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# PUNISHMENT, FORGIVENESS, AND THE PROXY PROBLEM

DANIEL N. ROBINSON\*

## I.

The concept and the issue of punishment both raise philosophical questions that resist straightforward analysis. Factors at once personal, contextual, and circumstantial generate vexing concerns as to whether an action otherwise rightly punished under one set of conditions warrants punishment under *this* set of conditions; or in the case of *this* actor; or in light of the time and place at which *this* action occurred. Matters become no more tractable by invoking versions of legal positivism. To exhaust the conditions of punishment merely by referring to violations of law simply defers fundamental questions regarding the sense in which “consequences,” “violating,” and “law” are to be understood. “Did Oedipus murder his father?” Note that the burden of the question is not adequately borne by joining the fact that Laius was the biological father of Oedipus to the fact that, on the fateful day, Oedipus struck a mortal blow against him. If there were a special punishment reserved to those guilty of parricide, it is not at all clear that Oedipus would be justly found guilty. Similarly, in light of the moral law that condemns an incestuous relationship between mother and son, it is clear that neither Oedipus nor Jocasta was guilty, for neither knew the actual familial relationship obtaining between them.

Staying with this famous tragedy, it may be asked how the matter of punishment should be understood, given that Oedipus and, later, Oedipus and Jocasta acted as they did. More generally, what principles should determine punishments for various offenses? It is, of course, a veritable fixture within the rule of law that punishment must *fit* the offense that warrants it. Nonetheless, there is no calculus or modulus of “fitness” in any objective mathematical sense of proportionality. Moreover, the sense in which the offense “warrants” punishment is typically left to what is no more than conventional or allegedly intuitive understandings.

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The earliest effort to reduce such problems to an objective system was Jeremy Bentham's. In Chapter VII of his *Principles of Morals and Legislation*, he distills that the very function of government "is to promote the happiness of the society, by punishing and rewarding."<sup>1</sup> If the task of government is maximizing pleasure, in large measure by reducing pain and suffering, then punishable offenses are those that produce the latter. Thus, the warrant for punishment is wrongfully causing pain to others or significantly reducing their innocent pleasures.

Bentham then sets forth what he takes to be the four principal objectives of punishment—*prevention, attenuation, motivation, and economy*—and thirteen rules for its application.<sup>2</sup> Punishment is designed to prevent mischief. If it cannot be prevented, it can be lessened by inducing the perpetrator to commit the least mischievous action compatible with his own purposes.<sup>3</sup> Through this same motivating power of punishment, the perpetrator becomes rather more disposed to restrain himself even in the commission of offenses.<sup>4</sup> Finally, of all the ways punishment may be effective, the least costly is to be preferred.<sup>5</sup>

It is instructive to consider briefly several of the axioms Bentham offers as a way into the thickets of a rule of law that seeks to put punishment on a rational foundation. To wit:

1. The effects of punishment must outweigh whatever profit is in the offense.<sup>6</sup>
2. The greater the mischief of the offense, the greater the expense it may be worth to punish it.<sup>7</sup>
3. The same amount of punishment is reserved for the same offenses, more or less indifferent to the identity of the offender, *except insofar as specific persons differ in their sensibilities, dispositions, and circumstances.*<sup>8</sup>
4. The deterrent power of punishment is established not only by its severity but by its predictability, and the two in combination must reach the threshold of efficacy.

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1. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES AND MORALS AND LEGISLATION 189 (Wilfred Harrison ed., Basil Blackwood & Mott, Ltd. 1948) (1823).

2. *Id.* at 289–98.

3. *Id.* at 289.

4. *Id.*

5. *Id.*

6. *Id.* at 290.

7. *Id.* at 292.

8. *Id.* at 293.

Thus, as the probability of punishment is the less, so its severity must be the greater.<sup>9</sup>

5. With the habitual offender, the punishment must be much greater; so much so as to “outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.”<sup>10</sup>

As reasonable as these five precepts appear to be on first reading, closer examination discloses whole realms of what is disputable and even hopelessly conjectural. Consider the committed terrorist whose actions must satisfy deeply held religious convictions. What punishment “outweighs” the profit secured by the offense? The precepts are also regularly violated under the banner of law. The State offers to drop charges against a known criminal, in return for which testimony is obtained that incriminates others. For all practical purposes, a benefit has followed a wrong-doing. Indeed, until relatively recent times, courts would not deny inheritance to a beneficiary who had murdered the testator!

Bentham’s second precept, designed to set the costs of punishment according to the degree of mischief, raises two questions at the start: *Mischief to whom, and measured by what means?* On utilitarian grounds, what constitutes the mischief in an action is the pain it causes or the pleasure it diminishes or prevents. Mischief, in this sense, is inextricably tied to states whose intensity must be particularized at the level of the specific victim. Indeed, Bentham’s third precept acknowledges just such individuated attributes found within the specific offender. As for the fourth precept, which proportions the severity of punishment to the improbability of apprehending the offender, it is clear that the scheme leads to counterintuitive results. It would call for the periodic recalibrating of punishments just in case refinements in policing and forensics yield higher probabilities of apprehension. The fifth precept, based on some sort of guess as to how many undetected offenses a recidivist may have committed, would appear to set no limit whatever on the severity of punishment administered, for example, to persons addicted to narcotics or to compulsive forms of criminal but not especially destructive behavior.

The point of this brief rehearsal of early utilitarian attempts to base punishment on seemingly objective grounds is to underscore their futility. At work is an attempt to solve conceptual

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9. *Id.* at 294.

10. *Id.* at 294–95.

problems by treating them as if they were essentially technical. In the matter of punishment, the conceptual difficulties do not arise first in connection with the nature of offenses or the need to address them proportionally. Rather, the foundational issue is that of identifying and justifying *punitive authority*. It is only after there is understanding of the nature of the rights and the duties to punish that it becomes clearer as to what the aims and nature of punishment should be. By way of conceptual parity, it also becomes clearer as to the sources and the justification of forgiveness.

## II.

Prior to the reforms of Solon, grievances were addressed by way of the *lex talionis* which was the grounding of *phratrie* justice.<sup>11</sup> One who injures the clan or phratry exposes his own community to retaliation. The retaliation could be averted through compensatory payments.<sup>12</sup> Otherwise, acts of revenge were launched and were utterly indifferent to questions of individual guilt. The offense could be avenged by targeting any member of the offending clan, for it is in the very nature of phratrie societies that one's personal identity is just one's phratrie identity.<sup>13</sup>

Only after the rise of the *polis* is there the development of a form of statutory law that establishes a new aggrieved or victim-class variously known as the Crown, the People, the State, or Society. Now the offender takes on the burden of debt of some sort to be repaid through punishment, after which the debt is, as it were, reset to zero. Under such arrangements and understandings, a new and still complex issue arises; viz., that of the state authority as *proxy*. In some sense needing to be clarified and then justified, punitive authority is invested in a central executive with the power to impose penalties to redress grievances typically endured by specific persons. In the paradigmatic instance, Bill kills Tom. Tom's three dependent children are now fatherless, and Tom's spouse has lost forever a beloved mate. The State

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11. It is worth noting that the reforms of Solon and Draco in this connection gave to the Hellenic world a form of law respecting the individuated nature of moral fault. Although blame and punishment were not focused on the actual perpetrator, the ancient law continued to include among the injured and offended the widest range of family relations. See DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* 1-47 (1996).

12. See DOUGLAS M. MACDOWELL, *ASPECTS OF GREEK AND ROMAN LIFE* 110 (H.H. Scullard ed., 1978).

13. See ROBINSON, *supra* note 11, at 1-47; see also MACDOWELL, *supra* note 12, at 110.

(the Crown, the People, etc.) convicts Bill and carries out the imposed death penalty. Thus having suffered the *maximum penalty*, Bill has *paid his debt to society*.

There seems to be something wrong with this picture. Though Tom's wife and children are members of society and are in some sense beneficiaries of this "payment," it is obvious that their loss is incalculably greater than that suffered by anyone else—by everyone else—as a result of the crime. If it were plausible to approach such losses in a quantitative way, it would be relevant to recognize that the offense cost one life mortally, but also caused enduring pain and suffering to four other lives. The assailant's lost life simply cannot be made proportional to the cost of his offense. How, indeed, is his execution even *compensatory*? Would it not be fairer to allow the family to execute Bill, perhaps torturing him before delivering the lethal blow or injection? Though death is the final penalty, there are certainly additions to death that would greatly increase the total package. Would it not be more punitive and proportional to round up some number of Bill's relatives thereupon executing them in Bill's presence, and including this in the overall calculation of just compensation? To ask a comparably macabre question, is not rape the right ("proportional") punishment for a rapist?

The last word on just what it is that constitutes an "offense" is likely to remain elusive. It has been suggested that, at the most general level, an action becomes an *offense* in virtue of it constituting disrespect for the person. Punishment then serves as a form of rectification.<sup>14</sup> The notion here is that each person embodies a measure of moral worth and dignity that others have a duty to respect. Crimes against the person are, on this account, finally acts of disrespect toward this very worth and dignity. However, it is routinely the case that persons are treated differently in different contexts, such that to treat them the same in all contexts might well result in patent acts of disrespect. Nor is it at all clear just how punishing the offender "rectifies" the results of the offense. If "rectify" means to set aright, it is lamentably the case that the consequences of many criminal acts are irremediable. Harm has been done, the crime committed, and the past cannot be undone. The life or limb taken cannot be restored; often the property cannot be recovered. To speak, then, of punishment as

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14. Geoffrey Cupit, for example, treats injustices as modes of treating persons as less than they are and establishes a linkage between the implicit (or explicit) disrespect to a deserts scheme of punishment. See GEOFFREY CUPIT, *JUSTICE AS FITTINGNESS* (1996).

a way of setting things aright is to say more than the words convey, for it is obvious that what has been done cannot be undone.

Moreover, although the notion of human dignity and moral worth is profound, and profoundly consequential in testing the rationale on which legislative and juridical practices are based, it is doubtful that practical and defensible remedies can be pegged to something as protean as "human dignity." The same may be said of Philip Pettit's theory of crime as that which violates "the republican ideal of freedom as nondomination."<sup>15</sup> Pettit charges the criminal with violating the ideal by subjecting the victim to domination, thereby restricting the range of undominated choices and engendering fear in still others who are comparably vulnerable.<sup>16</sup> Again, however, it is not at all clear that such an understanding of the wrongfulness of offenses can be translated into a rational metric of earned punishment. Many instances of offenses in the legal sense do not match up with domination (e.g., contractual violations, perjury to shield a guilty loved one), and many patently offensive actions do not rise to the level of a punishable action (e.g., a domineering parent). Moreover, by accepting that every offense somehow violates "the ideal of nondomination," one may even be at a loss to distinguish law itself from domination. Briefly put, there is something about unlawful offenses not captured by the notions of disrespect and domination. At the level of common sense, the actions that are punishable are those that result in the loss of or damage to that which a reasonable person values. Granting this much, and accepting the classification of offenses now widely adopted, the core question of punitive authority persists. Specifically, what is the basis on which the *State* comes to have this authority?

One answer arises from the retributivist theory of punishment. On this account, the costs exacted by the offense call for measures intended to restore the balance. The biblical guide here is "an eye for an eye," but this fails to convey the philosophical arguments developed in defense of retribution. Richard Swinburne presents an especially compelling version which includes, as well, a specification of what is to be counted in determining what the violator owes to the victim.<sup>17</sup> Punishment should take into account the time and effort involved in discovering the guilty party, the emotional costs in anxiety associated with

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15. Philip Pettit, *Republican Theory and Criminal Punishment*, 9 *UTILITAS* 59, 59 (1997).

16. *Id.* at 61.

17. See RICHARD SWINBURNE, *RESPONSIBILITY AND ATONEMENT* 93-109 (1989).

these efforts, and the actual losses to the victim.<sup>18</sup> The ensemble of factors is then the base for reasonable judgments as to reparations. On this account, the punishment exacted now constitutes or in some way includes the required reparation.<sup>19</sup>

Swinburne rejects the customary distinction between revenge and punishment, at least as that distinction is generally explained, arguing that the State's imposition of punishment makes sense only to the extent that the State in this is serving as proxy for the victim.<sup>20</sup> As he says:

If you suppose that the state has a right to punish which has nothing to do with its acting as an agent for the victim, it becomes impossible to provide any satisfactory retributivist justification of punishment. [For] what else can justify the state effecting retribution? What gives *it* that right?<sup>21</sup>

This is a traditional and a compelling argument for the State's punitive authority. It sets a limit on the conditions that permit punishment: minimally, there must be an offense, and this entails a victim.<sup>22</sup> It also seeks to honor the requirement of proportionality by ordering punishments to the judged magnitude of the pain or loss suffered by the victim.

If it is sound to equate punishment with revenge, however, and if both are to be understood as retributive demands for reparation, it should make no difference *who* exacts the punishment. That is, if it is incumbent on the State to justify its claim to punitive authority, and if the only justification is its serving as a proxy for the offended, there would seem to be only two plausible arguments leading to this result: one drawn from contractarian political theory which finds persons investing in the State such rights as they have in the state of nature; the other developed as a principled defense of retribution for wrongs done to those for whom the State claims proxy powers. The first of these accounts is insufficient unto the present purposes for it fails to establish that, in the state of nature, there is something called a *right* to avenge injuries and losses in the first place. The *lex talionis* describes practices under a maxim that cannot stand as its own justification.

If the State's punitive authority is but a proxy power, one may ask how that power was acquired. If it was "granted" via

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18. *Id.* at 93.

19. *Id.*

20. *Id.* at 94.

21. *Id.*

22. *Id.* at 102.



some form of social contract, it must be a power that could have been bestowed on or even claimed by other entities. Thus, if it mandated that *wrongs be punished*, there is no obvious basis on which to reserve the power of punishment to the State or, for that matter, to the injured party. Theorists following Locke's version of the social contract will grant the actual victim of offenses the highest standing in the order of potential avengers. Locke wrote famously that a "state of nature" exists in which each person has the right to recover from the offending party "so much as may make satisfaction for the harm . . ." <sup>23</sup> However, this mythical state gives the theorist rather too much room for invention. Terms such as satisfaction and harm—not to mention "so much"—leave utterly unanswered a number of significant questions about punishment as a *moral* (as opposed to a *psychological*) mode of redress.

Beings in the alleged natural state are, presumably, possessed of social and moral resources still unrefined by the rule of law and by the discipline that rule applies to civic life. What, then, supports Locke's all too calm conclusion that, in that state, aggrieved parties—exactng just *so much* by way of punishment as to give themselves *satisfaction*—will do anything approximating what is achieved through the rule of law? Will they fashion rules of evidence? Will they consider mitigating circumstances? Will they assign an objective value to the stolen property? Will they permit appeals and the examination of witnesses? Will they test their own sensibilities to determine whether perhaps they have felt too deeply a loss that others would regard as trivial?

Presumably, what gives the State the *right* is just that institutionalization of rational deliberation that is *the rule of law* itself, and that preserves the rights of states even in the face of opposition by a majority of those living within their jurisdiction. To punish a wrongdoer may, in fact, function as a sort of proxy-revenge but this cannot be the State's aim, except in the rare instance in which the victim would seek *only what is right*; where the victim would estimate *harm* rather than *my harm*; where the satisfaction sought is not personal but principled. Law as *an ordinance of reason*, an ordinance of reason promulgated by those entrusted with securing the common good, is not the proxy-expression of various human passions, ephemeral desires, often quirky claims and sensitivities. It replaces the populace as it is likely to be found at any given time with the ideals persons can rationally comprehend under favoring conditions. It then stands

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23. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 11–12 (Prometheus Books 1986) (1690).

as the proxy for their morally best selves, which, in the nature of things, may not be their usual and often self-indulgent selves.

### III.

The answer to the question, *By what right does the state punish, if not as an agent of the offended party?*, is, *By the very source of all "rights,"* including those the offended party might have to deserve or expect reparations. The right and power of punishment are reserved therefore to the law, not to the offended.<sup>24</sup> This is Kant's position on the matter, and it requires some amplification.

For Kant, freedom and morality are often so mutually entailing as to render each incomplete as a concept until the other is incorporated.<sup>25</sup> Owing to this, Kant's political and legislative ideals accord absolute value to freedom and are incompatible with alternative ideals in which the value of freedom is merely instrumental. It is the First Critique that expresses the standard with uncompromising economy:

A constitution allowing *the greatest possible human freedom* in accordance with the laws by which *the freedom of each is made to be consistent with that of all others*—I do not speak of the greatest happiness, for this will follow of itself—is at any rate a necessary idea, which must be taken as fundamental not only in first projecting a constitution but in all its laws.<sup>26</sup>

This paragraph-length sentence contains four distinct elements, each illuminating vast areas of the Kantian project. It is only under conditions of freedom that choice is possible; only when free that one can be responsible in the moral sense of the term. The fullest moral life, then, presupposes the agent's free investment of his life in the ideals of morality. The first element is the conceptual and necessary relationship between freedom and the very possibility of morality.

If, however, there is to be a social world at all, the preservation of freedom requires laws, some constitutive structure of society capable of securing freedom. Inevitably, laws constrain and limit freedom, thereby presenting a threat to morality itself. Those who are compelled to honor a moral maxim are merely behaving properly but cannot be said to be living a moral life.

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24. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 312 (Norman Kemp Smith trans., St. Martin's Press 1965) (1781) [hereinafter *KANT, CRITIQUE OF PURE REASON*].

25. *Id.*

26. *Id.* at 312.

How, therefore, should the task or aim of law be understood? This is the second element: The task or aim of law is to make the freedom of each consistent with the freedom of all. An exercise of freedom that imperils the freedom of others is one that reduces their *moral* standing which is the significant respect in which unlawful conduct may be regarded generically as a form of *disrespect* or contempt. The law itself is contemptuous of those living under it when its aims are indifferent to freedom. Such a regime loses the right—it abandons the conceptual tools—by which to expect allegiance or fidelity as a moral obligation. No one can be morally required to support a rule of law that renders morality itself jejune.

Hence, the third element, which insists on the *necessity* of the relationship between the very concept of law and the maximization of freedom. Obedience to the law is either the outcome of fear and coercion or the expression of fidelity to principle by a rational being possessed of an autonomous will. Obedience secured by force and threats of force is compulsory, leaving its subject beyond the perimeter of moral space. It connects all conduct to one or another *hypothetical* imperative (e.g., the imperative to avoid or reduce one's pain or suffering), and thus detaches the lived life from that *categorical* imperative by which one gains full citizenship in the moral world. Finally, as the fourth element, the *greatest happiness* available to a rational being is the fullest expression of that rationality in framing a authentic form and course of life. There can be no fundamental conflict between the happiness worthy of such a being and that rule of law which has as its determinative objective securing *the freedom of each* in a manner that is *consistent with that of all others*.

Those who are fit for the rule of law understand this, for it is a foundational assumption. One could not at once comprehend the concept of what is "forbidden," except by recognizing that there are some actions that one *can* choose but *must* not. To comprehend this much is already to know oneself to be autonomous and to know the same about kindred beings. It is to understand, therefore, that the manner in which justifies a course of action is by the application of a principle; one that supplies a reason for action not confined to this or that action, but covering all actions of a certain kind; e.g., destructive actions, cooperative actions, or affectionate actions. The *maxim* of the action is not simply a rationale for doing something here and now, but a justification for acting in a certain way in a wide range of situations. The question then arises as to whether there is a single maxim capable of directing all actions under all conditions in every situation. If there is, then it is *categorical*. It is a *categorical imperative*.

"Act as if the maxim of your action were to become through your will a universal law of nature."<sup>27</sup>

That Kant's version of retributivism could be construed as inconsistent with such high blown purposes has been noted often enough. Kant's arguments for punishment, however, are based chiefly neither on fear nor utility. The threat of punishment motivates the actor to understand the importance of due deliberation and also is a useful way of controlling one set of hypothetical imperatives with another. Punishment under the forms of law is also a form of embarrassment; a loss of standing and respect that reaches the moral core of the person in ways that physical pain and duress do not.<sup>28</sup>

There is, however, another form of pain, uniquely inflicted when attached to a significant moral failing. Punishment that is "just" aims to inflict pain aroused by the knowledge that one has been the cause of pain to others. Operating on those with the capacity for guilt and remorse, such punishment is a form of *cleansing*. In this respect, retributivist theories of punishment are not unlike more ancient conceptions of crimes as requiring a *purification*. In addition to these functions, punishment secures the trust of persons in the law, thereby validating further the proxy power which just laws have by right. This is not merely the subjective feeling of confidence but an objective trust established by the predictability of retributive punishments.<sup>29</sup>

It is not beyond the pale of reason or, indeed, of actual cases to expect the offender, as a member of the community of rational and moral beings, not only to feel guilt and strive to atone but to wish for such purifying punishment. The Kantian theory requires of moral beings a desire for justice.<sup>30</sup> There is no bar to this desire being reflexive. If one requires that offenders be punished, then one must require the same of oneself. Gary Herbert expresses the Kantian position this way: "[T]he person who asserts the right of humanity in his own person acknowledges his freedom, his humanity, his rights, his capacity to obligate others, and, coincidentally, but not unimportantly, the

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27. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 89 (H.J. Paton trans., Harper & Row 1964) (1785).

28. See Thomas E. Hill, Jr., *Punishment, Conscience, and Moral Worth*, 36 S. J. PHIL. 51 (1997) (containing an excellent discussion of this aspect of Kantian theory).

29. See Susan Dimock, *Retributivism and Trust*, 16 LAW & PHIL. 37 (1997) (discussing insightfully the objective trust established by the predictability of retributive punishments). However, I do not accept her claim that the "purpose of law" is to maintain basic trust of this kind. See *id.* at 39.

30. KANT, *CRITIQUE OF PURE REASON*, *supra* note 24, at 313.

legitimacy of his punishment when he fails to act according to the law."<sup>31</sup>

Retribution thus understood reconstructs not only what the moral offense has destroyed or disfigured in others, but in oneself. This same understanding illuminates the deficiencies of purely utilitarian or consequentialist theories of punishment. To punish in order to deter others, or to give vent to the same passions that impelled the offense, strips the offender of the right to be punished—the right to an earned desert.

In *After Virtue*, Alasdair MacIntyre notes the movement from an Aristotelian to a Nietzschean world view.<sup>32</sup> The bureaucratization of moral and social problems leads to solutions based on "suppressed Nietzschean premises"<sup>33</sup> that are indifferent to or by now ignorant of the radically different premises that grounded Aristotle's conception of politics and morality. In the end, a political regime is either justified or is a tyranny. Justification is a matter of rationality and principle, as regimes are a matter of laws and obligations. What it is in law that would *obligate* is not the threat of punishment; not even the endorsement of majorities.<sup>34</sup> It is, instead, the rational contact it makes with the citizen's own rational powers and rationally framed ends and purposes.

#### IV.

*By what right does the state punish in my behalf?*

*By what right does the state forgive in my behalf?*

These are conceptually symmetrical questions. Having addressed the first in the previous section, the second calls for less attention. The most direct answer to these questions is that the state's rights are a feature of statehood itself. Indeed, absent statehood or some recognizable and settled form of essentially civic or political life, the very concept of a "right" must be vanishingly thin. Nevertheless, the political or civic protections that come to stand as "rights" must match up with something real and actual. If there is ontological weight to rights as such, it is conferred not by the *powers* of those who claim or take them, but by

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31. Gary B. Herbert, *Immanuel Kant: Punishment and the Political Preconditions of Moral Existence*, 23 INTERPRETATION 61, 66 (1995).

32. ALASDAIR MACINTYRE, *AFTER VIRTUE* 109–20 (1981).

33. *Id.* at 114.

34. See generally ROBERT P. GEORGE, *MAKING MEN MORAL* (1993) (assessing the limited authority enjoyed by majorities *as majorities*). George considers Lord Devlin's famous contention that, as the function of law is to preserve social cohesion, the law may be fashioned to endorse or forbid whatever threatens that cohesion and needs no justification beyond that. *Id.* at 71–82.

the *vulnerabilities* of those who might be victimized by just these powers. To have a “right” in this sense is to be vulnerable in a manner that is subject to respect and protection.<sup>35</sup> In the enlarged sense of vulnerabilities, the offenses calling for punishment and moral disapproval are those that exploit or enlarge certain of the vulnerabilities. The phrase used to describe offenses of this sort is that they violate the rights of the victim.<sup>36</sup>

As vulnerabilities are generative of rights, it is powers that are generative of duties. The misapplication of one’s powers in such a way as to infringe the rights of others is what constitutes offenses warranting punishment and moral censure. Moral censure, however—and in a manner not unlike what Bentham had in mind—is or should be a source of pain and distress. It is a punishment and therefore must be proportionate to be just. Once the offender has been punished enough, the resulting disposition is that of *forgiveness*. Forgiveness is the expressed or implicit judgment that the price paid by the offender is proportionate within the power of reason to discern. Whatever emotion might accompany the judgment adds or subtracts from the quality of mercy or compassion by which justice refines and perfects itself. If it is the aim of justice to achieve good, to want for others what is in their best interest (as the ideal friend would want for the other) then the attainment of justice should be the occasion of joy.

In its laws, punishments and pardons, the state is the embodiment of what is best in those who form and sustain it. In its institutional projection it has little means by which to have or express sentiments. Rather, by customary attention to human frailty, by an official disposition toward clemency and away from lustful vengeance, the state is able to administer a form of justice that has the look and the spirit of friendship. It was Aristotle’s understanding that the ideal *polis* is a community of friends, but with friendship itself understood in ineliminably moral terms. As he says in his ethical treatise, “Friendship and justice seem to be concerned with the same things and to be found in the same people. For there seems to be some kind of justice in every community, and some kind of friendship as well.”<sup>37</sup>

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35. See Rom Harre & Daniel N. Robinson, *On the Primacy of Duties*, 70 *PHIL.* 513 (1995).

36. Current developments in the so-called “restorative justice” are illustrative. See, e.g., JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002).

37. ARISTOTLE, *NICOMACHEAN ETHICS* 218 (Sarah Broadie & Christopher Rowe trans., Oxford Press 2002).

Although this may all succeed as an adequate defense of the state's punitive authority, it is still not sufficient to explain and justify proxy-*forgiveness* extended by those who were not the victims of the offending action. The deceased has left behind a wife and infant child. The question is whether, if, and how the widow can forgive the assailant. In whose name is the forgiveness extended? Is the spouse a proxy in such matters? Can she forgive also in behalf of the now fatherless infant who will go through life with only one parent? Might it be said that she has the power to confer quasi—but not full—forgiveness?<sup>38</sup>

Properly understood, no one forgives "by proxy," though one may have compassion for both the victim and the offender, even in equal amounts. One forgives by *judgment*, and it is in this sense that the state stands as the rational judge of the extent, in time and in severity, of punishment sufficient to warrant forgiveness. The judgment that, all relevant factors considered, the punishment of moral censure—the punishment of reduced moral standing—has run its course, the time now having arrived when the offender is to be restored, returned to the human family, better prepared now to take up the life of citizen, if not saint.

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38. See, e.g., Piers Benn, *Forgiveness and Loyalty*, 71 PHIL. 369 (1996) (concluding that a proxy can confer quasi, but not full, forgiveness).