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Retributive Justice and Standing: A Critique of State Punishment

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**Retributive Justice and Standing:
A Critique of State Punishment**

By

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of the requirements for
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ABSTRACT

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This thesis investigates the philosophical justifications of punishment, focusing in particular on the idea of standing to punish, and how the state can have standing. The two main doctrines of justifying punishment, retributivism and consequentialism, are considered. According to retributivism, punishment is justified by the desert of the wrongdoer, whereas consequentialism contends that punishment is justified by the good consequences that follow from punishing wrongdoers. This thesis concludes that retributivism better captures the moral intuitions associated with punishment, and is better suited to articulating the concept of standing to punish.

Standing to punish can be seen as the “moral authority” of the punisher. In order to describe how the state can have standing, the Rawlsian social contract is employed. The social contract shows that the state can have standing to punish through the implicit, rational consent of citizens to be punished. The conceptual device of subjective rights is employed in order to show that the contractarian justification of the state's standing to punish is tied to the socioeconomic equality of society. Ultimately, it is concluded that the institution of punishment has a moral commitment to punish the guilty, but that the state does not have the moral standing to punish.

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1. Defining Retributivism and Consequentialism

What does it mean to get what one deserves? Desert motivates some of our most fundamental modes of moral expression - punishment and reward; judgments of desert are not only common, they often form the basis, wholly or in part, of entire social structures. Capitalism, for example, is predicated, in part at least, on the view that wealth is deserved based on talents, skills, and effort, whereas communism asserts that all people deserve equal well-being. Even though the appeal of desert is ordinary and intuitive, it seems to stubbornly resist any attempt at philosophical explanation.

Insofar as punishment and desert are inextricably connected, the former inherits the conceptual obscurities of the latter. This obscurity has caused the two sides in the debate over the justification of punishment to be among the most intractable in philosophy. The two main camps in this debate are consequentialism and retributivism.¹

Consequentialism justifies punishment by attending to the alleged good consequences it achieves. These good consequences can include a broad range of ends, including happiness, the prevention of suffering, psychological satisfaction, and social cohesion, among many others. Punishment itself is not seen as a good - since punishment is the deliberate infliction of suffering, it is viewed as inherently wrong, and so can only

¹ The two camps in the philosophy of punishment roughly overlap with two major camps in ethics as a whole: deontological (Kantian) and teleological (Utilitarian) ethics. Retributivism corresponds to deontological ethics, consequentialism corresponds to teleological ethics. Therefore many of the familiar arguments between teleological and deontological doctrines have analogues in the debate over punishment.

be justified if the suffering that comprises it is offset by some other goods. There are plenty of ways in which those goods can be brought about, but the most commonly cited ways are deterrence, incapacitation, and rehabilitation.

Punishment has deterrent value because it discourages further wrongdoing, either by the wrongdoer herself or others who are aware of the punishment. Thus when the ex-con refrains from stealing because she wouldn't dare risk returning to prison, or when the child at school decides not to steal his friend's lunch out of fear of being punished, the deterrent value of punishment is at work.

Incapacitation is simply the wrongdoer being physically prevented from committing further crimes. Put simply, a criminal in prison cannot commit any crimes (at least against the law-abiders outside the prison walls). The case is even more clear within the context of capital punishment - the executed criminal will commit no more crimes, death is the ultimate incapacitation.

Rehabilitation is the effect of punishment causing some positive change in the wrongdoer. This might be achieved in a number of ways. One is by communication - given some denunciatory view of punishment, society is expressing its condemnation of the criminal when he is punished. This could lead to the moral improvement of the criminal, who realizes the error of his ways. There is also the possibility of more directly rehabilitative models of punishment, in which criminals are given counseling, training, job placement programs, and so on, thus giving the criminal the skills and self-esteem to become a productive, law-abiding member of society.

In contrast to all these consequentialist views, retributivism contends that punishment is justified by the desert of the wrongdoer. Thus, most retributivists would

assert that for one to deserve punishment is a necessary and sufficient condition for one to be justifiably punished. Though it is thus presented as a straightforward thesis, retributivism is nonetheless often confused with a variety of other positions; I shall draw on Michael Moore's work as I show how it differs from these other positions.

1. Any theory determining the *degree* of punishment is not retributivism. In particular, the principle of *lex talionis*, that an offender's wrong should in turn be inflicted on her, is often confused with retributivism. The retributivist believes that the wrongdoer should be punished because she deserves it. What exactly is the amount which is deserved is a separate question which is important, but needs not concern the retributivist.²

2. The theory that desert is merely a necessary condition for just punishment is not retributivism. On this view, desert has no role in justifying punishment, so it is typically justified by consequentialist considerations, that is, by the good ends it achieves. Desert matters here only as a side-constraint, or as a criterion that must be satisfied in order for punishment to be permissible. Retributivism asserts that desert is both necessary and sufficient for justified punishment - any good ends achieved by punishment are merely a happy side-effect. It is worth noting that this view is characteristic of some so-called "mixed-justifications" of punishment, which attempt to synthesize retributivism and consequentialism. Because these views trivialize the role of desert in justifying

2 Retributivism and *lex talionis* are often erroneously combined because of many philosophers' endorsement of both, including Kant. This may be because retributivism, unlike consequentialism, has no clear way of determining how much punishment should be inflicted on wrongdoers. *Lex talionis* provides a clear solution to this problem.

punishment, they are not retributivist.³

3. The theory that punishment is justified by the psychological satisfaction it generates in victims with vengeful feelings is not retributivism. Such satisfaction would be a good end achieved by punishment, so would justify punishment only on consequentialist grounds. The retributivist does not believe that psychological satisfaction is the same as the service of justice.⁴

4. The theory that punishment is justified because it satisfies the preferences of all people in society is not retributivism. Similar to the previous theory, this is a consequentialist justification. Preference satisfaction should not be equated with satisfaction of desert.

3 The role of desert as a necessary but not sufficient condition for punishment is a trademark of so-called “mixed-justifications” of punishment. Mixed theories of punishment claim that punishment as an institution is justified by consequentialist concerns, but that individuals should be punished because they deserve it. These theories should be considered versions of consequentialism, since they justify punishment with consequentialism. These theories' inclusion of desert as a necessary condition for just punishment does not integrate retributivism in a very meaningful way because it still fails to express retributivism's main contention: that desert alone justifies punishment.

4 I will later argue, however, that retributive feelings provide good reason to believe that deserved punishment is morally good. While psychological satisfaction itself is not important to the retributivist, the psychology of desert and punishment is nonetheless important to this paper.

5. The theory that punishment is justified because it prevents vigilantism is not retributivism. Again, this is a consequentialist consideration. Furthermore, this is limited to punishment in the context of the state, and thus cannot be seen as a basic theory of the justification of punishment *simpliciter*.⁵

6. Denunciatory theories of punishment are not retributivist. On such theories, punishment is a way of expressing society's condemnation of the criminal. Here again, moral communication is a consequence of punishment. The retributivist wants the wrongdoer to get what he deserves, even if he learns nothing from it. Consider, for example, a disgruntled student who, after being humiliated in front of his peers by his teacher, punishes his teacher by 'keying' her car. It would be awkward to describe this action as communicative, since the teacher won't even know who was responsible for the damage to her car - it is much more plausible that the student simply believes that his teacher deserves to suffer for her cruelty.

7. The theory that like cases must be treated alike is not retributivism. Such a theory demands that two offenders who have committed the same wrong must be punished the same. But retributivism is a theory of a prior consideration - why the offender should be punished. The theory that like cases must be treated alike could be appended to any

5 In fact, the retributivist would probably have less of an issue with vigilantism than the consequentialist. Vigilantism is generally opposed because it poses a threat to an orderly society. But threats to societal order carry much more weight in the consequentialist analysis of punishment than the retributivist. The retributivist could, however, oppose the vigilante on moral grounds, due to a possible lack of standing on the vigilante's part (see p. 8).

justification of punishment.

These other theories are sometimes mislabeled as retributivism because they share some superficial characteristics or connotations with pure retributivism. But they all make one of two mistakes: confusing the standards of inflicting punishment with the justification of punishment (as in the case of the equivocation of *lex talionis* and retributivism), or seeing some consequence of punishment as a retributivist reason to punish. Such mistakes distort the real meaning of retributivism and, especially in the latter case, blur the line between consequentialism and retributivism, thus confusing any conceptual investigation of the two justifications; it should be made clear that the two are radically different.

Retributivism justifies punishment through the desert of the offender. But the retributivist is not committed to valuing the giving of just deserts over all else. Certainly, the retributivist believes that we have a duty to punish the guilty, but that duty is not in the radical category of Kant's "perfect duties" (nor is any other). Punishing the guilty is simply one moral duty along with, and possibly competing with, many others - this position is what I will call a "minimal version" of retributivism.

2. Standing to Punish

I have thus far been occupied with the theories which tell us, "*why* are we justified in punishing?" But I will now venture into somewhat less well-charted territory by looking at the question. "why are *we* justified in punishing?" This question is definitely a part of ordinary moral thinking - we intuitively believe that the government should not punish people who cheat at board games, civilians should not punish each other for crimes, and perhaps no one should punish a person for not trying to fulfill his or her full

potential, though in all three cases punishment may be deserved. I will investigate this question, focusing in particular on whether or not the state is justified in punishing - a question that remains unanswered in ethics, but generally goes unasked.

Since consequentialism and retributivism are such radically different theories, apparently sharing no common ground for compromise, desert and punishment continue to be amongst those controversial concepts underlying our major political institutions. While the battle over how punishment is justified has gone on for centuries among scholars, punishment has persisted unchallenged as a state fixture. How has the institution of punishment remained unquestioned in the practical level when it sits on such unstable justificatory foundations? It is perhaps because the philosophical discourse on punishment has remained in large part insulated from political and social facts. For most people, it would seem odd to assert that an institution as clear and established as punishment is in need of justification, so the debate over punishment in philosophy may seem, to some, like a rather abstruse and theoretical activity with no real connection to real-life problems. Skyrocketing incarceration rates in the US make it clear, now, that the reverse is true. The legal institution of punishment is bereft of a clear justificatory foundation, and so has spiraled out of control through a cycle of political competition to increase punishment and demonize criminals. The public is in dire need, then, of a common understanding of how punishment is justified.

This paper will not attempt to tackle the Gargantuan task of justifying state punishment, but will rather examine the available justifications and see how well they fit with other values that members of the American society also cherish; I am in particular concerned with the question of the state's moral standing to punish. Standing can be

understood as moral authority to punish, which should be distinguished from institutional authority (henceforth referred to as “authority”), which is a non-moral aspect of institutions. I will illustrate the concept of standing with which I am concerned, by discussing the four possible combinations of standing and authority.

The first case is that in which the punisher has both standing and authority; a teacher fairly punishing an unruly student would satisfy these conditions. Then there is the case in which the punisher has neither authority nor standing. Imagine a student who is a constant source of trouble in the classroom. When one of his classmates talks out of turn in class, this student berates him angrily. Here, the unruly student has no authority, as the authority to punish in the classroom is reserved for the teacher, and he has no standing, since his own indiscretions have caused him to forfeit his moral right to be an arbiter of such moral issues in class. A case of standing without authority would be the righteous vigilante. Because the punishment doled out by the vigilante is extralegal, by definition, she lacks the authority to punish. However, assuming that her methods are effective and her motives are virtuous (to protect the innocent, to champion justice, etc.), the vigilante has moral standing to punish. A case of authority without standing would be the father who punishes his child for dabbling in recreational drug use, though he himself experimented with drugs at the same age. This father's standing may be in doubt, even if his son's drug use is wrong, because he may not be in a moral position to punish his son, even though he does have the authority as a parent.

In this section, I am not interested in the question of when punishment is justified, but rather, assuming that punishment is indeed justified, in the question of when the state actually has the standing to administer it. But though there is a *prima facie* distinction

between standing and justification, it is conceptually difficult to draw. Imagine another case - John confronts his girlfriend, Jane, on the street after finding out about her infidelity. A passerby, Paul, hears the exchange, and, feeling that Jane deserves to be punished, Paul slaps her. Though Jane should have been punished for her unfaithfulness (either because she deserved it or because she would learn a lesson), Paul certainly lacked standing to administer it. Clearly Paul shouldn't have punished Jane, but was this case of punishment unjustified?

The consequentialist would have great difficulty articulating why Paul shouldn't have slapped Jane. Suppose that his punishment were to produce bad consequences, since John and Jane would both be furious at Paul's presumptuousness. In such a case, the punishment would simply be unjustified. This is an unsatisfactory result because it fails to capture the intuitive idea of standing - Jane should have been punished, but not by Paul. Perhaps Paul's punishment would in fact produce good consequences - then the consequentialist would certainly be committed to saying that Paul's actions were justified. In either case, if the consequentialist wants to explain why Paul shouldn't have punished, she will likely resort to a system of rules or conceptual placeholders.

As I said, Paul's lack of standing would be reflected in a consequentialist calculation. After all, John and Jane would both be furious. The consequentialist might claim, then, that the intuitive idea of standing is a conceptual placeholder for the class of bad consequences that would arise when the wrong person punishes. I am skeptical of this move. The consequentialist cannot easily divide consequences into different classes, with each class embodying an ordinary moral concept. Suppose, for example, that a hard-boiled ex-marine has his family killed by his unhinged former-friend-and-fellow-marine-

turned-rival. Ex-marine wants to punish his rival, but he doesn't want to get the police involved, since he considers this a personal vendetta. It seems that the consequentialist would have to claim that the police do not have standing, since all parties involved would be upset at the interference of the police. This is not a satisfactory result - the police do have standing as a matter of moral fact. The opinions and values of those involved (i.e. the ex-marine's sense of personal honor) do not affect who has actual moral standing. I think this situation demonstrates why this consequentialist move fails.

The retributivist fares better, but understanding why will require a more in-depth understanding of both consequentialism and retributivism. I will show that understanding the nature of desert can explain our intuitive notions of standing, whereas consequentialism, being focused exclusively on consequences, has serious trouble articulating individual rights, which are the key to understanding the problem of standing. I will proceed, then, with a more in-depth discussion of both retributivism and consequentialism, in which I will contend that some version of retributivism is indispensable in justifying punishment. I will begin with a critique of consequentialism, followed by a defense of retributivism. My goal is to prove that the justification of punishment requires at least a minimal version of retributivism. Having established this retributivist foundation, I will use the tools of retributivism to discuss a problem of standing in political punishment.

3. Justifying Punishment

Of the two justifications of punishment, consequentialism is the forward-looking one. Rather than looking backward and focusing on the wrongdoing of an offender, like retributivism, it instead only looks to the future and justifies punishment by the good

consequences it produces. Because of this, consequentialism is often seen as the more progressive ideology. I will show that there are, in fact, some fundamental flaws in consequentialism. There are many reasons to doubt that punishment, at least as legal institution, does in fact produce good consequences like deterrence, incapacitation, and rehabilitation. America's prison system makes a strong case for the negative effects of punishment, as the United States has the highest incarceration rate in the world, and is nowhere near the lowest crime rate.⁶ But though there is much to be said about the (negative) effects of legal punishment on society, I will focus on the theoretical side of the issue. After all, we cannot weigh the importance of consequences until it is determined how important consequences are to the justification of punishment.

I will note, however, that even if we ultimately reject consequentialism, the consequences of punishment are always worth consideration. I am not advocating an extreme version of retributivism that would endorse punishing the guilty even at the most catastrophic expense. But if I am right in arguing that retributivism is a stronger theory than consequentialism, then retributivism presents us a set of moral duties that must be weighed alongside consequences when justifying punishment.

A typical objection to consequentialist ethics in general, the scapegoat problem, is also a classic objection to consequentialist justifications of punishment. The objection is this: imagine a there is a crime, and the public is outraged. Society is on the brink of rioting and upheaval, and the only way to appease the people is to punish the offender. But since the offender can't be caught, the only way to placate the people is to punish an

6 The Sentencing Project, "New Incarceration Figures"

http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf

innocent person, while claiming that they are the offender. Since the suffering of the one innocent person being punished would be outweighed by the benefit to society, this instance of punishment would be justified by consequentialism. In a cases like this, then, consequentialism justifies punishing the innocent. Punishing the innocent is wrong, so consequentialism can lead us to make wrong decisions.

There are two typical responses from a consequentialist to an argument such as this. The first would be to claim that punishing the innocent is not punishment at all. This move counts as what H.L.A. Hart called the “definitional stop”.⁷ Consequentialism justifies inflicting suffering on the innocent; even if it is not called punishment, it is still none the less a problem for the theory. The second response would be some form of rule consequentialism. In rule consequentialism, each individual act is not gauged to be right or wrong, but rather is subjected to a certain set of rules. These rules are formulated based on consequentialist concerns, so there would be a rule like, “don't punish the innocent,” since allowing punishment of the innocent, in general, is worse for everyone than disallowing it. However, this strikes me as the wrong reason for not punishing the innocent. The innocent should not be punished because of individual rights, not because of consequentialist rules. Consequentialism's inability to articulate rights is a flaw for the theory in every case, not just punishing the innocent.⁸

7 H.L.A. Hart, *Punishment and Responsibility* (2008), pp 5-6.

8 I will remind the reader again that consequences are always morally relevant. If retributivism is correct, then we have a moral duty to punish the guilty. But we also have many other moral duties, like the duty to minimize the suffering of others. I am not out to prove that consequences never matter, but I do want to show that some of

I don't want to elaborate too much on the specific system of rights to which I'm alluding. Simply put, the consequentialist view of moral responsibilities is comprised solely of the pleasure and pain caused by actions. This view fails to capture our actual moral views. In our ordinary interactions, we need to consider not only the pleasure and pain caused by our actions, but also what W.D. Ross calls "*prima facie* duties".⁹ Based on circumstances, different of these duties may have greater or lesser weight, and the relative strength of these duties determines what action is right. When I refer to the rights of an individual, I have in mind the *prima facie* duties that others have towards the individual. In this system of rights, consequences matter because they are part of the circumstances that make duties relatively more or less important, but unlike consequentialism, actions are ultimately right because of duties, not consequences.

Because consequentialism ignores desert and rights, it actually has very little connection to wrongdoing at all. The consequentialist does not see the wrongdoer *qua* wrongdoer, but rather sees the wrongdoer as a means to an end. Even in the case of punishing the guilty, this is a problem for consequentialism. Consider an adolescent who shoplifts from a pharmacy. In the consequentialist process of justifying punishment of this adolescent, at no point is it relevant what the offender has done. Thus the consequentialist could justify the death penalty for the shoplifter, given that it would produce enough good consequences (by deterring other shoplifters).

Punishment is a response to wrongdoing. So it is a serious problem for a justificatory theory of punishment not to refer at all to the wrong that was done.

our duties, like the duty to punish, cannot be cashed out in terms of consequences.

9 W.D. Ross, *The Right and the Good*, Indianapolis: Hackett Pub, 1988

Consequentialism does refer to future wrongs, but it is wrong to punish people for future wrongs. For example, imagine an innocent man in a certain demographic, who lives in a certain place, and has certain characteristics such that he is statistically almost certain to commit crimes. The consequentialist punishes wrongdoers on the grounds that they, and others, are likely to commit more crimes in the future, so why not punish this innocent man if he, too, is likely to commit crimes? The consequentialist cannot argue otherwise because consequentialist justifications are only minimally connected to wrongdoing.

One could then argue that consequentialism is hardly interested in punishment at all, since it is hardly interested in wrongdoing. This is not to say that consequentialist concerns are unimportant in punishment; it is clear that ignoring consequences entirely could lead down a dangerous road. But it is also clear that a theory of justifying punishment that is monofocused on consequences does not agree with what we think about punishment - one of the most fundamental qualities of punishment is that it is for a wrong; thus a justification of punishment must explain why the wrong creates a moral reason to punish.¹⁰ It does not follow from this failure of consequentialism, however, that retributivism is the correct theory. Retributivism is backward-looking, as it focuses entirely on wrongdoing and the desert it accrues, and so it is often seen as barbaric and mindlessly vengeful. It remains to be seen how desert is connected to morality, which is the central task of justifying retributivism. Retributivism is the foundation for my eventual comments on standing, so I will provide that justification.

I will again draw on Moore's work in defending retributivism. The argument has

10 John Gardner, in his "Introduction" to *Punishment and Responsibility*, H.L.A. Hart,

Oxford, Oxford University Press (2008). p. xxv

two main parts. First, I will point out how our moral intuitions agree with retributivism, thus answering the affirmative the question, “is it virtuous to have retributive emotions?” Second, I will bridge the gap between retributive emotions and morality, thus establishing that not only is it virtuous to have retributive feelings, but that those feelings function as guides to objective moral truths. Ultimately, then, I will have shown that retributive feelings give us good reason to believe that retributivism justifies punishment. So the argument begins with an appeal to intuition. I have already discussed, in my critique of consequentialism, how consequentialism fails to capture the essential intuitive connection between punishment and wrongdoing. In retributivism, desert makes that connection, and retributive emotions are the indicators of desert. When one witnesses some wrongful act, for one to experience retributive feelings, moral indignation and the desire to punish, is not only the normal response, it is the virtuous one.¹¹ This point becomes clear in a case when the wrongdoing is one's own - the virtuous response is clearly to feel guilty. Imagine the emotional state of a murderer. It is strange, in a way, to talk about a more or less virtuous murderer, but it seems that the murderer who feels no remorse is a worse figure than the murderer wracked with guilt who turns himself in. It would be incoherent to accept that self-directed retributive feelings are virtuous, while maintaining that other-regarding retributive feelings are not. The only plausible way to maintain such a position would be by claiming that retributive feelings can only be self-directed because our ability to judge others' mental states is fallible, thus we do not have the right to judge

¹¹ Note that I do not exclude the possibility of other emotional responses to wrongdoing.

However, I will focus on retributive feelings, since they are exclusively associated with responses to wrongdoing.

others. I reject this position because everything from passing blame to everyday social interactions would be impossible if we were not able to judge the mental states of others. I think, then, that doubting our ability to judge others' mental states is a radical position that I need not discuss more.

Consider another thought experiment: After the end of the war, a high-ranking Nazi official escapes to Argentina, and is found until years later. He is found living happily with his family in Argentina, and he is ostensibly a reformed man. Suppose it is true that there will be more harm than good in punishing the officer - he, his family, and his community will be hurt if he is punished, and the time since the war has dimmed the public's desire for vengeance. Should he then be left in peace when he is found? I am inclined to say no; this is because the Nazi official deserves to be punished for the atrocities he has committed. The alternative would be to absolve him simply because he has gone on to lead a happy, and productive, life. Getting away with murder is no reason not to punish.

In summation, the first thought experiment, of the murderer who does or does not feel guilty, was meant to show that retributive feelings are virtuous, and that it is justified to feel retributive feelings towards both the self and others. The second thought experiment, concerning the Nazi official, showed that retributive feelings or emotions remain forceful even when consequentialist reasons for punishing run out. If one agrees with these conclusions, then the stage is set for the second part of the argument, which is showing the connection between retributive feelings and moral truths.

The second part of Moore's defense of retributivism is his claim that emotions should be seen as "heuristic guides" to moral truths. On this view, emotions are not

essential in discovering what, say, justice is, nor are they to be seen as infallible indicators. In fact, it is possible to make moral judgments without any reference to emotions at all. Consider a case of theft: using observation and inference, someone could recognize the victim's ownership of some property and the thief's taking of said property, thus having the tools to attribute culpability to the thief. But such a moral judgment would be an impoverished one, as recognizing responsibility alone does not generate the acute sense of wrongness that accompanies an emotionally charged response to wrongdoing. Thus when it comes to recognizing the actual rightness or wrongness of an action, emotions are at least powerful guides. Given that emotions are powerful tools in recognizing moral truths, it follows that the emotions normally felt in response to wrongdoing, namely, retributive emotions, point to real moral truths.

That is not to say that emotions are infallible, or that they are proof of moral truths. Moore admits, for example, that homophobia can be seen as a negative emotional response to homosexuality, which would suggest that homosexuality is wrong. But emotions alone are not sufficient for determining moral truths - emotions should always be checked by reason and impartiality. For example, we find murder to be abhorrent, but there are also good, rational reasons for believing that murder is wrong. Thus we should conclude that murder is wrong because a number of heuristic guides to moral truth agree in finding murder wrong. The mere fallibility of some heuristic is no reason to reject it. Our sense of sight is fallible, but we do not reject it as a tool for discovering truth out of hand because it is mostly reliable and certainly valuable. The same is so with retributive feelings.

4. State Standing and The Social Contract

In the immediately preceding section I argued that retributive feelings are natural and intuitive, and that they are heuristic guides to moral truths. In earlier sections, I argued that consequentialism has serious flaws in justifying punishment. It is wrong to ignore wrongdoing and desert when justifying punishment. My arguments above, then, lead us to accept retributivism, and if we do, then we have the tools to finally explain standing. In the second part of this thesis, I will explore the idea of standing, especially as it relates to political punishment. I will explore how the social contract and retributivist justifications of punishment can give the state standing to punish, and it will emerge from this exploration that certain conditions must be actual in order for the state to have standing to punish.

In legal judgments, standing is never a part of the equation. Punishing a criminal requires only the authority of the state - a criminal could not claim, for example, that the state cannot morally punish her because the state has killed many more people in wars, and thus lacks the standing to punish killers at home. Once authority is present, standing fades into irrelevance. So it is clear how an institution of punishment could lose its moral grounding, yet maintain power and authority. The potential for the dissolution of standing without any effect on authority runs counter to our moral intuitions, since standing actually seems more important than authority. I will illustrate this point utilizing the well-known thought-experiment of a desert island.

Imagine a group of strangers shipwrecked on an island. They are in an environment without institutions, thus no one has the authority to punish the others. But each may have different degrees of standing. If the strangers were to designate a leader of the group, it is likely that they would grant that authority to the individual with the

highest standing. Suppose one of the strangers heroically saved several others when the ship sank; the others assume that he has a strong moral character, so they unanimously designate him the leader based on this assumed standing. A set of laws is carved into a stone, and order arises from the initial anarchy of their situation. So which is more meaningful - the laws on the rock, or the standing of the leader? Clearly it is the latter. If the leader turns out to be a tyrant, then he forfeits his standing and the others will surely depose him. On the other hand, if some miscreant scratches off the words from the rock, the people on the island won't suddenly disregard the position of the leader. This is because the rock is only a symbol; the leader's standing is what really gives weight to his legal powers.

Looking at the relative importance of standing and authority, there is a clear asymmetry between the actual state and the imaginary island state I have just introduced. It is perhaps because the island leader's authority has not been cemented by time, culture, and tradition. The laws on the rock are nothing like the actual government, which is vast, complex, and filled with pomp and ritual. The average citizen, mostly alienated from the internal processes of government, is nothing like the island-dweller, each of whom had a personal hand in the laws' inception. The islanders don't see their government with any particular reverence or fear; the actual citizen rarely questions his government's authority. Perhaps these facts explain, psychologically, how the importance of standing diminishes as one moves from the desert island to Washington.

But while standing may seem invisible in actual government, it is not necessarily impossible to identify. The standing of a just institution is certainly harder to articulate than that of the island leader, but it can be identified with the right tools. A closer look at

the standing of the island leader, who is an individual but also represents an institution of sorts, will serve as an intermediate step towards articulating the standing of an institution. Recall the earlier example of the arguing John and Jane, and the intrusive Paul. Paul's lack of standing is intuitively obvious - he knows neither party and he has little knowledge of the situation, so he clearly has no business interfering with John and Jane's private dispute. Now consider a similar dispute amongst a pair of islanders, Island-Man and Island-Woman. Suppose that the island leader knows as little of the dispute between Island-Man and Island-Woman as Paul knows of the dispute between John and Jane. I would like to claim that island leader has the standing to interfere in Island-Man and Island Woman's dispute. Why does the leader have this standing when his situation is ostensibly analogous to that of Paul? It may seem that the perceived standing of the leader is really just his authority. But as we have seen, authority alone has little weight without standing. The leader does in fact have standing, and it stems from his elected position. By choosing the leader, the islanders willingly give the leader the right to punish. The leader's standing, then, comes from the consent of the people.¹²

Fleshing out this assertion will be a lengthy process, but I would like to precede that by elaborating on the reasons why this discussion of standing is unintelligible to the consequentialist. The consequentialist is committed to saying that punishment is justified

¹² In our own society, of course, we do not think the state has standing to interfere in our private affairs, such as marital disputes. But on the imaginary island, the islanders are more concerned with preserving order within the fledgling state than citizens are in the real world. So we can see how the desires of the people (islanders prefer order, real people prefer autonomy) affect the standing of the state.

if it produces good consequences. The intuitive idea of standing is that punishment may be justified, but not for just any punisher - only a punisher with standing may justifiably punish. Standing is conceptually incompatible with consequentialism, then, because the idea of standing is not concerned with consequences. As said before, a consequentialist analysis of punishment might indicate the illusion of standing - to return to the case of John and Jane, if Paul were to interfere, then there would be bad consequences due to Paul's intrusiveness. But to say that consequentialism can thus accommodate the idea of standing would be a mistake. A goal of this thesis is to examine punishment in a way that broadly agrees with our intuitive response to punishment. Standing is, I believe, essential to that intuitive response. I think an effective approach to ethics captures basic moral emotions and intuitions because, as I claimed in the section on retributivism, feelings serve as heuristic guides to moral truth. Standing, like desert, is evidenced by the moral conscience. Consequentialism can only identify a lack of standing insofar as it produces bad consequences, but if standing is a fundamental moral aspect of punishment, then punishment without standing is unjustified regardless of consequences, just as is undeserved punishment. Because it is examining standing, this paper necessarily adopts a retributivist view.

The example of the shipwrecked strangers is a form of the well-known philosophical construct of the state of nature. In *Leviathan*, Hobbes imagined a world of *bellum omnium contra omnes*, war of all against all.¹³ This is the state of nature, where no institutions or rules exist. Thus the state of nature is often presented as a condition of infinite freedoms and zero rights. Each person is free to do as she pleases - take any

13 Thomas Hobbes, *Leviathan*. Ed. J. C. A. Gaskin. Oxford: Oxford UP, 2008

object, inflict any harm on others, and so on. But each person has no rights, and thus has no right to own property or to be unharmed. One might immediately object to this scenario on the grounds that it seems to contradict the notion of human rights, rights that all men and women possess regardless of their circumstances. I think we can accept the existence of human rights, while denying that they exist in the state of nature by remembering that the state of nature is not real - it is only a theoretical construct. To illustrate the importance of this fact, imagine what life might be like if the government were to collapse. Certainly there would be some chaos, but it would not therefore be a state of nature. Though the institution of government would be gone, the common language of morality would remain. Even if people diminished their respect for moral rules, they would still understand them. Thus in such a scenario, if someone were to begin killing and enslaving others, he would still understand that he was violating others' non-institutional rights (and that he deserved to be punished for it). In the state of nature, the moral and social norms we take for granted simply do not exist. The person in a state of nature has no notion at all of respecting the well-being of others, and will only help others insofar as doing so would help himself. We can still believe in human rights, then, because the state of nature does not, and perhaps even could not, exist.

Out of the universal self-interest of the state of nature emerges a universal agreement called the social contract. The social contract is obviously not a real document any more than the state of nature is a real condition, but it is an idea meant to illustrate how a world full of totally selfish actors could form a moral society. The social contract takes the infinite freedoms and non-existent rights from the state of nature and shifts the scales towards rights. Thus the social contract revokes freedoms, such as the freedom to

kill others, and grants rights, such as the right not to be killed. Rational people will see that it is in their own self-interest to have the right not to be killed, even if it means giving up the freedom to kill others. Thus the “terms” of the contract are a set of trade-offs, and they are determined simply by what is mutually beneficial for all. Those trade-offs are succinctly embodied by Freud's claim that “civilized man has exchanged a portion of his possibilities of happiness for a portion of security”.¹⁴

With the social contract come rights, and with rights comes the potential for violation of rights. For the contract to be meaningful, violation of rights must have some consequences; if there was no punishment for murder, then the illegality of murder would be meaningless, or almost meaningless. Thus the social contract creates the institution of punishment. But to define punishment as something that makes rights meaningful is insufficient. The relationship between violations of rights and punishment is not one of passive coexistence, but of active response. To simply describe rights as meaningful because of punishment is too one-dimensional - punishment is also meaningful because of rights. By looking at the social contract, I will show how rights make punishment meaningful, and how punishment can “offset” wrongdoing.¹⁵

The social contract's view of rights as trade-offs is the key to understanding the relationship between punishment and rights. Having rights means giving up freedoms, and giving up freedoms is a negative for the individual. For example, someone might want to steal a car; in the state of nature, he would be free to take it. The social contract

14 Freud, *Civilization and Its Discontents*, 1961

15 For more on “offsetting”, see Leo Zaibert, *Punishment and Retribution*. Aldershot, England: Ashgate 2006. pp.33-34

revokes that freedom, which negatively affects his interests. What offsets this negative is the right to own property and not have it stolen. Each member of society, then, is constantly in a state of balance between negative non-freedoms and positive rights.

In a society with laws, being a part of the social contract is not a choice. This is because everyone in a lawful society benefits from the rights granted by laws, and since everyone benefits from laws, everyone has a duty to obey them. It should not be said, however, that the social contract is forced upon the citizen. The very purpose of the social contract is to model how rational people would agree to rights and laws, even without explicit consent.

Punishment enters the picture when the social contract is violated. For example, Walter commits assault. In doing so, he violates his victim's right not to be assaulted - one of the rights that he himself, as a member of society, has always benefited from. By breaking the social contract, the essential trade-off of the social contract is upset. In committing assault, Walter ceases to be negatively affected by the social contract's revoking of freedoms. The scales, always balancing positive rights and negative non-freedoms, is unbalanced. Punishment rebalances those scales.

Unbalanced scales are a good way of picturing a very important concept in this paper - desert. To deserve punishment is to enjoy the benefits of rights, while not bearing the burden of the duty to respect the rights of others. Punishment is painful, so it adds weight to the negative side of the scales. The intuitive idea of proportionality in punishment is made quite clear by this picture. The right to not be killed is a much more positive effect than the right not to be stolen from, so violating the former upsets the scales more than the latter. Therefore murder calls for a greater punishment than theft.

Before continuing my account of punishment, I will address an important objection to the social contract. The objection is this: even a cursory look at history will show that social systems are not naturally egalitarian. The rational person does not necessarily want to share rights with others, often she wants to dominate others. For example, the 18th century American slave-owner would not agree to the social contract - he would want to retain his own rights while granting none to his slaves. So how does the social contract accurately model what we would rationally choose?

John Rawls famously attempted to defeat this objection in *A Theory of Justice*. Rawls refashioned the social contract by adding the concept of the veil of ignorance. For Rawls, a social contract can only be formulated justly when all parties in the contract are behind a veil of ignorance. The veil of ignorance is a state of not knowing one's future state in society. Countless characteristics have historically allowed some in society to dominate others: gender, race, religion, knowledge, strength, age, reputation, honor, wealth, and charm, to name a few. Behind the veil of ignorance, no one knows which and how much of these characteristics each will possess. Even more of an abstraction than the state of nature, Rawls calls this state the original position. Think back to the slave-owner - not knowing whether he (or she) would own slaves or be one of the slaves, he would, solely out of self-interest, decide that slavery ought to be outlawed. Like so many other important concepts in ethics, as diverse as The Golden Rule (“Do unto others as you would have them do unto you”), Buddhism's metaphysics of non-self, and utilitarianism, the original position is meant to eliminate the dualism of moral subject and object, eliminate bias, and make self-interest and other-interest one and the same.

The original position is an important adjustment to the theory of the social

contract. I think it is clear *prima facie* that the inherent impartiality of the original position moralizes the social contract in a way that formulating the social contract *via* state of nature does not. I do not think that Rawls' formulation of the social contract can provide a complete account of social justice, since it may fail to account for just redistribution, but it is nonetheless a powerful blueprint for making just decisions. It might be argued that it is impossible to think from behind the veil of ignorance, since no one can completely abstract their thoughts from their own contingent characteristics. Certainly the original position is neither real nor possible, but it is enough to say that it represents an ideal, and that ideal is still intelligible enough to follow.

The social contract is meant to reconcile the competing values of individual autonomy and state authority - by making rights a function of rational decision, individuals autonomously agree to a universal set of rights and laws. Using the social contract, I can now more thoroughly defend my claim that the state has standing to punish because of the consent of the people.

Kant famously claimed that “even if a civil society were to be dissolved by the consent of all its members... the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people”.¹⁶ The framework of the social contract allows us to understand what Kant meant. An unpunished murderer has benefited from laws, without paying the price of breaking them, so he deserves punishment. And we can now explain how the state has the standing to inflict it.

I have just explained the relationship between rights and punishment. Because

¹⁶ Kant, *Metaphysics of Morals*, Kt 6: 333

these two concepts are inseparable, agreeing to rights means agreeing to punishment. The individual agrees to the social contract in order to gain rights, so he also agrees to punishment. Therefore the state has standing to punish citizens because citizens consent to their own punishment. This position seems at first absurd. Why would a criminal consent to be punished? Surely she would prefer to commit a crime, then go unpunished. But the criminal, as a citizen, already has implicitly agreed to the social contract, and thus consented to punishment.¹⁷ The criminal's own rights are granted by the social contract, and because of the veil of ignorance, she cannot selectively grant herself rights while denying them to others. The nature of the original position is such that it is rational to apply all rights universally, even to oneself. Therefore, while a criminal would probably not explicitly consent to being punished, the consent is implicit.

At this point, I will remind the reader that the social contract is a model, not a reality. The social contract is necessary, however, to justify the state's standing to violate individual autonomy. But the social contract is not does not justify punishment *a priori*. The reason it is able to function as justification is that the environment and actors in the social contract resemble those in reality. For example, contingent factors like limited resources and susceptibility to injury must be actual so that the social contract is an functional model of rational human choices. In the next section of this thesis, I will take a deeper look at what these factors are, and what they mean for the justificatory power of

¹⁷ This idea of implicit consent to be punished has its roots in Hegel's *The Philosophy of Right*, in which Hegel famously defended the criminal's "right to be punished". I think it is less peculiar, however, to call the criminal's assent to punishment "consent" rather than a "right".

the social contract in a real-world context. I will argue that real-world conditions do not match the necessary conditions for the social contract to work.

Before continuing, I will note that my critique of state standing to punish is based on the social contract, so one could dismiss my argument by rejecting the social contract. For example, one might claim that the goal of law is not to satisfy rational self-interest. It is commonly thought, for example, that government should not only protect individuals from each other, but also help the disadvantaged in society. It could be argued, then, that there is more than mutual self-interest at the heart of laws - there are also irreducible moral principles. This would be a fundamentally different view of law. I have already argued that the original position would lead to laws that help the disadvantaged, but I do not want to defend the social contract against every other conception of social justice. I will readily admit that there is more to social justice and state principles than the social contract can explain. But I will limit my discussion to the social contract because even adherents of other doctrines of social justice should accept the social contract as at least presenting a foundation for justice. Even if humans are essentially violent and selfish, the social contract still presents a powerful conception of social justice. Therefore the social contract should be acceptable because it assumes no special moral character in humans, and it derives justice from the simple building blocks of fairness and impartiality. I think there is no reason, then, to reject the contractarian political theory that underlies this paper.

5. Objective vs. Subjective Rights in an Unfair Society

In *A Theory of Justice*, Rawls explores, at great length, the results of his thought

experiment regarding an the original position behind a veil of ignorance.¹⁸ He ultimately decides that the rational person in the original position would develop a vision of “justice as fairness”, a concept constituted by two principles of justice that would make up the social contract. The first principle is that “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others” (Rawls 53). This principle is the one with which this paper has been thus far concerned, since the violation of basic liberties is what calls for punishment. But my argument in the latter part of this paper will be as much concerned with Rawls' second principle of justice, the difference principle. The difference principle determines the extent to which economic inequalities are justified. According to this principle, economic inequalities are justified only if those inequalities benefit those least well-off in society. For example, the relative wealth of a successful entrepreneur is justified if his business or product improves wealth of all of society. The veil of ignorance makes the fair distribution of wealth the rational choice, just as it does for fair distribution of rights.

So how does Rawls's second principle of justice relate to punishment and standing? It may at first seem that punishment exists entirely in the moral realm, which is encompassed by the first principle of justice, and that the second principle of justice has no relation to punishment. But basic individual rights (the first principle) and economic fairness (the second principle) do overlap, and that overlap is in the realm of social justice. State punishment, as we have seen, cannot be justified in the same way as punishment between individuals can be; with its justification in the social contract, state punishment is conceptually rooted in social justice. Thus both of Rawls' principles of

18 John Rawls, *A Theory of Justice*. Cambridge, MA: Belknap of Harvard UP, 2000.

justice are important to state punishment.

Just like other issues in social justice, state punishment is pulled from both sides by moral and economic concerns. This is clear in the case of familiar issues of social justice like worker's rights, minimum wage, welfare, healthcare, and equality of opportunity. In each case, finding what is just is a matter of balancing the rights of the individual and the economic costs of doing so. In the case of punishment, it may be true that the state needs to balance giving criminals what they deserve and the costs of doing so. But the problem I am interested in is more subtle. What I want to look at is not the economic costs of punishment, but the economic effects on the moral aspects of punishment.

Without further delay, here is my claim: modern American society (along with many other societies, to be sure) does not satisfy Rawls' second principle of justice; in other words, the division of wealth is unjust. This unjust distribution of wealth marginalizes segments of society, not just financially, but also morally. Such an unjust society does not fit the model of the social contract, and thus the contractarian justification of state punishment fails. Therefore state punishment in our society is unjust.

This paper is a theoretical, not sociological, investigation of punishment, so I will say relatively little to defend my claims about the unjust distribution of wealth. But some brief comments should, I think, be made, and will perhaps be compelling to the reader. The United States has the highest incarceration rate in the world. This rate is nearly 8 times that of France and Germany, and 11 times that of Japan.¹⁹ Blacks represent 12.4%

19 The Sentencing Project, "New Incarceration Figures"

http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf

of the U.S. Population, but commit 36.5% percent of murders²⁰, 39.4% of violent crimes, and 30.1% of property crimes²¹; and constitute 38.2% of the prison population. Of black males in their late 20's, 11.7% are currently incarcerated.²² The disproportionately high levels of black crime and incarceration are even higher among the poor and uneducated, though blacks are overrepresented in so-called white collar crime as well. These statistics represent a crisis in American society. I will simply assume for this paper that this relationship of race and crime is not coincidental, or biological in origin, but that it indicates a demographic group that is to a considerable extent socially alienated and economically marginalized.

If this is true, then justifying state punishment becomes very problematic. The reason why can be found by looking at the important character of rights as trade-offs, and punishment as rebalancing the scales of duty and freedom. The social contract characterizes justice as fairness; without fairness, the social contract achieves little. Thus when we talk about individuals with a set of freedoms and a set of duties, those sets are identical for everyone.²³ Insofar as this is legally the case, the justification of state

20 http://www2.fbi.gov/ucr/cius2008/offenses/expanded_information/homicide.html

21 http://www2.fbi.gov/ucr/cius2008/data/table_43.html

22 Bureau of Justice Statistics, "Prison and Jail Inmates at Midyear 2006"

<http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf>

23 It is possible that some persons do have a claim to special rights which would be meaningless to others. For example, the biological differences between men and women might necessitate some special men's or women's rights. As long as these rights would be derived from the process of the social contract, they are not

punishment is not in trouble. But while the set of rights and freedoms is objectively the same for all individuals, not all duties and freedoms are subjectively actual.

What is the distinction between “actual” rights and rights that only exist legally or abstractly? Put simply, objective legal rights are subjectively actual rights only when they are able to be exercised. The right to own property means little, at least immediately, to a man who owns nothing, and the right to free speech means little to a man to whom no one will listen. Such rights, while legally real, would not in these cases be subjectively actual. The same can be true for duties to respect the rights of others. A man who despises violence is not at all burdened by his duty not to harm others, and a man with vast wealth is untroubled by his duty to respect others' property. These duties would, again, be subjectively non-actual. When I referred earlier to a demographic group that is “socially alienated and economically marginalized”, I suggested that this group would problematize the justification of state punishment. The reason is that a marginalized group in society can have the same objective rights as the rest of society while enjoying fewer subjective rights.²⁴

Consider again the contractarian justification of punishment: When a person violates an other's rights, that person ceases to be burdened by their duty under the social

problematic.

24 There is also the worrying fact that some groups are objectively disadvantaged. For example, punishment for crack cocaine, whose use is much more common among black communities, is much more severe than punishment for powder cocaine. This arguably represents institutional racism - an obvious injustice. I am concerned in this thesis, however, with the standing (or lack thereof) of just institutions.

contract, while continuing to benefit from their rights. In the absence of the burden of duty, punishment is needed to rebalance the scales. It should be clear how a lack of subjective rights disrupts this rationale. Consider, for illustration, the sort of person to whom this argument applies. A young, uneducated black male with an absent father, no positive role models or opportunities for constructive activities, and a social environment in which a future in prison seems inevitable; let's call him Thomas. I don't want to delve deeply into the psychology of such an individual, but it is important to look at his set of subjective rights. Legally, of course, Thomas has the same rights as anyone else. But his legal freedoms are in contrast to his feeling of freedom. He feels threatened by, and threatens, the powerful and affluent in society; and coming from a broken home, he does not aspire to having a positive family environment in his future, nor does he feel that he could ever have a legitimate means of income.

The justification of state punishment seems not to fit Thomas. Compare his subjective experience of duty to that of a white, affluent, well-educated individual; let's call him Henry. Thomas has a duty not to steal from others, even though it seems impossible for him to find a secure or comfortable job. Furthermore, Thomas feels little moral duty not to steal, since the feelings between him and the wealthy are characterized more by hostility than solidarity. Henry, on the other hand, feels certain that his financial future will be bright, so he feels no compulsion to seek out extralegal sources of income, and since he identifies much more with society's values than Thomas does, it would in fact be painful for him to steal from others. To say that Thomas and Henry are members of the same social contract would be ridiculous. Rights under the social contract are supposed to be trade-offs, but it seems that they are not so for either person. Thomas has

an objective duty not to break the law, but the physical and psychological barriers he faces limit his freedom. Henry is not at all inclined to commit crimes, but he certainly has benefited much from his rights. So while the social contract ought to work to Henry and Thomas's mutual advantage, it seems in fact that it is simply working to protect Henry from Thomas, with little cost to Henry and little benefit to Thomas.

When the contractarian justification of punishment is functioning properly, it seems paradoxical that the criminal would consent to her own punishment. But the paradox is not real because the sort of consent at play is not actual, given consent, but consent that is implicit in the dictates of justice under the social contract. For Thomas, however, the paradox becomes real. Thomas, like a criminal in a just society, would not explicitly agree to be punished, but in his case justice does not present any implicit consent either. Since society has not ultimately benefited Thomas, we cannot make a fundamental contractarian claim of justice - that he owes some duty to society. Therefore the state does not have standing to punish Thomas.

This result does, I think, agree with our intuitions. It should not be surprising that there cannot be a just justice system in an unjust society. What is even worse is the possibility that the justice system is not only lacking in standing, but also complicit in the unjust conditions of society. Thomas is not a member of the social contract because society limits his freedoms in both physical and psychological ways. It seems possible that the justice system could very well be fueling the “us and them” mentality that is so important to the psychological elements of injustice of society. To a demographic in society that is far overrepresented in prison populations, the justice system itself may seem to be an instrument of systemic injustice. While I do want to reiterate that this

paper is not meant to pursue psychology or sociology, the psychological impact of the institution of punishment is relevant insofar as it affects the subjective rights of persons.

Part of the reason that the defense of retributivism in this paper is important is that the issue I have just raised is not intelligible to the consequentialist. Granted, the consequentialist would probably see the negative societal and economic effects of over-criminalization and racial victimization, but seeing the issue from that perspective fails to capture the fundamental moral problem with which I am concerned: standing. The state needs some justification to be able to interfere with people's lives. For example, watching Reality TV may be a waste of time, but the government ought not to prevent people from doing it. This is not necessarily because of a consequentialist calculation, but because the government does not automatically have the right to limit people's autonomy. If the government were to ban Reality TV, everyone might be better off, but even so, people would not rationally want a government that limits what they can and cannot watch. The only reason the state has the right to punish is that people would rationally choose to live in a society where people are protected from one another. In the actual world, this choice would not be rational, since Rawls' second principle of justice is not satisfied.

A retributivist approach to the question of state punishment yields a much more complicated picture than a consequentialist one. In consequentialism, every factor in a moral question can simply be plugged into the moral calculation, and the question is ultimately answered when all factors are considered. Retributivism, much more at home within deontological ethical doctrines, is much less suited to resolving moral dilemmas, since it is less clear how to weigh competing moral principles against each other. Thus far in this paper, I have articulated two competing principles: retributivist desert, and the

state's standing to punish. The problem is this - if someone commits a crime, and the crime is wrong, then she deserves punishment. But due to unfair social conditions, the state does not have standing to punish. It seems, then, that punishing this criminal would be unjustified, yet it would be wrong for her to go unpunished.

It is tempting, then, to fall back on consequentialist ethics, since consequentialism can take a quantitative approach to the problem. This temptation, however, should be resisted. The consequentialist approach does simplify our ethical answers, but it also runs the risk of simplifying ethical questions.²⁵ If we were to revert to consequentialism at this point in the discussion, we would simply decide which injustice did greater harm to society: unfair punishment, or leaving offenders unpunished. I think it will be more fruitful, however, to stick to the ethical tools we have been using, and take a deeper look at the dilemma. One aspect of the question that has thus far remained more or less

²⁵ The so-called “problem of dirty hands” is a problem in ethics that supports this claim.

The problem is that it is possible, and perhaps even virtuous, to feel guilty about doing the right thing. Presumably, if someone were to kill one person to save many, or torture a prisoner in order to extract information that will end a war, those actions would be justified. But it might also seem monstrous for a person to do one of those things and feel no guilt. The problem of dirty hands is especially paradoxical for consequentialist ethics, since any moral problem can be calculated to be simply right or wrong. Deontological ethics might have a harder time deciding whether such actions are ultimately right or wrong, but this seems to capture our moral intuitions more accurately, since the problem of dirty hands shows that our moral conscience cannot simplify a moral problem the way a consequentialist calculation can.

unexamined is the question of agency. This issue relates to punishment on both a social and individual level, so it should be helpful to examine.

6. Moral Agency and Standing to Punish

Only a moral agent can be punished. A dog, for example, is not a moral agent; it lacks the intelligence to consider the moral consequences of its actions, and it is unable to speak the same moral language as humans. Therefore a dog cannot be held morally responsible for its actions; one can discipline, but not blame or punish a dog. Thus moral agency and punishment on the individual level are clearly linked, but what about punishment on the social level?

My critique of the state's standing to punish can be construed as a denial of a moral agency. Consider an analogy: remember John and Jane? Jane has been unfaithful to John, and he wishes to punish her by confronting her publicly and humiliating her. This time, I'm not interested in Paul's interference in the conflict, but another possible outcome. Jane believes she doesn't deserve John's punishment, and tearfully tells him, "you made me do it!" Jane is claiming that John, through his distant and unaffectionate behavior, drove Jane to infidelity. But there is something wrong with this argument - Jane is denying herself moral agency. Rather than taking responsibility for her actions, she is saying that the negative treatment she received from John caused her to stray from their relationship. In broad terms, Jane is illuminating the tension between determinism and moral responsibility.²⁶ But her appeal to determinism is opportunistic - one cannot pick and choose when one is and is not a moral agent.

How is this case analogous to state punishment? Recall that I said that the state's

²⁶ See *Libertarianism: A Defense of Free Will*, Richard Taylor

standing is unproblematic insofar as all citizens share the same objective rights. With fair distribution of rights, the contractarian justification of punishment is functional. But I argued that unfair social conditions render the distribution of subjective rights unfair, which voids the contractarian justification of punishment. This claim, that society grants fewer subjective rights to some than to others, could be analogous to Jane claiming that John left her no choice. Jane may have felt that she had no subjective duty to be faithful, despite her objective duty in the relationship, since she was treated unfairly. So we could criticize the idea of subjective rights the same way - just as Jane was denying herself moral agency, the claiming that there is a gap between objective and subjective rights may be claiming that some members of society lack moral agency.

I am indeed skeptical of the idea of full, unobstructed agency. Michael Moore considers such skepticism, and admits that "...we certainly have never been subject to the exact same stresses and motivations as [the criminal]. Therefore it may be tempting to withhold from [the criminal] the benefit each of us gives himself or herself: the benefit of being the subjective seat of a will that, although caused, is nonetheless capable of both choice and responsibility," (Moore 148). In other words, when we consider someone like Thomas, my example of someone who is marginalized in society, it is tempting to say that the causal forces to which he is subjected prevent him from having the same full moral agency which we believe ourselves to have, despite the fact that we too are subjected to some causal forces.

This claim is key to my argument, since this lack of moral agency results is what transforms Thomas' objective rights into a smaller set of subjective rights, which in turn is what causes the justification of state punishment to collapse. Moore goes on to reject

such a position, however:

Such discrimination is a temptation to be resisted, because it is no virtue. It is elitist and condescending toward others not to grant them the same responsibility and desert you grant to yourself. Admittedly, there are excuses the benefit of which others as well as you may avail themselves... [but] to refuse to grant [the criminal] the same responsibility and desert as you would grant yourself is... a refusal to admit that the rest of humanity shares with us that which makes us most distinctively human, our capacity to will and reason- and thus to be and do evil. Far from evincing fellow-feeling and the allowing of others to participate in our moral life, it excludes them as less than persons. (Moore 148-149)

If my claims about subjective rights are indeed “elitism masquerading as egalitarianism”, then my argument is in peril. If Moore is right, then my argument may be similar to my argument that you cannot punish a dog. Because dogs are not moral agents, we should not hold them morally accountable for their actions. I do not wish to make a parallel claim about marginalized people in society, because I don't want to portray such people as sub-human. To defend my argument, I will have to show that my claims about subjective rights do not demean the moral status of criminals, and that my claims about subjective rights are objectively valid, and not elitist moralism.

I will begin my defense by pointing out that Moore's theoretical treatment of punishment is focused on punishment between individuals. After all, the quote above is specifically addressing the case of an individual murderer. His words are potent in the context of a monstrous individual like the one he discusses, but they are less convincing

in a broad social context. I am concerned, in this paper, about the dangers of generalizing punishment's justification from an individual to a political and social level. Moore dismisses such concerns:

“[None] of the proper liberal worries that should on occasion stay our hand should lead us to eschew retributive justice when we set up institutions. The main such worry, the preservation of individual autonomy, argues in favor of retributive institutions, not against them. We respect someone's autonomy when we punish him only because he deserves it, not because his punishment is useful to others' welfare” (Moore 150).

Moore is right to point out that the retributive rationale respects the autonomy of the individual more than that of the consequentialist. But when Moore moves from individual to institutional punishment, he looks only at the moral side - if it's right to punish one person for these reasons, it's right to punish everyone for these reasons. He fails to look at the social side.

When expanding retributive justice into an institution, that institution should not look at justice the same way an individual should. If I were to catch a thief in the act of stealing my car, and the thief defended herself, “I'm from a poor neighborhood, I didn't go to school, and my parents-” I'd tell her to stop right there. None of those things have any bearing on my right not to have my car stolen. They are not so relevant in punishment between individuals. But they are relevant for an institution of punishment. The state has a responsibility to take a broad view of the criminal as a person, not just as a wrongdoer.

By now, the social sciences have abandoned the fiction of the person in a vacuum.

Surely when we talk about one person, we can only talk about one agent, but that agency is constantly conditioned and affected in manifold ways. I will not defend this claim scientifically, but I think it is intuitively clear based on the connection, which I have already pointed to, between social status and crime. Surely Moore would admit that socioeconomic factors have a huge influence on how likely one is to commit crimes. But Moore can, and does, admit this while maintaining his argument. As I have pointed out, this is arguably a reasonable position when it comes to punishment between individuals. But his charge of elitism does not seem nearly as righteous in a social context.

If a group in society is driven to commit more crimes than others due to a lack of wealth and a collective complex of victimization and alienation, is it elitist to claim that the state has a moral problem in punishing that group? I don't think so, especially considering the fact that the institution of punishment may even be deepening the rift in society causing the problem. Should we really be systematically punishing the victims in society, and congratulating ourselves for treating them as equals? It is not at all contradictory to respect the moral agency of a person, while remaining sympathetic to the fact that actions are shaped by causal forces. It is possible to maintain this position by excusing.

In neglecting the role of excuses, Moore overlooks a basic aspect of moral responsibility. In excusing, we can hold people responsible, but choose not to punish them because their agency was undermined by causal forces. Thus we can accept that a person has full moral agency, and is morally responsible for his actions, while deciding that, on final analysis, he does not deserve to be punished. In cases in which those causal forces that undermine agency are caused by the would-be punisher, it seems especially

unfitting not to excuse.

Because of the retributivist theory to which I subscribe, I do think that criminals are, causal forces aside, morally responsible for their actions. But Moore himself admits that the retributivist need not be “monomaniacally” focused on punishing the deserving. Treating punishment of the deserving as an inherent good does not exclude the existence of other goods. In the case of state punishment, an institution of punishment should exist to punish the deserving, but it should not do so if it comes at the cost of a just society. Just as there is inherent value in punishing the deserving, I think there is also value in having a fair society. As I have argued, the two go hand in hand, since the contractarian justification of state punishment only works in a fair society.

There is little more I can do in objecting to Moore's argument. Moore's accusation of elitism is less a deductive argument, and more of an aesthetic claim. Doubting the full moral agency of persons is, according to Moore, aesthetically ugly, since it seems to demean basic human dignity. I cannot object to an aesthetic evaluation of my argument, but I think I have shown that Moore's position can be at least as ugly as mine. In rejecting any view shy of absolute, fully accountable agency, Moore ignores the role of excuses, and is guilty of the monomania which he insists need not be characteristic of retributivists.

But I want to avoid characterizing my view as a mere aesthetic preference over Moore's. My critique of state standing is essentially rooted in the distinction between objective and subjective rights. In an unfair society, equal objective rights fail to translate to equal subjective rights. The distinction between objective and subjective rights is not at all aesthetic: An objective right from which one gains nothing, or an objective duty that

costs nothing, is not subjectively actual. This is the process by which the moral agency of marginalized groups is undermined, and it should lead us, as a matter of morality, not aesthetics, to excuse the wrongs of those groups.

7. What it Means if State Punishment is Unjustified

The result of my argument is not a simple conclusion but a dilemma. On one hand, retributivism demands punishment of the guilty. On the other, the necessary conditions for the state to have standing to punish are not present, so the state ought to excuse the guilty. I will recount how I reached this conclusion.

This thesis began by showing the intuitive appeal of retributivism, which makes it preferable to consequentialism. The keys to this appeal are that retributivism (1) is based on retributive feelings, which are our central heuristic guide to recognizing wrongdoing, and (2) that retributivism better captures the fundamental character of punishment – that wrongdoing creates a reason to punish.

I went on to observe that the intuitive idea of standing is only intelligible, or important, to the retributivist. By exploring both retributivist justification of punishment and the concept of standing, I presented the tools to answer two essential questions about punishment: “*why* do we punish?”, and “*why* do *we* punish?”.

I then used the social contract to show how the state can have standing to punish, and combined this contractarian justification of state punishment with the concept of objective and subjective rights to show how the state lacks standing to punish in an unfair society.

So, retributivism commits us to punishing the guilty, but the state lacks standing to punish; thus the dilemma just mentioned. Of course, this dilemma only arises for the

retributivist, but it would be no solution to abandon retributivism in favor of consequentialism. I settled initially on retributivism because of its greater intuitive appeal, so I am committed to facing the moral problems it raises.

It is far beyond the scope and spirit of this paper to propose a solution to this dilemma, but we can probably say with some confidence that abolishing the institution of punishment would do more harm, and serve justice less, than it would help. The more reasonable direction to go in order to solve this problem, then, is to cultivate a fairer society. I have already granted that, for the most part, our society is fair insofar as it grants all citizens the same objective rights. But, as I have argued, the socioeconomic inequalities in society decrease the subjective rights of some groups in society, and thus erode the basic equality essential to having just institutions. Thus until we live in a truly fair society – a society in which all citizens are treated not just “equally” but “as equals”²⁷ - the institution of punishment will remain in a moral gray area.

²⁷ Ronald Dworkin, “Liberalism”, *Liberalism and Its Critics*. New York: NYUP, 1984

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