

2000

## The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy

Kenneth W. Simons

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Simons, Kenneth W. (2000) "The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy," *Hofstra Law Review*: Vol. 28: Iss. 3, Article 3.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol28/iss3/3>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

# THE RELEVANCE OF COMMUNITY VALUES TO JUST DESERTS: CRIMINAL LAW, PUNISHMENT RATIONALES, AND DEMOCRACY

*Kenneth W. Simons\**

## CONTENTS

I. INTRODUCTION .....	636
II. PRELIMINARY ISSUES .....	641
A. <i>The Retributivist Perspective</i> .....	641
B. <i>Democratic Input of Citizens Distinguished</i> .....	643
C. <i>Sources of Retributivist Norms</i> .....	646
III. THE RELEVANCE OF LAY OPINIONS OR COMMUNITY VALUES .....	650
A. <i>The Content of Retributive Principles</i> .....	650
B. <i>The Justification of Retributive Principles</i> .....	653
IV. THE COMPARATIVE ADVANTAGES OF UTILITARIANISM ARE EXAGGERATED .....	659
V. PATHS NOT TAKEN .....	662
A. <i>The Role of the Jury</i> .....	663
B. <i>Criminal Law Norms Expressly Incorporating Community Values</i> .....	663
C. <i>Expressive Theories of Punishment</i> .....	664
VI. CONCLUSION .....	665

---

\* Professor of Law, Boston University School of Law. ©2000. All rights reserved. I thank Eric Blumenson, Alon Harel, Don Herzog, Don Regan, Larry Sager, and Chris Whitman, as well as participants in a workshop at Michigan Law School, for their helpful advice.

## I. INTRODUCTION

In their recent book, *Justice, Liability, and Blame: Community Views and the Criminal Law*, Paul H. Robinson and John M. Darley argue that lay opinion about the criminal penalties that offenders deserve is relevant to what criminal law rules ought to be.<sup>1</sup> Moreover, they claim that popular views of this sort are relevant both to those who would justify criminal law in retributivist terms and those who would justify it in utilitarian terms.<sup>2</sup>

This approach is initially appealing. Considering the opinions of ordinary people about proper criteria and levels of criminal punishment appears to be respectful of democratic values. If, as the authors conclude, participants in case studies support objective rather than subjective criteria for attempts; if they support significantly harsher punishment for a completed offense than for an attempt;<sup>3</sup> if they would punish accomplices less than principals; if they would recognize a broader privilege of self-defense than under current law; if they would reject a broad felony-murder doctrine;<sup>4</sup> then perhaps theorists (whether retributivists or utilitarians) who endorse different views should pause to reconsider.

As a descriptive matter, moreover, it appears that popular views about deserved punishment carry significant weight in explaining many actual criminal justice practices—even if they have less influence on criminal law *theorists* than Robinson and Darley would like. In the United States (not to mention other nations), there is substantial variation between communities, and over time, in what counts as a criminal wrong, what wrongs are most serious, and what penalty attaches to a given wrong. Consider state-by-state variations on the question of whether and when the death penalty is authorized; or in the law of self-defense, whether the actor must retreat before using deadly force if he may safely do so. Consider also significant recent changes in the definition of rape. Insofar as these geographical and temporal differences ex-

---

1. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 1 (1995).

2. See *id.* at 5-7.

3. The participants supported harsher punishment for the completed crime even when the attempting actor was dangerously close to completing the crime (in the process of cracking a safe) and was prevented from completion by police intervention. See *id.* at 23.

4. For a useful summary of these and other results of the Robinson and Darley study, see Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 316-21 (1996) (reviewing PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995)).

press differences in community views about desert, and insofar as at least some of these differences are defensible, perhaps criminal law theory should explain the relevance of community views.<sup>5</sup>

Yet it is not obvious how, or even whether, community views about what is just are relevant to the best account one could give of what really *is* just. In particular, modern retributivist approaches that endorse giving the offender his “just deserts”<sup>6</sup> appear to be distinctively inhospitable to community views about justice.

This appearance is strengthened when modern retributivist views are contrasted with utilitarian views. Utilitarians wish to maximize aggregate human welfare, and many utilitarians understand welfare as the satisfaction of individual preferences.<sup>7</sup> When a community strongly condemns a form of criminal behavior, the condemnation reflects the fact that members of the community have very strong preferences that the behavior not occur (as well as the fact that the behavior, in the particular case, causes or risks considerable harm to the victim). Individual views about what is just can thus be highly relevant to the utilitarian calculus.

On the other hand, retributivists wish, not to maximize human welfare, but to constrain the pursuit of such a goal by insisting that criminals receive their just deserts.<sup>8</sup> Moreover, “affirmative” retributivists<sup>9</sup> would go further and positively justify punishment by virtue of the actor’s just deserts quite apart from whether punishment will deter crime or otherwise bring about desirable consequences for human welfare.

5. The reader will have noticed that I have thus far employed a very loose notion of “community views,” ranging from participants providing responses to specific case studies (such as those of Robinson and Darley) to citizens expressing their preferences for criminal law practices in the voting booth. This Article will show that the particular conception of “community views” that should be employed depends on whether these views are relevant to democratic accountability or instead to the content of a punishment rationale; and if the latter, on the particular rationale (for example, retributivist versus utilitarian), and any more specific variant.

6. See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* chs. 3-4 (1997) (discussing the retributive theory); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 1, 25-45 (Michael Tonry ed., 1996) (providing an overview of “just deserts” theories).

7. See Robert Goodin, *Utility and the Good*, in *A COMPANION TO ETHICS* 241, 243 (P. Singer ed. 1991).

8. See Duff, *supra* note 6, at 7.

9. Retributivists disagree about whether to characterize just deserts as an affirmative justification, or even a goal or target for punishment, and not merely as a constraint in pursuit of other (consequentialist) goals. Many share H.L.A. Hart’s view that retributivist principles serve only as constraints. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 32 (1968). Michael Moore argues that retributivism is an affirmative justification for punishment. See MOORE, *supra* note 6, at 88-89. Similarly, R.A. Duff argues that pursuing just deserts is, in a certain sense, an appropriate goal for punishment. See Duff, *supra* note 6, at 45-57.

What does it mean to impose punishment in accordance with a person's "just deserts"? The concept has been elucidated in a number of different ways—as a requirement of respecting the offender's human autonomy, or treating the offender as an end rather than as a means, or restoring a fair balance of benefits and burdens that the offender's behavior has upset,<sup>10</sup> or countering the message of disrespect expressed by the offender.<sup>11</sup> These are rather abstract principles, and spelling out their content seems to depend more on understanding the contours and distinctive value of human agency, moral responsibility, and cooperative human community than on discerning what citizens in the community believe to be abhorrent behavior. Ironically, *traditional* retributive views were quite different in this respect, for they gave enormous, perhaps conclusive, weight to community sentiments. If the community felt that a particular form of conduct deserved a harsh and vengeful response, then that response really was deserved.<sup>12</sup> Modern retributivists, however, are more likely to argue directly for substantive principles of blameworthiness and wrongdoing, principles that have no obvious relationship to popular opinion.

Robinson and Darley argue that popular views are relevant on either a retributivist or a utilitarian account,<sup>13</sup> though most of their argument is devoted to the latter.<sup>14</sup> Furthermore, they go beyond the simple utilitarian argument sketched above—that satisfaction or nonsatisfaction of preferences about criminal justice is directly relevant to aggregate human welfare—for they also claim (on essentially utilitarian grounds)

---

10. For a discussion of this strand in the literature, see Duff, *supra* note 6, at 26-28. For a systematic account along these lines, see MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* chs. 3-4 (1992).

11. See Duff, *supra* note 6, at 36-41 (discussing the views of Jean Hampton).

12. See, e.g., 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 80-82 (William S. Hein & Co. ed.) (1883). The traditional retributivist need not be committed to vindicating the community's angry, vengeful reaction even when the reaction is merely an immediate and completely unthinking emotional response. But even if the retributivist endorses only those reactions that are minimally reflective or those which withstand some test of time, the basic criterion continues to be the vindication of extant community norms. The modern retributivist, by contrast, endorses a theory with the power to criticize those norms.

13. See ROBINSON & DARLEY, *supra* note 1, at 6.

14. Their argument supporting the retributive significance of lay opinion is sketchy. The community's view is relevant to a "desert" approach, they briefly suggest, "because it is one source of determining what counts as the just desert," and because, if a community overwhelmingly judges a rule unjust even though desert theorists purport to have derived that rule from principles of "fairness and good," then at a minimum, the reasoning behind the rule should be closely scrutinized. *Id.* These observations might be correct; but more must be said about how and when community views legitimately serve as a source, or at least a negative criterion, for determining just deserts.

that criminal law should not undermine a community's moral norms, lest the community's respect for law be undermined.<sup>15</sup>

There are some difficulties with that claim.<sup>16</sup> However, this Article focuses mostly on the question of whether popular opinion about just deserts has *retributive* significance. At the same time, it explores the comparative question of whether such opinions have any greater relevance to a utilitarian approach.

In assessing retributive and utilitarian rationales for punishment, retributivism initially appears to be at a comparative disadvantage, in light of its apparent insensitivity to popular preferences. Moreover, communities differ in what is punished, and by how much, and criminal law standards change significantly over time.<sup>17</sup> Both facts seem much easier to explain on a utilitarian theory sensitive to personal preferences than on a retributivist theory. To be sure, a retributivist might dismiss such geographical and temporal variations as impurities of a political process that regrettably fails to culminate in correct moral norms. But if that is all that can be said, then retributivism appears to be disturbingly abstract and insensitive to social context.

In exploring these issues, this Article first provides a general definition of retributivism, then clarifies that the point of the Article is to address how community values might be relevant to the content of retributive theory, and not the distinct question of whether community input into the political process satisfies democratic principles. Next, the Article briefly examines the source of retributive principles, from two different perspectives: Do retributivist norms essentially flow from political principles, from a proper understanding of the legitimacy, authority, functions, and limits of government when it punishes individuals? Or do retributivist norms instead begin with private moral norms (such as norms about when individuals deserve to be blamed for harming or offending others), and only then add political constraints that limit or modify those moral norms?

My conclusions, in brief, are as follows. Modern retributivist approaches often do value "community values" or "lay opinions," but they do so in many different ways, depending on the relationship of the retributivist approach to political theory and to private moral norms, and, more fundamentally, on how the retributivist principle is justified.

---

15. See *id.* at 6-7.

16. For some criticisms, see Slobogin, *supra* note 4, at 326-32.

17. See, e.g., ROBINSON & DARLEY, *supra* note 1, at 13.

Thus, on one plausible view, retributivism's culpability principles (*mens rea*, excuse, and responsibility) do draw on private blaming practices; so "commonsense" morality and "community values" are appropriate sources of principle, though only in an attenuated sense. However, with respect to identifying the specific wrongs to be punished, and at what level to punish them, the retributivist approach might give only a partial answer. While retributivism might forbid criminalization of some wrongs, or require criminalization of others, it might also permit the state the option of criminalizing and punishing a significant range of behavior. In this "optional" normative space, the expression of community values through the political process would be consistent with retributive norms.

Even a less agnostic conception of criminal wrongdoing can reflect changing and variable community values. An invariant *general criterion* of wrongdoing dictated by a retributive theory can, nevertheless, be sensitive to factual variations over time or between cultures and communities. (In this spirit, some criminal law theorists have endorsed an approach that measures wrongdoing according to its interference with "human functionings.")<sup>18</sup>

At a more fundamental level, the possible relevance of community values to the *justification* of retributivist principles should be considered. Under one plausible method of justification, "reflective equilibrium," moral principles (including punishment rationales such as retributivism) are tested against firmly held moral intuitions.<sup>19</sup> However, identifying "community values" in any ordinary sense of the term provides, at best, only a starting point for such a justification.

Community values do have indirect relevance to other issues of justification. Because our knowledge of moral principles is fallible, modesty counsels in favor of respecting lay opinions. Moreover, if one endorses a *relativistic* criterion of moral truth, dependent on the moral beliefs of the community, then community views are indeed dispositive. However, such a criterion is quite problematic, for it limits the power of moral theory to critique existing social practices, and it casts doubt on the legitimacy of using law to change prevailing views.

In sum, the relevance of community views to retributive principles is complex and uncertain. As a comparative matter, however, retributivism is not at a serious disadvantage relative to utilitarianism in these respects. For, at the more fundamental level of justification just noted,

---

18. See *infra* notes 45-46 and accompanying text.

19. See JOHN RAWLS, A THEORY OF JUSTICE 20-21 (1971).

utilitarianism presents precisely the same difficulties. For example, it must be determined whether “utility” should be understood as including all preferences, even antisocial ones; and also whether such a question itself should be decided by “reflective equilibrium,” which includes consulting “moral intuitions.”

To be sure, the Robinson and Darley approach itself seems to focus more narrowly on the utilitarian benefits of reinforcing community values about just deserts. Still, it is an open question whether those utilitarian benefits are sufficiently large to outweigh the utilitarian *costs* of securing correspondence between community values about just deserts and the content of the criminal law. Moreover, it remains very difficult to identify the “community” whose values are relevant, if the point is to reinforce the power of internal moral sanctions. (Recall that the issue is how to measure aggregate utility, not how the political system should provide accountability to citizens.) In the end, the utilitarian approach that Robinson and Darley endorse, and that they claim reflects community views about just deserts, might be no more tractable than a retributive approach.

## II. PRELIMINARY ISSUES

This Section begins with a brief account of the general characteristics of the retributivist approach. Second, it clarifies that the question for discussion, how community values are relevant to a retributivist rationale for punishment, concerns the *content* of retributive theory. It does not concern issues of democratic accountability or citizen input into the development of legal norms. Third, this Section examines the different possible sources of retributivist norms. These norms can be viewed as deriving from normative political principles, so that retributivism is one part of a defensible theory of the relation of the individual to the state. Or retributivist norms can be viewed as deriving from non-political moral principles, so that retributivism is an extension of private norms of blameworthy and wrongful behavior, norms that justify blaming individuals for their conduct even outside the realm of state coercion. In the end, this Section suggests that both sources are relevant under many retributivist theories, and sketches a plausible mixed approach.

### A. *The Retributivist Perspective*

Rather than endorsing any particular retributivist approach, this Article explores the relevance of lay opinion under a variety of different



retributive theories. Thus, I assume only that a retributivist theory possesses some general characteristics, characteristics that distinguish retributivism from other important theories of punishment. The following account by R.A. Duff is suitably general: "[W]hat unites retributivist conceptions of punishment, insofar as they are essentially nonconsequentialist, is their insistence that punishment must be justified, not (primarily) by reference to its contingently beneficial effects, but in terms of its intrinsic character as a response to past wrongdoing."<sup>20</sup>

Retributivists view criminal law as a distinctive set of legal practices concerned with punishing offenders who deserve blame for violating legal norms. Retributivism forbids punishment of the innocent, without regard to whether the possible beneficial consequences of such a practice outweighs the disadvantages; and requires that the type and severity of punishment accord with the actor's just deserts.<sup>21</sup> But "just deserts" is a notoriously contested concept. Some retributivists place greatest emphasis on the actor's culpability (his state of mind, degree of moral responsibility, and possible excuses), while others place significant independent weight on the extent of the actor's actual wrongdoing (his violation of the rights of others, or his infliction of harm) and the extent to which a *prima facie* act of wrongdoing is justified. And different retributivist theories define the requisite criteria of culpability and wrongdoing quite differently.<sup>22</sup>

Finally, some retributivists believe that consequentialist considerations are completely irrelevant to the proper justification of punishment; some would permit consequentialism a limited role; and some grant it a large role, insisting only that retributivism constrain consequentialist goals (such as crime prevention) at the margins. This Article does not select from among these views. Rather, it focuses on the relevance of community values to the retributive component of a theory of punishment, however large or small that component may be.

Before that issue is addressed, however, another issue, easily confused with it, must be carefully distinguished.

---

20. Duff, *supra* note 6, at 6-7.

21. *See id.* at 1, 7-8.

22. *See id.* at 230-37. Retributive theorists, like any scholars concerned about what justifies legal punishment, should address the following interrelated questions:

(1) What can legitimately be punished at all? (This is the criminalization issue.)  
 (2) What attitude may or should the state take towards offenders? Why may or should the state punish? (The justification issue.)  
 (3) What level (and type) of punishment is permitted or required for different offenses? (The proportionality issue.).

### B. *Democratic Input of Citizens Distinguished*

In a democracy, citizens are entitled to express their views concerning possible legislation. Their primary means for doing so are through election of representatives, or lobbying on a particular issue. If, in this manner, citizens express views about the desirability of criminal legislation premised on a retributive rationale, they thereby contribute to the creation of retributive legal rules. In this democratic process sense, lay opinions are indeed relevant to the content of retributive norms that a community enacts into law.

But this is not the sense in which this Article explores the relation of community views to just deserts. Nor is that a promising way to explore the relation of community views to a utilitarian, or any other, approach to punishment. Of course it is normally appropriate and legitimate for government to give effect to citizen views, but the democratic process aims to effectuate whatever views citizens happen to have (subject to important constraints about how votes are to be counted and the like). If we want to understand a particular retributive theory, or to judge which retributive theory is most attractive, and if we want to know how community views are relevant to the content of such a theory, then we must look deeper. In other words, we are trying to understand what reasons for punishment, and what particular punishment practices, citizens *should* endorse. How the political process should implement the views that they *do* endorse is a very different issue.<sup>23</sup>

In the debate between retributivist and utilitarian theories of punishment, this point is critical. For one superficially attractive argument for utilitarianism seem plausible only because of this confusion between how lay opinions are relevant under democratic principles and how they are relevant to the content of a punishment theory.

The argument, in brief, is that democracy requires the counting of citizen preferences, and utilitarianism is the moral theory most clearly committed to aggregating preferences. Therefore (the argument goes), utilitarianism is a more attractive theory of criminal punishment than competing theories (such as retributivism) that do not give weight to preferences in this way. For example, if most citizens in a community develop a strong concern about violent armed attacks in public schools, then legislators might be induced to enact criminal legislation purport-

---

23. Of course, as a matter of political reality, laws that express a just deserts perspective might not be enacted unless there is significant popular support for them, or for legislators known to have retributivist views. But this point is distinct from the claim that retributive justice is (partially or completely) *constituted* by popular views about justice.

ing to address the problem. It seems that a utilitarian theory, insofar as it takes account of such a change in preferences, better accounts for and justifies such legislation than do other punishment theories.

But this argument fails. There is no reason to assume that the same kinds of "preferences" are relevant both to democratic legitimacy and to maximizing aggregate human welfare (as utilitarianism requires). Indeed, a *deliberative* conception of democracy values the quality of public discussion, not the mere registering of preferences. (If the new legislation against crimes committed in public schools is enacted in a period of public frenzy, with citizens paying little attention to the content or effectiveness of the resulting legislation, then the legislation does not satisfy this richer conception of democracy.) Even those minimal conceptions of democracy that give more weight to bare expressions of preference often value *intensity* and quality of preference, as reflected in the conscientious decision to cast a vote as opposed to answering an opinion poll or "voting" to purchase a good in the marketplace. By contrast, utilitarian aggregation can (depending on the particular form of utilitarianism that is defended) ignore intensity of preference, or can accept as legitimate any preferences whatsoever, or indeed can reject preferences entirely in favor of a hedonistic (or other substantive) criterion of utility or welfare.<sup>24</sup> Thus, suppose that the most defensible type of utilitarian justification of criminal law considers the disutility caused by physical harms, and the disutility of expending social resources to prevent such harms, but does not place significant disvalue on the distress caused to individuals who witness such crimes on the evening television news. Then the fact that an aroused citizenry suddenly demands legislative action might not significantly alter *this* utilitarian calculus.

Indeed, the type of utilitarian punishment theory that might be most likely to coincide with the results of (minimal) majoritarian democratic processes is one that counts equally the preferences of all citizens for criminal legislation purporting to address a problem, but counts only those preferences. It is irrelevant, under this approach, whether the problem actually exists, whether the legislation will actually reduce the level of the criminal activity in question, how much disutility the crime causes to the immediate victim (for example, the person who suffers the physical assault or theft), or whether the diversion of social resources to this problem actually has the effect of dramatically increasing other

---

24. Also, on our best theory of democracy, some categories of preferences (e.g., racist and sadistic) should be filtered or ignored; but this might not be true of our best theory of utilitarianism.

forms of crime. Of course, any plausible utilitarian theory should consider all of these factors as relevant to the utility calculation. But this more complex analysis will depart significantly from a simple registering of citizen preferences.<sup>25</sup>

Moreover, it is certainly controversial whether democracy entails a commitment only to maximizing the welfare of its citizens as defined by satisfaction of existing wants; it might also, or instead, entail a commitment to a procedure for developing and choosing among ends; or a substantive commitment to cultivating the betterment of citizens, or to respecting nonwelfarist ideals.<sup>26</sup> Sometimes legislators should be leaders, not followers, and should attempt to shape citizen preferences, not merely reflect them. Civil rights legislation is an obvious example. In the criminal law domain, so is rape reform legislation, some of which has been designed to reshape widespread male attitudes about when women genuinely consent to sexual intercourse. To be sure, as a matter of political reality, it is understandable that legislators are often willing to vindicate even the unreflective, highly emotional reactions of citizens who are familiar with criminal law issues only as the mass media sen-

---

25. One way around this difficulty is to endorse a form of utilitarianism that ignores "second-order" preferences, and counts only an individual's "first-order" preferences more directly affecting the individual's own well-being. On this view, the insecurity and anxiety that people feel when they discover that a crime has been committed can be counted as disutility, but their (second-order) moral disapproval of the criminal behavior cannot be counted as such. But I am not sure that this distinction can be drawn reliably. (Ronald Dworkin made a similar attempt to distinguish "external" from "personal" preferences, an attempt that elicited much criticism. See John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 961-62 (explaining Professor Dworkin's attempt to distinguish between different types of preferences)). In any event, the distinction still leaves us with the difficulty of aggregating the more diffuse disutility that a crime causes to the mass of the citizenry with the more concrete and (plausibly) far greater disutility that it causes to immediate victims. If such aggregate utility is to correspond to citizen preferences registered through the political process, we must either ignore the disutility to immediate victims (a wildly implausible form of utilitarianism) or else assume that citizen political preferences reliably express the disutility to victims, as well as to themselves. Of course, there is a correlation here: Normally, the more disutility a crime causes to a victim, the more anxiety and insecurity it causes to citizens generally. But the correlation is only approximate. If most citizens are almost indifferent to crimes committed against prison inmates, or are less concerned about crimes committed against minorities than crimes committed against nonminorities, or are more upset about drug crimes characteristically committed by minorities than about drug crimes characteristically committed by nonminorities (witness the crack-cocaine debate), then the registering of majoritarian preferences will not reliably correspond to the results of the proposed utilitarian calculus.

26. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 138-39 (1986). "The principles of representative government guarantee some measure of control by the population over those in authority. They do not entail a commitment by the democratically constituted authorities to act on welfarist considerations alone." *Id.* at 139. See also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 141-43 (1993).

sationally reports them. But that is not the most attractive conception of democracy.

Finally, as noted above, if democratic endorsement that satisfies certain procedural and substantive criteria validates the *legitimacy* of incorporating a particular punishment rationale into the substantive criminal law, it validates the legitimacy of so incorporating *any* punishment rationale. Thus insofar as majoritarian preferences that satisfy the appropriate criteria should be given effect, preferences that express retributivist principles deserve no less respect than preferences that express utilitarian principles. In either case, however, two sets of issues must be distinguished. The first set poses questions of democratic process. What type of democratic accountability is required in order for criminal legislation to have the force of law? To have legitimacy? To deserve the obedience of citizens? The second set purports to explain and justify the content of a punishment theory: How are community views properly taken into account under the most attractive utilitarian, or retributivist, or other punishment theory?

### C. *Sources of Retributivist Norms*

How “community views” about just deserts are relevant to the content of a retributive theory depends on the particular retributive perspective. In categorizing retributive norms, one important question is the source of the norm. Broadly speaking, two very different types of sources can be identified.

On one view, retributivism is best understood as just an element of a larger political theory. From this perspective, the institution of punishment is justified insofar as it can be explained pursuant to a broader set of political principles, principles specifying the individual’s obligations to the state and to his fellow citizens. The nature and extent of the state’s legitimate power to impose coercive punishment would then depend on the larger political theory of which retributivism is only a part. On a strongly perfectionist view, for example, retributive punishment might be simply one aspect of the state’s duty to promote virtue and condemn vice. Or, on a variant of the Rawlsian view that society is a system of cooperation and reciprocity among free and equal citizens, retributivist punishment might be warranted for those who take unfair advantage by committing crimes.

Another view of the sources of retributivist norms looks to private morality, and in particular, to private blaming practices. The concepts and rationale of legal punishment practices do have much in common with private blaming practices. Similar concepts of culpability are em-

ployed. Thus, whether the actor intended a harm, knew that it would occur, should have known, or should have acted with more skill or attention are relevant to the degree of private blame. So is the question whether his action was excusable because of special circumstances of compulsion or because of the actor's status as a child or as seriously mentally disordered.<sup>27</sup> Moreover, any genuine use of the concept of blame appears to be incompatible with adopting a consequentialist perspective, both in private interactions and in the setting of legal punishment.<sup>28</sup>

But neither political theory nor private moral norms alone can fully explain the retributivist approach to punishment. Retributivists differ on the role of political principles in justifying retributivist norms; nevertheless, few purport to derive all retributivist principles from a more general political theory. At the same time, many of the wrongs addressed by private blaming practices are obviously quite different from those addressed by the criminal law. Lies, ingratitude, and thoughtlessness are hardly the proper domain of criminal prohibitions.

This Article does not fully explore the question of the source of retributive norms, but it is worth noting the different possible answers, since the significance of lay opinion depends in part on the particular answer one endorses. Speaking quite generally, political theories (such as those of John Rawls<sup>29</sup> and Robert Nozick<sup>30</sup>) often scant culpability issues and often provide an incomplete account of the wrongs that criminal law should or may address.<sup>31</sup> On the other hand, private moral norms are also not a sufficient justification for criminal punishment. If the state is to employ standards from private blaming practices in a system of coercive punishment, we must be satisfied that, as a matter of political justification, it is at least permissible for the state to endorse moral norms in this way.

Let me suggest one plausible position along the spectrum of possibilities. Perhaps the most justifiable political theory will dictate certain constraints on criminalization and proportionality, but will other-

---

27. The writings of such moral philosophers as J.L. Austin and Peter Strawson on private blaming practices and moral responsibility are often treated as sources of retributive concepts of *mens rea*, justification, and excuse in the criminal law. See, e.g., J.L. Austin, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 175 (J.O. Urmson & G.J. Warnock eds., 2d ed. 1970); Peter Strawson, *Freedom and Resentment*, in *FREE WILL* 59, 64-65 (Gary Watson ed., 1982).

28. See R.A. DUFF, *TRIALS AND PUNISHMENTS* 44-55 (1986).

29. See generally RAWLS, *supra* note 19.

30. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

31. For further discussion, see Kenneth W. Simons, *The Sources of Retributivist Norms: Political Theory or Private Moral Practices?* 1, 6 (unpublished draft on file with author).

wise leave the state relatively free to decide what wrongs to prohibit and how severely to punish them. At the same time, while the most plausible retributivist principles might specify standards of wrongdoing incompletely or only in very general terms, perhaps (when informed by private blaming practices) they specify standards of culpability much more fully.

This perspective is, to some extent, captured in the conventional distinction between the "general part" of the criminal law (establishing general criteria of wrongdoing and culpability, such as the act requirement, *mens rea* categories, and the excuses) and the "specific part" (establishing concrete wrongdoing and culpability requirements for particular crimes, such as homicide and theft).<sup>32</sup> Retributivist theory proper might concern itself mainly with the general part, and leave to other political and moral theories the definition and grading of wrongs.<sup>33</sup> In this vein, Michael Moore has argued that criminal law standards of responsibility for a wrongful act are content-neutral, i.e., independent of standards of wrongdoing.<sup>34</sup>

On this view, perhaps any plausible retributive theory should address certain core violations of life and liberty, such as murder and assault; but, the theory might decline to specify whether, for example, omissions, environmental harms, or other regulatory and public welfare offenses deserve criminal punishment.<sup>35</sup> Even the protection of property rights might be viewed as extrinsic to retributive theory proper. Rather, independent moral and political principles might better explain which property interests deserve what degree of protection.

In other words, retributive theory can be viewed as an important dimension of a general deontological perspective, a dimension that addresses the grounds and legitimate scope of the distinct institutional

---

32. See MOORE, *supra* note 6, at 30.

33. Moore draws a different conclusion: Retributivism includes a perfectionist theory of legislation, under which a legislator has reason to criminalize whatever he believes to be a moral wrong, because it is a moral wrong. See *id.* at 64-78. In my view, this is one coherent retributivist theory, but not the only one.

34. See *id.* at 32. However, I doubt that responsibility standards are *entirely* content-neutral. For example, we legitimately employ different *mens rea* criteria in homicide than in property offenses, or for results as opposed to circumstances. Moreover, I do not think it is always possible to specify what acts are "wrongful" and how "wrongful" they are without reference to culpability. Torturing another is always (or almost always) wrong; *causing pain* to another is not; so it is misleading to characterize "causing pain" as a wrongful act, without more. See Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 289 n.57 (1996).

35. My suggestion resembles the traditional distinction between "*malum in se*" and "*malum prohibitum*" offenses. However, a minimal retributivist theory might stop short of requiring punishment for all *malum in se* offenses, especially property law violations.

practice of punishment and the relation between criminal punishment and private blaming norms. But other deontological principles might specify which invasions of liberty, violations of property rights, or interferences with human capacities<sup>36</sup> are most important, and should be most stringently protected, especially through criminal sanctions.<sup>37</sup>

On this “modular” approach, Nozickian property law principles, or Rawlsian specification of “basic liberties,” might identify the harms and wrongs that may not be punished at all, and some of the wrongs that most deserve vindication; while largely independent retributivist principles would explain which excuses apply, which categories of *mens rea* properly invoke the most blame, whether the occurrence of harm (apart from *mens rea*) has independent significance, and the like.

Thus, from political theory, we might conclude that government legitimacy or fundamental autonomy principles require that government respect some basic constraints—constraints against punishing the innocent; against criminalizing conduct that does not seriously invade liberty or that merely offends;<sup>38</sup> against criminalizing thoughts or ambiguous conduct, rather than dangerous acts; or against criminalizing a failure to rescue a stranger. Beyond this, political theory might be indeterminate, leaving an “option” to impose punishment, or at least a punishment supplement, for retributivist reasons;<sup>39</sup> and leaving a similar “option” to forbid punishment disproportionate to just deserts. Finally (as discussed below), it might permit the democratic process to identify particular wrongs as worthy of criminal sanctions.

---

36. Cf. AMARTYA SEN ET AL., *THE STANDARD OF LIVING* 16, 18, 36-38 (Geoffrey Hawthorn ed., 1987) (expounding a “human functionings” criterion for identifying the relative importance of human interests).

37. Whether a moral theory “mixing” deontological and consequentialist concerns is coherent and defensible is an important question that I do not address here. As a matter of positive law, however, I think it is clear that criminal punishment, and indeed most legal practices, do reflect both types of moral perspectives.

38. The leading analysis of how principles of liberty should restrict the state’s power to impose criminal punishment is contained in Joel Feinberg’s four volume work: 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984); 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986); 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988).

39. “Option” here means that *failure* to impose punishment, within this range, would neither call into question the government’s very legitimacy, nor undermine other fundamental political values.



### III. THE RELEVANCE OF LAY OPINIONS OR COMMUNITY VALUES

Given the variety of retributivist perspectives, and the different possible sources of retributivist norms, how are lay opinions or community values relevant to the content of those norms?

The answer has two dimensions. At a first level, the issue is whether (on some more precisely specified retributivist principle) lay opinions are relevant. For example, how are private blaming practices (which, after all, are a kind of "community value") embedded in the specified principle? At a second and more fundamental level, the issue is how the retributivist principle itself is justified. For example, on a reflective equilibrium approach, do moral intuitions support or undermine the specified retributivist principle? Each level is examined in turn.

#### A. *The Content of Retributive Principles*

At the first level, we need to examine how private blaming practices, political principles, or other sources pour content into retributive principles. Consider first those retributivist principles that find their source in private blaming practices. The aspects of private moral norms that most plausibly serve as models for criminal punishment norms are the general criteria of culpability and wrongdoing, and the rationale for blaming. On a deontological approach to both private moral blame and to legal punishment, the existence and degree of a human agent's moral responsibility are critical to whether the agent deserves moral blame at all, and to how much blame she deserves.

Thus, it is not surprising that, as a descriptive matter, retributivist theories endorse principles of responsibility and excuse which, in broad outline, are similar to the principles implicit in private blaming practices. Of course, the distinctive institutional features of law counsel against any crude translation of moral norms directly into legal ones. Still, it is sometimes sound to consider private blaming practices as a source of retributivist culpability principles. To this extent, "community values" are indeed a legitimate source of criminal law norms. For example, the fact that people privately judge children and the mentally ill to be much less responsible than mentally competent adults for their misdeeds should inform our criminal law punishment practices.

Yet the question remains: *Which* private norms are relevant in this way? Put differently: How should the relevant "community" be defined? This depends on the concept of blame employed. Thus, moral practices and moral beliefs can be distinguished, and the former but not the latter might receive deference. (For example, moral practice in-

volves the questions of when and why parents actually express judgments of blame to their children, or take further actions in consequence of such judgments; moral belief involves the more limited question of when and why parents believe that their children have acted in a blameworthy way.) If the conclusion were that private blaming practices reveal the structure and rationale of the deontological perspective on moral responsibility, then it would be much less helpful to conduct an opinion poll than to investigate how, in fact, parents evaluate the misconduct of their children, or how people evaluate the dangerous but nonculpable behavior of a mentally ill person. (More sophisticated surveys of the sort that Robinson and Darley conducted are more valuable than simple opinion polls, but their value is still limited if actual practices are more informative than beliefs.)

Private blaming practices are diverse, however, and even widespread practices are not always morally justifiable. (Imagine that, in an era of greatly increasing crime, the widespread extralegal practice develops of blaming younger and younger people for their misdeeds.) When public punishment practices are discordant with prevailing blaming norms, there is indeed good reason (on an integrated retributive approach to both) to bring the practices and the norms into closer alignment. But, in the end, the relevance of "community views" (in the sense of prevailing blaming practices) to retributivist norms of punishment is somewhat attenuated.

Insofar as private moral norms do have some value, they seem most relevant in explaining principles of *culpability* for legal punishment. Let us now consider the possible relevance of community views to the problem of identifying which *wrongs* the criminal law should punish, and at what level. This depends, of course, on whether the definition of criminal wrongs comes from political values, autonomous retributive theory, or some other source of value. Insofar as fundamental political principles authorize the state to punish certain core invasions of liberty,<sup>40</sup> or forbid the punishment of conduct that does not cause or risk harm or offense to others,<sup>41</sup> then lay opinions are not necessarily directly relevant. Even here, however, the relevant political criterion might incorporate community values to some degree. What counts as a sufficiently "harmful" invasion of bodily integrity to warrant coercive state punishment is contextual. To take an extreme example: If physical ill-

---

40. See, e.g., NOZICK, *supra* note 30, at 6 ("The moral prohibitions [that the state] is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has.").

41. See generally Feinberg's four volumes, *supra* note 38.

ness were viewed today as it was viewed in prehistoric times—as prevalent and virtually unavoidable—then criminal sanctions for negligent medical care would make no sense.<sup>42</sup> Or, under a perfectionist political theory, the punishment of vice might be an important function of the state, and, on that theory, some particular community's understanding of "vice" might be definitive or at least a highly reliable criterion.<sup>43</sup>

Moreover, if we believe that retributive theory is genuinely *indeterminate* with respect to some of the wrongs that the criminal law may prohibit (apart from those wrongs that retributivist norms either insist must be punished or forbid to be criminalized), then retributivism would be consistent with employing community values to define the wrong. Of course, retributivism is then not informed by such values either. In this "optional" normative space, any output of a legitimate political process will be consistent with retributive norms.

Some types of criminal wrongs appear to have this character. Their geographical variability and changeability, therefore, do not undermine the possibility of invariant, unchanging retributivist norms touching on other dimensions of punishment (especially culpability and responsibility). Thus, if, at the millennium, public concern about informational privacy is weightier than concern about trespasses to land, or if the dangers of broad gun ownership seem weightier than the costs of infringing on freedom to own and use such weapons, then it might be perfectly consistent with retributive theory to redefine the gravity of such wrongs.

Moreover, even a less agnostic conception of criminal wrongdoing can reflect changing and variable community values. An invariant *general criterion* of wrongdoing nevertheless can be sensitive to factual variations over time or between cultures and communities.<sup>44</sup> Thus, suppose retributive theory itself—or a cognate deontological theory identifying which rights to life, liberty and property deserve vindication—establishes that the state should most severely punish intentional and permanent deprivations of personal interests vital to human flourishing in contemporary society. On this criterion, theft of a horse in 1900 was a more serious matter than theft of a horse in 2000. More controversially, violent physical attacks motivated by religious or racial bias matter

---

42. Compare Mark Tushnet's argument that the burden modern women experience in suffering the physical discomfort of a pregnancy is not comparable to the burden women would experience in a society in which that condition is viewed as no more troublesome than moderns view the common cold. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1369 (1984).

43. Of course, there are serious problems with perfectionist political theories of this sort, including the risks of intolerance and excessive paternalism.

44. See Kent Greenawalt, *Questions About the Place of Natural Law*, in NATURAL LAW AND CONTEMPORARY PUBLIC POLICY 363, 369-73 (David F. Forte ed., 1998).

more today than in previous generations, and matter more in some communities (perhaps those with the most heightened racial tensions) than in others.

It is in this spirit that some criminal law theorists have endorsed a “capacities” or “human functionings” approach to the ranking of criminal wrongs. Adopting the approach of Amartya Sen for measuring welfare across different nations, Andrew von Hirsch employs a “living standard” account that measures economic and noneconomic capabilities to live a “normal life” and evaluates the extent to which a given crime interferes with those capabilities.<sup>45</sup> The proper severity of punishment for different crimes might be analyzed similarly.<sup>46</sup> Whether this approach is defensible ultimately depends, however, on showing that such a metric of well-being is a justifiable component of the retributive theory at issue.

However, when assessing the significance of changing and variable community values to retributive theory, we must be cautious. Insofar as the political process reflects changing and variable citizen views about criminal law matters, of course actual criminal law norms will change over time, and will vary from place to place. Yet, as noted above, the question for retributive theory is not about political reality, but about a normative ideal: If a given retributive theory were true and were effectuated, how much change and variation would it recognize? To put the matter crudely: If every citizen and every legislator endorsed the retributivist perspective of Jean Hampton, or Michael Moore, or Herbert Morris, how much variation in criminal law norms should still be expected? The answer, I am confident, is: much less than we actually witness.

### *B. The Justification of Retributive Principles*

I now turn to the second-order issue that was identified earlier: How are retributivist principles themselves to be justified? More specifically, does the method of justification itself bring “ordinary opinions” into the picture? At this deeper level, can retributivism (or some other moral theory) be reconciled with community values?

---

45. See ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 31 (1993); FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN CRIMINAL LAW* 55-63 (1999) (comparing the living standard analysis to other approaches and applying that analysis to bias crimes); Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 7-16 (1991) [hereinafter von Hirsch & Jareborg, *Gauging Criminal Harm*].

46. See VON HIRSCH, *CENSURE AND SANCTIONS*, *supra* note 45, at 33-35.

On at least one respected view of moral justification, such a reconciliation is, to some degree, possible. The method of "reflective equilibrium," popularized by John Rawls,<sup>47</sup> calls for an attempt to reconcile considered convictions or intuitions about justice with more general principles. Where there is a discrepancy, "we work from both ends,"<sup>48</sup> either revising the considered convictions that we took as provisional fixed points, or revising the general principles. Eventually, we should reach "reflective equilibrium," a state in which "we have done what we can to render coherent and to justify our convictions . . . ."<sup>49</sup>

Moreover, it is probably no accident that Rawls, a powerful critic of utilitarianism, endorses the method of reflective equilibrium. For nonutilitarian (and especially deontological) principles tend to conform more closely than utilitarian principles to commonsense moral intuitions,<sup>50</sup> which are the raw data for the reflective equilibrium approach.

But the question remains: If reflective equilibrium requires examination of moral intuitions, which ones should be examined? At the highest level of generality is what many moral philosophers call "commonsense morality."<sup>51</sup> These norms tend to be relatively abstractly defined, and tend to refer, more or less, to moral intuitions and judgments widely shared among ordinary citizens in Western democracies. Alternatively, we might consider the views of a particular geographical community at a particular point in time.

Thus, in exploring whether children are as blameworthy as adults, or whether the fruition of harm makes a culpable actor more deserving of blame, we would consider people's ordinary reactions to such examples, and try to fit those and other moral intuitions into a coherent systematic account of moral responsibility and desert. But should we consider the reactions of any randomly selected group of adults living

47. See RAWLS, *supra* note 19, at 19-21, 48-51. Michael Moore employs a different type of coherence approach to justifying retributive principles. See MOORE, *supra* note 6, ch. 3. For other examples of moral theorizing that places great weight on intuitions about concrete moral controversies, see generally 1 F.M. KAMM, *MORALITY, MORTALITY: DEATH AND WHOM TO SAVE FROM IT* (1993); LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* (1996); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

48. *Id.* at 20.

49. *Id.* at 21. Although Rawls employs this method in the specific context of justifying principles of social justice, its potential value extends to any moral or political principles.

50. See, e.g., Samuel Scheffer, "Introduction," *CONSEQUENTIALISM AND ITS CRITICS* (Samuel Scheffer ed., 1988). On the other hand, Rawls' theory is more accurately characterized as consequentialist (though valuing equality and liberty at least as highly as welfare) rather than as deontological.

51. See, e.g., SHELLY KAGAN, *NORMATIVE ETHICS* 9 (1998); MICHAEL SLOTE, *COMMON-SENSE MORALITY AND CONSEQUENTIALISM* (1985).

today? Should we look only at a national community? At a state community? A more local one? If the inquiry were in service of political legitimacy, then the political community would of course be the appropriate focus. But since we are trying to evaluate the content of retributive principles that citizens might not now accept, but have reason to accept, the appropriate community could easily be wider (or narrower).

The appropriate criterion of community will not be purely geographical. Rather, since the function of the criterion is to justify the content of retributivist principles, it is necessary to analyze both what type of truth we are seeking, and what methods are most likely to give us knowledge of that truth. Regrettably, these metaphysical and epistemological issues do not lend themselves to a simple, workable criterion (geographical or otherwise) for testing the truth and justifiability of retributive norms.

In this light, the relevant questions and difficulties will concern whether community or “commonsense” views must, in order to be given weight, be widespread, reflective, long-considered, free of bias, or rooted in articulable principle. An opinion poll will not satisfactorily resolve these difficulties. A more careful study such as that of Robinson and Darley is surely an improvement, and thus worthy of consideration;<sup>52</sup> but much depends on which of these difficulties we find most critical to resolve.<sup>53</sup>

---

52. Slobogin notes some important difficulties that Robinson and Darley’s survey methodology poses for a retributive theory: citizens might not have thought deeply about the issues; they might be ignorant of the legal context, and thus of the real significance of their opinions; and their views are often extremely changeable and fragile. See Slobogin, *supra* note 4, at 324, 325. However, Slobogin concludes that community views are almost never valuable. See *id.* This is an overstatement. Nor do I agree that “if theoretical arguments are necessary for determining when lay opinion should influence retributive judgments, one doesn’t need the opinion in the first place.” *Id.* at 325. Whether this is true depends on whether a plausible argument can account for the role of lay opinions; this Article tries to provide such an argument.

53. In both his early and later work, Rawls offers possible guidance. His criteria for accepting intuitions as sufficiently “considered” to be eligible as possible “provision fixed points” for “reflective equilibrium” include: whether the judgments are made with hesitation, or with little confidence, or when upset or frightened, or when we stand to gain. See RAWLS, *supra* note 19, at 47-48.

In his later work, *Political Liberalism*, Rawls describes the “burdens of judgment” as the sources, or causes, of disagreement between reasonable people over important issues of political justice. See JOHN RAWLS, *POLITICAL LIBERALISM* 54-58 (1993). The more obvious sources, according to Rawls, are complexity of evidence; the weight of different considerations; indeterminacy of our concepts; our total life experiences as they affect how we view evidence and weight considerations; the incommensurability and variety of normative considerations on both sides of an issue; and the need to set priorities and limits among conflicting values. See *id.* at 56-57. Although Rawls invokes the burdens of judgment for a different theoretical purpose, presumably the method of reflective equilibrium will be more persuasive if it relies on considered judgments

Ultimately, since the point of consulting community views or considered intuitions is to develop a coherence theory of arriving at moral truth, these views have only indirect significance. They provide some of the raw "data" for the moral theory, sometimes serving as counterexamples, sometimes as guides for refining the principles; but, as Rawls suggests, we also might have sufficient confidence in the principles themselves that we will reject intuitions inconsistent with them.<sup>54</sup> (An important question is whether, if no principled basis can ultimately be adduced for an intuition or view, we *should* reject that view.)<sup>55</sup>

Consider, for example, the problem of "moral luck," of whether the fortuitous occurrence or nonoccurrence of harm that a culpable actor intended or risked should affect his deserved punishment. Whether an intended murder victim dies in the hospital or instead survives is, in my view, irrelevant to retributive desert. I see no principled reason for recognizing such "moral luck,"<sup>56</sup> nor do I have the unshakeable conviction that the occurrence of harm has independent moral significance. But some other retributivists disagree, either on the ground that a principled distinction does exist,<sup>57</sup> or, more to the current point, on the ground that a strong moral intuition, though difficult or impossible to articulate, supports their position.<sup>58</sup>

The relative weight to be given to moral intuitions and to articulable principles is ultimately a philosophical question, and a controversial one at that. Unfortunately, the question is both difficult and unavoidable, whether the substantive moral position in question is consequentialist or deontological, utilitarian or retributivist. Identifying "community values" in any ordinary sense of the term will provide only the very beginning of an answer.

---

reached under circumstances where the effects of the burdens of judgment are minimized.

54. See RAWLS, *supra* note 19, at 19.

55. For the argument that retributivist theory should accept stubbornly held views endorsing moral luck (in the context of blaming a person more if a harm fortuitously happens to occur, for example, if the victim of a murder attempt dies), see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* ch. 6 (1978); see also MOORE, *supra* note 6, ch. 5.

56. For a good statement of this position, see Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 3, 17-27 (1994).

57. See R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 184-92 (1990); MOORE, *supra* note 6, ch. 5.

58. See FLETCHER, *supra* note 55, at 473-83. Fletcher suggests a possible rationale for the distinction, but also concedes that it "is a deeply entrenched practice" that "has yet to receive an adequate explanation and theoretical justification." *Id.* at 474. Even Moore's careful effort to provide a principled explanation places significant weight on those judgments about particular cases that many find intuitively compelling, see MOORE, *supra* note 6, at 225, and on experiences of greater resentment at those who cause harm, greater guilt about causing harm, and the experience of choice. See *id.* at 229-33.

Justification is not the only difficult metaethical question here. We also need to consider the relevance of the question whether moral norms are objective or universal. Let me suggest three brief points on that issue.

First, even a universalistic or moral realist approach should concede epistemic fallibility. Neither legislators, nor judges, nor juries, nor even professional academics who devote their lives to developing the best retributive theories, have any purchase on moral truth. It is perfectly consistent with universalism to take a modest view and to respect “community values” or “lay opinions” as providing at least an important check or test of any particular approach.<sup>59</sup> Moreover, insofar as fallible legal and political institutions are the entities that will be enforcing moral truth, the political values of tolerance and legitimacy counsel strongly against some possible elaborations of the universalist approach. A dangerous example would be a perfectionist political view that merely enforces what the majority believes to be immoral behavior.<sup>60</sup>

Second, a very different reason for considering community views is the belief that the proper criterion of moral truth is relativistic, and relativistic in a specific way—namely, dependent on the moral beliefs of the community. On this approach, community views are indeed dispositive, for they *define* what morality requires, permits, or prohibits. Perhaps some traditional retributivists, who believe that “just deserts” is whatever the community says it is, hold this view.<sup>61</sup>

---

59. This does depend, however, on one’s epistemological theory. If one believes that moral intuitions are completely unreliable and irrelevant to discovering moral truth, then “community views” of this sort can be safely ignored. On the other hand, insofar as legal institutions themselves must justify their rules to citizens, moral intuitions remain relevant if ignoring them would undermine such legitimacy.

60. For a clear exposition of the distinction between a nonrelativistic view of morality and the view that legal institutions must account for our epistemic fallibility in discovering moral truth, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 164-87 (1999) (highlighting “The Irrelevance of Moral Objectivity”); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 49-51 (1993).

61. Note an ambiguity of this view, however. A particular community might be committed to a retributivist, rather than utilitarian, view of punishment; and on the relativist criterion of moral truth, it would then follow that retributivism rather than utilitarianism is true in that community. But the question still remains: What is the *content* of this retributivist theory? Suppose that the type of “retributivism” that the community endorses is: “whatever follows from Kant’s conception of autonomy [perhaps with the qualification: ‘as determined by the consensus of Kantian scholars’!].” Then the more detailed moral intuitions of the community with respect to issues of punishment would be completely irrelevant to the actual content of the retributive theory. Since traditional retributivists undoubtedly do wish to identify those detailed intuitions with the content of the retributive theory, either (1) they assume that the community both endorses retributivism *and* believes that it consists in those detailed views; or (2) they endorse some completely different (and quite possibly *nonrelativistic*) conception of retributivism, but one in which the detailed intuitions



This is not the place for an extended discussion of moral universalism and moral relativism. I do suggest, however, that it is difficult to make sense of most contemporary retributivist theories (theories often put forth in *criticism* of some extant moral practices and legal norms) except on the understanding that the theories claim universal validity.

Third, the debate between universalism and relativism is also quite relevant to an important issue that this Article has already explored—the extent to which changing or varying community values should affect the content of criminal law. For this depends (among other things) on whether changing views of human welfare reflect moral progress and a better understanding of universal moral truth, or instead reflect legitimate moral diversity on a relativistic understanding of moral truth.

Thus, consider one criminal law doctrine that has dramatically changed in recent decades—the law of rape. Traditional doctrine requiring the victim to resist has been replaced with doctrines permitting the threat of force to suffice, or even permitting conviction upon proof that the woman did not affirmatively express consent.<sup>62</sup> On one view, the legal change directly reflects a change in community values. That is, on a relativistic view of the content of retributivist norms, the community's interest in protecting men's sexual freedom has diminished in importance, while its interest in protecting women's autonomy has increased. A balance of values that once was legitimate is no longer so.<sup>63</sup> On another view, however, moral values have not really changed. An invariant standard of respecting the victim's autonomy continues to be applied, but now more honestly and accurately; sexist and, therefore, factually distorted notions of when a woman really consents to sexual intercourse have been replaced with more accurate ones.

On the first view, wide *geographical* variation is also entirely legitimate; in some communities, women's interests are simply valued less than in others. On the second view, both temporal and geographical variation are worrisome, unless they can be explained by differences in

---

of a particular community do provide the content of the conception.

62. See *State ex rel. M.T.S.*, 609 A.2d 1266, 1270-71, 1277 (N.J. 1992).

63. On a nonrelativistic view of morality, is it possible for morality itself to change over time? The question is difficult; in the view of Joseph Raz, the basic answer is: "Yes, but not too radically." See Joseph Raz, *Moral Change and Social Relativism*, 11 *SOC. PHIL. & POL.* 139 (1994). Even if Raz is correct that universalistic morality can change over time, I think it is more plausible to view the enormous temporal changes and geographical variations in criminal law doctrines and practices as not reflecting gradual change in moral principles, but some combination of (a) sudden changes (and great variability) in our imperfect human *knowledge* of invariant principles; and (b) application of invariant norms to widely varying social contexts.

social context that are relevant to the invariant standard.<sup>64</sup> The first view raises the usual problems engendered by relativism. Thus, how, on this view, can moral theory serve as a *critique* of existing social practices? And, in the legal context, how can it ever be legitimate to use law in an effort to *change* prevailing opinions about such matters as consent in rape law?<sup>65</sup> These difficulties militate in favor of a more universalistic approach.

#### IV. THE COMPARATIVE ADVANTAGES OF UTILITARIANISM ARE EXAGGERATED

It is time to reconsider the claim, noted at the outset, that utilitarianism provides a much better and more attractive account than retributivism of the significance of lay or community opinions. This Article has explored the concern that retributive theory is insensitive to community values, and the related concern that it cannot explain changes and community variations in criminal law standards. The previous section suggests that these concerns are sometimes overstated. They are overstated when the retributive principles are invariant, but the application of these principles depends on social context; and when the relevant context legitimately includes facts that change over time or vary between communities. The concerns are also beside the point insofar as the definition of wrongdoing itself might derive from principles other than retributive norms. However, the concerns remain valid for many retributive principles. Even insofar as retributive principles of culpability have their source in private blaming practices, such practices reflect “community values” only in an attenuated sense. And, at the more fundamental level of justification, the “moral intuitions” of “commonsense morality,” which are part of a reflective equilibrium approach, express “community values” only in a loose or diffuse sense.

Nevertheless, retributivism is not at a serious disadvantage relative to utilitarianism in these respects. At the fundamental, second-order level discussed above, utilitarianism presents precisely the same difficulties. For example, how are we to decide whether “utility” itself should be understood as preference satisfaction or as pleasure, as subjective or partly objective, and so forth? (More concretely, should it

---

64. As an example of the latter, punishment for rape in Bangladesh can justifiably be greater than punishment for rape in the United States, in light of the social fact that rape victims in Bangladesh suffer total social ostracism. See LAWRENCE, *supra* note 45, at 223 n.49 (citing von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 45, at 14).

65. See Matt Matravers, Book Review, 11 UTILITAS 246, 248 (1999) (reviewing ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1993)).

count all preferences, or instead “launder” out those which are racist, sexist, sadistic, or otherwise “antisocial?”) Should we decide these issues by reflective equilibrium, or by consulting commonsense morality? Answering these questions reproduces the same difficulties encountered in analyzing and justifying a retributivist approach.

Furthermore, as explained earlier, whether a utilitarian theory incorporates lay opinions generally, or lay opinions about just deserts in particular, depends on the specific account of intrinsic human value that the theory endorses. Both retributivism and utilitarianism require such an account. But many utilitarian theories endorse an account that is vulnerable to serious criticism. For example, on many preference-satisfaction or other mental-state views, if most people respond with as much anger to an eleven-year-old murderer as to a twenty-one-year-old murderer, or if they feel no more sympathy, then those preferences or emotional reactions affect the utilitarian calculus. That people are (on some particular retributivist account) *wrong* to feel this way might be simply irrelevant. Utilitarianism gives no *intrinsic* significance to the *reasons* why members of the public disapprove or are upset by the criminal conduct of others. Popular opinions are merely inputs in computing aggregate welfare.

The approach of Robinson and Darley is more discriminating than this. They believe that popular views about just deserts must be considered because people who do not see the criminal law system as just are less likely to comply.<sup>66</sup> Still, apart from the question of whether this empirical prediction is true,<sup>67</sup> the usual deontological objection applies. Their argument only requires that government persuade people that the criminal justice system is reasonably just; it does not require that the system actually *be* reasonably just. Government should, in principle, expend resources to deceive people into believing that the system is just (e.g. by suppressing information about injustices) if this would be cheaper than expending resources to improve the actual justice of the system.

Nor does utilitarianism offer a straightforward account of the relevant “community” whose preferences or desires should be considered. Again, the democratic process issue must be put to one side. Whatever the proper conditions of democratic accountability, the question remains: How should the best utilitarian theory take account of “community” views?

---

66. See ROBINSON & DARLEY, *supra* note 1, at 5.

67. For doubts, see Slobogin, *supra* note 4, at 326-27.

Is the relevant community defined geographically? But why examine the effects of criminal legislation only on citizens within the political jurisdiction? To be sure, principles of jurisdiction and federalism do constrain the proper scope of state and federal criminal legislation. But insofar as utilitarian theory itself is concerned, the appropriate domain for aggregating utility is all living persons, or perhaps all sentient life. Ideally, then, criminal legislation should be designed to promote general utility as much as possible, quite apart from jurisdictional boundaries.

The Robinson and Darley approach might best be understood, however, as addressing only a much narrower question: What are the utilitarian benefits of reinforcing community values about just deserts? Conformity to the criminal law is secured, not just by the external threat of criminal sanction, but through internal moral sanctions.<sup>68</sup> If legislators do not conscientiously attempt to keep criminal laws roughly in line with lay opinions about just deserts, then moral sanctions will lose some of their force in preventing crime.

Assuming that this empirical hypothesis is true, two important questions arise. First, how significant is this utilitarian benefit? If the benefit is not that large, it might actually be outweighed by the utilitarian *costs* of securing correspondence between community values about just deserts and the content of the criminal law. Suppose, as Robinson and Darley suggest, that lay opinions support broader use of defensive force, or more individualized tests of negligence, than under current law. If revision of these doctrines to conform to community values would have negative consequences (e.g., by encouraging fraudulent claims of self-defense, or by excusing negligence when the actor and others in his situation really could have done otherwise), then a utilitarian must weigh the relative benefits and costs of achieving correspondence. She might decide, in the end, that reinforcing community values is counterproductive.<sup>69</sup>

Second, what “community” and whose values are relevant, if the point is to reinforce the power of internal moral sanctions? Again, the answer need not be the political community. Strengthening internal

---

68. See ROBINSON & DARLEY, *supra* note 1, at 201 (“Most people obey the law not because they fear punishment but because they see themselves as persons who want to do the right thing.”).

69. Conversely, suppose community views of just deserts would support *increased* penalties relative to current law (for example, greatly increasing punishment when a more serious harm fortuitously occurs, without regard to the actor’s culpability). Then once again, it is quite possible that reinforcing community values would be counterproductive. If no actual crime prevention benefit is achieved, then the economic and social cost of imposing that extra punishment might not be warranted if the only other utilitarian benefit is a very slight marginal reinforcement of community norms.

norms across a far broader geographical community would ordinarily be far more potent. To be sure, community views might differ on some issues according to geography. Texans might be more supportive of a broad right to self-defense than residents of Massachusetts. But it does not follow that the failure of the two states to conform their criminal legislation to their own constituents' views will perceptibly undermine compliance with the law. It might turn out that so long as the major corpus of the criminal law in each state is in very rough accord with its citizens' values, the power of internal moral sanctions will be maintained; discordance beyond that threshold might have virtually no effect.<sup>70</sup>

The important questions here are how internal moral norms operate, and what types of beliefs and motivational conditions they require to be effective. Suffice it to say that the questions are quite complex. But it would not be surprising if only a profound discordance between criminal law norms and pervasive, long-continued social practice would significantly undermine general respect for the law. (The American experience with Prohibition comes to mind.) If this is true, then the relevant "community" turns out to be quite extensive and amorphous, both geographically and temporally.<sup>71</sup>

Thus, the utilitarian approach that Robinson and Darley endorse, and that they claim reflects community views about just deserts, does not seem more tractable than a retributive approach.

## V. PATHS NOT TAKEN

The following are some paths not taken in this Article. Although the paths might seem to be promising ways to include community values in retributivist norms, I conclude that each is a limited, unhelpful or irrelevant tangent, not a genuine path.

---

70. See Slobogin, *supra* note 4, at 326.

71. What about racial differences? Here we really do have significant differences in "community" views about the fairness of the criminal justice system, especially the fairness of its administration, but also the fairness of the content of its laws. These differences surely do undermine minorities' respect for law. At the same time, however, it is by no means clear how a utilitarian should respond. Should she explicitly vary criteria for administration of the criminal law, or for its content, according to the race of the defendant? Should black defendants be acquitted more readily than white defendants? Should laws that disproportionately result in the incarceration of blacks be found invalid? Such a response might increase minorities' respect for the law, but at the expense of increasing the disrespect of the majority. On a purely utilitarian view that attaches no intrinsic value to racial equality, the only question would be which approach is socially most costly.

### A. *The Role of the Jury*

In the American system of criminal justice, the jury plays a vital role in applying criminal norms, and also, occasionally, in nullifying applicable norms when the jury believes them to be unjust. Do these practices reveal that retributive principles genuinely reflect community views? Only to a limited degree. Although jury input indeed works as a “safety valve” of sorts,<sup>72</sup> an individual jury is too ill-informed, and its role too episodic, to serve as a source of reliable moral advice of broad scope.

To be sure, as a practical matter, the jury exercises significant interpretive authority in elucidating the meaning of vague criminal law norms. But this authority does not seem intrinsic to retributivism. A more detailed criminal code, or a larger role for the trial judge relative to the jury in interpreting the meaning of vague or ambiguous criminal prohibitions, each seems consistent with affording offenders their just deserts. Moreover, eliminating the jury’s power of nullification, or even abolishing jury trials altogether, seems to be consistent with most versions of retributivism (taken by themselves). Rather, the objections to abolishing nullification or jury trials derive from other political values, especially a certain form of democratic accountability.

### B. *Criminal Law Norms Expressly Incorporating Community Values*

Some criminal law standards explicitly make community values of a certain kind relevant to criminal liability. All “reasonable person” criteria can be so understood. Such criteria are employed in defining certain crimes (for example, manslaughter), or in qualifying defenses (for example, reasonable self-defense; a person of “reasonable firmness” in duress; and “reasonable excuse” in provocation).

However, this role of community values is subsidiary. The scope of the most serious crimes, at least, does not depend on a case-by-case explicit determination of community values. And, in principle, most modern retributivist views would be satisfied by full *ex ante* specification of legal standards, without any reasonable person criteria.

Moreover, “reasonable person” standards are not distinctive of retributivism. Utilitarians can also justify some use of reasonableness tests—for example, they might wish to guard against the proof and fraud problems that a purely subjective test might create.

---

72. See Slobogin, *supra* note 4, at 333.

To be sure, one could imagine a purely standard-based and highly decentralized retributivist approach to punishment, under which the jury was told only: "impose whatever punishment you believe (or, 'your community believes') that the actor deserves." But, quite apart from the unequal administration and lack of fair notice problems that such an approach would create, its more basic defect is a lack of determinate content. There is simply no way of knowing whether it will succeed in imposing punishment on actors in accordance with their just deserts, as articulated by some defensible set of retributive principles. If one believes that there really are no articulable principles of just deserts, this might be the sensible approach to take; but then why pretend that the approach is retributivist? (The same objection would apply if utilitarian principles were implemented by instructing the jury, without elaboration: "impose whatever punishment you believe would maximize total utility (or welfare).")

### C. *Expressive Theories of Punishment*

Recently, many criminal law theorists have advocated so-called "expressive" or denunciatory theories of punishment.<sup>73</sup> These theories often resemble, or are even offered as instances of, retributivist theories. Advocates of expressionism point out that a formal, public condemnation accompanies criminal punishment, and that such condemnation is characteristic of criminal penalties.<sup>74</sup> (Public condemnation is usually lacking when a noncriminal sanction, such as tort liability, is imposed.) Pure retributivism, it seems, could be accomplished by secret state punishment of the guilty; expressivism might explain why the pure theory is inadequate as an explanation and justification of punishment practice. Moreover, and most relevant to our topic, public denunciation seems to bring the "community" into the picture in a way that pure retributivism does not. For a judgment that the offender deserves criminal punishment is necessarily a solemn and official condemnation by the political community that enforces the relevant criminal law.

But the expressivist approach to punishment seems either problematic or redundant. Taken very literally, the approach focuses only on the condemnatory meaning of a criminal sentence. Yet it seems obvious that the point of punishment is not just to express strong disapproval, but actually to impose harsh penalties on those who have unjustifiably

---

73. See, e.g., Herbert Morris, *Professor Murphy on Liberalism and Retributivism*, 37 ARIZ. L. REV. 95, 97 (1995) (noting Professor Feinberg's expressive theory of punishment).

74. See *id.*

and inexcusably committed serious offenses. Instead, most expressivist arguments really seem to be instances of either retributive or consequentialist rationales: Public authorities condemn an offender's actions by means of a harsh penalty because that is what he justly deserves, or because the penalty, and the message of condemnation, will reinforce social norms and thereby discourage him or others from committing offenses in the future.

As for the claim that a purely retributive rationale cannot explain why secret punishment is illegitimate, an explanation might well be found in largely independent political values, including the requirement that state authorities be accountable for their decisions, especially decisions that deprive citizens of liberty. (Such values similarly explain why the state should publicize the reasons why it incarcerates the mentally ill, although such incarceration is imposed in the name of treatment, not punishment.)

Finally, with respect to the argument that denunciatory approaches better explain how the "community" plays a distinctive role in criminal punishment, the argument proves too little. There might be good reasons, deriving both from retributive rationales and from other norms, to have the official state apparatus proclaim that the offender has violated its laws. In this minimal sense, perhaps, the "community" (meaning only its official political embodiment) should declare the offender's guilt. But the questions remain whether and how the *values* of that political community (or some other community) should be incorporated into the criminal law. Thus, the Commonwealth of Massachusetts indeed authorizes its judges to impose guilty verdicts and official sanctions. But whether and how those public acts should (under some particular retributive approach) embody the opinions and values of the citizens of Massachusetts in determining just deserts is a far more difficult question, the question addressed in this Article.

## VI. CONCLUSION

Rather than recapitulate the analysis to this point, I turn briefly to a final issue—the political risks of retributivism. In this paper, I have tried to draw a clear distinction between questions of content—namely, whether and how community values are relevant to the content of a retributive rationale for punishment—and questions of democratic process—namely, whether and how community values (whether premised on retributivist, utilitarian, or other moral beliefs) should be implemented in criminal legislation.



But it is fair to ask whether the distinction can be honored in practice. More concretely, modern retributivists should address honestly the concern that retributivism is just too dangerous a theory of criminal law, in light of the risks that citizens and legislators will (in good or bad faith) interpret it as justifying extraordinarily harsh punishments.<sup>75</sup> The fear and revulsion that crimes can engender, together with often-sensationalized portrayals of crime in the media, pose a serious risk that ordinary citizens will demonize criminals<sup>76</sup> and will support ill-considered and unjustifiably harsh legislation. Retributivism is a punishment rationale that is especially dangerous in this respect: Because retributivists ignore or significantly downplay the consequential costs and benefits of punishment, they cannot rely on inefficacy and excessive cost as arguments against unduly harsh punishment. To be sure, the extraordinary harshness of much recent criminal legislation can be attributed to public support for a number of punishment rationales, including incapacitation and deterrence; but retribution is certainly among the explanations.<sup>77</sup>

A narrower issue is whether opinion surveys or other sources of community opinion can be trusted in a climate of fear and demonization. At the very least, the questions in such surveys should be posed with sensitivity to the risks of community prejudice (for example, eliminating gruesome depiction of facts, or asking about crimes that the addressees can imagine themselves committing or being tempted to commit).

More broadly, contemporary liberal retributivists who believe that determining an actor's just deserts requires sensitivity to the actor's cul-

---

75. Consider Brathwaite and Pettit's daunting warning:

When you play the game of criminal justice on the field of retribution, you play it on the home ground of conservative law-and-order politicians. You give full rein to those who play to the sense of normality of the majority, urging them to tyrannize the minority. Once all the players agree that retribution, or giving people what they deserve, is the rationale for punishment, the genteel visions of liberal retributivists count for naught.

JOHN BRATHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 6-7 (1990). See also JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* ch II, § 16 (1970 edition, J. Burns & H.L.A. Hart eds.) (arguing that "[t]he principle of sympathy and antipathy [today understood as the retributivist principle] is most apt to err on the side of severity").

76. On the risks of demonization, see SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 60 (1998); see also David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1652 (1992) (discussing the tendency to extend full criminal punishment to offenders in the absence of a principled account of the conditions that mitigate the offense).

77. See David Dolinko, *The Future of Punishment*, 46 *UCLA L. REV.* 1719, 1720 (1999).

pability as well as to the degree of harm he causes, need to take these concerns seriously in such areas as: the treatment of children as adults, the failure to give weight to evidence of mental retardation and mental disability, extraordinary penalties for drug crimes, and the prevalence of draconian “three-strikes” laws.<sup>78</sup>

Finally, two lessons of this Article are the complexity of the connection between “community values” and punishment rationales, and the concomitant difficulty of identifying which “community values” are relevant. We face problems of democratic accountability, of explicating the content of a retributive or utilitarian rationale, and of justifying a punishment rationale at a deeper level. None of these problems is adequately resolved by accepting at face value whatever sentiments the community expresses. To be sure, the depth and pervasiveness of moral indignation at a criminal act are relevant data in assessing the punishment that the act justly deserves. The fallibility of human reasoning argues for testing general principles against firmly held moral intuitions. Nevertheless, the social context in which the public develops its retributive reactions may understandably lead to prejudice, misunderstanding, and ill-considered, volatile moral judgments. To those who suffer criminal punishment in the name of retribution, and also to the victims and members of the public who cry out for retribution, we owe a more principled explanation and justification.

---

78. For a helpful survey, *see id.* at 1721-23.

\* \* \*