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## Retribution and Reform

Chad Flanders

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Chad Flanders

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## RETRIBUTION AND REFORM

CHAD FLANDERS\*

### I. INTRODUCTION

What is the relationship of punishment theory to punishment practice? What should this relationship be? The last twenty years have seen an amazing rise in sophisticated and elegant theories of retributive justice of a Kantian, and more recently, an expressivist variety—a “retributivist revival.”<sup>1</sup> As pure philosophical theorizing goes, this must surely be counted as real progress. But, those same twenty years have also seen increases in the length of criminal sentences, in the amount of activity subject to criminal sanction, and in the sheer number of people behind bars.<sup>2</sup> Professor James Q. Whitman has famously said that we are now witnessing the rise of a uniquely American brand of “harsh justice” in the United States.<sup>3</sup> It would seem

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1. For the refrain that we are witnessing a “retributivist revival,” see JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 23–24 (2003) [hereinafter WHITMAN, *HARSH JUSTICE*]; Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 Nw. U. L. REV. 843, 845 (2002); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314 (2000); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1417 (2004); Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 BUFF. CRIM. L. REV. 755, 761 (2000) (reviewing SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998)).

2. See, e.g., Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 (stating that the “United States leads the world in producing prisoners”); Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California*, L.A. TIMES, Feb. 4, 2010, at 5 (reporting that Justice Kennedy expressed “obvious dismay over the state of corrections and rehabilitation in the country”); see also GLENN C. LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* 25 (2008) (“The prison is used today as a kind of reservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety.”); CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* 213 (1999) (documenting the rise of the American “prison industrial complex”).

3. WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 6; James Q. Whitman, *The Comparative Study of Criminal Punishment*, 1 ANN. REV. L. & SOC. SCI. 17, 26 (2005); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 85 (2003) [hereinafter Whitman, *Plea*];

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natural to ask whether there is any correlation between these two independently significant events, that is, whether the philosophical developments in punishment theory and the practical increase in harsh punishment are related. In particular, has retributive theory in some way contributed to the harshness of our present punishment practice? If it has, should that impact how we evaluate philosophical retributivism?

Whitman has argued in a series of articles, a book, and testimony that it is no coincidence that “the age of the renaissance of neo-retributivism [has] also been the age of epochally harsh punishment.”<sup>4</sup> Whitman believes that there is a connection between retributivism in theory and harsh justice in practice, and that this connection is so much the worse for retributive theories of punishment. Given the seriousness of Whitman’s allegations—and the subtlety and care with which he levels them—there has been a surprising dearth of direct engagement with Whitman on this point.<sup>5</sup> Indeed, the fact that retributivists have largely remained uninterested in Whitman’s critique may simply reinforce the suspicion that Whitman is right: Retributivists really are unconcerned with the practical upshot of their proposals. They concern themselves with abstract issues of philosophical

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James Q. Whitman, *What Happened to Tocqueville’s America?*, 74 SOC. RES. 251, 251–52 (2007); James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2699 (2005) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004)) [hereinafter Whitman, *Happy Punishers*]; James Q. Whitman, Professor, Yale Law Sch. Testimony at the American Bar Association Justice Kennedy Commission Hearings: What Are the Objectives of Punishment? (Nov. 12, 2003) [hereinafter Whitman, Testimony], available at <http://www.abanet.org/crimjust/kennedy/jameswhitman.pdf>.

4. Whitman, *Plea*, *supra* note 3, at 88.

5. Most mentions do not rise above the level of a citation. See, e.g., Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 412 & n.17 (2005) (recognizing Whitman’s stance as a critic of retributive thought); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1295 & n.2 (2006) (noting Whitman’s “concerns about the proposed codification of retributivism in the Model Penal Code[’s] . . . sentencing provisions”); Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 740–41, 741 n.63 (2009) [hereinafter Ristroph, *Punisher*] (highlighting Whitman’s view that the Model Penal Code is “too retributive”). Leo Zaibert discusses Whitman’s book for a few pages, but is mostly dismissive. See LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 108–11 (2006). R.A. Duff comes closest to offering a sustained response to Whitman, but he still concedes Whitman’s central point that much current philosophy of punishment is too abstract and not focused on real world problems related to punishment. R.A. Duff, *Punishment, Dignity and Degradation*, 25 O.J.L.S. 141, 142 n.4 (2005) (“[T]oo much philosophical writing about criminal punishment is certainly vulnerable to Whitman’s criticism.”).

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justification and not with the consequences of their expounded theories.<sup>6</sup>

This Article, by contrast, uses Whitman's assertion as a springboard for assessing the present state of retributive theory and its relevance, or irrelevance, to practice—especially to our contemporary practice of harsh justice in punishment. Whitman's diagnosis of the state of Anglo-American punishment theory is useful because, in a particularly forceful manner, he asserts that theory and practice should be related in a certain way and that it is problematic when they are not.<sup>7</sup> He claims that retributive theory, when it is not practically useless for correcting our punishment practices, is positively harmful. There is something deeply correct in Whitman's allegation, and some versions of retributivism are especially vulnerable to it. In this Article, I defend a version of retributive theory against Whitman's charge.

Whitman may be right that many retributive theories do not intend to be harsh but nonetheless contribute to America's harsh punishment practices. He is less than clear, however, about the mechanism by which this happens and to what extent retributivist theorists themselves can properly be blamed for the resulting harshness. In many cases, retributivist theories can disclaim responsibility for America's harsh justice and on reasonably solid grounds at that. In Part II, after detailing what Whitman means by harshness and updating some of his empirical claims about American harshness,<sup>8</sup> I question whether Whitman has successfully defended his allegation that retributivist theorists not only contribute to harsh justice but are also properly to blame for this result.<sup>9</sup>

In Part III, I refine Whitman's objection. Many popular versions of retributivism do not go awry because of the harshness that they contingently cause. The problem with these theories is both more subtle and more basic. Many retributive theories seem to take the wrong *attitude* toward punishment: They treat it as a practice that realizes some good or that secures some right (even the "right to be punished").<sup>10</sup> But, punishment is fundamentally a dangerous practice

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6. See, e.g., David Dolinko, Book Review, 55 J. LEGAL EDUC. 401, 401 (2005) (reviewing DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* (1995)) ("Justification is perhaps the central issue raised by philosophical reflections on punishment.").

7. Cf. Whitman, *Plea*, *supra* note 3, at 90 ("How much impact can thoughtful retributivist theory hope for in contemporary America? Does our philosophy have any direct bearing on what is going on?").

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part III.A–C.

because it involves treating people in ways that we would never normally treat people.<sup>11</sup> It would be odd if punishment theorists—either expressly or implicitly—focused on how good punishment is or on how it respects prisoners. Yet, in many cases this is exactly what they do.

To this extent, Whitman is correct when he claims that retributivists are often naïve—or simply unconcerned—with the realities of punishment and the degradation that is almost always a part of punishment. Many retributive theories obscure this fact. Indeed, the theories of retributive justice examined in Part III paint punishment as a fundamentally benign institution that is dedicated toward realizing some good or the good—at least in theory.<sup>12</sup> It is the orientation of these theories that makes plausible the claim that these theories lead to harsh results in theory and in practice. Briefly, retributive theories may contribute to harshness by allowing us to forget that punishment has an ineluctable tendency to become harsh.

There is, however, an alternative tradition of retributivism. Borrowing from Augustine and Adam Smith, I defend a version of retributivism that construes punishment as a necessary step in checking our vengeful emotions.<sup>13</sup> Augustine and Smith appear to recognize punishment's tendency to become harsh and build this realization into their theories. Where some retributive theorists attempt to capture the good of the “right to be punished” or the value of “expressive condemnation,” Augustine and Smith explicitly warn against the dangers of excessive resentment. They seem keenly aware of the danger

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11. See Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 609–10 (2006) (noting the tension between the liberal idea of treating all citizens with equal respect and the necessity of punishing some citizens with “hard treatment”).

12. A word might be in order as to why I do not spend any time in this Article discussing the work of Michel Foucault, who might be thought of as one of the key modern figures identifying the harshness of punishment. See generally, e.g., MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975). The first, and less interesting reason, is that my focus here is on Anglo-American philosophers, and not the European (“Continental”) tradition with which Foucault is usually associated. The second, and more important reason, is that for all of Foucault's brilliant sociological insights, he does not give us much hope that things can be better. He gives us pessimism, and little else. I therefore do not find much that is constructive in Foucault. See, e.g., Michel Foucault, *Nietzsche, Genealogy, History*, in *THE FOUCAULT READER* 76, 85 (Paul Rabinow ed., 1984) (“Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.”). For a somewhat more sanguine view of Foucault on power and a sympathetic reconstruction of Foucault's views, see Isaak Dore, *Foucault on Power*, 78 UMKC L. REV. 737 (2010).

13. See *infra* Part III.D.

of believing that punishment promotes some good or articulates some right. It may be that positively viewing punishment makes us most prone to punishing in excess. The solution is not to abandon retributivism but to give retributivism more modest and more realistic foundations—foundations that help us guard against harsh punishment.

## II. OUR PRESENT HARSHNESS AND RETRIBUTIVISM'S ROLE

### A. *How We Are Harsh*

The argument that retributive theory has, directly or indirectly, contributed to the harshness of American punishment relies on the assumption that American punishment is indeed harsh. But, is this assumption true? It is a fact beyond serious dispute. Consider the following from a recent piece in the *New York Review of Books* (entitled, revealingly, “Can Our Shameful Prisons Be Reformed?”):

With approximately 2.3 million people in prison or jail, the United States incarcerates more people than any other country in the world—by far. Our per capita rate is six times greater than Canada's, eight times greater than France's, and twelve times greater than Japan's. Here, at least, we are an undisputed world leader.<sup>14</sup>

But, the harsh (or shameful) facts do not end merely with the number of our citizens in prisons. It also extends to the length of the average prison sentence, the acts we choose to criminalize, and perhaps most damningly, the unremittingly awful conditions in our prisons.<sup>15</sup> Combined, these factors paint a picture of unmitigated and extreme harshness.<sup>16</sup>

In *Harsh Justice*, Whitman provides a useful analytic framework for understanding what constitutes “harsh justice” in punishment. In what follows, I borrow and, perhaps necessarily, update Whitman's categories. *Harsh Justice* was published in 2003 and already shows some signs of age: There have been important changes—both legally and politically—in the practices of punishment and criminalization since the book was published.<sup>17</sup> On the whole, Whitman's generalizations stand firm, even with some shifts at the margins. Specifically, his charge of harshness sticks despite the passage of more than seven

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14. David Cole, *Can Our Shameful Prisons Be Reformed?*, N.Y. REV. BOOKS, Nov. 19, 2009, at 41, 41–43 (book review).

15. WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 60, 70–71.

16. For a dated, but still penetrating review of “prison reality” by a noted theorist, see generally Hugo Adam Bedau, *Penal Theory and Prison Reality Today*, 2 JURIS DOCTOR, Dec. 1972, at 40.

17. See *infra* text accompanying notes 25–35.

years. American punishment practices have certainly not improved in the interim.

1. *Harshness in the Inflexibility of Punishment*

American punishment is harsh, Whitman claims, partly because it relies on inflexible punishments, or what he specifically refers to as “the large-scale turn to *determinate sentencing*.”<sup>18</sup> Whitman contrasts this with the “individualization” in punishment that “still reigns in Europe.”<sup>19</sup> A scheme of determinate sentencing results in individuals who commit relatively similar crimes receiving the same lengths of punishment. This is part, Whitman tells us, of the Enlightenment ideal of treating people equally.<sup>20</sup> Assuring this uniformity means removing the discretion of the sentencing judge who might otherwise tailor the sentence to the individual characteristics of the offender and adjust the sentence accordingly.<sup>21</sup> By favoring determinate sentencing, the United States has engaged in “a campaign to eliminate *all* forms of individualization, in favor of a revival of formal equality in sentencing.”<sup>22</sup> Another aspect of uniformity (which Whitman treats separately, but which is salient here) is the trend away from granting pardons or clemency—and therefore away from mercy in sentencing.<sup>23</sup> Punishments in the United States, Whitman opines, are both inflexible at the front end (in sentencing decisions) and at the back end (in executive refusal to reduce existing sentences).<sup>24</sup>

At this juncture, we might legitimately question whether *Harsh Justice* shows its age. Whitman’s book was written before the United States Supreme Court handed down two landmark sentencing decisions: *Blakely v. Washington*<sup>25</sup> and *United States v. Booker*.<sup>26</sup> In *Blakely*, the Court cast doubt on judicial discretion in sentencing by ruling that a judge could not base his decision on facts not submitted to the jury and proven beyond a reasonable doubt.<sup>27</sup> In *Booker*, the Court ruled that the provisions of the federal sentencing statute that made the Federal Sentencing Guidelines mandatory were unconstitutional

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18. WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 49.

19. *Id.* (first emphasis omitted).

20. *Id.* at 53.

21. *Id.*

22. *Id.*

23. *Id.* at 36, 67.

24. *See id.* at 67 (discussing the rarity with which the pardon power is used).

25. 542 U.S. 296 (2004).

26. 543 U.S. 220 (2005).

27. *Blakely*, 542 U.S. at 303–05.



and must be severed;<sup>28</sup> thus, the Guidelines are now “effectively advisory,” “requir[ing] a sentencing court to consider Guidelines ranges” but allowing “tailor[ing of] the sentence in light of other statutory concerns.”<sup>29</sup> Whitman’s book was written prior to these significant developments, which gave judges greater leeway to “individualize[ ]” sentences.<sup>30</sup> Instead, Whitman tells the familiar story of the compromise that led to the Federal Sentencing Guidelines of the 1980s: What many hoped would be a compromise resulting in uniform and moderate sentences instead led to uniformly harsh sentences.<sup>31</sup>

Whitman could surely reply that in reality not much has changed since *Blakely* and *Booker*. Judges continue to use the Guidelines, even if only in an “advisory” capacity, and continue to sentence within the Guidelines ranges.<sup>32</sup> Practically, we are far from entering a new era of individualized sentencing. Moreover, Whitman could argue that appellate courts presume that sentences made within the Guidelines ranges are “reasonable” and therefore permissible.<sup>33</sup> As a whole, then, Whitman’s diagnosis of American punishment as inflexible remains on the mark.

## 2. *Harshness in the Length of Punishments*

Whitman next notes that the length of sentences in the United States has increased in the past several decades, due, in part, to the sentencing reforms of the 1980s.<sup>34</sup> He points especially (and correctly) to increasingly lengthy sentences given to drug offenses, even nonviolent offenses (an increase, he notes, that is at odds with the traditional idea that prison, in general, and long prison terms are primarily intended for violent criminals).<sup>35</sup> Whitman finds the rise of so-called “three-strikes-and-you’re-out laws” particularly disturbing.<sup>36</sup>

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28. *Booker*, 543 U.S. at 245.

29. *Id.* at 245–46.

30. See generally Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665 (2006).

31. See WHITMAN, HARSH JUSTICE, *supra* note 1, at 53–56.

32. See, e.g., *Gall v. United States*, 552 U.S. 38, 46 (2007) (“As a result of [the *Booker*] decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are ‘reasonable.’”); see also McConnell, *supra* note 30, at 676 (“The overall effect [of *Booker*] on sentence length, so far, has been negligible. After *Booker*, the average length of sentence has been about the same as before.”).

33. See, e.g., *Gall*, 552 U.S. at 46–47 (finding that although the guidelines are advisory, courts must still give them “serious consideration” and explaining that the standard of review for sentences is the deferential “abuse-of-discretion” standard).

34. WHITMAN, HARSH JUSTICE, *supra* note 1, at 57.

35. *Id.* at 56.

36. *Id.* (noting that under such laws, “three-time offenders” are given “fixed long term [sentences], often life terms”).

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Under such laws, the commission of a minor crime, such as stealing golf clubs or minor drug possession, can lead to a life sentence in prison without the possibility of parole.<sup>37</sup> In comparison to the rest of the world, Whitman notes that our sentences are very harsh: “[W]e have now reached the point where American convicts . . . serve sentences roughly five to ten times as long as similarly situated French ones; and almost certainly even longer by comparison with German convicts.”<sup>38</sup> Whitman notes that the constitutional doctrine of proportionality has done little to address the harshness of such laws.<sup>39</sup>

But, does this argument remain true across the board? The Supreme Court’s recent decision in *Graham v. Florida*<sup>40</sup> may indicate that proportionality is alive in some circumstances or has been even given new life.<sup>41</sup> We should certainly take note of *Graham*’s most significant development, that is, the application of the constitutional doctrine of proportionality to a term-of-years sentence.<sup>42</sup> No more is a robust understanding of proportionality only at work in death penalty cases. *Graham* illustrates a trend that seemingly runs counter to Whitman’s argument.

*Graham* must be read without exaggerating its holding.<sup>43</sup> Although the Court did use a proportionality analysis to strike down a non-death penalty sentence, Justice Kennedy’s majority opinion was

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37. See, e.g., *Ewing v. California*, 538 U.S. 11, 28, 30–31 (2003) (upholding a sentence of twenty-five years to life for felony grand theft of golf clubs based on a three-strikes-and-you’re-out law).

38. WHITMAN, HARSH JUSTICE, *supra* note 1, at 57.

39. Whitman, *Plea*, *supra* note 3, at 90–91.

40. 130 S. Ct. 2011 (2010).

41. See *id.* at 2034 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.”).

42. *Id.* at 2022–23. The Court said:

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant’s sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

*Id.*

43. Cf. Youngjae Lee, *Graham v. Florida—Collapse of Capital-Noncapital Distinction?*, CONCURRING OPINIONS (May 17, 2010, 8:11 AM), <http://www.concurringopinions.com/archives/2010/05/graham-v-florida-collapse-of-capital-noncapital-distinction.html> (describing *Graham* as “[p]otentially revolutionary”).

careful not to overturn the major line of precedent regarding the doctrine of proportionality<sup>44</sup> under the line of decisions ending with *Harmelin v. Michigan*,<sup>45</sup> which strongly reasserted the ability of legislatures to fix sentences.<sup>46</sup> Justice Kennedy's decision fits within the line of precedent indicating that certain groups of offenders should not be subject to certain types of punishment.<sup>47</sup> This is a much more ambiguous line of precedent regarding proportionality, and it is hard to see how it might apply to sentencing generally. Therefore, Whitman's conclusion that the courts will rarely upset a legislature's determination that a sentence is proportionate to an offense seemingly remains correct.<sup>48</sup>

### 3. *Harshness in Prison Conditions*

Whitman describes prison conditions in the United States as “unspeakably barbaric.”<sup>49</sup> A recent two-part series in the *New York Review of Books* laid out—in grisly detail—the depressing regularity of prison rape and other forms of inhumane treatment.<sup>50</sup> There is little quibbling with Whitman on this charge, and he needs no updating—if anything, prisons have become even more overcrowded and consequently even more brutal with tightening budgets.<sup>51</sup>

Surprisingly, perhaps, Whitman concedes that conditions have been much worse. A wave of reform in the 1970s, which culminated in the passage of the Constitutional Rights of Incarcerated Persons

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44. For Justice Kennedy's discussion of the doctrine of proportionality, see *Graham*, 130 S. Ct. at 2021–23.

45. 501 U.S. 957 (1991).

46. *Id.* at 961, 994–96 (finding that a life sentence for possession of 672 grams of cocaine did not constitute “cruel and unusual” punishment under the Eighth Amendment and explaining that only the rarest sentences will be struck down as disproportionate).

47. *Cf. id.* at 998 (“Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types.”).

48. See generally *id.* (“[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’” (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980))).

49. WHITMAN, HARSH JUSTICE, *supra* note 1, at 59.

50. See generally David Kaiser & Lovisa Stannow, *The Rape of American Prisoners*, N.Y. REV. BOOKS, Mar. 11, 2010, at 16, 16–19 (reviewing a variety of administrative and investigative reports on sexual victimization in prison facilities); David Kaiser & Lovisa Stannow, *The Way to Stop Prison Rape*, N.Y. REV. BOOKS, Mar. 25, 2010, at 37, 37–39 (same).

51. At the same time, ironically, the tightening of prison budgets may force some states to release nonviolent offenders from prison, potentially creating a less harsh justice system overall. See, e.g., Randal C. Archibold, *California, in Financial Crisis, Opens Prison Doors*, N.Y. TIMES, Mar. 23, 2010, at A14.

Act,<sup>52</sup> attempted to require that prison inmates receive at least a minimum level of humane care.<sup>53</sup> But, Whitman notes, this wave of reform was indeed the high water mark. The minimum standard turned out to be very minimal, and the constitutional standard for proving cruelty in prison—the “deliberate indifference” of prison officials<sup>54</sup>—is hard to meet.<sup>55</sup> As courts withdraw from prison management, prisons become harsher.<sup>56</sup>

### B. *Why We Are Harsh*

There can be no comprehensive explanation for how the United States arrived at its present state of harsh justice. In his book, Whitman offers what he believes is a persuasive historical explanation for how we reached our present harsh state, but he does not claim that this historical account is the whole story—only that it represents an important part of that story. For example, Whitman does not spend much time discussing the role race has played in the rise of harshness in American punishment—a rather striking omission.<sup>57</sup> Some scholars have questioned, moreover, whether Whitman’s sweeping historical story is on point. Professor Carol Steiker, for one, has claimed that Whitman’s historical analysis cannot explain why the spike in American harshness occurred mainly in—and not before—the last half of the twentieth century.<sup>58</sup> Our present harshness, Steiker has argued, may owe more to President Nixon than to sweeping historical forces that began operating centuries ago.<sup>59</sup>

Adjudicating these historical debates is not my present concern.<sup>60</sup> I am interested, instead, in a narrower claim that Whitman makes in

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52. Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. §§ 1997–1997j (2006)). For more on the use of the Act under different presidential administrations, see Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 652 n.299 (2010).

53. See WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 74.

54. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (internal quotation marks omitted).

55. See WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 74.

56. *Id.* at 61.

57. See *id.* at 6 (explaining that he will not examine how American harshness stems from America’s religious traditions or its history of racism).

58. See generally Carol S. Steiker, *Why We’re So Tough on Crime*, BOS. REV., Oct.–Nov. 2003, at 43, 43–45 (reviewing WHITMAN, *HARSH JUSTICE*, *supra* note 1).

59. See *id.* at 43 (“The huge bump up in the American incarceration rate of the last three decades, the revitalization of capital punishment during the same period, and the increasing willingness to charge juvenile offenders in criminal court are all evident features of the current harshness of the American penological regime, as Whitman quite correctly observes. But they are also all completely the products of the decades since 1970.”).

60. This is neither within the scope of this Article, nor my competence.

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his article, *A Plea Against Retribution*, which builds on *Harsh Justice*.<sup>61</sup> In *A Plea Against Retribution*, Whitman makes a more modest, yet still important, claim about the nature and causes of American harshness. He asserts that retributive theory has, in several ways, contributed to American harshness, or at the very least, done nothing to abate it.<sup>62</sup> Even if retribution does not explain the whole of American harshness, according to Whitman, retributive theory is a part of the story about American harshness. It is important, therefore, that retributivist theorists pay attention to Whitman’s charges and evaluate whether they are true. For the most part, however, retributive theorists have not engaged in this kind of evaluation.<sup>63</sup>

While Whitman makes various different arguments about why retributivism is harsh, I am interested in two of these arguments in particular: (1) Retributivism is simply irrelevant to American harshness, and (2) Retributivism indirectly contributes to American harshness.<sup>64</sup>

1. *Retributivism Is Irrelevant to American Harshness*

Whitman’s first claim is rather simple but disarming: Retributive punishment theory has nothing to say about American harshness.<sup>65</sup> It is too theoretical and too untethered from the day-to-day realities of punishment—with the result that it hardly speaks to anything resembling punishment in America today. Retributive theory does not tell us, among other things, how much respect is owed to prisoners or what kind of prison conditions they deserve. This silence is due, in part, to the abstract level at which most retributive theorizing is done.<sup>66</sup> Retributivism does not address what prison conditions should be like. Instead, retributive theory speaks in vague terms about what prisoners are owed, what the function of punishment is (namely, giv-

61. Whitman, *Plea*, *supra* note 3.

62. *See, e.g., id.* at 94 (“Indeed, if we are honest about it, perhaps we will admit that our neo-retributivism does have a spiritual affinity with our crackdown, much though we may resist the thought.”).

63. *See supra* note 5 and accompanying text.

64. Whitman, *Plea*, *supra* note 3, at 89–90. Whitman makes a third, political irrelevance argument, which I bracket, for the most part, because it does not seem unique to retributivism; in fact, Whitman seems at times to imply that any theory will be irrelevant to American politics. *See id.* at 94–95. This is a sweeping charge which, I think, is false—although I do not address in any detail here. For a general statement on the relevance of theory to politics, see Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1780 & nn.16–19 (1998).

65. Whitman, *Plea*, *supra* note 3, at 89.

66. *See id.* (arguing that retributive theory “often seem[s] weirdly blind to the nasty realities of the American world around it, with its otherworldly discussions of abstractly conceived autonomous actors”).

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ing prisoners their due), and what goods are realized or what rights are protected by punishment.<sup>67</sup>

Thus, many pressing practical issues are unanswered and unaddressed by retributive theory. These issues include whether the fact that prisoners are often required to dress in fluorescent jumpsuits is consistent or antithetical to retributive theory, how corrections officials should treat prisoners, and whether prison should be the default mode of punishment.<sup>68</sup> Whitman is particularly concerned that retributive theories have rarely discussed, or even acknowledged, the extent to which actual punishment involves the degradation of offenders.<sup>69</sup> Broadly, Whitman's point is that retributive theory says much about the justification of punishment but comparatively little about how punishment should work or how retributive theory should be practically implemented. Where, Whitman wonders, are the retributivists who descend from the lofty plains of theory to say anything about actual punishment and the actual institutions of punishment?

Whitman indicates that the problem is not simply that retributive theory is theoretical. There is no reason why a theory, in principle, could not discuss its practical implications or give concrete recommendations about how a punishment practice should function. Rather, the problem is the endemic inability of most retributive theories to bestow much in the way of practical advice. In fact, retributive justice is, Whitman implies, systematically blind to how we should institute punishment. Some retributivists, for instance, stipulate that we exist in a society of rough equality such that it is fair to punish someone in exact proportion to the wrong he has done to another in order to restore baseline equality.<sup>70</sup> This is undoubtedly an idealizing assumption. What if social conditions are not roughly equal (as they

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67. See David Gray, *Punishment as Suffering*, 64 VAND. L. REV. (forthcoming 2010) (manuscript at 140) (on file with the Maryland Law Review).

68. What does retributive theory have to say, Whitman asks:

about an American system of punishment that so consistently treats offenders like second-class citizens, and indeed like sub-humans? Why does it find so little to say about humiliating prison uniforms, and routine deprivation of all forms of privacy? Why does it find so little to say about rules and practices that deny inmates contact with family-members? Or about corrections officials who treat offenders with offhanded contempt? Why does it find so little to say about chain-gangs, or about public shaming?

*Id.* at 102–03.

69. See, e.g., Whitman, *Happy Punishers*, *supra* note 3, at 2699.

70. See, e.g., Markel, *supra* note 5, at 438 (explaining that Robert Nozick distinguished retribution from revenge because retribution limits punishment with proportionality and seeks “equal application of the criminal law” (citing ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366–68 (1981))). But see, e.g., Whitman, *Plea*, *supra* note 3, at 102 (“The stubborn retributivist belief in the necessary link between equality and retributivism is simply false.”).

certainly are not)? What does our punishment practice require then? Should our punishments be unequally distributed? On this point, retributivism seems to lack a response, or if it does have something to say, retributive theorists are not saying it.

This lack of a response is unfortunate for two related reasons. First, it means that retributivism, as a theory, will be practically inert, operating mainly as a philosophical exercise. Arguably, this is bad enough because a theory about an existing institution should somehow generate practical suggestions about what that institution should look like. But, even worse, retributivism's abstractness means that retributivism, as a theory, cannot prevent American harshness because it does not address our penal institutions as they operate in reality. This is even worse because our penal institutions are not running as they should, and retributivist theory is mute on pressing issues such as the appropriate length of prison sentences or standards for the treatment of prisoners. Essentially, retributivism is alleged to be a philosophical exercise without legs to change current harsh practices.

## 2. *Retributivism Contributes to Harshness*

Whitman's first point leads to his second, more serious indictment of retributive theory, which contends that retributivism is not only useless, but is positively harmful; that is, that retributivism has contributed to the harshness of American punishment.<sup>71</sup> Whitman does not usually say that retributive theory, as a theory, is necessarily harsh—such a position would be in tension with his argument that retributive theory does not really have much to say, positive or negative, about whether or not punishment should be harsh.<sup>72</sup> Nor does Whitman contend that retributivism is just a species of revenge—a tiresome (and false) point that many have made and that cannot be rebutted often enough.<sup>73</sup> Rather, Whitman argues that retributivism tends to have harsh effects because it is easily co-opted to the harsh ends of those who implement our punishment practices or those who want to make our practices more punitive.<sup>74</sup>

Whitman is less than transparent about how retributivism creates harsh effects in our punishment practice, but his claim appears to develop as follows. Retributivism speaks broadly in terms of people receiving their just deserts, of the necessity of blame, or of the right to

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71. See generally Whitman, *Plea*, *supra* note 3, at 103–07.

72. See *supra* Part II.B.1; see also *infra* note 78.

73. See generally Nozick, *supra* note 70, at 366–68 (explaining how retribution differs from revenge).

74. See generally Whitman, *Plea*, *supra* note 3, at 91–93.

be punished. Retributivism may also speak about hatred, noting that it can—at times—be a justified emotion. For instance, retributivists assert that it is acceptable to feel hatred and resentment toward those we punish or to feel that part of punishment involves expressing our mastery over the offender and “defeat[ing]” his implicit claim to superiority over us.<sup>75</sup> However subtle and qualified these philosophical statements may be, they do not translate well into popular thought.<sup>76</sup> In fact, despite what theorists may intend, the resulting interpretation is that harsh punishment—for example, long sentences or horrible prison conditions—is amply and philosophically justified.<sup>77</sup> In fact, retributivism’s lack of practical suggestions may tacitly license this translation problem. Because retributivists rarely explain what their theories require, some people may dangerously assume that retributivism requires harsh justice.<sup>78</sup> The criticism of retributivism’s relationship to popular discourse is by far Whitman’s most serious claim, and this criticism also has the most truth to it.<sup>79</sup>

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75. See generally Jeffrie Murphy, *Introduction: The Retributive Emotions*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 1, 2–6 (1988) (arguing that certain passions, such as resentment and hatred, can be morally appropriate and should be institutionalized in our system of criminal law). I discuss Jean Hampton’s views in more detail later in this Article. See *infra* text accompanying notes 194–212.

76. Cf. Whitman, *Plea*, *supra* note 3, at 94 (“The worry, in short, is that, to the extent retributivist philosophers are heard at all, they are heard in ways that amount to pouring gasoline on the fires of American punishment.”).

77. *Id.* at 93–94.

78. See *id.* at 93 (“[O]ur philosophies of retributivism are hedged about at every turn by distinctions and caveats, as they have been for generations. The problem . . . is that the public is not very good at understanding all the subtle stuff.”).

79. Professor Leo Zaibert believes that Whitman’s irrelevance and harshness arguments cannot be made simultaneously. ZAIBERT, *supra* note 5, at 109–10 (2006) (“If the worrying aspect of the relationship between retributivism and the harsh American criminal justice system is that there is no relationship after all, then [the argument that there is a link between retributivist philosophy and American harshness] is a formidable non-starter. It is hard to see how retributivism could possibly be the cause of the unwarranted harshness of the criminal justice system if it is just an ‘academic irrelevance.’”).

There is no tension, however, between saying that retributivist theories do not translate well into popular discourse and saying that the practice of philosophy is irrelevant. Philosophers prove abstractly that punishment is justified because it gives offenders what they “deserve” and validates our “retributive emotions.” What the public hears the philosophers say, however, is that it is morally acceptable to hate offenders and that offenders deserve their (long) sentences. Philosophers may, in turn, insist that the public has misinterpreted the intent of their philosophies. They are speaking at a level of abstraction that does not dictate any one version of their philosophies. Yet this abstraction is precisely the problem. According to Whitman, the philosophers do not reach concrete details and specific problems, leaving their philosophies and concepts (for example, “proportionality” and “desert”) open to interpretation in a manner consistent with the climate of American harshness. See generally Whitman, *Plea*, *supra* note 3, at 93–95.

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C. *The Superficial Version of the Criticisms Superficially Rebutted*

So far, I have summarized two of Whitman's "practical" objections to retribution: It is practically irrelevant, and it has harsh effects, no matter what retributivist theorists may intend.<sup>80</sup> In Part III, I will provide a sympathetic reconstruction of one version of retributivism's theoretical underpinnings, showing that the theory should not be considered harsh in its entirety and can be practically relevant. In the hands of Augustine and Smith, I will demonstrate that retributivism is a theory that offers a solution to the problem of reckless human emotions.<sup>81</sup> Two popular versions of retributivism, however, simply fail to address the problem of human emotion and its dangers.<sup>82</sup>

But, before we even reach my sympathetic reconstruction of retributivism, there is still something we can say in defense of retributivism generally. Whitman's objections thus far are not entirely convincing, even against the more popular versions of retributivism. Some of Whitman's assertions have a tossed-off and even *ad hominem* feel, and they can seem more polemical than penetrating. Many times, his allegations do not give enough credit to the work retributivist theorists have done and continue to do in concrete circumstances. Furthermore, many of Whitman's charges hold retributivism to a higher standard than rival justifications of punishment. Before reaching the objection to retributivism that really has force in Part III, I will first address a superficial interpretation of Whitman's complaints.

1. *Is Retributivism Practically Irrelevant?*

Whitman's practical irrelevance thesis asserts that retributivism has nothing to say about the most pressing problems of American punishment.<sup>83</sup> According to this thesis, retributivism is simply silent as to the harshness of punishment or involves models and assumptions about punishment and human behavior that are too abstract to be useful.<sup>84</sup> Whitman's argument is, at the very least, exaggerated.

First, it is simply no longer true that retributivists have nothing to say about the "messiness" of the real world or do not speak about degradation or sadistic prison wardens. Even if that were true at the time Whitman wrote (which I doubt), it is not true today. The mountain of

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80. *See supra* Part II.B.1–2.

81. *See infra* Part III.D.

82. *See infra* Part III.B–C.

83. Whitman, *Plea*, *supra* note 3, at 89.

84. *See id.*

critical essays written by retributivists on the topic of shaming punishments surely presents a counterpoint to Whitman's claim.<sup>85</sup> Retributivists are responsible for the fact that Professor Dan Kahan's proposal for shaming punishments as a form of "alternative sanction[s]"<sup>86</sup> had only a brief moment in the sun.<sup>87</sup> Furthermore, Professor Martha Nussbaum's *Hiding from Humanity* puts to rest the notion that retributivism (a label Nussbaum accepts for her theory) has nothing to say about the dangerous emotions that drive punishment.<sup>88</sup>

Nor is it the case that retributivists are blind to inequality in personal capacities and circumstances. Professor Jeffrie Murphy addresses this issue in his classic essay on Marxism and retribution.<sup>89</sup> Murphy claims that retributivism should be viewed as a social ideal until material conditions among people are roughly equal; only then can a society exist in which "crime itself and the need to punish" are fairly meted out.<sup>90</sup> One may disagree with Murphy's claims,<sup>91</sup> but they

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85. Whitman gleefully makes this point in the opening of his review of Nussbaum's book. Whitman, *Happy Punishers*, *supra* note 3, at 2698 (describing the "steady flow of literature on" some "of the darker and uglier emotions in the law," focusing "in particular on shame and disgust, for the past decade or so"). Whitman tends to dismiss this focus, but he should at least acknowledge some of the practical good it has done and the extent to which it shows that retributivists can be practical when they choose to be.

86. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631 (1996) (arguing that "by using [shaming] practices, either alone or in combination with conventional sanctions such as fines and community service, American jurisdictions can fashion politically acceptable alternative sanctions").

87. Kahan himself seemed to later retreat from his earlier advocacy of shaming sanctions. See, e.g., Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075 (2006) ("I've now had an extended period to reflect on [my previous] argument. And I've concluded that I was wrong."); Dan Markel, *Are Shaming Punishments Beautifully Retributive?: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2162–64 (2001) [hereinafter Markel, *Beautifully Retributive*] (rebutting the idea that shaming punishments are compatible with retributive theory); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1386–88 (2007) (identifying and exploring three potential problems with Kahan's recent retreat from shaming punishments).

88. See generally NUSSBAUM, *supra* note 3. Whitman ends his review of Nussbaum by claiming that she owes us more—a sentiment echoed later in this Article. See Whitman, *Happy Punishers*, *supra* note 3, at 2724. At the same time, surely Nussbaum is on the right track, and the "more" that Whitman yearns for may be found in Nussbaum's other work. See generally MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* ix (1997) (arguing in favor of a "particular norm of citizenship" and "mak[ing] educational proposals in the light of that ideal").

89. See J.G. Murphy, *Marxism and Retribution*, in *A READER ON PUNISHMENT* 47, 49 (R.A. Duff & David Garland eds., 1994) ("What does [this] right to punish tell us about the *status* of the person to be punished—e.g., how are we to analyse his rights, the sense in which he must deserve to be punished, his obligations in the matter?" (emphasis added)).

90. *Id.* at 65.

91. It is worth pointing out that Murphy himself was—at least for a while—an influential retributive theorist.

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do indicate the fallacy of the claim that retributivists simply assume that all people are equally autonomous.

Second, the nonapplication of retributive theory to many current punishment controversies does not mean that it could not, in principle, be applied to those controversies. Retributivists have had plenty to criticize about degradation in punishment, especially in shaming punishments.<sup>92</sup> This shows that at least retributivism has the potential to be practically relevant. We simply cannot take silence to mean that the theory in question is irrelevant as to that topic. We could not, for example, criticize utilitarian theory for being silent about prison uniforms because no utilitarian has yet written a paper detailing why fluorescent prison uniforms do not maximize utility. Perhaps the theory only needs to be applied.<sup>93</sup>

These replies, however, may not sufficiently attend to the force of Whitman's practical irrelevance argument. Whitman argues that retributivism is practically irrelevant because it makes unrealistic assumptions about human nature.<sup>94</sup> For instance, retribution assumes that we can achieve an ideal of nondegrading punishment—in fact, it is only under such conditions that punishment will be justified. But, we cannot achieve such an ideal. We will never escape degradation in punishment.<sup>95</sup> In simpler terms, Whitman may be claiming that retribution is utopian. Its main flaw is not that it has nothing to say to us, but rather that it asks too much of us without telling us how to get there.<sup>96</sup>

Is utopianism necessarily a flaw in retributivist theory? We do not want a theory to tell us that we can solve our problems by growing wings and flying or by inventing a perpetual motion machine. These things would be objectionably utopian: They would ask us to achieve something that is not just hard but impossible. It is not clear, however, that retributivism is utopian in these unacceptable ways, but it may be naïve as Whitman claims. Given our current punishment prac-

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92. See *supra* notes 86–88 and accompanying text.

93. Two of Dan Markel's articles provide solid examples of the application of retributivist theory to practical problems in punishment. See generally Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009) [hereinafter Markel, *Executing Retributivism*] (explaining *Panetti v. Quarterman*, 551 U.S. 930 (2007), which prohibited the execution of an incompetent person, through the lens of retributivism); Markel, *supra* note 5 (arguing that the death penalty is not compatible with retributivist principles).

94. Whitman, *Plea*, *supra* note 3, at 107.

95. See *id.* ("In practice, the choice for retributivism in America is turning out to be the choice, not for equality, but for degradation.").

96. Cf. *id.* (arguing that theorists must "acknowledg[e] the truth of the ugliness around us, in a spirit of frankness, and work[ ] with that ugliness").

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tice, any ideal will ask a lot of us—and appropriately so. Whitman has not, in my opinion, laid a foundation to a legitimate claim that the retributive ideal of punishment is impossible. At most, he has demonstrated that retributivists should expand upon how our society should approach the ideal given our present circumstances.

Still, if some versions of retributivism seem practically obtuse, it may be because such theories should properly be considered *ideal* theories. In other words, these theories may provide an idealized picture to which our institutions should aspire. The theories are not properly criticized by the claim that the ideal does not match up with the real, because the ideal is supposed to show how much work is necessary to *reach* the ideal. An ideal that simply mirrors current conditions is no ideal at all.

Consider how Professor Herbert Morris's "liberty" theory might be used to criticize our shameful prison conditions.<sup>97</sup> Morris argues that the appropriate sanction for a criminal who has taken an extra liberty by breaking the law is the loss of some part of his liberty.<sup>98</sup> If this is so, then a liberty-deprivation brand of retribution would be internally committed to better (or at least more humane) prison conditions. Prison should be used solely for the loss of liberty, not for the offender's humiliation and degradation. Prison would then be no place for inhumane conditions, sadistic prison wardens, and the like. An offender who is punished with humiliation and degradation, in addition to his loss of liberty, is punished unjustly under Morris's theory.<sup>99</sup> When (abstract) retributive theory is applied to concrete circumstances, retributivism actually can make a practical contribution.<sup>100</sup> It is no criticism of Morris's theory to say that prisons now are not simply liberty-depriving. It is the point of Morris's theory to show us that this is all they should be, ideally speaking.

It is therefore not true that retributivism, as a theory, is practically irrelevant. Retributivism may be demanding, but that is different than claiming that it has nothing, in principle, to say about our problems. If anything, retributivism has too much to say—if only we would apply it correctly. We are too far fallen from the ideal. The way we treat prisoners inflames our resentment rather than curbs it. Our sentences are disproportionate on almost any reasonable conception

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97. See *infra* Part III.B, for a more detailed and critical discussion of Morris.

98. HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 36 (1976).

99. See *id.*

100. And, of course, the fact that we cannot achieve nondegrading prison conditions right away does not mean that we might not try to approach the ideal.

of proportionality. And Whitman's complaint that our retributive theories are practically irrelevant is a counsel of despair.

Interestingly, Whitman's counsel of despair is one uniquely for Americans. Europeans have achieved—or at least come closer to—the mildness that Whitman wishes we were able to achieve.<sup>101</sup> Whitman does not argue, however, that there is a deep or inescapable reason why, given the right institutions, Europeans can be mild but Americans cannot. Certainly, American traditions may make punishment reform harder, but this may only indicate that we increasingly need the tug of utopian theories to help us reach our potential for reform.

## 2. *Does Retributivism Contribute to Harshness?*

Whitman's more serious charge (the one I concede has some truth to it in the next Part) is that retributivism tends to lead to harshness regardless of whether such a result is intended.<sup>102</sup> This suggests that retributivism, even in the abstract, is a theory we should abjure because of the dangers it may encourage. According to Whitman, politicians and others can easily co-opt the language of retribution (of desert or of blame) and use it as cover for increasing the harshness of punishments.<sup>103</sup> Philosophers cannot entirely disclaim the consequences of their philosophies, Whitman claims, for it remains true that “[w]hatever the subtleties in their philosophy, our retributivists do indeed typically believe in hard looks and hard consequences, just as their fellow citizens do.”<sup>104</sup> At bottom, retributivism is a philosophy of blame and just deserts, and these terms, however nice they may sound in the abstract, are translated as a prescription for, in Whitman's words, “hard looks and hard consequences.”<sup>105</sup>

Sometimes, as the above quote intimates, Whitman phrases his objection in terms that imply, in effect, that retributivism itself is harsh.<sup>106</sup> But many times, he claims that retributivism only tends to be heard as harsh<sup>107</sup> whether or not it is actually harsh at bottom. I

101. WHITMAN, HARSH JUSTICE, *supra* note 1, at 97–150; *see also* Whitman, *Plea*, *supra* note 3, at 97–103.

102. Whitman, *Plea*, *supra* note 3, at 89, 103–07.

103. *See id.* at 91–93.

104. *Id.* at 94.

105. *Id.*

106. *See, e.g., id.* at 103–07 (stating that retributivism is a “choice, not for equality, but for degradation”).

107. *See, e.g., id.* at 94 (“The worry, in short, is that, to the extent retributivist philosophers are heard at all, they are heard in ways that amount to pouring gasoline on the fires of American punishment.”); Whitman, *Happy Punishers*, *supra* note 3, at 2718 n.71

address this latter, weaker criticism here, and I take up the stronger version (that retributivism is in essence harsh) in the next Part.

The first response to Whitman's argument may simply be that philosophers are not responsible for the harms they cause indirectly, especially for harms that they did not intend to cause. How could they be? Philosophers cannot be blamed for how their ideas are used, especially if those ideas are quite opposed to what retributivism in its pure theoretical form would counsel. For example, some blame Nietzsche's writings on the will to power as partly responsible for the rise of Nazism and Hitlerism.<sup>108</sup> If these dark forces misread Nietzsche, which they probably did, surely it is not his fault. He was only philosophizing and perhaps, properly read, his ideas do not lend themselves to ideals of racial purity and the idolization of naked power.

But, Whitman's argument, which is not to be taken lightly, is that we must judge a theory partly by its effects. Accordingly, Nietzsche may be to blame for the consequences of his philosophical ideas in the world, even those that he did not intend to cause. This is not an altogether crazy position. Nietzsche should have been more careful. Perhaps retributivists should also be more careful. Surely, though, this is a rather mild objection, and it may not move the average retributivist much. The lines of causation are hard to draw, and the abstractness of the retributivist philosophy, coupled with a lack of practical prescriptions, might isolate retributivism from the full force of the charge.

We should also examine whether retributive philosophy is unfairly singled out. Are other theories really blameless in the harshness of American punishment practice? Certainly deterrence theory has always been able to justify indeterminately long sentences. If a certain length of sentence is not deterring the crime sufficiently, then there seems no reason on deterrence grounds not to punish those who commit that crime much longer and much harsher.<sup>109</sup> In such a climate,

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("[R]etribution' is a slogan that encourages punitiveness, and [Dan] Markel and [Martha] Nussbaum have not offered any reason to suppose that careful philosophizing about the distinction between retribution and vengeance can do anything to ward off that danger.").

108. For a discussion (and dismissal) of this charge, see BRIAN LEITER, *NIETZSCHE ON MORALITY* 290–91 (Routledge 2002). According to Leiter, the Nazis "misread[ ]" Nietzsche. *Id.* at 290; *see also* WALTER KAUFMANN, *NIETZSCHE: PHILOSOPHER, POET, ANTICHRIST* 17 (4th ed. 1974) ("[O]ne must forgo any temptation to picture [Nietzsche] as the precursor of one of the many contemporary movements that identify him with their own causes.").

109. The idea that "optimal deterrence" is a fixed, objective fact that we can study and measure has been decisively refuted by Dan Kahan. *See generally* Dan M. Kahan, *The Secret*

stating that punishment is necessary to deter crime does not limit the length of a sentence. It also gives legislatures free reign to determine how long a sentence is necessary to achieve “optimal deterrence.”

Rehabilitative justifications of punishment also suffer from this flaw. If someone is an inherently dangerous sex offender, why not simply detain him in prison forever? Indeed, the Supreme Court seems receptive to this type of argument, arguably having given Congress the authority to detain sex offenders indefinitely so long as the offender is deemed incurable.<sup>110</sup> Rehabilitation theories seem to support the idea that we should imprison offenders for life if we view them as incurable. On this point, the retributivist may have the better argument that such treatment is harsh. It is unfair, according to the retributivist, to punish someone in excess of his desert based on a prior determination of his dangerousness rather than on his actual commission of a crime. Sex offenders (or anyone else) cannot be held past the sentence they deserve for their original bad act. At least when it comes to incarcerating sex offenders, the retributivist can, in theory, support the less harsh result. Rehabilitative and deterrence theorists cannot obviously support the same result.<sup>111</sup> Indeed, these theorists may be in the same position as the retributivist theorist: They may intend mildness, but their theories will be interpreted as legitimating harshness in the form of long or indeterminate sentences.<sup>112</sup>

At times, Whitman’s analysis seems to be a counsel of despair—a sort of generalized pessimism. To my *tu quoque*, Whitman might respond that all theories of punishment, given the present political climate, are subject to abuse by courts and legislatures. They are all too abstract to give guidance. They can all be abused given the harshness of American political life. The problem, Whitman might argue, is that our American system is too democratic, and democracy yields harshness. This, of course, is a problem all theories might have, not just retributivism.

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*Ambition of Deterrence*, 113 HARV. L. REV. 413, 425–28 (1999). After Kahan, it is easy to see “optimal deterrence” as formal and empty—much as many view proportionality.

110. See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010) (holding that Congress may use its authority under the Necessary and Proper Clause to civilly commit sex offenders beyond the conclusion of their federal prison sentences).

111. See *supra* text accompanying notes 109–10.

112. Ristroph, *Punisher*, *supra* note 5, at 743 (“The truth may be that all the mainstream justifications of punishment are subject to the charge of elasticity: applied to real world sentencing policies, the theories can and have been invoked to justify punishments that academic experts believe are excessive.”).

Whitman favors rehabilitation of the offender as a theoretical matter.<sup>113</sup> Practically, he believes that punishment practice should be removed from direct popular control as much as possible.<sup>114</sup> Whitman has my sympathy. There are good reasons to want to dilute popular passion when it comes to making punishment policy. But, this is a proposition that retributivists can also support.<sup>115</sup> If not sentencing commissions,<sup>116</sup> then judges<sup>117</sup> should at least ensure that sentences are not disproportionately long. There are also good reasons to believe that judges will not always be dispassionate in making sentences, so we should also worry about checking their worst impulses.<sup>118</sup> Whitman and some retributivists could agree that punishment should be a matter of more or less “elite” decision making or, at the very least, more bureaucratized, institutionalized decision making.<sup>119</sup> We need to insulate punishment from our passions and from our worst selves, a point some retributivists have emphasized. Moreover, the idea that democracy should be constrained by robust constitutionalism is an old one, and retribution occasionally fits into this discourse, as I explain later.<sup>120</sup>

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113. See Whitman, *Plea*, *supra* note 3, at 107 (“The choice for rehabilitation is indeed the choice of a system that treat[s] offenders as inferiors—but at least it is the choice of a system that can in principle treat offenders with some measure of indulgence and even kindness, preserving the aspiration that they may be reintegrated into society on equal terms.”).

114. See *id.* at 93–94.

115. See *infra* Part III.D, for more on restraints on passions in punishment.

116. For a discussion of the American sentencing scheme, see *supra* text accompanying notes 18–48.

117. Particularly in the area of punishment, the popular election of judges is cause for concern. See, e.g., Chad Flanders & Matt Hall, Special to the Beacon, *Pro Missouri Plan: We Should Not Elect Judges*, ST. LOUIS BEACON, Feb. 16, 2010, <http://www.stlbeacon.org/content/view/100346/74/> (arguing against a proposed amendment to the Missouri Constitution that would require the election of all state court judges); cf. Benjamin A. Levin, Note, Caperton v. A.T. Massey Coal Co.: *Something is Rotten in the State of West Virginia—A Common-Law Approach to Constitutional Judicial Disqualification*, 69 MD. L. REV. 637 (2010) (discussing a case in which a judge did not recuse himself after receiving large campaign contributions from a party).

118. See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 19 (1973) (“Whatever our platonic vision of the judge may be, this subject, like others, must be considered in the setting of a real world of real, mixed, fallible judicial types.”).

119. See, e.g., Whitman, *Testimony*, *supra* note 3, at 9 (“The best solution to [this] problem [of harshness] is one that requires some courage: The best solution is to take policy-making in criminal justice out of the democratic process, to the extent possible—ideally through more deeply constitutionalizing the law of punishment.”).

120. See, e.g., George Kateb, *Punishment and the Spirit of Democracy*, 74 SOC. RES. 269, 275 (2007) (“[W]ithout substantial constitutionalism, democracy would not be itself, but wield a popular sovereignty that is always potentially tyrannical.”).

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In sum, retributivists have a ready reply to the superficial criticisms that retribution is both irrelevant and possibly harmful. Retributivism is not that irrelevant, they can say: It has had things to say about our harsh punishment system.<sup>121</sup> The simple fact that retributive theory is often abstract does not preclude it from being made more concrete. Furthermore, retributivists can disclaim the effects of their theories.<sup>122</sup> It is not their fault that bad people have misread their theories, or if their ideas are somehow “in the air” when people make punishments harsher. At the very least, other theories are no better than retributive theories in this regard. Whitman’s criticisms, then, may seem both superficial and easily rebutted. But, this is only at first blush.

### III. RETRIBUTIVISM: THREE TRADITIONS

In the previous Part, I dealt with a mostly superficial version of Whitman’s charges against retributivism.<sup>123</sup> By and large, Whitman’s charges could be rebutted by showing that retributivists have made contributions to debates in punishment practice and by highlighting why it is not obvious that retributivists should be held responsible for the unintended effects of their philosophizing. But, neither of these responses reaches Whitman’s deeper criticism. He does not claim that retributivism can never say anything about punishment practice or that it may have harsh effects; rather, Whitman’s deeper worry is that retributivism, as it is frequently articulated and defended, begins and ends with a flawed understanding about the nature of punishment.<sup>124</sup> There is something wrong with the theory of retributivism, even in its abstract form. The problem is not primarily that retributivism is easily co-opted into harsh aims or silent about harsh punishment. Instead, something about retributivism itself compels us to view punishment in a way we ought not.

Many retributivists problematically view punishment as yielding some good—either for the prisoner or for society—and thus justify punishment by reference to that good. A philosophy of punishment, however, should be focused more on preventing the realization of some bads (emotional excess, status degradation) rather than the realization of some goods. There is considerable truth to this allegation.<sup>125</sup>

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121. *See supra* Part II.C.1.

122. *See supra* Part II.C.2.

123. *See supra* Part II.C.

124. *See* Whitman, *Plea*, *supra* note 3, at 103–07.

125. *See infra* Part III.A–C.

Attempts to give retributivism content, especially in the latter half of the twentieth century, have resulted in theorists emphasizing some of the worst parts of punishment while at the same time dressing them up in flattering colors. The idea that there is a right to be punished or that punishment is necessary to express the equal social status among members of a community paints punishment in a positive—even glowing—light. It is here that we find the mechanism that links retributive philosophy to practical harshness: Retributive philosophy leads us to underplay the dangerousness of punishment or to promote certain aspects of punishment with the idea that they are “good,” when they are instead deeply problematic.

Perhaps it is understandable that retributivists have gone in these directions. The bare idea of retribution—that a criminal deserves to be punished<sup>126</sup>—lacks real substance. Apart from its intuitive feel, it does not offer a fully fleshed out idea of what purpose punishment serves. But, if we add to retribution a theory of rights, that the criminal has a right to be punished, or a theory of societal expression, that punishment is society’s way of expressing its disapproval of a criminal’s action, we have something more than the sheer ipse dixit that the criminal deserves to be punished. Indeed, we have something more like a theory of political society—or at least a theory of rights. But, it is these same moves—the moves that make retribution more theoretically attractive—that also tend to make retributivism a philosophy that seems blind to the problematic nature of punishment as an institution.

In the last two Sections of this Part, I outline an understanding of retributive punishment as a theory of restraint rather than as a theory of realizing goods or satisfying rights. I attempt to make a limited form of retributivism seem more appealing without making punishment seem like a practice dedicated to realizing some good. Support for this theory of retributivism comes from both Augustine, who saw retribution as a way of embodying Christian mildness, and especially Adam Smith, who viewed retribution as a way of checking our worst

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126. As Michael Moore summarizes, “[r]etributivism is the view that punishment is justified by the moral culpability of those who receive it.” Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179, 179 (Ferdinand Schoeman ed., 1987) (emphasis omitted); see also John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 4–5 (1955) (“What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act.”).

passions instead of giving expression to them.<sup>127</sup> In exploring these traditions, I deny the assertion that retributivism is an intrinsically harsh theory of punishment. I agree with Whitman that, in some popular versions, retributivism unquestionably has this tendency,<sup>128</sup> but not in all versions.

A. *Our Orientation to Punishment*

Throughout this Section, I claim that some versions of retributivism have the wrong *attitude* toward the institution of punishment, or that they have a wrong *orientation* toward it. It is this attitude or orientation, I suggest, that may lead to harsher punishment. I conclude that some variations of retributive theory will have harsh results, and it will oftentimes be no accident that those retributive theories lead to harsh results because of how these theories encourage us to view punishment.<sup>129</sup>

What does it mean to claim that a theory encourages us to view punishment in a certain way? We might say that a theory is oriented toward a result. A theory is oriented toward a certain state of affairs, an attitude, or a result if the internal logic of that theory promotes, or at least does nothing to prevent, that state of affairs, attitude, or result. Orientation might simply refer to the tendency toward a result, but it also might refer to an attitude. The theories of retributivism I discuss point in the direction of harshness by obscuring the inherent harshness of the act of punishment itself. By encouraging us to view punishment positively, some retributivists license certain results, even if those results are not directly intended or entailed by the theory. Below I argue that many retributivist theories have the wrong orientation toward punishment, and we should not be surprised when that orientation leads to harsh results. This may give us insight into the mechanism by which retributive theories may lead to, or encourage, harshness in the real world.

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127. See *infra* Part III.D.

128. I will not engage here with a version of retributivism that is receiving increased play, albeit mostly by attack. It is the idea that retributive punishment involves the infliction of physical or mental suffering on the offender, rather than the deprivation of some good or goods. For an exegesis of Kantian retributivism that rebuts this mischaracterization of retributivism, see Gray, *supra* note 67 (manuscript at 142–47); see also Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. (manuscript at 4) (forthcoming 2010).

129. See *infra* Part III.B–C.

To illustrate, an example from a different theory of punishment may be helpful.<sup>130</sup> Commonly, rehabilitation is criticized as treating criminal offenders as patients suffering from a disease or disability rather than as moral agents.<sup>131</sup> Some rehabilitative theorists, at least those with the most radical agendas who wished to replace punishment with a system of therapy or hospitalization,<sup>132</sup> spoke in exactly these terms.<sup>133</sup> It seems fair to state that at least some rehabilitative theories orient us toward viewing criminal offenders as beings to be treated rather than as agents to be held responsible.<sup>134</sup> At least this was the popular objection. Some rehabilitative theorists might balk at this extreme characterization, but it seems clear that theories about rehabilitation at least tend in this direction, or at the very least do nothing to prevent us from viewing criminal offenders in a potentially objectionable way. Moreover, rehabilitative theories espouse this view under the guise that punishment is a good thing for offenders and for society.<sup>135</sup>

By claiming that retributivism can be oriented toward a certain result, I mean that some versions of retributive theory tend to encourage a certain attitude about punishment and the people who are

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130. I take the rough outline of this example from C.S. Lewis's great essay on the "humanitarian" theory of punishment. See generally C.S. Lewis, *The Humanitarian Theory of Punishment*, in *PHILOSOPHY AND CONTEMPORARY ISSUES* 71 (John R. Burt & Milton Goldinger eds., 1972) (arguing against the "[h]umanitarian theory" of punishment and for a return to retributive theory in the interests of the criminal). By "humanitarian," I take Lewis to mean what we understand as rehabilitative justifications of punishment—namely, that a punishment may be for the offender's own good. These justifications will also tend to view lawbreaking as evidence of a condition that needs to be treated rather than punished.

131. See, e.g., *id.* at 72 ("[W]hen we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case.'").

132. For a discussion (and brilliant dissection) of Lady Wootton's views on punishment, see H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 193–94 (1968). Hart characterizes Wootton's views as part of a "new skepticism" about "the whole institution of criminal punishment so far as it contains elements which differentiate it from a system of purely forward-looking *social hygiene* in which our only concern . . . is with the future and the rational aims of the prevention of further crime, the protection of society and the care and if possible the cure of the offender." *Id.* (emphasis added).

133. Others were less explicit. See, e.g., Karl Menninger, *The Criminal Law System*, in *PHILOSOPHY AND CONTEMPORARY ISSUES*, *supra* note 130, at 62, 73 (suggesting that punishment be replaced by a system focused on helping the criminal).

134. See, e.g., Lewis, *supra* note 130, at 71–72 ("[T]his doctrine, merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being.").

135. See *id.* (noting that the doctrine only "appears" merciful). Of course, we might go further and state that rehabilitation is oriented not only to a type of attitude but also to a type of treatment: commitment (perhaps indefinitely so). We need not spin out the example more; I want only to present the general idea.

punished, and at least do nothing to discourage that attitude. In many respects, my claim about retributivism's orientation mirrors many of the objections made to the orientation of rehabilitationist theories of punishment. Rehabilitation, it was initially thought, led us to view punishment as maximizing a good; we were treating people, making them better, healing them rather than hurting them.<sup>136</sup> But, the response was: while rehabilitationists may have thought that punishment was maximizing a good, their theory had an underlying orientation that led to a bad attitude toward offenders, an attitude that failed to respect offenders as agents.<sup>137</sup> In a similar way, I argue that, despite the theoretical efforts to view retributive punishment as a good that respects the offender's rights and allows society to express its condemnation, there is something about some retributive theories that should worry us—an orientation that is deeply mistaken.<sup>138</sup> I also argue, however, that this orientation is not intrinsic to all versions of retributive punishment.<sup>139</sup>

One last point: Claiming that a theory's orientation is bad or wrong or mistaken is not necessarily the same as saying that the theory itself is false. Rather, it means something more subtle—namely, that the theory encourages us to view punishment or criminal offenders in the wrong way. At the extreme, this criticism articulates the concern that the theory's orientation will lead to bad results in the world—including treating people as they should not be treated and developing regimes of harsh punishments. Because of the nature of this criticism, I will not delve deeply into the merits of the various theories. After all, that is not my main point. Instead, I am focused on whether some theories may have a fundamental orientation (not a true or false conclusion) that should give us pause.

### B. *Retributive Punishment as a Right*

Whitman complains that retributivism is too abstract; that is, retributivism abstracts from discussions about human emotion and from the phenomenon of degradation, or the tendency to view those whom we punish as less than human.<sup>140</sup> Whitman alludes to a tradition that views punishment as a matter of (abstract) equals disciplining (abstract) equals so that the hierarchy between punisher and punished is

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136. *Id.* at 71.

137. *Id.* at 72, 74–75.

138. *See infra* Part III.B–C.

139. *See infra* Part III.D.

140. *See, e.g.,* Whitman, *Plea, supra* note 3, at 107 (referring to “degrading retributivism”).

hardly noticed. Whitman draws explicit attention to this lineage when he describes the contemporary defenders of retribution as the “children of Kant”<sup>141</sup> and speaks of the lessons retributivists learned at “the knee of Kant.”<sup>142</sup> Leaving aside whether Whitman correctly interprets Kant,<sup>143</sup> it is true that many influential punishment theorists have explicitly acknowledged their debt to Kant.<sup>144</sup> Whatever Kant might have said, we can make do with the following portrayal that Whitman borrows from Herbert Morris.

According to Morris, society is made up of equals who work under the burden of obedience to the law.<sup>145</sup> When a person breaks the law, he takes advantage of society by taking a benefit (a freedom from the law) that others do not have.<sup>146</sup> To take the offender seriously—that is, to treat him as an equal agent—we must place a new burden upon him.<sup>147</sup> That burden is his punishment.<sup>148</sup> We must force him to accept the deprivation of his liberty as repayment for the extra liberty he enjoyed at our expense.<sup>149</sup> In a way, he has chosen to be punished, because his punishment is the (natural? expected? justified?) outcome of his choice to break the law.

When we punish the criminal by depriving him of liberty, we reestablish him as our equal, and in so doing, treat him with respect.<sup>150</sup> We take seriously his status as a moral agent capable of answering for his wrongs. As Whitman summarizes: “[O]nly blame takes the offender seriously as a moral actor.”<sup>151</sup> To cure the offender is to treat him as a patient, or as sick and needing to be managed and manipulated rather than as one to be held responsible.<sup>152</sup> It is equally problematic to punish for the sake of deterring others because then punishment treats the offender as merely the means to ensuring the

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141. Whitman, *Happy Punishers*, *supra* note 3, at 2704.

142. Whitman, *Plea*, *supra* note 3, at 95.

143. See generally Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 509 (1987) (suggesting that Kant never actually developed a coherent theory of punishment).

144. See, e.g., JACOB ADLER, *THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT* (1991) (acknowledging Kantian theory throughout); JEFFRIE G. MURPHY, *Three Mistakes About Retributivism*, in *RETRIBUTION, JUSTICE, AND THERAPY* 77, 77–80 (1979) (arguing that Kantian retributivism is worth taking seriously); WOJCIECH SADURSKI, *MORAL PLURALISM AND LEGAL NEUTRALITY* (1990) (same).

145. MORRIS, *supra* note 98, at 33.

146. *Id.* at 34.

147. *Id.* at 34–36.

148. *Id.*

149. *Id.*

150. *Id.*

151. Whitman, *Plea*, *supra* note 3, at 95.

152. *Id.*

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safety of others.<sup>153</sup> This is why Hegel, following Kant's lead and still in the grips of the Kantian picture, speaks of the prisoner's right to be punished.<sup>154</sup> To not punish, Hegel argues, is to deny the offender his right to be treated as an equal. For Hegel, the offender, who has autonomously chosen to break the law, has, at the same time, chosen to be punished. To fail to respect that choice is to fail to respect the offender's right to choose.<sup>155</sup>

Above, I rebutted part of Whitman's criticism that retributivism is too abstract by construing Morris's picture of society as an ideal rather than as a picture of reality.<sup>156</sup> Jeffrie Murphy made a similar move in his article on Marxism and retribution.<sup>157</sup> If Morris's theory claims that society is composed of rough equals but society is not so comprised, then we must either change society to fit Morris's theory or accept another justification for punishment.

Articulating Morris's theory this way has the perhaps surprising reformist implication that we can only punish once society has attained a level where each person is roughly equal. Morris's theory might also commit us to improving prison conditions.<sup>158</sup> If the sole aim of punishment is to deprive the offender of the extra liberty he has taken from society, then prison conditions that also humiliate and degrade the offender are excessive, unjustified, and therefore unjust. In these two ways (there may be more), Morris's simple vision could lead to radical reformation of society and punishment practices.

But, the reformist potential of Morris's theory has been eclipsed by the indisputable anchor of his influential essay—namely, his reworking of Hegel's argument that criminals do not simply deserve to

153. See *id.* at 95 ("We must found punishment on blame, because only blame takes the offender seriously as a moral actor.")

154. See GEORGE WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* 70–71 (T.M. Knox trans., Oxford Univ. Press 1942) (1821) ("[The criminal's] action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right.")

155. See *id.* ("The injury . . . which falls on the criminal is not merely *implicitly* just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e. in his objectively embodied will, in his action.")

156. See text accompanying notes 97–100.

157. See Murphy, *supra* note 89, at 49–50 ("I believe that retributivism can be formulated in such a way that it is the only moral defensible theory of punishment. I also believe that arguments, which may be regarded as Marxist at least in spirit, can be formulated which show that social conditions as they obtain in most societies make this form of retributivism largely inapplicable within those societies. . . . The consequence: modern societies largely lack the moral right to punish.")

158. See discussion *supra* text accompanying notes 97–100.

be punished but have a positive *right* to be punished as a matter of societal respect.<sup>159</sup> According to Morris, failure to punish actually violates the criminal's rights.<sup>160</sup> Morris's claim that we have a right to be punished has invaded the retributivist imagination, not the reformist ideas and implications described above.

The right to be punished has struck many scholars as a bizarre concept.<sup>161</sup> Indeed, who would want to claim such a right? Who would be upset if the offender's right was violated, and he was not punished? Some scholars have suggested that the right is better characterized as a right not to be treated as a patient (a kind of liberty right) rather than as an affirmative right to be punished.<sup>162</sup> This characterization may be a better overall interpretation, for much of Morris's essay is dedicated to the "badness" of therapy and not the "goodness" of a right to be punished. It may also be a more plausible position. It is not, however, what Morris argues. Instead, he argues that punishment is a right.

Morris's defense of retributive punishment orients us in the wrong direction when it comes to punishment. By focusing on how punishment is a right, we become less reluctant to tolerate ways in which we might depart from an adequate enforcement of that right. That is, if we conceive of punishment as a right, rather than as just deserts, we might ignore its awful aspects, which we should not feel good about imposing. When we think of punishment as a right, we risk viewing it like other rights, such as the right to free speech or the right to vote, which, even if different, are good things to have. (Indeed, Morris remarks that the right to be punished is the precondition of all other rights!<sup>163</sup>) When we view punishment as a right, we do not just license the state's penal power. We encourage and bless it, representing that punishment is a way of respecting rights and treating others as equal human beings with equal dignity.

The right to be punished encourages us to view prison as a good thing, which wrongly orients us toward punishment—much in the

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159. Morris emphasizes this point early in his essay. The right to be punished, he says, is often dismissed as "[a] strange right that no one would ever wish to claim." MORRIS, *supra* note 98, at 32. "With that flourish," Morris continues, "the subject is buried and the right disposed of." *Id.* According to Morris, however, his paper "resurrect[s]" this subject. *Id.*

160. *Id.* (arguing that "the denial of [the right to punishment] implies the denial of all moral rights and duties").

161. *See id.* (acknowledging the apparent oddity of his own argument).

162. *See, e.g.,* John Deigh, *On the Right to Be Punished: Some Doubts*, 94 ETHICS 191, 195–97 (1984) (puzzling through scenarios in which it makes sense to speak of a right to be punished).

163. MORRIS, *supra* note 98, at 56 (arguing that the denial of the right to punishment entails the denial of all moral rights and duties).

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same way that rehabilitation wrongly orients us toward punishment because we come to view punishment as a benefit to the offender. This orientation does not change fundamentally when we say that punishment is a way of *respecting* the offender's rights. We are still viewing punishment as a way of realizing a good thing. This orientation toward punishment, however, does not adequately capture the nature of the risks inherent in punishing offenders. In this respect, Whitman is unquestionably correct: We ignore what punishment really is when we begin treating it as a matter of securing equal rights. We ignore, more specifically, the fact that most punishment involves a form of degradation and not equality.

The example Morris uses to begin his essay is illuminating on this point.<sup>164</sup> His example describes a hero-criminal who is “deeply moved” and “exhilarated” when the mock prosecutor “demands the death penalty as [a] reward for a crime that merits admiration, astonishment, and respect.”<sup>165</sup> The hero is a brilliant criminal who is fully responsible for his crime.<sup>166</sup> He does not want to be treated as sick or in need of treatment, and he is insulted when his attorney portrays him as a “victim” not fully responsible for his actions.<sup>167</sup> He wants to face his punishment as a “man,” not a victim, and it is only the most severe punishment, death, that he feels could fully honor the greatness of his crime.<sup>168</sup> The greater the punishment, the greater the respect.<sup>169</sup>

Without fully embracing the idea that a prisoner should be treated rather than punished, we may wonder whether Morris's heroic criminal is really the norm. Most crimes are not of the heroic type, and most punishment—especially the death penalty—cannot plausibly be construed as a “reward” for a crime well committed.<sup>170</sup> A theory that uses this picture of punishment as its ideal badly misleads us in accepting aright the true nature of punishment. It does not take into account the circumstances under which most crimes occur, nor

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164. Morris's example is literary, “Alfredo Traps in Durrenmatt's tale.” *See id.* at 31 (emphasis omitted). The use of a fictional example—instead of a real life example of someone committing a crime and being punished—is revealing.

165. *Id.* at 31 (internal quotation marks omitted).

166. *See id.* (“disavow[ing] with indignation and anger” his attorney's attempt to argue that he was innocent and incapable of guilt).

167. *Id.*

168. *Id.*

169. *See id.*

170. *Id.* Certainly few criminals will think of punishment, especially the death penalty, in this way.

does it recognize how punishment, under most conditions, is a morally ambiguous institution that can tend toward harshness.

We might say further that viewing punishment as a matter of rights encourages precisely the harshness that Whitman warns against under the guise of securing “equal liberty” for offenders.<sup>171</sup> Consider the ways that Morris’s position is consistent with the measures of harshness that Whitman identifies.<sup>172</sup> Defending the right to punishment means resisting efforts to reduce punishment in the interest of mercy. Indeed, we should be wary of mercy because punishment reduction on mercy grounds *actually violates the offender’s rights*. Sentences should be fixed for each crime—not varied between offenders—because punishing someone less than another offender means treating him as less responsible. In short, any version of retributivism that defends the right to be punished endorses a type of harshness. It leads to rigidity and absolutism; the right to punishment “trumps”<sup>173</sup> concerns about efficiency or mercy, leading to inflexible punishments. It is no wonder, then, that a contemporary punishment theorist much influenced by Morris<sup>174</sup> wrote an article titled “Against Mercy,” which finds “some truth” in the “familiar trope” that “if punishment is deserved, mercy to the offender is a breach of the duty of justice and a rupture in the public trust in the reliability and consistency of law” and advises against the “dangerous charms” of mercy.<sup>175</sup>

I am not claiming that Morris’s theory of retribution is false. I am saying only that it inculcates a potentially dangerous attitude toward punishment—an attitude that treats punishment not as a necessity but as a positive good. Some theories may not be wrong in substance but are wrong in how they encourage us to view an institution. Consider again the rehabilitation theorist: He problematically wanted us to view punishment as a mode of treatment and the offender as sick—an orientation that is subtly, but horribly, wrong.<sup>176</sup> It encourages us to treat offenders as patients to be cured and not as agents to be pun-

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171. See discussion *supra* Part II.B.1.

172. See discussion *supra* Part II.A–B.

173. See, e.g., Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., Oxford Univ. Press 1984) (“Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”).

174. See, e.g., Dan Markel, *supra* note 5, at 427 n.94 (2005) (acknowledging the contributions of Herbert Morris). R

175. See generally Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1425, 1478 (2004). Markel allows that there should be some sites for mercy in punishment, but emphasizes that there should be “guardrails . . . to protect those sites from the possibility of improperly insinuated compassion, caprice, corruption, or bias.” *Id.* at 1478.

176. See *supra* text accompanying note 152. R

ished.<sup>177</sup> Morris's theory similarly encourages us to think that we are respecting prisoners, even as we are degrading them.

These types of theories may not intend to be harsh, but by suggesting that we view punishment positively, they give us the wrong orientation toward punishment. Morris's theory encourages us to view punishment positively, which may obscure the many ways that punishment is, and can be, harsh. In Whitman's understanding, this problematic orientation, alone, gives us good grounds to reject the theory, even if the theory justifies punishment in the abstract.

### C. *Expressive Retributivism*

In the last twenty years, an even more popular version of retributivism has emerged, owing a debt, at least in part, to Dan Kahan who has adopted Joel Feinberg's emphasis on the "expressive function" of the law.<sup>178</sup> Historically, expressivism is associated with the Victorian James Fitzjames Stephen who believes punishment serves to express our anger and hatred at the crime and the criminal.<sup>179</sup> He also believes punishment channels and focuses our hostile emotions.<sup>180</sup> Stephen infamously analogizes punishment to marriage: just as marriage domesticates human lustfulness within the context of matrimony, punishment also constrains vile passions, such as hatred and resentment, by elevating them to the noble purpose of condemning offenders.<sup>181</sup> Punishment, to Stephen, is a means of condemning the offender and a pragmatic device that prevents our worst emotions from completely dominating us.<sup>182</sup>

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177. See *supra* text accompanying notes 152–55.

178. See, Kahan, *supra* note 86, at 592, 595 (suggesting that resistance to alternative sanctions "reflects their inadequacy along the expressive dimension of punishment"). See generally Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397 (1965).

179. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81 (London, MacMillan & Co. 1883) ("The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.").

180. *Cf. id.* at 93 ("Great and indiscriminate severity in the law no doubt defeats itself, but temperate, discriminating, calculated severity is, within limits, effective, and I am not without hopes that in time the public may be brought to understand and to act upon this sentiment; though at present a tenderness prevails upon the subject which seems to me misplaced and exaggerated.").

181. See *id.* at 82 ("The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the [sexual passions].").

182. This latter idea is important; for a further discussion of how both Augustine and Adam Smith embrace it, see *infra* Part III.D. Stephen seemed to think that the problem in his age was not an excess of anger, but of tenderness. See STEPHEN, *supra* note 179, at 82 ("[I]n the present state of public feeling, at all events amongst the classes which principally

Stephen's lasting contribution is his belief that punishment serves to express our anger at offenders.<sup>183</sup> Stephen almost seems to revel in the joy of hating lawbreakers.<sup>184</sup> He may therefore be of use as a shrewd diagnostician of our present condition where our contempt for wrongdoers seems to know no limits. At the same time, Stephen's theory, at least in its pure form, cannot and should not be considered retributivist. It is a purely expressive theory because punishment is justified not on the ground that the offender deserves to be punished but on the ground that punishment validates our hatred for the offender.<sup>185</sup>

Still, many of Stephen's ideas have influenced the retributivist revival, especially through the works of Professors Jeffrie Murphy,<sup>186</sup> Jean Hampton,<sup>187</sup> and (most recently) Dan Markel.<sup>188</sup> Stephen pointed the way toward making retributivism not about balancing pain for pain or liberty for liberty (as with Morris) via punishment, but about negating the symbolic message that the criminal sends with an equally forceful symbolic response through punishment.<sup>189</sup>

Expressivism has been newly reconceptualized as a way of giving flesh to the bare retributive idea that an offender should be punished for his wrong. The bare idea of retributivism is intuitive but nonetheless uninspiring, even empty. Wrongdoers, retributivists posit, deserve to be punished. Why? What good comes of it? Here, the bare retributive idea needs fleshing out. One way of fleshing out retributivism is through the idea of a social contract in which benefits and burdens are evenly distributed: The criminal who commits a crime gets an ex-

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influence legislation, there is more ground to fear defect than excess in these passions.”). It is an open question what Stephen would have made of our age.

183. STEPHEN, *supra* note 179, at 82–83 (describing “[t]he expression and gratification of these feelings” as “one of the objects for which legal punishments are inflicted”).

184. *See id.* at 81 (“I am also of opinion that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community.”).

185. *Id.* at 81–82 (“I think it is highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it”).

186. *See, e.g.*, Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 594–95 (1998) (placing Murphy in the “retributivist revival”); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1764 (1999) (describing Murphy's theory of punishment as expressive).

187. *See, e.g.*, Henderson, *supra* note 186, at 594–95 (describing Hampton's claim that punishment “reaffirm[s]” the victim's “moral worth” as part of the retributivist revival); Kahan, *supra* note 86, at 594–95 (explaining that both Stephen and Hampton “emphasize[ ] the expressive dimension of punishment”).

188. *See, e.g.*, Markel, *Executing Retributivism*, *supra* note 93, at 1181 & n.73 (citing Stephen for the proposition that retributive punishment performs an expressive function).

189. For further discussion on this point, see Flanders, *supra* note 11, at 616.

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tra benefit and so must bear an additional burden. Although this may seem like a promising approach, many scholars have claimed that it is a substantive non-starter.<sup>190</sup> Morris's theory assumes that breaking the law is always a benefit to the offender because he receives an extra freedom through his lawbreaking.<sup>191</sup> But, are freedoms of this sort good? Is the "freedom" to rape, for example, an "extra freedom" anyone wants (or should want)? Do we resent the rapist because he did something that we wanted to do? That hardly seems right.<sup>192</sup>

Jean Hampton argues that a better way of thinking about the exchange of benefits for burdens is to look at the *symbolic* or *expressive* exchange of messages between the offender and society.<sup>193</sup> Rather than thinking about what a criminal gets by way of his crime, we should ask what the criminal says to society by committing a crime. In not so many words, he states his superiority: "I am better than you, because I can commit this crime in which you are the victim." He is supposed to obey the law like everybody else, but, by breaking the law, he symbolically asserts that he is above the law.

Punishment, for Hampton, nullifies this message by expressing to the criminal and society that the criminal is no better than the rest of us.<sup>194</sup> He may have a symbolic victory with his crime, but we must hand him a symbolic defeat through punishment.<sup>195</sup> He has made a false claim, and we must show it to be false by punishing him. And, the greater the symbolic victory, the greater the defeat at our hands must be.<sup>196</sup> As Hampton says, "The higher wrongdoers believe themselves to be (and thus the more grievously they wrong others), the harder and farther they must fall if the moral reality of the parties' relative value is to be properly represented."<sup>197</sup>

This version of Hampton's defense of the "retributive idea" appears in the book that she co-edited with Jeffrie Murphy, in which

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190. R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 26-27 (1996) (outlining several of the "stringent criticism[s]" that this theory has received).

191. See discussion *supra* text accompanying note 146-50.

192. See generally Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 75, at 111, 115 (1988) [hereinafter Hampton, *Retributive Idea*].

193. *Id.* at 125-26.

194. *Id.* at 125.

195. *Id.*

196. See *id.* ("If I cause the wrongdoer to suffer in proportion to my suffering at his hands, his elevation over me is denied, and moral reality is reaffirmed.")

197. *Id.* at 134.

Murphy defends the value of “retributive hatred.”<sup>198</sup> Hampton clearly wished to distance herself from Murphy’s defense of retributive hatred, and instead replaced his defense of retributive hatred with a “retributive motive.”<sup>199</sup> Although we may be skeptical about whether such feelings can be cleanly distinguished in practice, let us assume that Hampton’s retributivism is not motivated by hatred.<sup>200</sup> Even if suitably purified, we might still wonder whether Hampton’s attitude toward punishment is correct or dangerous, despite its benign intentions.

To see the risk of Hampton’s position, we need only look at the language she employs in defending her model: “mastery,” “defeat,” and “lordship.”<sup>201</sup> To be fair, Hampton states that we must remove the offender from his position of superiority, so her model ultimately forms a defense of equality.<sup>202</sup> The way to achieve this equality, Hampton argues, is by dominating the offender and by bringing him low; the higher he has gone “the harder and farther” he must fall.<sup>203</sup> This is the language of status degradation, as Whitman points out, and Hampton firmly embraces it.<sup>204</sup> But, is this an appropriate theory for a society of equal citizens? Or, should we worry (again) about the choice of metaphors?

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198. See generally Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY, *supra* note 75, at 88, 89–95 (suggesting that resentment and hatred might be appropriate in certain circumstances).

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199. Hampton, *Retributive Idea*, *supra* note 192, at 129–30.

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200. At the same time, Hampton herself is not so sure about this, and indeed seems to defend a form of “moral hatred” for the offender. Hampton, *Retributive Idea*, *supra* note 192, at 146–47. She states:

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I want to argue that moral hatred is the respectable form of hatred that is frequently linked with retribution. Indeed, I want to propose that *what Murphy characterized and defended as retributive hatred is in fact the desire for retribution coupled with the experience of moral hatred of the wrongdoer. . . . [I]t is not the desire for retribution which stands in the way of the forgiveness. . . . [I]t is moral hatred which blocks forgiveness, because that hatred involves the belief that this person is (to some degree) a bad thing and an enemy whom one must welcome back.*

*Id.*

201. *Id.* at 126–28. Whitman is especially incisive on how Hampton wittingly embraces the language of status degradation in her theory of punishment. See generally Whitman, *Happy Punishers*, *supra* note 3. I am especially indebted to Whitman’s account in my analysis of Hampton.

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202. Hampton, *Retributive Idea*, *supra* note 192, at 125.

203. *Id.* at 124–30, 134.

204. WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 85 (noting that “status-degradation . . . is a prime feature of American criminal justice culture” (emphasis omitted)); see also Whitman, *Plea*, *supra* note 3, at 105 (“When human beings punish, they tend, in the very act of punishment, to create a relationship of inequality. They tend to lord it over the person they are punishing, as Jean Hampton herself well knew.”).

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It is important to distinguish the point I am making now—about the orientation of Hampton’s theory—from any comment on the correctness of Hampton’s theory. We might wonder, for instance, whether the offender really asserts his superiority when he commits most crimes—for instance, drug possession or simple theft. Without serious stretching, crimes committed out of passion or out of dire economic need do not quite fit this model. Perhaps the offender was angry or hungry, and that, alone, is why he committed the crime. He is not necessarily “mastering” his victim. A more banal description is appropriate: He is simply stealing out of need or anger. Likewise, an underprivileged youth who commits a crime might not really be making a credible claim of superiority over his victims (who may also be similarly-situated underprivileged youths). These examples might make us wonder whether Hampton’s theory really “fits” most crimes and criminal situations. Hampton’s characterization of punishment squares best with Rodion Romanovich Raskolnikov, the fictional protagonist of Fyodor Dostoyevsky’s *Crime and Punishment*, who defies societal norms because he believes he is better than everyone else.<sup>205</sup>

It is irrelevant, however, whether we accept the truth of Hampton’s theory. I am instead concerned about the orientation of her theory toward defeating the “criminal’s claim to lordship” through “methods of mastery.”<sup>206</sup> How do Hampton’s words orient us toward the practice of punishment? Like Morris’s theory, there is a strong push in Hampton’s theory toward inflexibility and uniformity: To vary punishments would disconnect the offender’s defeat from his message of superiority, sending a message that perhaps some people can get away with their crimes, or at least avoid having their claim of superiority entirely nullified.

More important is the evident bias in Hampton’s theory toward the offender’s defeat and degradation, toward treating him harshly. Punishment is not just about a deprivation; it is also a symbolic effort to bring the offender low.<sup>207</sup> It is perhaps no accident that shaming punishments were thought to be, in their own way, “beautifully retributive”—although there is serious debate over whether this characterization is in any sense correct.<sup>208</sup> But, does such a theory of

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205. See generally FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (David McDuff trans., 2003) (1866). Raskolnikov, of course, hardly fits the image of the typical criminal.

206. Hampton, *Retributive Idea*, *supra* note 192, at 136.

207. See *id.* at 125.

208. For a sensitive discussion about the rise and subsequent fall of shaming punishments, as well as a discussion about why shaming punishments are not “beautifully retributive,” see Markel, *Beautifully Retributive*, *supra* note 87, at 2167–77, 2216–22.

domination and degradation have any real resources to stop, for example, the drift toward poorer prison conditions? After all, might we not see such conditions as a way of teaching the offender that he is, in fact, not superior to his victim? Hampton may disclaim this result and argue that such treatments do not treat the offender in a dignified way.<sup>209</sup> One implication of Hampton's theory, nonetheless, might be poorer prison conditions, which are the natural drift of a theory that emphasizes concepts of "mastery" and "lordship" over the offender and the good of society reasserting its expressive superiority over the criminal.<sup>210</sup> It is not simply that her theory can be co-opted to these (bad) uses; more problematic is the fact that her theory is fundamentally oriented in that direction.

Hampton's theory shares something fundamental with Morris's theory: It encourages us to think positively of punishment as creating a good. Morris's theory masks its harsh implications by stating that punishment is a right. For Morris, it is good to punish because we are respecting the rights of criminal offenders.<sup>211</sup> Hampton does not put her theory in terms of the offender's rights. Rather, for Hampton, good is found in the victim's vindication and in the restoration of the symbolic equality between the victim and the offender.<sup>212</sup> While this may not be good for the offender, it is good for the victim of the crime and for society, more generally. If we focus on the vindication of the victim—the putative good in Hampton's theory—rather than the domination of the offender, we may miss the inherent structural harshness in her theory.

#### D. *A Retributivism of Restraint*

While my sample of modern day retributive theories was limited, I picked two versions of retributivism that are fundamentally oriented toward harshness and that have been influential in recent decades.<sup>213</sup> There are, of course, many other versions of retributivism that may be

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209. Hampton says that her theory entails responding to the offender in a way that respects his humanity. Hampton, *Retributive Idea*, *supra* note 192, at 137. But why does this necessarily follow? The offender has not treated his victim in a dignified way, so to reassert the victim's dignity we may need to play dirty ourselves. After all, how does it effectively show our mastery over the offender if we do not also fight with our gloves off? There may be good reasons to be restrained in our punishment, but they certainly do not derive from the idea that we must show lordship over the criminal. They arise, most probably, from an independent concern for the dignity of the offender.

210. *Id.* at 127–28.

211. See generally MORRIS, *supra* note 98, at 32–46.

212. Hampton, *Retributive Idea*, *supra* note 192, at 125–26.

213. See *supra* Part III.B–C.

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more or less subject to the allegation that they are oriented toward harshness,<sup>214</sup> but I leave those for another day.

Is that it? Do all versions of retributivism have this mistaken orientation? Or, if they lack it, are they theoretically uninteresting? As it happens, there is another, better narrative that we can construct about retributivism, one that gives flesh to the bare retributive idea without tending toward an unrealistic, ungrounded view of punishment. It is, in other words, a version of retributivism that is neither founded on a priori reasoning about the human subject nor extols the virtues of punishment. It is rooted, instead, in the relationship between punishment and human emotion. Under this version of retributivism, we need a theory of retributivism precisely because punishment is so fraught with “hot” feelings of vengefulness that threaten to make punishment harsh.<sup>215</sup> This narrative is rooted in the same “messiness of society” that, according to Whitman, retributivists usually disdain. The fundamental orientation of this narrative is to avoid emotional excess in punishment—to avoid getting carried away when we punish, which we are apt to do if we focus on the good of punishment rather than its dangers.

I begin with a passage from Augustine that addresses the Old Testament’s principle of *lex talionis*. The scriptural maxim posits that one should give an eye for an eye and a tooth for a tooth.<sup>216</sup> Many have understood the maxim as counsel for brutal revenge and condemned

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214. See, e.g., John Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 103 (1999) (outlining a Thomistic version of retributivism). Here, I leave aside Dan Markel’s confrontational conception of retribution (“CCR”), which I have previously endorsed. See generally Markel & Flanders, *supra* note 128. There are some aspects of CCR that I am not too sure about, and which I am not sure are entailed by retributivism more generally—a prohibition on mercy and a disapproval of judicial discretion in sentencing, for instance. Markel has, however, persuasively shown how retributivism can be practically relevant, and there are aspects of his “communicative” conception that may avoid some of the tendency toward harshness that I have identified as problematic in the retributivism of Morris and Hampton. (Markel is, of course, indebted to both of these thinkers.) More generally, Markel’s version of retributivism is significantly more ambitious than the minimalist retributivism of restraint that I sketch later in this Article. My retributivism of restraint, however, does not conflict with CCR inasmuch as each theory tries to do different things. CCR may be trying to sketch out what punishment, at its best, might become; I am more interested in describing a theory of punishment that might limit some of the harshness we see in the real world. In this sense, CCR is aspirational in a way that the retributivism of Augustine and Smith is not.

215. Again, I do not mean to suggest that punishment under either Morris’s or Hampton’s theories collapses into revenge. Their theories remain retributivist, but it is my position that they encourage us to look at punishment in the wrong way. The value of Whitman’s harshness framework is that it allows us to see some retributive theories as fundamentally flawed, without requiring us to see them as rooted in vengefulness.

216. *Exodus* 21:24.

it for this reason.<sup>217</sup> For Augustine, however, the problem with *lex talionis* is not merely conceptual—it is also scriptural. In the New Testament, Jesus says that we should not seek revenge, but that we should, instead, “turn the other cheek” when wronged.<sup>218</sup> Jesus seems to explicitly repudiate the tenet that one should repay “an eye for an eye,”<sup>219</sup> and Jesus seems, in Whitman’s terms, to advocate that we replace a regime of harshness (the law of revenge or an “eye for an eye”) with a regime of mildness (the law of compassion or love). It would seem, then, that we must accept one and give up the other: We cannot have both.

Augustine says, however, that it is a mistake to interpret the two passages as contradictory because they are not actually in tension.<sup>220</sup> Both passages, he explains, actually prescribe mildness. The principle of *lex talionis* is a limiting principle: you can take an eye for an eye but no more than an eye. To take more would be disproportionate. Augustine thus constructs the familiar equation of retributivism and proportionality—pay someone according to his desert, pay him no more and no less.<sup>221</sup>

But, Augustine says more. The equation of retributivism and proportionality is not merely a mathematical exercise. It is also a counsel directed at our emotions:

In order to set a just limit to this uncontrolled and therefore unjust vengeance, the law established the penalty of equal retaliation, that is, that each person should suffer the same sort of punishment as the injury he inflicted. Hence, *an eye for an eye, a tooth for a tooth* was not intended to arouse fury but to set a limit to it; it was not imposed to kindle a dormant fire but to set bound beyond which an already blazing fire should not go.<sup>222</sup>

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217. Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 O.J.L.S. 57, 57–62 (2008) (exploring various historical interpretations of *lex talionis*, including “less charitable view[s]” that viewed it as “cruel and vengeful”).

218. *Matthew* 5:39.

219. *See id.* at 5:38–39 (“You have heard it said an eye for an eye, and a tooth for a tooth. But I say do not resist an evil person. If someone strikes you on the cheek, turn to him the other also.”).

220. AUGUSTINE, ANSWER TO FAUSTUS, A MANICHEAN 254 (Boniface Ramsey ed., Roland Teske trans., New City Press 2007) (408–410).

221. *Id.*; *see also* Fish, *supra* note 217, at 61–62 (“In short, Augustine found that the *lex talionis* rested on principles of proportionality and compensation. It thus operated to restrain wanton or excessive retaliation and cannot be understood to have authorized cruelty as an acceptable form of punishment.”).

222. AUGUSTINE, *supra* note 220, at 254–55.

Retributive theory, at least in Augustine's hands, constrains unruly emotions; it is not meant to *be* harsh, but to *stop* us from being harsh.<sup>223</sup> After all, Augustine rhetorically asks, "[w]ho . . . is easily satisfied with merely exacting revenge equal to the injury that he received?"<sup>224</sup> This, then, is the aim of the biblical commandment: to "hold in check the flames of hatred and to rein in the unbridled hearts of raging people."<sup>225</sup> For Augustine, law must set the penalty at "*equal* retaliation"; law should not indulge a person's desire for retaliation, which may not stop at one eye.<sup>226</sup>

This particular genealogy of retributivism is far removed from Whitman's theses of irrelevance and harshness. It is a tradition of retributivism that is closed to the superficial objection that it has nothing to say about our vengeful emotions, our tendency toward harshness. Moreover, it can inform our response to Whitman's deeper point about retributivism. For Augustine, at least, retributivism is relevant to human psychology's problematic tendency toward harshness. And, for Augustine, retributivism is first and foremost a counsel of mildness, not of harshness. In my terminology, Augustine's theory has the right orientation toward punishment. It views the emotions that punishment deals with and engenders as dangerous and as needing to be carefully monitored and controlled. Our desire for justice in this area is not necessarily righteous, nor is it always healthy. For Augustine, a main concern is observing the limits to punishment rather than finding the good that may be realized by punishment.

Adam Smith, like Augustine, is sensitive to the emotional roots of the retributive impulse and recognizes how resentment can, and often will, quickly outrun the bounds of legitimate feeling.<sup>227</sup> Most people,

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223. *See id.*

224. *Id.* at 254.

225. *Id.*

226. *Id.* at 255.

227. I do not pretend to capture all the subtleties of Smith's position here. For a more sensitive exposition and defense of Adam Smith as a retributivist, see Eric Miller, "*Sympathetic Exchange*," *Adam Smith, and Punishment*, 9 *RATIO JURIS* 182 (1996). According to Miller, for Smith, "[t]he measure of punishment is thus not directed toward the future effect of punishment on the victim, but rather is retributivist and backward-looking, *focused on the motive and action of the agent*." *Id.* at 195; *see also* PAUL RUSSELL, *FREEDOM AND MORAL SENTIMENT: HUME'S WAY OF NATURALIZING RESPONSIBILITY* 143–44 (1995) (collecting passages from Adam Smith that demonstrate his "retributivist sentiments"). That said, Smith's view is also heavily influenced by an awareness that punishment is needed for the preservation of society, and indeed, in one place, Smith remarks that "[r]esentment seems to have been given us by nature for defence, and for defence only." ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 79 (D.D. Raphael & A.L. Macfie eds., Liberty Classics 1982) (1759). Again, my sketch of Smith is just that—a sketch—and is based only on a few passages in *The Theory of Moral Sentiments*.

Smith says, are “incapable of . . . moderation” in their resentment and must expend “great . . . effort . . . in order to bring down the rude and undisciplined impulse of resentment to [a] suitable temper.”<sup>228</sup> We do not, Smith acknowledges, always succeed in dampening those impulses; those who are able to command and cabin their resentment are worthy of our esteem, but if their animosity exceeds “what we [as bystanders] can go along with, . . . we necessarily disapprove of it.”<sup>229</sup> In the extreme, one who manifests violent and excessive resentment earns our resentment rather than our sympathy.<sup>230</sup> Although resentment can become excessive, it remains a worthy sentiment; when it is proportionate, it can indeed be the “proper object of praise and approbation.”<sup>231</sup>

Augustine’s and Smith’s perspectives may seem to support Whitman’s allegation that we can theoretically speak about the good (proportionate) and the bad (vengeful) emotions while still not tackling what those emotions mean in practice. Smith simply shows us, one might argue, that it is not easy to separate “good” resentment from “bad” resentment. Resentment, by its very nature, is a dangerous emotion, one not easily limited to just boundaries.<sup>232</sup> But this point—that “good” and “bad” resentment are nearly inseparable—is only the first step in Smith’s argument. What this point really evidences is that Smith is keenly aware of the problem that Whitman highlights—that our emotions, especially the so-called retributive emotions, are liable to become harsh.<sup>233</sup> It does not show, however, that Smith did not think we could do nothing about it.

In fact, Smith believes the solution to the problem of excessive emotions is to set up retributive institutions of punishment.<sup>234</sup> Because retributive emotions are good to a very limited extent but also

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228. SMITH, *supra* note 227, at 77.

229. *Id.*

230. *Id.* at 77 (“And this too violent resentment, instead of carrying us along with it, becomes itself the object of our resentment and indignation. We enter into the opposite resentment of the person who is the object of this unjust emotion, and who is in danger of suffering from it.”).

231. *Id.*

232. *Id.* (“[A]s experience teaches us how much the greater part of mankind are incapable of this moderation, and how great an effort must be made in order to bring down the rude and undisciplined impulse of resentment to this suitable temper, we cannot avoid conceiving a considerable degree of esteem and admiration for one who appears capable of exerting so much self-command over one of the most ungovernable passions of his nature.”).

233. *See id.* (explaining how “ungovernable” resentment can lead to revenge).

234. *See id.* at 389 (commenting that government officials must have the authority to punish offenders or make them “compensate the wrong that has been done” to enforce justice and satisfy the injured).

extremely liable to abuse, impartial institutions must administer punishment. If each individual was left to satisfy his own grievances, civil society would soon become a “[s]cene of [b]loodshed . . . and disorder every man revenging himself at his own hand whenever he fancie[d] himself injured.”<sup>235</sup> To avoid this scene, we authorize magistrates to “give [s]atisfaction to the injured either by punishing the offender or by obliging him to compensate the wrong that has been done.”<sup>236</sup> The magistrate agrees “to hear all complaints of injustice, to enquire diligently into the circumstances alleged upon both [s]ides, and to give that redress which to any impartial person shall appear to be just and equitable.”<sup>237</sup> Retributivism, then, for Smith, is a solution to the basic problem of human emotion. We control resentment, allowing our emotions to be retributive and not vengeful, by putting punishment in the care of an impartial magistrate who “employs the power of the commonwealth to enforce the practice of [j]ustice.”<sup>238</sup>

Smithian society is not composed of equally autonomous individuals who do not feel or of individuals, if they do feel, who are able to control their emotions. It is not Kantian in the familiar caricature of Kant.<sup>239</sup> Smith’s individuals are all too passionate; it is to the dangers of passion—resentment and disgust, for example—to which retributive theory must respond.<sup>240</sup> Both Augustine and Smith would agree with Whitman’s proposition that punishment “always threatens to spin out of control” without a “guarantee that prisoners are treated respectfully.”<sup>241</sup> That is, what drove Augustine and Smith to be retributivists—the notion that we institute state punishment to regulate those emotions—is an insight often buried in contemporary retributivist accounts. Many contemporary accounts, as we have seen, emphasize the good that comes from punishment.<sup>242</sup> Augustine and Smith, however, emphasize the bad things we must avoid in punishment; they are sen-

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235. *Id.* This is the place where Smith has an obvious affinity with Stephen’s pragmatic point about the dangers of punishment. Smith, however, does not share Stephen’s endorsement of hatred as unqualifiedly good.

236. *Id.*

237. *Id.*

238. *Id.*

239. This is not, however, without textual support in Kant. *See, e.g.,* IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 87 (Lara Denis ed., Thomas K. Abbott trans., Broadview Press 2005) (1785) (positing that a rational being would wish to be wholly free from the influence of emotion).

240. *See* SMITH, *supra* note 227, at 77, 389.

241. Whitman, *Happy Punishers*, *supra* note 3, at 2701 (citing Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT’L J. CRIMINOLOGY & PENOLOGY 69, 93–94 (1973)).

242. *See, e.g., supra* Part III.B–C.

sitive to how our emotions get the better of us, especially when we think we are doing things for just reasons. Retributivism limits us from doing what we might do were there no checks on our emotions.

Moreover, Augustine's and Smith's retributivism has the resources to respond to many of Whitman's questions about retributive theory. Smith is particularly insightful on the issue of institutionalizing retribution. If the state is meant to ensure that punishment is proportionate and impartial,<sup>243</sup> Smith would resist measures that are designed to inflame resentment rather than cabin it. He would resist, for example, humiliating prison uniforms or the deprivation of offenders' privacy. These would be measures that would feed, what Smith called, the "rude and undisciplined impulse of resentment."<sup>244</sup> Shaming punishments, for many of the reasons that Whitman himself has detailed,<sup>245</sup> would also be anathema to the purposes of state retributive punishment; they encourage an "excess of resentment," the "most detestable of all the passions."<sup>246</sup> To revert back to Augustine's metaphor, shaming punishments are a brand used "to kindle a . . . fire."<sup>247</sup>

Further, for Smithian retributivists, the prison guards treating offenders with "offhanded contempt" deserve to be the objects of our resentment and indignation.<sup>248</sup> The offender, who is the object of this unjust emotion (contempt) and "who is in danger of suffering from it," deserves the very opposite of resentment.<sup>249</sup> These principles, if applied, can address some of the practical problems with punishment. That Smith phrased his principles at a somewhat higher

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243. See SMITH, *supra* note 227, at 389 (suggesting that the magistrate exists to enforce justice, prevent disorder, and "give [s]atisfaction to the injured").

244. *Id.* at 77.

245. See generally James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

246. SMITH, *supra* note 227, at 77; see also Whitman, *supra* note 245, at 1091 (criticizing shame sanctions for "stirring up demons" and arguing in favor of the state's role as "the imposer[ ] of measured punishment").

247. See AUGUSTINE, *supra* note 220, at 255 (suggesting that proportionality is intended to set a limit to fury, not to "kindle a dormant fire").

248. Whitman, *Plea*, *supra* note 3, at 103. Again, this is the truth of the superficial reply to Whitman's criticism that retributivism is too abstract. We need to give some content to abstract theories in order to make them practically relevant. At the same time, I have tried to show that some theories may generate bad practical suggestions based on the fact that they are oriented toward punishment. If the goal of a theory of punishment is to "dominate" the offender, then this theory does not guide us well in asking how we should properly respect prisoners.

249. SMITH, *supra* note 227, at 77.

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level of abstraction than Whitman does not mean that the principles do not apply to the questions.<sup>250</sup>

Finally, Smith was not so naïve as to believe that government officials were immune to excesses of emotion. That is precisely why we place judges in a position to resolve controversies, while simultaneously making sure that “rules are prescribed for regulating the decisions of those judges.”<sup>251</sup> Sometimes the laws themselves are corrupt and out of line with what “natural justice would prescribe.”<sup>252</sup> As Smith notes, “[i]n some countries, the rudeness and barbarism of the people hinder the natural sentiments of justice from arriving at that accuracy and precision which, in more civilized nations, they naturally attain to.”<sup>253</sup> No positive laws can accurately represent all that natural justice requires, and some countries will be better than others at achieving all that natural justice requires.<sup>254</sup> Here, Smith is speaking in terms of better and worse, not in terms of the best—which is, in any event, unattainable.<sup>255</sup> Sometimes punishments dictated by law will be proportionate; sometimes they will not be.<sup>256</sup> But, allowing states to enact laws is a better approach than allowing each individual to punish according to his present passion. With states, at least, we can try to regulate the behavior of judges.<sup>257</sup>

What type of orientation toward punishment do Augustine, and especially Smith, advance? Augustine and Smith are certainly, I think, best characterized as retributivists: They subscribe to the fundamental tenants of retributivism—that wrongdoers deserve to be punished and that a just measurement of punishment is owed to the offender. They

250. In a way, I am simply reasserting the superficial reply made to this objection above—namely, that there is no reason that our abstract theories cannot be made practical by applying them. See *supra* text accompanying notes 92–93.

251. SMITH, *supra* note 227, at 340.

252. *Id.* at 341.

253. *Id.* Smith’s statement mirrors the comparison Whitman’s *Harsh Justice* makes between civilized Europeans and barbaric Americans. See generally WHITMAN, *HARSH JUSTICE*, *supra* note 1, at 43, 56–57 (explaining, for example, how three-strikes-and-you’re-out laws highlight “a new style of American toughness” and “have had an impact on American law that would be strictly impossible under prevailing doctrine in continental Europe”).

254. SMITH, *supra* note 227, at 340 (“Every system of positive law may be regarded as a more or less imperfect attempt toward a system of natural jurisprudence, or toward an enumeration of the particular rules of justice.”).

255. See *id.* at 341 (“Systems of positive law, therefore, though they deserve the greatest authority, as the records of the sentiments of mankind in different ages and nations, yet can never be regarded as accurate systems of the rules of natural justice.”).

256. See *id.* (“In no country do the decisions of positive law coincide exactly, in every case, with the rules which the natural sense of justice would dictate.”).

257. See *id.* at 340–41 (suggesting that our “imperfect attempt[s] towards a system of natural jurisprudence,” while not perfect, are necessary).

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share this view with Morris and Hampton. But, where Morris and Hampton flesh out retributivism in terms of rights and even goods (the good of expressive equality among citizens, in Hampton's case, and the right of prisoners to be treated as agents, in Morris's),<sup>258</sup> Augustine and Smith part ways and refuse to endorse punishment as a matter of realizing a particular good. Instead, their concern is with limiting the damage that inevitably accompanies a regime of punishment. The retributivism of Augustine and Smith is a retributivism of restraint. We naturally tend toward extremes in punishment; we rarely know where to stop.<sup>259</sup> The state, by exercising its legitimate power to punish, channels this resentment and simultaneously (and importantly) sets limits to it.<sup>260</sup> The fundamental orientation of their retributivism is against harshness and for proportionality, at least in so far as that ideal is attainable.<sup>261</sup>

In embracing this orientation toward punishment, this view of retributivism—especially as articulated by Smith—fits neatly into a major strain of liberal thought, namely, liberal constitutionalism. Liberal constitutionalism avers that popular passions must be constrained by a system of rights or checks on political power embodied in a constitution.<sup>262</sup> On certain fundamental matters, democracy simply cannot have the last word. Democratic passions must be checked, restrained, channeled, and, at the extreme, overridden. Typically, although not necessarily, this constraint is cashed out in terms of rights. Citizens have rights that protect them from the majority's will.

Morris neatly turns this idea on its head and departs from this strain of liberalism, at least when he articulates the right to be punished. The right to be punished is not a right against the state—as it would have been if Morris had simply made it the right to be free

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258. See Hampton, *Retributive Idea*, *supra* note 192, at 136–38 (“The punitive mastery of the wrongdoer is perceived not as a competitive victory that elevates the victim but, rather, as a denial of the wrongdoer’s claim to elevation over (or relative to) the victim.”); MORRIS, *supra* note 98, at 31–58 (attempting to “resurrect[ ]” the notion that a criminal has a “*right to be punished*”); see *infra* Parts III.B–C.

259. See generally SMITH, *supra* note 227, at 77 (explaining that “the greater part of mankind” is unable to maintain resentment in moderation and suggesting that “malice should be restrained by proper punishments”).

260. See *id.* at 389.

261. See *id.* at 340–41 (exploring the attempt to reach justice in punishment through a system of positive law); see also AUGUSTINE, *supra* note 220, at 255 (“Hence, *an eye for an eye, a tooth for a tooth* was not intended to arouse fury but to set a limit to it; it was not imposed to kindle a dormant fire but to set bounds beyond which an already blazing fire should not go.”).

262. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 18–23 (1995).

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from being treated as a patient. Instead, it is a positive right.<sup>263</sup> The state must give you punishment. It is not a right, as Smith argues, to be free from excessive punishment. Punishment is therefore no longer a check against the state but an entitlement owed to you by the state.<sup>264</sup>

*E. Contra Ristroph's Hobbes*

In a recent, provocative article, Professor Alice Ristroph presents a Hobbesian theory of punishment, which may seem to resemble the one I have just sketched.<sup>265</sup> In fact, our theories are only loosely related, and, in many respects, they are in complete opposition to each other. Where it matters, Smith and Hobbes are fundamentally opposed, and Smith has the better of the arguments.

The Hobbesian orientation—as Ristroph portrays it—is one that departs from the theories of Morris and Hampton. Punishment for Hobbes may be a political necessity, but it is not a positive good in the way Morris and Hampton treat it.<sup>266</sup> For Hobbes, punishment is, in Ristroph's words, “regrettable but necessary.”<sup>267</sup> This statement seems to strike the right note. If we are to view punishment as regrettable but necessary, this might allow us to check some of our more extreme emotions when it comes to punishment. We might not abolish punishment, but we might be careful to show restraint when using it. We would not always be proud of ourselves when punishing. Hobbes's account, Ristroph says, “is unusual in its modesty and its open acknowledgment of its own limitations. It does not claim that anyone consents to be on the receiving end of superior physical force. It does not claim to have transformed the exercise of such force into a cause for moral celebration . . . .”<sup>268</sup> All of these points are perfectly consonant, and agreeable, with the picture of Smithian retribution that I

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263. See MORRIS, *supra* note 98, at 32–36 (explaining that offenders have a right to be punished to offset an “unfair advantage”).

264. More generally, still, Smith might be seen as operating in what Judith Shklar has called “the liberalism of fear,” which has as its leitmotif the avoidance of cruelty. See generally Judith N. Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21, 24, 28–30 (Nancy L. Rosenblum ed., 1989) (explaining that the avoidance of cruelty, or the “deliberate infliction of physical[ ] and secondarily emotional[ ] pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible” is the “liberalism of fear”).

265. See generally Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601 (2009).

266. See *id.* at 613–14 (suggesting that the “right to punish is a manifestation of the sovereign's right to self-preservation”).

267. *Id.* at 619.

268. *Id.* at 621.

developed in the last Section.<sup>269</sup> In this respect, at least, Smith and Hobbes are surprising allies.

Ristroph's Hobbes, however, takes a further step that Smith does not join. The citizen in the Hobbesian state retains a right to resist legitimate punishment.<sup>270</sup> For the punishing sovereign and the to-be-punished offender, things remain in a quasi-state of nature: While the state has the right to punish, the offender can, and may rightfully, fight back and has no duty to submit to his imprisonment or execution.<sup>271</sup> As Ristroph provocatively suggests, "It is possible that Hobbes did not see a moral distinction between the sovereign's successful punishment and the criminal's successful resistance, as morality had little relevance to Hobbes's state of nature."<sup>272</sup> Ristroph also makes some interesting claims about how our modern constitutional order might be an embodiment of the criminal's right to resist that I do not find persuasive but can be put aside for now.<sup>273</sup> Her main point is that, for Hobbes, the criminal has the right to resist his punishment.<sup>274</sup>

Smith would disagree. State punishment is at bottom legitimate punishment, and the offender has an obligation to submit to his deserved punishment.<sup>275</sup> Avoiding the deep mechanics of Smith's justifications, the impartial spectator would understand that it is appropriate for an offender to submit to justified punishment, just as it is appropriate for society to feel a just measure of resentment

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269. See *supra* Part III.D.

270. Ristroph, *supra* note 265, at 615.

271. See *id.* at 620, 622 (concluding that "we should view the coexistence of the right to punish and the right to resist as an indication of Hobbes's awareness that diverse human interests can be reconciled only imperfectly," and noting that there is no "obligation on the subject to go down quietly"). As Ristroph writes early in her essay, if punishment is "a conflict between two mere mortals in the state of nature," then "both the sovereign and the criminal will have equal rights of self-preservation, and the criminal has as much right to resist punishment as the sovereign has to impose it." *Id.* at 615.

272. *Id.* at 620. Ristroph clarifies that the sovereign may have the political authority to punish—that is, the authority of all those who are not being punished. From the point of view of the person being punished, however, Ristroph is clear that, for Hobbes, the state is not acting with his authorization. See *id.* at 622 ("The punishing sovereign acts with authority, but only with the authorization of those subjects who are not themselves punished. In relation to the condemned, the sovereign can claim only the natural right to use violence, so punishment is never fully representative.")

273. For Ristroph's thoughts on the modern constitutional order as an embodiment of the criminal's right to resist, see *id.* at 629–30.

274. *Id.* at 615–19.

275. See, e.g., SMITH, *supra* note 227, at 88 ("[W]e frequently have occasion to confirm our natural sense of the propriety and fitness of punishment, by reflecting how necessary it is for preserving the order of society").

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against the offender.<sup>276</sup> For Smith, then, the state and the offender are not on equal moral grounds when it comes to punishment.

The basic distinction between Smith and Hobbes can be put as follows. For Hobbes, according to Ristroph, both the state and the offender are exercising, or trying to exercise, violence against each other. At bottom, there is no salient moral distinction between the state and the offender when it comes to punishment (although there will be political reasons why the sovereign has the authority to punish). In other words, the state and the offender are both in the business of self-preservation: The state wants to rid itself of the offender, and the offender wants to save his own life and freedom. For Smith, by contrast, the state has a legitimate right to punish, and the offender has a correlative duty to submit to his punishment or, at least, to accept society's resentment against him as appropriate. The state and the offender are, in fact, in very different moral places. They are not moral equals.

This difference is amplified when applied to respect for prisoners. The Smithian version of respect punishes the offender no more than he deserves and treats him in a way that does not inflame our passions against him.<sup>277</sup> The Hobbesian notion of respect for the offender, however, at least on Ristroph's reading, gives the offender the chance to fight to be free of his punishment.<sup>278</sup>

Such respect, however, is a mug's game: Any state worthy of its salt will have the power to crush the offender, and if we see the battle between the state and the offender as a war of all against all, what principles do we have to restrain the state? Why, in other words, should the state restrain itself against the offender who resists?<sup>279</sup> If, however, we view the state's punishment not merely as a matter of exerting superior force but as a matter of exerting legitimate force,

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276. *See id.* at 78 ("Actions of a hurtful tendency, which proceed from improper motives, seem alone to deserve punishment; because such alone are the approved objects of resentment, or excite the sympathetic resentment of the spectator."); *id.* at 88 (arguing that the impartial spectator will see the "propriety and fitness" of punishing the wrongdoing). Presumably, the one being punished can also take the point of view of the impartial spectator and understand that the punishment against him is appropriate.

277. *Id.* at 77, 389 (elucidating that punishment imposed by an authoritative magistrate keeps our passions in check).

278. Ristroph, *supra* note 265, at 615–19 (explaining the offender's "right to resist").

279. It is a deep question, to my mind, why the criminal offender does not simply become an enemy of the state, so that he may, according to Hobbes, "lawfully be made to suffer whatsoever the representative will." THOMAS HOBBS, *LEVIATHAN* 206 (Edward Curley ed., Hackett Publ'g Co. 1994) (1668). In other words, why doesn't the criminal by his actions make himself not just a criminal, but an outlaw, whom we can punish with gloves off?

there will be limits built into the scheme. For Smith, the goal is to properly punish the offender and not to defeat him. The Smithian philosophy respects the prisoner by punishing him as much as he legitimately deserves and no more.

The Hobbesian vision recognizes that punishment is potentially bad but then problematically does not bestow any moral resources on adequately spelling out *why* the state should refrain from making punishment worse.<sup>280</sup> Perhaps Hobbes best reminds us that we should modestly punish or agree that punishment involves inflicting a serious harm on an offender.<sup>281</sup> Hobbes rightly critiques the idea that an orientation toward punishment that views punishment as a good rather than as a regrettable necessity is dangerous. But there, the Hobbesian picture runs out of resources. It only gives us a violent state and a violent offender—power against power.<sup>282</sup> Unlike Hobbes, Smith claims that we can view punishment as a legitimate use of force, albeit one that must be constrained.<sup>283</sup> The state has its own reasons to limit the amount of power it uses and to limit how harshly it treats those it punishes. These self-imposed limits are certainly better than an empty right to resist.

The contrast becomes clear by way of a comparison. Hobbes views the state and the offender as engaged in a sort of war.<sup>284</sup> So, too, might Smith. But Smith wants just war, not a war where anything goes. Hobbes's restraints are ultimately restraints that power can put on power, force against force. The state can punish, and the offender can resist or run away.<sup>285</sup> The restraints Smith wants, however, are those imposed by a state checking itself morally or following the rules of just combat. Of course, there is no guarantee that the state will restrain itself. This, then, is what theorists can help us do. They can

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280. In Chapter XXVII of *Leviathan*, Hobbes lists many supposedly analytical characteristics of punishment—for example, that punishment cannot be a matter of private revenge or that punishment cannot be made without giving offenders advanced notice of what the law is. *Id.* at 203–10. All of these limits are perfectly acceptable, and even liberal. It is unclear what, however, on Hobbes's account, justifies these limitations on punishment; in fact, they seem merely stipulative.

281. *See generally id.* (explaining the purposes of punishment and stating that “if a punishment be determined and prescribed in the law itself, and after the crime committed there be a greater punishment inflicted, the excess is not punishment, but an act of hostility”).

282. *See Ristorph, supra* note 265, at 622 (“There is always a trace of the violence of the state of nature—and the rule of the stronger—in physical punishment.”). R

283. *See SMITH, supra* note 227, at 389 (explaining the magistrate's role in ensuring justice). R

284. HOBBS, *supra* note 279, at 76 (describing the state of nature as a state of war). R

285. *See id.* at 203–04 (explaining the state's ability to punish and man's right “of defending himself”).

help us point out when the state has stopped following the rules of just combat—so long as they take the proper orientation toward punishment and stop regarding it as a means of realizing a good, and instead, regard it as a means of (morally) limiting a bad.

#### IV. CONCLUSION

This Article began with a practical worry that was raised by Professor James Q. Whitman.<sup>286</sup> Is retributivism irrelevant to practice?<sup>287</sup> Even worse, is it positively harmful?<sup>288</sup> A great part of this Article tried to clarify these criticisms and to judge its force aright. Is Whitman correct that we should worry that our theories are practically irrelevant or that our theories may even contribute to American harshness? There are superficial ways to read this concern, and there are easy responses to it.<sup>289</sup> Retributivists can claim that they are interested in justifying theories, not applying them, and they can state—with some credibility—that they are not to blame for whatever harshness exists in America today. I suppose that some will want to leave it at this level. Theorists can continue spinning their theories, American punishment practice can continue worsening, and never the twain shall meet.

The lack of contact between theory and practice should disturb those who work in the philosophy of punishment. Punishment theories should be able to say something about practice, or, at the very least, they should make clear their orientation to our punishment practices. Do retributive punishment theories implicitly or explicitly condone our regime of harshness, or do they instead counsel restraint? This foundational question is one that our punishment theories must answer. We should demand a certain type of answer. Regardless of a theory's elegance, and even its truth or falsity, a theory of punishment that does not give us clear resources to condemn our current system of punishment—its long sentences, its mass imprisonment, its degrading conditions—is not a theory worth taking seriously. They should be able to explain what has gone wrong, and why.

Perhaps this call is unique to our historical moment. If Adam Smith is right, however, it is an enduring problem of punishment and condemnation that our sentiments tend toward harshness and demonization in punishment.<sup>290</sup> Still, I have suggested throughout this Article that one way theories can—and should—be clear about how

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286. *See supra* Part II.A–B.

287. *See supra* Part II.B.1.

288. *See supra* Part II.B.2.

289. *See supra* Part II.C.

290. *See* discussion *supra* text accompanying notes 227–57.

they view contemporary American punishment is in their orientation.<sup>291</sup> Do they, in their broadest outlines, encourage harshness? Such is the case, I have argued, with theories that view punishment as a matter of the offender's rights or of "mastering" the offender by denying his claim of superiority over society.<sup>292</sup> Although these theories may sound good, and even elegant, in the abstract, their orientation tends toward harshness in general and specific terms. Generally, they make punishment about realizing some good, whether that good is a right or victim vindication. This is not the attitude we should have toward the grim necessity of punishment. More specifically, these theories make it hard to resist practices of inflexible sentencing or poor prison conditions. If punishment is a right, it will be hard to argue for greater judicial discretion in sentencing. If punishment is a matter of "mastering" the offender, it will be hard to resist the idea that poor prison conditions are a way of showing that mastery.

By emphasizing a theory's underlying orientation, I wish to make clear the demand that theories mark their stances on practical questions, if not in granular detail, then at least on the big picture. We should no longer allow retributive theories to take comfort in abstraction and to attribute harshness to the misapplication of their ideas. If there is an orientation toward punishment that mischaracterizes its nature and leads to some forms of harshness, then this is a legitimate criticism against the theory.

My own contribution to retributivism, as spelled out using Augustine's and Smith's theories, is still very abstract—although I have suggested various places in which it can become less so.<sup>293</sup> By highlighting Smith's emphasis on restraint in punishment, I clarified that Smith's theory is oriented toward restraint. Punishment that manifests inordinate resentment is to be condemned under Smith's theory, and much of American harshness fits clearly within this category.

What, at the end of the day, does theory owe to practice? That is a hard question, and as I intimated above, it may be impossible to provide a general answer.<sup>294</sup> Sometimes theory will have the luxury of divorcing itself from practical concerns. That is not the case here, and we should be grateful to Whitman for raising the question of the relevance of theory to practice in an area where our practice is partic-

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291. *See supra* Part III.A.

292. *See supra* Part III.B–C.

293. *See supra* Part III.D.

294. *See generally* Jeremy Waldron, *What Plato Would Allow*, in *THEORY & PRACTICE: NOMOS XXXVII* 138, 171 (Ian Shapiro & Judith Wagner DeCew eds., 1995).

ularly indefensible—an area where theorists should simply pay more attention to practice.

It is interesting that the theorizing that takes place in other areas of the law, such as tort or contract theory, is not done at the same arm's length as punishment theory. Tort theory, for example, works mostly in the mode of “middle level” theory: It attempts to give an idealization of current practice, to find out the essence of our current practice, and to give a justification of that practice.<sup>295</sup> Thus, there are real—and live—debates about whether the essence of our tort law is corrective justice or some version of economic efficiency. I do not want to get into those debates here; my point, rather, is that these debates are seeking to justify something like our current practice. They need not flinch from what our practice is. Instead, they can suggest reforms, but they mostly take it “as is.”

There is little middle level theory in punishment. I am aware of no theorist who begins with actual practice and builds up from there, attempting to defend our system “as is.” Perhaps our current practice fits no theory, except a theory of “warehousing,”<sup>296</sup> “indifference,” or maybe just plain racism.<sup>297</sup> This means that philosophers of punishment seeking to understand what justifies punishment will necessarily speak in ideal terms. They will ask: What, in a functioning system (which ours is certainly not), would be the appropriate grounds for punishment? This, however, does not relieve retributivists of staking out, if only in general terms, the relationship of their theories to our given practice, and to explain, if only broadly, how their theories are oriented toward changing harsh reality. Tort and contract theorists do not believe they have this burden. They are engaged for the most part in justifying the status quo. Their job is not to be revolutionaries.

In punishment theory, this *is* our task. Given our present situation, we have no other choice. We, as theorists, owe it to practice to

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295. See generally JULES L. COLEMAN, RISKS AND WRONGS 8–12, 430–31 (1992) (“In middle-level theory, the theorist immerses herself in the practice itself and asks if it can be usefully organized in ways that reflect a commitment to one or more plausible principles.”).

296. For a characterization of “warehousing,” see James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 Hous. L. Rev. 1003, 1022–26 (1997).

297. See generally, e.g., PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 179 (2009) (“When law enforcement stops using race to gauge suspicion, and starts using behavior, we will be safer, our prisons will not be as segregated, and our nation will be closer to the grand and egalitarian ideals that our Constitution professes.”); Steiker, *supra* note 58, at 4–5 (arguing that “[t]he increased use of the criminal law . . . [has] no doubt been driven in large part by the identification, part real and part mythic, of America's crime problem with the problem of controlling poor, Black, urban youth”).

contribute ideas on how to radically change punishment for the better. Although there are hardly many signs of hope that change can take root, there are a few—perhaps enough—to keep us from falling into despair. At the very least, we can, as theorists, ensure that our theories are oriented against the unremitting harshness of American punishment.