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RETHINKING LEGAL RETRIBUTION

by

STEPHEN C. PARSLEY

Under the Direction of Andrew J. Cohen and William Edmundson

ABSTRACT

In this paper I discuss retributivist justifications for legal punishment. I argue that the main moral retributivist theories advanced so far fail to support a plausible system of legal punishment. As an alternative, I suggest, with some reservations, the legal retributivism advanced by Alan Brudner in his *Punishment and Freedom*.

INDEX WORDS: Retributivism, Punishment, Criminal justice, Law, Crime

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STEPHEN C. PARSLEY

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

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RETHINKING LEGAL RETRIBUTION

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DEDICATION

Some of my earliest memories are of the wonderful conversations I had with my grandfather, Bill Colmery. At an early age I would spend hours asking and hearing from him about biology and history. Eventually politics entered the field of conversation, and later, theoretical physics. It is very likely that I would never have ended up in writing a graduate thesis in philosophy without him. His breadth and depth of knowledge continue to amaze me, and his kind encouragement means very much to me. This thesis is dedicated to him. Thanks, Papa.

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1 INTRODUCTION

Although retributivism has its roots in the thought of Kant and Hegel,[1] it was not until the second half of the 20th century that philosophers began to develop detailed retributivist theories. Since then, retribution arguably has displaced its chief rivals—deterrence and rehabilitation—as the most influential explanation for punishment. The details of the connection between punishment and desert vary among retributivists, but the central feature of retributivism is that punishment is supposed to be given if a person *deserves* it. To a retributivist, whether punishment has any further consequences (such as deterrence, education or reform of the wrongdoer) either is irrelevant to or only has a more general connection to its justification. While retributivists have a variety of concerns, all that I am aware of share a particular concern for *legal* retribution: that is, they want to justify punishment by the legal system, distinguished from other sorts of institutions (or individual actors).[2] In this paper, I will focus on legal retributive punishment, although some of the ideas will be relevant to other settings in which punishment is administered (schools, families, etc.). My thesis in this paper is that a justification for legal retribution is best given by *legal retributivism*: a theory that explains why (and when) the legal system ought to punish *lawbreaking*, rather than other moral aspects of criminal acts.

Three of the most influential contemporary retributivist theories of punishment are those of Herbert Morris, Jean Hampton and Michael Moore. Their theories are different enough that each will receive its own analysis in Chapter II, but there is enough similarity between them to classify them as forms of *moral retributivism*. What justifies the "moral" designation is that these

[1] However, cf. John Cottingham in "Varieties of Retribution," *Philosophical Quarterly* 29 (1979): 244 for a plausible argument that Hegel's famous statement that punishment "annuls the crime" is better understood as a theory of restitution, rather than retribution.

[2] Here it is important to note that this does not necessarily mean punishment by the state. The presence of a state is neither necessary nor sufficient for the presence of a legal system. Those condemned by a legal system might be declared outlaws (denied any legal protection), or their punishment might be set by a judge but left to whichever

theorists attempt to derive a justification for legal punishment from moral principles (Morris and Hampton) or intuitions (Moore) that are not specific to the law. To put it another way, moral retributivists seek to explain criminal desert as a certain type of moral guilt that would exist even in non-legal contexts (such as a desert island, a setting first employed by Kant). The problem I identify with all of these attempts is that penal desert cannot be explained well on the basis of moral guilt. I call this the congruence problem: the classes of acts for which their arguments support punishment are *incongruous* (too broad, too narrow, or both) with the acts that ought to be punished. Each moral argument either cannot justify punishment for some crimes that ought to be punished or logically supports punishing acts that are not, and should not be, criminal, or both.

The third chapter will discuss two variations of *legal retributivism.* I examine the theory of Herbert Fingarette, who argues that retributive punishment is entailed by the concept of law in response to legal violations. Fingarette's account is a promising start to legal retributivism, but is incomplete—it requires a general justification of law. Alan Brudner gives a fuller justification of legal punishment based on the argument that the law is directed towards the protection of freedom, in both a formal and a substantial sense. Brudner's theory is complex, but I argue that it improves on the weaknesses of Fingarette's account, and that it shows a comprehensive, if rough, legal retributivist justification of punishment. I then show how legal retributivism is superior to moral retributivism on several criteria relevant to a justification of punishment.

In Chapter IV, I examine several objections likely to be prompted by my discussion of legal retributivism. First is the objection that legal retributivism's separation of moral guilt from penal desert would allow the legal system to punish morally neutral acts. Second, I examine the

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members of the society wished to carry it out, among other possibilities. This means that we can put aside the topic of state legitimacy.

concern that legal retributivism does not provide a principle for choosing the type and amount of punishment. Lastly, I look at an objection that could be lodged against any version of "pure" retributivism: that the theory's singular focus on the desert of a criminal excludes consideration of consequences, such as deterrence and reform, that are part of how we judge punishment's success.

1.1 What it means to justify punishment

Before diving in to the details of retributivism, it is important to clarify exactly what it means to "justify (criminal) punishment." Michael Davis[3] helpfully distinguishes between three senses of the phrase: 1) justification of an institution (why the legal system should punish violators) 2) justification of a statutory penalty assigned to a crime, 3) and justification of a specific sentence carried out (i.e. who should be punished, and how the amount of punishment should be determined for specific criminals). I will refer to the first as the institutional justification, the second as the legislative justification (since it is a legislative function to match penalties with act-types), and the third as the sentencing justification (since the judiciary sentences criminals). Although these three issues are related, they are distinct topics. Any theory might be intended to give a justification for only one or two of these. Furthermore, a punishment theorist might give very different governing principles for each topic, such as the mixed theory,[4] which argues that the "general aim" of punishment—analogous to the institutional justification—is to secure some net social gain (such as deterrence and reform), but that desert operates as a constraint when determining whether and how to punish a criminal. Unfortunately, punishment theorists often fail to mention the tripartite distinction or any other comparable division. As a consequence of this

[3] Davis, Michael. "The Relative Independence of Punishment Theory," *Law and Philosophy* Vol. 7, No. 3 (1988 - 1989): 323.

omission, it can be unclear whether a theorist intends to give a single justification for all three topics, or instead intends for the theory to address only one of those topics.

For example, consider the statement, "punishment is justified on the basis of deterrence." Interpreted in the first—the institutional—sense, this statement would mean that we have the practice of punishment to dissuade persons from breaking the law. This would be a fairly plausible institutional justification. However, when taken in the legislative sense, the statement would mean that the penalty for a crime should be set by statute based on how it would affect potential lawbreakers. It is easy to imagine that with the penalties selected would be excessive. Deterrence is even more problematic when interpreted in the sentencing sense. Judges and juries might find that giving the maximum sentence to a person despite excusing or mitigating factors, or even making a scapegoat of an innocent person, would be an effective deterrent. If a theorist does not take pains to be clear, then, it can be difficult to know whether she is giving a plausible justification for the institution of punishment, or a very problematic justification for all three topics. When discussing versions of moral retributivism in Chapter 2, I will examine the arguments in all three senses.

To give the moral retributivists Morris and Hampton the best possible reading, we can assume that their claim is not that the judicial system is motivated by their particular moral principle. The second reading is more plausible: that a judicial system is justified because the overall *effect* of its functioning, regardless of the officials' intents, is to accomplish the particular moral principle. Under this reading, a general system of punishment is justified when it works to cancel out unfair advantages (Morris) or to repudiate criminals' false claims about victims' moral worth (Hampton). Still, with neither of the theories can this claim stand up under scrutiny,

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[4] As espoused by H.L.A. Hart, *Punishment and Responsibility,* Oxford: Oxford University Press, 1968.

as Chapter II will show. Even an idealized judicial system cannot be well characterized as primarily accomplishing either of the moral principles given by Morris or Hampton.[5]

1.2 Moral obligations and the law

For a retributivist, legal or moral, the question of when the state is justified in punishing violations of the law seems to be connected with the question of when citizens are obligated to obey the law. It would be bizarre for a retributivist to argue that someone is morally deserving punishment for breaking a statute that she was not morally obligated to follow. Any retributive theory of punishment must address questions about how the law affects moral obligations: Do all statutes create moral obligations, or only some? If only some statutes can create moral obligations, what distinguishes these statutes? Should the legal system punish immoral acts that are not prohibited by statutes? We have to consider several types of situations in which morality and law are not coextensive: (1) acts that are immoral but not prohibited by the legal code, (2) statutes that require immoral acts (such as prohibiting citizens from giving food to homeless persons), and (3) illegal acts regarding which there is no pre-legal moral obligation[6] either positive or negative.

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[5] Each theory fails to give a good explanation for an important area of law: Morris has difficulties with senseless acts that fail to provide any objective gain for the criminal, while Hampton cannot account for acts that do not have a clear victim.

[6] As I use it, the "pre-" in "pre-legal moral obligation" does not indicate temporal order, but rather the logical moment at which the obligation exists. A pre-legal moral obligation exists both before law is extended to some area, but also exists if the statutory prohibition is removed. For example, some American states have criminalized adultery but later repealed those statutes. The moral obligation to honor marriage vows existed before the adultery statutes were instituted and continued to exist after they were removed.

Acts for which there is no pre-legal moral obligation are a more complicated matter—the moral obligation created by a statute might or might not continue to exist in its absence The moral obligation to report one's income to the government would not exist if there were no statutes requiring it. On the other hand, if traffic regulations were repealed, the moral obligation to drive on a particular side of the road would continue, since citizens have formed a legitimate expectation that others will follow the practice. To put it in H.L.A. Hart's terms, the primary rule remains in the society even after the legal system has withdrawn from that sphere.

One view that could be adopted is that there is a general duty to obey the law. Under this view, any statute creates a moral obligation (perhaps with the caveat that the legal system must be generally just), regardless of the previous moral status of the act. This theory is faced with the objection that it would require obedience in the case of immoral statutes (category 2 in the preceding paragraph). I see two general sorts of responses. The first would say that the moral obligation of law is qualified—it disappears if a statute requires something immoral. This response is unconvincing, for it says that we are obligated to do moral acts when legally required to, but are not obligated to do immoral acts when legally required. Here, morality appears to be both necessary and sufficient to obligate a person to act in accord with statutes: law has no identifiable role.

Alternatively, we might say that law always creates a moral obligation, and that in the case of immoral statutes, we have a case of moral conflict.[7] Even if we make the right (or perhaps more accurately, *better*) choice by disobeying the law, we are still violating a moral obligation. The obligation to obey the law never disappears, but it sometimes is overridden (rather than cancelled) by other moral obligations. Presumably, the person would still deserve some punishment for breaking the law, even though he is not blameworthy. This seems the better way to go about defending a general duty to obey the law. However, since a general duty to obey the law is not advocated by any of the moral retributivists I will consider, I will put this possibility aside for now. In any case, convincing enough arguments against the duty to obey the law have been made by John Simmons[8] (among others) that we should view the idea as, at best, a fallback option for an explanation of punishment.

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[7] This is roughly Hegel's view of Sophocle's *Antigone*: that the protagonist's choice was not so much between a moral obligation and the threat of unjust force, but between two valid yet conflicting moral demands.

[8] Wellman, Christopher Heath, and A. John Simmons. *Is There a Duty to Obey the Law?* Cambridge: Cambridge University Press, 2005.

So, then, if we are to explain how laws create moral obligations, we will need a more nuanced account. I suggest two criteria for a satisfactory account. First, it will be a relatively *conservative* account relative to a liberal legal system. On the one hand, it will be a desirable account only if it tells us that most areas of our existing law should be enforced: an account that cannot justify the punishment of violations of health regulations or traffic rules, for example, would be deficient. Conversely, it should not recommend significant expansion of legal punishment into areas of life that political thought has regarded as being outside the province of law, such as (non-contractual or -quasi-contractual) promises, protected free speech, etc. We can allow our theory of punishment to recommend some legal reforms, but what is justified should be compatible with a liberal political theory.

The second criterion is that the amount of punishment justified will be roughly *proportionate* to the moral gravity of the offense. This is both relative (e.g. murder should be punished more harshly than tax fraud) and absolute (e.g. robbery should not be punished with amputation nor breaking the speed limit with a year in prison). Neither of these criteria are shared by all theories of punishment, but they are necessary to ensure that our theory is both liberal and retributivist. Departing from the first criterion means abandoning liberalism; departing from the second means that the theory is in tension with the less controversial[9] implication of Kant's *lex talionis*: that criminals should not be punished more harshly than they deserve.

With those criteria in mind, in the next chapter I will examine the moral retributivisms of Morris, Hampton and Moore to see if they are satisfactory. In the third chapter I will highlight

[9] The more controversial implication of the *lex talionis* I have in mind is that criminals *must* always be punished as harshly as they deserve. This would mean that that the legal system is necessarily unjust in cases of clemency and pardons.

the advantages of legal retributivism (as described by Fingarette, Brudner and Davis), before moving on to possible objection, which will be covered in the fourth chapter.

2 MORAL RETRIBUTIVISM

The theories of Herbert Morris, Jean Hampton and Michael Moore are all classified as "moral" because they attempt to derive a justification for legal punishment from moral principles or intuitions that are not specific to the law. That is, they seek to explain legal desert as a certain type of moral guilt that would exist even in non-legal contexts. The three theories fail to give good justifications because of the congruence problem: they either fail to justify legal punishment for some acts that clearly deserve it, or justify punishing some acts that do not seem to. The sphere of punishment justified by Hampton is both too narrow and too broad, as is that justified by Moore, while Morris's seems simply too narrow. Hampton, Morris and Moore's projects could be said to be successful if they were aimed at proving that moral violations are morally deserving of retribution, but their arguments are intended (among other things) to justify legal retribution.[10] Another, related problem that appears is that their theories do not give a plausible way to proportion punishment to the crime.

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2.1 Morris: Punishment as Distributive Justice

Herbert Morris (1976) conceives of the law as a system of rules that "establish a mutuality of benefit and burden" among the members of a society (33). The benefit of these rules for each individual is a sphere of noninterference that others do not transgress; the burden is the "exercise of self-restraint by individuals over inclinations that would, if satisfied, directly interfere or

create a substantial risk of interference with others in proscribed ways" (33). When someone chooses to violate a rule, "he renounces a burden" and "thus gains an advantage" over others (33). Punishment of a rule-violator removes his unfair advantage, and thus "restores the equilibrium of benefits and burdens" (34). Morris's justification of punishment, then, is essentially economic—it seeks to eliminate free-riders, who benefit from others' self-restraint while refusing to reciprocate.

According to Morris, the proper amount of punishment would depend on the advantage obtained by each violation. However, he does not clearly explain how we are to assess the "unfair advantage" gained by criminals that is to be removed by punishment. David Dolinko (1991) discusses two possible answers to this question given by Morris's defenders, neither of which seems successful. The first sees the unfair advantage as the criminal's satisfaction of inclinations that others choose to restrain. (This interpretation has support from Morris's statement that "the burden consists in the exercise of self-restraint" [Morris 33].) Dolinko points out that this would entail that the criminal's advantage is "proportional to the burden of self-restraint that others carry but that he has thrown off" (Dolinko 545). Thus, the advantage would depend on how strongly the general population is inclined to commit the crime. This would mean no connection to the seriousness of the crime—if people are more tempted to commit tax fraud than arson, then the advantage gained from tax fraud would be greater than that from arson. Since the harshness of the punishment is supposed to depend on the scale of the unfair advantage, this would mean that tax fraud ought to be punished more harshly than arson (Dolinko 545-6). This sort of result casts doubt on the "burden of self-restraint" interpretation of crime's unfair advantage.

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[10] Thanks to AJ Cohen for inspiring the wording of this sentence.

An apparently more promising explanation of how to measure the advantage gained by criminals is given by George Sher. He contends that the benefit of a crime depends on "the strength of the moral prohibition that has been violated" (Sher 81).

> A person who acts wrongly does gain a significant measure of extra liberty: what he gains is freedom from the demands of the prohibition he violates. Because others take that prohibition seriously, they lack a similar liberty. And as the strength of the prohibition increases, so too does the freedom from it which its violation entails (Sher 82).

This seems to match our intuition that the more heinous a crime, the harsher it should be punished. However, Sher's account is faced with a challenge: it does not seem to be the case that every (correctly) illegal act breaks a moral prohibition. Consider traffic law—it outlaws some acts that are morally neutral absent statutory requirements (546). For example, making a U-turn at a traffic light when there is no risk of accident—perfect visibility, no traffic, etc—does not seem to violate any moral obligations: the act neither harms nor risks harming anyone.. Therefore, it seems wrong to say that this particular violation of a U-turn law violates a pre-legal moral prohibition,[11] and so, under Sher's definition, there is no unfair advantage and no justification for punishment. At the same time, we can imagine settings in which having a ban on U-turns is justified, and therefore, the legal system would be justified in punishing him. Sher's theory fails to justify punishment in that sort of situation.

Someone might defend Sher's suggestion by saying that even in such a case, there is a moral obligation that the criminal violates: a duty to obey the law. As mentioned before, there are serious philosophical difficulties with a general duty to obey the law. For the unfair advantage theory, there is an additional problem: this would entail that all illegal but otherwise

morally neutral acts bring the same advantage for the criminal (Dolinko 547). Therefore, all such acts—e.g. illegal U-turns, hunting endangered animals, jaywalking—would deserve the same punishment. The resulting system, which would punish a wide variety of acts with the same punishment, does not seem to match the classical retributive picture of punishment that "fits the crime."[12] So far, then, Morris and his defenders have not given us a plausible way to understand the idea of unfair advantage that is the heart of his justification of legal retribution. Perhaps there is some other way to make sense of it, but it is not clear to me what this might look like.

An even deeper objection to Morris's approach is that it does not seem to be the case that all crimes count as an advantage for a criminal. It makes sense that violators of traffic laws, tax regulations and other sorts of cooperative schemes gain an unfair advantage: tax evaders receive government benefits paid for by others without sacrificing any of their own wealth, reckless drivers take advantage of others' traffic law compliance, etc. However, in what way can we say that a serial killer has benefited by his acts? Here, Jean Hampton puts the point very well,

> The idea that punishment is simply the taking away of the advantages which rapists or murderers have by virtue of being unrestrained presupposes that their actions (or the consequences of the actions) are, at least in certain circumstances, inherently desirable and rational, and that we object to them only because, if performed by everyone they would be collectively harmful.[13]

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[11] See fn 4 p. 5 for a definition of this term.

[12] A.J. Cohen has suggested to me that we might be able to distinguish between different classes of laws, with different levels of moral prohibitions against breaking them. For example, "laws that are necessary to prevent citizens from being harmed" would have a stronger moral prohibition against their breaking than other sorts of laws. Cohen's idea could be developed, perhaps, into a sort of "rule Harm Principle," *a la* rule utilitarianism: when a law prohibits a type of act that is usually harmful, breaking that law is immoral, even if the token act did not cause harm. This principle would be subject to the same sort of criticism made against rule utilitarianism: that when the principle that originally justified the rule is equally served by *breaking* that rule, why should the rule hold any normative force for us?

[13] Jean Hampton, "A New Theory of Retribution," 385.

Indeed, from the virtue ethics perspective, even if these sorts of criminals went unpunished they would probably have incurred a net loss—the harm done to their own character outweighs any gains in utility from indulging aggressive desires. There is something disturbing about thinking that indulging evil desires constitutes a benefit for criminals.[14] Since the unfair advantage account does not seem plausible for at least one broad area of crimes, it fails to provide a good justification for retributivism. Morris's notion of unfair advantage cannot be applied to all crimes, and fails to provide a defensible way to fit the punishment to the crime.

2.2 Hampton: Vindicating the Victim's Value

Jean Hampton (1991) contends that retribution is justified in order to nullify criminals' false claims about the value of victims. In committing a crime, Hampton believes, a criminal displays a lack of respect for the victim and asserts that he is superior to the victim. Punishment then denies the criminal's assertion of superiority over the victim by making the criminal experience "submission to the punisher" (Hampton 399). This usually means inflicting suffering, but non-painful methods can also be adequate if they count as defeats of the criminal. Hampton endorses the *lex talionis*, in a modified form, as a way to specify the appropriate sort of punishment: "to inflict on a wrongdoer something comparable to what she inflicted on the victim is to master her in the way that she mastered the victim." Now, says Hampton, "the score is even" (401). She holds that punishment is the *only* way to "counter the appearance of the wrongdoer's superiority and thus affirm the victim's real value" (402). The motivation behind retribution is fundamentally "to deny the wrongdoer's false claim to superiority and to assert the victim's equal value" (402).

[14] Cf. Plato in *Gorgias* and *The Republic*

Dolinko points out that Hampton makes the same sort of mistake for which she criticizes Morris: she fails to connect punishment of a criminal to "that which makes his *conduct* [emphasis mine] wrong" (Dolinko 551-552). According to her, the feature of a crime that deserves punishment is that it is a false moral assertion—the criminal expresses a message of superiority over the victim. Before getting to Dolinko's criticism, I think it worth noting that Hampton's model of crime as a wrongdoer demeaning a victim does not seem to apply well to important areas of the criminal law. There are many crimes that lack a distinct victim, such as embezzlement from a large corporation, driving without a seat belt and hunting without a license. All of these crimes can have negative *effects* on others (and so prohibition clearly seems justified) but there is no distinct victim in the usual sense of the word: the effects are dispersed over, respectively, stockholders, health insurance policy holders and those affected by the local ecosystem. It would be dubious to describe the man driving without a seat belt as claiming moral superiority over the others in his insurance pool, or the embezzler declaring her moral superiority over thousands of stockholders. Even if Hampton's argument justifies punishment of crimes with distinct victims, it becomes implausible when extended to many rightly-criminalized acts.

However, Dolinko identifies a different problem with her argument that affects even crimes with distinct victims. This is that we do not normally regard rebuttal of false claims of superiority to be a proper function of the legal system. There are many sorts of ways—publishing a book, setting up a web site, holding a rally—through which a person or group might proclaim superior moral worth over some other person or group, but against which we would not demand the legal system to take action (551).[15] If the message of another's inferiority were the core of criminal desert, it would seem that any assertion of that message, through a crime or some other medium, should deserve some sort of punishment. However, what matters for law is *how* a

person's moral worth is denigrated: it must have or threaten some actual effect—harm, wrongly interfering with the other's freedom, etc—for it to deserve punishment.[16] Hampton's approach, then, is unable to explain why the state should punish crimes in particular, as opposed to all messages of moral inferiority.[17]

To be fair to Hampton, she does intend for her theory to be an explanation not only of legal retributive punishment, but the idea of retribution in general. Thus, she says in a footnote about Herbert Fingarette's theory of retribution,

> Retributivists such as Kant have taken retribution to be a deeply moral notion… I am inclined to think [Fingarette's] account might be right as part of the reason a legal system punishes, but is wrong as an *account of retribution* [emphasis mine]. My account of retribution tries to explain its moral core, which I believe a variety of institutions, including not only the law but also families and universities, make use of in pursuit of both and non-moral objectives (400).

Thus, an early example she uses to characterize retribution is that of a child who desires to defeat a bully who has victimized him (401-402). Hampton wants to encompass both personal and legal punishment with her definition of retributive punishment as "the defeat of the wrongdoer at the hand of the victim (either directly or indirectly through an agent of the victim, e.g. the state) that symbolizes the correct relative value of wrongdoer and victim" (398). The problem with this, I would suggest, is either that Hampton either fails to recognize the dissimilarities between personal and legal retribution, or she does not consider punishment of crimes without victims to

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[15] We can judge such expressions of moral superiority to be evil, but not worthy of legal action.

[16] For example, the tort of slander requires that the statement be *damaging* to the person's reputation, not merely false. A neo-Nazi group distributing pamphlets that vilified some person simply for her Jewish ancestry would be making false moral claims about her, but this would not count as slander from a legal point of view.

[17] AJ Cohen has suggested that Hampton could simply accept this and endorse the legal punishment of all false claims of another's moral inferiority. This would remove the force of my critique, but seems to be a self-inflicted *reductio ad absurdum*.

qualify as retributive punishment. The first possibility is a serious mistake; any definition of retribution that could encompass both a child seeking to defeat a bully and the state punishing unlicensed fishing would have to be a relatively thin one, perhaps not much thicker than the idea of people deserving punishment.[18]

Although there is not clear evidence that Hampton regards only the punishment of demeaning crimes to be *retribution*, this interpretation would make her theory more credible. In that case, her explanation could play a role in determining the type and amount of punishment appropriate for some criminals. That is to say, whether an act demeans a person could plausibly be a consideration in the legislative and sentencing stages. It might well be the case that when an act demeaned a victim, the judicial system should make an effort to see the criminal punished in a way that helps to publicly "vindicate" the victim's moral value. Still, as has been shown in the above discussion, even in those stages it is neither necessary nor sufficient to justify punishment. Some crimes that ought to be punished do not demean a victim, while some false moral claims about others are not deserving of legal punishment. In the area of legal punishment, then, Hampton's argument seems at best suited to act only as a contributory factor in considerations. However, it does not seem to play any explanatory role in the institutional justification of legal punishment. At best, her theory is of limited use for giving a justification of legal punishment.

[18] See John Cottingham in "Varieties of Retribution," *Philosophical Quarterly* 29 (1979): 238-246 for an analysis of the different senses in which "retribution" is used by philosophers discussing punishment. Hampton's bully example fits well into the satisfaction theory (punishment of a criminal is justified when it brings satisfaction to those who have been wronged by that criminal). James Fitzjames Stephen puts forward a slightly different view, saying that the criminal law "regulates, sanctions and provides a legitimate satisfaction for the passion of revenge" (*A General View of the Criminal Law of England*: 99). A full critique of this view would take us too far afield, and so I will limit myself to the observation that reducing legal retribution to revenge is an unattractive view.

Section 3. Moore: Best Explanation for Our Intuitions

Michael Moore's justification of retributivism takes a notably different approach from those of Morris and Hampton. Rather than attempting to identify a single immoral feature of crimes (such as unfairness or defaming the victim), Moore employs a coherence strategy. He argues (see Ch 2 of Moore) that we have retributivist intuitions when faced with particular crimes. Moore relies on extremely evil crimes, such as those committed by Steven Judy, who raped and murdered a woman and drowned her three children (98). Cases such as these, says Moore, elicit emotional and cognitive responses in most people that can be characterized as retributivist—the criminal ought to be punished even when the punishment is unnecessary to produce some result, such as deterrence or incapacitation (99). From there, he uses "this psychological fact as the basis for an inference to a moral fact, viz., that there is such a thing as retributive justice and that we should design our penal institutions so as to realize this kind of justice" (104). Moore's argument, then, is that we have reliable intuitions that certain crimes deserve to be punished, and those reactions are best explained by "the truth of retributivism" (109).

Moore does not do much to prove that retributivism is a more successful explanation for our intuitions than other theories of punishment. He spends some time to show that retributivism does better than the mixed theory[19] of punishment, but the majority of his argument is concerned with defending the legitimacy of our condemnation of criminals against what he calls a Nietzschean argument (that retributivist intuitions arise from the negative emotions Nietzsche labeled *ressentiment*). We will leave aside, however, the question of whether non-retributivist theories of punishment are more successful at explaining our intuitive responses and instead examine whether his argument falls victim to a congruence problem.

[19] That is, a theory that punishment ought to be inflicted only in cases when both the criminal deserves it and the punishment brings a net social gain.

In making his argument, Moore limits his examples to particularly heinous crimes: murder, rape and genocide. This is understandable, for these are the sorts of cases that come the closest to universally eliciting a retributivist response. However, it might be the case that we react so strongly to these acts not because of their illegality, but because of independently evil features. That is, our intuition that Steven Judy deserves punishment comes not because his acts were legally prohibited, but because it is morally wrong to rape and murder an innocent woman and to kill innocent children. This possibility is supported by the following thought experiment. Imagine a country where women were forbidden to drive cars without a husband or a male relative, and the statutes specified that women were removed from legal protection if they drove alone. Would our intuition that Judy deserves punishment be any weaker if he had committed rape and murder in that country? The fact that his acts were prohibited by a statute does not seem to be a significant source of our moral outrage.

Conversely, let us consider crimes in which there is no pre-legal moral obligation to abstain. Consider, says Dolinko, a person who jaywalks in the early morning across a deserted street, where no cars are traveling. It seems unlikely that many of us would experience indignation towards the jaywalker or have the intuition that she deserves punishment (554). These two thought experiments suggest that the legality of an act plays little, if any, role in our intuitive judgments regarding desert. Rather, these intuitive judgments seem to be better explained by a principle such as, "Harm deserves to be punished, whether that act was prohibited by statute or not."[20] Moore's coherence strategy does not succeed at providing a broad basis for legal retribution—one that supports the punishment of acts against which we have no pre-legal

[20] Note that Moore argues that a principle of retribution is the best explanation for our intuitions. If our intuitions are better explained by something other than the moral principle "illegal acts ought to be punished," his argument for legal punishment is ineffective. Nor does it prove even the weaker claim that crimes causing harm deserve punishment, since our intuitions about punishment don't seem to be any stronger if a harmful act is illegal.

moral obligation, such as driving on the wrong side of the road late at night, "jaywalking, trading on inside information, or giving away ducklings to promote a store sale" (557).[21]

Moore responds to Dolinko's argument (that Moore's strategy does not support the punishment of all legally prohibited acts). He mentions but rejects the possible argument that "all criminal laws—whether prohibiting only slightly bad acts, morally neutral acts, or even morally good acts—obligate citizen obedience, at least in a reasonably just regime" (Moore 184). Rather than making this sort of claim, however, he instead says that the examples of acts claimed by Dolinko to be morally indifferent (absent the law) are, in fact, morally wrong. Moore seems to have the better of the argument on two of these: insider trading harms the financial system, and giving away ducklings in front of a store risks them falling into the possession of a careless owner (185). However, against Dolinko's other two examples, Moore's explanation for their immorality is a non sequitur: "[It is morally wrong to drive] on the wrong side of the road once a statute has been put in place solving the co-ordination problem presented by crowded traffic conditions." How does this show that driving on the wrong side of the road *when there is no traffic* is morally wrong? (185).[22]

To see what Moore is thinking when he says that the two late-night road crimes discussed so far are morally wrong, let us examine the general principle that appears to motivate his justification for imputing immorality to the acts. He states this as,

> Even acts that are morally neutral become wrong when the criminal law prohibits them, if the law's prohibition solves either a co-ordination problem or a prison's dilemma that we

[21] Dolinko (557) also points out that we experience no retributivist intuitions when considering violators of morally evil laws (such as a statute that forbids giving food to the homeless). He considers this to be a weakness of Moore's approach. Here, Dolinko is setting an unreasonable challenge for any retributivist. Even if one goes down the legal retributivist route I advocate, there is nothing amiss with holding that a statute making immoral demands imposes no moral obligations. To put it another way, the *prima facie* moral obligation of law is overruled when a statute conflicts with pre-legal morality.

> have an obligation to solve. Thus, many of what are called 'regulatory offences' may nonetheless prohibit actions that are morally wrong (186).

Before passing a law requiring people to drive on only one side of the road, driving on the other side was morally neutral. However, after the law is instituted to solve a coordination problem, it is immoral to drive on that other side. So far, so good. However, this argument still cannot do the work for which Moore employs it. It is able to show that *most* offences of a particular regulation are morally wrong, but it cannot show that *each and every offence* is. The types of laws discussed by Moore have power to create moral obligations because they generally work to prevent a hurt, such as traffic accidents. However, such a law will end up prohibiting some instances of the act that do not risk hurt, and so do not count as immoral. This is the case even for an ideally-crafted law, because of the clarity required for law to be effective. As statutes become more flexible and vague, they also become more difficult for citizens to obey: citizens find it harder to know whether they are acting in accord with the law. Still, we have the intuition that these laws ought to exist, and so we are led to say either (1) that some acts must be punished even when they are not, pre-legally, morally wrong or (2) that regulatory offences should not be punished when they are not, pre-legally, morally wrong. (1) entails that Moore's intuitions cannot justify the enforcement of some justifiable statutes; (2) entails complications and unpredictability in the enforcement of statutes.

To illustrate, let us return to the case of the jaywalker. If he was crossing at 4:00 A.M., in no risk of being hit by a car and fully aware of the absence of traffic, his particular act did not contribute in any conceivable way to "either a coordination problem or a prisoner's dilemma." Since *this particular instance* of jaywalking was in no way dangerous or harmful, it is unclear

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[22] Moore says nothing specifically about the jaywalking example, but we can easily extend his discussion of the driver to it.

what would make his act immoral, besides being contrary to a statute. "Fine," a defender of Moore might say, "but this is simply a poorly-crafted law. If we allow for the right sort of exceptions, we can ensure that only immoral jaywalking violates the statutes." The two ways to do this would be either to introduce some flexibility clause (e.g. "jaywalking is not prohibited when there is no risk of collision") or specific exceptions (e.g. jaywalking is legal after a certain hour). The drawbacks to the vague flexibility clause are the lack of clarity[23] introduced to the decision-making of both enforcers and citizens, and the inevitable accidents brought on by foolish jaywalkers. Similarly, if the exceptions are more specific, then we would need a quite complex list of exceptions to ensure that jaywalking would be prohibited if and only if it were dangerous. In reality, it seems unlikely that even the longest piece of legislation could ever give a clear, specific list of conditions in which jaywalking is morally unproblematic.

All of this discussion is intended to show that Dolinko's basic point is correct: it is incorrect to think that all violations of the law (even when the statutes are well-crafted) violate moral obligations. Our intuitions about moral desert do not map cleanly onto legal desert, and so Moore's argument for retributivism falls victim to the same sort of congruence problem as Hampton's and Morris's. If we are to find a retributivist justification for punishment, we need one that does not rely on our ordinary moral intuitions or a single moral principle. Hampton, Morris and Moore's projects would be successful if they were aimed at proving that moral violations are morally deserving of retribution, but their arguments are intended (among other things) to justify legal retribution. The project of describing violations of the law, even some idealized legal code, as a certain species of moral violations runs aground when we consider some justifiably illegal acts. These violations of the law are difficult to describe as moral

[23] See Fuller's brief but insightful discussion of the surprisingly complex relationship between clarity and vagueness (*The Morality of Law* 64-65).

violations without relying on the notion of a general duty to obey the law. The question we face is whether it is possible give a morally satisfactory argument for legal punishment without relying on the idea that all violations are moral wrongs. This is the project of legal retributivism, which will be examined in the next section.

3 LEGAL RETRIBUTIVISM

I hope that the preceding analyses have shown how the most influential moral retributivists have failed to explain how the immorality of illegal activity (independent of their criminality) justifies punishment without also implicitly justifying punishment in cases of many legally allowed acts. It is my belief that all such efforts are ultimately doomed to fail, for even the ideal legal code would have to punish some acts that would otherwise be morally neutral. Rather than explaining penal desert on the basis of the criminals' moral desert, legal retributivism defines penal desert as the violation of the law under certain conditions.[24] For moral retributivism, the key question is, "Why do criminals deserve punishment?" Legal retributivism begins instead by asking, "When is the law justified in punishing violators?" I will discuss the work of two legal retributivists: Herbert Fingarette and Alan Brudner.

[24] Recently, Michael Davis (2009) has given a significantly different definition of the distinction between legal and moral retributivism (which he prefers to call "conceptualism"). For Davis, the difference is that "legalistic theories assume that (justified) punishment is a practice (largely) confined to (relatively just) legal systems" (92). This is a broader sort of definition than the one that I employ, allowing him to include Herbert Morris in the legal camp.
Davis's distinction seems less substantial to me, since any moral (in my sense) retributivist might hold the principle of legality to be a necessary part of legal punishment for reasons independent from her justification of retribution. We can easily turn Hampton and Moore's theory into "legalistic" retributivism in Davis's sense simply by stipulating that legality is necessary for legal punishment. Moore gives a weaker version of this, saying that the value of legality means that we *usually* should punish only illegal acts (*Placing Blame* 186-187).

3.1 Fingarette's Conceptual Account of Punishment

Although he does not identify his theory as legal retributivism, in "Punishment and Suffering" (1977) Herbert Fingarette makes a powerful legal retributivist proposal. Fingarette leaves some questions to be answered, but he gives a unique theory—what Davis calls the "institutional" justification of punishment. He describes his goal as "to show how the necessity for punishment is independent of moral justification," but instead is a "necessity internal to law" (503). Fingarette professes "a concern with law as institution of government…rather than as merely a set of abstract conceptions, or a system of rules or principles" (503).

As an institution of government, law has force, i.e. is "enforceable and enforced" (504). This does not mean moral authority, but actual coercive power over the governed. He sidesteps the scholarly debate over the exact conceptual relationship between power and law by pointing to the wide consensus that law must be able to exercise power if it is to actually govern (504). Legal power is not primarily physical force, but power over a person's will: it exercises power over people who obey it and never experience punishment. This means that persons must possess the ability to will against the law, or the presence of law would be pointless (504-505). For law to rule a society, it must be able to exercise its power to forbid people from violating its requirements (505).

With this understanding of power as necessary to law, Fingarette explains, "The [legal] requirement has force even in relation to the non-complying act. We have the concept of *enforcing* the requirement, even *after* the act" (506). When the requirements of law have been violated, the legal system cannot stand idly by—to do so would mean that it had not truly imposed *requirements*. Instead, it must, as much as possible, erase the effects of non-compliance, i.e. make the situation how it would have been had the law been followed. Therefore, courts act

to force criminals to make reparation for wrongful damages—returning stolen property, paying for financial losses and medical costs, etc. However, although reparation makes amends for the damage done to a victim, it does not address the fact of non-compliance: this can only be done by punishment (508). Fingarette does not give a defense of this point, but it seems sound. For example, let us consider a driver who runs a red light, and in doing so damages another person's car. If the driver's only sentence were to pay compensation to the victim, his recklessness *per se* would not be punished; this sentencing would imply that if he had not damaged the other car, his defiance of the law would ought not be punished. Here Fingarette returns to the concept of law as power over the will. When a person commits a crime, she wills against the law's requirement. Punishment is the act of humbling the criminal's will, in response to her earlier defiance.[25] If a person willingly defies the requirements of the law, the legal system must make that person undergo something against her will.[26] Fingarette, then, seems to conceive of punishment and reparation as two expressions of the impulse of law to enforce requirements *post facto*, distinguished by the party that the criminal has wronged.

Fingarette leaves some details to be desired as to how punishment constitutes a restoration of justice, but I will do my best to expand his claims. Legal retribution cannot truly *erase* the noncompliance of the criminal, as Hegel claimed, or even *repair* it, which Fingarette acknowledges (513). We could say, then, that punishment "offsets" rather than "erases" noncompliance by inflicting something undesired on the criminal. If this seems a problem for

[25] A.J. Cohen has pointed out to me that court-ordered reparation, since it forces criminals to do something against their will, seems to be "humbling the will," which would make it fulfill Fingarette's definition of punishment. Cohen has a point here. At times Fingarette specifies his topic as "retributive punishment," but at other times he refer to the same concept simply as "punishment." A better classification would be to see legal retribution and reparation as two distinct forms of punishment. As previously mentioned, there are two aspects of a harm-causing criminal act: the harm it caused and the defiance of the law. Reparation (which includes both compensation and restitution) addresses only the first aspect; retribution, only the second. Cohen's objection

Fingarette, it is worth pointing out that other responses from the legal system are similarly incapable of true erasure. Reparation cannot restore some harms done to victims, such as emotional damage, permanent medical conditions and death, and even some material losses (e.g. possessions that have historical or sentimental value). Courts order restitution to restore the victim to her previous condition as closely as possible, but only some aspects of damage can be truly reversed through the legal system. Monetary awards do not erase "pain and suffering," but they help to balance out the harm done before. Recognizing the limited power of the law in repairing both losses and noncompliance might help to head off skepticism towards Fingarette's account of punishment.

In his overall approach Fingarette is radically different from the moral retributivists discussed, who seek justification for punishing criminals in principles independent of the law. Fingarette, in contrast, holds that law—requirements on individuals—must punish violations, or it would not really be law. "It is part of what it *means* for the law to exercise its power over us, to require things of us, that those who don't of their own will comply are normally punished" (510). It is important to note that by "humbling the will" Fingarette does not mean the criminal's will being led to comply with the law in the future. He means that the criminal is forced to suffer something against his will specifically for violating the legal requirement (510). As to the quantity and type of punishment, Fingarette rejects the view that punishment should be determined only by the severity of the moral wrong. Where Morris says that the "unfair advantage" from a crime is the measure for deserved punishment, and Hampton says that the punishment for a crime must be equal to the disrespect shown to the victim, Fingarette thinks the proper punishment depends on the gravity of the legal requirement as laid down by lawmakers,

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[26] This account of punishment has some similarities with Hampton in its focus on humbling the criminal's will. However, rather than doing this for the sake of the victim's dignity, for Fingarette, legal punishment is only

who consider other facts ("policy and politics, technical considerations related to the field of activity covered by the law, and considerations internal to the legal system") as well as moral judgments (512).

Wendell Stephenson (1990) considers a criticism made by Oliver Johnson (1985) that Fingarette's argument depends on the premise that criminals are capable of obeying the law but will to defy it. If something different were generally true about criminals, then enforcement could require something different: e.g., if criminals have a "sickness" or other inability to follow the law, the state ought to treat rather than punish them (Johnson 159). Therefore, Johnson's objection says, the concept of law does not entail punishment. This criticism has a point, but Fingarette's basic position can be salvaged with a slight clarification: *when a criminal can obey the law but chooses not to*, punishment is the only proper enforcement of the law.[27] Any other response to such a criminal would mean that the law had no power over that criminal's will (Stephenson 230).

Fingarette recognizes that his argument shows that law requires punishment but does not give a moral justification for it. He sees this as a significant task since punishment involves forcing something on a person against his will, and so is an evil (he rejects the idea that because punishment is in response to that person's evil it constitutes a good) (513). [28] So, he concludes that giving a moral justification of punishment requires proving that "law, as a governing

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concerned with the criminal's offence against the law.

[27] Of course, this presumes that there are criminals who fit this description. A more accurate statement would be along the lines of, "if there are criminals who could obey but choose not to, then if they choose not to, punishment is the only proper enforcement of the law." (Thanks to A.J. Cohen for this phrasing)

[28] This line of thought has earned the response from Bill Edmundson that Fingarette's theory does not seem to truly be retributivist. Since it justifies punishment on the basis of its necessity to law, Edmundson says the theory seems to be only "instrumentalist." At times, Fingarette's discussion (such as when he calls punishment a "necessary cost" of law) could lead to this understanding. However, Fingarette is not arguing that punishment is something different from law that must exist in order for law to be effective. Rather, he argues that punishment is in some sense internal to the concept of law. If law exists, then so does punishment, assuming that there are lawbreakers.

institution, is morally justified" (513). Fingarette does not take up this task, but points in the direction of another legal retributivist when he says,

> The exercise of the power of law over our will…does embody respect for our freedom and for our status as choosing beings. The point is that law does leave us free to do much as we will—*provided* that what we will also conforms to the requirements of law. In this way a system of law, thought it constrains the will in its direct import for that will, can allow an enormous residual range of freedom (514).

3.2 Brudner's Purpose of Laws

Alan Brudner in *Punishment and Freedom,* like Fingarette, argues for a legal retributivist justification of punishment. It is a far more comprehensive treatment of punishment, though, giving attention to nearly every issue in the philosophy of criminal law. Although there is much more that could be said about Brudner's theory, I will focus on how his explanation of legal desert can justify punishment for both true crimes and regulatory offenses. Brudner gives a thorough account of legal retribution, particularly the institutional and judicial senses of justification, that avoids the flaws found in the moral retributivist approaches. His theory is able to explain the punishment of many acts that are not well described as immoral and also to avoid justifying radical expansion of punishment into areas of legally allowed immorality.

Brudner begins with the idea that punishment can only be right if it "can be conceived as self-imposed by the sufferer by virtue of his choice to do what he did" (2). This is an apparently paradoxical claim, since something must be done *against* the choice of a person for it to count as punishment. He explains this with a hypothetical social contract model similar to Rawls's original position in *A Theory of Justice*. Brudner relies on the notion of the Agent: a person who

has no subjective ends, and therefore is concerned only with protecting her "freedom to choose and pursue material ends" (4). In this thought experiment, the ideal Agent acts as a representative of actual persons for giving consent to a particular legal system, including its rules on punishment. Since the Agent would have no subjective ends, it would endorse laws that work to protect human freedom. Freedom receives this privileged status within the thought experiment because it is a value shared by all branches of liberalism and, unlike other characteristically liberal goods, it is "an interest that is necessarily rather than contingently shared" by all persons (22). If an act of punishment is affirmed by the Agent as upholding freedom, Brudner says, it counts as "self-willed" by a criminal. By considering the interests of the ideal Agent, we can determine whether punishment of actual criminals is justified.

Of course, the punishment justified by Brudner's Agent depends a great deal on the conception of freedom being considered by the Agent. Brudner discusses two possibilities, which he calls "formal agency" and "real autonomy" (5).[29] Formal agency is the "capacity to have chosen otherwise than one did" (5). To have formal agency in an act, it does not matter what *motivates* the person to act (appetites, habit, rationally chosen goals, etc.) so long as that person is free from the actual coercion of others. Under this conception of freedom, the Agent would endorse punishment in cases where a criminal freely (i.e. as a formal agent) chose to "pre-empt the free choice of another" (5). Formal agency imposes two conditions, then: the criminal must have *chosen* to do some act and the act must be an interference with or destruction of another's capacity to choose. Both of these conditions must be fulfilled for the conception to justify

[29] He also discusses a third called "communal solidarity," but this conception plays a much smaller role in his theory and is not important for our purposes.

punishment. This set of acts roughly corresponds to the legal category of true crimes,[30] and so Brudner argues that consideration of formal agency is the foundation for true crimes.

The second conception of freedom—real autonomy—requires that a person act from self-determined ends. In formal agency, a person acting on the basis of ends that arise by "instinct or by immediate biological need" would count as free, but not under real autonomy (5). A person must exercise his "capacity to form and realize a life plan reflecting a self-conscious conception of [his] good" to be free in this sense. To sum up real autonomy,

> An agent is free only if it acts from ends that are self-authored and only if the vulnerability of its life plans to adversity is limited by law to a vulnerability to accidents it could have foreseen and avoided (5).

The punishment justified by this conception of freedom differs from that of formal agency in two important ways. First, real autonomy entails a wider range of protections for persons. To be able to select and pursue their own ends, persons must have a certain amount of protection for their welfare: physical needs, economic opportunities, etc. To protect real autonomy, the criminal law must prohibit some acts that do not violate a person's formal agency—her simple capacity to choose—but do threaten her ability to live according to her own plans. Second, real autonomy sets a lower standard for punishment than formal agency. To be culpable for violating a law under real autonomy, it is not necessary that the criminal be intentional or reckless in committing the act (173). It is only necessary that the criminal "could have foreseen and avoided" the consequences of his act—what the law calls negligence (5). Real autonomy, Brudner says, is the conception that justifies the legal category of public welfare offences, or regulatory offences. He uses the terms interchangeably, but it is better to say that public welfare offences are a particular

[30] In Anglo-American legal thought, prohibited acts against persons, property, the state and administration of justice, when done with an intentional mental state, are classified as true crimes (Brudner 8-9).

type of regulatory offence. Therefore, I will use the term "regulatory offence" unless the statute is particularly directed at threats to the public.

What makes Brudner's theory remarkable is his response to these two conceptions of freedom. Rather than enshrining one as a comprehensive framework for the legal system, he recognizes shortcomings to each. Formal agency's sole focus on freedom from external coercion excludes as ends things that are necessary for all persons, such as life and health (27). Formal agency would not prohibit any act unless (a) it is *intentionally or recklessly* committed and (b) is directed against another person's capacity to choose. Thus, formal agency has nothing to say about regulations to protect public health, which fail condition (b) (e.g. polluting water or air does not constitute a denial of another's agency), or laws that penalize negligence, which fail condition (a). If formal agency is our complete understanding of freedom, any consideration of these laws would occur in a "normative vacuum," subject only to cost-benefit analysis (57).

Since real autonomy requires that a person be able to choose and pursue her own ends, it protects a broader conception of goods than formal agency. It is easy to imagine persons who have formal agency, yet lack real autonomy. For example, a person driven by poverty and lack of education to work in a dangerous, abusive sweatshop would be judged as free under formal agency, but not real autonomy. To protect her freedom, real autonomy would provide support for statutes to prohibit unsafe working conditions, protect educational and employment opportunities, etc. Furthermore, since real autonomy includes the ability to *pursue* one's own ends, it gives justification for statutes to protect goods and activities that are widely desired, such as statutes to set up and manage public parks.

The previous paragraph might lead one to think that real autonomy is, on its own, a satisfactory framework for law—that it is sufficient to cover the acts prohibited by formal

agency, plus threats to welfare. However, real autonomy cannot fulfill this aspiration. Since most violations of formal agency include setbacks to welfare, real autonomy frequently does overlap with formal agency. However, real autonomy cannot justify punishing harmless acts that still violate agency, such as a doctor administering a beneficial treatment to a patient under anesthesia without consent. This act would not harm the person's welfare; in fact, it would improve the patient's health, allowing her a greater chance to live according to her own conception of the good. What we see, then, is that neither conception of freedom is able on its own to justify a plausible sort of criminal law. One response to this problem could be to conclude that we need to find an entirely different conception to justify criminal law, but Brudner instead argues that the two conceptions are both necessary for our law, and so form a "complex unity" (8).[31]

Brudner's main reason for why we ought to accept the existence of two conceptions of freedom underlying the law appeals to the traditional distinction in both Anglo-American and European legal systems between two categories of legally prohibited acts—true crimes and regulatory offences. True crimes are when a person preempts, interferes with or destroys another's capacity for choice, through physical force or threats of force (172). Brudner also extends this category to interferences with public institutions that protect rights of agency, such as treason against the state and subversion of the legal system (57). Regulatory offences, on the other hand, threaten goods that are necessary either for persons to be able to select and pursue ends (called "agency goods," such as food, medicine and clean air) or to satisfy subjective, commonly held ends (such as game animals—hunting is not necessary for life or even universally desired, but it is necessary to fulfill many persons' desires). Because Regulatory

[31] Brudner does not give a decisive argument for why we ought to combine the two conceptions, rather than seek a third. His main reason appears to be that there is a commonly made distinction between true crimes and regulatory offenses (8-11), and that this distinction is best explained by the existence of two conceptions of freedom within the

offenses have a lower standard of liability than true crimes—negligence counts as fault—the category includes many of the acts to which the theories of Hampton and Moore have problems imputing immorality. True crimes require intent, recklessness or willful blindness for culpability. The classification for acts that cause physical harm or death to a person depends on the criminal's state of mind. Thus, reckless manslaughter counts as a true crime, while negligent manslaughter is considered a regulatory offense.[32] Although both are interferences with a person's capacity to choose, only when committed recklessly or intentionally does it constitute a choice to disregard that other person.

Brudner argues that each category of prohibited acts is primarily governed by one conception of freedom: true crimes by formal agency and regulatory offences by real autonomy. Note the use of "primarily," though: the other conception plays a secondary sort of role in each category. Real autonomy's considerations of welfare do not determine whether a true crime occurred, but they do influence the amount of punishment that is justified. Assault can occur without harm being done to the victim and always deserves punishment, but the greater the harm caused, the greater the amount of punishment given to the offender (10). Similarly, for the area of welfare offences, formal agency plays a secondary role in determining the severity of punishment. Threatening goods necessary to live autonomously (such as health) generally deserves more punishment than threatening goods necessary to subjective ends (like wildlife populations, the stock market, etc.).

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law. It should be admitted that it is at least possible that some other conception of freedom could be articulated that could account for the true crime/ regulatory offence distinction.

3.3 Advantages of Legal Retributivism

I will now discuss how legal retributivism avoids the problems faced by moral retributivism. The first problem is situations in which immorality and legal prohibitions do not overlap (what I have called the congruence problem). Since legal punishment requires illegality, dealing with immoral acts that are not legally prohibited is not a dilemma for legal retributivism. Legal retributivists have no difficulty with saying both that an act is immoral and that the legal system ought not punish the act. There are some types of acts that are immoral, yet with which the legal system should not concern itself. Of course, if the legal code were *mistaken* in allowing the act, then the legal retributivist would say that the statutes need revision, but that the legal system should not punish acts. This is in contrast to moral retributivism, which, as shown in Chapter 2, tends to imply that immoral but legal (either correctly or incorrectly so) acts ought to be punished. The best response that moral retributivists can give to this problem is to introduce a principle of legality[33] (the legal system should not punish acts that are not prohibited by statute). However, this principle is no way a necessary or even natural part of moral retributivism: it adds nothing to the internal coherence of the theory, and even stands in tension to the general force of the argument. For example, Moore says that the principle of legality has some normative force, but that in some cases of great immorality, legally allowed immoral acts still ought to be punished.[34] For legal retributivism, on the other hand, the principle of legality is an implication, not an optional addition that causes conflict.

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[32] The issue of strict liability is mentioned in Chapter 4, Sec 1 (p. xx)

[33] Such as Michael Moore in *Placing Blame* (186-187)

[34] Ibid. 187. Moore uses the Nuremberg trials of Nazi leaders as his example here. However, saying that those trials violated the principle of legality assumes that the crimes of the Nazi regime were truly done by law, which depends on a certain sort of legal positivism. Other theorists, such as Fuller (1958), have given justification for punishing the Nazis without characterizing it as illegal punishment. Either way, much of the theoretical problems in the Nazi case come from the widespread corruption of the German legal system, which was so systematic that it is a reasonable question whether there was any genuine *law* at all under the Nazi regime. In more healthy legal systems, Moore's willingness to have legal punishment for acts not forbidden by law would become more problematic.

The converse situation has been covered in-depth by this point: cases where the law prohibits acts and yet it is difficult to describe the criminal as behaving immorally. Negligently causing harm can only be described as immoral in a much weaker sense than intentionally or recklessly causing it. Acts that violate justified laws but avoid excessive risk of harm to others, such as the person jaywalking on a deserted road early in the morning, do not seem to be immoral under any principle besides the dubious general duty to obey the law. Legal desert in these cases is better explained on non-moral grounds: that the criminal law is justified in coercing persons who violate a statute that generally works to protect agency and welfare.

The second problem identified in moral retributivism had to do with how to correctly measure the amount of punishment for a specific crime. Here, someone skeptical of legal retributivism might find it wanting, as it does not give any single principle to explain the measurement of punishment. For example, Fingarette says,

> *They* [legislators] establish, as part and parcel of the legislative act, how grave the requirement is to be, and it this that determines, in turn the gravity of the offence against that requirement. The graver the legislators mean their requirement to be, the graver the punishment. (512)

In the next chapter, I will examine how a legal retributivist would measure punishment, and consider other objections to Fingarette and Brudner's versions of legal retributivism.

4 OBJECTIONS

Now that legal retributivism has been explained, I will consider three likely objections to the theory. Two objections to legal retributivism are related to the legislative aspects of punishment.

The third is centered on the institutional sense of justification, but has implications for the legislative and sentencing aspects as well.

4.1 Punishment of morally neutral acts

One objection to legal retributivism could arise from Brudner's downplaying of moral desert, which might seem to imply that the state is justified in punishing people who have done nothing morally wrong. It would be strange for a theory to have such a gap between moral obligation and justification of punishment. This objection would presumably be directed against Brudner's explanation of regulatory offences, since, as he defines them, true crimes,—intentional or reckless interference with or destruction of another person's autonomy—clearly constitute moral wrongs.[35] Whether we have an additional obligation when a true crime is prohibited by the law—e.g. in addition to the universal duty to refrain from murder, also an obligation not to break the law against murdering—is unclear, but by violating another's autonomy these criminals have already violated a moral obligation.

Whether it makes sense to describe regulatory offences as immoral is more complex. Brudner does not deny that most of these offences are "morally blameworthy;" he argues only that the moral blameworthiness of regulatory offences is not reason for them to be punished (176). Acts fall into the regulatory offence category, rather than true crimes, for two reasons: either a lower level of culpability or the nature of the act (or both). Acts that interfere with another's autonomy, but are committed negligently (rather than intentionally or recklessly), seem to count as morally culpable. A driver who injures a pedestrian negligently has, by definition, failed to exercise the amount of care appropriate to driving a car, and would be apt for moral

condemnation even if the pedestrian had by chance avoided the injury. Acts that only interfere with widely held preferences, not autonomy, do not always qualify as immoral, according to Brudner. Prohibiting these acts is justified if they "regulate for everyone's benefit the pursuit of private satisfactions" (180). Lest he be understood as relying solely on a utilitarian-esque preference maximization analysis, Brudner stipulates that autonomy-based rights maintain absolute priority over subjective preferences (e.g., we cannot limit free speech merely to increase overall utility), and that negligent offences against preference-based laws can be punished only with fines, not imprisonment (181-182).

It is worth mentioning that in the case of regulatory offences, the only significant revisions suggested by Brudner's theory to existing legal systems are in favor of potential offenders. Brudner rejects strict liability as a condition for fault, saying that punishment is unjustifiable if the offender was unable to foresee and avoid the offending act (181). In place of strict liability, due diligence should be the strictest standard for welfare offences. Second, as mentioned above, negligent offences that threaten only preferences, rather than autonomy, should only be punished with fines and not imprisonment. This might mitigate the worry that Brudner's theory gives too much latitude to the state in criminalizing and punishing acts.

4.2 Measuring punishment

A second possible objection to legal retributivism is similar to the first: that it gives no moral principle to determine the appropriate type and amount of punishment for a crime. Although the unfair advantage version of moral retributivism was found to be problematic, it at least offered

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[35] Brudner does include among true crimes acts that obstruct or undermine legal institutions that protect liberty. However, even philosophical anarchists would presumably regard someone bribing police or legal officials to be immoral, assuming that the particular legal system were reasonably just.

an initially plausible way to measure the amount of punishment crimes deserve. I will examine both Fingarette and Brudner to see how they stand up to this objection.

What does Fingarette have to say about measuring punishment? First, he rejects Kant's idea that punishment ought to reflect the characteristics of a crime (death for murderers, castration for rapists, etc.). So long as a punishment directly humbles the defiant will of the criminal, it is permissible (511). The amount of punishment, he says, depends on "the gravity of the requirement" (511) that is laid down by the legislators. The "gravity" is partially, but not solely, dependent on morality:

> Moral judgments may have influenced the legislative decision to establish the requirement of law and its gravity. But other facts, too, have an important influence on that legislative decision – policy and politics, technical considerations related to the field of activity covered by the law, and considerations internal to the legal system. We do not need here to know how legislators weigh and synthesize all this… *They* [legislators] establish, as part and parcel of the legislative act, how grave the requirement is to be, and it is this that determines, in turn, the gravity of the offence against that requirement. The graver the legislators mean their requirement to be, the graver the punishment [ought to be]. (512)

What we have, then is the idea that there are two stages to determining punishment. The legislators determine the gravity of the requirement, which in turn determines how severe the punishment ought to be. Upon first reading, by speaking of the legislators "establishing" the gravity of the punishment, Fingarette seems to mean that the correct amount of punishment is *whatever the legislators decide*, which would clearly be an unacceptable answer. The most favorable interpretation is to take him as meaning that the correct amount of punishment is

whatever would be selected by *ideal* legislators considering all the aspects of an act. Even if we give such a favorable interpretation of Fingarette's statements, he does not give significant explanation of how the legislative decisions ought to be made, and so his comments fail to give a satisfactory answer to the question of how to measure punishment. I turn, then, to Brudner.

Having divided penal justice into two categories (true crimes and regulatory offences), Brudner's account gives different guidelines for how to measure punishment. In the case of true crimes, liability to punishment depends only on whether an act interferes with another person's formal agency. However, the *amount* of punishment "depends crucially (though not exclusively) on the kind and extent of the harm caused or risked by a criminal interference" (10). So, to return to an earlier example, a doctor who injected a patient with some drug against his will would be liable for punishment even if the drug were harmless. However, the doctor would deserve greater punishment if the drug caused harm, and even more so if the drug caused death. On the other hand, liability for regulatory offences exists on the basis of welfare. Whether the act constitutes a setback to another person's agency is not necessary for welfare offence liability, but does affect the degree and type of punishment. A negligent act that results in harm or death to a person should be punished more harshly than some negligent act that only interferes with a person's ends. Imprisonment for a regulatory offence is only just if the offence (a) negligently risked harm to another's agency or (b) volitionally damages public interests.[36]

However, although Brudner provides some clear boundaries for punishment—when imprisonment is acceptable and when only a fine can be justified—his account gives less than sufficient guidance for how to set particular amounts of punishment. Of course, we cannot expect detailed recommendations of punishment from a philosophical account of criminal law, any

[36] For example, killing endangered animals could justly be punished with imprisonment if it were done intentionally, but not if it were done negligently.

more than a theory can give us a formula to choose a particular amount of compensation (e.g. it is just to require a criminal to pay the cost of a victim's medical bills). It is probably too much to ask from a theory of punishment that it be able to set precise measurements of imprisonment or fines for specific crimes (e.g. assault causing paralysis equals X number of months imprisonment).[37] Even with this caveat, however, Brudner's theory leaves something to be desired. It does not specify how the central principles—protection of agency and real autonomy—would be translated into actual penalties. Instead, it merely helps us to give a *relative* ranking of crimes; for example, an assault causing a death should be punished more harshly than an assault causing an injury.

Thom Brooks (2011) suggests that Brudner could improve his account by incorporating elements from British Idealists (such as James Seth).[38] Rather than seeing law as protecting freedom, the British Idealists saw it as aimed at protecting a system of rights. The amount of punishment would depend on the importance of the right that had been violated. Brooks claims that this revision better explains the rationale behind some regulatory offences. I am doubtful that this revision constitutes an improvement to Brudner's theory, but Brooks does make another claim here that is relevant to the matter of setting amounts of punishment. Brooks draws from the British Idealists the principle that "there is no one fixed penal tariff for any crime: instead, we continue to revise our account as we reconsider the importance of the rights we have *vis-à-vis* each other" (9). It is very possible that Brudner holds a similar belief about punishment measurement: although he does not state this explicitly, it would explain the scarcity of discussion about measuring punishment. Let us assume, then, that Brudner would endorse

[37] This is not to say that it cannot be attempted, for this is what Kant attempted to do when he tried to match the characteristics of a punishment to the characteristics of the crime.
[38] Both Brudner and the British Idealists look to Hegel's political and legal writings for inspiration, so this is a plausible move to make.

Brooks's revision. This would leave the measuring of punishment up to the legislators, who would then base the amount of punishment on either the importance of the right violated (Brooks) or the severity of the setback to others' freedom (Brudner).

This explicit endorsement of vagueness ought to give us pause. From the perspective of legislators, it might not seem problematic to say that we select statutory penalties "as we reconsider the importance of the rights we have *vis-à-vis* each other." However, for anyone seeking to evaluate the justice of a statutory punishment this sort of legal retributivism gives us no specific criteria to use in assessment. As described by Brudner and Brooks,[39] neither the importance of a right nor the severity of a setback to liberty is a thick enough concept to be the sole factor in setting a punishment. So far, then, this objection to legal retributivism has not been satisfactorily addressed.

4.3 Must retributivism be pure?

A third objection to legal retributivism concerns its account of the aim of punishment. Previous forms of retributivism are often criticized for their singular focus on penalizing the past actions of a criminal, without regard to future effects, and legal retributivism as described so far seems likely to elicit this objection. Retributivism has been opposed not only to consequentialist theories, but also so-called "mixed" theories of punishment, which rely on both retributivist and consequentialist considerations. These theories argue that a criminal should be punished only if both he deserves it *and* the punishment will achieve some social gain. Usually, punishment is only justified if it achieves some social gain (deterrence of future crime or reform of the

[39] Here it must be pointed out, in his defense, that Brooks does not claim that the importance of a right should be the only factor in setting punishment. This will become clear in the next section.

criminal), but desert operates as a constraint (to exclude the possibility that an innocent person would be punished, or a criminal punished out of proportion to the crime).[40]

Both Fingarette and Brudner are clear that their theories are not mixed: punishment is solely justified by the act of the criminal, with no role for deterrence or reform in consideration of punishment. Brudner says of his theory, "legal retributivism is pure retributivism" (20). Fingarette says,

> In itself punishment has no constructive aim. If it tends to deter, or to induce moral reform, so much the better…In real life punishment may deter or reform, or it may not…This element of contingency is one major reason why, when the general practice of punishment is justified by reference ultimately to deterrent or reformative ends, that justification is subject to serious challenge (513).

Instead, the concept of punishment necessarily means only that the criminal be made to suffer. Fingarette concludes from this that the essence of punishment (suffering) is an evil. Therefore, he says, to justify punishment one must show that "law is morally justified." The best we can say of punishment, then, is that it is a "necessary cost" for the overall good of law (513).

Fingarette expresses well the sort of understanding found in pure versions of retributivism (including Brudner) that has earned the distaste of critics. He admits that retribution *in itself* is an evil, for it is not conceptually aimed at any good consequences. So long as this is held to be true, it is unsurprising that consequentialist and mixed theories have remained appealing as alternative theories: we have an intuition that punishment is better when it deters future crime and reforms criminals. It does not merely seem desirable in some peripheral sense—in the way that a painting that deterred crime would be desirable. The excellence of a painting is

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[40] H.L.A. Hart is usually understood as giving such a theory in *Punishment and Responsibility,* Oxford: Oxford University Press, 1968.

found in aesthetic value, not how it affects potential criminals. However, the effects a system of punishment, if not particular instances of punishment, has on future criminals seem relevant to how we judge it. Intuitively, it seems that considerations of deterrence and reform still ought to affect a system of punishment, even if their role is not as important as consideration of retribution.

Drawing on both Hegel and British Idealists, Brooks argues that Brudner's theory can be made to accommodate the idea that deterrence and reform are proper aims of punishment. Since Brudner holds that the aim of the law is to protect freedom, a system of punishment that leads to fewer transgressions of freedom seems to be preferable to a system that does not. Both deterrence and reform, when successful, protect freedom for the future, and for that reason, they ought to have value to Brudner (13). Brooks says the following to explain how he would incorporate deterrence and reform into legal retributivism,

> If our primary aim is the protection of rights, then this task may be achieved in different ways and it will depend upon the particulars of a situation… In neither case is rehabilitation nor deterrence the justification of punishment with both playing a secondary role to the primacy of desert and the protection of rights (13).

The vagueness that characterized Brooks's discussion of the importance of a particular right has reemerged here. Once again, Brooks leaves much up to the judgment of individual legislators and judges. All that I can gather from this is that rehabilitation, deterrence and retribution should be considered equally important when punishing some act. As before, this is unhelpful for evaluating a specific penalty or sentence. Furthermore, it seems incorrect to call whatever theory would emerge "retributivist," since retributive, rehabilitative and deterrent elements would be equally important.

How deterrence and reform might better be incorportated into legal retributivism deserves more attention than I can give here, but there are two guidelines that I think such a theory needs to follow. First, the theory ought to remain retributivist, in the sense that violation of a law protecting freedom is both necessary and sufficient for a person to be liable for punishment. It being necessary entails that no innocent person ought to be punished, regardless of positive consequences; its being sufficient means that criminals ought to be punished even when the punishment will neither deter others nor reform the criminal.

Second, deterrent and reformatory consequences ought to play a secondary role in selecting statutory penalties and sentencing to determine both the type and amount of punishment. Here, the primacy of retributivism would be seen in the fact that it sets constraints on the type and amount of punishment: in Brudner's theory, the extent to which a crime set back the freedom of others would be the maximum amount of freedom of which that criminal could be deprived.[41] However, within that limit, legislators and judges ought to consider deterrence and reform when setting punishment. For example, even though sending someone to prison for six months for robbery might be justifiable on the basis of his act, if a more extensive probationary program is more likely to reform him, then probation might be the option recommended by the theory. On the other hand, if leniency to a high-profile criminal would be likely to embolden potential criminals, then giving the maximum sentence might be preferable on this approach. [42]

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[41] Assuming, of course, that it is possible for "setting back another's freedom" to be a criterion for measuring punishment, as questioned in the previous section.

[42] Bill Edmundson has questioned whether it is possible for a theory that includes rehabilitation and deterrence in any role still to count as retributivist. He refers to Michael Moore, who defines retributivism as a theory that deserved punishment is a "good in itself" and says that any consideration of consequences is incompatible with retributivism. However, what Moore has given is too restrictive to be a proper definition of retributivism; it is only one *conception* of retributivism. A theory should be considered retributive so long as it holds that punishment should be given on the basis of the criminal's acts alone. I would expect controversy from my suggestion that a theory can still be considered retributivist if it includes consideration of consequences like rehabilitation and deterrence, but the limited roles played by those considerations means that my outlined theory can at worst be called "mostly retributivist."

In a sense, the resulting theory might be labeled as "mixed," but it would be significantly different from the usual sort of mixed theory, *a la* Hart. Retributivism operates as the sole or main consideration at every level of justification; deterrence and reform have only a secondary sort of influence in selecting the penalty and sentencing for a crime. Since Brudner holds the law to be retributivist only in a legal, not moral, sense, deterrence and reform do not seem to be in tension with his theory, but rather to strengthen it. Incorporating these two considerations gives legal retributivism yet another advantage over moral retributivism: also it helps to alleviate the problem pointed out in the preceding section—that considerations of freedom alone do not give adequate guidance for setting a punishment.

Conclusion

I have shown some major problems with three of the most important varities of moral retributivism: Morris's unfair advantage theory, Hampton's expressivism, and Moore's intuition-based approach. All regard punishment as primarily directed against immorality, which they explicate in different fashions. All of them have difficulty establishing why only some immoral acts should be punished, and how all things that deserve punishment are truly immoral. Legal retributivism, particularly Alan Brudner's version, offers a sort of retributivism that avoids that congruence problem by explaining the law as directed against infractions of freedom, rather than immorality. By employing two conceptions of freedom, Brudner's theory gives us the resources to punish threats to both agency and welfare. The weak areas of his theory, I argue, can be strengthened by incorporating deterrence and reform as legitimate goals of punishment, although in a way subordinate to retributivist considerations. Work remains to be done in legal

retributivism, but it offers the potential to incorporate the strengths of retributivism while avoiding the most important weaknesses made in moralistic versions.

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