

# WHY RETRIBUTIVISM NEEDS CONSEQUENTIALISM: THE RIGHTFUL PLACE OF REVENGE IN THE CRIMINAL JUSTICE SYSTEM

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## ABSTRACT

*Consider the reaction of Trayvon Martin's family to the jury verdict. They were devastated that George Zimmerman, the defendant, was found not guilty of manslaughter or murder. Whatever the merits of this outcome, what does the Martin family's emotional reaction mean? What does it say about criminal punishment—especially the reasons why we punish? Why did the Martin family want to see George Zimmerman go to jail? And why were—and are—they so upset that he did not?*

*This Article will argue for three points. First, what fuels this kind of outrage is vengeance: the desire to see defendants like George Zimmerman forced to "pay" for the harms that they needlessly and culpably inflict on others. While this point may seem obvious, it isn't. Most people repudiate revenge and therefore the notion that it plays any role in the criminal justice system.*

*Second, this attitude toward revenge is misguided and needs to change. We need to recognize that vengeance not only does but should play a significant role in motivating criminal punishment. Our vengeful reactions to harmful crimes are not ugly or shameful; on the contrary, they manifest a deep valuation of victims and a bitter denunciation of individuals who actively renounce this valuation through their criminal behavior.*

*Third, these two points have significant implications for the two main theories of criminal punishment: "retributivism," which says*

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*that criminals should be punished in order to give them their “just deserts,” and “consequentialism,” which says that criminals should be punished in order to bring about such good consequences as deterrence, incapacitation, and rehabilitation. Traditionally, these two theories have been at war with one another. But I will show how recognizing revenge as a motivation and justification for punishment can help to end this war and bring these two theories together.*

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## I. INTRODUCTION

On August 22, 2002, Ariel Castro kidnapped Michelle Knight.<sup>1</sup>

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1. Erin Donaghue, *Michelle Knight, Cleveland Kidnapping Victim, to Ariel Castro: “Your Hell Is Just Beginning”*, CBSNEWS (Aug. 1, 2013, 4:04 PM), <http://www.cbsnews.com/news/michelle-knight-cleveland-kidnapping-victim-to-ariel->

For eleven years, he imprisoned Michelle at his house, tortured her, raped her, impregnated her several times, and brutally forced her to miscarry.<sup>2</sup>

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

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

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

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

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

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

Imagine also that the mayor then leaked this email to the media. What would happen to the governor? Almost everybody would roundly condemn him, and his political life—certainly his

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castro-your-hell-is-just-beginning/.

2. *See id.*

3. Michael Muskal, *Ariel Castro Gets Life, No Parole; Victim Says His Hell Awaits*, L.A. TIMES, <http://www.latimes.com/news/nation/nationnow/la-na-nn-ariel-castro-michelle-knight-20130801,0,2844274.story#axzz2r2LCAkQc> (last updated Aug. 1, 2013, 10:50 AM).

4. Andrew Welsh-Huggins, *Ariel Castro Pleads Guilty to 937 Counts in Ohio Kidnapping Case*, DALLAS NEWS (July 26, 2013), <http://www.dallasnews.com/news/crime/headlines/20130726-ariel-castro-pleads-guilty-to-937-counts-in-ohio-kidnapping-case.ece>.

5. *See Donaghue, supra* note 1.

6. *Statements on Behalf of Amanda Berry, Gina DeJesus and Michelle Knight*, PR NEWSWIRE (Aug. 1, 2013), <http://www.prnewswire.com/news-releases/statements-on-behalf-of-amanda-berry-gina-dejesus-and-michelle-knight-217977801.html>.

presidential ambitions—would die a swift death. This kind of vengeful language is simply unacceptable from a governor.

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

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7. See Barbara Mutch, *Mandela Taught the Power of Forgiveness: Column*, USA TODAY (Dec. 8, 2013, 9:09 AM), <http://www.usatoday.com/story/opinion/2013/12/08/nelson-mandela-remember-column/3896245/>; Justice Malala, *'Mandela Looked His Enemy in the Eye and Held Him Close'*, TELEGRAPH (Dec. 7, 2013 12:54 PM), <http://www.telegraph.co.uk/news/worldnews/nelson-mandela/10501060/Mandela-looked-his-enemy-in-the-eye-and-held-him-close.html>.

8. Opponents of victim-impact statements offer two main arguments. First, they argue that victim-impact statements debase the criminal justice system by permitting, if not encouraging, victims and their families not to forgive but to do the very opposite—express their ugliest, most vengeful sentiments. Indeed, for this reason, victim-impact statements have been derogatorily characterized as “institutionalized revenge.” See Catherine Guastello, Comment, *Victim Impact Statements: Institutionalized Revenge*, 37 ARIZ. ST. LJ. 1321 (2005); see also Michael Price, *Revenge and the People Who Seek It: New Research Offers Insight into the Dish Best Served Cold*, AM. PSYCHOL. ASSOC., <http://www.apa.org/monitor/2009/06/revenge.aspx> (last visited Aug. 22, 2014) (“Victim impact statements . . . can partially satisfy a victim's vengeful feelings while also putting the responsibility for punishment on the state . . . .”); Brian Rosebury, *Private Revenge and its Relation to Punishment*, 21 UTILITAS 1, 11 (2009) (“[A] suspicion of [revenge's] presence hangs over some recent developments in criminal justice doctrines. One example is the introduction of ‘victim impact statements’ in some jurisdictions.”). Second, opponents of victim-impact statements argue that they are unfair to defendants. While these statements bear no relevance to defendants' blameworthiness, they play on judges' and juries' emotions and thereby manipulate them into increasing defendants' sentences. See *Payne v. Tennessee*, 501 U.S. 808, 860-61 (1991) (Stevens, J., dissenting) (“[A]spects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant the defendant's ‘personal responsibility and moral guilt’ and therefore cannot justify a death sentence.”) (citations omitted); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 421-22 (2003) (“[C]ommentators are particularly concerned that victim impact statements highlight the perceived relative worth of the victim, and consequently that the jury's judgment about whether to impose the death sentence will be influenced by this inappropriate factor. . . . [T]he death reflects neither the murderer's mental state nor the morality of the act itself. In addition, victim impact statements detail the various harms that befall the victim or the victim's family after a crime . . . that a defendant might not have been able to foresee at the time of the crime.”) (citations omitted). This criticism of victim-impact statements is part of a more general debate about whether the harm a person causes should be factored into her blame or punishment because it was a matter of “outcome luck”—something outside her control and therefore something that arguably should not affect her desert. For two opposing views, see Bebhinn Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); and Ken Levy, *The Solution to the*

Only a very small number of people might answer this last question in the affirmative. Most would insist that Michelle was perfectly justified in saying and thinking what she did, that she had every right to wish eternal suffering on the man who had cruelly and callously inflicted such suffering on her for his own pleasure. So counterbalancing our tendency to condemn vengeance in the abstract is our tendency to adopt the very opposite position when we learn of the particular circumstances that justify it.<sup>9</sup> The task of this paper is to show that harmful criminal wrongdoing is just such a circumstance and therefore that, contrary to popular wisdom, vengeance plays a *legitimate* and *central* role in the criminal justice system.<sup>10</sup>

The theory of *retributivism* is sometimes thought to capture this point of view. But this perception is not quite right. The relationship between retributivism and revenge is much more complicated, as I hope to show. Retributivism is the theory that we punish criminals in order to give them what they deserve because this result is inherently good—an end that is justified in itself.<sup>11</sup> Retributivism is usually contrasted with *consequentialism*, which suggests that we

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*Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action That Causes It*, 24 LAW & PHIL. 263 (2005).

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

10. See Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031, 1049 (2003) ("The centrality of revenge is . . . so widespread and pervasive in the criminal justice system that it could be considered one of its central tenets . . . . By not accounting for this desire in their vision of a future criminal justice system, current legal scholars underestimate its role in current punishment.") (citation omitted).

11. See DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 87 (2008); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 87-88, 111 (1997); David Dolinko, *Punishment*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 403, 406 (John Deigh & David Dolinko eds., 2011); R. A. Duff & D. Garland, *Introduction: Thinking About Punishment*, in *A READER ON PUNISHMENT* 1, 7 (R. A. Duff & David Garland eds., 1994); JOHN RAWLS, *Two Concepts of Rules*, in *COLLECTED PAPERS* 20, 21-22 (Samuel Freedman ed., 1999). Some opponents of retributivism include: Russell L. Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002) [hereinafter Christopher, *Detering Retributivism*]; Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93 (2003) [hereinafter Christopher, *The Prosecutor's Dilemma*]; Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269 (2005) [hereinafter Christopher, *Time and Punishment*]; Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003); Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUD. 289 (1996); Brian Slattery, *Commentary, The Myth of Retributive Justice*, in *RETRIBUTIVISM AND ITS CRITICS* 27 (Wesley Cragg ed., 1992); Mark Thornton, *Against Retributivism*, in *RETRIBUTIVISM AND ITS CRITICS*, *supra*, at 83; James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003).

punish criminals in order to bring about a particular good result beyond—or instead of—merely giving criminals their just deserts: protecting society against more crimes by (a) incapacitating them (through incarceration or, in rare cases, death); (b) discouraging them from repeating the same kinds of crimes after release (specific deterrence and possibly rehabilitation); and (c) discouraging others in society from committing similar crimes (general deterrence).<sup>12</sup>

There is also a third theory—*expressivism*—which suggests that we punish criminals in order to express our moral disapproval of their criminal behavior.<sup>13</sup> Punishment is the best, if not the only, “language” through which we may blame individuals for violating the criminal law, communicate the gravity of their wrongdoing, and thereby affirm the moral and criminal-legal norms of the community.<sup>14</sup> It may plausibly be argued that expressivism ultimately reduces to a combination of the two main theories in play—retributivism (giving criminals their just deserts) and consequentialism (for educative effect).<sup>15</sup> But whether or not this reductive hypothesis is true, the virtue of expressivism is that it captures moral censure and stigmatization, two essential components

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12. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 414-20 (1978); MOORE, *supra* note 11, at 91-92; Dolinko, *supra* note 11, at 405-06; Duff & Garland, *supra* note 11, at 8. For critiques of both retributivism and consequentialism, see BOONIN, *supra* note 11, at 37-154.

13. See BOONIN, *supra* note 11, at 180-92.

14. See *id.* at 183; R. A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 16-19 (2001); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 93-94 (2008); MOORE, *supra* note 11, at 84-88; ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 48-49 (1976); Duff & Garland, *supra* note 11, at 8; Joel Feinberg, *The Expressive Function of Punishment*, in *A READER ON PUNISHMENT*, *supra* note 11, at 73, 74; Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 212 (1984); Robert F. Schopp, *Mental Illness, Police Power Interventions, and the Expressive Functions of Punishment*, 39 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 99, 109-13 (2013); Andrew von Hirsch, *Censure and Proportionality*, in *A READER ON PUNISHMENT*, *supra* note 11, at 115-27. For critiques of expressivism, see HUSAK, *supra*, at 88; Dolinko, *supra* note 11, at 417-20; D.B. Hershenov, *Restitution and Revenge*, 96 *J. PHIL.* 79, 85-86 (1999). For a very helpful summary of consequentialism, retributivism, and expressivism and potential problems with each, see DUFF, *supra*, at 3-34. For a list of purposes that do not fall cleanly into any one of these three categories (retributivism, consequentialism, or expressivism), see FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS* 80-81 (Walter Kaufmann ed., R.J. Hollingdale trans., Vintage Books 1989) (1967).

15. See Dolinko, *supra* note 11, at 421; Hampton, *supra* note 14, at 212-13; Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS*, *supra* note 11, at 1, 13, 14; Eric Jaffe, *The Complicated Psychology of Revenge*, *OBSERVER*, Oct. 2011,

available

at

<http://www.psychologicalscience.org/index.php/publications/observer/2011/october-11/the-complicated-psychology-of-revenge.html>; J.L. Mackie, *Morality and the Retributive Emotions*, 1 *CRIM. JUST. ETHICS* 3, 4-5 (1982).

of criminal punishment.<sup>16</sup>

Regarding the first of these three theories of punishment and the central topic of this Article, retributivism, I will argue that it is only partly correct. While retributivism helps both to explain and to justify criminal punishment, it cannot *completely* fulfill both of these tasks—explanation and justification—on its own. Instead, it must be supplemented by what is usually considered to be its principal competitor<sup>17</sup>—again, *consequentialism*. In this way, my paper is ultimately a plea for rapprochement. The war between retributivism and consequentialism has gone on long enough. This Article will attempt to hammer out the terms of a lasting peace treaty.<sup>18</sup>

The war between consequentialism and retributivism has been fueled by three kinds of mischievous thought-experiments, hypotheticals in which highly unusual conditions are stipulated in such a way that the two theories' different goals (backward-looking just deserts and forward-looking good consequences) end up opposing each other: (a) bad consequences result from punishing criminals,<sup>19</sup>

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

17. See generally DUFF, *supra* note 14, at 3; Christopher, *Deterring Retributivism*, *supra* note 11, at 855-65; Dolinko, *supra* note 11, at 408-09.

18. Many courts and scholars have advocated "mixed" or "hybrid" theories of punishment. See, e.g., *Tapia v. U.S.*, 131 S. Ct. 2382, 2387-88 (2011); FLETCHER, *supra* note 12, at 418; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 21 (2d ed. Harvard Univ. Press 2008); HUSAK, *supra* note 14, at 203-05; MOORE, *supra* note 11, at 92-94; VON HIRSCH, *supra* note 14, at 49-55; Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 30-31 (2003); Douglas N. Husak, *Why Punish the Deserving?* 26 NOÛS 447, 452 (1992) [hereinafter Husak, *Why Punish*]; Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 970-77 (2000) [hereinafter Husak, *Retribution*]; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1442-43 (2004); Alice Ristorph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1297-98 (2006). But see DUFF, *supra* note 14, at xvii-xviii; MOORE, *supra* note 11, at 94, 97-102 (arguing that mixed theories fail because retributivism does all the work and consequentialism either interferes with this work or gratuitously free-rides on it); Christopher, *Deterring Retributivism*, *supra* note 11, at 869 ("The difficulty for most mixed theories is that either substantive issues of justification are assumed away by definition or the instability of the components leads to a collapse back into consequentialism. While [H.L.A.] Hart's mixed theory may avoid those problems, its own difficulty is in setting the amount of punishment.") (footnotes omitted); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1390-91 (2003) ("The comforting consistency of utilitarian and retributive theories with respect to most practical issues may be a cognitive illusion."). For a survey and critique of different mixed theories, see Dolinko, *supra* note 11, at 421-27.

19. Punishment "abolitionists"—people who believe that criminal punishment does (much) more harm than good—rely on these kinds of examples. Abolitionists include: BOONIN, *supra* note 11, at 213-75; H. Bianchi, *Abolition: Assensus and Sanctuary*, in A READER ON PUNISHMENT, *supra* note 11, at 336, 336-39; Eugene E. Dais, *Commentary*:

(b) *good* consequences result from punishing *innocent* individuals,<sup>20</sup> and (c) *good* consequences result from *not* punishing criminals.<sup>21</sup> The idea behind all three thought-experiments is to show that consequentialism (good consequences) and retributivism (just deserts) can come into conflict and therefore that we must choose one over the other. It is certainly true that these three kinds of situations can drive a wedge between retributivism and consequentialism. As long as two different ethical theories of *any kind* have two different primary goals, there will always be ways to bring these goals—and therefore these theories—into conflict. But the fact that retributivism and consequentialism *can* come into conflict hardly shows that they do not *usually* work together. On the contrary, that is exactly what retributivism and consequentialism do—*usually* work together.

In fact, retributivism not only works well with consequentialism; it *needs* consequentialism. There are three reasons. In Part III, I will provide the first two of these reasons. Both of these reasons start

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*Positive Retributivism and Despicable Justice*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 11, at 107; see also Husak, *Why Punish*, *supra* note 18, at 448-49 (arguing that, in several different kinds of situations, an offender should not be punished even though he deserves it because the consequences of punishing him would be too costly); Husak, *Retribution*, *supra* note 18, at 975-76 (“Retributivists . . . seemingly suppose that their task is complete when they show that the punishment of culpable wrongdoers is intrinsically good . . . . But this demonstration does not suffice to justify the institution of punishment—even for retributivists. They must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is *sufficiently* valuable to offset the drawbacks that inevitably result when an institution of punishment is created. . . . My point is that the value of realizing retributive justice, by itself, is insufficient to justify the creation of an institution of punishment with [several] formidable drawbacks . . . .”) (citations omitted).

20. See J.J.C. SMART, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM FOR AND AGAINST 69-72 (J.J.C. Smart & Bernard Williams eds., 1973); RAWLS, *supra* note 11, at 9-13; MOORE, *supra* note 11, at 93 n.19, 94-97; WILFRID J. WALUCHOW, THE DIMENSIONS OF ETHICS: AN INTRODUCTION TO ETHICAL THEORY 166-68 (2003); Hampton, *supra* note 14, at 214; Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 118 (2000); Christopher, *Deterring Retributivism*, *supra* note 11, at 870-80, 922-23.

21. See 2 JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 193 (1988); see generally MOORE, *supra* note 11, at 100-01 (proposing a hypothetical in which “[o]ur pretending to punish [a rapist who has accidentally lost the ability to engage in sexual activity] will . . . serve the needs of general deterrence and maintain social cohesion, and the cost to the state will be less than if it actually did punish him.”); Christopher, *Deterring Retributivism*, *supra* note 11, at 858 n.66 (“[P]ublicity of the faked punishment will have a deterrent effect. . . . [I]t is the perception of punishment, and not actual punishment, which generates general deterrence. Retributivists conclude, therefore, that the general deterrence theory of punishment fails to justify actual punishment but only the faking of punishment.”); Dolinko, *supra* note 11, at 406-07 (arguing that consequentialists are committed to accepting both (a) hypothetical “sham punishments”—that is, “method[s] of deceiving both offenders and the general public into believing that offenders are punished, even though they receive *no* punishment at all”; and (b) hypothetical “nonpunitive” techniques that offer more favorable cost/benefit ratios than criminal punishment).



from the fact that retributivism is as much in need of explanation as the thing that it is trying to explain (criminal punishment). The notion that the state should give criminals the punishment that they deserve requires further explanation because retributivists do not also believe that the state should give *good people* the *praise or rewards* that they deserve for their *virtuous* acts. So why do retributivists think that it is imperative that the state inflict *negative* desert but not bestow *positive* desert? Simply stating, as retributivism does, that we should give people their just deserts does not answer this question. The concept of just deserts is neutral between negative and positive desert and therefore fails to explain retributivism's asymmetrical emphasis on negative desert.

The first consequentialist reason why retributivists believe that the state should inflict negative desert rather than guarantee positive desert is that inflicting negative desert is much more practicable than guaranteeing positive desert.<sup>22</sup> Difficult as the task of law enforcement may be, it is much easier to find, arrest, prosecute, convict, and punish criminals than it would be for the state to seek out the much larger number of virtuous people and give them the praise and rewards that they deserve.

The second consequentialist reason why retributivists believe that the state should inflict negative desert rather than guarantee positive desert is what I will refer to as the *Motivation Thesis*. The Motivation Thesis says that, whether or not retributivists admit it (to themselves, no less to others), retributivism is largely motivated by *vengeance*; that retributivists' desire for retributive justice, for giving criminals their just deserts, is itself motivated by the (deeper) desire to give criminals a *taste of their own medicine*, to *pay them back* for the unjustified and unexcused harm that they have caused.<sup>23</sup> And, as a motivation, vengeance (or the channeling of vengeful feelings, which is sometimes euphemized as "victim closure") is consequentialist, not retributivist, because we act on it in order to achieve a good consequence—namely, annulling the crime (or turning the crime back on the criminal) and thereby achieving a restoration of the moral and social order, which itself contributes to the victim's sense that the criminal's wrongdoing has been at least partly righted.<sup>24</sup>

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22. See HUSAK, *supra* note 14, at 205-06.

23. See Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY 88, 95 (Jules Coleman ed., 1988); Leo Zaibert, *Punishment and Revenge*, 25 LAW & PHIL. 81, 115 (2006).

24. See *Graham v. Florida*, 130 S.Ct. 2011, 2028 (2010) (stating that "[s]ociety is entitled to impose severe sanctions on a[n] . . . offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense"); CHARLES K.B. BARTON, *GETTING EVEN: REVENGE AS A FORM OF JUSTICE* 10 (1999); GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 37-38 (1998)] ("Punishment

Most retributivists are reluctant to admit that retributive justice is motivated by vengeance largely because they fail to realize that vengeance can be not only justified but justificatory.<sup>25</sup> And they fail to achieve this realization because vengeance has a bad reputation.<sup>26</sup> It is generally thought to be just plain *wrong*, a feeling that should not be indulged but rather repudiated in favor of its angelical opposite—forgiveness.<sup>27</sup> So to suggest that vengeance can actually be justified or justify criminal punishment will strike many as not only misguided but also wicked and pathological.<sup>28</sup> Still, this perception is wrong. We retributivists need to do better damage control. We should no longer be reluctant to articulate our theory of criminal punishment in terms of vengeance. In Part IV, then, I will supplement the Motivation Thesis with what I call the *Justification Thesis*. The Justification Thesis says that the desire to exact revenge against criminals for the harm that they cause is not an unfortunate, irrational disposition lodged deep in our psyches but rather a morally appropriate reaction—indeed, a perfectly decent and honorable motivation for criminal punishment.<sup>29</sup>

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counteracts domination by reducing the criminal to the position of the victim. When the criminal suffers as the victim suffered, equality between the two is reestablished.”); Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 23, at 111, 125, 130; Murphy, *supra* note 23, at 89; Theodore M. Benditt, *Revenge*, 38 THE PHIL. F. 357, 358, 362 (2007); Bradley, *supra* note 18, at 29-30; Alan Brudner, *In Defence of Retributivism*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 11, at 93 *passim*; Dolinko, *supra* note 11, at 416-17; John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J. JURIS. 91, 103 (1999); George Fletcher, *What Is Punishment Imposed For?* 5 J. CONTEMP. LEGAL ISSUES 101, 104, 109 (1994); Hershenov, *supra* note 14, at 80, 87-88; Jones, *supra* note 10, at 1048-49; Mackie, *supra* note 15, at 5 (attributing this position to Hegel and Kant); Markel, *supra* note 18, at 1446-47.

25. See BOONIN, *supra* note 11, at 152; Rosebury, *supra* note 8, at 11.

26. See BARTON, *supra* note 24, at xiv, 1-2, 9; PETER A FRENCH, THE VIRTUES OF VENGEANCE x (2001); Murphy, *supra* note 23, at 90; Rosebury, *supra* note 8, at 20. *But see* ROBERT WRIGHT, THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY 339 (1994) (suggesting that the “impulse of retribution” is surrounded by an “aura of reverence” and is imbued with “the ethereal sense that [it] embodies some higher ethical truth”).

27. See BARTON, *supra* note 24, at 2; MICHAEL E. MCCULLOUGH, BEYOND REVENGE: THE EVOLUTION OF THE FORGIVENESS INSTINCT xix (2008); Jeffrie Murphy, *Introduction, The Retributive Emotions*, in FORGIVENESS AND MERCY, *supra* note 23, at 1, 4; David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?* 27 FORDHAM URB. L.J. 1663, 1663-64, 1666-67 (2000).

28. See BARTON, *supra* note 24, at xiv.

29. Since the late 1980s and especially in the last fifteen years, some scholars are finally admitting this point. See BARTON, *supra* note 24, at xv, 30; MOORE, *supra* note 11, at 117-18, 141-44; Murphy, *supra* note 23, at 90; STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 532 (2011); WRIGHT, *supra* note 26, at 339; Hershenov, *supra* note 14, at 90. Even the United States Supreme Court accepts this point. See *Graham*, 130 S.Ct. at 2028; *Philip Morris USA v. Williams*, 549 U.S. 346, 359 (2007) (“[A] punitive damages award, instead of serving a

Finally, in Part VI, I will present the last of the three reasons why retributivism needs consequentialism: consequentialism does a much better job of explaining and justifying criminal punishment of harmless or victimless crimes—crimes that do not necessarily harm anybody (e.g., drug possession, resisting arrest, and perjury)—than does retributivism.<sup>30</sup> While it is true that retributivists believe that people who commit crimes, harmful or harmless, should be punished, the primary explanation and justification of the infliction of criminal punishment for harmless crimes is consequentialism. Retributivism plays a much smaller role.

## II. THE MAIN GOALS OF THE CRIMINAL JUSTICE SYSTEM

The three primary goals of the criminal justice system are to give criminals the punishment that they deserve,<sup>31</sup> minimize crime,<sup>32</sup> and thereby express serious moral condemnation of criminals for their criminal acts.<sup>33</sup> Putting aside the third goal for now, there is no need to decide which of the first two goals is *more* important. It is perfectly acceptable to maintain that they are both *equally* important, at least when it comes to punishing harmful, as opposed to harmless, crimes. As I mentioned in the Introduction, one of the central points of this Article is to end the unnecessary war between these two positions and recognize that they generally work beautifully together.

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

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

The criminal law is largely concerned with protecting people

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compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction.”).

30. As I will briefly argue in Part VI, the classic inchoate crimes—attempt, conspiracy, and solicitation—often inflict *psychological* harm even when they do not inflict *physical* harm. In support of this point, see R.A. DUFF, *CRIMINAL ATTEMPTS* 130 (1996); Anthony M. Dillof, *Modal Retributivism: A Theory of Sanctions for Attempts and Other Criminal Wrongs*, 45 U. RICH. L. REV. 647, 662 (2011); Susan Hanley Duncan, *Myspace Is Also Their Space: Ideas for Keeping Children Safe From Sexual Predators on Social-Networking Sites*, 96 KY. L.J. 527, 542 (2007-08); Hershenov, *supra* note 14, at 87.

31. See *supra* note 11 and accompanying text.

32. See *supra* note 12 and accompanying text. Many criminal scholars suggest that the primary purpose of the criminal justice system is crime *prevention*. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN (WITH STEPHEN MORSE), *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 3 (2009); ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 30-31 (2006). But *prevention*, which connotes success, is less accurate a term than *deterrence* or *minimization* for the simple reason that, in spite of the existence of a criminal justice system, crime still occurs.

33. See *supra* notes 13-14 and accompanying text.

against deliberately inflicted harm to their supremely valued interests, to the interests that they generally most highly value—namely life, physical well-being, emotional well-being, family, liberty, and property. That is why we have criminal laws against homicide, manslaughter, rape, assault, battery, kidnapping, unlawful imprisonment, and theft.<sup>34</sup>

I should also have included general security, which is protected by criminalizing espionage, treason, and terrorism.

Of course, there are other criminal offenses that do not necessarily harm the supremely valued interests listed above—for example, reckless endangerment, solicitation, conspiracy, and attempt. But what justifies legislatures in defining these acts as crimes is the same kind of goal: protecting our supremely valued interests against acts that not only do damage to our supremely valued interests but also *tend or threaten* to damage one or more of our supremely valued interests.<sup>35</sup> For the same reason, public order should *not* be included in the list of supremely valued interests. Instead, it should be included in another list, the list of *lesser* or *secondarily* valued interests. Its inferior status explains why such victimless crimes as disorderly conduct, vagrancy, and public drunkenness are misdemeanors rather than felonies.

So minimizing injury to our supremely or secondarily valued interests is one of the two primary goals of the criminal justice system. We established such a system (way back when) and maintain it largely to discourage as many people as possible from committing crimes.<sup>36</sup> But how exactly do we go about *doing* this discouraging and minimizing? The first thing we do is *threaten* the public with criminal punishment. The (just) state tells the public what kinds of acts are legally forbidden and what level of criminal punishment they may expect to suffer if they still perform any of these forbidden acts and are caught. It defines what it considers to be supreme-value-threatening acts and supreme-value-damaging acts as criminal offenses and threatens criminal punishment for their performance. It does all of this defining and threatening with the goal of deterring as

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34. Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1065 (2007) (emphasis omitted). When protected by the State, these supremely valued interests are called *rights*.

35. See DUFF, *supra* note 30, at 134-35; HART, *supra* note 18, at 6; see also Bradley, *supra* note 18, at 25-26 (offering a slightly different account). Because some crimes are harmless *and* do *not* tend to cause harm—for example, drug possession, resisting arrest, and perjury—their criminalization warrants a different justification. These kinds of crimes will be addressed more fully below in Part VI.

36. See PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 211 (2013) (“[T]he argument is that the absence of punishment mechanisms in a society would lead to a set of violations sufficient to threaten the existence of the society.”); Husak, *Why Punish*, *supra* note 18, at 459-62.

many people as possible from performing these supreme-value-hostile acts and thereby minimizing human-caused threats to individuals' enjoyment of their supremely valued interests.<sup>37</sup>

Unfortunately, however, no criminal justice system can fully eliminate crime.<sup>38</sup> In every society, some individuals will simply not be deterred by the threat of punishment. What, then, should the State do with these individuals, at least those who are caught? The answer—and the second means of fulfilling the goal of crime minimization (in addition to making threats to punish)—is the State's *execution* of its earlier threats to punish these law-breakers. The State's actual *punishment* of criminals helps to minimize crime in three different ways: by (a) incapacitation (temporarily or permanently preventing such criminals from committing further crimes); (b) specific deterrence (discouraging these specific individuals from committing further crimes and thereby risking further punishment); and (c) general deterrence (discouraging many other would-be criminals from committing crimes by showing, through the example of these particular criminals, what will likely happen to them if they are caught).<sup>39</sup>

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

Is consequentialism correct that criminal punishment's contributions toward crime minimization are sufficient to justify criminal punishment? The answer might seem to be an obvious *yes* until we really consider just what criminal punishment *is*: the intentional infliction of hardship, deprivation, or suffering by the state in return for a proven violation of its criminal laws.<sup>40</sup> Hardship, deprivation, or suffering is not merely a foreseeable but

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37. See VON HIRSCH, *supra* note 14, at 38; Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 90 (2005); John M. Darley, Kevin M. Carlsmith, and Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 165-66 (2001); Hampton, *supra* note 14, at 210-11; von Hirsch, *supra* note 14, at 122.

38. See Stephen Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 267 (1999).

39. See *supra* note 12 and accompanying text.

40. See BOONIN, *supra* note 11, at 7, 17; DUFF, *supra* note 14, at xiv-xv; HART, *supra* note 18, at 4-5; HUSAK, *supra* note 14, at 92; David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992); Feinberg, *supra* note 14, at 73; Husak, *Why Punish*, *supra* note 18, at 455; Husak, *Retribution*, *supra* note 18, at 963-64; Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 L. & PHIL. 383, 408 (2008); von Hirsch, *supra* note 14, at 118; Zaibert, *supra* note 23, at 110; see also Hampton, *supra* note 24, at 126 ("I propose that the most general and accurate definition of 'punishment' is: the experience of defeat at the hands of the victim (either directly or indirectly through a legal authority)."); Dolinko, *supra* note 11, at 404-05 (critiquing Hart's definition).

unintended consequence, as it is with (a) civil commitment,<sup>41</sup> (b) administrative regulations,<sup>42</sup> and (c) medical treatment.<sup>43</sup> Once again, hardship, deprivation, or suffering is *intended*.<sup>44</sup>

The same, however, cannot be said of tort remedies. For this reason, they are harder to distinguish from criminal punishment than are civil commitment, administrative regulations, and medical treatment.<sup>45</sup> Like criminal punishment, tort remedies such as compensatory damages and restitution are *intended* to make defendants suffer a deprivation—namely, a deprivation of their money. But there are still two main differences between tort remedies and punishment. First, tort remedies are designed to fulfill two main ends: (i) deterring defendants and the general public from committing the same kinds of torts in the future and (ii) restoring as much as possible the plaintiffs, whom the defendants previously injured, to the condition that they enjoyed prior to injury.<sup>46</sup> While criminal punishment also aims largely at deterrence, it does not generally aim at victim restoration.<sup>47</sup> Instead, it intentionally inflicts

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41. See *Kansas v. Hendricks*, 521 U.S. 346, 361-64, 368-69 (1997); *Bell v. Wolfish*, 441 U.S. 520, 535-539 (1979); FLETCHER, *supra* note 12, at 412-13; HART, *supra* note 18, at 17; HUSAK, *supra* note 14, at 93.

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

43. See *State v. Perry*, 610 So.2d 746, 751-53 (La. 1992); *People v. Fuller*, 248 N.E.2d 17, 20-21 (N.Y. 1969); Jami Floyd, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1272-78 (1990); Edward M. Opton, Jr., *Psychiatric Violence Against Prisoners: When Therapy Is Punishment*, 45 MISS. L.J. 605, 608 (1974).

44. See BOONIN, *supra* note 11, at 12-17; HUSAK, *supra* note 14, at 92.

45. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 783-84 (1997); Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 489, 491-92, 503-05 (2006).

46. See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 355 (2007); Steiker, *supra* note 45, at 784-85.

47. Some scholars, however, advocate shifting the criminal justice system's focus from retributive to restorative justice. See, e.g., BOONIN, *supra* note 11, at 213-75; Bianchi, *supra* note 19, at 340; Carrie J. Niebur Eisnaugle, *An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209 *passim* (2003); Lerman, *supra* note 27, at 1664, 1674-75; see also ROBINSON, *supra* note 36, at 209-15 (arguing that restorative justice might supplement but cannot entirely replace criminal punishment, especially for more serious crimes); Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 16, 29-30 (Austin Sarat, and Nasser Hussain eds., 2007) explicating and briefly critiquing the

hardship, deprivation, or suffering in order to achieve two *other* ends (in addition to deterrence): giving the criminal what she deserves and expressing condemnation of the criminal for her criminal activity.<sup>48</sup>

Second, while criminal punishment may amount to a fine, which superficially resembles monetary damages and restitution, criminal punishment is often implemented in other ways that tort remedies are not. These other ways include incarceration, probation, shaming,<sup>49</sup> community service,<sup>50</sup> license revocations,<sup>51</sup> and loss of civil rights such as the right to vote<sup>52</sup> and the right to own firearms.<sup>53</sup>

### 1. The Problem of Punishment

Given that the criminal justice system *intentionally* inflicts hardship, deprivation, or suffering, one might very well argue that criminal punishment simply *cannot* be just—no matter how much it helps to minimize crime. On this view, no matter what the person's crime, punishment is the morally wrongful response. This is what David Boonin calls the *problem of punishment*.<sup>54</sup>

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view that the criminal justice system should strive for restorative justice rather than for retributive justice). Charles Barton advocates a restorative approach that *includes* revenge. See BARTON, *supra* note 24, at 137.

48. See *supra* notes 11 and 13 and accompanying text.

49. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 734-37 (1998) (providing several examples of shaming punishments).

50. See generally WARREN YOUNG, COMMUNITY SERVICE ORDERS 3-70 (1979) (summarizing the background, legislation, philosophy, and practice of community service sentences).

51. See Janis Mary Gomez, Comment, *The Potential Double Implications of Administrative License Revocation*, 46 EMORY L.J. 329, 329 (1997) (noting that the majority of "states and the District of Columbia have enacted laws which provide for the administrative revocation of a driver's license after a first arrest for drunk driving." (citation omitted)).

52. See Mark E. Thompson, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 168 (2002) (noting that despite an "expansionist view of the franchise" over the last 150 years, 1.4 million ex-felons "remain permanently excluded from the electoral process in nine states.") (footnote omitted).

53. See 18 U.S.C. § 922(g) (2012) ("It shall be unlawful for any [ex-felon] . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

54. See BOONIN, *supra* note 11, at 1; see also DUFF, *supra* note 14, at xi-xii ("To ask, 'What can justify criminal punishment?'—the central question in philosophical discussions of punishment—is to ask what can justify practices of this kind. . . . The question of justification . . . is . . . a crisis of legitimacy: for when we reflect on the punishments inflicted (in our name) on so many of our fellow citizens and on the effects of those punishments on those who suffer them, we cannot but raise the question of legitimacy—of what can justify any practice of criminal punishment."); HUSAK, *supra* note 14, at 92 ("I argue that state punishment is hard to justify because it involves two essential features: hard treatment and censure. Under normal

In response to the problem of punishment, one might continue to stress the benefits, if not necessity, of crime minimization. But the punishment *abolitionist* will maintain that no matter how great the social utility of an institution, it cannot be morally legitimate if it is fundamentally inhumane. (Consider, for example, slavery.) And an institution such as the criminal justice system that intentionally inflicts suffering *for the sake of suffering* is fundamentally inhumane.<sup>55</sup>

So in order to refute the punishment abolitionist, it needs to be shown that the criminal justice system—in particular, the practice of criminal punishment—is *not* inherently inhumane. According to retributivists, if social utility will not help to demonstrate this point, something else will: *moral desert*. What justifies criminal punishment—intentionally inflicting suffering on criminals—is not merely its significant contribution to crime minimization but also the fact that it is *what criminals deserve* in virtue of their criminal wrongdoing.<sup>56</sup>

According to retributivists, then, the state is justified in

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circumstances, impositions of hard treatment and censure violate important personal interests. Because ordinary utilitarian reasons do not allow the government to infringe these important interests, we have reason to countenance a *right not to be punished* . . . [T]he key to a theory of criminalization is to determine when the state is permitted to infringe the right not to be punished.”); *id.* at 95 (“The criminal sanction is the most powerful weapon in the state arsenal; the government can do nothing worse to its citizens than to punish them . . . . As a *type* of response . . . criminal sanctions are the most severe and therefore the most in need of justification.”); Christopher, *Deterring Retributivism*, *supra* note 11, at 852 (“[P]unishment does require justification, for the same reason we consider conduct violating the core prohibitions of our criminal law to be wrong. Punishment involves the deliberate infliction of pain, suffering, and deprivation, which is *prima facie* wrong.”) (citations omitted); Dolinko, *supra* note 40, at 1626 (“Punishment involves the deliberate imposition of suffering on persons convicted of crime; it involves treating these persons in ways we ordinarily believe violate human rights (for example, incarceration and execution). Why is it morally permissible to do these things (or at least some of them) to criminals, when in most other contexts such treatment is morally prohibited?”).

55. See *supra* note 19 and accompanying text.

56. See *supra* notes 10-11 and accompanying text. Doug Husak argues that the task of justifying criminal punishment is to show not that it is morally permissible or that it is morally obligatory but that it helps “the state more closely approximate[] the ideal of justice, and thus add[] value to the world.” Husak, *Why Punish*, *supra* note 18, at 454; see also HUSAK, *supra* note 14, at 200-01 (“I share [Michael] Moore’s judgment that the state of affairs in which [people who commit monstrous crimes] receive their just deserts is preferable to the state of affairs in which they do not (even though the former may not be intrinsically good). I also concur with Moore about the crucial point that divides retributivists from consequentialists: our judgments about these respective states of affairs do not depend on utilitarian gains.”); see also Husak, *Retribution*, *supra* note 18, at 984-85 (“The *only* benefit of punishing harmless wrongdoing is that so doing makes ‘the world . . . a morally better place.’ But there are many ways to improve the world; exacting retributive justice on harmless wrongdoers is very low on any sensible list of priorities.”) (citations omitted).



inflicting criminal punishment not because of its presumed good consequences for society, as consequentialists claim, and not because of its symbolic importance, as expressivists claim, but simply because criminals *deserve* it.<sup>57</sup> This desert can take two forms: either a “moral debt” that only criminal punishment can discharge<sup>58</sup> or a *right* to criminal punishment that the criminal “earned” through her commission of a crime.<sup>59</sup> Both the debt view and the rights view of criminal punishment presuppose that the criminal is at least criminally, if not morally, responsible for her crime.<sup>60</sup>

## 2. Proportionality

There are two kinds of retributivism: *weak* and *strong*.<sup>61</sup> Weak retributivism says that just deserts is a necessary condition of criminal punishment, that criminal punishment cannot be just unless the person punished committed criminal wrongdoing and is being punished *for* that wrongdoing.<sup>62</sup> Strong retributivism says that just deserts (criminal wrongdoing) is a *sufficient* condition of criminal punishment, that criminal punishment should always be inflicted for

57. See BARTON, *supra* note 24, at 10; BOONIN, *supra* note 11, at 85; FLETCHER, *supra* note 12, at 415; Dolinko, *supra* note 40, at 1626; RAWLS, *supra* note 11, at 21-22; Mackie, *supra* note 15, at 4.

58. See BOONIN, *supra* note 11, at 149-52; Bradley, *supra* note 18, at 20; Finnis, *supra* note 24, at 99; Hershenov, *supra* note 14, at 86-93; Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 483 (1968). *But see* Mackie, *supra* note 15, at 5 (“It is often suggested that by being punished a criminal pays a debt to society. But how can this be, unless what he suffers does some good to society? Reparation might be justified in this way, but reparations are clearly different from punishments . . .”).

59. See BARTON, *supra* note 24, at 5; MOORE, *supra* note 11, at 150-51; Christopher, *Deterring Retributivism*, *supra* note 11, at 864 n.113; Dais, *supra* note 19, at 112; Dolinko, *supra* note 40, at 1642; Hershenov, *supra* note 14, at 79, 91-92; Morris, *supra* note 58, at 485-86; Jeffrie G. Murphy, *Moral Death: A Kantian Essay on Psychopathy*, 82 ETHICS 284, 291-92 (1972); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 5, 30-31 (2003).

60. See Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 NEB. L. REV. 1, 19 n.68 (2012); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1333 (2009); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 340 (1996); Ken Levy, *Dangerous Psychopaths: Criminally Responsible But Not Morally Responsible, Subject to Criminal Punishment And To Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1345, 1363 (2011); von Hirsch, *supra* note 14, at 121.

61. See MOORE, *supra* note 11, at 88-89, 153-154; Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 3 (2009); Duff & Garland, *supra* note 11, at 7 (making a similar distinction in terms of “negative” and “positive” retributivism); Mackie, *supra* note 15, at 4 (distinguishing among “negative retributivism, the principle that one who is *not* guilty must not be punished,” “positive retributivism, the principle that one who is guilty ought to be punished,” and “permissive retributivism, [the principle] that one who is guilty may be punished.”).

62. See MOORE, *supra* note 11, at 88.

criminal wrongdoing.<sup>63</sup>

While weak retributivism is accepted by all but a few radical consequentialists who believe that it is sometimes morally permissible to knowingly punish an innocent person,<sup>64</sup> strong retributivism is much more controversial. There are at least two objections against it, two arguments that mere just deserts is not a sufficient condition for just punishment. First, other conditions—especially due process and all the conditions that due process entails—are necessary.<sup>65</sup> Second, there are situations in which a person committed a crime and is afforded due process but still does not deserve punishment, at least by the state. These include situations in which the person committed the crime with a recognized excuse or justification, the person has already been punished proportionately by non-state actors,<sup>66</sup> the person deserves forgiveness or mercy,<sup>67</sup> or the crime is *de minimis*.<sup>68</sup>

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

Regarding (b), proportionality is built in to moderate retributivism. Once again, retributivism is all about *just* deserts, and just-ness—or justice—implies proportionality.<sup>69</sup> It is clearly *not* just but *unjust* deserts—an injustice to the offender—if she is punished far more than her crime merits.<sup>70</sup> So a person who receives twenty-five years in prison for stealing a \$10 item may legitimately claim that her punishment does not “fit the crime”; that—given the interests, values, and rights that her crime tends to impair and the actual harm suffered by the victim—her crime merits much less

63. See *id.* at 83, 88, 91-92, 104-105, 153-154, 173, 180.

64. See *supra* note 20 and accompanying text.

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

66. See HUSAK, *supra* note 14, at 201-02; Husak, *Retribution*, *supra* note 18, at 972-73; Zaibert, *supra* note 23, at 100.

67. See discussion *infra* Part V.C.

68. See Husak, *supra* note 16, at 350.

69. See RAWLS, *supra* note 11, at 4-5; ROBINSON, *supra* note 36, at 209; von Hirsch, *supra* note 14, at 115.

70. See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (“The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”).

punishment.<sup>71</sup> It is also clearly unjust—an injustice to the victim and to all similarly situated offenders who are punished more harshly—if the offender is punished far less than her crime merits.<sup>72</sup> So a defendant who is sentenced to only thirty days in jail for a violent rape is not “paying” nearly what he “owes.”

In addition to justice itself, there are both a *consequentialist* reason and an *expressivist* reason for proportionality as well. Regarding the former, disproportionate punishment erodes enforcement of, and respect for, the law.<sup>73</sup> To consider an extreme example, suppose that parking tickets were punished by life in prison without parole.<sup>74</sup> At first, it might seem that this kind of law would fully eliminate all illegal parking. And maybe it would—initially. But sooner or later, the conscience of the community would step in and thwart enforcement of this law. The public would stop reporting parking offenses, police would stop writing parking tickets, prosecutors would stop trying recipients of these tickets, and judges and juries would stop convicting parking-ticket defendants—all of them out of fear of helping contribute to grave injustice. Conversely, if serious crimes were under-punished—for example, the statutory sentence for first degree murder were reduced from life in prison to a maximum of one year in prison—judges and juries would routinely nullify the statutory limit and recommend far greater sentences.

The expressivist reason for proportional punishment is simple: to convey both to the criminal and to the community just how grave or serious her crime was.<sup>75</sup> In general, the “message” conveyed by harsher punishment is that the crime was worse than crimes that receive lesser punishment. Still, it is important to realize that this near-platitude oversimplifies the situation.

Most crimes prescribe a range of punishment, a range that allows for judicial discretion.<sup>76</sup> Three factors determine the statutory ranges: (i) the relative importance of the interests, values, or rights that the crime opposes or impairs; (ii) the punishments that other crimes receive; and (iii) the relative “rankings” of these crimes (for example, murder is considered to be worse than burglary and

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71. I leave aside the objection that she *does* deserve life in prison if this is her third felony in a “three strikes” jurisdiction. See *Ewing v. California*, 538 U.S. 11, 29 (2003).

72. See MOORE, *supra* note 11, at 98-102; von Hirsch, *supra* note 14, at 126.

73. See ROBINSON, *supra* note 36, at 209; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477-78 (1997); Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2450-51 (1997).

74. See *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

75. See Hampton, *supra* note 15, at 13; Schopp, *supra* note 14, at 110; von Hirsch, *supra* note 14, at 125.

76. See generally Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Val. U. L. Rev. 693 (2005).

burglary worse than criminal trespass).<sup>77</sup> So, in any given jurisdiction, the range of punishment for murder is going to be harsher than the ranges of punishment for attempted murder, rape, and burglary because it is the only crime among these four that violates the most important interest, value, and right that we have—life.

Once the range of punishment has been specified by statute, a judge will determine how much punishment within that range a particular criminal receives. But what determines the particular punishment that the judge picks within this range? The degree of punishment that a judge considers to be proportional to a given criminal act within the statutory range will depend on three main factors: (a) the magnitude of harm, if any, caused by the criminal act (for example, a \$100 theft as opposed to a \$50,000 theft); (b) various characteristics of the offender, such as her age, mental condition, history, and reason(s) for committing the criminal act; and (c) any aggravating, mitigating, or exculpatory circumstances.<sup>78</sup>

The upshot of all this is that proportional punishment only *partially* communicates the gravity of the crime being punished. Statutory ranges, which are determined entirely by the community's (legislature's) estimation of the gravity of the crime in the abstract, are only the starting point, not the end point. For example, in the abstract, we regard rape as a much worse crime than armed robbery.<sup>79</sup> But given the other factors that go into determining proportional punishment, it may very well be that some armed robbers are punished more harshly than some rapists—even in the same jurisdiction. A defendant found guilty of armed robbery might be given a harsher sentence (say, fifteen years) than a defendant found guilty of rape (say, ten years) because two different judges, or maybe the same judge in two different cases, picked two different points in the different ranges—a lower point in the rape range and a higher point in the armed-robbery range—on the basis of different evaluations of the different harms that each crime caused and the different circumstances under which each crime was committed.

### III. TWO REASONS WHY RETRIBUTIVISM NEEDS CONSEQUENTIALISM

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

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77. *See id.*

78. *See generally* von Hirsch, *supra* note 14, at 128-30.

79. *See id.*

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

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

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

Second, the notion that we are concerned that criminals receive their just deserts because we are concerned that *all people* receive their just deserts is simply not true. The fact of the matter is that the (modern) State is much more concerned that criminals receive *their* just—i.e., negative—deserts than that the exceptionally virtuous receive *their* just—i.e., positive—deserts. It has not set up any system or institution that is designed to make sure that the exceptionally virtuous among us receive praise or reward.<sup>80</sup> To be sure, the military honors soldiers who show exceptional bravery, and the government—or at least some government officials—bestow lavish praise from time to time on various individuals who have demonstrated exceptional achievement, generosity, or heroism.<sup>81</sup> But, again, we have no *virtue* justice system to complement our *criminal* justice system, no State-mandated apparatus systematically designed to make sure that the exceptionally virtuous are found and

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80. Cf. Mackie, *supra* note 15, at 7 (asking why virtuous acts merit praise/reward as a response in the first place). Mackie's question, then, is the mirror-image of the question that I am asking here about retributivism: why do we think that criminal acts merit punishment as a response?

81. Michael Reynolds, *Army Ranger Cory Remsburg Honored as Hero During State of the Union Address*, NBC NEWS (Jan. 18, 2014, 8:24 PM), [http://usnews.nbcnews.com/\\_news/2014/01/28/22487629-army-ranger-cory-remsburg-honored-as-hero-during-state-of-the-union-address?lite](http://usnews.nbcnews.com/_news/2014/01/28/22487629-army-ranger-cory-remsburg-honored-as-hero-during-state-of-the-union-address?lite).

given *their* just deserts (praise and rewards) with the same zeal and solemnity that the *criminal* among us are found and given *their* just deserts (blame and punishment).<sup>82</sup>

*B. The First Consequentialist Explanation: Practicability*

Retributivists may respond that it is much more important for the State to see to it that criminals receive their just deserts than that the virtuous receive their just deserts. But it is not clear that they can defend this point without resorting to *non*-retributivist—i.e., consequentialist—considerations.<sup>83</sup> As it turns out, the reasons for the state's asymmetrical emphasis on dispensing negative desert over positive desert are all consequentialist.

First, when it comes to maximizing protection of our supremely valued interests, which is, as we saw in Part II, one of the State's main concerns and duties, it is more important that the State incentivize compliance with the law than the performance of supererogatory acts. Second, it is much easier to determine when a criminal law has been violated than when a given act is virtuous. The former is, for the most part, a question of objective fact; the latter is, for the most part, a matter of subjective opinion because it requires two highly subjective judgments—one regarding what the standards of virtue are and the other regarding whether or not a given act meets these standards. Third, there are (fortunately) many more instances of virtuous activity than there are of criminal activity. As a result, a *virtue* justice system, especially if it was concerned to treat all equally virtuous people equally, would have to be immense—much bigger than the taxpayers could afford—to fulfill the monitoring, evaluation, and decision demands placed upon it.<sup>84</sup>

Again, these are all good explanations of why the State is not nearly as concerned to bestow positive desert as well as negative desert. But they are not *retributivist* explanations; they are not non-consequentialist, desert-based reasons. By itself, then, retributivism fails to explain why the state should be much more concerned with inflicting negative desert than bestowing positive desert.<sup>85</sup> So we now have one very good reason why retributivism must be supplemented by consequentialism.

*C. The Second Consequentialist Explanation: Revenge*

There is yet a second reason why retributivism should be

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82. This asymmetrical emphasis on dispensing just *negative* deserts over just *positive* deserts is ironic when we consider that the latter is much easier to justify than the former. See VON HIRSCH, *supra* note 14, at 53.

83. See Mackie, *supra* note 15, at 4; Rosebury, *supra* note 8, at 18-19.

84. See HUSAK, *supra* note 14, at 205-06.

85. See Hampton, *supra* note 14, at 235-36.

supplemented by consequentialism. Most people agree that criminals should receive their just deserts.<sup>86</sup> But retributivists go further than merely subscribing to this proposition. They have made this the very centerpiece of their theory. They have assigned a higher status and significance to just deserts than they have to any consequentialist desiderata (such as deterrence). The question is: why? Why are just deserts so important? Why do retributivists feel so strongly that criminals should get what they deserve?

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

It remains to be explained, then, what retributive justice even means beyond criminals receiving their just deserts and why retributivists want it. My answer to these questions is that there is nothing about the notion of just deserts itself that motivates retributivists. In itself, the thesis that criminals should get their just deserts is a mere truism, a virtually empty abstraction. Nor is it merely a brute, inexplicable fact that retributivists want criminals to receive their just deserts or regard criminals receiving their just deserts as an inherent good, a positive value in its own right. The real reason why retributivists so passionately adhere to this otherwise unmotivated abstraction is because a powerful emotion pushes them toward it: *vengeance*.<sup>87</sup>

Retributivists—like many, if not most, human beings—instinctively wish to return harm for (unjustified and unexcused) harm.<sup>88</sup> They—we—feel the urge to hurt another person who has, we

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86. Kevin M. Carlsmith, et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 287 (2002).

87. See *supra* note 29 and accompanying text.

88. See ROBINSON, *supra* note 36, at 211; Hershenov, *supra* note 14, at 87; Mackie, *supra* note 15, at 6.

feel, unjustifiably and inexcusably hurt us. This desire for revenge is rooted in the deeper, instinctive desire to maintain our supremely valued interests against unjustified and unexcused injury by others.<sup>89</sup> So when another person frustrates this desire, we naturally react with such negative feelings as anger, resentment, indignation, and sometimes humiliation.<sup>90</sup> These feelings are not pleasant or comfortable. Like any other kind of emotional suffering, we would prefer to discharge them as quickly as possible.<sup>91</sup> And the most effective *short-term* way to achieve this catharsis, to alleviate or eliminate this emotional distress, is by acting upon the urge to injure the *perpetrator's* supremely valued interests in turn, to show *her* how it feels.<sup>92</sup> We feel tremendous satisfaction in putting the perpetrator in the same position that she put *us* (the victim). This turning of the crime against the perpetrator helps to restore our sense of emotional equilibrium.<sup>93</sup> And here's the rub: because achieving this emotional equilibrium, this righteous satisfaction, is retributivism's goal or objective, retributivism—once again—needs consequentialism. Call this proposal that vengeance motivates both retributivism and (therefore) criminal punishment the *Motivation Thesis*.

One might immediately object that the Motivation Thesis is just wrong, that criminal punishment is not motivated by vengeance any more than parental punishment is motivated by vengeance. When a father F punishes his son S—say, for hitting his older sister—F's purpose is not at all to exact revenge against S. While he may or may not be angry with S, a desire to alleviate this anger by hurting S is not what motivates F to give S a "time-out" or ground him. (And if this desire does motivate F, then we may seriously call into question his parenting and his character.) Instead, F is motivated by two other desires: (a) the desire to educate S and (b) the desire to reform S. Regarding (a), F wishes to teach S—through the "language" of

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89. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); BARTON, *supra* note 24, at xiv, 15; OLIVER W. HOLMES, JR., *THE COMMON LAW* 41 (1881); MOORE, *supra* note 11, at 99; PINKER, *supra* note 29, at 529-30; JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 149, 151-52 (1882); Jones, *supra* note 10, at 1049 ("The desire for revenge 'is a current, deep American trait.' . . . [R]evenge is a natural human trait, one that seeks the expression of a deep, primitive desire to impose a counter bad act upon those who have caused harm. When a person has been a victim of cruelty, it is her natural inclination to seek to victimize the victimizer. The criminal justice system satisfies this desire by allowing the victim and society to act upon their revenge through the imposition of harsh criminal sentences.") (citations omitted).

90. See ALEXANDER & FERZAN, *supra* note 32, at 6; BARTON, *supra* note 24, at 13; FRENCH, *supra* note 26, at x, 81; MOORE, *supra* note 11, at 141, 164; RACHEL SIMMONS, *ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS* 139 (2002).

91. See PINKER, *supra* note 29, at 530-31.

92. See BARTON, *supra* note 24, at 17-18.

93. See *supra* note 24 and accompanying text.



punishment—that he should not hit his sister. Regarding (b), F hopes that the punishment will help to deter this kind of behavior—violence against others—in the future. The same, then, can be said of criminal punishment. It is designed solely to educate and reform, not to avenge.<sup>94</sup> Put in slightly different terms, criminal punishment, like parental punishment, is motivated solely by consequential concerns, not by retributivist concerns; solely by the expected good consequences of punishment, not by the gratifying prospect of seeing the guilty party finally “get his.” It is easy to see why this is sometimes referred to as the “paternalistic” theory of punishment.<sup>95</sup>

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

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94. See BOONIN, *supra* note 11, at 180-84; Hampton, *supra* note 14, at 216, 237-38. *But see* BOONIN, *supra* note 11, at 184-92 (critiquing the moral-education approach); HUSAK, *supra* note 14, at 88 (same).

95. See, e.g., HUSAK, *supra* note 14, at 88; Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981), reprinted in A READER ON PUNISHMENT, *supra* note 11, at 95. According to supporters of the paternalistic theory of punishment—or *rehabilitationists*—punishment is possibly the most effective means of reforming a criminal—i.e., of getting the criminal to regret her criminal act, feel remorse for her victim, internalize the moral norms of the law, and thereby convert her into a law-abiding member of society. See, e.g., Margaret M. Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 L. & PHIL. 25, 44, 46 (1987); PINKER, *supra* note 29, at 540; Hampton, *supra* note 14, at 237; Morris, *supra*, at 98-99. Some scholars, however, oppose rehabilitation as a purpose or justification of criminal punishment on the grounds that it is overly paternalistic, “coerced therapy” that is inflicted on the offender “for her own good.” See, e.g., FLETCHER, *supra* note 12, at 415-16; MOORE, *supra* note 11, at 86-87; Murphy, *supra* note 58, at 291-92. *But see* Dolinko, *supra* note 40, at 1645-46 (arguing that, contrary to retributivists, rehabilitation is not necessarily any more demeaning or disrespectful than punishment). Whether or not retributivists regard rehabilitation as a goal of punishment depends on how vengeful they are; the more they want the offender to “pay” for her crime, the less they tend to value her becoming a better person. At its extreme, the retributive sentiment tends to work against the concern for rehabilitation, as is reflected in such statements as, “After what she did, she does not *deserve* a second chance.”

“lower-level” anti-social activity is purely consequentialist, the criminal justice system’s attitude—or at least the attitude of various people in the criminal justice system, especially the prosecutors and the victims—toward the “higher-level” anti-social activity is partly retributivist.

Second, parents stand in a very different relation to their children than does the criminal justice system to criminals.<sup>96</sup> Because the former generally love their children, they are much less likely to want to see their children hurt for *any* reason, including avenging the harm that they cause. On the other hand, the criminal justice system—especially the prosecutors and the victims—typically do not stand in a loving, nurturing relationship with offenders. On the contrary, victims often bear nothing but anger and resentment toward criminals. And prosecutors generally attempt to represent and vindicate these attitudes. Admittedly, there are situations when victims do stand in a loving relationship with their assailants. Perhaps the best example is domestic violence.<sup>97</sup> Victims of domestic violence are much more likely than most other kinds of victims to forgive perpetrators, blame themselves or the police, and withdraw their complaints.<sup>98</sup> But this kind of situation is the exception, not the rule. In the vast majority of cases, cases in which there is no loving relationship between the perpetrator and the victim, forgiveness, self-blame, and withdrawal of complaints are much less likely than anger, resentment, and a vengeful desire to see the perpetrator “get his” for what he did.<sup>99</sup>

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

One might argue that revenge is *nonsensical* or *irrational* because it tries to do what is impossible—namely, annul or undo the harm that the criminal inflicted.<sup>100</sup> This annulling or undoing is

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96. See BOONIN, *supra* note 11, at 190-92.

97. Sexual violence is another example. See MARCUS BERZOFSKY ET AL., U.S. DEPT OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, 7 (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4594>.

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

99. See Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 81 (1980) (“To be sure, even a public enforcement system relies to some extent on the ‘thirst for revenge’ which motivates victims and sometimes even bystanders to assist the police. That a victim of crime is quite likely to complain to the police and appear as a witness at the trial of the offender, all without compensation, is some evidence that a genetic disposition to retaliate has survived . . .”).

100. See *supra* note 24 and accompanying text.

impossible because the past simply cannot be undone.<sup>101</sup> There is no use crying over spilt milk because the milk simply cannot be un-spilt. Even if the victim makes a full recovery, which is not always the case, she still suffered at least some physical, psychological, or economic harm and had to spend at least some valuable time and effort recovering from it.<sup>102</sup> Indeed, the objection continues, undoing the crime is impossible even in situations where restitution can be made because there is still irreversible *moral* harm, the harm of having one's rights, humanity, dignity, and autonomy violated.<sup>103</sup> If, for example, a thief steals \$5000 from a victim and is later caught, the \$5000 can, and might very well, be returned to the victim. But because the initial violation, the stealing itself and the disrespectful attitude that it represents, is in the past, it cannot be undone.

To be sure, it *does* seem rather strange that revenge should ever bring about any emotional equilibrium in the first place. It is strange because the emotional equilibrium does not seem to reflect any metaphysical equilibrium. But things are not really as strange as they may first appear. When the state punishes a criminal, it is not undoing the crime. That *would* be establishing metaphysical equilibrium because it would involve changing the past, which is impossible. Rather, the state is reducing the criminal's rights and powers to roughly the same degree that he previously reduced the victim's rights and power when he committed the crime. While the perpetrator indicated through his crime that his rights and interests were superior to his victim's, criminal punishment negates that message and puts the perpetrator back into his non-superior, equal position. By restoring the equality between perpetrator and victim, and by communicating that the perpetrator's rights and interests are not superior to his victim's rights and interests, criminal punishment helps to restore not *metaphysical* equilibrium but *moral* and *social* equilibrium.<sup>104</sup>

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101. See MOORE, *supra* note 11, at 110; Dais, *supra* note 19, at 107; Finnis, *supra* note 24, at 102; Hampton, *supra* note 14, at 236; Mackie, *supra* note 15, at 5; see also Beth Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 632-33 (1998) ("The death penalty cannot bring back the dead . . . Wounds that cut as deep as these never will be healed by the death of another. That is simply not the nature of the healing process, and it is not the purpose or the intent of the criminal justice system.") (footnotes omitted).

102. See Hershenov, *supra* note 14, at 87.

103. See Fletcher, *supra* note 24, at 102.

104. See *supra* note 24 and accompanying text; see also Finnis, *supra* note 24, at 102 ("[T]he purpose of retributive punishment is forward-looking, and not in vain . . . Punishment does not negate the crime, but it does negate, cancel out, the advantage the offender gained in the crime—the advantage not necessarily of loot or psychological satisfaction, but of having pursued one's own purposes even when the law required that one refrain from doing so.").

The *emotional* equilibrium then follows this restoration of the moral and social order. Given our peculiar moral psychology, the victim's knowledge that the criminal has been restored to equal status—that is, has been put as far below his prior baseline as he previously put the victim below her baseline—helps to make her feel better about the entire situation. So revenge is *not* irrational. It does *not* motivate us to try to undo what cannot be undone. On the contrary, it very *rationaly* motivates us to try to do the next best thing to undoing the harms—namely, undoing the moral and social inequality and bad feelings that these harms cause and represent. At the time that the offender committed the crime, he enriched himself in some way—usually emotionally or financially—at the expense of the victim. Retaliation in the form of criminal punishment helps to *compensate* for this unjust enrichment by *justly* enriching the victim—specifically, her relative moral and social status and emotional state—at the expense of the criminal.<sup>105</sup>

#### E. Our Peculiar Moral Psychology

In the second sentence of the previous paragraph, I attributed our vengeful satisfaction at seeing criminals punished to “our peculiar moral psychology.” My point is that our widespread belief in retributive justice is very much a reflection of our very human moral psychology. Specifically, our desire to achieve retributive justice—just deserts—is not *sui generis* but is itself motivated by a deeper desire, the desire for revenge.<sup>106</sup> We believe that it is (a) just to punish criminals in proportion to the moral severity of their crimes and (b) unjust not to punish them or to under-punish them *not* because (a) and (b) are self-evident principles or because dispensing

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105. See WRIGHT, *supra* note 26, at 339; Bradley, *supra* note 18, at 23. Importantly, my statement that the offender unjustly enriches herself at the expense of her victim refers not merely to the kinds of enrichment that most would recognize as valuable but rather to whatever the offender herself considers valuable, even if it is just enhanced pleasure. In this way, my point differs from Herbert Morris's otherwise superficially similar point that offenders unfairly reap benefits from their crimes that most other people deny themselves by complying with the law and therefore that the state must punish them in order to restore a level playing field. Morris, *supra* note 58, at 478. The problem that Morris's theory runs into (and my point here does not) is that it accounts only for a narrow group of crimes—namely, crimes yielding benefits that most law-abiding citizens *recognize* as benefits, such as money or insider information. It does not capture most other crimes—namely, crimes that benefit or please the people who commit them but would not benefit or please most law-abiding people if they were to engage in the same activity, such as rape or kidnapping. For similar criticisms of Morris's benefits/burdens version of retributivism, see BOONIN, *supra* note 11, at 122-43; FLETCHER, *supra* note 12, at 417-18; HUSAK, *supra* note 14, at 86-87; Dolinko, *supra* note 11, at 414-16; Hampton, *supra* note 15, at 4-5; Hershenov, *supra* note 14, at 82-84; Mackie, *supra* note 15, at 5; Ristroph, *supra* note 18, at 1299; von Hirsch, *supra* note 14, at 116-18.

106. See *supra* notes 88-93 and accompanying text.

just deserts is *obviously* a good end in itself but because we are the kind of beings who desire (proportional) revenge in response to culpable causation of harm. Without this particular, if not peculiar, psychological configuration, retributive justice would not be *justice* in the first place. This is a point that most retributivists, who tend to work entirely within the normative, non-psychological framework of just deserts, simply miss.

Of course, we can certainly *imagine* intelligent beings who react to crime—that is, to deliberately inflicted injuries against their supremely valued interests—either (a) with the same anger, resentment, etc. but without a corresponding urge to retaliate or (b) *not* with anger, resentment, etc. (and therefore not with a corresponding urge to retaliate) but rather with sadness, regret, indifference, resignation, or forgiveness. Indeed, we need not look to other species, extraterrestrial or earthly, to find these non-vengeful beings. Some of them are *human*. People like Mother Theresa, Martin Luther King, Jr., Nelson Mandela, and Mahatma Gandhi come to mind.<sup>107</sup> How, then, do we account for this state of affairs? If, as I am suggesting, vengeance is instinctive and therefore universal among human beings, why do some, if not many, humans react to some crimes with non-vengeful feelings?

There are several reasons. First, to say that vengeance is our peculiar instinctive response to victimization is *not* to say that it cannot be overridden by more powerful impulses or emotions that the situation may trigger. Indeed, it is likely that most of us have *sexual* instincts. But this hardly means that every situation—even provocative ones—will equally trigger these instincts. Other forces such as socialization or stress may counteract them. Second, in many situations, people are too emotionally distanced from the victims. Even the most horrific crimes rarely move most of us because we do not know the victim, and we have (unfortunately) heard about too many other anonymous victims to invest our emotions in any particular one of them.<sup>108</sup> Third, to say that vengeance is a powerful

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107. So does Viktor Frankl, one of the few survivors of the Nazi concentration camps. According to William J. Winslade:

[Frankl] believed strongly in reconciliation rather than revenge; he once remarked, 'I do not forget a good deed done to me, and I do not carry a grudge for a bad one.' Notably, he renounced the idea of collective guilt. Frankl was able to accept that his Viennese colleagues and neighbors may have known about or even participated in his persecution, and he did not condemn them for failing to join the resistance or die heroic deaths. Instead, he was deeply committed to the idea that even a vile Nazi criminal or a seemingly hopeless madman has the potential to transcend evil or insanity by making responsible choices.

William J. Winslade, *Afterword*, in VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* (Ilse Lasch trans. (pt. I), Beacon Press 2006) 162 (1946).

108. See Bradley, *supra* note 18, at 21.

human instinct is *not* to suggest that it is deeply rooted in all human beings to the same degree. Some are more vengeful than others. Fourth, we can *unlearn* revenge, just as we can unlearn, or at least learn to control, most other natural instincts. And this fact only proves rather than refutes the point. The natural instinct was already there; otherwise, there was nothing to be unlearned or controlled in the first place.

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

The Motivation Thesis, which (again) says that vengeance motivates both retributivism and therefore criminal punishment, should strike the reader as both trivial and controversial. It is trivial to the extent that the definitions of revenge and criminal punishment are so similar. While criminal punishment is the intentional infliction of harm, deprivation, or suffering by the state in return for a proven violation of its criminal laws,<sup>109</sup> revenge is a desire to inflict—or the infliction itself of—harm, deprivation, or suffering in return for a perceived wrong or injustice.<sup>110</sup> Given these two definitions, it is hardly surprising to learn that the latter (revenge) helps to motivate the former (criminal punishment).

But the Motivation Thesis is still controversial. Despite the similarity just noted between the definition of criminal punishment and the definition of revenge, most—including retributivists—regard revenge and criminal punishment with opposite attitudes. While most believe that the institution of criminal punishment is a good thing, in theory if not also in practice, they also think that vengeance is simply wrong, something “primitive,” “mindless,” “barbaric,” “base,” “animal,” or “cruel.”<sup>111</sup> They argue that while we may be able

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109. See *supra* note 40, and accompanying text.

110. See RANDOM HOUSE ENGLISH DICTIONARY 1647 (2nd ed. 1987) (defining *revenge* as “the act of revenging; retaliation for injuries or wrongs; vengeance . . . the desire to revenge; vindictiveness.”); see also Epaminontas E. Triantafilou, *In Aid of Transitional Justice: Eroding Norms of Revenge in Countries with Weak State Authority*, 10 UCLA J. INT’L L. & FOREIGN AFF. 541, 546 (2005) (“I define revenge as a response to an actual or perceived harm. The manner of such response explicates, in the eyes of the average person, the connection between the harm and the response. Furthermore, such a response confers on the responder the feeling or the perception of a counterbalancing benefit to himself.”); PINKER, *supra* note 29, at 530 (“Revenge is, quite literally, an urge.”).

111. See BARTON, *supra* note 24, at 9; HART, *supra* note 18, at 234-35; Murphy, *supra* note 27, at 3; VON HIRSCH, *supra* note 14, at 46; Timo Airaksinen, *Commentary: ‘Against Retributivism’: An Evaluation*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 11, at 101, 102-03; Christopher, *Deterring Retributivism*, *supra* note 11, at 848-49; Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 438-39 (2008); Hershenov, *supra* note 14, at 86-87; Markel, *supra* note 18, at 1429-30; Zaibert, *supra* note 23, at 117-18; see also Steiker, *supra* note 47, at 30 (“Once . . . determinations of culpability are made by law, they reinforce social and systemic tendencies toward

to understand victims' and society's vengeful desire to retaliate against criminals, it is still wrong for society to *act* on this feeling. We should no more act on it than we should act on any other understandable but ignominious motive. Given this stark difference in attitudes toward criminal punishment and revenge, it seems difficult to maintain that the latter motivates the former.

Perhaps the most prominent defender of this view is Robert Nozick. Nozick argues that criminal punishment bears a much closer relationship to *retribution* than to revenge.<sup>112</sup> While these two words are often taken to be synonymous, Nozick makes five distinctions between them:

1. Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong.

2. Retribution sets an internal limit to the amount of the punishment, according to the seriousness of the wrong, whereas revenge internally need set no limit to what is inflicted. . . .

3. Revenge is personal: 'this is because of what you did to my \_\_\_\_\_' (self, father, group, and so on). Whereas the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution.

. . . .

4. Revenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done. . . .

. . . .

5. There need be no generality in revenge. Not only is the revenger not committed to revenging any similar act done to anyone; he is not committed to avenging all done to himself. . . . Whereas the imposer of retribution, inflicting deserved punishment for a wrong, is committed to (the existence of some) general principles (*prima facie*) mandating punishment in other similar circumstances.<sup>113</sup>

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attitudes of smugness and even satisfaction in punishing 'evil' that are always latent in a society with deeply rooted religious attitudes toward personal responsibility for sin.").

112. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366-68 (1981).

113. *Id.*; see also FLETCHER, *supra* note 12, at 416-417 ("Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed. It is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust."); HAMPTON, *supra* note 24, at 138 ("[W]e can appreciate how close [retribution and revenge] are (so that many victims may slide, unaware, back and forth between them). Both responses involve the desire to inflict pain as a way of mastering another, and both see such mastery as making a point about the relative value of offender and victim. But the point each wants to make is different. The vengeful hater masters the offender either to make the offender low in rank in order to elevate herself or to reveal the offender as low in rank and thereby

If Nozick were correct, then one might very well conclude from these distinctions that, contrary to the Motivation Thesis, it is wrong, if not conceptually incoherent, to talk about the *state's* exacting *revenge* for an offender's crime. On this view, only the victim of the crime or her allies—i.e., *non-state* actors—can exact *revenge*. What the *state* exacts when it punishes crimes is *retribution*.<sup>114</sup>

This Nozickian objection to the Motivation Thesis, however, warrants several responses.<sup>115</sup> First, thus stated, it is merely a semantic point. When the *state* avenges a crime, we call it one thing—*retribution*; when a *private citizen* avenges a crime (or perceived transgression), we call it something else—simply *revenge*. Even if this semantic point is correct, it fails to rule out my *substantive* point—the Motivation Thesis—which, again, says that criminal punishment is generally *motivated* by vengeance against criminals for their criminal acts. None of Nozick's five distinctions explicitly rules out this possibility.

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reveal herself as higher . . . . The retributivist, on the other hand, wants incorrect evidence of superiority denied and the victim's value reaffirmed. The punitive mastery of the wrongdoer is perceived not as a competitive victory that elevates the victim but, rather, as a denial of the wrongdoer's claim to elevation over . . . the victim."); Bradley, *supra* note 18, at 20-21 (distinguishing between retribution and revenge, at least an interpretation of revenge as barbaric); Brudner, *supra* note 24, at 95-96 ("We can say . . . that the necessary implication of A's intentional infringement of B's right is a negation of his own right to liberty . . . . This implication may be brought home to A through the medium of B's outraged feelings, or it may be executed by someone who disinterestedly wills the equal freedom of all persons. In the former case, retribution is revenge; in the latter case, it is punishment."); Finnis, *supra* note 24, at 102 ("Retributive punishment . . . is . . . remote indeed from revenge. Punishment cannot be imposed by the victim as such. Indeed, it cannot rightly be imposed on behalf of the victim as such, but only on behalf of the community of citizens willing to abide by the law."); Hershenov, *supra* note 14, at 86 (rejecting the view "that retribution is really revenge, though often disguised").

114. See HUSAK, *supra* note 14, at 200 n.103.

115. See also BARTON, *supra* note 24, at 56-68 (arguing that none of Nozick's distinctions between revenge and retribution are correct); Rosebury, *supra* note 8, at 3 (arguing that Nozick's fourth distinction is "surely wrong"); Zaibert, *supra* note 23, at 92-114 (arguing that Nozick's distinctions fail to show that punishment differs in any meaningful way from revenge); *id.* at 117-18 ("What I have criticized is the philosophical thesis which asserts that punishment and revenge are different by somehow attributing to revenge all sorts of bad features . . . features which, by means of some sort of euphemistic alchemy are absent in punishment. The typical story goes roughly like this: only the emotions experienced by the avenger are vicious, only avengers unauthorizedly and inconsistently inflict disproportionate, grave harm in response to very minor slights. . . . I hope to have succeeded in showing, first, that avengers need not always conform to this story, and, second, that punishers are not exempt from conforming to it. To have ugly, base emotions, or to exaggerate one's concern for justice so much as to corrupt it, is not the monopoly of avengers. . . . The contrast between punishment and revenge in terms of justice versus barbarism, which in the end is what all these maneuvers amount to, can only be drawn if, in the final analysis, it is stipulated that punishment is just by definition, unlike revenge which is stipulated to be unjust by definition.").



Second, a supporter of Nozick's distinctions between retribution and revenge might argue that they help to show not merely the descriptive point that retributive punishment and revenge have different characteristics but also the normative point that retributive punishment is *morally superior* to revenge; that while retributive punishment is just, revenge is unjust; that while revenge has a base goal or motivation, retributive punishment has a much nobler goal or motivation. But Nozick's distinctions simply do *not* demonstrate this point. Nor do they show that retributive punishment is motivated by something *other* than vengeance. Indeed, the very *meaning* of the word *retribution*—namely, a “requit according to merits or deserts, esp[ecially] for evil”<sup>116</sup>—suggests as much. So it is not at all clear from Nozick's distinctions how retribution is supposed to be morally superior to revenge.

Third, contrary to Nozick, there are two very good reasons (in addition to those I offered in Part III.C) to think that, even though criminal punishment is inflicted by the state rather than by private citizens, it is still motivated by vengeance. First, one reason why it is the *State*—never the victim—that prosecutes criminals is because crimes are considered to victimize not merely the individual victims themselves but all individuals collectively. The *society* is victimized by the crime insofar as the criminal is breaking *its* law and thereby implicitly denouncing *its* moral values.<sup>117</sup> So, even by Nozick's distinctions above, the state *is* exacting *revenge*—revenge against the criminal for victimizing *it*.

The second reason for thinking that criminal punishment is motivated by vengeance is that the state is acting *in place of* the victim. It is helping the victim to do what she would ordinarily be powerless to do on her own. It is, in this sense, the victim's *avenging agent*, working *on her behalf* to make sure that the person who victimized her gets the punishment that he deserves *for* victimizing her. By assuming victims' burden of punishing the criminals who harm them, the state demonstrates that it shares and affirms the victim's motivations, that it *also* wants revenge for violations against

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116. RANDOM HOUSE ENGLISH DICTIONARY, *supra* note 110 at 1644.

117. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 261 (1963); FLETCHER, *supra* note 24, at 39; Bradley, *supra* note 18, at 23, 25; Colby, *supra* note 111, at 438 n.198; Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 990-91 (1985); Markel, *supra* note 18, at 1448-49; Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1524 (2000). *But see* Murphy, *supra* note 23, at 93 n.5 (“[W]e hear much talk about crimes being offenses against the state or community as a whole—against the general rules of order in which all citizens have an equal stake. Because of this, it is often thought that all citizens have the same stake in demanding punishment for crime and that individual victims, therefore, should play no special role. But this is too simplistic. The rapist may be a free rider on the legal compliance of all of us, but only some very unfortunate subset of us suffer from him in ways that seriously undermine our actual well-being.”).

its "client."<sup>118</sup>

#### IV. THE JUSTIFICATION THESIS

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

Specifically, I will defend what I call the *Justification Thesis*. While the Motivation Thesis says that revenge helps to *motivate* criminal punishment, the Justification Thesis says—even more controversially—that revenge helps to *justify* criminal punishment. According to the Justification Thesis, revenge that is prompted by genuine injustice is a very *good* thing; retributive justice just *is* righteous vengeance.<sup>119</sup> I will start by showing that the arguments purporting to show that revenge is an unmitigated evil are weak. I will then argue—more positively—that revenge is not only morally permissible but also morally justified and therefore that the criminal justice system *should* reflect, as it does, this peculiar feature of our moral psychology.

One thing I should make clear at the outset is that I am not guilty of the "naturalistic fallacy." That is, I am not reasoning from the way things are to the way things ought to be. I recognize that even if the Motivation Thesis is correct, it does not follow that the Justification Thesis is also correct; that even if I am correct that vengeance is (a) a natural, instinctive reaction to culpable wrongdoing and therefore (b) helps to motivate criminal punishment, it does not follow that vengeance is a *good* or *right* reaction or that it

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118. See FLETCHER, *supra* note 24, at 37-38; Fletcher, *supra* note 24, at 110; Markel, *supra* note 18, at 1445-46; Rosebury, *supra* note 8, at 13.

119. See BARTON, *supra* note 24, at xiv-xvi; HOLMES, *supra* note 89, at 41; PINKER, *supra* note 29, at 538; Hershenov, *supra* note 14, at 80; see also Rosebury, *supra* note 8, at 7, 10 (attributing this position to the sociologist Émile Durkheim and the repudiation of this position to Aristotle and Kant).

should help to motivate criminal punishment. In fact, one might argue the very converse: that while vengeance is a natural, instinctive reaction to culpable wrongdoing, it is wrong and harmful and therefore that we should do whatever we can to resist and overcome it.<sup>120</sup> So the Justification Thesis has not yet been demonstrated. It still requires arguments that are independent of the ones that I have made for the Motivation Thesis. I intend to provide these arguments in this section.

#### A. Arguments Against Revenge

Those who think that revenge is morally wrong may not simply *assume* this point, especially when others (such as myself) disagree with it.<sup>121</sup> They need to provide an *argument* for this conclusion.<sup>122</sup> As it turns out, the four main arguments offered against revenge tend to be rather weak.

First, it is argued that religions repudiate revenge.<sup>123</sup> For example, the Bible encourages a person who has been hit in one cheek to respond not with violence but by turning the other cheek.<sup>124</sup> But this argument is not very persuasive. First, such biblical passages amount to undefended assertions, not reasoned arguments. Second, while other biblical passages also repudiate returning an eye for an eye,<sup>125</sup> some of these—and other—biblical passages endorse *divine* vengeance.<sup>126</sup> Third, not everybody is Christian, no less religious.<sup>127</sup> Arguments that are derived from religion or religious texts will fail to persuade the vast secular among us.

The second argument against revenge: revenge is impractical because it helps to perpetuate the “cycle of violence.”<sup>128</sup> Indeed,

120. See *supra* note 27 and accompanying text; *infra* Parts V.A and V.C.

121. See MOORE, *supra* note 11, at 111.

122. See Rosebury, *supra* note 8, at 20.

123. See Jean Hampton, *Introduction: Forgiveness and Christianity*, in FORGIVENESS AND MERCY, *supra* note 23, at 10.

124. *Matthew* 5:38.

125. See *Leviticus* 19:18; *Mark* 11:25; *Matthew* 26:52; *Proverbs* 20:22, 24:29; *Romans* 12:17; *1 Samuel* 24:12; *1 Thessalonians* 5:15.

126. See *Deuteronomy* 28:47, 32:35; *Exodus* 20:1, 21:24, 34:6; *Ezekiel* 25:17; *Genesis* 9:5; *Hebrews* 10:30; *Nahum* 1:2; *Numbers* 31:1; *1 Peter* 2:13; *1 Romans* 12:19, 13:14; see also FRENCH, *supra* note 26, at x (“[F]rom the Stoic-Christian point of view . . . only God could be both pure enough and knowledgeable enough to administer vengeance in a morally fitting way. Leave it to heaven. Perhaps, but if God can play the part of the avenger, then vengeance cannot be all that bad.”); Hampton, *supra* note 124, at 12 (“Jesus . . . is frequently an angry man, reminding one of the Old Testament prophets.”).

127. See FLETCHER, *supra* note 12, at 417; FRENCH, *supra* note 26, at x.

128. See PINKER, *supra* note 29, at 537-38; Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 166 (2010); Eisnaugle, *supra* note 47, at 210-11, 231-32; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J.

banners and bumper stickers continue to replicate Mahatma Gandhi's (or at least India's independence movement's) maxim, "An eye for an eye makes the whole world blind."<sup>129</sup> But poignant as this sentiment may be, it is not always true. First, not all revenge involves violence in the first place. Second, as an empirical matter, many acts of private revenge—and most acts of state-imposed revenge (that is, criminal punishment)—terminate the matter; they are not met with further retaliation.<sup>130</sup>

The third argument against revenge: it is often, usually, or always for no good reason, against the wrong person, or against the right person to a degree that is disproportionate to the severity of that person's crime.<sup>131</sup> While revenge certainly *can* be any of these things, the risk that it *will* be any of these things does not count as an argument against revenge itself. It counts only as an argument against "misapplying" revenge; as an argument *not* against revenge per se but against *bad* revenge—that is, against revenge that is unjustified, misplaced, or excessive.<sup>132</sup> And there is no good reason to think that all, no less most, revenge is bad.<sup>133</sup> The proper response, then, is not to condemn revenge per se. It is to condemn *unjustified, misplaced, or excessive* revenge.

The fourth argument against revenge: even though tribalism is instinctive, it is wrong and therefore something that should be resisted and repudiated rather than encouraged. Likewise, then, with revenge. My first response to this argument by analogy, however, is that it relies entirely on the assumption that both

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524, 602 (2005); Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 97 (2005); William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 767 (1997).

129. *Essential Quotes of Mahatma Gandhi*, GANDI INT'L INSTITUTE FOR PEACE, <http://www.gandhianpeace.com/quotes.html> (last visited Aug. 29, 2014).

130. See PINKER, *supra* note 29, at 538; Airaksinen, *supra* note 111, at 105.

131. See Murphy, *supra* note 23, at 99-100.

132. See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) ("[T]his Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."); Murphy, *supra* note 27, at 4. For examples of *bad* revenge, see PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 367 (2008) ("It is apparent that revenge led to retaliation [at Abu Ghraib] against inmates who had rioted or who had allegedly raped a boy. . . . Humiliating and beating them up was 'teaching them a lesson' about the consequences of getting out of control. . . . Forcing detainees to simulate fellatio or to masturbate in public in front of women soldiers and then documenting this humiliation was more than just a tactic of embarrassment. It was the MPs' sexual scenarios as payback for detainees they felt had gone over the line.").

133. See Murphy, *supra* note 23, at 108; Rosebury, *supra* note 8, at 18.

tribalism and revenge are instinctive. And being instinctive is hardly sufficient for being wrong; some of our instincts are clearly good or right or moral.<sup>134</sup> So even if tribalism may be wrong, it hardly follows that revenge is also wrong. Tribalism may be wrong for reasons that simply do not apply to revenge.

Second, it is certainly true that tribalism and, as I just argued, revenge *can* be wrong. But they are not *always* wrong. On the contrary, there are two reasons to think that they are often *right* or *justified*. First, both revenge and tribalism have served us humans well. They are expressions of ancient traits that gave us an evolutionary advantage. While tribalism reinforced group solidarity, which promoted individual survival, revenge helped to enforce primitive rules protecting life and property.<sup>135</sup> Second, like revenge (as I will argue in the next two sections), tribalism still has a rightful place in the modern world. We not only tolerate but celebrate people's loyalty and devotion to family, school, community, team, culture, religion, and nation.<sup>136</sup>

I conclude that the extant arguments against revenge are weak. In stark and ironic contrast, the arguments *for* revenge are *strong*. I say that this point is *ironic* because, as I mentioned in the

134. See, e.g., MCCULLOUGH, *supra* note 27, at 112-33.

135. See PINKER, *supra* note 29, at 532 ("The necessity of vengeful punishment as a deterrent . . . has been demonstrated repeatedly in mathematical and computer models of the evolution of cooperation.") (endnote omitted); ROBINSON, *supra* note 36, at 43-44 (arguing that our penchant for retributive justice is very likely a product of evolution); Eyal Aharoni, Lisa L. Weintraub & Alan J. Fridlund, *No Skin Off My Back: Retribution Deficits in Psychopathic Motives for Punishment*, 25 BEHAV. SCI. & L. 869, 881 (2007) (endorsing "the hypothesis that retribution facilitates prosocial, cooperative behavior . . . [P]unishment facilitates cooperation in iterated economic relationships. . . . Our data suggest that signals of intent may provide reliable input conditions for a retributive response given that they may have been reliable predictors of recidivism in our evolutionary past."); Katherine Harmon, *Does Revenge Serve an Evolutionary Purpose?*, SCI. AM., May 4, 2011, available at <http://www.scientificamerican.com/article.cfm?id=revenge-evolution> ("Michael McCullough . . . explains that the impulse for revenge evolved as a simple cost-benefit equation . . ."); Jaffe, *supra* note 15 ("The long history of vengeance in art suggests a basic instinct for retribution ingrained in the human spirit. . . . [W]hy does it remain a favorite dish of the people? . . . [M]any psychological scientists have embraced an evolutionary explanation of revenge."); Mackie, *supra* note 15, at 8-9 (offering a "biological explanation for the tendency to feel nonmoral resentment of injuries and gratitude for benefits"); Murphy, *supra* note 23, at 95 n.9 (referring to "reciprocal hatred" as an "evolutionary strategy").

136. See Zygmunt J.B. Plater, Keynote Essay: *A Modern Political Tribalism in Natural Resources Management*, 11 PUB. LAND L. REV. 1, 5 (1990) ("Tribalism is a cohesive instinctive affiliation between people based on their recognition of and loyalty to common roots, a narrowed, non-official, racial, social and cultural allegiance that has evolved to have remarkable staying power and utility. Tribalism can be a precious cultural commodity, helping people survive in settings of extraordinary stress, deprivation, and complex antagonisms; it is a strategic survival mechanism in much of the Third World.")

Introduction and then again at the beginning of this Part, revenge is normally assumed to be bad. In the next two sections, I will offer two arguments that the desire for revenge in response to criminal wrongdoing is indeed justified and therefore can itself help to justify criminal punishment.

*B. The First Argument for the Justification Thesis*

Whether or not we admit it, most of us embrace revenge in our everyday lives. We only half-jokingly parrot the well-known sayings that "revenge is sweet" and a "dish best served cold."<sup>137</sup> We often say things like "It serves him right!" and "She had it coming!" Bumper stickers proudly announce and warn: "I don't get mad. I get even."<sup>138</sup> And we spend much of our everyday lives enjoying both fictional and non-fictional accounts of karma, payback, the tables being turned, settling scores, getting even, and unpleasant people getting theirs across widely different contexts. Examples include a dominating sports team being crushed; an unfaithful ex-lover being cheated on by his or her new spouse; a cocky politician losing big in an election; a wicked executive losing his wealth; an evil regime being toppled; a ruthless corporation going bankrupt; a bully getting pummeled; and wicked witches being crushed by flying houses and melting into lifeless puddles. Few, if any, of us object to these vengeful satisfactions. On the contrary, most of us regard them as delicious, refreshing, and highly entertaining; the stuff of great gossip, tabloids, literature, and movies; and therefore at least morally permissible, if not morally desirable.<sup>139</sup>

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

In response to the questions raised in the previous paragraph, the only two answers to these questions that come to mind do not

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137. *But see* FRENCH, *supra* note 26, at 69 ("Vengeance is warm, retribution is cold, poetic justice is frigid.").

138. *See* PINKER, *supra* note 29, at 531.

139. *See* BARTON, *supra* note 24, at xiv; FRENCH, *supra* note 26, at 3-64; Hershenov, *supra* note 14, at 90; Zaibert, *supra* note 23, at 84.

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

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

In response to this second proposal, as I argued in Part IV.A above, revenge is harmful only when it is unjustified, misplaced, or excessive.<sup>140</sup> This is not to say that the criminal justice system does not inflict unjustified, misplaced, or excessive vengeance. Unfortunately, it does. But these mistakes are still much more contained than they would be if private—or *vigilante*—justice were allowed or encouraged. Because the state is a more disinterested, less emotionally involved party than are victims, and because the state has appropriated from victims the role of punisher, criminals are generally punished in a more careful, fair, humane, and proportional manner than they would be if victims themselves were allowed to take matters into their own hands.<sup>141</sup>

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140. This point assumes that suffering does not constitute a harm if it is deserved. See Gabriel Seltzer Mendlow, *Is Tort Law a Form of Institutionalized Revenge?*, 39 FLA. ST. U. L. REV. 129, 130-32 (2011) (arguing that even though tort remedies impose substantial burdens by limiting “defendants’ freedom of action and . . . caus[ing] defendants to part with money and other things of value,” they do not constitute harms because they are not setbacks to *legitimate* interests—that is, interests that the defendants have a *right* to maintain).

141. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (“The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.”) (Stewart, J., concurring); BOONIN, *supra* note 11, at 153 (“One possible answer to this question [how punishment can be justified] is as follows: because the feeling of revenge is so widespread and so powerful, it is virtually inevitable that if the state does not punish an offender, someone else will . . . . Since the state is in a position to judge and mete out punishment impartially, while victims and their friends are more likely to act



C. *The Second Argument for the Justification Thesis*

Feeling angry, resentful, indignant, and therefore vengeful toward a blameworthy wrongdoer, especially a perpetrator of a harmful crime, is actually *morally superior* to *not* having these feelings because these feelings are ultimately rooted in *sympathy* for

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indiscriminately and disproportionately, it follows that the harms caused by the pursuit of revenge can be minimized by channeling this desire through the state rather than by letting it run wild on its own."); FLETCHER, *supra* note 12, at 417 (referring to the "fashionable consequentialist argument that it is socially desirable to channel the hostile energies of society into the punishment of criminals; not to do so would supposedly risk the greater evil of private vendettas and blood feuds.") (citation omitted); HOLMES, *supra* note 89, at 40 ("If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."); MOORE, *supra* note 11, at 152 ("[I]f we recognize the dangers retributive punishment presents for the expression of resentment, sadism, and so on, we have every reason to design our punishment institutions to minimize the opportunity for such feelings to be expressed . . . . Retributive punishment is dangerous for individual persons to carry out, dangerous to their virtue . . . . For those like myself who are not theists, [the biblical injunction that retribution be exacted] must be performed by the state, not God."); Murphy, *supra* note 27, at 3-4 ("Certain wrongdoers quite properly excite the resentment (anger, hatred) of all right-thinking people, and the criminal law is a civilized and efficient way in which such passions may be directed toward their proper objects, allowing victims to get legitimate revenge consistently with the maintenance of public order."); PINKER, *supra* note 29, at 538 ("The law may be an ass, but it is a disinterested ass, and it can weigh harms without the self-serving distortions of the perpetrator or the victim. . . ."); *id.* at 541 ("[T]he disinterested justice of a decent Leviathan induces citizens to curb their impulses for revenge before it spirals into a destructive cycle."); VON HIRSCH, *supra* note 14, at 52 ("Perhaps the restraint of vengeance is an important function of the criminal sanction, but this is another utilitarian claim: that there will be less social disruption if offenders are punished by the state rather than left to private retaliation.") (footnote omitted); Colby, *supra* note 111, at 441 ("If we control revenge through the legal system—through the mechanism of judicially constrained punitive damages—we can ensure that it is achieved in a way that is consistent with, not defiant of, law and justice. We can ensure that the punishment fits the offense, that like cases are treated alike, and that the accused is treated fairly. In fact, allowing controlled revenge affirmatively serves the goal of justice. Given the powerful, instinctive human impulse for revenge, affording a legal outlet for revenge within the framework of justice helps to prevent victims from seeking revenge outside of the framework of justice.") (citation omitted); Rosebury, *supra* note 8, at 9-10, 15, 17 (summarizing arguments for the superior practicality and justice obtained by state punishment as opposed to private revenge); Zaibert, *supra* note 23, at 100 ("[W]hat is really bad about vigilantism is the taking of justice into one's own hands, since there are many good reasons not to do so. . . . The wrongness of vigilantism is that, for political reasons, it makes good sense to prevent people from taking justice into their own hands (even if people would mete out exactly just punishments) regarding some sorts of wrongs."). *But see* MOORE, *supra* note 11, at 89-90 n.14 (arguing that prevention of vigilante justice is "not even a prima facie justifying reason for punishment."); Husak, *Retribution*, *supra* note 18, at 971-74 (arguing that retributive justice can, in principle, be achieved without state involvement).



the victim and *respect* for her humanity.<sup>142</sup> We are, as Moore suggests, “vicariously injured.”<sup>143</sup> We feel angry, resentful, indignant, and vengeful toward the criminal precisely because she harmed the victim, a fellow human being. At the very least, she committed a crime against her victim; this alone constitutes a *moral* harm. And through this criminal act, she also caused her victim fatal, physical, psychological, or economic harm. Again, if we have *moral* sentiments—namely, respect for the victim as a person, a human being whose rights, autonomy, and dignity were violated—we will react with anger, resentment, indignation, and vengeance.<sup>144</sup> Because these feelings have moral motivations behind them, they are *moral* reactions.<sup>145</sup> It follows, then, that *not* to react vengefully—to react with, for example, indifference, amusement, immediate forgiveness, or even greater sympathy for the perpetrator than for the victim—is actually insulting and therefore *immoral*.<sup>146</sup>

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142. See Ristroph, *supra* note 18, at 1299-1300 (“[M]odern retributivists . . . have argued . . . that the equality that punishment restores is really an equality of expressed dignities. In Jean Hampton’s account, ‘inherent in a criminal’s action is the message that the victim is not worth enough for him to treat her better.’ Consequently, retributive punishment ‘uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is, ‘What you did to her, she can do to you. So you’re equal.’ Both versions of egalitarian retributivism recounted here emphasize respect for persons. Punishment must be imposed to respect the dignity of the victim as well as the dignity of the wrongdoer.”) (citations omitted).

143. MOORE, *supra* note 11, at 141.

144. See *supra* notes 23, 90, and 99 and accompanying text.

145. See Murphy, *supra* note 23, at 89-90 (“The hatred felt by [victims of serious injustice] will typically have a *righteous* dimension—indicated by the fact that they . . . are often willing to avow publicly, as appropriate and as nothing to be ashamed of, the true nature of their feelings and motives . . . . Even those who would argue that such [sentiments] should not influence a judge must surely admit that [they] are in some sense understandable, natural, and appropriate to the harm done to those people—that they involve something which is . . . at least more worthy . . . of our attention and respect.”).

146. See MOORE, *supra* note 11, at 141 (“While it has a saintly ring to it to turn the other cheek so long as it is one’s own cheek that has just been slapped, is it virtuous to feel nothing stronger than sympathy for the suffering of others at the hands of wrongdoers? Where is that compassionate concern for others that is outraged because another person has been so unnecessarily caused such suffering?”); *id.* at 144 (“If it is morally odious not to care about others . . . then must it not be virtuous to feel such concern? And if the answer to this question is ‘yes’, as I think it plainly is, then must it not also be virtuous to feel negatively *in some way* towards flagrant moral violations that hurt others, virtuous to allow such negative feelings to cause retributive judgments?”); *id.* at 164 (“[I]t evinces both a lack of empathetic identification with others who are victims, and a lack of attachment to morality, to be indifferent to culpable wrongdoing by another. . . . [T]here is no virtue in turning someone else’s cheek when they have been slapped. Violations of others’ moral rights should make us angry at those who flout that morality . . . .”); Murphy, *supra* note 23, at 92 (“I would have found it indecently insensitive and presumptuous had anyone charged [rape victims] with the vice of failing to forgive and love their enemies . . . had, in short,

The following hypothetical helps to demonstrate this point.<sup>147</sup> It is a hypothetical of the third kind mentioned in the Introduction: non-punishment with good consequences.<sup>148</sup> Suppose that pharmacologists have synthesized a drug that cures pedophilia. A convicted pedophile need take only one small, tasteless twenty-milligram tablet of "NoPed" with water to immediately and permanently lose all of his illicit sexual desires. Moreover, in addition to being 100% effective, NoPed has proven to be 100% safe. Nobody who takes it will suffer any temporary or permanent side-effects. For this reason, the Food & Drug Administration (FDA) has approved of NoPed as a treatment for convicted pedophiles.

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

The proponent of the Justification Thesis—call her the *Avenger*—will clearly opt for the latter.<sup>149</sup> She regards Pedo's moral debt as

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anyone attempted to add to their already considerable burdens by making them feel guilty or ashamed over a reaction that was, given what was done to them, natural, fitting, and proper."); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 689 (1989) ("In the context of punishment, which focuses on responsible acts of disrespect for others, moral caring means being angry at culpable acts of disrespect. I will refer to this emotion as moral outrage. Moral outrage represents caring for the morality of persons by denouncing their demonstrated evil—their responsible disrespect for others. We should feel angered by the deliberate choice of an offender to commit an act of severe disrespect. Such a feeling demonstrates our commitment to preserving moral order and to society which promotes respect and regard for others.") (citations omitted).

147. See MOORE, *supra* note 11, at 97-103 (using similar thought-experiments to show that (a) even if conditions were such that criminal punishment yielded no good consequences, most of us still want perpetrators of sufficiently serious crimes to be punished and therefore (b) most of us support criminal punishment primarily to deliver just deserts, not to deliver good consequences).

148. See *supra* note 21 and accompanying text.

149. See PINKER, *supra* note 29, at 538-39 ("Even if we were certain that the perpetrator of a heinous crime would never offend again, nor set an example for anyone else, most people would feel that 'justice must be done' and that he should incur some harm to balance the harm he has caused."); Dolinko, *supra* note 11, at 406-07 ("[S]uppose that some nonpunitive technique is developed that costs much less than traditional punishment (both in money and in suffering) yet is more effective in reducing crime levels. . . . A consequentialist would have to favor replacing punishment by this new system, provided its advantages are great enough. But such a shift would do violence to the sentiments of the vast majority of people, who believe that justice demands that the perpetrators of brutal, heinous crimes be made to suffer for what they have done.") (citations omitted); Hershenov, *supra* note 14, at 84 ("If the motivation were just deterrence and/or reform, then, if for some reason this could be achieved without offsetting the psychological benefits the criminal received from his conduct, the interest in erasing such wrongful gains, or in their absence, just imposing

twofold: not only (a) the physical and psychological harm that Pedo inflicted upon Victim, but also (b) Pedo's malevolent attitude toward both Victim and the law. Regarding (a), Pedo caused injury to Victim's supremely valued interests, her physical well-being and emotional well-being. Regarding (b), Pedo also caused moral harm; he showed contempt and indifference not only for Victim but also for the law. By treating Victim, a young girl, as a mere means to his own end, sexual pleasure, he made it clear that he simply *did not care* what society thinks is wrong and *did not respect* Victim as a human being with a right against sexual violation.<sup>150</sup> According to the Avenger, we simply should not tolerate this kind of defiance. On the contrary, we should send our own counteractive message right back at Pedo. We should convey to Pedo, with righteous anger, that whatever *he* may think, *society values* Victim and the law and *laments* the fact that Pedo broke it, the harm that Pedo thereby caused Victim, and the cavalier, indifferent, and selfish attitude with which Pedo wreaked all this havoc. The Avenger further maintains that the only way in which society can convey this message with sufficient force is through criminal punishment—in this case, imprisonment. It is at this point that the Motivation Thesis (payback) and expressivism (teaching him a lesson) come together.<sup>151</sup>

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burdens on the criminal, should vanish. But such interests are unlikely to disappear.”); see also Kennedy Ryan, *Father Beats Man Unconscious After Catching Him Molesting Son: Police*, KTLA 5 News, July 18, 2014, available at <http://ktla.com/2014/07/18/daytona-beach-father-beats-man-unconscious-after-catching-him-molesting-son-police/> (“No charges were filed Friday against a Daytona Beach father who beat a man unconscious after allegedly catching him in the act of sexually assaulting his 11-year-old son. . . . ‘Dad was acting like a dad. I don’t see anything we should charge the dad with,’ Daytona Beach police Chief Mike Chitwood told The News Journal.”).

150. See JOAN MCGREGOR, *IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN’S CONSENT SERIOUSLY* 230-31 (2005) (“Rapes express very clearly the message of the inferiority of women. The rapist . . . sends the message that this woman is for his enjoyment, an object to be used for his pleasure. His actions express her inferiority to him . . . . For him, her wishes and desires are irrelevant. He is superior to her, his desires matter and hers do not, making her an object rather than an equal person. Sending this message is the expressive moral injury of rape. The message of inferiority, of what women are for, is received by all women, not merely by the woman who experiences the rape . . . . The rapist aims, whether consciously or not, to establish his mastery of men over women . . . . Rape is therefore a moral injury to women as a group.”); see also Fletcher, *supra* note 24, at 110 (“Blackmail, theft, embezzlement, all leave a wake of dominance and subordination. Rape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or he otherwise knows her address. Burglars and robbers pose the same threat. . . . It would be difficult to maintain that all crimes are characterized by this feature of dominance. The most we can say is that this relationship of power lies at the core of the criminal law. It is characteristic of the system as a whole.”).

151. See FRENCH, *supra* note 26, at 84 (“Revenge delivers a message, or, rather, revenge is a message. . . . Some might say that the message is an educative one. . . . Alternatively, it might be supposed that the message is one of deterrence. . . . Yet

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

Doug Husak suggests that "it is notoriously difficult to explain why [our natural psychological reaction of disapproval or censure] is widely regarded as [a] fitting" response to criminal behavior.<sup>152</sup> But if my account above is correct, then we do have an explanation of this psychological reaction. We find disapproval to be a fitting response to criminal behavior because (a) criminal behavior either harms or threatens to harm what we value most and (b) the offender thereby exhibits contempt and disregard for our supremely valued interests.<sup>153</sup>

## V. OBJECTIONS AND REPLIES

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

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another possibility is that the message is one of reform . . ."); *id.* at 85 ("The act of vengeance is an expression of the effect of morality in and for itself. Morality has been mocked by the offender, but, through the avenger's agency, morality will yet have a very significant effect on the offender's life. It may well end it."); *id.* at 86 ("Morality qua morality is transmitted in the message of vengeance. The avenger is the agent of an otherwise impotent morality, which is enabled, through the avenger, to communicate a significant impact in the life of the offender . . ."); Hampton, *supra* note 15, at 13 ("The retributive punisher uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is 'What you did to her, she can do to you. So you're equal.' The one who acted as if he were the lord of the victim is humbled to show that he isn't lord after all. In this way, the demeaning message implicit in his action is denied."). The consequentialist is also likely to opt for imprisonment because Pedo's avoiding imprisonment would likely encourage many not-yet-cured pedophiles to take as many "free bites of the apple" as they could before getting caught.

152. Husak, *Why Punish*, *supra* note 18, at 456. Eight years later, Husak seemed to have changed his attitude and regarded this "fittingness" as obvious or transparent when he suggested that "there is something fitting or appropriate about reacting with disapproval at the sight of cruelty" and that "the fit we intuit does not really obtain between crime and punishment, but rather between crime (as culpable wrongdoing) and suffering (or deprivation or hardship)." Husak, *Retribution*, *supra* note 18, at 973.

153. See MCGREGOR, *supra* note 150, at 226-27; Hershenov, *supra* note 14, at 87.

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

According to Objection 1, I have contradicted myself. On the one hand, I argued in Part III.E that many members of society do not feel much, if any, emotional reaction to particular crimes or criminals. I said, "Even the most horrific crimes rarely move most of us because we do not know the victim, and we have (unfortunately) heard about too many other anonymous victims to invest our emotions in any particular one of them." On the other hand, I also argued in Part III.C that one of the two primary goals of the criminal justice system, to give criminals what they deserve, is motivated by an intense, deeply rooted desire for revenge against criminals. These two propositions appear to be inconsistent.

*Reply to Objection 1:* They are not inconsistent. To see how they are consistent, we need to make two distinctions. First, we need to distinguish between individuals' reactions to particular instances of criminal wrongdoing and individuals' attitudes towards criminal wrongdoing generally. A person may feel vengeful toward criminals generally without feeling vengeful toward any particular criminal. Put enough of such people together, and we end up with an institution, criminal punishment, that is motivated by collective, anti-criminal vengeance in a society where most of the individuals do not necessarily feel terribly vengeful toward most of the criminals whom they read or hear about.<sup>154</sup> The institution of criminal punishment, then, symbolizes or represents the collective vengeance just noted as well as the actual, personal vengeance felt by victims, victims' families, and those members of society who *do* wish to see this or that particular criminal punished.

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

Consider, for example, neighborhoods in which the police have proven either unhelpful or ineffective at reducing such crimes as

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154. See Murphy, *supra* note 27, at 2.

drug distribution and gang violence. The majority of law-abiding citizens in these neighborhoods do not generally regard this criminal activity with indifference. On the contrary, they feel considerable anger—both at the criminals for menacing them and at the police for failing to remove this menace.<sup>155</sup> Indeed, once this frustration and anger reaches a critical mass, many of these neighborhoods “band together,” fight back, and do their best to remove the menace themselves, without the assistance of law enforcement.<sup>156</sup>

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

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

Jeffrie Murphy was perhaps the most prominent and outspoken advocate not only for retributivism but also for the Motivation Thesis.<sup>157</sup> In 2006, however, Professor Murphy softened his position and referred to himself as a “reluctant retributivist.”<sup>158</sup> Murphy is now reluctant, as opposed to enthusiastic, about retributivism because he agrees with Nietzsche that retributivism *without* reluctance—an unhesitant, unwavering, enthusiastic, self-righteous desire to judge and punish—tends to reflect an unhealthy soul; a soul that judges others too harshly and itself too lightly.<sup>159</sup> The unhealthy soul does these things because it fails to take into account *situationism*: the theory that people’s behavior is generated largely by internal and external factors outside their control.<sup>160</sup>

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

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155. See Kim Remesch, *Drugs and Crime in Your Neighborhood? Fight Back*, YAHOO (March 14, 2009), [http://voices.yahoo.com/drugs-crime-neighborhood-fight-back-2879899.html?cat=17\[1/18/2014](http://voices.yahoo.com/drugs-crime-neighborhood-fight-back-2879899.html?cat=17[1/18/2014).

156. See *id.*; see also Olena Heu, *Mililani Residents Fight Back After Rash of Burglaries* (FOX NEWS broadcast Apr. 13, 2010), available at [http://www.clipsyndicate.com/video/play/1974606/mililani\\_residents\\_fight\\_back\\_after\\_rash\\_of\\_neighborhood\\_burglaries](http://www.clipsyndicate.com/video/play/1974606/mililani_residents_fight_back_after_rash_of_neighborhood_burglaries);

157. See generally Murphy, *supra* note 23; Murphy, *supra* note 27.

158. Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, PROCEEDINGS & ADDRESSES AM. PHILOSOPHICAL ASS’N, Nov. 2006, at 45, 57.

159. *Id.* at 60.

160. For some comprehensive defenses of situationism, see generally PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007); Dripps, *supra* note 18; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004).

factors outside the wrongdoer's control—the *bad luck*—that helped lead to her wrongdoing. Because bad luck tends to mitigate or excuse, ignoring this element of bad luck in all wrongdoing is not only misguided and uncharitable; it is cruel.<sup>161</sup> On the other hand, the unwavering, enthusiastic, self-righteous avenger judges herself too lightly insofar as she fails to take into account her own *good luck*—the fortuitous circumstance that all of the factors outside her control did not lead *her* to commit the very same bad acts that she now so eagerly wishes to condemn and punish.<sup>162</sup>

Rather than inferring from situationism that criminal punishment is no longer justified, we need to strike a healthy balance between them. And this is exactly what Murphy tries to do when he declares himself a *reluctant* retributivist.<sup>163</sup> He remains a retributivist; to this extent, he still endorses blaming and punishing criminals for their criminal acts.<sup>164</sup> But he is reluctant to fully endorse this position because he recognizes that bad luck plays a role in every criminal act. Murphy refers to these two positions—retributivism and reluctance—as the “Two Faces of Retribution.”<sup>165</sup>

Given his reluctance, why does Murphy even remain a retributivist to begin with? Why doesn't he abandon it altogether? According to Murphy, while we must acknowledge the bad luck that lies behind every crime, we must still blame and punish the criminal for this crime because bad luck does not *completely* explain it.<sup>166</sup> When it does, the defendant *is* fully excused; too much bad luck is arguably what all the traditionally recognized criminal law excuses—insanity, infancy, hypnotism, involuntary intoxication, automatism, duress, necessity, mistake of fact, mistake of law, and entrapment—attempt to capture. To the extent that bad luck does *not* play a part in the explanation of a given criminal's behavior—that is, to the extent that this individual knowingly and voluntarily broke the law without a good excuse or justification—she still *does* deserve to be convicted, condemned, and punished.<sup>167</sup>

*Reply to Objection 2:* In a nutshell, Murphy's point is that while we should indeed continue to judge, blame, and punish, we should always keep in mind when we do this judging, blaming, and

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161. See Murphy, *supra* note 159, at 59. The notion that it is unfair to punish a person for bad luck—something not in the person's control—is a fundamental axiom in philosophy and criminal law. For a comprehensive list of books and articles discussing this axiom, see Levy, *supra* note 8, at 267-68 n.7.

162. See Murphy, *supra* note 159, at 55-56.

163. See *id.* at 57.

164. See *id.* at 54, 56.

165. See *id.* at 57.

166. See *id.* at 57.

167. *Id.*

punishing that there but for the grace of luck go I. I fully agree with this situationist point. But situationism still leaves as much room for vengeance as it leaves for just blame and just punishment. In fact, it is the *same* room. Yes, the criminal suffered from some bad luck. But so did the victim—at the hands of the criminal. So to the extent that the criminal *does* indeed *deserve* blame and punishment for knowingly and voluntarily hurting the victim—again, a point that Murphy still endorses, however reluctantly—the criminal *equally* deserves the victim's and society's wrath and vengeful desire for retribution.

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

According to Objection 3, the Justification Thesis is both false and short-sighted. It is false because forgiveness is morally superior to vengeance. And it is short-sighted because it prioritizes the most effective *short-term* method for discharging the uncomfortable feelings of anger, resentment, indignation, and humiliation over the most effective *long-term* method for achieving this same satisfaction: patiently waiting until the “rotten” feelings pass, at which point we may feel more inclined to *forgive* the criminal for her transgressions, to *accept* what she did *without* any accompanying feelings of anger or a desire for retaliation. This long-term approach is preferable for the same reason that long-term planning is generally preferable, all else being equal, to short-term planning: it generates greater overall utility.<sup>168</sup> As compared with vengeance, forgiveness is psychologically healthier, and it does a much better job of promoting reconciliation.<sup>169</sup>

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

Second, because forgiveness often takes a very long time, because most human beings are not that patient, and because many think that some crimes are simply unforgivable, they tend to give up earlier in the process and opt for the short-term method: vengeance,

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168. See Ken Levy, *On the Rationalist Solution to Gregory Kavka's Toxin Puzzle*, 90 PAC. PHIL. Q. 267, 277 (2009) (“[R]ule-utilitarianism produces greater overall utility than act-utilitarianism. Pursuing utility-maximizing courses of action produces greater overall utility in the long term than pursuing utility-maximizing actions, even if such pursuit sometimes requires performing actions that are likely to produce less utility than alternative actions.”) (footnote omitted).

169. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 19-20 (1998).



usually in the form of criminal punishment.<sup>170</sup> As a result, a criminal justice system that generally forgave criminals rather than punishing them would seriously frustrate the (vengeful) public. It would, in most cases, fail to achieve the moral, social, and emotional equilibrium that only criminal punishment can yield.<sup>171</sup>

Third, especially for more serious crimes, only the victim, not the state, is in a position to forgive the wrongdoer. It would be arrogant and presumptuous for the state to appropriate this prerogative from the victim, the one who suffered the brunt of the harm.<sup>172</sup>

Fourth, the criminal justice system does not hold us to an impossibly high standard. The criminal justice system does not require us all to be saints. If it did, then most of us would be in jail. Instead, the criminal justice system does just the opposite. It establishes a floor, not a ceiling. It tells individuals within its jurisdiction the minimum that they cannot drop below, not a threshold that they must rise above. We are all free to be jerks; we just cannot be *supreme* jerks. That is, we are all free to do such morally wrong things as lie to friends, send angry emails, and “flip the bird” at other drivers. We will not go to jail for these acts even though they fall below a proper standard of virtue. But we *will* go to jail if we injure or attempt to injure others in much more serious ways—ways that fall below a minimum standard of care that we owe everybody else. So even if forgiveness were indeed the most virtuous response to all transgressions, the criminal justice system simply does not endorse or reflect this supposed moral truth. It does *not* forgive or recommend forgiving people for committing acts that fall below the minimum standard of care.<sup>173</sup>

Fifth, a policy of forgiveness would lead to a dramatic increase in crime because it would signal to all would-be criminals that they could now commit crimes with impunity.<sup>174</sup> For this reason alone, it

170. *Id.* at 16-19 (discussing reasons to resist forgiveness).

171. See KATHERINE S. NEWMAN, ET AL., *RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS* 179-81 (2004) (providing evidence that many people, including devout Christians, prefer to blame and punish rather than forgive school shooters); Hershenov, *supra* note 14, at 88-89 (“Even if the victim is exceptionally forgiving and seeks to drop the charge without a debt payment, the criminal cannot go free. First, this much too quick offering of forgiveness is really such a corrupt form of forgiveness . . . Perhaps a person who forgives too quickly has such low self-esteem he does not believe it was that bad for him to be treated as he was. Or the corrupt motivation for prematurely granting forgiveness is the victim really wants to *forget* rather than *forgive*. . . . Second . . . all of society . . . have the right to relish [the criminal’s] justified suffering even if his direct victim immediately ‘forgives’ him.”).

172. See LEWIS B. SMEDES, *THE ART OF FORGIVING* 39 (1996); Meyer, *supra* note 117, at 1524-25; Dennis Prager, Editorial, *The Sin of Forgiveness*, WALL ST. J., Dec. 15, 1997, at A22.

173. See Lerman, *supra* note 27, at 1667-70.

174. See Prager, *supra* note 172.

would be very foolish for the state to replace criminal punishment with a policy of forgiveness.

Still, despite the five arguments above, forgiveness may be advisable for the state with respect to some perpetrators in some situations. For example, forgiveness may be appropriate when either the crime is relatively trivial<sup>175</sup> or the criminal had an understandable reason for committing it.<sup>176</sup>

Martha Minow also argues that forgiveness, or at least attitudes and practices "between vengeance and forgiveness," might be appropriate for victims of mass atrocities such as genocide, crimes against humanity, and war crimes.<sup>177</sup> She offers three reasons: (a) there may be so many perpetrators that the post-atrocity transitional state simply lacks the resources to try and punish all of them; (b) trials, which tend to last years, may perpetuate, if not exacerbate, societal divisions, thereby prevent the state from "healing," and possibly even lead to renewed hostilities; and (c) victims and their families will likely be psychologically healthier if they can eventually bring themselves to forgive rather than let themselves be consumed by insatiable hatred and a desire for retaliation that may just never be realized.<sup>178</sup>

To be clear, this qualified defense of forgiveness in certain, very specific situations should not be confused with a defense of *mercy*.<sup>179</sup> Forgiveness and mercy are distinct in at least two respects. First,

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175. See Husak, *supra* note 16, at 330.

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

177. See MINOW, *supra* note 169, at 21-24.

178. See *id.* at 105-06 ("[Hatred] . . . could, in some cases, become one's life instead of being a part of one's life . . . . [F]eelings of hatred can, in many cases, consume one's entire self. Thus it might be seen a blessing—perhaps even divine grace—to have the burden of hatred lifted from one's mind. For this reason forgiveness can bless the forgiver as much as or more than it blesses the one forgiven.") (citations omitted); Steiker, *supra* note 47, at 29 ("[O]ne of the goals of the restorative justice movement is to move beyond the cycles of violence that communities and whole nations face . . . . '[Mercy] brings into the world those sorts of actions that break the cycle of revenge and retribution into which actors and even whole communities can so easily fall. It promotes harmony in the community, reconciliation, and flourishing.'" (quoting Andrew Brien, *Mercy Within Legal Justice*, SOC. THEORY & PRAC. 24, 106 (1998). *But see* Prager, *supra* note 173 ("Some people have a more sophisticated defense of the forgive-everyone-everything doctrine: Victims should be encouraged to forgive all evil done to them because doing so is psychologically healthy. It brings 'closure.' This . . . is selfishness masquerading as idealism—the argument being, 'Though you do not deserve to be forgiven, and though you may not even be sorry, I forgive you because I want to feel better.'").

179. *But see* Steiker, *supra* note 47, at 25 ("Under the skeptical view [of mercy], mercy has no place in criminal justice because justice is served only when offenders are punished in accordance with their desert. But this view does not attend to the possibilities of forgiveness by victims or their reconciliation with offenders . . . .").

forgiveness is an attitude, mercy an act.<sup>180</sup> Second, those who advocate a greater role for mercy in the criminal justice system are *not* advocating that we increasingly *forgive* criminals. They still support continuing to prosecute and punish criminals. They argue only that this punishment is often excessive; that in our inherently imprecise calculations of just deserts, we too often ignore or discount the complex social and psychological conditions that cause many people to violate the law.<sup>181</sup> So to make punishments *better* fit the crimes, judges, jurors, and legislators should develop a greater awareness of, and concern for, these mitigating conditions and incorporate this awareness into the sentences that they help to impose.<sup>182</sup>

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180. See Markel, *supra* note 18, at 1440.

181. See *supra* note 160 and accompanying text; see also SUSAN GRIFFIN, *A CHORUS OF STONES: THE PRIVATE LIFE OF WAR* 115-66 (1992); ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* (1984); Denny LeBoeuf, *Joel in the Wormhole*, 77 UMKC L. REV. 1059 *passim* (2009); Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS (Ferdinand David Schoeman ed., 1987), reprinted in PERSPECTIVES ON MORAL RESPONSIBILITY 119, 134-37 (John Martin Fischer & Mark Ravizza eds., 1993); see also Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002) (explicating the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000), that capital defendants have a constitutional right to provide evidence of "rotten social background" as a mitigating factor at the sentencing phase of their trials). *But see* ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 3-47 (1994) (arguing that the criminal justice system should not recognize past abuse as an excuse for criminal wrongdoing); Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J. L. & PUB. POLY 703 *passim* (1996) (arguing that while the "abuse excuse" is "indefensible," it is rarely used and even more rarely successful); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); Alan M. Dershowitz, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?*, 3 BUFF. CRIM. L. REV. 775 *passim* (2000) (arguing that the "abuse excuse," in particular battered woman syndrome, is weak both morally and empirically); George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 *passim* (1987) (arguing that an "adverse early social background" can at best mitigate, but not excuse, defendants for their criminal acts); Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 475 (2006) (arguing that if we cannot allow abuse to excuse adults for their wrongdoing, we can no more allow it to excuse children for their wrongdoing).

182. See Steiker, *supra* note 47, at 30-31; Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 7, 2008, at B07; see also Bernard E. Harcourt, *Reply*, in CRIMINAL LAW CONVERSATIONS 181, 183 (Paul H. Robinson, Stephen P. Garvey, & Kimberly Kessler Ferzan eds., 2009) (citing, with qualified approval, the following passage from NIETZSCHE, *supra* note 14, at 72: "As its power increases, a community ceases to take the individual's transgressions so seriously . . . . It is not unthinkable that a society one day might attain such a *consciousness of power* that it could allow itself the noblest luxury possible to it—letting those who harm it go *unpunished*. 'What are my parasites to me?' it might say. 'May they live and prosper: I am strong enough for that!"). *But see* Markel, *supra* note 18, at 1454 (arguing that "acts of mercy

While some have argued that this "pro-mercy" approach is incompatible with retributivism,<sup>183</sup> the fact that the pro-mercy camp still advocates criminal punishment—indeed, *fairer* criminal punishment—suggests that this approach is actually perfectly compatible with retributivism.<sup>184</sup> More importantly for my purposes, it is also perfectly compatible with the Justification Thesis. One can be for both mercy *and* vengeance. Mercy is designed merely to prevent the vengeance from spinning out of control, not necessarily to extinguish it altogether.

#### VI. THE THIRD REASON WHY RETRIBUTIVISM NEEDS CONSEQUENTIALISM: HARMLESS CRIMES

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

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

When I say that only consequentialism, not retributivism, can

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ultimately undermine each of the principles undergirding [retributivism]—moral accountability, equal liberty under law, and democratic self-defense").

183. See, e.g., Markel, *supra* note 18, at 1453-64; see also Husak, *Why Punish*, *supra* note 18, at 450 (arguing that Herbert Morris is committed to the (bizarre) position that because criminal punishment is a *right* (see Morris, *supra* note 58, at 475-76), criminals should *themselves* be opposed to mercy).

184. See Steiker, *supra* note 47, at 25-27.

explain and justify punishment of harmless crimes, I am referring not to (a)-type (risky) harmless crimes but to (b)-type (non-risky) harmless crimes. There are two reasons that retributivism *does* help to explain and justify punishment of risky harmless crimes. First, once again, risky harmless crimes substantially increase the risk of causing serious harm, and this increase of risk may itself be considered a harm for which the wrongdoer deserves punishment.<sup>185</sup> Second, inchoate crimes often cause psychological harm even when the object of the inchoate crime is not achieved. For example, while the target of an attempted murder might feel relieved that she is still alive, she may very well feel very distressed that she came so close to being killed. Likewise, a child who has been solicited for sexual activity might be traumatized merely by the solicitation even though no sexual activity actually ensued.

Non-risky harmless crimes, on the other hand, do present a real challenge to retributivism.<sup>186</sup> Consider, for example, drug possession. Suppose Cokie is carrying ten ounces of cocaine in the passenger seat while driving thirty miles per hour over the speed limit. The police pull Cokie over for speeding. After Cokie rolls down her window, they notice the bag of cocaine. They ask her what it is, she answers honestly, and they arrest her for cocaine possession. Several weeks later, after a brief trial, the jury convicts Cokie of cocaine possession. This seems to be the correct result—at least the legally correct result. Cokie should be punished because she culpably committed the crime of cocaine possession.

Once again, retributivism says that the desire to give a criminal her just deserts motivates criminal punishment. Given this, it seems, retributivism cannot explain why Cokie should be punished. A desire to give Cokie her just deserts is *not* the motivation for punishing her. Cokie's "act" of possessing cocaine does not *motivate* punishment in the same way that, say, murder or rape does; it does not "scream out" for punishment. More generally, it is not because of anything to do with just deserts that we have laws criminalizing the possession of drugs. There is nothing intrinsically wrongful—and therefore intrinsically deserving of criminal punishment—about possessing any drug.<sup>187</sup>

Instead, what is really *motivating* Cokie's criminal punishment is *not* the retributivist goal of giving her what she deserves but

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185. See Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 1000 (2003); John C.P. Goldberg & Benjamin Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1651 (2002).

186. See Husak, *Retribution*, *supra* note 18, at 966-70, 985.

187. See DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 64-68 (1992) (arguing against the notion that drug use should be criminalized because it is immoral); von Hirsch, *supra* note 14, at 116 ("Criminal prohibitions of today have wide scope . . . and include conduct that seems in no plausible way blameworthy.").

rather the *consequentialist* goal of minimizing the risk of certain harms. There are laws prohibiting possession of cocaine because they are thought to contribute toward an overall good *consequence*—namely, minimization of the dangers of cocaine use. Use of cocaine is dangerous because it can lead to, among other things, anxiety, headache, high blood pressure, sinusitis, severe depression, violent behavior, loss of consciousness, tremors, hyperthermia, kidney failure, stroke, bleeding of the brain, heart attack, seizure, suicide, and sudden cardiac death.<sup>188</sup> So the state has a significant and compelling interest in deterring cocaine use and therefore any and all activities that are necessary for, or contribute to, its usage. And one such activity (or act) is possession.

Still, in response to this objection against retributivism, I argue that retributivism still can help, at least to some extent, to explain and justify criminal punishment for non-risky harmless crimes like cocaine possession. There are at least two different ways in which it can help to provide this explanation and justification. First, recall from Part II.B that weak retributivism is the theory that just punishment requires that the person being punished both committed wrongdoing and is being punished for this wrongdoing. Responsibility is a necessary condition of all just criminal punishment<sup>189</sup> even if it—or the desire to *hold* somebody responsible—is not the driving motivation for certain kinds of criminal punishment. By weak retributivism, then, Cokie *deserves* punishment. It is not merely that she *wanted* to possess cocaine or *fantasized* about it. She actually *carried through* on this desire, this carrying-through violated a criminal law, and she is *criminally responsible* for this act. Ex hypothesi, she knowingly and willingly acquired cocaine, omitted to dispose of it, and does not have any good excuses or justifications for this acquisition and omission.

Second, in addition to weak retributivism, there is what is called “soft” or “limiting” retributivism and sometimes “side-constrained consequentialism.”<sup>190</sup> This version of retributivism suggests that (a) criminal punishment is justified primarily by consequentialism (the benefits that it yields such as specific deterrence and general deterrence) and (b) retributivism plays only a secondary role, which is to dictate an upper limit on the amount of punishment that may be inflicted for any given crime. Consequentialists who adopt this

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188. See JAN GARAVAGLIA, HOW NOT TO DIE: SURPRISING LESSONS ON LIVING LONGER, SAFER, AND HEALTHIER 147 (2008).

189. See *supra* note 60 and accompanying text.

190. See DUFF, *supra* note 14, at 11; MOORE, *supra* note 11, at 93; Ristroph, *supra* note 18, at 1301-03. *But see* Steiker, *supra* note 47, at 27 (“The idea of retributivism as an outer limit on punishment fails to tell us how to choose punishments up to that limit, and the idea of retributivism as setting a range of punishments likewise fails to guide us in choosing among them.”).



version of retributivism are assuming three things: (a) the proportionality principle (the punishment should fit the crime or at least not be grossly unfitting), (b) pure consequentialism does not entail proportionality,<sup>191</sup> and (c) retributivism is therefore necessary to make sure that the proportionality principle is observed.

As I argued in Part II.B.2, however, (b) seems false. Once again, there is at least one good consequentialist reason for proportionality: it contributes to more effective enforcement of, and respect for, the law. And if, as I suggested in the Introduction, expressivism is at least partly consequentialist, then there is yet another partly consequentialist reason for proportionality: to communicate both to the criminal and to the community just how bad her crime was. Therefore (c) is false as well. So the fact that vengeance plays no role in motivating (or justifying) criminal punishment for non-risky harmless crimes does not mean that proportionality does not apply in this context. It still does—which just goes to show that the proportionality principle does not entail the Motivation Thesis, no less the Justification Thesis.<sup>192</sup>

## VII. CONCLUSION

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

In this Article, I have tried to show just why this is the case. One concept that links the two—however much both consequentialists and retributivists repudiate it—is revenge. The retributivist imperative of giving criminals their just deserts—punishment—is itself largely motivated by our need to restore the moral and social order and thereby re-establish victims' emotional equilibrium. But fulfilling these needs—an excellent *consequence*—is

191. See, e.g., Hampton, *supra* note 14, at 221-22.

192. See also Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 687-88 (2010) (arguing that punishment for bad Samaritanism should not be proportional to the gravity of the offense).

a consequentialist goal. So beneath retributivism lies consequentialism. They are joined from the outset.

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