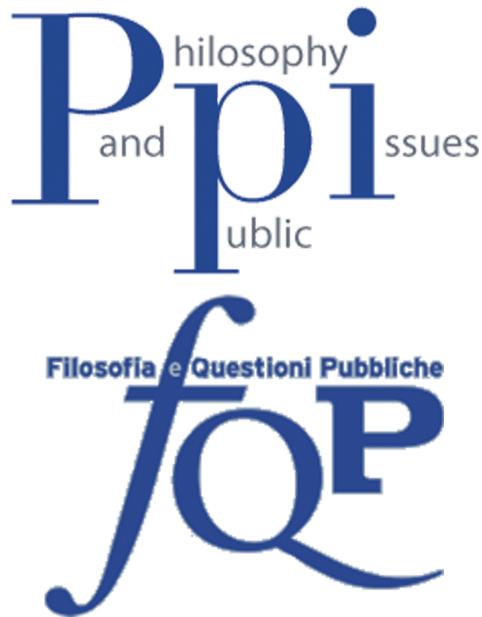


SYMPOSIUM
THE PHILOSOPHY OF PUNISHMENT



THE REACTIVE SENTIMENTS AND
THE JUSTIFICATION OF PUNISHMENT

BY
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The Reactive Sentiments and the Justification of Punishment

Andrew Engen

The conviction that those who commit serious acts of wrongdoing should be punished is secure in our moral thinking. Public debate about whether an accused murderer or rapist should be punished focuses on his guilt or innocence, not whether he should be punished if he is guilty.¹ Certain modes of punishment, such as the death penalty, are sometimes the subject of vigorous debate, but the idea that murderers and rapists should be punished is not. A theory of punishment that takes commonsense morality seriously must give an account of the positive reason the state has to punish those who commit serious crimes in our society. Without such a reason, the state would be devoting its limited resources to pointlessly harming its citizens. I will call this the *positive reason* desideratum. In order to make sense of our moral thinking, this account should be sufficiently general: it should explain why we always, or almost always, have positive reason to punish serious crimes.

It is remarkable that the idea that serious wrongdoers should be punished is so entrenched in our moral thinking. For no less entrenched is a seemingly conflicting moral conviction: that

¹ This is not simply out of respect for the rule of law. The applications of laws that are controversial are themselves often the subject of public debate, in many cases to highlight the injustice of those laws.

people have moral rights to goods such as liberty and property. Our conventional modes of punishment, such as imprisonment, seem to violate this set of rights. Moral philosophers writing on punishment have largely been concerned with this issue—not why we have positive reason to punish those who commit serious crimes, but how we are ever permitted to punish any persons who normally bear rights to liberty and property. A theory of punishment must explain why the punished cannot reasonably object to their punishment, even though it deprives them of goods to which they otherwise have a right. I will call this the *no valid objection from rights* desideratum.

In this paper, I defend an expressive justification of punishment grounded in our emotional responses to wrongdoing. This “reactive theory” is constructed out of a Strawsonian account of moral responsibility that understands our practice of holding one another responsible in terms of the reactive sentiments of resentment, indignation, and guilt. Punishment is morally justified on the theory insofar as it appropriately expresses the justified indignation of the community in response to serious wrongs. I contend that this blaming function of punishment avoids some familiar problems encountered by traditional justifications of punishment in satisfying the *positive reason* and *no objection from rights* desiderata, which makes it a promising centerpiece of a theory of punishment.²

² In trying to make sense of “our” moral thinking about punishment, I will be drawing upon my own intuitions as well as my understanding of the practices of moral responsibility and the system of punishment in the liberal democratic, Western society in which I live. This bias is apparent in my formulation of the *positive reason* desideratum. The notion that “we” have reason to punish addresses readers who have some access to political power. Because the reactive theory justifies punishment as a reaction of the community to crime, it will only apply to those societies where the state acts on behalf of the people.

I

Deterrence and Retribution

One traditional strategy for justifying punishment focuses on its deterrent function. According to deterrence theories, punishment is justified by the role that it plays in reducing crime. Imprisonment, for example, both provides a disincentive for potential lawbreakers and incapacitates those who have shown a disposition not to respect the law. Deterrence theories have obvious appeal: the reduction of serious wrongdoing is clearly an important social goal. Yet critics question whether the deterrent function can satisfy each of the *positive reason* and the *no objection from rights* desiderata.

We can conceive of scenarios in which punishing a serious criminal would not deter crime. Consider the assassin of a civil rights leader in the distant past. He is not apprehended until years after the murder. Great social progress has been made so he and others are no longer disposed to commit similar crimes because the political ends they were intended to achieve are no longer achievable. We can suppose that punishing the assassin would do nothing to reduce crime. The deterrent function of punishment does not explain why, intuitively, we still have positive reason to punish the assassin for his atrocious wrong. In response to this counterexample, it might be argued that a deterrence theory could come up with *some* explanation of how punishing him would deter crime, given more information about the case. Such a strategy cannot, however, make sense of our moral thinking; our shared conviction that we have positive reason to punish the assassin does not depend on such information.

The most common objection to deterrence theories casts doubt on whether they can satisfy the *no valid objection from rights* desideratum. The objection holds that the state is not justified in

punishing a person known to be innocent, even if doing so would effectively deter crime. Intuitively, an innocent person has a valid objection to her imprisonment with appeal to her rights, regardless of the deterrent effect of her imprisonment. A deterrence theorist could claim that the bad consequences of punishing the innocent never actually outweigh the good.³ But the validity of an innocent person's appeal to her rights to liberty or property do not seem to hang in the balance as we weigh such considerations. This points to a larger problem with the consequentialist character of deterrence justifications: they treat the punished as causal levers in a system that aims to make society secure.⁴ In commonsense morality, rights are thought to limit how people may treat one another independently of the consequences of that treatment. The state is not normally justified in violating people's rights simply on the basis that doing so would lead to good social consequences. Deterrence considerations alone do not explain why such treatment is justified when we punish serious crimes.

The traditional rival to deterrence theory, retributivism, is based on the idea that wrongdoers deserve to suffer in proportion to the harm they have caused their victims. Punishment fulfills its retributive function by inflicting this deserved suffering on the punished. Serious criminals do not have a valid objection to the deprivations of punishment because those deprivations ensure the criminal gets his just deserts. Retributivism justifies punishment as a backward-looking *response* to serious wrongs,

³ For a well-developed version of the criticism that deterrence theory justifies punishment of the innocent and a utilitarian response along these lines, see H. J. McCloskey, "A Non-Utilitarian Approach to Punishment" *Inquiry* 8 (1965): 239-63 and T. L. S. Sprigge, "A Utilitarian Reply to Dr. McCloskey" *Inquiry* 8 (1965): 264-91.

⁴ For a prominent presentation of this criticism, see Jeffrie Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2 (1973): 217-43.

rather than as a forward-looking device for achieving desirable consequences and thereby avoids some of the difficulties that plague deterrence theory. Unlike its traditional rival, retributivism does not take an instrumental view of criminals, but instead responds to them as moral agents.

Nevertheless, there is reason to be skeptical of the retributive idea that grounds this justification of punishment because it is in tension with the rest of our moral commitments. We generally think it is morally inappropriate to hold anyone's suffering to be intrinsically good.⁵ The idea that wrongdoers deserve to suffer in proportion to the harm they have caused is difficult to square with this moral commitment. Upon reflection retributivism can seem to be, in the evocative phrase of H. L. A. Hart, "a mysterious piece of moral alchemy in which the two evils of moral wickedness and suffering are transmuted into good."⁶ Reasonable skepticism about the retributive idea calls into question retributivism's claim to satisfy both the *positive reason* and the *no objection from rights* desiderata. While a convincing argument for the retributive idea could defuse this skepticism, attempts to ground the retributive idea are notoriously obscure.⁷ With respect

⁵ See, for example, A. C. Ewing, *The Morality of Punishment* (London: Kegan Paul, Trench, Trubner & Co., Ltd, 1929), 29: "In every other instance the deliberate infliction of pain is wrong, except where necessary as a means to happiness or ethical improvement, in every other instance our primary duty is to abstain from bringing evil on our fellow-men.... Yet here we are asked to inflict pain for pain's sake. It seems strange that a kind of action which under ordinary conditions is regarded as the very extreme of moral depravity should become a virtue in the case of punishment."

⁶ H. L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), 234.

⁷ Both critics and defenders of retributivism emphasize this point. See, for example, Ted Honderich, *Punishment: The Supposed Justifications Revisited* (London: Pluto Publishing, 2005), 196; George Sher, *Desert* (Princeton: Princeton University Press, 1987), 69.

to the first desideratum, such skepticism undermines the view that the state should spend its resources inflicting punishment on serious criminals so that they get their deserved suffering. With respect to the second, a criminal could reasonably object to the deprivations of punishment if those deprivations are justified in their role of inflicting the suffering he purportedly deserves.

Even if we assume that wrongdoers deserve to suffer, retributivism faces a further difficulty satisfying the *positive reason* desideratum. Intuitively, it seems that the state has reason to punish even when punishment does not inflict suffering on the punished. Consider less severe forms of punishment, such as community service. We do not think that the punishment of someone who finds that he enjoys community service fails to serve its purpose because it does not make him suffer. Of course, we do not punish the most serious criminals, such as murderers, with community service. However, I do not believe that this is because other forms of punishment, such as imprisonment, carry out the retributive function. I grant that the life of someone in prison often involves a great deal of suffering; confinement in small spaces often takes a physical and an emotional toll. But imprisonment does not always inflict more suffering on inmates than they would have experienced on the outside. Sometimes imprisonment takes people out of dire and dangerous situations and provides them with food, shelter, and medical care that they otherwise might not have had. When punishing someone causes less suffering in a person's life than not punishing him, it does not carry out its purported retributive function.⁸ Yet

⁸ Some retributivists might claim that this objection reveals that I misconstrue what the retributive idea is. It is not that wrongdoers deserve to be worse off overall because of their wrongdoing, but rather than they deserve to be deprived of some objective good in proportion to what they have deprived their victims, who, after all, may not have been made worse off overall by the

commonsense morality does not hold that such punishment thereby fails to be a fitting response to wrongdoing.

I have posed challenges to both the deterrent function and the purported retributive function with respect to fundamental features of our commonsense thinking about the morality of punishment. My argument has been brief and has not established that more sophisticated theories built around these respective functions could never meet the challenges. Instead of investigating those possibilities, however, I will go on to argue that the blaming function central to the reactive theory satisfies both the *positive reason* and *no objection from rights* desiderata in a relatively straightforward way. I believe that this provides reason to think that the theory better reflects our moral thinking about punishment than the traditional alternatives.

A defender of the traditional views might claim that my above argument ignores the possibility that traditional views could be combined in a way that avoids the objections I raised against each separately. General deterrence could provide the reason we have to set up a system of punishment, while the pursuit of this aim could be constrained by retributive considerations. Only those who had committed crimes would be subject to punishment because only they deserve to suffer, but they would be punished for the sake of the social good. Such a theory would evade the worries that I raised about the deterrence function's satisfaction

crime. Imprisonment deprives the imprisoned of important objective goods regardless of whether their lives are worse because of their imprisonment, thus it is a fitting response to wrongdoing. If that is the correct understanding of "retributivism," the reactive theory could be interpreted as a version of expressive retributivism that explains why it is fitting that wrongdoers are deprived some objective good. Though, as will become clear in section 3, the reactive theory understands proportionality differently than traditional retributivism.

of the *no valid objection from rights* desideratum and the retributive function's satisfaction of the *positive reason* desideratum. Nevertheless, the theory would still need to explain why we have positive reason to punish criminals when no deterrence would be achieved by doing so and why reasonable skepticism about the retributive idea does not ground a valid objection to punishment.⁹ I believe that the reactive theory is superior to such a combined theory because it avoids these difficulties while capturing some of what makes the traditional views appealing. On the one hand, part of the explanation of why we are willing to contribute significant state resources to systems of punishment is undoubtedly that we think crime reduction is an important goal. I will contend that the nature of blame gives us reason to express it in ways that contribute to that goal. On the other hand, one reason why people are sometimes reluctant to give up on retributivism, even if they are skeptical of the retributive idea, is that retributivism acknowledges the agential status of the punished. The reactive theory offers an alternative, according to which we can treat the punished as responsible agents without being retributivists.

II

The Moral Importance of Blame

In his seminal 1965 article, “The Expressive Function of Punishment,” Joel Feinberg criticizes contemporary philosophical

⁹ Igor Primoratz emphasizes the first point in objecting to a two-level theory of this kind. Primoratz, *Justifying Legal Punishment* (New York: Humanity Books, 1989), 142.

discussions of punishment for ignoring the way in which punishment expresses both the community's emotions and also the judgment that the criminal acted wrongly.¹⁰ He points out a number of important social roles that punishment plays in virtue of its expressive function.¹¹ However, he questions whether the harms characteristic of punishment are actually required to carry out that function.¹² A number of philosophers subsequent to Feinberg have offered justifications of punishment grounded in its expressive function.¹³ The reactive theory fits in this tradition, focusing in particular on the emotions from the community that punishment expresses. According to the reactive theory, the state is justified in punishing someone insofar as punishment expresses well the community's appropriate indignation toward that person's crime. In this section, I will explain how systems of punishment can be conceived of as systems of blame. I will

¹⁰ Joel Feinberg, "The Expressive Function of Punishment" reprinted in *Doing and Deserving* (Princeton, N. J.: Princeton University Press, 1970), 95-118.

¹¹ *Ibid.*, 101-105.

¹² *Ibid.*, 115-116: "One can imagine a public ritual, exploiting the most trustworthy devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed. Such a ritual might condemn so very emphatically that there could be no doubt of its genuineness, thus rendering symbolically superfluous any further physical hard treatment. Such a device would preserve the condemnatory function of punishment while dispensing with its usual physical media—incarceration and corporal mistreatment. Perhaps this is only idle fantasy; or perhaps there is more to it. The question is surely open."

¹³ See, for example R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2000); Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy and Public Affairs*, 13 (1984): 208-38; Uma Narayan, "Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment," *Oxford Journal of Legal Studies* 13 (1993): 166-82; Robert Nozick, *Philosophical Explanations* (Cambridge, Mass.: Harvard University Press, 1981), 363-397; Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993).

maintain that where political institutions are suitably democratic, the state is in a position to blame on behalf of its citizens and that such blame is morally important. A full defense of the theory, like a full defense of deterrence theory or retributivism, would take up issues of political legitimacy, such as the conditions under which the state has the authority to punish criminals. In this paper, I will set aside those issues for the most part. My more modest aim will be to explain how the blaming function that justifies punishment according to the reactive theory satisfies the *positive reason* and *no objection from rights* desiderata, and how characteristics of the emotions that constitute blame provide the theory with tools for explaining why hard treatment is required to carry out punishment's expressive function.

In "Freedom and Resentment," P.F. Strawson argues that by looking at our practice of holding one another responsible, we can see that ascriptions of moral responsibility would not be threatened by the truth of determinism.¹⁴ I will not assess Strawson's argument as a response to incompatibilism about responsibility and determinism here, but will take from his famous lecture the account of moral responsibility and its connection to the emotions. According to Strawson, when we hold agents responsible we are subject to a range of emotions that are given to us with the structure of human relationships. We feel resentment when we are wronged and indignation on behalf of others when they are wronged. Toward some people, such as very young children and the severely mentally disabled, we are not subject to these attitudes, taking instead what he calls "the objective stance" toward them. When we suspend the reactive sentiments toward someone in this way, we do not hold him morally responsible. Strawson maintains that these emotions are

¹⁴ P.F. Strawson, "Freedom and Resentment," reprinted in *Free Will*, ed. Gary Watson (New York: Oxford University Press, 1982), 59-80.

constitutive of our practice of holding one another responsible: “the making of [a moral] demand *is* the proneness to such attitudes.”¹⁵ Holding people morally responsible involves holding them to moral obligations, so that holding someone morally responsible is being prone to the reactive attitudes in one’s interactions with him, should he violate a moral obligation: resentment when he violates a moral demand toward oneself, and indignation on behalf of third parties when he violates moral demands toward them.¹⁶

Our practice of blame is closely related to our practice of holding people morally responsible. In developing a Strawsonian account of moral responsibility, R. Jay Wallace spells out the connection:

[T]o blame someone is to be subject to one of the reactive emotions in terms of which the stance of holding people responsible is essentially defined, and these emotions are *expressed* by the sanctioning behavior to which the stance of holding people responsible naturally inclines us.¹⁷

Wallace’s reactive account of blame identifies the reactive sentiments as the common element of all forms that moral blame takes—from private, unexpressed blame to public censure. He argues that accounts of blame that ignore the reactive sentiments leave out the attitudinal quality of opprobrium that is characteristic of blame.¹⁸ This quality sets blame apart from other

¹⁵ *Ibid.*, 77.

¹⁶ Strawson includes a number of other emotions among the reactive sentiments, but the connection of these emotions to moral responsibility is not obvious. See R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994).

¹⁷ *Ibid.*, 52.

¹⁸ *Ibid.*, 81. See also R. Jay Wallace, “Dispassionate Opprobrium: On Blame and the Reactive Sentiments” in *Reasons and Recognition: Essays on the Philosophy of*

negative assessments, such as criticisms of people’s arithmetic or hairstyles, which are not typically accompanied by the reactive sentiments. Though the reactive sentiments are marked by a quality of opprobrium, they are not constituted by the retributive judgment that their objects deserve to suffer. One can reflectively endorse the idea that expressing the reactive sentiments is an appropriate response to wrongdoing without endorsing the idea that the suffering of the targets of those expressions is intrinsically good.

We can conceive of punishment as blame, on the reactive account of blame, if we can understand it to express the reactive sentiments. According to the reactive theory of punishment, punishment is justified when it expresses well the appropriate indignation of the community. The sense of “community” is to be understood broadly to include all citizens under the jurisdiction of the system of punishment. It is thus a condition on the reactive justification that the law and judicial system be responsive to the democratic will of citizens. It is beyond the scope of this paper to articulate how that condition may be met, but where it is, acts of punishment can be understood as externalized expressions of the indignation of the community. The criminal law sets out moral demands on members of the society in which it applies. In societies where the criminal laws are enacted by procedures that are answerable to the will of the community, the moral demands enshrined in the law are normative expectations to which citizens hold one another. According to the reactive account of moral responsibility, this stance of holding one another responsible is to be understood in terms of the reactive sentiments. When citizens hold all their fellow citizens to the normative expectation of following the laws,

they believe it would be appropriate to feel the reactive sentiments when their fellow citizens violate those laws. The criminal law also delineates the punishment for those who violate its demands. In democratic societies, acts of punishment that deprive their objects of important goods, such as liberty and property, can be conceived of as expressing the indignation the community has endorsed as appropriate in response to the crime.

However, the democratic endorsement of punishment in response to some action does not always suffice for that punishment to express appropriate indignation. Emotional reactions can sometimes be irrational. Indignation would be inappropriate in response to actions that do not violate moral obligations. Punishment of such actions would not be justified by the reactive theory even in cases where such punishment reflects the will of the community. There are also actions that could be classified as blameworthy violations of moral obligations, but whose criminalization would violate citizens' civil liberties. In some cases criminalization of these actions would be inappropriate because punishing minor wrongs would express a higher degree of indignation than is appropriate. Moreover, the blaming function of punishment provides reason to punish only when embedded in a larger theory of democratic legitimacy that articulates the limits on state power, including presumably why some wrong actions ought not be criminalized.

Where public blame is called for, the reactive theory can account for the importance of its expression because the reactive emotions are bound up with values at the center of morality. When we feel resentment, indignation, or guilt about episodes of wrongdoing, we show that we value those people who have been victimized by it in a particularly important respect. These emotions are partially constituted by the value judgment that the person who has been wronged is owed moral consideration and

so is properly protected by moral obligations. When we are emotionally exercised on behalf of the mistreated party this reveals that we care about them in a way that simply intellectually recognizing their value does not.¹⁹ In addition to showing that we value those who are wronged as being owed moral consideration, when we feel the reactive sentiments, we show that we also take the moral obligation whose violation inspires the sentiment to be important. This is reinforced when the underlying pattern of emotional response is general, involving a comparative susceptibility to the reactive sentiments in all cases in which the obligation is violated: a pattern of this kind demonstrates that we value certain ways of people getting on with one another. When we are susceptible to the reactive sentiments with respect to a moral obligation, we reveal that we take the obligation to be an important standard that ought to structure human interactions, and that we care that human interactions are structured accordingly.²⁰

The values that underlie these responses give us reason not only to blame, but also to express blame publicly in a way that

¹⁹ The idea that the resentment is essentially tied to self-respect is a main theme of Jeffrie Murphy's work on forgiveness. See, for example, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), 16.

²⁰ Wallace suggests that the reactive sentiments reflect the valuing of a sort of relationship that moral norms make possible. "Dispassionate Opprobrium: On Blame and the Reactive Sentiments" in *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon*, eds. R. Jay Wallace, Rahul Kumar, and Samuel Freeman (New York: Oxford University Press, 2011), 369: "To internalize a concern for morality... is to care about relating to people in the distinctive way that is constituted through compliance with basic moral requirements. But people who care about this form of relationship naturally tend to hold themselves and others to the moral norms that are constitutive of it, where this in turn involves a susceptibility to the distinctively reactive sentiments."

speaks on behalf of the members of the community.²¹ In going in for a system of blame that expresses indignation on behalf of all victims of serious crimes, a society affirms that all of its members are owed moral consideration. Failure to offer protection in the establishment and enforcement of laws to some members of the community signals a lack of respect for them. Part of what is objectionable about a society that punishes crimes against oppressed groups at a lower rate than those that target other citizens is that it treats people in the oppressed groups as less valuable. When, on the other hand, a community aims to hold all of those who commit serious crimes to account, it shows that it takes seriously the idea that all of its citizens have basic rights, rights whose violation it would be appropriate to be emotionally exercised about. It also reinforces the importance of those moral demands enshrined in criminal law as appropriately structuring relations between members of the community. Societies have reason to blame publicly in order for members to demonstrate that they value their citizens and take certain moral standards to be inviolable.

We have reason to blame serious crime not only to speak on behalf of members of the community, but also in a sense to speak *to* them: we have reason to blame in a way that citizens understand as expressive of blame. Anyone in society with an interest in seeing that those who commit serious wrongs are held accountable by the community for their wrongdoing should be able to understand that they are. One important potential audience is the family and friends of victims of crime. These people have an interest in having the victim's value affirmed by

²¹ Speaking on behalf of the entire community in rejecting wrongdoing is one of the social roles of punishment described by Joel Feinberg, "The Expressive Function of Punishment" in *Doing and Deserving* (Princeton, N. J.: Princeton University Press, 1970), 103.

the community.²² Marginal groups in society are another important audience. Members of these groups have a special interest in seeing the affirmation of those members of their groups who are crime victims. Marginalized members of society often have reasonable concerns about whether the institutions of society treat them as equals. By making good faith efforts to blame all those who commit serious crimes in ways that everyone in society can recognize as blame, a society can show that it takes all its citizens to be owed the moral consideration that makes blaming responses on their behalf appropriate.

According to the reactive theory of punishment, this public blaming function is the basis of the justification of punishment. Punishment is justified because it expresses indignation that appropriately blames criminals for serious wrongdoing. By subjecting criminals to punishment, we publicly acknowledge the moral standing of their victims, and show that we are committed as a society to the importance of certain moral standards in regulating our interactions with one another.

III

Why Not Say it with Weeds?

²² The way that punishment affirms the sense of victims of crime as being wronged is highlighted by T.M. Scanlon, “Punishment and the Rule of Law” reprinted in *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2003), 219-233. Scanlon, however, does not think that the expressive role of punishment justifies its hard treatment for a reason that I address in the next section.

I have argued that we have moral reason to publicly blame those who commit serious crimes because of the importance of the values to which blame is connected. Blame can take many forms, however, so why should we express it with punishment? If the indignation of the community could be expressed just as well (or better) without depriving criminals of their liberty or property, the blaming role of punishment would not justify those deprivations. In this section, I will argue that we have moral reason to express indignation toward serious crimes through depriving criminals of such goods.

Many philosophers who acknowledge the expressive function of punishment reject the idea that this function gives us reason to deprive criminals of their liberty or property.²³ T.M. Scanlon, for instance, writes

Pointing out “the expressive function of punishment” helps us to understand our reactions to punishing particular kinds of people, but what role if any does it have in the justification of punishment? It seems to have no positive role in justifying hard treatment of the legally blameworthy. Insofar as expression is our aim, we could just as well “say it with flowers” or, perhaps more appropriately, with weeds.²⁴

Contra Scanlon, I will argue that when punishment is understood as an expression of indignation, the expressive

²³ In addition to Feinberg, quoted in footnote 12, see, for example, David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008), 176-179; Thom Brooks, *Punishment* (New York: Routledge, 2012), 117-118; Nathan Hanna, “Say What? A Critique of Expressive Retributivism,” *Law and Philosophy* 27 (2008): 325-349; H. L. A. Hart, *Law, Liberty and Morality* (New York: Random House, 1963), 66; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 108-109.

²⁴ T.M. Scanlon, “The Significance of Choice” in *The Tanner Lectures on Human Values, Vol. 8* (Salt Lake City: University of Utah Press, 1988), 214.

function of punishment explains why we have reason to subject criminals to the characteristic deprivations of punishment.

Consider how expressions of another moral emotion, compassion, might be criticized. Imagine a very wealthy man is sitting in front of the television watching coverage of a natural disaster that has been devastating to some members of his community. He tells his personal assistant who is working nearby, “I feel a great deal of compassion for the victims of this disaster. Please send them flowers with a note expressing this compassion.” She replies, “If you were really compassionate, you could send them money to help provide for their basic needs and give them an opportunity to rebuild their lives. In fact, if you were really motivated, you could spend some time volunteering at the shelter that has been set up.”

There are at least two ways in which the wealthy man’s gift of flowers is deficient as an expression of compassion. First, the expression is not, as we might say, “constructive” in light of the values that underlie compassion. When people feel compassion, they judge that the suffering of those for whom they feel it is bad. A purported expression of compassion that does nothing to alleviate this suffering when such alleviation is possible shows a lack of commitment to the value judgment that is characteristic of compassion. Second, a gift of flowers does not express, as we might say, a “proportionate” degree of compassion. Emotions have affective elements that lead to action. Compassion involves a disposition to engage in actions that typically alleviate suffering. Generally, the more intense the compassion is, the more one is willing to help. The wealthy man’s refusal to do anything for the victims of the natural disaster beyond sending flowers belies his claim to feel a great deal of compassion. The suffering brought by the natural disaster in this example calls for a high degree of compassion, and merely sending flowers, to put it crudely, does

not express “enough” of it. These mundane observations suggest that in expressing compassion, we cannot always just as well say it with flowers.

Likewise, when it comes to serious crimes, norms of constructiveness and proportionality give us reasons to express our indignation with punishment rather than weeds. In section 1, I suggested that a plausible account of the justification of punishment could not disregard the moral significance of the social goal of crime reduction. The values that make blame important give us reason to express it in ways that contribute to this goal. Just as we characteristically perceive the significance of suffering when feeling compassion, so too does indignation reflect an acknowledgement of the moral consideration that victims of wrongdoing are owed. Where possible, constructive expressions of indignation will reduce the likelihood that others are victimized. Such expressions demonstrate a commitment to the values that partially constitute appropriate indignation.

Punishment’s deterrent function makes it a constructive way to express indignation in light of the values that appropriately inspire our indignation. Threatening to deny criminals certain desired goods can deter crime, insofar as the punished and others in society who are aware of the punishment do not want to be denied the good in question. Moreover, the goal of crime reduction partially explains why state punishment takes the form it does. Imprisonment, for instance, incapacitates those who are risks for committing crimes and places them in a situation in which they will have a lot of time to think about their wrongdoing. Prisons often (and should) have programs whereby criminals can earn college degrees and develop skills that will

make it less likely that they will commit future crimes.²⁵ In these ways, imprisonment increases the likelihood that moral obligations are not violated in the future and, in doing so, protects the rights of members of the community. When we express indignation toward serious crimes through imprisonment, the values that explain the moral importance of that indignation are reflected in the very manner of its expression. This is less obviously true if we express our indignation with weeds. Weeds would not provide much of a disincentive to crime. Weeds would neither incapacitate criminals nor effectively encourage them to reflect on their crimes. We cannot just as well express indignation toward serious crimes with weeds as punishment, because such expressions are not constructive. They do not show the same commitment to the values that animate the reactive sentiments.

Like constructiveness, proportionality gives us reason to express indignation toward the most serious crimes by means of punishment. We understand expressive behaviors that are objectively worse for their targets as signaling those sentiments in a greater degree. In order to signal to all members of the community the value of those who have been victimized, the form that blame takes must be accessible to everyone in society as expressive of an unambiguously high degree of blame. A society that consistently punishes serious crimes emphatically shows that it values the victims of those crimes as being owed moral consideration. Expressions that deprive their targets of something less important could legitimately be viewed by members of society as failing sufficiently to stand up for those victims.

²⁵ One reasonable worry about the expressive component of punishment is that it stigmatizes the punished. The goal of reducing the likelihood that criminals reoffend gives the state reason to treat them in ways that limit the extent to which punishment permanently ostracizes them from the community.

Resentment and indignation deny their objects something objectively good, a certain sort of social regard. People who feel these emotions are characteristically disposed to perform actions that are bad for their objects, even when those who feel them do not desire that those objects suffer. There are three rough categories in which we might categorize these harms. First are those harms that come with the awareness that someone feels a reactive sentiment toward you. A paradigm example is the distress one feels when one is the target of verbal expressions of blame. Second are the denials of further social goods that come with other people withdrawing goodwill that they would otherwise have toward you. Examples of these harms include being excluded from a social circle or not being able to receive aid with one's projects. Harms in this second category often accompany harms from the first, insofar as those deprivations signal the presence of a reactive sentiment. Third are those harms that are only appropriate when carried out by agents of the state, because they take away goods whose denial requires the threat of force. State punishment denies criminals goods in this category. The third sort of harms often bring the first two with them: when people are imprisoned for committing a serious crime, for instance, they are typically aware that they are being blamed and they are denied the aid of society to some of their life projects.

Holding fixed our relation to the object of our reactive sentiments, the category of harms that our reactive sentiments dispose us to countenance seems to correspond to the degree to which we feel those sentiments. Blaming serious criminals by denying them goods in the third category shows that we endorse a high degree of indignation in response to their crimes. Note that, in practice, our judgments about what makes particular modes of expression proportional indirectly depend on what makes them constructive. Having grown up in societies in which

imprisonment is thought to contribute to crime reduction helps to account for our general disposition to express indignation toward murderers through imprisonment. The deterrent function of punishment thereby informs our view of what a proportionate response is, even in cases in which deterrent aims will not be achieved by an act of punishment.

Given considerations of proportionality and blame's public role as described in the previous section, we have reason to express blame toward those who commit serious crimes by depriving them of goods in the third category. Such expressions are accessible to everyone in society as expressive of a high degree of indignation. We cannot just as well express blame with weeds; weeds would not express a sufficient degree of indignation for this task.²⁶ Imagine that our government suddenly starts to say it with weeds, sending weeds to convicted murderers rather than punishing them. We and our fellow citizens are likely to have trouble conceptualizing this as genuinely blaming them. Giving someone weeds is not an action that is typically objectively bad for its target and thus is difficult to understand as even a candidate expression of indignation.

But imagine the government makes clear the expressive meaning of these weeds and claims that they are to represent the highest degree of indignation. Those who receive the weeds would presumably be deprived of some benefit of social regard. There may be some in society who would accept this system as expressive of the appropriate amount of blame for murderers, but I suspect most people, given their own emotional experience,

²⁶ See also Raffaele Rodogno "Shame, Guilt, and Punishment," *Law and Philosophy* 28 (2009): 429-464 at 437 and 459. Rodogno makes a similar point, emphasizing how impositions of the loss of property and liberty are widely believed to embody the emotions of "punitive hostility" in a way that merely conventional symbols of social condemnation would not be.

would find the expression insufficient. Many victims of serious crimes, and those who care about them, will still reflectively endorse their own reactive sentiments that dispose them to approve depriving their perpetrators of goods beyond social regard. A weeds-dispensing system that is not collectively understood to express a sufficient degree of blame will not be capable of discharging its public expressive function. It will seem to many not to stand up adequately for the victims of those crimes, or not to take violations of important moral obligations seriously enough. Giving weeds to murderers would neither convey the degree to which the community is indignant about their actions, nor would it make clear the value that the community attaches to the victim's moral rights and moral standing.

One might worry that this line of reasoning would entail that if members of some community were disposed to express their indignation toward the most serious crimes with cruel and inhumane behavior, norms of proportionality would give the society reason to punish in cruel and inhumane ways, unchecked by legal institutions that protect civil liberties. If this is a defect of the blaming function, however, it is a defect shared by the deterrent and retributive functions. Cruel and inhumane punishment may be an effective deterrent. It is not obvious that cruel ways of inflicting suffering would not carry out the purported retributive function of punishment on criminals who have treated their victims terribly. However, any of these three candidate justifications of punishment could appeal to a wider political theory in response to the objection. As I asserted in the previous section, the blaming function of punishment must be integrated into an account of democratic legitimacy that sets out civil liberties protecting all citizens from certain government actions.

To summarize the past two sections, the reactive theory identifies a positive reason to subject all those who commit serious crimes to proportional punishments. The argument draws on the reactive account of moral responsibility, and in particular on the role of blame and its social expression in protecting and promoting central moral values. The form the expression takes must be capable of communicating a high degree of blame to everyone in society. Punishment is well-suited for this task because it denies the punished goods that we all recognize to be important. Systems of punishment also contribute to crime reduction and thereby demonstrate commitment to the values that make blame appropriate.

IV

The Moral Standing to Object

I have contended that the reactive theory of punishment satisfies the *positive reason* desideratum. In this section, I will maintain that the reactive theory also satisfies the *no valid objection from rights* desideratum: it explains why the punished cannot reasonably object to being denied a good to which they would normally have a right. Using examples of interpersonal blame, where our blaming responses are not mediated by systems of punishment, I will argue that the targets of appropriate blame do not have the standing to object to proportionate blame or its expression, even when that expression involves treatment that would otherwise be morally problematic. The reactive theory interprets state punishment as continuous with interpersonal responses in this respect. Insofar as the deprivation of goods such as liberty and property expresses a proportionate degree of blame for serious crimes, those who are punished for those crimes

cannot object to their punishment on the grounds that it deprives them of liberty or property.

Someone might object to being blamed by those around him because he feels distress when the reactive sentiments are directed toward him. This complaint is reasonable if he was justified in acting the way that he did or has an excuse for acting in that way. It is inappropriate to blame the person in these cases, because he has not really violated a moral obligation or there is some extenuating circumstance that renders blame inappropriate. In other cases, his objection is unreasonable unless he is properly exempted from blame. Those without capacities for moral reasoning or guiding their behavior in light of moral reasons are appropriately exempted from being the objects of reactive sentiments. But if someone commits an unexcused wrong while in the possession of these capacities, he cannot reasonably object to others, appropriately situated, feeling the reactive sentiments toward him to a proportionate degree. This point is about the standing of those who violate moral obligations to object to blame, and *not* about whether those in a position to blame always have conclusive reason to do so. There are other ways of responding to wrongdoing that are consistent with treating those who commit wrongdoing as responsible agents. For example, the swearing off of the resentment that is characteristic of forgiveness is a way of respecting the forgiven as a moral agent. But people who have committed wrongs are not in a position to demand forgiveness when they are appropriately the object of resentment; as far as resentment is concerned, they are rightly at the mercy of the persons they have wronged.

Not only is it unreasonable for people who have violated a moral obligation to object to others, appropriately situated, feeling the reactive sentiments to a proportionate degree toward them, they also *prima facie* do not have standing to object to the

appropriate expression of those sentiments. Imagine that Jim has betrayed Susie's confidence in a matter of some importance, and she expresses her resentment toward him: "I can't believe you did that! You betrayed my confidence." It would be peculiar for Jim to reply by saying, "You ought not express your resentment like that, because it really hurts my feelings, and hurting feelings is morally wrong." What's inapt about the response, I maintain, is not that the general moral claim is problematic. In general, it is morally wrong to hurt people's feelings, and if Jim had not actually betrayed her confidence, he could legitimately appeal to these feelings in objecting. What makes the response unsuitable is that Jim does not have the standing to object morally to the negative impact an appropriate expression of blame has on him.

One might question this diagnosis. It is unreasonable to object to a wide range of actions performed by others on the basis of hurt feelings. It would be unreasonable, for example, for me to demand that my unrequited love date me, or my teacher give me a good grade, because failure to do so would hurt my feelings. In light of such examples, it might be thought—too quickly, no doubt—that hurt feelings do not constitute much of a basis for objecting to the actions of others. Consider instead, then, expressions of blame in the interpersonal context that take the form of deprivations of goods beyond social regard. Imagine that Susie withdraws from Jim an invitation to a party she is throwing in response to his betrayal. He responds, "You ought not express your resentment like that, because I had a legitimate expectation to go to that party and didn't make other plans that night." This is an unreasonable response, not because it is unreasonable to object to having one's legitimate expectations thwarted, but rather because Jim is not in a position to object to the negative effects that his own wrongdoing has on him when they are a result of his being appropriately blamed for that wrong. In response to Jim's

betrayal, Susie's father might express his indignation by breaking off a mentoring relationship with Jim. Assuming the betrayal was serious enough to make the severing of this relationship appropriate, Jim could not reasonably object that Susie's father has broken a promise to mentor him. Though one can usually reasonably complain about a broken promise, one cannot reasonably demand that promises be kept when doing so would preclude the appropriate expression of blame about something one has done.²⁷

Jim's standing to object to similar treatment is not undermined when that treatment is not an appropriate blaming response, however. Were the rescinding of the invitation not a blaming response at all—say a friend of Susie's who is helping throw the party and unaware of Jim's betrayal randomly chooses to disinvite him—Jim could reasonably object to it. Jim also retains the standing to object to blaming responses that are disproportionate. If Susie conspires to get him fired from his job as an expression of her resentment, he could reasonably complain. Such a course of action is not an appropriate expression of blame; it is an excessive response to his wrongdoing, expressing a higher degree of resentment than is called for.

²⁷ T. M. Scanlon makes a claim that seems to be at odds with my point here. *Moral Dimensions: Permissibility, Meaning, and Blame* (Cambridge: Belknap Press of Harvard University Press, 2008), 142: "Even those who have no regard for the justifiability of their actions toward others retain their basic moral rights—they still have claims on us not to be hurt or killed, to be helped when they are in dire need, and to have us honor promises we have made to them." However, it seems to me uncontroversial that Susie's father is permitted to break his promise to Jim in response to his wrongdoing. This need not be because that promise is somehow conditional on Jim's relationship with Susie. He might have made the promise to mentor before Jim met Susie. He would still be permitted not to honor it in these circumstances.

These observations about the way blame works in the interpersonal context can be extended to explain why serious criminals do not have moral standing to object to punishment that denies them their liberty or property. I argued in the previous section that communities have reason to express indignation toward those who commit serious crime by depriving them of important goods. Such deprivations signal an appropriately high degree of indignation. They show that members of the community take such crimes seriously and are committed to reducing their occurrence. Because punishment is a proportionate way to express indignation toward serious crimes, those who commit such crimes cannot reasonably object to punishment that blames them, even if it deprives them of goods to which they would otherwise have a right. Those who have committed serious crimes and been fairly convicted do not have the same standing to appeal to their rights to liberty and property that other people have, when the deprivation of their liberty and property partly constitute proportionate expressions of blame.²⁸ It would be unreasonable for a fairly convicted murderer to object at sentencing, “You cannot imprison me; it violates my right to freedom.” Murders cannot appeal to their right to liberty, not because this is not a right that people are usually protected by, but because convicted murderers do not have the standing to appeal to that right when members of the community have appropriately endorsed imprisonment as the way to blame those who commit murder.²⁹

²⁸ In order for convictions to be fair, the accused must retain due process rights throughout the criminal justice process, regardless of the rights to which they lose the standing to appeal.

²⁹ One might want a deeper explanation of what about appropriate blame makes its targets lose standing to object to its negative impact. A candidate explanation might be grounded in the notion that the reactive sentiments respect their objects. Proportionate expressions of blame treat their targets in

Nevertheless, those who commit serious crimes retain their standing to object to deprivations of their liberty and property when those deprivations are not constitutive of appropriate blame. They can validly object, for instance, to random kidnappings on the grounds that they violate their right to liberty. The blaming function of punishment is able to explain why punishment is permitted in just those circumstances in which commonsense morality endorses it: we do not think serious criminals forfeit their rights without condition, but only when they are targets of proportionate punishment that blames them for their crimes.

V

Conclusion

The secure place in our moral thinking of the conviction that those who commit serious crimes should be punished is accounted for by the reactive theory of punishment. First, the theory satisfies the *positive reason* desideratum: we think that there is positive reason to punish such wrongs, because blame is called for in response to serious wrongs, and punishment is an

ways that would usually fail to respect them in ways that all persons are owed, but blaming expressions always respect their targets as moral agents. Mitchell Berman recommends a strategy like this one to the retributivist in “*Punishment and Justification*,” *Ethics* 118 (2008): 258-290 at 279. This suggested deeper explanation behind the moral standing account of the permissibility of punishment relies on a questionable premise, however: that the only valid grounds that someone could have to object to a form of treatment is that the treatment fails to respect his agency. The reasons why expressions of blame are inappropriate are hardly exhausted by such failures. Some excessive expressions of blame address their targets as responsible agents, for instance. I believe that the notion of the moral standing to object to blame is best understood as fundamental and not analyzable in other terms.

appropriate way to express this blame. Second, the theory satisfies the *no valid objection from rights* desideratum: we do not think that someone who has committed a serious wrong has the standing to reasonably object to an appropriate expression of blame on the grounds that it deprives him of a good to which he has a right.

In addition to satisfying these desiderata, the reactive theory embodies some of the features of our moral thinking that make deterrence theory and retributivism plausible in the first place. I will conclude by suggesting how the reactive theory is able to take on board these features while satisfying the *positive reason* and *no valid objection from rights* desiderata. Reduction of instances of serious wrongdoing is clearly a morally important social goal. The deterrent function of punishment is part of the reason that communities decide to spend their limited resources on justice systems and detention facilities. Theories of punishment that ignore this function overlook something of moral importance. The reactive theory is not guilty of this sin of omission. According to the reactive theory, part of the reason why blame takes the form of punishment is that punishment deters crime. Because deterrence promotes those values that underlie the community's indignation, punishment that deters crime is an especially constructive expression of the community's indignation. Nevertheless, on the reactive theory, a particular instance of punishment need not actually deter in order to be justified. A successful expression of blame is all that is necessary. Even if imprisoning the assassin of the civil rights leader described in section 1 would serve no deterrent function, for instance, it would proportionately express indignation in our actual social context.

The reactive theory of punishment also satisfies the *no valid objection from rights* desideratum. According to the reactive theory, justified punishment just *is* appropriate blame, and the targets of

appropriate blame do not have the moral standing to object to such blame. This understanding constrains the deterrent goals of punishment. Punishment is justified, on the reactive theory, only if, and to the extent that, it expresses an appropriate degree of indignation in response to a serious crime. We cannot punish people merely as a means to social order. Even if a given punishment would reduce crime, the punished can reasonably object to it if deprives them of a greater good than would express a proportionate degree of indignation.³⁰

The other traditional justification of punishment, retributivism, does not justify punishment based on its consequences, but instead based on the idea that it is a fitting response to wrongdoing. The notion that punishment is a backward-looking response to wrongdoing captures something central to our conception of it, acknowledging the agency of the wrongdoer. The reactive theory also justifies punishment as a response to wrongdoing but departs from retributivism on the response that is called for. Retributivism holds that wrongdoers deserve to suffer in proportion to the harm they have caused their victims, and that punishment inflicts this deserved suffering. The reactive theory holds that serious wrongdoers should be held accountable for their wrongs, and that punishment is an appropriate way to blame the most serious crimes. This difference between the responses called for on the two theories is key to explaining why the reactive theory avoids the difficulties of retributivism in satisfying the *positive reason* and *no objection from rights* desiderata.

³⁰ Likewise, while norms of constructiveness give us reason to express blame in ways that will lead the punished to reform their behavior, the expressive function of punishment is carried out in cases where the offender is insensitive to the moral opprobrium of the community. The indignation of society is still expressed in a way that shows that it attaches value to the offender's victim.

In section 1 I argued that reasonable skepticism about the retributive idea undermines retributivism's claim to satisfy each of the desiderata. The reactive theory is based on the "reactive idea" that the reactive sentiments are appropriate responses to wrongdoing. Rather than being "a mysterious piece of moral alchemy," the fittingness of these sentiments is a lived conviction for most of us, given to us with our involvement in interpersonal relationships. I have offered an account of why these sentiments survive moral reflection: we endorse the value judgments that partially constitute them concerning the moral status of the person who has been wronged. The reactive sentiments are not vindictive and do not characteristically involve the thought that it would be intrinsically good for their object to suffer. Justified reactive punishment does not aim to inflict suffering on the punished for its own sake. Instead, it gives appropriate expression to the justified indignation of the community, in a way that is constructive in light of the values that constitute the community's indignation.

I raised a further concern about whether retributivism satisfies the *positive reason* desideratum: it does not seem to explain we have positive reason to punish serious criminals in cases where their punishment does not cause them to suffer more than they would have suffered were they not punished. If, on the other hand, we punish in order to express blame, there is nothing puzzling about these cases. The reactive sentiments do not necessarily involve the idea that their object should suffer, so blame can be expressed effectively in ways that do not in fact turn out to inflict suffering. According to the reactive theory, we have reason to express the community's indignation toward serious crime through punishment because it publicly shows that we take certain violations of moral obligations seriously and take the victims of crime to be owed moral consideration. This expression can be

successful regardless of whether it causes its target to suffer. Sending criminals to prison expresses a high degree of indignation whether or not they suffer a great deal day to day as a result. The reactive theory can explain why we have positive reason to punish even in those cases in which punishment will not actually inflict suffering on the punished.³¹

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