

RETRIBUTIVISM: THE RIGHT AND THE GOOD

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RETRIBUTIVISM: THE RIGHT AND THE GOOD

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ABSTRACT. Victor Tadros claims that punishment must be justified either instrumentally or on the grounds that deserved punishment is intrinsically good. However, if we have deontic reasons to punish wrongdoers then these reasons could justify punishment non-instrumentally. Moreover, even if the punishment of wrongdoers is intrinsically good this fact cannot contribute to the justification of punishment because goodness is not a reason-giving property. It follows that retributivism is both true and important only if we have deontic reasons to punish. Tadros also claims that the constitutive aim of punishment is to inflict harm or suffering on offenders. On the contrary, the constitutive aim of retributive punishment is to inflict (justified) wrongs on offenders that are proportionate to the (unjustified) wrongs they commit. Indeed, punishment should involve the least harmful wrong that is proportionate to the wrongfulness of the offense, adequate to facilitate recognition, and (perhaps) conducive to deterrence.

I. INTRODUCTION

In *The Ends of Harm*, Victor Tadros offers an original and attractive account of the justification of punishment. Tadros motivates this account with two premises. His first premise is that the constitutive aim of punishment is to inflict harm or suffering on criminal offenders. His second premise is that if the suffering of offenders is not intrinsically good then punishment can only be justified instrumentally. Tadros goes on to argue that the suffering of offenders is not intrinsically good and concludes that punishment can only be justified instrumentally. Tadros then presents his instrumentalist account of the justification of punishment. In this article I deny both premises of Tadros's motivating argument.

In Section II, I deny that punishment must be justified either instrumentally or on the grounds that deserved punishment is

intrinsically good. If we have deontic reasons to punish wrongdoers then these deontic reasons could justify punishment non-instrumentally. Moreover, even if the punishment of offenders is intrinsically good this fact cannot contribute to the justification of punishment because, perhaps counter-intuitively, goodness is not a reason-giving property. I conclude that retributivism is both true and important only if we have deontic reasons to punish.

In Section III, I deny that the constitutive aim of punishment is to inflict harm or suffering on offenders. Instead, the constitutive aim of retributive punishment is to inflict (justified) wrongs on offenders that are proportionate to the (unjustified) wrongs they committed. Put another way, the commission of a serious moral wrong justifies the infliction of a comparably serious wrong (or an act that would constitute a comparably serious wrong but for its justification) on the offender as punishment for the offense. Since inflicting harm or suffering is not the aim of retributive justice, punishment should involve the least harmful wrong that is proportionate to the wrongfulness of the offense, adequate to facilitate recognition, and (perhaps) conducive to deterrence. In principle, a proportionate term of incarceration is the most appropriate sentence for most serious crimes.

II. EVALUATIVE AND DEONTIC RETIBUTIVISM

In the first half of this article I argue that Tadros is wrong to think that if we cannot justify proportionate punishment on the grounds that such punishment is intrinsically good then we can only justify punishment on instrumental grounds. In Section A, I distinguish between evaluative and deontic retributivism as well as between positive and negative versions of each account. If deontic retributivism is true, or if negative evaluative retributivism is true, then punishment is justified neither instrumentally nor on the grounds that it is intrinsically good.

In Section B, I draw on a 'buck-passing' view of value to argue that even if proportionate punishment is intrinsically good this fact gives us no reason to punish over and above the facts that make proportionate punishment intrinsically good. In addition, I argue that the fact that wrongdoers deserve proportionate punishment might make proportionate punishment intrinsically good but gives us only weak reasons to punish. I therefore agree with Tadros that punishment

cannot be justified on the grounds that punishing wrongdoers is intrinsically good. I also agree with Tadros that punishment cannot be fully or even primarily justified on the grounds that wrongdoers deserve punishment.

However, I disagree with Tadros that the punishment of wrongdoers can only be justified instrumentally. In Section C, I argue that if we have deontic reasons to punish wrongdoers then these reasons provide a strong non-instrumental moral justification for punishment. Moreover, such deontic reasons provide a stronger *political* justification for punishment than either the intrinsic goodness of punishing wrongdoers or the fact that wrongdoers deserve punishment. In Section D, I provide some reasons to believe that, in fact, we have non-instrumental, retributive duties to punish serious wrongdoing.

A. *Four Varieties of Retributivism*

On any retributivist view, the fact that an individual has committed a serious moral wrong, culpably and without justification or excuse, provides a reason to proportionately punish her. But what is the nature of this reason and what explains its normative force? Below I discuss four possible retributivist views, each of which, if true, would provide a non-instrumentalist justification of punishment. In addition, only one of these possible views depends on the claim that proportionate punishment is intrinsically good.

Evaluative retributivism holds that the fact of wrongdoing derives its normative force from the further fact that proportionate punishment makes the world a better place, perhaps from an impartial point of view. There are two ways in which proportionate punishment might make the world a better place. *Positive* evaluative retributivism holds that proportionate punishment adds value to the world that does not exist prior to punishment. *Negative* evaluative retributivism holds that proportionate punishment eliminates a disvalue that exists prior to punishment. For example, a positive evaluative retributivist might argue that it is intrinsically good when individuals get what they deserve, and that wrongdoers deserve proportionate punishment. In contrast, a negative evaluative retributivist might argue that it is intrinsically bad when wrongdoers profit from their wrongdoing, and that proportionate punishment annuls the unjust advantage wrongdoers gain through wrongdoing.

On both accounts, proportionate punishment is intrinsically good in the comparative sense that it makes the world better than it was before. But only on the first account is proportionate punishment intrinsically good in the non-comparative sense that it adds value to the world as opposed to removing disvalue from the world.

By way of comparison, the creation of pleasure and the reduction of pain generally make the world a better place but in quite different ways. The creation of pleasure generally adds value to the world, while the reduction of pain generally removes disvalue from the world. Both the creation of pleasure and the reduction of pain are intrinsically good in the comparative sense that they both represent an improvement relative to a temporal baseline. But only the creation of pleasure is intrinsically good in the non-comparative sense that it adds value to the world. It would be as misleading to say that the reduction of pain adds value to the world as to say that the creation of pleasure removes disvalue from the world. Although both pleasure and pain give us reasons for action, the reasons they give us are different in kind and, in principle, one set of reasons could exist without the other. In particular, our reasons to reduce pain are much stronger than our reasons to create pleasure.

In contrast, *deontic* retributivism holds that the fact of wrongdoing either carries its own normative force or derives its normative force from a deontological principle or a value that we have reason to respect but not to produce or promote. *Positive* deontic retributivism holds that by proportionately punishing wrongdoers we satisfy some deontological requirement or respect some important value. *Negative* deontic retributivism holds that by failing to proportionately punish wrongdoers we violate some deontological prohibition or disrespect some important value.¹ For example, a positive deontic retributivist may believe that we have a moral obligation to create and sustain a criminal justice system and punish individual wrongdoers. In contrast, a negative deontic retributivist may believe that we have no positive duty to create a criminal justice system but that, given that we have such a system, we would violate a negative duty of fairness

¹ In my very first article, I described negative deontic retributivism as the view that we have deontic reasons not to impose disproportionate punishment. See Adil Ahmad Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law', *Buffalo Criminal Law Review* 9 (2005): 273. Although this view was worth discussing there, it was mislabeled. Strictly speaking, in the phrase 'negative deontic retributivism' the term 'negative' qualifies 'deontic' not 'retributivism.' The view I described there is better described as 'deontic negative retributivism'.

were we to punish some wrongdoers but spare others. Alternatively, punishing some wrongdoers while sparing others might wrongfully express a lack of respect or concern for the victims of the spared wrongdoers.

By way of comparison, merit and fairness provide deontic reasons of quite different kinds. We may have positive deontic reasons *to award* positions to the most meritorious candidates, and we may have negative deontic reasons *not to deny* positions to candidates on the basis of race or gender. Considerations of merit give us positive reasons but no negative reasons: if there are two equally meritorious candidates then we have competing positive reasons to award the position to each of them but no negative reasons to deny the position to either of them. Conversely, principles of fairness give us negative reasons but no positive reasons: we have no reasons of fairness to award a position to anyone, only not to deny someone a position for discriminatory reasons.

One might think that we have positive reason to do whatever we have negative reason not to not do, or negative reason not to not do whatever we have positive reason to do. But this is either a form of double-counting or a misunderstanding of the content of our reasons. For example, we have negative deontic reasons *not to kill*, but we have no positive deontic reasons *to not kill*.

If any of these versions of retributivism is true then punishment can be justified non-instrumentally. If either form of deontic retributivism is true, or if negative evaluative retributivism is true, then, contrary to Tadros's claim, punishment can be non-instrumentally justified without claiming that the punishment of wrongdoers is intrinsically good.

B. Evaluative Retributivism

With the available alternatives before us, I now wish to explore a general theoretical challenge to all evaluative retributivist views. If this challenge is sound then evaluative retributivism is either false or trivially true, and retributivism is true and important only if deontic retributivism is true.

According to many leading moral theorists, including Tim Scanlon and Derek Parfit, the fact that a state of affairs is good or bad

provides us with no reasons to pursue or avoid it. Instead, such reasons are provided exclusively by the facts that make the state of affairs good or bad.² The facts that make a state of affairs good or bad give us reasons to pursue or avoid that state of affairs, to want that state of affairs to obtain or not obtain, and to hold positive or negative attitudes toward that state of affairs. However, the fact that a state of affairs is good or bad is itself normatively inert, giving us no additional reasons of any kind. For example the fact that dental surgery is bad gives us no reasons over and above the fact that it is painful, while the fact that eating honey is good gives us no reasons over and above the fact that it is pleasant.

Note that I am not here invoking a 'buck-passing' view of the *nature* of value, only of the *normative force* of value. I am not proposing that to have value *just is* to have other, lower-order, reason-giving properties. I am only proposing that having value is not itself a reason-giving property. This is significant because several theorists who reject the former claim accept the latter claim.³

On the latter buck-passing view, even if proportionate punishment is intrinsically good this fact gives us no reasons to pursue it, and even if impunity is intrinsically bad this fact gives us no reasons to avoid it. Only the facts that make punishment good or impunity bad give us reasons to punish. Evaluative retributivism, in its generic form, is therefore false necessarily: it could not possibly be true that we are justified in imposing proportionate punishment because doing so produces an intrinsic good or eliminates an intrinsic evil.

Of course, an evaluative retributivist could recast her position: we are justified in imposing proportionate punishment for the reasons that *make it* intrinsically good or its absence intrinsically bad, not for the reason that it *is* intrinsically good or its absence is intrinsically bad. What are these lower-order reasons? Are they deontic or evaluative? No doubt, if proportionate punishment is morally required then this fact makes proportionate punishment intrinsically good. Similarly, if failure to punish is morally forbidden then this fact makes failing to punish intrinsically bad. However, the fact that

² See, e.g., T.M. Scanlon, *What We Owe to Each Other* (London: Harvard University Press, 1998), pp. 95–100; Derek Parfit, *On What Matters*, Vol. 1 (Oxford: Oxford University Press, 2011), pp. 38–39.

³ See, e.g., Jonathan Dancy, 'Should We Pass the Buck?', in Anthony O'Hear (ed.), *The Good, the True and The Beautiful* (Cambridge: Cambridge University Press, 2000), pp. 159–173; Roger Crisp, 'Goodness and Reasons: Accentuating the Negative', *Mind* 117 (2008): 257–265.

conforming to our deontic reasons is intrinsically good gives us no additional reason to conform to our deontic reasons. So if deontic retributivism is true then evaluative retributivism is trivially true but practically irrelevant.

Alternatively, we could explain the goodness of punishment and the badness of its absence by reference to non-moral properties (such as the provisions of a validly enacted law) or to lower-level evaluative properties (such as desert). Most plausibly, if wrongdoers deserve proportionate punishment then this fact might make their proportionate punishment intrinsically good. In addition, the fact that wrongdoers deserve proportionate punishment plausibly gives us some reason to punish them, to want them punished, and to take satisfaction in their punishment. If we 'pass the buck' from the intrinsic goodness of deserved punishment to the fact that wrongdoers deserve proportionate punishment then the justification of proportionate punishment would rest not on its intrinsic goodness but on the fact that it is deserved.

We are drawing a distinction between two familiar claims: that wrongdoers deserve punishment ('the desert claim') and that deserved punishment is intrinsically good ('the intrinsic good claim'). This distinction is important because retributivists disagree, among themselves and with their critics, about which of these claims is more important to the justification of punishment. In this symposium, Doug Husak embraces the desert claim while expressing skepticism about the intrinsic good claim, while Leo Zaibert embraces the intrinsic good claim wholeheartedly.⁴ Based on the preceding discussion, I am ready to side with Husak in this controversy. The intrinsic good claim, even if true, is practically irrelevant: it adds nothing of normative significance to the desert claim. If we have non-deontic reasons to punish the deserving these reasons derive from the fact that punishment is deserved and not from the fact that deserved punishment is intrinsically good. Evaluative retributivists should therefore embrace the desert claim and abandon the intrinsic good claim as a distraction.

The distinction between intrinsic goodness based on desert and desert itself is also significant because the supposed intrinsic goodness of deserved punishment lends itself to efforts to consequentialize retributivism.⁵ After all, if deserved punishment is intrinsically

⁴ See Douglas Husak, 'Retributivism in *Extremis*' (this issue); Leo Zaibert, 'The Instruments of Abolition, or Why Retributivism is the Only Real Justification of Punishment' (this issue).

good, and if we have consequentialist reasons to maximize the good, then we have consequentialist reasons to maximize deserved punishment. By contrast, the mere fact that offenders deserve punishment at most tells us what we have reason to think, want, feel, and do with respect to each individual offender. How those reasons might combine with one another is left an open question.

Having said all that, I want to suggest that retributivists should not stand pat with the desert claim. As Husak notes in his contribution, the reasons generated by desert may be quite weak except perhaps in cases of extreme wrongdoing. As a result, Husak thinks that desert-based reasons may not make a decisive contribution to the justification of punishment. Here I tend to follow Mitch Berman in thinking that even if the fact that wrongdoers deserve punishment does not generate a very strong reason to punish them this fact may be in other ways quite decisive in the justification of punishment.⁶ For example, this fact may attenuate or cancel the normative force of the most salient apparent reasons not to punish wrongdoers, namely that to do so would harm them, make them suffer, or infringe their rights. However, Husak may be right that the desert claim does not make a decisive contribution to the affirmative case for punishment, one that could outweigh or significantly offset the other costs of punishment.

To sum up, we have rejected the intrinsic good claim based on the 'buck-passing' view that the goodness or badness of a state of affairs generates no practical reasons over and above the reasons generated by the facts that make the state of affairs good or bad. It follows that punishment cannot be justified on the grounds that deserved punishment is intrinsically good. We have also seen that the desert claim can play an important role in rebutting the case against punishment but does not appear to play an important role in making the affirmative case for punishment. In the next section we will see that deontic retributivism can avoid both of these problems.

C. Deontic Retributivism

Those scholars who support passing the buck on goodness and badness tend to oppose passing the buck on rightness and wrong-

⁵ See, e.g., Michael Moore, *Placing Blame: A Theory of the Criminal Law* (1997): 155–159; Michael Cahill, 'Retributive Justice in the Real World', *Washington University Law Review* 85 (2007): 815.

⁶ See Mitchell Berman, 'Rehabilitating Retributivism' (this issue).

ness. In other words, these scholars maintain that, unlike goodness and badness, rightness and wrongness are practical reason-giving properties. On this view, the fact that an action is morally wrong is a reason not to perform it over and above the facts that make it wrong. Similarly, the fact that an action is morally required is a reason to perform it over and above the facts that make it obligatory.

Derek Parfit offers two arguments to show that wrongness must be a reason-giving property.⁷ First, Parfit argues that we have morally decisive reasons not to violate deontological constraints only if it is wrong to do so. For example, Parfit argues, harming someone as a means does not make her substantially worse off than comparably harming her as a side-effect. This fact makes it hard to believe that we can have morally decisive *non*-deontic reasons not to harm someone as a means but no such decisive reasons not to harm her as a side-effect, holding the harm and the intended outcome constant. If we have morally decisive reasons not to harm others as a means then these reasons must be deontic reasons grounded in the wrongfulness of doing so.

To Parfit's first argument let me add one of my own. The only morally decisive reason we have not to violate deontological constraints as a means of *preventing* others from violating the *same* deontological constraints as a means is that it is wrong to do so. This is because every non-deontic reason not to violate such constraints as a means is also a reason to prevent others from violating the same constraints as a means. If we have morally decisive reasons not to violate deontological constraints as a means, even to prevent others from violating the same constraints as a means, then these reasons must derive from the fact that it is wrong to do so, not from the facts that make it wrong to do so.

Second, Parfit observes that we often judge that an action is wrong and conclude that its wrongness gives us morally decisive reasons not to perform it without attending to or reasoning from the facts that make the action wrong. For example, most of us judge it wrong to intentionally harm one person as a means of preventing comparable harm to two other people and that this fact gives us morally decisive reasons not to do so. Importantly, we do not arrive at this judgment by first considering the facts that make this action

⁷ Parfit, *On What Matters*, pp. 450–451.

wrong. Indeed, we may be unsure whether this action is made wrong by its intentional structure, by its causal structure, or by some other property. Without attending to our non-deontic reasons to avoid such actions, or to the wrong-making properties of such actions, we judge that we have a morally decisive reason to avoid such actions, namely the deontic reason that they are wrong.

To Parfit's second argument let me again add one of my own. If some action is wrong but we have otherwise good reasons to perform it, we typically weigh those reasons against the wrongness of the action and not against the facts that make it wrong. Put another way, we ask whether our reasons to perform the act defeat our deontic reasons not to perform the act, not whether our reasons to perform the act outweigh our non-deontic reasons not to perform the act. If we are right to reason in this way then it seems wrongness must be a reason-giving property.

I hope Tadros will be receptive to the view that deontic properties generate practical reasons over and above the non-deontic properties from which deontic properties arise. For it is only on the basis of deontic categories such as rights, liabilities, and duties that Tadros's Duty View of permissible harming gets off the ground. According to the Duty View, it is permissible to harm an individual on the grounds that she has a duty to allow herself to be harmed. So stated, the Duty View seems plausible. But it is very hard to believe that it is permissible to harm an individual merely on the grounds that she has very strong non-deontic reasons to allow herself to be harmed. In other words, while the Duty View seems facially plausible, its buck-passing cousin (call it 'The Strong Reason View') does not.

If these arguments are sound then rightness and wrongness, unlike goodness and badness, generate additional practical reasons. The rightness of punishing wrongdoers and the wrongness of sparing wrongdoers can therefore make a rational difference to the justification of punishment. Deontic retributivism at least has the right structure and content to justify punishment, while forms of evaluative retributivism based on the intrinsic good claim could at best be a placeholder for a justification based on lower-level evaluative properties such as desert.

Moreover, as we have seen, the reasons provided by desert may be too weak to make a decisive contribution to the affirmative case for punishment. In comparison, the deontic reasons provided by the duty to punish wrongdoers or the duty not to spare wrongdoers are plausibly viewed as stronger and more insistent. As Parfit puts it, when we claim that an action is wrong, in the ordinary sense of 'wrong,' we are claiming that action *mustn't be done*.⁸ Put another way, non-deontic reasons generally involve an advisory 'should,' while deontic reasons necessarily involve an imperative 'must.'

While the greater insistence of deontic reasons comes from their nature, the greater strength of deontic reasons comes from their structure. On one popular view, duties involve both an ordinary reason to perform (or refrain from) some action as well as a second-order, exclusionary reason not to refrain from (or perform) that action for certain opposing reasons. The strength of a duty, on this view, is a function of the strength of the reason protected from competition and the exclusionary scope of the reason doing the protecting. This is significant because our non-deontic reasons to punish (such as the fact that wrongdoers deserve punishment) compete with our non-deontic reasons not to punish (such as the fact that punishment is expensive) on an even playing field. In contrast, our deontic reasons to punish exclude at least some of our non-deontic reasons not to punish and compete only with whatever non-excluded reasons remain. It follows that deontic reasons to punish a wrongdoer provide a qualitatively stronger justification for punishing that wrongdoer than non-deontic, desert-based reasons to punish that wrongdoer.

Finally, it is more plausible to argue that the state has the right to use our resources to punish on the grounds that we have a duty to punish or that it would be wrong for us not to punish than solely on the grounds that wrongdoers deserve punishment. As Tadros and others have argued at length, it is not entirely clear that a liberal state is justified in using the finite resources of its citizens simply to give wrongdoers what they deserve. For one thing, considerations of desert may be excluded by duties of liberal neutrality. However, if we have a natural duty to punish wrongdoers then even a liberal state should either allow us to discharge that duty or (preferably)

⁸ Parfit, *On What Matters*, p. 173.

discharge that duty on our behalf.⁹ Alternatively, it may be much less important to give wrongdoers the punishment they deserve than to give children the education they deserve, to give the sick the care they deserve, and so on. However, if we have duties of retributive justice then these duties may at least sometimes outweigh our duties of distributive justice.

Importantly, Tadros adds that when the state taxes its citizens to fund the pursuit of deserved punishment the state effectively coerces those citizens to pursue a project they may not and need not share.¹⁰ However, if citizens have a duty to punish wrongdoers, either directly or (preferably) indirectly (that is, through the state), even at some cost to themselves, then it would not be wrong for the state to force them to pay this cost so that the state can punish on their behalf. Indeed, one of the major assumptions of Tadros's own account of the justification of punishment is that it is often permissible to force people to discharge their duties, or to impose on them a harm comparable to that which they are required to absorb in discharge of their duties. It follows that if citizens have a duty to punish wrongdoers at some personal cost then states are permitted to punish wrongdoers at an equal or lower cost to each of their citizens. Deontic retributivism therefore seems better positioned than desert-based evaluative retributivism to generate both a moral and a political justification of punishment.

D. Is Deontic Retributivism True?

As we have seen, Tadros argues that punishment is not intrinsically good and concludes that punishment can only be justified instrumentally. In contrast, I have argued that deontic retributivism offers a non-instrumentalist justification of punishment that does not depend on the intrinsic good claim or, for that matter, the desert claim. Moreover, we have seen that deontic retributivism is the most plausible and powerful form of retributivism. Of course, it is possible that all forms of retributivism are false. What reason do we have to think that deontic retributivism is true? Naturally, it is difficult to

⁹ Elsewhere, I argue that the duty to punish falls directly on individuals and only indirectly on the state. See Adil Ahmad Haque, 'The Revolution and the Criminal Law', *Criminal Law & Philosophy* 6 (2012).

¹⁰ Victor Tadros, *The Ends of Harm* (Oxford: Oxford University Press, 2011), pp. 78–83.

answer this question without presenting and defending a particular version of deontic retributivism. Since I am not prepared to attempt such a feat here I will offer only some general remarks.¹¹

All retributivists believe that the fact that an individual has committed a serious moral wrong against another person, culpably and without justification or excuse, is itself a reason to punish her in proportion to her moral blameworthiness. Deontic retributivists believe, in addition, that this fact gives rise to a moral duty. If retributivism is true then we have a reason to punish past wrongdoing even when doing so will not prevent future wrongdoing. We therefore should be able to construct examples in which we have reason to punish a wrongdoer who is no longer dangerous, either cannot be reformed or has already reformed, and whose punishment would not deter others. In addition, if retributivism is true then the total strength of our overall reasons to punish will not vary in direct proportion to the instrumental benefits of punishment. We therefore should be able to construct examples in which large changes to the instrumental benefits of punishment yield proportionately smaller changes to the strength of our overall reasons to punish, with the difference best explained by the presence of non-instrumentalist reasons to punish. Finally, if deontic retributivism is true then we should be able to construct examples in which our reactive attitudes toward failures to punish will be those associated with breaches of duty.

Since I lack Tadros's talent for constructing original examples I will draw on an actual case. In July 2012, Hungarian authorities arrested 97-year-old Laszlo Csatory on charges of torturing detainees at a Nazi internment camp in 1944. We can realistically stipulate that Csatory poses no future threat; that punishment will not make him recognize the wrongfulness of his actions if he has not already; and that no one who will commit a future war crime if Csatory is not punished will be deterred from doing so if Csatory is punished. Nevertheless, it is clear to me that we have strong reason to punish Csatory.

Now suppose that punishing Csatory *might* prevent some future wrongs, and that we may fairly force him to bear the risk that it will not. On this supposition, if our only reasons to punish are instru-

¹¹ I made some gestures in this direction in Haque, 'Group Violence and Group Vengeance'.

mentalist then we should expect our overall reasons to punish Csatory to be quite weak. Yet it is clear to me that our overall reasons to punish Csatory are quite strong. The best explanation for the strength of our overall reasons to punish Csatory is that we have non-instrumentalist reasons to punish him. The best candidate for that non-instrumental reason is the very fact that he committed very serious wrongs against many innocent human beings.

Finally, suppose that Hungarian authorities refuse to prosecute Csatory and that other concerned states, social groups, and individuals stop advocating for his punishment. It is clear to me that these agents would have reason to feel guilt when contemplating their decision and shame when confronted by Csatory's surviving victims or by his victims' families. It is also clear to me that Csatory's surviving victims and his victims' families would have reason to feel resentment toward these agents. The reasonableness of these reactive attitudes strongly suggests that refusing to punish Csatory would breach a duty owed to his victims.

Suppose that there is such a duty to punish and that this duty is owed to victims. Who bears this duty? One possibility is that this duty falls on whomever is best suited to carry it out. Another possibility is that this duty falls only on those with a special responsibility to protect the victims' rights or promote the victims' welfare. I tend to believe that the truth lies in between. As I have discussed elsewhere, I believe that the social groups with the most basic responsibilities to protect individuals are poorly suited to carry out the duty to punish, and that it is for this reason that the duty to punish passes to impersonal legal institutions of the state or (in appropriate cases) of the international system.¹² But I will not defend that claim here. For our purposes it is enough to show that there are plausible accounts of who bears the duty to punish.

As Tadros observes, most people feel that something is amiss when serious wrongdoing escapes punishment.¹³ Tadros believes that this feeling is best explained by the intuition that unpunished wrongdoers fail to discharge their (protective and corrective) duties to their victims. In contrast, I submit that this feeling is best explained by the intuition that the relevant political community has

¹² Haque, 'Group Violence and Group Vengeance'.

¹³ Tadros, *The Ends of Harm*, pp. 43, 276.

failed to discharge its (retributive) duties to its victimized members, namely to punish those who wrong them. Tadros might argue that our duty to victims is no more and no less than to force wrongdoers to perform their duties, but he would be mistaken.

As the Csatory case shows, we have a duty to punish wrongdoers even if doing so will not force them to compensate or protect their victims or make them recognize the wrongfulness of their actions. Indeed, generally we have a duty to punish wrongdoers who have already been forced to compensate and protect their victims and who have already recognized the wrongfulness of their actions. Criminal penalties generally are set without regard to the payment of tort damages; the use of defensive force against an attacker generally does not affect the attacker's liability to punishment; and while we often punish remorseful wrongdoers less severely than remorseless wrongdoers generally we still punish the former all the same. Our duty to punish seems independent of wrongdoers' duty to correct and protect. So Tadros is right that something is amiss when a wrong is committed and a responsive duty remains unfulfilled. But the responsive duty most important to the justification of punishment is our own.

III. DOING RIGHT BY DOING WRONG

But obviously enough, we can't justify punishment on the grounds that punishment wrongs offenders!¹⁴

In the second half of this article I will argue that Tadros is wrong to think that the constitutive aim of retributive punishment is to inflict harm or suffering on criminal offenders. Since crimes are serious moral wrongs, and retributive punishment is an apt or fitting response to crime, the aim of retributive punishment is to inflict proportionately serious wrongs on offenders. If retributivism is true then punishers are justified in inflicting proportionately serious wrongs on offenders. Thus, though it may not seem obvious to Tadros, we can and should justify punishment at least in part on the grounds that punishment wrongs offenders.

We ordinarily think of a wrong as an infringement of a right or a breach of a duty. On this view, we can speak perfectly coherently

¹⁴ *Id.* p. 86.

about *justified wrongs* such as those committed to prevent a much greater evil. Since incarceration ordinarily infringes the rights of others and breaches our duties toward them, it seems perfectly coherent to describe justified incarceration as a justified wrong. There is, however, a complication, namely that some justifications cancel or annul the very right or duty at issue. For example, some people believe that if I act in justified self-defense then I do not wrong my attacker at all, even though my use of force would ordinarily infringe her rights and breach my duties toward her. These people believe that by attacking me my attacker has forfeited her right not to be harmed. Similarly, Tadros believes that wrongdoers forfeit their right not to be punished, leaving behind no right for punishment to infringe. If Tadros is correct, then justified punishment cannot involve justified wrongs in the ordinary sense. To avoid rather than settle this controversy, I will simply stipulate that in the following discussion I will use 'a wrong' to mean 'an act that will infringe a right or breach a duty if it is not justified.' Thus, a 'justified wrong' is either a justified infringement or breach or an act that would be an infringement or breach but for the fact that it is justified. It is in this looser sense that I will characterize justified punishment as a justified wrong.

To be sure, the wrongs punishers justifiably inflict on offenders may and in some cases must be harmful: harmless punishments are hardly ever proportionate to harmful crimes, may not lead offenders to recognize the wrongfulness of their crimes, and may not effectively deter future wrongdoing. Nevertheless, within the limits of proportionality and mindful of the importance of moral recognition and deterrence we should make punishment as harmless and painless as possible. In principle, imprisonment is a suitable punishment for serious crimes, since the term of incarceration can be proportioned to the seriousness of the offense and imprisonment itself is arguably more humane than capital and corporal punishment. In practice, by contrast, the conditions of confinement can render incarceration inhumane as well.

A. Wrongs and Harms, Crimes and Punishments

On all versions of retributivism, just punishment must be an apt or fitting response to crime. In general, a punishment is an apt or fitting

response to a crime if 'the act of punishment [is] similar to the offense in certain respects'.¹⁵ Let us call this 'the Symmetry Thesis.' Since punishment cannot be similar to the offense in *all* respects, we must select *certain* respects in which a fitting punishment must be similar to the offense punished. I tentatively propose that a fitting punishment must share only those features of the offense punished that are necessary to justify its criminalization. For example, many scholars believe that it is justifiable to criminalize an offense only if the offense involves a serious moral wrong. Following Doug Husak, let us call this 'the wrongfulness constraint.'¹⁶ If the wrongfulness constraint and the Symmetry Thesis are correct then it follows that a fitting punishment must involve the commission of a moral wrong comparable in seriousness to the criminal wrong punished.

At one point, Tadros suggests that adequate punishment necessarily involves the infliction of harm or suffering. However, according to the proposed interpretation of the Symmetry Thesis, a fitting punishment necessarily shares with the crime punished only those features necessary to justify criminalization. It follows that punishment necessarily involves the infliction of harm or suffering only if crime necessarily involves the infliction of harm or suffering. Yet crime does not necessarily involve the infliction of harm or suffering. For one thing, we are sometimes justified in criminalizing harmless wrongs, that is, wrongs that do not inflict harm or suffering on each occasion. More precisely, it is justifiable to criminalize harmless wrongs if criminalization will prevent more harm than criminalization will cause.¹⁷ For another thing, even when we criminalize harmful wrongs it is the wrongfulness rather than the harmfulness that (partially) justifies criminalization. In general, wrongful harms are fitting objects of tort law while non-wrongful harms are fitting objects of regulation. Neither is a fitting object of criminal law. This suggests that we are justified in criminalizing harmful wrongs not in virtue of their harmfulness but in virtue of their wrongfulness. If I am right that crime does not necessarily involve the infliction of harm or suffering then, according to the Symmetry Thesis, neither does punishment.

¹⁵ Jeremy Waldron, 'Lex Talionis', *Arizona Law Review* 34 (1992): 25.

¹⁶ See Douglas Husak, *Overcriminalization* (Oxford: Oxford University Press, 2007).

¹⁷ See John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007): 1–32.

The claim that neither crime nor retributive punishment necessarily involves harm or suffering may strike many as strange. First of all, many harmful wrongs seem wrongful at least in part because they are harmful. It is true that some fundamental moral rights exist to protect basic interests that human beings ordinarily share. But the wrongfulness of violating an interest-protecting right generally does not closely track the degree to which the protected interest is set back. For example, a person with a long life expectancy and abundant opportunities and resources may lose more from dying than a person with a short life expectancy and meager opportunities and resources. However, this fact does not entail that the former has a stronger right not to be killed than the latter, let alone that someone who murders the former commits a more serious wrong or should be punished more severely than someone who murders the latter.

Even if wrongfulness supervenes on harmfulness, this at most means that any change in wrongfulness results *from* a change in harmfulness; it does not mean that every change in harmfulness results *in* a change in wrongfulness. It is for this reason that the justification for criminalizing even harmful wrongs turns on wrongfulness rather than harmfulness. Harmfulness contributes to the justification of criminalization indirectly, by contributing to wrongfulness, while wrongfulness contributes to the justification of criminalization directly. Put another way, the wrongfulness of an act is opaque rather than transparent to its harmfulness.

Second of all, almost all actual punishments inflict harm or suffering and, as we shall discuss at greater length in the next section, punishments that inflict no harm or suffering may prove disproportionately lenient. For now let me say that, as in the context of criminalization, harmfulness only indirectly contributes to the justification of punishment by directly contributing to its proportionate wrongfulness. Even if the rights that punishment infringes exist to protect basic human interests, the proportionality of punishment should be determined by looking to the right infringed rather than to the interest set back. Since it is wrongfulness rather than harmfulness that figures in the direct justification of punishment, it follows that in punishing our aim should be to inflict a proportionate wrong on the offender rather than a proportionate harm. Importantly, we need not aim at the offender's harm or suffering, though as we shall see we

must attend to the difference such harm or suffering might make to the wrong we inflict.

B. Harmless Punishment?

On the view we are exploring, the aim of retributive punishment is to inflict on each wrongdoer a proportionately serious wrong rather than a proportionately serious harm. If the suffering of offenders is not intrinsically good, this view may seem to suggest that, for reasons of humanity, the wrongs we inflict on offenders through punishment should be as harmless and painless as possible.

Against this latter claim, Tadros argues that 'it is difficult to believe that we should focus on the restriction of the offender's rights in itself rather than the impact that the restriction on his rights has on him'.¹⁸ Tadros offers the following scenario:

For example, suppose that the offender has stolen a television. We wish to punish him by restricting his rights, but we want to do so in a way that does not diminish his well-being. Knowing that he hates opera, we deny him the right to go to the opera by prohibiting people from selling him tickets. His rights have been restricted, but his well-being has not been set back (or it has not been set back significantly). Could this restriction on his rights be a fitting response to his crime? If we focus on the restriction of rights rather than the impact on well-being, it is difficult to see why not. But this hardly looks like punishment at all, let alone an adequate response to the offender's wrongdoing.¹⁹

Why might such a harmless punishment seem inadequate? One reason is that, in Tadros's scenario, the punishment is not proportionate to the crime. The offender wrongs the victim in at least two ways, violating at least two rights: to use her existing property and to sell her existing property. The offender is punished in a very different way, infringing a very different right: to buy new property. A qualitatively (though probably not quantitatively) more fitting punishment would be to bar the offender from either using or selling opera tickets he already bought (perhaps to impress a former partner). More practically, the offender might be fined, depriving him of the freedom to either spend or save his money. Note that the latter punishment might be proportionate even if it is harmless because, for example, the offender never spends his own money and has all his material needs met through the generosity of others.

¹⁸ Tadros, *The Ends of Harm*, p. 86.

¹⁹ *Id.*

A second reason is that harmless punishments may not bring home to offenders the wrongfulness of their own actions. For example, if instead of imprisoning a serious offender for some term of years we place her in a coma for the same period of time we may sharply reduce the harmfulness of her punishment but we may also sharply reduce her opportunity to recognize the wrongfulness of her crime. Tadros argues that we have significant reasons to encourage offenders to recognize their own wrongdoing, though he thinks these reasons are inadequate to justify the institution of punishment. Nevertheless, these reasons may be adequate to justify choosing one manner of punishment over another, provided that the chosen punishment is not disproportionate overall.²⁰

Finally, harmless punishments may not deter offenders as effectively as harmful punishments. It is plausible to suppose that offenders will respond to threats to their wellbeing more readily than threats to their rights. Perhaps it is permissible to impose a more harmful (but still proportionate) punishment rather than a less harmful (but still proportionate) punishment for the sake of deterrence. Although it is not permissible to inflict an otherwise unjustified (harmful) wrong on one person to deter others it may be permissible to inflict an otherwise justified (harmful) wrong on one person to deter others. Although we may not inflict a wrongful harm on one person to prevent a wrongful harm to another person, perhaps we may inflict a non-wrongful harm on one person to prevent a wrongful harm to another person. If so then the view we are exploring may produce a form of 'limiting' retributivism according to which we may look to consequentialist considerations to select a punishment within a range set by non-consequentialist principles.

We may tentatively conclude that retributive punishment should involve the least harmful wrong that is proportionate to the wrongfulness of the offense, adequate to facilitate recognition, and (perhaps) conducive to deterrence. Importantly, harmless punishments are hardly ever proportionate to harmful wrongs. It is hard to imagine any harmless punishment comparable in seriousness to murder, rape, or other violent crimes. However, in reforming our

²⁰ Importantly, recognition might be an independent reason to punish, or it might be part of a broader retributive account. Retributivists might argue that it is apt or fitting that wrongdoers be made to recognize their own wrongdoing as a result of undergoing proportionate punishment. Antony Duff may hold such a view.

own criminal justice system we should explore less harmful (but still proportionate) punishments for serious crimes, and much less harmful (but still proportionate) punishments for less serious crimes, than we currently impose.

C. Objectivity and Subjectivity in Punishment

We are exploring the view that the constitutive aim of retributive punishment is to inflict a proportionate wrong, rather than a proportionate harm, on offenders. If true, this view would explain what is wrong with recent subjectivist accounts of proportionate punishment.²¹ On these subjectivist accounts, a proportionate punishment is one that inflicts an amount of harm or suffering comparable either to the harm or suffering inflicted by the crime (cardinal proportionality) or to the harm or suffering inflicted on other offenders for the same offense (ordinal proportionality). Since different offenders have different interests and different sensitivities, proportionality is said to require that punishers impose different objective deprivations on different offenders to ensure a comparable setback to their interests or sum of negative experiences.

This subjectivist view might be true if the constitutive aim of retributive punishment is to inflict on offenders the same degree of harm or suffering that the offender inflicted on her victim or that the state imposes on similar offenders. However, the subjectivist view cannot be true if the constitutive aim of retributive punishment is to inflict a wrong comparable to the wrong the offender committed. On the latter view, variations in the harmfulness of punishment, like variations in the harmfulness of crime, ordinarily should not affect proportionality. Just as it is not a more serious moral wrong to kill an older victim than a younger victim, so too it is not a more serious (justified) moral wrong to imprison a younger offender than to imprison an older offender. We need not impose different objective deprivations on similarly blameworthy wrongdoers simply to ensure a particular degree of harm or suffering.

Exceptional circumstances may exist in which the interests and sensitivities of two offenders are so different that by imposing the same objective deprivation on both of them we actually impose different

²¹ See, e.g., Adam J. Kolber, 'The Subjective Experience of Punishment', *Columbia Law Review* 109 (2009): 182.

wrongs on each of them. The same deprivation might constitute a different wrong if it affects a different basic interest; the same basic interest in a different way; or the same basic interest in the same way but to a very different degree. For example, the imprisonment of a severe claustrophobe might inflict two wrongs upon her (depriving her of her freedom and inflicting severe mental suffering upon her) when only one would be proportionate and the second would be inhumane. However, the same deprivation does not constitute a different wrong if it affects the same interests in the same way but to only a somewhat different degree. Since incarceration generally affects the same interests in the same way to only a somewhat different degree, in the vast majority of cases, proportionality will not depend on the different interests and sensitivities of offenders.

D. A Barbaric Conclusion?

Tadros suggests that an account like the one we are exploring has 'even more barbaric implications than standard retributivist views'.²² Specifically, it seems that on the account we are exploring we have at least some reason to commit the *same* wrong against an offender that the offender committed against her victim. As Tadros seems to acknowledge, there are a number of reasons to refrain from capital or corporal punishment irrespective of their proportionality. For example, an innocent person sometimes can overturn her conviction and avoid at least some portion of a wrongfully imposed term of imprisonment. An innocent person's window of opportunity for avoiding capital and corporal punishment is even smaller. Incarceration might also lend itself to reflection and recognition in a way that capital and corporal punishment does not. Capital and corporal punishment may also be harmful to the moral character of individuals, the political identity of societies, and the basic nature of the legal system. But Tadros's point is that, for retributivists, all these considerations compete with some reason, however inconclusive, to wrong offenders in the same way they wronged their victims. It is this competing reason that Tadros finds barbaric.

I cannot help observing that on any theory of punishment there will be *some* reason to wrong or harm offenders in the same way

²² Tadros, *The Ends of Harm*, p. 86.

they wronged their victims. For example, such a 'matching penalty' likely will prove an effective deterrent. Indeed, on Tadros's own view, it appears permissible to impose such a matching penalty if doing so is the only way to make an offender protect her own victim from future comparable offenses.²³ Perhaps what Tadros finds barbaric about retributivism is the claim that there is some *non-instrumental* reason to inflict matching penalties on offenders. In other words, perhaps what he finds barbaric is not the matching penalty but the non-instrumental justification. I find this suggestion very difficult to accept. Tadros agrees that our wrongdoing can render us liable to matching penalties; retributivists add that our wrongdoing gives others a *pro tanto* reason to impose such matching penalties upon us. It seems hard to believe that this distinction between liability and justification, though important in various ways, marks the difference between the civilized and the barbaric.

In any event, I propose that retributivists admit that we have reasons of justice to impose capital and corporal punishment when otherwise proportionate but argue that these reasons of justice are always outweighed by competing reasons of humanity. For example, in 2004 a young Iranian woman named Ameneh Bahrami was blinded and disfigured when a man she refused to marry threw a jar of acid in her face. When she later appeared before a criminal court in Tehran, Bahrami asked the court to '[i]nflict the same life on him that he inflicted on me'.²⁴ The court agreed, and sentenced her assailant to be taken to a hospital, placed under general anesthesia, and blinded by acid. In the end, only hours before the procedure, Bahrami exercised her legal right to waive retribution and accept financial compensation for her injuries. In reflecting on Bahrami's case, I feel sure that the original sentence was inhumane but I cannot say that it was unjust. The original sentence seemed to me both a just response to the crime and, at the same time, utterly inhumane treatment of a human being. I conclude that we should reject barbaric punishments for barbaric crimes not because these punish-

²³ Tadros suggests that only a somewhat lesser penalty would be a proportionate means of forcing an offender to protect other potential victims from future offenses by other offenders.

²⁴ Saeed Kamali Dehghan, *Iranian woman blinded by acid attack pardons assailant as he faces same fate*, Guardian, July 31, 2011, <http://www.guardian.co.uk/world/2011/jul/31/iran-acid-woman-pardons-attacker>.

ments are unjust but because these punishments are barbaric. To call this latter conclusion barbaric is, in my view, unjust.

IV. CONCLUSION

I have argued that the best justification of punishment is not that it is good but that it is right, and that it is right not because it inflicts a proportionate harm but because it inflicts a proportionate wrong. Tadros is wrong to think that punishment can only be justified either instrumentally or on the grounds that the suffering of wrongdoers is intrinsically good. We can and should justify punishment non-instrumentally, on the deontological grounds that it is right to wrong offenders in proportion to their own wrongs.

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