

Wrongful Action Answered: The Role of Retribution in Responses to Crime*

L ELAINE MILLER**

I. Introduction

No one likes to suffer, and the infliction of suffering is generally agreed to be wrong, according to our moral intuitions and most normative codes. If done in the name of the state, it would certainly require justification.

Criminal punishment is one institution of a civilised society that involves deliberately causing someone hardship or discomfort, or taking away benefits and freedoms he or she ordinarily enjoys.¹ Efforts to provide a moral justification for punishment may have the aim of articulating reasons for our conviction that ‘something must be done’ about crime, and/or explaining why we punish criminals rather than taking some other type of action.

Theories of punishment that seek to provide such a moral justification are usually divided into two general camps. Consequentialist reasons point to some result or results brought about by punishment; that is, some independent good. It is only those consequences that allow the state to confine someone, to take money from him, or to harm his interests in some other way. Retributivism, on the other hand, is the view that criminals should be punished ‘because and only because’² they deserve punishment, or (at least) that the *primary* reason to punish is the moral desert of the offender. Although punishment may have beneficial consequences as well, these play no part in what justifies punishment and makes it just. Retributivism typically also includes a principle of proportionality that

* Winner of the ASLP Essay Prize, 2004.

** BA (Hons), MA, MA (The Ohio State University); LLB (Monash University). This essay was written in my third year at Monash University. My thanks to Dale Smith and Dirk Baltzly for their comments.

¹ In our legal system, that hardship generally takes the form of deprivation of liberty or, for minor offences, a fine.

² Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (1997) 153.

governs the amount or severity of punishment required for particular offences.³

Mixed theories attempt to incorporate elements of each, although they vary in their logical structure and in the role played by desert and by consequences.

Jean Hampton has one of the more interesting accounts of retribution, which she argues is an essential element of any morally sound system of punishment.⁴ Her stated aim is to explain and defend the idea of desert, for which many retributivists offer little support beyond an appeal to intuition. While Hampton's concepts of a criminal action and what we are doing when we punish the criminal are provocative metaphors and go further than some retributivist accounts of desert, I shall argue that they still fail to provide the required link between the wrongful act and the punishment.

Hampton admits to being a pluralist about reasons to punish, although she thinks retribution is the most important one. Unlike Michael Moore, for example, she does not hold that desert is both a necessary and sufficient condition of just punishment.⁵ However, her 1992 article 'Correcting Harms versus Righting Wrongs' focuses on the nature and role of retribution, so I shall not attempt to deal with whether in fact it is consistent with other (consequentialist) goals that Hampton has defended elsewhere, specifically moral education.⁶ Nor does the scope of this paper permit a comprehensive survey of the merits of hybrid theories, though in

³ 'Negative retributivism' is the view that 'only the guilty may be punished and then only to the extent of their desert'. As such, it can be used as a constraint upon a consequentialist justification of punishment. See, eg, B Douglas Robbins, 'Resurrection from a Death Sentence: Why Capital Sentences should be Commuted upon the Occasion of an Authentic Ethical Transformation' (2001) 149 *University of Pennsylvania Law Review* 1115. Robbins espouses a rather peculiar view in which character affects desert and thus the amount of punishment; for a more straightforward explanation see R A Duff and D Garland, 'Introduction: Thinking about Punishment', in R A Duff and D Garland (eds), *A Reader on Punishment* (1994) 7. Arguably, this view is not a species of retributivism at all, because desert then serves merely as a limiting condition of punishment, not a justifying feature. Such a compromise bears some similarity to the mixed theory of H L A Hart, set out in 'Prolegomenon to the Principles of Punishment', in H L A Hart (ed), *Punishment and Responsibility: Essays in the Philosophy of Law* (1968).

⁴ Jean Hampton, 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' (1992) 39 *UCLA Law Review* 1659.

⁵ Moore, above n 2, 88–9, 91, 153–4.

⁶ Notably, in Jean Hampton, 'The Moral Education Theory of Punishment' (1983) 13 *Philosophy and Public Affairs* 208. In Hampton, 'Correcting Harms', above n 4, n 65, she suggests that these goals may be compatible.

my view, a theory of just punishment is likely to be one of that sort. It is hoped that the criticisms of retribution will suggest a way toward a theory whose emphasis is on the *purpose* of punishment, and which considers justice (or ‘desert’) as both concomitant with and a limitation on other, consequentialist goods.

(a) Retributivism

To justify the infliction of suffering, which is *prima facie* morally impermissible, some retributivists argue that by violating the rights of others, criminals have forfeited their own right not to be jailed or otherwise made to suffer.⁷ Others claim that the reason criminals should be punished is because they have enjoyed a benefit that law-abiding citizens voluntarily forgo. By breaking the law, the criminal takes an unfair advantage over everybody else; she or he is a ‘free rider’.⁸ Punishment restores the balance by taking away the criminal’s unfair advantage.⁹ The principle of proportionality is supposed to govern this balancing exercise, although ‘separate argument is required’ to answer the questions of how much and what type of punishment.¹⁰

As many commentators have pointed out, including Hampton,¹¹ the ‘free rider’ theory is quite unsavoury. Most of us do not think of obedience to the law as a burden or privation, or of crime — especially violent crime, child-molesting, etc — as a temptation to be resisted. But another question that it brings into focus — more central for our purposes — is exactly how the retributivist thinks punishment *addresses* wrongdoing: what is this

⁷ See, eg, Alan H Goldman, ‘The Paradox of Punishment’ in A John Simmons, Marshall Cohen, Joshua Cohen and Charles R Beitz (eds), *Punishment: A Philosophy and Public Affairs Reader* (1995) 31.

⁸ Herbert Morris, ‘Persons and Punishment’ in Jeffrie Murphy (ed), *Punishment and Rehabilitation* (1973) 40; Jeffrie Murphy, ‘Marxism and Retribution’ (1973) 2 *Philosophy and Public Affairs* 217; Michael Davis, ‘Harm and Retribution’ in A John Simmons, Marshall Cohen, Joshua Cohen and Charles R Beitz (eds), *Punishment: A Philosophy and Public Affairs Reader* (1995) 188.

⁹ This is a ‘positive retributivism’: justice *requires* punishment, because otherwise criminals will ‘get away with’ their unfair advantage: Duff and Garland, above n 3, 13. See also Jean Hampton, ‘Retribution and the Liberal State’ (1994) 5 *Journal of Contemporary Legal Issues* 117, 124. Here she explains three types of retributivism: the ‘weak’ (negative) form; the positive form which obliges us to punish *all* and only the guilty; and the strongest, under which the moral obligation to punish is never defeasible.

¹⁰ Moore, above n 2, 88. He notes that retributivists are not committed to any particular penalty scheme or to *lex talionis*, the idea that the criminal should have a similar act done to her as the act that she committed.

¹¹ Hampton, ‘Correcting Harms’, above n 4, 1660–1.

notion of ‘desert’, which is said to constitute the link between criminal behaviour and state infliction of suffering on the criminal?

The notion that a crime is ‘annulled’ by punishment was espoused by Hegel,¹² who denied that it is compensatory. Rather, punishment ‘rights a wrong’.¹³ By inflicting a harm on the offender, it somehow cancels or negates the wrong that she has done. This is a fairly baffling concept. In the 18th century (prior to Hegel), Cesare Beccaria wondered how it could be possible to undo what has already been done.¹⁴ The idea of restoring a state of affairs that existed before some wrong took place makes sense in the context of tort law, where damages are awarded to compensate the victim for what he has suffered, and, to some extent, in the context of ‘annulling’ a marriage, where the parties return to single status as if they had never gone through the ceremony of matrimony. But how could a wrongdoer’s suffering accomplish the turning back of time, whether or not it is capable of compensating anyone?

Although Hampton does occasionally use the term ‘annulment’, she has an independent account of how retributive punishment is supposed to negate or nullify a wrong. Whether this account makes sense is the question at hand. A less abstract metaphor than annulment may be useful for comparative purposes, and to assess whether retribution fulfils the purposes that Hampton claims for it. ‘Balancing the ledger’, rather than changing a ‘wrong’ to a ‘right’ by nullifying or cancelling it, calls to mind an exchange of (existing, but poorly distributed) positive and negative factors until the ‘books’ constituting the relationship between offender and victim are balanced. I shall return to this idea later when considering Hampton’s view of how the appropriate response to wrongdoing operates.

¹² G W F Hegel’s *Philosophy of Right* (T M Knox, trans, 1942) has been discussed by many. Among the more helpful are James F Doyle, ‘Justice and Legal Punishment’, in H B Acton (ed) *The Philosophy of Punishment: A Collection of Papers Edited by H B Acton* (1969) 159, and C L Ten’s elaboration on David E Cooper’s work, in C L Ten, *Crime, Guilt and Punishment* (1987) Ch 3: Retributive Theories, 384 1.

¹³ Hegel, above n 12, 69–70 [99], quoted by Doyle, above n 12, 159.

¹⁴ Cesare Beccaria, *On Crimes and Punishments* (David Young trans, first published 1764, 1986 ed), ch XII, quoted by Russell L Christopher, ‘Deterring Retributivism: The Injustice of “Just” Punishment’ (2002) 96 *Northwestern University Law Review* 843, n 102. Hart also criticises this view in *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 234–5; as does Hampton in ‘The Moral Education Theory of Punishment’, above n 6, 236.

II. Hampton's Retributivism

In her defence of the 'retributive response' to wrongdoing,¹⁵ Hampton states that she is concerned with the wrong itself — the actions of the wrongdoer — rather than any losses or harms resulting from those actions.¹⁶ There can be harm with no wrong (for example, natural disasters),¹⁷ and not all wrongs result in harms (for example, attempted murder).¹⁸ Moreover, some wrongful actions require a retributive response, but others (even if they potentially result in harm for which compensation should be given) do not.¹⁹ It is only when the wrongdoer inflicts a *moral injury* that retribution is appropriate.²⁰ This is not the same as a loss or harm.

(a) What is a moral injury?

The moral foundation for Hampton's thesis relies heavily on the obligation to treat persons as ends in themselves. This is a reasonable starting point, as some form of the idea is present in many of our common-sense ethical intuitions — particularly with regard to prohibitions of crimes against the person — whether or not one wishes to follow Kant in all respects. Briefly, all human beings have intrinsic worth as persons and as members of the moral community. Failing to respect this characteristic of persons is what makes the offender morally culpable and deserving of punishment. It is easy to see how a criminal violates the victim's right to be treated as a person should be treated by committing criminal acts such as homicide, assault and rape. Crimes involving deception and dishonesty, such as fraud and even petty theft, also in some sense 'use' another person to obtain an advantage for oneself.

Hampton's account, however, is not that simple. Moral injury involves the wrongdoer *representing* the victim's value or worth as less than it really is. The 'message' communicated by someone's behaviour — but also, importantly, the manner in which this is communicated and the result of that act — constitute the injury that requires a retributive response. Hampton uses a true example of a white farmer who, angered by some trivial act done by his black farmhand, put the farmhand and his four sons in large burlap bags, hung them from a tree and began burning them. Further horrific treatment involved cutting off the penis of one of the suffering men when he asked for a cigarette and sticking it in his mouth.

¹⁵ Hampton, 'Correcting Harms', above n 4, 1660 ff.

¹⁶ *Ibid* 1662–5.

¹⁷ *Ibid* 1678.

¹⁸ *Ibid* 1681.

¹⁹ *Ibid* 1664.

²⁰ *Ibid* 1666.

A favourite tactic of retributivists is to play on our sense of outrage with the help of such extreme examples, but Hampton's intention here is to illustrate how a wrongdoer's behaviour can communicate something about the victim's worth, as well as something about how the wrongdoer views his own worth.²¹ But if, as Kant thought, human value is permanent and indestructible,²² why is a false representation of someone's value as degraded or inferior a wrong, and the only kind worthy of retribution? If nothing done to a person can extinguish or destroy his value, it would seem that the wrongfulness of actions or the harm they cause will have to be found somewhere other than in their effect on the victim's essential personhood.

Hampton's answer is that by denying someone's value, the wrongdoer's behavioural meaning effects the *appearance* of degradation (which she calls 'diminishment'). She employs a Gricean account of meaning to flesh out this analysis of how diminishment occurs.²³ Diminishment is wrong not only because it causes suffering, but because it either fails to respect what the victim is entitled to by virtue of his status as a person (for example respect, dignity, autonomy) or, by misrepresenting the victim's value, it threatens to undermine community belief in human value, in some way.²⁴

The crucial premise in Hampton's argument is that the wrongfulness of certain kinds of acts comes from the fact that behaviour 'carr[ies] meaning with regard to human value'.²⁵ Two objections might be raised at this juncture. First, even if we accept that acts can be communicative, *how* does their propositional content make them morally wrong? All of the four Gricean types of meaning, even natural and conventional meaning, are something additional to what is done to the victim. Although there are

²¹ Ibid 1677.

²² Hampton provides two different interpretations of the Kantian view of why persons are valuable; both reject the idea that human value can actually be destroyed: *ibid* 1673.

²³ The four types of meaning mentioned are natural meaning (where the speaker's behaviour is intended to serve as *evidence* of a claim about someone's worth, not just an indication of what the speaker believes); linguistic conventions which convey meaning regardless of intention; non-natural meaning (where a speaker communicates something about personal worth by using conventional forms in novel and metaphorical ways); and conversational implicature (where the assumption that the speaker is trying to communicate something allows an inference about the speaker's beliefs): *ibid* 1675–7.

²⁴ Hampton refers to these two types of damage as damage to the 'realisation' of the victim's value, and damage to the 'acknowledgment' of his or her value: *ibid* 1678–9.

²⁵ *Ibid* 1670.

plenty of circumstances in which ‘saying something’ can by itself amount to wrongdoing (for example, defamation; making a promise while intending to break it; telling someone contemplating a camping trip that the weather forecast is fine when in fact you’ve heard predictions of tornadoes), surely acts such as assault or rape need no more than the requisite *actus reus* and *mens rea* to make the perpetrator criminally liable and morally culpable. While Hampton’s aim is to provide an account of when and why the *retributive* response is appropriate, not to explain existing punitive practice in the criminal law, it is at least questionable whether the additional explanatory layer (‘moral injury’) is necessary in order to keep the focus on the wrong, regardless of whether and how any harm has resulted from it.

Secondly, if the wrongfulness of an act stems from its being a false representation about someone’s worth, as well as from other people’s responses to that representation²⁶ — and if the retributive response is a way of rectifying it — how does the theory avoid reliance on (somewhat complicated) consequentialist considerations? As stated earlier, Hampton is not concerned to avoid consequentialism at all costs, but she is trying to provide a justification that has retribution as an essential element. If that element is to add anything distinctive and fruitful to a justification of punishment, Hampton must explain how it does more than prevent or correct harms. It would appear that she thinks part of the problem with false representations is that, like libel, they have broad repercussions. ‘The misrepresentation of value implicit in moral injuries not only violates the entitlements generated by their value, but also threatens to reinforce belief in the wrong theory of value by the community.’²⁷ And, ‘a value-denying act ... can encourage the infliction of similar injuries by people who find appealing the apparent diminishment of the victim and the relative elevation effected by the wrongdoing.’²⁸ If crime is communication, this is perfectly plausible: in other words, the criminal’s act says something *to society*. But by pointing to the potential harm resulting from that representation, Hampton has just reached the same conclusion as a consequentialist — by a rather roundabout route.

Finally, if diminishment is not the same as actual degradation — that is, it does not and cannot destroy a person’s essential value — Hampton has not adequately answered the question posed above. True it is that failing to respect someone as an end in herself is a moral wrong. But it is not at all clear that the basis of this wrong is distinctively different from any other sort of wrong, or that society’s response to it has or should have a

²⁶ Ibid.

²⁷ Ibid 1678.

²⁸ Ibid 1678.

distinctive character that is not present in punishment conceived of as corrective or remedial.

Rather than an ‘annulment’ of a wrong, punishment, on Hampton’s view, is better characterised as a denial (by the state and society) of a false claim made by the criminal. She uses the terms ‘vindication’ and ‘repudiation’, but adds that the re-establishment of the victim’s worth is not accomplished by simply saying so, any more than the wrongdoer’s action constituted a mere assertion.²⁹

(b) Punishment and crime, retribution and wrongdoing

Hampton’s article does not purport to provide a complete and comprehensive theory of punishment, but because she claims that retribution is central to it, she owes us a fuller account of the justificatory job that retribution does in the context of punishment — that is, in the criminal law.

Hampton does not address particular types of punishment. She does consider ways in which a retributive response can be fashioned to the facts of a case, noting that it is not an easy task to ‘vindicat[e] the victim’s value without compromising the wrongdoer’s’.³⁰ But her example of a response that she finds both fitting and powerful comes from tort law and concerns exemplary damages in a tort case.³¹ While compensation is not an essential part of the retributive response, it may accompany it, and retribution can exist independently of criminal punishment.³²

Moreover, on Hampton’s view, punishment does not have to contain a retributive element. Because some crimes do not involve moral injury, retribution has no place in the way society should address them. Hampton’s attempt to fit a petty theft of a library book under the rubric of ‘treating oneself as more important’ than the rest of the university community³³ has some plausibility, but only in so far as the frustrated library users can be said to be victims, in some sense.³⁴ What, then, would she say about victimless crimes such as illegal gambling or possession of cannabis? For

²⁹ Ibid 1686.

³⁰ Ibid 1689.

³¹ Ibid 1687–9.

³² However, she seems to find the term ‘punishment’ in this context not at all inappropriate, discussing Marc Galanter and David Luban’s extension of her own theory to tort law, in a then unpublished article titled ‘Poetic Justice: Legal Pluralism and the Jurisprudence of Punitive Damages’ (1989).

³³ Hampton, ‘Correcting Harms, above n 4. 1680.

³⁴ Hampton says that some actions are immoral solely because of what they express, rather than any harm they bring about (eg attempts). This is reasonable enough; in attempted burglary or attempted murder, there is at least one person who was the *intended* victim.

these to be appropriate contexts for the retributive response, there would have to be a large and indeterminate class of persons who might *potentially* suffer indirect effects, whose human value the offender holds inferior to his own. In the case of offences like tax evasion, that group might have to be something like ‘society as a whole’— and the concept of individual persons possessing moral worth, autonomy and rights becomes somewhat removed from the situation at hand. If it would be preferable to have different justificatory schemes for different types of crime, it would be reasonable to ask for an account of what it is about crimes not involving diminishment of any particular persons’ human worth that justifies criminal punishment.

Alternatively, Hampton could claim that it is possible to inflict moral injury upon oneself. By breaking the law — any law, not just laws whose purpose might be interpreted as protecting health or safeguarding character — a person represents his own value as less than what is expected of a good citizen. Whether or not he feels himself to be harmed by his own action, the perpetrator of a crime diminishes himself.

Such a move would have rather curious consequences for Hampton’s theory, as the person to be punished would be identical to the person whose moral worth is to be vindicated. As an example of an act that involves self-diminishment, consider suicide, which is often very clearly a radical denial of one’s own worth. We might agree that it is morally wrong for this reason, but still find it odd to punish someone for attempting to kill himself.³⁵

To be fair, Hampton does not claim to be offering a justification for all of our existing punitive practices. Besides widening the application of retribution beyond the criminal law, she acknowledges the difficulty of ‘constructing retributive responses’ to crimes, and opines that ‘there is good reason to believe that our legal system does not do a very good job of it’.³⁶ She cites some real-life examples with approval, but does not think that all instances of criminal punishment stand up to her criteria. Many theorists have similar complaints; for example, legislation on sentencing in the United States, from the 1960s and 70s onward, has generated strenuous criticism for undesirable effects seen as resulting from its consequentialist objects and purposes.³⁷ And certainly a theory can have a reformist aim in

³⁵ Attempted suicide is no longer illegal in most common law jurisdictions.

³⁶ Hampton, ‘Correcting Harms’, above n 4, 1685.

³⁷ Critics of the alleged effects of consequentialism include Paul Robinson, Richard Singer, and A von Hirsch. Defenders include Michele Cotton, in an article arguing persuasively that the retributivist agenda infected courts and legislatures with a single-minded willingness to subvert normal procedural safeguards and even the rule of law: ‘Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment’ (2000) 37 *American Criminal Law Review* 1313.

challenging us to rethink the way the current system works. However, Hampton's emphasis on the centrality of retribution does not seem to stem from any particular dissatisfaction with the criminal justice system. In answering the question of why we should punish, she supplements — if not supplants — a constructive catalogue of what it is supposed to accomplish with the abstract goal of 'righting wrongs'. To show how the retributive response achieves this, she relies on a metaphorical characterisation of crime as a sort of speech act. This, I think, is the most imaginative and interesting part of Hampton's theory, but it also reveals the weakness of the link.

(c) The connection between punishment and crime

Hampton argues that if someone's act diminishes another's value, then the wrongdoer deserves retribution. Does she succeed in establishing a link between the wrong and the retributive response?

The retributive response involves 'remak[ing] the world in a way that denies what the wrongdoer's actions have tried to establish'.³⁸ Punishment does this by 'lowering the wrongdoer, elevating the victim, and annulling the act of diminishment'.³⁹ Like the crime, it is an act of communication, but one which has a very real effect on the person to whom it is done. There are several problematic points in this collection of concepts.

(i) Lowering the wrongdoer

One might think that no person or group of persons has the right to 'lower' someone — even someone who has assumed a position over others that she has no right to occupy. If the state does have such a right,⁴⁰ the retributivist should provide an argument for its being accorded this privilege. Because Hampton does not want to limit the exercise of retribution to state-imposed punishment, she does not deal with the issue in 'Correcting Harms'.⁴¹ Although she admits that 'defeating' the criminal runs the risk of failing to respect the criminal as a person, and that determining the appropriate kind and degree of punishment is a very difficult task,⁴² Hampton does not, in this article, provide guidelines for balancing these aims, apart from

³⁸ Hampton, 'Correcting Harms', above n 4, 1686.

³⁹ Ibid 1687.

⁴⁰ Kant thinks that it does: Immanuel Kant, *The Philosophy of Law: an Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie trans, 1974), 'The Right of Punishing and of Pardoning', 194.

⁴¹ However, in 'Retribution and the Liberal State', above n 9, she does discuss the purpose of the criminal sanction, and the question of how a liberal political philosophy can justify the state's interference in personal liberty by that means.

⁴² Hampton, 'Correcting Harms', above n 4, 1690.

suggesting that it is important to consider the specific facts of a case. She could argue that state authority to punish is no less legitimate with this aim than with any other. But one might be made nervous by the prospect of the government making pronouncements upon persons' worth or relative worth, even in the interest of enforcing the equal right to human dignity which the criminal has flouted by her act.

Secondly, how does punishment 'lower' the offender, except in the very literal sense of stopping him from criminal action? It causes him suffering of some sort, which may take the form of mere inconvenience, humiliation, or serious serious sorrow and hardship. But Hampton makes it clear that harm done by the offender to the victim is not what justifies the punishment; rather, it is the moral injury. Nor does she think the harm suffered by the offender is what effects the 'annulment'. In addition, she claims quite a wide scope for retribution, extending it to non-punitive responses⁴³ and to programs for sex offenders which, by 'making the rapist[s] imaginatively become the victim', require them to 'confront what they did to other human beings, and appreciate how badly their actions affected them'.⁴⁴ The 'defeat' of the rapists' illegitimate and immoral claim to power over others is accomplished by making them imagine what it's like to be a rape victim.

While suffering of some degree may in fact happen to be present in all punishment, Hampton does not choose to focus on it as an essential element of the retributive response. Even if she did, we are still left with the question of how some objective calculation of 'diminishment' to the wrongdoer, considered independently of its effect on his conscience or on his or anybody else's future behaviour, achieves a change for the better — for either the victim or for society.

It may be instructive to note that the imaginative role-playing exercise in the sex offender example has some similarity to theatre — it is a representation. By being forced to put themselves in the shoes of victims, the offenders must 'act out' or mimic the experience of persons whom they harmed. It is not simply a denial of the rapists' 'claim' to superiority (by representing them as weak and hurt); even less is it any sort of express affirmation about the real worth of the victims. Although I have no doubt that such exercises can be therapeutic and helpful, I am sceptical of the

⁴³ Illustrated by the Biblical story in the book of Esther, in which Mordecai's value is vindicated and Haman is humbled by the device of a parade for the former, escorted by the latter in the position of a servant. Whether this is truly non-punitive is questionable.

⁴⁴ Hampton, 'Correcting Harms', above n 4, 1690. Although the programs to which she refers have had beneficial effects upon the offenders, she states that they are intended as retributive, not rehabilitative.

claim that the value lies in any metaphysical ‘result’ being brought about. Perhaps the very notion of a ‘link’ between a wrong and a punishment is consequentialist. Annulment, by contrast, is symbolic. Although the parties are emotionally affected (just as we are when we view an intensely moving play), nothing really happens when something is annulled, any more than the performance of a drama brings about anything apart from thought, reflection and feeling. If we substitute the metaphor of ‘balancing the ledger’, what is brought about (if the ledger reflects any actual activity in the accounts), is compensation. The party who attempted to take more than her fair share, causing detriment to another, must replace it.

(ii) Elevating the victim and annulling the act

Hampton claims that retribution does ‘compensate’ the victim, but for the moral injury he has suffered, rather than for harm.⁴⁵ It is a different form of compensation from damages, which compensate for losses suffered; retributive justice, she says, compensates for moral injury. As an illustration, Hampton cites the ‘humbling’ act of saying ‘I’m sorry’ when we realise we have done something wrong, followed by an attempt to ‘make it up’ to the injured person. The apology and atonement cancel the hurt, put the victim back in the position he would have been in but for our thoughtless action, and restore the balance of the relationship.

This is a fairly accurate picture of normal human interaction, between, for example, friends, siblings or partners. However, it seems to me that the value of such rituals is not solely in the knowledge that the other person regrets what she has done, but in the assurance that she won’t do it again, or at least will give some thought to how her behaviour will affect others. Yet Hampton is adamant that moral injury is objective, and has little to do with the victim’s reaction.⁴⁶ Therefore it is unlikely that the appropriateness of retribution in a particular case would depend on whether the victim (if any) wanted the offender to be punished, or whether he felt any satisfaction or personal vindication as a result. The retributivist seeks to ‘do justice’, to right the wrong, not to bring about any concrete results or repair the harm, although she may not mind if corrective results are a side benefit.

On the one hand, Hampton wants to maintain that it is not possible to tamper with human value, which is determined simply by virtue of membership in the class of persons. What is damaged by a wrongful action is the ‘realisation’ or the ‘acknowledgment’ of value — in other words, a meaning as understood by members of the community. But if we accept that human value does not depend on any conventional or subjective assessment

⁴⁵ Ibid 1698.

⁴⁶ Ibid 1671–2; 1684. For example, someone with a very poor self-image may believe that rape was permissible for someone as ‘low’ as she.

of worth, the idea that the wrongfulness of a criminal or immoral act comes from its representational content is puzzling. So is the notion that what is going on when we punish is not merely the infliction of suffering, but the restoration of equality (which was never objectively altered anyway) by symbolically denying the offender's claim to superiority. Both of these components in retribution are especially odd if they are supposed to be independent of the parties' point of view, and relevant to wrong rather than harm.

An illustration of annulment as it applies to marriage might be helpful. If a couple decides to obtain an annulment, they are aware of what it entails. It is also clear to the state or religious body authorising the transaction, to the families and friends of the couple, and to any existing potential partners of them both. While no one could pretend that they really never were married, or that the emotional and experiential effects of having been married were tidily wiped clean, the civil and ceremonial nature of the contract means that similar legal or cultural means can be used to 'undo' or rescind it. It is a legal fiction that the marriage never had any existence, but the institution of marriage itself is a legal construct in the first place.

A crime, on the other hand — particularly a violent crime or one which causes the victim to suffer loss — is not the sort of event that has been authorised by legal and social structures and that can therefore be repudiated by those authorities.⁴⁷ 'Remaking the world' for the sake of the victim's value as a person may have great symbolic significance, but the fact remains that punishment, apart from its contingent effects (for example, taking the criminal out of society, possibly reforming him, etc) is incapable of doing anything about the *injury* that has already taken place. Hampton's focus on the wrong is misplaced.

III. Crime and Punishment as Communication

I would like to return to crime and punishment viewed as expressive acts, in order to examine more closely Hampton's concept of moral injury and how it is negated.

(a) Wrongdoing as representation

Hampton's explanation of how behaviour can be meaningful relies on an analogy between acts and statements or communications.⁴⁸ Wrongs are behavioural assertions, according to her — a type of performative utterance.

⁴⁷ The fact that both or all parties to a crime do not enter into it voluntarily is not a relevant factor, for even arranged and forced marriages can be annulled.

⁴⁸ Hampton, 'Correcting Harms, above n 4, 1675–7.

I submit that acts of communication — whether they are referred to as expressions, assertions, representations or speech acts — must be directed to someone. Otherwise they fail to fulfil the purpose of communication, which is to make one's thought, opinion, feeling or question known to another person or persons. Is the wrongdoer's message directed to society at large? If Hampton thinks so, she would need to account for cases where the criminal wants to avoid getting caught — which would surely be a rather large proportion of crimes. Where the offender doesn't care whether or not he's caught, is it an act similar to just talking out loud to oneself? If, instead, the wrongdoer's expressive act is directed chiefly to the victim, the notion of its being a communication starts to look a bit flimsy when, as in Hampton's own example, the victim is killed by it.

It might be replied that there are instances of meaningful action that have no connection with the speaker's intentions toward the audience. For example, imagine someone (call him Bob) who fails to take notice of people when going about his daily business, even to the extent of knocking old ladies to the ground from time to time (but still not noticing, and when he does notice he doesn't care). Does this disregard or lack of effort not communicate something about the speaker's attitude toward others, and does it not merit some sort of response? Because the behaviour has an effect on people, even absent any malicious intention toward them, one might argue that they are 'picking up signals' that definitely mean something.

One answer is that, while Bob is certainly harming others, and while his attitude is appalling and the actions that evidence it do 'mean' something to the poor old ladies, he is not *communicating*. There are certain criteria for communication, successful or otherwise, and one is that the party is cognizant of others as listeners or communicators. Bob's self-absorption has no connection with anyone else; he is not even 'performing' in the sense of 'making a statement' or expressing himself dramatically. While we may hold him liable for all sorts of misconduct, including failing to heed the plaintive cries, it is not at all clear that his actions can be considered 'representations' — except perhaps if he was a fictional character, and then his 'communication' with the reader is really that of the author.

Additionally, and more importantly, in any linguistic community there must be some criteria for distinguishing a meaningful utterance or expression from a set of data from which an observer might draw an inference, or conclude something about what the speaker is trying to say.

This is a different matter from the task of supplying criteria for determining what the meaning or meanings might be (although this

determinant may accompany it).⁴⁹ All I would ask is that a theory of meaning should supply a means of determining *that there is meaning* in what looks like a collection of linguistic or behavioural symbols — just because it came from a person with the capacity for language doesn't mean that she was engaging in an act of communication. Of course, it's very likely that she was, but people's behaviour can have a multitude of different types of significance to us, even when all of those interpretations are just plain wrong.

Generally, intention will play some role in distinguishing 'something that was meant by the speaker' from 'something from which we could conclude that she meant'. We communicate by conventions, even when we use them in a new and unorthodox way or deliberately seem to flout them. We think there is meaning being expressed when someone does something that is tied to those conventions. An utterance by someone not fully fluent in a language is usually interpreted as meaning what is said — or, if we know that she is not fluent, we would use other evidence to determine what was meant. What we do know *is that she meant something*. On the other hand, suppose we were to travel to another planet. Even if the inhabitants engaged in behaviour strikingly similar to that of intelligent Earthlings, we would want a bit more evidence to determine whether they really were purporting to say hello, warning us that they were about to attack us, or just using gestures and sounds that resemble communication but are really their way of taking in the atmospheric gases on which they survive.

Hampton thinks the actions of the farmer in her example can be construed as making 'metaphoric use of the behavioral conventions of his culture in order to convey his intentions regarding [the victims'] worth'.⁵⁰ I would not dispute that his actions produce a certain reaction, much the same reaction as if he had said 'These men are worthless trash', and/or 'I have the right to treat them like trash', and/or 'This one isn't much of a man, and I'm going to make him even less one', and/or 'I'm a superior being to these', or simply 'I deny that I have any obligation to accord them dignity and human rights'. Nor would I deny that all the evidence indicates that he had the requisite state of mind to support convictions on multiple counts of murder. However, explaining his behaviour as communication requires a bit more than *actus reus* and *mens rea*. Was he 'saying' something specific, and if not — if all the above interpretations come to the same thing as far as his

⁴⁹ Consider situations where the linguistic or cultural conventions permit a wide range of plausible interpretations. For example, in literary texts the words and expressions of the language are employed in ways that allow multiple layers of meaning — even (according to some literary scholars) inconsistent meanings. Non-natural meaning, such as may be expressed by art forms such as dance, is even more difficult.

⁵⁰ Hampton, 'Correcting Harms', above n 4, 1677.

criminal intent — what function does the explication of behaviour as expression serve?

Hampton thinks the wrongdoer does mean something by such actions, or that the behaviour is evidence of a particular intention, and that we can ‘read off’ the message from the behaviour.⁵¹ She would surely protest that we must always use other clues to determine whether a collection of data has meaning, not just when visiting other planets but in our normal social interactions. The set of ‘criteria’ that would have to be provided to tell whether there is meaning would be as large and unwieldy as the mass of behavioural data. And this would be quite right. But it is just not clear that we need the apparatus of ‘behaviour as expression’ to explain what makes someone’s action culpable. Even if Hampton’s theory is not wrong, it is at the very least needlessly complex.

(b) Punishment as performative communication

For Hampton, punishment as expression is a communication not only to the wrongdoer but also to the victim and to the wider community at large.⁵² Its purpose is to annul the wrongdoer’s message about the victim and about himself, and thereby to right the wrong that he committed. This cannot be done simply by announcing that the victim is a person who should be treated only as an end in himself, *because* the criminal’s action was not done by a mere assertion to the contrary.

This casts some doubt on the expressive theory. Hampton does not want to portray punishment as compensatory, in any concrete sense, but she does want to insist that it have some actual effect on the criminal. Retribution is an intrinsic good, but its point is to deny or repudiate the criminal’s implicit assertion that the victim is worthless relative to the criminal. Without getting into the question of whether punishment is *always* in the service of consequences, whether the retributivist likes it or not, I would suggest that the requirement that the ‘message’ of punishment be articulated by an action against the criminal is evidence that it is intended to have an effect upon him. Explaining this in terms of a message delivered, understood and perhaps acceded to looks a lot like an attempt to bring about a change of some sort. Hampton says, ‘[f]or a judge or jury merely to announce ... that [the victims] were [the criminal’s] equal in value, is to accomplish virtually nothing.’⁵³ This indicates that there are considerably more important things to be achieved by punishing someone than just telling him something. In addition, Hampton’s worries about punishments which are too severe or too lenient (and which suggest some opinion about the crime held by the court or the state) indicate that this type of

⁵¹ Ibid 1683.

⁵² Ibid 1684.

⁵³ Ibid 1686.

'expression' is valuable (or dangerous) by virtue of the use made of it in subsequent cases, and in wider social opinions, which the courts have some role in shaping. Punishment as communication is not only consistent with consequentialism, but the theory gains nothing from the addition of the mysterious element of 'desert'.

IV. Treating the Criminal as an End in Herself

The retributivist agenda is usually claimed to fulfil the goal of treating offenders as ends in themselves by recognising that the criminal is 'a morally responsible agent ... capable of making reasoned choices and accepting the consequences'.⁵⁴ Treating persons as moral agents entails 'leav[ing] them free to choose for themselves whether to obey the law, and subject[ing] them to the coercive attentions of the state only if and when they choose to disobey'.⁵⁵ The Kantian source of the obligation to treat persons as ends is in the autonomy of the will.⁵⁶ If the criminal exercises her autonomy and has knowledge of the prohibitions on wrongful actions, she is in some sense choosing to be punished. If we recognise that the criminal *can* make this choice — that she is a morally responsible agent — then we must punish her.

This is a bit disingenuous if used solely in support of retribution. First, it fails to acknowledge that we have *reasons* for wanting persons to refrain from criminal activity. To ignore those reasons is to ignore the purposes for which the legislation was drafted — which are closely tied to the reasons it is desirable that everyone obey the laws: that is, to have a community in which people can live without fear of being harmed or killed, in which parties in positions of power accept a duty of care for individuals' well-being, and in which traffic accidents are kept to a minimum (etc). This recognition is perfectly compatible with respect for persons' freedom to choose whether to accept these rules, with the knowledge that they *are* the rules and the state has the authority to enforce them.

Some retributivists want to go so far as to claim that an individual's right to be treated as an end gives rise to a right to be punished. If we fail to punish a guilty offender, we haven't taken her choice seriously, that is, haven't treated her as an autonomous moral agent. (We may have 'bent the rules' for some reason, such as mitigating factors in the offender's life history, and found her less than fully culpable despite the fact that she did

⁵⁴ Stanley Benn, 'Punishment' in Jeffrie Murphy (ed), *Punishment and Rehabilitation* 18, 33.

⁵⁵ Duff and Garland, above n 3, 11.

⁵⁶ Immanuel Kant, *Critique of Practical Reason* (Thomas Kingsmill Abbott trans, first published 1909, 1959 ed) Bk 2, Ch 2.

commit the criminal act.) Everyone has a right to be treated as an autonomous moral agent, and therefore everyone has a right to be punished if he or she breaks the law.

These arguments work best as part of a justification for punishment, but (supposing they are sound) why does the punishment have to stem from the retributive response? One way to articulate the answer is as follows. If we punish a criminal for some other reason (deterrence, rehabilitation, incapacitation), the punishment is a means to an end. Retributivists claim that consequentialist aims treat offenders like dogs⁵⁷ by threatening them with suffering for disobedience. Such treatment fails to respect the criminal as a person, because punishing her is intended to serve another purpose — stopping crime, in one way or another — which has nothing to do with the criminal as an end in herself. It ‘uses’ the criminal, just as someone does when he lies to another to further some selfish aim, has sex with another simply for his own pleasure without regard for the other’s pleasure or interests, or plants subtle seeds of suspicion in the boss’s mind (say, by dropping a casual comment about some missing office supplies) to induce her to fire a disliked colleague. Punishing someone to deter, set an example, teach a lesson, or prevent that criminal from committing further illegal acts uses that person as an instrument or tool in the fight against crime.

We would do well to recall that Kant’s prohibition was on treating persons as *mere* means — that is, *solely* as means. Deterrence, incapacitation and (especially) rehabilitation consider the good of the offender as well as that of society at large.

Secondly, there is nothing preventing a consequentialist from acknowledging that potential criminals are moral agents and capable of making a reasoned choice to commit or not to commit offences. An informed, rational agent who understands that everyone is subject to penalties for violation of the law can be said to have consented to punishment. The fact that the *institution* of criminal punishment has purposes pertaining to social well-being and safety does not entail that punishment of a particular offender in a particular case is only undertaken to further those ends. To suppose so is to confuse the purpose of the institution — a purpose that has been called the ‘General Justifying Aim’ of punishment⁵⁸ — with questions about the individual accused’s degree of culpability and whether punishment is appropriate in the circumstances, and if so what type and amount.

⁵⁷ Hegel, *The Philosophy of Right*, above n 12, quoted by Duff and Garland, above n 3, 11.

⁵⁸ See Hart, *Punishment and Responsibility*, above n 14, 3–4, 8–13.

(a) Hampton's retributivism and moral autonomy

If retributive punishment performs the role of repudiating a false assertion, does it treat the criminal as a mere means to an end?

[I]n the order of ends, man (and with him every rational being) is an end in himself, that is, that he can never be used merely as a means by any (not even by God) without being at the same time an end also himself ... For this moral law is founded on the autonomy of his will, as a free will which by its universal laws, must necessarily be able to agree with that to which it is to submit itself.⁵⁹

If we treat someone as an end in himself, we respect his autonomy by refraining from any deception or coercion that would give him no opportunity to act voluntarily. Someone may voluntarily enter into an agreement to do something, which ordinarily would not be a desirable course of action for him — say, cleaning up after a stranger's puppies, which have not yet been house-trained — but if he exercises his free will in entering into a contract to do so, he is not being treated as *a mere* means. Doing the work is still for someone else's end — namely that of the puppies' owner — and as such the cleaner is being treated as a means, but in some sense the voluntariness of the act makes it his end as well, and does not preclude the realisation and acknowledgment of his value as a person.⁶⁰

Suppose we are concerned to ensure that we are not treating anyone as a mere means. So we explain to someone convicted of, say, intentionally causing serious injury that we are going to punish her by imprisoning her for 20 years. We characterise her wrong as a diminishment of the victim's value, the prison sentence as a denial of the criminal's behavioural assertion about her own worth and/or that of the victim, and make sure that she is fully aware of the message to be sent to society by our so doing. Could she agree that this is what is happening, and is it possible that she might voluntarily choose to pursue this course of action? In other words, the retributivist wants to claim that, even if punishment requires treating the criminal as a means, it does not amount to treating her as a *mere* means.

Well, she could so choose, if she agreed that what she was doing by committing the crime was denying the victim's value, and that the counter-assertion now being made is the correct appraisal of the situation (that everyone has equal and intrinsic worth, including the victim). But if this is what is required for just retributive punishment, no criminal could be punished unless she had already been persuaded that her behaviour was

⁵⁹ Kant, *Critique of Practical Reason*, above n 56, Bk 2, Ch 2.

⁶⁰ While I think there are serious problems with this analysis when applied to exploitative labour practices, that is a matter external to the issue at hand.

wrong. To admit this would arguably require that she was remorseful, or contrite.

This is somewhat counterintuitive. Not only are there plenty of criminals who, upon sentencing (or ever) are not the slightest bit remorseful, but the case could be made (and often is, in criminal trials) that remorse should be a vitiating factor. Even if contrition does not *remove* the need to punish, it arguably changes the character of punishment to the extent that *retributive* punishment, as Hampton characterises it, is inappropriate. For once someone has agreed that her earlier representation was false, there seems to be no good reason to repudiate it.

However, a stronger interpretation of Kant's claim is that the person must be *able* to agree with what is to be done to her — that is, she *could* rationally accept the punishment without asserting a contradiction. The obligation to treat someone with the respect befitting a person and a free moral agent does not depend on whether that person consistently behaves with an eye to universalising moral maxims, and herself succeeds in treating others as ends rather than means, but only on the person's ability to do so. This obligation extends to all rational beings — everyone. A criminal is someone who is capable of universalising moral maxims (acknowledging other persons' worth) but fails to do so. How, then, does the question of what the criminal is 'able' to do serve as any more than a perfunctory test?

The retributivist is caught on the horns of a dilemma. If the criminal *does* acknowledge the worth of others (after having denied it by committing a crime), punishment is rather pointless unless it also has some potentially beneficial consequences. On the other hand, if the criminal *can* acknowledge others' worth, but doesn't — either at the time of the criminal act or afterward — then punishing her against her will in order to elevate the victim and right the wrong can fairly be said to treat the criminal as a mere means, because it is coercive. There is no consent on the part of the criminal. Either the Kantian 'can' implies 'does', or it is empty in this context.

Moreover, if the purpose of punishment is to reassert the victim's worth, which the criminal denied by her action, then the distinction between retributivism and a kind of consequentialism — with not very concrete consequences — becomes extremely subtle, and retributivism is no more respectful of the criminal as an end in herself than consequentialism is alleged to be.

V. Conclusion

Hampton offers an account of retribution which, she is careful to note, can be considered separately from criminal punishment. She is open to

additional, consequentialist purposes for punishment, but contends that central to it is the rather abstract goal of 'righting wrongs' rather than remedying (or preventing) harm. Moral injury to someone requires that the wrongdoer's assertion be denied by society, and this is done by a considered retributive response, fashioned with attention to the specific facts about the wrongful act.

I have argued that Hampton's account does not adequately explain how punishment can redress a wrong that has already taken place, and that it fails to respect the wrongdoer as an end in herself. While I think just punishment must have as a central tenet an absolute prohibition on punishing the innocent, I also think the institution as a whole can only be justified in terms of tangible benefits to the community and, optimistically, to defendants and potential criminals as well. Such a justification would employ, as a basic and useful starting point, Hart's distinction between the 'General Justifying Aim' fostered by the institution of punishment (primarily, preventing crime) and the requirements of justice in particular situations (which take guilt into account as a limitation on who can be punished). But a defence of this particular type of mixed theory is a subject for another time and place.