosenbaum sets out to make an argument, and falls short by that criterion. Together, these two books—one named *Wild Justice*, and the other about wild justice—offer an opportunity to contemplate the retributivist viewpoint that anchors capital punishment today.

The discussion proceeds as follows. In Part I of this Review, I present a brief summary of Mandery's book, providing readers a glimpse of the fascinating story *A Wild Justice* tells and the engaging prose with which it is written. In Part II, I do the same for Rosenbaum's book, distilling the argument in *Payback* and excerpting illustrative passages to provide readers an idea of what they will be getting. In Part III, I use both books to explore the difference between retribution and revenge, and the role those notions play in the defense of the death penalty today. I conclude that while Rosenbaum is unpersuasive in making a normative case for revenge, he is right in arguing that retribution is just revenge by another name, raising serious questions about the punishment theory that is now the death penalty's primary defense.¹²

5. See, e.g., Kourosh Zakeri, *Death Penalty Proves to be an Inhumane Act of Moral Justice*, THE DAILY COUGAR (June 9, 2014), <http://thedailycougar.com/2014/06/09/death-penalty-proves-inhuman-act-moral-justice/>; Lawrence Hummer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw was Inhumane*, THE GUARDIAN (Jan. 22, 2014), <http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane>; *Stop the Death Penalty - Now*, THE REPUBLIC, AZCENTRAL.COM (July 23, 2014, 10:51 AM), <http://www.azcentral.com/story/opinion/editorial/2014/07/23/moratorium-death-penalty-needed/13079539/> ("It is not humane to leave a human being, however deserving of death, to gasp for air for two hours before dying . . ."). For a discussion of the death penalty's other perceived failings, see ALI, REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (2009).

6. See, e.g., Allen G. Breed, *Victims' Families Seek Justice, Retribution and Closure From the Death Penalty*, HUFFINGTON POST (July 28, 2014), http://www.huffingtonpost.com/2014/07/28/death-penalty-victims-families_n_5626141.html; John Futty, *Death Penalty Brings Relief to Victims' Family*, THE COLUMBUS DISPATCH (May 16, 2012), <http://www.dispatch.com/content/stories/local/2012/05/16/measure-of-relief.html>; Gregory Kane, *To Murder Victims' Families, Executing Killers is Justice*, BALTIMORE SUN (Feb. 5, 2003), <http://www.baltimoresun.com/news/maryland/bal-md.kane05feb05,0,6557087.column>. For a discussion of other reasons for support for the death penalty, see *infra* notes 83-85 and accompanying text.

7. Cf. Laura Friedman, *Death Penalty Debate Isn't Simple for Families of Victims*, WASH. POST (Aug. 22, 2014), http://www.washingtonpost.com/opinions/death-penalty-debate-isnt-simple-for-families-of-victims/2014/08/22/eb766a2e-27d9-11e4-958c-268a320a60ce_story.html ("But for the families of victims, the debate is not so simple and the solution is not so clear. They cringe when they hear left-leaning commentators repeatedly describe the chilling details of a botched execution without repeating the far more chilling details of the crime the condemned man committed.")

8. EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* (2013).

9. THANE ROSENBAUM, *PAYBACK: THE CASE FOR REVENGE* (2013).

10. *Furman v. Georgia*, 408 U.S. 238 (1972).

11. *Gregg v. Florida*, 428 U.S. 153 (1976).

12. For a discussion of retribution as the primary reason for support of the death penalty today, see *infra* notes

I. WILD JUSTICE, THE BOOK

Furman v. Georgia, the case that struck down the death penalty in 1972, has to be one of the greatest jurisprudential stretches in Supreme Court history. Every shred of constitutional doctrine cut against the decision.¹³ Indeed, a solid basis for the ruling was so wanting that the five Justices in the majority each went their own way, writing a separate concurrence in the case.¹⁴ *Furman*'s five concurrences, and the four dissents that countered them, made it the longest decision to grace the pages of U.S. Reports (at least at the time it was decided).¹⁵ Surely there's a story to tell. What happened behind the scenes? And what caused the Justices do an about-face on the death penalty four years later in *Gregg*?

Mandery does a masterful job of giving us an inside look at the Justices' decisionmaking in both cases, enriching our understanding of the Supreme Court and its processes in important ways. Little wonder *A Wild Justice* was one of the finalists for a 2014 Silver Gavel Award.¹⁶ Even for those already steeped in the history of *Furman* and *Gregg*,¹⁷ the insights are substantial and the story a compelling read.

Mandery tells his tale in three parts, and I follow that framework here. The book begins with backstory, immersing us in the personalities of the Justices so we know just how improbable the outcome in *Furman* was. Mandery's characterization of William O. Douglas, one of *Furman*'s five majority Justices, gives a sense of the richness of his descriptions and flair for good writing. Douglas was one of the few Justices who thought the death penalty was constitutionally suspect in the late 1960s,¹⁸ but he was apparently uninterested in convincing anyone else. Mandery writes:

The totality of his career suggested the Douglas cared more about being right than being effective. During his thirty-six years on the Court, Douglas wrote 486 dissents. This meant he dissented at twice the normal rate. Even more remarkably, in more than half the cases in which he dissented, Douglas wrote only for himself. This figure is off the charts. . . . To bring an end to the death penalty in 1969, the Court needed a conciliator at the peak of his skills. What it had was a maverick at the height of his dissatisfaction and isolation.¹⁹

Equally engaging vignettes of the other Justices in *Furman* make the point in stunning

83-85 and accompanying text.

13. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 10-11 (2007).

14. The *Furman* decision was announced in a terse, one paragraph *per curiam* opinion, followed by five concurring opinions, each of which had only the vote of the concurring Justice who authored it. See *Furman*, 408 U.S. at 239-375.

15. See Lain, *supra* note 13, at 10 (noting that the *Furman* decision totaled a record 233 pages of official reports).

16. See American Bar Association Reveals Finalists for 2014 Silver Gavel Awards for Media and the Arts, ABA, available at http://www.americanbar.org/news/abanews/aba-news-archives/2014/03/american_bar_association.html (last visited Aug. 31, 2014).

17. See Lain, *supra* note 13; Corinna Barrett Lain, *Deciding Death*, 62 DUKE L.J. 1 (2007).

18. See MANDERY, *supra* note 8, at 11 ("While Frankfurter and Black disagreed about almost everything, on the death penalty they were in rare accord. Neither of them thought it offended the Constitution."). Even Chief Justice Warren thought the death penalty was constitutional. See *id.* at 25.

19. *Id.* at 87-89.

fashion²⁰—judicial abolition of the death penalty was something that at least at the start, no one saw coming.

Indeed, as Mandery explains, in the early 1960s, no one was even advocating the death penalty's constitutional demise.²¹ The NAACP Legal Defense Fund (LDF) came to lead the charge, but it was an unlikely hero. The LDF's mission was ending racial discrimination, not the death penalty.²² It's just that the two were inextricably mixed, and once the LDF started challenging capital punishment for blacks, it only made sense to challenge the punishment for whites too.²³

Civil rights lawyer Anthony Amsterdam played an integral part in the move.²⁴ An advocate of legendary talent, Amsterdam joined forces with LDF in the mid-1960s and made abolishing the death penalty his personal cause celebre.²⁵ But the odds were beyond stacked against him, as readers learn in a shocking revelation. The Supreme Court granted certiorari in *Furman* for the sole reason stated by Justice Black: to “once and for all make it clear to the nation that the death penalty and all its aspects pass constitutional muster.”²⁶ Wait, what? How, then, did we get the result in *Furman*? The table is set, here comes the feast.

In the second part of the book, Mandery depicts what happened to change *Furman*'s fate. Justice White reportedly turned ashen when presented with overwhelming evidence of racial discrimination in the imposition of death.²⁷ Justice Stewart struck a side deal with White.²⁸ Justice Marshall, to everyone's surprise, had written a stealth draft before oral arguments.²⁹ And Justice Douglas joined on his own terms.³⁰ What Justice Brennan assumed would be a lone dissent turned out to be a majority.³¹ That, in turn, led Chief Justice Burger to withdraw his dissenting vote (at least for the time being) and make the unprecedented move of assigning the majority opinion to each of the five majority Justices.³² And that was how the opinions would stay.

The last third of Mandery's book—what happened in the wake of *Furman*—is perhaps the best part. This is not because it details the death penalty's comeback (although it does), but because the insights are so rich, the maneuvering so unseemly, and the drama

20. See, e.g., *id.* at 10 (quoting Justice White, one of *Furman*'s five majority Justices, as saying to a friend before joining the bench, “[t]he trouble with these liberals up here is that they think they have all the answers to social problems, like crime and race, and what's worse, they're putting them in the Constitution.”).

21. See *id.* at 15 (“[I]n the summer of 1963, not even the ACLU believed that capital punishment posed a potential violation of constitutional rights.”).

22. See *id.* at 34 (“LDF was dedicated to ending racism, first and foremost.”).

23. See *id.* (quoting an LDF lawyer as saying to his colleagues, “If we aren't able to turn these cases away, we might as well focus on the real issue—capital punishment.”); *id.* at 48-49 (detailing LDF's shift from fighting the death penalty for blacks to fighting the death penalty for everyone, and quoting another LDF attorney as stating, “Our legal arguments created a lifeboat for people. Everybody was in the lifeboat, so LDF had an obligation to help them all.”).

24. See *id.* at 48 (“[A]ll of LDF's capital appeals involved blacks. . . . Amsterdam wanted this to change.”).

25. See *id.* at 40-47 (discussing Anthony Amsterdam's courtroom exploits and indomitable spirit).

26. *Id.* at 115 (quoting Justice Black) (internal quotation marks omitted).

27. See *id.* at 166.

28. See *id.* at 200-01.

29. See *id.* at 142.

30. See *id.* at 119.

31. See *id.*

32. See *id.* at 170.

so high. Chief Justice Burger had written a dissent that told states the death penalty was still viable and how they could get around the majority's ruling.³³ In the aftermath of *Furman*, thirty-five states took his advice, passing new death penalty statutes that purported to be free of the arbitrary and capricious imposition of death that *Furman* had held constitutionally impermissible.³⁴ When the Justices agreed to review those statutes in *Gregg*, Amsterdam was evenly matched with Solicitor General Robert Bork on the other side. "A jolt of electricity surged through the courtroom as Robert Bork stepped forward to the lectern, oozing intelligence and gravitas," Mandery writes.³⁵ We can feel the energy in the room. We can see Bork's black morning coat and striped trousers because we are there, watching the clash of the titans, watching Anthony Amsterdam go down in flames.³⁶ As painful as it is, we cannot look away.

Here Mandery also details Chief Justice Burger's behind-the-scenes push for a clean sweep—a vote to affirm all of the capital punishment statutes then under review, even the draconian mandatory death penalty schemes.³⁷ Justices Powell, Stewart, and Stevens formed a troika that cast the decisive votes, upholding the guided discretion statutes while invalidating the mandatory ones.³⁸ When they informed Chief Justice Burger that he had lost the majority on the mandatory statutes, he refused to reassign the opinion in those cases, leaving the troika to navigate the politics of reassigning the opinion on their own.³⁹ The rest, as they say, is history.

Mandery ends his tale with what might have been. What if the constitutionality of the death penalty had been decided by the Justices at the end of their tenure on the Supreme Court, instead of the beginning, as was true of several of the Justices in *Furman* and *Gregg*?⁴⁰ *Furman* dissenters Burger and Rehnquist stayed the course, never doubting their positions in the case.⁴¹ But Justices Blackmun, Powell, and Stevens each later expressed regret about their votes to uphold the death penalty in *Furman* and *Gregg*.⁴² Justice Blackmun's dissent in the denial of certiorari in *Callins v. Collins*⁴³ is the most famous

33. See *Furman*, 408 U.S. at 400-04 (Burger, C.J., dissenting) ("Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.... While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints that that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment."). Indeed, Chief Justice Burger's dissent originally began with the sentence, "[t]he Court holds today that the death penalty is not unconstitutional in all cases." MANDERY, *supra* note 8, at 230.

34. See *Gregg v. Florida*, 428 U.S. 153, 179-80 (1976).

35. See MANDERY, *supra* note 8, at 382 (emphasis omitted).

36. See *id.* at 382-400.

37. See *id.* at 404.

38. See *id.* at 408-13.

39. See *id.* at 413-14.

40. See *id.* at 432-40.

41. See *id.* at 400-01 (discussing Chief Justice Burger's votes in *Gregg*); *id.* at 403 (discussing Justice Rehnquist's votes in *Gregg*). Justice Rehnquist's voting pattern in death penalty cases is a nice example. See Lain, *Deciding Death*, *supra* note 17, at 63 ("Between 1972 and 1987, Justice Rehnquist voted to affirm the death sentence in all but two of the thirty-three capital cases he heard; in four of those cases, he was even the lone dissenter.").

42. See MANDERY, *supra* note 8, at 434-40.

43. *Callins v. Collins*, 510 U.S. 1141 (1994).

articulation of the point, and Mandery does not pass by the opportunity to quote Blackmun's insights in that opinion at length:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.⁴⁴

Readers may know about the dissent. But what they may not know is that days before filing it, Blackmun paid a visit to Brennan, “by then retired and frail,” and gave him the opinion.⁴⁵ “Thank you for the present,” Brennan told him upon reading it.⁴⁶ Mandery captures the poignancy of the moment beautifully—the evolution of Blackmun's views, the regret, the comradeship between the two.

One leaves Mandery's book wistful for what might have been, hopeful for the future. But there is another take on wild justice that demands, and deserves, our attention.

II. WILD JUSTICE, THE CONCEPT

Anyone interested in a thoughtful conversation about capital punishment has to take seriously the claim that death is appropriate in certain instances if only because the offender deserves it. A family member's cry for blood seems to be a part of this equation—at least, we see it in the public discourse⁴⁷—but how far does, or should, that consideration go? Into these murky and sensitive waters dives Thane Rosenbaum in *Payback: The Case for Revenge*.

Like Mandery's book, Rosenbaum's *Payback* can be divided into three major analytic parts (although to be clear, he doesn't actually do so, preferring the simplicity of chapter headings instead). The first part, and vast majority of the book, presents the case for revenge.⁴⁸ The second part points to pockets of state-sanctioned revenge, places in the criminal law that recognize the legitimacy of vengeance in some way. And the third considers how the criminal justice system might do a better job of incorporating revenge principles in the future. The writing is stylish and crisp, but the argument feels vague, slippery, even fantastical at times, and fails to persuade even on its own terms.

44. MANDERY, *supra* note 8, at 435 (quoting *Callins* dissent).

45. *Id.*

46. *Id.* (internal quotation marks omitted).

47. *See supra* note 6 and accompanying text.

48. Six of Rosenbaum's eight chapters in the book are devoted to the case for revenge. *See* ROSENBAUM, *supra* note 9.

As an initial matter, Rosenbaum is vague about the concept that is the subject matter of his book, leaving the reader wondering what exactly he is advocating that people do. He talks about the talionic principle—an eye for an eye⁴⁹—but how far does he want us to take it? Is he saying we should rape rapists? Torture torturers? Rosenbaum never defines the concept of revenge, or its limits, which makes understanding and engaging with his position a challenge from the start. He comes closest to clarity in the following passage:

No matter the arena, regardless of whether justice is being delivered by the state or by a deputized avenger, moral revenge must possess these four basic elements: (1) there must be a severe moral injury or act of wrongdoing; (2) the avenger, or the court, must have the authority to seek vengeance and communicate to the wrongdoer why vengeance is being taken and on whose behalf justice is being delivered; (3) the wrongdoer must be deserving of punishment; and (4) the punishment must not be disproportionate to the original injury; it must properly address and pay back for the harm.⁵⁰

But that still leaves the million dollar question—how far are we to take the proportionality principle? Does Rosenbaum literally want us to do unto others as they have done to us?

The central question of what exactly Rosenbaum is talking about blossoms into full-blown confusion when he turns to examples where the criminal law recognizes the righteousness of revenge. For Rosenbaum, “heat of passion” is one such place.⁵¹ As an example, he points to the betrayed husband who catches his wife with another man, stating, “[b]ut a *true man* knows that a betrayed husband has an obligation to defend his own lost honor”⁵² Set aside the obligation part for a moment. And set aside the questions this raises about which sorts of attacks on one’s honor justify revenge and which don’t. What is striking is the fundamental lack of clarity about what is actually happening in this scenario. When a betrayed husband shoots his wife’s paramour upon finding them in bed and is convicted of manslaughter rather than first degree murder, is that because the law recognizes revenge? Or is it because the law recognizes human frailty? If the answer is revenge, why doesn’t the principle apply a week, month, or year later?⁵³

49. *See id.* at 46-47 (“This is the cornerstone of *lex talionis*, the law of the *talion*—the intellectual and metaphorical birthplace for an eye-for-an-eye.”).

50. *See id.* at 46.

51. *See id.* at 235-37; *see, e.g., id.* at 235 (“The term of art ‘heat of passion,’ and the way it mitigates premeditated murder to a lesser crime, represents a tacit acknowledgment that emotions that motivate crimes are of a far less detestable nature than crimes that emanate out of wickedness and bad intention.”).

52. *Id.* at 246 (emphasis in original).

53. The importance of timing to the “heat of passion” principle is elementary, and can be found in most any first-year criminal law textbook. *See, e.g.,* ANDRE A. MOENSSENS, ET AL., CRIMINAL LAW: CASES AND COMMENTS 466 (9th ed. 2013) (“The fact finder confronted with evidence of the circumstances under which a killing occurred may consider an intentional killing to be voluntary manslaughter if the act occurred in the heat of passion after the victim had ‘provoked’ the killer. . . . [I]n order for voluntary manslaughter to be an appropriate fact finding, the killing must occur reasonably soon after the provocation occurred and before the defendant’s ‘blood had cooled.’”). Rosenbaum himself recognizes the principle. *See* ROSENBAUM, *supra* note 9, at 235 (“[V]oluntary manslaughter is a killing committed in the ‘heat of passion’ brought about by some ‘provocation’ without sufficient ‘cooling time’ in which to dissipate the attendant emotions, ultimately giving rise to murder.”).

Setting aside the conceptual ambiguity that pervades the book, I turn to what consumes the lion's share of Rosenbaum's pages—his case for revenge. Rosenbaum begins by telling readers that vengeance is immutable and irrefutable, an intrinsic part of the human condition.⁵⁴ “Revenge is life's ultimate dirty little secret and guilty pleasure,”⁵⁵ he writes, assuring us that it is only natural with passages like this one:

We can fake an orgasm, feign sincerity, exaggerate love, contrive all manner of moral outrage, and profess varying degrees of hatred, but the most genuine of all human impulses, the one that is not easily faked or forfeited, is revenge. Love we can live without, or it can be unrequited or experienced from afar. Anger can be managed. Jealousy can be transferred. Fear can be overcome. Hate has a way of fading, and grief dissipates with time. Revenge, however, is not so easily forgotten. It can be delayed, but it can't be ignored.⁵⁶

“Vengeance,” Rosenbaum writes, “sits comfortably and nobly within the select inventory of human instincts. It needs no invitation to join the club.”⁵⁷

Indeed, Rosenbaum goes on to explain, revenge is such an intrinsic part of our nature that we revel in the thought of it.⁵⁸ Just the anticipation of revenge can activate the same portions of the brain as a craving for food, he points out.⁵⁹ Perhaps this is why they say revenge is sweet.

Rosenbaum concedes that the fantasy of revenge is more satisfying than its reality. As he recognizes, studies show that those who act in revenge feel no better afterward; often, they feel worse.⁶⁰ Rosenbaum grants that the euphoria of revenge is an illusion; the promise of closure, a lie.⁶¹ No matter, he writes, “Happiness is not an expected outcome

54. See ROSENBAUM, *supra* note 9, at 31 ([I]ts denial is futile. Vengeance is everywhere, as a stealth human instinct, deeply internalized and powerfully felt.); *id.* at 32-33 (“[E]ven as our better angels whisper that we should look away from revenge, our human nature reminds us that we cannot. . . . Vengeance has always been with us, a partner in our evolutionary history, a mainstay of our DNA.”); *id.* at 85 (“Revenge is not like a bad habit, something to be licked and overcome. It is as innate to man as breathing, having sex, falling in love, and making war, which is oftentimes represented as vengeance taken against nations.”).

55. *Id.* at 7.

56. *Id.* at 103.

57. *Id.* at 212.

58. See *id.* at 66 (“Human beings take immense pleasure in cultural depictions of revenge. . . .”); *id.* at 94 (“[T]he mere anticipation of revenge can be the source of positive feelings.”).

59. See *id.* at 84 (discussing 2004 study that showed that “when people anticipate the taking of revenge after having been insulted or injured, the left prefrontal cortex of their brains is activated in the same manner as when they are about to satisfy their cravings for food.”).

60. See *id.* at 110-11 (discussing 2008 study showing that “vengeance actually increases the amount of unsettled aggression that existed before” and noting that 2004 study “measured only the anticipation of punishment and not its aftermath”); *id.* at 111 (quoting 2008 study as concluding, “people believed that exacting revenge would bring closure . . . when in fact it had the opposite effect—punishing the [offender] made people think about her more, which in turn made them feel worse.”); *id.* at 111 (“Neuroscientists can prove that the anticipation of revenge activates the blood flow to the brain. But once revenge is finally taken, the blood flow diminishes like a burst balloon. The circuitry lights up for the craving but not the completion. . . . Revenge might feel good as a fantasy, but not in reality.”).

61. See *id.* at 110 (recognizing studies showing that “Vengeance doesn't actually fulfill its promise of true satisfaction; getting even doesn't make the avenger feel any better.”); *id.* at 208 (quoting psychotherapist who works with families who have lost loved ones through violent crime as saying, “Taking a life doesn't fill that void, but it's generally not until after the execution [that the families] realize this.”).

nor is joy necessary for revenge to be justified. . . . The avenger can still feel miserable afterward, but that doesn't affect the duty or alter the responsibility to settle the debt."⁶² In his view:

[I]t shouldn't really matter how the avenger feels afterward. All that is important is that the emotion is acted on and that the injustice is not ignored—that no moral revulsion comes from the unsettled debt. A happiness quotient is not the standard; satisfaction is achieved by following through with the duty to avenge without regard to whether it puts a smile on the avenger's face.⁶³

What it comes down to, Rosenbaum argues, is a nonnegotiable duty to avenge—a demand by the “moral universe” to get revenge whether the avenger wants it or not.⁶⁴ Why that is so, and how we know what the moral universe requires and does not, the book does not say.⁶⁵

The last piece of Rosenbaum's case for revenge is a message to society: if we don't satisfy victims' taste for revenge, if we don't take care of business, they will. He writes, “The lesson, time and again and all over the world, is that when the law fails and victims are deprived of the leveling that comes with revenge, the aggrieved will invariably resort to other time-honored methods of making things right—even if it requires resurrecting ancient norms or resorting to street justice.”⁶⁶ Unfortunately, Rosenbaum's comparisons

62. *Id.* at 208.

63. *Id.* at 112; *see also id.* at 210 (“Even if the victim would feel no satisfaction at all from settling the score, society still would have an obligation to seek legal retribution against the wrongdoer. The victim's wish not to receive repayment does not in any way cancel the debt owed to the state.”).

64. *See id.* at 27 (“Yes, wrongdoers must serve their debt to society. But there is yet another debt—one that exists on the balance sheet of the moral universe—the one that is personally owed to the victims of that wrong. In the moral universe such debts are not dischargeable simply by making the wrongdoer repay the public at large.”); *id.* at 28 (“Payback is not optional but obligatory.”); *id.* at 47 (“Some measure of revenge *must* be taken; it cannot simply be forsaken or ignored.”); *id.* at 131 (“But punishment that neither is carried out nor contains the emotional payoff of vengeance won't satisfy victims, instill credibility with the general public, or meet the high standards of the moral universe.”); *id.* at 229 (“The moral universe never wavers in its demand for proportionate punishment . . .”).

65. One might reasonably make the case that the demands of the “moral universe” cut the other way. *See Romans* 12:19 (ESV) (“Beloved, never avenge yourselves, but leave it to the wrath of God, for it is written, ‘Vengeance is mine, I will repay, says the Lord.’”). For those wondering, as one of my colleagues did, whether Rosenbaum has anything to say about Christian and other belief systems that do not countenance revenge, the answer is yes. *See, e.g.,* ROSENBAUM, *supra* note 9, at 51 (“With the rise of Christianity and the New Testament, human beings were told to renounce their right of revenge—not because vengeance was too risky, but because it was deemed too unbecoming for the followers of the Prince of Peace. . . . Once God reserves the right to vengeance only for himself, the moral cause of revenge begins to lose its moral authority.”); *id.* at 65 (quoting Peter French as writing, “those that . . . restrain themselves, do nothing in response, are moral failures, not, as Christians would have it, to be praised for ‘turning the other cheek.’”); *id.* at 150 (“If retribution is ultimately vengeful—no matter who exercises it—then Christians must have a hard time reconciling the imperatives of criminal justice with the teachings of the New Testament. But punishing wrongdoers can't possibly be considered un-Christian. After all, how far must a cheek turn? For many Christians the question always boils down to: What would Jesus do? Curiously, we live in a world where people speculate with such certainty about what Jesus would do in a given situation. But do we really know?”).

66. ROSENBAUM, *supra* note 9, at 167; *see also id.* at 147 (“The law should always be given the first chance to do what's right. But what happens if it can't, or won't, do what's right—justice in name only, justice that is not just? The victim may have no other option than to resort to self-help.”); *id.* at 178 (“If governments would promise to do it, and do it well, there would never be a need for self-help.”); *id.* at 260 (“...to do anything less only invites vigilante justice.”); *id.* at 263 (“Without the law's failure, the avenger would remain in a permanent

are often between a vengeful response and none,⁶⁷ and since no one is advocating a non-response to criminal wrongdoing, the argument has little traction.

Having made his case for revenge, Rosenbaum turns briefly to the second part of his book, a discussion of criminal law's "legalized loophole[s] for revenge."⁶⁸ For Rosenbaum, victim impact statements and the death penalty are prime examples. "When emotion is introduced into sentencing decisions," Rosenbaum writes, "the dry concept of legal retribution begins to beat with the quickening pulse of moral revenge."⁶⁹ Of capital punishment, he says, "Ironically, it is through death sentences that revenge is given legal life."⁷⁰ Rosenbaum's only complaint in these areas is that the death penalty is not imposed more,⁷¹ and that victim impact statements are not introduced early enough.⁷² State actors are our "surrogate revenge takers," he argues, so "[t]hey should act like them. A good place to start is in developing strategies and adopting mindsets that place a priority on victim vindication."⁷³ And that brings Rosenbaum to the last part of his book—what he would do to improve the criminal justice system's ability to channel revenge.

First, Rosenbaum laments the constitutional provisions standing in his way. Surely the victims did not get due process or equal protection from their assailants, he points out, creating "an egregious example of . . . moral imbalance" when the defendant is clothed with such protections.⁷⁴ And then there is the presumption of innocence. "No, it is not better, morally at least, for ten guilty people to go unpunished in order to ensure that an innocent person is not railroaded through the legal system on account of sloppy or inept

state of retirement.").

67. *See id.* at 27 ("There is no justice if wrongdoers go unpunished and victims do not feel avenged."); *id.* at 63 ("With revenge comes moral clarity. Blindness comes not from the taking of revenge but from looking the other way in the face of injustice."); *id.* at 132 ("Vengeance is not easy to give up if justice isn't being provided any other way."); *id.* at 185 ("Revenge is morally right and the failure to seek vindication is a sign of moral neglect, a dishonoring of the dead, an abandonment of the moral obligation to memorialize loss."); *id.* at 200 ("Indeed, there are moral consequences to living in a society that shows itself to be indifferent about its obligation to punish wrongdoers.").

68. *Id.* at 227; *see also id.* at 196 ("There are loopholes in the law, secrete passageways where emotions get taken into account. . . . Despite all the pretenses and scaffolding of legal justice, some legal outcomes can be made to look a lot like vengeance. These exceptions within the law include capital punishment, victim impact statements, the temporary insanity defense, and general theories of self-defense.").

69. *Id.* at 216; *see also id.* at 227 ("[T]he use of victim impact statements serves to institutionalize revenge by adding a vengeful voice to the punishment process.").

70. *Id.* at 216; *see also id.* at 199 ("[C]apital punishment is just a legalized way to achieve what private avengers have been forbidden to do—take a 'life for a life.'").

71. *See id.* at 213 ("[O]ne reason why capital punishment should be utilized with greater frequency is quite simply because that's what crime victims want and that's what they need."); *id.* at 220 ("When dealing with the worst of the worst, why not more regularly apply the highest penalty under the law and provide victims of capital crimes with the emotional satisfaction of having their revenge?").

72. *See id.* at 224 ("Quarantined from the guilt phase of the trial, marginalized as overly biased and unreliable, it is only during sentencing hearings where they finally receive their day in court, such as it is."); *id.* at 230 ("Victim impact statements operate only after a guilty verdict is reached and not before, silencing the victim during the pretrial stage of the proceeding and during the entirety of the trial itself, which is precisely the most important legal decisions are made and facts bearing on guilt are presented—all without the victim's input.").

73. *Id.* at 133.

74. *Id.* at 225; *see also id.* at 32 ("The legal system, however, is far more concerned with the rights owed to the accused than with the honor that must be restored to the victim."); *id.* at 164 ("In the United States, certain liberties . . . are deemed fundamental and inviolable under the Constitution. The rights of victims to have wrongdoers properly punished are not regarded as rights at all, however.").

law enforcement,” he writes.⁷⁵ Rosenbaum views the Eighth Amendment with similar disdain, for it takes no account of the “cruel and unusual” manner in which the victim was treated in the first place.⁷⁶

That said, Rosenbaum does not advocate constitutional change. He just wants to change how the criminal justice system plays out. As he puts the point, “With a little fine tuning, courts could be deployed to simulate the experience of revenge”⁷⁷

What does Rosenbaum have in mind? Victims should have the right to veto plea bargains, he argues.⁷⁸ Indeed, Rosenbaum explains, “Victims could actually exercise this veto power over all prosecutorial and sentencing decisions in cases of violent crime.”⁷⁹

Rosenbaum contends that victims should play a more vengeful role during trial as well. He argues that victims should be permitted to give an opening statement to the jury, and that they should be permitted to question witnesses and conduct their own cross-examination.⁸⁰ In addition, Rosenbaum argues: “Victims must have legal standing in criminal cases to question judicial rulings. And they should have an independent right to appeal lower-court decisions even if the government is satisfied with the outcome.”⁸¹ States could even pass “revenge statutes” to “protect the righteous avenger who was compelled to perform his duty after the legal system left him with no other choice.”⁸² Two pages later, I had reached the book’s end.

The proper role of revenge in the criminal justice system of a civilized society is a profoundly important topic. Rosenbaum’s *Payback: The Case for Revenge* does not do it justice. From its lack of conceptual clarity, to its logic, to its vision of a criminal justice system geared toward vengeance, *Payback* falls short of what it sets out to do—make a cogent case for revenge.

This is not to say that Rosenbaum’s book is wholly without merit. To the contrary, its claims about the relationship between revenge and retribution raise key questions about the legitimacy of retribution itself, particularly in the death penalty context. What Rosenbaum’s book might teach us in that regard is the topic I turn to next.

III. REVENGE, RETRIBUTION, AND THE DEATH PENALTY

Thus far, I have discussed Mandery’s *A Wild Justice* and Rosenbaum’s *Payback* separately, considering each on its own terms. Now I turn to a question that anyone reading these books together cannot help but wonder: what is the difference between revenge and the retributivism that drives the death penalty today?

People support the death penalty for different reasons, and in the aggregate, those

75. *Id.* at 143; *see also id.* at 137 (“Innocent people surely should not be punished under the law. But a society that places a lower priority on punishing the guilty—by a factor of 10 to 1, the guilty measured in multiples while the innocent represented by one solitary man—is surely not a society that fears the wrath of the moral universe.”).

76. *See id.* at 209.

77. *Id.* at 195.

78. *See id.* at 271.

79. *Id.*

80. *See id.* at 273. The Sixth Amendment confrontation clause is not a problem, Rosenbaum argues, because “his or her unsworn statement is not in the nature of testimony but, rather, is purely prosecutorial.” *Id.*

81. *Id.* at 270.

82. *Id.* at 280.

reasons have changed over time. Today, support for the death penalty is not about deterrence; that justification has been largely discredited.⁸³ Nor is it about incapacitation; every state that has the death penalty now also has the sentencing option of life without the possibility of parole.⁸⁴ Today's death penalty is about retribution—we put people to death because we think they deserve it.⁸⁵ A life for a life. So what's the difference between that and revenge?

Rosenbaum says there is no difference. "Retribution is vengeance made respectable," he writes⁸⁶—the different names are just "wordplay and mind games."⁸⁷ According to Rosenbaum, victims can overdo it, setting off an escalating spiral of violence, so rather than risk decimating entire communities with honor killings and blood feuds, we gave the duty to avenge to the state.⁸⁸

I want to disagree with this. I want the death penalty to be about more than just revenge. But I am troubled. Mandery's account of *Furman* and *Gregg* suggests that vengeance was very much a part of both stories. Vengeance was widely viewed as illegitimate when *Furman* was decided.⁸⁹ Indeed, Justice Marshall wrote in *Furman* that "Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society."⁹⁰ Even Justice White voted to invalidate the death penalty in *Furman* in part because he believed "we should not give sanction to the idea of a man getting his deserts."⁹¹

In *Gregg*, by contrast, Mandery recounts how Justice Powell told his clerk that he wanted the opinion to say, "Society has a need for revenge."⁹² When the clerk told him,

83. An October 2014 Gallup Poll shows that just seven percent of those who support the death penalty do so because they believe it deters crime. See DEATH PENALTY, GALLUP, available at <http://www.gallup.com/poll/1606/death-penalty.aspx>. For an excellent summary of the research on the deterrent effect of capital punishment, see MANDERY, *supra* note 8, at 474-82.

84. See *Death Penalty States Offering Life Without Parole*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/life-without-parole#States>.

85. See GALLUP, *supra* note 83 (showing the single most common reason for support of the death penalty to be "they deserve it"); see also ROSENBAUM, *supra* note 9, at 125 ("Like Aristotle, Kant believed that there was no point searching for a reason to punish when the most obvious one was staring you right in the face: the wrongdoer deserves it; doing anything less would plainly be wrong and surely not just."); *id.* at 198 ("Retribution itself can provide its own justification for punishment—wrongdoers receive what they deserve because of what they have done, regardless of whether it helps prevent a future act.").

86. ROSENBAUM, *supra* note 9, at 20; see also *id.* ("To exact retribution is to avenge, although apparently with more elegance.").

87. *Id.* at 27; see also *id.* at 128 (describing revenge as "the colloquial word of choice for retribution").

88. See *id.* at 30 ("Vengeance can escalate into blood feuds and honor killings..."); *id.* at 46 ("Ethnic violence and tribal blood feuds are still traceable to repetitious revenge cycles. They occurred when retribution went too far, when getting even somehow was not enough. It was the fear of voracious vengeance that convinced governments to go into the revenge business for themselves. Individuals were suddenly required to outsource their revenge obligations by handing them over to the state."); *id.* at 121 ("The legal system was not created to settle private scores; indeed, it was established to put an end to private vengeance and its public consequence."); *id.* at 251 ("Yes, of course there are psycho avengers who can't control themselves and who give vengeance a bad name. . . . They become the poster children for revenge run amuck, and they scare society back into the arms of the state's monopoly over revenge.").

89. See MANDERY, *supra* note 8, at 23.

90. *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

91. MANDERY, *supra* note 8, at 169 (quoting Justice White in conference).

92. *Id.* at 414.

“You can’t put [that] in an opinion,” Powell replied, “It’s honest,” to which the clerk responded, “It’s wrong.”⁹³ In the end, the opinion said this:

In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.⁹⁴

Rosenbaum said the same thing, he was just more blunt.⁹⁵ As Mandery notes, even Herbert Wechsler, the man behind the Model Penal Code and an abolitionist at heart, cited “the desire for revenge, the belief that retributive punishment is just” as the reason the Model Penal Code ought to have a death penalty provision.⁹⁶

For the record, revenge and retribution are not *exactly* the same. Revenge, social scientists tell us, involves the emotional pleasure of retaliating past wrongs by making the offender suffer.⁹⁷ Retribution *can* embody that concept, but it can also embody the closely related principle of just deserts, which aims to restore some sense of balance by imposing punishment proportional to the wrong committed.⁹⁸ One is about retaliation, the other about restoration, but the distinction is a thin reed. The restorative principle at work in just deserts is the talion—an eye for an eye, life for a life—and that is also what gives rise to the anticipated emotional satisfaction of revenge.⁹⁹ In that sense, retribution and revenge are just two sides of the same coin; what the state does as retribution, the victim experiences as revenge. On this point, Rosenbaum was right after all.

That, in turn, brings a clarity I hadn’t had before. Revenge is ugly, darkness begetting darkness. It is a plunge into bitterness, anger, and spite. “You taught me how to hate,” said one woman to the killer of her son in a passage that still haunts me.¹⁰⁰ Society’s most horrific wrongs cause unimaginable pain and demand a response, but the right response is not revenge—reading Rosenbaum’s book convinced me of at least that much. What then of retribution?

For years now, I have unthinkingly accepted retribution as a legitimate punishment objective. I simply hadn’t paused to consider it for what it really is. Now I have.

And where that leads me is back to where the Supreme Court stood on the eve of *Furman*—with the strong sense that retribution has no business being the driving force of

93. *Id.* By Mandery’s account, Powell had the last word, telling his clerk, “You’re just more Christian than I am.” *Id.*

94. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

95. *See supra* notes 54-66 and accompanying text.

96. MANDERY, *supra* note 8, at 306-07.

97. *See* Monica M. Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Just Deserts*, 26 SOC. JUST. RES. 61, 63 (2013).

98. *See id.*

99. *See id.*; *see also supra* notes 58-62 and accompanying text (noting emotional satisfaction at the idea of revenge, and the lack of satisfaction in its reality).

100. ROSENBAUM, *supra* note 9, at 57.

our punishment practices.¹⁰¹ At some level, we already know this. We know it because we aren't willing to go anywhere near taking the proportionality principle to its logical end. If we are executing people just to get even with them, then why should we care if an execution is botched? Why aren't we applauding botched executions instead, and going out of our way to inflict talionic pain? Indeed, why is it that we don't rape rapists and torture torturers? Something about the idea strikes us as obviously wrong. Why?

For me, the answer is not the Eighth Amendment's prohibition against "cruel and unusual punishments," but rather the principle that it embodies—that we *don't* do to others what they did to someone else, that torture and like-minded punishments are off the table even though talionic justice would allow them. What the Eighth Amendment epitomizes is the notion that a civilized society is better than the worst of its members. As Justice Marshall famously put the point, "the Eighth Amendment is our insulation from our baser selves."¹⁰²

And that brings me pretty quickly to wondering what, if anything, is left to recommend the death penalty today. For years now, the administration of capital punishment in the United States has been beset by numerous infirmities. Exonerations from death row—150 to date.¹⁰³ Racial discrimination.¹⁰⁴ Grossly inadequate counsel.¹⁰⁵ Geographic arbitrariness.¹⁰⁶ Excessive cost.¹⁰⁷ If on the other side of the ledger all we have is vengeance, it strikes me as time we let the death penalty go.

In the end, my thoughts about the death penalty, and our punishment practices more broadly, bring me back to the quote with which I began this Review.¹⁰⁸ Vengeance, retribution—they allow us to get even with wrongdoers. But a civilized society ought not to aim so low.

101. See *supra* notes 89-91 and accompanying text.

102. *Furman v. Georgia*, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).

103. See *Innocence: List of those Freed From Death Row*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Jan. 13, 2015).

104. See, e.g., Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014).

105. See Stephen B. Bright, *Counsel for the Poor: the Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

106. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227 (2012).

107. See *Costs of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/costs-death-penalty>.

108. See *supra* note 1 and accompanying text (quoting Francis Bacon as saying, *inter alia*, "[c]ertainly, in taking revenge, a man is but even with his enemy; but in passing it over, he is superior").