The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 77 | MARCH 1, 2012

Retribution and Overcriminalization

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Abstract
From the ever-expanding number of federal criminal laws to prison sentences that are too numerous or too long, there are many promising bases for criticizing overcriminalization. One such basis, however, has yet to be fully considered: the fact that too many criminal offenses today are malum prohibitum *offenses—that is, they criminalize conduct that is morally innocuous—and do not contain an adequate* mens rea *(criminal-intent) element. In order to limit the growth of laws criminalizing morally innocuous conduct—a development that, in turn, would curb overcriminalization—the U.S. legal community would be well-served to explore the concept of retribution and the manner in which it provides an account of how punishing those convicted of criminal offenses is morally justified. Punishment without a firm basis in retribution is unjust and therefore should be avoided.*

This paper, in its entirety, can be found at **http://report.heritage.org/lm77**

Produced by the Center for Legal & Judicial Studies

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From the ever-expanding number of federal criminal laws to prison sentences that are too numerous or too long, there are many promising bases for criticizing overcriminalization. One such basis, however, has yet to be fully exploited for its potential to limit overcriminalization: the fact that too many criminal offenses today are *malum prohibitum* offenses—that is, they criminalize conduct that is morally innocuous—and do not contain an adequate *mens rea* (criminal-intent) element. These offenses often capture conduct that would otherwise be natural and even desirable in business, commerce, accounting, or everyday life. The primary instances discussed throughout this paper are strict liability regulatory offenses (referred to as the "central case").[1]

In order to limit the growth of laws criminalizing morally innocuous conduct—a development which, in turn, would curb overcriminalization—the U.S. legal community would be well-served to explore the concept of retribution and the manner in which it provides an account of how punishing those convicted of criminal offenses is morally justified. Indeed, punishment without a firm basis in retribution is unjust and therefore should be avoided.

Talking Points

- America's criminal justice system is predicated on an understanding of crime as—in some very basic way—a matter of bad choices. By fleshing out those bad choices as unfair grabs of liberty, retribution helps supply a common measure of the harm done in every crime.
- Retribution is a justification for punishment and not a theory about substantive criminal law. But what justifies also limits. Retribution offers solid moral bases for opposing overcriminalization.
- The central case of overcriminalization—a strict liability regulatory offense—is a case of unjust punishment, which is to say that it should not be done.
- Overcriminalization is a policy issue for legislators. In that arena, the anticipation that many people who could be prosecuted for a strict liability regulatory offense will not have chosen to prefer their own will is a very good reason not to enact proposed strict liability criminal laws.

Using the principle of retribution to critique overcriminalization may seem paradoxical for two separate reasons. The first arises from widespread and sometimes grotesque misunderstandings of retribution, such that it is often caricatured to mean lock up as many people as possible for very long times. In truth, however, retribution has no built-in tendency toward severity. The second criticism arises from the fact that retribution is a justification for punishment and not a theory about substantive criminal law. But what justifies also limits. Retribution offers solid moral bases for opposing overcriminalization.

Criticisms and Confusion: Toward a Proper Understanding of Retribution

Confusion about retribution, and about the moral justification for punishment more generally, is rampant. Almost nothing in standard first-year criminal law casebooks gets it right.[2] Scholarly literature is scarcely more helpful. Legislative reformers rarely understand it and, by all accounts, never accord it the central place that it needs to occupy if the institution of punishment is to be adequately justified. High state court authority is just as confused.

This widespread misunderstanding is one reason why retribution is so neglected today. Indeed, if retribution really did mean what people seem to think it means, then it ought to be neglected. But retribution is not *lex talionis*, the law of retaliation—"an eye for an eye"[3]—as many think it is.

THE "EYE FOR AN EYE" AXIOM WAS NOT AN AUTHORIZATION OF PUNISHMENT OR EVEN A COMMAND TO EXACT A LIKE PENALTY. IT WAS INSTEAD MEANT TO LIMIT RETALIATORY ACTS BY KIN AND FRIENDS OF THE VICTIM TO NO MORE THAN THE LOSS INCURRED.

To apply the "eye for an eye" norm non-metaphorically, a polity would have to be willing to do whatever its most depraved members might do. Probably no society has so abandoned moral constraint in the pursuit of criminal justice. It is true that "eye for an eye" is found in the Bible and was apparently meant to serve as a practical guide for the ancient Israelites, but biblical scholars have explained that the "eye for an eye" axiom was not an authorization of punishment or even a command to exact a like penalty. It was instead meant to limit retaliatory acts by kin and friends of the victim to no more than the loss incurred.[4]

The historical prevalence and perennial allure of retaliatory excess—vendettas, blood feuds, lynchings, and the like—no doubt had much to do with the emergence of public systems of criminal justice. According to Oxford legal philosopher John Gardner, it was "for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence."[5] Even so, society must distinguish between this—what Gardner calls the "displacement function" of criminal law and punishment—and its critical moral justification. For there is no necessary connection, either logically or practically, between a practice's origins and its critical moral worth. It is easy to see, too, that the "displacement function" cannot morally justify defining some conduct as a crime or imposing criminal punishment on anyone.

1. Strict liability criminal offenses allow the state to impose criminal punishment even if the "wrongdoer" did not intend to violate any law; did not intend to engage in inherently wrongful conduct (murder, rape, robbery, assault, theft, embezzlement, and the like); did not know that his conduct was wrongful or prohibited; and did not violate any duty of care he owed to the victim or to society as a whole. In other words, the "wrongdoer" need not have had any criminal intent or even be negligent in order to be subjected to criminal punishment under a strict liability offense.
2. American law schools' characteristic failures in criminal law instruction are not limited to the topic of retribution. Douglas Husak points out that that the "instructor's manual to the most widely adopted casebook in criminal law recommends that the brief materials on 'What to Punish?' should be skipped in a one-semester course" and notes that criminal-law courses generally fail to cover the topic of overcriminalization. Douglas Husak, Overcriminalization: The Limits of the Criminal Law 61 (2008).
3. *See Exodus* 21:24*; Leviticus* 24:20*; Deuteronomy* 19:21. Although found in and often thought to have originated with biblical scripture, the concept embodied in the *lex talionis* prescription (or proscription) also appears prominently in other ancient sources, such as the Code of Hammurabi.
4. *Cf.* Moshe Greenberg, *Some Postulates of Biblical Criminal Law, in* Yehezkel Kaufmann Jubilee Volume: Studies in Bible and Jewish Religion 13–20 (Jerusalem: Magnes Press, 1960) (comparing the relatively restrained and limited punishments under the law of the biblical Israelites for property crimes with the relative severity of contemporaneous legal systems' punishments for property crimes—and with the biblical law's own punishments for murder and other crimes resulting in death).
5. John Gardner, Offences and Defences: Selected Essays in the Philosophy of Criminal Law 213 (Oxford 2007).

Notwithstanding some historical kinship with retaliation, retribution properly understood as a critical moral proposition is not about domesticating popular hatred for a known criminal. It is not about channeling repugnance toward a particularly heinous crime. It is not state-orchestrated revenge. Retribution is not driven by anger, hatred, or any other emotion; it is distinct from community outrage. It is perhaps admissible to hold that these pacific tendencies are one desired effect or function of punishment, but that is not to say that retribution's tendency to pacify the passions of victims of crime and their communities constitutes a moral justification for punishment: It certainly does not. Mob-conducted lynchings and similar acts of cruelty and injustice are also capable of pacifying community outrage for (real or perceived) wrongdoing, but civilized society condemns such conduct.

Against the Transfer Justification of Punishment

H.L.A. Hart, one of the leading legal philosophers of the 20th century, famously argued that society may impose punishment on an offender only where society has been "harmed." He identified two types of harms: where the authority of law is diminished and where a member of society is injured.[6] Hart's first category could be mistaken for an awkward description of the retributive view described here, but his view of crime and punishment was very different from the one that is considered in this paper.

Hart's second harm—that a member of society is injured—points toward a deeper investigation of the moral relationship between the institution of punishment and private rights. Hart is scarcely alone in holding this view. Richard Swinburne has argued that the state enjoys authority to impose punishment for criminal harm only where it serves as a proxy for the individual victim,[7] and he said that this was a retributive viewpoint.

CENTRAL POLITICAL AUTHORITY AND ITS AUTHORITATIVE DIRECTIVES FOR THE COMMON GOOD—LAWS—ARE A NECESSARY PRECONDITION TO AND ARE CONCEPTUALLY DERIVED FROM THE INSTITUTION OF PUNISHMENT.

Swinburne and Hart apparently imagine a state of nature similar to that described by John Locke: a notional place where individuals hold a natural moral right to punish those who harm them.[8] When these individuals band together to form a civil society, these thinkers (Swinburne, Hart, and perhaps Locke) suppose that they transfer their natural authority to punish to the emergent political authority, so the state punishes as agent or delegate of the community—conceived as an aggregate of individual rights-bearers, now standing down.

This whole line of thought is mistaken. Civil society does not punish as transferee or delegate of the victim. Civil society punishes in its own name for its own sake because civil society itself is the victim of each and every crime. Indeed, central political authority and its authoritative directives for the common good—laws—are a necessary precondition to and are conceptually derived from the institution of punishment.

There are two additional compelling arguments against the transfer justification of punishment theory.

First, as a matter of contingent fact, criminal acts often do involve an injustice to one or more specific persons: the defrauded elderly lady, the black-eyed assault victim, the hapless pedestrian whose car was stolen. But many crimes lack any such unwilling, particularized victim. Among these offenses are many public morals laws (drug possession, gambling, and prostitution); offenses against the state (including treason, espionage, and lying to the grand jury); and "quality of life" crimes (littering and public intoxication). In these cases, it is often far from obvious which individuals, if any, have a natural right to punish those who did them harm.

Second, there is good reason to doubt the premise of the transferor theory: namely, that there exists a natural right to punish those who do wrong to oneself or to one's kin. People do have a natural right to defend themselves against attack and theft. People do have a natural right (within limits) to take back any goods that have been wrongfully taken from them. People do have a natural right to demand some remedy for vandalism or other wrongful deprivation of property. And people have a

6. H.L.A. Hart, *Prolegomenon to the Principles of Punishment, in* H.L.A. Hart, Punishment and Responsibility *22 (*5th ed. 1982*).*

7. *See* Daniel Robinson, Praise and Blame 180–83 (Oxford 2002).

8. *See* John Locke, Two Treatises on Government 271–76 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

natural right to use force that is reasonable in amount and kind in order to accomplish those goals. But all these rights bundled together do not yield, imply, or entail a natural right to punish, because the nature of punishment differs from the nature of self-defense, replevin, or restitution. Nor do these rights promise moral justification of criminal punishment (even if they perhaps do provide justification for an inchoate tort system and an embryonic joint protective or police association).

EVEN IN ADVANCED LEGAL SYSTEMS, VIOLATIONS OF LAW DO NOT AUTOMATICALLY AUTHORIZE ANYONE TO PUNISH THE VIOLATOR; ONLY CERTAIN OFFICIALS WIELDING DESIGNATED POWERS ACCORDING TO THE RELEVANT POSITIVE LAW ARE DESIGNATED COMPETENT TO PUNISH OTHERS.

Wicked deeds are a necessary but not a sufficient condition for morally justified punishment. Individuals regularly witness acts of injustice by others—lying spouses, cruel parents, disrespectful children, cheating colleagues—but it scarcely occurs to those witnessing these acts that they, as individuals, are authorized to punish those bad actions. Moreover, even if it is presumed that person *A* misbehaves and that his misbehavior warrants the judgment "*A* deserves to be punished," it does not follow that *B*, *C*, *D*, or anyone else has the moral authority to punish *A*. Even in advanced legal systems, violations of law do not automatically authorize anyone to punish the violator; only certain officials wielding designated powers according to the relevant positive law are designated competent to punish others.

Civil Authorities and the Imposition of Punishment

Punishing a criminal involves the deliberate imposition by the political community's administrative arm—the state—of some privation or harm upon an unwilling member of society. Whether punishment takes the form of a fine, incarceration, or (historically) the rack, the question arises: How is such a grave imposition upon someone morally justified?

The question of why civil authorities are entitled to punish is usually treated in law school as the "point" or "purpose" or "rationale" of punishment and not often as a question about its "moral justification"—a sign of the confusion that usually follows. The question is typically the first topic in criminal law class.

The laundry list of punishment's purposes in criminal law casebooks includes deterrence, rehabilitation, and incapacitation. These purposes refer to, respectively, sanctioning a convicted criminal with a view to providing a disincentive to him or others to commit similar crimes, making the criminal well psychologically and socially, and isolating the criminal from law-abiding people. The problem is that none of these "rationales" provides an adequate moral justification for punishing anyone. Retribution does. But retribution is usually mangled in the teaching materials.

The Purposes of Law in Political Society

Understanding retribution depends upon a prior understanding of the purposes of law and the nature of cooperation in political society.

In the absence of any established political order, people would be free from authoritative constraint to do as they pleased. Their choices would not necessarily render society an uncontrollably selfish state of nature, as Thomas Hobbes anticipated.[9] Absent political order, some people would act reasonably—maybe even altruistically—and seek to cooperate with other people to achieve common benefits. (Call this the possibility of private ordering.)

But such a state of nature would, by definition, lack the means to structure the sort of cooperation that a large and heterogeneous society sometimes requires. Even custom could not provide this structure, at least for any large or complex society. States of nature lack altogether a common or effective authority by which to bring recalcitrants and free riders into line and by which to respond coercively to those who acted unfairly outside of the common pattern. Without some such central authority, the weaker members of society would be prey for the stronger, save where the former allied themselves into protective associations with the latter—in which case the excesses of vendettas and retaliatory raids might call forth a central authority: a proto-state.

Political society provides just such an authoritative scheme for structuring cooperation. Once this authority is up and running and providing direction (usually through law), justice requires individuals to accept the pattern of liberty and restraint specified by political authorities. Indeed, it is everyone's acceptance of the established apparatus of political

9. Thomas Hobbes, On the Citizen 26–31 (Richard Tuck & Michael Silverthorne, eds., Cambridge University Press 1998) (1642).

society for the purposes of cooperation for common good that makes civil liberty possible. One crucial meaning of equality and liberty within political society is precisely that everyone observes the pattern of freedom, restraint, and forbearance set up by these authorities.

THE CENTRAL WRONG IN CRIME IS NOT THAT A CRIMINAL CAUSES HARM TO A SPECIFIC INDIVIDUAL. RATHER, IT IS THAT THE CRIMINAL CLAIMS THE RIGHT TO PURSUE HIS OWN INTERESTS AND PLANS IN A MANNER CONTRARY TO THE COMMON BOUNDARIES DELINEATED BY THE LAW.

Criminal acts often—but far from always (e.g., so-called victimless crimes)—involve injustice to one or more specific individuals, such as the battered spouse. What always occurs in crime is this: The criminal unjustifiably usurps liberty to pursue his own plans and projects in his own way, notwithstanding the law's pattern of restraint. Thus far considered, the entire community remains within the law, each member denying to himself the liberty to do as he pleases except for the criminal. The criminal acts outside the pattern of common restraint and thus of mutual forbearance and cooperation.

The central wrong in crime, therefore, is not that a criminal causes harm to a specific individual. Rather, it is that the criminal claims the right to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law. From this perspective, the entire community—with the exception of the criminal—is victimized by crime. The criminal's act of usurpation is unfair to everyone else; he has gained an undue advantage over those who remain inside the legally required pattern of restraint. In this view, punishing criminals is necessary to "avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of society."[10]

Punishment restores the fundamental fairness and equality of mutual restraint disturbed by the criminal's act. A criminal is punished in order to efface (as it were) his prior extravagance. By and through his punishment, society is restored to the *status quo ante*: The equality of mutual restraint within law is—morally speaking—re-established. The criminal's debt to society is paid.

Again, depriving the criminal of this ill-gotten advantage is the central aim of punishment. Since that advantage consists primarily of a wrongful exercise of freedom of choice and action, the most appropriate means to restore order is to deprive the criminal of that freedom. Punishment sometimes includes sensory deprivation and even limited and transient pain, such as the pain of being shackled or of not being able to satisfy one's hunger, and these will likely be experienced by the criminal as "suffering."[11] The essence of punishment, however, is to restrict a criminal's will by depriving him of the right to be the sole author of his own actions.[12]

Retribution: Moral Explanations and Justifications for Punishment

Arguing that retribution should be (at least) the primary driver of the moral justification of punishment is not like advocating that society dust off an impractical moralism, as if retribution were somehow a "justification in exile." Retribution not only performs the invaluable service of justifying an essential but morally confounding social practice; it also provides morally adequate explanations for some anchor commitments within that social practice.

Take, for example, the ubiquitous styling of criminal prosecutions as a lawsuit to which the entire

10. John Finnis, Natural Law and Natural Rights 262 (Oxford 1980).

11. Retribution has little (if anything) to do, however, with what Hart called the "intrinsic value" of inflicting suffering on wrongdoers. Suffering is necessarily a privation, a loss, a difficulty, a subtraction from the way things ought to be. Suffering so described is *bad*, and by definition, something *bad* does not have "intrinsic value." If it did, it would be *good*. It seems likely that what Hart actually had in mind was the fact that we feel relieved to see the unjust "pay" for their crimes. Yet that view refers to suffering's *instrumental* value, not its *intrinsic* significance.

12. Hart understood well the concept of excess liberty upon which the retributive view of punishment depended. In discussing tort liability, for example, Hart refers explicitly to the artificial equality that a just system of law imposes upon the inequalities of nature by forbidding the strong and cunning from exploiting their natural advantages to cheat or harm weaker or guileless individuals. This legal equality is disrupted, Hart concluded, whenever a tortfeasor is "indulging his wish to injure [another person] or not sacrificing his ease to the duty of taking adequate precautions." H.L.A. Hart, The Concept of Law 165 (2d ed. 1994). Legal remedies therefore attempt to restore the "moral status quo" in which victim and wrongdoer are, once again, on equal footing. *Id.* Yet Hart was confident *a priori* that retribution was solely a matter of inflicting suffering on a wrongdoer as a just return for his wickedness, a premise derived in part from his assumption that punishment was incontrovertibly defined as the infliction of pain. Perhaps it never occurred to Hart to extend his initial idea from tort to crime, even where he seemed very close to such a result. *See generally* H.L.A. Hart, Punishment and Responsibility, *supra* note 6.

community is party, as in *People v. Smith*. Why are the "People" (or the "State" or the "Commonwealth") the complaining party in every criminal case? Perhaps because retribution shows why and how by showing how society as a whole is victimized by every criminal act.

Retribution also underwrites the whole moralistic framework and language of criminal justice in a way that no other account of punishment can do. "Praise and blame," "freedom and responsibility," "guilt and innocence," "crime and punishment": This whole panoply of concepts and terms is part and parcel of America's criminal justice experience, and it is supported well by retributive theory. So, too, is the act-specific and choice-specific focus of the criminal law.

RETRIBUTION UNDERWRITES THE WHOLE MORALISTIC FRAMEWORK AND LANGUAGE OF CRIMINAL JUSTICE IN A WAY THAT NO OTHER ACCOUNT OF PUNISHMENT CAN DO.

From a retributive view, no one's uncharitable attitudes, character defects, or personality disorders (all of which might trigger intervention in a rehabilitative or reformative regime of punishment) are fit grounds for punishment. The reason that they are not predicates for punishment owes to the fact that they are not acts of usurping liberty. The mere possession of these traits or beliefs is not, moreover, unfair to others.[13] Proponents of rehabilitation and paternalistic moral reformers, by contrast, are hardly able to explain why their particular ministrations must always await (by dint of moral imperative) the performance of some prohibited act.[14]

Another indication of how retribution explains and justifies punishment involves a perennial chestnut of first-year criminal law classes: What if a public authority could stave off riots and mayhem only by hanging an innocent person popularly believed to be guilty? The commonplace statement of moral priorities in society has long been "better that a hundred guilty persons go free than that one innocent suffer."[15] Perhaps a hundred is hyperbole; Blackstone put the number at 10.[16] No matter, though, because both numbers express an important truth: A just society never wittingly convicts an innocent and stops at almost nothing to avoid negligently doing so.

Why? What are the moral underpinnings of this commitment, which is deeply embedded in this nation's law and institutions?

Where retribution forms the moral justification for punishment, the problem of punishing the innocent can be solved. The aim of retribution is always frustrated—and is never served—by punishing the innocent. Punishing someone who has committed no offense is counterproductive. If someone has not distorted society's equilibrium by committing a criminal act, harming him cannot restore that equilibrium, especially while the truly deserving party escapes retribution. Making an innocent disgorge his bold act of will is impossible, for there is nothing to be disgorged. Inflicting "punishment" on the innocent is instead simple scapegoating, which, even if it could somehow be morally justified, is surely not punishment at all.

Additionally, retribution promises cogent instruction on some controversial issues of the day. Retribution points straightaway, for example, in favor of determinate sentencing. The harm of any crime is cabined within a defined act performed on a particular occasion, and the measure of punishment required to redress it is tied tightly around that discrete act and its particular harm, both conceptually and morally.

Retribution also points, however, to a negative judgment on the broad movement in favor of "victims' rights." The specific victims of a criminal act deserve to be taken seriously and treated reasonably by all actors in the criminal justice system,

13. *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67–68 (1973) ("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution.").

14. Rehabilitative goals may be accommodated within a system of punishment rooted in retributive commitments as well. They do not fit, however, as justifications of punishment but instead play out as incidents of human care for those who are imprisoned. One incident of any custodial sentence is the state's assumption of a paternalistic role concerning the offender, a role which it would be wrong for the state to attempt apart from the morally justifiable custodial relationship. Prisoners cannot make many decisions for themselves. Their commercial options are those which the prison makes available to them. Their personal choices are limited by the exigencies of maintaining security in the prison. A prisoner with a drug habit may be obliged by the justice system to seek treatment, both for his own good and for the sake of those living with him in prison. A man guilty of criminal assault may be filled with abnormal rage and required to attend anger-management sessions in jail, or perhaps even in lieu of jail.

15. This formulation of the maxim is attributed to Benjamin Franklin and was first used by the Supreme Court in 1895. Coffin v. United States, 156 U.S. 432, 456. For a comprehensive treatment, see Alexander Volokh, *Guilty Men*, 146 U. Pa. L. Rev. 173 (1997).

16. 4 William Blackstone, Commentaries on the Laws of England *358 (1765).

from their first police encounter all the way through trial and sentencing. But it is dubious policy to make dispositive victims' opinions about the disposition of what some call "their" cases and about appropriate penalties for offenders. Reconciling victims with their victimizers is not a bad idea, but in most cases, it may be quixotic, and in no case should it be the only goal of those public officials who are in charge of criminal justice matters.

Retribution and Overcriminalization

The foregoing slog through retribution and its virtues and alleged vices lays the foundation from which this paper may now take aim at overcriminalization. Below are five distinct criticisms of this phenomenon. Each is based upon moral principle. Each cuts deeply. The five are mutually reinforcing in very interesting ways, and the whole may be greater than the sum of its parts. Taken together, these five criticisms support the conclusion that the central case of overcriminalization—viz., a strict liability regulatory offense—is a case of unjust punishment, which is to say that it should not be done.

The following considerations do not address whether any one of the criticisms or some combination of them short of five supports the same conclusion. The effective force of these five criticisms upon secondary and peripheral cases of overcriminalization is also left aside, save to say that these criticisms have considerable extended force.

Criticism #1: Overcriminalization is driven by a desire to deter and is therefore unable to morally justify criminal sanctions. As the Manhattan Institute's Marie Gryphon writes:

> [O]ften the overriding reason for enacting a piece of legislation is to produce an overall social benefit, and the criminal sanctions attached to certain forms of conduct...are chiefly aimed at conducing to that benefit by deterring that conduct rather than stigmatizing it and punishing the person who carried it out ... .[17]

Because it is impossible to fit the central case into the retributive framework—and because rehabilitation and moral reform are inapposite too—deterrence is left haplessly to shoulder the whole moral justificatory burden.

It is not altogether misleading to say that the goal of any criminal justice system is that certain conduct become rarer than it otherwise would be, and it is often said that retribution looks backward while deterrence looks forward and anticipates a beneficial societal result (more specifically, less crime). In this formulation of punishment theory, retribution is sometimes said to inflict socially useless suffering upon people and thus to be beyond the pale of worthy social policy. So far considered, it seems that deterrence and not retribution ought to be driving things.

The sole goal of deterrence is to reduce the future incidence of crime. Deterrence thinking is suffused with utilitarian theories of value, which tend toward social engineering in their social analyses. Retribution aims to restore a lost balance of fairness and equality for its own sake and not (as utilitarians would insist) because it is an overall state of affairs which includes proportionally more of goods or values or preferences than it does of corresponding negations, however these matters are determined.

The goal of retribution, though, is to re-establish the balance of fairness in political society. Both theories of punishment thus attempt to have a positive effect on society *after* the incidence of criminal activity, albeit in different ways. Retribution has the considerable further advantage of being capable of morally justifying criminal sanctions, which deterrence by itself lacks. And deterrent aims may be integrated (up to a point) with retributive moral underpinnings in a functioning criminal justice system, such as our own.[18]

Criticism #2: Overcriminalization disfigures the whole moralistic aspect of criminal law and its enforcement in two very different ways. The first way arises from the fact that, for the foreseeable future, a criminal conviction will continue to

17. Marie Gryphon, *It's a Crime? Flaws in Federal Statutes That Punish Standard Business Practice,* Manhattan Inst. Civil Justice Report No. 12, at 12 (Nov. 2009).

18. See *Retribution and the Secondary Aims of Punishment*, 44 Am. J. Juris. 105 (1999).

stigmatize the offender as morally deficient: as the possessor of tainted, if not just plain bad, character. But someone convicted in our central case (like others whose punishment cannot be justified on retributive grounds) does not deserve this obloquy. Nor is he rightly made to suffer the many collateral consequences that come with a criminal conviction—being labeled as a criminal offender, being deprived of his right to vote, and many other legal and informal social disabilities and handicaps.

The second distortion stems from the first. Precisely because the central-case defendant is not a moral reprobate, the moral obloquy of criminal conviction is likely to be watered down by its improvident extension to him. This sullying effect is not limited to the precise regulatory offense at issue or to a class of similar offenses. The point is that the social identification of criminal conviction with moral fault will be watered down across the board.

The classic example is overtime parking, a trivial violation of the motor vehicle code that probably everyone who has ever driven has committed at some time. Because everyone has committed that offense, no one treats the matter as evidence of a character flaw. The result is that, for such infractions, society has severed the connection between a moral defect and a criminal offense. Because there are very good reasons to retain and preserve this connection and to preserve it as a common good, overcriminalization portends a potentially serious social loss.

Criticism #3: Overcriminalization creates a scenario in which the central-case defendant can be punished without performing the generic conduct—the liberty grab—that is the moral predicate of just punishment. The third criticism hearkens back to the retributive understanding of the defining harm of criminal conduct, which is the malefactor's unilateral grab of more liberty than he is due. This is the morally reprehensible preference for one's own will over the prescribed legal course and at the expense of the common good, which is the heart of the retributive story.

The central-case offender, however, had no opportunity to choose to comply (or not) with the law. Or he might have chosen to (try to) comply but non-negligently failed to do so. In either event, he does not deserve to be punished, because he has not performed the generic conduct—the liberty grab—that is the moral predicate of just punishment. Because the paradigm individual never chose to commit a morally blameworthy act, society should not punish him with a device (the criminal justice system) that operates best, from a moral perspective, when its application is limited to parties who have grabbed for more gusto than their share allows.

This criticism is complicated by society's nearly dogmatic systemic commitment to the proposition *ignorantia legis neminem excusat*—"ignorance of the law is no excuse."[19] This maxim may be an impregnable—and largely sound—element of our criminal litigation system; at least, any alternative maxim could present problems of proof and might portend too much lawbreaking license. But overcriminalization is not a courtroom issue. It is a policy issue for legislators. In that arena, the anticipation that many people who could be prosecuted for the central-case offense will not have chosen selfishly to prefer their own will is a very good reason *not* to enact proposed strict liability criminal laws.

Criticism #4: Overcriminalization fails to encourage those who abide by the law. The fourth criticism is a mirror image of the third. Fully understanding it depends upon a moral imperative as well as a practical exigency heretofore left implicit. The moral imperative is that punishment is necessary to avoid the injustice that would otherwise fester in the wake of any criminal's unfair usurpation of liberty. This is society as *victim*. The practical matter is that punishment assures society that crime does not pay and that, by observing the law, the rest of society is not made into hapless losers. This is society as *chump*. Legal philosopher John Finnis explains this point more fully:

> There is a need to give the law-abiding the encouragement of knowing that they are not being abandoned to the mercies of criminals, that the lawless are not being left to the peaceful enjoyment of ill-gotten gains, and that to comply with the law is not to be a mere *sucker*: for without this support and assurance the indispensable co-operation of

19. For a critical discussion of that maxim, see Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm. & Mary L. Rev. 671 (1976).

> the law-abiding is not likely to be continued.[20]

The central-case defendant—one who violates a strict liability regulatory offense—is punished without any evidence that he intended to violate the law, intended to engage in inherently wrongful conduct, or knew that his conduct was wrongful or prohibited by law. Nor is any evidence required that he violated a duty owed to another individual, to a group of individuals, or to society itself. Just as he can scarcely be accused of choosing to usurp liberty that society's other members deny to themselves, they can scarcely be described as "suckers" for not doing likewise. Just as the central-case defendant had no real opportunity to choose to treat us unfairly, we have no real opportunity to choose to remain within the overall pattern of restraint marked out by law—or not to so choose.

Criticism #5: By eliminating the guilty-mind, or *mens rea*, requirement and by stipulating punishment for a morally innocuous act which the "wrongdoer" may never have chosen, the central case defies intelligent sentencing. The fifth criticism turns to how retribution guides the competent lawmaker in creating a schedule of actual sentences. There are two very different faces to this picture, one well focused and the other blurry. Moral principles can tell the lawmaker that assault and theft, for example, should be treated as crimes and that those who commit these crimes should be punished, but moral principles—including those supplied by the retributive justification of punishment—do not by themselves tell the lawmaker which privations should be imposed for those crimes. Nor does moral principle tell the lawmaker how much of any specific privation—confinement, monetary fine, community service, civil disability—is just right.

There is, in other words, a very substantial range of free choice here for the lawmaker. This is the blurry part: The task at hand is guided, but underdetermined, by reason.

The clearer picture is this: A retribution-based understanding of punishment implies that any sentence be doubly proportional—first to the harm caused by the crime and second among the various crimes—so that the more egregious crimes are subject to proportionally greater sanction than lesser crimes. But how is one to distinguish large from small in this context?

No one thinks that the harm of a crime is mainly the tangible loss to a specific victim. If that were the case, then this nation would not have, for example, the many gradations of homicide that it does have, ranging from murder in the first degree all the way down to negligent homicide, then off the criminal chart entirely to actionable civil homicides, and then to cases in which one person causes the death of another without acting unlawfully at all. (The latter include genuine accidents and justified killings, such as those committed in self-defense.) Attempts to commit crimes—particularly the most reprehensible crimes such as murder, rape, kidnapping, and armed robbery—are generally punished at just a shade less than the punishment for consummated offenses. But if tangible, realized harm were the metric, then it would be hard to justify punishing attempts at all.

Clearly, the U.S. criminal justice system is predicated upon an understanding of crime as—in some very basic way—a matter of bad choices. By fleshing out those bad choices as unfair grabs of liberty, retribution helps supply a common measure of the harm done in every crime.

This is not to say that the more tangible damage done by a criminal's bad choice does not matter at all. Someone who chooses intentionally to kill another human being has demonstrated an extraordinary preference for his own freedom of choice and has exercised it in gross disregard for the equal liberty and equal dignity of another person. This murderer's usurpation is much greater and more heinous than that of the petty thief, and they should each be sentenced accordingly.

The final criticism, plainly stated, is that by eliminating the guilty-mind, or *mens rea*, requirement and by stipulating punishment for a morally innocuous act which the "wrongdoer" may never have chosen, our central case defies intelligent sentencing. The central case swings free of the proffered common metric and would seem destined to gauge an appropriate sanction either arbitrarily or by exclusive reference to the raw tangible damage wrought by the putatively criminal act.

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20. Finnis, Natural Law and Natural Rights, *supra* note 10, at 262.