Making Sense of Retributivism[1]

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> For if justice goes, there is no longer any value in human beings' living on the earth … justice ceases to be justice if it can be bought for any price whatsoever.[2]
>
> … If we think that institutions of punishment are necessary and desirable, and if we are morally sensitive enough to want to be sure that we have the moral right to punish before we inflict it, then we had better first make sure that we have restructured society in such a way that criminals genuinely do correspond to the only model that will render punishment permissible—i.e., make sure that they are autonomous and that they do benefit in the requisite sense.[3]

Introduction

In 'Two Concepts of Rules,'[4] John Rawls draws a distinction between 'justifying a practice and justifying a particular action falling under it.' This point, he avers, can be used to rescue utilitarianism from the grips of a certain objection levelled against it, an objection which states that utilitarianism sometimes permits or requires the punishment of innocent persons for the sake of social utility maximization.

I shall argue that Rawls' attempt to rescue utilitarianism from the threat of this objection fails. Moreover, his suggestion that retributive and utilitarian theories of punishment, respectively, answer different questions about punishment is problematic. In arguing this point, I outline a retributivist theory of punishment, one that

[1] I would like to thank Joel Feinberg for incisive comments on earlier drafts of this paper.

[2] Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor, Translator and Editor (Cambridge University Press, 1996), 105.

[3] Jeffrie G. Murphy, 'Marxism and Retribution', in A. John Simmons, Marshall Cohen, Joshua Cohen and Charles Beitz (Eds), *Punishment* (Princeton University Press, 1995), 29.

[4] John Rawls, 'Two Concepts of Rules', originally published in *The Philosophical Review*, **64** (1955), 3–13. Pagination for purposes of this paper is found in John Rawls, *Collected Papers*, Samuel Freeman, Editor (Cambridge: Harvard University Press, 1999), 20–46.

https://doi.org/10.1017/S0031819101000067 Published online by Cambridge University Press

incorporates utility considerations as part of the secondary justification of the institution of punishment. Finally, I provide replies to some of the most important objections to retributivism.

I assume that wrongdoers do not have moral rights that preclude their being punished for their wrongdoings. For while legitimate punishment does harm[5] or set back the *interests* of wrongdoers, such interests are hardly legitimate in light of, among other things, their wrongful acts, omissions, and attempts. If a moral right is a *valid* moral claim/interest, it is not obvious that punishment violates a right of wrongdoers.[6] Unlike 'full' or 'strict' retributivism, I argue that the guilty and only the guilty should be punished, but that they should never be punished at any level higher than approximate proportionality permits, though sometimes the guilty need not be punished at all, or may be punished at a level significantly lower than proportionality dictates.[7] This makes my version of retributivism 'negative'.[8] But it is also 'mixed' in that it emulates Immanuel Kant's view that, though desert is what serves as the primary justification of punishment, considerations of social utility may serve as secondary reasons to punish. I shall argue that this model of punishment not only renders problematic the construal of Kant as a pure retributivist, but it also serves as the basis of a mixed view of the justification of both the institution and practice of meting out punishments in particular cases.

I also assume a positive standpoint on punishment, namely, that punishment both as an institution and particular forms of it are justified. Although an attitude of philosophical scepticism about punishment is always welcome, a negative standpoint on punishment according to which punishment cannot be justified in any

[5] For an analysis of the concept of harm, see Joel Feinberg, *Harm to Others* (Oxford University Press, 1984).

[6] Christopher W. Morris, 'Punishment and Loss of Moral Standing', *Canadian Journal of Philosophy*, **21** (1991), 53–80. This crucial distinction between a wrongdoer's interests and her rights uncovers the mischaracterizing nature of certain objections to retributivism such as that 'someone's deserving to receive certain treatment is not sufficient to make it morally permissible (let alone obligatory) to give him that treatment, particularly if doing so would involve violating his rights' [David Dolinko, 'Some Thoughts About Retributivism', *Ethics*, **101** (1991), 558].

[7] Some reasons for this include plea bargaining for the sake of securing stronger punishments for greater offenders who deserve it, or simply not punishing minor offenses so that limited resources can be focussed on more important wrongdoings.

[8] John Braithwaite and Philip Pettit, *Not Just Deserts* (Oxford University Press, 1990), 156.

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way is not addressed herein. Punishment sceptics, then are likely to be dissatisfied with the paper's starting points and conclusions.

Rawls on Retributivism, Utilitarianism, and Punishment

Rawls proposes to 'reconcile' retributivism with utilitarianism concerning the problem of punishment.[9] By 'retributivism' he means the view that

> Punishment is justified on the grounds that the wrongdoing merits punishment. It is morally fitting that a person who does[10] 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.[11]

[9] Rawls, *Collected Papers*, 20. Herbert Morris provides us with a theory of punishment which makes compatible retributivist and paternalist justifications of punishment: Herbert Morris, 'Persons and Punishment,' *The Monist*, **52** (1968), 476–9; 'A Paternalistic Theory of Punishment," *American Philosophical Quarterly*, **18** (1981), 263–71; 'Some Further Reflections on Guilt and Punishment', *Law and Philosophy*, **18** (1999), 363–78.

[10] Presumably, Rawls means to include criminal omissions (negligence, for example), for 'if punishment must be for commissions, not omissions, then the bad Samaritan cannot be punished at all' [Michael Davis, 'How Much Punishment Does the Bad Samaritan Deserve?' *Law and Philosophy*, **15** (1996), 93–116].

[11] Rawls, *Collected Papers*, 21–2. Compare this notion of retributivism with H. L. A. Hart's definition of 'simple retributivism:'

> Such a theory will assert three things: first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of his offence; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good [H. L. A. Hart, *Punishment and Responsibility* (Oxford University Press, 1968), 231].

For an explication of various kinds of retributivism, see John Cottingham, 'Varieties of Retribution', *The Philosophical Quarterly*, 29 (1979), 238–46. For discussions of various confusions in the use of 'retributivism' and its cognates, see K. G. Armstrong, 'The Retributivist Hits Back', *Mind*, LXX (1961), 471–90; Antony Flew, 'The Justification of Punishment', *The Journal of Philosophy*, **29** (1954), 291–307; Anthony Quinton, 'On Punishment', *Analysis*, **14** (1954), 1933–42. For arguments against 'character retributivism', the view that punishment is deserved because of the wrongdoer's moral evil or wickedness, see Jeffrie G. Murphy, 'Moral Epistemology, the Retributivie Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ', in Susan Bandes, Editor,

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By a utilitarian view of punishment, Rawls means the view that:

> On the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable by reference to the probable consequences of maintaining it as one of the devices of the social order. … If punishment can be shown to promote effectively the best interest of society it is justifiable, otherwise it is not.[12]

These are the respective views on punishment that Rawls seeks to reconcile. But with what notion of the nature of punishment is Rawls working? He avers that:

> A person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offence and the attached penalty, that the courts construe statues strictly, and that the statute was on the books prior to the time of the offence.[13]

[12] Rawls, *Collected Papers*, 22. For a discussion of the differences between utilitarian and retributivist models of punishment, see Mark A. Michael, 'Utilitarianism and Retributivism: What's the Difference?' *American Philosophical Quarterly*, **29** (1992), 2f.

[13] Rawls, *Collected Papers*, 26. Compare this conception of punishment with that of Hart's five-fold definition of 'punishment':

(i) It must involve pain or other consequences normally considered to be unpleasant;
(ii) It must be for an offense against legal rules;
(iii) It must be of an actual or supposed offender for his offence;
(iv) It must be intentionally administered by human beings other than the offender;
(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed (Hart, 4–5).

Law and Emotion (New York: NYU Press, 1999). A less sophisticated, yet none the less pure, version of retributivism than that articulated by Rawls is found in G. W. F. Hegel, *The Philosophy of Right*, F. M. Knox, Translator (Oxford University Press, 1942), 70–1. A remarkably similar version of retributive punishment is set forth in Herbert Morris, 'Persons and Punishment', *The Monist*, **52** (1968), 476–9. G. E. Moore also defends a version of retributivism in G. E. Moore, *Principia Ethica* (Cambridge University Press, 1962), 214.

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With these definitions in mind, it is clear, according to Rawls, that there is at least a *prima facie* conflict between the retributivist notion that only the guilty[14] deserve[15] to be punished and the utilitarian idea that if punishment is justifiable, then it must be shown to promote the interests of society. The reason why the latter point seems to conflict with the former one is that it is conceivable that an innocent person may be used as a mere means to the state's end of, say, social stability.

Rawls' way of resolving this apparent conflict is to argue that these respective models of punishment are in fact answering different questions (at variant levels) regarding the debate about the justification of punishment. He writes, '… utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.'[16] Among other things, this means that utilitarianism is concerned with justifying the institution of punishment itself, while retributivism is concerned with answering the question of how to justify certain practices of punishment (for instance, matters of proportional punishment). Rawls explains this point in terms of the different roles a legislator plays from that of a judge in relation to these different levels of punishment justification. He writes,

> … the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view.[17]

Thus Rawls states that these two views on punishment are reconciled by the 'time-honoured' device of making them apply to different situations or problems of punishment.[18]

[14] For an analysis of the concept of legal guilt, see Herbert Morris, 'The Decline of Guilt', *Ethics*, **99** (1988), 62–76.

[15] Throughout this paper, the notion of *negative* desert is used, unless specified otherwise.

[16] Rawls, *Collected Papers*, 22.

[17] Rawls, *Collected Papers*, 23.

[18] Rawls, *Collected Papers*, 24. A similar distinction is made in Stanley I. Benn, 'An Approach to the Problems of Punishment', *Philosophy*, **33** (1958), 325–6. Compare Rawls' distinction concerning the justification of punishment with that of Hart's when Hart distinguishes between the 'general justifying aim' of punishment and the question of its 'distribution'. Although he does not explicitly refer to Rawls on this matter, Hart seems to agree with Rawls on the following point:

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But Rawls misconstrues retributivism (or at least the intent of the view). He argues that the retributivist does not *necessarily* advocate, 'as an *institution*, legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering'.[19] This, Rawls insists, is enough to derive the conclusion that retributivism is not necessarily concerned with the justification of the institution of punishment. However, retributivists *are* indeed concerned with the justification of punishment as an institution. In

[19] Rawls, *Collected Papers*, 24.

> Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offense (Hart, 9).

Rawls, Benn and Hart are not the only philosophers to attempt hybrid conceptions of the justification of punishment. In the *Gorgias*, 525, Socrates articulates a position on punishment which sees punishment as being justified for reasons of deterrence and retribution:

> … it is proper for everyone who suffers a punishment rightly inflicted by another that he should either be improved and benefited thereby or become a warning to the rest, in order that they may be afraid when they see him suffering what he does and become better men. Now, those who are benefited through suffering punishment by the gods and men are beings whose evil deeds are curable; nevertheless it is from pain and agony that they derive their benefit both here and in the other world, for it is impossible to be rid of evil otherwise. But those who have been guilty of the most heinous crimes and whose misdeeds are past cure … are no longer capable themselves of receiving any benefit, because they are incurable … suffering throughout eternity the greatest and most excruciating and terrifying tortures because of their misdeeds, literally suspended as examples there in the prison house in Hades, a spectacle and a warning to any evildoers who from time to time arrive [See also *Gorgias* 478d–480b for a retributivist view of punishment. For other versions of the hybrid model of punishment, see W. D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1965), 56–64; Hart, 1–13; Michael Lessnoff, 'Two Justifications of Punishment', *The Philosophical Quarterly*, **21** (1971), 141–8 (These versions are noted in Allan H. Goldman, 'The Paradox of Punishment', in Simmons, Cohen, Cohen and Beitz, (Eds), *Punishment*, 363]. Kant has typically been misunderstood to be a pure retributivist, when in fact he was *not* (see note 33). For an argument in favour of the claim that David Hume was a 'mixed retributivist', see Paul Russell, 'Hume on Responsibility and Punishment', *Canadian Journal of Philosophy*, **20** (1990), 539–64].

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fact, the overall plausibility of retributivism is contingent on it! Of what value is it to the retributivist to assert that punishments should (or must) be meted out in proportion to the suffering caused to the victim(s)/the wickedness of the offender, etc. if the institution of punishment is itself morally groundless? Thus Rawls' claim that retributivism need not be concerned with the problem of justifying punishment itself is problematic.

Furthermore, Rawls states that 'utilitarians agree [with retributivists, and most everyone else, I suppose] that punishment is to be inflicted only for the violation of law'.[20] Additionally, utilitarians hold that no official should have the discretionary power to inflict punishments whenever he or she believes it would benefit society.[21] Rules would be in place to prevent such from happening. At least this would be so in a rule-utilitarian society. Thus the objection that utilitarianism permits or requires, under certain circumstances, that the innocent suffer punishment is unjustified because utilitarianism would not allow an innocent person's rights to be violated for the sake of social utility maximization. More precisely, Rawls argues that a system of punishment that violated the rights of the innocent would not benefit society in the long run (he calls such a rights-violating sanction 'telishment').[22] He writes, 'if one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose'.[23] In fact, he avers, a utilitarian justification for it is not likely.[24]

However, Rawls' example of why utilitarianism is not likely to justify 'systematic deception'[25] in the institution of punishment (such as in a case of 'telishment') does not work for an institution that is not systematic or ongoing. Could not utilitarianism justify, in principle, the one-time and 'minor' punishment of an unknown individual (a person beyond society's purview of concern) who is innocent? In such a case, there is no genuine risk that society would discover the moral difficulty in punishing this person, having no friends, acquaintances or even family. Only 'God would know' that the person was railroaded and punished, say, to stabilize society in the midst of its fears about a certain problem. And even if the problem persists, society does well to use this innocent person as a mere means to the end of attempting to establish social stability in the midst of a crisis. Certainly a utilitarian can support the punishment

[20] Rawls, *Collected Papers*, 24.
[21] Rawls, *Collected Papers*, 24.
[22] Rawls, *Collected Papers*, 27.
[23] Rawls, *Collected Papers*, 28.
[24] Rawls, *Collected Papers*, 28.
[25] Rawls, *Collected Papers*, 27.

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of an innocent person under circumstances akin to this. And is this not all that is needed to condemn the utilitarian view of punishment? Does it not make false Rawls' statement that 'utilitarians agree that punishment is to be inflicted only for the violation of law?' Does it not mean, as Rawls himself considers, but then denies, that utilitarianism permits or requires (in principle) the 'punishment' of certain persons?[26] Rawls does not provide us with an adequate reason to think that utilitarianism is immune from the objection that it sometimes permits or requires (for purposes of social utility maximization) the 'punishment' of the innocent.

Not only has Rawls misunderstood retributivism's intent, not only has he ineffectively rescued the utilitarian position on punishment from what might be referred to as the 'Punishment of the Innocent Argument', he unwarrantedly delimits the full value of retributivism. For he fails to realize that retributivism *does* have a way of justifying the very institution of punishment.

The retributivist may argue that not only do the guilty deserve to be punished in proportion to their wrong doings, etc., but the *institution* of punishment is justified *because it logically coheres with moral/social/political principles*, ones which do not imply or entail anything about the primacy of deterrence or future consequences of the state's inflicting of punishment on wrongdoers. Instead, such principles cohere with a desert[27]-based justification of the institution of punishment. For instance, the concept of deserved punishment seems to cohere with the principle that criminals have knowingly, intentionally, and voluntarily violated a law and that the offender in so doing accepts punishment as society's response to the breach of law and the disregard of the social contract[28] (Perhaps

[26] By 'punishment' here I mean the state's inflicting suffering or hard treatment on an innocent party in the *form* of actual punishment.

[27] For discussions of the concept of desert, see Braithwaite and Pettit, *Not Just Deserts*; Richard Burgh, 'Do the Guilty Deserve Punishment?' *The Journal of Philosophy*, **LXXIX** (1982), 193–210; Geoffrey Cupitt, 'Desert and Responsibility', *Canadian Journal of Philosophy*, **26** (1996), 83–100; Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979); David Lewis, 'The Punishment that Leaves Something to Chance', *Philosophy & Public Affairs*, **18** (1989), 53–67; A. T. Nugen, 'Just Desert', *Journal of Value Inquiry*, **31** (1997), 221–30; G. Sher, *Desert* (Princeton University Press, 1987). For discussions of Burgh's and Sher's respective arguments, see Stephen Kershnar, 'Justification and Deserved Punishment', *The Southern Journal of Philosophy*, **33** (1995), 461–84.

[28] For a defense of the institution of punishment grounded in the idea of fair play, see Richard Dagger, 'Playing Fair With Punishment', *Ethics*, **103** (1993), 473–88. For an argument that social cooperation and fair play are contingent on a system of retributive justice, see Andrew Oldenquist, 'An Explanation of Retributivism', *The Journal of Philosophy*, **LXXXV** (1988), 464–78.

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because it gives, let us say, the offender an unfair advantage over others, or because it disrespects the personhood or autonomy of victims of wrongdoing, etc.). This reason, or set of reasons, for punishment as an institution is not uniquely utilitarian, and it is consistent with retributivism as Rawls understands it.

No doubt there are other principles that would cohere with retributivist ones and simultaneously justify the institution of punishment. Jeffrie G. Murphy and Jules L. Coleman note that the cluster of moral concepts containing, among other things, rights,[29] moral responsibility,[30] and justice[31] serve to justify the retributivist

[29] For discussions of the concept of rights, see J. Angelo Corlett, 'The Problem of Collective Moral Rights', *Canadian Journal of Law & Jurisprudence*, **7** (1994), 247–63; Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978); Joel Feinberg, *Freedom and Fulfillment* (Princeton University Press, 1992), Chapters 8–10; *Rights, Justice, and the Bounds of Liberty* (Princeton University Press, 1980); *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973); James Griffin, 'Welfare Rights', *The Journal of Ethics*, **4** (2000), forthcoming; Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987); David Lyons, 'Human Rights and General Welfare', *Philosophy & Public Affairs*, **6** (1977), 113–29; Eric Mack, 'In Defense of the Jurisdiction Theory of Rights', *The Journal of Ethics*, **4** (2000), forthcoming; Thomas Pogge, 'The International Significance of Human Rights', *The Journal of Ethics*, **4** (2000), forthcoming; A. John Simmons, 'Makers' Rights', *The Journal of Ethics*, **2** (1998), 197–218; L. W. Sumner, *The Moral Foundation of Rights* (Oxford University Press, 1987); Judith J. Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990); Jeremy Waldron, *Liberal Rights* (Cambridge University Press, 1993); Richard Wasserstrom, 'Rights, Human Rights, and Racial Discrimination', *The Journal of Philosophy*, **LXI** (1964); Carl Wellman, *A Theory of Rights* (Totowa: Rowman & Littlefield, 1985); *Real Rights* (Oxford University Press, 1995); *The Proliferation of Rights* (Boulder: Westview, 1999).

[30] For some recent discussions of the concept of moral responsibility, see Harry G. Frankfurt, *The Importance of What We Care About* (Cambridge University Press, 1988); John Martin Fischer, Editor, *Moral Responsibility* (Ithaca: Cornell University Press, 1986); John Martin Fischer and Mark Ravizza, Editors, *Perspectives on Moral Responsibility* (Ithaca: Cornell University Press, 1993); John Martin Fischer and Mark Ravizza, 'Responsibility and Inevitability', *Ethics* **101** (1991), 258–78; Harry G. Frankfurt, 'An Alleged Assymetry Between Actions and Omissions', *Ethics*, **104** (1994), 620–3; Ishtiyaque Haji, 'Autonomy and Blameworthiness', *Canadian Journal of Philosophy*, **24** (1994), 593–612; The *Journal of Ethics* (Special Issue on Freedom and Responsibility), **1** (1997), 1–98; *The Journal of Ethics* (Special Issue on Harry G. Frankfurt's Contributions to Moral Responsibility Theory), **3** (1999), 275–384; Marina A. L. Oshana, 'Wanton Responsibility', *The Journal of Ethics*, **2**

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standpoint on punishment.[32] Surely a full-blown theory of retributive punishment would need to show how punishment as an institution coheres with these moral concepts as well.

Now it might be argued that the above coherence principle *is*, as stated, a utilitarian one, and that all such principles are utilitarian in character, making it impossible in principle for the retributivist to provide a purely retributive justification for the institution of punishment. However, this objection is weakened because retributivists such as Kant insist that the institution of punishment

> can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the grounds that he has committed a crime; for a human being may never be manipulated merely as a means to the purposes of someone else. … *He must first be found to be deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citizens.*[33]

[32] Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (Boulder: Westview Press, 1990), 121.

[33] Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, Translator (London: The Macmillan Publishing Company, 1965), 100; *The Metaphysics of Morals*, 105. Emphasis added. For discussions of Kant's retributivism, see Jeffrie G. Murphy, 'Does Kant Have a Theory of

(1998), 261–76; Michael Philips, 'Rationality, Responsibility and Blame', *Canadian Journal of Philosophy*, **17** (1987), 141–54; Lawrence Vogel, 'Understanding and Blaming: Problems in the Attribution of Moral Responsibility', *Philosophy & Phenomenological Research*, **LIII** (1993), 129–43; Susan Wolf, 'Sanity and the Metaphysics of Responsibility', in Ferdinand Schoeman, Editor, *Responsibility, Character, and the Emotions* (Cambridge University Press, 1987), 46–62.

[31] For discussions of the concept of justice, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); *Political Liberalism* (New York: Columbia University Press, 1993); *Collected Papers*; *The Law of Peoples* (Cambridge: Harvard University Press, 1999); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983). For critical discussions of the respective theories of justice of Rawls and Nozick, see, J. Angelo Corlett, Editor, *Equality and Liberty: Analyzing Rawls and Nozick* (London: Macmillan, 1990). For critical discussions of Rawls' theory of justice as fairness, see H. Gene Blocker and Elizabeth H. Smith, Editors, *John Rawls' Theory of Social Justice* (Athens: Ohio University Press, 1980); Norman Daniels, *Reading Rawls* (New York: Basic Books, 1975); and Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1990).

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But this passage also implies that considerations of social utility ought to (Indeed, 'must'!) figure into the justification of the institution of punishment, but at a secondary level. Whether or not this makes Kant's view of punishment a 'mixed' one, the point is that it is no embarrassment even for Kant, or for retributivists in general, that appeals to social utility are made once the primary justification of punishment is provided. The primary justification of both the institution and practices of punishment is 'so that everyone will duly receive what his actions are worth. …'[34] And the fact that even on Kant's view of retribution non-desert factors are relevant to punishment indicates that it misses the point of retributivism to construe it as a view that holds that giving wrongdoers what they deserve is *all* there is to justice.[35] It also renders problematic Stanley I. Benn's claim (concerning the justification of the institution of punishment) that 'the retributivist refusal to look at consequences for justification makes it impossible to answer this question within his terms.'[36] Apparently, then, even Kant recognizes by implication the truth of Joel Feinberg's claim that 'desert is one very important kind of ethical consideration, but it is not the only one.'[37]

Thus Rawls is incorrect in arguing that retributivism need not aim at justifying the institution of punishment. For retributivism *just is* a view which seeks and must seek a justification for both the institution and practices of punishment. Thus Rawls goes wrong on the matter of whether or not retributivism and utilitarianism can be reconciled, and why. This does not, however, mean that Rawls does not point us to a crucial distinction between the sorts of questions punishment theorists confront.

[34] Kant,102.

[35] This misattribution of retributivism is made by implication in Dolinko, 'Some Thoughts About Retributivism', 558.

[36] Stanley I. Benn, 'An Approach to the Problems of Punishment', in Herbert Morris, Editor, *Freedom and Responsibility* (Stanford University Press, 1961), 518.

[37] Feinberg, *Doing and Deserving*, 94.

Punishment?' *Columbia Law Review*, **87** (1987); 'Kant's Theory of Criminal Punishment', in Jeffrie G. Murphy, Editor, *Retribution, Justice, and Therapy* (Dordrecht: D. Reidel, 1979), 82–92; J. Angelo Corlett, 'Foundations of a Kantian Theory of Punishment', *The Southern Journal of Philosophy*, **XXXI** (1993), 263–84; Thomas E. Hill, Jr., 'Kant on Wrongdoing, Desert, and Punishment', *Law and Philosophy*, **18** (1999), 407–41. For a recent discussion of Kant's retributivism as it pertains to capital punishment, see Vernon T. Sarver, 'Kant's Purported Social Contract and the Death Penalty', *The Southern Journal of Philosophy*, **XXXIV** (1997), 455–72.

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Now let us consider some important objections to retributivism (or some form of it). Perhaps the replies to these concerns will enable us to make better sense of the nature of retributivism and its plausibility.

Objections to Retributivism, and Replies

Feinberg levels some criticisms against what he refers to as 'exact retributivism:' the view that whichever punishment is inflicted on a guilty party must match *precisely* the offence committed by the offender.[38] This version of retributivism is to be contrasted not only with Rawls' (above) construal of retributivism, but with the version mentioned by H. L. A. Hart:

> This is the deeply entrenched notion that the measure should not be, or not only be, the subjective wickedness of the offender but the amount of harm done. It is this form of retributive theory that seems to be reflected in the common practice of punishing attempts less than the completed crime, or punishing criminal negligence which has a fatal outcome more severely than the same negligence which does not cause death.[39]

There is also Michael S. Moore's version of retributivism, according to which punishment is justified by the moral culpability of those who receive it. On his view, it is the morally culpable who deserve punishment.[40] Furthermore, there is Murphy's understand-

[38] Joel Feinberg, *Doing and Deserving* (Princeton University Press, 1970), 116-8. It should be kept in mind, however, that Feinberg himself espouses a kind of expressivist retributivism in Feinberg, *Doing and Deserving*, 100f.; Jean Hampton, 'How You Can Be Both a Liberal and a Retributivist: Comments on "Legal Moral and Retributivism" by Jeffrie Murphy', *Arizona Law Review*, **37** (1995), 106.

[39] Hart, 234. For discussions of the 'problem' of punishing failed attempts, see Joel Feinberg, 'Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It', *Arizona Law Review*, **37** (1995), 117–33; Gary Watson, 'Closing the Gap', *Arizona Law Review*, **37** (1995), 135–41; Barbara Herman, 'Feinberg on Luck and Failed Attempts', *Arizona Law Review*, **37** (1995), 143–9.

[40] Michael S. Moore, 'The Moral Worth of Retributivism', in Schoeman, 179. For a critique of Moore's position, see Dolinko, 'Some Thoughts About Retributivism', 555–9. Other versions of retributivism include those found in Vinit Haksar, 'Excuses and Voluntary Conduct', *Ethics*, **96** (1986), 317–29; James B. Brady, 'A Rights-Based Theory of Punishment', *Ethics*, **97** (1987), 792–5; Vinit Haksar, 'Rights and Excuses: A Reply to Brady', *Ethics*, **97** (1987), 796–9;

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ing of retributivism as the view that punishment is justified because the wrongdoer deserves it.[41] However, 'in order to render punishment compatible with justice, it is not enough that we restrict punishment to the deserving, but we must, in addition, restrict the degree of punishment to the degree that is deserved.'[42] This supports my argument, contra Rawls, that a plausible retributivism must hold that both the institution of punishment *and* particular forms of it admit of retributivist rationales. Thus whereas the primary retributivist justification for both the institution of punishment and particular punishments is that the offender deserves it, the secondary retributivist justification for both the institution of punishment and particular punishments considers aspects of social utility. As Kant argues in the above quotation, the desert-based justification is lexically prior to the justification(s) based on social utility. As Richard Burgh argues, 'Justice, in other words, not only requires a principle of desert, but also requires a principle of proportionality between the gravity of the offence and the punishment deserved.'[43] In taking Kant seriously the retributivist need not have a difficulty in appealing to social utility considerations in expounding the concept of desert, both in justifying the institution and practice of punishment.

I shall defend the Rawlsian version of retributivism from the onslaught of Feinberg's criticisms in order to show that such criticisms count only against the plausibility of exact retributivism but not against a more plausible version of it. The extent to which my defence of retributivism succeeds is the extent to which a certain version of retributivism should be seen as the preferred model of justifying punishment.

Feinberg's Objections to Exact Retributivism

Feinberg's first criticism of exact retributivism is that the retributivist claims that only the guilty, not the innocent, deserve to be punished, where 'punish' and its cognates refers to the state's intentional infliction of suffering or hard treatment on one who violates the criminal law. However, his objection continues, it is 'impossible' to punish a guilty person without there being an adverse effect on

[41] Jeffrie G. Murphy, 'Legal Moralism and Liberalism', *Arizona Law Review*, **37** (1995), 73–93; Herbert Morris, 'Professor Murphy on Liberalism and Retributivism', *Arizona Law Review*, **37** (1995), 96.

[42] Burgh, 197.

[43] Burgh, 197–8.

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those who depend on or love the guilty party.[44] Thus it seems that retributive punishment necessarily punishes, along with the guilty, some innocent parties.

A few things need to be said in reply to this objection. First, the claim that only the guilty deserve to be punished is not what is distinctive about retributivism, except, perhaps, historically speaking. One can, for instance, be a vengeance theorist[45] and hold such a claim. Furthermore, according to Rawls, as we have seen, a rule-utilitarian theory of punishment would hold just such a view. Nevertheless, it is true that most if not all retributivists hold, or should hold, such a belief.

Secondly, Feinberg is guilty of equivocation when he argues that 'the innocent presumably deserve *not* to suffer, just as the guilty are supposed to deserve to suffer; yet it is impossible to hurt an evil man without imposing suffering on those who love or depend on him.'[46] For this line of reasoning assumes without argument that the imposition of suffering on criminals is the same (in kind) as that which is 'imposed' on 'those who love or depend on' them. But surely it is false that the state, in punishing criminals, intentionally imposes suffering or hard treatment on anyone except the criminal. Whatever suffering a criminal's significant others experience in such cases is an adverse effect of the punishment imposed by the state *on the criminal*.

[44] Feinberg, *Doing and Deserving*, 116. A related criticism of retributivism is found in George Schedler, 'Can Retributivism Support Legal Punishment?' *The Monist*, (1980), where it is argued that moral infallibility implies that legal punishment sometimes harms the innocent through wrongful convictions, and retributivists know this and thus are wrong for supporting legal punishment at all. In reply to this argument, it must be pointed out that retributivism does *not* support punishment *per se*, but only to the extent that punishment is inflicted proportionally on those who deserve it (never innocent parties). Wrongful punishments are always condemned on retributivist grounds. The fact that, practically speaking, human error sometimes leads to the punishment of innocent parties should hardly embarrass those who hold that *only* the guilty should be punished.

[45] Feinberg discusses three versions of the vengeance theory: the 'escape-valve' version holds that legal punishment is an orderly outlet for aggressive feelings; the 'hedonistic' version says that punishment is justified because of the pleasure it gives persons to know that a criminal suffers for her offense; and the 'emotional' version holds that punishment is justified in the retributive emotions that it expresses [See Joel Feinberg, Editor, *Reason and Responsibility*, Seventh Edition (Belmont: Wadsworth Publishing Company, 1989), 348].

[46] Feinberg, *Doing and Deserving*, 116.

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What Feinberg should have argued is that retributive punishment results in the punishment of guilty persons the *adverse effects of which unduly amount to suffering (of a different kind than what the criminal experiences)* for certain innocent members of society. But even this modified version of Feinberg's point is troublesome. For it is hard to understand just how this argument isolates a problem that is unique to retributivism in that such a difficulty is the concern of any and every plausible model of punishment! Since this is true, Feinberg's objection does not count as a decisive worry for retributivism. This is true unless, of course, one takes a sceptical position in regards to the justification of punishment as an institution, according to which it is either doubtful or impossible that the institution of punishment is itself justifiable.

Feinberg's second objection to exact retributivism is that deciding the precise amount of punishment to inflict on an offender requires the impossible task of assessing the offender's character throughout her entire life. Moreover, retributive punishment would require the abandonment of general rules of proportional punishment given the inequalities of moral guilt in the commission of the same crimes and inequalities of suffering from the same punishment.[47] To Feinberg's concern might be added Benn's: 'The retributivists' difficulties arise from seeking the measure of penalty in the crime, without first assuming a scale or a rule relating the two. Given the scale, any given penalty would require justification in terms of it; but the scale itself, like any rule, must in the end be justified in utilitarian terms.'[48]

In reply to Feinberg's criticism, the following points are in order. First, once again the problem of proportional punishment is a concern not only for retributivism, but also for every competing and positive model of punishment. For which model of punishment, save a sceptical one, wants to violate the dictum that punishments should be proportional to offences? Would any plausible version of utilitarian punishment foist the notion that those guilty of minor offences should be punished by death simply to maximize social utility? Thus it seems that Feinberg's point does not count exclusively against retributivism, but against models of punishment in general.

[47] Feinberg, *Doing and Deserving*, 116–7. A similar objection to proportional punishment, one not unlike Kant's own reservations with *lex talionis*, is made by William Blackstone when he writes that this idea is incapable of generalization without absurdity: 'There are many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery. …' (Hart, 161).

[48] Benn, 524.

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As to Benn's point of criticism of retributivism's ability to devise a plausible non-utilitarian principle of proportional punishment, its telling power rests on the assumption that retributivism cannot without pain of inconsistency appeal in part to considerations of utility in devising guidelines for proportional punishment. Yet I have already quoted Kant as implying that such considerations are in a secondary sense part of Kantian retributivism. And there is no adequate reason why such considerations of utility cannot be at work in a retributivist conception of proportional punishment. Thus Benn's critique of retributivism on proportional punishment fails to pose a genuine embarrassment for retributivism of the Kantian variety.

Nevertheless, in order to increase the overall plausibility of retributivism, it is helpful to satisfy these concerns.[49] For 'without the principle of proportional punishment—making the punishment fit the crime—it would be hard to understand retributive justice.'[50] And the retributivist might do so by devising plausible principles of proportional punishment.[51] The attempt to explicate such principles is hardly novel. Jeremy Bentham and Kant, respectively, recognize the importance of such principles.[52] Bentham recognizes them in

[49] Among the many who have raised the concern about there being a plausible explication of proportional punishment are Hugo Adam Bedau, 'Retributivism and the Theory of Punishment', *The Journal of Philosophy*, **LXXV** (1978), 611.

[50] George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford University Press, 1996), 104.

[51] For some recent retributivist accounts of proportional punishment, see Michael Davis, *To Make the Punishment Fit the Crime* (Boulder: Westview, 1992); Wojeiech Sadurski, *Giving Desert Its Due* (Dordrecht: Reidel, 1985); C. L. Ten, *Crime, Guilt, and Punishment* (Oxford University Press, 1987); Andrew Von Hirsch, *The Choice of Punishments* (New York: Hill and Wang, 1976); *Censure and Sanctions* (Oxford University Press, 1993); Nigel Walker, *Why Punish?* (Oxford University Press, 1991), 101–3.

[52] Indeed, Plato's *Laws* recognizes the significance of the problem of proportional punishment:

> However the best and soundest procedure is to class each sort with that which it resembles, discriminating the one from the other by the presence or absence of premeditation, and legally visiting the slaughter where there is premeditation as well as angry feeling with a severer, that which is committed on the spur of the moment and without purpose aforethought with a milder, sentence. That which is the graver crime should receive the graver punishment, that which resembles the light a lighter (Plato, *Laws*, Book 9, 867, A. E. Taylor, Translator).

See also the *Laws*, Book 9, 934, where it reads: 'The law must take careful aim at its mark; it must be exact in determining the magnitude of the correction imposed on the particular offense, and, above all, the amount of compensation to be paid'.

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the form of a list of thirteen rules of proportional punishments,[53] while Kant does so by admitting that *lex talionis*[54] simply does not work in many cases:

> Only the law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment; it must be well understood, however, that this determination [must be made] in the chambers of a court of justice (and not in your private judgment). All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice.
>
> Now, it might seem that the existence of class distinctions would not allow for the [application of the] retributive principle of returning like for like. Nevertheless, even though these class distinctions may not make it possible to apply this principle to the letter, it can still always remain applicable in its effects if regard is to the special sensibilities of the higher classes.[55]

It is helpful, then, to devise principles that would guide the state in proportionally (and fairly) sentencing offenders, assuming for the sake of argument, of course, that offenders are given due process and that the institution of punishment is itself morally and legally

[53] Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Hafner Press, 1958), Chapter 14. Here Bentham offers an account of relative proportion between punishments and crimes within a utilitarian framework of individual and general prevention. His guiding considerations are forward-looking principles: minor offenses are not to be punished as severely as major ones: the potential offender must be supplied with an inducement in the form of lesser punishments to commit a less harmful offense rather than a more harmful one (See Hart, 16).

[54] Formally, *lex talionis* is the 'principle that punishment should be proportioned to the gravity of the offense or otherwise made to "fit the crime". … *Lex talionis* may also be understood "materially", that is, as a principle requiring punishment to be proportioned (in part at least) to harm done (or, perhaps, to be limited to the harm done)' (Michael Davis, 'Harm and Retribution', in Simmons, Cohen, Cohen and Beitz, Editors, *Punishment*, 90–1).

[55] Kant, 101.

These kinds of statements support the idea that every positive theory of punishment faces the task of providing a plausible rationale for the institution of punishment, as well as rationales for punishments themselves. In light of this fact, it is startling that so many philosophers naively assume or argue that only retributivists face such a challenge [See, for instance, D. Golash, 'The Retributive Paradox', *Analysis*, **54** (1994), 72–8].

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justifiable. What sorts of guidelines for proportional punishment are there?[56]

The possibility of proportional punishment is argued by J. D. Mabbot when he claims that 'we can grade crimes in a rough scale and penalties in a rough scale, and keep our heaviest penalties for what are socially the most serious wrongs.'[57] One idea is to make the suffering experienced by punishment somehow equal or proportional to the wickedness of the crime, in light of the offender's mental state at the time of the offence. But in what sense can this be done? As Hart queries, 'How measure wickedness or suffering in the absence of units of either?'[58]

One principle of proportional punishment might be that *punishment must never be so great that it is inhumane*. This follows from Feinberg's claim that each and every human being possesses an absolute right to be treated humanely. This makes punishment by torture, for example, beyond the scope of moral justification.[59] Secondly, *the type, mode, or amount of punishment inflicted on an offender by the state must never be contingent on the offender's actual or perceived ethnicity, sexual orientation, gender, religious or political affiliation, socio-economic class, etc.* For as the retributivist argues, only the moral culpability of the offender is relevant to ascriptions of blame, responsibility, etc. Whether or not an offender is a Latino or an Anglo, a homosexual or a heterosexual, Jewish or Protestant, etc., has nothing at all to do with their being deserving of punishment.

Thirdly, contrary to the United States Sentencing Commission,[60] *an offender's criminal history should not be relevant to sentencing* for the following reason. If an offender is at a previous time given a fair, adequate and proportional punishment and has 'paid her dues' for committing the crime in question, allowing the criminal's history to figure into a subsequent sentencing calculus for her is an indirect way of making her pay for what she has already received in the form of punishment. Although a criminal's history is relevant to a utilitarian attempt to deter future offenders, it has no place in a retributivist mode of sentencing. To assume that it should have a role in sentencing is to admit the inadequacy of the original sentence(s)

[56] A complete account of such principles would include a social psychological explanation of how an offender's mental state is determined, what motivated the offense, etc. I will not provide such an account. Instead, I assume that it is possible to provide such important details.

[57] J. D. Mabbot, 'Punishment', *Mind*, **48** (1939), 162.

[58] Hart, 161.

[59] Feinberg, *Social Philosophy*, 96.

[60] United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (St. Paul: West Publishing Company, 1990).

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meted out to the offender (even in terms of pure deterrence!). On a retributivist view, a sentence is to be meted out to an offender in that she deserves it based on her moral culpability for her violation of a law *at a certain time*, not because it might deter her or another from subsequent violations or because of the criminal's recidivism.

Fourthly, *only when it is humane to do so is punishment to be meted out in sameness of kind to the offense committed, based on the intent, capacity to act freely, etc. of the offender at the time of the offense.* As Kant argues, murderers must be punished by capital punishment.[61] But as stated above, even Kant recognizes that not every offence should be punished according to *lex talionis*. Rapists should not be raped, nor should the state sanction burglars to be burglarized as punishment for their offences. For punishment to be justified, it must be grounded in the full range of features that go into making the criminal act itself: the offender's motive, intent, capacity to act freely, deliberation, as well as the amount of harm done by the offence. Thus another principle is needed to cover cases where it is inhumane or simply absurd to render to the offender what she did to the victim of her offence.

Perhaps the following principle of proportional punishment is also helpful: *punishment is justifiably inflicted on an offender only if it 'weighs' the same for the offender on a scale of suffering as the offense 'weighs'* (*or would 'weigh' on such a scale if the victim is incompetent or dead*) *to the victim on a scale of suffering, where the victims weighing of her own suffering* (*for purposes of determining whether or not or how to punish the offender*) *is not influenced by revenge* (*or any retributivist attitude*) *toward the offender.* This principle assumes a scale of suffering, say, from 0 to 10, where 10 is the greatest justifiable suffering a human can experience by way of institutionalized punishment (perhaps capital punishment, assuming, for our purposes, that it is morally and legally justified). It also assumes that punishment is never justified if the conditions of moral and legal responsibility are not satisfied by the defendant. That is, an offender must have committed the wrongful deed voluntarily (to a requisite degree), intentionally, and knowingly. This is a harm-based principle of proportional punishment, one which seeks to match the victim's

[61] Kant, 102. Of course, there are many who would argue for the inhumaneness of capital punishment. But I am assuming, for purposes of this paper, the moral and legal justification of capital punishment. For some discussions of capital punishment, see Hugo Adam Bedau, Editor, *The Death Penalty in America* (Chicago: Aldine Publishing Company, 1967); Simmons, Cohen, Cohen and Beitz, Editors, *Punishment*, section 3; Stephen Nathanson, *The Morality of Punishing by Death* (Totowa: Rowman & Littlefield, 1987).

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perception of the weightiness of the suffering experienced as a result of the offence. For instance, if the offender raped the victim, and (if the victim was a psychologically normal and reasonable person) and if the victim rated her suffering of the offence at say, a 9, then the suffering inflicted on the offender by the state should weigh a 9 *for the offender* (that is, from the offender's standpoint) and the punishment chosen by the state to inflict on the offender should ensure this sort of suffering for the offender.[62]

But what if some poor wretch murders someone and truly wants to receive capital punishment? Kant would argue that the offender must be put to death, not because the offender wants capital punishment as her sentence, but in that she *deserves* it. Plato's *Laws*[63] sees the importance of utilizing capital punishment in certain cases, but it also notes that death is not the 'last deterrent' or most horrible fate for the criminal.[64] Does proportional punishment demand that this criminal be given the death penalty? Or, should this offender be given a punishment the suffering of which is not to her liking?

This presents a problem for any subjectivist (or significantly subjectivist) account of sentencing. Given that punishment is the state's intentional infliction of *pain and suffering* on a criminal offender, it might be argued that a criminal cannot be punished in a way that she wants to be 'punished' because punishment must be contrary to the offender's desires. Thus it makes no sense to sentence the wretched murderer to death. Another means of punishment must be sought, perhaps by way of the subjectivization of sentencing (according to the offender's own perception of how she would suffer under such circumstances).

However, against this line of reasoning it might be argued that the wretched murderer may *prefer* death to other forms of punishment, but she may nonetheless experience suffering as a result of her having the death penalty inflicted on her. One must not confuse an offender's desire to be put to death with that offender's ability or capacity to experience suffering as the result of capital punishment. This suggests that, when determinations of an offender's perception of suffering from particular punishments is concerned, it is not simply an offender's desire to receive a particular sort of punishment which goes to determine such a perception. It also involves *how much an offender stands to lose* if she is given a certain kind of punishment instead of another. By 'lose' I mean what she stands to

[62] Contrast this set of principles of proportional punishment with the account of proportional punishment found in Nozick, *Anarchy, State, and Utopia*, 59f.

[63] Book 9, 863.

[64] Book 9, 881.

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lose economically, personally, etc. How much a wrongdoer stands to lose may be determined both subjectively (according to the extent to which the offender thinks she stands to lose) and objectively (according to the extent to which a reasonable person thinks the offender stands to lose). Often the subjective standard is useful in determining how most effectively to punish a wrongdoer with respect to the wickedness of her act and the extent to which she harmed the victim(s).

But what if the *victim* is not psychologically normal or rational? How, then, is her perception of suffering to be determined or figure into the punishment calculus? In such cases, her perception of suffering would be determined by an objective (reasonable person) standard by asking how a reasonable person would weigh such experiences of hard treatment. What if the victim is incapable of weighing her suffering due to the fact that she is the victim of murder, manslaughter, or the like? Again, an objective standard might be used to determine the sentence of the offender.

What should happen in cases where the *offender*, at the time of the offence, is incompetent? How is her amount of suffering to be determined? And what if the offender is incompetent at the time when her suffering is to be determined? In the former case, it is unclear that the offender ought to be punished at all. Perhaps therapy is needed and justified instead.[65] In the latter case, problems of personal identity might prohibit the identification of the self which is responsible for the crime and the self which is later found to be incompetent. If such difficulties of personal identity and responsibility arise, then it is unclear that the offender ought to be punished. But barring such difficulties in assessing the responsibility of the agent in question, an objective standard may be used to figure out what the offender would consider to be the right punishment for the level of suffering that is to be inflicted on the wrongdoer.

But there is a more serious concern with this harm-based principle of proportional punishment. Suppose that the victim of an arson weighed her suffering at 9, where corresponding to 9 on the victim's scale of suffering is capital punishment for the offender in that the offender believes her receiving a sentence of death is preferable to a prison sentence of any length. Suppose further that the offender

[65] Karl Menninger, *The Crime of Punishment* (New York: The Viking Press, 1966). Some difficulties with a therapeutic model of 'punishment' are noted in Jeffrie G. Murphy, 'Marxism and Retribution', Simmons, Cohen, Cohen and Beitz, Editors, *Punishment*, 29; Jeffrie G. Murphy, Editor, *Punishment and Rehabilitation* (Belmont: Wadsworth Punishing Company, 1973).

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sincerely believes that such a punishment is well worth her committing the offence of arson, but the offender has "shallow pockets." It might be argued that this example shows that there is something wrong with the way in which this harm-based principle of punishment is stated in that capital punishment seems much too harsh a punishment for arson not resulting in death.

However, there are at least two replies to this concern. One is that the offender might be viewed as being incompetent such that her perceptions of suffering are not to be taken as decisive in determining what would count as a 9-rated punishment in this case, given the offender's system of beliefs, desires, preferences, etc. Thus the objective standard would be used to decide what sort of punishment would best correspond to the victim's suffering as a result of the offence.[66]

Another response to this concern, assuming the offender *is* competent, is to insist that her preference for what most would consider to be an overly lenient punishment for the crime nevertheless justifies the state in inflicting the offender's own preferred (9-rated) punishment of being fined on the offender. Thus if the offender is not competent to the extent that her preferences in regards to suffering cannot be taken as decisive, then an objective standard may be used to determine how to punish her proportionately. If, on the other hand, the offender is assumed to be competent in her preferences about suffering, then it makes sense for the state to punish her in light of those preferences. Empirical psychology, of course, must assist the court in deciding the question of offenders' competence.

Thus a restriction must be placed on the above harm-based principle of punishment: *an offender's suffering from a form of punishment* (*and/or compensation*) *must both adequately compensate the victim* [*or the victim's surviving significant other*(*s*)] *as much as possible, and such punishment must negate the economic, social, etc., advantage*(*s*) *the offender gains by committing the offense as much as possible.*[67] This principle guards against an offender's being inadequately punished for her crime. For it says that the punishment (and/or compensation) must be adequate in light of the harm done to its victim. Also, it says that whatever the offender gained by way of committing the offence must be negated by way of the punishment (and/or compensation) inflicted on the offender. For instance, money stolen must be confiscated by the state and returned to its rightful owner(s). An assumption here is that it is unjust for a wrongdoer to profit from her wrongdoing.

[66] Note that the offender is competent at the time of the offense, and that it is only her own perception of suffering afterward that is tenuous.

[67] The idea here is to link the degree of wrongness of an act, omission or attempt with the extent to which a wrongdoer benefits from it, as argued similarly in Sher, 82.

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Yet another concern might be raised about the above harm-based principle of proportional punishment. It might be argued that it is unrealistic to think that victims of offences are able to estimate fairly their degree or level of suffering from offences, and that such estimates will typically be inflated due to the victim's feeling of vengeance. Certainly human cognition is such that this objection points to a significant empirical difficulty with one's thinking that humans can, when victimized, fairly and accurately determine their feelings of suffering. How many victims of, say, auto theft will rate their suffering or loss lower than 7 or 8, for instance? Will not the tendency be for victims to rate the suffering or loss even higher than this? And will not this tendency be due, at least in part, to the victim's retributive emotions[68] or attitudes (resentment, hatred, etc.) toward the offender? If so, does not this pose a problem for the harm-based principle of proportional punishment?

Perhaps a subjective standard of assessing suffering is not, for this reason, appropriate concerning the determination of the *victim's* level or degree of suffering as the result of an offence. If not, then an objective standard of reasonableness may be used in such cases. But this does not rule out the use of the subjective standard in cases where the *offender* is a sufficiently competent person whose own suffering preferences need to be determined for the purposes of fair and proportional punishment for her offence. The upshot of this view of proportional punishment is that, *whenever it does not pose a problem of the sorts mentioned above, subjective determinations of suffering are relevant and useful to the proportional meting out of punishment to offenders who deserve it*.

Thus it is possible to begin to devise retributivist principles of proportional punishment. Although this is not a complete list of such principles, it provides us reason to think that (contrary to Feinberg) it *is* possible in principle to proportionally mete out punishment, according to objective (and sometimes subjective) standards. Even if certain of these principles fail, this does nothing to show that retributivism is any less plausible (comparatively speaking) than it would otherwise be without these principles. Again, the problem of proportional punishment is faced by any competing and plausible view of punishment.

[68] Peter F. Strawson, 'Freedom and Resentment', in Fischer and Ravizza, 45–66; Gary Watson, 'Responsibility and the Limits of Evil: Variations on a Strawsonian Theme', in Fischer and Ravizza, 119–50; Michael McKenna, 'The Limits of Evil and the Role of Moral Address: A Defense of Strawsonian Compatibilism', *The Journal of Ethics*, **2** (1998), 123–42.

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However, it might be argued that, even if a coherent set of principles of proportional punishment can be devised, the very possibility of there being competing lists of punishments-to-crimes stands in the way of our knowing which set is justified.[69] Suppose there is a coherent set of principles of proportional punishment which sets as the least severe punishment thirty years in solitary confinement and sets as its most severe punishment torture to death (where the crimes range from petty theft to murder). Call this the 'Barbaric Code'. Suppose also that there is an equally coherent set of such principles which sets as its least severe punishment probation or parole, and sets its highest end of punishment at life imprisonment (where the crimes range from petty theft to murder). Call this the 'Humanitarian Code'. The Barbaric Code and the Humanitarian Code are both coherent, internally speaking, and proportional to their respective lists of offences (each of which stands in proper relation to the corresponding punishments). Which set of principles is justified, the Barbaric Code or the Humanitarian Code? Furthermore, of what use is it to speak of proportional punishment unless this preliminary question can be resolved?

As important as this question is, it is crucial to see that it is not a problem unique to retributivism. To the extent that the general problem of proportional punishment is a difficulty for any view of punishment, this question is faced by every punishment theory save punishment scepticism. None the less, it is important to attempt to clear the way for the possibility of proportional punishment by tackling this issue head-on.

This concern points out that the mere coherence of a set of beliefs about or practices of punishment is at best a necessary condition for a justified set of principles of proportional punishment. Being able to construct a table of corresponding crimes and punishments based on principles of proportionality is not sufficient for a justified set of such principles. What is also needed, in terms of justification, is that the principles that underlie such tables of crimes and punishments themselves be supported by a coherent set of moral/social/political principles and intuitions. In other words, the justified table of crimes and punishments is one that is supported by a coherent set of principles of proportional punishment, which in turn is supported by a coherent and intuitively plausible set of moral/social/political principles which serve as the keystone beliefs about punishment.[70] Thus there is an answer to the question of how

[69] I owe this point to Feinberg.

[70] For a detailed account of coherentist justification, see Keith Lehrer, *Theory of Knowledge* (Boulder: Westview Press, 1990), Chapters 5–6.

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a table of crimes and punishments is justified, ultimately. It is justified if in the end it is supported by a coherent moral/social/political philosophy.

I have argued that Feinberg's objections to exact retributivism do nothing to embarrass the retributivist, unless, of course, they simultaneously cause all other non-sceptical punishment theorists to blush. Moreover, the retributivist (and competing theorists as well, I suppose) *can* begin to develop principles of proportional punishment which might help guide the state in inflicting punishment on offenders fairly and proportionally (contrary to Feinberg's claim that, in principle, it is impossible to do so because subjective states of offenders are private, not public).

A Marxian Objection to Retributivism

There is also a Marxian concern with retributive punishment, one articulated by Murphy:

> … the retributive theory fails to acknowledge that criminality is, to a large extent, a phenomenon of economic class. To acknowledge this is to challenge the empirical presupposition of the retributive theory—the presupposition that all men, including criminals, are voluntary participants in a reciprocal system of benefits and that the justice of this arrangement can be derived from some eternal and ahistorical concept of rationality.[71]

Indeed, when Karl Marx asks: 'Is it not a delusion to substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of 'free will' … Is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, …',[72] he is correctly challenging the *practical application*, not simply of retributivism, but of *any* model of punishment due to the fact that, on his view, social circumstances serve as excusing conditions from punishment, due to the voluntariness-reducing or eliminating factors inherent in capitalist modes of production.[73]

[71] Murphy, 'Marxism and Retribution', 27.

[72] Karl Marx, 'Capital Punishment', *New York Daily Tribune*, 18 February 1853.

[73] A similar concern with punishment in general (retributive or otherwise) is expressed in terms of a hard determinist stance that would, if plausible, undermine the idea of human agency requisite for a moral justification of responsibility and punishment (Fletcher, 100–1).

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However insightful Marx's words are on this matter, it is premature to interpret them as an indictment of retributive punishment *per se*. First, the content of Marx's words easily apply, if they apply at all, to any model of punishment. Secondly, it is unclear that Marx's words are plausible if they are assumed to imply that the voluntariness-reducing factors of capitalist societies render all law breaking *excusable*. Whatever lack of autonomy or voluntariness that persons experience under capitalism, it is hardly transparent that they lack a sufficient degree of it to make at least some of their wrongdoings punishable, if only in a *mitigated* way. So assuming that Marx's above words are plausible, it hardly follows that retributivism is unjustified, or that punishment in general is. For at least some cases of wrongdoing, though their circumstances are mitigated, might still warrant some amount of punishment.[74] Third, Marx's words speak only to the *practical application* of a model of punishment, such as retributivism. They do not in the least render retributivism's justificatory status problematic. For even if we are socialized such that we are insufficiently autonomous or voluntary beings to be held legitimately accountable for what we do, fail to do, or attempt to do, this would not count against retributivism. For retributivism does (or need) *not* hold that there are or must be guilty parties to be punished.[75] Rather, it holds, among other things, that only the guilty deserve (can or must) be punished, and it *sets the conditions for justified punishment*. Yet if no one satisfies the conditions for retributive punishment, then no one is to be punished! Thus there is nothing inconsistent between Marx's words on punishment and what is essential to retributivism. Hence the putative Marxian concern with retributivism is resolved.

The Argument Against Desert

The Marxian concern with retribution is related to a concern as to whether or not the concept of desert is sufficient to ground retributive

[74] It is assumed here that the greater control a wrongdoer has over her wrongful act, omission or attempt, the more punishment she deserves, other things being equal.

[75] This claim is attributed to 'strong retributivism' in Braithwaite and Pettit, Chapter 8. However, even if retributivisms did hold such a view about the requirement of punishment for offenses, 'if the principal function of a legal system is to create and maintain conditions of trust in a community, then those who violate the law must be punished. Any legal system which is understood as performing this function must adopt a retributivist approach to punishment' [Susan Dimock, 'Retributivism and Trust', *Law & Philosophy*, **16** (1997), 37. Along the lines, punishment has been construed as a means by which to 'promote community' [Eric Reitan, 'Punishment and Community: A Reintegrative Theory of Punishment', *Canadian Journal of Philosophy*, **26** (1996), 57–82.

https://doi.org/10.1017/S0031819101000067 Published online by Cambridge University Press

punishment. It would appear, however, that only a strong or full version of retributivism would hold that desert is a sufficient condition for punishment. And I have already provided important textual evidence that even Kant implies that desert is insufficient for the justification of, or duty to, punish.

None the less, it is hardly evident that the sufficiency of desert was ever a characteristic of retributivism. What is truly distinctive about retributivism, historically and philosophically speaking, is its insistence that desert is a necessary condition of punishment. Hence, according to retributivisms, only the guilty deserve to be punished. Whatever else a particular version of retributivism holds, it must subscribe to this claim. And if Rawls is correct in devising an account of rule-utilitarianism in the way that he does, then what was once a distinctive feature of retributivism has recently become one of the key elements of any plausible model of punishment such that no plausible model of punishment contradicts the rule against punishing only the guilty.

One important thing to note here is that the rule 'Only the guilty should be punished' says that guilt merits punishment, or that it *deserves* it. If this is true, then the concept of desert as a necessary condition of punishment's justification must become an element of any plausible theory of punishment.

Ultimately, the concept of desert can be fleshed out in a variety of ways, some better than others. But it is clear that, whether desert is elaborated in terms of fair play and a social contract theory, or the intrinsic wrongness of particular acts, omissions or attempts, desert need *not* be construed as a primitive or basic (underived) moral concept. It is noteworthy that neither of these ways of understanding desert stands in contradiction to the retributivist notion that the punishment of the guilty is intrinsically good regardless of its usefulness.[76]

Vengeance and retribution

Ronald Dworkin avers that it is important to ask whether our conventional attitudes about blame and punishment are relevant to the law.[77] Similarly, I will now investigate whether or not our retributive

[76] That retributive punishment is of intrinsic value is argued in A. C. Ewing, *The Morality of Punishment* (London: K. Paul, Trench, Trubner and Co. Ltd., 1929); Robert Nozick, *Philosophical Explanations* (Belknap: Harvard University Press, 1981), 374; Lawrence Davis, 'They Deserve to Suffer', *Analysis*, **32** (1972), 136–40.

[77] Dworkin, *Taking Rights Seriously*, Chapter 1.

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attitudes[78] or emotions such as hatred and resentment) are relevant to punishment, morally speaking.

It is often argued that retributivism entails the notion of vengeance.[79] Indeed, it has been claimed that 'retribution is mere vengeance, a giving back in kind to the wrongdoer what he has inflicted on others without justification, indulged in for pleasure, for the expression of such emotions as anger and outrage, or for the relief of hostilities engendered by the offence.'[80] But as Moore argues, retributivism need not, and should not, entail vengeance of any kind.[81] Robert Nozick concurs with this point when he makes a five-fold distinction between retribution and vengeance.[82] First, retribution sets limits to the amount of punishment that should be inflicted on an offender, while vengeance sets no such limitations. Secondly, retribution is impersonal in the sense that retributive punishment involves no special tie to the victim of the offence, whereas vengeance does involve such a connection. Thirdly, retribution involves no emotional tone, whereas vengeance does. Fourthly, retribution is done for a moral wrong, whereas vengeance may be inflicted for other reasons (an injury or a 'slight'). Finally, retribution is generalizable, whereas vengeance is not. Whereas retribution is committed to punishing each and every offender in relevantly similar circumstances, avengers are not committed to such a principle. So it is clear that retribution and vengeance do not imply each other.

But let us suppose, for the sake of argument, that retribution *does* entail vengeance. Would this necessarily pose an embarrassment for retributivism? I think not for the following reason. What is usually considered problematic with vengeance theories of punishment is the idea that the punishment inflicted on an offender under such a scheme tends to be unwarrantedly tainted by the deeply seated retributive emotions certain folk in society feel toward the offender because of what she did. It is often believed, and with good reason, that such feelings unduly influence the *sorts* of punishments offenders receive, or would receive, under such a 'system.'

But it is unclear that the problem here is with what might be

[78] Such retributive attitudes of hatred and resentment are species of the more general 'reactive attitudes' (gratitude, respect, indignation, hatred, resentment) discussed in Strawson.

[79] For an analysis of the concept of vengeance in the context of punishment, see Roger Wertheimer, 'Understanding Retribution', *Criminal Justice Ethics*, **2** (1983), 34.

[80] R. E. Gahringer, 'Punishment and Responsibility', *The Journal of Philosophy*, **LXVI** (1969), 291.

[81] Moore, 180.

[82] Nozick, *Philosophical Explanations*, 366–8.

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referred to as 'retributive vengeance' *per se*, or whether it is a difficulty concerning the fact that retributive emotions are allowed to influence the sort of punishment that is inflicted on the offender. It seems quite possible to incorporate revenge into a retributivist scheme of punishment, *as long as such emotions are not permitted to enter into decisions of whether or not or how a defendant is to be punished*. However, there seems to be nothing morally problematic with the notion that retributive emotions should or may be expressed (verbally, say) to the offender during her term of punishment. In fact, such an expression of vengeance might be construed as the state's authoritative condemnation of the offender, something which does not conflict with Feinberg's own idea of the expressive function of punishment as vindictive resentment, authoritative disavowal, symbolic non-acquiescence, vindication of the law, and absolution of others.[83]

An obvious concern here is to make sure that such a scheme (of permitting vengeance in the form of allowing the expression of retributive emotions to enter into the stage of punishing the offender without such feelings affecting the decision to convict and punish or how much to punish) is possible. But even if empirical psychology correctly informs us that retributive emotions cannot be separated from our decisions to punish and how much to punish, it does not follow that such emotions are not based on epistemic and moral truths about whether and to what extent a wrongdoer ought to be punished.[84] For a claim that '*S* is morally culpable for doing *X* and is deserving of punishment' is either true or false, regardless of the retributive emotions one has when uttering them. That a moral agent has and exhibits retributive emotions at the time she believes that *S* is deserving of punishment has no effect at all on the truth-value of such a belief. Such emotions have no relevance to whether what one says is true, though they do relate to *how* one goes about deciding what to believe about criminal punishment.

Another concern with this view of retribution and vengeance is that it precludes, or seems to preclude, the notions of forgiveness and mercy, and that an adequate model of punishment must make room for these notions.[85] This point is explicated in detail by Jean

[83] Feinberg, *Doing and Deserving*, 100f.

[84] Moore, 198f.

[85] The role of forgiveness in the state's imposition of punishment is recognized in Plato's *Laws*, Book 9, 869: 'If any party soever freely forgive any party soever his death, and that it as undesigned, the law enjoin on the homicide performance of the prescribed purifications and one year's absence from the country.'

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Hampton,[86] who defines 'forgiveness' as 'a change of heart towards the wrongdoer in which one drops any emotions of hatred or resentment towards him and his deed, takes a pro-attitude towards him and is disposed (under most conditions) to make the offer of reconciliation.'[87] Moreover, she defines 'mercy' as 'the suspension or mitigation of a punishment that would otherwise be deserved as retribution, and which is granted out of pity and compassion for the wrongdoer.'[88] Mercy is akin to forgiveness, Hampton says, in the sense that it is a gift to which the offender has no right, but which the state may be 'monstrous' not to grant.[89] Murphy argues that forgiveness is justified only when it is consistent with self-respect since it is a response to harms done to oneself.[90]

But that mercy by the state can *ever* be justified is unclear to the retributivist, at least the Kantian sort of retributivist who holds that punishment is both the state's right and perfect duty of justice to punish wrongdoers.[91] Of the reasons that might be marshaled in favour of the state's bestowing mercy on offenders, none seem to be unproblematic from the retributivist's perspective. First, it might be argued from a religious standpoint that mercy is justified because it is a way of treating persons (even offenders) as we would want to be treated in similar circumstances. But this reason for mercy is flawed in that the retributivist just *is* one who herself wants to be punished if she deserves it! Thus the state's having mercy on offenders enjoys no respect from the retributivist.

Secondly, it might be argued that mercy is justified in that it may reform the offender. However, criminal reform enjoys no privileged status among retributivists (or, at least, it need not). For if an offender is morally culpable and deserves to be punished, then she should be punished. That she might be reformed by way of the state's having mercy on her is irrelevant to the matter of retributive justice.

[86] Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988).

[87] Murphy and Hampton, 157. Murphy defines 'forgiveness' as 'primarily a matter of how I *feel* about you (not how I treat you), and thus I may forgive you in my heart of hearts or even after you are dead' (21). Joseph Butler, Murphy points out, defines it as 'the forswearing of resentment' (22), which is defined as 'a response not to general wrongs but to wrongs against oneself …' (16).

[88] Murphy and Hampton, 158. Murphy avers that 'to be merciful is to treat a person less harshly than, given certain rules, one has a right to treat that person' (20).

[89] Murphy and Hampton, 159.

[90] Murphy and Hampton, 19.

[91] Corlett, 'Foundations of a Kantian Theory of Punishment', 265.

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Thirdly, it might be argued that mercy is justified on the utilitarian ground that it maximizes social utility. That is, the state's exercising mercy on offenders creates and maintains a loving and compassionate community the constituents of which are increasingly bound together in solidarity[92] and stability. For just as 'the person who cannot forgive cannot have friends or lovers,'[93] the state which cannot bestow mercy cannot have solidarity and stability that are needed for genuine community. But should the state's concern for these things outweigh a victim's right to expect the state to punish offenders in each and every case where offences occur?

It is unclear that a retributivist is able to justify the state's having mercy on offenders (That is, on those whom the state has duly tried and convicted of serious wrongdoings) in that retributivism entails, at least in its Kantian form, the claim that punishment is a categorical imperative, a perfect duty of justice.[94] It is, therefore, difficult to

[92] By 'solidarity' I mean, as Feinberg does, that property which is possessed by a collective where there exists a large community of interest among its constituent members, where such a community is often associated with bonds of mutual affection between parties, and where the goods and harms of the members of the collective are necessarily collective and indivisible (See Feinberg, *Doing and Deserving*, 234).

[93] Murphy and Hampton, 17.

[94] Kant, 100, 107. That whatever is required by the categorical imperative is a perfect duty is inferred from *The Metaphysical Elements of Justice*:

> A perfect duty ('narrow duty') is one the nonperformance of which is wrong: it is a duty owed (xiv);
>
> Duty is that action to which a person is bound. It is therefore the content [*Materie*] of obligation (23); … an imperative is a rule the representation of which makes necessary and subjectively contingent action and thus represents the subject as one who must be constrained (necessitated) to conform to this rule.
>
> The categorical (unconditional) imperative is one that does not command mediately, . . . but immediately, through the mere representation of an end that could be attained by an action itself (its form), which the categorical imperative thinks as objectively necessary and makes necessary (23).

From these passages it seems reasonable to infer that, for Kant, an act required by the categorical imperative is also a perfect duty in the sense that such an act 'is one the nonperformance of which is wrong: it is a duty owed'.

As Hart points out, however,

> Some modern retributivists would dissent from this and for them the satisfaction of the conditions constitutes no more than a license to punish the offender, as one who is morally blameworthy and so punishment-worthy; but whether in this case, he should actually be punished is a

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understand how mercy can be made compatible with the imperative of punishment on the (Kantian) retributivist view.[95] This does not mean, though, that the notions of justification,[96] excuse,[97] and mitigation[98] have no role in a retributivist scheme of punishment. Indeed, mercy is a qualitatively distinct notion from mitigation, for example. The former is not a retributive idea, while the latter is. The reason why mitigation is a retributive matter is that retributivism seeks to punish the morally culpable according to (among other things) the degree or level of an offender's intent, voluntariness, knowledge, etc., where a lesser degree of these factors obtaining in a given case affects the level of responsibility ascribed to the offender, and in turn the punishment the offender should receive. But mercy, when exercised, inflicts no punishment on offenders. The only type of case where no punishment would be inflicted on an offender on the retributivist model is where an offender violated a law without intent, voluntariness, knowledge, etc. But this is precisely the sort of case where mercy is impossible to bestow because the 'offender' is not truly responsible (morally culpable) for the 'offence'!

[95] It should be noted, however, that even Kant makes room for the sovereign's right to pardon in unusual cases. How the sovereign's right to pardon can be squared with the state's right and perfect duty to punish offenders is unclear. For more on this apparent inconsistency in Kant, see Corlett, 'Foundations of a Kantian Theory of Punishment', 277–8. Moreover, Kant's retributivism might be modified to amount to the state's having an absolute right but *not* a perfect duty to punish offenders, as articulated in Sterling Harwood, 'Is Mercy Inherently Unjust?' in Michael Gorr and Sterling Harwood, Editors, *Crime and Punishment* (Boston: Jones and Bartlett, 1995), 469.

[96] As Hart states, 'In the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes" (Hart, 13).

[97] Excuse is similar to justification in that, when either obtains, no punishment is forthcoming. But unlike justification, excuse obtains when a law is violated (due to ignorance, unintentional action, compulsion, etc.) (Hart, 14).

[98] Mitigation presupposes that a person is convicted (that there is an offender) who is liable to be punished, but there are factors that might lessen the severity of such punishment (Hart, 14).

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question to be settled by reference to the effects which punishment is likely to have on the offender or on the fabric of law and morality in general (Hart, 236–7).

Indeed, there is room for mercy on such a version of retributivism, one which, unlike Kant's position, permits but does not require the punishment of those who deserve it.

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Thus the argument from forgiveness and mercy is not telling against retributivism, nor must retributivism incorporate such concepts and practices in order to be plausible.

Conclusion

In sum, I have explicated and raised objections to Rawls' attempt to reconcile retributivism and utilitarianism. In so doing, I clarified the explanatory goal and power of retributivism as a model of punishment. I have provided plausible replies to Feinberg's objections to exact retributivism, an alleged Marxian objection to retributivism, warded-off some other concerns with retributivist models of punishment, and have argued that, whether or not revenge is entailed by retribution, retributivism is not embarrassed in the least. The upshot is that some major features of retributivism are clarified, making it all the more sensible.

More needs to be said to further explicate and defend the sort of retributivism articulated herein. Several important questions remain about punishment as an institution and about particular forms of punishment. For example, should failed attempts be punished?[99] In so far as the version of retributivism articulated and defended in this paper does not rule out deterrence as a secondary justification of the institution of punishment, is deterrence a good reason to punish?[100] How ought retributivism to punish bad samaritanism?[101] These and other questions urge the retributivist to further develop the depths of its plausibility. Even more fundamental is the question of the precise nature of desert. For as Feinberg argues, 'what is it to deserve something? … until its peculiar perplexities are resolved, a full understanding of the nature of justice is impossible, for surely the concepts of justice and desert are closely connected.' Perhaps what punishment theory needs most is

[99] For a recent discussion of punishment for failed attempts, see David Schmidz, 'Deterrence and Criminal Attempts', *Canadian Journal of Philosophy*, **17** (1987), 615–24.

[100] For recent discussions of this issue, see Warren Quinn, 'The Right to Threaten and the Right to Punish', *Philosophy & Public Affairs*, **14** (1985), 327–73; Richard Brook, 'Threats and Punishment', *Philosophy & Public Affairs*, **17** (1988), 235–9; Warren Quinn, 'Reply to Brook', *Philosophy & Public Affairs*, **17** (1988), 240–7; Michael Otsuka, 'Quinn on Punishment and Using Persons as Means', *Law and Philosophy,* **15** (1996), 201–8.

[101] For a recent discussion of this problem, see Davis, 'How Much Punishment Does a Bad Samaritan Deserve?'

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an unproblematic analysis of the concept of desert, a Herculean task that I have set aside for another occasion.[102] My aim here has been to make sense of a particular version of retributivism in light of various objections that have been raised against retributive justice. In turn, I hope to have made significantly more plausible a model of punishment that has been the target of an array of criticisms.

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[102] One must be mindful, however, of Feinberg's words: 'It is necessary that a person's desert have a basis and that the basis consist in some fact about himself, but neither of these conditions is sufficient. … It is impossible, however, to list the necessary and sufficient conditions for personal desert in the abstract, for the bases of desert vary with the mode of deserved treatment' (Feinberg, *Doing and Deserving*, 61). Feinberg's caution stands as a reminder to those who criticize retributivisms that hold to the intrinsic value of punishing those who deserve it that it might be asking too much to demand a complete analysis of desert and its bases.

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