The Scales of Injustice

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Introduction

In 208 BCE the question arose as to who was the rightful chieftain of Ibes, a city in Spain. Livy tells us that Orsua, whose father had been the previous chieftain, and Corbis, who was Orsua's first cousin and the elder of the two, both staked their claims and declared that Mars, god of war, should judge between them. Hoping to soothe the rivals' inflamed feelings, the statesman and future general Publius Cornelius Scipio called for the matter to be instead settled with words. But each claimant had already informed his family that talk was not his way and, in any case, he would rather die in combat than be subjected to the authority of the other. And so it was that a crowd was afforded a great and bloody spectacle: Corbis, the more skilful at arms, slew Orsua, whose reliance on brute force ultimately failed him.[1]

A very long time passed before such trials by combat were abandoned in the West. In fact, they had a place in Germanic legal traditions until the 16th century. The use of scales as an emblem for legal justice has continued, however. Because even while reason has come to play a much greater role in legal proceedings, antagonism between opposing counsel persists, and scales, which operate according to a zero-sum dynamic (lowering one pan raises the other and vice versa), provide an extremely apt metaphor. So it is that, today, lawyers' arguments are said to be "weighed against" each other whenever judges and juries deliberate over the cases in front of them.

Yet the scales emblem has not always carried this meaning. Its origins remain obscure, though they probably lie first in Egyptian and then in Greek mythology. Maāt was the Egyptian goddess of truth and order, charged with weighing the souls that arrived in the underworld in order to determine which could be allowed into the paradise of the afterlife.[2] A symbol of the deceased's

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[1] Adapted from Livy, *The History of Rome*, bk. 28, ch. 21.

[2] See Maulana Karenga, *Maat, The Moral Ideal in Ancient Egypt: A Study in Classical African Ethics* (New York: Routledge, 2004), pp. 64, 139–40, 164, 172–73, 289.

heart, which represented their actions in life, was balanced against a feather, which stood for truth: damnation or redemption depended on how the scales tipped.[3]

Later, Homer's *Iliad* tells of Zeus' scales, which the king of the gods used to weigh men's chances in battle, and says of legal proceedings depicted on Achilles' shield that the winner would receive talents of gold (*talanta* originally meant scales).[4] But rather than associating scales with the ideas of reason or merit, they symbolized no more than what we would today consider pure chance; right, in other words, did not weigh more than wrong.[5] However, at one point Apollo does speak of Athena, goddess of wisdom, using the scales, which can be seen as an echo of the Egyptians' pairing of Maāt with Thoth, who represented the reasoning powers of Rā, the sun god who embodied the others. In fact, in time, Maāt/Thoth came to be identified with Plato's *logos*.[6]

Nevertheless, when it came to symbolizing legal justice, the Greeks turned instead to the Titan Themis and her daughter Dike, both of whom often came to be identified with Justitia, the Roman goddess that is personified as Lady Justice today.[7] Dike held scales, it is true, but she didn't use them to weigh people or their deeds;[8] on the contrary, persons and actions were tested *against* the scales, which were fixed. They had to be, as they represented the perfect equilibrium of the cosmos' polarities (i.e. being and nonbeing, illusion and reality, good and evil), and indeed both Dike and her mother stood for its divine ordering, a feminine principle. While this idea is present in Homer under the guise of Fate, or Moira, it is in Hesiod that Moira, Themis and Dike are most clearly portrayed as descendants of Gaia, the Great Mother-Goddess.[9] Thus, people prosper when

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[3] The all-or-nothing quality of this decision has been emphasized by David Daube, "The Scales of Justice (1951)," in *Daube on Roman Law: Collected Works of David Daube*, vol. 5, eds. Calum Carmichael and Laurent Mayali (Berkeley: Robbins Collection Publications, 2014); and Martin Loughlin, *Sword and Scales: An Examination of the Relation between Law and Politics* (Oxford: Hart Publishing, 2000), p. 55.

[4] See the *Iliad* 8.69–75, 12.433–438, 16.658, 19.222–224, 22.209–213.

[5] See Johan Huzingas, *Homo Ludens: A Study of the Play Element in Culture* (Boston: Beacon Press, 1950), pp. 79–80.

[6] See the *Iliad* 7.26; and Budge, pp. 29, 407.

[7] See Catherine Burnett, "Justice: Myth and Symbol," *Legal Studies Forum* 11, no. 1 (1987): 79–94, esp. pp. 81–83.

[8] See Daube, p. 14.

[9] See Donna Marie Giancola, "Justice and the Face of the Great Mother (East and West)," paper delivered to the Twentieth World Congress of Philosophy in Boston, 13 August 1998, pp. 3, 6–7; and Hesiod, *Theogony* 135, 217.

they conform to her will by acting "straight and just" rather than "crooked [or] violent"; otherwise, they provoke her dark side and are cursed, with Zeus ordaining their punishment.[10]

Today, the scales held by Lady Justice are supposed to measure not the cosmos, like Dike's scales, but the pleas advanced by lawyers clashing over a case, which they do as part of an adversarial process that's meant to conclude with a judgment that is a matter of degree rather than all-or-nothing. If these scales hark back to anything, therefore, it's to the scales of Zeus and Achilles – even if, as noted, those scales invoke the vicissitudes of battle instead of principles of reason or merit. All of which is to say that the decline of trials by combat appears to have led to an important transformation such that the scales have come to represent a hybrid conception, one encapsulated by the idea of "adversarial reasoning," or what we sometimes call "pondering" (from *ponderare*, the Latin for weighing).

It seems to me, however, that we haven't come far enough. Because I believe that the law is simply not at its best when it's associated with the scales emblem. Of course, what's meant by legal "balancing" today is often vague.[11] Still, I have concerns with any and all interpretations of it, including the weighing of the merits of a given case and the accommodations that are often arrived at between different legal purposes. After all, there exists a superior form of practical reason, one that aims to reconcile or integrate things rather than merely balance them against each other. Pondering has its limitations not only because reconciliation is better than accommodation, but also because some things are simply incompatible with, because wholly undermined by, antagonism. This is why, as I shall argue here, those approaches to the law that favour pondering either distort or fail to recognize certain legal purposes altogether. Sometimes, they do both.

What might these purposes be? Faced with an apparently criminal act, we have reason to be concerned about all of the following: that the truth of what happened be accurately known; that if an offence was committed there be proper recognition of its wrongness and some form of censure and sanction of the offender; that there be some way to prevent the offence from occurring again, particularly to protect the security of the public; that, if possible, the offender be rehabilitated and

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[10] Hesiod, *The Works and Days*, in *Hesiod*, trans. Richmond Lattimore (Ann Arbor: University of Michigan Press, 1959), pp. 231, 219; see also pp. 220–47.

[11] "The difficulty is that many of those who employ this terminology fail to stipulate exactly what is being balanced, what factors and interests are to be included or excluded, what weight is being assigned to particular values and interests, and so on." Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2005, 3rd ed.), p. 40.

so become the kind of person who would no longer commit such an act; and that the whole process not be too costly. My argument, in essence, is that all of the approaches to criminal law which invoke balancing in one form or another lead to less than optimum ways of meeting one or more of these purposes. I will advance it by emphasizing a certain metaphysical difference between the approaches, in particular, as regards the classic theme of "the one and the many."

The dominant approach is, of course, the monist one, whereby legal justice, and so the purposes identified above, constitute a unity. The opposite, pluralist approach emphasizes instead the irreconcilability of their conflicts and so fragmentation. As I shall show, however, both can be identified with the scales emblem. This is because both conceive of these conflicts as a matter of "clashing" or "colliding," a highly adversarial image which encourages the idea that the best way to respond, metaphorically speaking, is to put each in a different pan on a set of scales and balance them against each other. Monists think this because they assume conflicting things struggle within a unity, and so that they should ultimately be seen as like competitors in a game or sport, competitors being people who relate antagonistically while being nevertheless unified under a set of rules to which they conform. Pluralists think this because their emphasis on fragmentation leads them to conceive of conflicting things as separated by gaps rather than cohering as parts of a unity, and this implies that they're not mere competitors but adversaries of the kind we call enemies. For whenever parties separated in this way conflict and one of them loses, what they've lost is surely more than a mere game.

By contrast, if we are to make room for genuinely reconciliatory solutions to conflict, those that are win-win and so positive- rather than zero-sum, then we need, once again, to conceive of the parties to a conflict as being capable of being integrated rather than balanced against each other. Otherwise put, their conflict needs to be seen as "oppositional" rather than "adversarial," since they are parts of a disunified but not necessarily fragmented whole, which could be open to being transformed in a way that integrates them further. For this to be possible, however, the parties in conflict must see each other as "friends" of a sort, rather than competitors or enemies.[12]

However, ever since at least Aristotle's *Metaphysics* (e.g. 1023b25), philosophers – and, following them, pretty much everyone else – have tended to treat "wholeness" and "unity" as

[12] See my "Opponents vs. Adversaries in Plato's *Phaedo*," in *Patriotic Elaborations: Essays in Practical Philosophy* (Montreal and Kingston: McGill-Queen's University Press, 2009).

synonyms.[13] What we need instead is to recognize disunified wholes, which have gaps in them that represent the sites of conflict. Such conflicts are consequently best described not as consisting of antagonists that have banged together, whether within a unity or outside of one, but of certain regions of a whole exhibiting tensions or disharmony. This makes way for posing the question of how that whole might be transformed in order to close the gaps and so reconcile the conflict.

The question is central to an alternative conception of law, one whose metaphysics is, we might say, situated *in between* monism and pluralism. Legal justice as so understood should be associated with the conception of political justice that I have called "patriotic."[14] Patriots are members of civic or political, as distinct from national, communities; they are citizens who strive to maintain and develop the common good by responding to their conflicts in ways that reconcile rather than merely accommodate them. I want to show here how this approach is relevant not only to politics but also to the conflicts that may arise between the various legal purposes.

I will do so by offering some criticism of the main alternative approaches to legal, and especially criminal, justice on offer today – each of which, in its own way, endorses the balancing scales metaphor. Three are monist, *consequentialism*, *retributivism*, and *abolitionism*, and a fourth, often referred to as the *mixed* approach, is pluralist.

Consequentialism

Consequentialists strive to bring about states of affairs where a master good is promoted. This good could be utility, for instance, following Bentham and other utilitarians, or freedom as non-domination, as in the case of John Braithwaite, Philip Pettit and other neo-republicans.[15] Because consequentialists would reduce all goods to a single, ostensibly coherent master good they should be considered monists.[16] When faced with a conflict, they thus fulfil their monism by weighing

[13] For a more recent case, see Carl G. Vaught, *The Quest for Wholeness* (Albany: SUNY Press, 1982).

[14] See my *From Pluralist to Patriotic Politics: Putting Practice First* (Oxford: Oxford University Press, 2000).

[15] See Bentham, *Introduction to the Principles of Morals and Legislation* (1789), eds. J.H. Burns and H.L.A. Hart (Oxford: Oxford University Press, 1970), chs. 13–17; and Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990).

[16] Writing of human actions in general, Bentham tells us that "though numerous and heterogeneous, [they may] derive a sort of unity from the relation they bear to some common design or end." Similarly, Braithwaite and Pettit recommend their approach because it "allows us to take a unified view of the demands of rationality and morality." Bentham, ch. 7 § 19; and Braithwaite and Pettit, p. 8.

the conflicting things against each other in order to promote the master good.[17] Hence their use of the balancing scales emblem.

Of course, a by-now-standard critique of consequentialism is that, while its followers are certainly able to weigh a wide diversity of things, including the various legal purposes identified above, they must nevertheless conceive of them all as merely instrumentally valuable. For each is ultimately accorded weight to the degree that it contributes to the master good being promoted. The problem with this is that whenever an offence has been committed and we need, say, to recognize it with appropriate censure and sanction, doing so requires having a certain concern for (ethical) truth. But it's in the nature of truth that something is true whether or not it is also useful. Say exaggerating a crime's severity or even framing someone for it contributed to promoting utility or freedom in society overall. While consequentialists could object to such actions because, for instance, they fail to maximize the master good over the long run, they cannot do so because of truth, which suggests that their approach fails to meet this particular legal purpose fully.[18]

But rather than rehearse this issue here, I want to raise two others. The first arises from what seems to me to be the consequentialist's failure to sufficiently respect goods other than the master good. Pettit has acknowledged that there are occasions when it would be undesirable for a person to deliberate over the actions that would best promote the master good. Sometimes, for example, decisions about what to do need to be arrived at in a "spontaneous, uncalculating way," and this can mean "abjuring the right to consider all relevant circumstances."[19] Say a friend asks for your help in moving to a new apartment, a perfectly reasonable request. To consider all of the possibilities before acquiescing would amount to having "one thought too many," in Bernard

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[17] See Bentham, chs. 4 § 5, 13 § 5, 14 § 8, § 10, § 17, §18, § 20, 15 § 2, 17 § 8; and Braithwaite and Pettit, pp. 9, 11, 13, 15, 33, 68–69, 78, 106, 109, 116, 154–55.

[18] On pp. 72–76, Braithwaite and Pettit tell us that their consequentialism is unlike utilitarianism in that it's not vulnerable to this charge because freedom as non-domination has a subjective dimension that would be compromised if people began to suspect that the state wasn't scrupulously respecting their rights. But what about those occasions when state agents believed that they could successfully hide their unscrupulousness? The authors are surely right that parents who wish to instil a sense of independence in their teenage child would do well to declare that the child's decisions will not be interfered with even if the parents consider them wrong. But as long as they manage to interfere in secret, they would not be undermining their child's sense of independence. This suggests that authenticity is a better conception of the liberty of the individual than non-domination, since its goal of being true to oneself means that it includes a concern for truth. Because what if, even though one was dominated, one would have done some act anyway? By interrogating an individual's reasons for acting and so focusing on the question of those reason's internal, and not only external, alignment with the self, authenticity thus provides a more inclusive understanding of liberty.

[19] Pettit, "Consequentialism," in Peter Singer, ed., *A Companion to Ethics* (Oxford: Blackwell, 1993), pp. 236, 237.

Williams famous phrase.[20] Pettit thus argues that it is normally fine to rely on virtuous dispositions towards particularist goods such as friendship even though they ultimately support the master good, which, after all, is motivated by impersonal benevolence, only indirectly. In support of this argument, he invokes the image of a cowboy riding herd on cattle, letting the cows move as they wish and only exercising control should one or more start to wander off; analogously, a person should be able to fulfil goods such as friendship spontaneously, feeling the need to deliberate with a view to the master consequentialist good only if a red flag has gone up, so to speak. Say the favour turns out to involve helping the friend move not boxes, but a body.[21]

However, the idea that people should be ready to actively deliberate over whether or not to help their cattle, I mean friends, only when a red flag goes up, and to do so by subjecting their friends' requests to a test involving overriding consequences, seems to me a failure of respect for friendship. Because even if the test tends to remain in the background on stand-by, there's a sense that it still dominates the friendship. Not that I think we should adopt the opposite extreme and assume that friendship automatically overrides other such considerations; only that goods such as friendship are, after all, often put to the test precisely in unusual situations. Regardless, any reasoning over a conflict involving the friendship cannot include a master good that has previously been awarded an overriding status. Ironically, this objection draws support from Pettit's defense of the idea of freedom as non-domination, since he argues that there can be a failure to respect an individual's freedom despite their not having been interfered with. Even a slave who has a kind master who rarely if ever interferes with them, is still a slave; the fact that the master (or cowboy) *could* interfere should be enough for us to recognize the domination.[22]

The second additional criticism I want to raise is that consequentialism often does too much for us. What I mean is that it offers responses to too many questions rather than leaving it up to the people directly involved with the given issue. Consider that Braithwaite and Pettit recommend their book as "a bargain at the price!" because, they say, their theory does more than just speak to

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[20] Williams, "Persons, Character and Morality," in *Moral Luck: Philosophical Papers 1973–1980* (Cambridge: Cambridge University Press, 1981), p. 18.

[21] See Pettit, "The Inescapability of Consequentialism," in Ulrike Heuer and Gerald Lang, eds., *Luck, Value, and Commitment: Themes from the Ethics of Bernard Williams* (Oxford: Oxford University Press, 2012), pp. 45–47; and "Direct Consequentialism, Unlimited," in David Copp, Connie Rosati, and Tina Rulli, eds., *The Oxford Handbook of Normative Ethics* (Oxford: Oxford University Press, 2025).

[22] See Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), esp. pp. 21–22.

the means and ends of criminal sentencing, it also purports to give us "an integrated account of what ought to be done by the legislature, the judiciary, and the executive in regard to the key policy questions raised by the criminal justice system."[23] In fact, if it did only the former, it would answer perhaps only three of the ten questions that, they tell us, tend to arise in criminal justice cases.[24] But should we be shopping around for a theory that answers so many questions?

Take the first question they mention, which is concerned with the aforementioned legal purpose of properly recognizing offences. According to Braithwaite and Pettit, if we follow their theory then

> only those activities would tend to be criminalized which threaten the persons, property, or province of other citizens. In other words, we think that the republican commitments would direct the criminal justice system towards the minimal type of institutions which the liberal applauds.[25]

Now, while I happen to be a (Canadian) liberal myself, I'm willing to accept that not everyone is sympathetic to this ideology and that, moreover, it's legitimate for them not to be. Because unlike monist thinkers, I don't believe it possible, much less desirable, to derive my ideological commitments from philosophy; on the contrary, they are based on my interpretation of the political culture in which I find myself. Monists think otherwise because they tend to assume that philosophy is, fundamentally, a matter of theories, and theories are, or can be made to be, fully coherent or unified. That's why there's no need to rely upon the cultural contexts in which one is set in order to resolve the tensions or gaps that (I would claim) theories always contain. Because of their faith in theoretical unity, Braithwaite and Pettit think questions such as the one about the kinds of behaviours that should be criminalized may be answered by applying their theory instead of by citizens and their representatives engaging in what I consider to be genuine, because atheoretical, dialogue.

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[23] Braithwaite and Pettit., pp. 10, 11.

[24] See ibid, ch. 2.

[25] Ibid., p. 94.

Not that Braithwaite and Pettit claim to have shown precisely *how* their theory produces answers to the various questions they raise; they admit that, in formulating it, they have done no more than establish "a research agenda for republican criminology."[26] Still, the implication is that the research can be completed by criminologists, experts who accept the task of fine-tuning the theory. Those who favour conversation instead would call on all concerned to listen to one another rather than to some preconceived doctrine, whether it supports neo-republicanism, liberalism, or some other ideology.[27]

Notice, as well, that it is only because they assume that criminal justice can consist of a unified "system" or "network of highly connected sub-systems"[28] that Braithwaite and Pettit think it is capable of being guided by theory, which is also systematic. But is this the right way to conceive of legal practices? While it's true that there exist certain highly restricted contexts, including the courtroom, that are governed by systematic procedures, most practices in society are holistic in an organic rather than systematic sense. By this I mean that they constitute not merely wholes which are greater than the sum of their parts (since this may also be said of systematic wholes, albeit to a lesser degree), but wholes whose parts can *never* be conceived as isolable components, that is, as modules or elements. Just as each and every cell in a body contains DNA that carries the genetic information for the whole body, there's a sense in which organic practices are "present" in each and every one of their parts; otherwise put, their parts are always *integrated* to some degree, unlike with systems whose parts are isolable because merely *interlocked*.[29]

However, this is not the place to defend these mereological claims. Instead, I'll offer some criticism of Braithwaite and Pettit's conceptions of both theory and practice. "A comprehensive theory," they write, "is coherent in so far as the answers provided are consistent with one another."[30] One might be tempted to say that their own theory is coherent virtually by fiat, since it doesn't so much provide multiple answers as it does a single, all-encompassing answer from which

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[26] Ibid., p. 9; see also p. 86.

[27] As I argue in "Political Philosophies and Political Ideologies," in *Patriotic Elaborations*.

[28] Braithwaite and Pettit, p. 17.

[29] For a related distinction, see the one Hubert L. Dreyfus draws between "practical" and "theoretical" holism in his "Holism and Hermeneutics," in *Skillful Coping: Essays on the Phenomenology of Everyday Perception and Action*, ed. Mark A. Wrathall (Oxford: Oxford University Press, 2014). See also my *From Pluralist to Patriotic Politics*, chs. 1, 3.

[30] Braithwaite and Pettit, p. 15.

all others are to be derived: in every case, do what you must to promote freedom as non-domination. Even so, we don't have to look far to find a contradiction. On the one hand, the authors tell us that theories must be abstract and so invoke "a universal value that is capable of being realized here or there, with this individual or that." Yet, on the other hand, they tell us that their theory avoids "universalist pretensions," since it is applicable strictly to Western-style democracies, the only ones where it is at present capable of commanding a consensus.[31]

But even thus restricted, can their theory's central value be accorded a consistently high ranking? There is at least one occasion when it seems even Braithwaite and Pettit fail to grant freedom as non-domination overriding weight. I'm thinking of their discussion of an imagined case of public indecency, where a homosexual couple engages in sexual activity on a bus, offending another passenger, a minister of religion. At first, the authors suggest that the minister might do best to simply close his eyes or move away. But they quickly decide that, for the sake of public order, the police may have to be called, either to request that the couple desist or to suggest that the minister move. But should these options fail, they say that the couple might then have to be removed from the bus, since "maintaining public order and thereby preventing crimes from occurring can be an important means of promoting dominion [i.e. freedom as non-domination]."[32] But is freedom as so conceived really the main concern here? I ask because, just a few paragraphs earlier, Braithwaite and Pettit seem to give great weight to another:

> You might say that the dominion of the minister is assaulted by the behaviour [of the couple], but this would be to adopt a much looser conception of dominion than we have advanced. The loss of dominion can only be that which forces the minister to close his eyes or move to another seat. But surely, you may counter, life would be unpleasant for most of us if this kind of behaviour were allowed to go [on] in public and that we are entitled to protection from such an intrusion on our feelings.[33]

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[31] Ibid., pp. 26, 42.

[32] Ibid, p. 96.

[33] Ibid.

Given that avoiding unpleasantness is, as they say, a concern that they don't wish to dismiss out of hand, one must wonder how it can be translated into freedom as they conceive of it, or indeed any other conception of that particular value.

To which we might add: Why so quick to call the police? Shouldn't the individuals involved be encouraged to try to resolve their differences through dialogue first? And, regardless, how much unpleasantness could the police be expected to avoid? What if the minister is in denial about his own homosexuality and, deep down, wishes to enjoy the show? Or what if the same could be said of other passengers? Or what if they couldn't care less? I don't mean to be flippant; rather, I raise these questions in order to suggest that determining what justice requires in a case such as this calls for a degree of openness and sensitivity that appears to exceed the bounds of Braithwaite and Pettit's theory. Because rather than deriving answers from the application of some theory, what's required in such cases depends on the people involved – on their culture(s) and on any dialogues that they, and the rest of us, might have about the matter.

Turning to practice, as we have seen, Braithwaite and Pettit conceive of criminal justice as (at least potentially) systematic. Among other things, this leads them to point out that the values underlying its various sub-systems can influence each other. But notice how they can do so. For example, regarding the question of the degree of discretion that should be granted to those working within the system, Braithwaite and Pettit remark that

> if we stop actors in one sub-system from exercising discretion to implement such values, we leave it to actors in other sub-systems who share these same values to compensate by exercising their discretion to the same end. Hence, if the problem of judges who are soft on drinking and driving is dealt with by mandatory prison terms or mandatory licence suspension, police officers who are equally soft on drunk drivers may exercise their discretion to arrest fewer of them.[34]

Thus may "the old equilibrium" be reasserted, since "attempts to destroy discretion in one or two sub-systems of the criminal justice system simply displaces it to other sub-systems."[35]

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[34] Ibid., p. 23.

[35] Ibid., pp. 23, 20.

But there is no "it." What I mean is that the actors located in different places in the system are never really exercising the "same" capacity – such as that of discretion in this case – nor are they aiming for "the same end." At least, we must assume this once we recognize that the whole of criminal justice is holistic in an organic rather than systematic sense, one incompatible with the idea of isolable components that can have the same value in different contexts. Otherwise put, different acts of discretion will never be quite "the same." Recognizing this suggests that there is something distorting about Braithwaite and Pettit's reference to the "constant monitoring of system outputs,"[36] since speaking of "outputs from" or "inputs to" a whole assumes that the things being monitored can be grasped in a way independent of their contexts. But if a change to the context leads to a change in their meaning or significance, as I believe it does, then we should acknowledge that the principle of identity (A = A) does not hold here.[37] Thus, it makes little sense to search for correlations, much less to identify things as related in terms of an equilibrium.

Consider the example of varying attitudes toward drinking and driving. While Braithwaite and Pettit are, of course, correct that mandatory prison terms reduces the discretion of judges, it's not really the "same" capacity that police officers would be exercising should they choose to arrest fewer drunk drivers. Given that they'd be making fewer arrests out of fear that those stopped would be disproportionally punished, the officers would be, in a sense, *forced* to act in this way. The kind of discretion one exercises while under such duress – assuming it's even appropriate to talk of discretion here – should not be equated with the kind judges exercise as a normal part of fulfilling their duties. Moreover, in this case the judges would be deciding *how heavily* drunk drivers should be punished, whereas the officers would be deciding *whether* they should be tried and punished at all – taking into account that the punishment, even in cases where suspects are found innocent, would include the experience of being prosecuted in the first place. Such differences should lead us to conclude that Braithwaite and Pettit's faith in "the old equilibrium" reasserting itself simply mischaracterizes what is actually going on.

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[36] Ibid., p. 153.

[37] See Martin Heidegger, "The Principle of Identity," in *Identity and Difference*, trans. Joan Stambaugh (Chicago: University of Chicago Press, 2002).

Retributivism

The most powerful defence of retributive justice is surely Hegel's. He begins by emphasising the universal dimension of criminal acts, their "infinite aspect," by which he means the bad example that they set.[38] Such acts are wrong because those who commit them make a "*semblance*" against the principles of universal right.[39] In the case of a theft, for example, one violates not only a particular, the legitimate right of the victim to the object stolen from them, but also a universal, the victim's moral status as a person, which is embodied in their very capacity for property rights.[40] Since there can be no possible – even partial – justification for such an act (Hegel is probably the greatest monist in the history of Western philosophy), he claims that what it represents is "null and void" from the start, which is why its negation of right must itself be negated.[41] This is where punishment comes in.

To Hegel, punishment annuls the infringement, restoring right by inflicting an injury on the criminal that is equal in value to the wrong they committed.[42] So it is here that we may say he appeals to the balancing scales emblem. It is as if, before an offence is committed, we begin with an ideal modern society where all rights are respected and the pans of the scale are perfectly level. Then, when someone chooses to commit a crime, we can imagine the scale's pans being put off balance, so that punishment is necessary in order to cancel the act and make them level again. That retributivists inherit a concern for commensuration from older, revenge-based conceptions of justice should thus come as no surprise.[43] Regardless, for Hegel the extent of punishment is, as we've seen, to be based on an equivalence between the punishment's value and that of the criminal's will. Hegel admits that determining the latter will always be difficult, and he cautions that philosophy can do no more than assert the need to do so. That's why it's up to the judge, and

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[38] See Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991), § 22, 91, 100; as well as Wolfgang Schild, "The Contemporary Relevance of Hegel's Concept of Punishment," in Robert B. Pippin and Otfried Höffe, eds., *Hegel on Ethics and Politics*, trans. Nicolas Walker (Cambridge: Cambridge University Press, 2004), p. 160.

[39] Hegel, § 82.

[40] See ibid., § 95.

[41] Ibid., § 82.

[42] See ibid., § 98–99, 101–102, 220.

[43] See William Ian Miller, *Eye for an Eye* (Cambridge: Cambridge University Press, 2006), esp. pp. 7, 31–42, 160–79.

not some armchair philosopher, to ensure that there's not "one lash too many, or one dollar or groschen, one week or one day in prison too many or too few."[44]

Hegel thus claims that, done properly, punishment "honours" criminals as rational beings, since restoring the balance between the harm they caused and the legitimacy of the legal order reconciles them with both that order and themselves.[45] Yet all this can be true only if we adopt the standards of what I have claimed is the inferior form of practical reasoning associated with weighing or pondering. Genuine reconciliation, again, requires integration rather than zero-sum balancing; only in this way can there be a win-win outcome for all concerned. Such an outcome is impossible if someone is punished, since punishment, by definition, implies that they lose something of value. Thus, offenders who are threatened with punishment cannot avoid conceiving of the law as an adversary, an institution that wishes to exact pain on behalf of the state,[46] rather than an opponent with whom it may be possible to reconcile.

In fact, even the way punishment tends to be measured ensures an adversarial relation between offender and legal order. To represent it with numbers (50 lashes, a 5-year prison term, a $500 fine, etc.) is to abstract punishment to a degree, ensuring that more or less of it can only be interpreted in a rivalrous way. It is just like when items whose value are measured in terms of money are exchanged: if I give you something worth *x* dollars then, necessarily, my assets will be judged to have diminished by that amount – minus, of course, the dollar value of whatever I receive in return. This is why Marx was careful to emphasize how, when money's involved, an exchange will always amount to "the alternating relation between two persons who are in polar opposition to each other."[47] But say we never thought to convert the items' use-value into the inherently "antagonistic forms"[48] of exchange-value: you give me your hockey helmet (which you no longer need because you recently received a new one) in return for my hockey stick (which has been too short for me for awhile now). By conceiving of the items as they exist for us in context, in terms

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[44] Hegel, § 214; see also § 101.

[45] See ibid., § 100, 220.

[46] See William E. Conklin, *Hegel's Laws: The Legitimacy of A Modern Legal Order* (Stanford, CA: Stanford University Press, 2008), pp. 311–13.

[47] Marx, *Capital*, vol. 1, trans. Ben Fowkes (New York: Random House, 1976), p. 208. An adversarial dynamic is also established when people choose to express the values over which they are in conflict with the language of rights. See my *From Pluralist to Patriotic Politics*, ch. 7.

[48] Marx, p. 199.

of our particular situations, it's easy to recognize that each is worthless to the one who trades it away but valuable to the one who receives it. Otherwise put: by keeping track of the details rather than measuring the items in terms of an abstract unit such as money, it's possible to appreciate how the exchange is synergistic rather than rivalrous. It's the same with punishment, since quantifying such "just measures of pain" ensures a zero-sum relation: the more punishment suffered by the offender, the greater the benefit according to the law.

Hegel has no room for the reconciliation of offender and victim. Because reconciliation, unlike mere accommodation, requires parties to recognize that they share a common good. Only in this way can they reach a common understanding about this thing they share, as distinct from merely agreeing to a set of trade-offs. But Hegel must conceive of those involved in a conflict, including offenders and victims, as being temporarily apart from each other. There's a sense in which they float above the whole; otherwise, they wouldn't be in conflict but, like the whole, unified. Hence his description of conflicts as consisting of "collisions" of rights and of those who persist in characterizing their just punishments as evil as expressing a subjective, "superficial" point of view.[49] Because, for Hegel, criminals need to appreciate that their punishment is "*punitive* rather than *avenging*,"[50] since, by bringing them into alignment with objective right, it reconnects them with the unity that is the whole.

How different all of this is from an approach that aims to meet criminal acts with reparation rather than punishment. Say I stole your car, crashed it, and was indicted for the offense. What if, instead of having lawyers battle over the measurable duration of my prison term, the question becomes: How can I be convinced of the need to feel shame and remorse for what I did and to repair the damage? Answering would require my participation in a conversation that, should it succeed, would result in myself, my victim, and the state arriving at a win-win situation. How else to describe the outcome if, say, I willingly agree to apologize and repair the damage done? If I've come to appreciate the extent of my wrongdoing, I will actually *want* to do these things. Moreover, allowing me to do them honours me as a rational being more than if I were punished against my will to set some abstract balance right.

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[49] Hegel, § 84, 99.

[50] Ibid., § 103.

All this suggests that punishment is appropriate only when I cannot be said to have reached such an understanding. Even then, and precisely because punishment can accomplish no more than striking a zero-sum balance, we should appreciate how it may, at best, constitute a form of "justifiable injustice." After all, that's a sword Lady Justice has in her other hand; unlike conversation, swords may do good – when they do good – only while also doing bad.

In fact, recognizing illegality with punitive rather than reparative sanctions has the added disadvantage of ensuring rivalrous relations between all of the other legal purposes invoked above. We can see why by drawing an analogy between identifying and sanctioning a criminal act, on the one hand, and reconstructing and interpreting a text, on the other. Because every crime is also story: an event has taken place, there are people involved, and there is a beginning, middle, and end.[51] Of course, we're interested here in nonfictional as distinct from fictional stories; still, thinking about them in these terms allows us to see how, first, determining precisely what happened is analogous to the work of textual philology, the discipline of reconstructing texts. Just as the philologist pieces together fragments in order to establish a definitive work, courts need to decide upon the evidence presented to them by the police and counsel to determine precisely what happened. Both police and the court must then also take on a task analogous to that of the literary critic, for they must interpret the evidence/text in order to decide whether the suspect ought to be arrested (the police's task) and, if so, whether he or she should then be arraigned and found guilty or innocent (the court's task). And should the verdict be guilty, the court will then also have to engage in interpretation to determine the necessary censure and sanction.

Both the philological and critical exercises are concerned with truth, the first factual and the second ethical. But should there be potential for the ethical to call for punishment then an adversarial relation between the offender and the state is likely, and this makes it more difficult to maintain fidelity to the truth. Say I finished reading a confusing novel and, wishing to understand it better, I called upon two literary critics for help. Which would make the most sense: (i) to

[51] Ian Watt runs the analogy in the opposite direction: "The novel's mode of imitating reality may therefore be equally well summarized in terms of the procedures of another group of specialists in epistemology, the jury in a court of law. Their expectations, and those of the novel reader coincide in many ways: both want to know 'all the particulars' of a given case – the time and place of the occurrence; both must be satisfied as to the identities of the parties concerned, and will refuse to accept evidence about anyone called Sir Toby Belch or Mr Badman – still less about a Chloe who has no surname and is 'common as the air'; and they also expect the witnesses to tell the story 'in his own words'. The jury, in fact, takes the 'circumstantial view of life', which T.H. Green found to be the characteristic outlook of the novel." Watt, *The Rise of the Novel: Studies in Defoe, Richardson, and Fielding* (Harmondsworth: Penguin, 1963), p. 31.

instruct, and even pay, each to present an interpretation that is the polar opposite of the other, leaving me to develop my own interpretation that balances the extremes on the assumption that this would be the most true; or (ii) have each present their best interpretation, which have been arrived at partly through friendly discussion between them, and have them point out where they agree and where they disagree so that I, following yet more discussion, may formulate an interpretation that seems the most inclusive and so the best? Surely (ii) is the better way. Indeed, balancing is not only inferior when it comes to two or more opposing interpretations of a given text or criminal case as a whole, but also when it comes to opposing features or tensions within a single interpretation; it's always better to develop an account that integrates or reconciles rather than merely balances. And all this is no less true of philological disagreements or those over evidence.

My complaints about zero-sum balancing are meant to apply not only to adversarial justice systems but also to inquisitorial ones, about which it has been said that there are times when "one is not unaware that the examining magistrate shows a certain tendency to behave as an agent for the prosecution."[52] Because, in both, there are individuals in the room – in particular, defendants – who face a potential conviction that may entail punishment, and so they cannot be expected to feel secure and open-minded enough to participate in a genuine conversation. Conversation, it's worth noting, is not only absent from trials within the two traditions, but also from pre-trial plea bargaining, whose increasing frequency in recent years has meant that more cases are being dealt with by negotiation.[53]

The greater potential for punishment, the greater incentive for those who would avoid punishment – not only defendants but also the attorneys representing them – to deceive. It's been suggested that lawyers, particularly those working within anglophone traditions, must become serial deceivers to fulfil their roles successfully.[54] Add to this the brutalization of those who run

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[52] Robert Vouin, "The Protection of the Accused in French Criminal Procedure," *International and Comparative Law Quarterly* 5, no. 1 (Jan. 1956): 1–25 and 157–73, p. 13.

[53] See, for example, Thomas Weigend, "Why have a trial when you can have a bargain?" in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial*, vol. 2: *Judgment and Calling to Account* (Oxford: Hart, 2006).

[54] See Arthur Isak Applebaum, *Ethics for Adversaries: The Morality of Rules in Public and Professional Life* (Princeton: Princeton University Press, 1999), pp. 104–108, 199–200.

and work in prisons[55] and we have reason to include compromising the integrity of participants in the tally of the cost of the retributive process, this being the last of the legal purposes identified above.

Speaking of cost leads me to note how expensive prisons are, and to point out that their inmates are unable to contribute to society, economically or otherwise. Nor should we ignore the price in suffering that is paid by the inmate's innocent family and friends. It is also worth mentioning that while punishing criminals is certainly one way of condemning their acts to the public, it is far less effective at communicating this condemnation to the criminal. Attempting to impose feelings of repentance on someone is counter-productive more often than not; such feelings are genuine only when voluntary. Whence Martin Wright: "punitive sanctions are more likely to produce resistance, resentment and attempts to avoid the pain; they inhibit learning rather than promote it."[56]

It's a very different matter when offenders are faced with the need for repair rather than punishment, since repair is compatible with listening and so with learning through conversation. Moreover, such learning – if it comes – contributes to, rather than balances against, the offender's rehabilitation, and it will do so in a way that prisons, widely recognized as "schools of crime" that harden their inmates, never can. Finally, the ability of repair to facilitate rehabilitation also provides greater security for the public, unlike punishment which tends not to be an effective deterrent. This is why, except in the case of those locked-up for life, the high recidivism rates associated with imprisonment suggest that, in the long run, the relation between retributive justice and public security can only be zero-sum.

Returning to the question of cost, while a process which favours repair over punishment will certainly not be free, there is reason to expect that, with a reduced need for legal professionals, it will be relatively cheap. That said, I admit that striking a balance between justice and expense seems unavoidable. Yet even here I would argue that retributivism virtually ensures that it will not be struck properly.

Consider what Ronald Dworkin, a leading contemporary retributivist (albeit one closer to Kant than Hegel) says about the matter. Dworkin begins by wondering whether people are not "entitled

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[55] See, for example, Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (New York: Random House, 2007), chs. 14–15.

[56] Wright, "Is it time to question the concept of punishment?" in Lode Walgrave, ed., *Repositioning Restorative Justice* (Portland, OR: Willan Publishing, 2003), p. 8.

to the most accurate trials possible, hang the cost."[57] He complains that those who call for "striking the right balance" between the interests of the accused, on the one hand, and those of the community in limiting expensive trials, on the other, at best merely restate the problem. As Dworkin is no friend of consequentialism, this is only to be expected. The surprising thing is that he then ends up calling for balancing as well.

He does so because he believes it is acceptable as long it's guided by a monist vision, albeit one designed not to maximize some end but to respect the conception of equality that he identifies with the "principles of fair play."[58] These principles are not themselves to be balanced or compromised; rather, they guarantee the proper respect of people's rights to just criminal procedures in the first place. They do so because they ensure "consistent weighting" when it comes to the accommodations that, Dworkin believes, must inevitably be reached between the risk of suffering moral harm from wrongful conviction or sentencing, on the one hand, and the expense of ensuring the most accurate trials possible, on the other.[59] To Dworkin, it's unavoidable that some individuals will suffer this kind of moral harm; what can be guaranteed, however, is that the injustice of their suffering will not be unfair.

If this sounds confusing, it is (at least to me). How can knowing that the injustice someone is suffering is not due to any unfairness in the system provide much comfort? Couldn't it even do the opposite? That Dworkin appears to think otherwise is ironic, since a willingness to sacrifice an individual's welfare for the community's is the kind of thing that we expect from a conservative, not a liberal; Dworkin, however, tells us that the conception of equality which underlies the principles of fairness is also the basis of liberalism.[60]

Evidently, this is another case of someone deriving an ideological position from philosophy. The problem here is that not everyone is liberal. We liberals tend to place great weight on the presumption of innocence and on procedures that err on the side of the accused because we are deeply concerned with upholding respect for the individual. That's why we tend to call for more spending to ensure the integrity of legal proceedings than conservatives, who put greater emphasis

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[57] Dworkin, "Principle, Policy, Procedure," in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), pp. 72–73.

[58] Ibid., pp. 84–85, 87.

[59] Ibid., p. 89.

[60] See Dworkin, "Liberalism," in *A Matter of Principle*.

on the security of the community. But surely, assuming that conversation has broken down and we've resorted to our respective political ideologies for guidance (there being no place for ideology in a conversation, where one must listen to one's interlocutor, not some pre-conceived doctrine) we ought to negotiate the matter in good faith. Among other things, this means we can expect that if negotiations succeed they will result in different accommodations in different political communities. What I am saying is that, when the time comes that we have no choice but to strike a balance – and when money's involved it will come – it is simply wrong for those such as Dworkin to demand that the balance be theoretically "rigged" in favour of one political ideology over others. How, in that case, could we justifiably speak of good faith?

The fact is, when retributivists accept (as they must) some limit on the expense of criminal procedures, it means that they too are willing to strike a balance. So the basic difference between them and consequentialists here is simply their belief that consequentialism proceeds in the wrong spirit. Gerry Maher, for example, argues that only approaches comparable to Dworkin's sufficiently protect individual rights while providing an appropriately clear rule for ranking and so balancing rights and interests; without such clarity, he warns, the law would be unknowable, as there'd be no means of predicting a judge's decision.[61] Now, while I don't wish to take sides in this debate between retributivists and consequentialists, I do want to point out that this claim about ranking reveals something that all monist theorists share, namely, the assumption that it's possible to commensurate the items being balanced – not in the strict sense of reducing them to a common unit of measure, but enough so that they may be considered rationally comparable through the guidance provided by a unified theory.[62] The implication here is that, speaking metaphorically again, the items being weighed have been placed in the pans of a scale with a single beam. Thus, even though such balancing may entail compromise, it's not the sort that makes for "dirty hands," since a single commensurating master value – be it utility, liberty, equality as fairness, or whatever – is always realised in the process.[63]

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[61] See Gerry Maher, "Balancing Rights and Interests in the Criminal Process," in Antony Duff and Nigel Simmonds, eds., *Philosophy and the Criminal Law* (Stuttgart: Franz Steiner, 1984), pp. 100–101.

[62] This appears to be the sense in which Maher asserts commensurability as a requirement. See ibid., p. 102. I believe Dworkin would concur, which is why I think John Cottingham is mistaken to suggest that Dworkin "does not address the commensurability issue at all." Cottingham, "The Balancing Act: Weighing Rights and Interests in the Criminal Process," in Duff and Simmonds, eds., p. 115.

[63] See the discussion of theoretical approaches in my "Dirty Hands: The One and the Many," *The Monist* 101, no. 2 (April 2018): 150–69.

However, there's a form of practical reason that has the ability to compare incommensurables.[64] This is the one that supports conversation, the one which, as mentioned above, aims for repair and reconciliation. It can do so in the case of criminal justice because it is able to take the needs of the victim into account, and so all of the incommensurable particulars of his or her suffering and situation. But surely the context-dependent nature of such reasoning undermines proportionality, objects the monist. One reason retributivists, in particular, favour numbers is because they believe that the commensuration provided by calculating provides makes proportionality possible. But for the same reason that $10 is worth less to a rich man than to a poor man, we should appreciate that numbers are deceptive in this respect.[65] Indeed, I would go so far as to suggest that proportionality, given its association with balancing and abstract magnitudes, is just not the most appropriate way to "get it right" when aiming to bring about remorse and repair. Because these things require a conception of criminal justice that fully embraces context, and that means conversation, not proportion.

When conversation succeeds, moreover, it makes all involved feel at home with the law, perhaps even more so than if a crime had never been committed in the first place. Feeling at home is a well-known theme in Hegel's philosophy, though as Dudley Knowles has pointed out Hegel insists "that persons cannot be, know, or feel themselves to be at home in a world where conflicting claims are made regarding each other's moral status and specific rights."[66] Retributivists think this because they have no room for the idea of conflict between opponents who are not also adversaries. But if we recognize that the society constitutes a disunified whole, then we must expect it to be riddled with conflicts, both legal and political, revealing the claim that people can only feel at home in the absence of conflict to be a utopian one. What's needed is not no conflict, only the recognition that citizens can be friends of a civic sort, since the laws they share express their common good. And who says friends can't ever come into conflict?

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[64] See my *From Pluralist to Patriotic Politics*, ch. 3.

[65] Braithwaite and Pettit make a similar point in *Not Just Deserts*, pp. 126–27, 180.

[66] Knowles, "Hegel on the Justification of Punishment," in Robert R. Williams, ed., *Beyond Liberalism and Communitarianism: Studies in Hegel's* Philosophy of Right (New York: SUNY Press, 2001), p. 130.

Abolitionism

Abolitionists favour reconciliation, but in a way that would do away with, or at least seriously curtail, criminal law. As I shall show, this is what comes from their conception of reconciliation, which is limited because of what it is understood to restore: not something like the harmonious relations between citizens that were present before a conflict arose – what I've tried to capture with the term integration – but the kind of equilibrium that can exist between the potentially independent parts of a system. According to Nils Christie, perhaps the leading contemporary abolitionist, the goal is "to restore the situation and thereby preserve social systems."[67] Abolitionists thus share a concern for balance with their arch-enemies the retributivists, and they do because, as Howard Zehr puts it,

> Both retributive and restorative theories of justice acknowledge a basic moral intuition[:] that a balance has been thrown off by the wrongdoing. Consequently, the victim deserves something and the offender owes something. Both argue that there must be a proportional relationship between the act and the response. Where they differ is on the currency that will right the balance or acknowledge that reciprocity.[68]

That Grazia Mannozzi, another abolitionist, endorses the scales of justice as "an emblem of the principle of proportion" is thus to be expected.[69]

The monism underlying all of this is reflected in the abolitionist belief that reconciliation is always, at least in principle, possible. When people fail to reconcile it must be because of their "blood vengeance," as Herman Bianchi puts it, or because some other strictly contingent cause has made them unable, or unwilling, to engage in the necessary dialogue.[70] The problem, in other words, is never because there are inherently irreconcilable "gaps" in practical reality.[71] This is

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[67] Nils Christie, *A Suitable Amount of Crime* (New York: Routledge, 2004), p. 96.

[68] Zehr, "Journey to Belonging," in Elmar G.M. Weitekamp and Hans-Jürgen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Portland, OR: Willan Publishing, 2002), p. 29.

[69] Manozzi, "From the 'Sword' to Dialogue: Towards A 'Dialectic' Basis for Penal Mediation," in Weitekamp and Kerner, eds., p. 243.

[70] Bianchi, *Justice as Sanctuary* (Bloomington: Indiana University Press, 1994), p. 29; see also, for example, Christie, pp. 80–82, 106; and Bianchi, pp. 29–30, 45–47.

[71] See my "Gaps: When Not Even Nothing Is There," *Comparative Philosophy* 12, no. 1 (Jan. 2021): 31–55.

why, even though Christie's first research project consisted of a study of Nazi concentration camp guards, he still concluded that there are no evil monsters in the world – none who, we might say, would violently push people into the gaps, destroying them for none other than destruction's sake.[72] Because Christie has no "room" for such gaps, he believes that even the worst injustices have the potential to be restored.

But we need not invoke evil in its most radical Nazi form to recognize that there are times when, no matter how willing and able the interlocutors, any conversation between them will inevitably fail. Consider a typical case of murder, about which Christie has written:

> What about serious crimes, so upsetting to the surrounding community that they – the surrounders – insisted that pain had to be used? The mother of [a] murdered child forgave the offender, but the surroundings did not. Who should be listened to? This would, in the concrete cases, depend on what sort of system the parties were members of. If the system consisted of victim and offender, and only these two, the problem would be non-existent, at least for these two. But the more members the system had, and the less closely related the victim and/or the offender was to the other members, the greater the problem of community reaction would become.[73]

But, one asks in astonishment, what about the murdered child? Surely they are the main victim here.[74] Because even if the "system" consists of only the child's mother and the offender, and even if the mother finds it in her heart to forgive the offender, the child does not have that option. The problem is anything but "non-existent," and the reason is obvious: death removes one from potential dialogue, making reconciliation impossible. Perhaps no one has expressed this idea better than the Bengali writer and religious leader Ram Mohan Ray: "Just imagine how terrible it will be

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[72] See Christie, pp. x, 97. On evil as so understood, see my "Good, Bad, Great, Evil," in *Patriotic Elaborations*.

[73] Christie, *Limits to Pain* (Oxford: Martin Robertson, 1981), p. 114.

[74] Bianchi also appears to neglect the main victim when he writes that "Persons who have committed unintentional manslaughter have a greater chance of convincing people of their repentance than does a conscious killer." Bianchi, p. 139.

on the day you die, / Others will go on speaking, but you will not be able to respond."[75] Only a monist could fail to see this.

The assumption of unity is responsible for another way in which abolitionists, or at least those who accept that we cannot do without punishment altogether, appeal to the idea of balancing. They identify punishment with the modern state, which they conceive as separate from, indeed as in a necessarily adversarial relation to, civil society and the reconciliatory conversations that may take place within it.[76] The state, moreover, is said to constitute its own unity – whether, with Christie, because it is a monoculture dedicated solely to capital or, with Bianchi, because it is a sovereign, secularized Christian entity[77] – and this unity is understood to transcend the other unity that is civil society.[78] So we're left with two separate ones, along with a conception of the punitive response to crime as exhibiting yet another zero-sum dynamic: when restoration fails within civil society then, and only then, should we abandon it and turn towards the state for the purposes of punishment. Hence Christie's claim that "the more State, the more the conditions are laid down for punishment, and the less State, the less the conditions encourage punishment," and hence Bianchi's call for us to endorse a "balance of power" between "two systems that must exist side-by-side."[79] In sum, to these abolitionists, the challenge of contemporary criminal justice is that of "restoring the balance between state and civil society to the advantage of the latter."[80]

But just as civil society is not a self-enclosed unity, we have no reason to conceive of the state and its laws as a separate unity either. The state is itself a locus of conflicts, and that's why a

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[75] Quoted in Amartya Sen, "Human Rights and Asian Values," in Joel H. Rosenthal, ed., *Ethics and International Affairs: A Reader* (Washington, DC: Georgetown University Press, 1999), p. 179.

[76] "Deliberative democrats" relate state and civil society in a similar way. See my "Patriotic, Not Deliberative, Democracy," in *Patriotic Elaborations*.

[77] See Christie, *Suitable Amount of Crime*, ch. 2; and Bianchi, pp. 6–18.

[78] Hence Christie's depiction of modern state justice as "hierarchical," and Bianchi's as "vertical." See Christie, *Suitable Amount of Crime*, pp. 76–77; and Bianchi, pp. 59–60, 143. This assumption is shared with more conventional approaches to criminal law, indeed with all those that assume it's possible to have a "theory" of the state, since this is to assume it is a self-enclosed unity. To cite but one example, J.W.F. Allison writes that "A well-developed theory of the state prevails and influences legal doctrine" when, among other things, it is "a theory that emphasizes the distinctness of the state administration." Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, 1996, rev. ed.), p. 34.

[79] Christie, *Limits to Pain*, p. 115; Bianchi, p. 97. Evidently, Christie's abolitionism has its roots in the anarchism of those such as Peter Kropotkin. See, for example, Kropotkin, *Organised Vengeance Called "Justice"* (1902) (London: Freedom Press, 1948).

[80] Jan Froestad and Clifford Shearing, "Conflict Resolution in South Africa: A Case Study," in Gerry Johnstone and Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, OR: Willan, 2007), p. 554.

patriotic politics would have us try to respond to them with dialogue, in particular, with conversation. Patriotism, then, draws at blurry or dotted line between civil society and the state so as to represent the fact that criminal activity damages not only relationships between people within the former but also between them and the latter, between citizens and the law – understood now not as some transcendent set of unified rules but, again, as the expression of the citizenry's common good.[81] So the political community, too, can be a victim. Drawing a sharp, solid line between state and civil society only makes sense if we agree with Christie that the state cannot avoid treating citizens as if they were strangers, while civil society, by contrast, is a domain of potentially neighbourly relations.[82] But to recognize that citizens share a common good is, since Aristotle (*Eth. Nic.* bks. 8–9), to appreciate that they are even closer than neighbours since they are, once again, civic friends. In calling for crime to be dealt with strictly in terms of civil law (if even that), abolitionists would only dissolve this friendship – the bonds of which, it must be said, are already weak.

None of this means that we must ignore the difference between political conflict, which often culminates in making laws, and criminal conflict, which begins when someone has broken one. For politics is, by nature, more controversial than law. And though Christie is quite right to emphasize conflict's edifying potential,[83] he fails to appreciate that this is even more true of the political kind than the criminal. Political conflicts always run deeper, given that they do not take place over already-made laws, about which citizens or their representatives have already reached some significant degree of agreement. That's why criminal acts constitute wrongs almost by definition, whereas political acts are political because people have yet to reconcile over their meaning. Christie would have us collapse the distinction between the two, however, as when he encourages us to put a political gloss on all crime, or when he suggests that there can be a "suitable" amount of it.[84] And while he's right to point out that criminal conflicts can eventually provide

[81] See my *From Pluralist to Patriotic Politics*, esp. ch. 5.

[82] See Christie, *Limits to Pain*, p. 111; and *Suitable Amount of Crime*, pp. 75–77.

[83] See especially Christie, "Conflicts as Property," *British Journal of Criminology* 17, no. 1 (Jan. 1977): 1–15.

[84] See Christie, *Suitable Amount of Crime*, chs. 3, 8. It's because of this blurring, moreover, that Christie never seems to consider that a victim may be unwilling to engage in dialogue with an offender not because she's irredeemably vengeful, but simply because she has better things to do with her time – such as, for example, attending to a political conflict.

those involved, especially the criminal, with some much needed "norm-clarification,"[85] he nevertheless neglects the possibility that political conflicts can lead to something greater, to what we might call "norm-development," because political reconciliations are more forward-looking and progressive, not to mention profound, than those which may arise after criminal acts. That said, even norm-clarification should be considered transformative rather than merely restorative, since reconciliation always brings something *new* into the world. Thus, it makes no sense to try to return to some antecedent, balanced unity, not only because there never was any such unity, but also because we just cannot go back.

In consequence, while criminal and political conflict must be distinguished, any line we might draw between them should, like the one between civil society and the state, be dotted rather than solid or blurry rather than sharp. Law may indeed be less controversial than politics, but both begin with conflict and, at their best, both aim for reconciliation; both, in other words, should be seen as parts of the common good that citizens share. This means that on those occasions when criminal justice cannot avoid turning from the attempt at repair to punishment, we should see this not as shifting the balance between two independent unified systems, but as a change in focus, from one feature of a disunified organic whole to another.

If I had to identify another reason, in addition to their monism, for abolitionists' attraction to balancing, it would be their overly loose conception of reconciliation. It arises from their failure to make the distinction invoked above between dialogue as negotiation, which is adversarial and so can at best result in balanced accommodations, and dialogue as conversation or discussion, which is no more than oppositional and, therefore, can sometimes bring genuine reconciliation.[86] It is interesting that Antony Duff, who is not an abolitionist, makes the same mistake, which leads him to criticize abolitionism in a way that blurs punishment and restoration.[87] At the centre of his account of criminal justice is what he calls "communicative censure," the law's use of punishment to persuade convicted criminals to recognize and repent for their wrongdoing. And because restoration cannot come from a mere apology – there must also be feelings of shame and remorse,

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[85] Christie, "Conflicts as Property," p. 8.

[86] For the blurring of these two see, for example, Bianchi, pp. 29–30, 48, 59-60, 63, 66, 98, 127; and Christie, *Suitable Amount of Crime*, pp. 98–99.

[87] See, for example, Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), pp. 92–93, 158–63.

not to mention material repair or compensation – Duff argues that any restorative process will have to be painful to the offender and so should be considered a form of punishment. Even harsher treatment such as imprisonment thus differs from restoration only in degree.[88]

Yet the pain that attends the recognition of, and remorse for, one's wrongdoing is not at all the same as that induced by punishment. The latter is imposed whereas the former, as we've seen, must be voluntary. In fact, any attempt to bring recognition and remorse by force makes their coming less likely – it is the difference, one might say, between "persuading," which can involve pressure or coercion, and "convincing," which is based strictly on reason.[89] That Duff himself refers to communicative censure as a form of persuasion is thus appropriate, although he is then led to make the dubious claim that inducing offenders to respond appropriately to their wrongdoing should in no sense be considered a form of moral education.[90] This is doubtful because there's surely an important difference between the pains inflicted by punishment, which represent loss, and the edifying, "growing pains" that can come from a successful conversation.

"Mixed" Pluralism

According to H.L.A. Hart, "our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles."[91] It's the same with criminal punishment, any "morally tolerable account [of which] must exhibit it as a compromise between distinct and partly conflicting principles."[92] Hart thus take pains to contrast his pluralism with approaches that invoke "one supreme value or objective" or "single value or aim," since they amount to a "drive towards an over-simplification of multiple issues which require separate consideration."[93] Evidently, Hart would have us "distinguish similar questions and confront them separately," because he believes that every part of the social institution of law calls

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[88] See ibid., pp. 80–82, 95–99.

[89] Rousseau similarly distinguished between persuading and convincing in his *Emile: or On Education*, trans. Allan Bloom (New York: Basic Books, 1979), pp. 90–91.

[90] See Duff, pp. 98, 110–11, 212 n. 21.

[91] Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), p. 10.

[92] Ibid., p. 1.

[93] Ibid., pp. 2–3.

for a "separate explanation" and a "separate justification," since every one poses, yes, "separate questions."[94]

The tendency to describe this approach as "mixed" arises from Hart's expressed wish to give both consequentialist and retributivist concerns together their due. "Mixed" is nevertheless misleading since pluralists, as we have seen, don't see themselves as reconciling or integrating and so mixing values, so much as compromising them, that is, balancing them against each other (and not in order to promote a single, master good overall). In fact, the maintenance of "balance" is, Hart often puts it, the central aim of legal justice.[95]

But given that he, like all pluralists, conceives of the things being balanced as incommensurable, how can this balancing be considered rational? The metaphor of a commensurating single beam balance, which, as noted above, is popular with consequentialists and retributivists, must certainly be ruled out. The Aristotelian pluralist Michael Stocker has provided another, however: imagine, he suggests, a single pan hung by a string in the middle; the items to be balanced can be placed in different positions on the pan, each causing it to tilt in a different direction.[96] This, it seems to me, could very well be the kind of scale that Hart is invoking when he refers to reaching "a reasonable compromise between many conflicting interests" or to "striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case."[97]

Thus, it should come as no surprise that Hart can only conceive of the censuring and sanctioning of criminal acts in punitive terms. This arises not only from his strictly balancing conception of practical reason, but also from the related idea that the purpose of punishment can be conceptualised independently of other legal purposes, that it is definable with a set of necessary *and sufficient* conditions. Indeed, the definition of just punishment, Hart tells us, comprises precisely five elements, no more.[98] Yet to define a concept in this way is to draw a solid line around it, and so to abstract it from context. This is incompatible with any reparative conception of censure and sanction since, as we've noted, repair requires a special sensitivity to context, in particular,

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[94] Ibid., p. 4.

[95] Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997, 2nd ed.), pp. 132, 135, 159.

[96] See Stocker, *Plural and Conflicting Values* (Oxford: Oxford University Press, 1990), pp. 148–49.

[97] Hart, *The Concept of Law*, pp. 132, 135.

[98] See Hart, "Prologomenon to the Principles of Punishment," pp. 4–5.

the victim's. I haven't the space to argue this here, but I would claim that any such abstract conceptualisation will necessarily have holes or gaps in it, lacunae that can only be filled-in with understandings arrived at through actual, and so contextual, dialogue. Moreover, because understandings are not accommodations, such dialogue must take the form of conversation rather than negotiation. Any proper censure and sanction of a given case, then, requires reconciling values that both the victim and the offender share with their fellow citizens. For this, it is necessary to appeal to the common good of their political community as a whole.

Hart, however, has no place for such a community. To him, it necessarily represent a monism, which as a pluralist he rejects. To give it a place alongside pluralism, then, would be to advocate a form of postmodernism, given that it would mean paradoxically affirming the one and the many, together.[99] Hart is no fan of paradox, however, which is why we find him embracing only the "uneasy compromise"[100] that is inevitably forced upon those who go no further than separating things out and balancing them against each other.

Conclusion

Unlike pluralism, the patriotism I favour strives for reconciliation before accommodation. But unlike abolitionists, patriots don't equate reconciliation with retrogressive restoration, since we don't believe in the possibility of returning to some previous, unified state of affairs. Fundamental unity, despite the claims of consequentialists, retributivists, and abolitionists, is simply not of this world. But this doesn't mean that we must adopt the opposite, fragmenting extreme of pluralism. There is third, middle way, one which calls for the progressive transformation of a disunified whole. Only this can make it possible to develop the good that, we should assume, both offenders and victims hold in common.

This is a good, moreover, that shouldn't be restricted to the bounds of civil society, since it receives its primary expression from the state and its laws. Conversations between offenders and their victims should thus always be understood as taking place on the basis of those laws, the subject of discussion being none other than what it means to be true to them. If and when the

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[99] This, for example, is how I read Mark Tunick, *Punishment: Theory and Practice* (Berkeley: University of California Press, 1992), ch. 5; and Alan Norrie, "'Simulacrum of Morality'? Beyond the Ideal/Actual Antinomies of Criminal Justice," in Antony Duff, ed., *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998), esp. pp. 116–17.

[100] Hart, "Prologomenon to the Principles of Punishment," p. 27.

discussion succeeds, the reconciliation it brings should be seen to be true to all of the various legal purposes.

That said, I must admit that more often than not, it will fail. Then, and only then, should we be struggling for the justifiable injustices that balancing brings. This requires negotiation, of a legal rather than political sort, since the negotiating parties must accept the limits set out by the law; for example, that fact that a crime was indeed committed in a particular case, and that it calls for a certain pre-set range of sanctions, are not up for negotiation. Such legal negotiations can also fail, of course, and when they do there will be a need to turn to an even more adversarial process, the trial. However, from all I've said so far, I obviously think that the more such trials can be avoided, the better.