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SOME UNSWEPT DEBRIS FROM THE HART–DEVLIN DEBATE

1.

On the question of which sorts of conduct the state can legitimately prohibit by means of the criminal law, H. L. A. Hart has been one of this century's leading advocates of the kind of position advanced by John Stuart Mill in the nineteenth century. That position, to which I shall refer by the overworked label "liberalism", is that the prevention of harm or offense to parties other than the actor is the only morally legitimate reason for a criminal prohibition. One important rival theory, often called "legal moralism", insists that it is also sometimes a legitimate reason in support of criminal statutes that they prevent actions that are inherently immoral, even if those actions cause no harm or offense to nonconsenting parties. Patrick Devlin defended legal moralism in his influential Maccabean Lecture at the British Academy in 1958, and thereby provoked a heavy barrage of criticism from liberal writers, including most prominently Hart himself. Then in 1965, Devlin fired the last shot in the "Hart–Devlin debate" by republishing his original lecture with the new title, 'Morals and the Criminal Law', additional footnotes replying to criticisms, and six new essays developing his views in more detail.[1]

To a reader two decades later, Devlin's book has a strangely uneven quality. On the one hand, his responses to Hart's critical arguments often seem feeble and perfunctory. On the other hand, when he turns his attack against Hart's own views he argues with fresh vigor. Most present day readers will probably conclude that there is no salvaging Devlin's social disintegration thesis, his analogies to political subversion and treason, his conception of the nature of popular morality and how its deliverance is to be ascertained, or the skimpy place he allows to natural moral change. But he does argue forcibly against liberals on the grounds that their nonmoralistic theories cannot account for certain features of our present criminal law that they would presumably be unwilling to have changed. Those arguments deserve our respectful attention.

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The subtlest of Devlin's arguments of this kind against Hart is one that Hart himself had discovered in James Fitzjames Stephen's 1873 attack on Mill.[2] The argument can be put as follows. The liberal allows no legitimate role to "the enforcement of morality as such" in the making of criminal law. The only legitimate function of criminal law for him is the prevention of private and public harms and nuisances. In all consistency then, he should not permit any considerations other than harm (and offense) prevention to enter into decisions about the degree of punishment to be assigned to different categories of crime, and to commissions of the same crime by different offenders under different circumstances. And yet it is our traditional practice, which not even the liberal would wish to alter, to treat greater moral blameworthiness (Stephen's term was "wickedness") as an aggravating factor and lesser moral blameworthiness as a mitigating factor in the assignments of punishment, a practice impossible to justify on the assumption that the aim of punishment, as of criminal law generally, is simply to prevent harmful behavior. If the makers of criminal law can have no legitimate concern with moral wrongdoing as such, then neither should judges determining degrees of punishment have any concern with morality independently of harmfulness. The only admissible kind of reason for punishing one thief more than another is that he stole more money and thus caused more harm.

Hart does not allow himself much space to reply to this argument, revealing perhaps his failure to be much impressed by it. He admits that "the moral differences between offenses should be reflected in the gradation of legal punishments",[3] but denies that this shows that the whole object of penal statutes cannot be to prevent acts dangerous to society, and that it must instead be a "persecution of the grosser forms of vice" (Stephen's phrase[4] for a condemnation of immoral behavior). The nonsequitur in Stephen's argument, Hart explains, comes from his "failure to see that the questions: 'What sorts of conduct may justifiably be punished?' and 'How severely should we punish different offenses?' are distinct and independent".[5] Given the logical independence of these questions, liberals

> can in perfect consistency insist on the one hand that the only justification for having a *system* of punishment is to prevent harm, and only harmful conduct should be punished, and yet on the other hand agree that when the question of the *quantum* of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment.[6]

Hart's claim that the questions of justification for a system of criminal prohibitions and for specific quanta of punishments are distinct and independent simply denies, without further explanation, the assumption behind Stephen's argument, and Devlin is unimpressed. The questions do not seem obviously independent to him. Rather,

> They are a division, made for the sake of convenience, of the single question which is: 'What justifies the sentence of punishment?' The justification must be found in the law, and there cannot be a law which is not concerned with a man's morals and yet which permits him to be punished [in part] for his immorality.[7]

"It is an emasculation of Mill's doctrine", Devlin concludes, "to say that it is to apply only to the making of law and not the administration of it".[8] The liberal then is placed in a dilemma: either he must approve legislation prohibiting "harmless wrongdoing" or else he must disapprove of even partial adjustments of sanctions and sentences in accordance with degrees of moral blameworthiness.

2.

I think the liberal can escape this trap, and I should like to suggest here how that might be done. Two lines of argument are available. The first, which is suggested by Hart's sketchy remarks, I shall consider in this section. The second response, which is the more fundamental one, maintains that the first is quite sufficient, but hardly necessary.

For any rule-structured social practice or institution, we can ask "What is it for?", meaning not just how it in fact functions, but how it ought to function, and what purposes it must achieve to be justified. Following Hart's earlier work,[9] we can label this proper purpose "the justifying aim" of the practice. Sometimes we cannot specify an institution's justifying aim without referring *inter alia*, to moral functions such as the cultivation of good character, moral counseling or instruction, resolution of moral conflict, provision of the means of penitence, and the like. Very likely some such moral functions must be mentioned in a full statement of the justifying aims of family law courts, churches, and schools, among other social institutions. For other structured practices, for example team sports, theatre, medicine, academic philosophy, and manufacturing corporations, moral functions are not part of the justifying aim. To cultivate character, exhort to virtue, condemn moral failings, inculcate moral teachings, resolve

moral dilemmas, etc., is not what structured practices in these categories are for, not part of the justification for their distinctive social roles. Nevertheless, even a practice lacking a distinctively moral *raison d'être* cannot do without moral rules for the regulation of its own activities. An amoral justifying aim does not imply an immoral mode of operation.

Consider the organized sport of football. What is its justifying aim? Presumably, a full answer to that question would mention provision of healthful exercise, demanding physical challenges, co-operative enterprise, and comradery for players, and absorbing tense entertainment for spectators. To be sure, some might also mention character-building for the players and cite that as a moral function, but the character traits developed, like courage, competitive ardor, co-operation, and patience, are perhaps not the most distinctively moral sorts of virtues. (The miscellaney of virtues called "moral" includes everything from saintly self-denial and scrupulous honesty to having a good sense of humor, cheerfulness,[10] and charm. The list shows how treacherously ambiguous and flexible the word "moral" is.) In any case, the cynical judgments of most college and professional players belie the claim that football either does, can, or should be expected to make the persons associated with it better people on balance. It is plausible then to characterize the justifying aim of football in nonmoral terms. But football must be governed by procedural rules, if it is not to become chaotic violence rather than a game. Kicking, gouging, punching, and the like are forbidden by these rules, and the teams that benefit in the game from transgressions are deprived of their unfair gains and penalized accordingly. It is still possible, however, for officials to distinguish between unintentional and deliberate infractions, and between serious and trivial ones. For the more egregious violations, individual offenders are ejected from the game, and depending on the gravity of their offense, suspended for a time from further participation. For minor offenses often a mere warning suffices. It would be unfair to the players as well as disruptive of the game if these distinctions were not made by the rules and enforced by the officials.

No matter what the institutional practice is, and no matter what it is for, there are moral and immoral ways of participating in its activities. Professional philosophy has as its justifying aim the pursuit of truth about certain abstract questions, the achievement of greater clarity, insight, understanding, and the like. It is no part of its purpose to

exhort people to virtue, punish sin, or excoriate wickedness. But a philosopher may yet practice his calling unfairly and immorally if he resorts to plagiarism, doctors texts, or uses abusive *ad hominem* arguments or deliberate sophistries. Such professional misconduct violates rules of procedural fairness that govern the pursuit even of nonmoral aims. The justifying aim of a business corporation is to provide wanted goods or services and thereby make work for employees and profits for owners. No mention need be made at this level of distinctively moral objectives. Yet one can pursue even purely economic goals morally or immorally and violate governing moral rules by unfair competition, false advertising, collusive price-fixing, union busting, or tax cheating.

We can therefore distinguish between the general justifying aim of a structured practice and the rules of fair procedure that govern its activities. Even when the former has no moral component, the latter may serve important moral purposes, and may assign penalties, awards, and compensations all in the interest of fair play. Applying this distinction to the criminal law, we must seek the justifying aim of a whole *system* of rules and practices, including legislative authority to prohibit some kinds of acts, police powers, prosecutorial discretion, rule-governed trials, verdicts, sentences, appeals, imprisonment, parole, etc. A liberal would say that the justifying aim of the whole system is to prevent private and public harms, while insisting that the rules governing the system's operations at every level must be *fair*. Fairness to the accused requires gradation of punishments in accordance with two distinct sets of considerations: the degree of *responsibility* of the wrongdoer for his deed, and the degree of his *blameworthiness* as determined by his motive and circumstances. Consider responsibility first. No matter what actions the criminal law may properly prohibit, it would be flagrantly unfair to convict a person of a crime when he did not in fact do the prohibited act (perhaps someone else did it, or perhaps no one at all). On the other hand, when a person calmly does what he knows is forbidden, the act can be imputed to him simply and without qualification, so that there is no injustice (at least of a procedural sort) in punishing him for the crime. It would be unfair to others if he were let go when they have been punished for doing just what he did. However, if the accused has done the prohibited act, but did it inadvertently, accidentally, or reflexively, then it is not true, baldly and without qualification, that he did it at all.

It is grammatically awkward but conceptually correct to say that the action was his but that the degree of "actness" in the doing of it was less than full, or that the act can only be partially, not fully, ascribed to him as his doing.[11] In that case, while some punishment may be justified (perhaps it would be unfair to others if he were let off scot-free), it would be unfair to punish him to the same extent as others who did the proscribed thing to a fuller degree. In fact they didn't *do* (in the full sense) the same thing.

The gradation of punishments then can correspond to the degree of responsibility of the wrongdoer for his deed. The offender may have been fully responsible, however, for what he did, in the sense that none of the standard adverbial qualifications ("accidentally", "unknowingly", "inadvertently", etc.) apply to his act, and yet, because of his motives and circumstances, be subject to less blame than the normal offender for the doing of it. Descriptions of his motives may have been excluded at his trial because the jury's sole task was to determine whether he intentionally did what was forbidden, but rules usually give discretion to the judge to consider such matters in sentencing. Two acts of killing might both be clear instances of first degree murder, equally intentional and equally premediated, yet one was done out of mercy, to give a suffering aged invalid the surcease he has requested, and the other out of malice, or greed. Both are equally violations of law, and the violators are equally guilty. It would be unfair, however, to punish the less blameworthy killer as severely as his more wicked counterpart, since it is unfair (according to the formal principle of justice stated by Aristotle) to treat alike cases that are relevantly unlike.

What is it about the degree of moral blameworthiness that renders it a "relevant" characteristic in the application of the formal (Aristotelian) fairness principle? Its relevance derives from its correspondence to an essential function of legal punishment which, as a symbolic device for the expression of public reprobation, automatically stigmatizes the condemned offender.[12] If an essential part of the *point* of a sentence of punishment is to express society's moral condemnation of the criminal, then the degree of that condemnation (expressed symbolically by the degree of imposed hard treatment), should match, as far as is practicable, the actual degree of blameworthiness incurred by the criminal for his criminal act. A judge can hardly be permitted to make moral blameworthiness of the particular criminal

the *sole* determinant of his degree of punishment, for there are other social functions of punishment, notably deterrence, that also have a bearing, and in any event, concentration on the moral quality of one particular wrongdoer's motives might obscure the general reprobation expressed by a specified punishment toward the general class of actions of which this offender's act was an instance. The punishment expresses condemnation of classes of crimes too, not only of particular criminals for committing those crimes; the act as well as the actor is condemned. Even if the actor's motives were entirely good so that he is not blameworthy at all, the condemnation is to impress on him the community's moral judgment that the *act* he intentionally performed from such innocent motives was nevertheless wrong. Still, other things being equal, it is surely unfair that a less blameworthy violation of a statute should be morally condemned more severely than a more blameworthy one. Fairness requires that relevantly dissimilar cases should be treated in appropriately dissimilar ways, and what could be more "relevant" to the degree of moral condemnation expressed by punishment than the degree of moral blameworthiness of the one to be punished?

The liberal, I maintain, can endorse this line of reasoning, even if he is interpreted as excluding distinctively moral purposes from his account of the justifying aim of a *system* of criminal law. The criminal law *process*, he can and should admit, is in its very nature a kind of complex "moral machine". Apprehended suspects are fed into one end of the process and either emerge, status unchanged, through various escape hatches along the way, or are processed right through to the other end of the machine, where the moral stigma is stamped on them both by a judge's solemn pronouncements and the reprobatory symbolism of their confinement. Those persons who are the "raw materials" of the process are separated by the machinery into classes, those who are returned unpunished to their previous lives, and those who are convicted, punished, and thereby morally condemned. The ultimate aim of the *system* which employs this punitive *process* is to reduce the number of wrongful harms inflicted by individuals on one another, but the mode of operation of the moral machinery must be fair, or else it will work to defeat its own built-in goals. That is to say that it would be self-defeating to use stigma-stamping machinery in such a way that admittedly less blameworthy acts are stigmatized more severely than more blameworthy acts, for this confusion of judgments

would impede the function of the machinery itself, namely to match stigma to actual blameworthiness.

Even those institutional practices that do not use moral machinery must be subject to morally fair procedural rules on pain of incoherence or counterproductivity. For example, the aim of a professional licensing examination (the bar exam, medical boards, certified public accountancy exams, etc.) is to separate the participating individuals into two groups: those who will be deemed qualified to enter the profession, and those who will not. In some cases (e.g., the certified public accountancy exams) all examinees, those passing as well as those failing, are given a score and thus rank-ordered. No moral judgments, explicit or symbolic, are passed on anyone. In that sense the test "machinery" is not moral. Still, it would be unfair to use a test, or testing procedure, that allowed incompetent persons to be qualified, and competent ones to be excluded, or persons of lesser skill to be ranked higher than more skilled ones. Given the essential nature and goal of the examination process, degree of knowledge and skill are the "relevant" characteristics in the application of the fairness principle, so that it will be unfair to treat parties dissimilarly who are similar in these respect, or to treat similarly parties who are relevantly dissimilar.[13] The point applies to these rule-governed practices even though their ultimate justifying aims are not distinctively moral, but rather narrowly professional. The most striking way in which criminal law differs from the professional licensing process is not that it contains a distinctively moral component in its justifying aim, but rather that it employs a constitutive *process* which is in its very nature morally judgmental. "Here is the complex moral machine", the legal philosopher says; "now, for what purposes only should we use it"? If he is a liberal, he can answer, without obvious absurdity, "Let us use it only to prevent individuals, by the threat of its operation, from inflicting certain kinds of harms and offenses upon one another".

In summary: a rule-governed practice or institution will have its own distinctive justifying aim and its own characteristic process ("machinery"). Either or both of these may be distinctively moral or entirely nonmoral. In either case, the operations of the practice must be governed by fair rules, else it will mistreat those people who participate in it, as well as defeat some of its own internal aims. The fairness of its procedural rules is determined in part by their accordance with the general Aristotelian principle that relevantly similar cases are

to be treated similarly and relevantly dissimilar cases dissimilarly in direct proportion to the degree of dissimilarity between them. The "relevance" of a characteristic for the purposes of the fairness principle is determined, at least in part, by the functions of the process it superintends – the job assigned (or built into) the "machinery". When those functions are moral (e.g., stigmatizing blameworthy acts) then such moral traits as blameworthiness will be relevant; otherwise not. But the relevance of these moral considerations will be a consequence of the rules of fair procedure that *any* kind of institution, distinctively moral or otherwise, must employ, not necessarily a consequence of an ultimately moral justifying aim. A system of criminal law, whether or not it be assigned a moral justifying aim, employs an inherently moral (judgmental) constitutive process, and that process, in conjunction with the formal principle of fairness, is what underlies the concern with blameworthiness in sentencing.

3.

I believe that the line of argument sketched above is sound and available to the liberal, but it is not really necessary for him to resort to it in reply to the Stephen-Devlin argument, for a much simpler and more direct reply is equally handy. As we have seen, even if the justifying aim of the criminal law is entirely nonmoral, it is consistent to require that its operations be subject to fair procedural rules. In point of fact, however, it is a misrepresentation of the liberal position (at least as I have tried to formulate it)[14] to say that it ascribes an entirely nonmoral justifying aim to the criminal law. There is a clear respect in which the liberal's liberty-limiting principle *is* a moral one. The justifying aim of the system of criminal law, on his view, is not merely to minimize harms, in the sense of setback interests, all round. If that is what he advocated he would have no quarrel with the legal paternalist. In fact, his principle permits prohibitory statutes only when necessary to prevent those harms (and offenses) that are also *wrongs*: those that are unconsented to, involuntarily suffered, and neither justified nor excused. The criminal law, he insists, must serve a profoundly moral purpose, namely the protection of individual's moral *rights*.

It does not follow, however, from the fact that the only legitimate purposes of the criminal law are moral ones, that any and all moral purposes are equally legitimate, or legitimate at all, as reasons for

criminalization. "Only moral considerations" does not imply "all moral considerations". The liberal, if I have interpreted him correctly, holds that:

(1) All of the justifying aim of the criminal law consists of moral considerations.

But this does not commit him to:

(2) All moral considerations are part of the justifying aim of the criminal law.

One might charge with equal cogency that the liberal is committed to the belief that all animals are dogs by his belief that all dogs are animals. Even though the liberal justifying aim might be entirely a moral one, then, he might yet reject "immorality as such" as a proper target of legislation.

Let me spell out this point a little further. The liberal does not advocate the criminalization of actions simply on the ground that they are likely to have adverse effects on the interests of other parties, for that would lead to the prohibition of dangerous acts that are fully consented to by the parties who are endangered. A criminalizable action must be more than harmful in this minimal sense; it must also be wrongful. But there may well be actions that are morally wrong yet do not *wrong* anyone, that is, do not violate anyone's rights. Even if there are such actions, since they don't wrong anyone in particular, they have no "victims". Nor are there any people who can express personal grievances against the wrongdoer for his wrongful conduct. It follows that the liberal, unlike his moralistic critics, cannot endorse the criminalization of such actions, even though it is open to him to agree with the legal moralists that the actions in question *are* morally wrongful. Immorality as such, therefore, is not a sufficient ground for legitimate criminalization, according to the liberal. The only legitimate ground, to be sure, is a thoroughly moral one, namely the protection of moral rights; but not every conceivable moral ground would be a legitimate one for criminalization. That is what is meant by saying that for the liberal, the criminal law is not concerned with the enforcement of "morality as such", but only with that sector of morality that protects the rights of others, that sector which might be called "grievance morality".[15]

The point can be put in still another way. We might distinguish two

classes of evils attributable to individual human beings (as opposed to natural disasters, epidemics, and "Acts of God"). On the one hand, there are *grievance evils* like wrongful inflictions of harm, indefensible violations of rights that also have adverse effects on interest, and exploitative injustices, including instances of free-loading that do not actually harm another party's interest but do "take advantage" of him, and understandably cause his resentment. All the evils in this category are grounds of personal grievances. In the other category are the miscellany of evils that do not wrong anyone in particular and thus cannot be voiced as grievances. I call these *free-floating evils*.[16] No one needs "protection" from a free-floating evil; no one can claim "protection" as his due. It is probably impossible to find unanimously convincing examples of free-floating evils, but there are some examples that are at least *prima facie* plausible. Private, consensual, contraceptively protected incest between a 38-year-old mother and a 21-year-old son might be such an example. Pandering to the debased taste of others for one's own profit might be another. Defaming the long dead might be yet another. I make no claim that there are such evils. My concern here is only to defend the liberal's claim that even if there are nongrievance evils, it should not be the purpose of the criminal law to prohibit and punish the actions that cause them.

We can now reply directly to Devlin's contention that "there cannot be a law which is unconcerned with a man's morals and yet which permits him to be punished for his immorality". The liberal does *not* urge that the legislators of criminal law be unconcerned with "a man's morals". Indeed, everything about a person that the criminal law should be concerned with is included in his morals. But not everything in a person's morals should be the concern of the law, only his disposition to violate the rights of other parties. He may be morally blameworthy for his beliefs and desires, his taboo infractions, his tastes, his harmless exploitations, and other free-floating evils, but *these* moral judgments are not the business of the criminal law.

The consistent liberal then must make important concessions in replying to Devlin. When he approves gradations in punishment based on different degrees of *blameworthiness* (as opposed to responsibility) he must not permit the types of blameworthiness which he excludes at the legislative level to sneak in the back door at the sentencing level. In both cases the moral blameworthiness that *is* relevant is the harm-threatening, right-violating kind – dispositions to feel or act in

ways condemned by grievance morality. And in both cases also, moral blameworthiness based on the principles of nongrievance morality must equally be excluded. Suppose, for example, that there is a municipal ordinance against jay-walking for which the penalty for violation is "up to $100 and up to 30 days in jail". John Doe is convicted of jay-walking for an act done absent-mindedly or to get a dental appointment on time – relatively innocent motives. He is fined $10 and let go. Richard Roe jay-walks with a "lustful heart" in order to keep within discreet ogling distance of a beautiful woman he is following. The judge sentences him to a $100 fine and 30 days in jail. Thus jay-walking with lascivious motives is punished more than jay-walking with "innocent" motives even when the disapproved motives have no traceable connection to harm to others. Of course, the liberal condemns this way of grading punishments on the same grounds that he would condemn a statute that made "discreet ogling" itself into a crime. The behavior in question cannot be punished separately as an independent crime for the same reason it cannot be the basis for gradation of penalties in the commission of other crimes, namely that the law has no business at any level in enforcing nongrievance morality. Devlin is at least right in insisting that the legislative and administrative questions must be treated alike in this respect. The liberal would be inconsistent if he defended a rule making lascivious motivation an aggravating condition in the commission of crimes while staunchly opposing legislation creating independent crimes of lasciviousness. But the liberal is not in this way inconsistent when he permits malice or spite as an aggravating condition, or when he recognizes mitigating excuses based on diminished responsibility.

The liberal also can and must concede that the criminal *process* in its very conception is inherently moral (as opposed to nonmoral) – a great moral machine, stamping stigmata on its products, painfully "rubbing in" moral judgements on the persons who had entered at one end as "suspects" and emerged from the other end as condemned prisoners. The question the liberal raises about this moral machine is: "which actions should cause their doers to be fed into it?", and his answer is: "only those actions that violate the rights of others". There is no doubt in his mind that the law may "enforce morality". The question is "*which* morality (or which sector of morality) may it properly enforce?", and he restricts the criminal law to the enforcement of "grievance morality". His answer would not be plausible if he

did not restrict criminal liability to the doing of actions that deserve condemnation, since legal punishment itself expresses such condemnation, though not everything for which a person might be condemned morally can legitimately be made a basis of criminal liability. But it would be no departure from the moral aims the liberal assigns to the whole system of criminal law (protecting rights) for him to approve of judicial consideration of degrees of responsibility and blameworthiness in sentencing. Even undertakings without ultimate moral purposes, like philosophy discussions, business enterprises, and football games, use moral procedural rules to govern pursuit of their nonmoral objectives, and permit moral gradations in the assignment of penalties for violations of those rules. All the more so then, given the moral purpose that the liberal attributes to the criminal law, should the law permit such gradations too. Given that moral purpose, even Lord Devlin would have to agree that there is no clash between it and the moral gradation of penalties. That is to say, more precisely, that there is no inconsistency in asserting that –

(1) The law should forbid only actions that violate the rights of others,

and

(2) The legal process should always respect the rights of the accused.

4.

I return now to James Fitzjames Stephen's original argument, for it raises a number of interesting issues, at least one of which was not fully resolved in the Hart–Devlin debate. The object of criminal legislation, he tells us, is to support the full moral system that is in place in the community – in a nutshell, to promote virtue and prevent vice, as generally understood in the community. In principle, at least, the legislature may use the criminal law to promote not only those virtues that consist in the disposition to respect and promote the rights of other people, but also those that consist in dispositions to avoid and prevent free-floating evils that wrong no one. Stephen hastens to reassure us, however, that the criminal law should not be used to enforce the virtue of chastity or to "indict a man for ingratitude or

perfidy",[17] not because these are illegitimate uses of law, but because they are expensive, inefficient and counterproductive means to a legitimate goal. "Such charges are too vague for . . . distinct proof . . . and disproof. Moreover, the expense of the investigations necessary for the legal punishment of such conduct would be enormous."[18] Such practical considerations, Stephen maintains, are "conclusive reasons against treating vice in general as a crime".[19]

It is otherwise, however, when such a vice as unchastity "takes forms which every one regards as monstrous and horrible".[20] Stephen refers here to actions that produce a widespread revulsion not because they are believed to be harmful violations of the rights of others, but rather because they are revolting in their own inherent character, apart from their direct effects on others. If these free-floating evils are great enough, Stephen affirms, it doesn't matter that it is extremely difficult and expensive to apprehend and punish *them*. Why should that be? Part of the answer, Stephen says, is that harm prevention is not the only proper ground for criminalization. The law as it exists now and has always existed makes no sense unless we also ascribe to it as part of its rationale the gratification of "the feeling of hatred – call it revenge, resentment, or what you will – which the contemplation of such conduct excites in healthily constituted minds".[21] Stephen then supports this interpretation by citing examples of criminal conduct in which factors mitigating the blameworthiness (perhaps a better word would be hatefulness) of an act decrease the punishment for that act, even though those factors would actually be aggravating if our sole purpose in selecting the degree of punishment were to deter harmful acts. That the criminal succumbed to an overpowering though common temptation, for example, should be an extenuating circumstance (or at least not an aggravating one) if we wish to modulate the fierceness of our punitive response to match the degree of our natural resentment, but if our aim is to deter others, then the greater their temptation, the greater the amount of punishment we need to threaten them with.[22]

Now I have no doubt that we do often assign lesser degrees of punishment in individual cases than we would assign were our sole purpose to deter others, and that we do this out of consideration of the criminal's degree of blameworthiness. The way I would express this, however, is somewhat different from Stephen's. I would say that this is one example among many of a procedural rule of fairness actually

constraining the direct pursuit of a justifying aim. I cannot deny, therefore, that there is a tension in any system of criminal law between its ultimate justifying aim and the rules of fairness that constrain its procedures. (Perhaps it is different in some of the other examples like football and the like, where the fairness-rules more directly contribute to the fulfillment of the justifying aim.) This tension creates a problem both for the liberal view of the scope of the law and for the alternative view advocated by Stephen and Devlin. If either side were to argue that there is no ultimate justifying aim beyond the inherent goals of the punitive machinery, then the problem would not arise, for there would then be no goal beyond condemning or exonerating the accused in proportion to his deserts, and the quantum of punishment would be determined entirely by the degree of the offender's blameworthiness and the corresponding degree of symbolic condemnation given to "similar cases". If Doe's crime is different in no morally relevant respect from that of Roe who is serving a sentence of one year's imprisonment, then the proper sentence for Doe is also one year's imprisonment whether or not the crime they both committed is becoming more widespread and more and more people have become tempted to commit it.

Both Stephen and the liberal, however, do allow for a justifying aim beyond that which is implicit in the nature of punishment itself. The liberal ascribes to criminal law the ultimate aim of reducing the extent to which wrongful harms are imposed on individuals and the public generally. Stephen and Devlin add to this the aim of reducing the amount of inherently hateful or immoral conduct whether or not that conduct wrongs or harms others. The ultimate purpose of the criminal law system in both theories is to reduce, by direct incapacitation and deterrent threat, the occurrence of actions of the appropriate kinds. Their only disagreement at this level is over which kinds of actions *are* appropriately discouraged by legal means. Now suppose that John Doe commits an act of a kind that is properly (and actually) prohibited during a mounting epidemic of such acts. Neither the legal moralist nor the liberal need have any objection to a rule that permits a judge to adjust upward the degree of punishment in such circumstances so as to strengthen the deterrent threat in the face of rising temptation generally to perform acts of the prohibited kind. Presumably both would urge that there be some reasonable upper limit to the judge's discretion to increase the sentence in this way. Neither would be

commited, for example, to approve of hanging and disembowelment as a sentence for illegal parking during a traffic congestion emergency. But neither is prevented by what is essential in his theory from approving an increase, decreed by emergency legislation or resulting from discretion already possessed by judges, (say) from $25 to $100 to help solve a mounting traffic crisis. (The penalty might be advertised as "up to $100".) According to the rules of procedural fairness applied to the operations of the stigma-stamping machinery, it would not be fair to punish Doe more severely than Roe for doing exactly what Roe had done in a way that was different in no morally relevant respect. Perhaps ideal candor would have the judge tell Doe: "I am sentencing you to pay a fine of $100 even though yesterday I fined Roe only $25 for doing exactly the same thing. $25 of this fine is to be considered your punishment, and that is the degree of punishment you deserve. The other $75 is an added tariff, not punitive in intention, but necessary to discourage others, in these increasingly difficult times, from doing what you did". I have some doubts that such a breakdown of costs would make the unlucky offender feel a great deal better, but it would perhaps make that part of his penalty that seemed undeserved seem less arbitrary.

My purpose here is not to try to resolve the tensions between deterrence and desert that trouble any theory which recognizes as a justifying aim the deterrence of some undesired sorts of conduct by the use of punishment, a process that has its own internal morality. I emphasize here only that the problem exists to the same degree for Stephen and Devlin as for Mill and Hart. The liberal assigns the law the aim of deterring wrongfully harmful behavior. The legal moralist would use law also to deter inherently immoral acts performed voluntarily or consensually in private. The one wishes to prevent grievance evils; the other would also prevent certain free-floating evils. But deterrence is central to both theories, and deterrence can conflict with procedural fairness in determining sentences equally in both theories.

What interests me in Stephen's position, however, is an intriguing paradox. For him the ultimate justifying aim of criminal law is twofold: to minimize hateful evils whether harmful or not, and also to provide orderly outlets for feelings of vengeance, hatred, and resentment against the wrongdoer. He has no objection to creating crimes without victims mainly because (if I interpret him correctly) the legislation creating such crimes is justified by the need to gratify the desire for

vengeance that arises so naturally in right-minded people. But if a crime has no victim who is there to want revenge? I wish to pursue this question in the remainder of this paper, but I will generalize it so that it not only covers vengenance but also more respectable forms of retribution. The question I shall investigate is whether the concept of retribution in any of its many forms can have coherent application to the punishment of a victimless crime. If "retribution" makes no sense applied to such punishment, then there is a plain conflict between legal moralism, the view that we may properly punish acts of harmless wrongdoing, and the retributive theory of punishment, the theory that punishment is only justified when it is retributive.[23] The committed legal moralist, of course, may respond to this conflict by saying "So much the worse for the retributive theory", just as the retributivist can respond "so much the worse for legal moralism". I cannot resolve that impasse. But if the incompatibility could be established, that would be a devastating argument against Stephen, and since some other legal moralists also purport to be retributivists, the alleged incompatibility should have more than a little interest for them.

5.

The word "retribution" has come to have various senses in the writings of moral philosophers, but there seems little doubt that its original use was in connection with the practice of "paying for" one's wrongfully caused injuries, or "paying off" one's victims or their kin in exchange for their foregoing vengeance, and thereby perhaps averting a blood feud. Punishment and compensation were fused in the earliest moral conceptions and legal systems, and that original confusion still survives in our talk of wrongdoers "paying for" their crimes, or of (what is a different but related idea) the retaliating victims "paying the wrongdoer back" by returning his harm back upon him. Restoring the moral equilibrium is a concept hardly distinguishable in its earliest employments from "balancing one's books", and still survives as a root metaphor in ordinary conceptions of punishment. In the light of this history one can understand the dictionary entries that define "retribution" as "something given or extracted in recompense", and "recompense" as "an equivalent or a return for something done, suffered, or given".[24] The word "retribution", in virtue of its embodiment of the repayment metaphor, is one

of a family of closely related and often interdefinable terms including "requital" (to make suitable return), "retaliation" (to pay back for a wrong), "reprisal" (retaliation for damage or loss suffered), "reciprocation" (return in kind), and "revenge" (retaliating in order to "get even"). One wonders who would have the standing to demand that retribution be returned upon a sinner whose wrongdoing was wholly self-regarding? If *no one* has a grievance in consequence of another's evil thoughts or private vices, who then can demand his own "satisfaction" through the other's suffering? How could punishment be a "return in kind"? How much suffering would constitute "payment" for one's sins? Who could "get even" with the self-regarding sinner, even symbolically or vicariously? In those early senses of "retribution" that employ the commercial repayment metaphor, retribution for wrongs without victims does not seem to make sense. Retribution in its original senses is a logically suitable response only to "grievance evils". The person who has the grievance "gets even" (by subtraction from the wrongdoer usually rather than by addition to the victim).

The philosophical theory of punishment called "retributivism", however, has given a variety of new and technical senses to the term "retribution", all of which bear some semblance to the original, but which depart from it in significant respects. To the ordinary non-philosopher, perhaps, "retribution" suggests "revenge". In legal punishment, it is often thought, the state exacts vengeance vicariously on behalf of the wronged victim of the crime, thereby obviating the need for private vengeance and the danger of perpetual feuds. Revenge in turn is often thought of primarily in psychological terms and identified with "satisfaction" or vindictive pleasure in the mind of the wronged party when he contemplates the suffering that has been inflicted on the responsible criminal. This sort of gloating *schadenfreude* is offensive to those moralists who are disposed by their principles to deny that it can ever be right to take pleasure in the sufferings of another, and many who have been called "retributivists" (e.g., Kant and Hegel) have taken pains to dissociate their own views from it. These non-vindictive retributivists justify punishment as retribution (in some sense), but insist that it must be inflicted calmly and rationally (not in anger) as the expression of a moral judgment, and that its primary justification "be found in the fact that an offense has been committed which deserves the punishment, not in any future advantage to be gained by its infliction".[25] The moral concept of

desert (or "fittingness") then replaces the disreputable idea of vengeful retaliation. Retribution as "deserved suffering" in turn has been given various interpretations by philosophical retributivists, and some of these interpretations, when applied to ordinary crimes (with victims) have at first sight an intuitive plausibility. But most of these are no more plausible than revenge is when applied to "harmless sins" and other free-floating evils.

Perhaps the form of nonvindictive retributivism (if I may use that phrase) that has the greatest initial plausibility is that which purports to apply principles of distributive justice to crime and punishment.[26] It is intolerable to a victim of a crime, or the next of kin of a victim, or to any disinterested observer to see the perpetrator enjoying the fruits of his ill-gotten gains, or even just continuing to live freely in pursuit of his own happiness, while the victim from whom the gains were wrongly extracted is, as a consequence, dead, disabled, or impoverished. That state of affairs will be intolerable even to the enlightened person who has foresworn the more primitive sorts of vengeance, and it will be intolerable because it is *unfair* that a "wrongdoer prosper . . . when his victims suffer, or have perished".[27]

It is offensive enough to distributive justice that good persons, for whatever reasons, should have fewer of the means to happiness than bad persons, but the outrage is multiplied many times when the disparity is explained as a consequence of the bad person's mistreatment of the good. Punishment of the wrongdoer then helps to rectify the disparity. It cannot in the worst cases restore the moral equilibrium entirely. The victim, if he is dead, cannot be brought back to life, and if he has suffered keenly during his mistreatment, that suffering cannot be nullified or cancelled out as if it had never occurred. Very often the wound produced in the wronged one cannot be repaired or even compensated for, either because the means of compensation are not available or because the harm in its very nature is not morally compensable. Nevertheless, from the standpoint of distributive justice, the repellant disproportion between the circumstances of the wrongdoer and those of his victim can at least be weakened to some degree by the punishment (and official moral condemnation) of the wrongdoer. But again, as Hart has pointed out,[28] where the wrongdoer had no victim, the concept of distributive justice in terms of which the present notion of retribution is understood has no intelligible application.

A more plausible way of applying the retributive theory to harmless wrong-doing is to punish the latter for its character as *disobedient*. The person who disobeys even wholly self-regarding moral rules thereby flouts the authority of the rule-maker or commander, and for *that* characteristic of his act he must "pay". Someone must exact retribution. Since by hypothesis no one else is harmed, perhaps it is the rule maker who can demand punishment as *his* due. But is the authority who lays down the rule necessarily "wronged" or "harmed" by acts of disobedience? The answer seems to be negative when we think of political and legal authorities. Criminals usually cause harm to aggrieved victims, but the legislators whose laws they break do not thereby acquire *personal* grievances at the wrongdoers. *Their* rights are not among those that have been directly infringed. Sentencing judges may be righteously indignant at the convicted criminal standing before them, but they do not put *themselves* among the wronged parties on whose behalf the indignation is expressed. Why then would they claim personal grievances when the crime is victimless? If legislators and judges could plausibly hold themselves to be personally wronged by disobedience as such, then merely private or victimless wrongdoing would not be free-floating after all, since there would exist wronged parties, genuinely aggrieved by it. Indeed, there could be no such thing in principle as a "victimless crime".

Let us remind ourselves what sorts of examples we are talking about when we speak of victimless immoralities – private vices, secret thoughts, moral corruption of another without danger to his other interests, defamation of the long dead, secret mistreatment of a corpse or desecration of a sacred symbol, incest-taboo infractions by adults, capricious squashing of beetles in the wild, voluntary participation in degrading sexual exhibitions or gladiatorial contests, etc. Before these acts are criminalized, what are the commands or rules they "disobey"? If the acts are true evils, then presumably, it is *moral* rules that they break, that is, the rules of true morality. Not all moral philosophers would take the next step and argue that all valid rules must stem from an authoritative personal rule-maker. Moral rules may carry their own authority, as rules of logic and mathematics do, quite apart from what any persons have said about them. Those who deny the autonomy (in this sense) of morals are nearly unanimous in identifying the authoritative moral rule-maker with God. Moral rules are valid, on this view, because they have been decreed by God, not the other way round. Do

"victimless immoralities" of the sort we have been considering then make a "victim" in the appropriate sense out of God? If they do, then perhaps some sense can be made of legal punishment construed as retribution – a restoring of the moral equilibrium between the wrong-doer and his commander or rule-maker.

There are at least two reasons, even given the usual theological assumptions, for doubting this account. Why, we might ask, does disobedience to rightful authority, as such, harm or wrong the person in authority? We saw above that human judges and legislators claim no personal grievances when their authoritative orders are disobeyed. Why should it be any different with the supreme moral commander? One good answer to this question is that the relation between God and those He commands is a much more intimate one than the distant and impersonal relation between political authorities and citizens, more like that between parental authorities, perhaps, and their children. Still, when Johnny disobeys his parents' rule and steals candy from his playmate Billy, only Billy is directly wronged. Johnny's parents will be angry and disappointed at the disobedience, and also at the wrong done to Billy, but can they claim also that a similar or comparable wrong was done to themselves? The answer, though not perfectly clear, probably depends on whether they think of Johnny's act as a deliberate piece of wrongdoing, motivated by envy, greed, or malice towards Billy, and only incidentally an infraction of the parental rule; or whether, on the other hand, they think of it as a deliberate *rejection* of the parental authority, a defiant rebellion, and therefore a conscious personal estrangement. Not every episode of moral wrongdoing, either with or without victims, can be thought of as a rejection of divine authority in a parallel way, though at least one paradigmatic bout of disobedience has been so interpreted, namely the fall of Lucifer. Any punishment of Lucifer by God could be thought of, I suppose, as a retributive "paying-back" for a wrong done to God even if the interests of others were not involved, but not because Lucifer's behavior was disobedient *merely*, but rather because it utterly flouted God's authority as an end in itself, and even challenged and usurped it.[29]

Even if it is conceptually coherent to think of each and every private episode of (otherwise) victimless immorality as a direct wrong to God, and hence of punishment as "retribution" on God's behalf, there still seems little point, and no justification, for using the

resources of the all-too-human political state for such purposes. Just as God's authority over human beings must be thought of in highly personal terms, so must His "retribution". No merely political leader has ever made persuasive claim to speak, *qua* political leader, for God, and the claim to be the instrument of God's highly personal purposes is a piece of swaggering presumption, not to say insolent usurpation. If God decrees "retribution" for all private acts that are incidentally noncompliant with His own Will, He has his own resources. The human criminal law is hardly necessary.

Leaving the theological theory aside, there are still other conceptions of retribution whose application to purely victimless wrongdoing is not conceptually distorted, but the lack of incoherence is virtually all that can be said for them when so applied. I have in mind various subtle theories of how punishment can restore a moral equilibrium – theories that do not essentially require that a moral relation between persons has been disrupted by the crime, and do not rely on the commercial "repayment" model: Hegel's theory of punishment as the "annulment" of the wrongdoing, or erasing or blotting out of the moral record-sheet;[30] G. E. Moore's theory of "organic unities", according to which the intrinsic value of a whole sequence of events (including a wrong act and a later punishment) may be different from the sum of the values of its parts;[31] and theories, based often on aesthetic analogies, of an intrinsic "fittingness" between doing moral evil and undergoing suffering for it.

Defenders of these varieties of retributivism are likely to concede that inflicting suffering on an offender is not "good in itself", but they will also point out that single acts cannot be judged simply "in themselves" with no concern for the context in which they fit and the events preceding them which are their occasion. Personal sadness is not a "good in itself" either, and yet when it is a response to the perceived sufferings of another it has a unique appropriateness. Glee, considered "in itself", looks much more like an intrinsically good mental state, but glee does not morally fit the perception of another's pain any more than an orange shirt aesthetically fits "shocking pink" trousers. Similarly, it may be true (the analogy is admittedly imperfect) that "while the moral evil in the offender and the pain of the punishment are each considered separately evils, it is intrinsically good that a certain relation exist or be established between them".[32] In this way, the nonvindictive, noncommercially modelled retributivist can

deny that a deliberate infliction of suffering on a human being is either good in itself or good as a means, and yet find it justified nonetheless as an essential component of an intrinsically good complex. Perhaps that is to put the point too strongly. All the retributivist needs to establish is that the complex situation preceding the infliction of punishment can be made better than it otherwise would be by the addition to it of the offender's suffering.[33]

These theories of retribution rely heavily on analogies to moral and aesthetic intuitions – orange and shocking pink do not go together; the last note of Beethoven's Fifth is absolutely required (a strong sense of "fits") by the notes that immediately precede it; glee does not morally match pain; compassion is morally called for by the awareness of another's suffering, etc. If we are asked how we know these things, we can only reply that anybody can, and everybody does, just *see* that they are so. Some of us, but by no means all of us, will express skepticism about the similar claim that one can "just see" that suffering inflicted on the sadistic murderer is uniquely called for by the wickedness of his crime. The judgment may seem to have a suspicious connection to the primitive lust for vengeance despite its moral trappings. Others might locate its element of plausibility in its implicit appeal to the notion of retribution as the rectification of distributive unfairness, which we discussed earlier. But when we come to apply this aesthetic-modelled retributivism to the harmless wrongdoers we have been considering in this essay, it loses whatever trace of self-evidence it had in its other applications. Hardly anyone will claim that he can "just see" that the harmless wrongdoer's suffering added to his sin will make a complex moral whole whose value is greater than that of either component considered separately. It is bad enough, many will say, that the voluntary spectator at the pornographic show should wallow in erotic delight at the degrading performances of voluntary participants, but to add pain and suffering to his subsequent experience, or to theirs, though it has no beneficial effects, is only to make matters *worse*. Without an aggrieved victim, I have argued, it is doubtful that the moral evil of a "harmless" action can ever be serious enough to counterbalance the loss of freedom to do it. Whatever the reader may think of the intuitive case for that comparative judgment, he will probably agree that the intuitive case for the intrinsic fittingness of *punishment* for such acts is a good deal weaker still.

In the end, I suspect, it is best to interpret Stephen as no kind of

retributivist at all, despite his injudicious use of words like "vengeance". Stephen does not think of punishment as paying the harmless wrongdoer back, getting even with him, or in any of the more traditional senses, restoring the moral equilibrium. Such retributive conceptions seem to require that the wrongdoer had a victim. Stephen thinks of sodomists' behavior as hateful, and advocates punishment as giving expression to the hostility they have coming. That hatred need not be a retributive emotion. It is not hate together with a sense of grievance, not hate on behalf of a victim, self or other. Rather it is hate as the automatic response of right-thinking people to *inherently* odious conduct, harmful or not. It is a familiar fact that the thought of what he takes to be "unnatural sex" may fill a person with disgust or repugnance, as the thought of "evil-tasting" food does. But *hate*? Stephen teaches the liberal to identify one of the moral presuppositions of his own political position, that it is not appropriate to hate people except (at most) for their disposition to harm and wrong others. But then that is a lesson, I think, that most "right-thinking people", liberal or not, do not have to learn.

I conclude that the liberal restriction of criminal law to the prevention of harmful wrongs and the enforcement of "grievance morality" can survive the argument from the moral gradation of punishments as formulated by Stephen and Devlin, and that Stephen's case for the legitimacy of victimless crimes, insofar as it rests on the notion of "retribution" for free-floating evils, will not survive scrutiny.

NOTES

[1] Patrick Devlin: 1965, *The Enforcement of Morals*, Oxford University Press, London. To this book, which has remained the definitive statement of Devlin's views, he gave the title of his original lecture ('The Enforcement of Morals').

[2] James Fitzjames Stephen: 1967, *Liberty, Equality, Fraternity*, Cambridge University Press, Cambridge, pp. 152ff.

[3] H. L. A. Hart: 1963, *Law, Liberty, and Morality*, Stanford University Press, Stanford, p. 36.

[4] Stephen, *op. cit.*, p. 152.

[5] Hart, *op. cit.*, p. 36.

[6] *Ibid.*, p. 37.

[7] Devlin, *op. cit.*, p. 130.

[8] *Ibid.*, p. 131.

[9] H. L. A. Hart: 1968, 'Prolegomenon to the Principles of Punishment', in his *Punish-*

ment and Responsibility, Oxford University Press, New York and Oxford, especially pp. 2–3 and 8–11.

[10] Aristotle includes among the "moral virtues" both cheerfulness and a sense of humor. (These are translated by Ross as "good temper" and "ready wit".) See *Nicomachean Ethics*, Book IV, Chapters 5, 8.

[11] J. L. Austin wrote that we might admit that an act, *A*, was not a good thing to have done, but go on "to argue that it is not quite fair or correct to say *baldly* '*X* did *A*'". He explains:

> We might say it isn't fair just to say *X* [with emphasis] did it; perhaps he was under somebody's influence or was nudged. Or, it isn't fair to say baldly he *did* it; it may have been partly accidental, or an unintentional slip. Or it isn't fair to say he did simply *A* – he was really doing something quite different, and *A* was only incidental, or he was looking at the whole thing quite differently....

J. L. Austin: 1961, 'A Plea for Excuses' in his *Philosophical Papers*, Clarendon Press, Oxford, p. 124.

[12] See my 1973, 'The Expressive Function of Punishment', in *Doing and Deserving*, Princeton University Press, Princeton, pp. 95–118. The point is also given emphasis by Neil MacCormick: 1982, *Legal Right and Social Democracy*, Clarendon Press, Oxford, pp. 30–34. MacCormick invokes the stigmatizing nature of punishment, however, to make a point at first sight opposite to mine, namely that "any principle whatever which allows that the state may resort to *punishment* necessarily allows state enforcement of some moral values" (p. 33).

[13] A more thorough account of procedural justice would have to make many more distinctions, and say more about the interplay between formal (Aristotelian) justice and what is often called "material justice". The requirements of procedural justice are not exhausted by the simple Aristotelian formula. What if we treated relevantly similar cases in similar ways but then used an inverted rank order: lowest scores ranked at the top, and highest scores disqualified! Also the formal principle could be satisfied by a procedure that is too severe – one that flunked, say, the lowest 99%.

[14] See my 1984, *Harm to Others*, Vol. I of *The Moral Limits of the Criminal Law*, Oxford University Press, New York, Chapter 1.

[15] I use this term to refer to rules designed to protect individuals from invasions of their rights and/or setbacks to their interests, or being unfairly "taken advantage of" to another's gain even without setback to their own interests, in short from any treatment that they can rightly complain about, on their own behalf, after the fact. Non-grievance morality consists of rules designed to prevent evils of a kind that would not be the basis of any assignable person's grievance.

[16] See my 1980, 'Legal Moralism and Freefloating Evils', *Pacific Philosophical Quarterly*, pp. 122–55.

[17] Stephen, *op. cit.* (see note 2 *supra*), p. 151.

[18] *Loc. cit.*

[19] *Loc. cit.*

[20] *Ibid.*, p. 151. Stephen is too delicate to say so here, but he is obviously referring to such "unnatural" sex crimes as sodomy, bestiality, and incest.

[21] *Loc. cit.*

[22] Stephen's intention is to show that any philosopher who makes deterrence the primary and overriding determinant of individual sentences should make the existence of widespread temptation an aggravating circumstance; whereas a philosopher who makes either the degree of hatefulness or the degree of moral blameworthiness the paramount determinant will *not* consider the temptation to be an aggravating circumstance. But Stephen proceeds to assume more than what is required by his argument when he claims that the vengeance-blameworthiness philosopher considers temptation to be not merely *not aggravating*, but positively *mitigating*. Thus, a person who commits a criminal act that he is only moderately tempted to do is more blameworthy than a criminal who performs the same act (in Stephens' own example as a partner) having "given way to very strong temptation". Not only is the claim not required by Stephens' argument: it is far from being intuitively compelling. If Stephens' example, *op. cit.*, p. 153, makes it seem plausible, that is perhaps because it introduces extraneous elements, in particular influence, ignorance, education, and rank. The moderately tempted party in Stephens' example is also the party who should have known better:

> A judge has before him two criminals, one of whom appears from the circumstances of the case to be ignorant and depraved, and to have given way to a very strong temptation under the influence of the other, who is a man of rank and education, and who committed the offense of which both are convicted under comparatively slight temptation. I will venture to say that if he made any difference between them at all, every judge on the English bench would give the first man a lighter sentence than the second.

[23] Punishment may *also* be deterrent in this view, and it is a good thing that it be so, but deterrence *alone* can never justify a particular instance of punishment. On the other hand, punishment is justified in those cases in which it is retributive whether it is deterrent in those cases or not. Note also that in the weakest sense of "retributive", that term may refer only to the requirements of procedural fairness that all punishment theorists must recognize, that there be no punishment without legal guilt, that the degree of punishment be proportionate to the degree of blameworthiness and discounted in proportion to the degree of responsibility, and so on. In this sense of "retributive", we are (almost) all retributivists. Whatever the criminal law is *for*, it must be administered fairly. Most of the theories to which the label "retributivism" has adhered, however, assert that giving wrongdoers their due is precisely what the system of criminal law *is* for (as well as reducing the amount of wrongdoing by the intimidation of example). In short, retributivism makes retribution part of the justifying aim of criminal law and not merely a requirement derivative from procedural fairness.

[24] 1973, *Webster's New Collegiate Dictionary*, G. & C. Merriam Co., Springfield, MA.

[25] A. C. Ewing: 1929, *The Morality of Punishment*, Kegan Paul, London, p. 13.

[26] For a sophisticated development of a retributive theory of this sort, see Herbert Morris: 1968, 'Persons and Punishment', *The Monist* **52**.

[27] H. L. A. Hart: 1963, *Law, Liberty, and Morality*, Stanford University Press, Stanford, p. 60.

[28] *Loc. cit.*

[29] Tradition shows Lucifer, as a mere functionary, usurping the role and symbolic trappings of his superior. Marlow characterized Lucifer's sin as "aspiring pride and

insolence" (the insolence adds something to the pride). According to some church fathers, Lucifer's original sin was "refusal to bow before the Great White Throne", but according to others, he actually tried to seize the throne itself or simply to seat himself on it. In certain medieval mysteries, Lucifer sits next to God by night, but when God leaves his throne for a moment, Lucifer, "swelling with pride, sits down on the throne of heaven" (the greatest wickedness open to him) and that is when "the Archangel Michael, indigant, takes up arms against him, and finally suceeds in driving him [out of heaven]". See Maxmilliam Rudwin: 1931, *The Devil in Legend and Literature*, Open Court Publishing Co., Chicago, Chapter 1.

[30] Georg Wilhelm Friedrich Hegel: *The Philosophy of Right*, translated by T. M. Knox: 1942 Oxford University Press, Oxford, Sections 99, 100.

[31] G. E. Moore: 1903, *Principia Ethica*, The Cambridge University Press, Cambridge, Chapter I, D.

[32] A. C. Ewing: 1953, *Ethics*, Macmillan, New York, pp. 169–70.

[33] It is not clear whether this kind of retributive theory is consistent with a general consequentialism in ethics. According to it, punishment *is* justified by some of its results, namely those which alter the moral relations between events one of which (the original wrongdoing) was in the past. According to this kind of retributivism, the "consequence" of punishment that justifies it is a "backward-looking consequence", a result that somehow alters the past. Punishment is justified if, as one of its results, a stretch of time beginning at a given point in the past and ending with *it*, an event in the present, is better as a whole than it would otherwise be.

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