Criminal Punishment and the Pursuit of Justice

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ABSTRACT

Since the beginning of recorded history societies have punished offenders while at the same time trying to justify the practice on moral and rational grounds and to clarify the relationship between punishment and justice. Traditionally, deontological justifications, utilitarian justifications, or a mix of the two have been advanced to justify the imposition of punishment upon wrongdoers. In this article, I advance a new conceptual spin on the mixed theorist approach to criminal punishment – one that can hopefully resonate not just among legal philosophers, but also among ordinary citizens, i.e. the people who are most affected by the criminal law. Distancing myself from previous scholarship, which has used utilitarian arguments to point out the shortcomings of retributivism and vice-versa, on the one hand I attack the philosophical foundations of retributivism (currently the predominant rationale for punishment) on deontological grounds; on the other hand I attack the consequentialist rationales on consequentialist grounds. Concluding that neither approach – as they all fail under their own standards – is sufficient per se to justify criminal punishment in a liberal democracy, I argue that a mixed theory approach, which is usually presented as a matter of preference, is instead a matter of necessity if we want a criminal justice system that, while still not perfect, can be defended on both rational and moral grounds. In this sense, retributive considerations are meant to serve as the normative check on a system that aims at rationality and efficiency, and it is thus strongly utilitarian in character. I conclude by arguing that something more than punishment is required if we want to implement a system that really pursues justice, and I suggest that a path worth exploring in that regard is the one laid down by restorative justice. If nothing else, hopefully my blistering attack on retributivism will serve the purpose of rekindling a debate that seems to have accepted the dominance of retributivist positions.

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I. INTRODUCTION

Why do we punish? How does punishment relate to justice? Does punishment *achieve* justice? For centuries, these questions have occupied the minds of moral philosophers, political theorists, and legal scholars. Today, as the American criminal justice system – with a prison population of just over 2.2 million[1] – has become the most punitive in the world,[2] these questions are ever-pressing.

During oral argument in *Miller v. Alabama* Justice Antonin Scalia seemed to have the answer to those questions when he exclaimed, "Well, I thought that modern penology has abandoned that rehabilitation thing, and they -- they no longer call prisons reformatories or -- or whatever, and punishment is the -- is the criterion now. Deserved punishment for crime."[3] Justice Scalia's answer endorses the retributive function of criminal law: just punishment for moral desert. The answer also reflects the fact that

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[1] Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011,* Bureau of Justice Statistics, Nov. 2012, at 3, available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&i*Id*=4537, (last visited Dec.20, 2012).

[2] The United States, with 753 per 100,000 people incarcerated at last calculation has by far the highest incarceration rate in the world. The United States is followed by Russia, with 629 per 100,000 people incarcerated, and Rwanda, with an incarceration rate of 593 per 100,000 people. *See* John Schmitt, Kris Warner, Sarika Gupta, *The High Budgetary Cost of Incarceration,* Center for Economic and Policy Research, 5 (June 2012) available at http://www.cepr.net/documents/publications/incarceration-2010-06.pdf. *See also generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

[3] Miller v. Alabama, The Oyez Project at IIT Chicago-Kent College of Law (*http://www.oyez.org/cases/2010-2019/2011/2011_10_9646)* (last visited 3 Mar.2013).

"punishment ... is now acknowledged to be an inherently retributive practice." [4]

But is this really what criminal law is – or should be – about? Of course, not everyone agrees with Justice Scalia; on the other side of the spectrum are those who, drawing upon Cesare Beccaria and Jeremy Bentham, offer utilitarian justifications for criminal punishment – deterrence, rehabilitation, incapacitation. But, once again, the question pops up: Is this a sound approach? My proposed answer to both questions is no; the answer itself, of course, begs the question: Why not? My response to this (third) question stems from a general viewpoint, which I want to lay out up front now, as it is the key to the arguments I am going to offer throughout this paper. Before I do that, however, there is another, maybe even more important question that needs to be answered: Why should we care about what the rationale(s) justifying criminal punishment should be? I can think of at least two reasons, both having practical implications (the first more directly and intuitively so than the second). The first reason is sentencing; although I am not going to engage with sentencing in this paper, I think it is paramount that those who do – and especially those at the legislative and judiciary levels who make actual, concrete decisions about sentencing practices – have a clear idea of what concepts are involved in criminal punishment, and how and why the practice of inflicting pain and taking liberty away is justified, and therefore what its characteristics and limitations in a liberal democracy ought to be. The second reason is that for the criminal law to maintain its moral force we need – I believe – to be able to justify criminal punishment on moral grounds while at the same time having a criminal justice system that resonates with the very people to protect and serve whom it was created. Failing to do so would undermine the very justifiability of imposing criminal punishment in a liberal democracy. And while it is true that these issues have been debated for centuries, because of the fact that nowadays retributivism has arguably taken the lead as *the* justification of punishment among academics and – maybe more importantly – policymakers,[5] I believe that a re-examination of the foundations of criminal punishment is in order.

Back to the premise of the arguments that I will develop below: One of the central tenets of a seminar that Alan Dershowitz and I teach at the Harvard College is that "absolutist" philosophies are wrong or, at the very least, untenable. As one of this year's students ironically put it: "Saying always is always wrong." What Alan and I pitch to our students is the idea

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[4] Hugo Adam Bedau & Erin Kelly, *Punishment*, *The Stanford Encyclopedia of Philosophy (Spring 2010)*, http://plato.stanford.edu/archives/spr2010/entries/punishment/ (last visited Dec. 8, 2012).

[5] *See generally* MARK D. WHITE, RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (2011); *see also* Whitley Kaufman, *Retributivism: Essays on Theory and Policy Book Review*, in Law & Politics Book Review, available at http://www.lpbr.net/2012/01/retributivism-essays-on-theory-and.html (last visited Dec. 15, 2012); *see also generally* MICHAEL TONRY (ED.), RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? (2011).

that we wouldn't want to live in a purely Kantian world, just as we wouldn't want to live in a purely Benthamite world. Rather, these two philosophies (or approaches, world-views, or what have you) should serve as checks and balances upon one another. In this paper, I will try to show that a "checks and balances" approach is also best suited to provide the most compelling (*rectius*, the least troublesome) justification for criminal punishment, contrary to what purely retributivists and purely utilitarians posit.

This paper aims to make two major points. The first point is that neither retributivism nor the utilitarian rationales (whether individually or combined) can stand on their own. However, unlike the vast majority of previous scholarship (including mixed theorists), which has traditionally taken sides and either argued against retributivism on grounds of utilitarian reasons, or argued against utilitarian reasons with deontological arguments,[6] I will make my point by attacking retributivism on deontological grounds, which is to say, at its moral and philosophical foundations; and I will attack utilitarian justifications on consequentialist grounds, both with regard to their effectiveness (= their utility) and to their logical consequences. The critical analysis of both a fully backward-looking retributivist view and a fully forward-looking utilitarian view will allow me make the case for a "checks and balances" approach to criminal punishment. The "checks and balances" approach that I advance differs from most traditional 'mixed theorist' approaches in that, whereas the mixed theorist approach is usually presented as a matter of *preference*, I will claim that the "checks and balances" take on mixed theories is a matter of *necessity*: since some sort of criminal punishment *is necessary*, and since each rationale is so deeply flawed as to be unable to stand on its own, then the only way we can present an acceptable justification for imposing criminal punishment is by pulling the rationales together and having them serve as "checks and balances" upon one another. The second point is that, the necessity of criminal punishment notwithstanding, *something more* than punishment as traditionally interpreted and implemented is required if we want to pursue *justice*. For reasons that I will elaborate, I will suggest that the most promising path toward justice is the one indicated by the promoters of restorative justice. Given the air of moral entitlement – a kind of righteousness, if you will – that seems to animate most retributivist scholarship, and in light of the fact that nowadays retributivism seems to be the dominant theory of punishment,[7] retributivism is going to be first on my list.

II. Looking Backward: Retribution

If one scrolls through the literature on retributivism, it will be almost impossible not to notice an aura of moral entitlement which, in my opinion, is the product of the equation, accepted and advanced by most retributivist scholars, that justice = giving offenders what they deserve. Before we

[6] *See*, *e.g.*, John Bronsteen, *Retribution's Role*, 84 Ind. L.J. 1129, 1131 –33 (2009).
[7] *See supra* note 5 and accompanying text.

get into that, however, I think it will be useful to offer a little background: What is retributivism, and how did it get to achieve the dominance that it nowadays seems to hold in the field of criminal justice[8] – and, some might wonder, why should we care?

The answer to why we should care I leave to David Dolinko:

> Under retributivism's spell, proponents of making penalties harsher or of expanding capital punishment feel free to scoff at any suggestion that their favored policies might have more drawbacks than benefits, or might even serve no useful purpose whatsoever. For those are "mere" utilitarian sentiments, unworthy of consideration by the devotees of justice, and a policy need have no "useful" consequences at all so long as it can be perceived as "doing justice" or "giving people what they deserve."[9]

I think that such an approach to criminal legislation, and criminal law in general, is, to say the least, misguided and dangerous. Rather than focusing on the practical consequences of this approach, however, for the moment I aim to strike at its premises. To do so, we need to answer the other two questions – what is retributivism and how did it become the dominant theory of punishment?

To answer to these questions, a brief historical overview of the origins of the modern philosophy of criminal punishment in the Western world will be useful. In the (roughly) 150 years leading to the drafting of the Model Penal Code (1962) retributivist ideas were largely absent from the mainstream criminal law discourse and played little if any role in the structuring of the criminal justice system;[10] "in our time, in contrast, retributive ideas seem an inherent part of thinking about crime and punishment."[11] Despite its "absence" from "mainstream criminal law discourse," however, retributivism has a long-dating pedigree in the criminal law. Indeed the history of criminal punishment – the history of the criminal law – is pervaded with retribution. Back in the day, retribution tended to be exacted through cruel and violent forms of punishment. Just think, for example, of Damiens' *supplice*, graphically described by Michel Foucault:[12]

> On 2 March 1757 Damiens the regicide was condemned 'to make the *amende honorable* before the main door of the Church of Paris,' where

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[8] *See, e.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 U.C.L.A. L. REV. 1623 (1992): "Retributivism ... has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment;" *see* also note 5, *supra*.

[9] Dolinko, *supra* note 8, at 1624.

[10] Michael Tonry, *Can Twenty-first Century Punishment Policies Be Justified in Principle?* in TONRY, SUPRA note 5, at 8; *see* also Matt Matravers, *Is Twenty-first Century Punishment Post-desert?*, *id.* at 31.

[11] Tonry, *supra* note 5, at 7.

[12] The description of the episode hereinafter, including quotations, is found in MICHEL FOUCAULT, DISCIPLINE AND PUNISH. THE BIRTH OF PRISON 3 – 5 (Alan Sheridan trans., Pantheon Books, 1977) (1975) (citations omitted).

> he was to be 'taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds;' then, 'in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes, and his ashes thrown to the winds.'

"Finally – Foucault continues – he was quartered." This operation was "very long:" the horses, in fact, were not "accustomed to drawing;" instead of the usual four, six horses were needed. Still, the six horses were not enough to quarter Damiens; hence the executioner was forced to "cut off the wretch's thighs, to sever the sinews and hack at the joints." Throughout the torment, although Damiens "was a great swearer, no blasphemy escaped his lips." The newspaper report on the *Gazette d'Amsterdam* recounts how the spectators were all "edified by the solicitude of the parish priest of St. Paul's who despite his great age did not spare himself in offering consolation to the patient." The description of the torment goes on: the executioner, grabbing some steel pinchers that "had been especially made for the occasion," started pulling the flesh off of Damiens' body, "first at the calf of the right leg, then at the thigh, and from there at the two fleshy parts of the right arm; then at the breasts." The executioner's task was so hard that he had to go through multiple attempts at each spot before he was able to rip the flesh off of Damien's body. After the ripping of the flesh, the executioner "dipped an iron spoon in the pot containing the boiling potion, which he poured liberally over each wound." While Damiens was crying out to God to forgive him, cords were tied to the horses and to his arms and legs – "the cords had been tied so tightly by the men who pulled the ends that they caused him indescribable pain" –; the horses started to pull. After some time of unsuccessful pulling, one of the horses fell to the ground, exhausted. Eventually, the executioner "drew out a knife from his pocket and cut the body at the thighs instead of severing the legs at the joints;" the horses gave a tug and carried away Damiens' body parts. When this was done, Damiens' pieces were gathered together and set on fire; "The last piece to be found in the embers was still burning at half-past ten in the evening."

Damiens' case was not the exception; in the eighteenth century, the administration of criminal law in continental Europe was barbaric. Gallows, torture, branding, mutilation, and the wheel were commonplace in the administration of "justice;" the death penalty was implemented even for the most trivial of crimes, such as, for example, stealing a handkerchief.[13] A dramatic change was initiated in 1764 when Cesare Beccaria, in

[13] *See generally* JOHN HOSTETTLER, CESARE BECCARIA: THE GENIUS OF 'ON CRIMES AND PUNISHMENTS' (2010).

what John Hostettler calls a "watershed" and "cri de coeur,"[14] effectively laid down the foundations of a liberal, humane criminal law built, among other principles, on the principle of the *extrema ratio*.[15] Analyzing the foundations of the power to inflict criminal punishment, in Chapter II of *On Crimes and Punishments* Beccaria writes:

> As the great Montesquieu says, every punishment that does not derive from absolute necessity is tyrannical. The proposition can be stated more generally in the following manner: every act of authority of one man over another that does not derive from absolute necessity is tyrannical. This is the foundation, therefore, upon which the sovereign's right to punish crimes is based: the necessity to defend the depository of the public welfare from individual usurpations; and the more just the punishments, the more sacred and inviolable the security and the greater the liberty the sovereign preserves for his subjects.[16]

For Beccaria the legitimacy of a sovereign derives from the harsh conditions in which men lived before civil society was formed – the Hobbesian state of nature: "Laws – Beccaria observes – are the terms by which independent and isolated men united to form a society, once they tired of living in a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of its preservation."[17] According to Beccaria, men "sacrificed a portion of this liberty so that they could enjoy the remainder in security and peace."[18] "The sum of all these portions of liberty"[19] is the foundation of the "sovereignty of a nation,"[20] where the sovereign is "the legitimate keeper and administrator of these portions."[21] It was not, therefore, by divine right or natural law that some men were invested with the power to govern other men; nor did men give up part of their freedom voluntarily:

> No man ever freely surrendered a portion of his own liberty for the sake of the public good; such a chimera appears only in fiction. If it were possible, we would each prefer that the pacts binding others did not bind us; every man sees himself as the centre of all the world's affairs.[22]

Rather, Beccaria explains, men *had to* give up part of their freedom in order to escape the state of nature – a state where, as Hobbes put it, *homo homini lupus* – and thus be able to enjoy in a relative tranquility the re-

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[14] *Id*. at *ix*; *xiv*.
[15] The description of Beccaria's philosophy hereinafter does not imply a complete adherence on my part; rather, it serves to illustrate the evolution of the philosophy of punishment in the Western world.
[16] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 11 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press, 2008) (1764).
[17] *Id*. at 10.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 11.

mainder of their freedom. The consequence of this "forced surrender" of freedom is, for Beccaria, compelling:

> It was … necessity that compelled men to give up part of their personal liberty; and so it is that each is willing to place in the public depository *only the least possible portion* … . The aggregate of these smallest possible portions constitutes the right to punish; everything that exceeds this is abuse, not justice; it is a matter of fact, not of right.[23]

The result of Beccaria's efforts is the forerunner of the well-known utilitarian conception: men are born free and therefore they will give up "only the least possible portion" of their liberty; deprivation of this liberty through punishment cannot be justified with transcendent ends, but only by the utility to society – the common good,[24] identified by Beccaria as "the greatest happiness *shared among* the greatest number."[25] The common good, combined with the respect for the citizen's originary freedom, demands that penalties be mild but certain, so that they can serve a deterrent effect without brutalizing society.[26] While "the prime objective of punishment in Beccaria's day was retribution or revenge,"[27] the *rejection* of retributivism and of the *lex talionis* which retributivism often implies is clear in Beccaria's work. Beccaria writes:

> The purpose of punishment … is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men *with the least torment to the body of the condemned*.[28]

Not retribution then – "it is evident that the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already

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[23] *Id*. at 12 (emphasis added).
[24] FEDERICO STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, 181 (2006).
[25] HOSTETTLER, *supra* note, 13 at 28 (emphasis added). Richard Bellamy, referenced in Hostettler, observes that this, and not "the greatest happiness of the greatest number," was Beccaria's actual view. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xviii – xix (Richard Bellamy ed., Richard Davies, Virginia Cox and Richard Bellamy trans., Cambridge Univ. Press, 1995). Indeed, as A.P. d'Entrèves has shown, Bentham was consciously indebted to Beccaria for the development of his famous utilitarianism, to the point that Bentham, referring to Beccaria, exclaims: "Oh my master, first evangelist of Reason, you who have raised your Italy so far above England and I would add above France... You who have made so many useful excursions into the path of utility, what is there left for us to do? – Never to turn aside from that path." *See* A.P. d'Entrèves, INTRODUCTION TO ALESSANDRO MANZONI'S *THE COLUMN OF INFAMY:* PREFACED BY CESARE BECCARIA'S *ON CRIMES AND PUNISHMENTS* xi (trans. Kenelm Foster & Jane Grigson, Oxford Univ. Press, 1964), quoted in Hostettler, *supra* note 13, at 28.
[26] STELLA, *supra* note 24, at 181.
[27] HOSTETTLER, *supra* note 13, at 29.
[28] BECCARIA, *supra* note 25, at 26 (emphasis added).

committed"[29] – but deterrence, and the common good, are – for Beccaria – what justifies punishment.[30] Beccaria's work was of great inspiration for sovereigns around Europe; for example, Frederick the Great abolished torture; Maria Theresa of Hapsburg outlawed witchburning and torture; and Leopold II, Duke of Tuscany, abolished the death penalty altogether in 1786 – the first state in the Western world to do so.[31]

As one can expect, Beccaria's efforts toward an enlightened and humane criminal law did not go unchallenged: for example, "the Inquisition forbade the use of Beccaria's book under penalty of death and it was placed on the Index in 1766;"[32] Beccaria was portrayed by Church apologists as a "man of a narrow mind, a madman, a stupid imposter, full of poisonous bitterness and calumnious mordacity."[33] Neither the Inquisition nor its henchmen, however, managed to stop the impact of Beccaria's revolutionary ideas; unfortunately, another intellectual giant – and otherwise one of the greatest contributors that mankind has ever had to its cause – took up the flag of retributivism: and so it was that Beccaria's efforts were overshadowed by Immanuel Kant's "vindictive folly."[34] The damaging effects of Kant's theory of punishment are still suffered today at the hands of contemporary retributivists who, enthusiastically, refer to Kant's – and Hegel's – theories as the foundations of their arguments.

A. *KANT AND HEGEL*

In a now famous excerpt – possibly Kant's *most famous* excerpt in penal literature – Kant, qualifying the right to impose criminal punishment as "*the right of the sovereign as the supreme power to inflict pain upon a subject* on account of a crime committed by him,"[35] lays down the philo-

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[29] *Id*.

[30] For similar reflections on Beccaria's work *see* also Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994) at 114 *et seq*. Unlike Pauley, however, I would think twice before dubbing Beccaria an "*amateur*" who "listened to what some people told him about the tortures and cruelties of the penal systems of Europe of his day" (*Id*. at 114). Beccaria in fact – contrary to Pauley's assertion that he "was not a professional lawyer" (*Id*.) – earned his law degree from the University of Pavia in 1758; his *On Crimes and Punishments*, rightly considered the foundational work of penology, is a *systematic* proposal to revolution and reform criminal law and procedure – the first of its kind.

[31] *See*, *e.g.*, Aaron Thomas, *Preface to* Beccaria, *supra* note 16, at xxix; STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24, at 181 – 182; HOSTETTLER, *supra* note 13, at *ix*.

[32] HOSTETTLER, *supra* note 13, at 21.

[33] *Id*.

[34] This expression, which effectively conveys an almost visual significance to the criticism of Kant and Hegel hereinafter, is found in STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24, at 180.

[35] IMMANUEL KANT, THE PHILOSOPHY OF LAW. AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 194 (trans. W. Hastie, The Lawbook Exchange, 2002) (1797) (emphasis added).

sophical foundations of retributivism asserting that punishment "must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*."[36] This is because, Kant claims, "the penal law is a categorical imperative;"[37] hence "woe" to those – such as Beccaria – who "cree[p] through the serpent-windings of utilitarianism" and thus stand in the way of justice.[38] According to Kant, in fact, "justice would cease to be justice if it were *bartered away* for any consideration whatever."[39]

After advancing this absolute notion of "justice" – which, *per se*, doesn't say a lot more other than that justice needs to be absolute, untouched, unspoiled – Kant proceeds to enlighten us with what he sees as the *measure* of justice: nothing less than the infamous *lex talionis* which, "properly understood," "is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty."[40] If at this point anyone is wondering what that "properly understood" means, here's Kant's chilling answer: "whoever has committed Murder must *die*."[41] This, in Kant's construction, is required by justice: "there is no Equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal."[42] To make sure that there really aren't any doubts left, the passage concludes with the famous hypothetical of a society living on an island which at some point decides to disperse throughout the world, never to come together as a people ever again: in such a case, Kant urges, unless the whole people were to partake in a public violation of justice "the last murderer lying in the prison ought to be executed before the resolution was carried out."[43] According to Kant, then, just punishment is retribution; retribution is justified because the criminal law is a moral imperative the violation of which *demands* retribution.

The first thought that comes to mind when reading this passage of Kant's is: why? Kant, in fact, throws in our faces an absolute truth – just punishment *is* retribution – that is not demonstrated as true, but rather, it is *assumed* to be true. Kant does not demonstrate that the justification of punishment is retribution; rather, he *affirms* that it is so.[44] Kant also fails to explain why a punishment that is not limited to retributivism, or even that, with complete disregard for retributivism, simply aims to the rehabili-

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[36] *Id*. at 195. We will see, *infra*, that this is still nowadays the base-claim of retributivism.
[37] *Id*.
[38] *Id*. *See* also DAVID YOUNG, BECCARIA: ON CRIMES AND PUNISHMENTS xv (1986).
[39] KANT, *supra* note 35, at 196 (emphasis added).
[40] *Id*.
[41] *Id*. at 198.
[42] *Id*.
[43] *Id*.
[44] For this observation *see* Ulrich Klug, *Skeptische Rechts-Philosophie und humanes Strafrecht*, Springer, Berlin, 1981, vol. II, p. 6, in LUCIANO EUSEBI (*a cura di*), LA FUNZIONE DELLA PENA: IL COMMIATO DA KANT E DA HEGEL 3 (Giuffrè, 1989).

tation of the criminal should be an infringement of justice.[45] Moreover, Kant tells us that "the penal law is a categorical imperative," but he doesn't tell us *why*. Again, we are asked to make a leap of faith and just trust him. Indeed, the "categorical imperative" rule as applied to penal law is, without further justification, an "empty formula."[46] On the premise that from an empty principle nothing can be derived in terms of content, Klug observes how the Kantian categorical imperative, being *per se* an empty formula, could be applied, for instance, by "a community of gangsters."[47] And unfortunately, history is full of examples where the Kantian formula has been "filled" with the wrong "content:" thus, in Nazi Germany the Kantian "thou shall" became a dreadful "thou shall kill." After all, that was the categorical imperative of the new system, and thus accepted and obeyed because "true."[48] But if the "thou shall" is, *per se*, an empty formula from which nothing in terms of content can be inferred, then most definitely it cannot serve to justify the equation that punishment = retribution.[49] Finally, it is by no means clear why, under an ethical point of view, evil needs to be compensated by evil, and not by good:[50] it can very well be argued that retribution in and of itself, without any further purposes, will not lead to anything good; rather, it will hurt human dignity.[51]

Ideas similar to those of Kant's, albeit within a somewhat more complex theoretical framework, are echoed by Georg Wilhelm Friedrich Hegel in *Elements of the Philosophy of Right*.[52] Hegel agrees with Kant that punishment equals retribution. Hegel, however, goes a little further than Kant, and bothers to provide us with a metaphysical justification for retribution: retribution, Hegel says, is the "infringement of the infringement."[53] Hegel's reasoning is the following: a crime is an infringement of rights; this infringement is erased by the infringement, caused by the infliction of punishment, of the rights of the criminal, and in particular of his right to freedom.[54] This theory of punishment is effectively summarized by the well-known expression that, "wrong being the negation of right, punishment is the negation of that negation."[55]

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[45] *Id*.
[46] *Id*. at 7.
[47] *Id*.
[48] For this observation see Federico Stella, *Perché Non Basta Affidarsi allo Spirito Critico*, CORRIERE DELLA SERA, 31 (June 22, 2004).
[49] Klug, *supra* note 44, at 7. While it would be interesting to explore what instruments could be used to guide the interpreter in choosing the right content for the "thou shall," it is a task that would go far beyond the objectives of this paper.
[50] *See*, *e.g.*, STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24, at 182.
[51] Klug, *supra* note 44, at 8.
[52] GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press, 1991) (1821).
[53] *Id*. at 101.
[54] *See* Klug, *supra* note 44, at 5.
[55] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42 (1881). Klug, *supra* note 44, at 5, notes how the expression "negation of the negation" does not appear in *Elements of the*

Albeit starting from the same premise that punishment is retribution, Hegel reaches a different conclusion than Kant on the quantification of punishment. Hegel, in fact, rejects the "eye for an eye" approach, opting instead for a punishment that equals the crime in terms of value.[56] Moreover, according to Hegel, the criminal has a *right* to be punished; through punishment, in fact, the criminal is honored as a rational being.[57]

Is this a sound approach – one on which to found the justification for criminal punishment? I think not. Hegel's elaboration of punishment is, ultimately, a result of his complex idealistic vision of reality. But his thesis – antithesis – synthesis model, if indeed it makes any sense to begin with,[58] seems at odds with the conclusions that he draws: why should violence be undone by violence? It could be argued that violence is increased by violence, or that violence is undone by non-violence.[59] And "what exactly is the infringement of the infringement?"[60] As Klug observes, a healing, or reconstruction, of the infringement, would be significant; a "negation of the negation" is simply a meaningless figure of speech.[61]

Finally, Hegel's contention that "insofar as the punishment … is seen as embodying *the criminal's own right*, the criminal is *honoured* as a rational being,"[62] is a mere "metaphysical reverie"[63] formed in the mind of a philosopher, and with no connection whatsoever to the real world, where criminal punishment "degrad[es] prisoners and … plung[es] them further into crime."[64] Conversely, it is precisely the respect for human dignity that requires society not to react to a crime in a purely retributivist way, but to try instead to rehabilitate the criminal. Only by doing so society really "honors" the criminal as a "rational being"[65] – or, in Kant's words, treats him not only as a means, but also as an end.[66]

Philosophy of Right, but rather, it is found in the Addings to Hegel's lectures collected by one of his students, Eduard Gans.

[56] Klug, *supra* note 44, at 6.

[57] *Id*. For a somewhat more expanded – and far more deferential – exposition of Hegel's theories of crime and punishment *see* also Pauley, *supra* note 30, at 141 *et seq*.

[58] *See* KARL POPPER, 2 THE OPEN SOCIETY AND ITS ENEMIES 27 – 89 (1966).

[59] Klug, *supra* note 44 at 7.

[60] *Id*.

[61] *Id*. at 8.

[62] HEGEL, *supra* note 52, at 100.

[63] Klug, *supra* note 44, at 9.

[64] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 470 (1897).

[65] Klug, *supra* note, at 9.

[66] I want to stress, at this point, that Kant is also wrong on the *lex talionis*. Although the *lex talionis* can be first found in the Code of Hammurabi, two other sources are more relevant with respect to the Western world: the Bible and the Law of the Twelve Tables. As for the Bible, it must be noted that, while the principle of "eye for an eye" is indeed present in the Old Testament, it is rejected in the New Testament: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, do not resist an evildoer. If anyone strikes you on the right cheek, turn to him the other also." (Matthew 5:38–39). Hence, the *lex talionis* was explicitly discarded. Besides, as Cliff Fishman has noted, when the Bible sets forth the *lex talionis* in Exodus 21:23-25 the context is that of

Indeed, while reading these passages from Hegel's work, one is reminded of Arthur Schopenhauer who – quoting Shakespeare – suggested that Hegel's philosophy was "such stuff as madmen tongue, and brain not," and that Hegel himself was nothing more than a "flat-headed, insipid, nauseating, illiterate charlatan, who reached the pinnacle of audacity in scribbling together and dishing up the craziest mystifying nonsense."[67]

As Ulrich Klug invites us to do in his poignant and heartfelt essay *Skeptische Rechts-Philosophie und humanes Strafrecht*,[68] we should take leave from the theories of punishment of Kant and Hegel.[69] At the end of the day, once we've pierced through the philosophical superstructure of Kant's and Hegel's theories of punishment what we are left with is an idea of "just punishment" that strikingly resembles vengeance – public vengeance at the hand of the state.

This "inconvenient truth" was most harshly denounced by Friedrich Wilhelm Nietzsche who, after noticing that "old Kant['s]" moral imperative "smells of cruelty," goes on to shed light on what he sees as the essence of criminal punishment:

> To put the question once again: in what way may suffering be a compensation for "debts?" In that the act of *making* another suffer produced the highest kind of pleasure; in that the loss (to which must be added the vexation caused by the loss) brought, by way of exchange, to the damaged party a most remarkable counter-pleasure – the *making* another suffer, – a true *festival*, as it were … . Revenge leads, in its turn, to the same problem, "How can the act of making another suffer be a satisfaction?" The feeling of delicacy, and still more the tartuffism of tame, domesticated animals (rather say – of modern men, rather say – of *us*) abhors, it seems to me, the energetic representation of the extent to which *cruelty* constituted

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civil damages, and not of criminal punishment. *See* Clifford S. Fishman, *Old Testament Justice*, 51 CATH. U. L. REV. 405 (2002) at 414 (Fishman's argument is quite convincing; however, it does not square with other passages of the Bible, such as that which establishes the death penalty for murder: "Whoever sheds the blood of man, [b]y man shall his blood be shed." *See* Genesis 9:5-6). With respect to the Twelve Tables, which were laid down as the law of Rome in 451 – 450 B.C., the "eye for an eye principle" is instead of great significance; it is, indeed, an enormous step forward for civilization. The reason is because, before the Twelve Tables, there was no limit to retribution in private justice; thus, the principle of "an eye for an eye" was meant to be the limit – to reverse a common metaphor, a ceiling, not a floor. In seeking justice, the individual who suffered the harm could go as far as inflicting the same kind of harm to the wrongdoer, but *no more*. Thus, for example, Law IX of Table VII, which deals with crimes, provides that "*Si membrum rupsit, ni cum eo pacit, talio esto*" ("When anyone breaks a member of another, and is unwilling to come to make a settlement with him, he shall be punished by the law of retaliation"). Thus, the injured party could break the injurer's member, but he could not *kill* the injurer. It did not mean, like most retributivists – first of all, Kant – seem to assume, that the *correct* punishment is *only* one that *equals* the wrong suffered.

[67] ARTHUR SCHOPENHAUER, ON THE WILL IN NATURE: A LITERAL TRANSLATION 7 (4th ed., 1887), as quoted in POPPER, *supra* note 58, at 32.

[68] *See supra* note 44.

[69] Klug, *supra* note 44, at 9.

> the great festive joy of early mankind and, in fact, is admixed as a necessary ingredient of nearly all their joys; and, on the other hand, the representation of the *naïveté*, the innocence with which this desire of cruelty manifests itself; of the deliberate manner in which "disinterested malignity" (or, in the words of Spinoza, *sympathia malevolens*) is pointed as a *normal* attribute of man; *i.e.* as something to which his conscience with hearty will says *Yes!* ... No festival without cruelty: thus the oldest and longest history of man teaches us – and in punishment, also, there is so much that is *festival*! ... The criminal is, first of all, a *breaker* – a breaker of a contract and of a word given .... . The criminal is a debtor, who not only fails to pay back the advantages and advances received, but even aggresses his creditor ... . The anger of the damaged creditor – community – plunges him back into the wild, out-law condition, against which so far protection had been granted him. Community repudiates him, and now all sorts of hostilities may wreak themselves upon him. "Punishment," in this stage of civilization, is simply the image, the *mimus* of normal conduct, as manifested against a hated, disarmed and cast-down enemy, who has forfeited not only all privileges and all protections, but even every claim to mercy; it is, therefore, the martial law and triumphal celebration of the *vae victis!* with all its unrelentingness and cruelty.[70]

According to Nietzsche, retribution – vengeance – is the "cruel festival" of punishment. What is most interesting is that even if we were to discard Nietzsche's analysis on grounds of it being too extreme, we couldn't ignore the fact that similar conclusions on criminal punishment and its relationship to vengeance were reached by Oliver Wendell Holmes, Jr.

In *The Common Law*, Holmes writes:

> There remains to be mentioned the affirmative argument in favor of the theory of retribution, to the effect that the fitness of punishment following wrong-doing is axiomatic, and is instinctively recognized by unperverted minds. I think that it will be seen, on self-inspection, that this feeling of fitness is absolute and unconditional only in the case of our neighbors. It does not seem to me that anyone who has satisfied himself that an act of his was wrong, and that he will never do it again, would feel the least need or propriety, as between himself and an earthly punishing power alone, of his being made to suffer for what he had done, although, when third persons were introduced, he might, as a philosopher, admit the necessity of hurting him to frighten others. But when our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not. The feeling of fitness seems to me to be *only vengeance in disguise*, and … vengeance is an element … of punishment.[71]

With an act of intellectual courage typical of his character, Holmes openly admits what most retributivists to this day refuse to admit – namely, that an essential (albeit not unique) element of criminal punishment is

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[70] FRIEDRICH WILHELM NIETZSCHE, A Genealogy of Morals, in THE WORKS OF FRIEDRICH NIETZSCHE, vol. X, 75 – 86 (Alexander Tille ed., William H. Hausemann trans., Macmillan1897).

[71] HOLMES, THE COMMON LAW, *supra* note 55, at 45 (emphasis added).

vengeance: in Holmes' own words, "it has never ceased to be one object of punishment to *satisfy the desire for vengeance*."[72] According to Holmes, this fact is "made clear" if only one "consider[s] those instances in which ... compensation for a wrong is out of the question."[73] In those cases, where no restoration or compensation is possible, Holmes argues, punishment "is inflicted *for the very purpose of causing pain*."[74] Insofar as this punishment "takes the place of compensation," Holmes concludes, "one of its objects is to *gratify the desire for vengeance*. The prisoner pays with his body."[75]

I believe that the arguments set forth by Nietzsche and Holmes should provide a strong incentive to heed Klug's exhortation and "take our final leave from Kant's and Hegel's theories of punishment and their irrational, lyrical-philosophical excesses."[76] The seeds of Kant's and Hegel's philosophy and their equation of justice with retribution, however, still pervade contemporary retributivist scholarship. It is to this scholarship, then, that I now turn my attention.

B. *MODERN-DAY RETRIBUTIVISM*

While Kant and Hegel may justly be considered the "fathers" of retributivism in the sense that they were the first to provide the practice with a systematic philosophical justification, they were far from being the last.[77] Interestingly enough, in most of the modern literature on retributivism the equation justice = retribution in consequence of one's deserts survives unchallenged.[78] What I find even more interesting is that little has been done to *demonstrate* Kant's – and Hegel's – assertion that justice *demands* retribution. Thus, for example, Jeffrie Murphy claims that "[T]he retributivist seeks, not primarily for the socially useful punishment, but for the *just* pun-

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[72] *Id*. at 40 – 41 (emphasis added).
[73] *Id*.
[74] *Id*. (emphasis added).
[75] *Id*. (emphasis added).
[76] Klug, *supra* note 44, at 9.
[77] *See generally* Dolinko, *supra* note 8.
[78] Matt Matravers seems to disagree with this statement, as he observes: "In short, with the notable exception of Michael Moore, the mainstream revival in retributivism since the 1970s has not been a revival in the desert thesis. The slogan "the punishment must fit the crime" is part of contemporary retributivism, but its association with traditional notions of desert is inappropriate. ... The traditional desert thesis is defensible only by invoking some pretty robust metaphysical commitments (such as can be found in Kant, Hegel, and Moore), and such commitments are not only out of fashion philosophically, but are widely regarded by liberals as an inappropriate basis on which to ground public policy in pluralistic societies." Matravers, *supra* note 10, at 36. While Matravers is right in theory when he observes that only "robust metaphysical commitments" can justify the desert thesis, he seems to overlook that the "desert thesis," rather than a 'thesis,' has, in practice, assumed the status of an 'axiom.' As I will show through the literature hereinafter, in fact, most scholars rely on the 'desert thesis' simply by claiming that justice = giving people their (just) deserts; from this axiom, they then go on to develop their theories.

ishment, the punishment that the criminal (given his wrongdoing) deserves or merits, the punishment that the society has a right to inflict and the criminal a right to demand."[79] The same point is made by Igor Primoratz, who claims that there is "nothing methodologically unsound" in advancing "the central tenet" of retributivism: "punishment is morally justified insofar as it is just, that justice is *the* moral consideration with regard to punishment."[80] According to Primoratz, punishment is just "when it is deserved," which is after the commission of an offense.[81] Advancing arguments that echo those of Kant's and that will be echoed by Michael Moore, Primoratz claims that "the offense committed is the sole ground of the state's right and duty to punish"[82] and that "[j]ustice is ... not being done when the guilty go unpunished"[83] because "justice ... is to treat offenders according to their deserts, to give them what they deserve."[84] As usual, this equivalence between justice and retribution is not *demonstrated*; rather, it is *asserted*. Primoratz, in fact, claims – along with Hegel – that "[i]t is justified to requite evil with evil, for it is only just; and it is just because when doing so, we treat another person in the way he has deserved."[85] Circular reasoning at its finest.

This chant – "justice is giving people what they deserve" – is sung over and over in the literature: John Kleinig writes that "[i]t is the fact that a person has committed a moral offence which, in the first instance, constitutes the justification for his being punished. It is what is due to him, what is his desert"[86] and that "to treat a man justly is ... to give him what is due to him, where what is due to him is determined either by considerations of need or of desert;"[87] Paul Robinson and John Darley claim that "[e]nhancing the criminal law's moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is doing justice."[88] If anyone were wondering what exactly "doing justice" could ever mean, Robinson has a ready answer: "doing justice [is] punishing offenders for the crimes they commit."[89]

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[79] Jeffrie G. Murphy, *Retributivism and the State's Interest in Punishment,* in NOMOS XXVII: CRIMINAL JUSTICE 156, 158-59 (J. Pennock & J. Chapman eds. 1985), cited in Dolinko, *supra* note 8, at 1630.
[80] IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT, 147 (1989).
[81] *Id*. at 148.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*. at 70.
[86] JOHN KLEINIG, PUNISHMENT AND DESERT, 66 (1973). Kleinig goes on to observe how "appeals" to reasons other than this would deny the wrongdoer the right to be considered a "moral subject." For a critique of this specific argument see *infra*, note 94.
[87] *Id*. at 80.
[88] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) at 477 –78.
[89] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) at 1429.

The chorus of retributivists who chant together that justice is deserved punishment for crime is joined by Michael Moore, whose organic, intelligent and well-thought defense of retributivism very few can, in my opinion, compete with.[90]

Moore recognizes that "the battleground of theory known as the philosophy of punishment is littered with the corpses of supposed general principles from which the retributive principle is supposed to follow."[91] According to Moore, however, there is only one way to correctly define and qualify retributivism: retributivism is a "theory of justice" according to which "punishment of the guilty" is an "intrinsic good:" "wrongdoers suffer and justice thus be done."[92] Echoing Hegel, Moore claims that the imposition of punishment is also required if we want to "[respect] the autonomy of the criminals."[93] This, according to Moore, is "the grain of truth in the otherwise misleading slogan that 'criminals have a *right* to retributive punishment'."[94]

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[90] Although Michael Moore has published extensively on retributivism, in this paper I will only take into account his latest published effort, *Placing Blame* (2nd ed. 2010), on the reasonable assumption that whatever views Moore has expressed before, they have either been discarded, or they are reflected in his most recent work.

[91] MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 170 (2010). Moore offers some illustrations: "Giving an offender the punishment he deserves solely because he deserves it has been said to follow from a principle that: debts to society must be repaid (coupled with the further idea that crime creates a debt and punishment is a form of repayment); wrongs must be annulled (coupled with the further idea that punishment annuls them); God's anger must be placated (coupled with the further thoughts that God is a retributivist and that human punishment placates her); wrongdoing must be denounced (coupled with the further belief that punishment is the appropriate form of denunciation despite there being other, less draconian forms); etc." *Id*. (citations omitted).

[92] MOORE, *supra* note 91, at 88 and 118, respectively. It is interesting to note that Moore is just as inflexible as Kant (and also how much of Moore's position is reminiscent of Kant's): "Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient. Such sufficiency of justification gives society more than merely a *right* to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved." MOORE, *supra* note 91, at 91 (citations omitted).

[93] MOORE, *supra* note 91, at 151.

[94] *Id*. David Dolinko offers a powerful and engaging critique of the argument that retributivism respects the criminal as a rational being. Responding to the respect/rationality argument, Dolinko concludes that "exposing the weakness of the retributivist's own theory ... I am ... attracted to the other possible response to the accusation: tu quoque. That is, retributivism itself can be accused of using convicted offenders, and thus stripped of its cloak of Kantian respectability. This can be done in two ways – by appealing to the inevitability of mistaken convictions, or by attacking the very notion that we can know what the offender truly deserves. ... Indeed, I think one could argue that it is the deterrence theorists, with their utilitarian outlook, who truly "respect" the criminal by acknowledging

To bring his point home, Moore offers the following thought experiment: he asks the reader to "imagine an offender"[95] who commits an atrocious wrong "in a very culpable way"[96] – Moore chooses the old Russian general who launches his dogs after a young boy and has them tear him apart in front of his mother's eyes, from Fyodor Dostoevsky's *The Brothers Karamazov* – and to assume that *no other purpose* but retribution could be served by punishing the offender. Moore then invites the reader to consider two possible scenarios, the first where the reader himself is the Russian general; the second where someone else, other than the reader, is the general. He then asks the reader whether the offender in either scenario should be punished "even though no other social good will thereby be achieved."[97] Moore concludes: "The retributivist's 'yes' runs deep for most people."[98] If Moore is right – and we will soon see whether he is –, then the conclusion is straightforward:

> Dostoevsky's nobleman should suffer for his gratuitous and unjustified perpetration of a terrible wrong to both his young serf and that youth's mother. As even the gentle Alyosha murmurs in Dostoevsky's novel, in answer to the question of what you do with the nobleman: you shoot him. You inflict such punishment even though no other good will be achieved thereby, but simply because the nobleman deserves it. The only general principle that makes sense of the mass of particular judgments like that of Alyosha is the retributive principle that culpable wrongdoers must be punished. This, by my lights, is enough to justify retributivism.[99]

If we want at this point to recap the essence of the retributivist position, we can say that it consists of a deontological argument that someone who chooses evil must suffer the consequences of that choice; this, the retributivist claims, is not vengeance: it is *justice*. Justice, the argument goes, requires that someone who intentionally (or knowingly, recklessly, negligently: just as long as his conduct is morally blameworthy) causes harm be punished for such harm. The problem with the proponents of this argument is that they – much like Kant and Hegel –, far from *demonstrating* that retributivism *is justice*, simply *affirm that it is so*.

Recall Moore's thought experiment about the Russian general from *The Brothers Karamazov*:[100] Moore asks if you and the offender should be punished even if no other social good will be achieved through the punishment and claims that "The retributivist's 'yes' runs deep for most peo-

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that inflicting pain on him is, in itself, *bad,* and not to be done unless it can be outweighed by its good consequences." For the full argument see Dolinko, *supra* note 8, at 1642 – 1652.

[95] MOORE, *supra* note 91, at 163.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] *Id*. at 188.

[100] *See supra* notes 95 – 99 and accompanying text.

ple."[101] Well, granted. I'm not saying it doesn't; I'm not saying it shouldn't; I'm not saying I wouldn't: all I am saying is that this is an instinct, a deep, almost atavistic drive toward vengeance. It is not just me, of course, who is saying that; "Social and experimental psychologists instruct that human beings are hardwired to react punitively to crime" and "evolutionary psychologists explain that natural selection has favored human beings with that hard wiring."[102] At this point, however, it seems to me that F.H. Bradley's quip that "metaphysics is the finding of bad reasons for what we believe upon instinct,"[103] referred to by Moore twice in *Placing Blame* to criticize his opponents' arguments,[104] can just as easily be turned against him. His whole argument in defense of retributivism can, in fact, be seen as the finding of "bad reasons" for what he and, admittedly, most of us believe upon instinct. To be fair, Moore's reasons are far from bad; to the contrary, he makes a quite compelling case that our retributive urges are *justified* (which, as any lawyer knows, does not necessarily mean they are *just*), and that our feeling them makes us neither bad nor immoral persons.[105] But Moore's argument seems to go no further than that. Indeed if we tried to stretch it further – as Moore does – we would simply fall prey to the naturalistic fallacy of *post hoc ergo propter hoc*. As we have seen, Moore claims that "punishing the guilty achieves something good – namely, justice,"[106] and he therefore concludes that "there is such a thing as retributive justice, a kind of justice that is achieved by the punishment of the guilty because and only because they are guilty [and] we have good reason to set up institutions that achieve such justice."[107] If this is the case, though, it

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[101] MOORE, *supra* note 91, at 163.

[102] TONRY, *supra* note 5, at 8 and references therein (citations omitted). Some studies even claim that "Individuals with clear senses of right and wrong and a willingness to act on them ... are better community members, fostering cohesion, increasing the odds of community survival, and perpetuating the gene pool that predisposed people to be retributive." *Id*. (citations omitted).

[103] F.H. BRADLEY, APPEARANCE AND REALITY xiv (2d ed. 1897), quoted in Sanford Kadish, *Foreword: Criminal Law and the Luck of the Draw,* 84 J. CRIM. L. & CRIMINOLOGY 679, 690, 691 (1994).

[104] MOORE*, supra* note 91, at 99, 60.

[105] *See* MOORE, *supra* note 91, at 104 – 188.

[106] *Id*. at 111.

[107] *Id*. at 149. In this essay, for purposes of argument, I accept at face value Moore's – and retributivists' in general – assumption that we all start at the same level on the moral ledger when we are judged for our "just deserts." As a matter of fact, though, I don't think we do, and this is another great weakness of retributivism. As Carol Steiker observes, one cannot avoid considering "the uncontroversial empirical fact that in our contemporary society, those most likely to commit the worst crimes (capital murders) are, as a group, also most likely to have had their volitional capacities affected or impaired by societal conditions for which we collectively bear some responsibility. Thus, it cannot fairly be said that this group is deserving of our worst punishment, or, more affirmatively, it must be acknowledged that there is a retributive gap between the culpability of such offenders and the punishment inflicted upon them." Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology and the Death Penalty*, 58 STAN. L. REV. 571

follows – as I had anticipated – that the whole construction necessarily rests on the coincidence of justice with retribution: which Moore & co. affirm *plurime*, but not even once try to demonstrate (except by saying that it is just because we feel it, and we feel it because it is just: not much of an argument after all). This is the point upon which their elaboration rests; but, I claim, it is also the point because of which said elaboration fails.

While the argument might seem compelling at first sight, in truth it just begs the question; its weakness is exposed right away as soon as one asks: *What is justice*? The strength of the argument, in fact, rests on the assumption that there exists a clear definition of justice, and that retribution fits within that definition. Unfortunately, the assumption is exactly what it is – an assumption; and it is anything but settled. Now, I am aware that the question of "what is justice" is – to use a euphemism – a tough one, and I am not presuming here to say the final word on a century-long debate. Indeed, all I am aiming to do here is to raise doubts (and thus, hopefully, revive the debate) on the validity of the retributivist idea of justice – an enterprise which, I believe, can be successful without needing to *impose* my own definition of what "justice" should be. While I do not want to be entangled in the metaphysical trap of defining the ideal of perfect justice, I will of course – as indeed I must – provide some indication as to what I believe would bring us closer to justice. The fact of the matter is that most writers who occupied themselves with the task of coming up with a positive definition of "what is justice" ended up producing very abstract, elusive theorizations that very little – if anything – have to do with reality;[108] I believe, however, that a better way may be found in what expe-

(2005) at 767 – 768. *See* also Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice* 30, *in* FORGIVENESS, MERCY AND CLEMENCY (Austin Sarat & Nasser Hussain eds., 2007) (noticing that "Retributivism is limited and skewed by its inability to make nuanced judgments about freedom of action and choice in a world of great inequality; this limitation is reflected in the on-off switch of culpability that characterizes much of substantive criminal law.").

[108] An emblematic example of this attitude is John Rawls' *A Theory of Justice*. Rawls defines "justice" as the idea that is proper of fundamental institutions; justice is defined as the "fairness" of society. "Justice," Rawls claims, "is the first virtue of social institutions;" "principles of social justice" are those that "provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation." (JOHN RAWLS, A THEORY OF JUSTICE 3 – 4 (1999)). Throughout his work, Rawls maintains the idea of "justice" as "fairness" and elevates the idea of the social contract to the "highest level of abstraction." (*Id*.) The end result is that the man who participates to the social contract in what Rawls calls the "originary position" is, himself, an abstraction of a man – a hypothetical man. But what help can a hypothetical man offer in the search of a definition of what is "justice"? The answer is that the hypothetical man can offer no help. Unfortunately, Rawls has fallen in the trap of elaborating a model that has little if any correspondence with *reality*. But, as Émile Durkheim – one of the fathers of sociology – asks: "By what privilege is the philosopher to be permitted to speculate about society, without entering into commerce with the detail of social facts?" (ÉMILE DURKHEIM, SOCIOLOGY AND THE SOCIAL SCIENCES (1903) as

rience has to tell us about justice. While, in fact, it is extremely hard to come up with a positive definition – or conceptualization – of "justice," it is far easier to recognize what is *injustice* – and it is easier because each and every one of us has, at one point or another, *experienced* injustice.[109] As Alan Dershowitz puts it: "There is far more consensus about what constitutes gross injustice than about what constitutes perfect justice."[110] In other words – paraphrasing Justice Potter Stewart's famous quip – we know injustice when we see it.[111]

Maybe, then, this approach "from bottom-up,"[112] which Dershowitz uses to offer "a secular theory of the origin of rights,"[113] can serve as our heuristic criterion to try to come up with a conceptualization of justice that more closely resembles our actual experience – that most closely resembles *reality*. In fact, it is precisely the experience of injustice – of the wrongs suffered; of the losses incurred; of the suffering endured – that may allow us to frame, in a sort of *a contrario* construction, an idea of "justice" that is *anchored to reality*. In this perspective, we could say that justice is the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured.[114]

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quoted in ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 132 (2004)). In what Alan Dershowitz defines as a "blistering attack on the ivory tower philosopher," (*Id*.) Durkheim demands that "moral issues be posed and addressed in the light of systematic study of experience." (DURKHEIM, SOCIOLOGY AND SOCIAL SCIENCES as quoted in DERSHOWITZ, RIGHTS FROM WRONGS, at 133). And Durkheim is right; the price of operating otherwise is to offer speculation that is detached from reality and that, therefore, can be of no use to those who have to operate *within* reality.

[109] *See* STELLA, *supra* note 24, at 13; *see* also BARRINGTON MOORE JR., INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1978).

[110] DERSHOWITZ, *supra* note 108, at 82.

[111] As it is well known (at least among lawyers), in his concurring opinion in the Supreme Court case *Jacobellis v. Ohio* Justice Potter Stewart wrote: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." *See* Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

[112] DERSHOWITZ, *supra* note 108.

[113] *Id*.

[114] *See generally* STELLA, LA GIUSTIZIA *supra* note 24. This approach to how to conceptualize "justice" is somewhat confirmed in ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE. TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW (2000) (arguing that an idea of "justice" can be derived from the several examples of injustice that are found in the Book of Genesis), and DERSHOWITZ, RIGHTS FROM WRONGS, *supra* note 108 (arguing that looking for a transcendent – whether religious or mystical or simply metaphysical – justification for fundamental human rights would be a pointless effort; rather, the sacredness of certain rights derives from the wrongs experienced in the past and from the horrors that derived from such wrongs, thus making the protection of those rights of vital importance to avoid that the horrors of the past be repeated).

Despite this is – I believe – as close and pragmatic a definition of justice as we can ever hope for,[115] as well as a conceptualization on which most people will be able to find common ground, it is also a conceptualization that gives us little reason to be happy. If, in fact, justice is the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured, then the inescapable conclusion is that, many times, justice simply *cannot be done*. How is it possible to do justice to a woman who has been raped? How is it possible to do justice to a mother whose son has been killed? The answer to these rhetorical questions contains the bitter truth that *it is not possible*.

Fyodor Dostoevsky, the great connoisseur of the human soul, paints a perfect picture of the situation in *The Brothers Karamazov*. In what I find to be one of the most touching pieces of literature of all times, during a confrontation with his younger brother – and novice – Alyosha, Ivan Karamazov cries out:

> Oh, Alyosha, I am not blaspheming! I understand, of course, what an upheaval of the universe it will be when everything in heaven and earth blends in one hymn of praise and everything that lives and has lived cries aloud: 'Thou art just, O Lord, for Thy ways are revealed.' When the mother embraces the fiend who threw her child to the dogs, and all three cry aloud with tears, 'Thou art just, O Lord!' then, of course, the crown of knowledge will be reached and all will be made clear. But what pulls me up here is that I can't accept that harmony. And while I am on earth, I make haste to take my own measures. You see, Alyosha, perhaps it really may happen that if I live to that moment, or rise again to see it, I, too, perhaps, may cry aloud with the rest, looking at the mother embracing the child's torturer, 'Thou art just, O Lord!' but I don't want to cry aloud then. While there is still time, I hasten to protect myself, and so I renounce the higher harmony altogether. It's not worth the tears of that one tortured child who beat itself on the breast with its little fist and prayed in its stinking outhouse, with its unexpiated tears to 'dear, kind God'! It's not worth it, because those tears are unatoned for. They must be atoned for, or there can be no harmony. But how? How are you going to atone for them? Is it possible? By their being avenged? But what do I care for avenging them? What do I care for a hell for oppressors? What good can hell do, since those children have already been tortured?[116]

What, then, of "those instances in which, for one reason or another, compensation for a wrong is out of the question?"[117] What about "the tears of that one tortured child who beat itself on the breast with its little fist and prayed in its stinking outhouse, with its unexpiated tears to 'dear, kind God'!"? Those tears will remain "unatoned for".

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[115] Or, if not "ever," at least for the time being. I honestly wish it were possible to come up with a better, happier and more hopeful definition; and maybe, one day, we will. Nowadays, however, I truly believe that we are far more likely to find a greater consensus on what is wrong rather than on what is ideal.

[116] FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 257 (Macmillan, 1922).

[117] HOLMES, THE COMMON LAW, *supra* note 55, at 40.

In those instances, where it is impossible to repair the wrongs, to give restitution for the losses and to give compensation for the suffering – and this, alas, seems to be the case for most of the instances that require the intervention of the criminal law – all that is left is to inflict a punishment "upon the wrong-doer, of a sort which does not restore the injured party to his former situation ... *for the very purpose of causing pain*. And so far as this punishment takes the place of compensation ... one of its objects is to *gratify the desire for vengeance*."[118] Even by trying to fit retribution within the idea of "justice," the conclusion is that, with respect to the core of criminal law, retribution – criminal punishment for the evil done, without transcendent ends – does not, and indeed, *cannot*! Achieve justice. In all those instances where there can be no undoing of the harm done, the conclusion is, once again, that retribution in its essence is closer to vengeance than it will ever be to justice.[119] We are right back where we were after dealing with Kant and Hegel; retributive punishment is, as Sir James Fitzjames Stephen wrote, the "gratif[ication of] the public desire for vengeance."[120] What's more, a consciousness of the close bond that ties retribution to vengeance is clear in the writings of at least some retributivists. To be sure, there are arguments that support a distinction between retribution and revenge. Samuel Pillsbury, for example, while acknowledging the in-

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[118] *Id*.

[119] In the excerpt from Dostoevsky quoted above, Ivan, after asking "what good can hell do [for the oppressors] since t[he] children have already been tortured," goes on to say that "too high a price is asked for harmony; it's beyond our means to pay so much to enter on it. And so I hasten to give back my entrance ticket, and if I am an honest man I am bound to give it back as soon as possible. And that I am doing. It's not God that I don't accept, Alyosha, only I most respectfully return him the ticket." (DOSTOEVSKY, *supra* note 116, at 258). While I am not ready to follow Ivan's decision to just "give up" and "return the ticket" to God (which by the way, as Michele Taruffo observes in the introduction to FEDERICO STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24 presupposes that there is a somewhere else to go to – but there is not, in reality, such a place) I agree with the bottom message – that justice, in front of the great evils that befall humanity (including those instances of evil that criminal law is called upon to repress and punish), cannot be attained. The moral choice, though, as Federico Stella indicates at the end of LA GIUSTIZIA E LE INGIUSTIZIE, is not to "return the ticket," but rather to "chase" justice by working to build a society that is less unjust. The first step toward the building of a society that is less unjust is, in my opinion, recognizing that evil – with what Hannah Arendt defined its "banality" – is the supreme source of all injustices that afflict mankind. And while this is not the place to engage in a meditation on "evil," I think we should still pause for a second to reflect on the fact that that "radical evil" is in all of us – as Kant himself was well aware: "*In the misfortunes of our best friends there is something that does not altogether displease us,"* he observes in RELIGION WITHIN THE LIMITS OF REASON ALONE (Theodore M. Greene trans., Digireads.com Publishing, 2011) (1793), of which book one is indeed dedicated to "the radical evil in human nature" (which renders his "vindictive folly" even the more puzzling). Acknowledging the presence of evil inside us – what Jung calls the "darkness" that "fills us" – is the first, necessary step to defeat it.

[120] JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, Vol. 2, 83 (Macmillan, 1883), quoted in Hostettler, *supra* note 13, at 70.

separability of anger and retribution,[121] claims that retribution "involves a judgment of wrong to the society according to publicly agreed principles of morality"[122] and it "seeks another's suffering, not to satisfy a personal need, but for a principle of good-enforcing respect for persons;"[123] revenge, on the other hand, "arises from a judgment of harm to self-made according to personal principles ... . The revenge-seeker ... seeks personal gain in the form of restored dignity or power from another's suffering."[124]

Another notable writer who argued for a distinction between retribution and revenge is Robert Nozick. Nozick individuates five criteria to distinguish vengeance from retribution: first, while retribution is imposed for a wrong, revenge can be carried out also for any other sort of injury; second, retribution has intrinsic limits of proportionality, whereas revenge knows no such limits; third, revenge is "personal," whereas retribution is carried out impersonally and therefore – one assumes – impartially. Moreover, revenge involves "pleasure in the suffering of another," whereas retribution involves "pleasure at justice being done." Finally, retribution, unlike revenge (which is focused on the harm suffered by the revenge-seeker), is committed to a level of generality, i.e. to "general principles" mandating equal punishment for similar cases.[125] The line between retribution and revenge, however, is not as clear-cut as Nozick makes it out to be. For starters, Nozick himself has to admit that "there can be mixed cases" and that "people can be moved by mixed motives."[126] As for the argument that revenge (and not retribution) requires a "personal tie"[127] between the avenger and the subject of the revenge, it seems to me that it all rests on the incorrect assumption that if A kills or rapes or maims B, it is only a matter between A and B. A plausible argument, however, can be made – and indeed it is an argument that is at the foundations of criminal law as a *public* institution – that A wronging B wrongs not only B, but the community as a whole. In John Donne's words, "No man is an island, entire of itself. ... Any one's death diminishes me, for I am involved in mankind."[128] A crime, then, always harms at least two categories of subjects: the victim of the crime itself, and the community at large.

Another apparently strong argument that is common to Pillsbury,[129] Nozick[130] and Hegel[131] rests on the public-private distinction. As Primoratz

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[121] Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment,* 74 CORNELL L. REV. 655, 657, 671 –72 (1989).
[122] *Id*. at 690.
[123] *Id*.
[124] *Id*.
[125] *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366 –68 (1981).
[126] *Id*. at 368.
[127] *Id*. at 367.
[128] John Donne, *Meditation XVII in* DEVOTIONS UPON EMERGENT OCCASIONS (1624).
[129] *See supra* notes 121 –24 and accompanying text.
[130] *See supra* note 125 and accompanying text.
[131] Hegel, *supra* note 52, at 100 – 03.

puts it, "retributivism has two forms: revenge and punishment."[132] Primoratz explains that revenge has two defects: first, it tends not to be objective and therefore not proportionate; second, it is private, and not institutionalized.[133] Once the State comes into play and institutionalizes punishment, retribution is "freed from both limitations that plague revenge."[134] The public-private distinction, however, seems to me to be mostly about *form*; it is the *collective* exaction of revenge versus the *individual* exaction of revenge. True, *public vengeance* will most likely be (more) constrained by proportionality, but other than that, given its formal nature, the distinction between revenge and justice based on the private or public nature of the execution is *a distinction without a difference*. This seems clear to Jeffrie Murphy, who acknowledges that "the desire to hurt another ... is ... sometimes ... motivated by feelings that are at least partly *retributive* in nature."[135] Later in the chapter, when Murphy sets forth three reasons why in his opinion "persons may sometimes fail to act out their retributive hatreds," two out of the three reasons involve "getting even" – an expression that recalls vengeance if there ever was one.[136] Murphy's conclusion is unequivocal: "retributive hatred" is a "desire for revenge;"[137] giving people their just deserts means "in short, to 'get even' through revenge."[138] Defining revenge as "any injury inflicted on a wrongdoer that satisfies the retributive hatred felt by that wrongdoer's victim,"[139] Murphy finally admits that "it will ultimately be impossible to draw a sharp distinction between the desire for retributive justice and the desire for revenge."[140] Once again, retributivists failed in their efforts to separate justice from revenge; indeed at least one of them openly admits that the two are *de facto* inseparable. So, while retribution exacted within the constraints of the legal system is clearly – and by far – preferable to individual, private and unbound revenge (the one which characterizes blood feuds, honor killings, and the like) it is still, in its substance, closer to revenge than it is to justice. And insofar as the argument for a difference between the two rests on formalist grounds, I would say that accepting that argument would mean yielding to the temptation of putting one's "last trust in a sure nothing, rather than in an uncertain something:"[141] it is probably easier to accept an empty distinc-

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[132] Primoratz, *supra* note 80, at 70.
[133] *Id*. at 70 – 71.
[134] *Id*. at 71.
[135] JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 89 (1988). The chapter from which the quote is taken is written by Murphy.
[136] *See id*., at 104 –05.
[137] Jeffrie G. Murphy, *Getting Even: The Role of the Victim, in* CRIME, CULPABILITY, AND REMEDY 209 (E. Paul, F. Miller, Jr., & J. Paul eds., 1990).
[138] *Id*.
[139] *Id*. at 218.
[140] *Id*. at 224. Murphy qualifies the conclusion as a "consequence of [his] view," but I think the conclusion has a broad, general value.
[141] FRIEDRICH WILHELM NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 14 – 15 (Helen Zimmern trans., MacMillan 1907) (1886).

tion than to recognize that one of the concepts to which we are most attached – that of retribution and its relationship to justice – may not be exactly as we thought it was.

I realize that – the foregoing arguments notwithstanding – I will not be able to persuade everyone that retribution equals revenge; especially I may not succeed in convincing someone who holds *deep-seated intuitions* to the contrary. Moreover, I will most certainly not manage to move someone who believes vengeance in and of itself to be a good thing – but, with regard to this latter point, I am not even trying, as it would be, I believe, a futile effort. Besides, I am not claiming here that public vengeance is never justified; even less so am I claiming that *we as people* are not justified in feeling revengeful impulses. Michael Moore has made quite the persuasive case to the contrary (although, as I have shown, that's *all* he proves);[142] and maybe Nietzsche was right when he quipped, "A little revenge is more human than no revenge."[143] Moreover, given the fact that our retributivist instincts run so deep and may even play a part in our evolution,[144] we may not – probably, even, should not – completely ban retribution from the realm of criminal punishment, if we want the criminal law and the criminal justice system to be respected and supported by the very society it was created to protect and serve.[145] But this shouldn't mean that revenge should be the *guide* of our actions, nor the *principle* that *shapes* our system of criminal justice. As Dolinko puts it, "punishing criminals is a dirty business but the lesser of two evils and thus a sad necessity, not a noble and uplifting enterprise that attests to the richness and depth of our moral character."[146] Therefore, even if I have only succeeded in raising some "reasonable doubts" about the equation justice = retribution, I shall be satisfied. After all, none of the arguments set forth by the retributivist camp is able to address satisfactorily – if at all – Sanford Kadish's basic questions on retributivism: what makes punishing offenders "a good thing to do in and of itself?"[147] After observing that "punishment consists of intentionally afflicting a person with suffering and deprivation or similar evils,"[148] Kadish presses on:

> Why is it good to create more suffering in the world simply because the criminal has done so? How does the unlikely proposition that it is right to

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[142] *See supra* notes 101 – 105 and accompanying text.

[143] FRIEDRICH WILHELM NIETZSCHE, *Thus Spoke Zarathustra*, *in* THE PORTABLE NIETZSCHE 180 (Walter Kaufmann ed., NEW York: Viking, 1954) (1883 – 1885). As Kadish candidly admits: "I freely confess that, like most people, I have a feeling in my bones that it is right to punish wrongdoers even where no good comes of it. Yet I can find no persuasive justification for my feelings; that they are widely shared tells me that it is human, not that it is right." Kadish, *supra* note 103, at 699.

[144] *See supra* notes 100 –07 and accompanying text.

[145] I owe this point to Cliff Fishman.

[146] Dolinko, *supra* note 8, at 1656.

[147] Kadish, *supra* note 103, at 699 (1994).

[148] *Id*.

> hurt a person apart from any good coming of it connect with other moral ideas in our culture that are worth preserving? Is it not a strange candidate for a good worthy of our devotion? Doesn't it resemble too closely for comfort the despised practice of taking pleasure in another's pain?[149]

Even a reader who were to completely reject my proposed conceptualization of justice and hence one of the pillars of my critique of retributivism would have to acknowledge that the failure to offer a plausible answer to any of the aforementioned questions renders retributivism "prima facie morally suspect."[150] But if something is *prima facie* morally suspect, then *a fortiori* – indeed, I daresay, by definition – it is unlikely to equal justice, however justice be defined. If people mean it when they say, "I want *justice*, not *revenge*," then retribution cannot offer them what they are looking for.

III. LOOKING FORWARD: DETERRENCE, REHABILITATION, INCAPACITATION

If, for the moment, we leave the backward-looking rationale for criminal punishment to one side, we can turn our attention to the forward-looking ones: deterrence, rehabilitation, and incapacitation. Are they going to provide us with a stronger, more compelling justification for the infliction of criminal punishment?

The deterrence rationale goes back to at least around 2400 years ago.[151] Establishing what can be called the "classical" theory of deterrence,[152] Plato writes:

> [N]o one punishes the evil-doer under the notion, or for the reason, that he has done wrong, – only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention.[153]

Plato's theory remains virtually unchanged for the next 2000 years.[154] Thus Beccaria in 1764 writes:

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[149] *Id*.
[150] *Id*.
[151] *See* Giancarlo De Vero, *Prevenzione Generale e Condanna dell'Innocente*, 990 RIV. IT. DIR. PROC. PEN. 1003 –04, (2005).
[152] As opposed to the "modern" theory of deterrence, see *infra*.
[153] PLATO, PROTAGORAS 43 (Benjamin Jowett trans., Serenity Publishers, 2009). For a more complete view of Plato's complex theories of punishment, which include, besides deterrence, also elements of rehabilitation, incapacitation and retribution, *see* Pauley, *supra* note 30, at 101-06.
[154] *See* De Vero, *supra* note 151, at 1003-04.

> It is evident that the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already committed ... . The purpose of punishment ... is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same.[155]

A somewhat different approach was advanced in 1799, with the publication of Anselm Von Feuerbach's *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*.[156] Feuerbach, the father of the "modern" conception of deterrence, introduces a distinction – which is not present in the "classical" conception – between the *threat* of punishment (= the penal law) and the *execution* of punishment.[157] Only the threat of punishment, by means of the proclamation of penal laws, is set forth *ne peccetur*; the infliction of criminal punishment is *quia peccatum est*. According to Feuerbach, criminal law can only have a function of *general* deterrence; this function is accomplished by establishing a law that provides a punishment for a crime. It is the establishment of the law *per se* that serves the purpose of deterrence.[158]

The novelty of Feuerbach's approach is that, anchoring the deterrence effect *to the legal provision* (as opposed to the infliction of punishment), it takes the foundations of their arguments away from those who refer to general deterrence as the justification for exemplary punishments.[159] What the "classical" and the "modern" theories have in common, however, is that the effectiveness of general deterrence – or rather, its *scope* – has never been *proven*. Once again, this is something of which Oliver Wendell Holmes was aware well over a century ago:

> [W]hat have we better than a *blind guess* to show that the criminal law in its present form does more good than harm? ... . Does punishment deter? Do we deal with criminals on proper principles?[160]

A satisfactory answer to Holmes' question has yet to be given; as Stephen Schulhofer has observed, "whether punishment deters certain kinds of crimes at all, whether more severe penalties produce greater deterrence,

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[155] Beccaria, *supra* note 25.

[156] PAUL JOHAN ANSELM RITTER VON FEUERBACH, REVISION DER GRUNDSÄTZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS (Erfurt, 1799).

[157] Feuerbach, *supra* note 155; for the reflections hereinafter *see generally* De Vero, *supra* note 151.

[158] *Id*. Hegel rejected and vehemently attacked Feuerbach's position: "Feuerbach – Hegel writes – in his theory of punishment considers punishment as a menace ... But is it right to make threats? A threat assumes that a man is not free, and will compel him by vividly representing a possible evil. Right and justice, however, must have their seat in freedom and in the will, and not in the restriction implied in the menace." HEGEL, *supra* note 52, at 96. For a summary of Hegel's attack and a defense of Feuerbach's position *see* also De Vero, *supra* note 151, at 1012 – 1015, and the texts thereby referenced.

[159] STELLA, *supra* note 24, at 187.

[160] Holmes, The Path of the Law, *supra* note 64, at 470 (emphasis added).

even these basic questions cannot be answered with confidence."[161] To be sure, some studies have shown that there is *at least some* general deterrent effect that follows from incarceration, although it is by no means a straight line;[162] for specific deterrence, at least one study claims that incarceration is responsible for a 10-25% reduction in crime rates,[163] although this small reduction comes at a very high cost for taxpayers[164] and although "the impact of incarceration on crime is inconsistent from one study to the next."[165]

The next rationale for punishment in our analysis is rehabilitation. The main idea of rehabilitation is to "recuperate" the criminal, so that he can be sent back into the community no more as a threat, but rather as a productive member of society.

According to Michael Moore, rehabilitation "is perhaps the most complex of the theories of punishment, because it involves two quite different ideals of rehabilitation."[166] Moore operates a distinction between rehabilitation that aims to make sure that the criminal no longer poses a threat to society, thus making the community "better off as a whole," and rehabilitation that focuses on the criminal and aims at allowing him to return to society and live a "flourishing and successful" life.[167] The latter kind is, according to Moore, "paternalistic in character" and "has no proper part to play in any theory of punishment."[168] Moore goes on to explain why such a theory should play no role in the justification for punishment:

> First, such a paternalistic reform theory allocates scarce societal resources away from other, more deserving groups ... . Second, in any political theory according high value to liberty, paternalistic justifications are them-

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[161] Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) at 1517. As for the specific deterrent effect, it is reasonable to assume that *at least some* offenders will not offend again, wishing not to go back to prison. For many convicted offenders – maybe even for most – however, prison ends up being a "school of specialization in crime," and the prison door turns out to be a revolving door. Thus, current prison practice casts serious doubts on the personal deterrence effect of criminal punishment.

[162] *See*, *e.g.*, Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, in Sentencing Matters, April 2011, available at http://www.abc.net.au/mediawatch/transcripts/1128_sac.pdf.

[163] Alfred Blumstein & James Wilson, *The Impact of Incarceration on Crime: Two National Experts Weigh In*, The PEW Center on the States, (April 5 2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/the%20impact%20of%20incarceration%20on%20crime.pdf (last visited Jan. 8, 2013).

[164] Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, Jan. 2007, at 2, available at http://www.vera.org/download?file=407/veraincarc_vFW2.pdf (last visited Jan. 8, 2013).

[165] *Id*. at 3.

[166] MICHAEL S. MOORE, LAW AND PSYCHIATRY 234 (1984), excerpt quoted from Kadish et al., *supra* note 103, at 98. *See* also Moore, Placing Blame, *supra* note 91, at 84 – 87.

[167] *Id*.

[168] *Id*.

> selves to be regarded with suspicion ... . Third, such recasting of punishment in terms of "treatment" for the good of the criminal makes possible a kind of moral blindness that is dangerous in itself.[169]

While I agree with Moore on the two ideals of rehabilitation, I cannot share his conclusion that the second kind is "paternalistic" and thus cannot play any "proper part in any theory of punishment."[170] On the contrary, the two ideals represent two vital sides of the same coin. On the one hand, in fact, we do want punishment to foster the good of society by rendering offenders "harmless" so that, when (if?) they re-enter society, society will be safe.[171] On the other hand, mere utility for society cannot be the only reason to attempt rehabilitation; an argument can be made that *morally*, rehabilitation is *required* to be undertaken *in the best interest of the offender* to be at least given a chance to become a positive, productive member of the community. Contrary to what Moore claims, this is not a "paternalistic" attitude; rather, it is the application of Kant's own golden maxim that "one man ought never to be dealt with merely as a means subservient to the purpose of another."[172] Like I argued *supra*, it is *precisely* by offering the criminal a *chance* to rehabilitate himself, that he is treated not only as a means, but also as an end; or, in Hegel's words, that he is recognized as a "rational being." [173]

This said, the concept of rehabilitation does have two structural problems: first, it cannot be forced upon the subject that needs to be rehabilitated (at least not, I believe, in a liberal democracy). It is a process that must be undertaken voluntarily; once the criminal accepts and wants to be rehabilitated, enormous success can be obtained[174] – but first, the criminal *must want* to rehabilitate himself. Second – and equally importantly – for rehabilitation to work, *it must be taken seriously*. It is precisely this second point which is systematically lacking, and which gives rise to the false notion that rehabilitation 'just doesn't work.' But the truth of the matter is that, pursuant to current prison conditions, rehabilitation simply is not an option: as a Human Rights Watch report on prisons contends, "prisons do

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[169] *Id*.

[170] For a critique of this argument see also Dolinko, *supra* note 8, at 1642 –52.

[171] A goal, this one, that doesn't seem to be served particularly well by the current prison system: see, *e.g.*, NILS CHRISTIE, CRIME CONTROL AS INDUSTRY. TOWARDS GULAGS, WESTERN STYLE (2000); LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON (2004); Joan Ryan, *Prisoner's Isolation Leads to Desperation. Safer Cells Means More Dangerous Streets*, S.F. CHRONICLE, Jan. 27, 2004, at A 13.

[172] Kant, *supra* at 195. *See also supra* note 66 and accompanying text.

[173] *See supra* note 57 and accompanying text. For similar arguments, *see also* Dolinko, *supra* note 8.

[174] On the issue of rehabilitation, its challenges and its successes see, for all, KIRAN BEDI, IT'S ALWAYS POSSIBLE: ONE WOMAN'S TRANSFORMATION OF INDIA'S PRISON SYSTEM (2006), where the author recounts her efforts to reform the prison of Tihar – one of Asia's largest prisons, counting over 10,000 inmates – and of the enormous successes attained through rehabilitative programs, including an abatement of recidivism.

more than deprive their inmates of freedom. The great majority ... are confined in conditions of filth and corruption, without adequate food or medical care, with little or nothing to do, and in circumstances in which violence – from other inmates, their keepers or both – is a constant threat."[175] In the words of Arne Nilsen, governor of Norway's Bastoy prison, in a "conventional prison where prisoners are given no responsibility, locked up, fed and treated like animals [they] eventually end up behaving like animals."[176] This seems indeed to be pursuant to the position advocated, among others, by former Massachusetts Governor William Weld, who "told a meeting of attorneys general that prison should be like 'Dante's inner circles of Hell'."[177]

Now compare this depiction with, for example, the model of Norway, whose prison system, according to Halden prison governor Are Hoidal, promotes a "focus on human rights and respect."[178] Norway's prison system aims to treat inmates as human beings who are of course being punished – they committed a wrong and thus their liberty is taken away from them – but whose dignity as human beings remains unspoiled.[179] During their sentence, inmates are taught a profession – crafting, cooking, plumbing, and so on and so forth – and, in the case of Bastoy prison, inmates spend their time working in various capacities so as to maintain the green and self-sustaining status of the institution ("The prison is self-sustaining and as green as possible in terms of recycling, solar panels and using horses instead of cars," says Nilsen).[180] Of course this approach will encounter a staunch opposition – infused with retributivism – from those who repel the idea of an offender having done something monstrous and being sent to a place that resembles a vacation resort more than a prison. To those who advance such an objection, however, my answer is twofold: first, as an anonymous contributor to *The Economist* has observed, it is true that such an approach might "offend our sense of justice."[181] This is, however, due

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[175] THE HUMAN RIGHTS WATCH GLOBAL REPORT ON PRISONS xv, New York: Human Rights Watch, 1993, available at http://dmitrijus.home.mruni.eu/wp-content/uploads/2009/12/Human-Rights-Watch-Global-Report-on-Prisons.pdf (last visited Jan. 9, 2013).

[176] Piers Hernu, *Norway's Controversial 'Cushy Prison' Experiment – Could It Catch On in the UK?*, DAILY MAIL, July 25, 2011, available at http://www.dailymail.co.uk/home/moslive/article-1384308/Norways-controversial-cushy-prison-experiment--catch-UK.html (last visited Jan. 9, 2013).

[177] PHYLLIS KORNFELD, CELLBLOCK VISIONS: PRISON ART IN AMERICA 23 (1997).

[178] William Lee Adams, *Norway Builds the World's Most Humane Prison*, TIME MAGAZINE, May 10, 2010, available at http://www.time.com/time/magazine/article/0,9171,1986002,00.html (last visited Jan. 9, 2013).

[179] *See* Hernu, *supra* note 176; Adams, *supra* note 178.

[180] *Id*.

[181] W.W., *Norwegian v. American Justice: Plush and Unusual Punishment*, THE ECONOMIST, July 28, 2011, available at

to our own "instinct for retribution:" "The idea of balancing some cosmic scale, of restoring the moral order to equilibrium, is deeply appealing. But there is no cosmic scale to balance. The moral order is not some sort of pervasive ethereal substance that threatens to undo us if a monstrous offence is not met with equally ferocious punishment."[182] If we approach the subject rationally – the anonymous contributor continues – we will see that the "main imperative" is to guarantee society's safety and to punish wrongdoing to the extent necessary to deter the commission of similar crimes in the future.[183] And with respect to this latter point – and this is the second part of my answer – a comparison of the recidivism rates of the United States, Europe, Scandinavia in general and Norway in particular pretty much speaks for itself; while the recidivism rate in the United States and Europe is between 50% and 75%, the recidivism rate in Denmark, Sweden and Finland is only 30%.[184] The recidivism rate in Norway is 20%, with Bastoy prison having a recidivism rate as low as 16% – the lowest in Europe.[185] This is indeed compelling evidence that rehabilitation can succeed and do well – if taken seriously. And while of course there are strong differences between Norway and the United States – just think, for example, that Norway's prison roll "lists a mere 3,300, or 69 per 100,000 people, compared with 2.3 million in the U.S., or 753 per 100,000"[186] – that may make the Norwegian model unfeasible in the U.S., the fact that such model exists and, even more, that it seems to work should be a cause for deep reflection on and reconsideration of the policies and principles – pure retributivism above all – that inform American criminal justice.

On the last rationale – incapacitation – I don't think there is much to be said. Pure and simple, incapacitation "works directly to build walls between the allegedly dangerous and the endangered populations."[187] This can happen essentially[188] in either of two ways: the allegedly dangerous individual can be locked up preemptively (such is the case, for example, of civil confinement for the mentally ill and dangerous) or he can be locked up after a crime has been committed and for as long as the dangerousness persists. A recent example of this latter scenario is that of Anders Breivik who, after killing 77 people and being denied a defense of insanity, was

http://www.economist.com/blogs/democracyinamerica/2011/07/norwegian-v-american-justice.

[182] *Id*.

[183] *Id*.

[184] Hernu, *supra* note 176.

[185] *Id*.

[186] Adams, *supra* note 178.

[187] Alan M. Dershowitz, *Background Paper*, in FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 73 (1976).

[188] For reasons of space, and in order not to stray too far away from the core topic of this paper, I am offering a somewhat simplistic description of preventive confinement. For a detailed, in depth analysis of the concept and forms of preventive confinement *see* Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973).

sentenced by an Oslo court to a prison term of 21 years – the maximum penalty under Norwegian law – to which judges will be able to add a succession of 5-year extensions for as long as Breivik will be considered dangerous.[189]

What the rationales described above have in common is that – as I have already pointed out – they are all forward-looking; punishment is imposed so that those who are punished (as well as the general population) will be deterred *from committing future crimes*; so that they will be rehabilitated and thus *will not commit crimes in the future* (upon release); so that they will be *prevented from offending again*. The question to be asked now, then, is: what is wrong with adopting a purely forward-looking approach?

The answer is that what the approaches outlined above also have in common is their utilitarian character; their ultimate goal is what is best for society (in the case of rehabilitation by means of what, I believe, also happens to be best for the offender). Without any elements of desert – without any looking backward – the imposition of punishment is reduced to a "simplistic Benthamite calculus."[190] But what are the consequences of a purely Benthamite calculus applied to the criminal law?

To respond to this question, one need not go very far, nor be very imaginative; the answer can be found, to begin with, in the writings of Cesare Lombroso. Lombroso – the founder of the Positive School of criminology – pushed Beccaria's deterrence theories beyond their limit and argued that rather than repressing crime, the focus should be on trying to prevent it.[191] According to Lombroso, the way to crime prevention was twofold; on the one hand, the broad, general causes of certain crimes had to be studied and addressed; on the other hand, a narrow focus on the individual criminal (or class of criminals) was required.[192] Observing with Cicero that *a natura hominis discenda est natura iuris*,[193] Lombroso concludes that some criminals "ought never to be liberated."[194] For Lombroso, "the preventive imprisonment of the ... criminal [is analogous] to the confinement of the insane;"[195] both are justified by "society's right to defend itself."[196] "Crime and insanity" Lombroso writes – "are both misfortunes; let us treat them,

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[189] Mark Lewis and Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 24, 2012, available at http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html?pagewanted=all&_r=1& (last visited 12/7/2012).

[190] Dershowitz, Background Paper, *supra* note 187, at 73.

[191] CESARE LOMBROSO, CRIME, ITS CAUSES, AND REMEDIES 245 (Henry P. Horton trans., Little-Brown & Co., 1911)

[192] *See* Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Crime*, 123 U. PA. L. REV. 297 (1974 – 1975) at 308 –09.

[193] Lombroso, *supra* note 191, at 386.

[194] *Id*. at 423. *See also* Dershowitz, Indeterminate Confinement, *supra* note 192, at 309.

[195] *Id.* at 309.

[196] *Id*. and references therein.

then, without rancor, but defend ourselves from their blows."[197] Utility to society is key to the Lombrosian theory: "formerly, punishment, which was made to correspond to the crime and like it had an atavistic origin, did not attempt to conceal the fact that it was either an equivalent or an act of vengeance;"[198] those, however, were "the theories of ... Kant ... and Hegel, [nothing more than] the ancient ideas of vengeance and the *lex talionis* disguised in modern dress."[199] According to Lombroso, there is only one acceptable (and absolute) rationale to justify criminal punishment: "[i]t is just because the principle of punishment is based upon the necessity of defense that it is really not open to objection."[200]

One can very well see how anchoring the justification of criminal punishment to the defense of society (a defense, moreover, which shows the colors of necessity, and, as the saying goes, necessity knows no law) can open the door to limitless preventive punishment exacted in the name of protecting society. Such was the case, for instance, of the internment of Japanese-Americans during World War II – "the most dramatic example of pure preventive confinement [in United States history]."[201] And while this may very well be the most extreme example to date, if we adopt a purely forward-looking approach (featuring any of the three rationales outlined in this section or any combination thereof) whose only consideration is the utility to society, we might be tempted not only to advance the preventive confinement and detention of those subjects considered to be socially dangerous or likely to (or having the potential to) commit (future) crimes, but also to confine the socially undesirable, to dilute standards of proof, to increase prison sentences, to force rehabilitation upon inmates, to – why not? – punish bad thoughts and bad character; after all, we would only have to invoke the necessity of defending society. This is precisely what happened in the Soviet Union, where criminal law was tasked with "the protection of the Soviet order, socialist property, the character and rights of citizens and the entire social law and order"[202] and where the purpose of punishment was "to reform and re- educate the convicted offender in the spirit of honest attitude towards work [and] verbatim adherence to laws and respect of the rules of the socialist way of life."[203] But is this the appropriate role of the criminal law in a liberal democracy? I believe that it is not. I believe that in a liberal democracy, a bedrock principle must be that the criminal law should be used only as the *extrema ratio*. By this, I mean that the criminal sanction should be invoked only as an option of the last

[197] Lombroso, *supra* note 94, at 421, quoted in Dershowitz, Indeterminate Confinement, *supra* note 192, at 310.
[198] Lombroso, *supra* note 94, at 381 (citations omitted).
[199] *Id*. at 383.
[200] *Id*. at 381.
[201] Dershowitz, Preventive Confinement, *supra* note 192, at 1285.
[202] Jaan Sootak, *Theories of Punishment and Reform of Criminal Law*, 68 JURIDICA INTERNATIONAL 72 (2000).
[203] *Id*.

resort – when certain interests cannot be effectively protected except through resorting to the criminal sanction, *only then* should we turn to the criminal law.[204] I believe this should be so even if we reject Cesare Beccaria's construction of the social contract, his idea that men only agreed to give up the smallest possible portion of their liberty, and his illuminist utilitarianism altogether.[205] There are, in fact, compelling reasons that demand that criminal punishment be used only as a last resort. Criminal law must be the option of the last resort because "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[206] A criminal proceeding impairs – and an eventual conviction definitely takes away – "the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place."[207] The criminal law's devastating effects are not limited to the life of the accused; "fine and imprisonment ... fall ... heavily on a criminal's wife and children."[208] Even before the verdict, the mere existence of a criminal proceeding against someone taints his or her good name.[209] This is even more so in a media- and internet-invaded society, where often the outcomes of judicial proceedings are "anticipated" by the verdict of public opinion – a situation portrayed in an effective (if somewhat caricatural) way by a cartoon on The New Yorker where a judge, talking to the defendant, says: "Since you have already been convicted by the media, I imagine we can wrap this up pretty quickly."[210]

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[204] Something akin to what Stephen Schulhofer calls the principle of frugality. *See* Schulhofer, *supra* note 161, at 1565, and references therein.
[205] *See supra* notes 16 – 30 and accompanying text.
[206] *In re Winship*, 397 U.S. 358; 90 S. Ct. 1068 (1970) (Brennan, J., writing for the Court).
[207] Albright v. Oliver, 510 U.S. 266 (1994) (Stevens, J., dissenting).
[208] Holmes, The Path of the Law, *supra* note 64, at 470.
[209] A long time ago Shakespeare taught us the importance of a person's good name: "Good name in man and woman, dear my lord,/Is the immediate jewel of their souls:/Who steals my purse steals trash; 'tis something, nothing;/'Twas mine, 'tis his, and has been slave to thousands:/But he that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed." WILLIAM SHAKESPEARE, *Othello*, III, 3 – 160. While it is probably true that – as Alan Dershowitz noted during a conversation – most people who quote this famous statement from the *Othello* fail to stress the irony of it – after all, these verses are pronounced by the villain Iago, whose conduct is in exact antithesis with the message carried by his words. I also believe that a message isn't less true just because the speaker does not believe in what he is saying or, as is indeed the case here, believes in what he is saying, but fails to act accordingly. In other words, the fact that Iago is the villain doesn't make his words less valuable in their truth, which transcends the contingency of why they were said. After all, Iago's ultimate evil plan was the ruin of Othello – a ruin that comprised taking away his good name and reputation.
[210] Mischa Richter, *The New Yorker Collection*, 08/05/1991, available at www.cartoonbank.com.

Moreover, criminal punishment is a knife that cuts both ways; much like Oliver Wendell Holmes, we still don't know whether it "does more good than harm." Indeed, most times, prison doors end up being, in fact, revolving doors.[211] What Oliver Goldsmith observed in 1752 is still true today: prisons "enclose wretches for the commission of one crime and return them, if returned alive, fitted for the perpetration of one thousand."[212] It is exactly the degrading of prisoners and the plunging them further into crime denounced by Justice Holmes.[213] In short, protection through the criminal law comes at a very high price.

These are not just words on paper. Anyone who practices – or has practiced – criminal law knows that. True, as Alan Dershowitz always says, we live in a country where most criminal defendants are, in fact, guilty; and thank God for that! Would anyone really want to live in a country, Dershowitz asks, where most of the defendants tried by the state are, in fact, innocent? The answer is – and it should be – no![214] But *not all* criminal defendants are guilty. For example, I once worked on the appeal for a heart-surgeon who had been convicted of performing unnecessary heart operations on patients in order to inflate the total volume of surgeries carried out at his hospital and hence obtain, by fraud, a higher level of compensation (his contractual agreement with the hospital provided for a bonus every x number of surgeries past a threshold level per year). The conviction was obtained on the basis of flimsy medical evidence, which ineptly characterized the surgeries as "unnecessary" (and which the previous counsel failed to challenge during trial), and a witness testimony. On appeal, my colleagues and I were able to contest the validity of the medical evidence, thereby dismantling the prosecution's theory, and to prove that the witness was unreliable; hence the conviction was reversed. What we couldn't do, however, was to give back to the surgeon the four years that elapsed between the start of the proceedings and the overturning of the conviction. During those four years, his license to practice medicine, as well as his teaching privileges, were revoked; he was left jobless and branded a criminal in the eyes of the community. A society that values individual liberty, self-determination, and freedom – and American society is, by all means, a society that values those principles – cannot ignore the devastating consequences of criminal law; thus it *needs* to embrace the bedrock principle of criminal law as the *extrema ratio*. Under-criminalization, ra-

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[211] *See generally* Bedi, *supra* note 170.

[212] OLIVER GOLDSMITH, THE VICAR OF WAKEFIELD 173 (The Folio Society, 1971), quoted in Hostettler, *supra* note 13, at 61.

[213] *See supra* note 63 and accompanying text. On the general issue of the conditions of prison inmates, besides the works referenced *supra* notes 175 & 177, *see* also ZIGMUT BAUMAN, WASTED LIVES. MODERNITY AND ITS OUTCASTS (2004); LOÏC WACQUANT, LES PRISONS DE LA MISÈRE (1999); ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICAN PRISONS (2004).

[214] *See*, *e.g.*, ALAN M. DERSHOWITZ, TAKING THE STAND: AN AUTOBIOGRAPHY (Random House, *forthcoming*, 2013).

ther than over-criminalization, should be the preferred way. The logical consequences of a purely forward-looking approach, however, point toward the latter. What then?

IV. CONCLUSIONS (PART I): CHECKS AND BALANCES

In the pages above I have offered a critical analysis of the justifications traditionally advanced in support of criminal punishment. If I have been effective, I will also have advanced convincing arguments as to why relying on a purely backward-looking or forward-looking approach would be a bad idea. And this brings us where we started: the backward-looking approach and the forward-looking approach should serve as checks and balances upon one another. While we have seen that retributivism is at least morally suspect and thus inadequate by itself to provide a moral justification for criminal punishment,[215] in fact, we have also seen that a purely forward-looking approach taken to its logical conclusions would violate the bedrock principle of the *extrema ratio*. Moreover, punishment detached from any backward-looking consideration whatsoever would not – could not! – resonate with the very people that the criminal law is crafted to protect and serve.[216] For the law in general – and the criminal law in particular – to maintain its moral force, it cannot stray too afar from what the sentiments of "we, the people!" are. As Robinson and Darley have argued, "when the just desert principle is violated, we ought to understand now as instances of injustice imposed on us all, since each such instance erodes the criminal law's moral credibility and, thus, its power to protect us all."[217] Thus, the notion of moral desert – which, as we have seen, lies at the core of retributivism – should serve as the *normative check* upon a purely utilitarian, forward-looking approach: no punishment without desert. I don't mean to suggest, of course, that pre-emptive measures are never justified. Especially in contemporary society, pre-emption is very alluring; to borrow some jargon from the law of torts, we may be tempted to "tax risk" so that hopefully we won't have to "tax harm."[218] This, however, is a very tricky enterprise that can easily lead down the very slippery slope indicated above. Thus, *as a general rule or principle* – to which exceptions may be carefully carved[219] – moral desert ought to be the *minimum*, the *sine qua non* for the infliction of criminal punishment, although by no means should it be the only element to be considered (and here is where the retributivist

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[215] *See* notes 147 – 150, *supra* and accompanying text.
[216] *See* note 145, *supra* and accompanying text.
[217] Robinson & Darley, *The Utility of Desert*, *supra* note 88, at 499.
[218] For a comprehensive work on preemption *see* ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006).
[219] *Id*.

and I part ways). As H.L.A. Hart masterfully put it, moral desert should serve as the "licence to punish the offender."[220]

In a checks and balances perspective, once moral desert has been found, utilitarian considerations should determine the duration, quality and intensity of punishment, both in theory (legislatures writing sentencing laws) and in practice (judges imposing sentences and correctional officers and facilities carrying them out). This proposed take on a mixed theory of punishment differs from the traditional one in that the mixed theory approach is not seen here as a matter of preference or choice, but rather of *necessity*. We have seen, *supra*, that retribution cannot stand on its own for both deontological and consequentialist reasons; we have also seen that the utilitarian rationales on their own verge on the top of a dangerous slippery slope. At the same time, we cannot reasonably claim to be able to do away with the infliction of criminal punishment altogether. What we *need*, however, is a criminal justice system that is *effective* and *rational*: thus, we *need* to induce deterrence; we *need* to promote rehabilitation; and we *need* to practice incapacitation. But we also *need* a criminal justice system which punishes people *for having done "something bad"* – hence we *need* backward-looking considerations of retribution and desert upon which to anchor the infliction of punishment. Only then can we have a criminal justice system that, while still not perfect, is at least justifiable on both rational and moral grounds.

Still, part of the original question remains to be answered: would this system achieve justice?

V. Conclusions (Part II): Something More

In light of my conclusions on the real nature of retribution,[221] and of the tentative and uncertain character of the utilitarian justifications,[222] I believe that while the checks and balances approach proposed above qualifies as the best way to approach and justify criminal punishment in a liberal democracy, *something more* is required if we want to move from simply punishing offenders and protecting society to *pursuing justice*. In my opinion, a proposal worthy of our attention of what this something more may be pursuant to the conceptualization of justice "from bottom up" proposed above[223] is that offered by the restorative justice movement.

The restorative justice movement posits that mercy, as opposed to (vengeful) punishment, might bring us closer to justice.[224] Appealing as this

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[220] H.L.A. Hart, Punishment and Responsibility 236 – 37 (1968), excerpt quoted from Kadish et al., *supra* note 103, at 91.

[221] *See supra* Part II.

[222] *See supra* Part III.

[223] *See supra* notes 109 – 119 and accompanying text.

[224] *See*, *e.g.*, Steiker, *Tempering or Tampering?*, *supra* note 107, at 29 – 30. It should be kept in mind that one need not – indeed should not – look at mercy as a panacea for all the evils that afflict the criminal justice system. Steiker herself, while "plant[ing her] tent in

idea may be to some, I believe that completely abandoning the idea of punishment would stray too far both from the sentiments of the people (which include the instinct to punish offenders for their deserts) and from the necessity of protecting society from offenders. However, leaving mercy aside, the restorative justice approach merits to be taken into serious consideration for a particular feature it presents: restorative justice *cares about the victim* – a figure that, along with its needs, is utterly absent in the more traditional approaches to (and literature on) criminal punishment.[225] In our traditional system of criminal justice, after a crime occurs, the victim is pretty much left to herself, almost forgotten about, until and if such time comes when the "victim card" is played to impose punishment at all costs, or to obtain a longer prison sentence, or to prevent a convicted offender from being released on parole, and so on and so forth. In all these instances, the victim's interests are *alleged* at best; but no one (and especially not retributivists, for whom retributive punishment is justified in and of itself) really cares about what the victim actually feels – and needs. Conversely, the restorative justice approach is an approach to justice that *has the victim at its center*. Restorative justice "focuses on the unique needs of the individuals affected by specific incidents of crime and invites them to participate in a personalized and private experience where they have the opportunity to consider what is necessary to help them heal."[226] By *empowering* the victim and giving the victim *an active role* (which is also a voluntary one- no victim is ever *forced* to participate in the restorative justice process) and *a say on what the offender should do to make up for the crime committed and for all the consequences of said crime* the victim resumes the

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the anti-skeptic, pro-mercy camp," acknowledges that mercy has some "dark sides" that need to be dealt with "before the case for the cultivation of mercy within our current institutions can prevail." *Id*. at 30 – 31. For practical concerns on the empirical problems in making people embrace restorative justice see also Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implication for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007) at 12 *et seq*. For further readings on restorative justice see, *e.g.*, Arthur V. N. Wint, *Are Restorative Justice Processes Too Lenient toward Offenders?*, in JOHN FULLER AND ERIC HICKEY (EDS.), CONTROVERSIAL ISSUES IN CRIMINOLOGY 167 (1999), and Duane Ruth-Heffelbower, *Rejoinder to Mr. Wint*, *id.* at 174; Mark Walters & Carolyn Hoyle, *Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime*, in NEIL CHAKRABORTI (ED.), HATE CRIME. CONCEPT, POLICY, FUTURE DIRECTIONS 228 (2010); Barbara Hudson, Restorative Justice: The Challenge of Sexual and Racial Violence, 25 J.L. & SOC'Y 237 (1998).

[225] While the problem of the "absence" of the victim in most of the discourse on criminal punishment has been in the back of my mind for a while, it was after a conversation with Richard Parker discussing a draft of the present article that I decided the issue needed to be explicitly, if briefly, addressed.

[226] Lorenn Walker & Leslie Hayashi, *Pono Kaulike: Reducing Violence with Restorative Justice and Solution-Focused Approaches*, 73 FEDERAL PROBATION. A JOURNAL OF CORRECTIVE PHILOSOPHY AND PRACTICE (June 2009) available at http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/FederalProbationJournal/FederalProbationJournal.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2009-06/index.html (last visited Aug. 2012).

central role that it should have in the administration of justice and that was stripped away from her with the rise of European monarchies and the concurrent transformation of crimes from offenses against a person to offenses against the Crown (and now, the state).[227] Without giving up accountability for offenders, restorative justice has been shown to have more positive effects on victims than the traditional court-based and adversarial administration of criminal justice: "Research on crime victims' feelings shows significant anger and anxiety reductions, along with increased understanding, after participation in restorative interventions compared to traditional court hearings;"[228] the evidence also indicates that "when participating in restorative justice sessions, victims obtain short-term benefits for their mental health by reduced post-traumatic stress symptoms (PTSS);"[229] victims also report to be more satisfied than with the traditional system and they see a decrease in their desire for violent revenge against offenders.[230] Mind me, the restorative justice process is not an easy one – neither for the victim or the victim's relatives, who, in a sense, have to re-live the traumatic experience (and, in fact, it is always the victim's choice, and no one else's, to participate in a restorative justice process), nor for offenders, who are *forced to face what they did*, and not allowed to take the easy way out or to shift blame on the system, or society, or what have you.[231] However, it is through restorative justice that victims can experience at least some form of reparation of the wrongs suffered, restitution for the losses incurred, compensation for the suffering endured – that they can experience some form of justice.[232] And while it must be acknowledged that there are several different approaches to restorative justice, and that there is evidence not only of success, but also of (at least some) failure,[233] "[w]hat all definitions of restorative justice share is a common moral vision: that justice requires more than the infliction of a "just dessert" of pain on an offender."[234] As it

[227] *See* for all Nils Christie, *Conflicts as Property*, 17(1) BRIT. J. CRIMINOLOGY, 1-15 (1977).
[228] Walker & Hayashi, *supra* note 226.
[229] Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence*, 9 (The Smith Institute, 2007) (available at http://www.sas.upenn.edu/jerrylee/RJ_full_report.pdf).
[230] *Id*. Interestingly enough, the report shows that, contrary to common intuitions, restorative justice seems to work best with violent crimes, and less with petty crimes and property crimes (with the exception of burglary). The report also shows that other benefits include a greater abatement of recidivism for adults, as compared to prison, and at least an equal abatement as that achieved by prison for juvenile offenders.
[231] *See*, *e.g.*, Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y.TIMES, Jan. 4, 2013, available at http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?_r=0 (last visited Jan. 9, 2013), recounting in all the details the painstaking restorative justice process that the parents of a murdered teenager went through, by their own choice, including the positive effect it has had on them and the necessary assumption of responsibility on the part of the offender.
[232] *See supra* note 114 and accompanying text.
[233] *See* Sherman & Strang, *supra* note 229; *see also supra* Sections 6 and 11.
[234] *Id*. at 32.

turns out, such an approach is not incompatible with the idea of punishing deserts. For example, R.A. Duff, acknowledging "the manifest destructiveness and inhumanity of so much of what now passes for punishment in our existing institutions of criminal justice" and "the rather crude brutalism of some retributivist thought, with its emphasis on making offenders suffer – on imposing a kind of pain that is purely backward-looking and that lacks any redemptive or constructive character,"[235] argues in favor of a retributivism understood as accountability – "call[ing] a wrongdoer to account for the wrong he has done"[236] – in a perspective that is "not merely retributive, since it also looks to the future: to the offender's (self-) reform, and to the restoration of the bonds of citizenship that the crime damaged."[237] This kind of retributivism, Duff concludes, would not be opposed to ideas of "restoration and reparation."[238] On the same note, even John Kleinig – who earlier in his career had advanced a hardcore retributivism based on just deserts[239] – concludes that "we may argue ... that although wrongdoing deserves punishment, what we ought ultimately to seek is a restoration of fractured relationships."[240] Sometimes, Kleinig admits, desert may "allow for other considerations to prevail." In those cases "we may wish to restore broken relations as well as – perhaps even more than – penalizing their breach."[241]

This approach allows us to go beyond one of the major faults of retributivism which, equating retribution with justice,[242] invites us to believe that, once an offender has been given their just deserts, justice *has been done* and that, therefore, our job is done. Such an approach to justice, I am convinced, would be a mistake; after all, even the Bible "commands 'Justice, justice you shall *pursue,*' suggesting an active and never-ending quest that assumes the perfectibility of even God's nature."[243] Irrespective of what one's religious beliefs are, the message has universal didactical value; if not even God's nature is perfect, how can we, inherently imperfect human beings,[244] think that we have actually *achieved* justice? I believe that the quest of justice is never-ending, and that by *pursuing* justice we further the cause of humanity. That is why even a checks and balances approach to criminal punishment is not enough; that is why we should do something more if we are aiming for justice. Explicitly recognizing the cross purposes

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[235] R.A. Duff, *Responsibility, Restoration, and Retribution*, in Tonry, *supra* note 5, at 69.
[236] *Id*. at 74.
[237] *Id*. at 80.
[238] *Id*.
[239] *See supra* notes 86 – 87 and accompanying text.
[240] John Kleinig, *What Does Wrongdoing Deserve?* in Tonry, *supra* note 5, at 57.
[241] *Id*.
[242] *See supra* Part II.
[243] Dershowitz, Rights from Wrongs, *supra* note 107, at 31.
[244] As Isaiah Berlin notes in the incipit of The Crooked Timber of Humanity, quoting Kant: "Out of timber so crooked as that from which man is made nothing entirely straight can be built." *See* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY. CHAPTERS IN THE HISTORY OF IDEAS (1992).

that inform the imposition of criminal punishment and consciously adopting the approach that I am here advocating may constitute the first step toward building what Cesare Beccaria fought for two and a half centuries ago – a more rational, more humane and more just system of criminal law.