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Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate

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Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate

*Dan Markel**

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INTRODUCTION

In the last few years, scholars and policymakers in the area of criminal justice have focused an increasing amount of attention on two topics. The first is the retributivist theory of punishment ("retributivism");¹ the second is the development of alternative sanctions to the orthodoxy of incarcerating criminals in publicly managed prisons.² This Article is about what connections may properly be drawn between what justifies punishment and how we actually go about punishing offenders.

A preliminary word on retributivism may be helpful. Retributivism is a theory about retribution, and retribution's features, or its definition, may be understood in either a weak or a strong sense. The weak sense asserts that a criminal may be punished because, and only because, in some sense he "deserves" that punish-

1. See David Dolinko, *The Future of Punishment*, 46 UCLA L. REV. 1719, 1720 (1999) ("[W]e can see that those seemingly antiquated retributive notions . . . have not only failed to disappear, but have come roaring back with—one might say—a vengeance."); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1835 (1999) ("[R]etribution has lately received renewed respect.").

2. See, e.g., *Development in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1866-75 (1998) [hereinafter *Alternatives to Incarceration*]; see also Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733 (1998) (describing imprisonment as the contemporary "punitive orthodoxy"); Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 591 (1996) ("Imprisonment is the punishment of choice in American jurisdictions.").

ment, and that punishment should be meted out in proportion to the wrong committed and the blameworthiness of the offender.

The strong sense incorporates the same desert and proportionality assertions, but also imposes an obligation: the criminal *must* be punished, regardless of the consequences. Many people attribute the strong thesis to Kant,³ and, without doubt, some of his most famous writings support that position.⁴

The recent scholarly and policymaking interest in retributivism stems in part from negative reactions to problems associated with recidivism, which indicate the failure of theories based on the specific deterrence or rehabilitation of the offender.⁵ Yet retribution's renaissance has another explanation: the theory has a stronger rationale than it once seemed to have. For many years, defenders of retribution offered little justification for the basic retributive notion that criminals should be punished because they deserve to suffer for their wrongdoing.⁶ They thought the concept of

3. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1230 (2001).

4. See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). There Kant writes that even if "civil society were to be dissolved by the common consent of all 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 . . ." *Id.* The rest of the sentence is supposed to explain why this is a duty: "[so that] blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice." *Id.* As one might figure, this is only a conclusory assertion, not argument in the usual sense.

Surprisingly perhaps, Kant is not always so categorical on the absolute duty to punish. He writes that executive prerogative would allow the state to waive punishment of a criminal for crimes against the state, such as treason. See, e.g., *id.* at 145. Hegel's language also supports the notion that there is a duty to punish, but there is little evidence to indicate that he would go as far as Kant in saying that there is no value to life when a crime goes unpunished.

5. See Dolinko, *supra* note 1, at 1720; Andrew Von Hirsch, *Penal Theories*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 659, 661, 666 (Michael Tonry ed., 1998). Specific deterrence posits that the experience of punishment by an offender will deter that offender from committing legal offenses in the future, after his punishment ends. Rehabilitation is a theory that seeks to transform the views and capabilities of the offender so that when his period of rehabilitative punishment ends, he will be able to make socially beneficial contributions as a citizen. The difference between these theories may be captured by the contrast between fear and hope. Specific deterrence might countenance a miserable punitive experience so that the person wishes to avoid the experience again, whereas rehabilitation hopes to change the mind of the offender so as to remove any motivation to commit legal offenses later. A rehabilitative experience might, on such a view, permit a punitive experience that is considerably less miserable than one that a theorist of specific deterrence would advocate. On the other hand, some rehabilitationists might say that a tough love approach is a desideratum in transforming and rehabilitating the offender.

6. Stanley Benn's well-known account of punishment observed (and impliedly criticized) the views of retributivists for denying that punishment needed any further justification. See Stanley I. Benn, *Punishment*, in 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 29, 30 (Paul Edwards ed., 1967).

desert was self-evidently attractive. Critics charged that when retribution is characterized this way, the theory does not offer much to elucidate why this intuition should be followed.⁷ It seemed that one could either agree with it or not.⁸ Those who agreed with the intuition were charged with having an insatiable psychological drive to exact revenge on behalf of victims⁹ or to express disgust at the wrong for the sake of communal solidarity.¹⁰

Seen in this way, retributivism sure looks like thin gruel. Nonetheless, it would be a mistake to think that there *could* be no plausible or attractive rationale for retribution.¹¹ The account I offer, which I call the Confrontational Conception of Retribution (CCR), explains the goods inhering internally to the practice of retribution in a way that goes a good bit farther than merely repeating

7. The critics point out that "it simply does not follow from the fact that the criminal acted wrongly—and, following Kant's view, thereby willed that his maxim be adopted universally, that the state acts rightly, rather than committing a further wrong, in imposing punishment." Kaplow & Shavell, *supra* note 3, at 1233 n.668.

8. Compare, e.g., Hugo Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 616 (1978) ("Either the [retributivist] appeals to something else—some good end—that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a nonretributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile."), with MICHAEL S. MOORE, LAW AND PSYCHIATRY 238-43 (1984) (relying on the "inherent rightness of the practice" of giving an offender his just deserts as the basis for a formal syllogistic defeat of utilitarian theories). Moore later says the justification for a theory that is not justified by the consequences it engenders, such as retributivism, is that "it appeals to both our particular judgments and our more general principles, in order to show that the theory fits judgments that on reflection we are sure of, and principles that on reflection we are proud of." *Id.* As will become clear, I reconceive what it means to understand something by the consequences it engenders. I argue that an appeal such as Moore's to the "inherent rightness" of some act is often to rely on an appeal to utility or well-being that is merely time-sliced, and therefore, balanced against the utility that one would sense later on if one acted in an "unprincipled" manner. In other words, principles perform certain functions for persons, such as lending narrative coherence to our personal identities, and it is their success in performing those functions that ought to have our moral consideration, not the fetishization of those principles themselves. See ROBERT NOZICK, THE NATURE OF RATIONALITY 2-12 (1993).

9. See TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 30 (1969).

10. See, e.g., JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (1967); see also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 159 (1968) (offering a hostile account that views retributivism "as useless obstructions to rational thought"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4-5 (1955) (providing a sympathetic account of noncognitive retribution).

11. The works of Jean Hampton and Jeffrie Murphy have contributed greatly here. See *infra* note 138. The theory offered *infra* at Parts III and IV draws on these works but differs in several significant respects, such as by emphasizing the political dimension to punishment and by expressly incorporating an ex ante viewpoint on matters such as criminal legislation and sentencing policy. The account here revises and extends further my previous attempt to understand retribution. See Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999).

the mantra that retributive justice requires punishment as a matter of just deserts. The goal is to help explain the attractiveness and truth of retributivism in light of other moral claims that practical reason leads us to believe.¹²

Now, as mentioned earlier, the second area of this Article's focus is the increasing exploration of alternatives to incarceration in publicly managed prisons—that is, expanding the arsenal of methods to punish. Some of these alternatives are stigmatic but do not involve incarceration, such as criminal fines, “demeaning” community service, and most controversially, shaming punishments.¹³ Other alternatives are carceral and stigmatic, like chain gangs,¹⁴ while others are carceral but less stigmatic, such as mandatory detox programs.¹⁵ Increasingly, some jurisdictions have devised imaginative “guilt” punishments.¹⁶ And, although they do not generate a markedly different experience than imprisonment in a public prison, privately managed prisons have been authorized by about half the states in the country and the federal government.¹⁷

12. I leave aside a variety of metaethical issues in this paper and save them for a book in progress, *Rethinking Retribution*, but I do think that for the limited purposes of this Article, it is enough that the argument justifies a commitment to retribution by demonstrating its relation to other principles we think are true and valuable, such as equality under law, individual moral responsibility, and the value that one's life has when lived in fidelity to those notions, among others.

13. Shaming punishments, as used in this Article, refer to punishments aimed at humiliating or degrading the offender in the public eye and invite the possibility of public participation in the humiliation.

14. See Emily S. Sanford, Comment, *The Propriety and Constitutionality of Chain Gangs*, 13 GA. ST. U. L. REV. 1155, 1171-72 n.143 (1997) (detailing several states' recent embrace of chain gangs).

15. See *Alternatives to Incarceration*, supra note 2, at 1898-99; Note, *Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485 (2000) (describing and endorsing such alternatives to incarceration).

16. Guilt punishments, as I define them for this Article, are punishments that aim at eliciting a moral awareness by the criminal of the specific legal wrongdoing he committed. Unlike what I call shaming punishments, they are not aimed at humiliating the criminal. Moreover, guilt punishments can be administered effectively without any crowds leering or jeering at the criminal. I discuss them at greater length *infra* at Part I.B.

17. See *infra* Parts I.B.3, IV.C. Private prisons are now authorized by over half the states and the federal government. They are not strictly speaking an alternative to incarceration, but they are a move away from the dominance of publicly managed prisons, and in this respect constitute an important development in penal practice that I want to address. As a result, I imprecisely lump together shaming punishments, guilt punishments, and private prisons under the rubric of “alternative sanctions.” The following list provides a sampling of references to the relevant legislation authorizing such use. See 18 U.S.C. § 4013 (1994); ALASKA STAT. § 33.30.031 (Lexis 2000); ARIZ. REV. STAT. ANN. § 41-1609.01 (West 1999); ARK. CODE ANN. § 12-50-106 (Lexis 1999); COLO. REV. STAT. ANN. § 17-1-202 (West 2001); CONN. GEN. STAT. ANN. § 18-86b (West 1998); FLA. STAT. ANN. §§ 957.01-16 (West 2001 & Supp. 2002); KY. REV. STAT. ANN. §§ 197.500-990 (Lexis 1999); LA. REV. STAT. ANN. § 39:1800.4 (West Supp. 2001); MISS. CODE ANN. §§ 47-4-1 to -5, 47-5-1201 (2000); MONT. CODE ANN. § 53-30-106 (2001); NEV. REV. STAT. ANN.

Proposals involving increased use of alternative sanctions have attracted lots of attention,¹⁸ in part because there are currently nearly two million people in state and federal prisons and jails.¹⁹ Frustrated by the apparent inability of the criminal justice system to reduce criminal populations at a reasonable cost, various scholars with different political agendas have united behind the flag of finding cheaper and more effective methods to reduce criminal populations and recidivism.²⁰

Although broad coalitions have formed to support the expanded use of alternative sanctions as a general matter, intense controversy has swirled around the use of shaming punishments.²¹ When referred to in this Article, shaming punishments denote state-sponsored punishments that are aimed at humiliating the offender by degrading the offender's status,²² that is, by communicat-

209.141 (Michie 2000); N.H. REV. STAT. ANN. § 21-H:8 (2001); N.M. STAT. ANN. §§ 33-1-17, 33-3-1 (Michie 1998); N.C. GEN. STAT. § 148-37 (1999); OHIO REV. CODE ANN. § 9.06 (West 1999 & Supp. 2001); OKLA. STAT. ANN. tit. 57, § 41 (West 1991); 1995 Ore. ALS 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 1081-1085 (West 1999); TENN. CODE ANN. §§ 41-24-101 to -117 (1997 & Supp. 2000); TEX. GOV'T CODE ANN. §§ 495.001-.024 (Vernon 1998 * Supp. 2001); UTAH CODE ANN. § 64-13-26 (2000); VA. CODE ANN. §§ 53.1-261 to -266 (Michie 1998); W. VA. CODE §§ 25-5-1 to -20 (1999); WYO. STAT. ANN. §§ 7-22-101 to -115 (Michie 2001). Five more states (Hawaii, Idaho, Kansas, Minnesota, and Missouri) have imprisoned criminals in privately managed facilities without express authorization. See Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 409-10 (1997). Interestingly, Illinois has legislated against the use of private prisons altogether. See 730 ILL. COMP. STAT. 140/1-4 (1995).

18. Reporters from *The New York Times* in particular seem fascinated with shaming punishments. In April, May, and June of 2001, there were three separate articles about the rise of shaming punishments in America in *The New York Times*. Sarah Boxer, *When Emotion Worms Its Way into Law*, N.Y. TIMES, Apr. 7, 2001, at B7 (observing the "reflowering" of shaming punishments); Belinda Cooper, *Righteous Indignation*, N.Y. TIMES, May 6, 2001, at G35; Dean E. Murphy, *Justice as a Morality Play that Ends with Shame*, N.Y. TIMES, June 3, 2001, at D5; see also Dan M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 365 (1999) (noting that "shaming penalties are on the rise in American law"); Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1 (observing growth in use of shame sanctions).

19. See Corrections Statistics, Bureau of Justice Statistics, U.S. Dep't of Justice, at <http://www.ojp.us-doj.gov/bjs/correct.htm> (last visited Feb. 13, 2001).

20. See Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691 (1998).

21. See, e.g., Aaron S. Book, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653 (1999) (defending shame sanctions in various circumstances); Kahan, *supra* note 2, at 591 (urging greater use of shame sanctions); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (criticizing shame sanctions as infeasible); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1060 (1998) (criticizing shaming punishments); see also Boxer, *supra* note 13 (observing the "reflowering" of shaming punishments); *Sixty Minutes: Joe the Jailer* (CBS television broadcast, Feb. 11, 2001).

22. Note that, for the purposes of this Article, I am conflating the acts of shaming and humiliating someone. Herb Morris has suggested to me that this is too hasty. At first, however, I

ing to others that he is a bad type. To realize that aim, shaming punishments occur before the public eye, sometimes with the public's participation.²³

While some academics have asserted that shaming punishments are compatible with every traditional justificatory theory of punishment,²⁴ the major proponents of the pro-shaming punishments movement have appealed to the economic benefits of alternative sanctions.²⁵ These sanctions, according to their defenders, incur lower social and financial costs but nonetheless deliver a comparable degree of punishment premium—a notion perhaps best understood as a compound of social expression of condemnation and deterrence.²⁶

Interestingly, both supporters and opponents of these alternative sanctions have concluded that retributivism, as a justification of punishment for wrongdoing, is fully compatible with the deployment of shaming sanctions.²⁷

To my mind, the views of these scholars rest on misunderstandings of what retribution is really about.²⁸ Indeed, a proper understanding of retribution reveals that shaming punishments are

was skeptical of this thought because I focused on the perspective of the object-person. It seems if *A* viciously abuses *B* through verbal or physical attacks that are unjustified, *B* should not feel humiliated, but rather angry. To be humiliated would indicate a lack of self-esteem or confidence. And if the attacks on *B* were justified, then *B*'s being humiliated also seems the wrong reaction. But things do change when the perspective changes. Perhaps *A* is himself a sadist, and wishes to humiliate *B*, but not necessarily to shame him, because *A* is not trying to make known a moral statement about *B*, but rather wishes to communicate his own ontological indifference to *B*'s worth. From this perspective, the distinction seems more crisp, and I am grateful to Professor Morris for pointing this out.

23. I am not referring to what might be called reintegrative shaming punishments, which have been advocated by those like John Braithwaite. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989). Those punishments attempt to shame an offender and then expressly attempt to bring them back into the community through some integration ritual or ceremony. These are not the punishments advocated by Kahan, Etzioni, or Posner, nor are they the sort typically inflicted by state and federal courts.

24. See, e.g., Massaro, *supra* note 21, at 1880.

25. See, e.g., Kahan, *supra* note 2, at 591 (focusing chiefly on the economic benefits of shaming punishments); see also Book, *supra* note 21, at 653; Kahan, *supra* note 20, at 704.

26. See Dan M. Kahan, *The Anatomy of Disgust*, 96 MICH. L. REV. 1621, 1656 (1998); Kahan, *supra* note 2, at 635.

27. See *infra* Part II.B.

28. One reason for the superficial treatment of the relation between retributivism and alternative sanctions might be that retributivism performs chiefly what H.L.A. Hart called a justificatory function in discussion about punishment, whereas the debate over alternatives to incarceration is not about why we (may or ought to) punish, but rather how we (ought to) punish. Although this distinction is helpful, it is a mistake to think that motive and method can be so neatly decoupled. For as this Article will show, the method used to punish has implications for determining whether a duty to punish has been discharged or perhaps even violated, and which justification one employs might constrain the range of responses a state may apply to a criminal.

not, as Professor Whitman has called them, "beautifully retributive,"²⁹ but rather are entirely inconsistent with retributivism.

But the Article aims at more than merely this descriptive claim. For ultimately, the CCR is a normative account: it answers why, if at all, we ought to punish offenders of legal norms. In answering that question, the CCR reveals resources for thinking about *how* we ought to punish. The Article, then, performs three tasks. First, as suggested above, it explains why shaming punishments are antithetical to the retributivist viewpoint. Second, the CCR, by showing the social practice of retribution to have its own internal intelligibility, responds to criticisms that claim that retribution rests on no more than a slogan that just deserts requires punishment.³⁰ Finally, the account offers constructive suggestions to the alternative sanctions debate by giving qualified endorsement for the use of alternative sanctions such as the use of guilt punishments and privately managed prisons. By the end of the Article, then, I hope to have encouraged critics of retribution to join the retributivist camp. But I also hope to have disturbed the settled views of those who may already self-identify as retributivists.

Although the CCR bears resemblance to prior retributivist accounts, it also makes several departures from the prior literature. First, by explaining the internal goods achieved by retribution, the CCR offers an alternative to the "intuitionist" defense of retribution.³¹ Second, the CCR posits retribution as one attractive social practice among many other attractive social practices within a complex scheme of social cooperation. It thus illuminates the demands and limits that any claim of justice may properly have on a scheme of cooperation designed to help individuals flourish as best they can. Thus, in contrast to accounts of retribution that ignore both the political dimensions and moral consequences of punish-

29. Whitman, *supra* note 21, at 1062.

30. I articulate only those features of the CCR needed to make my point here, but in future work, I explain certain foundational matters in greater depth. I should mention that the account I offer makes no attempt to address systematically a set of questions regarding aspects like the criminal procedures surrounding the institution of punishment, the role of judges, prosecutors, and legislators, and the potential role of mercy or forgiveness. It also does not provide a definitive answer on whether principles other than retribution may adequately guide punishment policy in a liberal state.

31. The CCR is a conception of punishment whose justification rests not upon an intuition but rather upon principles of practical reason that would lead one to support various practices and institutions. The idea of practical reason that I rely upon borrows in part from the account offered in JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 322-32 (1980).

ment,³² the CCR finds great power by envisioning retribution from an *ex ante* perspective.³³ As a result, the CCR can be sensitive to a range of institutional concerns that would affect interpretations of what counts as appropriate punishment. Finally, by explaining what justifies punishment, the CCR develops a rationale that has interesting but not overdetermined implications for answering the question of how much or what kind of punishment should be inflicted on offenders.

The Article unfolds in four parts. Part I gives a brief overview of the fall and rise of shaming punishments and other "alternative sanctions" in the United States. Part II begins by distinguishing between what I call shame punishments and guilt punishments. I then show how, in recent years, various legal scholars have identified a strong and friendly relationship between retributivism and shaming punishments. As noted above, this alleged friendship rests upon what I think is a faulty understanding of what retribution is about.

Part III lays the foundation for this criticism by developing the CCR. This part tries to show the internal intelligibility of retribution by explaining the justifications for seeking retribution. In very short form, the justifications of retribution for wrongdoing are threefold: retribution effectuates the ideal of treating human beings as responsible moral agents; it diminishes the plausibility of a criminal's claim to superiority over others; and it serves as a state's self-defense mechanism against the illegitimate usurpation of political power by a criminal. Note that these three justifications, or moral goods, are achieved without reference to the consequences of the retributive encounter. This is what makes them internal justifications. I also try to explain what makes retribution a *prima facie*

32. Herbert Morris's famous work, *Persons and Punishment*, was a rare exception in the literature because it took seriously the task of situating punishment as a political practice. See Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40, 42 (Jeffrie G. Murphy ed., 1973). Morris thought that retribution is deserved for criminal wrongs because a criminal's action "renounces a burden which others have voluntarily assumed and thus [he] gains an advantage which others . . . do not possess." *Id.* Thus punishment was necessary to end free riding on the political agreement of others. The problem here is that we do not punish in order to end free riding itself, but rather to achieve social goals such as security in person and property and to communicate moral norms to offenders and nonoffenders alike. The fact that free riding might terminate by threat of punishment is a consequence of retribution but not its purpose.

33. By *ex ante* perspective, I refer to a perspective where a person internalizes all available information about possible outcomes except the identity of what position one will occupy later. This "ideal observer" status guarantees an element of impartiality that would better yield the practices and policies for an attractive society and state.

duty in light of these internal justifications.³⁴ The effect of the argument, I suggest, is to render retribution an internally intelligible and attractive social practice. But like all social practices, retribution cannot assert an absolute claim on our moral imaginations. I try to explain why this is the case, and thus why retribution's goods are to be pursued only as a *prima facie* obligation.³⁵

Having presented the CCR for greater inspection, I return in Part IV to alternative sanctions. Here I begin by examining shaming punishments through the lens of the CCR. I argue initially that shaming punishments risk improperly inviting social forces, or what James Whitman has called the crowd, to participate in the state's responsibility of retribution. But upon further scrutiny, this improper invitation of the crowd is ultimately an insufficient reason to reject shaming punishments, at least in most cases. The real problem with shaming punishments, I argue, is that they ignore the dignity-bearing nature of an autonomous moral agent, the very autonomy that motivates the ideals underlying retributivism. Further, the reason people have attributed a compatibility between shame and retribution is, I argue, due to their confusion of revenge with retribution. Once the two concepts are made distinct, it becomes evident that shaming punishments both rely upon and cultivate an emotional disposition that is inappropriate to retributivism. Moreover, unlike Whitman, who views the participation of the crowd as a concern extraneous to traditional liberal theories of the state, my argument indicates precisely why a liberal theory of the state proscribes the use of shaming as a practice of retribution.

I then argue that although retribution forecloses most types of current shaming punishments, it by no means need end all at-

34. A *prima facie* duty or obligation refers to an obligation for which there is good moral reason to do (or forbear) a certain act in the absence of countervailing concerns. Moral obligations compete with each other, of course, and so a general obligation to keep a promise to meet someone for example may be overridden by an urgent obligation to rescue a life. For a discussion of this in a legal context, see DAVID LYONS, *ETHICS AND THE RULE OF LAW* 208-14 (1984).

35. Briefly, the status of retribution as a social obligation will have to compete with other social obligations. One can imagine an external end that might "trump" an internal end—and thus render the duty to punish "*prima facie*"—by positing a situation of imminent and total catastrophe. For example, when a society is on the brink of extermination due to war or famine, it would be reasonable to spend fewer resources on investigating, prosecuting, and incarcerating (certain types of) offenders than in "normal" periods of social stability and relative prosperity. Alternatively, other duties might also present themselves, such as a duty to aid those in need, or a duty to respect certain constitutional rights. Thus, a retributivist might think, without contradiction, that although a criminal deserves punishment on the merits, he should not be punished if, say for example, his constitutional procedural rights were violated. For this, among other reasons, I discuss the *prima facie* duty to punish, precisely because other moral commitments may be at stake.

tempts to rethink alternatives to the publicly managed prison. Thus, I explain how the CCR may be given expression through alternatives such as "guilt" punishments and even the careful use of prison-services corporations. My hope is that Part IV will demonstrate nonintuitive and compelling policy implications of this renewed retributivism, and thus spur reconsideration of what constitutes attractive punishment in a society such as ours.³⁶

I. THE FALL AND RISE OF SHAMING PUNISHMENTS

My goal in this part is to illustrate three simple points. First, from the colonial period until the nineteenth century, authorities in America used a wide array of punitive methods including shaming punishments. Second, until the last decade or so the reliance on shaming punishments or other consciously stigmatic methods of punishment had been largely displaced by a devotion to incarceration, fines, and probation. And third, we are now witnessing an increase in the use of privately managed prisons and alternatives to incarceration, including the rise of shaming and "guilt" punishments. The justifications for the increase in these alternatives are also explored here.

Punishment can be roughly divided into five kinds of deprivation: life (execution); liberty (incarceration); personal security (corporal violence); property (fines and forfeitures); and dignity or reputation (shaming).³⁷ In practice, of course, these categories often bleed into each other, or two or more punishments are used together. A period of incarceration, for instance, may involve certain deprivations of property and dignity in addition to liberty. The focus of this Article, however, will be on the sorts of alternative punishments that attack an offender's "dignity."

A. *Shame's Demise*

Colonial America employed a variety of tools and practices to respond to legal wrongdoing. Because Americans lived in smaller communities and were less likely than today to move between communities, they were far more sensitive to threats to their repu-

36. To be sure, the policy choices encouraged here are not required under the prevailing mode of current constitutional jurisprudence. They are, however, permitted. Thus the arguments here have to be developed as choices the polity makes collectively, through legislation at both the federal and state level.

37. Whitman, *supra* note 21, at 1060.

tation and good name.³⁸ For example, in colonial Virginia, punishments occupied the weak form of admonitions, where an offender was lectured or scolded in private by a magistrate or clergyman and then brought before an open court "for a formal admonition by the magistrate, a public confession of wrongdoing, and a pronouncement of sentence, wholly or partially suspended to symbolize the community's forgiveness."³⁹

This commingling of church and state institutions in responding to wrongdoing was hardly atypical. Congregations often witnessed a scene in which an offender came before them to confess his sins, with the offender garbed in white cloth seeking redemption through forgiveness.⁴⁰ Labeling an offender could take two forms: temporary or permanent. The temporary kind constituted a reintegrative shaming sanction because it was designed to signify the wrongness of the offender's actions, but when the period of shaming was over, it would indicate the community's attempt to embrace the offender again.⁴¹ More serious offenses, however, resulted in permanent maiming or branding of permanent letters or signs on offenders. In addition to shaming the offender, these punishments usually helped disable the offender from causing more harm and warned those who might interact with the offender about his criminal past.⁴²

Other methods of punishment sought to couple physical restraint with emotional humiliation before the public, often in a manner reflective of the crime committed. Someone who stole cabbages would be placed in the pillory with cabbages placed on his head.⁴³ Pillories, stocks, branding, maiming—all of these were used as tools of public punishment prior to the use of jails and penitentiaries.⁴⁴ But these were not the only means of punishment used in

38. See *Alternatives to Incarceration*, *supra* note 2, at 1870 (noting the "goldfish-bowl-like existence of a colonial citizen"); Massaro, *supra* note 21, at 1912 (describing the "ultrasensitivity" of individuals within colonial communities).

39. Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1224 (1982).

40. Massaro, *supra* note 21, at 1913.

41. See *id.* For more information on reintegrative shaming sanctions, see BRAITHWAITE, *supra* note 23.

42. Hirsch, *supra* note 39, at 1228.

43. Massaro, *supra* note 21, at 1914.

44. See ALICE MORSE EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* 29-56, 138-49 (Singing Tree Press 1968) (1896).

the United States.⁴⁵ Public whipping was popular in the colonies, in particular for crimes committed by slaves or servants.⁴⁶ Sometimes, convicts were “exposed,” that is, required to stand in front of crowds for a designated period of time, usually an hour, and forced to hold a sign describing one’s transgression, issue public apologies, or to do some form of labor intended to attract attention to themselves.⁴⁷ Fines, as well as measures of restitution to victims, may have been the most common form of punishment.⁴⁸ But banishment from a community was also common.

As can be seen, the early period of American law enforcement used shaming punishments extensively, but hardly exclusively. Over the next two hundred years, the use of shame as a penal method would decline rather dramatically as prisons grew in popularity.

Our modern system, which relies heavily on the use of prisons (and to a lesser degree, fines), finds its roots in the late eighteenth and early nineteenth centuries and in the development of the penitentiary.⁴⁹ After the Revolution’s broad-based social dislocations, self-proclaimed reformers sought to “rationalize” punishment and reduce the use of pillories and executions.⁵⁰ Developed as a partial response to the perceived decline in the utility of shaming punishments,⁵¹ incarceration of the criminal soon became the dominant penal response.⁵² By the time of President Jackson, prisons grew to be the prevailing mode of punishment.⁵³

45. For general overviews, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993); EDWIN POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620-1692*, at 195-211 (1980).

46. FRIEDMAN, *supra* note 45, at 37.

47. See POWERS, *supra* note 45, at 199-200; Whitman, *supra* note 21, at 1061.

48. See FRIEDMAN, *supra* note 45, at 38.

49. See generally George Fisher, *The Birth of the Prison Retold*, 104 *YALE L.J.* 1235 (1995). Modes of incarceration, however, were not completely unfamiliar in colonial periods. Usually, jails were used to house debtors and defendants before their trials, and workhouses were for “vagrants” or “idlers.” See FRIEDMAN, *supra* note 45, at 48-50; Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 *J. CRIM. L. & CRIMINOLOGY* 35, 36-37 (1920), reprinted in *POLICE, PRISON, AND PUNISHMENT* 11, 12 (Kermit L. Hall ed., 1987).

50. See *Alternatives to Incarceration*, *supra* note 2, at 1873.

51. See ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 35 (1992) (observing that demographic changes in America diminished the efficacy of reputational punishment).

52. See Kahan, *supra* note 2, at 612.

53. See David J. Rothman, *Perfecting the Prison—United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON* 111 (Norval Morris & David J. Rothman eds., 1995).

Though there were contentious debates over the desirability of the prison system,⁵⁴ the idea of separating deviants from the rest of society and isolating them from each other gradually took hold, and by the Civil War, penitentiaries had been built across the nation.⁵⁵ Of course, other forms of punishment, such as forced labor, persisted—but they eventually disappeared under litigation attacks.⁵⁶ Until only recently, the dominant use of the prison and probation constituted what one scholar has called a “punitive orthodoxy.”⁵⁷

B. The New Alternatives: Shame, Guilt, and the Private Prison

That punitive orthodoxy is now being challenged, as recent years have witnessed an increasing interest in alternatives to incarceration in publicly managed prisons.⁵⁸ This section describes only three of the developments in the ongoing project of reimagining punishment: shame punishments, guilt punishments, and private prisons.⁵⁹

By far, the most controversial recent developments have centered on the return of shaming punishments.⁶⁰ These bear a strik-

54. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (rev. ed. 1971), excerpted in *POLICE, PRISON, AND PUNISHMENT* 622, 637 (Kermit L. Hall ed. 1987).

55. See FRIEDMAN, *supra* note 45, at 155; *Alternatives to Incarceration*, *supra* note 2, at 1874. Incarceration today might be viewed as just a bit different from the use of banishment or excommunication in earlier days, as both penalties isolate and castigate the offender from the social intercourse of everyday life in the community in which the wrong was committed.

56. As Margo Schlanger notes, “a number of prison systems of the former Confederate states . . . were run for many years on a ‘plantation’ model. These self-financing forced-labor farm prisons were direct heirs to the slave plantation and the near-slavery systems of labor peonage and convict-leasing that succeeded the end of Reconstruction in the South.” Margo Schlanger, *The Courts: Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 *MICH. L. REV.* 1994, 2027 (1999) (book review) (citations omitted).

57. See Garvey, *supra* note 2, at 733 (describing contemporary “punitive orthodoxy” as comprising prison and probation).

58. See Boxer, *supra* note 18; Cooper, *supra* note 18; Murphy, *supra* note 18.

59. This Article does not include discussion of other methods. See, e.g., *Alternatives to Incarceration*, *supra* note 2, at 1895, (electronic monitoring), 1898-21 (prison boot camps), 1903 & n.40 (coerced abstinence programs); Annesley K. Schmidt, *Electronic Monitoring: What Does the Literature Tell Us?*, 62 *FED. PROBATION* 10 (1998) (electronic monitoring). These innovations attract less academic and popular attention than the more controversial use of shaming and guilt punishments, and prison-service corporations. This Article, frankly, does nothing to correct this imbalance in attention. The argument, however, for the CCR might be able to ground theoretically the use of selected alternative measures in a more coherent way than seems currently available.

60. The irony has been observed that shaming punishments, whose use declined as a result of changing demographic trends in the United States at the end of the eighteenth century, are

ing resemblance to the scarlet letter punishments of yore.⁶¹ Shaming punishments, as I suggested in the Introduction, are penalties that intentionally stigmatize an offender before public view and may invite some element of public participation in that stigmatization.⁶² The stigma might attach to the offender personally. For example, convicted shoplifters have been compelled to attire themselves in T-shirts saying "I am on felony probation for theft."⁶³ Sometimes the offender must display himself before the public, wearing sandwich boards on busy streets that say, for example, "I got caught possessing cocaine. Ordered by Judge Whitfield."⁶⁴ In Kansas City, Missouri, the faces and names of men convicted of soliciting prostitutes are displayed on "John TV," a local access channel.⁶⁵ And, as in the "exposures" of colonial periods, judges have required offenders to confess their offenses in church⁶⁶ or recite prepared (and court-approved) shaming speeches on the steps of courthouses.⁶⁷

Sometimes the judge meting out the shaming punishment wants the stigma to attach to the offender's property. Convicted

now being advocated again by a variety of academics, even though the demographic shifts that reduced shaming's effectiveness have, if anything, accelerated. See *Alternatives to Incarceration*, *supra* note 2, at 1873 n.55.

61. Scarlet letter punishments gained immortal fame through NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Chandler Publ'g Co. 1968) (1850). These punishments of "bygone days" centered on the publicity of the offender's wrongdoing. See EARLE, *supra* note 44, at 86-95; POWERS, *supra* note 45, at 198-201.

62. I do not deny that virtually all forms of punishment, whether imprisonment or otherwise, stigmatize the offender. But shaming punishments may fairly be said to differ from prison, fines, and most forms of community service in that they are directed primarily at stripping the dignity from someone, in public, as a spectacle. Shaming punishments are designed to express to the public that this offender is a bad person. Will there be some nonshaming punishments that nonetheless instigate feelings of guilt, or alternatively, shame? Emphatically, yes. But by defining shaming punishments as penalties that aim at humiliation or degradation in a public manner, I think we can create a general zone of clarity about the intended referent.

63. See *People v. Hackler*, 16 Cal. Rptr. 2d 681, 682 (Cal. Ct. App. 1993) (overturning condition of probation requiring such attire).

64. *CBS Morning News: Eye on America* (CBS television broadcast, May 16, 1997); see also Ann Woolner, *When Sentence Is a Shame*, AM. LAW., Nov. 1997, at 34 (describing sentence of convicted thief in Georgia who was required to walk around the courthouse for extended periods of time with a sign saying, "I AM A CONVICTED THIEF").

65. See Edward Walsh, *Kansas City Tunes in as New Program Aims at Sex Trade: "John TV,"* WASH. POST, July 8, 1997, at A3. See generally Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525 (1996).

66. See *Judge Orders Man to Confess Crime in Church*, UPI, Jan. 7, 1984. These forced confessions may present other problems for a liberal order. Though these confessional apologies are often presented under the terms of a plea arrangement, they could be challenged because they violate the unconstitutional conditions doctrine.

67. See David Doege, *Shaming Sentences Group Is Diverse*, MILWAUKEE J. SENT., Apr. 6, 1997, at 1.

drunk drivers in some counties have to affix bumper stickers proclaiming "CONVICTED: DWI,"⁶⁸ while sex offenders are required to post signs on their home and driveway that read "DANGEROUS SEX OFFENDER—NO CHILDREN ALLOWED."⁶⁹ Some might say that these offender notices should be viewed not as shaming punishments, but rather as devices to warn people of potential dangers. But if this were truly the goal, other means could be adopted without the shaming element.⁷⁰

What makes something a shaming punishment is that the penalty "expose[s] the offender to public view and heap[s] ignominy upon him in a way that other alternative sanctions to imprisonment, like fines and community service, do not."⁷¹ Posting names and faces on the World Wide Web or in other public places are the modern-day equivalent of the stocks: as one story put it, they might be called "cyber-pillories."⁷² Of course, one difference between these penalties and the shaming sanctions of colonial America is that we do not expect passersby to assault physically those who are the object of the shaming punishment. When an offender was placed in the stocks, throwing rotten eggs was permitted, whereas today we do not expect to incite lynch mobs when we post people's names on a website with an advertisement of their crime. We expect that background laws will protect the criminal from the crowd in a way

68. See *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995).

69. See *State v. Bateman*, 771 P.2d 314, 316, 322 (Or. Ct. App. 1989) (en banc), *overruled in part* by *State v. Anderson*, 833 P.2d 321, 323 (Or. Ct. App. 1992) (en banc); *State v. Burdin*, 924 S.W.2d 82, 84 (Tenn. 1996) (requiring posting of sign describing resident of home as convicted child molester).

70. In the case of sex offender notification statutes, in which a neighborhood is told about the presence of a released convict, it is unclear that a large sign on the person's property is required. An alternative would be to send a letter to houses in the relevant neighborhood; this would probably be equally effective in communicating the risk the convict may pose, and less stigmatizing. Or, if we really were concerned about a person's danger as a sex offender, we could condition his release upon his taking testosterone suppressants or sterilization. Sending letters would not work in the case of a car, since you cannot communicate a warning to everyone on the roads. But it strikes me as disingenuous to say that putting a bumper sticker on someone's car serves the purpose of adequate warning: people driving in front of the DWI convict's car, for example, will usually not know what is "lurking" behind them. The better answer here is to condition release upon a limitation of driving privileges to daytime, to require another person in the car, or to require that the convict drive a car installed with automated breathalyzers such that the ignition will not start without an appropriately low blood alcohol level. Another way to address this would be to place a bumper sticker of a certain color (without text) on a car owned by someone who has been a dangerous driver in the past, without specifying whether the danger was caused by alcohol, slow reflexes, or road rage. If we are concerned with the safety hazards people pose, then they should be classed together, rather than individually stigmatized, and their driving privileges should be reduced.

71. Garvey, *supra* note 2, at 737.

72. See *Now, CyberPillory Stocks*, NAT'L L.J., July 7, 1997, at A8.

that they did not in earlier generations. However, the high incidence of vigilantism in the last few years suggests that this expectation may no longer be reasonable.⁷³

The reintroduction of shaming punishments has been vigorously advocated by Dan Kahan, Eric Posner, and Amitai Etzioni.⁷⁴ In *What Do Alternative Sanctions Mean?*, the first of a series of influential articles on the subject, Kahan lamented the fact that deprivation of liberty in the form of incarceration served as the dominant penal method in America today.⁷⁵ Imprisonment, Kahan argued, is not only too "harsh and degrading for offenders," especially for nonviolent offenders, but also "extraordinarily expensive for society."⁷⁶ And yet, despite the alleged unanimity on the desirability of alternative sanctions that Kahan found among "theorists of widely divergent orientation,"⁷⁷ Kahan found that alternative sanctions were relatively rare five years ago because they failed to communicate "the dimension of severity or 'bite'" that all forms of punishment should express if they are to be politically feasible.⁷⁸

Imprisonment, by contrast, makes "offenders suffer," and the suffering criminals undergo is the direct result of a "special social convention that signifies moral condemnation."⁷⁹ In a free society, Kahan writes, liberty is the most valued good, and to deprive it from someone is to condemn that person in the way society most powerfully can, aside from capital punishment. But with other al-

73. Recent years have seen a host of incidents of vigilantism. See, e.g., Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569, 579 (1995) (detailing incidents of death threats or attacks on released sex offenders); Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1467-68 (1999) ("Many sex offenders have been physically assaulted. A gunman riddled one sex offender's home with bullets after receiving notification. When members of Joseph G.'s community were notified that he was to be released, they held a rally that culminated in the burning of his house. George H., a repeat sex offender whose address had been publicly released, answered his door and was punched in the mouth. Many others have faced violence in their communities at the hands of angry neighbors." (citations omitted)).

74. See also Book, *supra* note 21, at 653 ("Shaming punishment sets an example for others and provides the public with a tangible sense of justice in action."). It should be noted that Eric Posner, though an advocate of shaming punishments for white collar criminals, has not embraced all of Kahan's enthusiasm for shaming. He observes that the effects of shaming punishments may be quite unpredictable, driving some offenders into deviant subcommunities that will foster rather than remove antisocial conduct. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 100-03 (2000).

75. Kahan, *supra* note 2, at 591-92.

76. *Id.*

77. *Id.*

78. *Id.* at 593; see also Kahan, *supra* note 20, at 704 (arguing that shaming punishments are the "leading candidate" for sanctions that "meaningfully condemn" wrongdoers).

79. Kahan, *supra* note 2, at 593.

ternative sanctions, especially fines and community service options, there is an ambiguity in the social message conveyed. After all, Kahan explains, community service is something every citizen should be encouraged to perform.⁸⁰ And when we fine someone, doesn't that create the sense that there is merely a cost attached to certain behavior, like a tax on speeding?⁸¹ Because of this ambiguity, Kahan argues that we need to use stigmatic forms of shame to convey better social disgust at the offenses of the criminal and, to a degree, at the criminal himself.⁸² The shaming punishment supported by Kahan involves one or more of the following elements: stigmatizing publicity, literal stigmatization, self-debasement, and contrition.⁸³ The virtue of shaming punishments, Kahan and Posner argued in a later article, is that they destroy an offender's reputation more effectively and totally than fines do, and, by humiliating him publicly, render the offender's future reintegration into society more difficult: people will avoid dealing with the offender to the extent possible because he is known to be "a bad type."⁸⁴

Noted communitarian theorist and sociologist Amitai Etzioni has similarly argued for a return to the use of shaming punishments. In his article, *Back to the Pillory?*, Etzioni argued that shaming punishments should be used not only for criminals, but even "bad Samaritans." Bad Samaritans—those who could have helped prevent a savage crime with low or no risk to themselves—should have their names posted

on a Web site and in advertisements (paid for by the offenders) in key newspapers. Such postings would remove any remaining ambiguities about what society expects from people who can help others when there is no serious risk to their own well-being. And those with a weak conscience or a faltering civic sense would be nudged to do the right thing by fearing that their names would be added to the list of bad

80. *See id.*

81. *See id.*

82. *See id.* at 648-53. Kahan has continued in his quest to extend shaming punishments by arguing that the federal sentencing guidelines should incorporate shaming punishments for white collar criminal offenders. *See* Kahan & Posner, *supra* note 18. *But see* John B. Owens, *Have We No Shame? Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047 (2000) (arguing that elements of Kahan and Posner's proposals are either redundant or ineffective).

83. Kahan, *supra* note 2, at 631-34.

84. *See* Kahan & Posner, *supra* note 18, at 370-71. What Kahan and Posner overlook is that if they are correct, and if the reputation of an offender is completely destroyed by the measures they endorse, the punishment of the offenders never ends, thus vitiating an important possibility that an offender can be punished and then "move on" in some manner productive to society. Without an effort to reintegrate the offender akin to the kind of shaming ceremonies advocated by John Braithwaite, Kahan and Posner posit a punishment that effectively ends the life of the offender by taking away all his dignity. Compare the rabbinic proverb that to shame a person is to murder him, as you drain the blood from his face.

Samaritans, that their friends and families would chide them, that their neighbors would snicker.⁸⁵

Etzioni argues that shaming punishments are “relatively light, especially if one takes into account that most other penalties shame in addition to inflicting their designated hurt.”⁸⁶

One benefit of shaming, according to Etzioni, is its “deeply democratic” character:

Shaming reflects the community’s values and hence cannot be imposed by the authorities against a people. Thus, if being sent to the principal’s office is a badge of honor in a boy’s peer culture, no shaming will occur in that situation. A yellow star, imposed to mark and shame Jews in Nazi Germany, is now worn as a matter of pride in Israel. Thus, people are protected better from shaming than from other forms of punishment, punishment that can be imposed by authorities without the specific consent of those who are governed.⁸⁷

Another aspect of shaming punishments that Etzioni and Kahan both observe and even celebrate is that criminals often choose the shaming punishment as a substitute for traditional forms of incarceration when given the choice between them. According to Kahan, offenders often prefer the shame sanction to prison.⁸⁸ But Etzioni acknowledges that some offenders are ambivalent about this choice:

An accountant who had been sentenced to stand in his neighborhood with a sign that said “I embezzled funds” seemed deeply distraught when interviewed, musing that he might have been better off if he had instead accepted a jail sentence. A woman convicted of welfare fraud in Eau Claire, Wisconsin, preferred to be jailed than to wear a sign admitting “I stole food from poor people.”⁸⁹

Academics are obviously not the only ones in favor of shaming punishments, since judges and sheriffs are the ones meting them out.⁹⁰ It is unclear, though, whether judges are employing shaming punishments to economize on the costs of punishment or because they perceive the shaming punishments as more effective forms of expressing social condemnation. This latter sense is captured in a comment by Texas State District Judge Ted Poe, a judge well-known for his use of shaming sanctions: “[A] little shame goes

85. Amitai Etzioni, *Back to the Pillory?*, AM. SCHOLAR, Summer 1999, at 43, 44.

86. *Id.* at 46.

87. *Id.* at 47. Etzioni’s comment also applies to the appropriation of the pink triangle by homosexual activist groups as a badge of gay pride.

88. Kahan, *supra* note 2, at 641 n.204, 646.

89. Etzioni, *supra* note 85, at 48.

90. See Owens, *supra* note 82, at 1055-57 (discussing federal cases of shaming punishments permitted by the Sentencing Guidelines); cf. JOE ARPAIO, AMERICA’S TOUGHEST SHERIFF: HOW WE CAN WIN THE WAR AGAINST CRIME (1996) (describing some of the shaming ordeals inflicted on Maricopa County convicts).

a long way. Some folks say everyone should have high self-esteem, but that's not the real world. Sometimes people should feel bad."⁹¹

The recrudescence of shaming punishments has not been the only controversial development in penal methods in recent years. Some cases have involved penalties that appear, at least from our current baseline, very weird. In one notorious case, a Tennessee court ordered a law enforcement official to accompany the victim of a burglary to enter the burglar's home unannounced to take something of similar value from the burglar.⁹² Some convicts are required to shovel manure, while in other cases negligent slumlords in New York City are forced into house arrest in their own decrepit tenements.⁹³ San Francisco has required men convicted of soliciting prostitutes to sit through lectures by former prostitutes who describe the unfortunate conditions of life on the streets.⁹⁴ Someone who assaulted an interracial couple was forced to watch *Mississippi Burning* a movie about violence in the civil rights era.⁹⁵

At their worst, some punishments degrade not only the punished but also harm the citizens responsible for implementing these punishments.⁹⁶ But this need not be the case. Some examples—sitting through lectures, house arrest in one's below-code apartment, watching movies, even doing hard labor—are instances of guilt-inducing punishments that have an enormous potential for what might be called "moral education." Depending on how they are structured, these guilt punishments may educate in a manner similar to traditional pedagogy (classroom and teacher), or, somewhat more obliquely, the punishments might involve a type of educational activity that can be refracted through a richer understanding of *lex talionis* (LT), known more crudely but familiarly as the Mosaic concept of "an eye for an eye."⁹⁷ None of this is to deny that shaming punishments may also yield morally educative experiences; but the distinction that I want to make is that guilt punish-

91. Etizioni, *supra* note 85, at 47-48.

92. See Joe B. Brown, *Judge Devises Instructional Penalties*, N.Y. TIMES, Feb. 13, 1993, at B16 (observing that victims often take back "what was taken from them" by the burglars).

93. See *Instead of Jail: "Welcome, Reptile!"*, N.Y. TIMES, Feb. 17, 1988, at A22 [hereinafter "Instead of Jail"].

94. See Michael J. Ybarra, *Patrons Given a Graphic View of Prostitution*, N.Y. TIMES, May 12, 1996, § 1, at 18.

95. See *Man Sentenced to See "Mississippi Burning"*, UPI, Mar. 9, 1989.

96. Cf. Bob Herbert, *Inside the Death House*, N.Y. TIMES, Oct. 9, 2000, at A21 (describing the trauma of the Texan executioners in dealing with their jobs on the "tie-down" team).

97. See Garvey, *supra* note 2. For an instructive reconceptualization of *lex talionis*, see Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992). In Part IV, *infra*, I say more about the relationship between *lex talionis* and retribution.

ments do not depend upon scorn and castigation to be effective. I say a bit more on this in the next part.

One last development that I want to highlight is the reemergence of the privately operated prison. In the nineteenth century, just after the Civil War, various Confederate states were close to bankruptcy, and one of the ways they raised cash was by auctioning off the control of the state's inmates, prisons, and equipment to entrepreneurs who would hire out the prisoners to work for private companies and capture the spread between the price of prison labor and the costs of maintaining that labor force.⁹⁸ Predictably, prisoners had no rights to speak of and conditions were, in a word, inhumane.⁹⁹ Over time, the states reassumed responsibility for their prisoner populations, until, in the wake of the deregulation trend that began in the 1980s under President Reagan, the privatization of prisons reemerged as a cost savings mechanism.¹⁰⁰ But in contrast to the sale of prison labor to private companies that characterized the nineteenth century "privatization," today's market for prison services has the state paying the costs of incarceration to private contractors.¹⁰¹ The reemergence of the privately run penal institution raises various questions for policymakers: public accountability, penal effectiveness, and allocational efficiency. But it is a mistake to assume that all of these questions are in any sense new, as federal and state governments have contracted with private parties throughout this nation's history to provide a range of services.

II. THE PROBLEMATICS OF SHAME

A. *What Is Shame?*

Before we can see how the relationship between retribution and shame has been misunderstood, I need to say a bit more about what shame is—in particular, how it might be distinguished from guilt. In ordinary speech, these two terms are often used interchangeably. For example, one might say, "I feel so ashamed" in the same way that one might say, "I feel so guilty about what I did." For the purposes of this Article, I am not interested in "correcting"

98. See Richard W. Harding, *Private Prisons*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 626, 626 (Michael Tonry ed., 1998).

99. See *id.*

100. See *id.*

101. See *id.*; JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 215 (1989).

ordinary language. Rather, I want to distinguish these two emotional phenomena solely for the purpose of describing what I mean by shaming punishments and guilt punishments.¹⁰²

To that end, I want to begin by focusing chiefly on what I think of as the public dimension of shame and the private dimension of guilt. Consider shame. It has been said that shame "is the emotion that a person experiences when she believes that she has been disgraced in the eyes of persons whom she respects."¹⁰³ It is a result of a ceremony or action whose meaning of disapproval can be understood both by the offender and the members of the community.¹⁰⁴ Think again of the types of shaming punishments described in Part I. They are marked by two features: first, there is an attempt to debase, degrade, or humiliate the offender; and second, the degradation occurs before the public eye, often but not always with the aid of the public.

As Kahan has pointed out, these penalties may be no crueler than the hardships of prison, which often have elements of humiliation bound up in the daily experience of being a prisoner.¹⁰⁵ But unlike incarceration, shaming punishments aim at the degradation of another human being. Moreover, shaming punishments "deal with the public, with society at large, with the crowd," in a way very different than incarceration does. Whitman, for example, notes that shaming punishments risk instituting "an official lynch justice."¹⁰⁶ In contrast, guilt punishments do not require this public dimension at all.

Consider two other distinctions that have been drawn between shame and guilt:

First, guilt is local; shame is global. Shame represents a judgment about one's worth as a person. In shame's eyes, therefore, the entire self stands condemned. In contrast, guilt distinguishes between the wrongdoer and the wrong, condemning the sin but not the sinner. Second . . . , because shame is total, it engulfs the true self and leaves it with no reason and no leverage to make amends. The shamed self can only hide or, when pressed against the wall, strike back. In contrast, because

102. Because this discussion of the distinction between shame and guilt is for such a narrow purpose, I would urge readers interested in a more lengthy discussion, with greater reference to the psychological literature, to read MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (forthcoming 2002) and Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *PSYCHOL. PUB. POL'Y & L.* 645 (1997).

103. Kahan, *supra* note 2, at 636.

104. *Id.* at 637.

105. *See id.* 646; *see also* TED CONOVER, *NEWJACK* (2000) (describing prisoner humiliation in one New York prison).

106. *See* Whitman, *supra* note 21, at 1059.

guilt focuses on the wrong, it leaves the wrongdoer with the room as well as the motivation he or she needs to make amends and right the wrong.¹⁰⁷

So for the purpose of this Article, I distinguish shame and guilt in the following, and admittedly, crude manner: shame is the emotion one feels when subjected to public degradation, whereas guilt is the emotion one feels after consciously becoming aware of wrongdoing over which one feels responsible.¹⁰⁸ Thus, I may feel guilt after successfully murdering my ex-lover despite the fact that no one suspects me of anything evil. By contrast, I may feel shame when my parents and my friends discover the unseemly fact of my wrongdoing and, for example, denigrate me before the view of others. Relatedly, I may feel shame after being publicly humiliated even though I did nothing wrong.¹⁰⁹ In that situation, I would not feel guilty.

There is an active dimension to this (artificial) distinction that I also wish to emphasize. When one shames another person, the goal is to degrade the object of shame, to place him lower in the chain of being, to dehumanize him. Kahan and Posner, as mentioned earlier, talk about destroying the reputation of the offender. But when one "guilts" another person, one (implicitly) appeals to ideals of reciprocity, decency, solidarity; one expresses sadness that the other defected from the agreement or the "team," as it were. Underlying the "guilting" activity is a hope of reconnection and a sadness from the original tear in the social fabric.¹¹⁰

B. Why People Think Shaming Punishments Are Beautifully Retributive

To provide background, I show in this section that both the critics and proponents of shaming punishments have identified a close affinity between the use of shaming punishments and the retributivist justification for punishment. My challenge later is to demonstrate why retribution, when properly understood, is actually hostile toward shaming punishments.

107. See Garvey, *supra* note 1, at 1812.

108. On this understanding, guilt is not to be viewed as a status or state of being, as in the phrase: "guilty of a crime." See generally P.F. STRAWSON, *FREEDOM AND RESENTMENT AND OTHER ESSAYS* 1, 4-6 (1974).

109. *But see* discussion *supra* note 22 (regarding shame and humiliation).

110. For this reason, one might think reintegrative shaming ceremonies, as advocated by Braithwaite, blur the line between shaming and guilting someone. See JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989); *see also* NUSSBAUM, *supra* note 102.

About a decade ago, Dean Toni Massaro wrote an article that questioned the effectiveness of shaming punishments.¹¹¹ According to Massaro, American communities lacked the “level of interdependence, strong norm cohesion, and robust communitarianism” that would make shaming effective.¹¹² Because of these demographic problems, Massaro concluded that “public shaming by a criminal court judge will be, at most, a *retributive spectacle that is devoid of other positive community-expressive or community-reinforcing content.*”¹¹³ Thus, although Massaro acknowledged that any of the four traditional ends of punishment—deterrence, incapacitation, rehabilitation, and retribution—could be satisfied by the use of shaming punishments,¹¹⁴ she argued that America’s current cultural situation renders shaming punishments wholly undesirable.

The interesting question for us is: How did Massaro find that retributivism could permit a shaming punishment, and indeed endorse it? It is important to focus on her argument in particular, because two Yale Law School professors who followed her path—Kahan and Whitman—seem to have been persuaded by Massaro’s characterization.¹¹⁵ Massaro begins by defining four elements of retributivism. First, “retributivists” argue that punishment is justified to “counteract” the “harm inflicted by the wrongdoer” because the wrongdoer “deserves it.”¹¹⁶ Second, “‘an eye for an eye’ is proper redress for a crime, in order to set right the moral balance.”¹¹⁷ Third, “retributive justice is nonconsequentialist in that it is uninterested in influencing the offender’s future behavior or the

111. See Massaro, *supra* note 21; see also Massaro, *supra* note 102.

112. Massaro, *supra* note 21, at 1883. Specifically, she argued that only the presence of five factors would enable the effective use of shaming sanctions: offenders must be members of a distinct group, such “as a close-knit religious or ethnic community”; the sanction must negatively affect the social standing of the offender within the group; the “shaming must be communicated to the group and the group must withdraw from the offender—shun her—physically, emotionally, financially, or otherwise”; the offender must wish to avoid withdrawal from the group; and finally, there must be “some means of regaining community esteem, unless the misdeed is so grave that the offender must be permanently exiled or demoted.” *Id.*

113. *Id.* at 1884 (emphasis added).

114. See *id.* at 1891 (“I conclude that as a theoretical matter, shaming may be justifiable under any of the classical theories of punishment.”).

115. See Kahan, *supra* note 2, at 630-41 (citing Massaro’s account of retributivism); Whitman, *supra* note 21, at 1059.

116. Massaro, *supra* note 21, at 1891.

117. *Id.*

behavior of other community members."¹¹⁸ Fourth, retributivism "presupposes free will by the criminal actor."¹¹⁹

The attraction of retributivism, according to Massaro, is that it "satisfies deep emotional, intuitive instincts. Moreover, its ends are simply stated and fairly easy to secure. We punish in order to avenge the harm, not to deter, rehabilitate, or contain. Revenge is easier to accomplish than these other objectives."¹²⁰ She continues: "Of course, pure retributivism, and thus any retributivist-based attempt to justify [shaming] signs, rests on fairly shallow reasoning, namely, that the law has to punish crime, however it can. Major objections to pure retributivism, which apply equally to retributivist justifications for shaming, are that it does not prevent the abuses of unequal, disproportional, or inhumane punishment."¹²¹ Massaro concludes her discussion of retributivism by speculating whether "wearing a sign or apologizing would . . . satisfy the community's interest in revenge."¹²² She hypothesizes that it might, but she doubts that shaming punishments would sufficiently express "community outrage" in various communities.¹²³

Although I think this part of Massaro's account of retributivism is flawed, the reasons why will not become clear until later in this Article.¹²⁴ At this point, it is important to note simply that Massaro argues that retributivism is fully compatible with shaming sanctions.

Dan Kahan's treatment of retributivism and shame is more nuanced, but he sees the same friendliness between retribution and shame. He identifies the "core idea of retributivism" as the idea "that an individual should be punished 'because, and only because,

118. *Id.*

119. *Id.* One observes that, thus far, there is a rough resemblance between this characterization and the strong thesis of retribution discussed earlier in the Introduction.

120. *Id.* at 1892. Note how Massaro is conflating revenge and retribution, which is analogous to what I later will call the socially denunciative and the confrontational relationships.

121. *Id.* at 1893.

122. *Id.* Strictly speaking, a coerced apology is quite different from wearing a sign, and poses its own problems for a liberal regime, since it contravenes free speech principles, which include the right not to speak.

123. *Id.*

124. The relevant sections are Parts III and IV.A. I should say this, however: there are obviously many different ways of describing what retribution is, and what theorists of retribution have to say about it. A person could say X, Y, and Z are what she means by retribution and decide not to include P and Q. Although there is some value to such a stipulative definition, it risks confusing others who think retribution really includes P and Q. My view is that Massaro's account of retribution is really about revenge, and thus rests on a conceptually confused foundation. Once we understand why retribution is distinct from revenge, and once retribution is rendered as an intelligible practice with its own internal goods, retribution no longer would look as shallow or ugly as it does in the account offered by Massaro.

[he] deserves it.'"¹²⁵ To give more content to this notion, he draws on Jean Hampton's work, contending that "the proper retribution is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies."¹²⁶ From this statement and his generally warm embrace of shaming punishments, we are to infer that shaming punishments are indeed compatible with, if not endorsed by, retributivism. Near the end of his article, Kahan defends shaming punishments against a barrage of criticisms—namely, that shaming punishments offend notions of equality and dignity and that they are not effective as deterrents—and he apparently thinks he has addressed the most significant challenges that a retributivist might offer.¹²⁷ In fact, though, Kahan never fully considers what problems might inhere in a linkage between retributivism and shaming punishments.

Professor James Whitman also subscribes to Massaro's account, and thus identifies the same (mistaken) compatibility between retributivism and shaming punishments.¹²⁸ Indeed he characterizes shaming punishments as "beautifully retributive."¹²⁹ This acceptance of Massaro's stance is unfortunate because had Whitman examined retributivism more closely, he would not have concluded that the liberal tradition is unable to "reveal why shame sanctions are wrong."¹³⁰ This is because liberalism and retribution trade on many of the same constitutive ideals.¹³¹

Why might it be that scholars such as Massaro, Kahan, and Whitman thought that shaming punishments could be justified from a retributive point of view? One potential explanation is historical.¹³² In the debate about the justification of criminal punishment, there has, at least for the past couple of generations and maybe for a good deal longer, been only one moralizing position:

125. Kahan, *supra* note 2, at 602 (quoting Michael Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179 (Ferdinand Schoeman ed., 1987)).

126. *Id.*

127. *See id.* at 649; Whitman, *supra* note 21, at 1062 (interpreting Kahan as indicating compatibility between shaming punishments and retributivism).

128. Whitman, *supra* note 21, at 1062.

129. *Id.*

130. *Id.* at 1063.

131. Part IV of this Article illustrates precisely how the liberal tradition can reveal the incompatibility of shaming punishments with a liberal political order. I will not make the bolder claims, however, that if one is a retributivist, one must be a liberal, or if one is a liberal, one must be a retributivist. I do think there is a deep affinity, but it is not my project to show either of these relationships to be necessary ones.

132. This, at least, was the suggestion made to me by Bill Stuntz.

retributivism. Utilitarians might think in deterrence terms or they might be more pro-rehabilitation.¹³³ But for moralists, retribution was the only partner at the dance. And what is more, shaming looks thoroughly moralistic. As will become clear as the argument unfolds, looks are deceiving; however, given this intellectual history it may seem almost natural to link shaming to retribution.

Of course, there are arguments that would defend shaming punishments on other grounds, such as standard fare utilitarianism accounts that emphasize some net economic benefit accruing from their use. In essence, these are the arguments of Book, Kahan, and Posner.¹³⁴ Although I think these kinds of utilitarian arguments are incomplete—they often take a short-sighted view in assessing the long-term net social benefits—my goal is to focus on explaining the incompatibility between shaming and retribution.

One might wonder, finally, why it is significant to clarify this relationship between retribution and shame. After all, neither the opponents of shaming such as Massaro and Whitman, nor the proponents of shaming, such as Kahan and Posner, self-identify as retributivists. One reason this clarification is important is to encourage greater caution in the use of our conceptual classifications. But equally important is the task of providing grounds to help shift the rhetorical and political coalitions that might stand in favor or against shaming punishments. Achieving those tasks can now begin.

III. THE CONFRONTATIONAL CONCEPTION OF RETRIBUTION

In this part, I sketch the contours of what I call the Confrontational Conception of Retribution (CCR).¹³⁵ The goal here is to provide an account of retribution that not only justifies but also obligates (in a *prima facie* sense) organized political responses to legal wrongdoing.¹³⁶

133. Obviously, utilitarians think the course that maximizes the most utility is the moral choice. So when I use "moralist" or "moralizing," I am referring to the scolding sensibility of the schoolteacher, the kind of person who punishes, and enjoys punishing, as a result of what Nietzsche called "ressentiment."

134. See Book, *supra* note 21; Kahan, *supra* note 2; Kahan & Posner, *supra* note 18. Bear in mind that in his recent book, Posner has retreated from a full embrace of shaming punishments. See POSNER, *supra* note 74, at 88-106.

135. This part draws upon but revises and extends further my previous work on retributivism. See Markel, *supra* note 11, at 421-42.

136. The reader should observe from this sentence in the text that I am not interested in defending retributive justice in some prepolitical noninstitutional way as some do. See GEORGE SHER, DESERT 69-90 (1987).

A. Three Relations

To begin, I want to discuss three oddly named relations that need to be addressed in the context of punishment: the confrontational relation, the social denunciativist relation, and the common good relation. Understanding these three relations is a helpful heuristic to understand the claim that retribution is internally intelligible and attractive as a social practice.

1. The Confrontational Relation

The first relationship, the most straightforward, is what I call the confrontational relationship between the offender and the state, specifically the state's institutions of investigation, prosecution, adjudication, and punishment. This confrontational relationship results from the legal wrongdoing of the offender and some knowledge of that wrongdoing by the state.¹³⁷ The relationship presupposes an extant legal order that issues laws worthy of an obligation to obey.¹³⁸ When these two elements are present, the relationship ideally results in an encounter between the state and the offender, an encounter or confrontation that may or may not include punishment as traditionally understood. The dimensions and duration of the encounter are stipulated by law, though the law will not insist on only one kind of encounter. For example, if during the encounter the offender is deemed incompetent, then one might rea-

137. Must the state have certainty of legal wrongdoing? Before the determination of culpability, the state has no certain way of knowing, so the standard ought to be something like a good-faith basis for thinking a guilty conviction could be attained from a reasonable factfinder.

138. In other words, the topic of what ought to trigger criminal legislation is not at issue. There is no necessary tension between a commitment to retributivism and a positive conception of legal obligation, which *ex ante*, one has good reason to obey as a *prima facie* matter. Doubtless, a decent retributivist would feel moral outrage at the notion of prosecuting a couple for miscegenation or for some other stupid "crime," but that moral outrage stems from commitments and reasons extraneous to her retributivism. A person's commitment to retributivism would be balanced against her commitments to other principles of practical reason. Otherwise she would be unreasonably fetishizing one set of commitments over equally or more compelling commitments. Of course, despite the separateness of the questions of (a) what should be the object of criminal legislation and (b) what justifies punishment, there are some retributivists who have suggested lines of inquiry for answering the first question. *See, e.g.,* JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 130-37 (2d ed. 1990); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659 (1992).

sonably expect that the encounter is not identical to those encounters when a offender is deemed competent.¹³⁹

During the encounter, the state attempts to learn more about the wrongdoing of the offender and the reasons for the wrongdoing. Once the state has sufficient knowledge of a given situation, it responds in a way commensurate with the knowledge of the situation.¹⁴⁰ Hence, if the state can make no adequate determination, it dismisses the matter and ends the relationship. On the other hand, if a certain threshold of knowledge is passed, the state has a range of options from which it can choose to communicate to the offender the unacceptable nature of the wrongdoing.¹⁴¹ At this stage, assuming there aren't any sufficient excuses for the wrongdoing, it is crucial that the state use its power to respond in a way that signifies the denial of the offender's claim to, among other things, greater liberty than his fellow citizens and, if relevant, his victim.¹⁴² The law realizes, through its range of responses, that the

139. See generally Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

140. The state is obligated in a prima facie sense to pursue the encounter, and to make a good-faith effort to do so. This does not forbid imposing statutes of limitations or manpower caps on investigation or adjudication. Rather, the extent of the obligation will have to be decided through the institutions of our complex and pluralistic democratic society. It is what Aquinas would call a matter of "determinatio." That is, it is an area that is not dictated by a priori reason, but through consideration of practical alternatives and reasoned consideration of a variety of interests. These rules, which cover a "vast area" for legislative creativity, are "to some extent guided by the circumstances of a particular society, and to some extent, 'arbitrary.'" FINNIS, *supra* note 31, at 286.

141. Unfortunately, there are cases in the United States permitting the state to remain willfully passive in the face of knowledge about legal wrongdoing. See *Wayte v. United States*, 470 U.S. 598, 607-14 (1985). In *Wayte*, the government had a passive enforcement policy, meaning that it would enforce the law only against those who refused to comply with the government's draft-selection procedure, and only after the government "begged" them to comply and they refused. The government ended up prosecuting about 16 of some 674,000 persons that failed to register. Although the government had databases that could easily list who had been noncompliant, the government's policy was vindicated by the courts as a matter of prosecutorial discretion. This case provides a good example of the complex relationship between social cost and retribution. To prosecute all the noncompliant offenders under the extant law would require the state to hire a new army of prosecutors and to build a new city of prisons. The effect of this might be so overwhelming as to spur the legislators to reconsider what should really be sanctioned through the criminal law. It is because of potentially devastating social costs that theorists of punishment must be prepared to situate matters of criminal legislation and sentencing in the ex ante position, where one adopts an "idealized observer" status in which one chooses a policy based on all available information and perspectives except for the identity one would have later on. I discuss this at greater length in a book-length project, tentatively entitled, *Rethinking Retribution*.

142. The claim to greater liberty may seem odd, but my basic point here relies on the familiar first principle of JOHN RAWLS, *A THEORY OF JUSTICE* (2d ed. 1999), namely that society be structured in a way as to provide the greatest amount of liberty that would be consonant for all to have in equal amounts. The criminal's act is a claim to greater liberty because by its nature, the criminal act is a rejection of the rule that limited everyone else's liberty.

denial of this claim can be conveyed in a host of ways and that some ways are more appropriate than others. The purpose of those responses, however, is essentially the same: to affirm the moral responsibility of the offender and to diminish the plausibility of any offender's claim to usurp power from the state or to possess superiority over his fellow citizens.¹⁴³ Coercing the offender to undergo some form of deprivation, it should be noted, serves as evidence of the denial of these claims. But not all retributive responses need to be punitive in the same manner.¹⁴⁴

2. The Socially Denunciative Relation

Consider now a second relationship, one I call the socially denunciative perspective. In this relationship, not just the offender and the state appear, but also the particular victim (if there is one) and those individuals or groups sympathetic to the victim within society. The practice of punishment here, according to Emile Durkheim, is to serve as a "sign indicating the sentiments of the collectivity."¹⁴⁵ The English jurist, James Fitzjames Stephen, articulated a similar position: "[Criminal] law gives definite expression and a solemn ratification . . . to the hatred which is excited by the commission of the offence . . ." ¹⁴⁶ Punishment's relation to crime, says Stephen, stands "to the one set of passions in the same relation in which marriage stands to the [sexual passions]."¹⁴⁷ Stated along these narrow dimensions, there is a great overlap between the confrontational and socially denunciative relations.

Social denunciation takes on a new meaning, however, when this expressivist view is taken to mean that these signs of senti-

143. This brief explanation is developed in Part III.C and is manifestly indebted to Jean Hampton's work. See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 131 (1988). Hampton's account, however, does not sufficiently explain the state's interest in retribution because her account is chiefly victim centered. The version in the text addresses this, here and in Part III.C.

144. This claim is what permits consideration of alternative sanctions, and it constitutes a departure from Kantian accounts.

145. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 63 (W.D. Halls trans., 1984).

146. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81 (London, MacMillan 1883). Dan Kahan observes that Durkheim and Stephen, as well as Joel Feinberg, Robert Nozick and Jean Hampton, all serve as intellectual authority for the expressive dimension of punishment. See Kahan, *supra* note 2, at 594-95. This is a correct observation, as all the above-mentioned figures do view punishment as an expressive act that repudiates false values. But it is a mistake to think that all of these thinkers would endorse an expressive dimension of punishment that includes the expressions that occur in the use of shaming punishments. Some of the thinkers might, others might not.

147. 2 STEPHEN, *supra* note 146, at 82.

ments are for the purpose of ventilation or reconciliation. This is where we begin to see the roots of the confusion in Massaro, Kahan, and Whitman's accounts, all of which identify a connection between retribution and shaming punishments. To see this confusion with greater clarity, it is important to separate two elements that inhere in the socially denunciative view. The first element, which is shared by the confrontational relation, communicates moral condemnation of the offender's act. The second element is that this condemnation occurs for two purposes: the satisfaction of the public's desire to see justice done and, more basely, the exercise of its hatred or rage at the offense and, sometimes, the offender. In modern parlance, this latter idea gets translated as a belief that "judges [should be] adding humiliation to the mix to soothe a public hungry" for punishment.¹⁴⁸ This discourse is no different than that used by Lord Devlin to justify use of the criminal law to enforce society's moral evaluations on matters that scarcely cause harm or suffering to others.¹⁴⁹

Let me say a point about the first purpose—the desire to see justice done. There is nothing wrong with (and indeed something quite good about) the public having knowledge of the confrontation between the state and criminals. When the public witnesses the state repudiate a offender's claim to greater liberty, such a claim is more obviously denied. The public belief that punishment for wrongdoing occurs helps form the mucilage that keeps society together. For that reason, courtrooms open to public viewing, jury trials, and other social practices that permit transparency in the administration of justice have their benefits.

But the socially denunciative position has a second purpose, the satisfaction of seeing the offender suffer. I want to suggest that this second purpose goes to the heart of the social denunciative view because without public condemnation of the offender, there would be no reconciliation between the victim's family and the state or between the group to which that victim belonged and the group to which the offender belonged.¹⁵⁰ This second purpose is the essence of the socially denunciative relationship: even though the exponents of this view of punishment appear to be retributivists,

148. Haya El Nasser, *Paying for Crime with Shame*, USA TODAY, June 25, 1996, at 1A (referring to the assessment by various legal scholars).

149. See SIR PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 66-82 (1959). H.L.A. Hart characterized Lord Devlin's view that punishment may be used for "venting" as "uncomfortably close to human sacrifice as an expression of religious worship." H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 65-66 (1963).

150. This might be the case with respect to hate crimes, for example.

seeking "just justice," their real interests appear to be more of the expressive than retributive sort.¹⁵¹ Is this an important distinction?

Obviously, one can hold a mixed position, and say that both moral condemnation and public expression of that condemnation should attach to all punishments.¹⁵² But it is worth isolating the idea that social denunciativists seek the condemnation of the offender in a public way. They want to know that punishment is occurring, and they want to know that others know it as well. If they do not know of the condemnation and subsequent pain or privation visited upon the criminal, then the confrontation between the state and the criminal has no value to them.

What then is it about this convention of visibly administered incarceration that appeals to social denunciativists? It is the same thing that made public whippings or beheadings desirable, or at least bearable, two hundred years ago—a desire to respond adequately to our emotional sense of not just anger but disgust at what was done.¹⁵³ As Kahan writes, "[N]o other moral sentiment can reproduce the work that disgust does in voicing our opposition to moral atrocities."¹⁵⁴ Punishments that impose a more visible hardship properly manifest social disgust with what was done.¹⁵⁵ To be sure, disgust has its moral limits: it can reinforce unjust hierarchies, it can lead to disproportionate reactions, and it can work against individual autonomy.¹⁵⁶ But for the social denunciativists, the better society is one that expresses disgust effectively, if not unequivocally, by publicly condemning not only violations of law, but also the violators of law.

For Kahan and other supporters of shaming punishments, the reason a shaming punishment is a preferable punishment to community service or a fine is that it seems capable of channeling disgust appropriately. As one commentator puts it, a shaming punishment "sets an example for others and provides the public with a tangible sense of justice in action."¹⁵⁷ Here justice in action appears to be a short way of saying that this offender is getting his face

151. The view of "just justice" was articulated in street signs and legal challenges to the South African Truth and Reconciliation Commission (TRC), where protestors expressed their antipathy to the particularized amnesty regime.

152. Indeed, there is a way to capture this mixed position in a more attractive manner. See *infra* text accompanying note 272.

153. Kahan, *supra* note 26, at 1656.

154. *Id.* at 1657.

155. Kahan, *supra* note 2, at 591.

156. See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 2-9 (1997).

157. Book, *supra* note 21, at 653.

rubbed in the mess he made and that having this done in public will mollify the bloodlust of the multitudes.¹⁵⁸

One might surmise that the retributive, or confrontational, relationship is also expressively condemnatory, since the state in its response is effectively saying, "You, the criminal, were wrong to have transgressed the law." But the retributive relationship is different because it is less interested in expressing condemnation to the world and more interested in communicating the message of opprobrium to the offender. To borrow from C.S. Lewis, retribution "plants the flag of truth within the fortress of a rebel soul."¹⁵⁹ Thus, retributivism does not require, though it permits and endorses, the public aspect of this expression in certain forms. For the social denunciatiivists, on the other hand, public expression of the denunciation is crucial because in its absence punishment would not achieve the desired reconciliation (or peace of mind) between the victim's family and the criminal or the survivor's family and society more generally.¹⁶⁰ What matters for the social denunciatiivists is the social satisfaction derived from the state's response.¹⁶¹

Two problematic implications arise from a theory of social denunciatiivism unmoored to a theory of confrontational retributivism. First, to the extent that the social denunciatiivists believe reconciliation or peace of mind cannot occur without public expression condemning the wrongdoers, a significant question emerges regarding whether it even matters who the wrongdoer is. As long as the survivor (or society) gets to see a plausible story of punishment enacted, in which some "offender" is made to suffer, then the purpose behind the social denunciatiivist's ideology—to express moral outrage at the wrongdoing experienced by the victim and society—is

158. Cf. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* pt. II (Walter Kaufmann & R.J. Hollingdale trans., 1989) (castigating the resentment motivating the priestly caste's joy in punishing).

159. C.S. LEWIS, *THE PROBLEM OF PAIN* 95 (1944).

160. The political appeal of this concern is suggested by the bipartisan support of a victims' rights amendment to the American Constitution. For example, both major candidates in the 2000 presidential race supported a crime victims' constitutional amendment.

161. It bears mentioning that expressivist understandings of punishment can be unpacked in different ways. At one extreme, one can try to justify punishment merely by the state's communicative response to the offender. For others, there is no utility derived unless there is publicity of the state's response. And for others, one might justify punishment from a hypothetically possible satisfaction of expression ("We punish because, under ideal conditions, punishment satisfies the public need to express rage at crime."); or we might point to actual satisfaction as the justifying feature of punishment ("Each criminal should be punished because that way the public will be satisfied."); or we might point to the actual satisfaction as the aim of punishment ("We punish in order to satisfy public rage."), either in particular instances or in the practice and method of punishment in society at a given time.

satisfied.¹⁶² In other words, noble lies possessing the appearance of narrative integrity, akin to those described by Socrates in Plato's *Republic*,¹⁶³ may acceptably be told to ease the suffering of the victims, survivors, and groups sympathetic to their plight.¹⁶⁴

This narrative of pain connects up with the way in which some might conceive someone's "taste for fairness." If the goal is only to satisfy subjective tastes and preferences, the Benthamite utilitarian would prefer to satisfy this taste with cheap(er) substitutes when possible, assuming the other consequences (deterrence, denying need for revenge outside the law) remain constant. But characterizing a taste for fair punishment as a taste fails to capture the expressive meaning that punishment may signify.¹⁶⁵ Thinking of this preference merely as a thirst to be quenched fails to capture the richer sense in which one thinks punishment for legal wrongdoing is worthwhile. This problem is similar to the classic critique Hart had of Austin's characterization of law as a threat-based set of commands: it distorts the nature of obligation through its reductionism.¹⁶⁶

A second problem relates to the matter of prediction or, rather, the lack of certainty of desired outcomes. Will the public condemnation actually achieve the reconciliation desired? Will it actually afford the psychic comfort sought by those seeking the punishment? To the extent that certain losses and grief are incomensurable and inconsolable,¹⁶⁷ it is uncertain—even improbable—that the suffering of another will serve as the balm to the perturbed mind that James Fitzjames Stephen posited.¹⁶⁸ This is

162. 2 STEPHEN, *supra* note 146, at 82 (contending that the execution of criminal justice stands "to the one set of passions in the same relation in which marriage stands to the [sexual passions]").

163. See PLATO, *THE REPUBLIC*, at III.415a-d (Allan Bloom trans., Harper Collins, 2d ed. 1991).

164. Some practical limits inhere: the strategy of framing the wrong person will not work if the real offender continues to commit similar crimes and uses the same modus operandi.

165. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000); Dan M. Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352 (1996).

166. See H.L.A. HART, *THE CONCEPT OF LAW* 26-49 (2d ed. 1994).

167. See JOSEPH WILLIAM SINGER, *ENTITLEMENTS* 282 (2000) (observing that in most situations compensation never compensates).

168. For instance, many members of victims' groups such as Parents of Murdered Children are banding together to express their opposition to the death penalty. One website reports that victims' families often feel that

no sentence can ever "equate to the loss of your child's life and the horrors of murder." Frequently, victims' families recognize that the death penalty will inflict the same pain they have felt on the accused's family. As one mother replied

not to say other desirable outcomes might not occur: greater deterrence is one possible outcome that might arise even if reconciliation does not. But it is important to recognize that the same difficulty of prediction will affect, and thus render problematic, policy choices that rely exclusively on uncertain consequences.

3. The Common Good Relation

In addition to theories of penal encounter centering on retribution and social denunciation, I briefly want to call attention to a third relationship. This relationship involves the moral ecology that connects the web of interests, reasons, preferences, and values that prevail in any given society. This third relationship appears nebulous because it is so all-encompassing, but the idea of "common good" begins to capture the point. What might be the common good? One possible definition is the "set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s) for the sake of which they have reason to collaborate . . . in a community."¹⁶⁹ This relationship encompasses the variety of communities and individuals who participate in a complex scheme of social cooperation among free and equal citizens. All legal and political institutions must respect this third relationship, and all the groups and individuals in this relationship must peacefully coexist for the state to rule effectively and fairly. I will call this the common good relationship. It is this relationship that is considered when we situate the project of retributive justice *ex ante*, that is, as one practice among many attractive practices within a good and decent society. I say a bit more about the demands this relation may make upon the confrontational relation at the end of this part.

With a rough understanding of these three relationships, we can now try to address how the competing goals of the second and third relationships can be mediated by a proper understanding of the first relationship, the confrontational relationship between offender and state.

when asked at the funeral of her murdered son if she wanted the death penalty:
"No, there's been enough killing."

Religious Action Center of Reform Judaism, Issues: Death Penalty, at <http://rj.org/rac/issues/issuedp.html> (last visited Nov. 13, 2001).

169. FINNIS, *supra* note 31, at 155.

*B. The Internal Justification and Prima Facie Obligation of
Retribution*

Understanding the differences among the three relations described above is only the first step in trying to understand the CCR. This section performs the next step. Here I wish to explain what I mean by the CCR and show why the practice of retribution is both justifiable (regardless of contingent social benefits) and obligatory in a prima facie sense.¹⁷⁰ Punishment requires justification because its potential modes of corporeal violence, insults to one's dignity or reputation, and restrictions on an individual's liberty are all otherwise illegitimate social practices in the context of a well-ordered society. Indeed, the understanding is that it is better for a society to have less punishment rather than more, because punishment is only merited for legal offenses, of which we should prefer fewer.¹⁷¹

Various justifications are offered for state punishment. In a passage from Nietzsche's *Genealogy of Morals*, a well-known catalogue of the utilities of punishment appears. Through its various forms, Nietzsche writes, punishment renders a person harmless; it prevents further harm generally; it provides recompense to the injured party for the harm done; it isolates a disturbance of equilibrium, so as to guard against any further spread of the disturbance; it inspires fear of those who determine and execute the punishment; it is a kind of repayment for the advantages the criminal has enjoyed hitherto; it expels a degenerate element; it serves as a festival, namely as the rape and mockery of a finally defeated enemy; it makes the memory, whether for him who suffers the punishment, or for those who witness its execution; it pays a fee stipulated by the sovereign power that protects the wrongdoer from the excesses of revenge; and it is a compromise with revenge when revenge is claimed as a privilege by powerful clans; it awakens the feeling of guilt in the guilty person.¹⁷²

The list, Nietzsche writes, is overdetermined by utilities of all kinds.¹⁷³ But of these many utilities, only some of them occur in

170. Prima facie duties cannot be denied as obligations, but the determination of how and when to discharge those obligations is a prudential matter and these obligations may be set aside when other duties supervene.

171. Cf. H.J. McCloskey, *The Complexity of the Concepts of Punishment*, 37 PHIL. 307, 323 (1962) ("Punishment differs from quarantining, social surgery, etc., in that with these the evil is not an essential, deliberately intended part of the activity, in that if the evil could miraculously be avoided, the quarantining and social surgery would remain.")

172. NIETZSCHE, *supra* note 158, at 80-81.

173. *Id.* at 81.

a noncontingent manner. Those utilities I call internal utilities, because their goods are realized inside the practice; they do not require or depend upon future consequences to have their good realized. Thus, the fact that punishment may curb potentially limitless and disproportionate private revenge, that it deters future crimes, that it provides social self-defense, and that it offers rehabilitative opportunities—all these are potentially powerful justifications, but they are external to the practice and therefore contingent.¹⁷⁴

By pointing to internal goods, the theory of punishment I endorse commends retribution independent of the external social ends it might serve, that is, as worthwhile in itself.¹⁷⁵ (This is *not* the same as indifference to the consequences and costs of punishment.) Can retribution for legal wrongdoing be defended without concern for the external consequences it may bring about, such that “punishment for immorality would exemplify justice or [have] worth not merely in our familiar world, but in any possible world?”¹⁷⁶ I think it is possible if it can be shown that punishment for legal wrongdoing itself does something good and that the good it achieves is not outweighed by some other course of action.¹⁷⁷ The theory I offer contends just this: that retribution for unlawful wrongdoing is internally justifiable because it achieves certain goods. Although others have endorsed retribution by appealing to the intuition that the just deserts of an offender requires punishment,¹⁷⁸ few have explained what it is about “just deserts” that makes it valuable. I try

174. Among the better-known early formulations of these justifications are those of Cesare Beccaria and Jeremy Bentham. See CESARE BECCARIA, *ON CRIMES AND PUNISHMENT AND OTHER WRITINGS* (Richard Bellamy ed. & Richard Davies trans., Cambridge Univ. Press 1995) (1764); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970).

175. Of course, this internal character does not in and of itself make it a better theory of punishment than one motivated by the pursuit of external ends. The point here at least is to show that there are ideals that are effectuated by a retributive understanding of punishment; one's commitment to these ideals may legitimately guide punishment even if the external ends could not be achieved. It should be said that just because some good is achieved by retribution does not mean that under certain extreme circumstances there might not be warrant for the suspension of retributive practices.

176. See Gertrude Ezorsky, *Introduction to PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT*, at xi, xvii-xix (Gertrude Ezorsky ed., 1972).

177. Where I wrote “good,” others might say “inherently right.” See, e.g., MICHAEL S. MOORE, *The Argument for Retributivism*, in *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 238, 238-43 (1984) (relying on the “inherent rightness of the practice” of giving an offender his just deserts as the basis for a formal syllogistic defeat of utilitarian theories). I prefer “good” because saying a practice is inherently right stops the conversation. It requires us to accept that characterization as intelligible without asking what might make it a good reason for action against all other actions.

178. See, e.g., M. Thornton, *Against Retributivism*, in *RETRIBUTIVISM AND ITS CRITICS* 83 (Wesley Cragg ed., 1992).

to do this in what follows. But to say retribution is good in itself, however, does not render it a *prima facie* obligation—that too needs to be shown. For, as I have suggested earlier, not all goods can be pursued when the call of other goods (such as avoiding war or famine) supervenes with urgency.

Let me begin with a brief encapsulation of what the CCR looks like. The bare claim is that states are justified and (defeasibly) obligated to respond to legal wrongdoing in a manner shaped by law when that response is administered by (an agent of) the state to the person who deserves such a response because of his legal wrongdoing.¹⁷⁹ The justifications for this cluster of claims are what we turn to now.

The argument functions on several levels. First, retribution for legal wrongdoing is justified in part because it affirms the dignity of the offender by treating him as a responsible moral agent.¹⁸⁰ How? When the state addresses a person's unlawful wrongdoing, her moral agency is affirmed because she can express remorse, recognize her wrongdoing, and make efforts to avoid that conduct in the future. Or, in the alternative, she may give reasons that the conduct was not harmful or wrongful, or that though her conduct was harmful, it was excusable under the circumstances.¹⁸¹ A cognitive process is involved in retribution that possesses moral weight.¹⁸² This weightiness is highlighted by dialectical consideration of the alternative. Imagine that the state knew about someone's legal wrongdoing but refused to address it. Not only does this inaction indicate a fundamental disrespect for the victim (your interests and values are not those we deem important)¹⁸³ but also for the offender (we will not condescend to treat your actions seriously).

179. One might fairly ask whether, on this characterization, parents "punish" their children. Words often mean different things in different contexts. For this Article's purpose, I would propose that we stipulate to the idea that punishment is but one form of penalty, a form over which the state has a (proper) monopoly. So parents do not "punish" their children.

180. See HERBERT MORRIS, ON GUILT AND INNOCENCE 31 (1976).

181. See Von Hirsch, *supra* note 5, at 667.

182. Cf. Garvey, *supra* note 1, at 1805-10 (positing the ideal theory of punishment as one that generates ideas of atonement in the mind of the offender of the wrong); Moore, *supra* note 125 (explaining the value of recognition and the opportunity of repentance).

183. This is not always the case though, so certain exceptions may apply. For example, when a starving man steals a loaf of bread, the moral injury to the victim is not quite as great (as when he steals out of mere convenience) since there is no intended insult to the owner as a person deserving moral consideration and respect. Conversely, the decision to allocate more prosecutorial resources to violent crimes than nonviolent crimes may be justified because violence is a more demeaning disrespect than most forms of theft or drug possession.

As a result, when we punish a competent criminal, we instantiate the ideal of moral responsibility for one's actions.¹⁸⁴

By grounding retribution's worth upon the criminal's awareness of the state's desire to repudiate his illegitimate claims, we are also able to give greater currency to the idea that punishment is a communicative practice, not merely an expressive one.¹⁸⁵ Thus, effective communication to the offender is of fundamental importance to the practice of retribution.¹⁸⁶ The practice of retribution would not be intelligible, for example, if the offender could not understand the message that the state was sending. A thought experiment fleshes out this view. Say the offender unwittingly swallowed an amnesiac drug that erased his entire prior self-concept, or was massively lobotomized, such that he had no memory of the action, and indeed no memory of his personality—would punishment make sense in this context? On the retributivist view that I am developing, it would not.¹⁸⁷ (It would conversely be implausible to assert that a failure to punish the insane would demoralize or render less compliant mentally competent citizens.)¹⁸⁸

184. One cannot say that the affirmation of another's autonomy as a morally responsible agent stops as soon as there has been a (correct) judgment of a court; it must continue throughout the retributive encounter. Cf. JAMES Q. WHITMAN, *DIGNITY IN PUNISHMENT: THE WIDENING WESTERN DIVIDE* (forthcoming) (offering as an instructive example the protection of dignity for prisoners in contemporary Germany).

185. By this distinction, I mean that the state has an interest in communicating a particular message to someone in particular; the expressivist has a larger audience in mind, and conceivably is indifferent to whether the expression reaches a particular person. For example, when I call you at home to tell you Dad is not coming home tonight, that is a communication. When I write a column in the newspaper, I am expressing my opinion. Communication, as I use it, has a known and particularized target. This differs slightly from the definition used by others. Anderson and Pildes, for example, say that expression requires only the manifestation of a mental state in speech or action, whereas communication of a mental state requires "that one express it with the intent that others recognize that state by recognizing that very communicative intention." Anderson & Pildes, *supra* note 165, at 1508. Thus, a shoplifter may express her intention to get away with pinching a purse but often she does not intend to communicate that intention. *Id.*

186. Unfortunately, the systemic defects of the procedures affecting criminal prosecution severely hinder the practice of effective communication to the offender. This is a topic I take up in an ongoing project, *The Promise of Constitutional Criminal Procedure*.

187. As a practical matter, this account suggests how the application of the death penalty to retarded individuals is seriously misguided, on retributivist grounds at least.

188. That is not to say that no social action is warranted if we assessed the person as requiring therapy or some other form of treatment. But without some inquiry into, and evidence of, the knowing malevolence of the offender's will, we would have to conclude that the imposition of "punishment" would lack intelligibility. (What about someone who intentionally lobotomizes himself after the crime? You would punish him for the same reason you punish a person who gets drunk or stoned and commits a crime.) Relatedly, the will of the offender is, to a degree, made evident by his cooperation with the authorities both after his crime and during his period of punishment, which explains why coming forward, offering a plea, or behaving well in prison may justify reductions in a sentence handed down as retribution.

If the first good achieved by retribution is the establishment of a punitive discourse that communicates norms of moral agency, the second good is that it upholds our commitment to treating individuals with equal concern and respect under the law. The premise for this claim is that we are all equally burdened in our obligation as citizens to obey the law. When someone flouts the law, he is actively choosing to untether himself from the common enterprise of living peaceably together under a common law; he is defecting from an agreement he would have made as a reasonable person in concert with other reasonable people.¹⁸⁹ By his act, the criminal is implicitly saying, "I have greater liberty than you, my fellow citizen."¹⁹⁰ He is cutting himself off for the purpose of imposing a new order by his acts against people who should enjoy equal liberty as guaranteed by the state's rule of law.¹⁹¹

Retribution serves as the rejection of this claim and thus effectuates equal liberty. Metaphorically, it plants the flag of moral truth in the rebel soul. When the state responds with retribution it does not make the crime or harm disappear. It does, on the other hand, diminish the evidence that might be proffered to a criminal's claim of greater liberty: namely, an unanswered crime.¹⁹² And the

189. I use the pronoun "he" simply because crime and punishment is dominated by males. However, the larger justification for the theory that I offer should be attractive to both men and women under *ex ante* conditions. Even though the account here may use "masculinist" language at times, the account is intended as egalitarian in nature, viewing both genders as rights-bearing moral agents who come together in concert to form unions of social cooperation that seek to secure the conditions for human flourishing.

190. One infers the claim of greater liberty from the *mens rea* to violate the structural arrangement that one, as a reasonable and rational moral agent, has (or would have) chosen, not at the contingent time that one may be required to remedy the breach.

191. One might think that this is hardly what goes on in the mind of most criminals. I do not doubt that criminals are not articulating this as they pick a pocket or steal a car. Indeed, it is true that there might be many maxims to be inferred from a criminal's behavior. But the question is whether there is plausible evidence to sustain one or several of these interpretations. And part of what makes an interpretation of social fact a plausible one is that we decide to announce that this is how we will interpret this kind of behavior prospectively. This interpretation is defensible, for when we affirm the moral agency of the offender through retribution, we recognize that he himself might have acted for venal reasons, perhaps nothing quite so grand as political rebellion or insult to fellow citizens. But by holding him accountable for his actions, we treat him better than he was toward others, because we respect his capacity for moral decisionmaking. Of course, there will be certain circumstances when it is fully implausible to infer these maxims from a person's behavior and when those circumstances attach, retribution would not be sought, or at least, not in the same way or to the same extent. This is what creates room for excuses, justifications and mitigating circumstances, such as necessity, self-defense, and provocation.

192. See MURPHY & HAMPTON, *supra* note 143, at 131. Note that the discussion so far is completely susceptible to a Nietzschean criticism: Why should one care about the criminal's denial of the value of someone? Can we not just shrug our shoulders and move on? There is no answer that can persuade the Nietzschean other than to state that "it is part of what it means to

person who most needs to see that evidence diminished is the offender himself. To be sure, this false claim of greater liberty is more clearly challenged when the public knows that this repudiation of false valuation of others' rights is happening. But there is something good that is achieved even when the state communicates its denial of the criminal's false valuations only to the offender himself.¹⁹³ That good is the good of retributive justice.

Note that retribution is constrained: its purpose is to communicate to the offender that his untethering violates the basic legal structure that he had good (or overriding) reason to accept as a presumptively reasonable and rational person in the company of others similarly recognized by him as reasonable and rational.¹⁹⁴ It follows then that if the offender is incompetent, then the mens rea behind the untethering cannot exist.¹⁹⁵ The offender, then, must understand that he is experiencing retribution even if he does not accept the reasons for it.¹⁹⁶

The act of untethering oneself by a criminal act, it should be observed, is not exactly the same as free riding off the order pro-

say that something is valuable that we ought to care about preserving and acknowledging that value." Hampton, *supra* note 138, at 1684.

193. The fact that there may be duties of transparency does not diminish my fundamental point: namely, that communication to the offender of his wrongful behavior is of at least some significance. All else flows from that.

194. See John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828, 1839 (1999) (reviewing ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999)) (relaying Ripstein's argument that punishment is necessary to denounce a criminal's behavior that "shows contempt for the very idea that he must conduct himself with due regard for the basic interests of others").

195. One implication of this theory so far is that culpability has more valence than harm as a determinant in how severely one should be punished, and thus, there is no intrinsic reason, for example, to distinguish between failed and successful attempts. For even a failed attempt is nonetheless an act that manifests "the criminal's substitution of calculating, private rationality for public reasonableness." *Id.* at 1841. Some might argue that there is a further distinction: namely, that a completed crime "is conduct through which an actor consciously puts his interests ahead of others so as to cause a rights violation," and this is worse "because it has wrought greater damage to the scheme of rights protected by the law." *Id.* at 1842. I do not appreciate the "greater damage" to the scheme of rights here, since if all that distinguishes an attempted from a completed crime is a matter of luck, it is hard to discern what extra harm to the scheme of rights attaches.

196. What does it mean to understand without accepting? Is it to deny on principle the state's legitimacy or the wrongfulness of breaking the law that one broke? Is it like being a jailed anthropologist who says, "Oh, these people punish rape, which is rather odd; I guess I now understand that it is against their laws, even though where I am from, it is perfectly acceptable to treat others as the extension of one's sexual imagination." Well, the phrase "to understand without accepting" means that the criminal comprehends that the government thinks he has violated a law with which he could reasonably be expected to comply as either citizen or visitor to the country in which he resides. Despite that comprehension, he may think that the government got the wrong guy, or perhaps they got the right person, but given his circumstances, the government should have been more lenient to him, etc.

vided in a stable social union by others' good behavior.¹⁹⁷ The language of free riding implies that everyone else would enjoy the benefit of murder or robbery, when in fact many of us would not derive any satisfaction from that license.¹⁹⁸ Viewing retribution only as a means of limiting free riding thus conceives the issue too narrowly. It wrongly presumes we all have the motivation to do wrongful acts. Moreover, on the free riding view, it is not clear that ending the free riding is the task of the state.¹⁹⁹ The idea of untethering, on the other hand, more accurately captures the more significant responsibility of participating in the reasonable but significant obligations of a larger social enterprise, and thus intimates the role the state needs to play here.

The metaphor of untethering needs strengthening though. For the offender by his unlawful act does more than just withdraw or cut himself off from society. As stated earlier, the criminal act is a claim of superiority by the criminal over other citizens and the polity itself. Leaving this criminal act unaddressed provides evidence for this claim of superiority because the unaddressed *actus reus* (or, morally wrong act) creates the impression that the offender is justified in his claim of superiority. Thus, by responding to his crime for what it is, we are destroying (or at least diminishing) the evidence for this false claim. The criminal experiences the denial of his claim to superiority through the state's application of coercive force. That the encounter may transform the offender so that he internalizes the values symbolized by the confrontation (equal liberty under law) is a valuable bonus, but it is not required. What justifies the act of retribution is the good achieved by placing the criminal in a position where he can no longer make that claim of superiority with plausible evidence.

The retributive encounter thus connects the criminal with the purpose of affirming equal treatment under law; it cannot therefore be claimed that the good of retribution is uncertain or external in character. By denying the plausibility of a criminal's claim to superiority to the offender himself, retribution achieves a second good whose character is in no way uncertain.

197. This is Herbert Morris's well-known theory. See MORRIS, *supra* note 180, at 31.

198. See MURPHY & HAMPTON, *supra* note 143, at 116.

199. What about societies that have socially recognized castes or classes in place—can they delegate retribution to the state? It may depend on the legitimacy of the regime; if an entirely religious and homogeneous society including the offender himself accepted the rule of the priests, then his act would still constitute an act of political rebellion that may properly be squelched. But the proof of such acquiescence may be a tall order. The argument of the text applies chiefly to societies such as ours, or to those that aspire to be like ours in the relevant respects.

The account thus far may appear insufficient to establish that it is the state, and not some private person or agency, that should enact retribution. Why should the state play the central and exclusive role in criminal justice? After all, it is only a modern phenomenon that the state has assumed this central role; as shown in Part I, clergymen and other communal figures used to play an extensive role in administering punishment. Moreover, today the state's monopoly on punishment is under attack again. In a provocative article, Dan Kahan has said that it is time "to get over" the kind of thinking about criminal law that permits the state to "monopolize" legitimate force: "Just as air travel and telecommunications have been freed from inefficient forms of centralized control, so punishment is due for a liberating dose of privatization."²⁰⁰ Suggesting that the state's criminal laws are insufficiently respected by inner-city communities, Kahan contends that in the face of such "enfeebled legitimacy" the answer is to rely on the moral authority of a multitude of private institutions and actors such as the "Black church and juveniles."²⁰¹ Kahan, oddly, seems to prefer exacerbating the allegedly enfeebled legitimacy of the state instead of succoring it. To address him, I need to answer the question—what justifies the state's role in punishment?

The state plays the role of the exclusive decisionmaker (at least with respect to punishment) because it, and it alone, has the capacity for legitimacy among all actors in society in a way that various communal institutions could not in our pluralistic social union of social unions.²⁰² Kahan's empirical claims—that various subcommunities no longer recognize the state's legitimacy—are not only implausible, they are inconceivable from an *ex ante* viewpoint. The communities of which he speaks may be opposed to the harsh federal or state drug laws that require stiff mandatory minimum sentences. But Kahan marshals no evidence to suggest that they think some other political body has a more legitimate claim to legislate, adjudicate, and punish them in a society with demographics like ours. Moreover, if we are interested in, as we should be, what someone would choose *ex ante*, that is, not knowing whether she will be black, white, male, female, etc., we would have little reason to be stirred by Kahan's provocations. Instead, we would embrace

200. Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1859 (1999).

201. *Id.* at 1862.

202. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993). The fact of social pluralism is in part what motivates and justifies reliance upon an impartial agent, such as the state, to administer justice in modern times.

the procedural cautions that characterize state action in a constitutional regime.

But there is a further, more fundamental reason for the state's involvement in retribution. Note that while revenge rarely occurs for acts that are not immediately or transparently victim-oriented, retribution, by contrast, occurs for acts that are either *malum in se* (prohibited by nature) or *malum prohibitum* (prohibited by convention of the state). This distinction helps to capture the idea that there are some wrongs, such as treason or forgery, for which the victim is collective and not specifically identifiable.²⁰³

The state is the appropriate agent of retribution because the crime, even if it is "victimless," is a rebellion against the government's rule-making authority. The state has a vital interest in protecting both the particular determinations of the people regarding the rules of property, liability, and inalienability²⁰⁴ and the process through which those determinations are made. As a result, the state has an obligation to defend itself against those who flout its rules and encroach upon a decision-making authority that they have (or would have) chosen *ex ante*. On this understanding, every crime is fundamentally an act of political rebellion and punishments serve as measures of war against those rebellions.²⁰⁵

Rebellions vary in strength of course and so the resources husbanded to quell the rebellions should also vary appropriately to avoid waste. But a legitimate regime has not only the right but also the obligation to protect itself from these encroachments, for to do nothing to an offender when something is possible is to fail to take the moral agency of individuals seriously, constituting a *prima facie* injustice; and to make no effort at pursuing the correct offender is to tell the victim of the crime that the moral injury she experienced does not count. Just because the victim might be, in some cases, the collectivity or the popular sovereign does not mean that the suffer-

203. Joel Feinberg and Jean Hampton have separately explained the basis for why these wrongs should also be subject to state punishment. See JOEL FEINBERG, *HARMLESS WRONGDOING* 3-38 (1986); Hampton, *supra* note 138, at 1690.

204. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1009 (1972). This idea is manifested outside the realm of economic theorizing as well. See generally ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) (observing that the state helps protect rights, which provide moral space); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983) (contending that social structures must obstruct illegitimate incursions across "spheres" of social intercourse that are characterized by differentiated meanings and currencies of exchange).

205. Cf. NIETZSCHE, *supra* note 158, at 81 (describing punishment as, among other things, a measure of war against those who are enemies of peace in the community).

ing endured or the insult to the legitimacy of the political decision-making regime is not real.²⁰⁶

Let me say this more clearly: even where crimes are “merely” *malum prohibitum*, and there is no apparent victim, the state has a *prima facie* obligation deriving, in a sense, from a contract to fulfill. Just because the “victim” of the crime may be the state and society at large does not mean the state may waive its duty to pursue an offender of a legal wrong.²⁰⁷ When a wrong occurs, it occurs against the body that decided that some particular act was a wrong.²⁰⁸ Al-

206. What I have said on this point applies to legitimately constituted regimes. Does it mean by implication that the state loses its right and duty to seek retribution when it is founded and maintained tyrannically? If so, does that mean the state cannot (morally) punish me for stealing your car when it is a wicked regime? Certainly the state’s right to punish becomes attenuated when the state itself is an instrument of the few for the repression against the many. See generally JEFFRIE G. MURPHY, *Marxism and Retribution*, in *RETRIBUTION, JUSTICE, AND THERAPY* 93 (1979). Murphy’s point focuses on the economic stratification that exists in capitalist societies. This focus is odd by my lights. All uses of the state’s coercive powers deserve scrutiny and few, if any, uses of state power are legitimate when the state operates without duly constituted authority, that is, without legitimacy. But, if we are to avoid infantilizing persons and reducing them to the sum of their material wants, then the stratification on which to focus attention has to be a political one, not an economic one. Thus, we would have to focus on crimes of a more clearly political nature, crimes whose offenders can be said to be acting in civil disobedience: that is, crimes committed with expressivist motivations by offenders who are willing ultimately to submit to the system’s judgments. Cf. Martin Luther King, Jr., *Letter from Birmingham Jail* (1963), at <http://www.nobelprizes.com/nobel/peace/MLK-jail.html> (last visited Aug. 24, 2001). To return to the question above: Does that mean an illegitimate state can never engage in rightful punishment? I think we would have to view the institutions as pathologically generated, but it is far from clear to me at least that each practice, and each instance within that practice, is necessarily defective. One way to handle this is to create a rebuttable presumption that in cases like this, the state lacks authority to punish. Cf. *State v. Peart*, 621 So. 2d 780, 788-89 (La. 1993) (creating rebuttable presumption that appointed counsel in a particular district were ineffective counsel, as a matter of state constitutional law, due to resource constraints on them).

What about the claim that in a state that creates, permits, or perpetuates gross stratification, certain crimes are desirable and/or liberating, since the acts are serving as worthy rebellions against an unjust order? This claim might be defensible for crimes against the state and its corporate structure, but it is harder to justify for crimes against individuals.

207. I recognize that some reject the ascription of mental states or intentions to collectivities that are legal fictions, such as the democratic state or corporations. See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996) (“[L]egal fictions cannot commit criminal acts . . . , [nor] can they possess mens rea, a guilty state of mind.”). But this conclusion has been persuasively challenged by expressivist theorists. See Anderson & Pildes, *supra* note 165, at 1504-06. All that is necessary for a collective agent to have mental states that can be expressed is that its

members . . . be capable of understanding themselves as expressing such mental states. The members are not, however, the final authorities about the meanings of their actions. The expressive meaning of collective actions is a matter of public and shared meanings. . . . While the process of determining the expressive meaning of any particular action will undoubtedly be complex, there is no reason in principle that the democratic State cannot be viewed expressively.

Id. at 1527.

208. Here I depart from Kant, who wrote that the prerogative of the majesty includes the ability to pardon crimes against the state. See KANT, *supra* note 4, at 145.

though that body may decide prospectively to change what it views as a wrong, it would be a breach of duty for the branch that enforces the law to make no effort at enforcing already existing and valid laws passed at the behest of the appropriate legislature. To do nothing betrays the obligations the state has to its masters: the people. Accordingly, the state serves to protect not only the equal rights of individuals but also the decision-making regime agreed upon by the people at the time.²⁰⁹ That said, explicit grants of discretion might resolve the problem.²¹⁰ On this account, retributivism as a justification for punishment is enmeshed within a larger political theory embracing equal liberty under a legitimate rule of law that respects the institutional design in matters ranging from separation of powers to federalism.²¹¹ To be sure, these institutions are respected not only from a formalistic perspective, but also because they serve to constrain and disperse power and decision making.²¹²

We see then three internal goods achieved by retribution: the affirmation of moral agency; the effectuation of equal liberty under law; and the state's defense of its decision-making authority, which may also be understood as compliance with its authorizing charter.²¹³ These three goods form the basis of what I call the internal intelligibility of retribution. They explain, I hope, the justificatory force behind the notion of desert that has been central to prior conceptions of retribution.

Although we might have justified retribution, we have not yet fully obligated it. I alluded earlier to one partial source of obligation: namely, the breach of duty the state as our agent owes us in protecting the decision-making regime we agreed upon (or would have chosen *ex ante*). In this sense, retribution is obligatory upon the state because it fulfills the state's promise to those who generated the political compact in which a certain decision-making system would be preserved and equality under law defended.

A bit more is needed to give shape to this claim. To see retribution as a duty, it is helpful to consider what the world looks like

209. The implication, as suggested earlier, is that a regime whose decisionmaking power is illegitimate has less moral claim to punish those without fair and formal access to participate in decisionmaking for political matters. *See supra* note 206.

210. This is a topic I will tackle in an article tentatively entitled *Prosecutorial Discretion in the Administrative State*.

211. This angle in particular is often ignored by other theorists of retribution.

212. This is not dissimilar to the familiar ideal of subsidiarity in natural law theorizing. For a brief overview, see generally ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 239-41 (1999).

213. Thus, for a state not to punish is to renege on a deal made between the representatives and the citizens.

in the alternative, where a taste for retribution is deemed no different in kind, urgency, or intensity than a taste for gnocchi. In such a world, one can decide not to have retribution for a particular murder with the same caprice that motivates a desire to have gnocchi one night instead of gazpacho. The reason this picture is unattractive stems from a particular sensibility: namely an awareness of the injustice we cause by not pursuing these internal goods.²¹⁴ Leaving a legal wrong unaddressed gives the offender the misimpression that he may exercise superiority over others with the imprimatur of the state. Retribution, which is, by definition, performed by the state, corrects this misimpression.

Retribution, then, is justified by virtue of what it does. It does not undo a past crime—that would be impossible. Rather, as Jean Hampton has written, the criminal message of that past act—the claim of superiority—is contested.²¹⁵ As Hegel puts it, the annulment demonstrates “the non-being [and thus, non-validity] of the criminal principle” which is the enactment of a belief in an “arbitrary and unrestrained freedom of the will.”²¹⁶ Because punishment presupposes legal wrongdoing by the punished, retribution leaves no moral possibility of intentionally punishing innocent people for the benefit of a grand utilitarian calculus, as other theories might require or permit.²¹⁷

214. I think we have a prima facie duty not to cause injustice, but this is not quite the same as saying that we cannot abide any injustice. Here, I depart from Kant, who wrote that “if justice goes, there is no longer any value in men’s living on the earth.” KANT, *supra* note 4, at 141. Contrary to Kant’s prescription that justice must be done though the heavens should fall, I side with those who recognize that justice is only one part of human well-being, but not the whole of it, and that therefore, certain compromises must be made in the face of what Michael Walzer calls cases of “supreme emergency.” See MICHAEL WALZER, *JUST AND UNJUST WARS* 251-63 (1977).

215. See Jean Hampton, *An Expressive Theory of Retributivism*, in *RETRIBUTIVISM AND ITS CRITICS* 15 (W. Cragg ed., 1992).

216. Alan Brudner, *Retributivism and the Death Penalty*, 30 U. TORONTO L.J. 337, 346 (1980). Brudner’s account draws heavily from G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* paras. 97-99 (T.M. Knox trans., 1967).

217. This is generally viewed as one of the more attractive features of the retributivist account. See, e.g., Brudner, *supra* note 216, at 347. Utilitarians often respond by distinguishing between act and rule utility and thus incorporate a rule of desert within their framework; alternatively, they say the demoralization costs to others are high if people knew the innocent would get punished, and so incorporate desert as a general matter. But there would be no protection for this rule when the exceptions are chosen with “sufficient selectivity or with sufficient isolation that the general level of social anxiety or unpredictability does not increase.” MURPHY & COLEMAN, *supra* note 138, at 122. There is something uncharitable about this critique, though, because it fails to credit the sincerity of utilitarians with respect to their allegiance to the requirements that would make law possible. Cf. Rawls, *supra* note 10, at 4-5 (resolving the distinction between utilitarian and retributivist justifications for punishment on the basis that utilitarian arguments are “appropriate” for “justifying a practice as a system of rules to be applied and enforced”).

An important point about the baselines for a sentencing policy emerges if we see retribution as the state's attempt to diminish the evidence of a false claim of greater liberty: retribution need not always require pain or the deprivation of liberty.²¹⁸ Some accounts, such as Hegel's, certainly permit the infliction of suffering upon the wrongdoer, perhaps with *lex talionis* serving as the upper bound. But once we appreciate Hampton's understanding of what Hegelian annulment really is—the denial of a certain kind of message by the criminal—then retribution need only ensure that the criminal understands, if not accepts, that the state is nullifying as best as it can the claim of superiority.

To annul the crime's message, one need not inflict pain or deprive the criminal of his liberty. Incarceration, after all, is only a recent obsession. Two old examples illustrate the point. The King of Persia in the Book of Esther required the wicked Haman to lead Mordecai through the equivalent of a ticker-tape parade.²¹⁹ Paul went further, arguing in Romans 12:20-21 that, rather than lash out, one should feed one's enemy and quench his thirst, for to do so is to "heap coals of fire on his head." As Hampton explains, Paul's point is to make the offender "feel humbled in the face of kindness," which in other words is to induce guilt.²²⁰ Ceremonies and incongruous kindness will not always lead to a successful denial of the criminal message—prison might do that better—but there is no reason to suspect that ceremonies or rituals will never work. The state may devise other options to carry out the annulment.

Let me recapitulate the main features of this account so far. First, because punishment presupposes legal wrongdoing on retributive accounts, there is no room within retributivism for punishing innocent people, at least not intentionally.²²¹ Second, retribution for wrongdoing is not merely "suffering" for the sake of a social goal external to the relationship of the offender and the state, but rather should be viewed as a valuable practice independent of ex-

218. One should note that just because retributivist account has certain aims (e.g., annulling the evidence of a claim to greater liberty and affirming the dignity of the offender, among others), this does not make it a utilitarian account; there is a distinction between affirming a practice because of its internal telos and judging the value of the act by its effects, as a utilitarian would. Compare S.I. Benn, *An Approach to the Problems of Punishment*, in *FREEDOM AND RESPONSIBILITY* 517 (H. Morris ed., 1961), with Thornton, *supra* note 178, at 85.

219. *Esther* 6:11 (New King James).

220. See Hampton, *supra* note 215, at 16.

221. Note that this negative thesis is insufficient on its own to commend retributivism because it is compatible with the position on prohibiting punishment altogether. See J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* (Joel Feinberg & H. Gross eds., 1986).

ternal goods. Third, retribution is not only an internally valuable practice, but also an obligation. For to do nothing in the face of unlawful wrongs grants plausibility to the claim by offenders of unequal liberty under law, leaves a lie about the moral reality of our social world uncorrected,²²² and, by permitting the tyrannical usurpation of public decision making by rogue individuals,²²³ doing nothing causes the state to breach its quasi-contractual obligation to protect that order of decision making. The state resists these injustices by ensuring a connection "designed to bring home to the offender the nature of his criminal act."²²⁴ The state, however, has latitude to determine how that connection is made. This is because "the nature of the criminal act" is a fact that is interpreted in a particular culture and a particular time: legislators are the ones interpreting the criminal act and they may properly, i.e., democratically, denominate what counts as meriting more severe penalties and what should not, based on a variety of factors including, but not limited to, social cost and deterrence.²²⁵

This leads us to the third feature of retributivism, namely, the requirement that punishment be meted out in a predictable and impartial way. The impartiality requirement does not betoken identical treatment of all offenders.²²⁶ Impartial here means that the criteria invoked to justify different results in sentencing for two offenders of the same kind of crime can be identified clearly before we know who the offender is specifically. Thus, a decision by the state to shorten a long sentence of incarceration for *X* and not *Y* may be justifiable if certain preconditions are met—for example, *X* offender has come forward and provided substantial assistance to

222. As noted earlier, it is the offender who must see the message annulled; however, consistent with other concerns, it is desirable for the public (including the victim) to witness or have knowledge that the message is being annulled.

223. See GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 35 (1998).

224. *Id.* (citing ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 374-80 (1981)).

225. I leave for another day the concern, deriving from public choice theory, that legislators have incentives to overcriminalize through the use of very broadly drafted statutes.

226. Again, here we can depart from Kant, who, at least in matters of crimes against persons, rather than the state, would be incensed by the prospect that not all crimes of the same class are punished identically. See KANT, *supra* note 4, at 141. Fletcher, interpreting Kant, emphasizes for example that Kant would despise the notion that cooperation with the state would result in different treatment. See FLETCHER, *supra* note 223, at 36. A better understanding questions what is at stake with equality, suggesting that there is a difference between treating people equally and treating them the same. If some offenders manifest evidence of understanding the gravity of their wrongdoing, say, by coming forward, then there is no argument from equality that they should necessarily be put in the same circumstances as those who did not. The harm they cause to the public and its resources is considerably diminished because the polity does not have to expend energy and money on investigations or lengthy trials.

the state.²²⁷ Impartial also means being free from bias in the application of the law to the facts of this offender; indeed this is the hallmark of impartiality, and this aspect of impartiality helps distinguish retribution from revenge.²²⁸

Much of what I said above explains why the person who is guilty of wrongdoing should be punished. It is equally useful to explain how what I have said affects the related question: why the *innocent* should *not* be punished. For on the account offered, we can see that the innocent person has made no assertion of greater than equal liberty against others, he has not rebelled against the state, and he should recognize the wrongness of legal wrongdoing, given that he had good reason *ex ante* to accept the legitimacy and authority of the laws that emerged from the regime he participates in as a citizen in a liberal democracy.

If there is no account here that permits the knowing punishment of an innocent, one might wonder whether the state can tolerate any error rate greater than zero. Is the punishment still valuable if the punished defendant is actually innocent? The answer in short depends upon the error rate's causes. If the average person thinks the state has taken all reasonable steps to reduce errors affecting truth-seeking in the proceedings, a person might still quite reasonably choose *ex ante* to have the social practice of punishment.

C. Retribution, Social Meaning, and Proportionality

Retribution does not claim that the features of a fitting punishment are absolutely consistent across time and place. As Aristotle observed long ago, human affairs simply cannot brook precision of this sort.²²⁹ An obligation to punish neither entails nor specifies a code of sentencing that is impervious to the variations across history and culture. As suggested earlier in the discussion of expressivism, the meaning of punishment—just like wrongdoing—is contingent upon the cues, linguistic customs, and conventions of a given society.

To see this better, it may be helpful to distinguish the social meaning of a punishment from the communication of that meaning,

227. See Markel, *supra* note 11, at 389.

228. This distinction is important for this Article's thesis about the incompatibility of retribution and shaming punishments. See *infra* Part IV.A.

229. See ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* bk. 1 (J.A.K. Thomson trans., Penguin Books, rev. ed. 1976).

and to distinguish how the social meaning is communicated to the offender from how it is communicated to the public. In other words, planting the flag of retribution is different from the perception of that planting by the public at large (the visibility of the flag to others). This metaphor may help illustrate the conceptual separation of the retributivist position from the social denunciativist position.

Punishment's dependence on social meaning is a dependence on the statement that the law makes in a particular time and place. A good instance of retribution should effectively communicate the nature of the wrongdoing and, by that communication, annul the offender's criminal message. The primary and necessary target of that communication must be the offender.²³⁰ The offender must be able to understand that he is experiencing this retribution. Thus, if a state decided to punish the criminal with insults, the retributive nature of the insults would not be realized if the criminal did not speak the language in which the insults were delivered. The state need only act in some fashion that reflects the rejection of the claim of superiority. Hence, state coercion (as retribution) is only required to the extent necessary to effectuate that rejection of superiority.²³¹

There is also a flip side to consider with respect to social meaning. For if what I just said counsels some degree of frugality in punishment, it is important that retributivists understand crimes (and punishments) as social phenomena. Once we consider punishment as a social practice, we have to consider it *ex ante*, as one attractive practice among others. Once viewed as a social institution responding to a social problem, retributivism must consider the social cost dimension of the wrong and then calibrate the severity of the response. The wrong, when including a social cost dimension and viewed from the *ex ante* viewpoint, may include costs of investigation, adjudication, punishment, as well as collateral effects on the community.²³² The practice of rape, for example, affects not only

230. This is the core of my bare-bones retributivism. Retributivism, as I have explained it, is a theory that serves as the foundation and *sine qua non* of criminal justice; it does not foreclose the incorporation of compatible measures that satisfy social denunciativists or restorative visions of justice. For instance, the state may decide, if all parties are amenable, to host criminal-victim conferences, to require detoxification programs in conjunction with or posterior to the punishment, etc. These decisions, in the main, go to sentencing, and sentencing is a policy matter that should be chosen using the *ex ante* heuristic to the extent possible, that is, except for when the type of government response is at odds with the underlying values that motivate retribution.

231. Conversely, a recalcitrant recidivist may need a longer or harsher sentence. This account may give some justification for the "three strikes and you're out" rules adopted in various American jurisdictions.

232. One makes these assessments as legislators do, with attention to the generality of the cases and the awareness that *ex ante* we would not want all resources spent on one social project, however worthy.

the victims, but also others in the neighborhood (the fear of going out at night alone) and the tax base from which expenses in finding and punishing the offenders are incurred.²³³ This does not mean that we calibrate the social cost of a particular instance of a particular kind of crime and then figure out the sentence. Rather, it means that we try to understand the gravity of the wrongdoing *as a general matter* and then make our best estimate of the fitting punishment. During this analysis, we might assess the gravity of certain crimes as including the difficulties associated with the probability of detection, and thus increase the penalty if we thought that would be best from the *ex ante* perspective.

On this view, it might be perfectly plausible for the legislature to determine that a person's theft of one hundred dollars has social costs of six hundred dollars. This may be a result of the fact that the offender engaged in conduct that is extremely hard to detect or to prosecute;²³⁴ thus, there is no reason to suspect that effective communication to the offender will only be the clawback of one hundred dollars.²³⁵

So, while it is true that the classical Kantian understanding of retribution asserts that justice requires punishment in equal amounts to the crime, and that each offender of the same crime should be punished equally,²³⁶ it is not absolutely necessary for our own account that proportionality in some crude and primitive sense constitute the appropriate punishment.²³⁷ One obviously does not, as Blackstone observed, punish forgery with more forgery.

233. Some might also deem it reasonable from the *ex ante* position to include a separate multiplier to the punishment because *ex ante* we know we will not be able to detect and prosecute every violation, and optimal deterrence may require that type of kicker to operate. The problem, which is not insoluble, is that it charges offenders a cost for crimes they did not commit, which arguably fails to respect their individual personhood and what they have done. One possible response might be that we would choose to add a deterrence kicker at the *ex ante* position, and so, when an offender is punished with a multiplier effect, it is morally permissible because he would have chosen that multiplier effect himself, not knowing what position he would occupy later on. Viewed this way, it becomes harder to make the claim that we are failing to respect one's personhood.

234. Cybercrime is a good example of this problem. It is remarkably easier to leave virtually no traces of your crime in cyberspace than it is in real space.

235. Again, the generality of cases forecloses concern about the odd case where someone who steals one hundred dollars from some wealthy person and is able to save lives by buying inexpensive foodstuffs for the poor and hungry.

236. See GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 78-89 (1996).

237. One could rehabilitate the Kantian position on proportionality, which is often identified with *lex talionis*, partially by saying that the crime is not merely the theft of one hundred dollars from the victim but includes the damage and moral injury done to the public and the state. And it is important for us not to run together two separate questions: retribution theory primarily

Clearly, the *ex ante* perspective does not yield absolutely determinate answers in sentencing.²³⁸ There will be contextual and cultural judgments regarding what one's blameworthiness is and how to interpret a particular wrong within the general scheme of things. It might well be that *ex ante* we would say that if the state determines (*ex post*) that the offender has taken responsibility for his actions, there is no necessary reason to inflict further suffering as such. That said, part of what it means to understand the falsity of one's claim to superiority is to undergo measures that make clear that understanding.

Other implications of this account need to be explored further. I said earlier that the retributive encounter must occur (subject to the preceding caveats) and that the encounter must have cognitive content. That cognitive content must possess two features. First, the offender must see the criminal message of his wrong contested and denied, and second, that denial must be made by the apparatus of the state. I need to be clearer about this content.

Because our account depends upon notions of moral agency and social welfare, we cannot avert our eyes from the damage that an ill-conceived act of retribution has upon those responsible for punishing the offender.²³⁹ When we ask a citizen to kill, maim, or otherwise brutalize another human being, we have to be concerned about the effects that might have upon that particular citizen, as well as upon the object of that conduct.²⁴⁰ As a result, I suggest a further requirement of retribution, one that goes to the intent and method of the state's coercive force. What might this mean?

Well, to insist only on the offender's perception of his defeat, to the exclusion of the potential internalization of correct values

answers what justifies punishment; it only secondarily advocates that the amount of punishment be proportional to the crime, which is a separate matter, a matter of sentencing.

238. I want to underscore this point: the claims I have made on behalf of retributivism are not imperialistic in scope. That is, many of the concerns central to restorative justice, social denunciation, victims' rights, deterrence, etc., could be made compatible with the theory outlined above because most of these other concerns would be factored into an analysis of the sentencing policy *ex ante*.

239. We might say that the principle of "frugality" requires us not to expend more force than is necessary to achieve our justifiable goals. We want law enforcement officers (whether police officers or prison guards) to be firm without becoming sadistic. The code of conduct to which they adhere should be one that lets them know they are participating in an enterprise that is not only necessary, but also dignified. The current system of imprisonment, needless to say, does not always adhere to this standard. See generally ACLU National Prison Project, at http://www.aclu.org/issues/prisons/npp_mission.html (last visited Oct. 17, 2001) (detailing prison abuses).

240. See Herbert, *supra* note 96; Witness to an Execution, A Day in the Life of a Death Row Employee, at <http://www.npr.org/programs/atc/witness/> (last visited Oct. 12, 2000) (describing documentary of Texan executioners and the traumas they experience).

that the confrontation encourages, would undermine the justificatory prong first discussed, namely the interest we have in recognizing each other as moral agents capable of responsible decision making.²⁴¹ In order to militate against the corrosive effect punishment may have upon those meting it out, it is crucial that the denial of the criminal message is explained and carried out in a way that is conducive to the internalization of the values that the retributive encounter is meant to uphold. The encounter need not *guarantee* the internalization of those values, but it cannot proceed without the desire for that result.²⁴² Otherwise, retribution would operate mechanistically, a practice that devalues both the punisher and punishment itself.²⁴³ Consequently, the state must have as its hope not just the denial of the offender's claim of superiority, but also his transformation. We must heed Nietzsche's warning and not punish from resentment.²⁴⁴ This is the intent requirement of the CCR.

Does any of this ultimately reveal this Article to be an attempt at resuscitating rehabilitative theories of punishment? I do not think so. Under the account I have offered the state is not principally interested in playing a central role in the therapy of the offender so much as it seeks to ensure the cognizance of correct values by the offender.²⁴⁵ It would be tragic if the impetus to heal and mend our world through talk of rehabilitation waged an aggressive war against the sense of moral freedom and responsibility that helps make a life worthy of authentic existence. That said, there is nothing incompatible between pursuing and imposing a retributive encounter with the offender and then, once that encounter has concluded, permitting attempts by the state (or other groups within

241. Thus, the account I have offered differs sharply from that of a retributivist like Finnis, who talks of a murderer forfeiting his basic rights, including a right to life. See JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 129-30 (1983). I think this idea of forfeiture is fundamentally at odds with Finnis's otherwise plausible and attractive theory of the good. See FINNIS, *supra* note 31, at 118-27.

242. Thus, capital punishment is forbidden, because by ending the life of the offender it forecloses the aspirational point of the practice, which is the reconstruction of a moral self. Once the execution occurs, there is no further opportunity for the offender to act with fidelity to the value for which the criminal law stands.

243. For an interesting portrait of this phenomenon in historical detail, see Whitman, *supra* note 21, at 1070-72, and see also NOZICK, *supra* note 224, and Hampton, *supra* note 215.

244. See NIETZSCHE, *supra* note 158, at pt. I.

245. One reason to resist rehabilitative theories that require enormous and disproportionate expenditures of social resources on criminals is that the claim on those resources is morally weaker when made by a criminal than when made by someone whose behavior has already exhibited greater fidelity to law. However, empirical study of the matter may show that an investment in reintegration will yield lower recidivism costs, and this is surely a worthy concern of statecraft and crime control policy.

civil society) to encourage criminals to learn useful skills and to inculcate the habits of sociability in its former convicts.²⁴⁶

* * *

Let us now distinguish the above account of retribution from the social denunciativist account. Imagine that a person commits a typical crime (e.g., theft), and is then tried fairly, but in secret, so that the encounter between the state and the criminal is not known by the general public. The trial has familiar evidentiary requirements, access to legal counsel, and so on. The accused is convicted.²⁴⁷ The severity of the sentence accords with the *ex ante* notion of proportionality discussed earlier. The thought experiment simply says it is a typical trial and a typical punishment; it is just that the record of this conviction will not be publicly available. No public reconciliation and no potential social condemnation are ever achieved because of the secrecy, so the encounter has no socially expressive value. It will not satisfy the average person's taste for fairness in a particular case, nor will ignorance of the trial damage the average person's confidence in the legal system. It also has no general deterrence value.²⁴⁸

Is there still value to the secret retribution? On the account offered here, the answer is yes, and therefore it is to be preferred to a situation where no retribution occurs at all. This is because the confrontational relationship has its own internal goals and goods that are achieved. Some might say that the good brought about is that the offender is brought to justice. My goal has been to elucidate that claim. By its efforts, the state diminishes the plausibility of evidence to a claim of superiority and complies with the charter that gives the state its legitimacy.²⁴⁹ Secret and fair punishments are better than no punishments at all on this account because the

246. Pursuant to this goal, states may need to reconsider whether laws that continue to stigmatize criminals after they have been punished, such as sex offender notification statutes or diminished voting rights laws, can be justified. *Cf.* Small, *supra* note 73, at 1467-68 (describing harassment and violence directed towards sex offenders).

247. The experiment would not change if the offender decided to plea-bargain, as the overwhelming majority of criminals do in the United States.

248. It is true that if incarceration were the response, the punishment would serve the function of incapacitation and may thus reduce the likelihood that the offender will commit crimes outside the prison; however, other types of responses are possible that would still be punishment. Imagine the appropriate punishment was a criminal fine. But this might have some prospective benefit too, such as the specific deterrence of the offender.

249. Of course, if the charter required transparency, then it would be a breach here, but *ex hypothesi*, this is not a problem.

encounter between state and criminal itself effectuates the ideals of treating citizens as morally responsible agents living as free and equal citizens.²⁵⁰

As long as one accepts that some secret and fair punishment is better than no punishment at all, one can grasp the internal intelligibility of retribution. The theorist seeking general deterrence or publicly expressed condemnation cannot appreciate the desirability of this practice. The retributivist can. Although the retributivists might approve of the byproducts of public awareness of punishment (deterrence, denunciation, social self-defense, and reconciliation), the retributive encounter is valuable independent of those reasons. Indeed, there may be a host of ancillary benefits.²⁵¹

None of this is to say, however, that we should prefer secret retribution to transparent retribution. Indeed, the account I have offered indicates the duty to some degree of transparency in the administration of criminal justice. For the state's concealment of the encounter can be read by citizens as a message of inactivity by the state, which would itself run afoul of the principal-agent relation that motivates the state's participation in the matter. Not meeting the transparency requirement does not itself vitiate the good of the confrontation between state and offender, but it does create its own moral problems that ought to be avoided.

To be sure, appreciating the intelligibility of this "second-best" type of retribution does not mandate its enactment in all circumstances. A commitment to retribution can only be intelligible and reasonable when situated among other moral commitments that create and perpetuate a good society. It is vital that retributivists realize that there are other goods and other values necessary to human flourishing that must be advanced, sometimes at the cost of

250. It is a harder question regarding whether we could say we would want this as a social practice, as a law that would implement this practice. I think our hesitation to do so is because we are so used to enjoying the benefits of public transparency with respect to punishment and because our other commitments to transparency and accountability, coupled with skepticism of the possibility of fair punishments occurring as a general matter, make it difficult for us to imagine this as an ongoing social practice. But I am prepared to acknowledge that secret but fair punishment is a sub-optimal arrangement. The real question is whether we would prefer it to a state of affairs where there was no punishment at all. I think we would agree that there is some value to what is going on.

251. Chief among them is the interest that the rest of society has in verifying that the proposition of equal liberty under law is still being vouchsafed by its government. Note, however, that some of those ancillary benefits could be realized without having to visit pain or deprivation of liberty upon each offender. The healing victims might gain from knowledge of punishment that could be gained through other forms of therapy made available by the state or other bodies within civil society.

the project of retributive justice itself. This realization helps explain why Kant's endorsement of the strong sense of retributive justice—in which he abjures all responsibility for the consequences of his actions—is wrong from the moral point of view. Whereas Kant appears to require the confrontation between the state and offender, most reasonable people will recognize that this obligation will never be absolute. We would never expect nor deem reasonable an effort to spend a society's entire resources on the pursuit of one offender, or on all offenders for that matter. Doing so would be positively suicidal, and would thus jeopardize the possibility for the ongoing of human flourishing. Thus, to impose rules such as statutes of limitations, which evidence some (unwitting) sensitivity to social cost, or rules governing procedural due process, may be deemed reasonable at some point along a spectrum of possibilities.²⁵²

Moreover, there is a continuum regarding the quantum of resources that ought to be expended in achieving accuracy in adjudication. A dollar spent in administering matters of retributive justice amounts to a dollar less available to adjudicate matters of corrective justice. And it may be a dollar less for feeding the hungry. Recognition of social costs is a point that should be of great significance for those committed to norms of fairness, justice, or cognate concepts. What these limits point to, then, is the intellectual and moral necessity of facing and making difficult choices given constrained and scarce resources; making hard choices is, as the old saw goes, the essence of governing. The significance of social cost, once realized, should alert retributivists to the following proposition. Any commitment to fairness or proportionality in matters of punishment requires a broader understanding of two things: first, what the magnitude or size of a wrong is; second, how the desirability of addressing that wrong compares against other social needs in terms of pervasiveness, urgency, or cost.

The skeptic might now argue that the CCR is too capacious, that it is a rubber stamp under which any decision by the state could pass as sufficient to serve the goals of retributivism. Explaining why this charge of hollow formalism is false will bring the CCR into sharper relief. The theory I have outlined requires the occurrence of the retributive confrontation against the possibility of will-

252. See generally FINNIS, *supra* note 31, at 110 (noting that a coherent life plan, necessary for human flourishing, would counsel the value of fidelity to certain prior commitments to pursue one element of the good and that such fidelity preclude pursuing another good that conflicts with the prior course of action); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). This will have implications for determining when the state has made reasonable efforts to bring someone to justice and when it may reasonably say it must move on.

ful passivity.²⁵³ Good faith efforts must be made, but what counts as good faith efforts will be subject to the institutions of a polity to determine. What is most crucial is that the state's retributive activity be viewed as diminishing the plausibility of a claim to greater liberty under law. This affirmatively rules out any attempt to leave room for "political mercy" in the form of a blanket amnesty in recovering states, or otherwise in "normal" states.²⁵⁴ By ruling out blanket amnesties, the CCR sharply contrasts those Kantian retributivist theories that have compared the offender-state relation to a debtor-creditor relationship, a relation in which sovereign prerogative permits the "creditor" to waive responsibility for collecting the debt in certain ex post situations.²⁵⁵

When it comes to the discussion of alternative sanctions, though, it is less relevant to debate how much the state must expend to discharge its initial prima facie obligation to confront offenders, because the alternative sanctions debate begins after the determination of culpability. Our real concern then, as we move to Part IV, where we consider the relationship between retribution and alternative modes of punishment, is whether the state can be said to be punishing an offender within its legitimate bounds when it imposes incarceration in a privately managed prison or applies various alternative sanctions. In other words, we might now have a sense of why retribution is justified, but we still need to figure out what implications exist for prescribing or limiting the ways in which that practice is enacted. The task of explaining what these

253. In other words, the state is not obligated to prosecute every wrong, but only those wrongs for which the offenders are known (in the sense that the government would have a good chance of winning if a trial resulted).

254. Does this mean that I am against cities or states that grant blanket amnesties to all those who turn in weapons that are illegally obtained or possessed as part of an effort to get guns off the streets? Yes. That would absolve people of their responsibility. However, a city could offer to buy guns from any citizens and presume, not entirely unreasonably, that all incoming guns are from law-abiding citizens.

255. There are a number of good reasons that explain why this analogy is flawed. First, we have no antecedent obligation to avoid civil debts, in contrast to those that would be punishable in criminal law. Second, the payment of a debt for criminal action does not compensate the losses of a victim the way a civil and contractual debt does. That is, civil debts are undertaken on a voluntary basis, in contrast to the criminal debts paid. Third, civil debts can generally be determined ex ante, whereas there is no equivalently precise calibration available to price the cost of assault or rape. See MURPHY & COLEMAN, *supra* note 138, at 139 n.26. Personhood plays an important role here as well. The holder of the debt is the state, which has its own interest in protecting the regime of decisionmaking. But the state shares its interest in the debt with the public and the victim, and the debt is not one that can be separated into units of fungible currency such that the portion held by the government can be waived while the portion held by the victim is retained.

implications are for the alternative sanctions debate is the task of the next part.

I should say, before closing this part, that we will have good reason to try to revise some of what has been said on the alleged dichotomy between the confrontational relation and the social denunciativist relation. But there is a better place for this revision to appear than right here, so although we have a good idea of what the CCR is about now, it is by no means wholly enclosed within this part.

IV. RETRIBUTION AND ALTERNATIVE SANCTIONS

Before we examine particular alternative sanctions and their specific compatibility with the account of retribution discussed above, let me make a general point about how to justify the inquiry into alternatives to public prisons. Drawing from the *ex ante* perspective I alluded to earlier, consider the following rationale. Imagine that we had to decide, not knowing whether we would be victims, offenders, or bystanders, how much society should spend on the sanctions of retributive justice. The moment we realize that limitless pursuit of that project would lead to civil conflict, or perhaps less dramatically, would jeopardize our ability to provide care for the elderly or food and education for the young, that is the moment we realize that choices must be made among competing worthwhile enterprises. Consider that we make these decisions through our representatives every year in allocating resources within state budgets and in establishing guidelines or rules constraining resources used to investigate, prosecute, and adjudicate various wrongs. It seems perfectly justifiable to contemplate and implement a range of sanctions that could adequately address the demands of retributive justice at an acceptable social cost. Consideration of these alternatives serves as the point of departure for this Article.

In the first two sections of this part, I have two tasks: First, I want to explain, drawing on the CCR, why shaming punishments are not beautifully retributive. Second, and relatedly, I want to challenge Professor Whitman's contention that "our familiar liberal traditions do not give us any persuasive answer" as to why shaming punishments are not acceptable.²⁵⁶ In the remainder of the part, I show that the CCR yields some interesting positions on other devel-

256. Whitman, *supra* note 21, at 1059.

opments in the law, specifically: the use of guilt punishments and privately managed prisons.

A. *Why Shaming Punishments Are Not "Beautifully Retributive"*

In Part II, we saw a variety of scholars on both sides of the debate over shaming punishments who claimed that such punishments were "beautifully retributive." Shaming punishments, recall, are punishments that rely upon the public castigation of the offender in a way intentionally designed both to express condemnation of the offender and his act, and to do so in a way that humiliates the offender before the public eye. These penalties derive their effectiveness in moral condemnation from reliance upon communication of moral disgust by the public at large,²⁵⁷ or what Whitman calls the crowd, rather than the state.²⁵⁸ Thus shaming punishments, by invoking the aid of the crowd, challenge the idea that it is only the state that may play a role in the practice of enacting retribution. To the extent this is true, this change in the punishing agent's identity effects a radically dangerous departure from retribution. The depth of the incompatibility between shaming punishments and retribution can be seen by contrasting retribution with revenge.

Consider the distinctions that may be drawn between retribution and revenge.²⁵⁹ First, whereas retribution occurs for legal wrongs only, revenge is often pursued in response to insults, harms, and slights. Second, retribution closes cycles of violence, whereas revenge encourages such cycles through the enduring memory of hatred and resentment. Third, the scope and intensity of retribution is constrained by law, whereas revenge is not similarly limited. Fourth, retribution is administered only by those authorized to do so and follows from a particularized determination about the identity of the offender; revenge, by contrast, occurs at the hands of a victim or his ally and need not be a result of any determination.

257. See Kahan, *supra* note 2, at 594.

258. Whitman, *supra* note 21, at 1059.

259. These distinctions are drawn from NOZICK, *supra* note 224, at 366-70. Justice Thurgood Marshall mistakenly suggested that retribution is the idea that punishment is justified in order to prevent citizens from seeking their own private revenge. See *Gregg v. Georgia*, 428 U.S. 153, 231-41 (1976) (Marshall, J., dissenting). But this is just a straightforward "revenge-utilitarianism." Margaret Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1169-73 (1980). Moreover, Justice Marshall's understanding gives no prima facie reason to punish offenders but rather only those citizens who seek to punish the offenders outside the law.

And finally, the identity of the punisher tends to work a morally relevant difference in the emotional character of the encounter between punisher and punished. That is, the avenger takes pleasure in the suffering of the offender, whereas the agent of retribution, because of his (relative) impartiality, does not exhibit (or is considerably less likely to exhibit) any inappropriate rage or pity; if anything, the agent of retribution may take satisfaction at justice being enacted. It does not matter to the state's punitive agent who the offender is (whether it is John or Peter), but it does matter greatly that the person punished is, in fact, the offender of the wrong (that John committed this crime). The avenger, in contrast, cares that John committed the crime if he is avenging John's victim, but he may not care that Peter did the same thing to another person.²⁶⁰ The contrasts between retribution and revenge—in particular, the last three differences—reveal the state's significant role in the enterprise of retribution and its assurance of (relative) impartiality.²⁶¹

It might fairly be said that retribution and shaming punishments both convey condemnation of the offender's act. But consider: In what other respects do shaming punishments bear any similarity to retribution? In fact, shaming punishments bear more resemblance to instances of vengeance than instances of retribution. How?

First, one might think of vengeance because of the potentially unconstrained scope and intensity of shaming punishments; they invite the public to perform a role uncomfortably close to lynch mobs.²⁶² In this sense, shaming punishments do not allow for retri-

260. It is instructive to go back to Massaro's account and see how she conflates these two concepts. See *supra* text accompanying notes 120-121.

261. One might wonder what, if any, similarities exist between retribution and revenge. For example, is retribution a surrogate or compensation for revenge, an institutionalized revenge or something different altogether? Historically, the motivation for retribution may have stemmed from tastes for revenge; however, today the differences are significant enough to work a sharp break. Retribution is sometimes thought to be motivated by emotions such as hatred or resentment, the same emotions that might animate revenge. See MURPHY & HAMPTON, *supra* note 143, at 88-110 (providing an explanation by Jeffrie Murphy of the retributive hatred thesis). The account I offer, however, explains that emotions such as hatred or resentment are not relevant to a plausible and attractive theory of retribution; indeed, it is only fidelity to certain principles of practical reason that motivate the CCR commitments to norms such as moral responsibility and equality under law.

262. Cf. Whitman, *supra* note 21, at 1088 ("Who knows how private persons, given the right to play policemen, will behave?"). Whitman's point seems less powerful when two factors are considered: The crowd is never authorized to play policemen. Moreover, policemen do not inflict punishment; they investigate crimes, apprehend criminals, and, among other things, engage in crowd control. But the point still remains: there is an element of disorder that exists with shaming sanctions and that absence of control is antithetical, by its very nature, to a well-ordered regime. Whitman calls this "at base, a form of officially sponsored lynch justice." *Id.* Various

bution to be constrained in the same manner as methods where the state is the exclusive disciplinary force.²⁶³

Moreover, they are punishments enacted by those who are not authorized to do so. Might the second point be contested? That is, could one suggest that when a judge metes out a shaming punishment she is authorizing the viewing public to act as agents of the state in its role as punisher? Judges are not properly authorized to make those kinds of decisions, at least not under traditional understandings of the basic idea of agency. Under that traditional understanding, two core features of a principal/agent relationship exist: first, that the principal can control the agent (relatively speaking), and, concomitantly, that the principal will bear liability for the agent's actions performed in the scope of the agent's authority. In the shaming punishment context, the judge would not be able to control the citizen who humiliates or scorns the offender because she does not even know who the mocking citizen will be. One cannot intelligibly render the public at large one's agents.²⁶⁴

Further, the judge cannot and would not agree that either the state or she assume liability for various lawless actions that the shaming citizen(s) might commit. So the invocation of the crowd's help certainly does not fit into any cognizable notion of responsibility within a principal/agent relationship. That does not mean the practice of invoking the crowd's aid is an unintelligible practice; it simply means that it disrupts the notion of the state serving as the public's agent of retribution when it delegates that power back to the public at large again.

The advocate of the shaming punishment could respond here by saying that one's worry of the unconstrained lynch mob could be addressed by posting a corrections official or police officer near the offender to make sure that both the offender's physical integrity is protected and that no one breaks the law in trying to humiliate the offender. This would obviate the worries of an uncontrollable mob

instances of vigilantism in recent years seem to bear out this concern with respect to shaming sanctions. Small, *supra* note 73, at 1451.

263. Whitman, *supra* note 21, at 1059. Though they may be close in appearance, at least one obvious difference between shaming punishments and lynch mobs is that lynch mobs are not enacting a judicially prescribed penalty that results from a putatively fair legal process.

264. One could argue that the judge is only the agent of the people and the agent serves his role when he impartially adjudicates the guilt of the offender, but that, with shaming punishments, the people reclaim the opportunity to punish and thus narrow the scope of delegation to the judge. Though there is a certain plausibility to this possible characterization, there are good reasons that explain why we do not want the public to retain a right to punish (even non-violently), for much the same reasons that we distinguish between retribution and revenge. See *supra* text accompanying note 259.

and still subject the offender to some humiliation, some degradation of status, in front of the public, potentially with the aid of the public.

To see why this would still be unattractive from a retributivist viewpoint, we must first recall that retribution's first internal moral good is that it treats the offenders as agents who possess the competence to make morally responsible choices. This point puts forward the notion that the practice of punishment, like all legal practices, is for the sake of human beings,²⁶⁵ and thus should treat offenders as moral agents whose personhood itself requires consideration of their dignity as human beings.²⁶⁶ Because shaming punishments have as their goal the destruction of a person's reputation and dignity,²⁶⁷ the shaming punishment denies the very dignity of moral agency that the retributive encounter is designed to uphold. The problem with encouraging public shaming in the first place is that it makes the offender an instrument of the state; he is being used (even if indirectly) for display purposes rather than being treated as someone possessing the basic dignity that attaches to a responsible moral agent.²⁶⁸

In order to appreciate further the connection between shaming and vengeance (not retribution), we have to look at the emotional character of the person punishing the offender in the shaming punishment. It is significant that shaming punishments, because they occur in public and rely upon the public, permit victims, families of victims, and sympathizers to participate in (and perhaps help orchestrate) the degradation of the offender. Those who shame others may take personal pleasure in the suffering inflicted on the offender. The practice of retribution, by contrast, requires that those who punish have no personal interest in the suffering of the offender; retribution's impartiality removes the possibility of developing, cultivating, and indulging sadistic impulses in the public realm. Impartiality in the administration of criminal justice helps

265. See JUSTINIAN, *INSTITUTES* 39 (Peter Birks & Grant McLeod eds., 1987) ("There is little point in knowing the law if one knows nothing about the persons for whom it exists.").

266. See WHITMAN, *supra* note 184; cf. John Finnis, *The Priority of Persons*, in *OXFORD ESSAYS IN JURISPRUDENCE* 1-15 (4th Series) (Jeremy Horder ed., 2000).

267. See Kahan & Posner, *supra* note 18, at 365.

268. Might one choose the shaming punishment from the *ex ante* position? Doubtless, there are hypotheticals one can imagine (Martians land and say: "Humiliate this person for their crime or we will incinerate the earth.") where *ex ante* we would probably choose to be shamed, but given what we know now about our state of the world, there seems to be little reason to think we would not choose to effectuate the cluster of ideals enveloping a conception of responsible, autonomous, and dignity-bearing agents, when there are viable alternatives that do not impose the same moral costs of degradation.

ensure adherence to fair procedures, reasonably accurate determinations of guilt for legal offenses, and limited potential for inflicting (unnecessary) abuse upon an individual. In short, shaming sanctions stray quite far from the requirements of retribution and, instead, look quite a bit more like opportunities for popular revenge.

Two other points put more flesh on the bones of this claim that shaming sanctions are not “beautifully retributive.” The first point concerns the motivation of the punisher. Recall that earlier we described the CCR as positing a type of retribution that, when properly pursued, aims at getting the offender to appreciate at a cognitive level why he is being punished. We said that the punishment should aim at connecting the offender to an understanding of lawfulness and give the offender an opportunity to internalize those lawful values in the life he leads during and after the retributive encounter. The problem with shaming is that shaming punishments aim at a kind of reputational homicide. According to Kahan and Posner, shaming seeks to “destroy” the dignity of the offender. In doing that, shaming forecloses the opportunity for the offender to be recognized later on as having the basic dignity that should attach to a responsible moral agent in the company of other women and men sharing that moral agency.²⁶⁹ Thus it violates the intent requirement we discussed earlier.

The second point goes to the effect shaming might have on those who are active in the shaming process. A society that allows shame punishments both degrades and potentially harms those involved in punishing the offender. The act of humiliation, bringing another person down before others, corrupts those endeavors truly concerned about human flourishing.²⁷⁰ If this point is accepted, then shaming sanctions encourage a practice that inevitably coarsens our sensitivity to the dignity of other persons, and thus, ourselves.²⁷¹

269. It might seem that this argument works against the punishment of life imprisonment without possibility of parole, but prisons are their own communities, and one can imagine that some prisoners create meaningful lives even within the confines of a penitentiary. See, e.g., Elizabeth Kolbert, *The Prisoner*, *NEW YORKER*, July 16, 2001, at 44 (narrating the story of Kathy Boudin, a felon who started a literacy program while she was in prison).

270. See, e.g., AVISHAI MARGALIT, *THE DECENT SOCIETY* (1996) (describing a political theory centered around the avoidance of humiliation in its citizenry and social practices); cf. MILTON STEINBERG, *AS A DRIVEN LEAF* (1939) (depicting, as a work of historical fiction, the effects of brutal spectacles on the public under the Roman Empire).

271. See NUSSBAUM, *supra* note 102 (relying on the psychology literature for this conclusion). This might seem like a straightforward utilitarian approach to assessing shaming sanctions: it is true that we are looking at the effects (corrosion of sensitivity) of a given practice (shaming) on a particular group of individuals (the public shamers), but the process is different in that we do not

This type of negative effect would then run up against the very maxim undergirding retributivism: namely, that competent individuals bear responsibility for their actions. This maxim, of course, applies not only to offenders but also to government officials, policymakers, and the citizens of a democratic polity.

Before moving forward any further, it might be useful to reconsider the path we have followed and ask what revisions might be made to what has been said. Our initial suspicion towards shaming was similar to Whitman's, in that it improperly invited the public to participate in mob justice, and therefore encroached upon the state's monopoly on punishment. But this reason alone was a red herring, because we could imagine a world where the state still legislated, adjudicated, controlled the administration of shaming punishments, and avoided the risk of mob justice, merely by posting guards and policemen around the shamed offenders. This reduced the pungency of the whiff of mob violence. But more importantly, it still permitted the retention of the essential features of the shaming punishment: namely, the crafting of a punishment that aimed at degrading the offender, destroying his reputation, and having that degradation occur before the public eye, with the nonviolent participation of the people.

Forced to reconsider, we noted three things that create conflict between retribution and shaming: first, shaming fails to take seriously the dignity-bearing nature of a morally autonomous citizen within a good and decent polity; second, shaming violates the intent requirement of all punishments by aiming at the destruction of someone's ability to interact as an equal citizen once the retributive confrontation ends; and finally, shaming relies upon and cultivates the wrong emotional dispositions in the people engaged in punishing.

These points raise a vitally important question: Could we envision a practice of punishment that blurred the line between the confrontational relationship and the social denunciativist relationship without yielding these violations of the retributive framework?

I think the answer is yes.²⁷² As I have suggested earlier, the confrontational relationship is not imperialistic. That fact creates space between, on the one hand, making punishment only between the state and the criminal, and, on the other hand, allowing unca-

think it necessary to measure the quanta of the effects. We assume them to be real, in the same way that we assume that punishment of offenses effectuates equal liberty under law.

272. And I am very grateful to Michael Blake's comments for explaining why. His thoughts are incorporated in the next two paragraphs in the text.

nalized public recrimination to flood into the world of criminal law. Earlier I noted that retribution is justified not simply because the criminal has arrogated too much political power, but also because the criminal has claimed powers over others in civil society that the complying individuals have renounced. This would make the wrong not just one against the state, but against other people in society. The state is involved, since the state's role is to ensure a functioning civil society, but so might the members of civil society. It strikes me that, on this account, we could acknowledge some role of citizens without making our theory of retribution rest on their hatred or mob violence.

In other words, we might imagine that citizens legitimately desire seeing the legal norms of the state vindicated, not in seeing another person humiliated—the goal is not to increase happiness by satisfying their bloodlust. This would make the problems identified with the denunciation conception—its unguided search for narratives of pain—less problematic. It is possible to see a world in which the public took seriously the rules of civil society, and took seriously its reactions to those who violated them. Then, they do not regard those who are being exposed for their crimes as mere vehicles for gleeful cruelty, but as participants in a solemn practice designed to expiate a wrong. (Imagine something like shunning here—in which there is a duty on the part of all to play a certain defined role in the execution of the punishment.) This sort of punishment, it seems, might escape many of the criticisms raised before. In particular, it would reduce the fear of the unconstrained lynch mob. It would be no more degrading to society than incarceration. And without some more evidence to the contrary, this would probably be no more degrading to the criminal than incarceration already is. However, this qualified support could be mustered only if there were what John Braithwaite calls “reintegrative ceremonies” at the end of the retributive encounter.²⁷³ As it stands, what I have just described as a possibility lies far afield from the types of actual shaming punishments discussed in Part I, and thus, the main argument still seems to me to ring true.

B. Why Shaming Sanctions Are Illiberal

Although the focus of this Article is on the incompatibility between shaming and retribution, it seems worthwhile to show the

273. See BRAITHWAITE, *supra* note 23, at 107.

problems that shaming poses to those committed to liberalism. In his critique of shaming punishments, Yale Law School Professor James Whitman has suggested that there is no idea particular to liberalism that leads one to reject shaming punishments. He argues that from the viewpoint of the "great liberal tradition," there is nothing particularly disconcerting about shaming sanctions.²⁷⁴ While I agree as a general policy matter with Whitman's eloquent critique of shaming punishments, I think he makes two mistakes here: The first one I have just discussed, namely, his claim, in summarizing the views of others, that shaming punishments are "beautifully retributive." The second is this claim that liberalism is indifferent to shaming punishments. Perhaps those who identify not as retributivists, but as liberals, will be curious to see how Whitman's second claim can be contested.

Whitman finds that the main contemporary danger of shaming punishments is to the stable ordering of society by the state and that this concern for protecting order from the unpredictable political energy of the people is not uniquely liberal, for even kindly monarchs or tyrants have interests in holding on tight to the reins of power.

And yet, perhaps unwittingly, Professor Whitman canvasses a variety of historical sources that suggest precisely some of the ways liberalism would be hostile to shaming punishments. For example, he begins his argument by first explaining the various motivations behind the move against shaming punishments in the Enlightenment period. He observes that the early opponents of shaming punishments were often involved in a larger project to eradicate status differences through the particular mode of punishment chosen. What this larger project denotes is a concern for ensuring that the law does not appear to favor any one (type of) individual over another (type). Once the revolution's egalitarianism took hold, the guillotine, for example, was used for all capital punishments in France, whereas previously noblemen had been beheaded and commoners hanged.²⁷⁵ Oddly, Whitman sees this flat-

274. Whitman, *supra* note 21, at 1063. In conversations subsequent to the publication of his article, Professor Whitman accepted the possibility that current strands of liberalism may exist that indicate an incompatibility between shaming and liberalism. Nonetheless, he did not think that the liberalism of that time required that incompatibility. While this is a helpful qualification, I still think the liberal tradition of that time encompassed thinkers whose writings would deny the compatibility between shame and liberalism, such as Locke or Kant. It would be a mistake to rely exclusively on reformers like Bentham and Beccaria to establish the parameters for the "liberal tradition." Cf. Peter Berkowitz, *Ethicisim*, NEW REPUBLIC, Mar. 5, 2001, at 40, 43-44 (decrying the canard that liberalism does not have a public good envisioned by its tradition).

275. Whitman, *supra* note 21, at 1070.

tening of legal hierarchy as having little to do with liberalism. This seems peculiar given that even the most Millian version of liberalism—a society guided by the harm principle and not much else—presupposes an insistence that all persons of majority age and competence have the same political and civil rights under the law and that the law ought not give effect to different social statuses.

Whitman then observes that the social reformers of the Enlightenment period feared the corrosive effects shaming punishments would work on the offender, as well as the agents of the state and the public at large. Hobhouse, for instance, thought shaming rendered the offender subhuman, making him an example of “sensuality [and] ferocity” to the public.²⁷⁶ Thackeray noted his own sense of deep unease when “brutal curiosity” would draw him to public executions.²⁷⁷ Cruelty in punishment, they said, is “born of cruelty in the mores of society,” and it thus “makes those mores yet more brutal in turn. . . . This is all the more true if indecency is mingled with the punishment in question, if the victim becomes the plaything of the populace. . . .”²⁷⁸ This set of concerns, it seems to me, appears to be fundamentally a part of the Kantian strand of liberalism that envisions each citizen as a dignity-bearing and rationally autonomous moral agent.²⁷⁹

It seems then that Whitman bases his conclusion that liberalism is indifferent to shaming only on the fact that a few liberals of the utilitarian stripe had this view. In particular, he cites both Bentham and Beccaria as viewing shaming “as an indispensable punishment device.”²⁸⁰ Bentham endorsed various other kinds of shaming sanctions as replacements for the pillory,²⁸¹ while Beccaria stood in favor of forced public labor.²⁸²

For Whitman, though, the dignity-focused arguments against shaming “no longer seem to carry weight,” or at least not for our age.²⁸³ He writes that “[w]e have lost too much of the sense

276. L.T. HOBHOUSE, *MORALS IN EVOLUTION* 114 (1908).

277. William Thackeray, *Going to See a Man Hanged*, 22 *FRASER'S MAG. FOR TOWN & COUNTRY* 150, 158 (1840).

278. J. Tissot, *INTRODUCTION HISTORIQUE À L'ÉTUDE DU DROIT* 100 (Paris, Librairie de Marescq Ainé 1875).

279. See generally IMMANUEL KANT, *THE GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1998).

280. Whitman, *supra* note 21, at 1071 & n.80.

281. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 347-50 (C.K. Ogden ed., Harcourt, Brace & Co. 1931) (1802).

282. See BECCARIA, *supra* note 174, at 54-55.

283. Whitman, *supra* note 21, at 1082.

that shaming others is not a decent way to act.”²⁸⁴ As a result, the arguments against shaming today draw their power from what he calls the “statist-authoritarian” argument: “Exposing offenders to the public . . . is likely to excite the crowd so much that it causes rioting, and when there is rioting, the state loses control.”²⁸⁵ According to Whitman, there is nothing particularly liberal about this concern.²⁸⁶

Whitman still thinks the statist argument, concerning worries over crowd control, has “a kernel of truth in it.”²⁸⁷ For example, various courts and commentators expressed concerns over “harassment” of released offenders with respect to sexual predator notification statutes, like Megan’s Law.²⁸⁸ This is what creates the image of “state-encouraged lynch justice” that Whitman conjures up, an “ochlocracy” too vulnerable to the “pitch and yaw of mob psychology.”²⁸⁹ Of course, as should be clear from the prior section, lynch mobs, whether state encouraged or not, hardly enact (retributive) justice.²⁹⁰

Only in his conclusion does Whitman begin to suggest that liberal democracies possess an abiding and uniquely proper interest in the rule of law, a rule of law “that denies our officials the authority to pluck on the bass strings of public psychology and that makes criminal law the province of trained and disciplined officers,” offi-

284. *Id.*

285. *Id.* at 1083.

286. Whitman does note one other liberal argument against shaming. He suggests that the classical liberals believed that although shame was an effective tool of sanctioning behavior, it was a tool that should be used by society, and not the state. On this view, the “state could never order members of society to regard private persons either with respect or contempt, for public opinion formed its own judgments about the merit of private persons, judgments over which the state could not have the slightest influence.” *Id.* at 1086. This empirical speculation of course has not been vindicated by history. In the aftermath of successful propaganda campaigns and the use of the mass media by democratic leaders and contenders, however, the idea that the government cannot influence public opinion seems positively quaint—and wrong. *Id.* at 1086-87. He writes that “[it] is hard . . . to believe that the state cannot succeed in stirring up the passions of the crowd against individuals. . . . Does anyone really doubt that our own shame sanctions, whether directed against sex offenders or drunk drivers, have some impact on ‘public opinion’ about that person?” *Id.* at 1088.

287. *Id.*

288. See, e.g., *E.B. v. Verniero*, 119 F.3d 1077, 1082-90 (3d Cir. 1997) (discussing New Jersey’s Megan’s law); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 39-42 (1991) (observing danger of private violence resulting from certain disclosure rules); Whitman, *supra* note 21, at 1089 n.7.

289. Whitman, *supra* note 21, at 1089.

290. Perhaps Richard Parker and other populists would disagree here, and nonetheless support community-based penal initiatives. See generally RICHARD D. PARKER, “HERE, THE PEOPLE RULE” (1994).

cers operating under an "ethic of restraint and sobriety."²⁹¹ That this remark comes so late in the essay is surprising.

To my mind, the liberal ethos of restraint and sobriety generates two related critiques of shaming sanctions, both of which Whitman overlooks. The first critique suggests that liberals may properly be concerned with inculcating the appropriate virtues for participation in a vibrant liberal democracy.

On this view, liberalism needs to care for the virtue of its citizens, and therefore its politics must reflect that need accordingly. The skeptic might ask: Which virtues though? Is it possible for the state to undertake this task without stepping on the toes of citizens who hold different views and values? The answer is yes, the state can do so, but only if we view the moral psychology of the liberal regime in a deeper way than Whitman's assessment.

The liberal way of life requires an education of citizens that appreciates the importance and order of individual freedom, moral responsibility, and respect for the procedures that guarantee a well-ordered polity. This is a point increasingly emphasized in recent contemporary political theory. Drawing upon moderns such as Hobbes, Locke, Kant, and Mill, Peter Berkowitz interprets and commends the liberal way of life as an achievement that "demands of individuals specific virtues or, to speak less formally, certain qualities of mind and character—such as reflective judgment, sympathetic imagination, self-restraint, the ability to cooperate, and toleration—that do not arise spontaneously but require education and cultivation."²⁹² Berkowitz is hardly alone.

In Stephen Macedo's words, liberalism is more than just "a set of negative mechanisms for limiting and controlling political power."²⁹³ It admits of a "positive means for fostering a politics worthy of esteem. This is the case not only because liberal politics protects basic liberties, but also because it fosters a political community united by basic principles and by a commitment to criticizing, debating, and refining those principles in public."²⁹⁴ The commitment to education and cultivation for a liberal way of life finds itself represented, I suggest, in our social practice. If we were truly

291. Whitman, *supra* note 21, at 1092.

292. PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM*, at xi (1999). *But cf.* PARKER, *supra* note 290, at 65-115 (urging constitutional theory aficionados to be less leery of the energy of the people, whether in crowds or assemblies).

293. Stephen Macedo, *In Defense of Liberal Public Reason*, in *NATURAL LAW AND PUBLIC REASON* 14 (2000).

294. *Id.*

neutrality-type liberals, would we not be forced to end the support from the public fisc for schools, museums, and parks?²⁹⁵ A fervid commitment to state neutrality with respect to our moral lives would upend the "sense of justice" that John Rawls himself argues is vital for citizens in order to maintain a scheme of fair cooperation over generations. Though this vision of liberalism may appear thoroughly non-Dworkinian,²⁹⁶ it has hardly been an obscure or marginalized viewpoint, as both Joseph Raz²⁹⁷ and others²⁹⁸ have written extensively in advocacy of this view.

The second point concerns one liberal virtue in particular: modesty about one's intellectual and moral claims. Modesty, for the good liberal, need not engender self-abasing behavior, but merely self-critical and self-correcting behavior. In that vein, consider the following: on the view of liberalism described and endorsed in the previous two paragraphs, a good liberal is someone who exhibits the character dispositions of judiciousness, open-mindedness, and sympathetic imagination. That is why we adopt procedures that make all sides think that they have a chance to use reason to persuade the decisionmaker of their side of the story. That is why our judicial decisions follow the norm of explaining to the losing parties in a case why they lost. And that is also why we publish dissents along with the majority opinions. These norms reflect a commitment to reconsideration of similar cases over time (or in the future life of the same case through direct or collateral review). *Pace* Whitman, these norms evolve as part of the liberal ethic not only of restraint and sobriety, but also modesty: an awareness of our fallibility, an awareness of the fragility of our judgments,²⁹⁹ and an awareness of the contingent circumstances that might place one person under the scrutiny of the legal system rather than another.³⁰⁰ As good liberals

295. See Jeffrie G. Murphy, *The State's Interest in Retribution*, 1994 J. CONTEMP. LEGAL ISSUES 283, 294.

296. See RONALD M. DWORKIN, A MATTER OF PRINCIPLE 335 (1985) (developing the liberal neutrality thesis through discussion of a strong right to "moral independence").

297. See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

298. See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991) (criticizing Dworkin's neutrality thesis of liberalism).

299. See JEFFRIE G. MURPHY, *Cognitive and Moral Obstacles to Imputation*, in *CHARACTER, LIBERTY AND LAW* (1998).

300. This is not to discount a liberal's or retributivist's commitment to moral agency and responsibility, but to suggest that life is not fully within our control. Richard Rorty gives a powerful performance of the liberal imagination when he points out the contingency of some of our moral outlooks. See RICHARD RORTY, *On Heidegger's Nazism*, in *PHILOSOPHY AND SOCIAL HOPE* 190 (1999). There, he counters the critics of Heidegger, who say his Nazism was essential to his philosophical outlook, by suggesting a plausible world in which Heidegger falls in love with a

then, our punishment practices should be tempered—but not paralyzed—by this awareness of our imperfection. Embracing the practice of intentional degradation of another person before the public and with the public's aid runs afoul of this awareness, and renders shaming punishments incompatible with the liberal virtues discussed above.

Can the same point about modesty be made, not only for liberalism, but also retributivism? I should hope so. Recall from Part III that the CCR is a mode of discourse that, by taking criminal actions seriously, affirms the moral agency of the offender. If the CCR is followed properly, the use of state power for punitive purposes is not an undignified use, but a quietly ennobling one. If state power is used capriciously or sadistically, the agents bearing that power act without legitimacy, for they transgress the bounded use of power that chartered their use of coercive power over another citizen. What this means is that if retributivists are committed to interpreting the practice of punishment as a dignified use of coercion, then one should ensure that the ascription of moral responsibility for a crime to another person must be accompanied by the correct posture. A posture of overweening confidence, such as would be required for the use of the death penalty or shaming sanctions, is inappropriate for retributivists to assume. For although retributivists affirm the notion of moral agency, they also recognize that one cannot understand all that surrounds us with acuity and insight.

If what I have said seems plausible, then a just political order cannot be viewed merely as the coordination that permits the aggregation of preference satisfactions. Rather, society's authorized penal institutions must comport its practices to the limits that practical reason imposes, not because these ideas or ideals should be privileged above human flourishing, but because, absent supreme emergencies, reflection upon and compliance with practical reason help constitute that notion of human flourishing.³⁰¹ Viewed against this backdrop, shaming punishments are inconceivable because they exhibit none of the features necessary to create a "political community united by basic principles" of decency and dignity.³⁰² As such, they destroy the respect for others that help make a polity worth living in and for.

Jewish student and escapes during the war to University of Chicago, only to return later to Germany as an anti-egalitarian agrarian with good anti-Nazi credentials. *See id.* at 193-95.

301. *See* NOZICK, *supra* note 8, at 2-12 (describing the functional role principles play in improving human life).

302. Macedo, *supra* note 293.

-C. *The CCR and Guilt Punishments*

In the argument so far, I have tried to show why shaming punishments are incompatible with both retributivism and liberalism. It would seem unfortunate, however, if people viewed retributivism as a rearguard movement against developing alternative sanctions to public prisons. Consequently, I want to suggest how certain kinds of alternative sanctions are consistent with the account expressed here. Let us begin with guilt punishments.

Recall the distinction between guilt and shame punishments offered earlier. Whereas shaming punishments have the goal of degrading offenders for their wrongs, and of doing so in public and with public participation, guilt punishments are structured to induce a kind of contrition for one's wrongdoing without the intentional debasement or publicity that attends shame punishments. This contrition would arguably be desirable under any theory of punishment, but retributivism is notably concerned about the moral character of the offender, and therefore takes contrition particularly seriously.³⁰³

Some popular examples illustrate how guilt punishments might work. A rapist or pederast may be punished, not only with a period of incarceration, but also with exposure to documentaries depicting how victims of rape or child molestation have been traumatized by such actions. Slumlords who violate the housing codes of a city may be sentenced to house arrest in one of their tenements for a period of time.³⁰⁴ If someone's recklessness blinded a victim in one eye, the criminal could be sentenced to wear an eyepatch for a period of time, to bring home the effect of having blinded a victim in one eye. The public would not have to know that his wearing an eyepatch was a state-imposed punishment, but the offender would. Similarly, those who attack interracial couples could be required to view civil rights movies.³⁰⁵

What these punishments have in common is that their effectiveness depends in a subtle way upon a reconfigured notion of *lex talionis* (LT). This reconfigured *lex talionis* "recommends the infliction of hardship on an offender that 'mirrors' his own wrongdo-

303. *But see* Garvey, *supra* note 1, at 1835 (lamenting that "retribution gives us punishment without atonement"). Atonement is ultimately, I believe, a matter of private conscience, and thus it is not something the state can reliably elicit. *Cf.* THOMAS HOBBS, *LEVIATHAN* ch. 43 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651). On the other hand, it is something that the state can encourage through practices such as those described in the next paragraph in the text.

304. *See, e.g., Instead of Jail, supra* note 93.

305. *See, e.g., Man Sentenced to See "Mississippi Burning," supra* note 95.

ing. . . ."³⁰⁶ What LT punishments do is help "reflect back on the offender what he has done to his victim."³⁰⁷ Some have suggested that LT is deemed obligatory in some way for retribution.³⁰⁸ But to insist on LT requires someone to give reasons for its use, since it is not otherwise self-evident. What reasons might there be? As Stephen Garvey proposes, a (guilt) LT punishment " 'mirrors' [the criminal's] own wrongdoing in order to morally 'educate' him, to make him see the error of his ways, and ideally, to lead him to repentance."³⁰⁹ Of course, one can imagine punishments that are not drawn from LT that might still be morally educative. And conversely, there might be LT-type punishments that are not always morally educative, such as the death penalty. Nonetheless, something about LT might be instructive.

As Jeremy Waldron notes, *lex talionis* need not (and, often, should not) be a true mirror. Rather, we "expect the punishment demanded by LT to share some of the features of the original offense and not others."³¹⁰ What makes LT an attractive principle for Waldron is that it works a type of educative reciprocity; that said, we need to be careful about which features we select to highlight in the penal response to the wrongdoing. As a general matter, "we should identify the relevant act-type at the level of generality that indicates exactly the features that make the action wrong."³¹¹ On this scheme, someone who kills need not be killed, but might instead be deprived of the ability consciously to self-direct her life.³¹² Similarly, someone who commits fraud, and thus endangers the stability of representations in the marketplace, might be subjected to serving time in prison in an unpredictable and occasionally last-minute manner, so as to drive home the message of what it means to have reliance interests capriciously ruptured.³¹³

Of course, in its crude form the *lex talionis* appears to be of little use when there are no apparent victims, or when the criminal

306. Garvey, *supra* note 2, at 739.

307. *Id.*

308. Kaplow & Shavell, *supra* note 3.

309. Garvey, *supra* note 2, at 739.

310. Waldron, *supra* note 97, at 32-33.

311. *Id.* at 35.

312. *See id.* at 36.

313. I am not suggesting that these should be the only elements of the punishment the state inflicts. It could be that fines and imprisonment supplement this LT variation. As I have indicated elsewhere in this Article, one should choose the sentencing, like all the policy choices, from an *ex ante* viewpoint, and thus incorporate all the relevant information and norms that one deems relevant and attractive in fashioning a good and decent polity. I am only illustrating ways in which we can reimagine punishment to effectuate some of the norms we think have purchase.

act itself is so degrading that the state could not ask its employees to practice the "mirror" image of the crime on the offender.³¹⁴ But there are ways of using the *lex talionis* to punish criminals without aiming at their humiliation. And of course, there can be guilt punishments that do not necessarily have an LT component that are still contrition inducing—these too would be consistent with the CCR. Which guilt punishments we pick should presumably be subjected to rational scrutiny and democratic deliberation.

Unlike shaming, which requires an audience, these guilt punishments can be applied in (relative) solitude—they do not communicate to a wide audience that this offender is of a bad type, to be avoided or scorned. And while these punishments will not wipe out the wrong or change the past, they achieve the internal goals of retribution, such as, to use Robert Nozick's phrase, repairing "the disconnection with value" that the crime represented.³¹⁵ In this important way, they affirm the moral agency of the offender.

One of the organizing and distinctive themes of the CCR is that the CCR does not make a claim for exclusive control over what considerations may properly shape a state-administered punishment. Although the CCR does foreclose certain types of punishment, like shaming, it does not *require* the application of imaginative guilt punishments to supplant incarceration and/or restitution. Rather, it only permits, and indeed may support, these alternative sanctions.

What is it about guilt punishments that the CCR may commend? For one thing, these alternative sanctions reflect the underlying justificatory principles of retribution more effectively. By requiring the offender of a hate crime to sense the toxicity of hatred through his punishment experience (by seeing the pain of others dramatized or documented), the state might be better able to convey its commitment to the principle of equal liberty under the law. And it does so in a way that "ordinary" incarceration (alone) may not do as well. This is not to say that incarceration ought to be abandoned—it may well be the most widely accepted way to deny the offender's claims to superiority and achieve other legitimate goals. The point here is only to show that, because efficient allocation of scarce public resources is a legitimate concern, we may le-

314. One of the many virtues of Waldron's pellucid essay is explaining with great analytic clarity how the *lex talionis* can be used in cases like forgery, where there is no obvious victim, or like rape, where the brutality of the crime is not one we want state officials to visit upon the offender. See Waldron, *supra* note 97.

315. NOZICK, *supra* note 224, at 379.

gitimately look to noncarceral punishments that still serve the goals of retribution. Reasonable legislators should consider an array of interests so long as those interests do not themselves violate the guiding principles described earlier.

In sum, the choice of state legislators and judges to apply guilt punishments as an alternative sanction remains a choice. And as a choice, it must be scrutinized, debated, implemented, and revised through the appropriate democratic institutions that help articulate which punishments are appropriate for which crimes.³¹⁶

D. The CCR and Private Prisons

In the previous section we saw how retributivism supports some alternatives or supplements to incarceration in a publicly managed prison. In this section I argue that, although private prisons would at first glance appear to run contrary to the principles of retribution described in Part III, they may under certain circumstances be compatible with those principles and, as such, a defensible development in penal practice.

As mentioned at the outset of this Article, one recent development in American penal strategies has been to privatize prison services.³¹⁷ Three causes lie at the root of this development. The first two causes are the endemic problem of overcrowding in public prisons and the resulting perception that public authorities have failed to deal with that problem in an effective and expeditious manner.³¹⁸ The third factor is the surge in costs for incarcerating such a large population; legislators and budget analysts are there-

316. Those who reject certain positive laws that we have will obviously be less enthused about at least one of the goods achieved internal to the practice of retribution, namely, the protection of the decisionmaking regime that spawned these "disagreeable" positive laws. But their dissatisfaction with that regime occurs *ex post*, not *ex ante*. Pointing this out does not necessarily mollify the critics, but they might come to agree at one higher level of abstraction that the government may permissibly enforce laws that result from procedures they would have reasonably chosen beforehand. Moreover, the critics of a given law, such as a prohibition on consensual sodomy, will have a problem not with retribution *per se*, but with any discomfort that might be brought to bear upon them, regardless of the guiding principles of punishment operating.

317. See Fox Butterfield, *For Privately Run Prisons, New Evidence of Success*, N.Y. TIMES, Aug. 19, 1995, at A7 (noting that corrections officials around the country are paying greater attention to the use of private prisons). In truth, private prisons are nothing new in America. See *supra* Part I.B.

318. See Lisa Belkin, *The Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14 (attributing rise of private prison services to overcrowding); John J. DiIulio, Jr., *What's Wrong with Private Prisons*, PUB. INT., Summer 1988, at 66-67 (observing increases in recidivism and overcrowding as instigations of the privatization movement).

fore excited to see the possibility of reducing the costs of incarceration through the use of the marketplace.³¹⁹

A fierce debate now exists over the ethical propriety and the economic prudence of private prisons.³²⁰ Most proponents of private prisons point to the benefits of private prisons, highlighting that the outcomes in private prisons on issues such as cost savings, inmate safety, and the quality of prison conditions are equivalent to or better than those in publicly administered facilities.³²¹

Opponents of private prisons respond by taking one or more of three possible tacks. First, they might point out that the cost savings are misleading because accounting procedures differ.³²² These critics note the hidden costs of private prisons that governments may be required to absorb, costs such as monitoring compliance with constitutional or other statutory requirements.³²³ Other critics observe that the private prison companies are engaged in the practice of "creaming" the prison industry: that is, they "have largely confined themselves to managing smaller, lower-security institutions and have yet to tackle any of the big maximum security prisons that require more staffing and are therefore more expensive to run."³²⁴

Finally, the opponent might, instead of questioning private prison proponents' empirical findings, challenge the enterprise of private prisons on normative grounds. That is, rather than contest the effects or outcomes claimed by the proponents, certain "expressivist" opponents, such as Michael Walzer, regard private prison

319. See DiIulio, *supra* note 318, at 68. Some studies of private incarceration indicate that savings, from the moderate to the dramatic, can be gained. See Wayne H. Calabrese, *Low Cost, High Quality, Good Fit: Why Not Privatization?*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* 175, 177 (Gary W. Bowman et al. eds., 1993); Nzung Xiong, *Private Prisons: A Question of Savings*, N.Y. TIMES, July 13, 1995, at C5 (noting that a study of Louisiana prisons found private prisons saved, on average, ten to twenty percent off the per diem cost of maintaining state-run facilities).

320. See, e.g., RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* (1997); CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* (1990); Calabrese, *supra* note 319; Sharon Dolovich, *The Ethics of Private Prisons* (Nov. 1999) (unpublished manuscript, draft on file with author).

321. See Butterfield, *supra* note 317 (reporting that inmates of private prisons who have a basis for comparison prefer private prisons).

322. See Xiong, *supra* note 319 (describing a Government Accounting Office paper stating that it would be impossible to derive, on the basis of a survey of various studies, the conclusion that prison privatization is more economical).

323. See *McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1996) (noting that profit-seeking firms may wish to "[cut] corners on constitutional guarantees").

324. Butterfield, *supra* note 317 (summarizing one of Professor DiIulio's criticisms).

services as abhorrent to values they cherish³²⁵—even if great savings in cost and an equivalency in matters such as the “effectiveness and efficiency” of private prisons could be realized.³²⁶

Different reasons are offered for this normative opposition. First, one might view the use of private prisons as expressing a message of the state’s indifference to the offense. On this view, using private prisons may appear to commodify inmates in a manner antithetical to a state’s duty to respect the dignity of its citizens, even those who have been incarcerated.³²⁷ Another concern is that the use of private prisons permits the “state to offload custodial responsibility for convicted offenders to institutions only derivatively committed to the values and obligations of the ethical liberal polity, thus itself constituting a violation of those values and obligations.”³²⁸

Indifference, commodification, offloading responsibility—these are things good people presumably do not endorse. Nonetheless, there is something of a conclusory air about them. What I want to suggest here in this section is that the CCR, which may at first appear to bolster these arguments against private prisons, in the end generates certain complications—the effects of which are to put the question of private prisons back on the table as a reasonable possibility for policy design.

What might the CCR argument against private prisons look like? First, one would observe that the CCR requires a reasonably effective communication by the state to the offender and that this communication aims to convey the rejection of the offender’s claims to superiority. With private prisons, the retributive response to the criminal appears to be made by the prison guard and his private employer, not the state. If it is not the state denying the claim of superiority, then it is manifestly not a CCR-type encounter, since it appears to be a communication occurring by private hands. This would seem, at first blush, to deny offenders, and other citizens,

325. See Michael Walzer, *At McPrison and Burglar King, It's . . . Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 10, 10 (noting that “economic arguments cannot be the crucial ones” in assessing private prisons).

326. Cf. *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting) (“Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.”).

327. Walzer, *supra* note 325, at 10-12 (arguing that what is wrong with the private prison is that it exposes “the prisoners to private or corporate purposes, and it sets them at some distance from the protection of the law”).

328. Dolovich, *supra* note 320, at 11.

their entitlement to reasonable evidence to think that it is the state after all that is fulfilling its *prima facie* duty to punish.

A second potential CCR claim against private prisons would highlight the appearance that punishment is occurring without the appropriate emotional disposition: namely, impartial detachment that nonetheless recognizes the humanity of the punished. The concern would be that a prison guard's sense of impartiality would be undermined when he is employed by a prison-services corporation whose goal is profit, and therefore not essentially committed to the project of retributive justice. The hidden premise of this claim, though, is that publicly employed prison guards have different and nobler motivations in performing their jobs.³²⁹

Impartiality is crucial on the CCR's view. Surely, it would be a mistake for determinations of admission to, and release from, prison, for example, to be made by those who do not wear the robes of the state. Ultimate authority for these tasks, along with the determination of what kind of confinement conditions the prisoners should experience, should remain firmly in the hands of public officials. But it is hard to say why, on the other hand, ministerial or administrative functions may not be delegated to others so long as the government retains final control over all meaningful matters affecting the life of a prisoner.

Perhaps this point can be clarified with reference to a continuum of control and power exercised by the liberal state over prison services. That control can be and is often determined by contracts, the basis of which are guidelines established by the relevant legislatures. Once control is viewed along a continuum, it becomes difficult to insist that the line must be drawn in one place rather than another.

To illustrate: it would presumably be acceptable to have a state receive bids from private contractors to build a government office building, hospital, school, or prison. Once the building is standing, we might also agree that at least certain goods and services from the private sector may be procured, with a variety of criteria in mind: durability, price, quality, etc. It probably does not bother us that Marriott Corporation provides the food and perhaps the linen service for state-run institutions such as prisons, asylums, nursing homes, hospitals, etc. (If it did bother us, we'd be in trouble: Would it mean that buying Coca-Cola instead of making one's own fizzy beverages was verboten for these institutions?) It cer-

329. Accounts of prison guards in public prisons throw significant doubts on this suggestion. See CONOVER, *supra* note 105.

tainly would not raise eyebrows if health, religious, and education services to prisoners were provided by contractors or volunteers rather than those on the government payroll. Furthermore, if the prison guards and staff were unionized, and affiliated with unions also operating outside the prison context, then that too would be presumably be uncontroversial.

If health, religious, and educative needs can be provided by nonemployees of the state, then why not their safety (and to be sure, disciplinary) needs? Here the question is whether the prison guards must receive their training and paychecks directly from the state, or whether an outside source is (morally) permissible. The concerns boil down to two related issues: control and liability. The consumers of private prison services are the state and federal governments. There are many suppliers, presumably interested in satisfying the benchmarks or criteria that the consumers of these services desire. To the extent they are able to, they will charge the efficient price for their services. If the governments insist on certain assurances (no beating the prisoners), the suppliers will have incentive to comply, since failure to do so would cost them the contract.³³⁰ The government could insist that the suppliers carry adequate insurance for torts inflicted upon prisoners, as one example. The cost of that is then passed on to the government as the price of compliance with constitutional norms. And under the "traditional government function" test of the state action doctrine, the expectation of compliance with constitutional norms would extend to private prison-services companies.

What this shows then is that there is a continuum between, at one end, a bunch of thugs getting kicks in on the criminal in an alley outside the courthouse and, at the other end, the controlled near-Panopticon environment in a maximum security prison run by state-employed prison guards. The question is how far we may move in the direction toward the thugs exercising vigilantism.

That question invites a nice comparison between private prisons and shaming punishment. One might be tempted to think that a private company authorized to use coercive measures is too close to the crowd. But to do so risks overlooking two important points.

330. See *Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that private prison guards are disciplined by the marketplace and therefore do not require qualified immunity under that doctrine's historical purposes).

The first is the difference between the control that is bargained for by the state in its contracts with private prison corporations, and the relative lack of control when shaming punishments are applied, or at least as they have been applied.³³¹ (Keep in mind that the control exercised by the state goes beyond merely enunciating various guidelines at the outset. The control can be exercised through a range of intermediate and ex post measures, such as damages or constant consultations and revisions of the guidelines.)

Ultimately this point about state control of the retributive response is about assuring due process to individuals. We do not want a situation where public power is being used for private purposes. Due process protects against that misuse. But there seems little reason to believe that when contracts include due process safeguards (including a right to have certain confinement decisions subject to independent review and appeal), the prisoner in the so-called private prison will necessarily be in a more precarious position. Indeed some have argued that as some of the administrative power moves to private prison corporations courts will decrease their traditional deference to prison officials.³³² This is in part because decisions made by a contractor are reviewable "by a government monitor as well as subject to challenge in court," thus creating "another layer of independent review."³³³ Contracting to private firms, in other words, can create an extra layer of impartiality that facilitates the provision of due process. Recognizing this possibility, some states have placed an ombudsman's office of a prison or other institution in the ambit of a private organization, precisely to monitor the state's organs of coercion.³³⁴

331. One might suggest the possibility of contracting out the shaming experience to shaming services corporations under strict contracts like the ones for which I offer qualified support for in the text. Assuming *arguendo* that shame could be privatized for this thought experiment, I would still not be satisfied, despite the pacification of my concerns about control and liability, since the shaming punishments are penalties of humiliation. The problem with state authorized contracts for the services of humiliation is that in seeking to destroy the reputation and self-worth of a person, as Kahan and Posner advocate, the state is acting (or permitting someone to act in its name) in a way that runs afoul of the notions that modesty should attach to one's mode of punishment and that the state should treat prisoners as dignity-bearing individuals capable of moral agency.

332. See David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1987).

333. LOGAN, *supra* note 320, at 65.

334. *Id.* at 66. It bears mentioning, of course, that a lot of these arguments are dependent upon how well-drafted the contracts are. There is currently reason to be skeptical of the due process safeguards in many state contracts with private prisons, but with greater vigilance about these issues there is no theoretical bar to the use of privately managed prisons. See Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997).

The second point is that there is nothing that inherently makes a state-paid prison guard different from a prison guard paid from another source. Ultimately the prison guard will be trained according to the dictates of the state and the source of funds will be the public fisc. (By contrast, there is no evidence that when the state orders a shaming punishment, a similar claim of agency can be made by the state about the crowd.) What should worry us then is not whether power is being exercised for profit,³³⁵ but rather whether power is being exercised properly.³³⁶

One final point is needed in response to the concern mentioned before about the emotional disposition of the punisher. We observed earlier that punishment had to be meted out in a manner that did not deny the moral agency of all those concerned. In the context of private prisons there is the concern that the administration of punishment will occur with the wrong motive: namely, profit. But even if private guards were given options in the company's stock, that profit-seeking motivation would not create a necessary friction with the impartial disposition we would wish the guard to have toward the prisoners. It is not even clear that the CCR would have something to say here. If we could fully automate prison services, we probably would not care so long as the prisoners were treated with decency, a modicum of dignity, and an ability to appeal certain decisions about their confinement.³³⁷

Perhaps the specter of automated prisons presents an equally pernicious message to the expressivist critics of private prisons. Is that message so pernicious as to outweigh the benefits that might materialize from experiments with private prisons? One test of the reasonableness of using private prisons would be to contemplate what our judgments would be *ex ante*, not knowing whether we would be prisoners or prison guards, legislators or citizens. Using that heuristic, we might prefer something like the confrontational conception, but again, understood within the practicalities of a complex regulatory state operated by and for diverse social groups. Here is what I take that to look like: knowing it could just

335. This is the concern of critics like Ira Robbins. But as Logan points out, there are pecuniary costs the corporation would face if it exhibited bias improperly one way or the other. For example, a concern that prison-service corporations would seek to extend unduly the stay of inmates to maximize the prison population will be addressed by the availability of lawsuits (with punitive damages attaching) against the corporation, as well as the detriment that a reputation for malfeasance would bring in future contracting. The prison-services corporation has as much incentive to keep its nose clean as the prisoners themselves. See LOGAN, *supra* note 320, at 69.

336. *Id.* at 64.

337. *Cf. id.* at 72.

as easily be me in the prison, I would want to make sure the level of services and safety was decent and similar in the relevant respects in either private or publicly managed prisons. Moreover, if there were a cheaper option that reasonably assured that level of service and safety, I would prefer that option, all other things being equal, since as a taxpayer I could be paying for it. In such a scenario, I would be unlikely to believe that I ended up in prison as a result of private or profit-seeking motives. (I would, however, want to ensure the availability of public oversight of my conditions of confinement so that I did not stay longer in prison due to the prison company's profit interest in making me stay longer.) This is the familiar distinction between legislation and adjudication on the one hand, and administration on the other hand.³³⁸ To the extent discretion about how prisoners will be treated can be constrained by positive law and contractual obligation, I would not be worried about ending up in a private prison. After all, a contractually managed prison nonetheless remains a government prison.³³⁹

Prison-service corporations operate as contractors with the state. To those unpersuaded by the arguments above, this very notion may be objectionable. But we should not overlook the fact that most understandings of our own relationship as individuals with the state reflect a similar contractual nature. The state operates as the agent of the people, and in that respect, administers the people's opportunity to punish. What reason then is there to explain "why subsidiary trustees cannot be designated, as long as they, too, are ultimately accountable to the people and subject to the same provisions of law that direct the state?"³⁴⁰ To be sure, there are other entities available—triads, clan leaders, and churchmen, for example. But whereas these alternative communal agents may be acceptable on theories (such as restorative justice) that seek to invite broad communal responses to legal wrongdoing,³⁴¹ these non-state parties lack the legitimacy that the state possesses on grounds of generality and procedural neutrality. With a private corporation constrained by the principles of the state's interests in

338. I recognize, of course, administrative agencies and regulatory commissions often exercise greater discretion than the kind I am imagining here for private prisons.

339. LOGAN, *supra* note 320, at 50.

340. *Id.*

341. See, e.g., Jennifer J. Llewellyn & Robert Howse, *Institutions of Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355 (1999).

contract, there seems to be greater reason to keep our minds open about private prison administration.³⁴²

CONCLUSION

Though I believe this Article, in laying out the bare structure of the CCR, will prod both retributivists and their critics to rethink their understandings of that theory of punishment, it is not my chief focus here to explain how and why the CCR is the superior way to understand the justification of state punishment. That is the task of another day. My focus, instead, has been to provide an attractive account of retribution that generates practical suggestions for the alternative sanctions debate. It cannot be emphasized enough that the *ex ante* retributivism described here does not require shutting out from consideration other factors that might affect human flourishing, such as the social cost or transparency dimensions. As a result, the CCR gives an organizing framework to think about punishment, but permits considerations of cost, political accountability, or social reconciliation that are also important for governing a polity.

The legitimacy of other concerns is a useful bridge to the Article's examination of the alternative sanctions debate. For even if one is not persuaded by the normative claims I make on behalf of the CCR, one should still agree with me that the supporters and opponents of shaming punishments have misunderstood retribution when they say that shaming punishments are beautifully retributive. This Article identifies the problematic core of this imputation: a failure to separate conceptually the public expression of moral condemnation from the communication of repudiating certain claims of superiority by the offender, and the concomitant failure to separate revenge from retribution. As I have shown, the internal goods of retribution can be achieved in substantial part without broad public expression. Because shaming punishments occur without an emotional or intellectual disposition appropriate to the animating principles of retributivism, and because they aim at the destruction of a person's reputation and self-worth, they are punishments antithetical to the idea of retribution and, relatedly, the most attractive theories of liberalism.

342. Note that the grounds of generality and procedural neutrality serve as functional categories. As Logan reminds us, when a publicly employed prison guard engages in brutal behavior, his acts are illegal and unauthorized. The same would go for a privately employed prison guard. What matters is the derivation of authority and the act made under that authority. See LOGAN, *supra* note 320, at 54.

I have tried to show that although retribution is incompatible with shaming punishments, retributivists might still have something constructive to say about alternatives to the publicly managed prison. It is precisely because retribution is only one attractive practice among other attractive practices within a complex scheme of general and fair political obligation that one has the responsibility to engage seriously those who express concern about cost or institutional transparency, to name just two reasonable concerns. This speaks to the justification for experimentation with private prisons on retributivist grounds, as well as guilt punishments. By referring back to the underlying goals and overarching principles of retributivism, we found that there are arguments to be proffered on behalf of certain alternative sanctions.

Our imaginations can extend further. Canada, for example, now employs something called a conditional sentence,³⁴³ which condemns certain nonviolent offenders to house arrest if they are not at work and subjects the offenders to constant monitoring. If the offenders violate their conditions, they go to prison. While there is no reason to think that these alternatives are necessitated by the CCR, they almost certainly lie within its zone of compatibility; therefore, those who view themselves as retributivists should pay special concern to other legitimate considerations in the decision process.

The sketch of punishment offered here is a project in philosophy, law, and ultimately, social hope. By elaborating upon the ideas of retributivism—what it demands, permits, and proscribes—I hope I will have chastened the at times imperialistic tendencies of both retributivists and their critics. I hope the portrait of retribution I have supplied will call into question various notions held by those who self-identify as retributivists. I hope that everyone, but especially retributivists, will realize this: Punishment can be ennobling, for both the punishing and the punished, but a spirit of modesty should temper our punishing inclinations—we are, after all, only human, all too human. A discourse and practice of punishment that reflected that sad fact better would look considerably more attractive.

One disquieting and last thought: to the extent that the account of retribution offered here is of any value, it spurs reconsideration not only of the world of alternative sanctions, but also of current doctrine and mainstream practice with respect to criminal

343. This was the recent subject of an important Canadian Supreme Court decision. See *Regina v. Proulx*, [2000] S.C.R. 61.

procedure and incarceration. The enormous and (judicially) unreviewable discretion prosecutors in this country enjoy, the reluctant manner with which judges deny bail even though technological devices are cheap alternatives to jail, the teeming and squalid state of our prisons, and the humiliating rituals prisoners often undergo—all these are at odds with the picture of retribution suggested here. The state of our prisons is of particular significance especially in light of the critique I offered of shaming punishments. For although a sentence to prison should not be interpreted as involving the directly intentional humiliation of another person, time in prison very often involves these practices as a matter of reality. And one cannot plausibly disclaim responsibility for fully foreseeable effects. Thus it should come as no surprise that quite a bit more than the future of “alternative sanctions” is at stake if we are to realize any of the promise that might inhere in the vision of retribution I have tried to articulate.