A Plea Against Retributivism

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I.

As we all know, the United States has embarked on a campaign of intensifying harshness in criminal punishment over the last three decades or so. Longer prison sentences and the reinstatement of the death penalty are the most important aspects of this campaign, but they are only part of it. These thirty years of harsh justice have made for an epochal shift in American law, opening a large divide between the United States and the other countries of the western world. American criminal punishment is now staggeringly harsher than punishment in such countries as Germany, France, or Japan: In criminal punishment, there is no longer any single "western" or westernized world. There is an American world, tough and unforgiving, and a Euro-Japanese world, mild in ways that have come to seem wholly impossible in the American climate.[1]

The last thirty years have been, indeed, the era of a great and unparalleled American crackdown. This is an event that deserves a place on the grand American timeline, alongside wars, depressions, and other defining collective experiences. To be sure, this late twentieth-century campaign has not touched as many lives as the Great Depression or World War II or the war in Vietnam. Nevertheless, it has touched a great many lives indeed. In impoverished parts of black America in particular, the crackdown has struck a disturbing percentage of the male population, with an impact comparable in its epidemiology

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1. Here as elsewhere in this article, I summarize evidence and arguments presented in my Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe (2003). For this paragraph, see in particular ch. 2. For Japan, see Daniel H. Foote, The Benevolent Paternalism of Japanese Criminal Justice, 80 Cal. L. Rev. 317 (1992).

to any plague.[2] But not only inner-city blacks are involved: From white collar offenders, to minors of all races and segments of American society, the risk and severity of criminal punishment has grown by leaps over the last decades. American criminal punishment has become harsher for persons on every point of the social scale.

The United States has become, in fact, a country notable, not only for its liberty, but for its harsh punishment. This is an unsettling development, one that presents us with a real test of American values—a test no less severe, in its way, than the tests presented by times of either depression or war. The Great Depression put Americans to the hard question of whether they were really committed to a free market with minimal state intervention. World War II and the war in Vietnam put them to the hard question of whether they were willing to project American military power into the world in order to defeat fascism and communism. Our crackdown puts us to an equally hard question: Do we really want to be, by orders of magnitude, the harshest society in the western world?

This is not only a hard question. For any of us who are uneasy about the harshness of American punishment, it is also a painful question. It is painful because our epochal three-decade-long crackdown has coincided with three decades of well-intentioned reform and thoughtful punishment philosophy. Our thirty years of iron harshness have not been years during which the voices of reformers were ignored. On the contrary: The same thirty years have been something close to a golden age for the realization of reform schemes. Programs that liberal and humane Americans of the early 1970s yearned for have become law. In sentencing, what reformers like Marvin Frankel and others demanded thirty years ago—equal sentencing for

2. See e.g. Fox Butterfield, Study Finds 2.6% Increase in U.S. Prison Population, New York Times, July 28, 2003, available at http://www.nytimes.com/2003/07/28/national/28PRIS.html (visited July 28, 2003) (citing figure of 10.4 % of African-American population); Tracy L. Meares, Social Organization and Drug Law Enforcement, 35 Am. Crim. L. Rev. 191 (1998).

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comparable offenses—has now become the rage: Determinate sentencing, especially as embodied in sentencing guidelines, has swept much of the country.[3] The same is true more broadly of punishment philosophy: The old belief in rehabilitation, which was closely associated with indeterminate sentencing, has been widely abandoned. In its place has come the triumph of American neo-retributivism. Thirty years ago, a new generation of philosophers demanded a criminal law founded on blame—on unembarrassed condemnation where condemnation is warranted. They have made themselves dominant on the American philosophical scene, both in our analysis of substantive doctrine and in our general understanding of the propriety of criminal punishment. Indeed, we have had nothing less than a renaissance of retributivist punishment philosophy, which has produced the brilliant work of scholars like Jean Hampton, Michael Moore, and many others.[4]

So reform has triumphed, and philosophy has flourished—at the same moment that America has veered into a harshness of historic proportions. Is there any connection? Is the success of our reform movements in any way responsible for, or linked with, the harshness of our times? None of the reformers and philosophers who began their labors a generation ago aimed to create the system that we have at the beginning of the twenty-first century, of course. But have they played a role nevertheless, fostering, or at least failing to check, our descent into lonely severity? This is a question, not of what they desired, but of what they have wrought. It is a question that has troubled many reform-minded scholars,[5] and to my mind it

3. Marvin E. Frankel, Criminal Sentences; Law without Order (1973); American Friends Service Committee, Struggle for Justice: A Report on Crime and Punishment in America (1971).

4. Jean Hampton, An Expressive Theory of Retribution, in Retributivism and its Critics 1 (Wesley Cragg ed., 1992); Michael S. Moore, Placing Blame: A General Theory of the Criminal Law (1997).

5. Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998).

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is the burning question of our time in criminal justice. If you like it is something akin to the question we all remember from the era of the Vietnam war: Are we living through a tragedy of good intentions?

Any scholar of conscience has to ask this question, and searchingly. It is a failure of the ALI revised draft that it does not do so. The drafters have decided to ratify, if with caveats and hesitations, the orthodoxies of the last generation. To be sure, they pick their way carefully through the thickets of punishment philosophy, trying to leave an open path toward limited forms of rehabilitationism. And to be sure, they do not associate themselves with the most uncompromising forms of retributivism. They are, moreover, by no means cruel or bloody-minded. On the contrary, they show unmistakable signs of humane uneasiness at the harshness of contemporary American punishment: The drafters know that there is matter for concern here, and indeed matter for fear and trembling. They therefore recommend moderation to legislators, and they struggle as well to find principles of a kind of mildness within the orthodoxies they restate.[6] In particular, they insist that a commitment to "limiting retributivism" logically entails a commitment to proportionality in punishment.[7]

So the failure is not by any means a personal moral failure of the drafters. But I think it is a distressing failure nevertheless. Before we endorse retributivism, even in its most modest forms, we need some thoughtfully worked-out understanding of its dangers. Why has the age of the renaissance of neo-retributivism also been the age of epochally harsh punishment? How can we go on repeating the reform orthodoxies of the last generation, when the realities of punishment have reached such a disturbing pass during the very years in which those orthodoxies triumphed? How, in particular, can we content ourselves with the pat assertion that retributivism logically entails

6. American Law Institute, Model Penal Code: Sentencing, Report 35-41 (April 11, 2003).

7. Id.

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proportionality? Logic is as logic may be, but the Supreme Court, in a manner typical of the current atmosphere, has effectively declared proportionality a dead letter in current law.[8] Talking about proportionality in contemporary America is so much philosophical whistling in the wind. How can we refuse to look this reality in the face?

II.

Please, let us draw a deep breath before we decide to restate retributivism. We owe it to ourselves, and to our nation, to ask frank questions about its place in our punishment culture. We need to ask whether the philosophy of blame, however philosophically compelling it may seem, is not the wrong philosophy for our time and place.

What link could there be between our retributivist philosophies and maelstrom of American harshness? There are at least three ways in which retributivist approaches might seem worrisome to observers who are troubled by the exceptional severity of contemporary American punishment. First, and most simply, we might worry that retributivism is an academic irrelevance. Retributivism is a form of admirable and elegant reasoning, to be sure, founded in what seem like unimpeachable moral certainties, and our neo-retributivist literature is a superb corpus. But it does often seem weirdly blind to the nasty realities of the American world around it, with its otherworldly discussions of abstractly conceived autonomous actors. Perhaps it has no impact at all on the actual workings of American justice. Then again, secondly, we might believe that retributivist theories do have an impact on American punishment, but an impact that only makes things worse. Whatever the humane intentions of retributivist philosophers, however certain they are that a retributivist system is one that honors principles of proportionality, it may be that crying "blame!" in the current American atmosphere does more

8. Ewing v. California, 123 S. Ct. 1179 (2003).

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harm than good. Not least, we might worry that retributivism is in some important way wrong as an account of the workings of punishment. I think there is some obvious truth in all three of these worries. I will speak briefly about the first two, and then turn to a more detailed discussion of the third.

Let me begin with the first worry. How much impact can thoughtful retributivist theory hope for in contemporary America? Does our philosophy have any direct bearing on what is going on? Most especially, does the doctrine of proportionality, as our philosophers develop it, make any difference? We all know the answer, at least in its simplest form. As a matter of constitutional law, our philosophy makes no difference whatsoever. The Supreme Court reminded us of this, with awful clarity, only a few months ago. The decision in question is of course *Ewing v. California*, which upheld a twenty-five year sentence for a shop-lifting conviction. For those who think that the principle of proportionality ought evidently to place some limit on such a sentence, the Court explained the state of play in American law:

> Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety. . . .
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> Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution "does not mandate adoption of any one penological theory." . . . A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.
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> When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime.

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> Nothing in the Eighth Amendment prohibits California from making that choice.[9]

We have all read this decision, and others like it. We all know that such decisions make the promise of proportionality cruelly empty in American law. In practice, the principle of proportionality has been in tatters for years. What good does it do us to cover our nakedness with such rags? How can we conscientiously declare ourselves to be for retributivism in a legal system so fixedly hostile to proportionality? In what sense are we good moral philosophers if we do so?

In response, to be sure, retributivist philosophers, and the ALI drafters, may note that the Supreme Court is not our only court. There are other decisions, and other constitutions, in the states. Indeed, not every state is by any means as gung-ho about punishment as California.[10] Most importantly, retributivist philosophers may note that even the Supreme Court has left plenty of room for a model code that enshrines norms of proportionality: If nothing prohibits California from rejecting proportionality, nothing prohibits California from embracing it either. That is simple legal logic.

So it is. But I am hardly alone in saying that it is a legal logic that is incapable of capturing the realities of American criminal justice—especially in places like California, to be sure, but not exclusively in places like California, as the comparison of our nationwide statistics with the statistics from other countries shows. California *could* embrace proportionality, but California *doesn't*, and this reflects an obvious and disturbing truth about American criminal legislation—a truth that has nothing to do with any of the logic of thoughtful retributivism, and that indeed makes thoughtful retributivism seem beside the point. Criminal justice in the United States is highly politicized. Punishment is indeed the product of "legislative policy choices"—which means in practice that it

9. Ewing v. California, 123 S. Ct. at 1187.
10. See the Appendix to the dissent of Justice Breyer, 123 S. Ct. 1202-1207.

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is the subject of a mass democratic politics that shows little patience for philosophical subtleties. Honest and reflective observers agree that our harshness is largely, perhaps overwhelmingly, the product of our mass democracy.[11] To an extent unmatched elsewhere in the developed world, America allows fundamental policy choices to be made through the political process, denying a leading role to criminal justice professionals. This politicization is not just a matter of the workings of the legislative process. Actors throughout the system, from prosecutors to judges to representatives on all levels of government, make political careers by running on tough-on-crime platforms. Talking about crime is a way of exciting voters in America, and that is not achieved by advocating sobriety and moderation. The result, as I have argued elsewhere, is that our criminal justice system bears a distressing resemblance to those of some of the worst regimes of the twentieth century: Politicization of the crime issue is a technique of governance that has always appealed to propagandistically-minded leaders.[12]

Such are the troubling forces at work—as the *Ewing* decision itself makes manifest, by setting up an opposition between proportionality, on the one hand, and legislative sovereignty, on the other. The deadly enemy of proportionality, in America, is politics; and the honest and courageous advocate of proportionality ought therefore to be ready to declare himself an opponent of politicization, and perhaps even of legislative sovereignty. To this, the retributivist may believe that he has a response. *The political process itself*, he may say, *can solve the problem. Let wise and humane professionals reason with their fellow citizens, and convince them to enact wise and humane programs!* The new Model Penal Code will indeed represent exactly such a reasoned appeal; and of course, it is not wholly outside the realm of logical possibility that

11. See, e.g., Franklin E. Zimring, Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California, 28 Pac. L.J. 243 (1996), and the literature cited in Whitman, supra note 1, at 199.

12. Whitman, supra note 1, at 202-203.

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reasoned appeals could succeed. But the American experience of the last thirty years argues otherwise. Indeed, I think there are powerful analytic reasons for believing that wise and humane electoral programs can *never* succeed, where criminal justice is concerned. Most ordinary human beings are simply not capable of sober deliberative reasoning where crime is concerned. When ordinary people talk about crime and criminals, fear and contempt rapidly overwhelm their faculties of reason. Indeed, I would suggest that criminal justice simply cannot be a proper topic of public discussion in a true deliberative democracy. That is a difficult point that I leave to be argued elsewhere, though. For the moment I simply want to insist on the truth that we all already know: Experience leaves vanishingly little hope that proportionality will triumph through the political process in America, and our law leaves us no alternative to the political process. There is nothing about being "philosophers" that licenses us to ignore this truth. Quite the contrary: To the extent we claim to be seeking the correct moral stance, we have an obligation to take careful stock of the realities of the society in which we live.

Thus the first worry: In our politicized criminal justice system, talk about retributivism is an academic irrelevance. But the second worry goes deeper than that. Perhaps the public does in some sense hear what philosophers have to say. But one fears that what they hear are the words "blame," and "condemnation," and that when they hear those words they succumb to the urge toward vengeance. To be sure, all thoughtful philosophers are careful to distinguish retribution from vindictiveness or vengeful ferocity, just as all of them insist on the principle of proportionality.[13] Indeed, our philosophies of retributivism are hedged about at every turn by distinctions and caveats, as they have been for generations. The problem, once again, is that the public is not very good at understanding all the subtle stuff. This would hardly matter if we were writing

13. E.g. Robert Nozick, Philosophical Explanations 366-68 (1981).

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only for ourselves or our students. It would matter even less if we and our students—the criminal justice profession—were making criminal justice policy. We are not.

The worry, in short, is that, to the extent retributivist philosophers are heard at all, they are heard in ways that amount to pouring gasoline on the fires of American punishment. There may indeed be some justice in the way European observers perceive the American scene. Europeans find two aspects of American justice strange and disturbing: On the one hand, they see a spectacularly harsh criminal justice system; and on the other hand, they see a world in which professionals talk unapologetically about "retribution" in a way that Europeans themselves long ago ceased to do. For the Germans and the French, ideas of "retribution" certainly necessarily play a large role in any careful reasoning. Nevertheless, they have an obvious tendency to decline into savagery. Accordingly the ordinary European view is that the role of retributivism must be strictly limited, and punishment professionals remain quite attached to rehabilitationist programs.[14] There are no such limits in America, of course, and to the continental mind, it is natural to conclude that American neo-retributivism and American harshness go hand in hand. Of course, we Americans philosophers perceive the situation differently: We know that we are in favor of *good* retributivism, not the savage kind. Therefore, we feel, we cannot be condemned in the way Europeans might be inclined to condemn us. But is it possible that we are more naïve than we ought to be about the ways of living retributivism in the world in which we find ourselves?

Indeed, if we are honest about it, perhaps we will admit that our neo-retributivism does have a spiritual affinity with our crackdown, much though we may resist the thought. Whatever the subtleties in their philosophy, our retributivists do indeed typically believe in hard looks and hard consequences, just as their fellow citizens do. Their hostility to rehabilitationism is indeed of its time,

14. Whitman, supra note 1, ch. 3.

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and future historians will surely have no trouble concluding as much. It is not entirely an accident that retributivism has come to the fore during the period of our crackdown. Of course there is something "American" about a philosophy of blame—which makes it all too unsurprising to find retributivism flourishing at the end of the American twentieth century.

III.

These are worries, I contend, that should figure in the night thoughts of any American attracted to retributivism. Nevertheless, I am aware that the convinced retributivist will not be shaken by anything that I have said so far. Indeed, the convinced retributivist will insist that I have not yet grappled with the fundamental problem. That fundamental problem, he will say, is the problem of the *moral foundations* of punishment—the problem of explaining what could *justify* punishment. Retributivism may be difficult to realize in practice, or even dangerous to realize in practice, but it offers the only possible moral foundation. This is for reasons we have learned primarily at the knee of Kant. We must found punishment on blame, because only blame takes the offender seriously as a moral actor. A just society is a society of equals, in which we all agree to accept the burden of obedience to the law. To punish those who violate the law is to treat them as responsible moral actors—as members in full standing of society. This implies necessarily that we hold them fully accountable for what they have freely chosen to do.[15]

The importance of these considerations, the retributivist will say, emerges clearly when we compare our current retributivist beliefs with our quondam rehabilitationism. Rehabilitationism may have survived, curiously, in Europe, but it has rightly been abandoned in America. Rehabilitationism is typically, as it were, a

15. This is of course an effort to summarize in a few quick strokes a very rich body of philosophy. Of course I do not do it justice. For discussion, see Moore, supra note 4; Herbert Morris, Persons and Punishment, 52 Monist 475 (1968).

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patronizing theory of punishment. To speak of "rehabilitating" the offender is not to speak of the offender as a responsible actor who is the equal of all of us. Instead, it is to speak of the offender as a problem, an object, a thing to be treated or cured. This is unacceptable in a society of autonomous equals. There is thus no possible foundation for punishment, in a society of free and autonomous equals, except retributivism, which offers the only means by which we can treat offenders with meaningful *respect*, as our moral equals.[16] If saying so makes philosophers seem harsh, that is a cost that must be paid in order to have a morally well-grounded democracy.

In one form or another, the American advocates of retributivism generally say something like this; and they will react to what I have argued so far by insisting that, difficult as it may be to achieve a just retributivism in our mass democracy, we must commit ourselves to doing so. Otherwise we will not be justified in punishing at all. If we do not embrace retributivism, we will end up embracing either immorality or chaos. At a minimum, we will have failed to treat offenders with the respect that is due to all citizens.

Any plea against retributivism must answer these concerns. What is wrong with these Kantian and post-Kantian claims? Can we have a just system of punishment that is *not* about assigning blame to autonomous equals? This is the deepest challenge faced by any attack on retributivism, and it must be met with both care and energy.

In the remainder of this paper, I want to offer an answer. It is an answer that will take us far from the world of Kantian philosophy, in the direction of something that may seem vaguely Nietzschean. In particular, it is an answer that will insist on the inevitability of relationships of superiority and inferiority in human society, and particularly in punishment. Such claims are hardly the daily bread of most American punishment philosophers, and I want to acknowledge that my answer may seem strange. Nevertheless, I am going to try to show that it can

16. See the discussion of Moore, supra note 4, at 85-87.

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successfully satisfy the critical moral challenges that American neo-retributivism has thrust upon us.

My quasi-Nietzschean answer is drawn from my historical studies of continental criminal justice, which are embodied in a new book, and I must begin by summarizing very briefly the conclusions that I have defended there. The starting point, I believe, for any sane assessment of our punishment practices must be a comparison of our ways with the ways of other western countries, and here we must recognize that northern continental countries like France and Germany have far milder punishment systems than our own. This is something, I think, to be envied and admired—and if possible explained.[17]

In search of an explanation, I have tried to show that those systems aim systematically to treat criminal offenders with "respect" of a certain kind. The "respect" in question is not the kind of "respect" usually spoken of by retributivist philosophers. It is a kind of "respect" better analyzed in anthropological terms—a "respect" that involves avoiding practices that can seem degrading or humiliating. Thus continental prison systems have worked to eliminate such things as uniforms, barred doors, and disrespectful language on the part of prison guards. Most broadly, they have embraced, in one degree or another, what Germans call the "principle of approximation": the principle that life within penal institutions should resemble life in the outside world as closely as possible. As for the large majority of offenders who are not incarcerated: Continental systems have made energetic efforts to shield them from public exposure and other sorts of shame. These measures, and others as well, aim to guarantee that criminal punishment will avoid inflicting the sort of degradation that has been analyzed by sociologists like Erving Goffman as well as by anthropologists like Mary Douglas and Louis Dumont.[18] "Rehabilitation" of the

17. The following paragraphs summarize research presented more fully in my Harsh Justice, supra note 1.

18. Erving Goffman, Asylums; Essays on the Social Situation of Mental Patients and Other Inmates 14-74 (1961); Mary Douglas, Purity and Danger: An

continental kind is thus a complex operation, which involves not only psychological counseling and job training and the like, but also a concerted effort to guarantee that the offender will not feel like an outcaste, like an untouchable, like a social status inferior. (As for the worst dangers of indeterminate sentencing: Continental systems have dealt with them through the simple expedient of mandatory maxima.)

These systematic continental efforts to eliminate or diminish degradation play, I argue, a centrally important role in the comparative mildness of criminal punishment in those countries. Respectful systems are mild systems. This reflects a truth about the psychological dynamic of punishment itself. Practices of punishment are often infected by a dangerous impulse toward degrading the offender. As no less a figure than Bentham put it, "legislators and men in general are naturally inclined" to extreme harshness, since "antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity."[19] Criminal punishment does not only visit measured retribution on blameworthy offenders. Nor does it only deter. Nor does it only express considered condemnation. It is also expresses contempt. We do indeed harbor a strong natural tendency to perceive offenders as "dangerous and vile," and therefore to strike them hard: Human beings are so constituted that they typically want, not to punish in a measured way, but to crush offenders like cockroaches. Continental efforts to eliminate degradation in punishment practices thus represent an important form of psychological engineering: They aim to eliminate the impulses toward vilification and disgust that fuel (as I argue) much of the severity of American punishment. This tends to foster a spirit of mildness on

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Analysis of the Concepts of Pollution and Taboo 98-99 (1995); Louis Dumont, Homo Hierarchicus: The Caste System and its Implications 46-64 (Mark Sainsbury trans., 1970).

19. 1 Jeremy Bentham, Principles of Penal Law, in The Works of Jeremy Bentham 365, 401 (John Bowring ed., 1843).

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the continent, which is greatly furthered by the strong continental resistance to politicization of criminal justice.

The critical question—or at least, *a* critical question—in explaining the dramatic and disturbing contrast between continental European and American punishment is thus why Europeans resist practices of degradation in the way that they do. Why do Europeans work so hard to eliminate degradation, while we do not? To that question, I have offered an historical answer. The resistance to degradation that we discover in continental punishment is part of a much broader continental pattern of social reform and egalitarianism. Continental countries, like the United States, show a strong attachment to egalitarianism; but theirs is an egalitarianism with a different sensibility from our own. European egalitarianism is a form of *status* egalitarianism: It has been shaped by a history of resentment against historically high-status privileges. Political sensibilities in the continental world are informed by a kind of collective memory of a hated past—a past in which aristocrats, and a few others, lorded it over everybody else. This memory lies behind a powerful and distinctive drive in continental society: a drive toward leveling up, toward generalizing what were once exclusive privileges to the entire population. This is the drive that sociologist Philippe Iribarne has characterized as offering the promise that, in a world with no more slaves, "you shall all be masters!"[20] It is the effort to admit everyone to the privileges of high status. As I have tried to show, this drive has had measurable and important consequences for the shape of continental law, which displays a broad-gauged tendency to eliminate historically low-status patterns of treatment, while generalizing formerly high-status privileges to the entire population.

That same drive has also made itself felt in criminal punishment. In the world that pre-dated the French Revolution, there were two forms of punishment: low-

20. Philippe d'Iribarne, Vous Serez Tous des Maîtres: La Grande Illusion des Temps Modernes (1996).

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status and high-status. When low-status persons were executed, they were ordinarily hanged, a degrading and humiliating form of execution; whereas high-status persons were ordinarily beheaded. When low-status persons were not executed, they were subjected to mutilation or penal slavery in one form or another; whereas high-status persons who were not executed were subjected to comfortable and respectful forms of imprisonment. As I have tried to demonstrate (in dense detail that I cannot repeat here), the subsequent development of continental justice has been conditioned by this history of status differentiation in punishment. Over the last two and a half centuries, continental Europe has seen a sustained revolt against historically low-status treatment, which seemed obnoxious and inconsistent with the values of true social egalitarianism. As a result, the historically high-status punishments have gradually driven the historically low-status punishments out. Very slowly, all offenders have come to be treated in the respectful manner that was once the privilege of a small minority in the eighteenth century.

The pattern of continental punishment thus reflects the undiminished political power of an unforgotten hierarchical past. In this sense, the continental tradition is far in spirit from the philosophy of Kant, much though Kant is frequently cited by continental thinkers. Kant's strong desire was to forget the hierarchical past, substituting for it a kind of abstract social-contractarianism: As recent scholarship has demonstrated, his moral philosophy was drafted in response to Christian Garve's idealizations of ancient social hierarchy, and its aim was precisely to create a moral order as though human hierarchy of the pre-modern kind had never existed.[21] He did not predict, and would not have understood, a European society that continues to wrestle with the ghosts of the past.

It is America that is more truly Kantian in this regard: We prefer to talk in social contractarian terms, forgetting the past as much as possible. We do not think that our

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21. Manfred Kuehn, Kant: A Biography 278-83 (2001).

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history of black slavery, for example, has any bearing on the propriety of the way we treat a largely African-American population of offenders today. Our past of degradation just does not seem relevant.[22] The continental pattern is generally not to be found in the United States, either in criminal punishment or in other aspects of the law.[23] There is little sense, in the American tradition, that egalitarianism means eliminating the degrading practices of the past, and generalizing former privileges to all. Instead, we tend, broadly speaking, to favor the abolition of privilege. This helps us understand the comparative savagery of American punishment, which does indeed treat offenders in a degrading way, as status inferiors. We share very little of the European conviction that a true egalitarian society must commit itself to the elimination of historic forms of low-status degradation. Consequently, the strength of the normal human impulse to degrade, to treat offenders as "dangerous and vile," goes largely unchecked in American punishment culture. The results show in our practices of imprisonment, with their use of humiliating uniforms and utter denial of privacy to most inmates, just as they show in the revival of traditionally degrading punishments like the chain gang. The strength of this unchecked impulse to degrade is especially significant for our understanding of the potential virulence of retributivist rhetoric in our highly politicized criminal justice system. The language of blame tends to call forth feelings of disgust in most human beings.[24] Such feelings can be very successfully stirred up by any skilled tough-on-crime

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22. For this pattern as the unfulfilled promise of the Thirteenth Amendment, see G. Sidney Buchanan et al, The Quest for Freedom: A Legal History of the Thirteenth Amendment 9-10 (for the promise) and passim (for the failure to deliver) (1976).

23. For other aspects of the law: James Whitman, Enforcing Civility and Respect: Three Societies, 109 Yale L.J. 1279 (2000); Gabrielle Friedman & James Whitman, The European Transformation of Harassment Law: Discrimination versus Dignity, 9 Colum. J. Eur. L. 241 (2003); James Whitman, The Two Western Cultures of Privacy, Yale L.J. (forthcoming April 2004).

24. See Dan M. Kahan, The Anatomy of Disgust in Criminal Law, 96 Mich. L. Rev. 1621 (1998).

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politician, and politicians frequently do exactly that. A system that reflects no systematic opposition to historic degradation is thus a system very likely to fall prey to the worst dangers of politicization.

Such is the argument I have presented at great length elsewhere. It may seem to be merely a historical or sociological argument, remote from the sorts of arguments philosophers typically find convincing. A retributivist philosopher in particular might be unmoved by my claims, even if he were persuaded that they were true in all of their particulars. It may be the case that ordinary untrained minds tend to regard offenders as "dangerous and vile." It may be the case, he will say, that French or German traditions work to combat such attitudes, for historical reasons. Nevertheless, the moral requirements of a philosophy of punishment remain. We still must treat people as equals, which means that we still must be committed to retributivism.

Yet I contend that thoughtful study of the continental tradition demonstrates that retributivism rests on a flawed understanding of the nature of punishment, and of its place in society. Degradation is a constant danger in punishment, and it is an insidious enemy of true social equality. The stubborn retributivist belief in the necessary link between equality and retributivism is simply false. France and Germany *are* meaningfully egalitarian societies, even though they show nothing like our retributivism. The commitment to eliminating degradation *is* an egalitarian commitment. Continental punishment is part of an effort to create social status equality in society, and social status equality matters.

In fact, continental ideals make an unsettling mockery of American retributivist claims. If retributivism is such an egalitarian philosophy, why does it find so little to say about an American system of punishment that so consistently treats offenders like second-class citizens, and indeed like sub-humans? Why does it find so little to say about humiliating prison uniforms, and routine deprivation of all forms of privacy? Why does it find so little to say

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about rules and practices that deny inmates contact with family-members? Or about corrections officials who treat offenders with offhanded contempt? Why does it find so little to say about chain-gangs, or about public shaming? If our retributivists are egalitarians, motivated by a commitment to respect, why don't they focus more on explaining the practice in some states of stripping ex-offenders of voting rights? These are especially pressing questions if I am right, and if Bentham is right, in insisting that the spirit of degradation in punishment tends to drive precisely the sort of ever-deepening harshness that we are experiencing in the United States today. Status degradation matters. Yet retributivists seem to have nothing to say about it. What is it that is missing in our neo-retributivist philosophy?

IV.

What is missing from retributivist philosophy is an adequately rich and nuanced account of human action, and an adequately rich and nuanced account of the dynamic of punishment. These inadequacies make, in turn, for thin and unconvincing accounts of the nature of both "respect" and equality.

In fact, retributivist philosophy is chargeable with exactly the sort of callow simplification of human behavior that has been attacked by critics of law and economics. It may seem odd to tar retributivism by association with law and economics, since retributivists generally like to claim that they have transcended the utilitarian follies of their economistic colleagues. Yet the failings of the one movement are close indeed to the failings of the other. (Indeed, it is not surprising that both movements arose at the same time in late twentieth-century America.) Law and economics, in its classic form, starts by postulating the human beings are rational actors. This can lead to appealing forms of analysis, especially in America, where the commitment to free market mechanisms is strong. Nevertheless we all know the distorted and eccentric

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picture of the legal world that results. And we all know that specialists in law and economics have felt the need, in recent years, to remedy the ills of their field by developing ideas of bounded rationality that can serve as the basis of a *behavioral* law and economics.

Something of the same problem, with the same sort of eccentricity and distortion, grows out of the retributivist practice of postulating "autonomous" offenders who are punished by dispassionate punishers. These are postulates that serve to create neat, and often elegant, schemes of punishment philosophy—schemes just as neat and elegant, in their way, as the schemes of a Posner or a Shavell. They are also postulates that can seem quite appealing in an American society in which the commitment to norms of individual responsibility is strong. We Americans like to hold people to the consequences of their choices, whether they are actors in the free market or in the world of criminal justice. But, like the schemes of law and economics, the schemes of retributivism generally fail to do justice to the messiness of human society—which in many cases means that they fail to do justice *tout court*.

Some of that messiness has to do with the notion that we punish "autonomous" offenders, of course. The postulate of the meaningfully autonomous offender has been under attack for generations. We are all familiar with the early critiques that came, for example, from Raymond Saleilles—a man who was, of course, one of the prophets of rehabilitationism. To Saleilles, it seemed obvious that the Kantian model, as it was understood in the late nineteenth century, made no sense. True "autonomy," Saleilles maintained, had to be understood as impulse control—as the ability to resist our desire to do wrong. Autonomy begins in the mind of the individual: It begins as control of oneself. Criminal offenders, he argued, were obviously persons incapable of self-control. By definition, then, criminal justice was concerned with persons who had shown themselves to be *not* truly autonomous.[25] To

25. Raymond Saleilles, The Individualization of Punishment 64-72 (Rachel

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Saleilles it thus seemed clear that a meaningful commitment to the value of autonomy implied a commitment to *rehabilitation*: The punishment system had the task of teaching offenders to be truly autonomous.

Autonomy, for Saleilles, was thus not an existing reality, but a social ideal—an ideal to be achieved partly through the activities and interventions of criminal justice professionals. Modern American retributivists will of course reject Saleilles' argument on the grounds that it permits criminal justice professionals to patronize offenders. But I am not entirely sure that they are invulnerable to his fundamental charge: the charge that it is wrong to think of autonomy as an existing reality, rather than as an ideal to be striven towards. And even if we reject Saleilles' account of human psychology, we must still respond to the many observers who, looking at the population of offenders, experience doubt that "autonomous" is the apposite adjective for describing most of them. We still are likely to want some account of what might perhaps be called "bounded autonomy."

I will leave the theory of "bounded autonomy" for another time, though. For the moment, I want to focus on something that was not emphasized by Saleilles, or by any of the classic advocates of rehabilitation. The postulate of autonomous offenders is not the only troubling notion; the postulate of dispassionate punishers is troubling as well. Retributivists speak of punishment as something that "we" administer in the obedience to the dictates of important moral principles. But is this really the way that "we" punish? In point of fact, as reflection on the European and American experiences suggests, punishment is a stormier and more complex form of social interaction than that. The act of punishment does not only affect the offender; it also affects the person doing the punishing. Retributivist philosophers write as though the problem of punishment were simply the problem of dispassionately calculating its impact on the offender. Yet a person administering

Jastrow trans., 1911).

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punishment can get carried away, and in frightening fashion; and "blame" is a word with a peculiar power to stir people up. Moreover, on a grander level, the promotion of one or another philosophy of punishment can have a jarring, and sometimes frightening, effect on the culture and politics of a given society. The very activity of "blaming" tends to excite people, and indeed to bring out unexpectedly savage and vindictive impulses. This is true regardless of the sobriety, wisdom, or acuity with which punishment philosophers formulate their ideas; and we cannot write about the morality of punishment as though it were not true: We cannot pretend that, in calculating the moral dynamics of punishment, it is possible to hold the punisher constant.

This is true, moreover, largely because so much of the psychology of punishment is a psychology of *degradation*—a psychology of the kind familiar from flogging, mutilation, public shaming and the rest of the traditional repertoire of human punishments. When human beings punish, they tend, in the very act of punishment, to create a relationship of inequality. They tend to lord it over the person they are punishing, as Jean Hampton herself well knew.[26] This lording-over, if we are frank about it, a large part of what excites us when we punish. The relationship between punisher and punished is indeed one of the core, definitional, relationships of inequality in human society, and one of the core, definitional relationships of disrespect. This is truth we can all know through introspection. But for those who doubt it, it is also a truth that is amply documented through the study of human history and comparative law. Master-slave relationships and the like have been closely associated with punishment practices, and symbolized by punishment practices, through all the centuries of human experience.[27] Degradation in

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26. Hampton, supra note 4, at 14, 16.

27. Classically argued by Gustav Radbruch, Der Ursprung des Strafrechts aus dem Stande der Unfreien, in Gustav Radbruch, Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts 1 (2d ed. 1950); Johan Thorsten Sellin, Slavery and the Penal System (1976).

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punishment is a part of human nature, which has not been successfully abolished in the pursuit of our grand republican experiment in the United States.

The core problem with retributivists' claims is thus not only that they postulate autonomous offenders. It is also that they postulate autonomous, and dispassionate, punishers, who can maintain a firm commitment to the ideals of equality. This is the foundation of a hopeless program. We *always* treat the persons we punish as inferiors. There is no avoiding it. The choice we face is accordingly *not* a choice between patronizing rehabilitation and equalizing retribution. The choice is in fact a choice between patronizing rehabilitation and degrading retribution. The choice for rehabilitation is indeed the choice of a system that treat offenders as inferiors—but at least it is the choice of a system that can in principle treat offenders with some measure of indulgence and even kindness, preserving the aspiration that they may be reintegrated into society on equal terms. In practice, the choice for retributivism in America is turning out to be the choice, not for equality, but for degradation.

It does very little good to imagine perfect orders inhabited by truly autonomous (or for that matter perfectly rational) Americans. All of us would prefer a world in which there were no impulse to degrade, no meanness, no political savagery; and all of us ought to know perfectly well that we do not have that option. In Kant's own famous phrase, we have to work with the "crooked timber of humanity."[28] This means acknowledging the truth of the ugliness around us, in a spirit of frankness, and working with that ugliness. That spirit of frankness is, to my mind, too little present in the ALI draft, and that worries me.

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28. As famously translated in Isaiah Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (1991).

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