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Philosophy of Law - Spring 2015

Deterrence and Retribution

Four Issues to Keep Distinct

1. Whether **our actions** are **predetermined**
2. Whether we have **free will** to act and choose
3. Whether we can be held **legally accountable** for our actions in a court of law
4. Whether we should be **punished** if we break the law

Two Justifications of Punishment

Deterrence. Punishment is justified because it *prevents* future crime. This is a **forward looking** criterion for the justification of punishment—i.e. the punishment is justified because of the positive effect it will bring **in the future**.

Retribution. Punishment is justified because the criminal *deserves* it. This is a **backward looking** justification of punishment—i.e. the punishment is justified because of what the criminal did **in the past**.

Retribution *versus* Deterrence

*We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and **deterrence** is a **sufficient practical justification** for them. **Retribution** is an independent moral justification...*

Ernest van den Haag, "The Ultimate Punishment: A Defense"

How Can We Decide Which is More Appropriate? Retribution or Deterrence?

Deterrence. Punishment is justified because it prevents future crime.

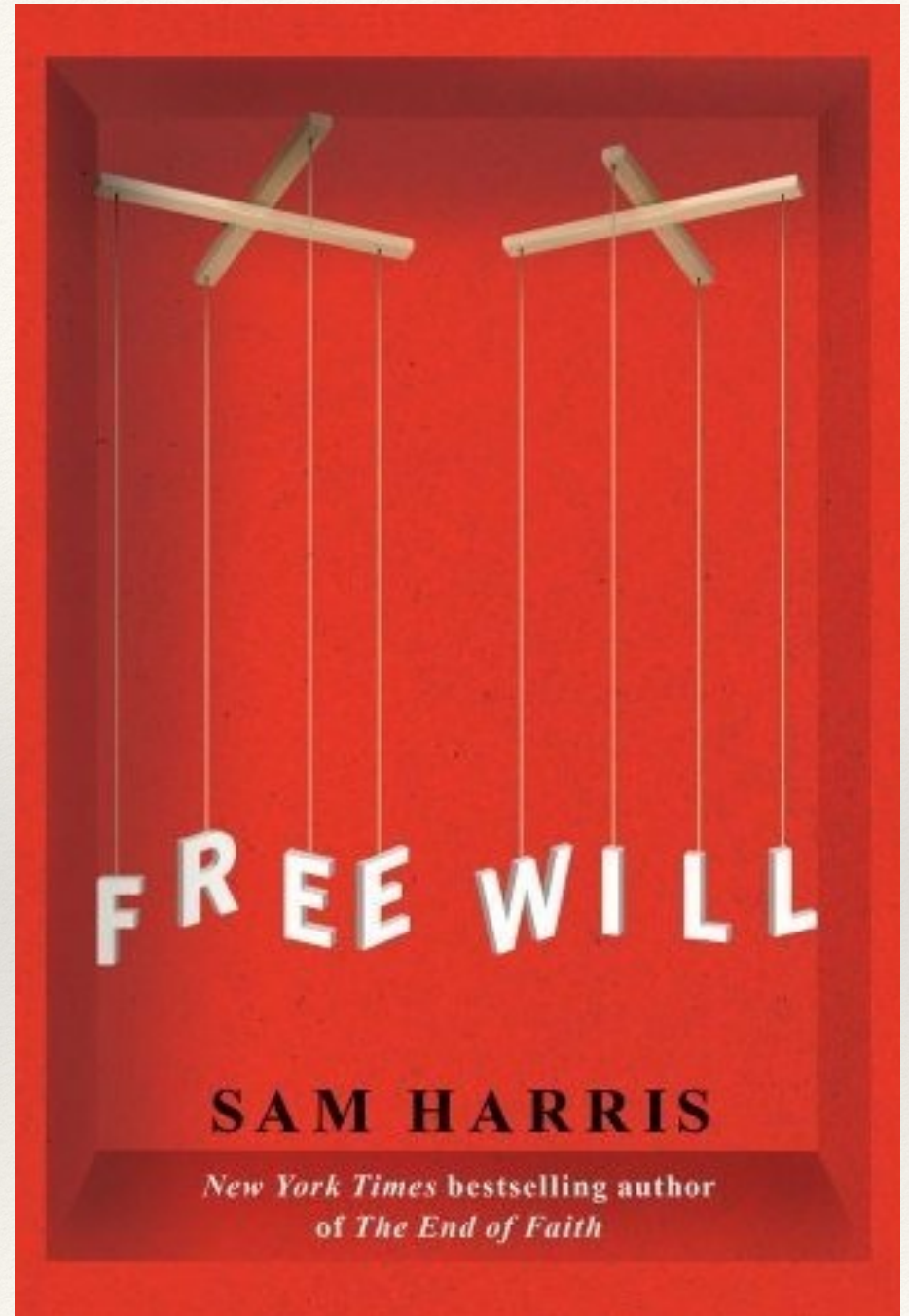
Retribution. Punishment is justified because the criminal deserves it.

Sam Harris on Free Will, Responsibility and Punishment

<http://www.skeptic.com/past-lectures/sam-harris-on-free-will/>

against free will — 4:48

against retribution — 38:35



OLD
PICTURE

Harris's
PICTURE

Free
will

Genetics

Brain
activity

Social
environment

Criminal act

Criminal act

If criminal acts are **mostly** (or even entirely) determined by genetics, brain activity and social environment, does it make sense to say that one *deserves* to be punished for his or her wrongdoings? *Sam Harris thinks so not.*

If not, Harris concludes that retribution cannot be an adequate justification of punishment.

A Rebuttal by Law Professor Stephen Morse

<https://www.youtube.com/watch?v=1QC9qaPpc2A>

Why Do We Fear Punishments?

But he who foresees that he must pass a great number of years, even his whole life, in pain and slavery — a slave to those laws by which he was protected; in sight of his fellow citizens, with whom he lives in freedom and society — makes an useful comparison between those evils, the uncertainty of his success, and the shortness of the time in which he shall enjoy the fruits of his transgression.

Cesare Beccaria, *On Crimes and Punishments*, Chapter 28

NB: This reasoning presupposes an *economic model of human behavior*. Here the author is implicitly assuming that people *maximize expected utility*.

A Debt for What?

Consider one example: a man has been convicted of armed robbery. On investigation, we learn that he is an impoverished individual whose whole life has been one of frustrating alienation from the prevailing socio-economic structure—no job, no transportation if he could get a job, substandard education for his children, terrible housing and inadequate health care for his whole family, condescending-tardy-inadequate welfare payments, harassment by the police but no real protection by them against the dangers in his community, and near total exclusion from the political process.

Learning all this, would we still want to talk—as many do—of his suffering punishment under the rubric of "paying a debt to society"? Surely not. Debt for what? I do not, of course, pretend that all criminals can be so described. But I do think that this is a closer picture of the typical criminal than the picture that is presupposed in the retributive theory—i.e., the picture of an evil person who, of his own free will, intentionally acts against those just rules of society which he knows, as a rational man, benefit everyone including himself.

J.G. Murphy (1973), *Marxism and Retribution*, *Philosophy & Public Affairs*, p. 241