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The Impulse to Punish: A Critique of Retributive Justice

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THE IMPULSE TO PUNISH: A CRITIQUE OF RETRIBUTIVE JUSTICE

by

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SUBMITTED TO SCRIPPS COLLEGE IN PARTIAL FULFILMENT OF THE DEGREE OF
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PROFESSOR CASTAGNETTO
PROFESSOR SCOTT-KAKURES

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ABSTRACT

This thesis explores the strength of the two major theories of punishment, consequentialism and retributivism. It also explores the two most critiqued systems of punishment in the world: The U.S and Norway. By presenting the idea that retributivism is the only plausible theory that can morally justify the U.S. penal practises, I argue against the theory by incorporating various objections delivered by Antony Duff, Michael Zimmerman, and Jeffrie Murphy. I then explore the question of what could possibly ground the Norwegian justice system, for the answer to this is crucial, if we hope to demand prison reform and tailor our systems to resemble the Norwegian ideal. To answer this question, I present a theory that incorporates the ‘capabilities approach’ as developed by Martha Nussbaum and Amartya Sen, arguing that the Norwegian prison system is grounded in a hybrid theory of consequentialism that aims to enhance our human rights.

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“Thus I do counsel you, my friends: Mistrust all in whom the impulse to punish is powerful.”

- *Frederic Nietzsche, Thus Spoke Zarathustra*

Introduction

Imagine two distinct societies, where each has a completely different response to crime.

(A) *The first, a racially and economically diverse state, punishes wrongdoers by placing them in prisons – indistinguishable grey blocks with miniscule quarters, strict surveillance, scheduled hours of unstimulating, unpaid work, and a squadron of guards packed with moral condemnation and weapons of intimidation. Long sentences are given, where a significant portion of inmates spend decades in these confines without release, and a minor portion is even sentenced to death. Half of the wrongdoers are in jail due to non-violent crimes involving drugs, property or public order. Most of the offenders are men, and most of these men are from the marginalized sections of society. Many of the women suffer more sexual harassment caused by routine searches than they do outside prison. Due to long sentences, the prisons are overflowing. Due to overcrowded quarters, more prisons are built and huge expenditures are made on behalf of the state. Families of the incarcerated are left to their own devices, where financial burdens grow heavier without any assistance from society. Wide-spread social inequality and dire educational opportunities render large parts of communities constrained to the choice of crime, while more tax money is spent on building more generic boxes to punish more of these wrongdoers.*

(B) *The second society is a relatively homogenous group that enjoys high standards of living. Here criminals can expect to make amends by serving time in an institution surrounded by nature and guards bearing no arms. Each criminal must thoroughly immerse oneself in work, such as organic farming, shepherding, or mechanics, for which they get compensated the same amount as they would outside the institute. Their families can visit often, and they regularly deal with clients from the surrounding towns who seek services such as car renovations. In addition*

to a steady income, they have the option to study any subject of their choice. Criminals may have access to all educational resources necessary, and they may leave prison with a notable degree in whichever field pursued, such as Biology, Business, or Law. In this institution, they can expect all the amenities of home, like cooking supplies, a library, televisions, gaming stations, music, art, and even ashtrays for their cigarettes. Their quarters resemble college dormitories, fully equipped with bathrooms and mirrors. If they live peacefully without problems, they have the choice to move to better institutions where they can live in proper houses with room-mates. Social workers frequent the locale to assist criminals re-enter their communities, by finding homes and jobs and providing emotional support. Each criminal will be home someday, unless proven unstable. The general philosophy of the institute is to ensure that all wrongdoers have the chance to grow and meet their true potentials as members of a normative community.

What is interesting about these scenarios is that one need not use their imaginations at all. I have presented a description of two opposing systems of punishment that actually exist. The first, which is ubiquitously spoken about and critiqued, one might recognize immediately as the prison system of the United States of America. But it is my hope to bring to the reader's attention that the second society is *also* real, and all its described events are currently taking place in the country of Norway.

It is hopefully apparent that one system is functioning more fruitfully and harmoniously than the other. System A seems to neglect entire communities by choosing to invest resources in heavy penalties rather than social welfare, while system B has avoided social strife precisely through its focus on social security and rehabilitation. Furthermore, when comparing the incarceration rates of each society, 716 per 100,000 people are imprisoned in the U.S., while 75 per 100,000 are in Norway. (The Sentencing Project, 2014, pg. 1) (International Center for

Prison Studies) No matter the difference in national populations, having such a large fraction of society behind bars is not a good indication of human development. That too, when the recidivism rate suggests that over 50% of American prisoners will return to prison within 3 years of release, while the recidivism rate of Norway, at 20%, is among the lowest in the world. (Deady, pg. 1-3) Given this stark contrast, what could rationalize the persistently harsh penal practices of system A, when the methods of system B have proven so successful?

In her book *Are Prisons Obsolete?* Angela Davis begs us to consider whether our intuitive notions about justice are informed from critically examining the issues of crime, or whether we just accept the existence of punitive practices because it has always been the norm. Many might (and certainly do) insist that system A is better than a system that handles crime so leniently; it is better than a system that provides opportunities where wrongdoers ought to be suffering. Indeed, it might be hard to see how the Norwegian system is even a system of punishment at all. But like Davis, in this thesis I request my readers to challenge the idea that punishment is the key component to justice. She argues, “The prison has become a key ingredient of our common sense. It is there, all around us. We do not question whether it should exist. It has become so much a part of our lives that it requires a great feat of the imagination to envision life beyond the prison.” (Davis, pg. 18) Though it seems inconceivable to handle crime without harsh penalties, in light of the existence and successes of the Scandinavian justice system, I would invite all persons to pause and question the legitimacy of the prison. If upon creating so much social and political strife, upon perpetuating systems of oppression and discrimination, and upon drastic over-expenditure¹, the U.S. government still chooses to support system A over B – shouldn’t we question it’s rationale for doing so? Without even remotely

¹ Arguable effects of the U.S. prison system that I will empirically support in the next chapter.

acceptable social or political justifications, shouldn't there be an incredibly compelling moral justification that grounds such a committed stance? To periodically reject the practices of a blatantly beneficial system, and to seriously deprive entire communities of their livelihoods, the U.S. must provide an irrefutable philosophical justification for their approach to wrongdoing.

In this thesis, I will present and critique the theory of retributivism, a justification for punishment that might lie at the foundation of the U.S. prison system. By evaluating the strongest contemporary justifications of punishment, consequentialism and retributivism, in Chapter 1 I argue that retributivism is the only possible theory that applicably resembles the policies of the U.S. With this as my primary assumption, in Chapter 2 I explore and present various arguments for the benefit-burden conception of retributivism. In Chapters 3 to 6, I present objections regarding the unfortunate message of retributivism, its inability to make sense of proportion, and its destructive implications when applied to a world of inequality; a fate that seems unavoidable given the present state of affairs in the U.S. In consideration of these critiques, I explore the question of how to implement a system of justice in an imbalanced world, and I return to the idea of system B, or Norway. In light of the failures of the two major theories of punishment, I argue that the Norwegian approach might entail a morally justifiable solution. Thus, in Chapter 7 I defend a hybrid-consequential theory of punishment that grounds the Norwegian prison system, which I argue respects the rights and personhood of all citizens. It is my principal hope to defend a theory of punishment that encourages society to envision justice beyond the realm of harsh punitive practices. Other than compelling socio-economic reasons, I argue that the Norwegian prison system is grounded in a theory of punishment that is morally defensible even using a retributivist's standards. Rehabilitation and retributivism are typically thought of as incompatible, but I propose that the Norwegian system embodies a synthesis of

both, which might be necessary in finding the best approach to justice. If the U.S. system has been reluctant to change its ways after causing immense amounts of social strife, then it must be grounded in the morally strongest theory of punishment. In this thesis, I argue that retributivism, the moral basis of the U.S. prison system, is nowhere near the strongest theory of punishment. As such, there is not a single reason for the country to continue its deliverance of justice in the manner that it chooses. To reclaim its ability to treat its own citizens ethically, the U.S. must turn to a stronger theory of justice– a theory that might ground the practices of Norway.

Chapter 1: Justifying Punishment

When a crime is committed, society demands justice. We hear of murders, thefts, and other harmful acts, and we hope the perpetrator doesn't continue to walk amongst us with impunity. We hope that the criminal is punished. But what could justify such a reaction to wrong-doing, when punishment involves doing to someone what is normally morally unacceptable? Punishment involves the infliction of harm and suffering upon others by taking wrongdoers away from home, property, freedom, and loved ones. Punishment is sometimes a heavy financial burden, which significantly changes the livelihoods of families, and at its worst, punishment can amount to death. Such acts are generally classified as abduction, robbery, and murder – and yet, punishment is something we instinctively assume as the natural recipe for justice. As George Sher once asked, “How can one impermissible act annul or cancel the normal impermissibility of another?” (Sher, pg. 4) The guilty may have harmed society, but our repulsion to the idea of being punished suggests that the typical criminal would not will this either. It seems that we must stop and question what we consider to be the most obvious consequence to crime; the most historically pervasive institution; and the most intuitive demands for justice. If we claim to respect the rights and freedom of individuals, then it seems that we must justify the coercive and harmful ways in which we treat wrongdoers.

Contemporary justifications of punishment tend to fall under one of two main branches of thought- consequentialism and retributivism. Consequentialists argue that the deterrent effects of punishment bring about the best overall consequences for society, which is of ultimate moral value. Punishment is a just reaction to crime precisely because of the consequences produced, for example, incapacitating offenders and preventing harm, disincentivizing others from crime, and rehabilitating wrongdoers to prevent future crimes. But as Jeffrie G. Murphy rightly asks, “Even

if punishment of a person would have good consequences, what gives us (i.e., society) the moral right to inflict it?” (Murphy, 1973, pg. 220) Consequential outlooks have been subject to much criticism because it remains unclear how producing the best overall consequences is a sufficient reason to inflict harm on others. To act in such a way is to treat wrongdoers as a means towards some societal end, and not as ends in themselves who are autonomous to choose what they wish. What is good to do is not always what we have a *right* to do, and at root, consequentialism seems to disregard the rights of persons. (Murphy, 1973, pg. 220)

Robert Nozick briefly considers the idea that using others for the greater good might, in fact, be reasonable. After all, we each undergo some pain or sacrifice for a larger benefit every now and then: we diet to improve our health, save money for important investments in the future, or even donate a kidney for someone’s life. Why not similarly hold that some persons must undergo some sacrifice for the greater good? But, he argues, there is no *social entity* that is undergoing some sacrifice – there are only individual people, with their individual lives. (Nozick, pg. 140-141) As such,

“Using one of these people for the benefit of others, uses him and benefits the others. Nothing more... Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.” (Nozick, pg. 141)

As Nozick explains, each person has only one life, and to treat him or her as a tool that can be manipulated and used to solve a problem or create results is to essentially deny the value of their existence – to deny that which makes them human and equal to us in every respect. Herbert Morris, a well-known critic of the therapeutic model of punishment, further argues that to deny the human-ness of individuals is to essentially deny our status as moral agents. Since persons are free to choose and create their own paths in life, it is this unique aspect of being human that allows our actions to be praiseworthy and blameworthy. We blame someone for

doing something hurtful because they had the *choice* not to do so. We praise someone for their philanthropy because they had a *choice* not to do so. By forcibly punishing wrongdoers towards some end, consequentialism seems to diminish humans to the status of objects that have no choices. We do not *morally blame* a chair for breaking under the weight of a body, nor do we *morally praise* a table for remaining intact over dinner. Chairs and tables have no choice in the matter. Thus, Morris argues that to disregard the autonomy of persons, consequentialism must also disregard the moral status of our actions. (Morris, pg. 486)

Another, yet debatable, objection is that consequentialism might wrongly punish the innocent or disproportionately punish the guilty just to set a precedent and deter future crimes. It is of course conceivable that such punitive measures do *not* render the best consequences and so would perhaps be rejected by most consequentialists. But the idea that consequentialists would reject such measures on the grounds of utility rather than the rights of these individuals is what seems to be most outrageous about the theory.

Finally, and most importantly, it seems that the U.S. prison system could not possibly be built on a consequential justification for punishment. This can be confirmed by a quick examination of the effects of the U.S. prison system, to see that these are clearly not the desired outcomes of any system aimed at producing happiness or deterrence. The United States currently has 25% of the world's prison population, with a total of approximately 6.3 million people under some form of correctional control, including incarceration, probation, or parole. (Deady, pg. 1) (The Sentencing Project, 2014, pg. 2) Two decades ago, the total population controlled by the U.S. justice system was nearly a sixth in comparison, and the total state expenditure on incarceration was only \$6.7 billion. With an inflation of about 800%, the current state expenditure on corrections lies at over \$53.3 billion and rising. (The Sentencing Project, 2014,

pg. 2) These drastic changes from the 1980's to the 2000's can be mostly attributed to the U.S.'s "tough on crime" approach, introduced by 'the war on drugs' and the Violent Crime Control and Law Enforcement Act of 1994. President Clinton passed measures that included \$9.7 billion in funding for more prisons, 100,000 new police officer positions, mandatory sentencing, strict drug laws, zero tolerance, three strikes, and elimination of inmate education. (Violent Crime Control and Law Enforcement Act of 1994) Results of these arguably discriminatory measures include a devastating surge in the number of African American and Latino inmates, so much so that today, 1 in 3 Black men is likely to be imprisoned, and 1 in 6 Latino men is likely to be imprisoned, while a trifling 1 in 111 White women are likely to be imprisoned. (The Sentencing Project, 2014, pg. 5) Angela Davis further argues that the racially and economically targeted policies of the U.S. justice system have left entire communities in shambles, destroying their social services such as job prospects, education, and housing. Creating the very conditions that constrain people to the choice of crime, Davis writes that "The prison has become a black hole into which the detritus of contemporary capitalism is deposited. Mass imprisonment generates profits as it devours social wealth, and thus it tends to reproduce the very conditions that lead people to prison." (Davis, pg. 16) Finally, to evaluate whether U.S. sentencing has reduced crime levels or recidivism rates, in his book *Imprisoning Communities*, Todd Clear argues "When it comes to deterring crime and incapacitating criminals, the modern prison is a blunt instrument. It does not offer a panorama of finely calibrated experiences designed to surgically counteract the forces of evil. Rather, when a prison sentence is imposed, the action is basically a one-size-fits-all decision to remove someone from his or her community." (Clear, pg. 18) I must stop here, because it is possible to fill multiple volumes on the topic². This is only scratching the surface. But from the above description, I hope it is apparent how the U.S. prison system is indeed a 'blunt instrument'

² Which, regrettably, I do not have the space to do in this essay.

in deterring crime and incapacitating wrongdoers – the primary aims of a consequentialist justification of punishment. If the government was under the impression that this system is producing the best consequences, they need to seriously re-evaluate their position and face reality.

Assuming the U.S. government is not utterly deluded in thinking that they have managed to maximize any goods such as reduced crime or overall happiness – it might be safe to conclude that system A does not follow a consequentialist doctrine. Furthermore, philosophers have raised serious objections that weaken the moral standing of consequentialism, for example, the theory cannot respect the rights or moral status of the people to be punished. This is why Murphy believes that retributivism is the only “morally defensible theory of punishment”, because it respects these very rights and takes the autonomy of individuals seriously. (Murphy, 1973, pg. 221) The theory of retributivism believes that *in virtue* of their guilt, criminals deserve to be punished proportionately. (Zimmerman, pg. 67) In this thesis, I will be examining what I consider to be the strongest retributive arguments for punishment, and I will critique these arguments to confirm that *even if* system A was grounded in a compelling moral justification, this justification is invalid and only creates further harm when applied to a nation of inequality.

Chapter 2: Retribution as the Restoration of Fairness

The strongest retributive theory has its foundations in Kantian and Rawlsian ideas, as inspired by the Social Contract theory. Also known as the argument of *moral balance*³, this version of retributivism argues that “punishment is a just and proper response to a past offense, since it restores that fair balance of benefits and burdens in society which crime disturbs; and it respects the criminal’s autonomy, since it accords with his own rational will.” (Murphy, 2007, pg. 11) Murphy, a self-proclaimed Kantian and contemporary critic of retributivism, invokes this idea to justify retributivism by neatly tying together explanations for why we must have laws, why the state must enforce the law, and finally, why we must punish.

According to Murphy, the Social Contract theory justifies a state-controlled punitive system as a form of preserving our freedom rather than a form of coercion. He argues that the state *needs* to be coercive in order to monitor the laws, because these laws protect our freedom, which is of ultimate value. (Murphy, 1973, pg. 224) Then, borrowing ideas from John Rawls’s *A Theory of Justice*, Murphy argues that all rational agents, given the chance at some “original position” prior to living in society, would necessarily agree on having a particular set of rules and regulations to smoothly govern mutual affairs. Given the conflicting desires of people in a community, these rules simultaneously limit and maximize our liberty by ensuring that people cannot freely infringe on the freedom of others. Rational agents allegedly must arrive at this system of rules “and run the risk of having some desires thwarted” because this contract is far better than alternative organizations of society, such as anarchy and chaos. (Murphy, 1973, pg. 225)

³ Murphy, 2007, pg. 11

The rules that rational agents agree upon will determine the benefits and burdens that are distributed equally across society. For the benefits of freedom, the law imposes the burdens of self-restraint. For instance, to preserve the benefit of bodily security, everyone must carry the burden of not threatening the bodies of others. While this arrangement of society opens the doors to a range of freedoms we can enjoy, it comes at the price of needing to obey the law whether we want to or not. Punishment is retributively justified because any rational agent who commits a crime in this society has now shirked a burden that others are still upholding, thereby gaining an unfair advantage and destroying the fair balance of benefits and burdens. The wrongdoer, referred to as a “free-loader” by legal philosopher Antony Duff, has been sharing the benefits of the law, but refuses to share the burden on which they depend. (Duff, 1986, pg. 206) Punishment is seen as a way of restoring this uneven balance, by imposing an extra burden on the agent who tried to cheat the system by gaining an unfair advantage.

There are several values to such a retributive theory. For one, it successfully explains the use of normally morally impermissible acts, such as the infliction of harm when dealing with criminals. The suffering caused by fines and imprisonment serve as an added burden that the guilty must endure, in place of the previous burden that was thoughtlessly disregarded by the criminal and yet upheld by society. Furthermore, by purely focusing on what we have earned and what we deserve, a retributive justification is unlike a consequentialist justification in that it treats all members of society as ends in themselves, rather than punishing criminals as a means to some social benefit like reduced levels of crime. (Duff, 1986, pg. 208) The punishment a criminal endures should not be disproportionately high to disincentivize crime, but rather, in proportion to his guilt in order to make reparations for the unfair effects of that crime.

Lastly, even the idea that it is coercive to punish someone against their will seems to be resolved by the theory. Prominent retributivists such as Morris have argued that for any rational agent to commit a crime is for the agent to *willingly choose* their punishment. (Morris, pg. 492) This is because all members of society live with the same set of rules, and having enjoyed the protection of their freedoms through these rules and regulations, wrongdoers must acknowledge that the system works in their favour. As Morris once states,

“...because the primary rules are designed to benefit all and because the punishments prescribed for their violation are publicized and the defenses respected, there is some plausibility in the exaggerated claim that in choosing to do an act violative of the rules an individual has chosen to be punished.” (Morris, pg. 479)

He argues that knowing the rules and acknowledging the system as beneficial is to consent to the repercussions of shirking one's burden, which is ultimately to consent to one's punishment.

Retributivists who endorse the Social Contract Theory would further argue that all rational agents necessarily *would* structure society in this manner, and so, if the criminal is rational, he or she would necessarily consent to the prescribed consequences of wrongdoing. The criminal chooses to be punished because (s)he necessarily *will* desire a system that ensures the protection of most human freedoms, (s)he is fully aware of the repercussions, and would insist that these repercussions exist normally. Thus, to respect an agent as rational is to respect their implicit agreement to such repercussions – that is, punishment is not against the general will of the criminal.

Morris goes so far as to say that “When what we do is met with resentment we are indirectly paid something of a compliment.” (Morris, pg. 487) This is because he emphasizes the importance of treating people as autonomous agents rather than objects without rational capacities who cannot be held morally responsible for their actions. Expressing resentment over

an agent's wrongdoing is actually a manner of acknowledging the agent's potential worth, or potential to be praiseworthy and blameworthy. If humans could not earn anything, then there would be no sense in rejoicing over achievements or holding anyone responsible for their actions. He calls us to imagine a sick patient, where the expression of resentment would be unfounded, for a sickness cannot have intentions or make choices. Thus, it seems that wrongdoers not only will their own punishment, but indeed, if we are to respect their autonomy and rationality, they have a *right* to be punished. (Morris, pg. 486)

Overall, there are two elaborations of retribution as the restoration of fairness. There is the Kantian and Rawlsian idea that revolves around the Social Contract, and there is the version presented by Morris that simply speaks of benefits and burdens. But regardless of their origins, both arguments seem to assume, whether implicitly or explicitly, that social harmony and legal order is a "cooperative endeavor." (Dagger, pg. 260) All crimes committed involve the shirking of burdens that society is obliged to hold onto, and so, all crimes are principally crimes of unfairness. (Dagger, pg. 260) As such, retributivism argues that punishment is the imposition of burdens in the restoration of fairness.

Chapter 3: The Message of Retributivism

The first objection to this version of retributivism, as articulated by Antony Duff in *Trials and Punishments*, forces us to consider whether all crimes can be considered in terms of benefits and burdens. Certain laws in society seem to have no moral significance, for they merely prevent certain activities for whatever political reasons, and these are the kinds of laws that might be burdensome to live with, like traffic laws or drug laws. But there are also criminal laws of great moral importance, like those which protect us against rape and murder, and it seems improper to think of avoiding such activities in terms of ‘self-control’ or ‘restraint’. A rapist does not deserve punishment because he ‘gained an unfair advantage’ while the rest of society was ‘forced to live with the burden of not-raping’. As Duff puts it,

“What is morally wrong with rape is that it is a grievous assault on its victim’s interests and integrity, not that it takes unfair advantage of those who restrain themselves (we do not show a rapist the wrongness of his deed by saying ‘But suppose everyone did that?’); and it should be a crime because the law should protect members of the community against such assaults, not because the law should ensure a fair balance of abstract benefits and burdens.”

(Duff, 1986, pg. 212)

While the law stands to protect us from such heinous acts, it still remains that the only way a retributivist may justify the punishment of a rapist or murderer is by using the philosophy which views the criminal as the holder of an advantage. Such an outlook seems to trivialize the truly horrific and offensive nature of certain crimes, thereby creating “an implausible separation between its wrongness as a crime and the moral reasons in virtue of which it should be a crime; between its criminal and its moral character.” (Duff, 1986, pg. 212)

Furthermore, Duff forces us to ask- what kind of attitude is expressed in the view that criminals have gained an unfair advantage? (Duff, 1986, pg. 214) It seems shocking to think that a morally guilty culprit deserves punishment because the larger society views her crime as an

unreasonable profit. The serial killer or gang-rapist should not, theoretically and morally, be thought of as gaining something that society has painfully deprived themselves of by exercising restraint. It might not be the retributivist's intention, but their strongest justification for punishment forces us to wear a dishonourable shade of envy.

A related objection emerges from the idea of crimes that are *mala in se*.⁴ How can retributivism account for attempted crimes? It seems difficult to measure the advantage gained when an act (that gravely offends the sentiments of victims) is carried out unsuccessfully.⁵

This series of objections reflects that retributivism as the restoration of fairness cannot seem to grasp what is truly *wrong* about crimes and why they should be punishable. Even if, at minimum, all crimes are crimes of unfairness⁶, philosopher Jean Hampton argues that “an advocate of the position would have to develop a theory that explains how those who break gravely important laws derive more benefit from doing so than those who violate less serious laws, so that the former deserve more punishment than the latter.” (Murphy and Hampton, pg. 115) Here Hampton makes an important point: if punishment is the imposition of another burden to eliminate the benefit that has been gained, then retributivists need to view ‘the benefit of raping’ as extremely weighty in order to match the punishment proportionately. Alternatively, one can concede that avoiding such acts is not really burdensome, and completing such acts is not really beneficial, and punish the rapist with a \$50 fine, for example. To view such crimes as either supremely beneficial or minimally punishable is what the theory cannot avoid.

⁴ *Mala in se* refers to acts that are inherently evil, as opposed to *mala prohibita*, which are acts that are simply prohibited. See under ‘Crime’ in Legal Information Institute, Cornell University Law School.

⁵ An argument originally presented by Jean Hampton in *Forgiveness and Mercy* (Murphy and Hampton, pg. 115)

⁶ As argued by Richard Dagger, “Punishment as Fair Play”, *Res Publica*, 2008, Volume 14, Number 4, Page 259 – 275

In light of these concerns, and a desire to establish some justification to punish those who seriously hurt us, I believe that no single argument need be the umbrella theory under which criminalization is justifiable. As pointed out above by Duff and Hampton, different crimes have vastly different natures, origins, and consequences – and it seems almost absurd to think that philosophers are in pursuit of a *single* theory that can justify punitive measures for all of kinds of wrongdoings using the same line of reason. Contrary to the belief that criminal wrongfulness must be unitary, Duff presents the question, “Why should we not, more plausibly, be pluralists about criminal wrongfulness, and recognise that there are irreducibly different kinds of wrong that merit criminalization?” (Duff, 2008, pg. 280) This is why I am compelled by Hampton’s theory of ‘punishment as a defeat’. (Murphy and Hampton, pg. 124) Another form of retributivism, this theory of punishment seems to appropriately capture the message of crimes that are *mala in se*. Hampton argues that when a crime takes place, the wrongdoer is making a false moral claim about their value relative to the victim. She says, “[wrongdoers] incorrectly believe or implicitly assume that their own value is high enough to make this treatment permissible.” (Murphy and Hampton, pg. 124) As such, punishment is seen as a way for the victim to *defeat* the wrongdoer, and to correct this false moral claim that has been made. The punishment symbolizes that all members of society are equal; that the wrongdoer is not above the victim, and that they are in fact peers. Similar to Kantian values, Hampton argues that if society were to condone such behaviour without enforcing repercussions, “we would be acquiescing in the message it sent about the victim’s inferiority.” (Murphy and Hampton, pg. 131) Thus, if society is committed to the idea of equality of all persons, then the state (as a representative of the victim) must take action against wrongdoers, thereby “asserting the moral truth in face of its denial.” (Murphy and Hampton, pg. 125)

Where retributivism as the restoration of fairness cannot suffice, Hampton's retributive idea might be a convincing replacement that represents the true wrongness of certain crimes. With her adaptation, we no longer run into the trouble of portraying harmful criminals as gaining advantages that we resent, or of being unable to account for unsuccessful crimes where no actual burdens were relinquished. Punishment is simply a defeat to those who misconceive their value relative to society. But it is important to remember Hampton's clarification that punishment need not be in the form of brutal suffering to convey this normative message. A proportional amount of undesirable treatment will suffice, because "punishment is an experience designed to "humble the will" of the person who committed the wrongdoing." (Murphy and Hampton, pg. 126) But now another objection emerges: what might constitute such proportionate treatment? How can we ever reliably calculate what sort of punishment would 'humble the will' of our wrongdoers, even assuming that an inflated sense of self-importance is what motivated the crime? Furthermore, people often harm others out of desperation, frustration, or a series of other complex situations that we cannot speak of with empirical certainty. So what right do we have in assuming that our wrongdoers need to be humbled – or that our victims need them punished for this purpose? If Hampton's concern is about the degraded value of the victim, it certainly seems possible for society to emphasize her equal worth through physical, emotional and financial support – where the use of treatment to induce humility in others seems hardly necessary, or even appropriate, if the crime stems from some other origin and communicates some message unrelated to human worth.

Ultimately, even if retributivism can be salvaged by introducing Hampton's theory, there seem to be a range of problems related to our conception of what motivates crimes that are *mala*

in se, and what victims really need after having been victimized. As the “strongest” theory of punishment, we must question whether retributivism is truly as resilient as it seems.

Chapter 4: Proportionality

The previous objection regarding retributivism's inability to appropriately measure the intensity of benefits and burdens is one that has been noted by Michael J. Zimmerman in his book *The Immorality of Punishment*. He muses that the burden of paying one's taxes is significantly weightier than the burden of not murdering your neighbours, and yet, retributivism must find a way to punish killers more harshly than the typical tax-fraud. (Zimmerman, pg. 64) But Zimmerman argues that even if proportional punishments were measured by some reliable factor, say degrees of guilt, retributivism would fall apart. "The thesis that punishment should fit the crime is intuitively very appealing, yet on inspection it proves to be extremely elusive. Just what is supposed to fit what, and how?" he questions. (Zimmerman, pg. 88) Retributivism is a theory that purports to punish the guilty in proportion to their guilt, but how can we ever appropriately determine whether the punishment is 'proportionate'? If there is no way to deliver this proportion, then the theory must be false. In this chapter I will explore the meaning and possibility of proportionate sentencing within retributivism.

To begin, Zimmerman clarifies that proportionality must be construed in terms of seriousness of the offence and the severity of the punishment, where the seriousness of offence is determined by the agent's degree of legal guilt, moral guilt, and metaphysical control over one's actions⁷. We find ourselves using such a rubric all the time, for instance, when someone unintentionally commits a crime out of neglect or sheer ignorance, we find ourselves more inclined to excuse her than somebody who maliciously harms someone. Furthermore, we all have 'a sense' of what constitutes fair and unfair punishments. Zimmerman begs us to imagine a world in which you get capital punishment for littering, or a \$10 fine for first-degree murder. Such scenarios seem

⁷ For example, if you were mentally challenged or a new born baby then you would have less control over your choices, thereby rendering you less culpable for your actions.

wholly unjust and disproportionate, but what informs this sense of proportion? Or as Zimmerman asks, “What underlies our judgement about such matters? Are they merely a matter of convention, or is there some truth about proportionality, independent of us, that we are striving, however imperfectly, to ascertain?” (Zimmerman, pg. 89) The matter of whether proportionality is based entirely on convention or objective truths is crucial in understanding whether retributivism can ever deliver proportionate sentences.

On the one hand, if proportionality were simply a matter of convention, then retributivism would be nothing more than a trivial theory that justifies the treatment of wrongdoers in any which way society sees fit. This could lead to a situation where it is not wrong to deliver capital punishment to the person who litters, or let the mass-murder walk free after a small fine. By this philosophy, our outrage regarding the torture of those in Abu Ghraib would appear unfounded; for if the majority of law-enforcement personnel found such treatment fitting, then the punishment is justified⁸. But on the other hand, if there were some independent moral truth that we are striving towards in our sentencing, then retributivism as we practise it would be grossly unjust, as we have not yet attained perfect proportionality. Furthermore, this objective standard seems impossible to reach. How can we ever determine just what degree of punishment corresponds with what degree of crime? For instance, we understand that certain crimes are far more serious and cruel than others, and warrant more severe treatment than others. We also understand that all else being equal, 1 year in prison is better than 10 years, which is better than 20 years. We also know that imprisonment is better than solitary confinement, which is better

⁸ Also, such an account of proportion would require complicated measurements of the evolving opinions of society and the scope of the population needed for each jurisdiction. For instance, when X is being tried for a crime in Minneapolis, do we account for the opinions of all of Minnesota, or all of the Mid-West, or all of the United States, or the world? If majority of people in the world find the stoning of rape-victims in Saudi Arabia unfair, does that matter, when most of Saudi Arabia does not? Retributivism would now have to deal with the problems of moral relativism.

than capital punishment, and so on. But do we *really* know these things? Zimmerman argues that “it’s not obvious just when “all else” is to be considered “equal,” since actual conditions of incarceration can and do vary widely.” (Zimmerman, pg. 92) and moreover, how can we even compare different types of treatment like imprisonment and capital punishment? Isn’t it possible that some individuals might prefer death over 20 years of imprisonment in a place like system A? It further seems impossible to compare the seriousness of inter-category wrongs, for instance, how does one compare stealing \$5000 to the crime of public indecency, or corporate polluting to sexual assault?

But even if we created a scale that perfectly ranked crimes by their seriousness and corresponding punishments by their severity, at the end of the day, the punishments we deliver always seem arbitrary. How do we know that 1 year in little grey box is what covers your debt to society⁹? It might rest well with our intuitions, but the logic is at best random. To put it simply, if there is an objective standard of punishments in proportion to wrongs, “how can we be sure that the two rankings match one another in such a way as to meet the demands of justice?” (Zimmerman, pg. 93) As of now, there seems to be no way of knowing how far we have come on the path to proportionality.

Earlier in his book, Zimmerman makes an even larger claim about the idea of proportionality: the very idea of *punishment* as a means to repay the burden is arbitrary. Forgetting all discussions about pairing crimes with their punishments, it is worth questioning how retributivism even arrives at punishment to begin with. If burdens need to be imposed to remove unfair advantages, then surely there are other kinds of burdens that don’t involve the sort

⁹ It might be objected that the point attacks the heinous conditions of the prison, and not the concept of punishment itself. But I would respond that we are critiquing a theory that views these very conditions as the concept of punishment. Furthermore, when the aim is to inflict harm on a criminal to extract a debt, it will always seem arbitrary how we go about choosing that harm, and how that harm seems to constitute a ‘proportional’ debt.

of degrading treatment and psychological harm with which we treat criminals today? As Zimmerman puts it, “even if the offender is taken to have incurred a debt to society due to his lack of self-restraint, it’s not clear how punishment, at least as conventionally administered (by means of incarceration, for example), is supposed to constitute an appropriate, let alone the most appropriate, means for him to repay that debt.” (Zimmerman, pg. 64) The key phrase of that excerpt is challenging how punishment is ‘the *most* appropriate’ burden in the restoration of justice. Even Hampton argues that if our response to wrongdoing ought to be a defeat that “humbles the will” of the criminal, this defeat can be made in a number of ways that don’t involve punishment. So it seems that for systems which claim to be retributive and deny the exercise of these possibilities, punishment is imposed merely out of revenge. And for the retributivist to ignore these possibilities by embracing the language of ‘punishment’ is for them to conform to status quo, rather than deliver the most meaningful ways in which to repay our debts – a feat that is probably impossible, as Zimmerman argues. Thus, if there is no meaningful way to strike proportionality, then retributivism is false, “for it cannot be that someone deserves to be punished in proportion to his guilt, if no such proportion exists.” (Zimmerman, pg. 95)

If we take a closer look into what is happening around us, then we can see how Zimmerman’s objection about the impossibility of proportionality is valid. At present, we seem to have wildly unintuitive ways of handling crime – so it cannot be either that we are conforming to convention (which holds that these laws are disproportionate) or that we are close to reaching the objective truth. For example, consider the fact that the minimum sentence for manslaughter while driving drunk is 15 months in prison, which is the same as for the embezzlement of \$250,000. (Zimmerman, pg. 93) Also, as Michelle Alexander astutely points out, the entire process of plea bargaining in the U.S. seems to undermine the idea of truly serving justice, when

more than 90 percent of criminal cases are never tried before a jury. (Alexander, 2012)

Alexander argues that “In the race to incarcerate, politicians champion stiff sentences for nearly all crimes, including harsh mandatory minimum sentences and three-strikes laws; the result is a dramatic power shift, from judges to prosecutors.” (Alexander, 2012) Fearful of losing in trial, most people charged with crimes forfeit their constitutional rights and take the plea – condemning themselves to punishment even if they are innocent, or denying themselves a fair trial due to the dauntingly disproportionate sentences. So it seems that the system, allegedly designed in our best interests, often hands out sentences that are wholly undeserved, much less proportionate.

Chapter 5: Willing Your Own Punishment?

When a Rawlsian picture of retributivism is painted before us, we are asked to imagine a group of “rational agents” standing behind some veil of ignorance at some point before the shaping of society. Proponents of retributivism argue that they would unanimously and necessarily arrive at the organization of society in such a way that perpetrators of offenses would be punished for their unfair advantages. (Duff, 1986, pg. 217) But there are several aspects about this situation that seem entirely unlikely.

Duff argues that there can be no such “objective rationality” because there is no way of knowing what characteristics, values or principles the agents in this group might harbour. (Duff, 1986, pg. 218) We are certainly not imagining a group of individuals who have grown up in a vacuum, for we would never know what sort of rationality they might have, having never encountered this. This implies that whatever group of agents we have, they come with prior experiences and biases, and therefore their prior principles with which they make decisions. This leads to an important question: why should these agents necessarily consent to retributivism? It is completely possible that they might structure society in a consequentialist manner, where punishment always has a deterrent and rehabilitative purpose, and the balance of fairness is not even a consideration. Murphy makes a similar point, arguing that the guiding principles of any group is the basis on which the rationale will be determined, and since retributivists provide no independent rational foundation for these principles, the rationale cannot be proven as objective. (Murphy, 1973, pg. 238) In the words of Duff, “The supposed choices of imaginary beings in an original position may provide a dramatic explication of a set of principles: but they must presuppose, and cannot serve to demonstrate, that those principles are rationally justified.” (Duff, 1986, pg. 219)

Given that the objective nature of a rational agent's deliberations is unproven, the retributivist's claim that any rational agent necessarily wills her own punishment needs to be re-examined. If there is no proper way of gauging what rational people necessarily *would* want out of society and handling crime, then how can one attribute a random theory to the thoughts of millions of others, who, given the right principles, might even opt for anarchy? In such cases, a state that punishes its offenders might very well be a form of coercion. But this is a radical example, and the claim that retributivism doesn't respect the autonomy of individuals can be made even by assuming an objective rationale that all humans would adopt.

For example, if a crooked criminal X has been caught, against his will, and is told that the State can punish him because as a rational man, he has willed his own punishment, how should we respond to his protests? There seems to be a 'larger rational will' which can be seen from X living among others and reaping the benefits of freedom and safety, an 'irrational will' as seen by him committing a crime and willing his own punishment in such an order of affairs, and a 'present will' as seen from his adamant protests against being harmed by the State. How can we find out which will is most essential in order to dictate our next actions? If we choose to consider X's present will, then punishing him is unjustified because he has, in fact, not consented to being punished. But if we prioritize his larger rational will, then we must convince him, against his protests, that he is currently being irrational, and that he has already agreed to the consequences of his actions. But this is not to treat X as autonomous, rather, it is to manipulate and coerce X into revoking his present autonomy. (Duff, 1986, pg. 223) Thus it seems we are still unjustified in punishing him. What we have left is an irrational will, as seen from X's life-long enjoyment of freedoms in society, a tacit recognition that this is the best system, and yet an engagement in criminal activity that inevitably results in his own downfall. If X acts against his own rational

will, he is acting against his own interests, and thus cannot truly profit from the crime. If X is an irrational agent who gains no added advantage, then there is little sense in saying that he is deserving of a burden to even things out. In fact, the treatment X now deserves in light of his irrationality would be the opposite of punishment, for his irrational nature cannot possibly be rationally or voluntarily caused. It seems that X ought to be pitied and cured of his irrational urges. So ultimately, even if the retributive system is best for society, it seems impossible to punish criminals while respecting their autonomy.

But what of a different account of retributivism, like the one provided by Herbert Morris? Morris doesn't claim that wrongdoers will their own punishment because of any Social Contract or "objective rationality". He merely asserts that punishment is not coercion, because obeying the law must be the norm. Here is a sample of what he thinks about coercion:

"This system is the accepted setting; it is the norm. Thus, in any coercive situation, it is the coercer who deviates from the norm ... In a just punishment situation, it is the person deviating from the norm, indeed he might be a coercer, who is responsible, for it is the norm to restrain oneself from acts of that kind." (Morris, pg. 492)

It is hard to determine exactly what he means by this and where the criminal's consent lies, but Morris seems to be arguing either one of two things. My first interpretation is that he thinks punishment is not coercive because lawbreakers deserve punishment. But this sounds tautologous to me – essentially claiming that punishment is justified because punishment is justified. The second interpretation could be that punishment is not coercive because the law applies equally to all. If all members of society enjoy the same benefits and burdens, then this enjoyment is a tacit way of consenting to the repercussions of their actions within this system. But even this stance is objectionable. It seems obvious that even if I do consent to having consequences with every action, it is possible for me to reject the consequences that the State has

chosen. I might desire consequences *other than* punishment, such as therapy or moral education. Consenting to some consequence upon the breaking of a contract requires the consequence to be agreed upon – which is the topic under discussion here. And this brings us back to Zimmerman’s previous concern- why is it that retributivists must arrive at *punishment* as a repercussion? What informs this decision? Even if it is clear that wrongdoers must deserve *something* to restore the balance of equality, why are the terms of the contract pre-dictated, in a theory that purports to respect the will and autonomy of individuals? It seems that retributivism must rely on a consequentialist justification for the general *practice* of punishment¹⁰, because the idea of desert cannot reflect the true consent of individuals in their punishment.

Another way to phrase the point might through an example: retributivism assumes that what Meena wants for the general law-breaker is invariably punishment, and therefore, if Meena is caught, she must be consistent and will her own punishment. But what if Meena has a different conception of paying one’s debt to society? What if she thinks that a sincere apology and time spent contemplating and growing from your mistakes is what people deserve, as she tends to think whenever friends or family members wrong her? Shouldn’t she be consistent with that view, and expect to be burdened with these handlings rather than punishment? Retributivism seems to infer the consent of every wrongdoer from the traditional consequences of law-breaking that have been historically employed by leaders who view crimes as acts that must be prevented for its good consequences, rather than take each act and attempt to understand its specific requirements- which is what retributivism initially purports to do. It claims to respect the personhood of all members of society, their rights and their choices, and claims to treat people

¹⁰ Which is what several philosophers have argued, such as John Rawls in *Two Concepts of Rules*.

only as they deserve. And yet, it rarely attempts to account for people's actual opinions, while touting that retributivism is the only non-coercive path to justice. As Murphy puts it,

“Now this idea of treating people, not as they in fact say that they want to be treated, but rather in terms of how you think they would, if rational, will to be treated, has obviously dangerous (indeed Fascistic) implications. Surely we want to avoid cramming indignities down the throats of people with the offhand observation that, no matter how much they scream, they are really rationally willing every bit of it. It would be particularly ironic for such arbitrary repression to come under the mask of respecting autonomy.” (Murphy, 1973, pg. 230)

Within retributivism, the will of individuals seems to be hugely generalized, especially since the enjoyment of benefits is not a sufficient indicator of the consent of wrongdoers to be punished. It could be entirely possible that an individual desire to enjoy the benefits of freedom while living a life of crime and impunity. Much like the bearer of Plato's Ring of Gyges, who turns invisible with a ring on his finger, one could hope to commit crimes without getting caught. (Plato, 360b–d) To many, this might even seem the most rational choice. But the problem with both Murphy's and Morris's accounts of retributivism is that the will of individuals regarding their own treatment is being assumed or fallaciously inferred, without any real principles that indicate how one can do so. As Marx rightly pointed out, the overly stated consent of individuals makes retributivism seem like “a transcendental sanction for the status quo”, rather than a theory committed to finding the best approach to wrongdoing. (Murphy, 1973, pg. 221¹¹)

¹¹ Extracted from Karl Marx, "Capital Punishment," New York Daily Tribune, 8th February 1853

Chapter 6: Theory to Practice

I have spent the last few chapters discussing how far the retributive theory can take us. Firstly, the theory cannot seem to account for *what* the consequences of wrongdoing entail. It merely argues that the guilty ought to be punished proportionately, without establishing any meaningful foundation for this proportion. Furthermore, I have argued that the theory has an unfounded perception of consent. On the one hand, retributivism claims to innately value our autonomy, while on the other, it completely disregards our actual choices by inferring our consent through selective avenues of reason. These objections suggest that retributivism, as the strongest justification of punishment, needs some massive reconstruction, where it must account for the consent of individuals and alternative responses to crime. But this is not to say that these are the only shortcomings of retributivism. The above critiques fall within the boundaries of the theoretical world, where we assume that there is actual equality in the distribution of benefits and burdens. But when the theory is applied to a world of inequality, a familiar sight to us all, it can go terribly wrong. As Morris himself once noted, “To the extent that the rules are thought to be to the advantage of only some or to the extent there is a maldistribution of benefits and burdens, the difference between coercion and law disappears.” (Morris, pg. 492) In this section, I will be examining the coercive results of applying retributivism to the real world, and I will offer ways in which we might be able to avoid these repugnant implications.

Unjustified Punishment

To begin, it is crucial to examine whether retributivism entails an accurate depiction of human nature, criminality, and equality. In his essay *Marxism and Retribution*, Murphy thinks that Marx’s most valuable contribution to social philosophy is “simply his insight that

philosophical theories are in peril if they are constructed in disregard of the nature of the empirical world to which they are supposed to apply.” (Murphy, 1973, pg. 232) Even if retributivism were theoretically fool-proof, if the logical assumptions are far removed from the society we live in, the theory is practically inapplicable.

As pointed out earlier, it seems clear that the benefits and burdens assumed by retributivism are not equally distributed in society. Murphy argues that this renders the punishment of many citizens unjustified. If all of society starts off on uneven footing, then some enjoy more benefits than others, while some carry heavier burdens. In a capitalistic society like the U.S., legal philosophers such as Willem Bongers have identified the main causes of crime as need and deprivation on the part of the disadvantaged, and motives of greed and selfishness generated and reinforced in competitive capitalistic societies. (Murphy, 1973, pg. 234) When significant portions of society enjoy far fewer benefits at the cost of more burdens, it is unjustified to penalize the very citizens that have been pushed to the margins and provided incentive to commit crimes. Murphy writes, “There is something perverse in applying principles that presuppose a sense of community in a society which is structured to destroy genuine community.” (Murphy, 1973, pg. 239) So while retributivism prides itself on the preservation of fairness and equality, the theory is hazardous if its application in reality only results in the further maldistribution of benefits and burdens. As Duff puts it, “Punishment cannot restore a fair balance of benefits and burdens, if no such balance existed in the first place.” (Duff, 1986, pg. 229)

So, what are the exact injustices from practicing retributivism in an unequal society? Firstly, the retributive theory assumes that we are all members of a community of shared values which allow us to rationally arrive at rules that benefit all, or at least, acknowledge that the rules

benefit all. But the values of a community cannot possibly be shared when some are profiting at the expense of others, creating a clear dichotomy of views and alienation from one's own neighbors. For example, the vast majority of the incarcerated in the U.S. are from the most racially marginalized communities. (The Sentencing Project, 2012) It should come as no surprise that these communities experience racism or deprivation of upward social mobility in almost every field of life: lack of employment, affordable health care, and being targeted by the police. So it simply cannot be the case that all criminals are malevolent, rational beings who agree with the existence of these "shared values" and acknowledge that they are benefiting from them. Even Morris's view regarding consent seems to fall apart by these statistics. If Morris argues that reaping the benefits of society is a manner of willing your own punishment, then it can be argued that those who live in such abject poverty, with such scarce opportunities or feelings of community, and who are themselves the victims of crime more often than not¹², have not reaped any real benefits that could possibly represent their consent or acknowledgement that the system works in their favour. As a result of our societal inertia and apathy, Murphy laments that "[Criminals] certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for." (Murphy, 1973, pg. 240) To put it simply: if citizens do not enjoy equal benefits and burdens, then they cannot acknowledge that the law works in their favour. And when the system works against them – which is the vast majority of the incarcerated community of the U.S. – they cannot consent to their own punishment.

¹² Families who earn less than \$7,500 a year have reportedly been victims of crimes more than any other income bracket in the nation. African-American families earning less than \$7,500 a year have the overall highest victimization rate. (Bureau of Justice Statistics, 2011, Table 14 and Table 15)

At this point, one might argue that the individuals of a community who do not share these normative values do not need to benefit from the current system of law when they can simply leave. If they stay, that means they give their consent and thus deserve the prescribed punishment. But voluntary acceptance isn't indicated by an agent staying or leaving – it is also indicated by the agent's ability to stay. If a country has rendered thousands of citizens disadvantaged enough to steal for bread and butter, then how can one expect the vast majority of criminal offenders to have a choice regarding where they live, much less, how their society is governed. To even suggest that poor people, who have no choice politically or economically in how things are run or what they wish to be burdened with, have agreed to the laws by staying in the country, is to live in a world of “social and political fantasy”. (Murphy, 1973, pg. 240)

Murphy's astute observations regarding the implications of retributivism do not undermine the validity of the theory. But they certainly reflect how our present social conditions render compelling, if not the strongest, accounts of punishment inapplicable. Perhaps what we can learn from Murphy is that we need to focus our resources on creating equality before we can justifiably punish people in the name of fairness.

Rotten Social Background:

In an essay called “*The Wretched of the Earth*”, author Richard Delgado expresses his grave disappointment about the fact that people who have faced years of severe deprivation are rarely acknowledged as victims of injustice. In the early 1970's, Judge David Bazelon used the term “Rotten Social Background” or RSB to describe a situation that could possibly constitute a criminal defense. RSB are those who grow up with extremely difficult circumstances, like being born to a single parent in a violent ghetto in a racist town. But such a defense has been repeatedly

disallowed, to the point that further incarceration of the poor is as good as tolerating more crime, in lieu of directing resources to resolving social and economic issues, or recognizing a legal defense that might protect the RSB offenders from a cycle of crime and poverty. (Delgado, 2011, pg. 6)

In an earlier paper, Delgado uses the retributive idea of benefits and burdens, and argues that the benefits we can claim as individuals may extend far further than simply the right to life and bodily security. (Delgado, 1985, pg. 57) For example, Delgado identifies the top social causes for crime as poverty, unemployment, substandard living conditions, and inadequate schools. (Delgado, 1985, pg. 24-28) Surely, homes, jobs and a good education are some of the “benefits” that our retributivists imagined all of society to have. So Delgado questions, if we are allowed to defend ourselves against violence, isn’t state neglect is a form of physical and psychological violence that we should be allowed to resist? (Delgado, 1985, pg. 57) RSB defendants should have the right to protect other interests (or benefits) as well, such as the right to self-respect, or the right to a community regarding them with full and equal respect, or the right to full and equal participation in society - benefits that are taken for granted by the bourgeois. (Delgado, 1985, pg. 58-59) In some cases, the actions of an RSB offender “can be seen as a protest against political or economic subjugation, an appeal to a right more fundamental than the one protected by the law which is broken.” (Delgado, 1985, pg. 59) For instance, some might argue that severe deprivation doesn’t make you immune to respecting the law in general, but what, then, do they think of civil disobedience movements and strikes? (Delgado, 1985, pg. 60) Delgado makes a crucial point about the nature of revolutions and protests, which occur because of vast inequalities in society and radical efforts to inspire change. To reject the struggle of an individual RSB defendant is to reject the valid justification behind these movements as

well, for they also claim to be victims of societal neglect and segregation. Thus, the wrongdoings committed by RSB defendants can be seen acts that protect important personal interests.

(Delgado, 1985, pg. 61)

In sum, Delgado's arguments amount to another possible implication of retributivism applied in a world of inequality: the theory must now also allow for criminal defenses in the case that members are *not* receiving equal benefits. If an equal distribution is our right, then the court should acknowledge the deprivation of this right as a viable defense against the state or those who try to deprive them. So, in addition to Murphy's view that punishment of the marginalized is wholly unjustified, Delgado now presents an idea to actually exonerate them during trial: to argue that the maldistribution was a form of violence they were defending themselves against. Parallel to Murphy's objection, Delgado notes, "The view that the criminal needs punishment "to heal the laceration of the bonds that joined him to society" assumes the actual existence of a community to which each individual is bonded in a meaningful way." (Delgado, 1985, pg. 69) And if a significant portion of society is excluded from the community¹³, then how can we punish them based on the principle of fairness? If a retributivist desires to justify punishment by appealing to the principles of equality, then the retributivist has the responsibility to care wholly about societal equality and ensure its existence before the infliction of disproportionately severe punishment.

¹³ As is evident from the severe wealth disparity in the U.S. In 2013, the median net worth of upper-income families was \$639,400, nearly seven times as much of those in the middle, and nearly 70 times the level of those at the bottom of the income ladder. (Cohen, 2014)

Blame and Hypocrisy:

Murphy has claimed that punishment of those who are severely deprived is unjustified because they do not belong to a community of shared values, and they do not share the same benefits as others, thereby being unable to acknowledge the value or beneficence of the system. In such cases, there is neither explicit nor implicit consent, rendering punishment coercive. Delgado has argued that there is indeed a way to handle crimes committed by those who have been deprived, as this deprivation could possibly ground a justification or excuse for the crime. Perhaps the sentences of criminals could be reduced or completely pardoned in light of the deprivation they have faced, resembling something like system B. I believe that there is another dismaying implication of retributivism in a world of inequality, but it also gives rise to another solution that points us in the direction of system B. This final argument is delivered by Antony Duff in his article titled *Blame, Moral Standing, and the Legitimacy of the Criminal Trial*.

Duff begins to describe situations in which it would be legitimate and illegitimate to blame someone. For example, if I have hurt my friend, it would be completely unfounded for a random stranger to approach me and blame me for my actions. As empathetic human beings they may comfort my friend, or pass judgement about me, but they have no place to *call me to answer* for my actions, that is, to conduct a trial and assign consequences. It is simply none of their business. This is because “Blame requires a suitable relationship between blamer and blamed, as fellow members of a normative community whose business the wrong is: it is an attempt at moral communication, appealing to values by which blamer and blamed are, supposedly, mutually bound.” (Duff, 2010, pg. 125) As a result, if the stranger has no proper relationship to me and the values concerned in the conflict between me and my friend, it would be wholly inappropriate for her to punish or forgive me for my actions.

Duff gives us another thought-experiment: if Hilda blames Ian for stealing her room-mates money, when Hilda was complicit in the crime and encouraged Ian to do so, isn't there something wrong about the situation? Duff insists that there is certainly something wrong, for even though it is entirely Hilda's business, she is calling Ian to answer for something that she herself is guilty of. This example proves to show that in order to hold someone answerable for their crimes, one must have an appropriate relationship that is built on moral reciprocity. If the blamer appeals to some value that the accused has flouted, then the blamer must *necessarily* embody that value herself, in order to avoid contradictions and hypocrisy. Hilda is applying moral standards to Ian that she does not apply to herself, and so, she has undermined her own position as a blamer.

Tying this back to retributivism and punishment, Duff tries to connect this example to a criminal trial. He writes, "The trial can be seen as a formal, legal analogue of the informal, moral process of calling another to answer for an alleged wrong, and blaming her for it if she cannot offer a suitably exculpatory answer." (Duff, 2010, pg. 130) This implies that when the state calls wrongdoers to plead either 'guilty' or 'not guilty' and provide exculpatory evidence, it is possible that they have no right to do so. It is possible that their own actions have undermined their standing to blame the wrongdoer in trial, providing probable cause for a 'bar to trial'. Duff admits, it is "a different kind of bar to trial – that which consists in some prior misconduct towards the defendant by the state, by the polity, or by its officials." (Duff, 2010, pg. 131) But if society has pushed citizens to depraved existences, including the loss of opportunities, education, employment, and societal respect, then in what ways does the state harbor the same moral values it claims the wrongdoers from serious depravation have flouted? Duff argues that our collective failure to treat offenders justly in the past undermines our standing to punish them now. It is

further possible that the state, by neglecting so many citizens from society, is no longer even part of the normative community of shared values – and in some way, the crimes committed are none of their business. “Citizenship cannot be divided,” Duff says, and “that failure to treat him as a citizen outside the court cannot be dismissed as irrelevant to the legitimacy of his trial.” (Duff, 2010, pg. 138) Thus, by refusing to ensure the equal distribution of benefits and burdens, we lack the moral standing to call criminals to answer for their actions, when we don’t answer for our own.

So what is the solution from here? We cannot just excuse all crimes committed by those who have suffered at our hands, for that would be deeply insensitive to those who have been victimized and undergone serious losses themselves. It is here where Duff makes a crucial observation. What undermines the standing of Hilda to blame Ian is not simply her complicity in the crime, but also her attitude while she is blaming Ian and how (if at all) she deals with her own wrongdoing. (Duff, 2010, pg. 127) “A recognition of our own sinful condition should induce a certain humility in our blame: we should blame others not as our inferiors, but as our equals.” Duff writes. (Duff, 2010, pg. 127) And this could mean either through apologizing, making amends, or through some provision to repair the harm caused to Ian and her room-mate. Analogously, what is wrong about the criminal trial is not the *blaming per se*, but,

“...to try the defendant for his wrongs, whilst refusing to answer to him for the wrongs that he has suffered (and still suffers) at our collective hands. For what denies his equal citizenship, in a way that undermines our standing to call him to account, is not the injustice that he has suffered by itself, but that injustice plus our refusal or failure to recognise it, to answer to him for it, and to try to provide some appropriate remedy.” (Duff, 2010, pg. 139)

If the state can answer for its wrongs either at the same trial, or in a separate process, then perhaps we might still be able to hold people accountable for their crimes in a just manner. This might entail solutions like the Norwegian approach to justice, where convicted wrongdoers

spend time in a place that inhibits their freedoms and prevents them from causing further harm, but simultaneously provides them with opportunities such as education, intellectual stimulation, creativity and play. If the state has undermined its own ability to blame wrongdoers, then perhaps a way to avoid chaos and hold people accountable for their actions is to remedy the harm caused by state neglect via methods of progressive incarceration. If the state were to regard those who suffer serious deprivation as equals, then it is the duty of the state to ensure that those individuals are no longer disadvantaged. So perhaps Duff offers us a way to consider reasons for the U.S. system to adopt a Norwegian approach to justice: to remedy the harms caused by state neglect, to avoid hypocrisy and moral inconsistencies, and to reclaim the nation's standing in attempting to ensure justice.

Chapter 7: Norway and the Realization of Capabilities

In the last chapter, I increasingly revisit the idea of system B, as my ultimate goal is to put forward a series of compelling reasons for societies to seriously consider the deliverance of justice in the face of wrongdoing as a rehabilitative endeavor, like that of system B, which in the real world is the system of Norway. This is not simply because the Scandinavian approach to justice paralleled my own intuitions about punishment, or because the Norwegian prison system revealed the capacity of human reform in even the ‘cruellest’ individuals (certainly, these aspects were hugely influential in my recent obsession with Norway). More than anything, what those progressive prisons showed me was the possibility of a system of punishment that embodies multiple moral values at once. There need not be a stark distinction between retributive and utilitarian values – as H. L. A Hart once suggested, all these different objectives such as deterrence, retribution and reform are important in their own respects, and should each feature into our theory of justice, even if they answer different questions. (Hart, pg. 2-3) But how can this be achieved, when consequentialism often breaches autonomy and retributivism can create disastrous consequences in society? The solution, I think, can be found by examining the philosophical foundations of the Norwegian prison system and exploring the moral arguments for rehabilitation.

The Norwegian prison system provides two types of facilities that each prisoner must live in for some amount of time. Immediately after conviction, wrongdoers are expected to stay in a ‘high security’ facility until they serve a specific amount of time, or until they demonstrate good enough behavior to be transferred to the ‘low security’ prison. High security, or closed prisons have single rooms that are locked every evening, sealed windows that prevent escape, small

libraries, private televisions, tea-kettles, ashtrays, vending machines for snacks and cigarettes, spinning classes, 1 hour breaks for fresh-air, daily printed menus, and a requirement to work some job that is provided by the facility. There is clearly a limit to the freedoms an inmate can enjoy in a facility like this. After a few months (or years, in the case of extremely dangerous convicts), individuals must move to ‘low security’ or open prisons. These are picturesque campuses, usually surrounded by nature such as lakes and forests, and all inmates live in quaint little houses that resemble warm, family cabins. They share these homes with others serving time, and each home has a fully equipped kitchen (yes, knives and all), living room with gaming stations, cheerful upholstery and potted plants. The open prison campus is filled with quaint surprises, like barbeque grills and volleyball courts, inmates lounging in the sun listening to the radio, and bicycles strewn across lawns. In these facilities, inmates have many more employment opportunities. To repeat, each wrongdoer must either work or study (or both, if she’d like), and so the work opportunities in each prison can include mechanics, organic farming, and shepherding, among others. The mechanics studio can be as large and efficient as any mechanic store in the city. Fully equipped with all kinds of tools (hammers, axes, chainsaws), these studios, and the entire prison, are open to the public – and they receive many customers on a daily basis. As I walked by, inmates were working under cars, fixing their engines or putting together new ones. I then entered the colourful house they called school, which was a brightly lit, modern building filled with educational posters showing the anatomies of crickets, hummingbirds, and beluga whales. There were multiple classrooms, computer labs filled with students in their thirties, and the undeniable smell of freshly brewed coffee wafting down the hallway. Just a stroll through the forest can bring you to this strange, beautiful campus – where there isn’t even a single guard in sight to suggest that you are in a prison¹⁴.

¹⁴ As a side-note: I had to walk around for fifteen minutes through the campus to find a friendly guard

How can such a lenient system flourish? In what ways does this even qualify as punishment? These are questions that have been frequently asked by American journalists who cannot grasp the concept of trusting our imprisoned citizens to follow the rules. In some respect, perhaps these questions emerge from retributive values, and what they *really* mean to ask is- how are these wrongdoers repaying their debt to society? My response is that the Norwegian approach constitutes a punitive element where, as a convicted criminal, you are not free to live where you choose. To be moved to a facility where you cannot choose how to spend the hours of your day, where you cannot live spontaneously and decide to go an adventure, to be living away from your family, your friends, and the comforts of your home – this is what constitutes punishment. And if anybody doubts that this is a struggle, then they should try voluntarily handing the reigns of their lives to somebody else for some years.

The Norwegian prison system is unique because it seems to be founded on a healthy combination of retributive and consequentialist values. Perhaps, there is no sharp distinction between the two after all, as consequentialism need not measure ‘the good’ in terms of a single metric, thereby denying that there are irreducibly plural goods that humans can value. If retributivists value our rights and personhood as ends, why is it that consequentialists fail to do the same? In her essay *Capabilities and Human Rights*, Martha Nussbaum deals with this very idea. She argues that the term ‘rights’ is inherently vague and can be understood in many different ways. Within the philosophical context, rights are typically used as the cornerstone of Kantian values to assert that consequentialism treats people as means towards some social good by denying people their freedom of choice. But Nussbaum argues that this conception of rights as necessarily distinct from the social good is flawed. Rights are more than simply abstract laws

who wasn't slightly surprised to see me loitering about. He was sitting on a table, laughing and chatting with three inmates, and delightedly showed me around for the afternoon.

that promise non-interference in our choices; rights are also the *capabilities* of people.

(Nussbaum, 1997, pg. 285) For instance, consider how “Women in many nations have a nominal right of political participation without having this right in the sense of capability: for example, they may be threatened with violence should they leave the home.” (Nussbaum, 2003, pg. 38) Furthermore, these women have the right to report sexual assaults, but cannot do so if they’ve never been educated to know *how* to file a report or that they have this right¹⁵. The example should demonstrate how rights are more than simply rules written down in our constitutions; they are also the actual capacities that people need to engage in the full range of their freedoms, which could include external capacities like the power-dynamics of society, as well as internal capacities like the actual *knowledge* of one’s rights, and the actual ability to construct your own values. And for this reason, a consequentialist who is truly determined to bring about the most social good will also be determined to enhance our actual rights and freedoms.

An example closer to the issue of criminal justice might be Delgado’s illustration of those from a “Rotten Social Background”. While it is true that those who are deprived still *technically* have the right to make various choices, unfavourable social and economic circumstances significantly prevent the RSB from accessing the full spectrum of liberties and opportunities that help inform their choices. As Amartya Sen, the pioneer of what is now called the ‘capabilities approach’, has said:

¹⁵ This is actually a devastating problem endemic to India. With a lack of education, women fail to realize their equal status in society and their rights to charge men against sexual assault, and their rights to go above corrupt policemen who tell them there is no facility to file reports. Even more fundamental to their lack of agency is the fact that they view themselves as inferior after they have been raped, and therefore do not feel the need to take legal action. In fact, many of them are very against it. As such, Nussbaum’s approach suggests the provision of capabilities to enhance the freedom of these women, which can only happen if they are informed of their rights and their equal worth, or if they have the freedom against religious and cultural indoctrination, and if they have the freedom to think critically about their truly *individual* desires.

“It is odd to conclude that the freedom of a person is no less when she has to choose between three alternatives which she sees respectively as ‘bad’, ‘awful’, and ‘gruesome’ than when she has the choice between three alternatives which she assesses as ‘good’, ‘excellent’, and ‘superb’. Further, it is always possible to add trivially to the number of options one has (e.g. tearing one’s hair, cutting one’s ears, slicing one’s toes, or jumping through the window), and it would be amazing to see such additions as compensating for the loss of really valued options.”
(Sen, 2008, pg. 274)

As such, when we speak of the preservation of rights, what we really ought to speak of is the enhancement of capabilities that are integral to all human beings. For instance, it is distinctively human to reason and imagine – all of us are born with the potential to do so. But without the right exposure to develop abilities – without the exposure to education – how can we expect humans to maximize their full potentials to be reasonable or creative? Imagine how millions of Indian households have denied their daughters the permission to attend school. Should we say that those children have the exact same potential to reason and imagine as we; that they have the exact same freedoms to reason and imagine as the educated? Should we say they are capable of similar intellectual achievements, but they simply *choose* not to do so? What Sen and Nussbaum are therefore suggesting is a switch from the language of preserving rights to the language of enhancing capabilities – where the enhancement of our human faculties should be synonymous with human rights. Talk of ‘rights’ is useless without the appropriate measures to make people truly capable of political exercise.

With this conception of rights as capabilities, Nussbaum argues that providing the tools to enhance our autonomy ought to be the aim of public policy. She writes, “The choice of whether and how to use the tools, however, is left up to the citizens, in the conviction that this choice is an essential aspect of respect for their freedom. They are seen not as passive recipients of social patterning, but as dignified free beings who shape their own lives.” (Nussbaum, 1997, pg. 292)
Her list of fundamental human rights, or capabilities, include being adequately healthy and

nourished, having bodily freedom and integrity, being able to use and hone our senses, imagination and thought, having emotional attachment to others, being able to form a conception of the good and to engage in critical reflection about the planning of one's life, being able to respect and form friendships with others, to live in concern and in relation to nature, being able to enjoy recreational activities, to laugh, and being able to participate effectively in political choices that governs one's life, among others. (Nussbaum, 1997, pg. 287-288) If we can strive towards providing these capabilities to all human beings, then they are truly free to determine their course. As she concludes, "The person with plenty of food may always choose to fast, but there is a great difference between fasting and starving, and it is this difference that we wish to capture." (Nussbaum, 1997, pg. 289)

So what has any of this got to do with consequentialism, retributivism, prisons, or Norway? I find Nussbaum's argument that the primary aim of politics should be to enhance our capabilities is a consequentialist justification for the enhancement of human rights. And this is a form of consequentialism that possibly grounds the Norwegian justice system. Since consequentialism justifies anything towards the maximization of some social end, the 'end' in question here is the enhancement of our autonomy¹⁶. This strain of consequentialism would actually use the incapacitation of wrongdoers as a way to achieve this end. Stopping criminals from committing more crimes and setting a precedent for potential criminals allows members of society to live more freely, without the risk of being harmed. Furthermore, the theory would also find rehabilitation as a necessary measure towards this end: to enhance the capabilities of wrongdoers so that they are not constrained to the choice of crime, as well as to provide the basic rights they deserve by virtue of being human. The provision of opportunities such as education, training

¹⁶ Or capabilities (as she argues, they are one in the same)

programs, and employment skills is an effective measure in enhancing the most freedoms of society because they help the convicted abstain from further wrongdoing¹⁷, as well as enhance the autonomy of wrongdoers for their own sakes. As such, consequentialism with a capabilities approach would embrace 1) incapacitation, 2) deterrence, 3) rehabilitation, and most importantly, 4) a respect for human rights. Given that the theory respects each of these values, it might be possible to have of a theory of justice that can simultaneously maximize a plurality of goods, rather than classical consequentialism that only strives towards happiness by disregarding our rights. Perhaps this theory of consequentialism, by focusing on enhancing the autonomy and personhood of all individuals, is not doomed to treating people as means towards some distinct end, as Morris and Murphy have objected. If the state acts in a way as to respect and enhance the rights of each person, then it is difficult to see how its actions violate those very rights. So, perhaps this form of consequentialism endorses the underlying principle of retributivism –an ultimate respect for autonomy. And perhaps what is going on in the seemingly liberal Norwegian prisons is the provision of opportunities that are not overly-generous or morally prescriptive – but opportunities that are essential for a genuinely human existence, that enhance our human faculties and provide us true autonomy. Morris has argued that ‘therapy’ to remedy wrongdoers disrespects the autonomy and moral status of humans. But perhaps the Norwegian prisons are grounded in a consequentialist justification aimed at providing these remedies out of *respect* for the autonomy and moral status of humans. By acknowledging the lack of choices of many, and by providing opportunities that generate *more* choices, rehabilitation in this sense only enhances one’s autonomy. Finally, by virtue of being a consequentialist theory, this approach can avoid all the objections to retributivism that I argued throughout my paper. Without the concept of desert, there need be no concept of benefits, burdens, or proportionate treatment. And so, perhaps this

¹⁷ That is, further infringements on freedoms

justification of punishment can avoid the fatal objections to both consequentialism and retributivism that I discussed previously. Just as the strongest organisms evolve from combining diverse genes pools, perhaps the combination of crucial elements from each classical theory of punishment will produce a theory of justice that is immune to the typical problems we have encountered.

Indeed, the theory I have just outlined might even be used to resurrect classical consequentialism as the strongest justification of punishment, so long as the ‘good’ we strive towards includes the enhancement human rights. Thomas Scanlon has even argued that the only way to make sense of our desire to respect human rights is by virtue of its utility, or in his words, “...rights themselves need to be justified somehow, and how other than by appeal to the human interests their recognition promotes and protects?” (Scanlon, pg. 74) So why not skip all this talk of a new, ‘hybrid theory’ and ensure that classical consequentialism starts enhancing human rights? I hesitate to endorse such a view, for acknowledging some further interest or happiness that results from human rights would entail a rejection of human autonomy as an ‘intrinsic good’. As previously discussed, retributivists such as Morris have argued that autonomy and rights are essential in understanding the moral nature of our actions, which is why they must be considered valuable in themselves. To only pursue human rights because of the overall benefit in doing so seems to trivialize the moral status of our actions, by merely referring to the benefit derived from *viewing* our actions as morally significant, rather than actually claiming: our actions and lives are morally significant.

Furthermore, my hope to separate this “Norwegian consequentialism” from classical consequentialism also stems from the desire to value people as ends in themselves, rather than caring for their autonomy only as means towards some other good. This seems crucial if one

desires to avoid regarding the rights of people as one viable option in producing overall happiness among others. It seems more respectful instead to regard human rights as indispensable ends – but ends that value a variety of objectives as instrumental. The attraction of this capabilities approach is its ability to accommodate deontological values within consequence-based evaluation, and not merely as side-constraints or pathways towards the promotion of something else. When broken down and examined, Norwegian consequentialism appears to truly care about the enhancement and preservation of human autonomy, for its own sake.

One possible objection to this approach is that by making provisions for enhancing prisoners' capabilities, the Norwegian officials must assume that every wrongdoer suffers from a lack of development of these capabilities. This is certainly a serious objection, given that Norway is one of the most developed, egalitarian countries in the world. How could they justify the provision of these opportunities in a place where opportunities are hardly ever lacking? But I would argue that even in a fairly egalitarian country, not everybody experiences equal opportunities. Some people might suffer from mental illnesses, drug addictions, or a number of social pressures that prevent them from exercising genuinely free choices¹⁸. So the provision of capabilities-enhancing opportunities respects wrongdoers not only as individuals who have the right to the subsistence of their human faculties, but also as individuals who ought to be given more opportunities to enhance their choices in life, away from the choice crime. Furthermore, there is a consequentialist benefit to rehabilitation even if inmates *do not* experience any lack of freedoms (which is highly unlikely). Helping inmates grow into responsible members of a community allows them to actually become such members of a community, or at least be better

¹⁸ For instance, many Norwegians feel the social pressures of earning money, appearing “rich”, wearing expensive clothing etc. They might steal, or sell drugs to cope with such pressures. Education, away from this environment, is a way for them to reflect critically on conforming to these social pressures and shaping their lives in a meaningful way.

at it than before¹⁹. This significantly reduces crime (possibly why Norway has the lowest recidivism rate in the world) and therefore significantly reduces the breaches upon the rights of others. Whether it is to directly help the inmates, or to indirectly preserve the freedoms of society, there is an undeniable consequentialist benefit to providing rehabilitation, regardless of whether criminals have been deprived of any capabilities themselves. The argument for rehabilitation might be strikingly similar to the argument for education, where developing the students' capacities to make them productive members of society must assume a lack of these capacities to begin with. This might be true for younger students, as it is with inmates from RSB. But given older students in universities, do we argue that their education is useless because they have been able to hone these capacities their entire lives? On the contrary, their education is extremely useful, as it opens doors to many intellectual and professional opportunities. Inmate rehabilitation can be viewed in this way: extremely useful for those who have been deprived of such opportunities, but also useful for those who have not. Being able to go to prison and choose what you study; being able to “graduate” from prison as a legitimate lawyer, historian or mechanic – these are prospects that the wrongdoer can reject if needed, but the provision of such opportunities acknowledges the person's right to choose more freely, and to shape their lives in whatever way they wish. Moreover, it is not enough to incapacitate offenders and put them in little boxes. This would actually disregard their human rights, rendering incapacitation as detrimental to the goal of enhancing capabilities. Out of respect for humanity, we must also make provisions to simulate a livelihood that is equal to the world outside the prison, so that we may maintain their rational and emotional capacities and open doors for their future choices²⁰.

¹⁹ They are wrongdoers, after all. One cannot argue that they are harmless, in need of zero improvements.

²⁰ All Norwegian inmates will re-enter society someday, for the maximum life-sentence for any crime is 21 years. Thus, by truly allowing each citizen to repay their debits, it can be even more “retributive” than

The aim of imprisonment should not be to induce suffering by restraining *all* choices – just to restrain the choice of crime. Therefore, this brand of “Norwegian consequentialism” actually respects the personhood of all individuals tremendously, that in spite of their wrongdoing, criminals are provided with what is considered their basic human rights.

Analogously, it is arguable that the U.S. prison system is actually depriving people of their human rights, beyond the loss of liberty, by denying them these essential capabilities. In fact, if this method were used in an unequal society like the U.S., where there is complete disparity in resources and opportunities, then there would be even more of a consequentialist benefit in its application. There would be a larger scope to enhance capabilities that are seriously lacking in society, thereby providing more autonomy to inmates who are clearly constrained to the choice of crime, as indicated by the skyrocketing recidivism rates. The mere existence of laws that prevent criminals from voting or finding jobs are an example of the ways in which their autonomy is being completely robbed (in the name of respecting autonomy and paying the given price, according to retributivists). Furthermore, the psychologically scarring conditions of American prisons and the lack of opportunities that enhance our choices are, in my opinion, the very factors that lead inmates back to where they began. As Delgado and Duff have suggested, the U.S. justice system must at least acknowledge its role in the perpetuation of more criminal activity and restricting people’s autonomy. And perhaps it can do so by providing the absent capabilities and freedoms during punishment. Where capabilities are being enhanced, human rights are being respected. And as Nussbaum, Sen, and every retributivist have argued: human rights are undeniable goods that ought to be the respected.

the U.S. justice system, where you might never leave the prison, or laws that enable people to discriminate against your criminal record ruin your life after prison.

Another important objection to be considered is whether the capabilities approach, as a consequentialist justification for methods such as rehabilitative punishment, is just another form of paternalism. Even if systems like the Norwegian prison are enhancing people's capabilities and providing them with tools to make better choices, people don't always *want* what is good for them. People should have a right to choose to be subject to these provisions. What if people have no interest in being educated, given employment skills, or interacting with nature? And what sense does it make to declare 'universal human rights', if some people choose to reject them? There are a few things to be said about this.

For one, imagine a retributive system where people are severely punished, treated with moral condemnation constantly, deprived of good food, nature, play, and intellectual stimulation. How can this possibly be a scenario that respects people's choices? For a prison to provide opportunities like that of a Norwegian prison is to continue to treat you as human, even while you're paying your debts. And if you reject the usefulness of these provisions, then you can choose not to incorporate them in your future decisions. But it is always better to have them and reject them than to be denied of opportunities you might want. And it would certainly not be a stretch to say that people appreciate such provisions more often than not.

Secondly, deciding what constitutes the objectively necessary capabilities that we should hone is indeed complicated. But Nussbaum does a good job of pointing out the issues involved in blindly prioritizing the subjective opinions of those who have been deprived:

“As Sen has repeatedly pointed out, people's satisfactions are not very reliable indicators of their quality of life. Wealthy and privileged people get used to a high level of luxury, and feel pain when they do not have delicacies that one may think they do not really need. On the other hand, deprived people frequently adjust their sights to the low level they know they can aspire to, and thus actually experience satisfaction in connection with a very reduced living standard.”

(Nussbaum, 1997, pg. 282)

Here Nussbaum describes a phenomenon called ‘adaptive preference’, which is a central problem of the typical utilitarian basis of normative calculations. When utilitarians seek to maximize the preference-satisfaction of communities, they do not take into account the idea that those who have been dehumanized and devalued for the entirety of their lives set their standards of happiness and preferences to much lower levels, as they see appropriately attainable. This can lead to depressing situations – where women in developing countries, who have faced systemic oppression in every facet of their lives, value their lives accordingly and set very low expectations for themselves. Here is a devastating example of adaptive preference:

“In 1944, the year after the Great Bengal Famine, the All-India Institute of Hygiene and Public Health did a survey. Included in this survey were a large number of widows and widowers. The position of widows in India is extremely bad, in all kinds of ways but notoriously in terms of health status. But in the survey, only 2.5 percent of widows, as against 48.5 percent of widowers, reported that they were either ill or in indifferent health. And when the question was just about "indifferent health," as opposed to illness-for which we might suppose there are more public and objective criteria-45.6 percent of widowers said their health was "indifferent," as opposed to zero percent of the widows.” (Nussbaum, 1997, pg. 282)

The phenomenon of adaptive preference reflects the ways in which our present demands often fail to grasp the truth about our value as human beings. Even if there is no universal standard of human rights that we can agree on, it seems crucial to provide to each individual certain capabilities for them to at least value themselves as equal to others. So even if the capabilities approach appears paternalistic and against the will of certain individuals, providing these opportunities is instrumental in these individuals being able to make an informed decision about their own value, their own rights, and accordingly, their own desires. For the lower-caste Indian women refusing to work or study because they have no desire to, it is not a simple matter of respecting their wishes. One has to at least explain to them how these opportunities could drastically change their lives and allow them many more freedoms. As Nussbaum herself admits,

there are good and bad kinds of paternalism, and we reject the bad kinds by appealing to something else that we like, namely each person's liberty of choice in fundamental matters. (Nussbaum, 2000, pg. 53) But, she argues, "It is fully consistent to reject some forms of paternalism while supporting those that underwrite these central values, on an equal basis." (Nussbaum, 2000, pg. 53) As such, making others confront the truth about their potentials in life only appeals to the same principles of liberty and choice that we typically use to object to paternalism. It would be hypocritical to be committed to enhancing the liberty of all individuals without being able to correct their false notions regarding their own inferiority. Part of what it takes to enhance all human rights is to allow people to acknowledge their own entitlement to these rights. To readily agree with their opinions is to deny them of this capacity, and acquiesce in the message that they have no potentials and deserve no choices. As Sen has argued, "Political rights are important not only for the fulfillment of needs, they are crucial also for the formulation of needs. And this idea relates, in the end, to the respect that we owe each other as fellow human beings." (Sen, 1994, pg. 38)

Furthermore, if the worry is that this sort of 'good paternalism' treats people as a means towards some subjectively valuable end, then one might respond by considering Kant's 'Formula of Humanity' in his *Groundwork for the Metaphysics of Morals*. In the 'Formula of Humanity', Kant argues that our 'Humanity' is a collection of features that makes us distinctively human, and these features include capacities that are interestingly similar to those suggested by Nussbaum, such as engaging in self-directed rational behavior, and adopting and pursuing one's own ends. (Kant, 1965, pg. 96-98) If, as Kant suggests, we should value these human faculties as ends that we ought to cultivate in ourselves and in others – then his view of Humanity is more similar to Nussbaum's capabilities approach than imagined. The entire objective of the

Groundwork was to establish “a supreme principle of morality”. (Kant, 1965, pg. 15) And ‘The Formula of Humanity’ was just one construction of this objectively valid law. Thus, it can be argued that Nussbaum’s conception of human capabilities might actually conform to (and are possibly inspired from) the Kantian account of morality that purports to be objective. And given the chance that these Human faculties are indeed objective ends that we ought to enhance, our worries about paternalism might slowly disappear²¹. For instance, Kant famously advises us to treat people only as ends, and never merely as means. (Kant, 1965, pg. 96) But he also clarifies that treating others as “mere means” involves acting in such ways that, assuming they have freely exercised their rational capacities, they could not possibly give their consent. (Johnson, 2014) This clarification implies that *in the case that* people have *not* freely exercised their rational capacities, their consent might be void – and we may override their present choices. Tying this back to the Norwegian justice system, wrongdoers who reject rehabilitation cannot be treated as means towards some end because as criminals, they have acted in ways that represent their own lack of freedoms (which constrain them to crime), or their irrationality (as a result of having many freedoms, but reducing them by choosing to be incarcerated). It seems that wrongdoing might be a decent indicator of the liberties rational capacities that individuals enjoy – both of which, if lacking, indicate that their consent cannot be dependable or in their own interest. Thus, wrongdoers - who invariably commit wrongs resulting from remote choices or irrationality - cannot be treated as mere means by this theory of justice, for their consent is rendered unreliable. “Norwegian consequentialism” might be able to treat them as ends in themselves, after all²².

²¹ Unfortunately, I do not have the space to consider whether Kant’s moral law is genuinely objective in this paper.

²² Norwegian inmates are frequently given ‘feedback forms’ to express their thoughts about their prison experience and what improvements they would like to see. They also have social workers who advocate

A final objection might be to express concern about how Norwegian consequentialism truly accounts for all rights, when it rehabilitates offenders but neglects victims. What about a victim's right to ensure justice retributively – to see the wrongdoer suffer for her sins – or to “humble the will” of the assailant? If we are to care about all rights, perhaps we ought to prioritize our victims, who have had their rights invaded only to see their offenders given a second chance. But the only comment I can provide is that our conception of what remedies the losses victims have suffered is socially constructed. We watch films that depict the evil getting their “just deserts”, or superheroes thwarting villains as revenge for their misdeeds, and judges sentencing the child-abducting murderer to death. All of these representations inspire in us a sense of outrage when justice isn't fulfilled retributively – when the criminal isn't harmed. But this could all amount to nothing more than a morally disreputable need for vengeance that has been systematically encouraged by existing penal practices and the media. So our conception of what victims are owed might be entirely unfounded – one need only look outside our culture to see this. Norwegian victims are provided a free mediation process to cope with their losses and confront their wrongdoers, if they wish. (The Norwegian Mediation Service) Their society seems so pleased with their rehabilitative approach that they have produced a television show documenting the experiences of U.S. prison guards in Scandinavian prisons, who predictably express their utter disbelief and condemnation, while the Norwegian commentators laugh at their naïve perspectives on justice. (*The Norden*, 2014) With such contrary ideas of what constitutes justice, there are no known facts about what victims have a right to, in light of their victimization. It is entirely possible that victims should receive counseling, financial

for their desires, for instance, to petition to be transferred to a better unit. Think of this in terms of respecting their choices.

compensation, or even mediation as Norway provides. But without a proper sense in which these rights exist, there is no proper sense in which they are being compromised.

Lastly, if there is any concern as to how these opportunities such as education, proper houses with proper kitchens, and real responsibilities can enhance one's autonomy, then perhaps we can learn from the empirical findings of Phillip Zimbardo. In his famous Stanford Prison Experiment, Zimbardo found that people derive their sense of identity from their immediate surroundings. Or as he puts it,

“Our personal identities are socially situated. We are where we live, eat, work and make love. It is possible to predict a wide range of your attitudes and behavior from knowing any combination of "status" factors - your ethnicity, social class, education, and religion and where you live - more accurately than by knowing your personality traits. Our sense of identity is in large measure conferred on us by others in the ways they treat or mistreat us, recognize or ignore us, praise us or punish us. Some people make us timid and shy; others elicit our sex appeal and dominance. In some groups we are made leaders, while in others we are reduced to being followers. We come to live up to or down to the expectations others have of us. The expectations of others often become self-fulfilling prophecies. Without realizing it, we often behave in ways that confirm the beliefs others have about us. Those subjective beliefs can create new realities for us. We often become who other people think we are, in their eyes and in our behavior.”

(Zimbardo, pg. 319)

So for the Norwegian prison guards to attend a mandatory prison school that trains them in handling wrongdoers with equal dignity²³, and for them to give each inmate great trust in handling their own lives, they essentially create a sphere of expectations that allow wrongdoers to understand their own equal worth and capacity to reform. Hopefully, as Zimbardo's findings demonstrate, the inmates will grow to live up to these expectations. But by contrast, the attitudes of superiority and condemnation held by the U.S. prison guards, their need to wear arms, the constant surveillance, and the bars on every window of every room: these are all expressions of the expectation that wrongdoers cannot be trusted. Inmates in American prisons are often treated

²³ *Time Magazine*, 2011

in dehumanizing ways, where food and health-care is substandard, access to educational provisions are limited, and it is difficult to keep in touch with families. (Thayer, 2003) One can imagine how these degrading conditions might shape the confidence and capabilities of its inmates, causing more damage and increasing the likelihood of recidivism than enhancing a single aspect of their personhood and freedom.

The successes of the Norwegian prison system might be attributed to its high social capital and relatively equal distribution of benefits and burdens among its citizens. But I think a more pertinent factor behind its ability to maintain the world's lowest recidivism rates and happiest inmates is the philosophical principles on which it is founded. I believe that the Norwegian approach to justice can best be understood as a hybrid form of consequentialism aimed at enhancing human capabilities – and thereby inclusive of different, indispensably important features that we must strive towards at once, that is, a respect for autonomy, incapacitation of wrongdoers, deterrence, and rehabilitation. Using accounts developed by Nussbaum and Sen, I argue that “Norwegian consequentialism” respects the autonomy of incarcerated individuals, and that there is no inconsistency in this hybrid framework. Furthermore, due to its consequentialist origins, the framework can avoid the major problems of retributivism, including the difficulties in accounting for proportionality and dissecting what retributive punishments should stand for. By avoiding the concept of desert entirely, consequentialism need not present a commensurable relationship between the seriousness of the wrong and the severity of the punishment. And without the idea of benefits and burdens, neither must it account for the interpretation of crimes as unfair advantages. As a result, “Norwegian consequentialism” might prove to be the most effective approach to wrongdoing – by taking that

which is most valuable to retributivists like Morris and Kant – and promising to act only in a way that promotes this exact value – human autonomy.

Conclusion:

In sum, what we can learn from the Norwegian system of justice is that Hart might be right in thinking that elements of consequentialist and deontological justifications of punishment are actually compatible. But Hart and Rawls both argue that these distinct objectives are compatible because they answer different questions: How can we justify the institution of punishment? And how can we justify how severely we punish? (Hart, pg. 3) (Rawls, 1955, pg. 3) They conclude that consequentialism can be used to justify the general practice of punishment, as a means to maintain social harmony, but that retributivism can be used to justify why and how much individual wrongdoers are punished, as a way to establish proportion. But I disagree with this characterization as the *only* way to combine all the virtues of consequentialism and deontology. In fact, to justify punishment on two different levels using two different theories leaves each of these theories open to their particular objections. And I am reluctant to support such a two-tier theory especially because of the objection that retributivism cannot avoid: even if it were possible to punish individual wrongdoers in proportion to their guilt, there is no way of knowing how to establish this proportion, or how far we have come to attaining objective proportionality (assuming it even exists). As I have argued, there are some serious objections that retributivists must deal with, and it is for this reason that I wish to compatibilize the different objectives of each theory in a specific manner that avoids retributivism entirely. And this hybrid theory is tailored after the achievements of the Norwegian prison system.

Initially in this paper, I argued that consequentialist justifications were generally doomed to treat citizens as a means towards whatever desired social outcomes. But this does not have to be the case if consequentialism strives towards enhancing the capacities and freedoms of all

individuals. Since crime impedes our freedoms, “Norwegian consequentialism” will incapacitate offenders to prevent further breaches of freedoms. Simultaneously, such incapacitation is a way to deter future crimes from *potential* wrongdoers, thereby preserving even more freedoms in society, while embodying the typical objectives of consequentialism. Finally, the theory can embrace rehabilitative programs because the provision of such healing opportunities only enhances the autonomy and personhood of inmates, who after all, deserve to have their rights respected too. It seems ironic that a system designed to limit the freedoms of wrongdoers should aim to enhance that very thing. But it does so because incapacitation is sufficient in preserving the freedoms of others, while rehabilitation is necessary to ensure a full array of choices that support autonomous decision-making and steer wrongdoers away from crime. The result is a consequentialist theory that respects the most rights of most people at once. This is why “Norwegian consequentialism” or rights-consequentialism is a unique, hybrid theory of punishment. Because it allows states to act in a way that embraces a plurality of goods essential to our concept of justice; goods that traditionally conflict with each other, and force us to reject theories that cannot account for both. It also represents a remarkable achievement in showing us how retributivism and rehabilitation are not incompatible, even though they have been historically represented as such. Morris might never have believed that helping wrongdoers recover morally and socio-economically through rehabilitation is actually a way to respect their autonomy and personhood. But as I have argued, the availability of opportunities to enhance our faculties such as critical thinking and employment skills are nothing but beneficial provisions aimed at enhancing our liberties, our options in life, and if nothing else, our human rights to sustain such capacities throughout our imprisonment. The deprivation of such opportunities is an

unjust denial of choices that should be available to every human, by virtue of their being human, and by virtue of their autonomy and moral worth.

What I hope to have achieved in this paper is to show that retributivism, the current justification of punishment that appears to underlie the U.S. prison system, is utterly unjustified, and could lead to disastrous implications if applied to a world of inequality (as exists today). But this is not to critique the values that retributivism represents, such as respecting autonomy and rights. Further, accounts of consequentialism that appeal to general deterrence or some form of therapy to “cure” criminals cannot find a way to incorporate the consent of individuals and to respect these rights that retributivism values. But hopefully in the final parts of the paper, we have discovered a way out of this conundrum. Perhaps there is a consequentialist account that can appropriately justify the actions of the state without resulting in coercion. And this, I argue, is “Norwegian consequentialism”, which aims to promote a variety of different objectives as crucial in the fulfillment of justice, such as incapacitation of the guilty, and the enhancement of fundamental capabilities, all from a respect for our personhood. Crime is an act that robs people of their freedoms, either directly, through victimizing attacks, or indirectly, through violating laws that are created for the preservation of freedoms (for instance, laws against speeding exist to preserve the most freedoms in traffic). It is only fitting that a theory of justice be carved around the need to preserve and enhance our freedoms.

As a final remark, the critiques I have offered were inspired by the shockingly oppressive conditions of the U.S. prison system. Though philosophy is only abstractly related to these happenings, it is my hope that this paper can convey the gravity of the situation that the U.S. is confronted with. Not only is the sole theory it could be based upon seriously flawed, but the U.S. is not even conforming to the practices of that flawed theory – creating a chain of chaos that

might be worse than the perfect application of an unsound theory. For example, as Morris and Murphy claim, retributive punishment ought to be “a debt owed to the law-abiding members of one's community; and, once paid, it allows reentry into the community of good citizens on equal status.” (Murphy, pg. 229) But Michelle Alexander’s characterization of how punishment actually works in the U.S. shows how far it diverges from what Morris and Murphy describe:

“Today, it is legal to discriminate against ex-offenders in ways it was once legal to discriminate against African Americans. Once you're labeled a felon, depending on the state you're in, the old forms of discrimination -- employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service -- are suddenly legal. As a criminal, you have scarcely more rights and arguably less respect than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.” (Alexander, 2010)

It appears that as a convicted wrongdoer in the U.S., one’s debt to society is never paid. So the U.S. system of punishment cannot possibly abide by retributive values, even if it’s current existence were justified by retributivism, and even if retributivism were free of objections (which it certainly is not). Another instance of blatantly shirking the guidelines of retributivism is seen from the existence of private prisons, which reflect how the American criminal justice system is driven by a desire for profit, and not for justice. The practice of contracting private corporations to handle the sentences of wrongdoers encourages the creation of laws based on profiting these companies and lengthening the time and severity of each sentence. Research has proven that privately run prisons control costs by providing less salary benefits, less training, and less resources for the prisons itself – and they invest all their profits in lobbying groups to advocate for stricter laws that ensure the steady flow of inmates, and consequently, the steady flow of government compensation that is barely commissioned to provide for the livelihoods of these inmates. (Cody, pg. 10) As the Sentencing Project states, “This effort to increase reliance on

incarceration comes at a time where America's rate of imprisonment is the highest in the world and when the prison population is far beyond the point of diminishing returns in terms of public safety." (Cody, pg. 17) This introduces a whole new spectrum to Zimmerman's arguments about proportionality, for if our wrongdoers are severely punished towards the *generation of profit*, and if there is no sense in which they can properly repay their debts, then the U.S. system is completely disregarding the importance of delivering 'just deserts' or responding to degrees of guilt. It is completely disregarding that which makes punishment retributive. So the American prison can no longer defend its existence by appealing to the moral virtues of retributivism. And more depressingly, it can no longer defend its existence by appealing to moral virtues *at all*.

On one level, we have a theory that is unjustified even if it were properly administered, and on top of that, the system that endorses this theory has applied its practices so improperly that it has rendered it impossible for wrongdoers to re-enter society as equals, and has left many crucial decisions regarding crime-control in the hands of privileged corporations that have no interest in benefiting society, respecting autonomy, or any other conceivable moral value. This is why I have called my readers to question the legitimacy of the prison as we know it in America. Through the course of this thesis, I have explored the problems endemic to the U.S. prison system, but optimistically, I have tried to establish a justification for its present form. Thinking that perhaps, if there were no social or political utility in its actions, there must certainly be a moral justification somewhere in its heart and soul. I found that the only possible theory that could reflect the workings of the U.S. prison system was retributivism, but even this justification quickly fell apart. Now finally, to make matters much worse, it appears that the U.S. does not even fully abide by principles of this objectionable theory, thereby eliminating any hope of being morally justified.

But there is a bright side to this grave discovery: by arguing that the U.S. justice system has not a single rational or honorable defense, the public has *every* reason, quite literally, to demand change. There is simply no more scope for excuses; for last-minute arguments to swoop in and ‘save the day’. We desperately need a theory that radically challenges all the assumptions of how we respond to wrongdoing, and that challenges the necessity of punitive measures itself. As Zimmerman had asked: why punishment? It makes no sense to claim that this is what people truly deserve, especially if punishment comes in the shape and form of the U.S. prison, which can be perfectly summarized by Angela Davis: “The prison ... functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.” (Davis, pg.16)

For all these reasons, I am drawn by the Norwegian approach to justice. Many have critiqued the Norwegian prison as a “luxury unit” where inmates go on “vacation”, because the idea of challenging the prison in its traditional form, as a place of suffering, is too unfathomable to us all. (*The Guardian*, 2013) But this is the exact radical idea needed to challenge the legitimacy of the U.S. prison, which can be done through comparing the logical and practical implications of the two. In fact, I have given the U.S. justice system more credit by mostly comparing the Norwegian approach to proper theories of punishment that reliably apply rationally derived principles, in contrast to the haphazard, irrational realities of the U.S. prisons. If “Norwegian consequentialism” seems more just and effective than other theories I have described, then it’s incontrovertible that it is more just and effective than what is happening in America.

The American prison, in its rabid consumption of communities that are pushed to the margins of society, metaphorically functions as a system that devours the entire lives and futures of the individuals it entraps. All the while, it does so under the guise of ‘restoring justice’ and ‘respecting autonomy’. Within this infuriating landscape, the Norwegian justice system emerges as a theoretical *and* concrete example of the sort of change we should aim towards, both morally and practically. Norway has managed to create a system in which crime can be kept at a minimum, but simultaneously, the freedoms of society can be enjoyed at a maximum. This approach to justice advocates for institutions that can hardly be classified as prisons. As far as the U.S. is concerned, the only obstacle in the way of this change is to convince the masses—and politicians--that prisons are, in fact, obsolete. Our criminals are our citizens. And even if they hurt us, we owe it to them to fulfill the demands of justice – a vague concept that we can only hope to grasp by seriously considering all the moral values that philosophers have found important. And this is what I hope to have done.

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