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CRIMINAL JUSTICE WITHOUT RETRIBUTION*

The ideal of retribution seems to carry with it a bitter and righteous form of resentment. Peter Strawson analyzes the moral indignation behind our retributive sentiments as the vicarious form of a personal reaction.[1] Certainly the bitterness of resentment and its air of entitlement are often felt in response to breaches of broadly moral expectations that characterize personal relationships. Within a committed or sustained relationship our interactions with persons acquire moral depth and urgency usually lacking in impersonal relations. It matters a great deal to us that persons we care about treat us well, and we may invest seriously in the expectation that they will. Violations of moral expectations within personal relationships—spousal infidelity, the discovery that one has been lied to by a friend, the mistreatment of a child by a parent—provoke strong reactions that are especially painful and can easily lead to residual resentments of a heavy sort.

When resentment involves a disappointed sense of moral expectation, its bitterness seems to turn on our investment in the notion that the person whom we expected to treat us well could have done better by us, if she had not freely chosen otherwise. We attribute her failure to the free exercise of her agency, in the sense that we view our moral expectations as reflecting possible choices for her that she has disregarded. Because the resentment we feel in such cases seems to rely on our belief that the wrongdoer ought to and could have treated us better, it may seem to sit uncomfortably with any psychological profile that would narrow the scope of her agency and obscure those choices. It is difficult to accept that the actual organization of a person's psychology could make it the case that her perception of the relevant options might not and perhaps could not have included a course of action she ought to have taken. The compatibilist's claim that the

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[1] Strawson, "Freedom and Resentment," in Gary Watson, ed., *Free Will* (New York: Oxford, 2003, 2nd ed.), pp. 72–93.

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agent *would* have done otherwise *if* she had so desired or *if* she had judged there to be sufficient reason for so acting is not adequate. We suppose that *this* person, under the *actual* circumstances of our relationship, should and could have acted otherwise. We think that under the actual circumstances she could have grasped the ethical importance of acting well and cared enough to do so. Moreover, we treat this possibility as consistent with our appreciation of her actual values, traits, and dispositions. This means that our presumption about her freedom cannot be reduced to the judgment that an average or normal person would have done otherwise or that a person with her values would typically have acted otherwise.[2] Our supposition is about the moral capacity of *this* person under *these* circumstances.

Interpersonal relationships encounter important junctures where we seem inevitably to make such commitments to another person's freedom. Love and friendship involve a mutual commitment to viewing one another as free enough to do what love and friendship require. This means that our normative commitments influence our perceptions of the boundaries of another person's agency. The stake we have in this is tied importantly to our presumption that a framework of moral considerations is relevant to the other person's deliberative stance. Indeed, friendship seems to require this presumption as an expression of respect and trust. We commit ourselves to the idea that our value as a person whose interests ought to be respected, who is entitled to care and consideration, informs and guides a friend's treatment of us. When these values fail to guide her, we find that we have dedicated ourselves, so to speak, to the possibility that she could have done otherwise under the circumstances in which she failed. Our moral reactions—expressed, for example, through our resentment or hurt feelings—are premised on another person's freedom to have done otherwise. We treat a friend's moral failure as up to her, as something that was under her control, despite her limitations as a person. It is her choice rather than her character or dispositions that is the focus of our evaluation. My point is that this presumption seems required by some of the moral expectations we have in personal relations. We presume that it is possible to do what one ought to and we hold a friend responsible for her part in the relationship.

The problem is that an agent's psychological profile could come into tension with our moral expectations. When a given person fails

[2] Cf. John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (New York: Cambridge, 1998).

morally, we might ask what underwrites our belief that he could have done better. Of course, people often do meet our moral expectations and this gives sense to our moral concepts, as does our experience of our own agency. We are directly acquainted with our ability to initiate action and to change our mind. But still we may wonder, in a given case, whether a moral "ought" implies "can" or, rather, whether a moral "should not have" implies a "could have done better." This worry is especially troublesome in the domain of criminal justice, where some offenders obviously have pretty serious problems. We might wonder whether the factors that are causally relevant to explaining crime have influenced the scope of an offender's agency. A person's past experience, genetic make-up, education, and social circumstances influence what he views and experiences as the relevant possibilities for action. We might want to know how the factors that in this way constrain which reasons for action counted from his perspective, and how much each counted, should bear on our sense of whether he deserves punishment for his offense. The absence of coercion, duress, and the other standard excusing conditions does not seem to settle this question.

Skepticism about desert creeps into personal relationships as well. A close friend's misdeeds seem by their nature to open the door to skeptical doubt about whether our reactive attitudes are justified, for a free agent with the moral commitments we thought she had would not have acted as she did. The possibility of explaining a friend's morally unjustifiable actions by reference to her impulses, circumstances, prior experiences, or dispositions threatens the investment we have made in viewing her as capable of doing what she ought to despite her past experiences, psychological traits, or other features of the causal order. Because our reactive attitudes are premised in this sense on her responsibility, they are unsettled by explanations that would refer to the causal influence of these factors. We may thus come to doubt whether a causal explanation of her actions could be compatible with the "justification" of our resentful attitude at the same time our moral dismay leads us to seek it. This helps to explain how the violation of our moral expectations can be so unsettling. We are caught between, on the one hand, our moral indignation—which supposes a view of her action as autonomous and, by extension, her values as freely adopted—and on the other hand, our desire to make sense of her behavior and, perhaps, to soothe our own hurt feelings by recognizing the many factors beyond her control that have influenced her dispositions.

This tension extends to our self-understanding. We generally understand ourselves to be capable of acting as we think we morally

ought to; so when we fail, we may be led to consider our own judgment and priorities. Our active identification with moral principles may lead to self-criticism and a sense of guilt, but we might also be aware that our sense of authority over ourselves is limited by the reactions, desires, preferences, goals, and ideals we actually have. A certain profile of concern guides a person's deliberation and judgment.[3] Identifying core concerns involves an ongoing process of reflection and observation. This is a process of discovery and interpretation as much as a matter of self-invention. Our judgments are related to our commitments, which may be difficult fully to articulate or even to understand. The connection between judgment and action is also not transparent. We do not directly perceive the causal connection between our decision to act and our so acting. And when we fail to act as we judge we have most reason to act, we may be puzzled and have difficulty making sense of our failure to exercise self-control.[4]

Because the moral breaches of criminal activity can be so egregious, they may provoke reactive sentiments with the moral depth and urgency more characteristic of involved relationships and the morally principled basis of self-criticism and guilt. The higher the moral stakes, the more judgmental and less understanding we may become. A serious injury may provoke indignation that a person could ever have chosen to inflict it. We dwell on the willfulness of criminal acts and feel appalled by the moral indifference behind them. We are outraged that a person would choose to violate someone's basic rights in order to assuage anger, jealousy, greed, or a desire for power. We may hate persons who would do this. Indeed, as Jeffrie Murphy suggests, these sentiments may appear to be tied to self-respect and concern for moral order: it is because we value ourselves and the rights of other people that we would feel so repelled by a person's moral transgressions.[5] But it is also because we imagine that the offender might not have acted as he did. What happened was not inevitable but rather the product of human agency. It should not and might not have occurred.

Murphy and others appeal to our retributive sentiments in defending a strong desert thesis. Their position is that retribution is a

[3] See Simon Blackburn, *Ruling Passions* (New York: Oxford, 1998), pp. 252–53.

[4] See Watson, "Skepticism about Weakness of Will," in his *Agency and Answerability: Selected Essays* (New York: Oxford, 2004), pp. 33–58.

[5] See Murphy, "Forgiveness and Resentment," in Murphy and Jean Hampton, *Forgiveness and Mercy* (New York: Cambridge, 1988), pp. 14–34, on p. 16. See also Peter French, *The Virtues of Vengeance* (Lawrence: Kansas UP, 2001), pp. 94–111.

natural and justified expression of these sentiments. A wrongdoer deserves a hostile response, namely, to be harmed. I have been arguing that the retributive sentiments have a foothold in presuppositions about a person's moral capacity and that this foothold is unstable. We are drawn to the thought that persons who would commit a serious crime are defective in their mental or psychological development. It is hard to deny that such defects impair a person's freedom to act morally. In fact, the most "evil" offenders strike us as "sick." Their actions seem to call out for explanation of the sort that bypasses autonomous moral deliberation. The possibility that an explanation could be found seems to interfere with our judgment that the offender deserves our indignation.[6]

Joel Feinberg points out that our ordinary thinking about the relation between moral blameworthiness and mental illness is, as a result, muddled:

> We have heard judgments both in the law and in the views of the ordinary person in the street that suggest a variety of different kinds of relationships between sickness and wickedness. Sometimes it is suggested that sickness and wickedness bear an inverse relationship to each other (the more sick you are, the less wicked, and the more wicked, the less sick). At other times, sickness and wickedness are said to vary directly; the sickest crimes are judged the most wicked and inspire the strongest moral outrage. Some writers, we have seen, even judge that sickness aggravates character flaws, that is, makes them more flawed than ever.[7]

Feinberg thinks that the relatively new terminology of "sickos" and "wackos" resolves this tension in favor of equating sickness and wickedness and that it represents a kind of sea change in our attitudes toward mental illness. He writes,

> A sicko, like a weirdo and a wacko, by definition is sick in such a manner that his illness actually aggravates his moral guilt and deservingness of punishment. Instead of being a kind of softening excuse, mental illness has become in some quarters a kind of hardening aggravation. Instead of saying, 'He is mentally disordered, poor fellow, go easy on him,' now some say, 'He is a damned sicko, so draw and quarter him.'[8]

[6] Watson's interesting paper, "Responsibility and the Limits of Evil," in *Agency and Answerability*, pp. 219–59, discusses this tension, a kind of schizophrenia, in our moral judgments.

[7] Feinberg, "Evil," in his *Problems at the Roots of Law: Essays in Legal and Political Theory* (New York: Oxford, 2003), pp. 125–92, p. 139.

[8] Feinberg, "Evil," p. 141. See also Watson's discussion of the case of Robert Harris in Watson, "Responsibility and the Limits of Evil."

This equation grounds the concept of desert in a person's characteristics, dispositions, and record of behavior. Moral capacity is not a condition of moral desert. Of course, ascribing an action to a person based on certain standing characteristics and dispositions could be used to support a weaker sense of "holding responsible." We might hold a person responsible in the sense that the traits and attitudes a person's behavior displays say something about what he is like. When a person displays traits and attitudes we deem worthy of criticism or rejection this helps to make sense of our negative reactions and why we might choose to revise or to terminate our relationship with him.[9] His responsibility need come to no more than this to make our responses rational.

This notion of responsibility is inadequate to support a retributive conception of justice. Retributivists claim not merely that it is understandable for us to feel resentment and anger toward a wrongdoer and rational to revise our expectations and intentions toward her. They maintain that justice requires us to punish an offender because that is what he deserves.[10] The retributivist's claim about justice is tailored to strong claims about individual culpability and desert. Here is where the problem lies. A person's moral autonomy may be open to skeptical doubt. This possibility is fatal to retributive justice. It makes little sense to claim that punishing a person who lacks the moral capacity to act as he ought to could be an end of justice.[11]

I have argued that in close personal relationships we commit ourselves to a view of one another as morally capable of conforming to the ethical norms governing our relationship. Doing this is a presup-

[9] For a discussion of this notion of blame, see T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Harvard, 2008), chapter 4.

[10] Here I am addressing what H.L.A. Hart calls the "General Justifying Aim" of the practice of punishment. Hart argues that a principle restricting punishment to an offender for an offense does not imply that retribution is the General Justifying Aim of a punishment system. Principles of distribution should not be confused with the general aim of the practice. See Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford, 1968), pp. 1–27, on pp. 8–10. Later in this essay I discuss and support requirements of due process and fairness in the distribution of punishment that restrict punishment to an offender for an offense.

[11] Some retributivists might deny this by claiming that the value of retributive justice is fundamental and does not stand in need of justification. See J.L. Mackie, "Morality and the Retributive Emotions," in *Persons and Values: Selected Papers, Volume II*, Joan Mackie and Penelope Mackie, eds. (New York: Oxford, 1985), pp. 206–19, on p. 208. Strawson also seems to take this view. But this controversial view is incompatible with the notion that a conception of justice should have a public justification. On the idea of public justification, see John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge: Harvard, 2001), pp. 22–29.

position of the moral expectations that guide our relationship and a source of the value we place on these relationships. We need not view the possibility and value of other people's law abidingness in these terms. When we view society as a cooperative endeavor for mutual advantage, the equal status of our fellow citizens and the respect we owe to them does not depend on their standing capacity to respond to moral reasons.[12] An important function of the criminal law is to provide incentives to persons not otherwise sufficiently motivated to comply with the law's directives. We use incentives and the threat of punishment to guide people. The use of such incentives in a system of criminal law presupposes that the law's subjects are more or less rational, but it does not presuppose that they have the sensibilities required by morality.

Committing ourselves to the idea that all persons who are eligible for punishment have the capacity to comply with the law for moral reasons is not an unavoidable presupposition of a society governed by law or of the value we place on law-governed social relations. Dropping the presumption of moral capacity does not risk failing to take the rule of law or the personhood status of offenders seriously in the way that compromising our moral expectation that a friend can and will treat us with care undermines friendship. But if we drop the presupposition of moral capacity, we must give up on retributive justice. Retributivism, as I understand it, is the view that justice requires the punishment of criminal wrongdoers, apart from the (further) social benefits a system of punishment might bring. The case for this notion of justice is built on reactive attitudes that presuppose a wrongdoer's moral capacity to have acted as morality demands. If we drop the assumption that offenders always have this capacity, we must reevaluate the aims of punishment.

In view of my serious doubts about retributive accounts of criminal justice, I will pursue an alternative approach, namely, one that justifies punishment in terms of the reasons we have to criminalize certain types of behavior. When people break criminal laws, I will argue, they are liable to criminal punishment, but only if the practice of punishment helps to achieve the protection of people's basic rights by deterring crime. The rationale for punishment is in this way forward-looking. I argue that the goal of protecting a system of rights by deterring crime can be advanced in a way that is fair to criminal offenders,

[12] Cf. Stephen J. Morse, "Reasons, Results, and Criminal Responsibility," *University of Illinois Law Review*, II (2004): 363–444.

even though it does not presuppose the moral capacity of an offender to have avoided his crime. Examining how considerations of fairness harmonize with the reasons we have to criminalize certain types of behavior will enable us to see how this can be so.

I

The strategy I will pursue begins by exploring the idea that we are permitted to criminalize certain acts and to use the threat of criminal sanctions in order to deter persons from committing those acts. That is, I begin with the case of "special" deterrence, in which we threaten punishment in order to deter the person being threatened. Then I will discuss the connection between a special deterrence rationale for threatening punishment and a special deterrence rationale for inflicting punishment.[13] This is obviously important since, in general, threats are not taken seriously if they are not carried out. Finally, I will bring in an element of "general" deterrence, which is the practice of punishing offenders in order to deter other people from committing crimes. In the first step, in which I justify the threat of punishment by appealing to its special deterrent value, I follow an interesting line of thinking developed (independently) by Warren Quinn and Daniel M. Farrell.[14] I depart from their discussions when I address the special deterrent rationale for inflicting punishment and when I introduce considerations of general deterrence. In order to support these steps in my argument, I bring in some considerations of fairness, due process, and the shared responsibility of criminals for the consequences of their crimes. Thus my argument depends in ways theirs do not on a broader conception of justice.

Deterrence is a troubling rationale for criminal justice. General deterrence especially is hard to justify because it certainly seems like we are "using" someone when we make an example out of him in order to discourage *other* people from committing crimes. Many people's deontological intuitions lead them to balk at the moral permissibility of using someone in this way—as a "mere means," as Kant

[13] I am supposing that to threaten persons with punishment is to aim to get them to believe that they stand some chance of incurring punishment for criminal behavior. I am not assuming that to threaten punishment we must conditionally intend to deliver the punishment. The threat could be empty. Below, I argue that the state must be permitted to carry out the threat and that the special deterrence value of punishment provides good reason to punish. In section IV, I argue that the expressive value of punishment also counts in favor of its imposition.

[14] See Quinn, "The Right to Threaten and the Right to Punish," *Philosophy and Public Affairs*, XIV (1985): 327–73, and Farrell, "The Justification of General Deterrence," *The Philosophical Review*, XCIV (1985): 367–94.

would put it. We do not normally view ourselves as responsible, at the cost of our basic liberty, for preventing other people from acting wrongly.

A strategy of beginning from the threat of punishment as a special or individual deterrent is attractive, for it would seem that we are not using a person as a mere means if we merely *threaten* him with punishment in order to stop *him* from acting so as to violate someone else's rights. The aim is to guide his action and, in particular, to discourage him from acting in a way that we have good reason to prohibit. If the threat does not exceed what is needed to deter that person, the burden this threat imposes on his liberty does not seem objectionable.[15] Farrell draws a connection between the right to threaten criminal punishment and a right to self-defense. He argues that the reasoning that justifies our individual right to self-defense in the face of imminent threats to our basic rights can be extended to the collective use of threats for the sake of special deterrence. Our individual right to self-defense entitles us to avert imminent harms to our basic rights by harming, if necessary, those persons who threaten us. As Farrell points out, the right to self-defense involves a principle of distributive justice:

> To see this, notice that in cases of the relevant sort, the victim is faced with a choice of two ways of distributing certain harms: she can refrain from resisting the aggressor thereby sparing the aggressor harm while suffering harm herself, or she can resist, thereby saving herself from harm (at least if her resistance is successful) by subjecting the aggressor to harm (*op. cit.*, p. 372).

Farrell argues that when an aggressor has made it the case that a victim must make this choice, "justice entitles the victim to choose that the aggressor, rather than the victim, will suffer the harm that, by hypothesis, one or the other of them must suffer" (*op. cit.*, p. 372). Based on this principle, he reasons, we have a right to self-defense.[16] From this he argues that employing a system of credible threats in order to protect our basic rights and liberties amounts to the collective exercise of this right.[17]

The importance of the rights and liberties a system of threats aims to protect seems to warrant extending our right to self-defense to the right to threaten potential offenders with punishment, especially in view of the following, further reasons. The threat of punishment is felt as a significant burden only by a person who is tempted to commit a crime. The liberties restricted by criminal prohibitions are liberties that the greater society has determined should not be protected. The threat of punishment functions as a disincentive to do something that anyway people should not do. Moreover, the burden the threat imposes is largely defeasible. The threat of punishment operates by giving the person who is threatened a good reason not to commit the crime.[18] What the person is being threatened with can be avoided if the person chooses to comply with the law, perhaps for self-interested if not moral reasons.[19] And finally, the burden imposed by the threat of punishment seems no more onerous than the liability to harm supported by a principle of self-defense, even if it is more far-reaching.

For these reasons, the threat of punishment for criminal wrongdoing seems easy to justify to those who value the rights a system of punishment aims to protect, and who have an opportunity to avoid the sanction by choosing to comply with the law. Although the threats themselves have a coercive element, when we face the real threat of crime, they seem to comprise among the least intrusive and least unsettling means of protecting each person's basic liberties. These considerations support the conclusion that we should accept that wrongdoers incur some moral liability for the dangers they pose to other people's rights, even when those dangers are not imminent.

A feature of this argument for special deterrence is that the voluntariness of the potential criminal act is a criterion of liability to the threat

[15] This claim is subject to qualifications explored in sections II–III.

[16] It seems plausible to hold that your right to self-defense does not depend on the moral fault of the aggressor who poses the threat. Judith Jarvis Thomson has emphasized this point. She claims, "the aggressor's fault or lack of fault has no bearing on when you may kill the aggressor to defend [yourself]." See her "Self-Defense," *Philosophy and Public Affairs*, xx (1991): 283–310, at p. 285. Cf. Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford, 2002), pp. 398–411. McMahan argues that the case for a right to defend ourselves against innocent threats is weaker. Still, he allows for self-defense in such cases.

[17] Quinn argues that the right to self-defense and the right to protect ourselves by placing would-be criminals under threats belong to a general class of self-protective rights that permit us to create serious risks for wrongdoers (*op. cit.*, p. 341). In order to protect ourselves from attack, we may engage in violent self-defense, appropriately limited, or we may erect barriers and the like. We may also create reasons for would-be offenders not to violate our rights by arranging costs to precede or accompany the violation of some rights—for example, one-way tire spikes to discourage trespassing. If we may take measures such as these, Quinn argues, it is hard to see why we could not create disincentives to would-be rights violators by threatening costs to follow an offense (*op. cit.*, p. 343).

[18] Quinn emphasizes this. See also Hart, "Legal Responsibility and Excuses," in *Punishment and Responsibility*, pp. 28–53, on p. 44.

[19] Questions about whether a person has the capacity to choose to comply with the law are addressed in section II of this paper.

of punishment—not for its connection with moral blameworthiness, but for its connection with the rationality of the threat of punishment as a deterrent.[20] The threat of punishment is being justified here as an incentive to make it rational for potential lawbreakers to choose to comply with the law. This rationale for a person's liability to the threat of punishment immediately signals its own limitations. For persons who cannot understand or be influenced to avoid a criminal sanction, the threat of it cannot function as a disincentive.[21] Since that is the basis I am endorsing for justified liability to the threat, this liability would not obtain under what are commonly recognized as excusing conditions. Excusing conditions—insanity, coercion, deception, and so on—point to conditions that undermine the possibility of informed, reasoned choice to comply with the law. When a person's agency is compromised by mental incapacity or severe mental illness, nonpunitive forms of behavior control and crime prevention, such as medical treatment, should be pursued instead.[22] The threat of punishment is properly directed only to those persons for whom it could rationally count as a disincentive under the circumstances in which those persons are disposed to commit a crime.

Even with these qualifications, there is a serious challenge to the use of deterrent threats. If the state would not be permitted to carry through on a threat, the use of the threat would be illegitimate. A government that threatens the illegitimate use of force against its citizens bears the characteristics of a tyrannical regime. It is thus important that liability to the threat of criminal punishment be extended to liability to punishment. The permissibility of the threat of criminal punishment depends on the possibility of this extension, as likely does its effectiveness.

With respect to the group of offenders, then, we must consider a substantial extension of their liability to threats to include liability to punishment for the purpose of special deterrence. The relevant extension is enabled by the same burden-shifting principle of distributive justice that we have seen permits us to impose costs on offenders in order to diffuse the threat they pose. Specifically, we are allowed to

[20] See Hart, "Punishment and the Elimination of Responsibility," in *Punishment and Responsibility*, pp. 158–85, especially pp. 181–82.

[21] See Quinn, pp. 356–59. What I say here suggests an understanding of the insanity defense that is broader than the defense currently recognized by U.S. law.

[22] This is a big caveat since it encompasses the incapacitation rationale for incarceration or forced confinement. I cannot here pursue how far that rationale could reach. It connects with an extended self-defense justification. I must leave this complicated topic for another occasion.

avert harms to potential victims by burdening offenders with punishment in order to create and sustain a system of threats that will help to deter offenders from reoffending. Criminal offenders are candidates for punishment whose offenses suggest that they stand in need of further incentives to comply with the law. By imposing a penalty—the experience of incarceration—we permissibly aim to guide them in the future to comply with the law. By creating and sustaining a system of threats that have a deterrent effect, we relieve potential victims of a threat offenders pose.

Thus understood, the aim of punishment is not to give offenders the suffering they deserve but, rather, to provide them with an incentive to refrain from reoffending. We must, of course, restrict candidates for punishment to those persons who have broken the law, not only because requiring a person to serve the general good at severe cost to their personal liberty cannot be squared with that person's individual rights, but also because the effectiveness of a system of threats is undercut when persons lack confidence that they could avoid sanctions by complying with the law. Furthermore, we may punish only persons who have faced the threat of punishment; justice typically requires giving people advance warning that they face a penalty for certain acts.[23] This is a basic element of due process. We have also seen that the effectiveness of the threat of punishment depends on whether a person who is justifiably threatened is someone who has an opportunity to avoid the sanction and good reasons—other-regarding or self-interested—to avoid committing a criminal act. Persons who are not capable of perceiving the threat of punishment as a rational disincentive cannot legitimately be subjected to the threat. In other words, I have acknowledged and supported certain excusing conditions. When these conditions do not obtain, we can say that an offender's criminal act could have been avoided in this sense: it was committed under conditions in which the offender had good reasons and a fair opportunity to avoid breaking the law. The point of the punishment is to motivate the person to avoid doing something they ought not do and have a fair opportunity to avoid doing.

II

The construal of fair opportunity I have offered may seem to raise a difficult objection—indeed, a version of the objection that made retributivism seem implausible. Standard excusing conditions—coercion,

[23] There are arguably exceptions to this requirement in the case of extremely wrongful acts.

deception, insanity, ignorance, mistakes, accidents, and so on—may seem to be too limited. Suppose a person regards the threat of punishment as a disincentive for committing a crime, yet fails to be deterred. Her decision to commit a crime is a product of what she is like as a person—which, I have argued, is influenced by many genetic and environmental factors beyond the agent's control. Why, then, is it not plausible to argue that she lacked fair opportunity to avoid committing the crime?

A plausible answer is found in the idea that the relevant notion of fairness in the law generalizes across persons. Fairness requires us to evaluate and respond to individual infractions with standards that extend to relevantly similar cases. We should treat like cases alike, or at least with reasonable similarity.[24] Both positivist and nonpositivist legal philosophers have recognized this principle. Hart refers to it as part of the minimum moral content of law, and Ronald Dworkin calls it a matter of integrity in the law.[25] We might understand the rationale for this notion of fairness to connect with the purpose of law as a general and reliable guide to social interaction and conflict resolution. The criminal law, which functions primarily as a constraint on people's behavior, articulates a standard of what it is reasonable to expect of people generally, and it specifies which forms of behavior are important to discourage and reasonable to discourage using force. Priority is granted to the protection of basic rights and certain collective interests. A plausible understanding of fair opportunity is shaped by the general action-guiding purpose of the law together with an understanding of the rights, liberties, and interests it is the purpose of the law to protect. Fair opportunity is established when behavior that violates these rights or interests is justifiably criminalized and when the penalties designed to prompt compliance meet the following conditions: they are applied only in response to the criminal nature of a person's behavior and they are effective, generally speaking, for discouraging people who are inclined not to comply. If, as I am arguing, this understanding of the reasonable purpose of a legal system establishes both the aim of and limit to permissible punishment, the relevant measure of effectiveness will refer to the average offender.

With the exception of evaluating insanity, a principle of fairness maintaining that like cases be treated alike largely directs us to turn

[24] An overly strict commitment to this principle conflicts with a reasonable principle of parsimony in the imposition of punishment. See Norval Morris, *Madness and the Criminal Law* (Chicago: University Press, 1982), chapter 5.

[25] Hart, *The Concept of Law* (New York: Oxford, 1961), pp. 157–67, and Dworkin, *Law's Empire* (Cambridge: Harvard, 1986), especially chapter 6.

away from the question of what it is reasonable to expect of a particular offender, given his background and psychology, and to look instead to the circumstances in which offenders have committed their crimes, circumstances in which other persons face the same apparent choice about whether or not to comply with the law. We are to think about what it is reasonable to expect of most persons who stand in relevantly similar circumstances.[26] Principles of criminal justice tailored more specifically to realistic expectations of particular individuals would fail to serve as general guides to behavior. The purpose of the regulations imposed by the criminal law is a normative and practical one that is determined by a conception of justice that we have reason to believe persons generally are capable of respecting. This means that the directives and penalties of criminal law should be pitched according to the capacities of persons generally and may be justified even though some individuals do not and perhaps could not comply with them. We owe one another reasonable security for our basic rights and liberties, but not necessarily every measure of protection against committing crimes.[27]

The nature and purpose of criminal justice, as I have elaborated it, implies that offenders should be considered as members of a group: the group of offenders who, with adequate incentive provided by criminal sanctions, would typically not reoffend. Nevertheless, as I have suggested, a line of defense is open to some individual defendants, namely, those for whom the threat of punishment does not function as a rational incentive to comply with the law. The burden of proof naturally falls on an individual offender to demonstrate that, despite the fact that he committed a crime, he should not be placed in the group subject to punishment. The burden would be to demonstrate that the defendant lacked (or now lacks) the capacity to perceive the threat of punishment as a rational incentive to comply with the law. I have argued that lacking moral capacity would not be adequate to establish that the burden has been met. The defendant would have to be unresponsive to the incentive on any rational ground, including a calculation of self-interest. In this way, the standard excusing conditions can be seen to set reasonable limits to a plausible defense.

Clearly the notion of fair opportunity I have endorsed, together with its limited range of excusing conditions, falls considerably short

[26] Of course, motives and intentions may well be relevant to a catalogue of crime types. I cannot here pursue in any detail important questions about the proper rationale for a typology of crimes, although I touch on these questions in the next section.

[27] See Scanlon, "Punishment and the Rule of Law," in *The Difficulty of Tolerance: Essays in Political Philosophy* (New York: Cambridge, 2003), pp. 219–33.

of the fair opportunities for education, employment, health care, and the like demanded by social justice. On the rationale I have presented, criminal punishment may be permitted in a society even when that society is characterized by serious social and material inequalities, inequalities that are unjust and help to explain criminal behavior. The permissibility of punishment expresses the priority that protecting basic rights, liberties, and certain collective interests has within a conception of social justice. The wider context of social injustice, of course, demands redress and challenges our blaming attitudes toward criminal offenders.

It is possible, however, that systematic conditions of social injustice more consistently undermine the rational force of punishment as a disincentive for certain crimes. A convergence of factors across a social group affecting the dispositions of persons to comply with the law represents the partial breakdown of a system of law and order for that segment of society. Indeed, uniform evidence of the failure of special deterrence for a sub-class within society would be symptomatic of serious social injustice. The legitimacy of criminal sanctions for the sorts of crimes in question (for example, certain property and drug crimes) is thereby called into doubt, since the law would have become a system of coercion lacking public justification.[28]

I have argued that fairness in the law requires reasonable parity in sentencing: offenders who commit the same crime under similar circumstances are candidates for the same punishment, at least within a standard range. This means there is moral pressure to treat individual offenders as members of a group—the group of persons who have committed the offender's crime under the conditions in which the offender committed it. I have reached this conclusion without relying on considerations of general deterrence. As we have seen, general deterrence is troubling, for it involves restricting the liberties of some persons in order to prevent other persons from committing crimes. General deterrence seems inconsistent with the foundational commitment of liberal democratic institutions to people's equal basic rights and liberties. We can now see, however, that an interesting consequence of aiming for parity in sentencing is that in calculating our threats to deter offenders from reoffending we are, in effect, calculating the general deterrence value of the punishment. The rationale is special deterrence, but the effect is general deterrence.

[28] See Tommie Shelby, "Justice, Deviance, and the Dark Ghetto," *Philosophy and Public Affairs*, xxxv (2007): 126–60.

III

There will be some offenders who are not at significant risk of reoffending—less than the average person and perhaps not at all. We need to know whether and how a society could justifiably punish them without embracing retribution or falling into the problems with general deterrence. Call this the problem of nonrecidivist offenders. The considerations of fairness I have introduced suggest that allowing exemptions for nonrecidivist offenders will and should be resisted. As we have seen, integrity in the law prescribes that like cases be treated alike. Those who have committed similar crimes are eligible for comparable sentences. Yet the requirement of fairness may seem here to conflict with justice: it seems difficult to reconcile a principle of fairness requiring that like cases to be treated alike with a principle of justice requiring that no one's rights be compromised in order to increase overall social utility. This conflict might seem an unavoidable consequence of a possible gap between the penalties needed for general deterrence and those allowed on grounds of special deterrence. It might be thought that the value of fairness is not adequate to permit punishing those who are more easily deterred with penalties needed to deter the average offender.

We may connect this worry about punishing the nonrecidivist offender with a broader concern that nonretributive accounts of punishment permit punishing too much. Worries about scapegoating and overpunishing are commonly directed toward utilitarian accounts. The account I have begun to develop is not utilitarian, for reasons I will elaborate below, yet similar worries may seem to apply. Consider the matter of scaling punishments for different types of crimes. The account I have proposed thus far suggests that the groupings—the crime types—and the relative seriousness of the attached penalties be justified by appeal to how most effectively to deter crime overall. If this is so, what is to ensure that a certain type of crime is not punished too harshly? Many people share pretheoretical intuitions that, for instance, a ten-year sentence for petty shoplifting is overly harsh, even if a weaker penalty would have less deterrent value. Can this intuition be accounted for in nonretributive terms?

Appealing to a principle of fairness in order to standardize punishment for a given type of crime could also leave objectionable disparities in the severity of punishment across types of crimes. The deterrent value of a threat is a function both of the severity of the penalty and of the chances of being apprehended. This opens up the possibility that less harmful crimes that are difficult to detect might require stiff sentences to achieve effective deterrence while more harmful crimes that are easily detected could be deterred with light sentences. Appealing to

the value of deterrence does not seem to provide adequate protection against disparities in the rank-ordering of penalties by the gravity of crimes. Nor does it guarantee that the punishments for different crimes are adequately spaced. If one sort of crime is only slightly more serious than another, it might seem inappropriate for the penalty to be considerably more severe.

Retributivists deal with these concerns about proportionality in sentencing by claiming that sentences should be proportionate to the gravity of the crime, for only then are the penalties deserved. The difficulty comes in evaluating gravity and in illuminating the importance of achieving proportionality by reference to what the offender deserves. Andrew Von Hirsch and Andrew Ashworth write, "The gravity of a crime depends upon the degree of harmfulness of the conduct, and the extent of the actor's culpability."[29] I have raised skeptical doubts about the foundations of our assessments of individual culpability. But there is a further problem. Often the gravity of a crime is a function of factors that extend beyond assessments of individual culpability and harm done. Otherwise put, the scope of an actor's liability may be influenced by other people's crimes.[30] Let me explain.

When the cause of general deterrence requires a harsher penalty than what would be required for special deterrence, we might think of the penalty as warranted by extending the offender's liability in order to accommodate penalties that would deter typical offenders of the crime in question. We may do this in order to achieve purposes that correspond to the reasons we have to criminalize acts. One reason is to prevent intolerable harms which the acts in kind typically bring to individual victims (or associated persons). This may be a priority apart from the number of people affected. Certain acts, such as rape or murder, are intolerable, however many offenses of their kind we anticipate. These harms or potential harms are violations of people's most basic rights and we have reason to use the threat of criminal punishment to discourage people from acts that violate basic rights. Even if few people are tempted to engage in a certain type of behavior, such as mutilating corpses, the act may be morally serious enough that it makes sense to take steps to solidify our intolerance with measures to discourage those who might be tempted.

The other reason to criminalize a certain type of act is to prevent harm that results from the combined effect of acts of that type. The

[29] Von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles* (New York: Oxford, 2005), p. 144.

[30] I am not talking about felony murder and the like.

social disruption or fear generated by a certain type of crime can be a matter of the aggregate effects of many people's actions. A single tax evader may seem innocuous enough, but the combined effect of many is damaging to a society's infrastructure and to social programs in need of tax support. Moral appraisal of an individual offender in isolation provides inadequate insight into the reasons for criminalizing his action and the relative importance of discouraging it. When a person commits a crime, he contributes to a larger problem. This can be true of violent crimes as well. Fear of assault or robbery that impinges on people's personal freedom to walk alone at night, for example, is the product of a pattern of violations. The scale of the larger problem provides grounds to penalize the type of act in question, beyond the moral significance of the harm a particular offender may cause his victim.

Of course, it would seem unfair to hold each offender responsible for the total effects of his crime type. But it does not seem unfair to hold each offender equally responsible for a share in the total effects of his crime type. We can think of this as responsibility for the threat of harm, distributed across the population of offenders. Sometimes it is true that the number of people who engage in a certain type of crime influences a potential offender by figuring into his perception of the likelihood of getting caught. An offender may exploit the fact that others are likely to engage in the sort of crime to which he is drawn by attempting, in effect, to hide amongst their numbers. This weak sense of coordinated action strengthens the case for maintaining that offenders share responsibility for the aggregate effects of their type of crime, although I believe it is not essential to the case.

What my proposal for extending an individual offender's liability comes to is this. Legislation aiming for general deterrence can be understood to involve holding each of those who contribute to a social harm similarly responsible for the typical effects of their crime—taking the typical effects on individual victims together with the threat to persons generally, measured across the population. The offender is treated as a member of a group of offenders who together are responsible for serious harms, harms measured in the typical instance and for their aggregate effects. A society is permitted to shift harms onto this group in order better to protect the basic rights and interests of its members by establishing an effective scheme for preventing crimes of the kind in question from reoccurring. Without such a scheme the rights of potential victims remain insufficiently protected. How effective a deterrent scheme should be will depend on how important the society decides it is to deter crimes of the sort in question. The procedures for making this decision should be fair and inclusive. The result is that

the penalty would not exceed what would be effective enough for deterring persons tempted to commit the crime in question, and it falls evenly on all members of the group.

Our obligation to refrain from criminal activity is robust enough to warrant extending our liability for offenses in this way. Criminal liability is the corollary of obligations we have not to act in ways that cause certain harms either directly or when combined with the acts of other people. Criminalizing the act gives due notice that these harms are foreseeable. Offenders are liable because their criminal acts, acts they were on notice to avoid, have contributed causally to an aggregate social harm or to the violation of a person's rights. This notion of criminal liability fits together with what I have presented as a requirement of fairness: that like cases be treated alike. The risk of being held accountable together with other offenders in this way is assumed by the offender as a price of his action, something made clear by the law in advance. Punishment can be reconciled with the rights of offenders.

As I have described it, responsibility for the effects of crime distributes to individual offenders in the sense that each may be punished. Yet what makes the penalty appropriate is not an evaluation of what the offender deserves as a matter of his individual blameworthiness or the impact of a crime on a particular victim. The appropriate penalty is scaled instead to the typical harm caused. The harm is a function of the wrongdoing offenders have committed considered together with similar wrongdoing by others. This measure defines the seriousness of the crime type. Penalties ought to be rank ordered and spaced accordingly. Crimes that are typically more harmful may be punished more harshly than less harmful crimes since solving the problems posed by those crimes is more serious. The upper limit on the severity of punishment for a particular type of crime will be set by determining and preserving the place of that crime in the ordinal rank-ordering of crimes categorized by typical and overall damage done.[31] This will be a matter of what the society in question reasonably regards as most urgent. When priorities are decided, we have the basis for establishing an upper limit to how much we may punish a given crime, even when further punishment would be efficacious for achieving greater deterrence.

In considering the upper limit to the entire scale it is important to bear in mind that the idea of liability for harm done differs strikingly

[31] I set aside for now difficult determinations of interpersonal comparisons of utility and the problem of how to figure in aggregation, when it is relevant. The difficulty of making appraisals is not an objection to the need to maintain a standard of proportionality.

from the utilitarian goal of maximizing social utility. The goal I am advocating is to promote a legitimate social order after serious criminal activity has disturbed it. I have proposed that the utility exacted by the punishment should be scaled by deciding how important it is to avert the relevant type of harm. Since the harm is measured across a crime type and responsibility for the harm is distributed over the group of people who cause it, proper scaling will be gauged by the deterrent effect of imposing a penalty on the average person who has committed the crime. I have argued that this seems a fair way to distribute the burden across the group of persons who have committed a crime of a certain sort. The punishment is not calculated to maximize crime prevention by, say, targeting the most determined offenders—a goal that could violate the proper rank-ordering of penalties by the gravity of their crime type.[32]

Once retributivism is rejected, there are several considerations that exert pressure toward moderation overall in punishment. Surely there are some offenders who are nothing but trouble. No one cares about or depends on them. Some do not value their own lives. But this is seldom the case. Incarceration has devastating effects on offenders, their families, and their communities.[33] The importance of minimizing these costs counts against marginal gains in deterrence value.[34] In addition, incarceration brings with it serious costs for the broader society, since locking people up is very expensive.[35] When other social problems are also pressing, money may be better spent to solve them. Small gains in the marginal deterrence of criminals may not be worth the cost of scarce resources. This point gains force in view of studies which show that much lengthier sentences tend not to produce greater deterrent effects. More effective for deterring crime is the likelihood of getting caught.[36] Limits to general deterrence would then be set by the value a society places on individual liberty and pri-

[32] I am grateful to Paul Guyer for discussion of ideas in this paragraph.

[33] See Marc Mauer and Meda Chesney-Lind, eds., *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002).

[34] This sets a natural limit to how cost-effective it is to punish certain crimes with high rates of commission. Bentham stresses that we should include in these costs the anxiety that innocent persons may experience at the prospect that their actions could be misconstrued as illicit (for example, "fornication"). See Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Hafner Press, 1948), chapters XIII, XVII.

[35] For instance, in the state of Massachusetts, the average cost to house an inmate in the 2006 fiscal year was $43,026. See Massachusetts Department of Correction Website at http://www.mass.gov/?pageID=eopsagencylanding&L=3&L0=Home&L1=Public+Safety+Agencies&L2=Massachusetts+Department+of+Correction&sid=Eeops.

[36] See von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and P-O. Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford: Hart, 1999).

vacy, since crimes could be more easily detected by compromising these protections. A liberal political culture may not permit this.

As to the minimum for the scale overall, a minimum punishment for any crime could be preserved by a default shift to the broader deterrence aim of maintaining respect for the law. The burden of helping to maintain norms of law-abidingness is something that might reasonably be required of all lawbreakers, provided that the penalties tied to this general deterrence aim are modest enough to leave room for an ordinal ranking and spacing of crimes by severity. Such modest penalties could be seen in effect to anchor the entire scale.

Once the upper and lower limits are set for the scale overall, it is tempting to conclude that the sentence for each crime is established by its place in the ordinal ranking by severity. But without the goal of retribution there is no moral imperative to punish up to the point allowed by the place an offense occupies in the ordinal ranking. In fact, on the rationale I have given, punishment is permissible only as part of a broader strategy of crime control. Thus we must accept a serious caveat to the moral requirement that punishments be rank ordered in terms of the gravity of the crime. Penalties should be rank ordered and spaced according to the social harmfulness of the crime, but only provided that crime prevention can be achieved by imposing these penalties. Penalties that are not effective for preventing crime should not be imposed. If maximal deterrence is achievable with minor penalties despite the gravity of an offense, this could compromise the rank-ordering and spacing of penalties. There are good reasons for this. Further crime prevention is not attainable and retribution does not justify imposing additional penalties.

I conclude that the nonretributivist rationale I have been pursuing sets limits to the severity of punishment and provides a good enough scale for comparing the punishments of different types of crimes.

IV

I have argued that a criminal justice system should aim to establish and sustain an effective, credible, and fair system of threats, with the aim of protecting people's basic rights and liberties by deterring crime. The social goal of crime prevention sets this account of punishment apart from retributive views. Furthermore, the nonretributive orientation of my approach is evident in the measures I introduced for evaluating the gravity of crime types. I argued that the moral gravity of an offense may be influenced by the combined effects of its many instances. Thus an offender's liability to punishment may come apart from his moral blameworthiness and be influenced by other people's wrongdoing.

I also argued that liability to punishment does not presuppose an offender's moral capacity to have complied with the law. The offender can be faulted for having done something wrong in the sense that the act was his and he committed it under conditions in which he had a fair chance to avoid doing it. But the relevant criteria of fair opportunity do not ensure that the offender had the moral capacity to avoid criminal wrongdoing. This means that criminal liability does not establish or presuppose that the offender deserves to suffer, or so I argued. Some retributivists disagree. They take choice under fair conditions to be adequate to establish that offenders deserve to suffer. Determinants of choice under fair conditions—strong emotions motivating choice, for example—are regarded as factors for which the offender can rightly be held responsible because they are a part of who he is.[37] I argued that this retributive position is open to serious skeptical doubts about the bases of responsibility for self. My account of criminal justice is much less vulnerable to these worries.

Despite its nonretributivist character, the rationale I have given for the criminalization and punishment of certain acts opens possibilities for supplementing the aim of deterrence with certain expressive purposes. In fact, it seems naturally to incorporate an expressive function. We punish to discourage certain forms of behavior and in so doing we express our disapproval of acts of that kind. The relevance of an offender's fault, if not his blameworthiness, opens the way for his punishment to express a moral judgment. The object of the moral judgment, as I have construed it, would be the offender's act.[38] A criminal act is judged to be incompatible with other people's basic rights or with certain important collective interests. In judging an act to be wrong and worthy of criminal sanctions, we display publicly our moral rejection of acts of that type and call attention to the reasons we take them to be objectionable. This public expression stands independently of our assessment of any particular offender's blameworthiness for failing to take moral reasons into account.

While morally judging an act to be wrong differs from morally condemning the offender as blameworthy, it does make room for public acknowledgement in moral terms of the costs to the victim. This pub-

[37] See Michael S. Moore, "Choice, Character, and Excuse," in *Placing Blame: A General Theory of the Criminal Law* (New York: Oxford, 1997), pp. 548–92, on p. 557.

[38] See Samuel H. Pillsbury's illuminating discussion of the difference between act- and character-based assessments of criminal conduct, *Judging Evil: Rethinking the Law of Murder and Manslaughter* (New York: University Press, 1998), pp. 72–74, 83–86. Pillsbury stresses that *mens rea* considerations should focus on particular features of choice or conduct, rather than broader judgments of character (for example, "depraved" or "malicious"). See, for example, chapter 7.

lic acknowledgement may be important to many crime victims. Moreover, it may serve such important aims as strengthening the ties of community, vindicating the law, and increasing mutual respect for individual rights.[39] These aims would seem naturally to be served by a public demonstration of commitment to increasing the safety of potential victims by strengthening the effectiveness of the threat of punishment as a deterrent. These purposes together constitute a morally adequate response to victims. I submit that victims have no right to a retributive form of justice that would reach beyond these important aims.

The main danger of a deterrence rationale for criminal justice is its vulnerability to excessive fear of crime.[40] Crime prevention is but one among numerous social goals that serve our basic rights, liberties, and collective interests. A balanced political agenda will understand criminal justice as one aspect of a broader commitment to social justice. This broader commitment includes providing decent opportunities for all members of society to enjoy education, health, a decent income, and political influence. Fear of crime should not be allowed to offset the importance of our shared responsibility to advance this broader social justice agenda. Notably, there is also a tension between our shared responsibility to address the social injustice underlying much criminal behavior and the retributivist's focus on individual culpability for crime. Our understanding of criminal justice should not be at odds with our shared responsibility for securing the broader terms of social justice.

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[39] See Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: University Press, 1974), pp. 95–118. Feinberg himself explicitly disavows a retributivist theory of punishment. See pp. 116–18.

[40] See Pillsbury, *Judging Evil*, chapter 5.