

# Why Punish the Guilty? Towards a Philosophical Analysis of the State's Justification of Punishment<sup>1</sup>

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## ABSTRACT

There is general acceptance that those who break the law must be punished; however, not all agree as to why this is necessary. Some argue punishment is necessary to reform criminals, others to deter criminals, and others because you deserve it, whether punishment reforms or deters. Stripped of metaphors, this paper argues that punishment is retribution, but that a distinction must be made between the definition of punishment as retribution and its justification, if a case is to be made for its moral justification. Thus the most important question the paper raises relates to the justification of punishment as retribution.

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## I Introduction

The law takes the form of imperatives, of commands and orders, of 'do's' and 'don'ts'. It is possible, however, to disobey the law. Freedom is thus left to individuals either to obey or not to obey the law, to do what is legally required or not to do what is legally required. The law, therefore, seeks compliance in free choice. The law itself, then, does not bring along enforcement and it does not have any automatic in-built enforcement system of its own that it can use either to coerce or to encourage people to obey the law.<sup>2</sup> What, then, happens when people do not obey the law, break the law? What about crime? In response to this matter, it is generally taken for granted that those who break the law ought to be punished.<sup>3</sup>

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<sup>1</sup> This is a slightly revised and expanded version of a lecture I gave to the Philosophy Society at NUI Maynooth on 'The State's Justification of Punishment', on Thursday 20<sup>th</sup> November, 2008. I wish to thank the President of the Philosophy Society, Joseph Feely, for the invitation to talk to the Maynooth students' Philosophy Society and the students present at the lecture for their lively engagement and questioning of the issues, both during and after the lecture. I also wish to dedicate this article to the memory of my former teacher and Professor of Philosophy, Professor Matthew O'Donnell, who delivered an insightful public lecture on 'The Morality of Punishment' to the Maynooth students' Philosophy Society in 1986, if my memory serves me well. Any errors in my analysis are, of course, entirely my own. I would also like to thank Oliver O'Donovan for his critical remarks of an earlier draft of this paper, and which made me clarify further some points made in this final version.

<sup>2</sup> Thus J. D. Mabbott's point: 'Punishment is a corollary not of law but of law-breaking', 'Punishment', *Mind* 48 (1939), 152–167 (p. 161).

<sup>3</sup> Of course, governments do and could take alternative measures to encourage law-abiding, e.g., they offer inducements, such as tax amnesties, to those who have already broken the law in order to encourage those law-breakers to conform to existing law without impunity, or governments engage in psychological advertisement campaigns (e.g. "speeding kills" with vivid images of those seriously hurt or killed) in order to make people aware of the importance of keeping speed-limits and obeying laws etc. The morality or effectiveness of these measures, however, is not the concern of this article because if you are caught driving over the speed limit, or if you are found not to be paying the requisite amount of tax, after the tax amnesty is over, you are to be punished. The law, then, in the end, needs 'teeth', so it is believed, in order to ensure conformity, and so, resorts to the threat and actual infliction of punishment, of pain or deprivation of freedom. This is

There is, then, general acceptance that those who break the law must be punished. People, however, are not in agreement as to why punishment is necessary. Some argue that punishment is necessary in order to reform the law-breaker. Others argue that punishment is necessary in order to deter potential law-breaking. Others again argue that whether the person who commits a crime is reformed through the infliction of punishment, or not, and whether potential law-breakers are deterred from committing crime through knowing about the punishment of offenders, or not, you deserve to be punished for the crime that you committed.<sup>4</sup> ‘One fact and one fact only can justify the punishment of this man, and that is a *past* fact, that he has committed a crime.’<sup>5</sup> This, as Mabbot argues, is what punishment means: punishment *is* retribution.<sup>6</sup> There is no other way in which *punishment* can be understood. For the retributivist, then, concerns that related to reform and deterrence are entirely extraneous matters to the point and purpose of punishment, and so, irrelevant to the question of its moral justification. As Mabbott again succinctly puts it:

The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with the just punishment alone. But reform and deterrence are not modifications of the punishment, still less reasons for it. [...] But the punishment [*qua* retribution] would be no less just were reporters excluded and deterrence not achieved. [...] (P)unishment *itself* seldom reforms the criminal and never deters others. It is only “extra” [outside of punishment] arrangements which have any chance of achieving either result.<sup>7</sup>

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the topic of this paper, namely, the necessity of punishment as such. The moral evaluation of the content of the law, therefore, is not the focus of this paper. Thus the issue of obeying or not obeying a law as a matter of conscientious objection, for instance, the boxer Mohammed Ali’s well-known refusal to abide by Military Conscription Laws during the Vietnam War, or kindred moral issues, such as, capital punishment and the right to life, or moral reasons adduced for refusing to pay one’s taxes to a government that uses a considerable amount of those taxes to produce more nuclear weapons, etc., or the morality of a school or a parent inflicting corporal punishment on a student or a child is not the concern of this article.

<sup>4</sup> Immanuel Kant is probably one of the most well-known defenders of such a ‘just deserts theory’, as it is often called, or ‘retributive’ justification of punishment, but it has had its supporters both before and after Kant. In his famous 1788 *Critique of Practical Reason*, Kant argues that punishment is ‘good in itself, even if nothing further results from it’. I. Kant, *Critique of Practical Reason*, trans. by Lewis White Beck (Chicago: University of Chicago Press, 1949), p. 170. James Rachels takes up and supports Kant’s thesis (curiously on the back of ‘utilitarian’ arguments) in his ‘Punishment and Desert’, in *Ethics and Practice*, ed. by Hugh LaFollette (Oxford: Basil Blackwell, 1997), pp. 470–479.

<sup>5</sup> Mabbott, p. 152.

<sup>6</sup> Oliver O’Donovan notes that ‘(T)he name “punishment” means “requit” or “return,” deriving from an Indo-European root meaning “exchange,” and is therefore not very remote semantically from the term “retribution,” which means “giving back.” O. O’Donovan, *The Ways of Judgment* (Cambridge: Eerdmans, 2005), Chapter 7 ‘Punishment’, p. 101. What exactly is being given back, however, is highly problematical, but one thing is certain that it has to be a harm that is given (back?) to the offender of the crime. Therefore, ‘(T)he practice [of punishment]’, as O’Donovan continues, ‘consists in responding to a wrong which somebody had done by inflicting an evil upon the wrong-doer. It is described formally by Hugo Grotius as “suffering harm having done harm.”’ (ibid.). Far from making sense of, or justifying this practice, ‘(T)hese words’, nevertheless, as O’Donovan correctly concludes, ‘name the practice, they do not theorize about it. The task of a theory of punishment [on the other hand] is to make this practice of requiting and returning intelligible’ (ibid.).

<sup>7</sup> Mabbott, pp. 152–4. This is why Oliver O’Donovan remarks that ‘(T)he reason for this, of course, is not simply definitional or philosophical, but has to do with the nature of the practice of punishment and its conditions of rationality’. (p. 193). This leads O’Donovan, in agreement with Mabbot, to conclude that ‘(T)heories of punishment cannot therefore be divided into those which see it as backward-looking and those which see it as forward-looking. The latter category [of ‘utilitarian’ theory] would not be theories of *punishment* at all’ (ibid.). In the analysis of the

So, must punishment have all or only some of the four elements in it mentioned above in order for it to be morally justified? Must punishment take place (1) after a crime has been committed, (2) act as a preventative measure for the future law breaking/ crime through deterring potential criminals who have not yet broken the law, (3) reform criminals who have already broken the law, as well as (4) exact retribution for breaking the law? If, on the other hand, it can be demonstrated that punishment is either not entirely or totally ineffective in achieving what it claims to do in relation to the crime committed, that is to say, in exacting retribution, or in reforming the offender, or in preventing and deterring crime, is it still justifiable? Besides these theoretical questions pertaining to the purpose, value, effectiveness and justifications of punishment, there are practical questions which the topic of punishment also raises and that often evoke strong moral debate, such as, for instance, the severity of the punishment in relation to the crime committed, or the kinds of punishments that are acceptable in a given society, e.g., floggings, amputations, methods of capital punishments, (humane/ inhumane) conditions of imprisonment, fines for a person of plenty means versus for a person of few means. These latter concerns relate to the practices of punishment, but they presuppose that punishment, in whatever format it takes, is justified. In this paper, I will not be concerned with these matters pertaining to the practices of punishment, but with the more fundamental and theoretical issue regarding the justification of punishment itself (no matter what practical format the latter may take).<sup>8</sup> Of course, not only the State punishes, so do parents, schools, employers, football managers and so forth. And there are complex and interlocking issues here too, such as, for instance, whether a school or only a parent has the right to punish a child for that child's misbehaviour, or whether the State can legitimately intervene in a parent's particular chastisement of a child, in private or in public, and so forth. All of these presuppose, nevertheless, that punishment as a practice by either a public or private authority is justifiable. For the purposes of this article, however, I will not be concerned with practices of punishment outside of the State, and will confine my attention only to those general features of punishment and its justification that are most relevant to an evaluation of the State's justification of punishment.

Before addressing the issue of the State's justification of punishment, however, one could argue that there is no moral or practical necessity imposed on the State to justify its infliction of punishment on those who infringe State law. 'In a normal exercise of judgement within civil society,' as one commentator notes, 'we have no need to ask whether any given act of punishment will serve the social good or not; it serves it by being a just and consistent

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justification of punishment, nevertheless, O'Donovan believes that we must not fall back into, as someone like Mabbott does, 'the usual confusion of retribution as a [punitive] practice with retributivism as a [moral justificatory] theory of punishment' (p. 105). Whether O'Donovan's own proposal to relinquish both retributive back-ward looking *theories* of punishment and utilitarian forward-looking *theories* of punishment in favor of examining what punishment practices actually does *in concreto*, i.e., in a particular society or social existence (e.g. a family, a school, a work-place, a community etc.) in terms of a 'judgment' that is offered by that society both to itself and to the offender to legitimate the society's 'truth about itself' (p. 118) still leaves the moral justification of those practices of punishment at least debatable. See, *infra*, n. 8 and n. 10

<sup>8</sup> O'Donovan seeks to situate particular practices of punishment in terms of a '(J)udgment [that] offers society the truth about itself, just as it offers the offender the truth about himself. [In this regard] Each needs to grasp its own truth in order to flourish in relation to the other.' (p. 118). This is true. Punishment tends to re-enforce the values of a given society at a given time, rather than call into question the values of that society. Whether this can be construed as a moral justification for the necessity of such punishment or 'judgment' of society, however, is another matter. See, *infra*, n. 10

application of a practice on which society depends.’<sup>9</sup> From this point of view, then, punishment of criminals is regarded by most to be part and parcel of the way society has always operated.<sup>10</sup> It is thus an essential part of the very ‘fabric of society’ and of the way society actually works and runs. Without punishment, society, as we know it, would disintegrate and disappear, and possibly bring into actual existence that famous Hobbesian-hypothetical ‘original state of Nature’ wherein human life is imagined to be ‘solitary, poor, nasty, brutish and short’.<sup>11</sup> If punishment is a necessary feature for maintaining law and order and for holding society together, as some contend, then perhaps we could be excused from this entire debate and simply maintain that there is neither case nor cause to be made by anyone for moral inquiry into the State’s justification of punishment. In other words, the justification of punishment (both in practice and in theory) by the State is, as a matter of fact, self-evident. And yet, such a moral short-cut does not obviate the fact that punishment is damage to people. People are being taken against their will and some form of suffering/pain is inflicted upon them. Fear and suffering are things that one should try to eliminate from human life. The *deliberate* infliction of pain or suffering on those who break the law and commit crime, therefore, is not self-justifying; rather, it requires justification, as Honderich points out.<sup>12</sup> And so, if whatever we have responsibility for is a matter of morality, then it follows that the question ‘what right has the state to inflict punishment on those who infringe the law?’ can be legitimately posed. Note here that what is to be addressed in this question is not the issue of the fairness (or otherwise) of infliction of punishment on innocent people and the (alleged) benefits or otherwise of doing so by the State — one calls such acts ‘miscarriages of justices’, when later discovered — but the question: why *punish* the *guilty*?<sup>13</sup>

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<sup>9</sup> O’Donovan, p. 118.

<sup>10</sup> ‘There is no point in discussing punishment as though it were an optional extra, something which human societies may choose to do or not to do — in general terms, that is, for they are always in a position either to punish or not to punish in a particular case. All theories must accept that human communities do punish and always have punished, for that is what they are required explain.’ O’Donovan, p. 103. Punishment, as matter of fact, nevertheless, does not make it a matter of right, and it is the latter that a moral theory of punishment is supposed to provide the justification. It seems to me that retributivist theories, in whatever guise they take, cannot do this. Nor do utilitarian-consequentialist theories fare better. Viewing punishment as a society’s judgment does help us to understand better what punishment is doing, as O’Donovan argues, but that does not make the practice(s) of punishment (any more) acceptable, from a moral point of view. *That* human communities do punish is not an adequate answer to the moral question *should* human communities punish, and it is the latter moral question that this paper seeks to address. This, of course, would mean that neither public (e.g., the State) nor private (e.g., a parent) authorities are morally *justified* in their punitive practices just because it is they who engage in such practices.

<sup>11</sup> See, Rachels, pp. 475–476.

<sup>12</sup> See, Ted Honderich, *Punishment: The Supposed Justifications* (Hutchinson & Harcourt Brace, 1969), esp., Chapter One Problem, ‘Section 1 The Need for Justification’, p.11. As Honderich also remarks: ‘The general claim, that one cannot but regard punishment as in need of justification, is itself a judgment of a moral nature’ (p. 12).

<sup>13</sup> It is often argued *against* the utilitarian justification of punishment that the latter could proffer good reasons for punishing an innocent person. This attack, of course, avoids the real issue of the debate, and that is the morality of punishing the *guilty*. This attack, however, is usually deployed by supporters of the retributive theory of punishment who assume ‘punishing the guilty’ to be a self-evident moral truth. This latter assumption is the issue that mostly concerns us here.

## II

### Punishment as Spoken of in Metaphors

The human being is the only animal that punishes some of its own members. Punishment, therefore, is quite a human institution, but in this very fact the institution of punishment, like any of our other social institutions, is amenable to moral evaluation. A complicating factor in both understanding and assessing the State's justification of punishment, however, is that punishment is often talked about in metaphors, such as, for instance: (1) 'balancing the scales of justice'; (2) 'wiping the slate clean'; (3) 'paying a due (or a debt) back to society'; (4) 'removing a cancer from society', and so forth. Such metaphors, alas, are, at best, darkening metaphors that cast much obscurity on the topic of the debate from the outset. They do not help matters. As such, they need to be dealt with briefly and dispelled, before any intelligible discussion of punishment and its justification can unfold.<sup>14</sup>

#### (1) *Balancing the Scales of Justice*

In inflicting punishment on the perpetrator of a crime, what, exactly, is being balanced by the punishment? Firstly, the crime committed and the punishment inflicted by the State are clearly not similar units of comparison. They thus cannot be balanced. Secondly, if 'balancing the scales of justice' means 'restoring law and order' or 'restoring the unfair advantage gained through crime' (as it is often put) through punishment this is clearly not the case. The infliction of punishment on the offender for the crime perpetrated cannot *a priori* restore the status of 'law and order' before the crime took place, nor act as a support ('back-up') to 'law and order', or prevent law-breaking precisely because you are punished *because* you broke the law. Punishment steps in *after* the crime has been committed. Nothing is 'restored' or 'balanced' through the punishment. If one still wishes to look at punishment in terms of balancing the scales of justice, it can only mean revenge; that is to say, you deserve to be harmed because your actions harmed society, and that 'balances' things.<sup>15</sup> Whether punishment, as a formal institutional revenge-system of the State, is morally justifiable, or not, is an issue that would require much more in-depth analysis than I can presently give in this paper.<sup>16</sup> It is, nevertheless, of relevance to note about any alleged link between the infliction of punishment on an offender and the offender's crime that nothing whatsoever, in reality, is being 'weighed', 'balanced', 'rectified' or 'restored' through the punishment (as the metaphor would suggest).<sup>17</sup> Any alleged real connection between the

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<sup>14</sup> In relation to the metaphorical depiction of 'punishment' as a natural reflex action of society, 'like that of a living body to injury', Honderich remarks, this is 'at best darkening metaphor' (p. 11). This evaluation can be extended to most (if not all) of the metaphors deployed in the depiction of punishment as 'balancing the scales of justice', 'wiping the slate clean', 'paying a debt back to society', 'removing a cancer from society' and so forth.

<sup>15</sup> This is the main point of Rachel's paper regarding the justification of the retributive theory of punishment, which in that author's view, falls under 'the general idea of desert'.

<sup>16</sup> Even if one argues that the State, through its punitive systems, is an impartial and disinterested party, and so, not personally revengeful, this, of course, does not prohibit or preclude a person bringing a court action against another individual(s) from a motive of personal revenge.

<sup>17</sup> Rachels, for instance, believes that 'Punishment corrects things in the direction of greater equality. That is why it is commonly said that crime "upsets the scales of justice" and that punishing wrongdoers "restores the balance".' (p. 475, ff.) That crime causes hurt, harm, damage, sometimes death, and unfair advantage over others is undeniable, but punishment does not make amends for such hurt, harm, damage, death, or unfair advantage gained. Punishment does not and cannot *restore* the initial 'wrong-doing'. Other non-punitive measures that seek to 'restore', 'recompense', 'rehabilitate', 'restrain', would appear to be more appropriate

in inflictions of punishment and the crimes committed is mythical because in such cases one is comparing the incomparable.<sup>18</sup> ‘No punishment, [then,] however fitting, can restore the world to an equivalent condition to that obtaining before the crime.’<sup>19</sup> This is because, as O’Donovan also notes, ‘There is no “equality” between how things were before the offense and how they are after the punishment.’<sup>20</sup>

## (2) *Wiping the Slate Clean*

What exactly is being ‘wiped clean’ through the punishment? The crime committed is a historical event. What is done cannot be undone. Punishment cannot wipe out the historicity of the crime. What is wiped clean through punishment in the eyes of the State, of course, is one’s liability to be punished again for the same crime (‘I *did* my time’). This does not do anything for the crime, however. In this sense, nevertheless, it is no doubt true to say that punishment does something, it removes legal guilt; but the crime committed is not being ‘annulled’ by the punishment.<sup>21</sup> Furthermore, legal guilt and moral guilt are two different things. Legal guilt can be removed upon completion of the punishment (e.g., the sentence), but this does not mean that moral guilt (if one was sorry for the crime committed, for example,) will be removed on completion of the punishment. Punishment is not the kind of thing that removes moral guilt. Forgiveness does this; but forgiveness is not permissible in a court of law. If the person in the ‘dock’ is found guilty of committing a crime, and is sorry, the person still must be punished. It is not the State’s (or the judge’s) function in a court of law either to choose or not to choose to inflict punishment on the offender; nor is it the offender’s choice either to receive or not to receive the punishment meted out by the state. Punishment is inflicted against the will of the individual.<sup>22</sup> Punishment involves no negotiation; it is domination.<sup>23</sup> In sum, nothing is being wiped clean by the punishment, as

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responses to the wrong-doing involved. O’Donovan, for example, notes that ‘If you take what the thief stole and return it to its rightful owner, that is not punishment, merely restitution; if you take the life of the murderer who took your brother’s life, that is not punishment, but vengeance (p. 111). Given that O’Donovan seeks to defend the practice of punishment in terms of society’s ‘judgment’, such remedies as restitution are therefore ‘merely’ restitution, and personal acts of vengeance not ‘punishment’ because personal. See our conclusion.

<sup>18</sup> Even if we take it to be literally the case that punishment ‘must fit’ the crime — as in ‘an eye for an eye’ etc. — the pain inflicted by the criminal and the pain inflicted by the state are not identical units. If a person, for example, murders (= unjustly kills) another person, and forfeits one’s life through capital punishment, the State does not believe that it is murdering (= unjustly killing) its citizens. This is borne out in Rachels own remarks, towards the end of his paper in a section entitled ‘*Proportionality*: The punishment should be proportional to the crime’, when he declares (self-defeatingly in my view): ‘Sometimes it is not easy to say what punishment “fits” crime; nevertheless, the basic idea is clear enough’. O’Donovan also notes that ‘(I)n fact, the only practical application of the *lex talionis* ever advocated is the death penalty for murder’ (p. 120), but even in this case our comment above holds — the state does not believe it is doing the same thing as the murder, murdering (unjustly killing) a fellow citizen.

<sup>19</sup> O’Donovan, p. 112.

<sup>20</sup> O’Donovan, pp. 111-112. Thus no ‘*status quo ante*’ is being ‘restored’ or ‘given back’ or ‘annulled’ through such punishment, as Hegel and others suggest (*ibid.*). See also *supra*, n. 17.

<sup>21</sup> See previous n. 20 and n. 17.

<sup>22</sup> This is what Lucas refers to when he says punishments are ‘unwelcomed’. See J.R. Lucas, *Responsibility* (Oxford: Clarendon Press, 1995), Chapter 6 Punishment, pp. 86–123 (p. 86).

<sup>23</sup> In ‘Section 2. Why People Should Be Treated as They Deserve’, Rachels argues that ‘those who treat others badly provoke ill treatment in return. That is why, when a criminal is punished, it may be said that “He brought it on himself”.’ This, however, is a largely metaphorical expression. The convicted criminal does not choose the punishment for the crime he committed and the law broken; rather, punishment is inflicted against the will of

the metaphor would suggest, neither the crime committed nor the moral guilt that the offender may have regarding the crime committed.

(3) *'Paying a Due (or a Debt) Back to Society'*

What 'due' (or 'debt') exactly is being paid back (or owed) to society by way of the infliction of the actual punishment on the offender (whatever format the punishment takes, e.g., incarceration, fines, floggings, amputations, capital punishment)? When it is said that punishment is *for* the crime, this does not mean that it is in support of the crime (as when one says 'John is for Manchester United'), nor does it mean that punishment cancels the crime (as in when one says an aspirin is *for* a headache, i.e., it cancels the headache); rather, it identifies whom it is that is to be punished — punishment is for the person who perpetrated the crime, and not for the person who did not commit the crime. Only the guilty are to be punished. But this identifies the person who did the crime and does nothing for the crime perpetrated.<sup>24</sup> Punishment *for* the crime might mean that this amount of punishment is to be meted out against that person for the crime that that person has been found guilty of. Again, it is the commensurability of the severity of punishment to be allotted that is being captured here, and nothing about the crime itself — the severity of the punishment does not remove or cancel or fix the crime done.<sup>25</sup> What actual 'due' (or 'debt') then, is being paid back to society (or 'being collected by society') through the punishment?<sup>26</sup>

(4) *'Removing a Cancer from Society'*

If punishment cannot do anything about the crime that actually has been committed, but is, nevertheless, to be allotted to the person who is guilty of committing the crime, then is this what is captured by the metaphor of punishment as necessary in order to remove such 'a cancer from society'? This way of talking about punishment, however, is entirely misleading. Surgery does something with cancerous cells, and if successful the individual is able to live. Surgery improves things. Punishment, on the other hand, does nothing about the crime committed. Punishment does not improve things that were originally wrong or requiring fixing. What, then, exactly is being done to 'fix' the crime through the deliberate infliction of pain/ suffering on a person who committed the crime? If punishment as 'removing a cancer from society' refers to detaining the person who committed the crime in prison, what is

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the (caught and prosecuted and found guilty) individual. See *infra* n. 30 and corresponding definition of punishment given by Hart.

<sup>24</sup> 'Punishment singles *the offender* out for especially unfavorable treatment, and is thus coercive in a way other forms of judgment are not. Punishment excludes the offender from some elementary form of respect for person, property, and liberty that citizens customarily accord to one another.' (O'Donovan, pp. 109–10, my emphasis).

<sup>25</sup> And, of course, this asserted commensurability or 'fittingness' or 'proportionality' between the crime and the punishment is *mythological* because, in reality, '(T)he relation between them cannot be an exchange, which only occurs between commensurables' (O'Donovan, p. 110).

<sup>26</sup> Stripped of metaphor, then, 'in reality what is at stake in this question is the relation of retributive practice to the goods it secures' (O'Donovan, p. 115). In reality, however, punishment does not benefit 'the victim', nor 'the offender', nor 'society at large', which are the 'three possible beneficiaries of punishment' or 'goods' that traditional-classical discussion on punishment, as O'Donovan comments, identified (pp. 115–16). The question what is punishment good for is an intelligible question, and so, requires an answer of some sort. If the answer to this question is that punishment, as a practice, is not good for what it claims to rectify or to resolve in relation to the crime, then that is of utmost significance to its evaluation.

removed is the person who committed the crime, and not the crime, the crime remains in place. And if this person is removed from life altogether, through State inflicted capital punishment, such still does not remove the crime.<sup>27</sup>

If it is the case that punishment cannot, as a matter of fact, do anything afterwards to remedy the initial crime that has taken place precisely because the crime has taken place, what about the victim of the crime? Has not the victim the right to have grievance satisfied? Is the satisfaction of grievance not a justification of punishment?

That punishment of the offender satisfies grievance in some cases cannot be doubted, but in many cases punishment of the offender does not (and cannot) alleviate grievance or irreparable harm endured by those upon whom the crime was perpetrated or upon whom it had a detrimental affect.<sup>28</sup> Even if Kant is right to note that ‘when someone who delights in annoying and vexing peace-loving folk receives at last a right good beating, it certainly is an ill, but everyone approves of it and considers it good in itself, even if nothing further results from it’,<sup>29</sup> we can still raise the question is delight in seeing someone suffer, even a scoundrel, and the satisfaction of grievance experienced therein, a legitimate moral basis for the justification of inflicting punishment on the perpetrator? That is the moral question that needs to be addressed, and any answer to this question has to be argued for and reasons supplied, and not just asserted. Statements of fact do not make statements of right. Feelings do not win arguments. Nor do feelings loose arguments. Feelings, simply, cannot be substituted for argument.<sup>30</sup> Again, it is outside the limits of this article to address this complex issue, but it is of relevance to note in relation to the case put forward for the necessity of punishment to alleviate grievance that many victims of crime, or those close to a victim of crime, hold the view that punishment of the offender(s) does not and cannot alleviate grief suffered or damage done simply because punishing the perpetrator(s) cannot undo the crime done and the consequent grief for the victim(s), if alive, or for those

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<sup>27</sup> According to one commentator, ‘retributive punishment is designed to restore the status *quo ante*. It advocates hold that “evil calls and cries for obliteration,” and he [the retributivist] will not surrender the hope that, in some sense, the wrong can be annulled and set right by some vigorous counteraction of a penal character’. Walter Moberly, ‘Expiation’, excerpt from his *The Ethics of Punishment* (1968), in *Contemporary Punishment, Views, Explanations, and Justifications*, eds, by R. J. Gerber and P.D. McAnnay (Indiana: University of Notre Dame Press, 1972), pp. 73–82 (p. 81). Appealing to such injunctions that ‘evil calls and cries for obliteration,’ or ‘evil doing must be stamped out,’ or there must be ‘zero tolerance of crime’ do not explain what punishment does or is supposed to do about the crime done.

<sup>28</sup> This is why O’Donovan remarks that ‘The justice manifest in punishment is not exchange-justice, but is correctly understood as attributive’ (p. 113). This, nevertheless, cannot be construed, *ipso facto*, as a moral justification for such attribution.

<sup>29</sup> Kant, *Critique of Practical Reason*, p. 170. The remark is quoted by many supporters of the retributive theory of punishment, e.g., it prefaces Rachels’ paper ‘Punishment and Desert’.

<sup>30</sup> Feelings tell us other things, of course. Note, however, Nietzsche’s observation (and admonition) regarding the psychological motives behind punishment: ‘But thus do I counsel you, my friends: distrust all in whom the impulse to punish is powerful’. Whatever about the psychological origins whence the feelings of revenge that may arise, say, from resentment, for any individual, O’Donovan is correct to note that ‘[Moral] Intuitions are not dismissible, but neither are they self-sufficient; they are open to correlation with each other and with other elements of moral experience.’ (p. 115). And our moral experience has taught us, for example, that ‘informal vendettas’, outside of the law, lead to more and not less social disintegration (*ibid.*, p. 123). Whether resolutions once ‘sorted’ via vendettas is to be de-personalized into institutionalized revenge systems in a given society, through, e.g. state capital punishment) by a government is an entirely different matter and a highly debatable matter. Other non-punitive responses are possible. O’Donovan does note that ‘The paradigm case of exchange-justice for Thomas is not punishment, but restitution (II-2.62)’ (p. 112–113, n. 13). Of course, one cannot bring a person murdered back to life, but killing the offender is not a necessary response, other measures are possible e.g. non-punitive restraint.



aggrieved by the crime. This is another way of saying that there is no real connection between the crime committed and the punishment meted out afterwards. If punishment, therefore, does nothing either for the crime, or for the perpetrator of the crime, or for the victim of the crime, then why is punishment necessary?

### III Defining the Concept of Punishment

In the previous section we noted that metaphors such as ‘balancing the scales of justice’, ‘wiping the slate clean’, ‘paying a debt back to society’, and ‘removing a cancer for society’ that are used in describing punishment are not helpful at all in the debate about the justification of punishment. Far from resolving the problem, they cast obstinate obscurity on the issue at hand. Once these metaphors are dispelled from the debate, however, we are still left with the question that we raised at the end of the previous section, why the necessity of punishment? In order to address this question, we need to figure out what punishment is first, without appeal to metaphors but to the concept and the reality of punishment itself, and then address the issue of its justification. Again, it is of importance to note that though related, these questions of ‘What is punishment?’ and ‘what justifies punishment?’, nonetheless, are distinct questions. They are also intelligible questions, and intelligible questions require some kind of answers. The first question seeks a definition of the concept of punishment. The second question addresses the justification of punishment. This section deals with the definition of punishment.

Drawing on previous attempts (by Kurt Baier, Anthony Flew, and S. F. Benn) to define punishment, H.L.A Hart notes that ‘the standard or central case of “punishment”’ contains five main components: ‘(i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against legal rules. (iii) It must be of an actual or supposed offender for his offence [= the crime]. (iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.’<sup>31</sup> Honderich thinks this definition of punishment can be equally captured in the definition of ‘an authority’s infliction of a penalty on an offender’.<sup>32</sup> This definition, however, is incomplete, as it leaves out an essential ingredient in punishment, namely, ‘for the crime (at least allegedly) done’. To punish, then, is a relational verb, it necessarily involving three inter-related components, that is: the punishment ‘x’ [= whatever format that takes] in inflicted on ‘y’ [= the person] for ‘z’ [= the crime]. All of these three items are needed in order to make any sense or reference to punishment. That we also require an acceptable authority to inflict the punishment to complete the definition of punishment is of crucial significance too because without an acceptable dispenser of punishment, other things which are not, strictly speaking punishment, can go by the name of punishment. Lynch mobs or vigilante groups who ‘take punishment into their own hands’ deviate, both in theory and in practice, from the concept of punishment. This is why ‘punishment beatings’ and ‘punishment killings’ that take place outside of the law are called ‘so-called punishment beatings’ and ‘so-called punishment killings’ precisely because the authority that meted the ‘punishment’ is not a legitimate authority. Thus in the State’s justification of punishment, we can define punishment in full as: an acceptable public authority inflicts harm (physical pain,

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<sup>31</sup> H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968; 2008), pp. 4–5.

<sup>32</sup> Honderich, p. 11.

loss of freedom, fine, death etc.) on a person for something done, that is, for the crime committed that infringes state law. This definition rules out many misuses of the term, such as, for instance: ‘the Irish football team were punished 2–0 by Italy in the World Cup Semi-final for the Irish team manager’s decision to play three and not four defenders’; or, ‘the rock-star had a head-ache in the morning which was punishment for over-indulgence in alcohol the night before’; or ‘the rabid dog was put in quarantine (solitary confinement) as punishment for having a contagious disease’; or, ‘tax payers are being punished by a levy which the government is implementing on pension schemes in order to recoup bad debts incurred on account of unscrupulous practices among some bankers’, or ‘tax payers are being punished too for having to pay for those who are kept in prison’ and so forth. All of these are *misuses* of the term ‘punishment’. All of these examples play on either reducing or focusing on only one the components of punishment mentioned above in Hart’s definition, e.g., unpleasantness. Most medicines, for instance, are unpleasant, but they are not, therefore, punishments. And one cannot be punished for nothing.<sup>33</sup> In sum, punishment is an acceptable public authority’s infliction of harm on an offender for a crime (at least allegedly) done.

#### IV Justifying Punishment

Given that we know what punishment is, namely, an acceptable public authority’s infliction of harm (physical pain, loss of freedom, fine, death etc.) on a person for the crime committed, what justifies such a practice? Or, perhaps, more simply put, what is punishment good for? This is a different question to defining what punishment is, but it is, nonetheless, an intelligible question, and it is one that brings us to the question of the morality of punishment, its justification.

In response to this question, three justifications of punishment, also referred to as three ‘theories’ of punishment, have been put forward, and which we have already briefly met in section one of this paper. These justifications are: (1) you deserve punishment for breaking the law and committing the crime (the theory of retribution); (2) punishment deters future law-breaking (the deterrent theory); (3) punishment reforms the law-breaker (the reformatory theory). Justifications (2) and (3) are usually referred to as ‘utilitarian justifications/ theories’ since they emphasise the point that part of punishment is the good consequences (i.e. deterrence and/ or reform) that punishment can produce for society, i.e., punishment encourages law-abiding through threat of pain — and the actual infliction of pain, if one does not keep the law — among less than perfectly legally obeying human beings.<sup>34</sup> Punishment as a deterrent or as a reformatory measure is viewed from this perspective, then, as something useful for the ‘smooth functioning’, as it were, of society. The retributive theory, however, offers quite a different conceptual justification for punishment. It does not look to the future, but simply and purely to the past, and more particularly to the past fact that the crime has been committed. That is to say, the only justification for inflicting pain on the offender is the fact that the crime was committed. It is

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<sup>33</sup> ‘Either you punish someone *for* something, or you do not punish at all.’ O’Donovan, p. 103.

<sup>34</sup> Thus the three theories become two theories of punishment, the ‘utilitarian’ and the ‘retributivist’ types. See, Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press, Press, 1997), pp. 91, and ff.

thus usually characterised as a ‘backward looking’ theory of punishment. It should not be overlooked, nevertheless, that both retributive and the utilitarian justifications of punishment are, from *conceptual* points of view, *essentially different* kinds of justifications put forward for punishment. This has not prevented, alas, some contemporary philosophers from trying to combine the best features of both utilitarian and retributive justifications, but such compounds rather than solves the problem.<sup>35</sup> And such philosophers cannot but be unsuccessful precisely because, as Mabbot clearly noted, deterrence and reform are not part of the definition of punishment at all; hence, they cannot feature in the justifications of punishment — even if these added goods of deterrence and reform were to be and are to be achieved by the punishment, and that, of course, is highly debatable.<sup>36</sup> At any rate, deterrence and reform is not the *raison d’être* for punishment. Punishment, by definition, *is* retribution, there is no other way to understand it, but therein resides the main problem. An essential part of the meaning of the concept of punishment is that it entails that you are being punished because you committed a crime — but this assertion of the definition of punishment as retribution cannot be cashed in as a moral justification of punishment.<sup>37</sup> If punishment is to be justified, it has to be capable of being justified, nevertheless, in terms of what it is, that is to say, in terms of retribution. This is the most difficult but the most important ethical question in the debate. In Mabbott’s own paper, it is not clear whether he is arguing that (1) retribution is logically bound up with punishment, in that pain deliberately inflicted on a person who did not break the law and commit a crime is not, by definition, punishment, or that (2) it is morally permissible (or morally obligatory) to punish the guilty. Legal justification and moral justification are two separate issues. Mabbott, then, does not address this matter in his paper, but falls back in re-asserting the definition of punishment as retribution. This enables him to exclude from *moral* considerations, nevertheless, the feasibility of all utilitarian justifications of punishment as the latter justifications are not necessarily based upon the meaning of punishment itself, which is retribution. This leaves the moral justification of punishment as retribution *itself* unaddressed, however. It seems to me that Mabbott, nevertheless, gives us a hint in his paper about where a possible correct

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<sup>35</sup> Cf., Hugo Adam Bedau’s attempt to do this, however, in his article on ‘Punishment’ (2005), esp. ‘5 Conclusion’, in the on-line Stanford Encyclopedia of Philosophy at <http://plato.stanford.edu/>. O’Donovan likens the debate between the three, irreconcilable and competing theories of punishment as retribution, reform and deterrence to ‘a race of hobbled horses. None of the beasts are capable of finishing the course, so the victory goes to the jockey who knocks his rivals over’ (p. 102). Combining features of both type of justification, therefore, adds another horse in the race that is not capable of finishing the race.

<sup>36</sup> Other non-punitive measures may have much better effect in deterring law breaking (e.g., video cameras in buses to prevent vandalism). Deterrence is a laudable objective of punishment, but whether *punishment* can achieve this is highly dubious. 70% recidivism in Irish prisons would suggest otherwise. The actual extent of law-breaking is difficult to assess, nevertheless, because crime reported is a proportion of actual crime taking place, and crime going to court is a small proportion of crime reported, and crime convicted in court is a small proportion of the crimes prosecuted. Hence reports in ‘rise in crime’ may mean either (a) rise in reported instances of crime, or (b) rise in conviction. Whether one can deduce from this that law-breaking is increasing in society is, of course, impossible.

<sup>37</sup> This, I take it, is what Bedau means when he remarks and emphasizes the point: ‘*Defining* the concept of punishment must be kept distinct from *justifying* punishment. A definition of punishment is, or ought to be, value-neutral, at least to the extent of not incorporating any norms or principles that surreptitiously tend to justify whatever falls under the definition itself. To put this another way, punishment is not supposed to be justified, or even partly justified, by packing its definition in a manner that virtually guarantees that whatever counts as punishment is automatically justified. (Conversely, its definition ought not to preclude its justification.)’ (p. 5). If, however, punishment, by definition, *is* retribution, then its moral justification as retribution stands or falls together.

answer to this question may lie, in relation to an analogous situation that he recounts that arose for him when he was ‘disciplinary officer of a college whose rules included a rule compelling attendance at chapel’.<sup>38</sup> Some students broke this rule and he believed that he, therefore, had to punish them. It is worth relaying this story.

Many of those who broke this rule broke it on principle. I punished them. I certainly did not want to reform them; I respected their characters and their views. I certainly did not want to drive others into chapel through fear of penalties. Nor did I think there had been a [moral] wrong done which merited [morally] retribution. I wish I could have believed that I would have done the same myself. My position was clear. They had broken a rule: they knew it and I knew it. Nothing more was necessary to make punishment proper.<sup>39</sup>

If we look carefully at the above story we can deduce at least some things of relevance to the issue of the moral justification of punishment. Firstly, it is not necessarily true to maintain that we treat human beings as (more) responsible agents by punishing them.<sup>40</sup> There are other ways of treating people who break the law as responsible agents without recourse to punitive measures. In fact, Mabbott would have liked to have believed that he too would do the same as these students, as a matter of moral principle, and that the threat or actual infliction of the penalty would not be the reason for his either obeying or disobeying the particular rule.<sup>41</sup> In other words, we do not treat human beings as more responsible agents by *punishing* them. Secondly, it is only because the students broke the rule that they ‘must’ or ‘should’ legally be punished, as Mabbott argues. In other words, the students did not, in Mabbott’s opinion, deserve a harm done to them on moral grounds, but on legal grounds only. Mabbott himself, however, says that he, as disciplinary officer, had no moral reason to justify the infliction of punitive action on the individuals. If he had no moral reasons, then clearly he is not and cannot be justifying the retributive theory of punishment from a moral point of view, but implementing, without moral legitimating reasons, the practice of punishment. In other words, his proposed defence of the retributive theory of punishment in his paper is not a defence, but a re-assertion of the meaning of the concept of punishment: you are to be punished, by definition, if you break a rule and commit a crime, but this, as his own story as a disciplinary officer indicates, *cannot be held as a legitimate moral argument for the justification of punishment.*

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<sup>38</sup> Mabbott, p. 155.

<sup>39</sup> Ibid.

<sup>40</sup> Herbert Morris agrees with Moberly that punishment is retribution. See, H. Morris, ‘Persons and Punishment’, *The Monist*, 52 No. 4 (Oct. 1968) 475–501. He attacks the view that the therapeutic-reform approach, as an alternative to punishment, is justifiable because this approach assumes that the person is sick, and so, the danger here is to take people and treat them and deny their responsibility. Thus Morris argues that by punishing people we are treating them as responsible agents. The question we can raise, however, is: can we treat those who break the law as responsible agents without punishing them?

<sup>41</sup> J.R. Lucas makes the interesting argument that the purpose or justification of punishment cannot be taken in isolation from the purpose and justification of law, and so, the actual threat of punishment has to be tied to the enforcement of the law — keep the law, or else you will be punished. See J.R. Lucas, *Responsibility* (Oxford: Clarendon Press, 1995), Chapter 6 Punishment, pp. 86–123. This argument, however, can be disputed. First, it is difficult to see how the actual infliction of punishment, the validation of the threat of punishment, makes the law prevail when one is punished because one has broken the law. Even if the threat of punishment prevents most people from breaking the law, and this serves some sort of reformatory (or deterrent) function on people to obey and keep the law, one can still ask is this a morally justifiable position to adopt in regulating human conduct.

## V Conclusion

Punishment is often talked about in (misleading) metaphors and defended by recourse to qualitatively different and mutually exclusive retributivist or utilitarian-consequentialist moral justifications, and even features of both of these justifications held by the same person as essential to its justification. This, however, should not deflect one's attention from the fact that stripped of metaphors, such as, 'balancing the scales of justice', 'wiping the slate clean' or 'paying a debt back to society', punishment is revenge, and that retributivist and utilitarian-consequentialist justifications of punishment as an institutionalized revenge system are incompatible justifications of that institution. The pertinent moral question regarding punishment, therefore, would appear to be whether revenge is morally justifiable, or not. Addressing this matter would take much more time and detailed treatment than at hand for me at the moment, but it is suffice to say that when social order breaks down and revenge is the measured response to that break down in social order, the order is not restored through acts of revenge but further disintegration of the order happens.<sup>42</sup> This is well illustrated in the films on the *Mafia* and in 'real life' 'turf wars' among organised criminals e.g., 'drug barons' and their 'competing groups' — their forms of 'justice' leads to more and not less death and destruction in its wake. Whether the deliberate infliction of harm on the perpetrator of a crime for the initial harm done through punishment that is legitimated through the institution of retributive-punishment practice of the State fares any better from a moral point of view at least questionable and debatable.<sup>43</sup> So, does the utilitarian justification for State punishment fair better? Reform and deterrence are laudable objectives, but can the State achieve these through *punishment*? Punishment steps in after the law has been broken, and so, from this point of view, punishment cannot be justified in 'maintaining' or 'supporting' law and order. Punishment, as a reformative measure, is highly suspect too. Infliction of harm could lead to deeper resentment. Harsher sentencing could lead to more intelligent criminal behaviour on others to avoid detection. Non-punitive measures of reform and rehabilitation are better suited to achieve the objectives of reform and rehabilitation which the State seeks.

If punishment, therefore, can do nothing for the crime that had been done, and cannot do anything for the perpetrator of the crime, or anything for the victim of the crime, is it still a valuable social institution? If punishment is not capable of doing what it claims it can do in relation to the crime, and if it does not effectively reform or deter the criminal, or exact retribution, then what can we put in its place? This question concerns the phasing-out of the punitive dimension of punishment, and the putting in its place *alternative* responses, but this takes us beyond the question of the justification of punishment and requires thinking differently about more appropriate ways of responding to crime committed and to

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<sup>42</sup> It is often argued that punishment by the State is not personal, and hence cannot be understood, correctly, as personal vengeance; however, see *surpa* n. 12.

<sup>43</sup> 'We are all mortal, and our life has a limited expectancy. That fact gives all crime and punishment its meaning. Two years in prison are "two good years of my life"; if we were immortal, they would count for nothing. A heavy fine is a drain on resources needed for food, clothing, and shelter. Corporal punishment weakens the bodily constitution. Every serious crime is an assault, directly or indirectly, on the victim's life; so every punishment, too, is an assault on the offender's life.' O'Donovan, p. 122. We can still ask, what is the latter, the assault, i.e., punishment, good for? What justifies this?

those who break the law.<sup>44</sup> This means, however, that a certain amount of crime will have to be tolerated, but *non-punitive* remedies that are focused on recompense, restitution, rehabilitation, reform and restraint are all measures designed to make things better. It is hard, however, to get people to think non-punitively because, like revenge, the desire for punishment is a natural reaction. There is, nevertheless, growing dissatisfaction with the effectiveness punishment as a social institution. Recent choices, for instance, offered to drug addicts who are found guilty of stealing to feed their habit, to go to jail or to attend rehabilitation clinics, point against the argument for the necessity and effectiveness, and so, value of punitive systems. Punishment steps in *after* the crime has taken place; it bolts the door when the horse has fled. That *punishment* by the State, therefore, does something about *the crime* committed in the State and that the State through *punishment* is addressing *crime* would appear to be a noble lie of the State. Part of the way society is, nevertheless, is the way *we want* it to be. If we wanted to address crime differently through non-punitive practises that would change the way society works and social existence develops. Punishment is, nevertheless, a fact of society but it is worth noting in closing that only a very select few people receive punishment for crimes actually committed. Of actual crime taking place, a lot of crime goes undetected and a lot of crime detected is not reported. A certain amount of reported crime is not (and cannot) be seriously investigated. Much crime investigated does not lead to detection. Much of such detection of crime does not lead to prosecution (e.g., insufficient evidence). A lot of crimes prosecuted in courts do not lead to conviction (e.g., reasonable doubt has to be respected). A lot of crimes convicted in court do not lead to punishment (e.g., ‘probation act’, appeals court, squashed convictions on technicalities).<sup>45</sup> Only a very select few of those who break the law are punished by the State for the actual crime taking place in society. If justice, therefore, is so selective, is this justice at all? Or, is this not part of the scapegoat phenomenon?

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<sup>44</sup> This would apply, therefore, in analogous situations of punishment too, such as, e.g. by schools, parents, employers, clubs etc.

<sup>45</sup> Increase/ decrease in crime reported or in crime convicted, therefore, do not imply increase/ decrease in actual crimes being committed in a given society. It is thus difficult to assess the extent of actual law-breaking in society and on whether crime is on the increase or decrease by focusing on increase/ decrease of statistics relating to crime reported or to crime punished. See, *supra*, n. 36.

