

Larry Alexander

"The Doomsday Machine: Proportionality, Punishment and Prevention", *The Monist*, 1980.

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### *3. The Enterprise of Prevention and the Principle of Proportional Response*

The enterprise of retribution has, as we have seen, an array of philosophical difficulties. What is the proper basis of retributive desert—act or character—and what is the role of luck in that basis? Does ill-desert permit, justify, or compel retribution? Is retributive desert comparative or non-comparative, and is it distinct from positive, distributive desert? And there are other difficulties, to only some of which I have alluded. But despite those difficulties, the intuitive support for the enterprise of retribution remains strong, especially for two related principles of the enterprise on which all retributivists agree: no punishment of the innocent, and no punishment greater than culpability. The two are related if culpability is a matter of degree; once one is punished to the extent of his culpability, further punishment is “undeserved” and thus tantamount to punishment of the innocent.

The principle forbidding punishment greater than culpability, which I label the *principle of proportionality*, will be the focus of this section of the Article. It is a principle that is important not only for its role in the retributivists’ attack on excessive punishment, but also for its role in the American legal system’s limit on the amount of force that can be used to defend rights. I intend to demonstrate, not that the principle of proportionality is mistaken, but rather that it is often invoked where it does not in fact apply. In short, although some instances of “punishment” are in fact applications of the *enterprise of retribution* and thus limited by the principle of propor-



tionality, other instances are applications of the *enterprise of prevention*. In the latter enterprise, the principle of proportionality in its ordinary form plays no role.

I begin my discussion of the principle of proportionality by asking the reader to consider an example commonly used by retributivists to demonstrate the concept of excessive punishment violative of the principle of proportionality—the example of hanging pickpockets in Victorian England. (I really don't know or care if they did hang pickpockets, or cut off their hands, or what, but the example is a good one, fictitious or not.) Was such punishment for the minor crime of pickpocketing excessive, if one assumes that the punishment did have some deterrent effect? (If it had had a perfect deterrent effect, of course, it would not have been a problem, as it would never have been used.)

If the reader feels that hanging pickpockets was excessive—and most people I have polled feel that way—I now ask the reader to consider a product solely of the imagination. Assume there is a super-sophisticated satellite that can detect all criminal acts and determine the mental state of the actors. (The society that has invented this device has made criminal only those acts that are clearly violations of the moral rights of others.) If the satellite finds that the actor knew his act was a crime, that he had no recognized excuse or justification for committing it, that he was not acting in the heat of passion or under duress, and that he was not too young, enfeebled, mentally unbalanced, and so forth to be deemed without capacity to commit a crime, the satellite immediately—and without regard to the seriousness of the crime—zaps him with a disintegration ray. Once the satellite detects the crime, it is impossible to prevent punishment of the criminal, no matter how merciful the authorities might feel. The definitions of crimes and the punishments attached thereto can be changed only prospectively. The entire population is informed of the existence of the satellite and what it does.

Now, if, as hypothesized, the punishment of pickpockets is regarded as excessive, is the punishment meted out by my imaginary device (the Doomsday Machine, I call it<sup>6</sup>)—obliteration for all crimes committed with certain mental states, right down to intentional overparking—excessive?

At first the reader might feel that the Doomsday Machine is indistinguishable from the practices of Victorian England, and so, for consistency's sake, answer that its punishment *is* excessive. But something about the Doomsday Machine example as it relates to the notion of excessive "punishment" is no doubt unsettling (aside from the idea of being obliterated by a ray for a parking ticket). So consider some further hypotheticals.

Suppose a man receives a phone call from a burglar who says, "I've been spying on you and know you're going out tonight. I plan to burglarize your house in order to steal your valuables. But I want you to know that I have a



very bad heart, and if you hide your valuables, I might very well suffer a heart attack by expending a lot of energy and suffering anxiety in looking for them. So please leave them in plain sight; for I am definitely going to enter your house and look for them until I find them or drop dead." The listener hangs up the phone, takes his valuables, hides them on the very top shelf of his closet, and leaves. He returns home and finds the burglar, dead from a heart attack, on the floor. Excessive punishment for a non-violent burglary?

Consider some other examples that I feel are parallel. What if a man keeps a moat to protect his castle (or an electric fence to protect his house), and he receives a letter from someone who says that the first time the castle (house) is deserted he will attempt to enter it; and because he cannot swim (is not shockproof), his death will be on the owner's hands if the moat is not drained (the current not turned off). Is there a duty to drain the moat (shut off the current) in order to avoid excessive punishment? And what if one hides his jewels on top of an unscalable cliff after having been told by a thief that the latter would attempt to climb it if the jewels were placed there?

I might go on in my hypotheticals to drag out vicious dogs, crocodiles, and spring guns to protect persons from petty crimes, and pit these devices against petty criminals, whose common denominator is that they all know of the certain consequences of their acts, know that their acts are illegal, are determined to proceed with them anyway, and are acting premeditatedly without any recognized legal excuse, justification, or incapacity. (In all of my hypotheticals the protective devices are somehow programmed, like the Doomsday Machine, to be absolutely no threat to anyone acting in ignorance of their existence, or on a mistake of law or fact, or with a legal excuse, justification, or incapacity.)

At this point I expect a certain response to materialize among most of the readers. Most will not feel the above examples involve excessive punishment. Indeed, many are probably unsure whether the examples involve "punishment" at all. Perhaps only a few readers will maintain that in the examples one has a duty to render a violation of his rights reasonably safe in the face of a violator's threat of, in effect, suicide.

But if these examples do not involve excessive punishment, then the Doomsday Machine does not mete out excessive punishment either. The structure of the Doomsday Machine hypothetical and the other hypotheticals is the same. A person bent on violating another's moral rights is fully aware of a condition that renders such an attempt life-threatening to him but not to others who might have an excuse or justification or who might be unaware of the dangerous condition. There is a trap, but it is only one for the wary. And once the violation occurs or reaches a certain stage, no human intervention will be effective to prevent the threat from being carried out.



But if the Domsday Machine does not mete out excessive punishment, then perhaps neither did those oft-maligned judges in Victorian England. Does the Domsday Machine differ in any relevant respect from an ordinary system of criminal law that imposes harsh sentences, if the harsh sentences are imposed only under the same conditions as restrict the Domsday Machine?

Well, one difference surely is that getting caught and severely punished are never certainties for criminals facing an ordinary system of criminal law. Indeed, my Domsday Machine and other hypotheticals all made the choice to commit a criminal act indistinguishable from the choice to commit suicide. In the real world, the chances of escaping detection or conviction are substantial.

Most people I have polled, however, when asked whether it would make any difference to the question of excessive punishment if the Domsday Machine were imperfect and could detect only, say, one out of three crimes (or the moat were swimmable, the shock survivable, the cliff scalable, and so forth, one in three times), replied that it would not. I concur. The difference, if any, between Domsday Machine "punishments" and ordinary harsh punishments must lie in something other than the chance of escaping them.

One difference between the Domsday Machine and ordinary harsh punishments lies in the Machine's infallibility in detecting all the factors relevant to guilt, in contrast to the fallibility of even the most enlightened criminal justice system. But fallibility, logically, has more to do with whether we should punish at all, or how harsh our harshest punishment should be (Black, 1974), than with whether our punishments should be scaled according to the gravity of the crime and should not exceed the supposed "desert" of the criminal (assuming we have not been fallible in assessing it). We are equally as fallible in determining who is guilty of petty larceny as we are in determining who is guilty of murder. If the former crime but not the latter were punishable by death, fallibility would be as great but no greater a concern.

Another difference between the Domsday Machine and ordinary harsh punishments lies in the fact that the punishment the former metes out occurs substantially contemporaneously with commission of the crime. However, when I reprogrammed the Domsday Machine to mete out the punishment a day, or six months, or a year after the crime, none of the participants in my informal polls felt that the change was morally significant, especially after I replaced, in my other hypotheticals, my moats, fences, dogs, crocodiles, and so forth, with snakes whose venom took a year to kill.

Another possible distinction between some of my hypotheticals, although not my Domsday Machine, and ordinary harsh punishments is that the former involve a danger that materializes *before* the criminal



achieves his aim. The heart attack, the drowning in the moat, the shock from the electric fence—all occur before the criminal makes off with the booty and thus look like true instances of prevention. The Doomsday Machine and the Victorian punishments occurred *after* the crime and thus look like excessive punishment. This distinction is only apparent, however. First, in all of the hypotheticals a violation of a right had already occurred when the violator triggered the death-dealing mechanism. True, in some of the hypotheticals, the triggering violation—for example, trespass or breaking and entering—was but a means to a further, and usually more serious, violation—for example, theft. But in all cases there was *some* prior violation. Moreover, if attempted violations suffice to trigger just punishment, then whether the “excessive” punishment meted out in the hypotheticals occurs before or after a consummated violation appears to be irrelevant so long as there is an attempted violation.

If violations have occurred in all the hypotheticals, perhaps the hypotheticals can be distinguished on a different though related basis. In some of the hypotheticals, the criminal’s death, though it occurs after he violates the victim’s rights, nonetheless prevents a further or more serious violation. In the examples of the Doomsday Machine and the hanging of pickpockets, there may be no further or more serious violation contemplated by the criminal to be prevented by his death. (An extreme example where the death of the criminal cannot prevent the harm of a violation is that of the diamond that carries the notice, “Anyone who reads and understands this notice and who, without excuse or justification, attempts to steal this diamond, will be blown up by a bomb inside it.” Because the explosion will destroy the diamond along with the thief, it will not prevent the harm.) Thus, although in all the examples the *threat* is designed to *prevent the harms of violations*, in only some, not including the Doomsday Machine, is the *consummation of the threat* designed to *prevent the harms of violations*.

I confess that although I perceive the distinction just described, I fail to perceive its relevance to the question of whether the threatened injury is excessive, that is, morally impermissible. If the potential victim is willing to create a particular risk to *his* rights in order to increase the threat to violators and thus to decrease the overall risk to his rights, I see no valid moral objection on behalf of the violators.

The only remaining difference between the Doomsday Machine and ordinary harsh punishments that might be deemed significant is that the Doomsday Machine, unlike ordinary punishment, requires no human intervention between the criminal act and the punishment. (Indeed, in my hypothetical, human intervention to prevent the punishment is ineffectual.) Is our moral compunction against imposing harsh punishment, despite such punishment’s deterrent value, related to our inability to make the punishment



automatic and not subject to our control after the criminal act? Is the relevant analogy to a judge in a regime of harsh punishment that of a person returning to his castle to find a forewarned trespasser in the middle of the moat being attacked by crocodiles that the owner can call off by means of a whistle? Would the owner be morally compelled to call them off? If so, then perhaps we have a great incentive for building a Doomsday Machine.<sup>7</sup> If not, then the Doomsday Machine example draws into question the whole concept of excessive punishment and our adverse moral reaction to it.

Once it is clear that it makes no difference whether the disproportionate harm befalls the criminal before or after he succeeds in violating another's rights, so long as he is threatened with the harm before he acts, we can see that the electric fence, the moat, the cliff, and so forth, on the one hand, and harsh criminal punishment administered by human beings on the other, as well as the Doomsday Machine programmed for either instantaneous or delayed zapping, are all related phenomena. They are all instances of the *enterprise of prevention*, an enterprise that I maintain appears to be morally justifiable when conducted according to certain principles, among which is *not* the principle of proportionality. The principles which are germane to proper conduct of the enterprise of prevention are the principle that requires that the person threatened with the harm have no right to engage in the act which triggers the harm (the *wrongful act principle*) and the principle that requires adequate notice of the threat before it may be carried out (the *notice principle*).

Once these two principles are complied with, a harm disproportionate to ill-desert may be imposed on an actor, even if it is more harm than is necessary to effect a similar degree of prevention of the act in question. Thus, the sheriff of a small town where the courthouse lawn is trespassed upon by five hundred sitting sunbathers need not restrict himself to force proportionate to the wrong of trespassing in order to remove the trespassers. Nor need he restrict himself to the least force sufficient to remove them. He might, for example, be able to carry them off bodily through extreme physical exertion on his part, or by severe depletion of the town's budget to hire deputies to carry them. But he need not choose these minimally harmful (to the trespassers) options. He may, instead, place a machine gun on the roof of the courthouse, inform the sunbathers that the machine gun is programmed to begin spraying the lawn in five minutes, and leave. In other words, he may set up a sort of Doomsday Machine and avoid the expenses of less draconian measures. Once the trespassers have been warned (the *notice principle*), and because they have no right to be trespassing in the first place (the *wrongful act principle*), they have no right to demand proportional response if that is more costly in terms of other values. Moreover, if the sheriff can set up the *automatic* machine gun, then conceivably it would follow that he could man the machine gun;<sup>8</sup>



and if he could man the machine gun, then it would seem to follow that the town council could pass a new trespass ordinance mandating death by machine gunning as the punishment (to become effective at a time when the trespassers have had notice of the new ordinance and a reasonable time to get off the lawn). *When "punishment" of criminals is in pursuance of the enterprise of prevention, it does not conflict with but rather supersedes the enterprise of retribution and the latter's principle of proportionality.*<sup>9</sup>

#### 4. Difficulties in the Enterprise of Prevention

##### A. Difficulties Related to the Wrongful Act Principle

Before the disproportionate harm may be imposed under the enterprise of prevention, it must be established that the subject of harm has no right to undertake the act. After all, is it not wrong almost by definition to impose a risk on people in order to deter certain acts where the people have a right to engage in those very acts?

Consider, however, people who mistakenly but sincerely believe they have a right to perform an act that in fact violates the rights of others. They may be conscientious objectors, morally-motivated revolutionaries, ordinary soldiers on the wrong side of a war, or other "innocent" aggressors. Let us suppose that they are all violating rights but do not believe they are and do not merit ill-desert under the enterprise of retribution. (Indeed, were their desert all that mattered, they might be deserving of positive benefits.)

Now it is one of the virtues of positing a legitimate enterprise of prevention that can supersede the enterprise of retribution and its restrictive principle of proportionality that it appears to give us a moral basis for punishing the morally righteous offender.<sup>10</sup> Thus, we can say that so long as the moral offender is in fact offending and has in fact been warned of the consequences in store for him, he may be punished despite his not "deserving" (retributively) any punishment.

Although I do believe the enterprise of prevention has less difficulty with the punishment of the moral violator than does the enterprise of retribution, I am not convinced that it is totally free from difficulty. It is one thing to say we need not sacrifice time, energy, or expense to avoid harsh preventive measures where ordinary violators of our rights are concerned. But is that true where our threat is directed toward making more costly a choice that a violator believes (mistakenly) he has a moral duty to make?<sup>11</sup> Should we not rather be forced to sacrifice at least some of our interests in order to avoid a greater sacrifice by the offenders who are the victims of a moral error; that is, should we not consider their error a form of bad luck that should be redistributed so that everyone sacrifices to some extent?<sup>12</sup>



I leave this difficulty with the enterprise of prevention, a difficulty that may after all apply to only a small minority of offenders, and turn to a related difficulty. Sometimes it is deemed advisable to prevent or to reduce by threat of harm the frequency of a particular act even though the act will sometimes be morally permissible or even morally required. Placing speed bumps in roads to harm would-be speeders harms those who are morally required to speed (for example, because they are carrying a very ill person to a hospital). Wertheimer (1976), pp. 196, 197 n.46. Defining criminal acts overbroadly threatens harm to actors whose acts would be permissible or morally required. The speed bumps obviously cannot make exceptions (although speeders with excuses might be compensated for damages). But neither can the authors of overbroad laws make exceptions in many cases—for example, those cases in which narrowing the law would render it too vague to give adequate notice, to be efficiently administered, or to check abuses of discretion, or those cases in which it is expected and desirable that some persons violate the law. (For example, laws forbidding poaching are often intentionally more restrictive than desirable because some degree of noncompliance is expected. Note (1977), pp. 696–702.) These examples illustrate that within any moral theory that assesses acts by their consequences, it is possible that the correct act for A to undertake is to impose harm on B because of B's undertaking what was the correct act for him.<sup>13</sup> Because the practice of prevention is consequentialist, it will on occasion run into this philosophical difficulty, that is, on those occasions where the wrongful act is wrongful only because it falls under an optimific proscription, but not because of *its* consequences (or the consequences intended by the actor).

Finally, strict liability and negligence as bases for criminal punishment raise similar difficulties for the wrongful act principle. There is one good consequentialist reason, that is also the reason for overbroad laws and for not allowing conscientiousness as an excuse, for having some strict liability and negligence crimes: namely, reducing the total number of violations of the rights of the innocent, even if punishing the strictly liable or the negligent is in fact punishment of the innocent.<sup>14</sup> Note (1975); Coleman, pp. 170–71; Coleman (1974), p. 481; Sartorius, pp. 136–37; Greenawalt, pp. 965, 967. However, what makes punishment based on strict liability and negligence more problematic is that although the person who is punished for violating an overbroad law or a law to which he morally objects at least knew that he was risking punishment for his particular act, the strictly liable and the negligent are innocent in a more basic sense: they have no notice that their act is triggering punishment.<sup>15</sup>

Whichever one decides is the correct way of dealing with the difficulties of the wrongful act principle—the difficulties of conscientious objectors, overbroad laws, strict liability and negligence—there are a vast number of



acts the wrongfulness of which is unproblematic. The difficulties with the other principle of the enterprise of prevention—the *notice principle*—are philosophically more formidable.

### B. Difficulties Related to the Notice Principle

The notice principle appears crucial to the justifiability of imposing disproportionate harm under the enterprise of prevention. Where it is quite clear that the actor is knowingly undertaking a risk he has no right to undertake, we feel no regret in creating the risk. But when may actors be said to undertake the risk such that we do no wrong in creating it?

For example, must the actor be aware of the specific term of punishment he faces (5 years in prison, a fine of \$500, and so forth)? Or must he be aware only that there is a *chance* that he might receive a particular punishment, and if so, does it matter that he underestimates the chance? Suppose he underestimates the chance of the contemplated punishment because he underestimates the odds of getting caught, or the odds of having the punishment imposed once caught (because he is ignorant of the frequency of imposition,<sup>16</sup> or because he just does not believe what he has been told). In the enterprise of retribution, notice is relevant only insofar as it bears on our assessment of the character of the actor.<sup>17</sup> In the enterprise of prevention, however, notice performs an entirely different function. In the latter, the notice we require is that which we require generally when we say of a gamble that, whatever its payoff, it was fair.

It is not my purpose here to resolve the philosophical difficulties regarding the notice requirement of a fair gamble. All that I wish to maintain is that there are such things as fair gambles, that it is therefore humanly possible to give the notice required for a fair gamble, and that there is no reason in principle why that notice cannot be provided within the enterprise of prevention.

## 5. *Prevention, Gambles, and Justice*

I said at the outset that the enterprises of retribution and prevention may be related under a higher level principle or principles. It is, of course, possible to stipulate without further explanation that the enterprise of retribution and its principle of proportionality just do not apply when the notice principle allows the enterprise of prevention to be invoked.<sup>18</sup> But I believe that a further explanation can be provided, one that subsumes both the enterprise of retribution and the enterprise of prevention under more general *principles of justice*. The principles of justice include respect for autonomy. Respect for autonomy in turn requires that we allow fully competent adults to renounce, give away, contract away, or even gamble away that which they deserve,



retributively or distributively, because of their acts/character. The enterprise of prevention allows us to structure the world so that wrongdoing represents a poor gamble. The wrongful act and notice principles, if complied with, allow us to set up poor gambles that are, nonetheless, fair gambles. And if the wrongdoer receives worse under the enterprise of prevention than he deserves under the enterprise of retribution by having undertaken a poor but fair gamble, what he receives is just under the principles of justice.

If a person were not permitted to make himself worse off as the result of a fair gamble than he otherwise deserved, then he would not be permitted to keep the gains of any such gamble. And since the losses and gains of gambles would be socialized, only those gambles approved of by the state would be allowed. (Of course, if a person engaged in a prohibited gamble after announcing that he would accept whatever losses materialized, he might not deserve retributive punishment for engaging in the prohibited gamble. And if he did not deserve retributive punishment, then the only means the state would have to prevent unapproved gambles would be by means of an "undeserved" but fair threat—a gamble! If the state were not allowed to prevent gambles by imposing gambles, it would have to do so by making the world gamble-proof, an absurd idea.)

A Rawlsian would have to concede the justice of allowing a competent adult to gamble away at least the primary goods guaranteed him by the second of Rawls' two principles (the Difference Principle). Rawls, pp. 302–03. The liberty to gamble away, as well as to give or contract away, primary goods must be part of the liberty protected by the first principle (the Principle of Maximum Equal Liberty). For it would be odd indeed if the paradigm of fairness from which the two principles of justice are derived in the original position—the fair gamble by autonomous agents—were not itself allowed under those principles. Rawls, pp. 85, 120, 126.

We have no duty under most circumstances to interfere with normal adults who wish to undertake fair gambles. Nor do we have a duty to make the world risk-proof for such adults, or to compensate them for all injuries occasioned by undertaking risks.<sup>19</sup> Moreover, most people would deny a duty to compensate for all injuries stemming from risks undertaken in ignorance of the true odds, especially if it were wrong to undertake the risk in the first place. But may we alter the world to make some fair gambles riskier than they would otherwise be? Yes, if the gambles are wrong to undertake in the first place; and most criminal acts are gambles that are wrong to undertake.

Are there limits to the risks we can impose to prevent wrongful acts by competent adults? A risk severe enough to effect perfect deterrence is, of course, no problem, since no one will ever suffer the harm. What of some draconian harm which deters all but one criminal? Do we weigh the harm to him in excess of his retributive desert against the benefits to would-be victims



of deterrence? What if his harm is less than their benefits in the aggregate, but greater than the benefit to any one of them? Does the fact that he risked the harm in a fair gamble make any benefit gained by setting up the gamble morally weightier than any loss to the criminal?

I am not sure what, if any, moral limits there are in setting fair gambles in the path of wrongful actors. I am reasonably sure, however, that the harm to the gambler, when weighed against the benefits to would-be victims, is discounted considerably by the fact that he voluntarily undertakes the gamble. To deny this would be to leave us powerless against the really determined wrongdoer, the one who cannot be stopped by harm proportionate to his desert.<sup>20</sup>

Will not punishments in excess of retributive desert, even if imposed only on wrongdoers who undertake fair gambles, fall selectively on the foolhardy sub-class of the class of wrongdoers, those wrongdoers prone to underestimate risks? This objection appears at bottom to amount to a denial that either fair gambles or the autonomy presupposed by fair gambles exists where wrongful acts are concerned. It is similar to the argument regarding akratic behavior that one cannot act autonomously and at the same time realize the wrongfulness of his act—that all immorality is really ignorance. If one assumes to the contrary that undertaking a wrongful act in the face of a risk of punishment *can* be a fair gamble, the objection dissipates.

Finally, when the imposition of the threatened harm is within our power after the wrongdoer has taken the risk (committed the wrongful act) and lost (got caught), and the threatened harm is greater than his retributive desert, may we act as we have threatened and impose the harm? Even if we are permitted to restructure the world to make it riskier for wrongdoers, leaving the last act necessary for bringing about the harm up to them, may we “program” ourselves to undertake the last act necessary to impose the harm in response to the wrongdoer’s act? The objection to imposing the harm ourselves may go like this: Where imposition of punishment greater than retributive desert is within our control *after* the wrongdoer acts, we cannot say the punishment was a risk undertaken, for that is to take a third-person view of our imposition of punishment. Imposition of the punishment is not a “risk” from our perspective; we either impose or not, and either choice is within our control. The “odds” of the gamble are fixed by us *after* the act, and to do so renders the imposition of grave harm attributable to us, not to the gamble.

On the other hand, the objection might go like this: There is a natural resistance to imposing harm on wrongdoers greater than they retributively deserve. Wrongdoers will tend to believe, therefore, that punishers will be unlikely actually to impose severe punishment in excess of retributive desert if punishment is within their control. If the punishers in fact impose severe



punishment, the wrongdoers will have underestimated the risk in a way that renders the gamble unfair.

I am not going to attempt to deal with either of these objections, objections that might underlie the objection to ordinary excessive punishment like that administered by the Victorian judges. The objections raise profound issues with which I am not prepared to deal. If these objections are well-taken, however, then they provide an incentive to remove punishment under the enterprise of prevention from ordinary human hands and to place it in the hands of monsters or Domsday Machines.<sup>21</sup>

## 6. Conclusion

The costs of crime, including the costs of the criminal justice system set up to deal with it, are enormous. The costs are not just monetary costs to taxpayers and costs in terms of lives and property to victims. The psychological, social, and political costs of insecurity and distrust are perhaps even greater. One way to reduce crime and its costs is to raise the odds the fully competent criminal faces when he gambles on a criminal undertaking. We have been restricted in doing so by the principle of proportionality, a principle expressed in our legal system through judicial interpretation of the Eighth Amendment<sup>22</sup> and through principles and rules governing the amount of force that can be used to protect lives and property and apprehend criminals.<sup>23</sup> So long as we believe that only one set of principles can govern our treatment of criminals, then the principles of the enterprise of retribution, with all of the philosophical difficulties that plague that enterprise, are the most eligible, deeply embedded in our basic moral outlook. But if we deny exclusive jurisdiction to the enterprise of retribution, and allow room for the enterprise of prevention and its two governing principles, we can avoid the restrictions of proportionality and make a crime a fair, but extremely risky, gamble. If justice *permits* us to do so, and doing so, by reducing the costs of crime, allows more people to get what they deserve, then perhaps justice *requires* us to do so as well.<sup>24</sup>

Lawrence Alexander

University of San Diego

## NOTES

1. I restrict the first enterprise to prevention of intentional violations to avoid the issue of the justifiability of strict criminal liability and punishment of inadvertant negligence. I do not mean to imply that I believe punishing the negligent or the strictly liable cannot be justified. But excising such punishment from the more inclusive



enterprise of *preventing violations of rights*, leaving us with the more restricted enterprise of *preventing intentional violations of rights*, will render more plausible my suggestion in the last section that the latter enterprise and the enterprise of *giving people what they deserve* are both derived from common desert-focused principles.

There is a case, however, for deriving the more inclusive enterprise of *preventing violations of rights* and the enterprise of *giving people what they deserve* from common, desert-focused principles, as well. But doing so requires desert-focused principles that permit *deliberately giving known individuals* worse than they deserve in order that ultimately more people get what they deserve. Such principles may be more difficult to come by than, for example, principles that permit acts and practices that create a *risk to statistical persons* that they will get less than they deserve. *But see* Sartorius, pp. 136–37; Ezorsky (1974), pp. 111–12; Note (1975), pp. 1564–70. Consider, e.g., *procedures* which risk punishment of the innocent. Gross, p. 188; Wertheimer (1977). Nozick would appear to distinguish between (1) deliberately violating rights of known individuals in order to minimize rights violations and (2) risking rights violations with respect to statistical persons. *Compare* Nozick, p. 30, with *id.*, pp. 96–108.

2. It is not apparent, even if character is the correct basis of desert, how to measure the desert of various types of bad character; nor is it apparent what the relative virtue is among those who love others, those who love duty, those who love neither but who resist temptation, and the immoral amoralsists—those who love neither others nor duty and who do *not* resist temptation. *See* Sapontzis, pp. 51–52.

3. On the complexity of the act/character relation, see Henberg; Sher (1978).

4. *See also* Bedau, pp. 66–67.

5. *But see* Lemos, pp. 60–61 (where failure to act on the forfeiture is argued to be unjust).

Query: Would persons who acted on supererogatory maxims of will have cause to complain if others did not so act towards them but merely respected their rights?

Nozick, for whom distributive justice is a matter of rights, not desert, nonetheless seeks to limit the amount of punishment that can be inflicted on rights violators. Nozick, pp. 59–63. To do so he must either divorce punishment from desert yet limit punishment by some concept like forfeiture, or else he must maintain a radical distinction between positive and negative desert and also prevent the “whole life” desert of the offender from effecting a redistribution of wealth through the practice of punishment. *See* Ezorsky (1972), pp. xviii, xxiv–xxv; Parent (1976); Gardiner. *See also* Rabinowitz, p. 88 n74.

6. James Buchanan has conjured up a similar device, which he calls an “automatic enforcer,” perhaps because technically a “Doomsday Machine” is a device programmed to destroy everyone, not just particular individuals. Buchanan, p. 13.

7. *See* the text accompanying note 21 *infra*.

8. *But see* the text accompanying note 21 *infra*.

9. For a good example of confusing the two enterprises, see Hospers (Cederblom, et. al.), pp. 46–47.

10. Others have noted the problems raised by morally worthy wrongdoers. *See* Brandt, pp. 74 n6, 80; Goldinger, p. 9; McCloskey, pp. 119–20, 128–29, 130–36.

11. Of course, if we make the threatened punishment severe enough, the conscientious violator’s moral principle may excuse him or require him not to violate. It is possible that, for example, religious objections to laws may be handled, not by making exceptions on free exercise grounds, but by making the consequences of violation sufficiently severe so that the objector is excused *by his religion* from resisting. The danger in this approach is that some objector will not feel excused despite the high penalty and will go ahead and violate the law, which is to say that draconian penalties



are only moral problems when their threat fails to effect perfect deterrence and they must then be imposed. See MacCallum, pp. 145–51.

12. We might, for example, quarantine moral offenders, as we do lunatics, and then make the quarantine pleasant enough so that we have sacrificed as much satisfaction as they. See Alexander, pp. 411–12 n7.

The question of what risks it is fair to impose on morally innocent persons, including risks of accidents, pollution, unavoidable sacrifice of life, limb or property, and even of erroneous imposition of criminal or civil liability through imperfect procedures, as well as risks of punishment because of moral views in opposition to those of the rest of society, is one of the most difficult questions in social philosophy.

13. This is just one example of the general problem of thoroughgoing consequentialism in producing coherence between acts and attitudes, a problem not solved in my opinion by rule-consequentialist variations. Consequentialists ultimately cannot give satisfactory accounts of rights and rules, of praise and blame, of moral virtues, or of the ability of their moral theory to be publicized and taught. See Goldman (1977); Piper; Devine; Williams (1973), pp. 118–25; Lyons (1965), pp. 119–60; Ralls. See also Dworkin.

14. For an attempt—unsuccessful, in my opinion—to distinguish punishment for negligence from strict liability, see Richards, p. 207.

15. One cannot properly characterize the acts that give rise to strict criminal liability or punishment for inadvertent negligence as knowing violations of rights on the ground that one “knows” when he engages in any activity that he runs the risk that he is inadvertently neglecting some specific risk to another’s rights or that he is in fact bringing about a violation of rights. Coleman, pp. 70–71; Coleman (1974), p. 481; Greenawalt, p. 965. When I speak of “knowing” violations of rights, I use “knowing” in the more natural sense of being aware that one *is* violating or *is* unreasonably risking violation of another’s rights—intentional and reckless violations, in other words.

15. The punishment might be to subject the offender to a kind of lottery, e.g., based on whether he is found to be unproductive, or “dangerous,” or rehabilitated, the result of which lottery is more severe punishment for some than for others. See, e.g., van den Haag, pp. 242–45. Punishment in our society is meted out according to the “lottery” of how much harm was caused (e.g., felony-murder rules, lesser punishments for attempts than for successes, collections of uninsurable damages). Are lotteries such as, say, punishment based on productivity “unfair” to the unproductive because the odds of the criminal gamble are worse for them than for the productive, if we assume no one has a right to undertake the gamble in the first place (the *wrongful act principle*). Are the lotteries unfair if they benefit the least advantaged among those who do not undertake wrongful acts?

17. Thus, the punishments at Nuremberg, objected to by many because of the lack of previously promulgated laws criminalizing the conduct, may have been proper under the enterprise of retribution. Objections based on lack of notice—e.g., objections to vague or ex post facto laws—would have been pertinent to punishment under the enterprise of prevention.

18. Such a stipulation would not, of course, satisfy those who have expressly rejected the contention that the enterprise of prevention and its principles are sufficient without more to justify severe punishments. See, e.g., Goldman (1979), pp. 54–56; Wertheimer (1975), pp. 415–16; Lackey, p. 438.

Goldman is the only one of the three I have cited to attempt to justify the rejection. Thus, he writes at p. 55:

My warning you that I will assault you if you say anything I believe to be false does nothing to justify my assaulting you, even if you could avoid it by saying nothing. A society’s giving



warning that it will cut off the hands of thieves does not justify its doing so. In general, having warned someone that he would be treated unjustly is no justification for then doing so, even if, once warned, he could have avoided the unjust treatment by acting in some way other than the way he acted. The harm imposed must be independently justified. Once we have determined the proper amount of punishment for wrongdoing (I have argued that it is determined by social utility up to the equivalence limitation), adequate warning is normally a further necessary condition for just imposition. That criminals could have avoided punishment by having acted differently is again one reason why we are justified in punishing them at all. It does not justify excessive punishment.

It is clear, however, that in the quoted passage Goldman has done nothing more than assert the relevance of proportionality to prevention. He has not proved it. His example of threatening assault for *believed* false speech is irrelevant because the wrongful act principle is not complied with in the example. The rest of the passage is nothing *but* assertion, and examples such as those in this piece are nowhere else considered by Goldman.

19. Cf. Wikler, pp. 387–92.

20. It would rule out imposing even minor harms on wrongdoers if the wrongful act were even more minor; for example, it would rule out spikes at parking lot exits.

21. A similar argument is made regarding nuclear deterrence, viz., that such deterrence, the optimistic consequentialist policy, requires that we program ourselves or others to be non-consequentialists. See Kavka. See also Wertheimer (1976), pp. 189–90; Devine.

22. See, e.g., *U.S. v. Weems*, 217 U.S. 349 (1910).

23. Fletcher, pp. 859–60, 870–74.

24. Alan Goldman points out that if retributivism and the principle of proportionality are followed in punishment, and if punishment thus imposed fails to deter, a dilemma results. We can either respect the criminal's rights (defined by the principle of proportionality), or we can respect the victims' rights to have crime reduced. Goldman (1979). Because Goldman rejects the solution I have offered here (see footnote 17, *supra*), he is unable to provide a solution to his dilemma.

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