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Retribution: The Central Aim of Punishment

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When I worked for the Manhattan District Attorney's Office in the early 1980s, criminal sentences were consistently and dramatically too lenient. Though those years marked the ebb tide for the rehabilitative ideal of punishment and indeterminate "zip-to-ten" sentences, only career felons and those convicted of the most serious crimes were candidates for the sentences they justly deserved. The problem was not all theoretical; the chief difficulty was the simple lack of custodial space. With the city jail at Riker's Island bulging at the seams and prison space upstate scarce, the situation could best be described as get-out-of-jail-free for all but the most dangerous offenders.

Most people, however, were furious about crime and seemed to have collectively decided that they would do whatever was required to retake the streets, the parks, and the subways, almost all of which were hazardous after dark and some of which continued to be dangerous even during the day. This "get-tough" attitude towards crime matured shortly after Charles Bronson, as Paul Kersey in *Death Wish*, attempted to single-handedly eliminate crime from New York's streets.[1] Hamstrung by apparently silly rules of constitutional etiquette and bureaucratic sclerosis, the police were eclipsed in the mind of the public by the cold-blooded Everyman, bound only by the law of the jungle and some elusive sense of justice.[2] Ultimately, popular demand required greater sentences for career criminals, a corresponding increase in prison capacities, and more police officers patrolling the streets.

I do not mean to criticize the results of the aggressive policies adopted during that period. But I do mean to argue that deterrence and

1. DEATH WISH (Paramount Pictures 1974).

2. *See id.* In the movie, Bronson's character lashes out against urban violence after his daughter is raped and his wife murdered within the presumed safety of their New York apartment.

incapacitation are not adequate bases for sentencing those convicted of crimes. Neither, ultimately, is rehabilitation. These goals may contribute to a sound account of punishment—they may be secondary aims of punishment—but none can, on its own, morally justify punishment.[3] Only retribution, a concept consistently misunderstood or entirely forgotten during the time I practiced criminal law, justifies punishing criminals.

My aim in this paper is to present retribution as the morally justifying aim of punishment. The need to do so is well demonstrated by a dreary episode from my experience before a certain judge in the New York City Criminal Court. Also a professor at a local law school, this judge was known as a notoriously soft sentencer; indeed, he seemed to have missed his calling to either social work or psychoanalysis. Near the close of one particularly frustrating day in his courtroom, I recalled a principle of successful debate whereby one embraces the stated goals of the opposition and then explains that his proffered means are the best means to achieve those goals. Consequently, during sentencing, I argued that the best way to "help" this particular defendant was the distinctive way that criminal justice, insofar as it meant to "help" defendants at all, characteristically helped them: not by sending them to some bogus program, but by punishing them. The accused had incurred a debt to society which he had to repay. By punishing the defendant, the judge would set things right between him and the community. The judge said nothing, instead seemingly coming unstuck in time. His blank, uncomprehending stare struck me much as the empty look of a lobotomized bovine: vacant, confused, and unknowing. I had clearly gone beyond his experience, and beyond that of most sitting judges at that time. I suspect that many people fail to understand the concept of retribution even today.

I. COMMON MISCONCEPTIONS ABOUT RESTITUTION

First, retribution is not lex talionis, the law of retaliation, or "an eye for an eye."[4] A few societies may have tried to apply such a norm

3. For a discussion of how such secondary aims might properly be integrated into a coherent account of punishment morally justified by retribution, see Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 45 AM. J. JUR. 105 (1999).

4. *Exodus* 21:24; *Leviticus* 24:20; *Deuteronomy* 19:21. Although typically attributed to Scripture, the concept also appears prominently in other sources, such as the Code of Hammurabi.

literally, but I doubt that any has actually done so consistently. Rather, societies typically deprive criminals of human resources—time, limb, life, or money—which have no relation to the particular criminal harm. More primitive societies impose the universal privations of pain and humiliation upon criminals regardless of their crimes. In any event, to apply the "eye for an eye" norm literally, organized communities would have to be prepared, logistically as well as morally, to do anything that their most depraved individual members had done. Retribution, therefore, is not about revenge.

Second, retribution is not about domesticating popular hatred for a known criminal or redirecting repugnance toward a particularly heinous crime. Retribution does not mean that a state execution is simply a decorous lynching. Retribution is not driven by anger, hatred, or any other emotion; as such, it is completely distinct from community outrage. Indeed, in most times and places, crime causes little or no outrage. Crime is instead treated as an inescapable part of the urban landscape, a cost of city living; because it is an expected effect of social chaos, it is simply tolerated and often unreported.

Third, retribution has little (if anything) to do with the "intrinsic value" of inflicting suffering on wrongdoers that H.L.A. Hart suggested.[5] Indeed, Hart's notion that suffering could have any "intrinsic value" whatsoever is troubling. Suffering is necessarily a privation, a loss, a difficulty, a subtraction from the way things ought to be. Suffering so described is bad, and by definition, something bad does not have "intrinsic value," for if did, it would be good. To me, it seems likely that what Hart actually had in mind was the fact that we feel relieved to see the unjust "pay" for their crimes. Yet that view refers to suffering's instrumental value, however, not its intrinsic significance.

Fourth, retribution is not the source of criminal law; it is simply a theory of punishment. Notably, the content of criminal law is rooted in the whole ensemble of conditions that comprise the common good of political society. Some of the most obvious and important of these conditions include respect for basis human rights, such as the rights not to be intentionally killed or physically harmed by anyone.

Finally, retribution tells us little about what a particular defendant's sentence ought to be, or even how to define a range of acceptable

5. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 1, 8 (5th ed. 1982).

punishments for a given crime. Legislative and judicial authorities necessarily (and rightly) make the important choices in sentencing about fairness and proportionality, governed by a sense of the sentence's aptness to the crime and its coherent position within the global pattern of possible sentences. In other words, while moral reflection can tell us that assault and theft should be treated as crimes, it cannot stipulate which privations should be imposed for those crimes. As such, the sentence for a specific offender is not directly deducible from any single factor; it necessarily involves a decision guided, but not dictated, by reason.

II. PERSPECTIVES ON POLITICAL SOCIETY, CRIME, AND PUNISHMENT

In the absence of any established political order, people would do whatever they pleased. Yet their choices would not necessarily render society the uncontrollably selfish state of nature anticipated by Hobbes.[6] Even absent political order, some people would likely act reasonably, maybe even altruistically, and seek cooperation to achieve common benefit. But there would be no means through which to structure that cooperation; each person would have to exercise personal judgment about the appropriate way to cooperate with others. Political society, by contrast, provides an authoritative scheme for structuring cooperation, a scheme which thereby excludes all reasonable alternatives. Under such a system, individuals naturally accept these restrictions on their freedom to act on their own personal judgments about successful cooperation.

The following example, though simple, captures this concept well. Neither driving on the left side of the road nor on the right is immoral. Either could easily be chosen as the rule of the road.[7] Both, however, cannot be chosen without disastrous consequences. Refraining from all authoritative choice would be as catastrophic. After determining that driving shall occur on the right side of the road, political authority may then appropriately penalize those who continue to drive on the left. Legal norms such as this one guide people by specifying

6. *See* THOMAS HOBBES, ON THE CITIZEN 26-31 (Richard Tuck & Michael Silverthorne eds., Cambridge University Press 1998) (1642).

7. While the United States and 165 other nations drive on the right, 74 nations—including Great Britain—now drive on the left. Brian Lucas, *Which Side of the Road Do They Drive On?*, *at* http://www.travel-library.com/ general/driving/drive_which_side.html (last modified Sept. 2003).

the exact form that fair cooperation with others should take; they make general moral obligations concrete and explicit. "Drive in an orderly, consideration fashion" therefore includes an obligation to yield to cars and pedestrians in the right of way. Further, the law tells people how to determine who has the right of way under certain conditions. In short, specific legal norms tell people how to treat others fairly.

An important conclusion from these premises is that justice requires individuals to accept the pattern of liberty and restraint specified by political authorities. By accepting the established apparatus of political society and by observing its requirements, legal liberty for all is equalized. The central wrong in crime, therefore, is not that a criminal causes harm to a specific individual, but that the criminal unfairly usurps liberty to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law. (Alternately, where the crime is one of negligence, the offender demonstrates that he is unwilling to make the requisite effort to stay within the legally or morally required pattern of action or restraint.) From this perspective, it is clear that the entire community—save the criminal—is victimized by crime. The criminal's act of usurpation is equally unfair to everyone else, in that he has gained an undue advantage over those who remain inside the legally required pattern of restraint.[8]

Depriving the criminal of this ill-gotten advantage is therefore the central focus of punishment. Since that advantage primarily consists of a wrongful exercise of freedom of choice and action, the most appropriate means to restore order is to deprive the criminal of that freedom. Punishment may include sensory deprivation, even transient pain, which will likely be experienced by the criminal as "suffering." Hart notwithstanding, however, the essence of punishment is to restrict a criminal's will by depriving him of the right to be the sole author of his own actions. The goal of punishment, in short, is the undoing of the criminal's bold and unjust assertion of his own will. Punishment assures society both that crime does not pay and that observing the law is important; by doing so, it restores fundamental fairness and equality.

In his wonderful book *Praise and Blame*, Daniel Robinson poses

8. Punishment may appropriately include an order of restitution to a person specifically harmed by a given criminal act, but any such specific harm is *in addition* to that caused to society at large.

several questions that any justificatory account of punishment must answer.[9] Robinson first asks why only public authority—and not anyone at all—has the right to punish offenders,[10] then discusses whether punishment can ever make things right again, particularly since the past cannot be undone.[11] In addition to answering these questions competently, retribution also addresses one other important query: why is it always wrong—without exception—to knowingly punish the innocent? The remainder of this essay briefly engages each of these questions.

III. THE VALUE OF PUNISHMENT AS A REACTION TO SOCIETAL HARM

In his *Prolegomenon to Punishment*, H.L.A. Hart suggested that society may impose punishment on an offender only where society has been harmed. He further identified two types of possible harm to society: where the authority of law is diminished and where a member of society is injured.[12] Hart's first category could therefore be taken as an awkward description of the retributive view described in Part II. Yet Hart's view of crime and punishment is significantly different than my own.

Hart understood the excess liberty issues often discussed in the context of tort compensation. In *The Concept of Law*, for example, during his discussion of tort liability, Hart refers explicitly to the artificial equality that just law imposes upon the inequalities of nature by forbidding the strong and cunning from exploiting their natural advantages to cheat or harm weaker or guileless individuals. This legal equality is disrupted, Hart concluded, whenever a tortfeasor is "indulging his wish to injure [another person] or not sacrificing his ease to the duty of taking adequate precautions."[13] Legal remedies therefore attempt to restore the "moral status quo" in which victim and wrongdoer are, once again, on equal footing.[14] Yet Hart was confident a priori that retribution was solely a matter of inflicting suffering in return for wickedness, a premise derived in part from his assumption that punishment was uncontrovertibly defined as the

9. DANIEL N. ROBINSON, PRAISE AND BLAME 180-183 (2002).
10. *Id.* at 182.
11. *Id.*
12. HART, *supra* note 5, at 22.
13. H.L.A. HART, THE CONCEPT OF LAW 165 (2d ed. 1994).
14. *Id.*

infliction of pain. Perhaps it never occurred to Hart to extend his initial idea from tort to crime and from victim to law-abiding citizen, even when—as in *Punishment and Responsibility*—he seemed very close to such a result.[15]

The second harm Hart mentioned—that a member of society is injured—is equally problematic as an explanation for retribution as I have described it. Richard Swinburne, in his recommendation of retributive punishment, indicated that the state only has authority to impose punishment for criminal harm where it serves as a proxy for the individual harmed.[16] Swinburne apparently imagines a state of nature similar to that described by John Locke, in which individuals hold an exclusive right to punish those who harm them.[17] In a form of naive contractarianism, joining civil society therefore implies that the state receives, as if by transfer or delegation, one's natural right to correct wrongs.[18] If so, however, one might ask whether it really matters who—individual or state—actually exacts an offender's deserved punishment.

In this regard, Hart, Swinburne, and Locke are mistaken. Civil society does not punish as transferee or delegate of the victim. Civil society punishes in its own name for its own sake because, in truth, civil society is the victim of each and every crime. Indeed, the onset of civil society makes punishment possible and intelligible. Civil society is therefore a necessary condition of punishment, conceptually inseparable from it.

Further, Hart's two-part theory of punishment cannot explain our current penal code. Criminal acts often do involve an injustice to one or more specific persons: the defrauded old lady, the black-eyed assault victim, the hapless involuntary pedestrian whose car was stolen. But there are also many "victimless" crimes, such as drug possession, gambling, and prostitution. Some spectacular offenses (including treason, espionage, and lying to the grand jury) victimize the whole community, yet no one in particular, and usually no one more than any other person. The whole community is similarly victimized, though less seriously, in pollution or "quality of life" street offenses like public intoxication. Crimes which arise only after

15. *See generally* PUNISHMENT AND RESPONSIBILITY, *supra* note 5.

16. ROBINSON, *supra* note 9, at 183.

17. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 271-76 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

18. ROBINSON, *supra* note 9, at 184.

a distinct, political community is functional—such as treason, perjury, and public intoxication—have as their victim society as an undifferentiated community. The manner in which a community is victimized by these crimes complements the conception of crime outlined in Part II as a usurpation of liberty. It therefore refers to the entire community's interest in multiple undifferentiated goods, such as security (laws against treason), serenity (laws against public intoxication), and criminal resources (laws against perjury because of their inherent harm to the criminal justice system).

Finally, there is good reason to simply deny that individuals have any right to punish others, even in a state-less precursor to modern society's criminal justice system. Apart from the special case of the *pater familias*, I would argue that no one has a natural right to punish others.

My position can be explained in a more formal, yet intuitive manner. Wicked deeds are a necessary but not a sufficient condition of punishment. Presume that A misbehaves and that his misbehavior warrants the judgment: A deserves to be punished. But saying that A deserves to be punished does not imply that B, C, D, or anyone else has the right to punish A. Imposing some privation upon a malefactor is an act that requires its own moral justification. Even in advanced legal systems, violations of law do not automatically authorize anyone to punish the violator; only certain officials wielding designated powers according to the relevant positive law are designated competent to punish others.

We regularly witness acts of injustice by others—lying spouses, cruel parents, disrespectful children, cheating colleagues. But it scarcely occurs to us that each, or any, of us is authorized to punish those bad actions. We are conditioned by custom, experience, and the law to suffer criminal harms without becoming a vigilante. We recognize that police have the right to arrest and courts the power to punish; we have neither.

IV. PUNISHMENT AS DISTINGUISHED FROM SELF-DEFENSE

Individuals do have a natural right of self-defense, and they are sometimes required to make their own arrangements to be made whole where they have received injury. Their actions, as sanctioned by these two moral guidelines, may look like punishment. But even the most aggressive responses to crimes in nature need not—and, I think, should not—be viewed as exercises of some natural right to

punish. In a town with no sheriff, for example, individuals, families, or other groups may have to drive off cattle rustlers and forcibly recover property unlawfully acquired by such offenders. These rights of defense for person or property and of restitution may closely resemble punishment. But they are not punishment.

Presume a state of nature in which predatory nomads raid Farooq's oasis reserve, threaten to injure his family, and then escape with some of his livestock. When they return, Farooq has gathered friends to help him fend off or capture the invaders; together they successfully defend their lives, their homes, and their possessions, subduing and retaining the raiders.

Now what? Farooq has the right to take back his livestock. But that would not punish the raiders, because those animals are not theirs anyway. They belong to Farooq. The raiders, furthermore, might have no goods of their own to confiscate, and there is no magistrate or jail to extract justice. Should the raiders be released after a stern warning? For someone like Farooq, who is responsible for the safety of others, to be so naïve would be to behave irresponsibly. And even if Farooq could drive them into the desert, they might return again, angrier than before. Farooq eventually decides, after careful reflection, that the only way to defend his family and property from these determined raiders is to hang them. He does so, in a manner which looks much like capital punishment. Yet Farooq is exercising his right of self-defense with the only effective means available to him. The only way for Farooq to restrain his enemies is to kill them.

In this version of a state of nature, the righteous (or at least the stronger) may seem to be "punishing" malefactors. The bad guys do get it in the end. But that does not mean that the concept of punishment is inherent in this violent picture. Natural rights are indeed necessary to make any moral sense out of Farooq's behavior, but those rights can and should be limited to the rights of self-help and self-defense.

V. THE "PUNISHMENT"—OR SACRIFICE—OF THE INNOCENT

The question of punishing the innocent to save others is one of the great challenges of punishment theory, to which the reader can supply the predictable details: what if a public authority could stave off riots and mayhem only by hanging an innocent person popularly believed to be guilty? The classic example is that of Jesus Christ before Pontius Pilate. Where retribution forms the moral justification for

punishment, the problem of punishing the innocent is resolved simply and satisfactorily. Other theories cannot answer this conundrum so readily. Under a theory of deterrence, for example, it is impossible to argue that one innocent must not be sacrificed to demonstrate the law's fury, if general peace could thereby be secured. The administration of punishment, whether upon guilty or innocent, necessarily achieves the desired end of deterrence. Because Hart understood this fact well, he proposed a bifurcated account of the justification of punishment: while deterrence justified the institution of punishment, second order constraints such as retribution limited the who and how much of punishment.[19]

I do not suggest that, in cases of extreme need, it is morally impermissible for one to pay the ultimate price for the welfare of many. We have all heard of individuals who stepped into harm's way, sacrificing themselves for others. Dickens's Sidney Carton and the passengers on the United Airlines flight that crashed in Pennsylvania on September 11, 2001, are both examples of people who chose to risk death in order to prevent harm to others.

Other individuals (such as war heroes) may not have necessarily volunteered to give up their lives, and yet they typically agreed, in a lesser capacity, to protect others. Sometimes it may even be said that the multitudes benefit by conscripting a reluctant heroine. Typhoid Mary, for instance, spent decades in quarantine on the East River to protect the rest of us from infection. Her selection was obviously reasonable: as the source of infection, it would make no sense (logically or morally) to have quarantined anyone but Mary, yet it cannot be said that she "volunteered" in the traditional sense of the word.[20]

Sometimes, although fortunately not often, a stranger is called upon to make the ultimate sacrifice, perhaps the lone passerby who is directed to undertake a dangerous but necessary assignment. This apparent disproportion, morally palatable so long as the selection is fair, may bear an uncanny resemblance to the regrettable execution of a scapegoat for deterrent purposes.

But the two circumstances are not the same. Scapegoating the innocent is immoral, for it cannot be understood by those doing the

19. *See* HART, *supra* note 5, at 9-10.

20. *See generally* JUDITH W. LEAVITT, TYPHOID MARY: CAPTIVE TO THE PUBLIC'S HEALTH (1996).

scapegoating as punishment at all, for by hypothesis they know that the individual being sacrificed has done nothing wrong. Passing it off as punishment necessarily involves deception, for the scapegoat would have to be declared "guilty" of the heinous act about which the citizenry is enraged. The scapegoat is thus not selected fairly or reasonably; rather, he or she is chosen by the mob merely be virtue of availability, haplessness, or unpopularity. The account of Jesus before Pontius Pilate is again a fitting example. To the extent that deterrence requires such scapegoating, it suffers as a normative theory.

In fact, all alternative aims of punishment other than retribution swing blithely free of specific anti-social acts by the condemned; the ends can and often are served by "punishing" the innocent. The utilitarian concerns of tranquility, for example, may be served as well or better by the sacrifice of innocents. Further, if we consider rehabilitation in either its therapeutic or moral sense, one can scarcely argue that the law's ministrations must be limited only to those justly convicted of a crime. Some people need moral or psychological help, quite apart from any criminal misbehavior. In all these perspectives, therefore, the line between guilt and innocence can be traversed precisely in pursuit of the state objectives. That line will therefore sometimes seem an arbitrary barrier, which only the scrupulous or feckless dare not cross.

Conversely, the goal of retribution cannot be obtained by imposing punishment on the innocent. Punishing someone who has committed no offense is impossible. It is not that a certain group of people cannot err simply because they view retribution as the only moral justification for punishment. In fact, they might act immorally and "punish" the innocent. But they cannot knowingly punish the innocent, for if a given person has not distorted equilibrium by committing a criminal act, any attempts to restore what has not been disrupted are futile.

VI. TWO FINAL CHALLENGES REGARDING RETRIBUTION

We can now address two longstanding questions about restitution as a justificatory theory of punishment. The first is the mistaken notion that retribution somehow moves backward while deterrence anticipates a beneficial societal result (more specifically, less crime). But if the goal of retribution is to reestablish the balance of political society, as I have suggested in Parts II and III, it cannot properly be considered "backward." In that sense, retribution is at least as

forward-looking as deterrence, in that both theories of punishment attempt to positively affect society after the incidence of criminal activity. Indeed, retribution is significantly superior to deterrence in this regard, since retribution attempts to restore social balance instead of seeking only to discourage similar criminal behavior (whether by a given offender or within society at large).

Hart captured the second and related confusion about retribution with the following question: If, on the last day of civilization, only the hangman and the condemned remained on the town square, should the hangman execute the lawfully-imposed sentence? Kant famously concluded that such an execution not only may proceed but also must do so,[21] a position that Hart erroneously assumed was necessarily held by all retributivists.[22] Hart's assumption, however, is mistaken for two reasons. First, as discussed previously, the purpose of retribution is not to make the wicked "suffer," but to restore social balance. Second, that a person is capable of inflicting suffering on an offender does not indicate that he is morally authorized to do so. The hangman's authority to punish (as the presumably faithful remnant of public authority) is well established. Yet his authority exists solely to preserve the common good of society, an institution long gone by the time only the hangman and the condemned remain. In my view, no one—not even a hangman—may act for the alleged common good of a nonexistent society. Thus, on the last day of civilization, the condemned would receive a stay of execution, and he and the hangman would be left to "work things out" as in a hypothetical state of nature, such as the one in which Farooq addressed the problem of pesky raiders.[23]

I do not suggest that we entirely abandon other traditional justifications for punishment, for they may serve as valuable secondary aims. For example, a retributive system able to effectively detect crimes and apprehend criminals would also include considerable deterrence in the traditional sense, namely, the threat of

21. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Bobbs-Merrill Co., Inc. 1965) (1797). *See also* IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (William Hastie trans., T. & T. Clark 1887) (1796).

22. Hart, unlike Kant, believed that a hangman would be morally required to hang up his noose on the "last day of society." H.L.A. HART, *Murder and the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY, *supra* note 5, at 54, 75-76.

23. It is possible that the hangman would eventually kill the condemned, yet the justification for his decision to do so would no longer be rooted in his role as public enforcer of common good.

bad consequences to motivate compliance among those tempted to commit crimes. Further, retribution also includes a second type of deterrence, which provides reassurance to the law-abiding that those who voluntarily obey the laws will not be sacrificed to those who would not.

The adoption of retribution as the philosophical basis for punishment therefore provides a powerful, multi-faceted justification far beyond that proffered by the alternatives. Retribution certainly includes elements of deterrence, incapacitation, and rehabilitation, but it also ensures that the guilty will be punished, the innocent protected, and societal balance restored after being disrupted by crime. Retribution is thus the only appropriate moral justification for punishment.