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GUILT, ANGER, AND RETRIBUTION

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This article focuses primarily on the emotion of guilt as providing a justification for retributive legal punishment. In particular, I challenge the claim according to which guilt can function as part of our epistemic justification of positive retributivism, that is, the view that wrongdoing is both necessary and sufficient to justify punishment. I show that the argument to this conclusion rests on two premises: (1) to feel guilty typically involves the judgment that one deserves punishment; and (2) those who feel guilty after wrongdoing are more virtuous (or less vicious) than those who do not. I shall argue that premise (1) is false on both empirical and conceptual grounds and that there are no particularly good grounds supporting this premise (2). Finally, I consider and reject the claim that anger, as opposed to guilt, can afford the type of epistemic justification needed by positive retributivism.

I. INTRODUCTION

Punishment theorists have found at least three interesting and distinct roles for guilt in criminal-law theory. Perhaps the most well-known consider guilt as (i) *a practical justification of punishment through moral reform or education*. The thesis that one finds such theories defend is that punishment is partially justified by its capacity to induce guilt because of guilt's potentially positive role toward the moral reform or education of the offender.[1] Other

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1. An early defender of this view in the contemporary debate is Herbert Morris, *A Paternalistic Theory of Punishment*, 128 AM. PHIL. Q. 263–271 (1981). More recently, authors such as Stephen Garvey and Dan Markel defend the view that some penalties ought also to be aimed at inducing guilt. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733–794 (1998); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157–2242 (2001). All of these authors espouse retributive and communicative theories of punishment. Yet while Morris stresses the idea that punishment is a moral good for the wrongdoer, Markel seems concerned mostly with the communicative aspect of his theory: in punishing by attempting to induce guilt, the state is perceived as communicating the commitment to reintegrating the offender into the moral community.

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accounts consider guilt as (ii) *a form of punishment*. On Duff's account,[2] for example, punishment itself must consist in the pains or burden of guilt feelings. Finally, in a much anthologized article,[3] M.S. Moore claims that guilt functions as (iii) *an epistemic justification for retribution*. Here the connection between guilt and punishment is once again justificatory. However, the nature of the justification in question is epistemic rather than practical. Guilt is not considered as something desirable in itself or for the sake of something else that it brings about (e.g., moral education). Rather, when appropriately feeling guilt, we are warranted in judging that we deserve or ought to be punished.

Moore then moves from the fact of these warranted particular judgments about punishment deservingness to the general conclusion that retribution is justified or an intrinsic good. This general principle that retribution is intrinsically good has the status of a first principle of morality, the evidence for which is afforded by our guilt-validated particular judgments about punishment deservingness. Finally, it is important to note that the strand of retributivism Moore has in mind is the full-bodied version sometimes referred to as "positive" retributivism: "the moral desert of an offender is a *sufficient* reason to punish him or her".[4] This version goes beyond so called "negative" retributivism, according to which moral desert is merely a necessary condition for punishment.

Elsewhere,[5] I assess some important aspects of the connection between guilt and punishment as expressed by (i) and (ii). In this article, I focus primarily on (iii) and in particular I am arguing against the claim that the emotion of guilt warrants particular judgments to the effect that someone deserves to be punished. This view is an instantiation of a general argument in moral epistemology that takes as one of its premises the idea that emotions can afford epistemic support in favor of certain moral claims. The main aim of this paper is not to undermine this moral epistemological stance as such but only the particular instantiations of it that connect guilt or anger, on the one hand, with retributivism, on the other. In the absence of any alternative emotion capable of fulfilling the role guilt and anger were supposed to fulfill, we may safely conclude that this type of moral epistemology is unavailable to friends of retributivism.

2. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001).

3. M.S. Moore, *The Moral Worth of Retribution, in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS (F. Schoeman ed., 1987). The piece is reprinted in the following anthologies: PHILOSOPHY OF LAW (Joel Feinberg & Herman Gross eds., 4th ed. 1991; 5th ed. 1995; 6th ed. 2000); PUNISHMENT AND REHABILITATION (Jeffrie Murphy compiler, 3rd ed. 1995); WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS (R. Solomon & M.C. Murphy eds., 2nd ed. 2000).

4. Moore, *supra* note 3, at 180. Interestingly, sufficiency here is not to be understood as providing overriding reason to punish. It is rather a *pro tanto* reason which will be effective only when punishing does not involve violating other rights the offender may have, such as a right to life and bodily integrity. *See* M.S. Moore, *Justifying Retributivism*, 27 ISR. L. REV. 15–49 (1993), at 34–35.

5. R. Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL., PUB. POL'Y, & L. 142–176 (2008); R. Rodogno, *Shame, Guilt, and Punishment*, 28 LAW & PHIL. (2009) 5.

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II. GUILT AS WARRANTING RETRIBUTION

In this section, I sketch a version of Moore's[6] argument in favor of positive retributivism as epistemically justified by the emotion of guilt. For the sake of simplicity, I reproduce the argument in seven steps, aware that many more steps could be added by a close reading of the text.[7] I trust, however, that omission of these further steps will not compromise the critical discussion that follows. Here is the argument:

1. Emotions are heuristic guides to (or have epistemic import for) our particular moral judgments.
2. Virtue (or lack of it) in the possession of an emotion is a fallible guide to the epistemic import an emotion may possess. In particular, "If the possession of an emotion makes us more virtuous, then that emotion is a good heuristic for coming to moral judgments that are true; if the possession of an emotion makes us less virtuous, then that emotion is a good heuristic for coming to moral judgments that are false."[8]
3. The possession of guilt makes one more virtuous.
4. Feelings of guilt typically cause one to judge (a) that one is guilty (in the sense of "morally culpable") and (b) that one deserves (in the sense of "ought") to be punished.
5. There are no valid reasons that the first-personal judgment that one ought to be punished should not be transferred to third persons.
6. The emotion of guilt validates particular judgments to the effect that someone deserves to be punished.
7. By abductive reasoning we can generalize to the conclusion that moral culpability is sufficient to justify punishment.

In the end, we question the soundness of steps 3 and 4. This is in part because these premises are the ones that really bring emotional guilt into the picture and in part because steps 1, 5, and 7 have already received sustained critical attention.[9] Before focusing on our critical steps, however, it may be advisable briefly to run through the argument as a whole.

At the most general level, Moore's argument is grounded on a specific epistemological approach to ethical judgments as characterized by step 1. The idea here is that although first principles, such as the claim that retribution is intrinsically morally good, cannot be deductively proved, we can

6. Moore, *supra* note 3; Moore, *supra* note 4.

7. In a footnote, Moore, *supra* note 3, at 216, takes six steps to specify what in our argument is a single step, i.e., step 5.

8. Moore, *supra* note 3, at 204.

9. David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 537–559 (1991); Joel Feinberg, *Punishment, in* PHILOSOPHY OF LAW (Joel Feinberg and Hyman Gross eds., 4th ed. 1991); D. Knowles, *Unjustified Retribution*, 27 ISR. L. REV. 50–58 (1993); John Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3–10 (1982); John Mackie, *Retributivism: A Test Case for Ethical Objectivity, in* PHILOSOPHY OF LAW 677–684 (Joel Feinberg & Hyman Gross eds., 4th ed., 1991); Moore, *supra* note 4; J. Murphy, *Moral Epistemology, the Retributive Emotions, and "the Clumsy Moral Philosophy" of Jesus Christ, in* THE PASSIONS OF LAW (Susan Bandes ed., 1999).

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avail ourselves of evidence in their favor, and emotions may partly constitute such evidential support. As Moore notes, the idea is not new and was already present in J.S. Mill. Moore himself defends this view at length,[10] while a number of philosophers[11] have afforded it further plausibility. Clearly a successful critique of this view would have repercussions on Moore's retributivist conclusions. Yet its critique would be an exercise in metaethics, a quick review of which does not indicate difficulties for this view that are any more insurmountable than those faced by its main contenders. What is more, an argument's critique is most effective when conducted as much as possible on its very terms. I suggest, then, that we grant this premise and focus on questions that are closer to the topic of guilt and punishment, which appear later in the argument.

Suppose, then, that some emotions play the epistemic role of supporting particular moral judgments. If only some emotions can play this role, however, the question we need to ask next must concern the criterion that tells emotions apart with respect to their epistemic credentials. This criterion is what Moore offers in step 2, where virtue and truth, on the one hand, and vice and falsehood, on the other, are connected. Moore himself is not entirely happy with this criterion. He finds counterexamples for the very case of guilt, whereby it would be virtuous to feel guilt in the case of moral dilemmas even though the judgment that one is guilty is false, and the inverse case, whereby correct moral judgments seem to spring from not especially virtuous emotions (e.g., selfish emotions and correct Lockean judgments about labor and property). Yet he concludes that though virtue (or lack of it) in the possession of an emotion is not an infallible guide, it is certainly a guide, albeit a fallible one, to the epistemic import such an emotion may possess.[12]

The question now is whether "possessing" the emotion of guilt in particular is virtuous as Moore claims in step 3. Moore's argument goes as follows. Consider the case of Richard Herrin, a man who "intentionally smashed open the skull of a 23-year-old woman with a claw hammer while she was asleep, a woman [Bonnie] whose fatal defect was a desire to free herself from [Herrin's] clinging embrace."[13] Then imagine what you would feel if you had acted like Herrin. As for Moore, he would himself "feel guilty unto death [and] couldn't imagine any suffering that could be imposed upon [him] that would be unfair because it exceeded what [he] deserved."[14]

Next Moore asks whether it would be virtuous to feel guilt in such circumstances and concludes that though "virtue" is perhaps an odd word to use in

10. M.S. Moore, *Moral Reality*, WIS. L. REV. 1061–1156 (1982); Moore, *supra* note 3; Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424–2533 (1992); Moore, *supra* note 4.

11. JOHN SKORUPSKI, ETHICAL EXPLORATIONS (1999); G. Sayre-McCord, *Mill's "Proof" of the Principle of Utility: A More than Halfhearted Defense*, 18 SOC. PHIL. & POL'Y 2 (2001).

12. Moore, *supra* note 3, at 205–206.

13. *Id.* at 212.

14. *Id.*

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the context of extreme culpability, guilt seems at least *very appropriate*.[15] The shift from "virtue" to "appropriateness" is, as shown in Section IV, a crucial one.

At this point in the argument, the virtuous credentials of guilt have supposedly been established. The question, then, is: What exactly does this feeling validate? This is the topic broached by step 4. The crucial point here is the connection between guilt feelings and the judgment that one ought or deserves to be punished. Note that Moore specifically claims that the judgment here is to the effect that one ought to be punished rather than that one ought to *repair* the damage as best as one can. If only the latter were true, guilt feelings would at best justify corrective justice theories of punishment and not retributive ones. He argues, however, that that would be to put too nice a face on our guilt feelings:

> [To feel guilty] is to judge that we must suffer. We can see this plainly if we imagine ourselves having made provisions for Bonnie's family, comforting them in any way possible, and then feeling that our debt for killing her has been paid. It is so clear that such corrective actions do *not* satisfy guilt that to feel that they do is not to have felt guilty to begin with.[16]

Finally, with step 5 we move from the first-person judgment to the effect that in such circumstances we would deserve to be punished to the third-person judgment that Richard Herrin deserves to be punished. Here Moore argues that we should resist any temptation to withhold transferring the guilt to Herrin: doing so would be to count him as less of a person, as someone incapable of choice and responsibility. Such a move would be a form of elitism masquerading as egalitarianism.[17]

If this and the other steps are indeed correct, guilt feelings do validate particular judgments to the effect that someone ought to be punished as in step 6. From there, and through abductive reasoning, we find that what these guilt-validated particular judgments have in common is the moral culpability of the person who deserves the punishment. We can then take such judgments to be evidence in favor of positive retributivism, that is, the (first) principle to the effect that moral culpability is sufficient to justify punishment (or again, that inflicting punishment on the morally culpable is an intrinsic good). With the general shape of this argument in mind, I offer a critique of step 4 in the next section and of step 3 in Section IV.

15. *Id.*
16. *Id.* at 215.
17. *Id.* at 215–216.

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III. GUILT AND PUNISHMENT DESERVINGNESS

The first part of step 4 is a defense of the claim that guilt feelings typically cause the judgment that one is guilty in the sense that one is morally culpable. I understand this claim as follows:[18] when feeling guilt, we typically judge that we are morally responsible for a norm-violating act.[19] Though this claim is sometimes challenged,[20] we side with Moore and, in the rest of the section, challenge the second part of step 4, that is, the alleged connection between the emotion of guilt and punishment deservingness. Clearly, if this connection cannot be established, the retributivist project will not take off. The question, then, is: Does guilt *typically cause* the judgment that one deserves to be punished? As shown below, the answer is "no." In what follows, I first offer positive grounds in favor of this conclusion and then attempt to explain the origin of Moore's mistaken claim by looking at its Freudian and Nietzschean roots.

The claim that guilt involves the judgment that one ought to be punished (whether guilt partly consists in this judgment or typically causes this judgment) seems plainly false. Imagine any case of guilt less severe than the Herrin-the-axe-murderer case in which guilt would nonetheless be an appropriate emotion to feel. Suppose that you are in the context of an intimate relationship, the type of context, that is, in which, according to recent empirical research,[21] guilt is most likely to arise. You have said something quite offensive to your partner, something you did not really mean. She took it pretty badly and broke into tears. You think to yourself "Oh no, what have I done!" and generally feel bad about your behavior. You experience the situation as one in which you are responsible for harming someone you care about, and, clearly, avoiding harm to the people you love is something you care about. Suppose also that your emotional experience is accompanied by the disposition to make amends, maybe by way of an apology. Most of

18. Moore explains "guilty" in terms of moral culpability and tells us that the latter "does not presuppose that the act done is morally bad, only that it is legally prohibited. An actor is culpable when, in doing an action violating some criminal prohibition, he or she satisfies those conditions of fair fault ascription." *Id.* at 181, n.1. This particular elucidation of moral culpability has an unwelcome consequence: when feeling guilt, subjects must typically judge themselves as having violated a criminal (and legal) prohibition. The emotion of guilt would, in other words, presuppose a legal and criminal system of norms. Arguably, however, the emotion of guilt predates the coming about of legal and criminal systems, at least in their modern form.

19. I understand "act" here quite widely, so as to include also thoughts and feelings. This is to account for the commonly recognized phenomenon of guilt over one's thoughts and feelings.

20. *See* Herbert Morris, *Nonmoral Guilt*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY (Ferdinand Schoeman ed., 1987). In fact Morris challenges the idea that guilt is or is partly constituted by the experience or judgment of moral responsibility. Moore claims only that guilt feelings *typically cause* such judgments and could then in principle agree with Morris's challenge. The question surrounding guilt and moral responsibility is persuasively dealt with in F. Teroni & O. Bruun, *Shame, Guilt, and Morality*, J. MORAL PHIL. (forthcoming).

21. Roy Baumeister, A.M. Stillwell & T.F. Heatherton, *Guilt: An Interpersonal Approach*, 115 PSYCHOL. BULL. 243–267 (1994).

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us think that a case such as this involves whatever is sufficient to be in the presence of guilt, with no mention of punishment made.[22]

That most of us actually think this way and hence that guilt does not typically involve (belief of) punishment deservingness is not simply my own private intuition but a fact that enjoys strong evidential support from empirical psychology.[23] Perhaps, however, the evidence collected in these studies is not sufficient to discard Moore's view. It may very well be, the objection would go, that the experiments in question failed to mention punishment deservingness because their respective experimental designs were not aimed at finding out about punishment deservingness. This, however, is not the case. At least some of the methodologies employed in such studies, which include qualitative case-study analyses, content analyses of guilt narratives, participants' quantitative ratings of shame and guilt experiences, personality and emotional correlates, prototype "matching" analyses, and others,[24] were open enough to have let punishment deservingness arise as a dimension if it were indeed an important dimension of guilt.[25]

What is more, a study of the empirical literature affords direct negative evidence against Moore's view or something akin to it. I would speculate that Moore's ideas about guilt and punishment deservingness originate in either Friedrich Nietzsche (who is extensively referred to by Moore)[26] or Sigmund Freud, whose influential views associate guilt and punishment. In *Civilization and Its Discontents*, for example, Freud distinguishes fear of outer authority and fear of inner authority and argues that guilt is a kind of internal punishment due to one's internalization of figures giving rise to the superego mechanism.[27] Nietzsche's conception of guilt is structurally the same: guilt is the symptom of bad conscience caused or motivated by a negative stance toward vital energies and values imposed by alien forces; guilt arises out of the progressive internalization and moralization of the fear of punishment attending those who fail to obey the socially defined

22. Or perhaps as full-blown instances of a certain type guilt that we can call nonchronic or nonpathological. *See* J.L. Donatelli, J.A. Bybee & S.L. Buka, *What Do Mothers Make Adolescents Feel Guilty About? Incidents, Reactions, and Relation to Depression*, 16 J. CHILD & FAMILY STUD. 859–875 (2007) for a recent discussion of chronic and nonchronic (or dispositional) guilt.

23. *See, e.g.*, June Price Tangney, *Moral Affect: The Good, the Bad, and the Ugly*, 61 J. PERSONALITY & SOC. PSYCHOL. 598–607 (1991); J. Lindsay-Hartz, J. De Rivera, & M.F. Mascolo, *Differentiating Guilt and Shame and Their Effects on Motivation*, *in* SELF-CONSCIOUS EMOTIONS, 274–300 (J.P. Tangney & K.W. Fischer eds., 1995); H.G. Wallbott & K.R. Scherer, *Cultural Determinants in Experiencing Shame and Guilt*, *in* SELF-CONSCIOUS EMOTIONS, 465–487 (J.P. Tangney & K.W. Fischer eds., 1995). JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT (2002), at 24, actually claim that these studies as well as others they quote establish that shame and guilt are distinct emotional experiences that differ substantially along cognitive, affective, and motivational dimensions. When looking at these studies, however, one also notes the absence of punishment deservingness as a dimension of guilt.

24. *See* TANGNEY & DEARING, SHAME AND GUILT, *supra* note 23, at 24.

25. Even those experimental designs that presented subjects with a number of dimensions that did not include punishment deservingness did so on the basis of a theoretical background that suggested it should not be included.

26. Moore, *supra* note 3.

27. *See also* H. LYND, ON SHAME AND THE SEARCH FOR IDENTITY (1956).

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dictates of morality. For Nietzsche, as for Freud, guilt is an arbitrary internal punishment.

Although there are important differences between Freud's and Nietzsche's accounts, the crucial thesis, whose assessment will be enough for our present purposes, is that moral, guilt-eliciting norms are internalized through fear of punishment. This is the substantial psychological assumption that motivates their criticism of guilt. But recent empirical findings on the issue of internalization as well as on that of the developmental path of shame and guilt[28] show that it is fundamentally misguided. G. Kochanska and colleagues, for example, show that parental warmth and affection (rather than rejection and punishment) are positively linked to guilt development in the child.[29] These findings raise serious difficulties for the view of guilt as the expectation of punishment. They also reported that love withdrawal is linked with high guilt. When parents instead respond by asserting their power, as in direct punishment, guilt is less extensive. Within this developmental literature, evidence has also been found for the claim that guilt does not originate from fear of punishment but from empathic concern with others.[30] If, as the evidence suggests, this developmental story is correct, it is hard to see how punishment, as feared or as something deserved, should be part of the description of guilt.[31]

Some may view the reliance of my argument on empirical support with suspicion. A large part of the argument, the objection would go, relies on the intuitions and experiences of nonexperts, that is, the subjects participating to the experiments crafted by various psychologists. Now, these intuitions, even if numerous, should not be allowed to override the intuitions or experiences of experts. Let us assume that this point is true. The question remains, however, whether there is reason to think that Moore's intuitions on this subject are any more authoritative than those of the average subject participating in the experiments cited above. However, if the claim that Moore's intuition derives from Freudian and Nietzschean theories is correct, there is no reason to think that they are any more reliable than those intuitions that are not corrupted by incorrect theoretical accounts of guilt.[32]

28. *See, e.g.*, N. Eisenberg, *Emotion, Regulation, and Moral Development*, 51 ANN. REV. PSYCHOL. 665–697 (2000); G. Kochanska, J.N. Gross, M.H. Lin, & K.E. Nichols, *Guilt in Young Children: Development, Determinants, and Relations with a Broader System of Standards*, 73 CHILD DEV. 461–482 (2002); G. Nunner-Winkler & B. Sodian, *Children's Understanding of Moral Emotions*, 59 CHILD DEV. 1323–1338 (1988).

29. Kochanska et al., *supra* note 28.

30. Eisenberg, *supra* note 28.

31. I have borrowed much of the content of the last two paragraphs from Teroni & Bruun, *supra* note 20.

32. Note that leaving empirical results out of the argument altogether will not be of particular help to the friends of retributivism. If the example of punishment-deservingness-free guilt offered above is at least as intuitive as the Richard Herrin example, intuitions will clearly not suffice to solve the question in favor of retributivism. Also, empirical data must surely be admissible in an argument that hinges on what guilt feelings *typically cause*.

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As a final objection, consider the following thought from Herbert Morris:

> pain is sometimes deliberately sought out as punishment by a person who feels guilty, and, indeed, even the pain constitutive of feeling guilty can bear significance as punishment. There is a cycle in which a person may punish himself for one wrong by committing another and feeling guilty as punishment for wrongdoing. What is sought out is the pain of feeling guilty as punishment for wrongdoing.[33]

If Morris is correct, when feeling guilt we are sometimes disposed to self-punishment. There are two points to note in conjunction with this claim. First, this is once again a claim susceptible to empirical confirmation. If we consult the relevant literature, we find that guilt is strongly associated with reparative action tendencies. Those who experience guilt tend to want to repair the wrong, make amends, and apologize. Self-punishment as described in the last quote, then, might be a form of reparative behavior but is not the only form, nor is there evidence to the effect that it is the preponderant form. The connection between self-punishment and guilt, then, is not as strong as it ought to be to carry Moore's retributivist argument through. Second, even if the connection were very strong, the thesis advanced by Morris is that the action tendencies are *reparative* or *restorative* in nature.[34] Those who are guilty and tend to seek punishment do so for reparative purposes and not simply because they think they deserve punishment. It would be more appropriate to take such action tendencies as the beginning of a justification for corrective rather than retributive justice. I take these considerations to be enough for blocking the retributivist argument in its fourth step. For those who are yet unconvinced, however, I now offer some grounds to reject step 3.

IV. GUILT AND VIRTUE

Having argued that the virtuous nature of an emotion is what qualifies its moral epistemic credentials, Moore assesses the virtuous nature of guilt by considering the case of axe murderer Richard Herrin and concludes that though it would perhaps be odd to use the word "virtue" in the context of extreme culpability, it would be very appropriate to feel guilt for anyone in the position of Richard Herrin. Note the shift from "virtue" to "appropriateness." The normative assessment of emotions can focus on distinct dimensions. In particular, judgments about the virtue or the moral nature of any emotional occurrence or disposition are distinct from judgments about the fittingness or appropriateness of those emotions to their object.

33. Herbert Morris, *Guilt and Suffering*, *in* On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology 104 (1976).

34. *Id.*, 103–108.

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An emotion's formal object is what regulates fittingness or appropriateness judgments with regard to specific emotional occurrences.[35] Hence, for example, fear is the appropriate emotional reaction to dangerous objects. It is a distinct task, however, to assess the moral or prudential nature of any emotional occurrence or disposition. Hence, though fear would clearly be fitting or appropriate when confronted with an angry bear, we can imagine circumstances in which it would be imprudent or even immoral to give in to one's appropriate fear.[36] Similarly, a certain occurrence of envy may perfectly fit its object, and yet many would argue that envy is a systematically immoral emotion: in no case would feeling it add virtue.

Moore claims that it would be "virtuous" or perhaps "very appropriate" to feel guilt in the imagined circumstances. But which one is it? If the distinction above is correct, the claim that guilt is an appropriate reaction to a brutal homicide is not tantamount to the claim that feeling guilt "makes the person more virtuous." Perhaps most of us internalize a norm against murder and would hence think of guilt as fitting its object in cases such as Richard Herrin's. What Moore needs to show, however, is that feeling guilt would also add virtue or be morally better than not feeling guilt, that is, that Herrin would be more virtuous or perhaps less vicious if, after the fact, he were guilt-ridden rather guiltless.

Friends of Moore's view could accept in principle that at the conceptual level the appropriateness and morality of an emotion come apart while still maintaining that at the substantive level the following thesis is correct:

> In the case of guilt, when the emotional occurrence is appropriate, it is morally good to feel it and morally bad not to feel it.

Some will perhaps find this thesis intuitive. If you and I both committed a homicide and you felt guilty about it and I did not, in that respect you must be a morally better, more virtuous, or less vicious person than I am.[37] Perhaps the idea that affords plausibility to this claim is that the feelings of guilt signal the presence of a disposition that we take to be morally good in a person's character. Substantive theses such as this one, however, are in need of an explanation (unless we intend to put them forward as intuitions incapable of any backing beside the very fact that they occur to us with the content they happen to carry).

35. *See* F. Teroni, *Emotions and Formal Objects*, 61 DIALECTICA 395–415 (2007), for a recent elaboration of this point.

36. *See* J.D'arms & D. Jacobson, *The Moralistic Fallacy*, 61 PHIL. & PHENOMENOLOGICAL RES. 65–90 (2000), for an elaboration of this point.

37. I am implicitly assuming for the sake of the argument that if it is moral to feel an emotion, the person who feels that emotion is thereby more virtuous or less vicious than the person who does not feel it.

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A number of facts can serve as the basis for such explanation(s). On one important psychological account, guilt is understood as an interpersonal emotion that strengthens social bonds and attachments in many ways:

> guilt is something that happens between people rather than just inside them. That is, guilt is an interpersonal phenomenon that is functionally and causally linked to communal relationships between people. The origins, functions, and processes of guilt all have important interpersonal aspects. Guilt can be understood in relationship contexts as a factor that strengthens social bonds by eliciting symbolic affirmation of caring and commitment; it is also a mechanism for alleviating imbalances or inequities in emotional distress within the relationship and for exerting influence over others.[38]

Roy Baumeister and colleagues support these claims about the interpersonal nature of guilt with empirical evidence. The central idea of the interpersonal analysis is that guilt in all relationships arises primarily from the communal component and is proportional to it.[39] In particular, guilt serves three broad functions for relationships and strengthens social bonds and attachments in three ways. First, guilt motivates relationship-enhancing patterns of behavior by facilitating the enforcement of communal norms that prescribe mutual concern, respect, and positive treatment in the absence of self-interested return. Second, guilt operates as an interpersonal influence technique that allows even a relatively powerless person to get his or her way.[40] Third, guilt redistributes emotional distress within the dyad. After a transgression, the victim is presumably suffering while the transgressor has benefited. If the transgressor feels guilty, however, his or her enjoyment is diminished, and the transgressor's guilt may make the victim feel better. In this way, emotional equity is restored (because bad feelings are in effect restored to the person who caused them).[41]

38. Baumeister et al., *supra* note 21, at 243.

39. We should understand *communal relationships* in opposition to *exchange relationships*. The former "are defined by the existence of implicit rules that the individuals must be concerned about each other's welfare. . . . As a result, communal relationship partners do things simply to benefit each other without expecting equal or immediate benefits in return, in contrast to partners in exchange relationships, who seek to maintain equity and who benefit each other only when anticipating equal or greater benefits in return. Research has established that people seem ready to interact with even a stranger on a communal basis simply because they anticipate the possibility of a communal relationship." *Id.* at 246.

40. "If Person A wants Person B to do something, A may induce guilt in B by conveying how A suffers over B's failure to act in the desired fashion. Person B finds the guilt aversive and, to escape from guilt, complies with A's wishes." *Id.* at 247. But guilt can work only to the extent that B cares about A.

41. *Id.* at 247. "Why should victims feel better when a transgressor feels guilty? First, the transgressor's guilt affirms a commitment to the relationship, which is thus a potentially powerful indication of affection, caring, and intimacy that may be pleasing and reassuring to an intimate partner: Feeling guilty is a way of showing that one cares. Second, if the transgressor acknowledges guilt, the victim may see this as an implicit commitment not to repeat offense, as a promise to rectify that transgression by making amends, or as acknowledgement of a nonspecific debt toward the victim. Thus, despite the victim's misfortune or distress, he or she

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What is more, by bringing the two partners' emotional states into closer harmony, guilt may be beneficial for the relationship because people who are in similar affective states tend to be able to have mutually satisfactory interactions with a positive outcome, whereas people in mismatched affective states tend to enter into a vicious cycle of poor communication, mutual dissatisfaction, and increasing withdrawal.[42]

Similarly, according to Morris though we may think that there is something suspicious about guilt insofar as it involves pain and suffering for what is over and done with, we do think it essential to human life insofar as it implicates "a concerned involvement with others."[43] A person without a conscience, dominated exclusively by pain and pleasure for himself alone, is not as we wish to be, and surely we would not be at ease with him around.

The fact that guilt strengthens attachments and social bonds by showing our concerned involvement with others is value-free as such. Yet we can easily imagine at least two moral accounts that could coherently place normative value on such facts. Many eudaimonist accounts of virtue, for example, recognize the inherently social nature of human beings and include the goods stemming from personal relations as parts or constituents of the virtuous or *eudaimon* life. The fact that wrongdoers feel guilt is a sign that standing in certain relations to others is something they care about, and for the eudaemonist, these relations are constitutive of the virtuous life.

Similarly, other types of account can use the support provided by these facts about guilt. Various types of consequentialism, for example, take on board the idea that strong social bonds are a constituent of or instrumental to well-being and take some positive function of each individual's well-being to constitute impartial well-being, the ultimate principle of practical reason. Occurrences of guilt would then be instrumental to the realization of strong social bonds and hence impartial well-being. Perhaps it is also better for most of us to live among beings who show "concerned involvement with others," and if guilt is part of what it takes to show this concern, then greater impartial well-being may be realized when those for whom guilt is appropriate feel guilt. Finally, as claimed in the previous section, through its reparative action tendencies guilt fosters prosocial behavior, and once again, prosocial behavior may be instrumental to a number of prudential goods.

There are, then, a number of facts concerning guilt that are relevant to its moral status: it strengthens social bonds and attachments and is associated to prosocial behavior. As such, these facts do not talk about the moral goodness of guilt or the relative virtuous nature of guilty wrongdoers. What get us there are the normative theories that account for these facts, and

may be pleased to regard the partner's acknowledgement of guilt as an implicit promise of better treatment in the future." *Id.*

42. K.D. Locke & L.M. Horowitz, *Satisfaction in Interpersonal Interactions as a Function of Similarity in Level of Dysphoria*, 47 J. PERSONALITY & SOC. PSYCHOL. 71–84 (1990).

43. MORRIS, *supra* note 33, at 92–93.

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in particular, theories such as eudaimonism and consequentialism. When accounted for by such theories and their normative premises, the facts relevant to guilt can be seen to acquire positive moral value. This conclusion may seem to constitute all the support needed to provide independent support to our initial intuition. Unfortunately, however, this is not so.

These facts and the normative theories that impart positive moral value to them should help explain why the guilt-ridden wrongdoer is morally better or less vicious than the guiltless wrongdoer. Note, however, that strictly speaking, the only difference between a guilt-ridden and a guiltless wrongdoer is the fact that the former but not the latter is subject to feelings such as pangs of conscience, the self-blame and remorse that go with guilt. In other respects, guiltless and guilt-ridden wrongdoers may be exactly the same. In particular, they may both judge that what they have done is wrong and regret having done so, may both be at least equally disposed to repair and amend as well as they can, and in general may be at least as determined as each other to do better in the future.

None of the empirical facts mentioned above excludes that in this sense of guiltlessness, guiltless wrongdoers may be as morally good as if not better than guilt-ridden ones. All the evidence shows is that guilt strengthens social bonds. This, however, is not tantamount to showing that guiltless people are less motivated to strengthen social bonds than guilt-ridden ones, nor that they are less effective in doing so. The evidence we would need for the latter claims would have to show that guilt-prone people (or those who are in the grip of an occurrence of guilt) score generally better with regard to these prosocial behaviors than those who are not guilt-prone (or not in the grip of guilt). All the evidence we have, however, is that those particularly prone to guilt are also particularly prone to shame and that shame-proneness has a number of unwelcome antisocial associations.[44]

V. EXTENDING THE ARGUMENT

In light of the above, we should agree that the emotion of guilt cannot validate particular moral judgments about punishment and hence retributivism because: (1) the connection between guilt and punishment deservingness has not been established; and (2) there is insufficient support for the claim that guilt is a virtue. Friends of retributivism, however, may still use the *type* of argument discussed above while appealing to emotions other than guilt. The question, then, is whether there are any emotions other than guilt that are epistemically useful in coming to particular judgments about punishment deservingness. Candidate emotions would have to "add" virtue while enjoying a relevant connection to punishment. At first sight, it would seem

44. *See* TANGNEY & DEARING, SHAME AND GUILT, *supra* note 23; and Rodogno, *Shame and Guilt in Restorative Justice*, *supra* note 5, for a critical discussion of this evidence.

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that anger in one or another of its forms (indignation, outrage, moral outrage, or hatred) is a plausible—if not *the* only plausible—candidate capable of replacing guilt in such a type of argument. As shown below, its connection to punishment is well established and has historically been thought to be a virtuous expression of the moral understanding of crime and its implications.[45]

There seems to be agreement about the connection between at least some forms of anger and punishment. Aristotle, for example, characterizes anger as an impulse, accompanied by pain, to a conspicuous revenge for a conspicuous slight directed without justification toward what concerns oneself or one's friends.[46] More recently, Robert Roberts takes it that in anger we construe the situation in these terms:[47] S has culpably offended in the important matter of X (action or omission) and is bad; I am in a moral position to condemn; S deserves (ought) to be hurt for X; may S be hurt for X. Unlike Moore's discussion of guilt and what beliefs it *causes*, these are claims about what anger *is*, that is, a specific motivation to inflict pain on an offender or a specific construal of a situation such that a culpable offender deserves to be hurt and one is motivated to inflict pain on him or her. These characterizations, however, should serve the retributivist's purposes quite well because they establish an evident connection to punishment: to say that someone deserves to be hurt for a culpable wrongdoing is to say that he or she deserves punishment. We henceforth grant retributivism with whatever parts of these claims it needs to get the required connection to punishment.[48]

45. *See* See J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY. Both Murphy and Jean Hampton have been drawing connections between "retributive hatred" and "moral hatred," on the one hand, and punishment, on the other. JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY chs. 3–4 (1988). Unfortunately, neither one of their accounts displays the type of argumentative structure we are looking for. Even though Murphy draws a connection between what he calls "retributive hatred" and retribution in his account (*id.*, 94), the justification runs from retribution to hatred rather than the other way around. On Hampton's account, the desire for retribution may at times be coupled by the experience of moral hatred of the wrongdoer (*id.*, 146). Yet nowhere does Hampton claim that moral hatred or any other emotion affords epistemic (or practical) support in favor of retributivism; in her account retributivism receives an expressivist kind of justification (*see* Nathan Hanna, *Say What? A Critique of Expressivist Retributivism*, 27 LAW & PHIL. 123–150 (2008) for a serious challenge to expressivist accounts of retributivism, including Hampton's) that does not require any emotion. S. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655–710 (1989) may also be worth mentioning here, although he seems to assume the truth of retributivism while exploring the way in which various emotions can help determine what punishment a given criminal deserves (given that he deserves punishment).

46. ARISTOTLE, RHETORIC 1378a31–1380a4.

47. ROBERT ROBERTS, EMOTIONS: AN ESSAY IN AID OF MORAL PSYCHOLOGY (2003), at 204. *See id.*, ch. 2, for a discussion of "construal."

48. Note that even granting this much leaves some important questions unresolved. If these considerations figure in an argument meant to justify criminal punishment as opposed to nonpunitive sanctions, we have to find an emotion whose correct episodes take as their particular objects all and only those wrongs we are inclined to think of as criminal. Even if that were not a problem, and anger afforded epistemic support to retributivism, it is not clear why

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Next we need to consider the virtuous nature of anger. The substantial thesis at issue here is as follows:

> In the case of anger, when the emotional occurrence is appropriate, it is morally good to feel it and morally bad not to feel it.

Perhaps some find this intuitive. But we should be particular wary of such intuitions, for as shown above, anger is intimately connected to the infliction of harm on others, and this affords at least some reason for *not* thinking it a virtuous emotion. One quick way of dismissing the substantial thesis would parallel the argument I propose for guilt in Section IV. Consider an individual who feels appropriate anger and another who, in the same situation, fails to do so. Is there any reason to think that the former is any more virtuous than the latter, provided that the two otherwise think the same thoughts and display the same action tendencies? What is it about the feeling of anger that makes its subject gain in virtue? Though I think this line of argument promising, in what follows, I set it aside an offer a new challenge.

In providing explanatory support for the substantial thesis about anger, we must keep in mind the following two points. First, in the context of an argument in favor of retributivism, any substantial explanation of why correct anger is a virtue cannot assume the truth of retributivism. Hence retributivist explanations such as "correct anger adds virtue because it provides incentives to give people their just deserts or to right the wrong" will not do. Second, as in the case of guilt above, we should expect such an explanation to account for the known empirical facts about anger.

The problem for the retributivist argument is that the best and most direct explanation of the known empirical facts about anger is itself retributivist and hence cannot appear in such argument on pain of begging the question. Strong empirical evidence shows that people punish primarily on the basis of retributive motivation; they want wrongdoers to get their just deserts.[49] If, as granted above, in anger we construe the situation as justifying punishment and are motivated to inflict it and when punishing we do so primarily out of retributive motives, the motives involved by anger must themselves be primarily retributive. Any good explanation of the thesis that appropriate anger is virtuous must take this fact into account. Though perhaps a theory such as (indirect) consequentialism could explain in forward-looking terms why it is a good thing that agents display such retributive motives, the most direct explanation must itself be retributivist: correct anger adds virtue

it should be *the state's* task to institute and maintain a system of criminal punishment (cf. DUFF, *supra* note 2, at 24.

49. Kevin M. Carlsmith, John M. Darley, & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284–299 (2002); Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 437–451 (2006).

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because it provides incentives to give people their just deserts or to right the wrong. But this explanation should not be allowed to appear in an argument aimed at establishing retributivism.

VI. CONCLUSION

If, as argued above, neither guilt nor anger can aptly play their role of epistemic guides in favor of retributivism, it is hard to imagine what alternative emotion could. On the basis of this conclusion, we must qualify as unavailable arguments that take as one of their premises the idea that emotions can afford epistemic support in favor of retributivism.

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