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The Place of Victims in the Theory of Retribution

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Remarkably, the theory of criminal law has developed without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment. You can read a first-rate book like Michael Moore's recent *Placing Blame*[1] and not find a single reference to the relevance of victims in imposing liability and punishment. In the last several decades we have witnessed notable strides toward attending to the rights and interests of crime victims, but these concerns have yet to intrude upon the discussion of the central issues of wrongdoing, blame, and punishment.

Admittedly, victims and their sentiments have come to play a major role in sentencing in the United States. Victims are encouraged to speak at the time of sentencing and to express their personal preferences about what should happen to the convicted defendant. Since the victims usually are interested in making the defendant suffer as much as possible, this practice services the interests of prosecutors. But the sentiments of the particular victims seem to me less important than the class of victims violated by the particular offense. In the crime of homicide, for example, it should not matter whether the decedent is a solitary old lady killed for her money or the mother of three killed in a drive-by-shooting. After Susan Smith killed her two children in South Carolina, her mother and ex-husband weighed in with their views on whether she deserved the death penalty or not. It would seem odd that the determination of the death penalty should depend on the general affection or hostility of the defendant's relatives.

Victims definitely have a place in the definition of the

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1. Michael S. Moore, Placing Blame: A General Theory of the Criminal Law (1997).

interests protected by the criminal law. The crime of homicide protects life—not the life of particular persons but the right to life in the abstract. The crime of heterosexual rape protects sexual integrity—again not sensibilities of the particular victim but the interests of women as a class of potential victims. The abstract nature of these protected interests accounts for the minimal relevance of the views of the particular victims about sentencing a convicted offender.

The interesting challenge is to integrate victims into the justification for punishment. Of course, one could do that simply by asserting that the purpose of punishment is to gratify the desires of victims to witness the suffering of those who committed crimes against them. This approach would reduce punishment to simple vengeance and would hardly be very appealing, expect perhaps as a surrender to popular emotions. Another false start would be to transform the question of victims' rights into the right not to become a victim, which would provide a convenient bridge to various theories of deterrence and social protection. I will avoid that temptation and restrict myself instead to the problem of finding the link between punishment and the interests of people who have already been victimized.

The place to focus, therefore, is the theory of retributive punishment. And by the use of the easily misunderstood term "retributive," I simply mean imposing punishment because it is deserved on the basis of having committed a crime. Punishment can either be *deserved* on retributive grounds or it can be *useful* as an instrument of social protection. It might in many cases be both deserved and useful, but retributivism is a jealous theory in the sense that whatever the beneficial side-effects of punishment, if it is not deserved it cannot possibly be justified. In the efforts to justify retributive punishment, there are at least two distinct lines of thought—one that I would call intuitive and the other theoretical in some systematic sense. The intuitive argument begins with the assumption that we know evil when we see it—this is

obvious today in the field of genocide, war crimes, and crimes against humanity—and the right response to evil is to simply make the offenders suffer as they have the made the victims suffer. This is the way most people think of the newly established international criminal court. Its purpose is to ensure that evil is appropriately sanctioned. A basic intuition of justice supports the urge to punish those responsible for the barbarism associated with names like Eichmann, Pol Pot, and Pinochet.

When intuitive retributivists are challenged they often retreat into a vague consequentialism, arguing, for example, that punishing dictators for homicide and torture will deter national leaders from committing similar crimes in the future.

It is hard to know whether this predictive claim has merit or not. It is based on such dubious counter-factual assumptions as the claim: If we had not punished the Nazi leaders at Nuremberg, we would have had even more cases of state terrorism than we have regrettably witnessed over the last half century. Unfortunately, one has to write the hopes of deterrence as both wishful thinking and a feeble rationalization for the intuition that justice itself requires a punitive response to evil deeds.

Yet the intuitive argument that we must sanction evil deeds with punishment hardly seems like an argument at all. Why should we credit this intuition more than other feelings of rectitude that most intellectuals now reject—intuitions such as those favoring the death penalty or the punishment of homosexuality and adultery. To find a stronger foundation for retributive theory, the claim has to go beyond the supposed validating power of intuitions. One way of negotiating a "systematic" theory is to embed our intuitions in a theory prescribing the fair distribution of burdens and benefits in society. Punishment then comes into focus as the effort to correct the criminal's seizure of undeserved benefits. This is the line taken by Herbert Morris in his famous article, *Persons and Punishment.*[2]

2. Herbert Morris, Persons and Punishment, in On Guilt and Innocence:

Another foundation for retributive thinking draws on the Hegelian theory that the purpose of punishment is to defeat the Wrong, as represented by the Crime. Punishment vindicates the legal order, or the norm prohibiting the conduct, or has some other intangible effect that somehow recreates the moral balance upset by the commission of the crime. Some German theorists have adopted this Hegelian view under the clever rubric "positive general deterrence." Negative general deterrence is vulgar Benthamism; it relies on the intimidation and the manipulation of potential criminals. Positive general deterrence is arguably a more decent and respectable use of the criminal sanction, for it represents an effort to secure social protection by supporting the basic norms prohibiting criminal behavior rather than by frightening people into compliance. Positive general deterrence is simply retribution by another name. The importance of vindicating the norm or demonstrating that Right triumphs over Wrong is simply a more systematic way of stating the imperative to punish in the name of justice.

Both of these approaches toward retribution—the intuitive theory and the more sophisticated "systematic" theories—ignore the relevance of victims. This is evident in Michael Moore's latest book; in the course of hundreds of pages analyzing various aspects of retributive impulses he never once mentions the sentiments of victims whose suffering defines the core of the crime. Moore offers no argument for ignoring victims in his retributive theory. His position supposedly follows as a matter of course from rooting retributivism in the relationship between the criminal action and the norm prohibiting it.

The idea that drives much contemporary thinking about crime and punishment is that the core of the crime is the action—the realm of the actor's control—and the consequences of the action. The action violates the norm. The consequence is a contingency that may or may not occur. If you intentionally shoot at your victim you may or

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Essays in Legal Philosophy and Moral Psychology 34 (1976).

may not succeed in hitting him. The real crime, it is thought, consists exclusively in the action of shooting with the intention to kill.

One school of thought goes so far as to claim that bad consequences are simply "bad luck" and should not provide the basis for gauging the actor's deserved punishment. Actually, Moore and I agree that this view is wrong and that consequences do matter in assessing wrongdoing and deserved punishment. In this sense Moore concedes that harm to the victim does matter in evaluating criminal conduct.

It should be relatively simple, then, for Moore to take the next step and to recognize that doing justice to victims should be part of the theory of retributive punishment. For some reason, Moore resists this inference from the relevance of harm in his theory of wrongdoing. I want to convince him that his view of deserved punishment would be richer if it included the suffering of victims in his account of why punishment is deserved and therefore just.

I. WHO ARE THE VICTIMS?

It is important, preliminarily, to be clear about what I mean by "victims." First, the victims that are relevant for our purposes are the actual victims not the potential victims of future crimes. Second, it is not the particular victim who matters but rather the victim-type, the victims as a class of those who have suffered a particular crime. The purpose of bringing victims into the analysis is not to hear their particular grievance and sentiments toward the offender, but simply to recognize that crime is first and foremost an action that causes harm to other people. If the victim participates in the trial, as is common in Continental jurisdictions, the victim should appear as the representative of a class of victims all, of whom suffer the same basic invasion of their interests. The victim in a particular case is an emblem of the general class.

Unfortunately, in our most heinous crime, the only one for which the death penalty is permissible in the United

States, it is not so easy to identify with the victim. The ostensible victim of homicide is, of course, the decedent. But alas dead victims suffer not; they have no tales of woe. The next best candidate is the family of the decedent, but then there is some problem determining the contours of the affected parties who are still living, and then one wonders whether it should matter whether the putative victim's sentiments toward the decedent are positive or negative. Are the relatives still victims if they are happy to see the decedent gone? Presumably not, but then it seems to look as if the victims in homicide are simply those who are unhappy about the killing. And then the question presents itself whether all those unhappy about other crimes—ranging from rape to theft—should not qualify in much the same way as victims of criminal aggression. But if that approach were accepted, the notion of victimhood would lose its conceptual contours. I am afraid there is no easy solution to the problem of identifying the relevant victim in homicide cases.

The important point about victimhood in the criminal law, however, is the notion that it differs clearly from the purely private and particular nature of victimhood in the private law. What counts in the law of torts is the particular person affected by the tort. This explains why the defendant, if liable for the basic tort, also incurs liability for all damages that directly follow from the invasion of the particular interest. In the proverbial textbook formula, if the victim has an "eggshell skull," the defendant is liable for the unexpected and even unforeseeable consequences to the particular plaintiff. In criminal cases, the harm accrues to the public as well as to the class of victims who suffer the invasion of a particular interest.

This concept of public harm is not without its difficulties. Nozick tried to explain it by invoking a notion of general fright engendered by criminal conduct. Yet the notion of generalized fear proves both too much and too little. It proves too much because many torts—particularly mass torts—also trigger widespread public anxiety and

therefore this criterion hardly distinguishes between tort and crime. Also it could be the case with isolated crimes such as embezzlement and tax fraud that they engender no public fear at all. It is not so easy, therefore, to find a concrete manifestation of the supposed harm to the public that serves to distinguish crimes from torts.

An alternative approach to the public nature of crime might be simply to locate the public dimension of the crime in the extrapolation of the concrete harm to the general class of victims. This feature of criminal conduct is the primary factor that renders crimes different from torts and therefore it might be all we mean by insisting on a public dimension to criminal behavior.

II. THE AFTER-EFFECTS OF CRIMINAL CONDUCT

The general assumption underlying criminal conduct is that it begins and ends with an act causing harm. Admittedly, this is an important assumption of a liberal approach to criminal liability. Stressing the act causing harm provides a shield against imposing liability based on the status or the dangerousness of the suspect. The assumption underlying this approach to liability is that to protect the freedom and the privacy of the suspect, we should not inquire about the actor's personality and history in establishing liability.

Yet there is another way of thinking about crime that does not, so far as I can tell, entail an invasion of the suspect's freedom of privacy. A criminal act establishes a particular relationship with the victim. The criminal gains a form of dominance that continues after the crime has supposedly occurred. This feature of criminal aggression, the principle of dominance, provides the clue, I argued some time ago, to understanding the puzzling crime of blackmail.[3] The difference between acceptable exchanges and blackmail consists primarily in the leverage the

3. See George P. Fletcher, Blackmail: The Paradigmatic Crime, 141 U. Pa. L. Rev. 1617 (1993).

blackmailer gains over his prey: As soon as the prey agrees once to paying hush money, the blackmailer can demand more in the future. Other crimes of violence bear a resemblance to blackmail. In the aftermath of rape, victims often fear a return of the rapist; victims of burglary have reason to feel insecure in their homes. Implicit in the threat of recurrence is the offender's unjustified dominance over the victim. The function of arrest, trial, and punishment is to overcome this dominance and reestablish the equality of victim and offender.

This victim-based argument does not differ, in principle, from the Hegelian argument that punishment serves to vindicate the norms against those who have sought to defeat it. The only difference is that the "victim" takes the place of the "norm" in the structure of the argument. In the traditional Hegelian view, the norm is defended and the aggressor symbolically defeated; in my version of the argument, the position and dignity of the victim are rendered equal relative to the aggressor.

Seeking to bring about equality between victim and offender is a classic concern in Aristotle's theory of justice. Corrective justice seeks the equality that existed between victim and offender prior to the wrongful act; liability is supposed to reinstate arithmetic equality by taking the gains of the action from the wrongdoing and transferring them to the victim. Distributive justice seeks the geometric equality of distributing the goods and evils of society proportionately among potential recipients. Retributive justice combines features of both corrective and distributive justice. The corrective dimension consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her antecedent suffering.

The distributive dimension of punishments consists in the legal imperative to punish all offenders equally. The evil of punishment should be distributed fairly, with each offender receiving his just deserts. Admittedly, this principle of equal distribution gives way in many jurisdictions to prosecutorial discretion and plea-

bargaining. But this only demonstrates that these institutions, taken for granted in the United States, stand in considerable tension with basic principles of equal justice.[4]

In view of the fact that all theories of justice are primarily concerned with equality, it makes sense to ground retributive justice as well in a commitment to bring about equality both between offender and victim and among offenders. This approach to retribution runs through our classical philosophical text on retributive justice, namely Immanuel Kant's treatment in his *Rechtslehre* or Philosophy of Law.[5]

Of course, there are problems with this theory of punishment as there are with any theory. Not all crimes express dominance over victims. Embezzlement might, because once the embezzler has succeeded, the property-holder, once victimized by an insider to his organization, remains ever at risk. But perjury and other offenses against the administration of justice hardly seem to entail victims—except those who might have suffered unjust conviction as a result of perjured testimony. Yet those who sought to impeach President Clinton did speak about getting away with perjury as putting oneself above the law and therefore posing a great risk to the society. Whether one perceives this risk depends, in large part, on whether one sees Clinton's alleged perjury as cabined by the framework of sexual behavior and a private law suit or whether one sees it as an offense against the administration of justice comparable to lying in a way that might result in the conviction of an innocent person.

4. In United States v. Singleton, the Court of Appeals for the Tenth Circuit initially held that offering potential defendants special "deals" in return for their testimony against other defendants violated principles of equality between the prosecution and the defense. See 144 F.3d 1343 (10th Cir. 1998), rev'd, 165 F.3d 1297, 1298 (10th Cir. 1999) (en banc) (holding that the federal bribery statute, 18 U.S.C. § 201(c)(2), "does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office").

5. Immanuel Kant, The Metaphysics of Morals (Mary Gregor trans., 1991).

III. *IMPUNIDAD*

The particular evil represented by someone's "placing oneself above the law" raises the problem whether there is a duty to punish simply to avoid the phenomenon of *impunidad*—remaining unpunished for one's crimes. Kant dealt with this problem in his famous example of an island society about to disband. As he writes:

> Even if a civil society were to be dissolved by the consent of all of its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve [What his acts are worth, it says in German] and blood guilt does not cling to the people who are not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in the public violation of justice.[6]

Blood guilt in the biblical sense meant that there was some ongoing disorder in the moral universe. As David Daube has explained the role of blood in punishment for homicide, the manslayer acquires control over the victim's blood—the life spirit. Executing him releases the life spirit and enables it to return to God, the source of all life.[7]

"Blood guilt" serves as a good metaphor for the evil of *impunidad*—the phenomenon of offenders getting away with their crimes. The avoidance of *impunidad* has become a most compelling motive for criminal prosecution in recent years. The newly enacted Charter for a Permanent International Criminal Court cites this concern in its preamble:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by

6. Id. at 142.
7. David Daube, Studies in Biblical Law 122-23 (1947).

> enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . [8]

Note that the first clause states an absolute duty to prosecute "crimes of concern to the international community," while the second clause falls back on the argument of "prevention."

The frequent use of the Spanish term *impunidad* reveals the origins of this principle in the failure of Latin American governments to prosecute military authorities in Argentina and Chile who were responsible for the kidnapping and killing of the *desaparecidos*.[9] The same sentiment has gripped the West Germans who see the prosecution of East Germans responsible for such crimes as killing those who tried to escape to the West as necessary component of their "coming to grips with the past" (*Bewältigung der Vergangenheit*). The basic sentiment is that allowing crimes to go unpunished somehow repeats the evil. It is as though the government and the entire society becomes complicit in the occurrence of the crime.

This, I believe, is what Kant was trying to get at with his thought-experiment of the island society about to dissolve. If the people, through their government, do not insist upon punishment, they "can be regarded as collaborators in the public violation of justice."[10] Kant's intuition represents a fundamental plank in the tradition of retributive justice. The reason we must punish is to avoid liability for *impunidad*—for allowing criminals to go punished.

The intuition remains remarkably strong in modern society. It accounts for the depth of public reaction in cases in which the state has failed to punish or failed to punish adequately. Just witness the outrage at acquittals that are

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8. Preamble to the Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

9. For a valuable study of these prosecutions, see Jaime Malamud-Goti, Game Without End: State Terror and the Politics of Justice (1996).

10. Kant, supra note 5, at 142.

perceived to be unjust—acquittals such as those in the cases of O.J. Simpson, the police officers who beat up Rodney King, the trial of Lemrick Nelson for having killed Yankel Rosenbaum, and all the Southern acquittals in the trials growing out of the civil rights movement. Where there is a strong segment of the public which identifies strongly with the victim, this reaction is likely to be more acute. When the victim is a member of a minority group, the entire group is likely to interpret the *impunidad* as a betrayal of the commitment to equal citizenship.[11]

Admittedly, Kant's theory of complicity in the wrong of non-prosecution has some flaws. The rationale for avoiding *impunidad* is not exactly the same as justifying the use of retributive punishment ab initio. The argument that unjust non-prosecution entails complicity in the original crime presupposes the regular use of the criminal sanction as a background condition, as the "baseline" against which deviations are measured. If we could imagine a world in which there was no punishment, no practice for responding to criminal aggression, the problem of justifying retributive punishment would be cast in different terms.

The argument of complicity entailed by *impunidad* is embedded in a historical situation. The assumption is that for one reason or another the practice of punishing criminals has developed and has become a standard feature of social expectations. But this is the way arguments for equal treatment ordinary proceed. A practice is established, some people are left out, and then the claim is made that those who receive less are being unfairly discriminated against. This is the kind of argument made in favor of complicity in the failure to punish "the last murderer remaining in prison."

We should recall that we have offered two arguments for introducing the victim in the framework of retributive theory. Both of these arguments are based, directly or indirectly, on the significance of equal treatment in the

11. These issues are explored at greater length in George P. Fletcher, With Justice for Some: Victims' Rights in Criminal Trials (1995).

theory of justice. The first argument is that acts of criminal violence establish a form of domination over the victim. The function of punishment is to counteract this domination and reestablish equality between the victim and the offender. This argument does not presuppose a history of punishing crime, and therefore it can serve as a rationale for punishment ab initio. Once the practice of punishment becomes the historical background for thinking about criminal responsibility, the decision not to punishment represents a serious departure from the established norm of equal treatment. Thus the argument emerges that deliberately not-punishing criminals who deserve punishment becomes a means of acquiring indirect responsibility for the crime.

In view of the role of equality in these victim-based arguments and in view of the centrality of equality in theories of just punishment, it seems obvious that we should consider these proposals as proof that the interests of victims may be properly integrated into the theory of retributive punishment. Michael Moore may disagree, but the burden is on him to refute this compelling case.