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# Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System

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# Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System

KEN LEVY\*

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## I. Introduction

On August 22, 2002, Ariel Castro kidnapped Michelle Knight.<sup>1</sup> For 11 years, he imprisoned Michelle at his house, tortured her, raped her, impregnated her several times, and brutally forced her to miscarry.<sup>2</sup>

On May 6, 2013, Michelle and her two fellow victims, Georgina “Gina” DeJesus and Amanda Berry, finally managed to escape.<sup>3</sup>

On July 26, 2013, Castro pled guilty to 937 counts of rape, kidnapping, and aggravated murder in order to avoid the death penalty.<sup>4</sup>

On August 1, 2013, just before Judge Michael Russo sentenced Castro to life in prison without parole plus 1000 years, the three victims were permitted to give victim-impact statements.<sup>5</sup> Here is what Michelle Knight said (in part):

. . . You took 11 years from my life, but I've got my life back!

I spent 11 years in hell. Now your hell is just beginning. I will overcome all that happened, but you're going to face hell for eternity! From this moment on, I am NOT going to let you define me or affect who I am. I will live on but you will die a little more inside each day as you think of those 11 years and the atrocities you inflicted on us. What does God think of you hypocritically going to church each Sunday and then coming home to torture us? The death penalty would be the easy way out; you don't deserve that! We want you to spend the rest of your life in prison! . . .<sup>6</sup>

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<sup>1</sup> See Erin Donaghue, *Michelle Knight, Cleveland kidnapping victim, to Ariel Castro: "Your hell is just beginning"*, Aug. 1, 2013, <http://www.cbsnews.com/news/michelle-knight-cleveland-kidnapping-victim-to-ariel-castro-your-hell-is-just-beginning/>.

<sup>2</sup> *Id.*

<sup>3</sup> See Michael Muskal, *Ariel Castro gets life, no parole; victim says his hell awaits*, Aug. 1, 2013, <http://www.latimes.com/news/nation/nationnow/la-na-nn-ariel-castro-michelle-knight-20130801.0,2844274.story#axzz2r2LCAkQc>.

<sup>4</sup> See Andrew Welsh-Huggins, *Ariel Castro pleads guilty to 937 counts in Ohio kidnapping case*, July 26, 2013, <http://www.dallasnews.com/news/crime/headlines/20130726-ariel-castro-pleads-guilty-to-937-counts-in-ohio-kidnapping-case.ece>.

<sup>5</sup> See Donaghue, *supra* note 1.

<sup>6</sup> See *Statements on behalf of Amanda Berry, Gina DeJesus and Michelle Knight*, Aug. 1, 2013, <http://www.prnewswire.com/news-releases/statements-on-behalf->

Vengeful words indeed. To see just how vengeful they are, imagine that the governor of a northeastern state who had presidential ambitions emailed the following similar statements to a defiant mayor:

Now your hell is just beginning. I will overcome your slight, but you're going to face hell for eternity! From this moment on, I am NOT going to let you win. I will live on but you will die a little more inside each day as you think of your insolence.

Imagine also that the mayor then leaked this email to the media. What would happen to the governor? Almost everybody would roundly condemn him, and his political life – certainly his presidential ambitions – would die a swift death. This kind of vengeful language is simply unacceptable from a governor.

But if it is unacceptable from a governor, shouldn't it be unacceptable from *any* individual? Shouldn't we equally condemn Michelle Knight? After all, Nelson Mandela was imprisoned for 16 more years than Michelle and never said anything nearly as vengeful about his racist captors.<sup>7</sup> Why couldn't Michelle Knight have risen to the same heights as Mandela? Shouldn't we denounce her for saying such hateful things to *her* captor?<sup>8</sup>

[of-amanda-berry-gina-dejesus-and-michelle-knight-217977801.html](http://www.usatoday.com/story/opinion/2013/12/08/nelson-mandela-remember-column/3896245/).

<sup>7</sup> See Barbara Mutch, *Mandela taught the power of forgiveness: Column*, Dec. 8, 2013,

<http://www.usatoday.com/story/opinion/2013/12/08/nelson-mandela-remember-column/3896245/>; Justice Malala, 'Mandela looked his enemy in the eye and held him close', Dec. 7, 2013, <http://www.telegraph.co.uk/news/worldnews/nelson-mandela/10501060/Mandela-looked-his-enemy-in-the-eye-and-held-him-close.html>.

<sup>8</sup> Opponents of victim-impact statements offer two main arguments. First, they argue that victim-impact statements debase the criminal justice system by permitting, if not encouraging, victims and their families not to forgive but to do the very opposite – express their ugliest, most vengeful sentiments. Indeed, for this reason, victim-impact statements have been derogatorily characterized as “institutionalized revenge.” See Catherine Guastello, *Victim Impact Statements: Institutionalized Revenge*, 37 ARIZ. ST. LJ. 1321 (2005); see also Michael Price, *Revenge and the People Who Seek It: New Research Offers Insight into the Dish Best Served Cold*, THE MONITOR, June 2009, <http://www.apa.org/monitor/2009/06/revenge.aspx> (“Victim impact statements . . . can partially satisfy a victim's vengeful feelings while also putting the responsibility for punishment on the state . . .”); Brian Rosebury, *Private Revenge and its Relation to Punishment*, 21 UTILITAS 1, 11 (2009) (“[A] suspicion of [revenge’s] presence hangs over some recent developments in criminal justice doctrines. One example is the introduction of ‘victim impact statements’ in some jurisdictions.”) (citations omitted). Second, opponents of

While a very small number of people might answer this last question in the affirmative, most would not. Instead, they would insist that Michelle was perfectly justified in saying and thinking what she did, that she had every right to wish eternal suffering on the man who had cruelly and callously inflicted such suffering on her for his own pleasure. So counterbalancing our tendency to condemn vengeance in the abstract is our tendency to adopt the very opposite position when we learn of the particular circumstances that justify it.<sup>9</sup> The task of this paper is to show that harmful criminal wrongdoing is just such a circumstance and therefore that, contrary to popular wisdom, vengeance plays a *legitimate* and *central* role in the criminal justice system.

The theory of *retributivism* is sometimes thought to capture this point of view. But this perception is not quite right. The relationship between retributivism and revenge is much more complicated, as I hope to show. Retributivism is the theory that (a) we punish criminals in order to give them what they deserve (b) because this result is inherently good,

victim-impact statements argue that they are unfair to defendants. While these statements bear no relevance to defendants' blameworthiness, they play on judges' and juries' emotions and thereby manipulate them into increasing defendants' sentences. See *Payne v. Tennessee*, 501 U.S. 808, 860-61 (1991) (J. Stevens dissenting) (“[A]spects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant the defendant's ‘personal responsibility and moral guilt’ and therefore cannot justify a death sentence.”) (citations omitted); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 421-22 (2003) (“[C]ommentators are particularly concerned that victim impact statements highlight the perceived relative worth of the victim, and consequently that the jury's judgment about whether to impose the death sentence will be influenced by this inappropriate factor. . . . [T]he death reflects neither the murderer's mental state nor the morality of the act itself. In addition, victim impact statements detail the various harms that befall the victim or the victim's family after a crime . . . that a defendant might not have been able to foresee at the time of the crime.”) (citations omitted). This criticism of victim-impact statements is part of a more general debate about whether the harm a person causes should be factored into her blame or punishment because it was a matter of “outcome luck” – something outside her control and therefore something that arguably should not affect her desert. For two opposing views, see Bebhinn Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); and Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action That Causes It*, 24 L. & PHIL. 263 (2005).

<sup>9</sup> Cf. Anders Kaye, *Powerful Particulars: The Real Reason the Behavioral Sciences Threaten Criminal Responsibility*, 37 FLA. ST. U. L. REV. 539 *passim* (2010) (arguing that particular details about an individual's psychology and past victimhood tend to motivate sympathy more effectively than abstract theories about determinism and responsibility).

an end that is justified in itself.<sup>10</sup> Retributivism is usually contrasted with *consequentialism*, which suggests that we punish criminals in order to bring about a good result beyond, or instead of, merely giving criminals their just deserts: protecting society against more crimes by incapacitating them (through incarceration or, in rare cases, death); discouraging them from repeating the same kinds of crimes after release (specific deterrence and possibly rehabilitation); and discouraging others in society from committing similar crimes (general deterrence).<sup>11</sup>

There is also a third theory – *expressivism* – which suggests that we punish criminals in order to express our moral disapproval of their criminal behavior. Punishment is the best, if not the only, “language” through which we may blame individuals for violating the criminal law, communicate the gravity of the criminals’ wrongdoing to offenders, and thereby affirm the moral and criminal-legal norms of the community.<sup>12</sup>

<sup>10</sup> See DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 87 (2008); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 87-88, 111 (1997); David Dolinko, *Punishment*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 403, 406 (John Deigh & David Dolinko eds., 2011); R.A. Duff & David Garland, *Introduction: Thinking about Punishment*, in *A READER ON PUNISHMENT* 1, 7 (R.A. Duff & David Garland eds., 1994); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 4-5 (1955). Some opponents of retributivism include: Russell Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 *NW. U. L. REV.* 843 (2002); Edward Rubin, *Just Say No to Retribution*, 7 *BUFF. CRIM. L. REV.* 17 (2003); Russ Shafer-Landau, *The Failure of Retributivism*, 82 *PHIL. STUD.* 289 (1996); Brian Slattery, *The Myth of Retributive Justice*, in *RETRIBUTIVISM AND ITS CRITICS* 27 (Wesley Cragg ed., 1992); Mark Thornton, *Against Retributivism*, in *RETRIBUTIVISM AND ITS CRITICS*, *supra*, at 83; James Q. Whitman, *A Plea Against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85 (2003).

<sup>11</sup> See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 414 (2000); MOORE, *supra* note 10, at 91; Dolinko, *supra* note 10, at 405-06; Duff & Garland, *supra* note 10, at 8. For critiques of both retributivism and consequentialism, see BOONIN, *supra* note 4, at 37-154.

<sup>12</sup> See BOONIN, *supra* note 4, at 183; R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* xvii, xviii-xix (2001); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 93-94 (2008); MOORE, *supra* note 10, at 84-85; ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 48-49 (1976); Duff & Garland, *supra* note 10, at 8; Joel Feinberg, *The Expressive Function of Punishment*, in *A READER ON PUNISHMENT*, *supra* note 10, at 73, 74; Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 212 (1984); Robert F. Schopp, *Mental Illness, Police Power Interventions, and the Expressive Functions of Punishment*, 39 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 99, 109-13; Andrew von Hirsch, *Censure and Proportionality*, in *A READER ON PUNISHMENT*, *supra* note 10, at 118-27. For critiques of expressivism, see HUSAK, *supra*, at 88; Dolinko, *supra* note 10, at 417-20; D.B. Hershenov, *Restitution and Revenge*, 96 *J. PHIL.* 79, 85-86 (1999). For a very helpful summary of consequentialism, retributivism, and expressivism and potential

Every infliction of criminal punishment expresses three points: (a) the subject of punishment committed wrongdoing; (b) the subject is at least criminally, if not morally, responsible for this wrongdoing; and (c) the subject should be condemned for her criminal behavior. It may plausibly be argued that expressivism ultimately reduces to a combination of the two main theories in play – retributivism (giving criminals their just deserts) and consequentialism (for educative effect).<sup>13</sup> But whether or not this reductive hypothesis is true, the virtue of expressivism is that it captures moral censure and stigmatization, two essential components of criminal punishment.<sup>14</sup>

Regarding retributivism, the central topic of this Article, I will argue that it is only partly correct. While retributivism helps both to explain and to justify criminal punishment, it cannot *completely* fulfill both of these tasks – explanation and justification – on its own. Instead, it must be supplemented by what is usually considered to be its principal competitor<sup>15</sup> – again, *consequentialism*. In this way, my paper is ultimately a plea for rapprochement. The war between retributivism and consequentialism has gone on long enough. This Article will attempt to hammer out the terms of a lasting peace treaty.<sup>16</sup>

problems with each, see DUFF, *supra*, at 3-34. For a list of purposes that do not fall cleanly into any one of these three categories (retributivism, consequentialism, or expressivism), see FRIEDRICH NIETZSCHE, THE GENEALOGY OF MORALS 80-81 (Walter Kaufmann tr. 1989 [1887]).

<sup>13</sup> See Dolinko, *supra* note 10, at 421; Hampton, *supra* note 12, at 212-13; Jean Hampton, *An Expressive Theory of Retribution*, in RETIBUTIVISM AND ITS CRITICS, *supra* note 10, at 1, 13, 14 (1992); Eric Jaffe, *The Complicated Psychology of Revenge*, OBSERVER, Oct. 2011, <http://www.psychologicalscience.org/index.php/publications/observer/2011/october-11/the-complicated-psychology-of-revenge.html>; J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4-5 (1982).

<sup>14</sup> See HUSAK, *supra* note 12, at 93; Douglas Husak, *The De Minimis "Defence" to Criminal Liability*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 328, 349-50 (R.A. Duff & Stuart Green eds., 2011).

<sup>15</sup> See generally DUFF, *supra* note 12, at 3; Christopher, *supra* note 10, at 855-65; Dolinko, *supra* note 10, at 408-09.

<sup>16</sup> Many courts and scholars have advocated "mixed" or "hybrid" theories of punishment. See, e.g., *Tapia v. U.S.*, 131 S. Ct. 2382, 2387 (2011); DUFF, *supra* note 12, at xvii; FLETCHER, *supra* note 11, at 418; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 9 (2008 (2d ed.)); HUSAK, *supra* note 12, at 203-05; MOORE, *supra* note 10, at 92-94; VON HIRSCH, *supra* note 6, at 49-55; Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J. L. & PUB. POL'Y 19, 30-31 (2003); Douglas Husak, *Why Punish the Deserving?* 26 NOÛS 447, 452 (1992) [hereinafter Husak, *Why Punish*]; Douglas Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 971-77 (2000) [hereinafter Husak, *Retribution*]; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1442-43 (2004); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1298

The war between consequentialism and retributivism has been fueled by three kinds of mischievous thought-experiments, hypotheticals in which highly unusual conditions are stipulated in such a way that the two theories' different goals – backward-looking just deserts and forward-looking good consequences – end up opposing each other: (a) bad consequences result from punishing criminals,<sup>17</sup> (b) *good* consequences result from punishing *innocent* individuals,<sup>18</sup> and (c) *good*

(2006). *But see* MOORE, *supra* note 10, at 94, 97-102 (arguing that mixed theories fail because retributivism does all the work and consequentialism either interferes with this work or gratuitously free-rides on it); Christopher, *supra* note 10, at 869 (“The difficulty for most mixed theories is that either substantive issues of justification are assumed away by definition or the instability of the components leads to a collapse back into consequentialism. While [H.L.A.] Hart’s mixed theory may avoid those problems, its own difficulty is in setting the amount of punishment.”) (citations omitted); Donald Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1390-91 (2003) (“The comforting consistency of utilitarian and retributive theories with respect to most practical issues may be a cognitive illusion.”). For a survey and critique of different mixed theories, see Dolinko, *supra* note 10, at 421-27.

<sup>17</sup> Punishment “abolitionists” – people who believe that criminal punishment does (much) more harm than good – rely on these kinds of examples. Abolitionists include: BOONIN, *supra* note 4, at 213-75; H. Bianchi, *Abolition: Assensus and Sanctuary*, in A READER ON PUNISHMENT, *supra* note 10, at 336, 336-39; Eugene E. Dais, *Commentary: Positive Retributivism and Despicable Justice*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 10, at 107; *see also* Husak, *Why Punish*, *supra* note 16, at 448-49 (arguing that, in several different kinds of situations, an offender should not be punished even though he deserves it because the consequences of punishing him would be too costly); Husak, *Retribution*, *supra* note 16, at 975-76 (“Retributivists . . . seemingly suppose that their task is complete when they show that the punishment of culpable wrongdoers is intrinsically good . . . But this demonstration does not suffice to justify the institution of punishment – even for retributivists. They must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is sufficiently valuable to offset the drawbacks that inevitably result when an institution of punishment is created. . . . My point is that the value of realizing retributive justice, by itself, is insufficient to justify the creation of an institution of punishment with [several] formidable drawbacks.”) (citations omitted).

<sup>18</sup> See J.J.C. SMART, *An outline of a system of utilitarian ethics*, in UTILITARIANISM FOR AND AGAINST 69-72 (J.J.C. SMART & BERNARD WILLIAMS, 1973); Rawls, *supra* note 10, at 9-13; MOORE, *supra* note 10, at 93 n.19, 94-97; WILFRID J. WALUCHOW, THE DIMENSIONS OF ETHICS: AN INTRODUCTION TO ETHICAL THEORY 166-68 (2003); Hampton, *supra* note 12, at 214; Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 118 (2000); Christopher, *supra* note 10, at 870-80, 922-23.

consequences result from *not* punishing criminals.<sup>19</sup> The idea behind all three thought-experiments is to show that consequentialism (good consequences) and retributivism (just deserts) can come into conflict and therefore that we must choose one over the other. It is certainly true that these three kinds of situations can drive a wedge between retributivism and consequentialism. As long as two different ethical theories *of any kind* have two different primary goals, there will always be ways to bring these goals – and therefore these theories – into conflict. But the fact that retributivism and consequentialism *can* come into conflict hardly shows that they do not *usually* work together. On the contrary, that is exactly what retributivism and consequentialism do – *usually* work together.

In fact, retributivism not only works well with consequentialism; it *needs* consequentialism. There are three reasons. In Part III, I will provide the first two reasons. Both of these reasons start from the fact that retributivism is as much in need of explanation as the thing that it is trying to explain (criminal punishment). The notion that the state should give criminals the punishment that they deserve requires further explanation because retributivists do not also believe that the state should give *good people* the *praise or rewards* that they deserve for their *virtuous* acts. So why do retributivists think that it is imperative that the state inflict *negative* desert but not bestow *positive* desert? Simply stating, as retributivism does, that we should give people their just deserts just does not answer this question. The concept of just deserts is neutral between negative and positive desert and therefore fails to explain retributivism's asymmetrical emphasis on negative desert.

I will argue that there are two reasons why retributivists believe that the state should inflict negative desert rather than guarantee positive desert, and both reasons are consequentialist. The first reason is that inflicting negative desert is much more practicable than guaranteeing positive desert. Difficult as the task of law enforcement may be, it is much easier to find, arrest, prosecute, convict, and punish them than it would be for the state to seek out the much larger number of virtuous people and give them the praise and rewards that they deserve. The second reason is what I will refer to as the *Motivation Thesis*. The Motivation Thesis says that, whether or not retributivists admit it (to themselves, no less to others), retributivism is largely motivated by *vengeance*; that retributivists' desire for retributive justice, for giving criminals their just deserts, is itself motivated by the (deeper) desire to give criminals a *taste of their own medicine*, to *pay them back* for the unjustified and unexcused harm that they have caused.<sup>20</sup> And, as a

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<sup>19</sup> See JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION (Vol. 2) 193 (1988 [1781]); see generally MOORE, *supra* note 10, at 100-01; Christopher, *supra* note 10, at 858 n.66; Dolinko, *supra* note 10, at 406-07.

<sup>20</sup> See JEFFRIE MURPHY, *Hatred: a qualified defense*, in FORGIVENESS AND

motivation, vengeance (or the channeling of vengeful feelings, which is sometimes euphemized as “victim closure”) is consequentialist, not retributivist, because we act on it in order to achieve a good consequence – namely, annulling the crime (or turning the crime back on the criminal) and thereby achieving a restoration of the moral and social order, which itself contributes to the victim’s sense that the criminal’s wrongdoing has been at least partly righted.<sup>21</sup>

Most retributivists are reluctant to admit that retributive justice is motivated by vengeance largely because they fail to realize that vengeance can be not only justified but justificatory.<sup>22</sup> And they fail to achieve this realization because vengeance has a bad reputation.<sup>23</sup> Once again, it is generally thought to be just plain *wrong*, a feeling that should not be indulged but rather repudiated in favor of its angelical opposite – forgiveness.<sup>24</sup> So to suggest that vengeance can actually be justified or justify criminal punishment will strike many as not only misguided but

MERCY 95 (JEFFRIE MURPHY & JEAN HAMPTON, 1988); Leo Zaibert, *Punishment and Revenge*, 25 L. & PHIL. 81, 115 (2006).

<sup>21</sup> See *Graham v. Florida*, 130 S.Ct. 2011, 2028 (2010); CHARLES K.B. BARTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 10 (1999); GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 37-38 (1998); JEAN HAMPTON, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 20, at 111, 125, 130-31; MURPHY, *supra* note 14, at 89; Theodore M. Benditt, *Revenge*, 38 THE PHIL. F. 357, 358, 362 (2007); Bradley, *supra* note 16, at 29-30; Alan Brudner, *In Defence of Retributivism*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 10, at 93 *passim*; Dolinko, *supra* note 10, at 416-17; John Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 97, 103 (1999); George Fletcher, *What Is Punishment Imposed For?* 5 J. CONTEMP. LEGAL ISSUES 101, 104, 109 (1994); Hershenov, *supra* note 12, at 80, 87-88; Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031, 1045, 1048-49 (2003); Markel, *supra* note 16, at 1446-47.

<sup>22</sup> See BOONIN, *supra* note 4, at 152; Mackie, *supra* note 13, at 3; Rosebury, *supra* note 8, at 11.

<sup>23</sup> See BARTON, *supra* note 21, at xiv, 1-2, 9; PETER A FRENCH, THE VIRTUES OF VENGEANCE x (2001); MURPHY, *supra* note 14, at 90; Rosebury, *supra* note 8, at 20. *But see* ROBERT WRIGHT, THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY 339 (1994) (suggesting that the “impulse of retribution” is surrounded by an “aura of reverence” and is imbued with “the ethereal sense that [it] embodies some higher ethical truth”).

<sup>24</sup> See BARTON, *supra* note 21, at 2; MICHAEL E. MCCULLOUGH, BEYOND REVENGE: THE EVOLUTION OF THE FORGIVENESS INSTINCT xix (2008); JEFFRIE MURPHY, *Introduction, The retributive emotions*, in FORGIVENESS AND MERCY, *supra* note 20, at 1, 4; David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?* 27 FORDHAM URB. L.J. 1663, 1663-64, 1666-67 (2000).

also wicked and pathological.<sup>25</sup> Still, this perception is wrong. We retributivists need to do better damage control. We should no longer be reluctant to articulate our theory of criminal punishment in terms of vengeance. In Part IV, then, I will supplement the Motivation Thesis with what I call the *Justification Thesis*. The Justification Thesis says that the desire to exact revenge against criminals for the harm that they cause is not an unfortunate, irrational disposition lodged deep in our psyches but rather both a morally appropriate reaction and a perfectly decent and honorable motivation for criminal punishment.<sup>26</sup>

Finally, in Part VI, I will present the last of the three reasons why retributivism needs consequentialism: retributivism does a better job of explaining and justifying criminal punishment for *harmful* crimes than for *harmless* (or victimless) crimes such as drug possession, resisting arrest, insider trading, and counterfeiting.<sup>27</sup> While it is true that retributivists believe that people who commit crimes, harmful *or* harmless, should be punished, the primary explanation and justification of the infliction of criminal punishment for harmless crimes is consequentialism. Retributivism plays a much smaller role.

## II. The Main Goals of the Criminal Justice System

The three primary goals of the criminal justice system are to give criminals the punishment that they deserve,<sup>28</sup> minimize crime,<sup>29</sup> and

<sup>25</sup> See BARTON, *supra* note 21, at xiv.

<sup>26</sup> Since the late 1980s and especially in the last fifteen years, some scholars are finally admitting this point: BARTON, *supra* note 21, at xv, 30; MOORE, *supra* note 10, at 117-18, 141-44; MURPHY, *supra* note 14, at 90; STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 532 (2011); WRIGHT, *supra* note 23, at 339; Hershenov, *supra* note 12, at 90. Even the United States Supreme Court accepts this point. See *Graham*, 130 S.Ct. at 2028; *Philip Morris USA v. Williams*, 549 U.S. 346, 359 (2007).

<sup>27</sup> As I will briefly argue in Part VI, the classic inchoate crimes – attempt, conspiracy, and solicitation – often inflict *psychological* harm even when they do not inflict *physical* harm. In support of this point, see R.A. DUFF, *CRIMINAL ATTEMPTS* 130 (1996); Anthony M. Dillof, *Modal Retributivism: A Theory of Sanctions for Attempts and Other Criminal Wrongs*, 45 U. RICH. L. REV. 647, 662 (2011); Susan Hanley Duncan, *Myspace Is Also Their Space: Ideas for Keeping Children Safe From Sexual Predators on Social-Networking Sites*, 96 KY. L.J. 527, 542 (2007-08); Hershenov, *supra* note 12, at 87.

<sup>28</sup> See *supra* note 10 and accompanying text.

<sup>29</sup> See *supra* note 11 and accompanying text. Many criminal scholars suggest that the primary purpose of the criminal justice system is crime *prevention*. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN (WITH STEPHEN MORSE), *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 3 (2009); ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 30-31 (2006). But *prevention*, which connotes success, is less accurate a term than *deterrence* or *minimization* for the simple reason that, in spite of the existence of

thereby express serious moral condemnation of criminals for their criminal acts.<sup>30</sup> There is no need to decide which of the first two goals is *more* important. It is perfectly acceptable to maintain that they are both *equally* important, at least when it comes to punishing harmful (as opposed to harmless) crimes. As I mentioned in the Introduction, one of the central points of this Article is to end the unnecessary war between these two positions and recognize that they generally work beautifully together.

A. *The First Primary Goal of the Criminal Justice System: Crime Minimization*

Regarding the first goal, why do we want to minimize crime in the first place? In a previous paper, I offered this answer:

The criminal law is largely concerned with protecting people against deliberately inflicted harm to their supremely valued interests, to the interests that they generally most highly value—namely life, physical well-being, emotional well-being, family, liberty, and property. That is why we have criminal laws against homicide, manslaughter, rape, assault, battery, kidnapping, unlawful imprisonment, and theft.<sup>31</sup>

Of course, there are other criminal offenses that do not necessarily harm the supremely valued interests listed above – for example, reckless endangerment, solicitation, conspiracy, and attempt. But what justifies legislatures in defining these acts as crimes is the same kind of goal: protecting our supremely valued interests against acts that not only do damage to our supremely valued interests but also *tend* or *threaten* to damage one or more of our supremely valued interests.<sup>32</sup> For the same reason, public order or tranquility should *not* be included in the list of supremely valued interests. Instead, it should be included in another list, the list of *lesser* or *secondarily* valued interests. Its inferior status explains why such victimless crimes as disturbing the peace (or

a criminal justice system, crime still occurs.

<sup>30</sup> See *supra* note 12 and accompanying text.

<sup>31</sup> Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1065 (2007). When protected by the state, these supremely valued interests are called *rights*.

<sup>32</sup> See DUFF, *supra* note 27, at 134-35; HART, *supra* note 16, at 6; see also Bradley, *supra* note 16, at 25-26 (offering a slightly different account). Because some crimes are harmless *and* do *not* tend to cause harm – for example, drug possession, resisting arrest, insider trading, and counterfeiting – their criminalization warrants a different justification. These kinds of crimes will be addressed more fully below in Part VI.

disorderly conduct), vagrancy, and public drunkenness are misdemeanors rather than felonies.

So minimizing injury to our supremely (or secondarily) valued interests is one of the two primary goals of the criminal justice system. We established such a system (way back when) and maintain it largely to discourage as many people as possible from committing crimes.<sup>33</sup> But how exactly do we go about *doing* this discouraging and minimizing? The first thing we do is *threaten* the public with criminal punishment. The (just) state tells the public what kinds of acts are legally forbidden and what level of criminal punishment they may expect to suffer if they still perform any of these forbidden acts and are caught. It defines what it considers to be supreme-value-threatening and supreme-value-damaging acts (including omissions and possession) as criminal offenses and threatens criminal punishment for their performance. It does all of this defining and threatening with the goal of deterring as many people as possible from performing these supreme-value-hostile acts and thereby minimizing (human-caused) threats to individuals' enjoyment of their supremely valued interests.<sup>34</sup>

Unfortunately, however, no criminal justice system can fully eliminate crime.<sup>35</sup> In every society, some individuals will simply not be deterred by the threat of punishment. What, then, should the state do with these individuals, at least those who are caught? The answer – and the second means of fulfilling the goal of crime minimization (in addition to making threats to punish) – is the state's *executing* its earlier threats to punish these law-breakers. The state's actually *punishing* criminals helps to minimize crime in three different ways: by (a) temporarily or permanently preventing such criminals from committing further crimes (incapacitation); (b) discouraging these specific individuals from committing further crimes and thereby risking further, if not worse, punishment (specific deterrence); and (c) discouraging many other would-be criminals from committing crimes by showing, through the example of these particular criminals, what will likely happen to them if they are caught (general deterrence).<sup>36</sup>

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<sup>33</sup> See Husak, *Why Punish*, *supra* note 16, at 459-62.

<sup>34</sup> See VON HIRSCH, *supra* note 6, at 38; Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 90 (2005); John M. Darley, Kevin M. Carlsmith, and Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & SOC'Y REV. 165, 165-66 (2001); Hampton, *supra* note 12, at 210-11; von Hirsch, *supra* note 6, at 122.

<sup>35</sup> See Stephen Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 267 (1999).

<sup>36</sup> See *supra* note 11 and accompanying text.

B. *The Second Primary Goal of the Criminal Justice System: Retribution*

Is consequentialism correct that criminal punishment's contributions toward crime minimization are sufficient to justify criminal punishment? The answer might seem to be an obvious *yes* until we really consider just what criminal punishment *is*: the intentional infliction of hardship, deprivation, or suffering by the state in return for a proven violation of its criminal laws.<sup>37</sup> Hardship, deprivation, or suffering is not merely a foreseeable but unintended consequence, as it is with (a) civil commitment,<sup>38</sup> (b) administrative regulations,<sup>39</sup> and (c) medical treatment.<sup>40</sup> Once again, hardship, deprivation, or suffering is *intended*.<sup>41</sup>

The same, however, cannot be said of tort remedies. For this reason, they are harder to distinguish from criminal punishment than are civil commitment, administrative regulations, and medical treatment.<sup>42</sup>

<sup>37</sup> See BOONIN, *supra* note 4, at 7, 17; DUFF, *supra* note 12, at xiv-xv; HART, *supra* note 16, at 4-5; HUSAK, *supra* note 12, at 92; David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992); Feinberg, *supra* note 12, at 73; Husak, *Why Punish*, *supra* note 16, at 455; Husak, *Retribution*, *supra* note 16, at 963-64; Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 L. & PHIL. 383, 408 (2008); von Hirsch, *supra* note 12, at 118; Zaibert, *supra* note 20, at 110; *see also* HAMPTON, *supra* note 21, at 126 ("I propose that the most general and accurate definition of 'punishment' is: the experience of defeat at the hands of the victim (either directly or indirectly through a legal authority)."); Dolinko, *supra* note 10, at 404-05 (critiquing Hart's definition).

<sup>38</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 361-64, 368-69 (1997); *Bell v. Wolfish*, 441 U.S. 520, 535-539 (1979); FLETCHER, *supra* note 11, at 412-13; HART, *supra* note 16, at 17; HUSAK, *supra* note 12, at 93.

<sup>39</sup> See *Smith v. Doe*, 538 U.S. 84, 92-106 (2003); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); George L. Blum, *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities as Applied to Juvenile Offenders—Duty to Register, Requirements for Registration, and Procedural Matters*, 38 A.L.R.6TH 1, § 31 (*Registration requirement as nonpunitive*) (2013); *see also* Romualdo P. Eclavea and Lucas D. Martin, *Sex offender registration statutes*, 53 AM. JUR. 2D MENTALLY IMPAIRED PERSONS § 126 (2013) (discussing sex-offender registration laws).

<sup>40</sup> See *State v. Perry*, 610 So.2d 746, 751-53 (La. 1992); *People v. Fuller*, 24 N.Y.2d 292, 302-03 (N.Y. 1969); Jami Floyd, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1272-78 (1990); E.M. Opton, *Psychiatric Violence Against Prisoners: When Therapy Is Punishment*, 45 MISS. L.J. 605, 608 (1974).

<sup>41</sup> See BOONIN, *supra* note 4, at 12-17; HUSAK, *supra* note 12, at 92.

<sup>42</sup> See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 783-84 (1997); Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a*

Like criminal punishment, tort remedies such as compensatory damages and restitution are *intended* to make defendants suffer a deprivation – namely, a deprivation of their money. But there are still two main differences between tort remedies and punishment. First, tort remedies are designed to fulfill two main ends: (i) deterring defendants and the general public from committing the same kind of torts in the future and (ii) restoring, as much as possible, the plaintiffs whom the defendants previously injured to the condition that they enjoyed prior to injury.<sup>43</sup> While criminal punishment also aims to a large extent at deterrence, it does not generally aim at victim restoration.<sup>44</sup> Instead, it intentionally inflicts hardship, deprivation, or suffering in order to achieve two *other* ends (in addition to deterrence): giving the criminal what she deserves and expressing condemnation of the criminal for her criminal activity.<sup>45</sup> I will defend the former point (about just deserts) in this Part. Second, while criminal punishment may amount to a fine, which superficially resembles monetary damages and restitution, criminal punishment is often implemented in other ways that tort remedies are not. These other ways include incarceration, shaming, probation, community service, license revocations, and loss of civil rights such as the right to vote and the right to own firearms.

### 1. *The Problem of Punishment*

Given that the criminal justice system intentionally inflicts hardship, deprivation, or suffering, one might very well argue that criminal punishment simply *cannot* be just – no matter how much it helps to minimize crime. On this view, no matter what the person's

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*Limiting Principle*, 4 CARDOZO PUB. L., POL'Y, & ETHICS J. 489, 491-92, 503-05 (2006).

<sup>43</sup> See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 355 (2007); Steiker, *supra* note 42, at 784-85.

<sup>44</sup> Some scholars, however, advocate shifting the criminal justice system's focus from retributive to restorative justice. See, e.g., BOONIN, *supra* note 10, at 213-75; Bianchi, *supra* note 17, at 340; Carrie J. Niebur Eisnaugle, *An International 'Truth Commission': Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209 *passim* (2003); Lerman, *supra* note 24, at 1664, 1674-75; see also Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 16, 29-30 (Sarat, Austin and Hussain, Nasser eds., 2007) (explicating and briefly critiquing the view that the criminal justice system should strive for restorative justice rather than for retributive justice). Charles Barton advocates a restorative approach that *includes* revenge. See BARTON, *supra* note 21, at 137.

<sup>45</sup> See *supra* notes 10 and 12 and accompanying text.

crime, punishment is the morally wrongful response. This is what David Boonin calls the *problem of punishment*.<sup>46</sup>

In response to the problem of punishment, one might continue to stress the benefits, if not necessity, of crime minimization. But the punishment *abolitionist* will maintain that no matter how great the social utility of an institution, it cannot be morally legitimate if it is fundamentally inhumane. (Consider, for example, slavery.) And an institution such as the criminal justice system that intentionally inflicts suffering *for the sake of suffering* is fundamentally inhumane.<sup>47</sup>

So in order to refute the punishment abolitionist, it needs to be shown that the criminal justice system – in particular, the practice of criminal punishment – is *not* inherently inhumane. According to retributivists, if social utility will not help to demonstrate this point, something else will: *moral desert*. What justifies criminal punishment – intentionally inflicting suffering on criminals – is not merely its significant contribution to crime minimization but also the fact that it is *what criminals deserve* in virtue of their criminal wrongdoing.<sup>48</sup>

<sup>46</sup> See BOONIN, *supra* note 10, at 1; see also DUFF, *supra* note 12, at xi-xii (“To ask, ‘What can justify criminal punishment?’—the central question in philosophical discussions of punishment – is to ask what can justify practices of this kind. . . . The question of justification . . . is . . . a crisis of legitimacy: for when we reflect on the punishments inflicted (in our name) on so many of our fellow citizens and on the effects of those punishments on those who suffer them, we cannot but raise the question of legitimacy—of what can justify any practice of criminal punishment.”); HUSAK, *supra* note 12, at 92 (“I argue that state punishment is hard to justify because it involves two essential features: hard treatment and censure. Under normal circumstances, impositions of hard treatment and censure violate important personal interests. Because ordinary utilitarian reasons do not allow the government to infringe these important interests, we have reason to countenance a *right not to be punished*. . . . [T]he key to a theory of criminalization is to determine when the state is permitted to infringe the right not to be punished.”); *id.* at 95 (“The criminal sanction is the most powerful weapon in the state arsenal; the government can do nothing worse to its citizens than to punish them. . . . As a *type* of response . . . criminal sanctions are the most severe and therefore the most in need of justification.”); Christopher, *supra* note 10, at 852 (“[P]unishment does require justification, for the same reason we consider conduct violating the core prohibitions of our criminal law to be wrong. Punishment involves the deliberate infliction of pain, suffering, and deprivation, which is *prima facie* wrong.”) (citations omitted); Dolinko, *supra* note 37, at 1626 (“Punishment involves the deliberate imposition of suffering on persons convicted of crime; it involves treating these persons in ways we ordinarily believe violate human rights (for example, incarceration and execution). Why is it morally permissible to do these things (or at least some of them) to criminals, when in most other contexts such treatment is morally prohibited?”).

<sup>47</sup> See *supra* note 17 and accompanying text.

<sup>48</sup> See *supra* note 10 and accompanying text. Doug Husak argues that the task of

According to retributivists, then, the state is justified in inflicting criminal punishment not because of its presumed good consequences for society, as consequentialists claim, and not because of its symbolic importance, as expressivists claim, but simply because criminals *deserve* it.<sup>49</sup> This desert can take two forms: either a “moral debt” that only criminal punishment can discharge<sup>50</sup> or a *right* to criminal punishment that the criminal “earned” through her commission of a crime.<sup>51</sup> Both the debt view and the rights view of criminal punishment presuppose that the criminal is at least criminally, if not morally, responsible for her crime.<sup>52</sup>

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justifying criminal punishment is to show not that it is morally permissible or that it is morally obligatory but that it helps “the state more closely [to] approximate the ideal of justice, and thus add[] value to the world.” Husak, *Why Punish*, *supra* note 16, at 454; *see also* HUSAK, *supra* note 12, at 200-01 (“I share [Michael] Moore’s judgment that the state of affairs in which [people who commit monstrous crimes] receive their just deserts is preferable to the state of affairs in which they do not (even though the former may not be intrinsically good). I also concur with Moore about the crucial point that divides retributivists from consequentialists: our judgments about these respective states of affairs do not depend on utilitarian gains.”); Husak, *Retribution*, *supra* note 16, at 984-85 (“The only benefit of punishing harmless wrongdoing is that so doing makes ‘the world . . . a morally better place.’ But there are many ways to improve the world; exacting retributive justice on harmless wrongdoers is very low on any sensible list of priorities.”) (citations omitted).

<sup>49</sup> *See* BARTON, *supra* note 21, at 10; BOONIN, *supra* note 10, at 85; FLETCHER, *supra* note 11, at 415; Dolinko, *supra* note 37, at 1626; Rawls, *supra* note 10, at 5; Mackie, *supra* note 13, at 4.

<sup>50</sup> *See* BOONIN, *supra* note 10, at 149-52; Bradley, *supra* note 16, at 20; Finnis, *supra* note 21, at 99; Hershenov, *supra* note 12, at 86-94; Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475, 483 (1968); Ristroph, *supra* note 16, at 1301. *But see* Mackie, *supra* note 13, at 5 (“It is often suggested that by being punished, a criminal pays a debt to society. But how can this be, unless what he suffers does some good to society? Reparation might be justified in this way, but reparations are clearly different from punishments . . .”).

<sup>51</sup> *See* BARTON, *supra* note 21, at 5; MOORE, *supra* note 10, at 150-51; Christopher, *supra* note 10, at 864 n.113; Dais, *supra* note 17, at 112; Dolinko, *supra* note 37, at 1642; Hershenov, *supra* note 12, at 79, 91-92; Morris, *supra* note 50, at 485-86; Jeffrie Murphy, *Moral Death: A Kantian Essay on Psychopathy*, 82 *ETHICS* 284, 291-92 (1972); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *NW. U. L. REV.* 1, 5, 30-31 (2003).

<sup>52</sup> *See* Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 *NEB. L. REV.* 1, 19 n.68 (2012); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 *AM. CRIM. L. REV.* 1329, 1333 (2009); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *COLUM. L. REV.* 269, 340 (1996); Ken Levy, *Dangerous Psychopaths: Criminally Responsible But Not Morally Responsible, Subject To Criminal Punishment And To Preventive Detention*, 48 *SAN DIEGO L. REV.* 1299, 1345, 1363 (2011); von Hirsch, *supra* note 12, at 121.

## 2. Proportionality

There are two kinds of retributivism: *weak* and *strong*.<sup>53</sup> Weak retributivism says that just deserts is a necessary condition of criminal punishment, that criminal punishment cannot be just unless the person punished committed criminal wrongdoing and is being punished *for* that wrongdoing. Strong retributivism says that just deserts (criminal wrongdoing) is a *sufficient* condition of criminal punishment.<sup>54</sup> While weak retributivism is accepted by all but a few radical consequentialists who believe that it is sometimes (or even often) morally permissible to knowingly punish an innocent person,<sup>55</sup> strong retributivism is much more controversial. There are at least two objections against it, two arguments that mere just deserts is not a sufficient condition for just punishment. First, other conditions – especially due process and all the conditions that due process entails – are necessary.<sup>56</sup> Second, there are situations in which a person committed a crime and is afforded due process but still does not deserve punishment, at least by the state. These include situations in which the person committed the crime with a recognized excuse or justification, the person has already been punished proportionately by non-state actors,<sup>57</sup> the person deserves forgiveness or mercy,<sup>58</sup> or the crime is *de minimis*.<sup>59</sup>

Given the minimality of weak retributivism and the two problems with strong retributivism, I suggest that retributivists adopt a “middle-of-the-road option” – *moderate retributivism*. Moderate retributivism says that (a) it is generally a good thing in itself (not because of any expected consequences) if a person receives her just deserts and therefore that (b) if a person commits a crime, then it is generally a good thing in itself if, after receiving due process, she receives proportional punishment for this crime.

Regarding (b), proportionality is built in to (moderate) retributivism. Once again, retributivism is all about *just* deserts, and justness – or justice – implies proportionality.<sup>60</sup> It is clearly *not* just but

<sup>53</sup> See MOORE, *supra* note 10, at 88-89, 153-154; Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 3 (2009); Duff & Garland, *supra* note 10, at 7; Mackie, *supra* note 13, at 4.

<sup>54</sup> See MOORE, *supra* note 10, at 83, 88, 91, 92, 104-105, 153-154, 173, 180.

<sup>55</sup> See *supra* note 18 and accompanying text.

<sup>56</sup> See U.S. CONST. amend. XIV, § 1 (“... nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>57</sup> See HUSAK, *supra* note 12, at 201-02; Husak, *Retribution*, *supra* note 16, at 972-73; Zaibert, *supra* note 20, at 100.

<sup>58</sup> See discussion *infra* Part V C.

<sup>59</sup> See Husak, *supra* note 14, at 350.

<sup>60</sup> See Rawls, *supra* note 10, at 4-5; von Hirsch, *supra* note 12, at 115.

*unjust* deserts – an injustice to the offender – if she is punished (far) more than her crime merits.<sup>61</sup> So a person who receives 25 years in prison for stealing a \$10 item may legitimately claim that her punishment does not “fit the crime”; that – given the interests, values, and rights that her crime tends to impair and the actual harm suffered by the victim – her crime merits much less punishment.<sup>62</sup> It is also clearly unjust – an injustice to the victim – if the offender is punished far less than her crime merits.<sup>63</sup> So a defendant who is sentenced to only 30 days in jail for a violent rape is not “paying” nearly what he “owes.”

In addition to justice itself, there are a *consequentialist* reason and an *expressivist* reason for proportionality as well. Regarding the former, disproportionate punishment erodes enforcement of, and respect for, the law.<sup>64</sup> To consider an extreme example, suppose that parking tickets were punished by life in prison without parole.<sup>65</sup> At first, it might seem that this kind of law would fully eliminate all illegal parking. And maybe it would – initially. But sooner or later, the conscience of the community would step in and thwart enforcement of this law. The public would stop reporting parking offenses, police would stop writing parking tickets, prosecutors would stop trying recipients of these tickets, and judges and juries would stop convicting parking-ticket defendants – all of them out of fear of helping contribute to grave injustice. Conversely, if serious crimes were under-punished – for example, the statutory sentence for murder were reduced from a maximum of life in prison to a maximum of one year in prison – judges and juries would routinely nullify the statutory limit and recommend far greater sentences.

The expressivist reason for proportional punishment is simple: to convey both to the criminal and to the community just how bad (or grave or serious) her crime was.<sup>66</sup> In general, the “message” conveyed by harsher punishment is that the crime was worse than crimes that receive lesser punishment. Still, it is important to realize that this near-platitude oversimplifies the situation.

Most crimes prescribe a range of punishment, a range that allows for judicial discretion. Three factors determine the statutory ranges: (i) the relative importance of the interests, values, or rights that the crime opposes or impairs; (ii) the punishment that other crimes receive; and

<sup>61</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991).

<sup>62</sup> I leave aside the objection that she *does* deserve life in prison if this is her third felony in a “three-strikes” jurisdiction because this is a different issue. See *Ewing v. California*, 538 U.S. 11, 29 (2003).

<sup>63</sup> See MOORE, *supra* note 10, at 98-102; von Hirsch, *supra* note 12, at 125.

<sup>64</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477-78 (1997); Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2450-51 (1997).

<sup>65</sup> See *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (J. Powell dissenting).

<sup>66</sup> See Hampton, *supra* note 13, at 13; Schopp, *supra* note 12, at 110; von Hirsch, *supra* note 12, at 125.

(iii) the relative “rankings” of these crimes (for example, murder is considered to be worse than burglary and burglary worse than criminal trespass). So, in any given jurisdiction, the range of punishment for murder is going to be harsher than the ranges of punishment for attempted murder, rape, and burglary because, unlike these three other crimes, murder violates the most important interest, value, and right we have – life.

Once the range of punishment has been specified by statute, a judge will determine how much punishment within that range a particular criminal receives. But what determines the particular punishment that the judge picks within this range? The degree of punishment that a judge considers to be proportional to a given criminal act (within the statutory range) will depend on three main factors: (a) the magnitude of harm, if any, caused by the criminal act (for example, a \$100 theft as opposed to a \$5000 theft); (b) various characteristics of the offender (her age, mental condition, history, and reason(s) for committing the criminal act); and (c) any mitigating, exculpatory, or justifying circumstances.<sup>67</sup>

The upshot of all this is that proportional punishment only *partially* communicates the gravity of the crime being punished. Statutory ranges, which are determined entirely by the community’s (legislature’s) estimation of the gravity of the crime in the abstract, are only the starting point, not the end point. For example, in the abstract, we regard rape as a much worse crime than armed robbery. But given the other factors that go in to determining proportional punishment, it may very well be that some armed robbers are punished more harshly than some rapists – even in the same jurisdiction. A defendant found guilty of armed robbery might be given a harsher sentence (say, 15 years) than a defendant found guilty of rape (say, 10 years) because two different judges, or maybe the same judge in two different cases, picked two different points in the different ranges – a lower point in the rape range and a higher point in the armed robbery range – on the basis of different evaluations of the different harms that each crime caused and the different circumstances under which each crime was committed.

### III. Two Reasons Why Retributivism Needs Consequentialism

In this Part, I will offer two arguments for the central thesis of this Article: retributivism does not work – that is, does not succeed in explaining why we punish – unless we supplement it with consequentialism. In Part VI, I will offer yet a third argument for this conclusion.

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<sup>67</sup> See generally von Hirsch, *supra* note 12, at 128-30.

A. *Why Do Retributivists Insist on Inflicting Just Negative Deserts?*

If not for consequentialist reasons like crime minimization, *why* are most people – and all retributivists (by definition) – so concerned that criminals receive the punishment that they deserve in the first place? Retributivists cannot answer this question merely by responding that the state should give *everybody*, not just criminals, their just deserts. There are two reasons why this response would fail.

First, it simply fails to capture a certain psychological asymmetry. We are much more *outraged* to hear that a criminal suspect is acquitted (for example, because of a procedural or evidentiary technicality) or under-punished (for example, receives only a few years in prison for a heinous crime) than to hear that an exceptionally *virtuous* person was not sufficiently rewarded or praised, whether by the state or by anybody else. In fact, we are not really *outraged* that the latter did not receive the recognition and appreciation that she deserves. Instead, we are – at most – mildly disappointed or sad or sympathetic. The point is that whatever emotion we feel, it is much less negative and intense than the emotion (again, outrage) that we feel toward the criminal justice system's comparable failure to give a criminal the punishment that she deserves.

Second, the notion that we are concerned that criminals receive their just deserts because we are concerned that *all people* receive their just deserts is simply not true. The fact of the matter is that the modern state is much more concerned that criminals receive *their* just – negative – deserts than that the exceptionally virtuous receive *their* just – positive – deserts. It has not set up any system or institution that is designed to make sure that the exceptionally virtuous among us receive praise or reward.<sup>68</sup> To be sure, the military honors soldiers who show exceptional bravery, and the government – or at least some government officials – bestow lavish praise from time to time on various individuals who have demonstrated exceptional achievement, generosity, or heroism. But, again, we have no *virtue* justice system to complement our *criminal* justice system, no state-mandated apparatus designed to make sure that the exceptionally virtuous are found and given *their* just deserts (praise and rewards) with the same zeal and solemnity that the *criminal* among us are found and given *their* just deserts (blame and punishment).<sup>69</sup>

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<sup>68</sup> See Mackie, *supra* note 13, at 7. Mackie's question, then, is the mirror-image of the question that I am asking here about retributivism: why do we think that criminal acts merit punishment as a response?

<sup>69</sup> This asymmetrical emphasis on dispensing just *negative* deserts over just *positive* deserts is ironic when we consider that the latter is much easier to justify than the former. See VON HIRSCH, *supra* note 12, at 53.

*B. The First Consequentialist Explanation: Practicability*

Retributivists may respond that it is much more important for the state to see to it that criminals receive their just deserts than that the virtuous receive their just deserts. But it is not clear that they can defend this point without resorting to *non-retributivist* – i.e., consequentialist – considerations.<sup>70</sup> As it turns out, the reasons for the state’s asymmetrical emphasis on dispensing negative desert over positive desert are all consequentialist.

First, when it comes to maximizing protection of our supremely valued interests, which is (as we saw in Part II) one of the state’s main concerns and duties, it is more important that it incentivize compliance with the law than the performance of supererogatory deeds. Second, it is much easier to determine when a criminal law has been violated than when a given act is extremely virtuous. The former is, for the most part, a question of objective fact; the latter is, for the most part, a matter of subjective opinion because it requires two highly subjective judgments – one regarding what the standards of virtue are (in the absence of any “virtue statutes”) and the other regarding whether or not a given act meets these standards. Third, there are (fortunately) many more instances of virtuous activity than there are of criminal activity. As a result, a *virtue* justice system, especially if it was concerned to treat all equally virtuous people equally, would have to be immense – much bigger than the taxpayers could afford – to fulfill the monitoring, evaluation, and decision demands placed upon it.<sup>71</sup>

Again, these are all good explanations of why the state is not nearly as concerned to bestow positive desert as well as negative desert. But they are not *retributivist* explanations; they are not non-consequentialist, desert-based reasons. By itself, then, retributivism fails to explain why the state should be much more concerned to inflict negative desert than to bestow positive desert.<sup>72</sup> So we now have one very good reason why retributivism must be supplemented by consequentialism.

*C. The Second Consequentialist Explanation: Revenge*

There is yet a second reason why retributivism should be supplemented by consequentialism. Most people agree that criminals should receive their just deserts. But retributivists go further than merely subscribing to this proposition. They have made this the very centerpiece of their theory. They have assigned a higher status and significance to just deserts than they have to any consequentialist

<sup>70</sup> See Mackie, *supra* note 13, at 4; Rosebury, *supra* note 8, at 18-19.

<sup>71</sup> See HUSAK, *supra* note 12, at 205.

<sup>72</sup> See Hampton, *supra* note 12, at 235-36.

desiderata (such as deterrence). The question is: why? Why are just deserts so important? Why do retributivists feel so strongly that criminals should get what they deserve?

Retributivists are likely to answer these questions with a single word: *justice*. They want criminals to get their just deserts because they want *justice* – pure and simple. But the kind of justice retributivists (say they) want is not *distributive* justice, *procedural* justice, or *restorative* justice. The kind of justice that retributivists want is – as their label suggests – *retributive* justice. What, then, is retributive justice? What does *retributive justice* mean? It cannot mean simply that criminals receive their just deserts. There are two reasons. First, this explanation would fail to distinguish retributive justice from either distributive justice or restorative justice; both of these kinds of justice also involve giving people their just deserts. Second, it would amount to a circular explanation. If retributive justice just meant criminals getting their just deserts, then to say that retributivists want criminals to get their just deserts because they want justice is just to say that retributivists want criminals to get their just deserts because they want criminals to get their just deserts. This is not an explanation; this is an unhelpful tautology.

It remains to be explained, then, what retributive justice even means (beyond criminals receiving their just deserts) and why retributivists want it. My answer to these questions is that there is nothing about the notion of just deserts itself that motivates retributivists. In itself, the thesis that criminals should get their just deserts is a mere truism, a virtually empty abstraction. Nor is it merely a brute, inexplicable fact that retributivists want criminals to receive their just deserts or regard criminals' receiving their just deserts as an inherent good, a positive value in its own right. The real reason why retributivists so passionately adhere to this otherwise unmotivated abstraction is because a powerful emotion pushes them toward it: *vengeance*.<sup>73</sup>

Retributivists – like many, if not most, human beings – instinctively wish to return harm for (unjustified and unexcused) harm.<sup>74</sup> They – we – feel the urge to hurt another person who has, we feel, unjustifiably and inexcusably hurt us. This desire for revenge is rooted in the instinctive desire to maintain our supremely valued interests against unjustified and unexcused injury by others.<sup>75</sup> So when another

<sup>73</sup> See *supra* note 26 and accompanying text.

<sup>74</sup> See Hershenov, *supra* note 12, at 87; Mackie, *supra* note 13, at 6.

<sup>75</sup> See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (J. Stewart, concurring); BARTON, *supra* note 21, at xiv, 15; OLIVER W. HOLMES, JR., *THE COMMON LAW* 41 (1881); MOORE, *supra* note 10, at 99; PINKER, *supra* note 26, at 529-30; JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 149, 151-52 (1882); Jones, *supra* note 21, at 1049 (“The desire for revenge ‘is a current, deep American trait.’ . . . [R]evenge is a natural human trait, one that seeks the expression of a deep, primitive desire to impose a counter bad act upon those

person frustrates this desire, we naturally react with such negative feelings as anger, resentment, indignation, and (sometimes) humiliation.<sup>76</sup> These feelings are not pleasant or comfortable. Like any other kind of emotional suffering, we would prefer to discharge them as quickly as possible.<sup>77</sup> And the most effective *short-term* way to achieve this catharsis, to alleviate or eliminate this emotional distress, is by acting upon the urge to injure the *perpetrator's* supremely valued interests in turn, to show *her* how it feels.<sup>78</sup> We feel tremendous satisfaction in putting the perpetrator in the same position that she put *us* (the victim). This turning of the crime against the perpetrator helps to restore our sense of emotional equilibrium.<sup>79</sup> And here's the rub: because achieving this emotional equilibrium, this righteous satisfaction, is retributivism's goal or objective, retributivism – once again – needs consequentialism. Call this proposal that vengeance motivates both retributivism and (therefore) criminal punishment the *Motivation Thesis*.

One might immediately object that the Motivation Thesis is just wrong, that criminal punishment is not motivated by vengeance any more than parental punishment is motivated by vengeance. When a (good) father F punishes his son S – say, for hitting his older sister – F's purpose is not at all to exact revenge against S. While he may or may not be angry with S, a desire to alleviate this anger by hurting S is not what motivates F to give S a “time-out” or ground him. (And if this desire does motivate F, then we may seriously call into question his parenting and his character.) Instead, F is motivated by two other desires: (a) the desire to educate S and (b) the desire to reform S. Regarding (a), F wishes to teach S – through the “language” of punishment – that he should not hit his sister. Regarding (b), F hopes that the punishment will help to deter this kind of behavior – violence against others – in the future. The same, then, can be said of criminal punishment. It is designed solely to educate and reform, not to avenge.<sup>80</sup> Put in slightly different terms, criminal punishment, like parental

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who have caused harm. When a person has been a victim of cruelty, it is her natural inclination to seek to victimize the victimizer. The criminal justice system satisfies this desire by allowing the victim and society to act upon their revenge through the imposition of harsh criminal sentences.”) (citations omitted).

<sup>76</sup> See ALEXANDER & FERZAN, *supra* note 29, at 6; BARTON, *supra* note 21, at 13; FRENCH, *supra* note 17, at x, 81; MOORE, *supra* note 10, at 141, 164; RACHEL SIMMONS, *ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS* 139 (2002).

<sup>77</sup> See PINKER, *supra* note 26, at 530-31.

<sup>78</sup> See BARTON, *supra* note 21, at 17-18.

<sup>79</sup> See *supra* note 22 and accompanying text.

<sup>80</sup> See BOONIN, *supra* note 10, at 180-84; Hampton, *supra* note 12, at 215, 237-38. *But see* BOONIN, *supra* note 10, at 184-92 (critiquing the moral-education approach); HUSAK, *supra* note 12, at 88 (same).

punishment, is motivated solely by consequential concerns, not by retributivist concerns; solely by the expected good consequences of punishment, not by the gratifying prospect of seeing the guilty party finally “get his.” It is easy to see why this is sometimes referred to as the “paternalistic” theory of punishment.<sup>81</sup>

There is something to the paternalist theory. Certainly, criminal punishment for *harmless* crimes – for example, drug possession, resisting arrest, insider trading, and counterfeiting – is similar to parental punishment insofar as the sole purposes of both forms of punishment (with respect to the punished individual) are to educate and reform, not to avenge. (I will develop this point further in Part VI.) But criminal punishment for *harmful* crimes differs from parental punishment in at least two ways. First, harmful crimes are generally much more serious than most children’s worst wrongdoing. Of course, if a child commits a crime – or an act that would be criminal if she were old enough – then parental punishment may not be sufficient; the state may very well need to get involved. But if the child’s anti-social action does not rise to the level of a crime (or serious tort), then – by definition – it is not as serious (harmful) as even a criminal misdemeanor. And corresponding to these different levels of harm are different attitudes. While the parent’s attitude in punishing the “lower-level” anti-social activity is purely consequentialist, the criminal justice system’s attitude – or at least the attitude of various people in the criminal justice system (especially the prosecutors and the victims) – toward the “higher-level” anti-social activity is partly retributivist.

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<sup>81</sup> See, e.g., HUSAK, *supra* note 12, at 88; Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981), reprinted in A READER ON PUNISHMENT, *supra* note 10, at 95. According to supporters of the paternalistic theory of punishment – or *rehabilitationists* – punishment is possibly the most effective means of reforming a criminal – i.e., of getting the criminal to regret her criminal act, feel remorse for her victim, internalize the moral norms of the law, and thereby convert her into a law-abiding member of society. See, e.g., Margaret M. Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 L. & PHIL. 25, 44, 46 (1987); PINKER, *supra* note 26, at 540; Hampton, *supra* note 12, at 237; Morris, *supra*, at 98-99. Some scholars, however, oppose rehabilitation as a purpose or justification of criminal punishment on the grounds that it is overly paternalistic, “coerced therapy” that is inflicted on the offender “for her own good.” See, e.g., FLETCHER, *supra* note 11, at 415-16; MOORE, *supra* note 10, at 86-87; Murphy, *supra* note 51, at 291-92. *But see* Dolinko, *supra* note 37, at 1645-46 (arguing that, contrary to retributivists, rehabilitation is not necessarily any more demeaning or disrespectful than punishment). Whether or not retributivists regard rehabilitation as a goal of punishment depends on how vengeful they are; the more they want the offender to “pay” for her crime, the less they tend to value her becoming a better person. At its extreme, the retributive sentiment tends to work against the concern for rehabilitation, as is reflected in such statements as “After what she did, she does not *deserve* a second chance.”

Second, (good) parents stand in a very different relation to their children than does the criminal justice system to criminals.<sup>82</sup> Because the former generally love their children, they are much less likely to want to see their children hurt for *any* reason, including avenging the harm that they caused. On the other hand, the criminal justice system – especially the prosecutors and the victims – typically do not stand in a loving, nurturing relationship with offenders. On the contrary, victims often bear nothing but anger and resentment toward criminals. And prosecutors generally attempt to represent and vindicate these attitudes. To be sure, there are situations when victims do stand in a loving relationship with their assailants. Perhaps the best example is domestic violence.<sup>83</sup> Victims of domestic violence are much more likely than most other kinds of victims to forgive perpetrators, blame themselves or the police, and withdraw their complaints.<sup>84</sup> But this kind of situation is the exception, not the rule. In the vast majority of cases, cases in which there is no loving relationship between the perpetrator and the victim, forgiveness, self-blame, and withdrawal of complaints are much less likely than anger, resentment, and a vengeful desire to see the perpetrator “get his” for what he did.

#### *D. Why Revenge Is Not Irrational*

One might argue that revenge is *nonsensical* or *irrational* because it tries to do what is impossible – namely, annul or undo the harm that the criminal inflicted by turning the same kind or degree of harm back on the criminal.<sup>85</sup> This annulling or undoing is impossible because the past simply cannot be undone.<sup>86</sup> Even if the victim makes a

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<sup>82</sup> See BOONIN, *supra* note 10, at 190-92.

<sup>83</sup> Sexual violence too. See Marcus Berzofsky et al., *Female Victims of Sexual Violence, 1994-2010*, BUREAU OF JUSTICE STATISTICS, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4594>.

<sup>84</sup> See Dennis Feeney, Jr., *Ensuring the Domestic Violence Victim a Means of Communication: Why Passing Legislation That Criminalizes Impairing Another's Communication Is the Next Logical Step in Combating Domestic Violence*, 32 SETON HALL LEGIS. J. 167, 186, 186 n.87 (2007); Diksha Munjal, *Intimate Partner Violence – Is There a Solution?*, 19 DUKE J. GENDER L. & POL'Y 347, 357 (2012).

<sup>85</sup> See *supra* note 22 and accompanying text; see also Mackie, *supra* note 13, at 5 (attributing this position to Hegel and Kant).

<sup>86</sup> See MOORE, *supra* note 10, at 110; Dais, *supra* note 17, at 107; Finnis, *supra* note 21, at 102; Hampton, *supra* note 12, at 236; Mackie, *supra* note 13, at 5; see also Beth Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 632-33 (1998) (“The death penalty cannot bring back the dead . . . Wounds that cut as deep as these never will be healed by the death of another. That is simply not the nature of the healing

full recovery, which is not always the case, she still suffered at least some physical, psychological, or economic harm and had to spend at least some valuable time and effort recovering from it.<sup>87</sup> Indeed, the objection continues, undoing the crime is impossible even in situations where restitution can be made because there is still irreversible *moral* harm, the harm of having one's rights, humanity, dignity, and autonomy violated.<sup>88</sup> If, for example, a thief steals \$5000 from a victim and is later caught, the \$5000 can, and might very well, be returned to the victim. But because the initial violation, the stealing itself and the disrespectful attitude that it represents, is in the past, it cannot be undone.

To be sure, it *does* seem rather strange that revenge should ever bring about any emotional equilibrium in the first place. It is strange because the emotional equilibrium does not seem to reflect any metaphysical equilibrium. But this appearance is not quite right. When the state punishes a criminal, it is not undoing the crime. That *would* be establishing metaphysical equilibrium because it would involve changing the past, which is impossible. Rather, the state is reducing the criminal's rights and powers to roughly the same degree that he previously reduced the victim's rights and power when he committed the crime. While the perpetrator indicated through his crime that his rights and interests were superior to his victim's criminal punishment negates that message and puts the perpetrator back into his non-superior – equal – position. By restoring the equality between perpetrator and victim, by communicating that the perpetrator's rights and interests are not superior to his victim's rights and interests, criminal punishment helps to restore not *metaphysical* equilibrium but *moral* and *social* equilibrium.<sup>89</sup>

The *emotional* equilibrium then follows this restoration of the moral and social order. Given our peculiar moral psychology, the victim's knowledge that the criminal has been put as far below his prior baseline as he previously put the victim below her baseline itself helps to make her feel better about the entire situation. So revenge is *not* irrational. It does *not* motivate us to try to undo what cannot be undone. On the contrary, it very *rationaly* motivates us to try to do the next best thing to undoing the harms – namely, undoing the moral and social inequality and bad feelings that these harms cause and represent. At the

process, and it is not the purpose or the intent of the criminal justice system.”) (citations omitted).

<sup>87</sup> See Hershenov, *supra* note 12, at 87.

<sup>88</sup> See Fletcher, *supra* note 21, at 102.

<sup>89</sup> See *supra* note 21 and accompanying text. See also Finnis, *supra* note 21, at 102 (“[T]he purpose of retributive punishment is forward-looking, and not in vain. Punishment does not negate the crime, but it does negate, cancel out, the advantage the offender gained in the crime—the advantage not necessarily of loot or psychological satisfaction, but of having pursued one's own purposes even when the law required that one refrain from doing so.”).

time that the offender committed the crime, she enriched herself in some way – usually emotionally or financially – at the expense of the victim. Retaliation in the form of criminal punishment helps to *compensate* for this unjust enrichment by *justly* enriching the victim – specifically, her relative moral and social status and emotional state – at the expense of the criminal.<sup>90</sup>

### *E. Our Peculiar Moral Psychology*

In the second sentence of the previous paragraph, I attributed our vengeful satisfaction at seeing criminals punished to “our peculiar moral psychology.” My point is that our widespread belief in retributive justice is very much a reflection of our general moral psychology. Specifically, our desire to achieve retributive justice – just deserts – is not *sui generis* but is itself motivated by a deeper desire, the desire for revenge.<sup>91</sup> We believe that it is (a) just to punish criminals in proportion to the moral severity of their crimes and (b) unjust not to punish them or to under-punish them *not* because (a) and (b) are self-evident principles or because dispensing just deserts is *obviously* a good end in itself but because we are the kind of beings who desire (proportional) revenge in response to culpable causation of harm. Without this particular, if not peculiar, psychological configuration, retributive justice would not be justice in the first place. This is a point that most retributivists, who tend to work entirely within the normative, non-psychological framework of just deserts, simply miss.

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<sup>90</sup> See WRIGHT, *supra* note 23, at 339; Bradley, *supra* note 16, at 23. Importantly, my statement that the offender unjustly enriches herself at the expense of her victim refers not merely to the kinds of enrichment that most would recognize as valuable but rather to whatever the offender herself considers valuable, even if it is just enhanced pleasure. In this way, my point differs from Herbert Morris’s otherwise superficially similar point that offenders unfairly reap benefits from their crimes that most other people deny themselves by complying with the law and therefore that the state must punish them in order to restore a level playing field. Morris, *supra* note 50, at 478. The problem that Morris’s theory runs into (and my point here does not) is that it accounts only for a narrow group of crimes – namely, crimes yielding benefits that most law-abiding citizens *recognize* as benefits (for example, money or insider information). It does not capture most other crimes – namely, crimes that benefit (i.e., please) the people who commit them but would not benefit (please) most law-abiding people if they were to engage in the same activity (for example, rape or kidnapping). For similar criticisms of Morris’s benefits/burdens version of retributivism, see BOONIN, *supra* note 10, at 122-143; FLETCHER, *supra* note 11, at 417-18; HUSAK, *supra* note 12, at 86-87; Dolinko, *supra* note 10, at 414-16; Hampton, *supra* note 13, at 4-5; Hershenov, *supra* note 12, at 82-84; Mackie, *supra* note 13, at 5; Ristroph, *supra* note 16, at 1299; von Hirsch, *supra* note 12, at 116-18.

<sup>91</sup> See *supra* note 75 and accompanying text.

Of course, we can certainly *imagine* intelligent beings who react to crime – that is, to deliberately inflicted injuries against their supremely valued interests – either (a) with the same anger, resentment, etc. but without a corresponding urge to retaliate or (b) *not* with anger, resentment, etc. (and therefore not with a corresponding urge to retaliate) but rather with sadness, regret, indifference, resignation, or forgiveness. Indeed, we need not look to other species, extraterrestrial or earthly, to find these non-vengeful beings. Some of them are *human*. People like Mother Theresa, Martin Luther King, Jr., Nelson Mandela, and Mahatma Gandhi come to mind.<sup>92</sup> How, then, do we account for this state of affairs? If, as I am suggesting, vengeance is instinctive and therefore universal among human beings, why do some, if not many, humans react to some crimes with non-vengeful feelings?

There are several reasons. First, to say that vengeance is our peculiar instinctive response to victimization is *not* to say that it cannot be overridden by more powerful impulses or emotions that the situation may trigger. Indeed, it is likely that most of us have *sexual* instincts. But this hardly means that every situation – even provocative ones – will equally trigger these instincts. Other forces such as socialization or stress may counteract them. Second, in many situations, people are too emotionally distanced from the victims. Even the most horrific crimes rarely move most of us because we do not know the victim, and we have (unfortunately) heard about too many other anonymous victims to invest our emotions in any particular one of them.<sup>93</sup> Third, to say that vengeance is a powerful human instinct is *not* to suggest that it is deeply rooted in all human beings to the same degree. Some are more vengeful than others. Fourth, we can *unlearn* revenge, just as we can unlearn, or at least learn to control, most other natural instincts. And this fact only proves rather than refutes the point. The natural instinct was already there; otherwise, there was nothing to be unleashed or controlled in the first place.

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<sup>92</sup> So does Viktor Frankl, one of the few survivors of the Nazi concentration camps. According to William J. Winslade, Frankl “believed strongly in reconciliation rather than revenge; he once remarked, ‘I do not forget a good deed done to me, and I do not carry a grudge for a bad one.’ Notably, he renounced the idea of collective guilt. Frankl was able to accept that his Viennese colleagues and neighbors may have known about or even participated in his persecution, and he did not condemn them for failing to join the resistance or die heroic deaths. Instead, he was deeply committed to the idea that even a vile Nazi criminal or a seemingly hopeless madman has the potential to transcend evil or insanity by making responsible choices.” William J. Winslade, *Afterword*, in VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* 162 (1959).

<sup>93</sup> See Bradley, *supra* note 16, at 21.

*F. Nozick's Distinctions Between Retribution and Revenge*

The Motivation Thesis, which (again) says that vengeance motivates both retributivism and (therefore) criminal punishment, should strike the reader as both trivial and controversial. It is trivial to the extent that the definitions of revenge and criminal punishment are so similar. While criminal punishment is the intentional infliction of harm, deprivation, or suffering by the state in return for a proven violation of its criminal laws,<sup>94</sup> revenge is a desire to inflict – or the infliction itself of – harm, deprivation, or suffering in return for a perceived wrong or injustice.<sup>95</sup> Given these two definitions, it is hardly surprising to learn that the latter (revenge) helps to motivate the former (criminal punishment).

But the Motivation Thesis is still controversial. Despite the similarity just noted between the definition of criminal punishment and the definition of revenge, most – including retributivists – regard revenge and criminal punishment with opposite attitudes. While most believe that the institution of criminal punishment is a good thing (in theory if not also in practice), they also think that vengeance is simply wrong, something “primitive,” “mindless,” “barbaric,” “base,” “animal,” or “cruel.”<sup>96</sup> They argue that while we may be able to understand victims’ – and society’s – vengeful desire to retaliate against criminals, it is still wrong for society to *act* on this feeling. We should no more act on it

<sup>94</sup> See discussion *supra* Part II.A, note 30, and accompanying text.

<sup>95</sup> See RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (defining *revenge* as “the act of revenging; retaliation for injuries or wrongs; vengeance. . . the desire to revenge; vindictiveness.”); see also Epaminontas E. Triantafilou, *In Aid of Transitional Justice: Eroding Norms of Revenge in Countries with Weak State Authority*, 10 UCLA J. INT’L L. & FOREIGN AFF. 541, 546 (2005) (“I define revenge as a response to an actual or perceived harm. The manner of such response explicates, in the eyes of the average person, the connection between the harm and the response. Furthermore, such a response confers on the responder the feeling or the perception of a counterbalancing benefit to himself.”); PINKER, *supra* note 26, at 530 (“Revenge is, quite literally, an urge.”).

<sup>96</sup> See BARTON, *supra* note 21, at 9; HART, *supra* note 16, at 234-35; MURPHY, *supra* note 24, at 3; VON HIRSCH, *supra* note 12, at 46; Timo Airaksinen, *Commentary: ‘Against Retributivism’: An Evaluation*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 10, at 101, 102-03; Christopher, *supra* note 10, at 848-49; Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 438-39 (2008); Hershenov, *supra* note 12, at 86-87; Markel, *supra* note 16, at 1429-30; Zaibert, *supra* note 20, at 117-18; see also Steiker, *supra* note 44, at 30 (“Once . . . determinations of culpability are made by law, they reinforce social and systemic tendencies toward attitudes of smugness and even satisfaction in punishing ‘evil’ that are always latent in a society with deeply rooted religious attitudes toward personal responsibility for sin.”).

than we should act on any other understandable but ignominious motive. Given this stark difference in attitudes toward criminal punishment and revenge, it seems difficult to maintain that the latter motivates the former.

Perhaps the most prominent defender of this view is Robert Nozick. Nozick argues that criminal punishment bears a much closer relationship to *retribution* than to revenge. While these two words are often taken to be synonymous, Nozick makes five distinctions between them:

1. Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong.
2. Retribution sets an internal limit to the amount of the punishment, according to the seriousness of the wrong, whereas revenge internally need set no limit to what is inflicted. . . .
3. Revenge is personal: ‘this is because of what you did to my \_\_\_\_\_’ (self, father, group, and so on). Whereas the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution.
4. Revenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done. . .
5. There need be no generality in revenge. Not only is the revenger not committed to revenging any similar act done to anyone; he is not committed to avenging all done to himself. . . . Whereas the imposer of retribution, inflicting deserved punishment for a wrong, is committed to (the existence of some) general principles (*prima facie*) mandating punishment in other similar circumstances. . . .<sup>97</sup>

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<sup>97</sup> ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366-68 (1981); *see also* FLETCHER, *supra* note 11, at 416-417 (“Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed. It is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust.”); HAMPTON, *supra* note 21, at 138 (“[W]e can appreciate how close [retribution and revenge] are (so that many victims may slide, unaware, back and forth between them). Both responses involve the desire to inflict pain as a way of mastering another, and both see such mastery as making a point about the relative value of offender and victim. But the point each wants to make is different. The vengeful hater masters the offender either to make the offender low in rank in order to elevate herself or to reveal the offender as low in rank and thereby reveal herself as higher . . . The retributivist, on the other hand, wants incorrect evidence of superiority denied and the victim’s value reaffirmed. The punitive mastery of the wrongdoer is perceived not as a competitive victory that elevates the victim but, rather, as a

If Nozick were correct, then one might very well conclude from these distinctions that, contrary to the Motivation Thesis, it is wrong, if not conceptually incoherent, to talk about the *state's* exacting *revenge* for an offender's crime. On this view, only the victim of the crime or her allies – i.e., *non-state* actors – can exact *revenge*. What the *state* exacts when it punishes crimes is *retribution*.<sup>98</sup>

This Nozickian objection to the Motivation Thesis, however, warrants several responses.<sup>99</sup> First, thus stated, it is merely a semantic point. When the *state* exacts revenge, we call it one thing (*retribution*); when a *private citizen* exacts revenge, we call it something else (simply *revenge*). Even if this semantic point is correct, it fails to rule out my *substantive* point – the Motivation Thesis – which, again, says that criminal punishment is generally *motivated* by vengeance against

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denial of the wrongdoer's claim to elevation over . . . the victim."); Bradley, *supra* note 16, at 20-21 (distinguishing between retribution and revenge, at least an interpretation of revenge as barbaric); Brudner, *supra* note 21, at 95-96 ("We can say . . . that the necessary implication of A's intentional infringement of B's right is a negation of his own right to liberty . . . This implication may be brought home to A through the medium of B's outraged feelings, or it may be executed by someone who disinterestedly wills the equal freedom of all persons. In the former case, retribution is revenge; in the latter case, it is punishment."); Finnis, *supra* note 21, at 102 ("Retributive punishment . . . is . . . remote indeed from revenge. Punishment cannot be imposed by the victim as such. Indeed, it cannot rightly be imposed on behalf of the victim as such, but only on behalf of the community of citizens willing to abide by the law."); Hershenov, *supra* note 12, at 86 (rejecting the view "that retribution is really revenge, though often disguised.").

<sup>98</sup> See HUSAK, *supra* note 12, at 200 n.103.

<sup>99</sup> See also BARTON, *supra* note 21, at 56-68 (arguing that none of Nozick's distinctions between revenge and retribution are correct); Rosebury, *supra* note 8, at 3 (arguing that Nozick's fourth distinction is "surely wrong"); Zaibert, *supra* note 20, at 92-114 (arguing that Nozick's distinctions fail to show that punishment differs in any meaningful way from revenge); *id.* at 117-18 ("What I have criticized is the philosophical thesis which asserts that punishment and revenge are different by somehow attributing to revenge all sorts of bad features . . . features which, by means of some sort of euphemistic alchemy are absent in punishment. The typical story goes roughly like this: only the emotions experienced by the avenger are vicious, only avengers unauthorizedly and inconsistently inflict disproportionate, grave harm in response to very minor slights. . . . I hope to have succeeded in showing, first, that avengers need not always conform to this story, and, second, that punishers are not exempt from conforming to it. To have ugly, base emotions, or to exaggerate one's concern for justice so much as to corrupt it, is not the monopoly of avengers. . . . The contrast between punishment and revenge in terms of justice versus barbarism, which in the end is what all these maneuvers amount to, can only be drawn if, in the final analysis, it is stipulated that punishment is just by definition, unlike revenge which is stipulated to be unjust by definition.").

criminals for their criminal acts. None of Nozick's five distinctions explicitly rules out this possibility.

Second, a supporter of Nozick's distinctions between retribution and revenge might argue that they help to show not merely the descriptive point that retributive punishment and revenge have different characteristics but also the normative point that retributive punishment is *morally superior* to revenge; that while retributive punishment is just, revenge is unjust; that while revenge has a base goal or motivation, retributive punishment has a much nobler goal or motivation. But Nozick's distinctions simply do *not* demonstrate this point. Nor do they show that retributive punishment is motivated by something *other* than vengeance. Indeed, the very *meaning* of the word *retribution* – namely, a “requital according to merits or deserts, especially for evil”<sup>100</sup> – suggests as much. So it is not at all clear from Nozick's distinctions how retribution is supposed to be morally superior to revenge.

Third, contrary to Nozick, there are two very good reasons (in addition to those I offered in Part III.C) to think that, even though criminal punishment is inflicted by the state rather than by private citizens, it is still motivated by vengeance. First, one reason why it is the *state* – never the victim – that prosecutes criminals is because crimes are considered to victimize not merely the individual victims themselves but all individuals collectively. The *society* is victimized by the crime insofar as the criminal is breaking *its* law and thereby implicitly denouncing *its* moral values.<sup>101</sup> So, even by Nozick's distinctions above, the state is exacting *revenge* – revenge against the criminal for victimizing *it*.

The second reason for thinking that criminal punishment is motivated by vengeance is that the state is acting *in place of* the victim. It is helping the victim to do what she would ordinarily be powerless to do on her own. It is, in this sense, the victim's *avenging agent*, working *on her behalf* to make sure that the person who victimized her gets the

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<sup>100</sup> RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY.

<sup>101</sup> See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 261 (1963); FLETCHER, *supra* note 21, at 39; Bradley, *supra* note 16, at 23, 25; Colby, *supra* note 96, at 438 n.198; Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 990-91 (1985); Markel, *supra* note 16, at 1448-49; Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1524 (2000). *But see* MURPHY, *supra* note 20, at 92-93 n.5 (“[W]e hear much talk about crimes being offenses against the state or community as a whole—against the general rules of order in which all citizens have an equal stake. Because of this, it is often thought that all citizens have the same stake in demanding punishment for crime and that individual victims, therefore, should play no special role. But this is too simplistic. The rapist may be a free rider on the legal compliance of all of us, but only some very unfortunate subset of us suffer from him in ways that seriously undermine our actual well-being.”).

punishment that he deserves *for* victimizing her. By assuming victims' burden of punishing the criminals who harm them, the state shows that it shares and affirms the victim's motivations, that it *also* wants revenge for violations against its "client."<sup>102</sup>

#### IV. The Justification Thesis

Despite my responses to Nozick's five distinctions between retribution and revenge in the previous Part, one might argue that this is all sophistry, that revenge is obviously just plain wrong and therefore has no place in our criminal justice system. I offer two responses to this point. First, as a psychological matter, retributivists who think that their thirst for just deserts is *not* vengefully motivated may just be *in denial*. Again, they may be thinking that revenge is something bad and therefore cannot admit, either publicly or to themselves, to having vengeful feelings, at least not in the context of their support for giving criminals their just deserts. Second, if this first point is correct, retributivists need *not* feel this way about revenge in the first place. This all-too-common assumption that revenge is just plain wrong needs to be challenged. Of course, revenge can be ugly. Below, I will discuss what is undeniable: that revenge can be unjustified, misplaced, or excessive. But revenge also has a *good* side. The ultimate task of this Part is to bring this good side out.

Specifically, I will defend what I call the *Justification Thesis*. While the Motivation Thesis says that revenge helps to *motivate* criminal punishment, the Justification Thesis says (even more controversially) that revenge helps to *justify* criminal punishment. According to the Justification Thesis, revenge that is prompted by genuine injustice is a very *good* thing; retributive justice just *is* righteous vengeance.<sup>103</sup> I will start by showing that the arguments purporting to show that revenge is an unmitigated evil are weak. I will then argue – more positively – that revenge is not only morally permissible but also morally justified and therefore that the criminal justice system *should* reflect, as it does, this (peculiar) feature of our moral psychology.

One thing I should make clear at the outset is that I am not guilty of the "naturalistic fallacy." That is, I am not reasoning from the way things are to the way things ought to be. I recognize that even if the Motivation Thesis is correct, it does not follow that the Justification Thesis is also correct; that even if I am correct that vengeance is (a) a

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<sup>102</sup> See FLETCHER, *supra* note 21, at 37-38; Fletcher, *supra* note 21, at 110; Markel, *supra* note 16, at 1445-46; Rosebury, *supra* note 8, at 13.

<sup>103</sup> See BARTON, *supra* note 21, at xiv, xv, xvi; HOLMES, *supra* note 75, at 41; PINKER, *supra* note 26, at 538; Hershenov, *supra* note 12, at 80; *see also* Rosebury, *supra* note 8, at 7, 10 (attributing this position to the sociologist Émile Durkheim and the repudiation of this position to Aristotle and Kant).

natural, instinctive reaction to culpable wrongdoing and therefore (b) helps to motivate criminal punishment, it does not follow that vengeance is a *good* or *right* reaction or that it *should* help to motivate criminal punishment. In fact, one might argue the very converse: that while vengeance is a natural, instinctive reaction to culpable wrongdoing, it is wrong and harmful and therefore we should do whatever we can to resist and overcome it.<sup>104</sup> So the Justification Thesis has not yet been demonstrated. It still requires arguments that are independent of the ones that I have made for the Motivation Thesis. I intend to provide these arguments in this section.

#### A. Arguments against Revenge

Those who think that revenge is morally wrong may not simply *assume* this point, especially when others (such as myself) disagree with it.<sup>105</sup> They need to provide an *argument* for this conclusion.<sup>106</sup> As it turns out, the four main arguments offered against revenge tend to be rather weak.

First, it is argued that religions repudiate revenge.<sup>107</sup> For example, the Bible (Matthew 5:38) encourages a person who has been hit in one cheek to respond not with violence but by turning the other cheek. But this argument is not very persuasive. First, such biblical passages amount to undefended assertions, not reasoned arguments. Second, while other biblical passages also repudiate returning an eye for an eye,<sup>108</sup> some of these – and other – biblical passages endorse *divine* vengeance.<sup>109</sup> Third, not everybody is Christian, no less religious.<sup>110</sup> Arguments that are derived from religion or religious texts will fail to persuade the vast secular among us.

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<sup>104</sup> See *supra* note 24 and *infra* Parts V.A and V.C

<sup>105</sup> See MOORE, *supra* note 10, at 111.

<sup>106</sup> See Rosebury, *supra* note 8, at 20.

<sup>107</sup> See JEAN HAMPTON, *Introduction, Forgiveness and Christianity*, in FORGIVENESS AND MERCY, *supra* note 20, at 10.

<sup>108</sup> See Leviticus 19:18; Mark 11:25; Matthew 26:52; Proverbs 20:22, 24:29; Romans 12:17; 1 Samuel 24:12; 1 Thessalonians 5:15.

<sup>109</sup> See Deuteronomy 28:47, 32:35; Exodus 20:1, 21:24, 34:6; Ezekiel 25:17; Genesis 9:5; Hebrews 10:30; Nahum 1:2; Numbers 31:1; 1 Peter 2:13; 1 Romans 12:19, 13:14; see also FRENCH, *supra* note 17, at x (“[F]rom the Stoic-Christian point of view . . . only God could be both pure enough and knowledgeable enough to administer vengeance in a morally fitting way. Leave it to heaven. Perhaps, but if God can play the part of the avenger, then vengeance cannot be all that bad.”); HAMPTON, *supra* note 107, at 12 (“Jesus . . . is frequently an angry man, reminding one of the Old Testament prophets.”).

<sup>110</sup> See FLETCHER, *supra* note 11, at 417; FRENCH, *supra* note 17, at x.

The second argument against revenge: revenge is impractical because it helps to perpetuate the “cycle of violence.”<sup>111</sup> Indeed, banners and bumper stickers continue to replicate Mahatma Gandhi’s (or at least India’s independence movement’s) maxim, “An eye for an eye makes the whole world blind.” But poignant as this sentiment may be, it is not always true. First, not all revenge involves violence in the first place. Second, as an empirical matter, many acts of private revenge – and most acts of state-imposed revenge (that is, criminal punishment) – terminate the matter; they are not met with further retaliation.<sup>112</sup>

The third argument against revenge: it is often, usually, or always for no good reason (unjustified), against the wrong person (misplaced), or against the right person to a degree that is disproportionate to the severity of that person’s crime (excessive).<sup>113</sup> While revenge certainly *can* be any of these things, the risk that it *will* be any of these things does not count as an argument against revenge itself. It counts only as an argument against “misapplying” revenge; as an argument *not* against revenge per se but against *bad* revenge – that is, revenge that is unjustified, misplaced, or excessive.<sup>114</sup> And there is no good reason to think that all, no less most, revenge is bad.<sup>115</sup> The proper response, then, is not to condemn revenge per se. It is to condemn *unjustified, misplaced, or excessive* revenge.

The fourth argument against revenge: even though tribalism is instinctive, it is also wrong and therefore something that should be resisted and repudiated rather than encouraged. Likewise, then, with revenge. My first response to this argument by analogy, however, is that it relies entirely on the assumption that both tribalism and revenge are instinctive. And being instinctive is hardly sufficient for being wrong; some of our instincts are clearly good or right or moral.<sup>116</sup> So even if tribalism may be wrong, it hardly follows that revenge is also wrong. Tribalism may be wrong for reasons that simply do not apply to revenge.

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<sup>111</sup> See PINKER, *supra* note 26, at 537-38; Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SECURITY J. 145, 166 (2010); Eisnaugle, *supra* note 44, at 210-11, 231; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 602 (2005); Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 97 (2005); William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 767 (1997).

<sup>112</sup> See PINKER, *supra* note 26, at 538; Airaksinen, *supra* note 96, at 105.

<sup>113</sup> See MURPHY, *supra* note 20, at 99-100.

<sup>114</sup> See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); MURPHY, *supra* note 24, at 4. For examples of *bad* revenge, see PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 367 (2008).

<sup>115</sup> See MURPHY, *supra* note 20, at 108; Rosebury, *supra* note 8, at 18.

<sup>116</sup> See, e.g., MCCULLOUGH, *supra* note 24, at 112-33.

Second, it is certainly true that tribalism and (as I just argued above) revenge *can* be wrong. But they are not *always* wrong. On the contrary, there are two reasons to think that they are often *right* (justified). First, both revenge and tribalism have served us humans well. They are expressions of ancient traits that gave us an evolutionary advantage. While tribalism reinforced group solidarity, which promoted individual survival, revenge helped to enforce primitive rules protecting life and property.<sup>117</sup> Second, like revenge (as I will argue in the next two sections), tribalism still has a rightful place in the modern world. We not only tolerate but celebrate people's loyalty and devotion to family, school, community, team, culture, religion, and nation.<sup>118</sup>

I conclude that the extant arguments against revenge are weak. In stark – and ironic – contrast, the arguments *for* revenge are *strong*. I say that this point is *ironic* because, as I mentioned in the Introduction and then again at the beginning of this Part, revenge is normally assumed to be bad. In the next two sections, I will offer two arguments that the desire for revenge in response to criminal wrongdoing is indeed justified and therefore can itself help to justify criminal punishment.

#### B. The First Argument for the Justification Thesis

Whether or not we admit it, most of us accept and embrace revenge in our everyday lives. We only half-jokingly parrot the well-known sayings that “revenge is sweet” and a “dish best served cold.”<sup>119</sup> We often say things like “It serves him right!” and “She had it coming!” Bumper stickers proudly announce (and warn): “I don’t get mad. I get even.”<sup>120</sup> And we spend much of our everyday lives enjoying both fictional and non-fictional accounts of *karma*, *payback*, *the tables being turned*, *settling scores*, *getting even*, and *unpleasant people getting theirs* across widely different contexts. Examples include a dominating sports team’s being crushed; an unfaithful ex-lover’s being cheated on by his or her new spouse; a wicked executive’s losing his wealth; an evil regime’s being toppled; a ruthless corporation’s going bankrupt; a bully’s getting pummeled; and wicked witches being crushed by flying houses and melting into lifeless puddles. Few, if any, of us object to these vengeful

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<sup>117</sup> See MURPHY, *supra* note 20, at 95 n.9; PINKER, *supra* note 26, at 532; Eyal Aharoni, Lisa L. Weintraub, & Alan J. Fridlund, *No Skin Off My Back: Retribution Deficits in Psychopathic Motives for Punishment*, 25 BEHAV. SCI. & L. 869, 881 (2007); Katherine Harmon, *Does Revenge Serve an Evolutionary Purpose?*, SCI. AM., May 4, 2011; Jaffe, *supra* note 13; Mackie, *supra* note 13, at 8-9.

<sup>118</sup> See Zygmunt J.B. Plater, *A Modern Political Tribalism in Natural Resources Management*, 11 PUB. LAND L. REV. 1 (1990).

<sup>119</sup> *But see* FRENCH, *supra* note 17, at 69 (“Vengeance is warm, retribution is cold, poetic justice is frigid.”).

<sup>120</sup> See PINKER, *supra* note 26, at 531.

satisfactions. On the contrary, most of us regard them as delicious, refreshing, and highly entertaining; the stuff of great gossip, tabloids, literature, and movies; and therefore at least morally permissible, if not morally desirable.<sup>121</sup>

Given our acceptance – or at least cheerful toleration – of revenge in everyday life, it is not exactly clear why some still believe that it is morally *impermissible* to consider vengeance as a motivation for criminal punishment. Why do they draw a line between permissible revenge and impermissible revenge at the criminal justice system? Why do they think that vengeful attitudes and actions are generally morally permissible outside the context of criminal punishment but morally impermissible within the context of the criminal justice system? Indeed, if vengefulness toward non-criminals is acceptable in everyday life, then vengefulness toward criminals should be *all the more* acceptable because criminals tend to cause more serious harm.

In response to the questions raised in the previous paragraph, the only two answers to these questions that come to (my) mind do not seem terribly convincing. The first possible answer is that while it is certainly morally permissible to *enjoy* bad people “getting theirs,” it is *not* morally permissible to *give* bad people “theirs.” In other words, while a vengeful attitude is morally permissible, vengefully motivated actions are not. There is, however, no good argument for this position. Morally speaking, if an attitude is justified, an action motivated by that attitude is equally justified; conversely, if an action is not justified, then the attitude is not justified either. It is not at all clear why we should make exceptions to this general rule for vengeance.

A second possible reason for thinking that vengeance has no place in the criminal justice system is that vengeance is harmless *only* when it is “unofficial”; that our vengeful delight at the misfortune that befalls bad but non-criminal individuals is morally permissible *only* because it does not cause any further harm. Conversely, vengeance *does* become harmful when we act on it in the criminal justice system. By unleashing our vengeance *there*, significant harm *is* being done, primarily to convicted criminals.

In response to this second proposal, as I argued in Part IV.A above, revenge is harmful only when it is unjustified, misplaced, or excessive.<sup>122</sup> This is not to say that the criminal justice system does not inflict unjustified, misplaced, or excessive vengeance. Unfortunately, it does. But these mistakes are still much more contained than they would be if private – or *vigilante* – justice were allowed or encouraged.

<sup>121</sup> See BARTON, *supra* note 21, at xiv; FRENCH, *supra* note 17, at 3-64; Hershenov, *supra* note 12, at 90; Zaibert, *supra* note 20, at 84.

<sup>122</sup> This point assumes that suffering does not constitute a harm if it is deserved. See Gabriel Seltzer Mendlow, *Is Tort Law a Form of Institutionalized Revenge?*, 39 FLA. ST. U. L. REV. 129, 130-32 (2011).

Because the state is a more disinterested, less emotionally involved, party than are victims, and because the state has appropriated from victims the role of punisher, criminals are generally punished in a more careful, fair, humane, and proportional manner than they would be if victims themselves were allowed to take matters into their own hands.<sup>123</sup>

### *C. The Second Argument for the Justification Thesis*

Feeling angry, resentful, indignant, and therefore vengeful toward a blameworthy wrongdoer, especially a perpetrator of a harmful crime, is actually *morally superior* to *not* having these feelings because these feelings are ultimately rooted in *sympathy* for the victim and *respect* for her humanity.<sup>124</sup> We are, as Moore suggests, “vicariously injured.”<sup>125</sup> We feel angry, resentful, etc. at the criminal precisely because she harmed the victim, a fellow human being. At the very least, she committed a crime against her victim; this alone constitutes a *moral* harm. And through this criminal act, she also caused her victim fatal, physical, psychological, or economic harm. Again, if we have *moral* sentiments – namely, respect for the victim as a person, a human being whose rights, autonomy, and dignity were violated – we will react with anger, resentment, etc.<sup>126</sup> Because these feelings have moral motivations behind them, they are *moral* reactions.<sup>127</sup> It follows, then, that *not* to react vengefully – to react with, for example, indifference, amusement, (immediate) forgiveness, or even greater sympathy for the perpetrator than for the victim – is actually insulting and therefore *immoral*.<sup>128</sup>

The following hypothetical helps to demonstrate this point.<sup>129</sup> It is a hypothetical of the third kind mentioned in the Introduction: non-punishment with good consequences. Suppose that pharmacologists have synthesized a drug that cures pedophilia. A convicted pedophile

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<sup>123</sup> See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (J. Stewart, concurring); BOONIN, *supra* note 10, at 153; FLETCHER, *supra* note 11, at 417; HOLMES, *supra* note 75, at 41-42; MOORE, *supra* note 10, at 152; MURPHY, *supra* note 24, at 3-4; PINKER, *supra* note 26, at 538, 541; VON HIRSCH, *supra* note 12, at 52; Colby, *supra* note 96, at 441; Rosebury, *supra* note 8, at 9-10, 15, 17; Zaibert, *supra* note 20, at 100. *But see* MOORE, *supra* note 10, at 89-90 n.14 (arguing that prevention of vigilante justice is “not even a prima facie justifying reason for punishment.”); Husak, *Retribution*, *supra* note 16, at 971-74 (arguing that retributive justice can, in principle, be achieved without state involvement).

<sup>124</sup> See Ristroph, *supra* note 16, at 1299-1300.

<sup>125</sup> MOORE, *supra* note 10, at 141.

<sup>126</sup> See *supra* notes 20, 21, and 76 and accompanying text.

<sup>127</sup> See MURPHY, *supra* note 20, at 89-90.

<sup>128</sup> See MOORE, *supra* note 10, at 141, 144, 164; MURPHY, *supra* note 20, at 92; Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 689 (1989).

<sup>129</sup> See MOORE, *supra* note 10, at 97-103.

need take only one small, tasteless 20 mg tablet of “NoPed” with water to immediately and permanently lose all of his illicit sexual desires. Moreover, in addition to being 100% effective, NoPed has proven to be 100% safe. Nobody who takes it will suffer any temporary or permanent side-effects. For this reason, the Food & Drug Administration (FDA) has approved of NoPed as a treatment for convicted pedophiles.

Suppose further that 25-year-old “Pedo” has just been convicted of soliciting and engaging in sexual acts with a 9-year-old girl (“Victim”). Should Pedo’s sentence be a forced administration of NoPed, after which he will be allowed to return to the community? Or even if he takes NoPed, should he still have to spend at least a few years in jail to “pay” for his crimes?

The proponent of the Justification Thesis – call her the *Avenger* – will clearly opt for the latter.<sup>130</sup> She regards Pedo’s moral debt as twofold: not only (a) the physical and psychological harm that Pedo inflicted upon Victim but also (b) Pedo’s malevolent attitude toward both Victim and the law. Regarding (a), Pedo caused injury to Victim’s supremely valued interests, her physical well-being and emotional well-being. Regarding (b), Pedo also caused moral harm; he showed contempt and indifference not only for Victim but also for the law. By treating Victim, a young girl, as a mere means to his own end, sexual pleasure, he made it clear that he simply *did not care* what society thinks is wrong and *did not respect* Victim as a human being with a right against sexual violation.<sup>131</sup> According to the Avenger, we simply should not tolerate this kind of defiance. On the contrary, we should send our own counteractive message right back at Pedo. We should convey to Pedo, with righteous anger, that whatever *he* may think, *society values* Victim and the law and *laments* the fact that Pedo broke it, the harm that Pedo thereby caused Victim, and the cavalier, indifferent, and selfish attitude with which Pedo wreaked all this havoc. The Avenger further maintains that the only way in which society can convey this message with sufficient force is through criminal punishment – in this case, imprisonment. It is at this point that the Motivation Thesis (“payback”) and expressivism (“teaching him a lesson”) come together.<sup>132</sup>

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<sup>130</sup> See PINKER, *supra* note 26, at 538-39; Dolinko, *supra* note 10, at 406-07; Hershenov, *supra* note 12, at 84.

<sup>131</sup> See JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN’S CONSENT SERIOUSLY 230-31 (2005); see also Fletcher, *supra* note 21, at 110 (“Blackmail, theft, embezzlement, all leave a wake of dominance and subordination. Rape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or he otherwise knows her address. Burglars and robbers pose the same threat. . . . It would be difficult to maintain that all crimes are characterized by this feature of dominance. The most we can say is that this relationship of power lies at the core of the criminal law. It is characteristic of the system as a whole.”).

<sup>132</sup> See FRENCH, *supra* note 17, at 84-86; Hampton, *supra* note 13, at 13. The

In short, then, the Avenger will (correctly) rebel against the prospect of Pedo’s victimizing Victim and then suffering no more than a forced administration of a tasteless pill for his crime. Even if we could be certain that all convicted pedophiles would be immediately cured by NoPed, the Avenger will maintain that they would still need to suffer proportional criminal punishment for their pedophilic acts. Suffering criminal punishment is the only way in which they could pay the moral debt that they incurred when (a) they failed to notify the state that they are a danger to children, (b) thereby failed to take the best preventative measure (i.e., NoPed), and (c) ended up, for their own pleasure, selfishly and callously sexually abusing their young victims.

Doug Husak suggests that “it is notoriously difficult to explain why [our natural psychological reaction of disapproval or censure] is widely regarded as” a ‘fitting’ response to criminal behavior.”<sup>133</sup> But if my account above is correct, then we have an explanation of this psychological reaction. We find disapproval to be a fitting response to criminal behavior because (a) criminal behavior either harms or threatens to harm what we value most and (b) the offender thereby exhibits contempt and disregard for our supremely valued interests.<sup>134</sup>

## V. Objections and Replies

In this Part, I will anticipate and reply to three objections – the first two against the Motivation Thesis and the third against the Justification Thesis.

### A. *Objection 1: Criminal Punishment Is Not Motivated by Collective Vengeance*

According to Objection 1, I have contradicted myself. On the one hand, I argued in Part III.E that many members of society do not feel much, if any, emotional reaction to particular crimes or criminals. I said, “Even the most horrific crimes rarely move most of us because we do not know the victim, and we have (unfortunately) heard about too many

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consequentialist is also likely to opt for imprisonment because Pedo’s avoiding imprisonment would likely encourage many not-yet-cured pedophiles to take as many “free bites of the apple” as they could before getting caught.

<sup>133</sup> Husak, *Why Punish*, *supra* note 16, at 456. Eight years later, Husak seemed to have changed his attitude and regarded this “fittingness” as obvious or transparent when he suggested that “there is something fitting or appropriate about reacting with disapproval at the sight of cruelty” and that “the fit we intuit does not really obtain between crime and punishment, but rather between crime (as culpable wrongdoing) and suffering (or deprivation or hardship).” Husak, *Retribution*, *supra* note 16, at 973.

<sup>134</sup> See MCGREGOR, *supra* note 131, at 226-27; Hershenov, *supra* note 12, at 87.

other anonymous victims to invest our emotions in any particular one of them.” On the other hand, I also argued in Part III.C that one of the two primary goals of the criminal justice system, to give criminals what they deserve, is motivated by a desire for revenge against criminals. These two propositions appear to be inconsistent.

**Reply to Objection 1:** They are not inconsistent. To see how they are consistent, we need to recognize two distinctions. First, we need to distinguish between individuals’ reactions to particular instances of criminal wrongdoing and individuals’ attitudes towards criminal wrongdoing generally. A person may feel vengeful toward criminals generally without feeling vengeful toward any particular criminal. Put enough of such people together, and we end up with an institution, criminal punishment, that is motivated by collective, anti-criminal vengeance in a society where most of the individuals do not necessarily feel vengeful toward most of the criminals whom they read or hear about.<sup>135</sup> The institution of criminal punishment, then, symbolizes or represents the collective vengeance just noted as well as the actual, personal vengeance felt by victims, victims’ families, and those members of society who *do* wish to see this or that particular criminal punished.<sup>136</sup>

Second, we need to distinguish between active and dormant vengeance. Most of us do not have much, if any, emotional reaction to the crimes that we read or hear about because, as suggested above, we do not know the victims, no less the perpetrators. Just as importantly, we also believe that the individuals who committed these offenses are more or less being taken care of by the police, prosecutors, courts, and prisons. But if the criminal justice system were somehow to break down and we could no longer be as confident that criminals were being successfully pursued, caught, tried, convicted, and punished, many more people would likely experience much greater fear, anger, and – yes – vengeance.

Consider, for example, neighborhoods in which the police have proven either unhelpful or ineffective at reducing such crimes as drug distribution and gang violence. The majority of law-abiding citizens in these neighborhoods do not generally regard this criminal activity with indifference. On the contrary, they feel considerable anger – both at the criminals for menacing them and at the police for failing to remove this menace. Indeed, once this frustration and anger reaches a critical mass, many of these neighborhoods “band together,” fight back, and do their

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<sup>135</sup> See MURPHY, *supra* note 24, at 2.

<sup>136</sup> See Jones, *supra* note 21, at 1049 (“The centrality of revenge is thus so widespread and pervasive in the criminal justice system that it could be considered one of its central tenets. . . . By not accounting for this desire in their vision of a future criminal justice system, current legal scholars underestimate its role in current punishment.”) (citation omitted).

best to remove the menace themselves, without the assistance of law enforcement.<sup>137</sup>

As the very phrase “fighting back” suggests, these efforts at restoring public order are fueled primarily by anger and vengeance. And this anger and vengeance would not be felt in the first place if the law were already being effectively enforced. It follows that this collective anger and vengeance is already there, silently motivating the institution of criminal punishment. It is just not consciously felt by many, if not most, individuals until this institution fails to operate as usual. Then their – our – “true colors” come out.

### *B. Objection 2: Vengeance Is Too Harsh and Hypocritical*

Jeffrie Murphy was perhaps the most prominent and outspoken advocate not only for retributivism but also for the Motivation Thesis.<sup>138</sup> In 2006, however, Professor Murphy softened his position and referred to himself as a “reluctant retributivist.”<sup>139</sup> Murphy is now reluctant, as opposed to enthusiastic, about retributivism because he agrees with Nietzsche that retributivism *without* reluctance – an unhesitant, unwavering, enthusiastic, self-righteous desire to judge and punish – tends to reflect an unhealthy soul, a soul that judges others too harshly and itself too lightly.<sup>140</sup> The unhealthy soul does these things because it fails to take into account *situationism*: the theory that people’s behavior is generated immediately by things generally thought to be in their control – namely, reasons and character – and ultimately by things that are *out* of their control and therefore a matter of luck: upbringing, personality, cultural influences, and environmental circumstances.<sup>141</sup>

So, on the one hand, the unwavering, enthusiastic, self-righteous avenger judges the wrongdoer too harshly because she ignores the factors

<sup>137</sup> See Olena Heu, “Mililani Residents Fight Back After Rash of Burglaries,” available at <http://www.khon2.com/news/local/story/Mililani-Residents-Fight-Back-After-Rash-of-z2ax1qyj90egCQ7ukawnuQ.cspx>; Devon Patton, “Neighborhoods Fight Back in Omaha’s War on Crime,” available at <http://www.kmtv.com/global/story.asp?S=12512210>; Kim Remesch, “Drugs and Crime in Your Neighborhood? Fight Back,” available at [http://www.associatedcontent.com/article/1563895/drugs\\_and\\_crime\\_in\\_your\\_neighborhood.html](http://www.associatedcontent.com/article/1563895/drugs_and_crime_in_your_neighborhood.html).

<sup>138</sup> See generally MURPHY, *supra* notes 26 and 30.

<sup>139</sup> Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 80 PROC. & ADDRESSES AM. PHIL. ASS’N 45, 57 (2006).

<sup>140</sup> *Id.* at 60.

<sup>141</sup> For some comprehensive defenses of situationism, see PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007); Dripps, *supra* note 16; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEORGETOWN L.J. 1 (2004).

outside the wrongdoer's control – the *bad luck* – that helped lead to her wrongdoing. Because bad luck tends to mitigate or excuse, ignoring this element of bad luck in all wrongdoing is not only misguided and uncharitable; it is cruel.<sup>142</sup> On the other hand, the unwavering, enthusiastic, self-righteous avenger judges herself too lightly insofar as she fails to take into account her own *good* luck – the fortuitous circumstance that all of the factors outside her control did not lead *her* to commit the very same bad acts that she now so eagerly wishes to condemn and punish.<sup>143</sup>

Rather than inferring from situationism that criminal punishment is no longer justified, we need to strike a healthy balance between them. And this is exactly what Murphy tries to do when he declares himself a *reluctant* retributivist. He remains a retributivist; to this extent, he still endorses blaming and punishing criminals for their criminal acts. But he is reluctant to fully endorse this position because he recognizes that bad luck plays a role in every criminal act. Murphy refers to these two positions as the “Two Faces of Retribution.”<sup>144</sup>

Given his reluctance, why does Murphy even remain a retributivist to begin with? Why doesn't he abandon it altogether? According to Murphy, while we must acknowledge the bad luck that lies behind every crime, we must still blame and punish the criminal for this crime because bad luck does not *completely* explain why she broke the law. (When it does, the defendant *is* fully excused; too much bad luck is arguably what all the traditionally recognized criminal law excuses – insanity, infancy, hypnotism, involuntary intoxication, automatism, duress, necessity, mistake (of fact or of law), and entrapment – attempt to capture.) To the extent that bad luck does *not* play a part in the explanation of a given criminal's behavior – that is, to the extent that this individual knowingly and voluntarily broke the law without a good excuse or justification – she still *does* deserve to be convicted, condemned, and punished.<sup>145</sup>

**Reply to Objection 2:** In a nutshell, Murphy's point is that while we should indeed judge, blame, and punish, we should always keep in mind when we do this judging, blaming, and punishing that there but for the grace of luck go I. I fully agree with this (situationist) point. But situationism still leaves as much room for vengeance as it leaves for just blame and just punishment. In fact, it *is* the same room. Yes, the criminal suffered from some bad luck. But so did the victim – *at the*

<sup>142</sup> See Murphy, *supra* note 139, at 59. The notion that it is unfair to punish a person for bad luck—something not in the person's control—is a fundamental axiom in philosophy and criminal law. For a comprehensive list of books and articles discussing this axiom, see Levy, *supra* note 8, at 267-68 n.7.

<sup>143</sup> See Murphy, *supra* note 139, at 55-56.

<sup>144</sup> *Id.* at 57.

<sup>145</sup> *Id.* at 57.

*hands of the criminal. So to the extent that the criminal does indeed deserve blame and punishment for knowingly and voluntarily hurting the victim – again, a point that Murphy still endorses, however reluctantly – the criminal equally deserves the victim’s (and society’s) wrath and vengeful desire for retribution.*

*C. Objection 3: Forgiveness Is Superior to Revenge*

According to Objection 3, the Justification Thesis is both false and short-sighted. It is false because forgiveness is morally superior to vengeance. And it is short-sighted because it prioritizes the most effective *short-term* method for discharging the uncomfortable feelings of anger, resentment, indignation, and humiliation over the most effective *long-term* method for achieving this same satisfaction – namely, by patiently waiting until the “rotten” feelings pass, at which point we may feel more inclined to *forgive* the criminal for her transgressions, to *accept* what she did *without* any accompanying feelings of anger or a desire for retaliation. This long-term approach is preferable for the same reasons that long-term planning is generally preferable, all else being equal, to short-term planning: it generates greater overall utility.<sup>146</sup> As compared with vengeance, forgiveness is psychologically healthier, and it does a much better job of promoting reconciliation.

**Reply to Objection 3:** Objection 3 runs into several problems. First, it simply assumes that the opposite of forgiveness – vengeance – is morally wrong. But, as I suggested in Part IV, this assumption is false. So the proponent of forgiveness over vengeance in the context of criminal law is not entitled to it.

Second, because forgiveness often takes a very long time; because most human beings are not that patient; and because many think that some crimes are simply unforgivable, they tend to give up earlier in the process and opt for the short-term method: vengeance, usually in the form of criminal punishment. So a criminal justice system that generally forgave criminals rather than punishing them would seriously frustrate the (vengeful) public. It would, in most cases, fail to achieve the moral, social, and emotional equilibrium that only criminal punishment can yield.<sup>147</sup>

Third, especially for more serious crimes, only the victim, not the state, is in a position to forgive the wrongdoer. It would be arrogant

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<sup>146</sup> See Ken Levy, *On the Rationalist Solution to Gregory Kavka’s Toxin Puzzle*, 90 PAC. PHIL. Q. 267, 277 (2009).

<sup>147</sup> See KATHERINE S. NEWMAN, CYBELLE FOX, DAVID J. HARDING, JAL MEHTA, & WENDY ROTH, RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS 179-81 (2004); Hershenov, *supra* note 12, at 88-89.

and insulting for the state to appropriate this prerogative from the victim, the one who suffered the brunt of the harm.<sup>148</sup>

Fourth, the criminal justice system does not hold us to an impossibly high standard. The criminal justice system does not require us all to be saints. If it did, then most of us would be in jail. Instead, the criminal justice system does just the opposite. It establishes a floor, not a ceiling. It tells individuals within its jurisdiction the minimum that they cannot drop below, not a threshold that they must rise above. We are all free to be jerks; we just cannot be *supreme* jerks. That is, we are all free to do such morally wrong things as lie to friends, send angry emails, and “flip the bird” at other drivers. We will not go to jail for these acts even though they fall below a proper standard of virtue. But we *will* go to jail if we injure or attempt to injure others in much more serious ways – ways that fall below a minimum standard of care that we owe everybody else. So even if forgiveness were indeed the morally correct response to all transgressions, the criminal justice system simply does not endorse or reflect this (supposed) moral truth. It does *not* forgive, or recommend forgiving, people for committing acts that fall below, or directly contradict, the minimum standard of care.<sup>149</sup>

Fifth, a policy of forgiveness would lead to a dramatic increase in crime because it would signal to all would-be criminals that they could now commit crimes with impunity.<sup>150</sup> For this reason alone, it would be very foolish for the state to replace criminal punishment with a policy of forgiveness.

Still, despite the five arguments above, forgiveness may be advisable for the state with respect to some perpetrators in some situations. For example, forgiveness may be appropriate when either the crime is relatively trivial (that is, morally negligible and caused little or no harm)<sup>151</sup> or the criminal had an understandable reason for committing it.<sup>152</sup>

Martha Minow also argues that forgiveness, or at least attitudes and practices “between vengeance and forgiveness,” might be appropriate for victims of mass atrocities (genocide, crimes against humanity, and war crimes). She offers three reasons: (a) there may be so many perpetrators that the post-atrocity transitional state simply lacks the resources to try and punish all of them; (b) trials, which tend to last years, may perpetuate, if not exacerbate, societal divisions, thereby

<sup>148</sup> See LEWIS B. SMEDES, *THE ART OF FORGIVING* 39 (1996); Meyer, *supra* note 101, at 1524-25; Dennis Prager, Editorial, *The Sin of Forgiveness*, WALL ST. J., Dec. 15, 1997.

<sup>149</sup> See Lerman, *supra* note 24, at 1667-70.

<sup>150</sup> See Prager, *supra* note 148.

<sup>151</sup> See Husak, *supra* note 14, at 330.

<sup>152</sup> See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335-36 (1983).

prevent the state from “healing,” and possibly even lead to renewed hostilities; and (c) victims and their families will likely be psychologically healthier if they can eventually bring themselves to forgive rather than let themselves be consumed by insatiable hatred and a desire for retaliation that may just never be realized.<sup>153</sup>

To be clear, this qualified defense of forgiveness in certain, very specific situations should not be confused with a defense of *mercy*.<sup>154</sup> Forgiveness and mercy are distinct in at least two respects. First, forgiveness is an attitude, mercy an act.<sup>155</sup> Second, those who advocate a greater role for mercy in the criminal justice system are *not* advocating that we increasingly *forgive* criminals. They still support continuing to prosecute and punish criminals. They argue only that this punishment is often excessive; that in our inherently imprecise calculations of just deserts, we too often ignore or discount the complex social and psychological conditions that cause many people to violate the law.<sup>156</sup>

<sup>153</sup> See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 9-51 (1998); see also MURPHY, *supra* note 20, at 105-06 (“[H]atred . . . could, in some cases, become one’s life instead of being a part of one’s life . . . [F]eelings of hatred can, in many cases, consume one’s entire self. Thus it might be seen a blessing—perhaps even divine grace—to have the burden of hatred lifted from one’s mind. For this reason forgiveness can bless the forgiver as much as or more than it blesses the one forgiven.”) (citations omitted); Steiker, *supra* note 44, at 29 (“[O]ne of the goals of the restorative justice movement is to move beyond the cycles of violence that communities and whole nations face . . . ‘[Mercy] brings into the world those sorts of actions that break the cycle of revenge and retribution into which actors and even whole communities can so easily fall. It promotes harmony in the community, reconciliation, and flourishing.’”). But see Prager, *supra* note 148 (“Some people have a more sophisticated defense of the forgive-everyone-everything doctrine: Victims should be encouraged to forgive all evil done to them because doing so is psychologically healthy. It brings ‘closure.’ This . . . is selfishness masquerading as idealism: ‘Though you do not deserve to be forgiven, and though you may not even be sorry, I forgive you because I want to feel better.’”).

<sup>154</sup> But see Steiker, *supra* note 44, at 30-31 (“Under the skeptical view [of mercy], mercy has no place in the criminal justice because justice is served only when offenders are punished in accordance with their desert. But this view does not attend to the possibilities of forgiveness by victims or their reconciliation with offenders . . .”).

<sup>155</sup> See Markel, *supra* note 16, at 1440.

<sup>156</sup> See SUSAN GRIFFIN, A CHORUS OF STONES: THE PRIVATE LIFE OF WAR 115-66 (1992); ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE (1984); Denny LeBoeuf, *Joel in the Wormhole*, 77 UMKC L. REV. 1059, 1061 *passim* (2009); Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS (Ferdinand David Schoeman ed., 1984), reprinted in PERSPECTIVES ON MORAL RESPONSIBILITY 119, 134-37 (John Martin Fischer & Mark Ravizza eds., 1993); see also Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002)

So to make punishments *better* fit the crimes, judges, jurors, and legislators should develop a greater awareness of, and concern for, these mitigating conditions and incorporate this awareness into the sentences that they help to prescribe.<sup>157</sup>

While some have argued that this “pro-mercy” approach is incompatible with retributivism,<sup>158</sup> the fact that the pro-mercy camp still advocates criminal punishment – indeed, *fairer* criminal punishment – suggests that this approach is actually perfectly compatible with retributivism.<sup>159</sup> More importantly for my purposes, it is also perfectly compatible with the Justification Thesis. One can be for both mercy *and*

(explicating the Supreme Court’s decision in *Williams v. Taylor*, 529 U.S. 362 (2000), that capital defendants have a constitutional right to provide evidence of “rotten social background” as a mitigating factor at the sentencing phase of their trials). *But see* ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 3-47 (1994) (arguing that the criminal justice system should not recognize past abuse as an excuse for criminal wrongdoing); Peter Arenella *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J. L. & PUB. POL’Y 703 *passim* (1996) (arguing that while the “abuse excuse” is “indefensible,” it is rarely used and even more rarely successful); Alan M. Dershowitz, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?*, 3 BUFF. CRIM. L. REV. 775, 775 *passim* (2000) (arguing that the “abuse excuse,” in particular battered woman syndrome, is weak both morally and empirically); George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1661 *passim* (1987) (arguing that an “adverse early social background” can at best mitigate, but not excuse, defendants for their criminal acts); Cynthia Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 475 (2006) (arguing that if we cannot allow abuse to excuse adults for their wrongdoing, we can no more allow it to excuse children for their wrongdoing).

<sup>157</sup> See Steiker, *supra* note 44, at 30-31; Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 7, 2008; *see also* Bernard Harcourt, *Reply*, in CRIMINAL LAW CONVERSATIONS 181, 185 (Paul H. Robinson, Stephen P. Garvey, & Kimberly Kessler Ferzan eds., 2009) (citing, with qualified approval, the following passage from NIETZSCHE, *supra* note 12, at 72: “As its power increases, a community ceases to take the individual’s transgressions so seriously . . . It is not unthinkable that a society one day might attain such a consciousness of power that it could allow itself the noblest luxury possible to it—letting those who harm it go unpunished. ‘What are my parasites to me?’ it might say. ‘May they live and prosper: I am strong enough for that!’”). *But see* Markel, *supra* note 16, at 1454 (arguing that “acts of mercy ultimately undermine each of the principles undergirding [retributivism]—moral accountability, equal liberty under law, and democratic self-defense”).

<sup>158</sup> See, e.g., Markel, *supra* note 16, at 1453-64; *see also* Husak, *Why Punish*, *supra* note 16, at 450 (arguing that Herbert Morris is committed to the (bizarre) position that because criminal punishment is a *right* (according to Morris; *see supra* note 50), criminals should *themselves* be opposed to mercy).

<sup>159</sup> See Steiker, *supra* note 44, at 25-27.

vengeance. Mercy is designed merely to prevent the vengeance from spinning out of control, not necessarily to extinguish it altogether.

## VI. The Third Reason Why Retributivism Needs Consequentialism: Harmless Crimes

So far, I have argued that (a) society's vengeful attitude toward criminals who cause serious harm – fatal, physical, psychological, or economic – largely explains why we wish to punish criminals (the Motivation Thesis); and (b) because vengeance is an appropriate, *moral* reaction to criminals' injuring people's supremely valued interests, this sentiment also helps to justify criminal punishment (the Justification Thesis). But there are three reasons to think that retributivism cannot by itself fully explain and justify criminal punishment. The first two reasons – both consequentialist – were already given in Part III. Both explain why consequentialism does a better job than retributivism of accounting for the fact that the state insists on inflicting negative desert but not on guaranteeing positive desert. Once again, the first reason is practicability and the second reason is vengeance, the need to channel our vengeful impulses through criminal punishment in order to achieve moral, social, and emotional equilibrium. In this Part, I will offer yet a third reason for supplementing retributivism with consequentialism: only consequentialism, not retributivism, can explain – and therefore justify – our punishing certain *harmless* crimes.

Harmless crimes – or, more precisely, acts that do not necessarily cause harm but are still criminalized – fall into two categories: (a) acts that substantially increase the *risk* of causing serious harm; and (b) acts that do *not* substantially increase the risk of causing serious harm. Examples of (a) include the inchoate crimes of attempt, conspiracy, solicitation, and reckless endangerment. Examples of (b) include drug possession, resisting arrest, insider trading, and counterfeiting.

When I say that only consequentialism, not retributivism, can explain and justify punishment of harmless crimes, I am referring not to (a)-type (risky) harmless crimes but to (b)-type (non-risky) harmless crimes. There are two reasons that retributivism *does* help to explain and justify punishment of risky harmless crimes. First, once again, risky harmless crimes substantially increase the risk of causing serious harm, and this increase of risk may itself be considered a harm for which the wrongdoer deserves punishment.<sup>160</sup> Second, inchoate crimes often cause psychological harm even when the object of the inchoate crime is not achieved. For example, while the target of an attempted murder might feel relieved that she is still alive, she may very well feel very distressed

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<sup>160</sup> See Claire Finkelstein, *Is Risk a Harm?*, 151 U. PENN. L. REV. 963, 1000 (2003); John C.P. Goldberg and Benjamin Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1651 (2002).

that she came so close to being killed. Likewise, a child who has been solicited for sexual activity might be traumatized merely by the solicitation even though no sexual activity actually ensued.<sup>161</sup>

Non-risky harmless crimes, on the other hand, do present a real challenge to retributivism.<sup>162</sup> Consider, for example, drug possession. Suppose Cokie is carrying 10 ounces of cocaine in the passenger seat while driving 30 miles per hour over the speed limit. The police pull Cokie over for speeding. After Cokie rolls down her window, they notice the bag of cocaine. They ask her what it is, she answers honestly, and they arrest her for cocaine possession. Several weeks later, after a brief trial, the jury convicts Cokie of cocaine possession. This seems to be the correct result – at least the legally correct result. Cokie should be punished because she culpably committed the crime of cocaine possession.

Once again, retributivism says that that the desire to give a criminal her just deserts motivates criminal punishment. Given this, it seems, retributivism cannot explain why Cokie should be punished. A desire to give Cokie her just deserts is *not* the motivation for punishing her. Cokie’s “act” of possessing cocaine does not *motivate* punishment in the same way that, say, murder or rape does; it does not “scream out” for punishment. More generally, it is not because of anything to do with just deserts that we have laws criminalizing the possession of drugs. There is nothing intrinsically wrongful – and therefore intrinsically deserving of criminal punishment – about possessing any drug.<sup>163</sup>

Instead, what is really *motivating* Cokie’s criminal punishment is *not* the retributivist goal of giving her what she deserves but rather the *consequentialist* goal of minimizing the risk of certain harms. There are laws prohibiting possession of cocaine because they are thought to contribute toward an overall good *consequence* – namely, minimization of the dangers of cocaine use. Use of cocaine is dangerous because it can lead to, among other things, anxiety, headache, high blood pressure, sinusitis, severe depression, violent behavior, loss of consciousness, tremors, hyperthermia, kidney failure, stroke, bleeding of the brain, heart attack, seizure, suicide, and sudden cardiac death.<sup>164</sup> So the state has a significant (compelling) interest in deterring cocaine use and therefore any and all activities that are necessary for, or contribute to, its usage. And one such activity (or act) is possession.

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<sup>161</sup> See *supra* note 27 and accompanying text.

<sup>162</sup> See Husak, *Retribution*, *supra* note 16, at 966-70.

<sup>163</sup> See DOUGLAS N. HUSAK, DRUGS AND RIGHTS 64-68 (1992) (arguing against the notion that drug use should be criminalized because it is immoral); von Hirsch, *supra* note 12, at 116.

<sup>164</sup> See JAN GARAVAGLIA, M.D., HOW NOT TO DIE: SURPRISING LESSONS ON LIVING LONGER, SAFER, AND HEALTHIER 147 (2008).

Still, in response to this objection against retributivism, I argue that retributivism still can help, at least to some extent, to explain and justify criminal punishment for non-risky harmless crimes like cocaine possession. There are at least two different ways in which it can help to provide this explanation and justification. First, recall (from Part II.B) that weak retributivism is the theory that just punishment requires that the person being punished both committed wrongdoing and is being punished for this wrongdoing. Responsibility is a necessary condition of all just criminal punishment<sup>165</sup> even if it – or the desire to *hold* somebody responsible – is not the driving motivation for certain kinds of criminal punishment. By weak retributivism, then, Cokie *deserves* punishment. It is not merely that she *wanted* to possess cocaine or *fantasized* about it. She actually *carried through* on this desire, this carrying-through violated a constitutional criminal law, and she is *criminally responsible* for this act. Ex hypothesi, she knowingly and willingly acquired cocaine, omitted to dispose of it, and does not have any good excuses or justifications for this acquisition and omission.

Second, in addition to weak retributivism, there is what is called “soft” or “limiting” retributivism (and sometimes “side-constrained consequentialism”).<sup>166</sup> This version of retributivism suggests that (a) criminal punishment is justified primarily by consequentialism (the benefits that it yields such as specific deterrence and general deterrence) and (b) retributivism plays only a secondary role, which is to dictate an upper limit on the amount of punishment that may be inflicted for any given crime. Consequentialists who adopt this version of retributivism are assuming three things: (a) the proportionality principle (i.e., punishment should fit the crime or at least not be grossly excessive), (b) pure consequentialism does not entail proportionality,<sup>167</sup> and (c) retributivism is (therefore) necessary to make sure that the proportionality principle is observed. As I argued in Part II.B.2, however, (b) seems false. Once again, there is at least one good consequentialist reason for proportionality: it contributes to more effective enforcement of, and respect for, the law. And if, as I suggested in the Introduction, expressivism is at least partly consequentialist, then there is yet another (partly) consequentialist reason for proportionality: to communicate both to the criminal and to the community just how bad her crime was. Therefore (c) is false as well. So the fact that vengeance plays no role in motivating (or justifying) criminal punishment for non-

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<sup>165</sup> See *supra* note 52 and accompanying text.

<sup>166</sup> See DUFF, *supra* note 12, at 11; MOORE, *supra* note 10, at 93; Ristroph, *supra* note 16, at 1301-03. *But see* Steiker, *supra* note 44, at 27 (“The idea of retributivism as an outer limit on punishment fails to tell us how to choose punishments up to that limit, and the idea of retributivism as setting a range of punishments likewise fails to guide us in choosing among them.”).

<sup>167</sup> See, e.g., Hampton, *supra* note 12, at 221-22.

risky harmless crimes does not mean that proportionality does not apply in this context. It still does – which just goes to show that the proportionality principle does not entail the Motivation Thesis, no less the Justification Thesis.

## VII. Conclusion

This paper confronts an age-old question: why do we punish? And there are some age-old answers – the two primary ones being to give criminals their just deserts and to help minimize future crimes. Because these two theories – retributivism and consequentialism – aim at two separate goals, they do not necessarily always coincide. Sometimes one goal may be satisfied only at the expense of another. Scholars have exploited this situation to argue for one theory *over* the other theory – as if one theory is correct and the other incorrect. The fact of the matter is that while retributivism and consequentialism certainly *can* come into conflict in very rare situations, they normally do not. On the contrary, if we are to explain justify criminal punishment, the intentional infliction of harm, deprivation, or suffering – a state of affairs that is presumptively *unjustified* – we need *both* retributivism *and* consequentialism.

In this Article, I have tried to show just why this is the case. One concept that links the two – however much both consequentialists and retributivists repudiate it – is revenge. The retributivist imperative of giving criminals their just deserts – punishment – is itself largely motivated by our need to restore the moral and social balance (order) and thereby re-establish victims' emotional equilibrium. But fulfilling these needs – an excellent *consequence* – is a consequentialist goal. So beneath retributivism lies consequentialism. They are joined from the outset.

They are also joined at the peripheries of criminal law. Some harmless acts are criminal, and therefore punishable, even though they do not arouse our vengeance. Retributivism, which is fueled by vengeance, does not explain and justify this kind of criminal punishment. It explains and justifies only criminal punishment of crimes that arouse vengeance – that is, harmful and risky harmless crimes. We punish all the rest – all of the non-risky harmless crimes – strictly for consequentialist reasons. Still, just deserts is not entirely irrelevant here. Just deserts still comes into play – not as the motivation or the justification of punishment but rather as a means of determining proportional punishment.