

## **The Retributive Sentiments**

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The most popular philosophy of criminal punishment today, the one that seems to enthrall moral philosophers, legal theorists, and the American public alike, is based on the idea that justice has not been done until the criminally guilty get the punishment they deserve. Justice demands retribution. Retribution is achieved when morally culpable wrongdoers suffer in proportion to their culpable wrongdoing, or so it is claimed. Punishment is ugly, but crime makes it necessary. Retribution is *morally fitting*.

Retributive theories of criminal punishment bear a natural affinity to popular philosophies of moral blame. Many moral philosophers who write about moral responsibility endorse one or another version of the retributive theory, because the retributive sentiments are central to their account of morality. By the retributive sentiments I am referring to moralized anger, resentment, and indignation—certain negative emotions that are intertwined with moral judgments. These emotive responses have both cognitive and emotive content. They are sentiments that are allegedly warranted by evidence of a wrongdoer's moral faults, as those faults are displayed by the wrongdoer's wrongful actions. They combine an appraisal of the wrongdoer's personal faults with an emotive reaction to them.

A focus on the retributive sentiments is central to P.F. Strawson's famous article, "Freedom and Resentment." Strawson's idea is that the practice of blame is organized by

the retributive sentiments and is a core element of our moral practices. The retributive sentiments display moral engagement with a wrongdoer; the alternative, claims Strawson, is a disengaged “objective” standpoint of clinical diagnosis or social control. Because the perspective of diagnosis and social control are antithetical to morally engaged relationships, and a lack of response to wrongdoing is unacceptable, our blaming responses cannot be eliminated without damaging morality. Moreover, their importance to us defeats the relevance of skeptical challenges to free will.

In this way, Strawson finesses the free will debate. He emphasizes that we need not endorse either compatibilism or incompatibilism about free will. We are compelled to set the matter aside, for moral reasons. Strawson puts it this way: “The human commitment to participation in ordinary inter-personal relationships is, I think, too thoroughgoing and deeply rooted for us to take seriously the thought that a general theoretical conviction might so change our world that, in it, there were no longer any such things as inter-personal relationships as we normally understand them; and being involved in inter-personal relationships as we normally understand them precisely is being exposed to the range of reactive attitudes and feelings that is in question.”<sup>1</sup> The importance of the “reactive attitudes” —and, in particular, the retributive sentiments—to social life is, he says, part of “the general framework of human life.” As members of a moral community, we cannot step outside of that framework, much less give it up.

Strawson’s argument has been highly influential in analytic moral philosophy, and many current discussions of moral responsibility build upon it. In fact, there is a veritable

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<sup>1</sup> P. F. Strawson, “Freedom and Resentment,” *Proceedings of the British Academy* 48 (1962), 1-25. Reprinted in Gary Watson, ed., *Free Will*, 2<sup>nd</sup> ed. (Oxford: Oxford Univ. Press, 2003), section 1.

cottage industry of blame philosophies indebted to Strawson. But Strawson's argument is unconvincing. I am skeptical about the centrality of the retributive sentiments to morality and about Strawson's "solution" to the problem of free will. I think the importance of the retributive sentiments is exaggerated by moral philosophers and that the reactive attitudes Strawson highlights are not, in fact, required by morality. Morality will not fall apart if we refuse the retributive sentiments.

In what follows I challenge the idea that moral wrongdoing calls for the retributive sentiments. I will make the argument that neither the retributive sentiments nor the practice of blame they support are morally required responses to wrongdoing.<sup>2</sup> My motivation for this is partly a concern about the social implications of retributive thinking, specifically regarding criminal punishment. I am concerned that the retributive sentiments help to drive the problem of overpunishment and that they decrease sensitivity to the personhood of people who have been convicted of crimes.

I understand blame to involve the moral condemnation of wrongdoers. Blame reaches beyond an assessment of wrongdoing to a personal appraisal of wrongdoers in view of their actions. The most prominent philosophical accounts of blame, including Strawson's, focus on *the quality of a wrongdoer's will*—largely apart from psychological or social context, and with little attention to a wrongdoer's personal history. Such accounts ask whether an individual's actions demonstrate *ill will*, and they suppose that ill will provides insight into a person's character and values. The quality of an agent's motives and attitudes, and the sort of person they reveal her to be, are taken to rationalize retributive

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<sup>2</sup> I have developed these arguments in Erin I. Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Cambridge, MA: Harvard Univ. Press, 2018).

reactions. We are instructed to focus on whether a wrongdoer acted for bad reasons, reasons we should reject, and whether in so doing, she has expressed disregard for the rights or moral standing of other people. If a person has *bad attitudes*, according to this philosophy, a moralized response is called for, a response that is organized by the retributive sentiments.

Blame's defenders typically are interested in a condemnatory response that expresses what moral philosophers describe as appraisals of *moral worth*—a kind of moral ranking of persons. Blame is a performance of this personal assessment. It involves feeling, thinking, and acting toward the wrongdoer in ways that reflects the disapproval deemed to be a morally appropriate response to an agent's faults. Blaming involves enacting the moral responses a wrongdoer *deserves*; there is an intimate connection between the practice of blame and evaluations of moral desert.

As I have suggested, Strawson's understanding of the practice of blame emphasizes the retributive sentiments. Retributive punishment—which ensures that a culpable wrongdoer experiences a corresponding loss—is presented as a natural extension of blame. Strawson is explicit about this. He connects the moral “reactive attitudes” with a retributive notion of justice, by linking morally reactive attitudes with our disposition to inflict harm on wrongdoers. Punitive thoughts and actions, he believes, are fitting responses to ill will. Furthermore, he thinks the value of retribution would ideally be accepted by wrongdoers themselves; judgments of moral desert that support the practice of punishment are properly internalized.<sup>3</sup> He argues that all parties who are sensitive to the

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<sup>3</sup> Strawson, “Freedom and Resentment.” Strawson writes,

The preparedness to acquiesce in that infliction of suffering on the offender which is an essential part of punishment is all of a piece with this whole range of

demands of morality would naturally affirm the appropriateness of inflicting injury upon wrongdoers.

So understood, retributive punishment is a kind of public blame. Its expression is understood as deserved by criminal lawbreakers who commit the sort of heinous wrongs that earn broad and severe condemnation. The point is that blame—moral condemnation directed at the criminal actor—is called for when a person has committed a criminal wrong and displays bad intentions, motives, and attitudes. Criminal punishment serves as a justified expression of outrage that affirms the moral inferiority of criminal wrongdoers and inflicts deserved injury on them.

It should be noted that not all philosophies of blame are retributive in nature. For example, T. M. Scanlon rejects the retributive notion that the point of blaming responses is to impose a loss on culpable wrongdoers.<sup>4</sup> Even though blame often has negative consequences for persons who are rightfully blamed, Scanlon thinks it is not morally important that we guarantee that it does. He argues that certain moral judgments, emotive reactions, and sanctioning behavior are warranted by virtue of a wrongdoer's personal qualities, and the wrongdoer deserves these responses, whether or not they in fact injure

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attitudes of which I have been speaking. It is not only moral reactive attitudes towards the offender which are in question here. We must mention also the self-reactive attitudes of offenders themselves. Just as the other-reactive attitudes are associated with a readiness to acquiesce in the infliction of suffering on an offender, within the "institution" of punishment, so the self-reactive attitudes are associated with a readiness on the part of the offender to acquiesce in such infliction without developing the reactions (e.g. of resentment) which he would normally develop to the infliction of injury upon him; i.e. with a readiness, as we say, to accept punishment as "his due" or as "just." Section 6.

<sup>4</sup> T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard Univ. Press, 2010), pp. 128-9. See also T. M. Scanlon, "Giving Desert its Due," *Philosophical Explorations* 16, no. 2 (2013): 104.

her. For instance, we may have reasons to mistrust, disapprove of, and distance ourselves from someone who has wronged us. These are fitting responses, and may in fact harm the wrongdoer, even though morality does not require us to impose that harm as a matter of retribution.

There is a meaningful difference between Scanlon's view and a retributive philosophy, but I will not concern myself with it. My rejection of punishment as blame applies to nonretributive as well as retributive accounts of moral blame. It applies to any account of blame that is *required* by morality or justice as a response to culpable wrongdoing. In what follows, my criticisms of the retributive theory extend to nonretributive justifications of punishment as moral blame.

I now turn to the nature and shortcomings of an understanding of punishment as blame. The idea that the public function of punishment is to blame criminal wrongdoers fits the practice of criminal justice, at least in the United States. Moral condemnation is tightly associated with criminal punishment. It is expressed through the stigma and deprivations that accompany punishment. The humiliation and indignity of punishment, as it is currently practiced, impose a serious social stigma on people who have been convicted, especially those who are or have been incarcerated. Furthermore, the stigma of criminality, when it is formally imposed through conviction and sentencing in a court of law, is accompanied by the retraction, often permanent, of important entitlements and rights in addition to basic liberty. In many U.S. states, for example, the right to vote is withdrawn, as is eligibility for public assistance and student loans, even after a convicted person's sentence has been served. Many job applications require disclosure of felony convictions, however minor the crime or however long ago it was committed. It is not

illegal to discriminate against felons who apply for housing, employment, mortgages, or admission to college. Many states deny certification to ex-felons in professions like automotive repair, construction, and plumbing. These measures deepen the stigma of criminality by extending its reach in social and political space and over time. As the legal scholar Michelle Alexander has argued, felons become second-class citizens for the rest of their lives.<sup>5</sup>

The stigma of criminality expresses a moral conclusion about the criminally guilty in view of their criminal behavior: they are morally blameworthy because they are legally guilty. Yet the basis of criminal conviction is often morally inadequate to produce this assessment. Social and psychological factors that may shape our moral evaluation of people have little or no bearing on criminal liability. The influence of mental illness or racial injustice, for instance, has little to no relevance to determinations of criminal guilt. In most cases, mental illness functions as an excuse only when it fits the legal definition of insanity, a highly specialized notion that does not include bipolar disorder, autism, or many other forms of mental illness. And courts have thrown out racial discrimination as a basis for challenging criminal conviction and sentencing—for the perverse reason that such discrimination is too common.<sup>6</sup> A person facing a statistically higher likelihood of a harsher sentence because of his race cannot use that unfairness as a legal basis for objecting to his sentence.

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<sup>5</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010). See also James B. Jacobs, *The Eternal Criminal Record* (Cambridge, MA: Harvard University Press, 2015).

<sup>6</sup> See *McClesky v. Kemp*, 481 U.S. 279 (1987).

Let me elaborate. In prison you are not likely to find psychologically healthy people who were leading promising lives. Instead, you meet people who had hard lives before landing in prison. Many incarcerated people struggle with mental illness, including sociopathy, schizophrenia, and bipolar disorder. Others have suffered abuse or neglect as children, mistreatment that harms emotional development. According to a report by the U.S. Department of Justice, over half of all prison inmates have a mental health disorder.<sup>7</sup> It is difficult to believe that *these* are the people who *deserve* the hard treatment they get.

Consider some cases that you might read about in law textbooks. Eric Clark shot and killed a police officer. American society demands the harshest penalties for crimes like his. Eric Clark was convicted of first-degree murder and received a life sentence. In 2006, the U.S. Supreme Court heard his appeal.<sup>8</sup> Why? Because when Eric Clark pulled the trigger, it was a desperate effort to defeat a dangerous space alien. The Court acknowledged Clark's delusional schizophrenia but affirmed his conviction and life sentence. It ruled that his psychosis was irrelevant to determining whether he intended to kill a human being.

Now consider Sharon Patterson's case.<sup>9</sup> She was caring for a two year old boy who was not her son. When he wet his bed, she decided to stop giving him water in the evening. He also sometimes refused solid foods and, to get him to eat, she decided to restrict his water during the day as well. Withholding water from a child is a dangerous thing to do

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<sup>7</sup> James, Doris J. and Glaze, Lauren E. "Mental Health Problems of Prison and Jail Inmates," Bureau of Justice Statistics Special Report, U.S. Department of Justice. <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

<sup>8</sup> *Clark v. Arizona*, 548 U.S. 735 (2006).

<sup>9</sup> *State v Patterson*, 131 Conn. App. 65 (2011).

and, as a result, the boy died. Sharon Patterson was charged with criminally negligent homicide, found guilty, and given ten years in prison.

It is also the case, and presumably morally relevant, that Sharon Patterson is intellectually disabled. She didn't understand the harm she was doing. She thought she was helping. The court recognized that she did not understand the danger of her actions, but it upheld her conviction on the basis that a reasonable person would have.

What about a person who steals to support a drug addiction? Over two million people are afflicted by an opioid disorder in the United States today. But addiction does not mitigate punishment for any crime. Or consider the thousands of cases, in the United States, of people sentenced to life in prison for crimes they committed as juveniles.<sup>10</sup> The state of Pennsylvania alone has more than 480 people serving life sentences they received as juveniles. Studies show that childhood abuse and neglect increase criminal delinquency by at least 40%.<sup>11</sup> That truth, however, mitigates neither guilt nor punishment.

The American legal system has decreed that people such as these are legally culpable. Though the personal hardships of mental illness, trauma, and addiction represent problems that would be difficult for most people to manage well, none of them mitigates the law's assessment of criminal culpability, or not much. The same holds for the limitations of intellectual disability and immaturity. Short of the extremes of mental illness that qualify as legal "insanity," the vast majority of mentally ill, intellectually disabled,

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<sup>10</sup> Josh Rovner, "Juvenile Life without Parole: An Overview," *Sentencing Project* (October 2017). [http://sentencingproject.org/doc/publications/jj\\_Juvenile\\_Life\\_Without\\_Parole.pdf](http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf).

<sup>11</sup> Cathy Spatz Widom. "The Cycle of Violence," *National Institute of Justice: Research in Brief*. U.S. Department of Justice (September 1992).

<https://www.ncjrs.gov/pdffiles1/nij/136607.pdf>. See also Cathy Spatz Widom, "Child Abuse, Neglect, and Adult Behavior: Research, Design, and Findings on Criminality, Violence, and Child Abuse," *American Journal of Orthopsychiatry* 59 (1989): 355-67.

traumatized, addicted, and immature people are ruled criminally guilty when it has been established that they have committed criminal acts. It is hard to make *ethical* sense of these *legal* results. At the very least, they pose a serious challenge to the notion that moral retribution fits the law.

Of course, it might be objected that the American criminal justice system does not *now* deliver just deserts, but it *could*, were we to mitigate the sentences of teenagers, people afflicted with mental illness or addiction, and those who are intellectually disabled. Actually, the courts have expressed some sympathy with this idea, at least when it comes to the very harshest penalties, specifically, the death penalty and life without parole. They have ruled that the death penalty is unconstitutional when applied to juveniles or the mentally ill, and that juveniles cannot receive mandatory sentences of life without parole.<sup>12</sup>

It might also be thought that we should also go easier on people with substance addictions. The devastating opioid epidemic in the United States has increased public sympathy for a less punitive approach to the crimes of addiction. Now that addiction is no longer imagined to afflict only the ghetto poor, it has become a cause of public outcry. For example, the attorney general of the state of Massachusetts is currently suing the corporate pushers of prescription painkillers on behalf of the public.<sup>13</sup>

So it might be thought that by punishing less, and more selectively, we still have a chance to deliver retributive justice. But some disturbing facts would remain. American

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<sup>12</sup> See *Atkins v. Virginia* 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), *Miller v. Alabama* 132 S. Ct. 2455 (2012), and *Jackson v. Hobbs* 132 S. Ct. 548 (2011).

<sup>13</sup> *Commonwealth of Massachusetts v. Purdue Pharma*. Superior Court C.A. No. 1884-cv-01808 (BLS2). January 15, 2019. [https://d279m997dpfwgl.cloudfront.net/wp/2019/01/Mass\\_AGO\\_Pre-Hearing\\_Memo\\_and\\_Exhibits.pdf](https://d279m997dpfwgl.cloudfront.net/wp/2019/01/Mass_AGO_Pre-Hearing_Memo_and_Exhibits.pdf)

prisons are filled with people who are poor. Data from the Bureau of Justice Statistics indicates that incarcerated people across all race and ethnicity groups earned about forty percent less before going to prison than their non-incarcerated peers.<sup>14</sup> These are the poorest of the poor. They are also, disproportionately, people who have suffered racial harassment, discrimination, and other forms of racialized mistreatment.<sup>15</sup> For example, aggressive policing tactics in inner city neighborhoods influence the arrest rate. Although blacks are not more likely to use drugs than whites, they are more likely to be arrested and incarcerated for drug use.<sup>16</sup>

Socioeconomic disadvantage also influences the crime rate in poor, inner-city neighborhoods—racially segregated neighborhoods with failing schools and few jobs. More crimes are committed in disadvantaged neighborhoods. Socioeconomic deprivation is not, however, a factor that mitigates a criminal offender’s “just deserts.” An impoverished person has no legal excuse or justification for selling illegal drugs to sustain a living. Nor does lack of police protection provide a legal excuse for the crime of gang affiliation, or the illegal possession of a weapon, whether or not a person who lives in gang territory would otherwise fear for his personal safety. Furthermore, the hopeless condition

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<sup>14</sup> Bernadette Rabuy and Daniel Kopf., “Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned,” Prison Policy Initiative ((July 9, 2015), p. 1. <https://www.prisonpolicy.org/reports/income.html>. See also Bureau of Justice Statistics, “Survey of Inmates in State Correctional Facilities,” 2004. <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=275>.

<sup>15</sup> The Sentencing Project, “Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System,” April 19, 2018.

<https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

<sup>16</sup> See, for example, Ezekiel Edwards, Will Bunting, and Lynda Garcia, “The War on Marijuana in Black and White,” American Civil Liberties Union, June 2013.

[https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rell1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell1.pdf)

of the racialized ghetto does not mitigate criminal guilt for a person's oppositional use of violence.

These facts pose a serious problem for the retributivist and, more broadly, for blaming approaches to the justification of punishment. The focus of these philosophies is the idea that punitive responses to wrongdoing are *deserved* because of what a wrongdoer is like as a person. A conclusion about moral desert is grounded in an assessment of what a person's bad behavior tells us about what she is like. That evaluation is largely insensitive to the causes and context of a person's wrongful choice, except when it blocks ordinary inferences from wrongful action to bad will, for example, because a person is coerced or deceived. Granted, it might be argued that there are moral reasons to expand legally recognized excusing conditions. But, even if we do, it would still be the case, on blaming accounts of punishment, that when a wrongdoer actually displays morally faulty values and character, the social conditions that trigger a person's wrongful behavior or have influenced the person to become the way she is are beside the point of criminal justice. Morally culpable wrongdoing calls for punishment. To that extent, measures of social disadvantage rightfully drop out of the criminal process.

This way of thinking is not entirely misguided. Some actions—including robbery, assault, rape, and murder—are wrong under *any* circumstances, however difficult those circumstances may be. A criminal justice system must hold people accountable for committing such wrongs, in this sense: we owe it to victims and to law-abiding citizens to dissuade all people from committing wrongs like these and to protect ourselves from criminal wrongdoers, sometimes by removing them from society. A morally legitimate criminal justice system will protect our basic rights from wrongful violations by other

people, however disadvantageous the circumstances may be that incline a wrongdoer to violate another person's rights.

A "rights protecting" approach to criminal justice is morally defensible, but it does not support blaming theories of punishment. The essence of blaming theories is that we are obligated to mark a criminal offender as *bad*—someone who is morally inferior, defective, and unworthy—and deserving of punishment on that basis. So understood, the practice of punishment invests in an inference from the wrongfulness of the criminal act to the badness of the criminal wrongdoer. It purports to license a condemnatory personal judgment and the negative sentiments that often accompany it—moralized anger, disgust, hatred, and a desire to punish. Its conclusion that punishment is deserved and required by justice depends on the importance of these "retributive sentiments" to morality.

The problem is that judgments about personal badness are hard to contain. "Badness" extends beyond the criminal wrongdoer. It goes to the circumstances under which a person commits a crime. It encompasses struggling neighborhoods, childhood exposure to violence and abuse, lack of critical resources and opportunities, weak social structures, peer pressure, lack of personal security, and psychiatric emergencies. These are powerfully bad things. In fact, the more a person's troublesome psychological and social circumstances affect our understanding of a person's morally faulty choices, the harder it is to make sense of where a person's responsibility begins and ends. We cannot thoughtfully or honestly keep our focus on what a person deserves. When a person's individual "badness" begins to seem, in context, even somewhat understandable, our evaluations of

moral desert lose their grip.<sup>17</sup> People may deeply disagree about what counts as a wrongdoer's "just deserts," and reasonably so.

Without solid evaluations of moral desert, there is no stable public basis for retributive punishment or, more broadly, a blaming conception of punishment. Moral evaluation in this domain is insecure. In what follows I will analyze and elaborate this point. The upshot is that we should give up a commitment to punishment as blame. If we are justified in deploying measures to incapacitate and to deter people from committing crimes, it should not be on grounds of retributive justice or moral desert.

Now if Strawson is right, the idea that wrongdoing necessitates the retributive sentiments—namely, that notion that the retributive sentiments play a critical role in the “general framework of human life”—is an obstacle to relinquishing blaming theories of punishment. Yet the possibilities Strawson envisages for understanding and responding to wrongdoing are too narrow. Evaluating an agent's will in connection with its context and causes broadens our moral options for nonblaming responses. It shows how evaluating an agent's ill will can lead to empathy rather than blame. Through our understanding we may come to acknowledge the moral significance of difficulties that beset a person, whether psychological or social. Our emotive response might be compassionate, even when the wrongdoer's unfortunate personal history has led the wrongdoer to acquire qualities we justifiably criticize. Compassion reflects our understanding of how and why a person is morally damaged, insensitive, rash, or otherwise misguided. Rejecting morally undesirable characteristics and the wrongful behavior that results from them is compatible with a

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<sup>17</sup> See David Indermaur, Lynne Roberts, Caroline Spiranovic, Geraldine Mackenzie, and Karen Gelb, “A Matter of Judgment: The Effects of information and Deliberation on Public Attitudes to Punishment,” in *Punishment & Society*, Vol 14, no. 2, (2012): 147-165.

compassionate response to the wrongdoer. Compassion is also consistent with acknowledging harm done to victims. A nonblaming response can acknowledge the reality and personal impact of wrongdoing and, more generally, the significance of a wrongdoer's moral flaws.

A morally sensitive person is free to choose from a range of reasonable moral responses to another person in view of her wrongdoing. Though a person whose rights have been violated might not feel morally free to choose a response, since reactions can be reflexive and highly emotional, a number of responses remain morally possible. Responses might be unforgiving or merciful, angry or detached, sorrowful or withdrawn.<sup>18</sup> Each in a variety of moral positions has different personal and interpersonal meaning and consequences, and the moral enactment of a response implicates the responder in ways that are significant but not morally required. At a personal level, judging a wrongdoer blameworthy and engaging in blame closes off some relationship possibilities by, for example, solidifying feelings of mistrust, diminishing interest in friendship or intimacy, and prompting feelings of anger and resentment or a desire to meet injury with injury. The exercise of a prerogative to blame might also deepen relationships by insisting that the wrongdoer answer for her wrong by providing an account of it, a meaningful apology, the expression of good intentions going forward, and so on. On the other hand, contemplating hardships that mitigate blame might open up other avenues for engagement: greater

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<sup>18</sup> Some philosophers who write about forgiveness agree that forgiveness cannot be morally required. See Cheshire Calhoun, "Changing One's Heart," *Ethics* 103, no. 1 (October 1992): 76–96. Compare Hieronymi, "Articulating an Uncompromising Forgiveness." The view that forgiveness should not be demanded of victims has generated criticism of the South African Truth and Reconciliation Commission, which included the aim that victims forgive perpetrators.

psychological understanding, feelings of compassion, empathy, and the painful yet binding intimacy of confronting a moral misdeed together.

The personal dynamics of blame and its alternatives extend to people who do not know one another. Anger, retributive sentiments, and a desire to secure an apology are common responses to wrongdoing between strangers. A desire to understand is also familiar, and feelings of empathy might well follow an effort to understand. My point is that blame is not required—we have no grounds for criticizing a victim who does not blame—when compassion is a morally reasonable option, and that this is the case more often than most blame theorists suggest. In particular, it is the case when it comes to assessing criminal behavior, since much criminal behavior is causally related to significant hardships faced by the agent. The moral relevance of, for example, trauma, illness, or social injustice is incompatible with an obligation to blame criminals for their unlawful actions, and we demonstrate respect for victims by permitting them room to decide how to manage their own moral response to the crimes they have suffered. Many moral philosophers fail to see this because their account of the ethics of blame is grounded in a categorical assessment of the moral meaning of wrongdoing: wrongdoing that is not offset by defective moral agency on the part of the wrongdoer demands blame. We should reject this view—it is too uncompromising, too rigid.

When we consider the full range of morally engaged relationships, not all of which involve blame, we should conclude that criminal law institutions should not be in the business of blame. There are morally reasonable responses to wrongdoing that do not force us to choose between blaming and a disengaged, objectifying stance of treatment and control, the only two options presented by Strawsonian philosophies of blame and excuse.

Instead of reacting with blame, persons who are mistreated might instead come to believe that the obstacles the wrongdoer encountered—circumstantial pressures, strong impulses, personal trauma, social alienation—were understandably, although not justifiably, mishandled. Though it is easiest to accept that it is the victim who is morally permitted to refrain from blaming, others who are involved might also suspend blame. Even grave moral wrongs might be viewed as tragic for everyone involved.<sup>19</sup> This response is compatible with morality.

The position I am elaborating is compatible with maintaining that there are limits to a reasonable range of moral options for responding to wrongdoing. There are cases in which moral blame is misdirected. An agent might be so immature or impaired, or her circumstances so disabling to moral motivation, that either agency ought not be attributed to her, or her actions, while hers, do not reflect her values, dispositions, motives, and characteristics, that is, what she is like. It is plausible to maintain that when a person fails to meet minimal standards of rationality, or is coerced, moral blame is inappropriate. These sorts of cases might be thought to be represented, in a rough way, by the function of nominate excuses in criminal law, such as insanity, immaturity, duress, and necessity. Excuses recognized by criminal law offer grounds for limiting criminal liability by serving as a defense against criminal charges. These criminal defenses represent an “objective” standard through being very strict—imposing a high bar for a defendant seeking to invoke them to avoid punishment.<sup>20</sup> For example, the defense of insanity requires proof that the

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<sup>19</sup> See Saira Mohamed, “Of Monsters and Men: Perpetrator Trauma and Mass Atrocity,” *Columbia Law Review* 115, no. 5 (2015): 1157–1216.

<sup>20</sup> It would be possible, on the account of the conditions of moral responsibility I am proposing, to argue for a “subjective” interpretation of some legally recognized excuses. I leave this interesting question for another time.

defendant had, at the time of acting, no knowledge of the difference between right and wrong. When the relevant standard is met, defendants are not guilty of the criminal charges. Excuses as criminal defenses are seldom successful.

Failure to secure a nominate excuse leaves considerable latitude for contemplating mitigating factors that are compatible with criminal wrongdoing and might reasonably trigger compassion or otherwise justifiably quell vindictive and righteous moral sentiments and dispositions. I am arguing that this wider domain of moral assessment depends on an important subjective element—a choice about whether and how to relate to a wrongdoer, above the threshold set by legally-recognized excuses or, more specifically, the moral threshold of basic responsibility those excuses represent. The subjective dimension of evaluation means that imposing criminal punishment should not be used as an opportunity for the state to express blame.

Of course, some defendants do not appear to have suffered any hardship. Relatively privileged people who have been treated well, enjoyed opportunities to satisfy their needs and develop their interests, and are psychologically healthy—or at least not very unhealthy—seem like excellent candidates for blame. Suppose such a person commits a crime. In the absence of any evidence of hardship, might we be required to blame him? Naturally, these cases would not include criminal activity that is deranged, cruel, or compulsive. Perhaps psychologically healthy defendants who have acted out of “ordinary” dishonesty, jealousy, greed, egoism, bias, or selfishness deserve moral blame. Whether they deserve retribution is a further question, but a refined retributive thesis that applies only in cases like this would be more palatable and also radically constrained, though it

might often attract nagging suspicions that the people it targets suffer more serious problems that are not obvious.

I conclude that, above the lower limit set by nominate excuses, the possibility of blame for criminal behavior is negotiable, at least in a wide range of cases. Available moral responses have subjective conditions, and if the subjective conditions of blame are as I construe them, collective blame is not morally obligatory. We are each morally entitled, within the relationships in which we stand, personal and impersonal, to blame those who have done us wrong. We are similarly entitled to decide, within reasonable limits set by the acknowledgment of wrongdoing, that blaming does not fit our stance or interest within a relationship. This important domain of moral choice enables us in myriad ways either to distance ourselves from or to confront the psychological and interpersonal dynamics of wrongdoing, something about which we can have differing interests and aptitudes without offending morality.

While there are limits to what counts as a reasonable stance—that is, a stance compatible with recognizing that a moral wrong was done and that the wrongdoer met minimal conditions of rationality—within those limits lies the negotiable territory in which moral relationships take shape and evolve over time. The ethical value of a prerogative to blame or to excuse by engaging the wrongdoer’s psychic world with compassion and understanding is evidence for the contingency of blame. In many instances of wrongdoing, a range of attitudes, more or less engaged, more or less demanding, more or less angry or righteous or sympathetic or compassionate are morally permissible. The appropriateness of a response depends on whether the respondent chooses to relate to the wrongdoer as

righteous judge, empathetic partner, retrained bystander, or from some other morally acceptable position.

The conditional nature of blame—the subjective aspect of a decision about whether and how to position oneself in relation to a person who has done wrong—entails that blame is a poor foundation for criminal punishment. Though the relationship between a person's ill will and her life circumstances sets some limits to how other people may permissibly respond, it is not the state's job to guide or force us in that personal domain of moral choice. If it is acceptable for victims to refrain from engaging in blame, then it is implausible to think it should be morally required for us collectively, through actions by the state, to blame people who are criminally guilty. An individual's sentence should not be a function of a victim's subjective disposition to blame, or of the state's supposing the moral necessity of a blaming response. Blame is not required as a matter of law or justice. And since the retributive theory insists that there is a punitive blaming response required by justice, we should reject the retributive theory.

A blaming stance does not fit well with the general form of criminal law. It fits poorly with the public nature of criminal law: the collective nature of our obligation through law to redress violations of individual rights. In criminal law, redress is formulated in terms of the public's interest and obligation, which is to make it clear that certain types of behavior are forbidden and intolerable, to discourage people from engaging in those types of behavior, and, when available, to take other measures, such as restitution, to address harms to victims. A duty to redress criminal wrongs generalizes across the citizenry, even though the heaviest burdens appropriately fall on people who have been

convicted of crimes.<sup>21</sup> In these respects, the criminal law enterprise is driven by the public moral importance of rights and the equal moral status of right-holders. Its basic function is to guide people's actions, generally speaking, in a way that respects and protects rights, not to engage or disengage moralistically with the meaning of wrongdoing for assessing a wrongdoer's personhood.<sup>22</sup> This is to say that criminal law is rightly act-focused, rather than attitude-focused. We can and should reject behavior that violates public moral norms that are legitimately codified in criminal law. It is the responsibility of the criminal justice system to sanction such conduct as a form of intolerable wrongdoing. We are responsible for maintaining a standard of behavior consistent with the basic rights of all individuals and with important shared interests, and our collective obligation to protect the basic rights and liberties of our fellow citizens supports the permissibility of burdening criminal lawbreakers with punishment when doing so is necessary to defend our basic rights. But there is no blaming stance we are required as citizens to take toward criminal wrongdoers. Although we have obligations to control one another's wrongful behavior, we are not obligated to blame.

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<sup>21</sup> Victor Tadros also relies on a notion of redress in developing a nonretributivist account of punishment. However, he conceives of the duty of redress as falling on individual offenders, while I am suggesting that the duty is collective. See his *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), especially chap. 12.

<sup>22</sup> Arthur Ripstein takes a similar position. See Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999). I agree with Ripstein's emphasis on the distinction between punishment and blame (146). Where I differ is in the idea that a response to criminal wrongdoing must involve hard treatment. If it does not, Ripstein argues, the public response to the criminal wrong will function as a mere price tag. I doubt that moral condemnation of criminal acts can be expressed only via hard treatment. On the public nature of criminal law and its relation to democratic equality, see also Vincent Chiao, *Criminal Law in the Age of the Administrative State* (New York: Oxford University Press, 2018).

Deploying the state’s power to condemn the personification of “evil” has historically not gone well. From the Salem witch trials, to fabricated rape charges against Black American men perceived as threats to white women and white male sexuality,<sup>23</sup> to extreme sentences for “crack pushers,”<sup>24</sup> to dubious legal provisions in the war on terror—such as the indefinite detention by the U.S. government of “enemy combatants” and abuse of the Material Witness Law to incarcerate suspects indeterminately<sup>25</sup>—persons in positions of power have too frequently permitted or manipulated our moral commitments and our fears to rationalize abuses. A criminal justice system that remains focused on evidence of wrongdoing could avoid abuses like these.<sup>26</sup> We could insist on evidence of wrongdoing and dangerousness before applying criminal sanctions, and we could calibrate those sanctions to that evidence. People who commit heinous crimes should be brought to justice, yet using the moral language of evil to motivate the point of criminal justice is,

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<sup>23</sup> For a powerful historical overview and analysis, see Alison Edwards, “Rape, Racism, and the White Women’s Movement: An Answer to Susan Brownmiller,” 2nd ed., Sojourner Truth Organization, 1979, <http://www.sojournertruth.net/main.html>.

<sup>24</sup> In 2010, the Fair Sentencing Act reduced a 100:1 federal sentencing differential for crack versus powder cocaine to an 18:1 disparity.

<sup>25</sup> See Anjana Malhotra, “Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11,” ed. Jamie Fellner, Lee Gelernt, Jim Ross, Joseph Saunders, Robin Goldfaden, *Human Rights Watch* 17, no. 2 (June 2005). <https://www.hrw.org/report/2005/06/26/witness-abuse/human-rights-abuses-under-material-witness-law-september-11>.

<sup>26</sup> For example, international criminal tribunals have demonstrated a cautious approach. The International Criminal Court rejects the death penalty and it aims for reconciliation. It is moderated by international standards and is less easily confounded with a particular society’s mechanisms of social exclusion, hierarchical structure, or systems of oppression. See Alex Whiting, “In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered,” *Harvard International Law Journal* 50, no. 2 (June 2009): 323–64; *Prosecutor v. Plavšić*, Case No. IT-00–39&40/1-S, Sentencing Judgment, 73–81 (February 27, 2003); Michael P. Scharf and William A. Schabas, *Slobodan Milosevic on Trial: A Companion* (New York: Continuum, 2002).

morally speaking, a highly risky prospect, especially in a society characterized by racial injustice, serious socioeconomic inequality, and a woefully inadequate safety net.

A legitimate democratic state must defend, with fair defensive measures, the equal rights of all citizens. But it does not need to blame people who are found criminally guilty in order to take measures to do so. Furthermore, the moral basis of a state's permission to burden criminal wrongdoers with punishment does not license its morally righteous condemnation of them. It is enough that it criticize, even condemn, their criminal acts as wrongful violations of the public's interest and, specifically, the public's obligation to protect all people's basic rights. Punishment can and should remain focused on this dimension of wrongdoing. It should not involve moral evaluations of an offender's blameworthiness. Doing without blame fits better with the actual basis of criminal liability in criminal law. Forgoing blame would also enable us better to reintegrate people into society after they serve their sentences, and to consider alternatives to prison when incarceration is not necessary to further the legitimate aims of criminal justice. This reorientation would, however, require a significant revision in the public moral discourse surrounding criminal convictions.