



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

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Volume 17 | Number 2

Article 3

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March 2016

## The Unpunishable Immorality

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### Recommended Citation

Nasser, Ramzi (2016) "The Unpunishable Immorality," *Touro Law Review*. Vol. 17: No. 2, Article 3.  
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## The Unpunishable Immorality

Cover Page Footnote

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## THE UNPUNISHABLE IMMORALITY

Ramzi Nasser<sup>1</sup>

### I. INTRODUCTION

Listen, we're in town for six weeks, right? – and I'm just talking now, so jump in – but what, say . . . and this is perfect, what with the breakup thing you got going, too . . . but say we were to find some gal – and I know we've got a shitload of stuff to get done, I know that, but for the sake of argument, let's just say we stumbled on to somebody, okay? – so, this person is just vulnerable as hell, right? Young thing, the wallflower type, whatever – or disfigured in some way, I don't know – but some woman who is pretty sure that life . . . and I mean a full, healthy sexual life, romance, stuff like that . . . is lost to her forever. Okay? Anyway, we take a girl that type – some cornfed bitch who'd practically mess her pants if you sharpen a pencil for her! – and we both [pretend to fall in love with her.] You know? You and me upping the ante all the time . . . she's suddenly got two men! She's crazy with joy, she's wearing makeup again! And on we play, and on and on! And then one day, out goes the rug, and us pulling it hard and "Jill," she comes tumbling after . . . . Hour later we are back on a flight to civilization like nothing happened. Trust me, she will be reaching for the sleeping pills within a week and we'll laugh about this 'til we're very old men . . . what do you think?

"Chad," while speaking with "Howard" in the film,  
"In the Company of Men"<sup>2</sup>

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<sup>1</sup> J.D., University of Pennsylvania; B.A., University of California, San Diego. Clerk for the Honorable James T. Giles, Chief Judge of the Eastern District of Pennsylvania. I am greatly indebted to those who gave commentary on previous drafts or engaged in involved discussions with me before the first draft was written: Leo Katz, Michael Moore, Joe Farber, Paul Litton, Craig Green, and Myrna Gabbe. Special thanks to the staff of the Touro Law Review for their help with research. The views in this article are mine, and not those of my employer.

<sup>2</sup> Script available in Neil LaBute, *IN THE COMPANY OF MEN* (1997).

I was 14 and my neighbor was 16. He had just gotten a red Firebird for his birthday and we went driving around. We just happened to drive past the local pizza place and we saw a delivery boy getting into his car . . . . We could see the pizza boxes in the back seat. When the pizza boy pulled into a highrise apartment complex, we were right behind him. All of a sudden, my neighbor said, "You know, it would be easy to take a pizza!" . . . I looked at him, he looked at me, and without saying a word I was out of the door . . . got a pizza and ran back . . . . (As I remember, neither of us was hungry, but the pizza was the best we'd ever eaten.)

Student, University of California, Los Angeles<sup>3</sup>

At first, the two accounts listed above seem to have little in common. The fictional speaker in the first excerpt explains his evil plan to amuse himself and his co-worker, Howard, by intentionally causing severe emotional harm to another. Chad and Howard succeed in their plan. Feigning kindness and affection, Chad courts a young, deaf woman named Christine for weeks, eventually relishing in telling her that neither he nor his friend were the least bit interested in her. "I was going to let you down easy," says Chad, once Christine reveals she suspects his scheme, "but I can't keep a straight face, . . . so fuck it. Surprise . . . so, how does it feel?"<sup>4</sup> Meanwhile, the speaker from the second excerpt seems to successfully engage in fairly harmless mischief by stealing a pizza and adding to the thrill of a night out with a friend who had just become old enough to drive.<sup>5</sup> What unites the two acts is their wrongness. Nearly all would agree that both Chad's misrepresentations and the fourteen-year-old's pizza theft were morally wrong. People should not intentionally hurt others or steal the property of others. Further, most would agree that the actions of Chad and his comrade were morally worse, by an order of magnitude, and deserves much more punishment than the actions

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<sup>3</sup> JACK KATZ, *SEDUCTIONS OF CRIME* 52 (Basic Books 1988).

<sup>4</sup> Neil LaBute, *IN THE COMPANY OF MEN* (1997).

<sup>5</sup> KATZ, *supra* note 3.

of the young pizza thieves. In reality, our system of criminal punishment would leave Chad and Howard untouched, while legislatures pass criminal statutes that put a person in jail for stealing the "food or drink" of another "with the purpose to deprive him thereof."<sup>6</sup>

For some reason, the likes of Chad and Howard have always been able to commit moral wrongs without facing punishment by incarceration or any other act of the state. The government punishes wrongs more related to person and property, such as murder, assault, or pizza theft.<sup>7</sup> Other wrongs, like

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<sup>6</sup> MODEL PENAL CODE §§ 223.0(6) and 223.2. Section 223.0(6) states:

In this Article, unless a different meaning plainly is required: "property" means anything of value, including real estate, tangible and intangible personal property, contract rights, chose-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.

*Id.*

MODEL PENAL CODE § 223.2 (1) provides: "A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." *Id.*

<sup>7</sup> MODEL PENAL CODE § 210.2 states in pertinent part:

[C]riminal homicide constitutes murder when; (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. (2) Murder is a felony of the first degree . . . .

*Id.*

MODEL PENAL CODE § 211.1(1) provides:

(1) Simple Assault. A person is guilty of assault if he:  
 (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or  
 (b) negligently causes bodily injury to another with a deadly weapon; or  
 (c) attempts by physical menace to put another in fear of imminent serious bodily injury.  
 Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

manipulating loved ones or intentionally undermining the confidence of one's colleagues, never bring state-inflicted suffering for the offenders. This fact about state-imposed punishment poses some problems for the way punishment is understood and justified by both moral philosophers and the general public.

I believe the existence of cases such as those above casts doubt on retributivism.<sup>8</sup> There is extensive philosophical debate over why we punish people, with the explanation I find the most plausible being made by moral philosophers known as "retributivists." While an ordinary citizen usually assumes people are put in jail for the safety of the public, to deter further criminal acts, and because the offender deserves poor treatment by virtue of the wrongness of her act, a retributivist would counter that "punishment is properly inflicted because, and only because, the person deserves it."<sup>9</sup>

The retributive position is best understood by considering if the state should punish someone even if doing so would not achieve any goal other than giving an individual his just deserts. Professor Michael S. Moore gives the following example:

Imagine [that after committing a brutal rape] but before sentencing the defendant has gotten into an accident so that his sexual desires are dampened to such an extent that he presents no further danger of rape; if money is also one of his problems, suppose further that he has inherited a great deal of money, so that he no longer needs to rob. Suppose, because

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*Id.*

<sup>8</sup> WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(a)(6) (3d ed. 2000). Retribution, synonymous with retributivism, is explained as:

By this theory, also called *revenge* or *retaliation*, punishment (the infliction of suffering) is imposed by society on criminals in order to obtain revenge, or perhaps (under the less emotional concept of retribution) because it is only fitting and just that one who has caused harm to others should himself suffer for it . . . . Some contend that when one commits a crime, it is important that he receive commensurate punishment in order to restore the peace of mind and repress the criminal tendencies of others.

*Id.*

<sup>9</sup> MICHAEL S. MOORE, LAW AND PSYCHIATRY 236 (Cambridge 1984).

of both of these facts, we are reasonably certain that he does not present a danger of either forcible assault, rape, robbery, or related crimes in the future. Since [the rapist] is (by hypothesis) not dangerous, he does not need to be incapacitated . . . or reformed. Suppose further that we could successfully pretend to punish [him], instead of actually punishing him, and that no one is at all likely to find out. Our pretending to punish him would thus serve the needs of general deterrence and maintain social cohesion, and the cost to the state would be less than if it actually did punish him.<sup>10</sup>

It would seem wrong to allow the person who committed this brutal rape to go unpunished even if the goals of deterrence, rehabilitation, and public safety were not served by the punishment.<sup>11</sup> He deserves punishment by virtue of having done wrong.<sup>12</sup> Also, strong intuitions suggest that we should not punish an innocent person for any reason – not even to appease an angry mob ready to start violence or to create the appearance that the state has captured a notorious offender, deterring other citizens from attempting similar crimes. When the convict does not

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<sup>10</sup> *Id.* at 234.

<sup>11</sup> LAFAVE, *supra* note 8, at §§ 1.5(a)(2), 1.5(a)(3), 1.5(a)(4).

Under the theory of deterrence, “the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate.” Under rehabilitation, “also called *correction*, or *reformation*, we ‘punish’ the convicted criminal by giving him appropriate treatment, in order to rehabilitate him and return him to society so reformed that he will not desire or need to commit further crimes.” The notion of the public safety theory, also known as *restraint*, or *incapacitation*, “is that society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society.”

*Id.*

<sup>12</sup> This is classic retribution theory, that the only reason for punishment is that one has done wrong. “The offender may justly be subjected to certain deprivations because he deserves it; and he deserves it because he has engaged in wrongful conduct -- conduct that does or threatens injury and that is prohibited by law.” See LAFAVE, *supra* note 8, at § 1.5.

deserve punishment, no non-retributivist consideration justifies punishment. Hence, because only moral wrongdoing can justify punishment, retributivists believe people should be punished because they have behaved wrongly and only because they have behaved wrongly.<sup>13</sup>

But if it is the desert of the wrongdoer that justifies punishment, why is no such punishment justified for Chad and Howard? All would agree that they acted more wrongly than the pizza thieves, but somehow they do not seem to deserve as much – or even any – punishment by the state. This undermines the retributivist notion that desert alone justifies punishment. Either one is forced to conclude that Howard and Chad do not deserve punishment or that desert alone does not justify punishment. It certainly seems easier to admit that retributivism does not hold than to agree that Chad and Howard deserve better treatment than the pizza thieves. This article will discuss the threat to retributivism created by the fact that Chad and Howard *deserve* much worse treatment than the pizza thieves, yet at the same time should not be punished as the pizza thieves are punished.

Cases of unpunishable immoralities also seem to suggest a great deal of injustice in our institutions since many who commit terrible moral wrongs are never punished, and those who commit minor wrongs are. Usually, the following three assessments can be made when comparing two immoral acts: 1) Which act was morally worse?; 2) Which act deserves more punishment?; and 3) Which act should receive more punishment from the state? Given a retributivist account, the answer to the three questions should be the same. The more morally badly a person acts, the more punishment he deserves, and the more punishment he should

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<sup>13</sup> In MICHAEL S. MOORE, *ACT AND CRIME*, 53 (Clarendon Press 1993), author Michael S. Moore states,

Retributivism, however, is a backward-looking punishment scheme. For a retributivist, it is a sufficient reason to punish that the person deserve it, even if such punishment does not change future behavior at all. The retributivist answer thus has to lie in the nature of desert. Desert must be such that we deserve punishment for violations of morality's norms of obligation, but we do not deserve punishment for violation of morality's ideals of virtuous character.

*Id.*



receive from the state. In fact, we usually ask one of the questions to answer the other two. For example, one might note that he feels rape is morally worse than a simple assault, and hence should be punished more by the state. Another person might observe that insider trading is given less punishment in Japan than in the United States, so the Japanese must consider insider trading less immoral than Americans do.<sup>14</sup> However, once one accepts that Chad and Howard have committed a morally worse act than that of the pizza thieves, one has difficulty giving the same answer to all three questions when comparing some acts. One is forced into saying that a morally worse act somehow does not warrant more punishment from the state than a morally better act.

There are numerous instances where a different answer is given to question one (which act is morally worse) and question three (which act should receive more punishment from the state). Before considering the examples above, most would suspect that civic punishment is reserved only for the worst of immoral acts. People who have committed crimes are thought to act less morally than law-abiding citizens. After all, civic punishment is extremely severe and has been noted by one philosopher to include “a brand of censure and condemnation that leaves one, in effect, in permanent disgrace.”<sup>15</sup> Most citizens could not conceive of spending even a week locked away in a jail cell, and indeed, most believe that they are far from deserving such treatment.

But one must consider the following question: are criminal wrongs necessarily worse than wrongs not currently deemed criminal? That is, are acts which can lead to imprisonment always more immoral than those acts that the law does not punish? The obvious answer is ‘no.’ But answering no does not only mean that rare, unusually devious people, like Chad and Howard, can commit unpunishable crimes that are worse than criminal acts. Recall that the pizza thieves’ wrong was hardly worthy of overwhelming moral outrage. Certainly a spouse who coldly and unfeelingly carries out a host of infidelities or a parent manipulating her children, hoping to turn them against their estranged father, has

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<sup>14</sup> See Ramzi Nasser, *The Morality of Insider Trading in the United States and Abroad*, 52 OKLA. L. REV. 377 (1999).

<sup>15</sup> JOEL FEINBERG, 1 *THE MORAL LIMITS OF THE CRIMINAL LAW* 24 (Oxford University Press 1984).

also carried out worse wrongs than the pizza thieves. It seems that many people who could not conceive of spending time behind bars ordinarily commit acts worse than the pizza thieves.

If retributivists are right – and the state should punish people to the extent that they deserve it – then it seems unjust that people like Chad, Howard, the adulterer, and the bad mother go free while others who commit comparatively minor wrongs receive state-inflicted moral disapprobation with some element of permanent disgrace. Justice requires that people get what they deserve, yet our system seems to punish people who commit minor wrongs while finding punishment inappropriate for those who commit much more heinous offenses.

People could argue that Chad, Howard, the adulterer, and the bad mother would be punished by the state if the state had more resources. The reason that the law does not punish them is merely pragmatic. In passing, philosopher Alan Goldman explained that there are some “moral wrongs whose detection is so unsure that their prohibition would involve costs too great to be worthwhile: betrayals of friendship, deceptions in love affairs, and so on.”<sup>16</sup>

Goldman’s answer assumes that if the government were able to better detect, for example, deceptions in love affairs, it would be able to put a deceptive lover on trial and punish her. But one need merely reflect for a moment about punishing these previously unpunished acts to see that qualms about state intervention are more than just a reaction to inefficiency.

The pizza thieves were likely guilty of petty theft which commentators have suggested should be punishable by up to four months in prison.<sup>17</sup> An Illinois court upheld a one year prison sentence for a woman who committed a similar crime, stealing cigarettes from a supermarket.<sup>18</sup> As an intuitive matter, we are unlikely to feel that our adulterous neighbor or perhaps, our own

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<sup>16</sup> Alan H. Goldman, *The Paradox of Punishment*, in PUNISHMENT 30, 35 (Simmons et al., eds. 1995).

<sup>17</sup> See Kenneth Noble, *U.S. Sentencing Plan Urges Fixed Terms and No Parole*, N.Y. TIMES, April 12, 1987, at A16.

<sup>18</sup> See *Illinois v. Spence*, 272 N.E.2d 739, 740, 133 Ill. App. 2d 171, 171 (1971). The court rejected the argument that the lower court sentence was excessive and should be reduced on appeal. See 272 N.E.2d at 742, 133 Ill. App. at 174.

manipulative parents, should be forced to spend four months or more in prison. Though such actors have committed wrongs, the state, for some reason, should not intervene, put them on trial, or imprison them for such wrongs.

Some could also argue that Chad and Howard did not act as wrongly as offenders who do face state-imposed punishment. Upon noting that we do not wish to send the adulterer or the bad mother to the penitentiary, we may conclude that our initial moral assessment was wrong. Pizza theft truly is worse than infidelity, one might suggest, since we are certain a pizza thief may deserve to be locked up while an adulterer deserves, at most, resentment and indignation.

This position is indeed plausible. If a particular act deserves more punishment (question two), perhaps it must also be more wrong (question one). After all, it seems the questions of “does an act deserve more punishment?” and “is an act morally worse?” should be answered the same way. Though tempting, giving up on the intuition that a vast number of unpunishable acts are morally worse than pizza theft would be a grave error. I will explain below that it is in fact the third question, “which act should receive more punishment from *the state?*,” that can be answered differently than the questions of “which act deserves more punishment?” and “which act is morally worse?” I will show that we can often be certain that the acts like those of the adulterer and the bad mother are morally worse than minor crimes, deserve more punishment, and yet, should not be punished more by the state. We make a mistake when we infer from the fact that an act should not be punished by the state that the act *deserves* less punishment than criminal acts, or that the act is morally better than criminal acts.

Part II of this paper will show that the standard retributivist account of state-imposed punishment needs refinement to account for the absence of state punishment for a whole host of moral wrongs. I will conclude that the state is constrained by certain principles of liberty that keep it from imposing retribution on evildoers like Chad and Howard.

Part III will use concepts of resentment and poetic justice to show that those who have committed moral wrongs but should not be punished by the state still deserve punishment and have committed moral wrongs.

But there are important implications to the fact that acts the state should punish are different than the acts that deserve punishment. Part IV will assert that the difference between when the state should punish and when a person deserves punishment undermines the retributivist claim that desert justifies punishment. Some tentative remarks will suggest state-inflicted punishment may actually be justified by criminals' violation of the rights of others. I will also explore the possibility that, since punishment seems to turn on whether the offender violated certain rights of others, moral desert may have no place in determining if and how much the state punishes someone.

## **II. THE IMPORTANCE OF LIBERTY AND HOW IT CAN NOT BE OVERRIDDEN BY THE RETRIBUTIVISTS' NOTION OF DESERT**

The existence of unpunishable immoralities suggests that the state often cannot punish individuals who have done wrongly because such punishment would violate the liberty interests of the offenders. Retributivists take issue with consequentialists who justify punishment by pointing to some important state interest such as deterring crime or increasing safety. Retributivists feel that such ends do not justify infringing on the rights of citizens.<sup>19</sup> The State could not strip the average innocent citizen of her rights because it would somehow enhance the safety of the streets, so fulfilling the end of safety can not be a sole justification for punishment. What retributivists fail to recognize is that their account of punishment is open to the same type of criticism since people could not be stripped of their liberties simply because they were judged to deserve punishment. Amartya Sen's critique of Utilitarianism, for example, applies just as strongly to retributivists as Utilitarians.

### **A. Sen's Account of Liberty's Importance and His Critique of Utilitarians**

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<sup>19</sup> See MOORE, *supra* note 9, at 237.

Amartya Sen explains the importance of liberty to show the limitations of utilitarianism. Sen considers two individuals, Lewd and Prude.<sup>20</sup> Lewd derives great pleasure from reading *Lady Chatterly's Lover*, a book by D.H. Lawrence that includes explicit accounts of sexual experiences. Prude is very annoyed that Lewd is reading the book and would prefer to read it himself than have to think "of that depraved Lewd gloating over this terrible stuff."<sup>21</sup> Further, if Lewd was given the choice between reading the book himself, and having Prude read the book, he would prefer the latter taking "true delight in thinking of that pompous Prude suffering the consequences of his absurd disposition."<sup>22</sup> Hence, both Prude and Lewd would gain greater utility (than the default state of affairs where only Lewd reads *Lady Chatterly's Lover*) from the state of affairs in which Prude reads the book and Lewd does not. A utility-maximizing rule of law would require that Lewd read the book while Prude be prohibited from doing so. Sen points out that that even though the rule of law would maximize utility, it must be rejected. We value liberty, and Lewd is at liberty to read *Lady Chatterly's Lover*; while Prude is at liberty to avoid reading the book. The government should not force either man to read, or not read, lascivious books, simply because it would maximize utility.<sup>23</sup>

Sen's example seems to undermine a utilitarian justification of punishment. A utility-maximizing rule of law would punish Lewd for reading the book, while punishing Prude for failing to read the book. Even though such a rule would maximize utility, this imposition on liberty is impermissible. It is wrong for the government to punish Lewd and Prude because they are at liberty to read what they wish. Of course, the utilitarians would likely respond to Sen with a recharacterization of the example or of the utilitarian account. My purpose is not to defend Sen's position

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20 Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 155 (1970). See also James S. Fishkin, *Justice Versus Utility*, 84 COLUM. L. REV. 263, 268 (1984) (book review).

<sup>21</sup> Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 480 (1979).

<sup>22</sup> *Id.*

<sup>23</sup> Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. at 157. Sen actually refers to a state of the world that is "pareto optimal," as opposed to a state of the world that maximizes utility. This distinction is not relevant to my point. *Id.*

against utilitarian attack, but to point out the significance of Sen's account for retributivists' justification of punishment.

### **B. Retributivism Does Not Justify Infringing on Offenders' Liberty**

Sen's example not only poses problems for utilitarians, it also poses problems for retributivists who believe that punishment is justified because offenders who have behaved wrongly deserve to be punished. Imagine Lewd decided to read *Lady Chatterly's Lover* not because he enjoyed it, but because he knew that it would be the best possible way to cause Prude distress. Imagine further, that Lewd actually loathed D.H. Lawrence's work as much as Prude, and only continued to read the work out of sheer spite. In fact, Lewd would prefer to punch Prude in the face, or steal his car, than to read the offensive book, but reads on only because Lewd determined this would cause Prude the most pain and suffering. As described, it seems that Lewd's action is immoral. He is causing suffering out of pure spite. Nonetheless, we would still agree that liberty constrains the government from forcing Lewd not to read the book. Lewd seems to be behaving immorally, and seems to deserve punishment. But the liberty constraint binds the government whether punishing in the name of utility or in the name of desert.

Unfortunately, the example seems too outlandish to be explanatory. A person like Prude, who would rather be beat up or robbed than have an acquaintance read *Lady Chatterly's Lover*, is far too unlikely to reveal useful intuitions about the purposes of punishment. Further, it does not seem that reading *Lady Chatterly's Lover* is morally worse than stealing from Prude or assaulting him; so it seems appropriate for a retributivist to still believe that a minor assault deserves punishment while vindictively reading a book does not.<sup>24</sup> My point is only that the requirement of protecting liberty is not lifted because the offender

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<sup>24</sup>See LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 152-157 (The University of Chicago Press 1996). We can imagine that someone suicidal might prefer murder to theft, but that does not make a person who stole his wallet morally worse than a person who murdered him. *Id.*

acts immorally. Recall that Chad and Howard certainly committed an act morally worse than theft, and Christine was certainly not eccentric or outlandish to find the ruse more painful than if Chad and Howard had simply stolen her car. The government cannot punish Chad and Howard because they are at liberty to be manipulative in a relationship and pretend to be caring and thoughtful even if they are not. Liberty limits state-inflicted punishment not only in imagined hypotheticals. Our legal system is filled with examples where people acted wrongly, deserve punishment, and cannot be punished because the liberty of offenders constrains government action.

### Example 1: Hate Speech

Freedom of speech is one of the liberties we hold dearest, but this freedom also enables individuals to do evil acts while remaining untouched by the law. Few could argue that racial insults, for example, are usually invidiously calculated to harm people. Some scholars have argued that racial slurs should be outlawed “because of the immediacy of the injurious impact of racial slurs.”<sup>25</sup> Further, the experience of “being called ‘nigger,’ ‘spic,’ ‘Jap,’ or ‘kike,’ is like receiving a slap in the face. The injury is instantaneous.”<sup>26</sup> Critical race theorists such as Charles Lawrence and Richard Delgado<sup>27</sup> have noted the evils of such race-based attacks and advocated they be outlawed. Lawrence reasoned that racial insults were “undeserving of first amendment protection because the perpetrator’s intention is not to discover truth or initiate dialogue but to injure the victim.”<sup>28</sup>

Unsurprisingly, many scholars and judges disagree with Laurence. Freedom of speech includes being able to speak when nearly everyone believes it would be morally bad to say such things under the circumstances. Laurence Tribe has noted that if “the Constitution forces government to allow people to march,

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<sup>25</sup> Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (1990).

<sup>26</sup> *Id.*

<sup>27</sup> See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

<sup>28</sup> Lawrence, *supra* note 25, at 452.

speak, and write in favor of peace, brotherhood, and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide.”<sup>29</sup> A citizen is not at liberty to express herself if the government prohibits any expression determined to be immoral and worthy of punishment. A primary purpose of the First Amendment is to protect speech that is controversial, unpopular, and unpleasant; speech that the majority of citizens favor does not need such special protection.

Just as in the more general case of evildoers like Chad and Howard, the fact that government cannot punish one for immoral speech shows that liberty cannot be overridden by the retributivist notion of just deserts. A closer look at punitive prohibitions on hate speech shows how First Amendment protections are analogous to the types of liberties enjoyed by Chad and Howard.

In June of 1989, the Board of Regents of the University of Wisconsin (UW) adopted a rule to discipline students who intentionally made “racist or discriminatory comments” that were meant to “intentionally: (1) Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestor or age of the individual or individuals; and (2) Create an intimidating, hostile, or demeaning environment for education, university-related work, or other university-authorized activity.”<sup>30</sup> It is hard to deny that intentionally creating a hostile environment is an awful and mean-spirited activity that deserves punishment, but when the rule was actually put in operation, the results seemed unjust.

Consider the story of one of the first students punished under the University of Wisconsin Rule:

The University of Wisconsin-Eau Claire found [a student] violated the UW Rule by yelling epithets loudly at a woman for approximately ten minutes, calling her a “fucking bitch” and “fucking cunt.” [The student] was responding to statements the women made in a university newspaper about the athletic department. The university placed the student on probation for a semester and required

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<sup>29</sup> LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 838 n.17 (2d ed. 1988).

<sup>30</sup> *UMW Post, Inc. v. Board of Regents of the Univ. of Wis.*, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991).



him to perform twenty hours of community service at a shelter for abused women.<sup>31</sup>

It seems clear the perpetrator did something wrong – something much worse than say, sneaking into the woman’s office and stealing a few dollars from her wallet in retaliation for her disagreeable comments about the athletic department. Nonetheless, it does not seem just to put the vulgar and sexist sports enthusiast on academic probation and force him to work at a women’s shelter. A Wisconsin federal court agreed and found the University of Wisconsin rule unconstitutional because “speech does not lose its protected status merely because it inflicts injury or disgrace on its addressees.”<sup>32</sup> Freedom of speech includes the right to tell people what you think of them, no matter how ignorant, invidious, or immoral the telling may be.

For those readers who thought the fictional account about Chad and Howard was too uncommon or outlandish to have any explanatory force, the Wisconsin incident is a real world example where the retributive notion of just desert does not justify punishment, even though the perpetrator did something morally worse than pizza theft. Also, the example should dispel suspicions that the phenomena discussed in the introduction can be explained away by epistemological concerns. Upon reflection, it is not difficult to concede that there are unpunished wrongs that are morally worse than many punished crimes. Many are inclined to deny the theoretical importance of these unpunishable offenses by claiming, as philosopher Alan Goldman did, that “betrayal of friendship, deceptions of love affairs, and so on” are “moral wrongs whose detection is so unsure that their detection would involve costs too great to be worthwhile.”<sup>33</sup> The act of screaming obscenities at someone is no more difficult to detect than other criminal acts like wrongful imprisonment, assault (which does not require you hit someone, but only that you make them “fear imminent serious bodily injury”<sup>34</sup>), or reckless driving. Regardless of any concern about detection, hate speech, like betrayals in friendships and deceptions in love affairs, is not punishable.

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<sup>31</sup> *UMW Post*, 774 F. Supp. at 1167.

<sup>32</sup> *Id.* at 1172 n.7.

<sup>33</sup> See GOLDMAN, *supra* note 16.

<sup>34</sup> MODEL PENAL CODE § 211.1(1).

Government intervention in friendships, romances, and nonviolent arguments cannot be justified simply because one of the individuals committed a moral wrong.

### Example Two: The Act Requirement

Generally, the government only punishes people for what they do, not for what they do not do. Anglo-American law does not usually hold people liable for failing to help strangers who are in peril, no matter how grave the danger, or how simple it would be to rescue the stranger.<sup>35</sup> Our legal tradition includes a requirement, which, with some exception, limits criminal liability for harms to instances where the offender committed some act. Merely failing to act, even when we can agree the offender should have reported a rape in progress, thrown a drowning woman a nearby life-preserver, or warned a he blind man as he was about to walk into a manhole, does not allow the government to punish someone for the harm she caused.

The act requirement, in fact, allows many instances of unpunishable immoralities akin to those committed by Chad and Howard. The most common example is as follows:

Suppose 'A,' standing close by the railroad, sees a two-year old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself. And the instincts of humanity require him to do so. If he does not, he may be justly styled a moral monster, but he is not liable in damages for the child's injury or indictable under the statute for its death.<sup>36</sup>

'A' cannot be punished even if he acts as "a moral monster." He is at liberty to continue to stand in his place near the railway, even if it would be wrong to do so under the circumstances. Like all cases of unpunishable immoralities, A's freedom to do wrong and the state's reluctance to punish omissions

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<sup>35</sup> FEINBERG, *supra* note 15, at 127 ("The Statutory law of Great Britain, the United States, Canada, and Australia has also treated the bad samaritan with grudging tolerance. Until joined recently by Minnesota the only American state to enact a criminal bad samaritan statute of the European type was Vermont").

<sup>36</sup> John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382, 383-84 (1976).

is troubling. Nonetheless, judges and state legislatures alike are unwilling to punish people for omissions that cause harm.

A Georgia court would not even consider allegations that a defendant failed to save a four year-old child from drowning in "a swimming pool containing in the deep end thereof about 3 feet of water and the bottom of which, due to the accumulation of leaves, moss, and other trash and scum, was slippery and slimy."<sup>37</sup> The court explained that "the fact that a person sees another who is injured does not, of itself, impose on him any legal obligation to afford relief or assistance, but he might have a strong moral and humanitarian obligation to do so."<sup>38</sup>

Almost no state in America has a statute authorizing punishment when one citizen fails to come to the aid of another.<sup>39</sup> The state of Vermont has a statute punishing people who do not render aid to another person who is exposed to "grave physical harm;"<sup>40</sup> the punishment for violation of the provision is a fine of "not more than \$100."<sup>41</sup> The Vermont legislature is unwilling to impose a harsher punishment on someone like 'A,' who watches a baby be run over by a train, than the punishment for speeding on a Vermont highway. States are unwilling or unable to give people their just deserts for their failures to act.<sup>42</sup>

Theorists often justify the act requirement as underlied by concerns for liberty and the limits of government action. The most commonly cited explanation of why we cannot punish the immoral non-actor is the fear of a slippery slope.<sup>43</sup> The fear is that if the government can require a casual bystander to save an imperiled baby simply because it would be moral to do so, the government could also require a rich man to give food to a starving beggar or

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<sup>37</sup> *Handiboe v. McCarthy*, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966). The defendant in this case faced civil, not criminal liability.

<sup>38</sup> *Id.* at 907.

<sup>39</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 661 (3d ed. 1982).

<sup>40</sup> VT. STAT. ANN. TIT. 12, § 519(a) (1967).

<sup>41</sup> *Id.* § 519(b).

<sup>42</sup> FEINBERG, *supra* note 15, at 127.

<sup>43</sup> FEINBERG, *supra* note 15, at 149. Feinberg considers, but does not adopt the view that, "there is a slippery slope in the application of a bad samaritan rule, so that it is hard to avoid making into duties actions that are in fact genuinely supererogatory once we start down that path by making mandatory even the clear cases of easy rescue that we have been considering." *Id.*

require a surgeon to travel many miles because she is the only one who can perform a life-saving operation.<sup>44</sup> Notice that the ditch at the bottom of this slippery slope is an excessive government imposition on liberty. It is not that omissions are somehow immune from being considered severely immoral. Rather, some argue, government prohibitions of particular omissions could slide to a situation where “there are so many people to help, the government would control how we spend most of our lives. [This would end] freedom and individuality.”<sup>45</sup>

Another concern with punishing a failure to act is also a worry about government restriction of liberty. Theorists are concerned that requiring people to rescue others takes away our freedom to choose.<sup>46</sup> Indeed, saving a baby does not seem to be a morally commendable act if the hero only reluctantly offered aid so a nearby policeman would not arrest him. In order for our choices to have meaning, and for moral agency to be respected, the government must allow us the liberty to choose not to rescue a citizen in need. If the state could restrict any choice that was morally wrong, then we would no longer be free to choose right or wrong, and it would be difficult to make moral judgements about ourselves or others. Hence, this argument about moral agency concludes, our liberty to do nothing when someone else is in need cannot be overridden by a retributivist notion of desert. More than any of the previous examples, the act requirement proves that there is conduct the government does not punish that is morally worse and deserves more punishment than other conduct the state does punish. This point was recognized in the nineteenth century by Lord Macauley,<sup>47</sup> an English statesman. He agreed that it is “true that a man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man, probably, than many of those whom we have provided very severe punishment.”<sup>48</sup>

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<sup>44</sup> See Kleinig, *supra* note 36.

<sup>45</sup> FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, *THE PHILOSOPHY OF LAW 820* (Frederick Schaur & Walter Sinnott-Armstrong eds. 1996).

<sup>46</sup> *Id.* at 824.

<sup>47</sup> FEINBERG, *supra* note 15, at 151.

<sup>48</sup> SCHAUER & SINNOTT-ARMSTRONG, *supra* note 45, at 819.

Nonetheless, Macauley did not believe omissions were punishable simply because they were morally wrong.<sup>49</sup>

A textbook on legal philosophy similarly observed that even “if omissions do cause harms, this is not enough to justify punishing people for causing those harms. Many acts that harm other people are not subject to punishment.”<sup>50</sup> Thus, just like reading *Lady Chatterly’s Lover* only to annoy someone or screaming racial epithets at a classmate, omissions are unpunishable immoralities because of the constraints our liberty places on government.

The discussion of the act requirement has two implications. First, it shows that points made throughout this paper about liberty, retributive just desert, and punishment extend beyond explicit constitutional requirements and far-fetched hypotheticals. Second, the act requirement is not an unusual singular exception or a philosophically empty administrative necessity. Those so struck by the way the perpetrator of an evil omission remains untouched by the law should recognize that our commitment to liberty requires a whole host of evils go unpunished – omissions being chief among them. Further, philosophers are likely incorrect when they argue that “our reasons for not prosecuting the callous bystander are practical rather than moral.”<sup>51</sup> The act requirement is based on important philosophical principles about liberty and punishment as opposed to being solely the result of difficulties in drafting a statute, proving omissions occurred, or determining what types of omissions were morally wrong.

Because one can always exploit one’s rights, there are countless other cases where one can deserve punishment for one’s actions, and still not receive it. Out of sheer spite, a jealous employer can fire her employee for a minor infraction at work. One acquaintance can convince another that he would look cooler if he smoked cigarettes while secretly hoping the he would die of lung cancer. A child could choose never to speak to his parents again in hopes that they will both fall into a deep depression. The state does not have the power to infringe on rights and limit liberty simply in the name of retributive desert. Retributivists must be

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> LEO KATZ, *BAD ACTS AND GUILTY MINDS* 144 (1987).

wrong when they say it is permissible to infringe on the rights of offenders through punishment because the offenders have committed moral wrongs and deserve punishment.

### III. UNPUNISHABLE ACTS ARE OFTEN AS MORALLY WRONG AS PUNISHABLE ACTS

When faced with the examples above and their challenge to a retributive desert-based justification of punishment, an escape becomes evident: perhaps acts that are not punishable by the state – failure to rescue, hate speech, and manipulation of vulnerable mates – are not really as wrong as criminal acts. Indeed, such a position has a superficial appeal.

Professor Leo Katz, for example, has noticed that many seemingly evil acts cannot be punished by the state and has concluded that such acts must not be as wrong as criminal acts.<sup>52</sup> Professor Katz asks readers to compare a wallet thief to someone who “lets you (a perfect stranger) drown in a lake when he could easily throw you a life vest.”<sup>53</sup> Professor Katz notes that letting someone drown is “mean and outrageous,” but since citizens are “generally disinclined to punish” such outrageousness, he concludes that letting someone drown must be “far more benign” than a criminal act.<sup>54</sup> He even goes as far as to recommend that people hire attorneys to instruct them how to achieve their most desired ends (such as, by implication, having a hated stranger drown) by committing only unpunishable acts.<sup>55</sup> For those who question the morality of achieving their desired goals through catastrophic omissions, hurtful words, or manipulation of loved ones, Professor Katz replies, “there is something to their point, but only just something.”<sup>56</sup>

Just because acts cannot be punished by the state, that does not mean that the acts do not deserve punishment. Consider this excerpt from an interview with the creator of the film about Chad and Howard’s evil manipulation of Christine:

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<sup>52</sup> ILL-GOTTEN GAINS, *supra* note 24, at 152.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 131.

Question: Chad is a misogynist and a racist. He betrays and hurts both Christine and Howard. Why isn't Chad punished for his actions in the end?

Answer: It always seemed more potent to let Chad get away with everything . . . . [I hoped to make the audience] feel that the world is just not right. For many viewers, it's just not fair that Chad gets away.<sup>57</sup>

When the interviewer asked why Chad was not "punished," he was not asking why Chad was not indicted by a state prosecutor for his evil acts. He was asking why, by the end of the film, the repugnant character gets a promotion at work, moved into a nice new apartment, and continues to live with a girlfriend (other than Christine) who seems to love him dearly.<sup>58</sup> Chad deserved to be shown for the louse that he was, to be hated by all his colleagues, to fail in all his pursuits, and maybe, to be hit by a bus. Our ordinary understanding of punishment, and what it means to deserve punishment extends well beyond the type of punishment doled out by the government.

If someone breaks her promise to me, she *deserves* to feel guilty. If someone cheats on his wife, he *deserves* her resentment. If someone is mean and nasty to everyone they meet, they *deserve* not to have any friends. Similarly, if someone is always manipulative and insincere, yet people continue to revere her as a kind friend, she has not gotten what she deserves and justice has not been done. This broad understanding of "just deserts" demands that the types of unpunishable acts described throughout this paper be judged to deserve more punishment and be morally worse than many acts that the state is able to punish. To illustrate this, I will discuss the concepts of "resentment" and "poetic justice" below.

### A. Resentment

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<sup>57</sup> LABUTE, *supra* note 4, at ix.

<sup>58</sup> *Id.* at 4.

Philosophers have long recognized the connection between wrongness, desert, and resentment.<sup>59</sup> When people do wrong, they deserve to be resented. While if people have not done wrong, resentment is inappropriate. Professor Katz suggests that we feel a different way about those who commit legal wrongs than those who make harmful omissions or insulting comments.<sup>60</sup> He never contends that we do not or should not resent someone who idly watches while a stranger drowns, but concludes from our unwillingness to punish the evildoer that people do not, and should not, find the omission as objectionable as a criminal act.<sup>61</sup> However, an examination of our emotional responses to wrongdoers, both punishable and unpunishable, shows that the wrongness of acts is unrelated to the state's willingness to impose punishment for an act.<sup>62</sup>

Professor Katz's examples begin to convince one that abiding by the letter of law makes an otherwise objectionable act moral. For example, Katz tells of a doctor who wishes to take advantage of bankruptcy laws.<sup>63</sup> The doctor "made some unlucky investments and incurred, let us say, about \$20 million worth of debt which he does not have a prayer of paying off, since his current assets are little more than \$700,000."<sup>64</sup> The doctor exploits the bankruptcy laws in order to keep as much of his financial worth as possible.<sup>65</sup> The general thrust of bankruptcy law allows those facing insurmountable debts to give up what few assets they have in exchange for their creditors leaving them alone.<sup>66</sup> Of course, debtors do not have to give up all of their assets.<sup>67</sup> Depending on the state you live in, Katz explains, you may not have to give up "the house you live in, the furniture and various other stuff in it, your life insurance, and certain kinds of pension plans."<sup>68</sup> Given

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<sup>59</sup> See, e.g. Kent Greenawalt, *Commentary: Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983).

<sup>60</sup> ILL-GOTTEN GAINS, *supra* note 24, at 132.

<sup>61</sup> *Id.* at 131-32.

<sup>62</sup> *Id.* at 132.

<sup>63</sup> *Id.* at 7-8.

<sup>64</sup> *Id.* at 7

<sup>65</sup> ILL-GOTTEN GAINS, *supra* note 24, at 7.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*



these exceptions, Katz's hypothetical doctor pursues the following fairly ingenious strategy:

On the eve of declaring bankruptcy the doctor sells his crummy, old starter home and buys himself a villa, furnishes it extravagantly, covers the walls with some Old Masters, decks himself out with a fur-laden wardrobe, and pours the remaining cash into life insurance and exempt kinds of pension plans.<sup>69</sup>

It is usually immoral and illegal to purposely break a promise to pay someone her money. However, this doctor is only taking advantage of the law of bankruptcy, and he has not done anything illegal.<sup>70</sup> Readers may leave Katz's example believing that it is ordinarily immoral to unjustifiably break promises. However, taking full advantage of bankruptcy laws to keep one's assets is far from immoral. The doctor did not wish to pay his debt, and it may have been wrong to skip town to evade his creditors. Yet, Katz would conclude, if the doctor achieves his desired end (keeping his \$700,000 in assets) through legal means, we cannot say that he did anything wrong.<sup>71</sup> To the contrary, Katz would like readers to admire the doctor's savvy financial maneuvers. As long as one uses legally permissible means, Katz urges, we cannot classify one's acts as morally wrong.<sup>72</sup>

The hypothetical bankrupt doctor's acts were fairly harmless, however availing oneself of the bankruptcy laws would not always negate the immorality of unjustifiably breaking promises to one's debtors. Consider the story of real life

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<sup>69</sup> *Id.* at 8.

<sup>70</sup> 4 COLLIER ON BANKRUPTCY § 522.08 (15th ed., 1982). Bankruptcy law allows a "conversion of non-exempt property into exempt property on the eve of bankruptcy." *Id.* See also *In re Johnson*, 880 F.2d 78 (8th Cir. 1989). But see *In re Reed*, 700 F.2d 986, 992. "It would constitute a perversion of the purposes of the Bankruptcy Code to permit a debtor earning \$180,000 a year to convert every one of his major assets into sheltered property on the eve of bankruptcy with actual intent to defraud his creditors and then emerge washed clean of future obligation by carefully concocted immersion in bankruptcy waters." *Id.*

<sup>71</sup> ILL-GOTTEN GAINS, *supra* note 24, at 132.

<sup>72</sup> *Id.*

physician-debtor, Dr. Paul Geiger, and the person he stiffed, Margaret Kawaauhau.<sup>73</sup>

Mrs. Kawaauhau came to the doctor after dropping a box on her foot.<sup>74</sup> Her leg was “swollen and red and pus oozed from beneath the nail of the large toe on her right foot.”<sup>75</sup> Dr. Geiger wished to cut costs on Mrs. Kawaauhau’s treatment, so he prescribed her “oral penicillin, which costs \$4.00 per day, in contrast with intravenous penicillin that costs \$40.00 per day.”<sup>76</sup> An expert witness later testified that “Dr. Geiger knew, in fact, that intravenous penicillin was the appropriate standard of care for this type of problem and yet he intentionally used something less effective for the sake of cost.”<sup>77</sup> Dr. Geiger likely figured his patient’s leg would get better regardless, and there was no sense in spending any extra money. As a result of Dr. Geiger’s negligent cost-cutting, Mrs. Kawaauhau’s leg grew steadily worse and had to be amputated.<sup>78</sup> Mrs. Kawaauhau sued Dr. Geiger for medical malpractice and won a hefty award.<sup>79</sup> However, Geiger carried no malpractice insurance.<sup>80</sup> After the judgement, the doctor moved from his residence in Hawaii to St. Louis, Missouri where he declared bankruptcy in order to discharge his debt to Mrs. Kawaauhau.<sup>81</sup> Now, imagine Dr Geiger had engaged in some financially savvy conversions of his current assets. He is free to exploit the exemptions of bankruptcy statutes, which, depending on Missouri law and the amount of his assets, could mean he could sink his assets into a ‘fur-laden wardrobe’ or an ‘extravagant villa’

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<sup>73</sup> In *Re Paul Geiger*, 172 B.R. 916 (Bankr. E.D. Mo. 1994). I got the idea of examining a bankruptcy proceeding that followed a malpractice suit from a comment made by David Dudley during a Spring 1998 Law and Morality seminar at the University of Pennsylvania Law School.

<sup>74</sup> *Id.* at 917.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 918.

<sup>77</sup> *Id.* at 919.

<sup>78</sup> *Id.* at 918.

<sup>79</sup> *Geiger*, 172 B.R. at 919 (awarding Ms. Kawaauhau special damages in the amount of \$203,040 and general damages in the amount of \$90,000. The court also awarded her husband, a plaintiff in the lawsuit, general damages for loss of consortium in the amount of \$18,000 and emotional distress in the amount of \$35,000, for a total award of damages of \$355,040).

<sup>80</sup> In *Re Geiger*, 113 F. 3d 848, 859 (8th Cir. 1997).

<sup>81</sup> *Geiger*, 172 B.R. at 919.

without giving a penny to his sole creditor. Further, we can imagine the newly one-legged Mrs. Kawaauhau being forced to do without any compensation from the doctor. She may be unable to continue to work, pay for her past or present hospital bills, or, for that matter, pay her rent. She may also be unable to afford the latest prosthetic device. Dr. Geiger could lounge around his new St. Louis villa in his fur robe, while Mrs. Kawaauhau spends her days hobbling around waiting rooms in Hawaii's welfare offices and crowded public hospitals.

Given these circumstances, Mrs. Kawaauhau certainly would resent Dr. Geiger. He caused her serious personal and medical harm and, even though he had the means to help compensate her, he chose to avail himself of the bankruptcy laws and spend his assets on personal luxuries. She would probably resent him because his actions were wrong, and because he deserves to be resented. Whether or not his actions were legal has no bearing on how much resentment Geiger deserves. If Missouri's bankruptcy laws were less favorable than he had hoped, Dr. Geiger may have chosen a different way to keep his assets away from Mrs. Kawaauhau. He may have snuck away to St. Louis without anyone's knowledge and continued to practice medicine on unsuspecting patients, depositing his assets in a local St. Louis bank. Mrs. Kawaauhau would likely resent him no more if he used these illegal means to stiff her. Whether Geiger uses illegal tactics or bankruptcy exemptions, he deserves resentment for finding a way to leave his victim uncompensated and poor while he lives it up. Mrs. Kawaauhau would not think that the doctor's financial savvy is a "far different, far more benign form of outrageousness"<sup>82</sup> than if the doctor simply skipped town. She resents the legal act as much as the illegal one because the former is not morally different than the latter.

Mrs. Kawaauhau would not be the only victim still filled with resentment regardless of the legality of her offender's acts. A pizza delivery boy would resent pizza thieves, and likely would resent a cheating spouse much more and would resent a spouse who only married him as part of a cruel trick to hurt his feelings even more. We resent people more if their acts are more immoral.

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<sup>82</sup> ILL-GOTTEN GAINS, *supra* note 24, at 132.

The fact that Mrs. Kawaauhau appropriately resents the doctor regardless of his constructive use of the laws shows that, just because we are unwilling to impose state-inflicted punishment on someone, that does not mean that that person's actions were morally superior to a crime.

Moral theorists have long recognized that resentment and wrongness are inexorably connected. P. F. Strawson noted that only by "attending to attitudes" such as resentment can we "recover from the facts as we know them a sense of what we mean, i.e. of *all* we mean, when, speaking the language of morals, we speak of desert, responsibility, guilt, condemnation and justice."<sup>83</sup> We can tell that an act is wrong when we resent those responsible for the act. Further, as R. Jay Wallace recently observed, "those who have not done anything wrong clearly do not *deserve* to be subjected to reactive emotions and the forms of sanctioning treatment that express them."<sup>84</sup> Of course, the committers of all the unpunishable immoralities expressed above have done wrong or else it would not be fair to resent them for their acts. They would not *deserve* such resentment. The acts are no better than criminal acts since we feel Dr. Geiger, Chad and Howard, and many other savvy wrongdoers deserve much more resentment than the petty pizza thief.

Doubters may not put as much stake in the "amount of appropriate resentment" as the gauge of the wrongness of an action. After all, such a measure is admittedly vague. One could argue that punishable and unpunishable acts may both deserve the same amount of resentment, but they *do* deserve different amounts of punishment. It does not matter that perpetrators of seemingly evil, unpunishable immoralities deserve to be resented much more than common thieves. What is significant, one might argue, is that people like Chad and Howard do not deserve to spend time in jail, suggesting that they really do deserve better treatment and are less morally bad. The discussion of "poetic justice"<sup>85</sup> below shows that

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<sup>83</sup> Peter Strawson, *Freedom and Resentment*, in 59 FREE WILL 78 (Gary Watson ed., 1982).

<sup>84</sup> JAY R. WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 135 (Harvard Univ. Press 1994).

<sup>85</sup> ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 369-70 (1981). I got the idea about "poetic justice" from the remarks in this book.

notwithstanding one's view about the explanatory force of resentment, Chad and Howard did commit an act morally worse than pizza theft and *deserve* treatment *much worse* than pizza thieves, even if such treatment should not be doled out by the state.

## B. Poetic Justice

Recall that near the beginning of this paper, I explained three questions that could be asked when comparing two acts: 1) which act was morally worse?; 2) which act deserves more punishment?; and 3) which act should receive more punishment from the state? I further claimed that standard retributivist accounts would answer all three questions in the same way. One who claims that the unpunishable immorality is significantly less immoral than a petty crime does so by answering the three questions the same. Professor Katz, for example, noted that the bankrupt doctor should not be punished by the state (question three). Hence, the doctor does not deserve punishment<sup>86</sup> (question two) and did not behave morally badly (question one).<sup>87</sup> However, questions two and three should not always be answered the same way. The notion of "poetic justice"<sup>88</sup> shows that people often deserve punishment, even when the state should not inflict it. Unpunishable immoralities are often more wrong than crimes since the acts deserve worse punishment than criminal acts.

The notion of "poetic justice" that I am imagining can only be explained through an example. Recall the example used above, showing that certain types of verbal abuse seem undeniably immoral, even if such acts are not punishable by the state.<sup>89</sup> A University of Wisconsin student, angry about comments a reporter had made about the athletic department, "shouted loudly" at the reporter for approximately twenty minutes, "calling her [obscene names]."<sup>90</sup> Consider the following fabricated conclusion to the

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<sup>86</sup> Of course, debtors are not usually punished in modern times. The point still holds for any case where the perpetrator abides by the letter of the law specifically to avoid criminal liability such as a car salesman that avoids illegal fraud by artfully misleading a customer.

<sup>87</sup> ILL-GOTTEN GAINS, *supra* note 24, at 132.

<sup>88</sup> NOZICK, *supra* note 85, at 369-70.

<sup>89</sup> *UMW Post*, 774 F. Supp. at 1167.

<sup>90</sup> *Id.*

incident: immediately after this vulgar tirade, the rude man stormed out of the room in a hurry for effect. Unaware that someone had closed the door to the room since he had begun shouting, our student runs into the door, bruising his nose, and causing an unruly bleed. Normally, this moderate misfortune is regrettable, even if obtained in a somewhat comical fashion. However, since the student committed the immoral act, there is a sense that the vulgar student *deserved* to suffer this moderate injury and indignity. Though we may be uncomfortable allowing the state to force the student to work at a battered women's shelter, he still does deserve to suffer. When the student stormed out of the room and ran into a closed door, "poetic justice" occurred.<sup>91</sup>

It is because of "poetic justice" that one can conclude that just because the state should not punish a particular person, it does not follow that the person deserves less punishment than a criminal or that the person's act was not as immoral as a crime. The question of how much punishment a person deserves is very different from the question of how much punishment the state should inflict. Though some may define punishment as suffering inflicted by the state for the purpose of punishing,<sup>92</sup> I am considering punishment in a much broader sense. For my purposes, punishment is simply suffering in connection to a particular wrong. The rude student should not have been put in jail for the night for his outburst, but when he hurt his nose, most would say "he got (at least some of) the punishment he deserved." The appropriate measure of the immorality of an act is not the amount of appropriate state-imposed suffering, but the amount of suffering that is deserved. The example of the rude student shows that the amount of suffering (punishment) deserved is often independent of the amount of suffering that the state should impose through punishment.

The notion of "poetic justice" offered thus far must seem far too ambiguous and far-fetched to explain how to measure

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<sup>91</sup> See generally NOZICK, *supra* note 85, at 369-70 (examining the notion of "poetic justice" and what the author believes might constitute "poetic justice").

<sup>92</sup> See Greenawalt, *supra* note 59, at 345. "Punishment is imposed by people who have the authority to do so – authority conferred by legal rule, associational standard, or social morality." *Id.*

“deserved punishment.”<sup>93</sup> Perhaps we find what happened to the rude student pleasing simply out of an appreciation of irony or a desire for vengeance. However, this sense of “poetic justice” really does pervade judgement about how much punishment a person deserves in the real world.

For example, a Philadelphia man, Kyle Irvin, was recently put on trial for “carelessly leaving a loaded gun under a pillow where his 3-year old son could find it and use it.”<sup>94</sup> The 3-year old found the gun, pointed it between his eyes, and pulled the trigger.<sup>95</sup> The day’s newspaper story recounted the court room scene as follows:

“I shouldn’t have left the gun where he could reach it,” wept Irvin to himself after being taken into custody, testified Police Officer Greg Holman.

“I can’t believe this happened.”

“This man is as much a victim as the boy,” defense lawyer Frank Spina told Municipal Judge Harvey W. Robbins at the end of the preliminary hearing.

“This was a horrible, tragic accident,” said Spina, while urging the judge to reduce the charge to involuntary manslaughter. “Clearly, my client did not intend to kill this boy.”

But [Assistant District Attorney] Fisk argued that under the law, a parent has a special duty to see that a child is not put in danger.<sup>96</sup>

Now, certainly I do not wish to claim that it was somehow poetically just for Irvin to lose his son as a result of his morally offensive recklessness. I offer the example to show that the question of “what Irvin deserves for his bad act” is not only a question of how much state-imposed punishment should be imposed, but more a question of how much he should suffer in connection with his bad act. Irvin has suffered greatly because he

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<sup>93</sup> See NOZICK, *supra* note 85, at 370 (demonstrating that a person sentenced to death for committing murder who falls ill the day before his execution would probably be restored to health before proceeding with the execution in order to receive the punishment he deserved).

<sup>94</sup> Dave Racher, *Dad Held For trial in Gun Death of 3-Year-Old Son*, PHILADELPHIA DAILY NEWS, July 24, 1998, at 23.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

lost his son. It does not seem that he deserves to suffer much more at the hands of the state. A certain amount of suffering (and not a certain amount of *state-imposed* suffering) is connected to a bad act. It is this amount of suffering that we should look to as the “deserved punishment” that displays how immoral an act is.

A clearer, though less plausible, example may be necessary to make the observation convincing. Consider a bank robber who commits a crime worthy of twenty years imprisonment. Imagine the bank robber escapes to a remote location where she accidentally falls into an old mine and remains trapped for the next twenty years. She is able to survive by drinking from an underground spring and eating insects. Now, what should be done at the end of this twenty-year period when an amateur archeologist discovers the old mine and rescues the bank robber? Should she be transferred straight from the mine to the federal prison to begin her twenty-year sentence? Such treatment seems far too harsh. After twenty years of suffering in prison-like conditions, it would be odd to insist the bank robber now deserves twenty years of *state-imposed* punishment.

Hence, the true measure of how much punishment an act deserves is not how much the state should punish the person, but how much total suffering the person deserves as a result of her act.<sup>97</sup> Philosophers have taken some notice of this subtlety. Robert Nozick explained that the amount that the state should punish a person for a bad act should be reduced if the wrongdoer has already faced some detriment due to his act.<sup>98</sup> If a person has been forced to compensate his victim or if the offender was badly hurt while the victim was defending himself, then, contends Nozick, the state should punish the offender less than a similar offender who has faced no such detriment.<sup>99</sup> Alwynne Smart made the same point by considering a reckless driver who discovers the pedestrian that he recklessly injured was “his only child to whom he was devoted.”<sup>100</sup> Smart recognizes that it would not be just to punish the offender as much as the reckless driver that killed a stranger. Although it would be “irresponsible to suggest that remorse was

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<sup>97</sup> NOZICK, *supra* note 85, at 363.

<sup>98</sup> *Id.* at 364.

<sup>99</sup> *Id.*

<sup>100</sup> Alwynne Smart, 43 MERCY 345, 348 (1968).



sufficient to absolve a man of the consequences of a crime,” Smart notes that the man has already served part of what we consider a morally just punishment. It is not that we are ‘letting him off lightly,’ but simply that to impose the full penalty would be to impose a total amount of suffering quite out of keeping with the gravity of his crime.<sup>101</sup>

A small qualification is necessary before asserting that the amount of deserved suffering is the best measure of the immorality of an act. This suffering must occur in connection with the moral wrong. It is not enough that a bad person has suffered in her life. Recall the hypothetical bank robber who fell into a mine while escaping. If she was caught twenty years later having not fallen in the mine, she might still try to make the following argument before the jury: “The past twenty years have been horrendous. Everyone in my family has died of a rare disease and I have no loved ones left. I too came down with the rare disease and have spent the last twenty years languishing in the hospital in excruciating pain. Only recently have I gotten better and I am ready to go on with my life.” The jury may feel some sympathy for the bank robber, but it seems her plight is not quite the kind of harm that reduces the amount of punishment a person deserves in the same way as being forced to compensate one’s victim or being hurt in self defense.

I recognize that I have provided no account of what it means for suffering to be “in connection to the wrong.” Certain forms of suffering seem obviously connected with the wrong (having your child die as a result of your reckless behavior, storming into a door immediately after you verbally abuse someone), while other forms of suffering seem wholly unrelated, such as having one’s stocks plummet or having a parent die of cancer. There will be cases more difficult to classify. Will it matter if the bank robber caught the rare disease from the bank teller? Will it matter if the bank robber could have been cured of the rare disease after a few days, but avoided any large, reputable hospitals for fear of getting recognized as the bank robber? I am not sure of the answer to these questions. The point is simply that there are cases where the offender deserves less punishment due to some suffering that has not occurred at the hands of the state.

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<sup>101</sup> *Id.*

Hence, the amount of punishment that a person deserves for her wrong is not a function of how much the state should punish, but a function of how much that person deserves to suffer by virtue of her wrong. Now that it has been established that the proper measure of the gravity of a moral wrong is how much the offender deserves to suffer (be punished) in connection with the crime, we are in a better position to assess the wrongfulness of the unpunishable immoralities discussed throughout this paper. For a retributivist who believes that punishment is based on an offender's desert for a crime, the following identity should hold: Degree of Moral Wrong = Punishment Deserved for Wrong

Now consider the tale of Chad and Howard, and the tale of the pizza thieves. How much do the offenders deserve to suffer for their bad act? When trying to pull their trick on Christine, Chad and Howard might find that Christine is a crazed lunatic who finds them out and beats them to a bloody pulp. There seems to be some justice in this. It would not be right for Christine to make this choice, but once this has occurred, one could not say, as before, that Chad and Howard did not get what they deserved. Also, it does not seem to be a grave injustice that Chad and Howard were victimized by an insane woman. However, imagine the pizza thieves met similar circumstances. It does not seem to satisfy our desire for justice for the pizza delivery boy to be a homicidal maniac who administers severe beatings to the pizza thieves. We have much more sympathy for the pizza thieves than we do for Chad and Howard. This is because Chad and Howard deserved more punishment. Their act was more immoral than that of the pizza thieves. It was not "far more benign" than a criminal act. If it was, it would deserve less punishment.

Though terrible immoralities like those of Chad and Howard illustrate the point best, the idea of "poetic justice" highlights the immorality of all the unpunishable acts discussed in this paper. Whether Dr. Geiger skipped town with his assets or simply made himself judgement proof through exploiting bankruptcy exceptions, we are still not saddened if we hear he lost all his sneakily saved assets paying his own medical bills after his own run-in with a bad doctor. Whether the vulgar University of Wisconsin student slaps his victim or verbally abuses her, it still seems just for him to hurt his nose storming into a closed door.

The fact that we do not think it is proper for the government to step in and do the punishing sometimes is related only to the way in which we value liberty, and not to our moral assessment of how much punishment an act deserves or how morally wrong an act is. Certainly, state-enforced punishment seems worse than most other forms of suffering. One philosopher did call state-imposed punishment a form of “permanent disgrace.”<sup>102</sup> Philosopher Jean Hampton noted that state-imposed punishment was, in some ways, a unique form of suffering because of the fact that “the wrongdoer is *made* to suffer and [the suffering] represents his *submission* to the wrongdoer.”<sup>103</sup> Thus, it is tempting to conclude that those who deserve the terrible treatment known as “state-imposed punishment” have committed the most morally wrong acts. But by now it should be clear that this is not the case. A person who deserves to spend a night in prison because of public drunkenness will be made to submit to his punisher. However, if Chad and Howard are beaten to a bloody pulp by Christine, if the bankrupt doctor loses all of his assets, or if a vulgar student severely injures his nose, the offenders will have suffered much more than the offender who spent the night in prison. They deserve that suffering because their act was more immoral than the minor impropriety of being found drunk in public. Just because we value liberty and will not allow the state to punish them for their acts, that does not mean that their acts were less immoral than a crime.

#### IV. RETHINKING RETRIBUTIVISM: TAKING HEED OF RIGHTS

Part two of this paper examined the multitude of cases where the notion of retributive desert did not justify infringing on the rights of immoral offenders. Retributivists often challenge utilitarian justifications of punishment by pointing out that it is impermissible to punish an innocent person to reach some state-related goal such as deterring further crimes. Imprisoning someone violates her rights to pursue her own goals, live where she wishes, and generally move about freely. These rights cannot

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<sup>102</sup> Feinberg, *supra* note 15, at 24.

<sup>103</sup> JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 126 (Cambridge Univ. Press 1988) (emphasis original).

be taken away simply to benefit others in society. As I have suggested, however, the examples throughout this paper show that the retributivist notion of moral desert is similarly deficient in explaining *why* and *when* people's rights can be taken away by state-imposed punishment. We cannot take away the rights of individuals simply because they have committed moral wrongs.

In this part of the article, I will make some tentative remarks about what a new theory of deontological justification of punishment may look like, given that the examples in this paper suggest that moral desert does not necessarily justify state-inflicted punishment. I will observe that state-inflicted punishment occurs, and may be somehow justified by, the infringement of the offender on certain rights of others. I will examine more closely *when* the state can take away the rights of certain individuals through punishment and how this description of when punishment can occur raises further problems for a retributivist account of punishment. I will suggest that state-inflicted punishment is only appropriate when offenders infringe on certain rights of others such as an individual's right to bodily integrity or right to property. Whether a person can be punished by the state seems to turn on whether a certain type of right was violated, rather than if an act reached a certain threshold of immorality.<sup>104</sup> Near the end of this section, I will explore the possibility that, contrary to the position taken in this paper thus far, moral desert has no place at all in justifying state-imposed punishment. Indeed, the state may be obligated to punish a person even if the person committed no moral wrong at all and cannot be said to *deserve* punishment.

#### **A. People Can Only Be Punished By The State When They Violate Certain Rights Of Others**

Above, I examined certain liberties, the infringement of which could not be justified by the retributivist notion of moral desert. However, this certainly does not mean state-imposed punishment is never justified. Such liberties are not absolute. A

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<sup>104</sup> I do not claim to give a normative reason why state-imposed punishment should be justified when people violate certain rights or why the "certain rights" I keep referring to are especially important.

person's right to read *Lady Chatterley's Lover*<sup>105</sup> does not immunize him from state-imposed punishment when he steals a copy from a bookstore. One's right to play a cruel trick on an unsuspecting acquaintance does not free him from state-imposed punishment if he assaults the victim as part of the plan. This leads to a fairly familiar and simple (if not simplistic) view of human liberty: one has the right to do as one wishes as long as one does not infringe on the rights of others. The problem with this credo is its vacuity. What is meant by "rights" and "infringe"? The credo sounds reasonable when justifying a limitation on trespassing by saying my right to property limits your right to walk wherever you wish. The credo sounds less reasonable when you tell me I can never drive my car because of your right to clean air.

Despite the vacuity of this credo, it is still of use in understanding how the criminal law operates. There are some rights whose violation seem grounds for criminal punishment. Recall the Wisconsin student guilty of nasty name-calling and rudeness.<sup>106</sup> His act of retaliation did not violate the rights of his victim.<sup>107</sup> Certainly, in some sense, she had a moral right not to be treated so rudely. However, I am referring to a different grouping of rights. People become candidates for state-imposed punishment when they violate certain rights, such as a victim's right to bodily integrity or property.<sup>108</sup> I am not sure what the magic of these rights is and do not claim that this is a complete list of such rights. Nonetheless, whether or not an act is punishable by the state seems to turn on whether or not there was a violation of such a right. If state-imposed punishment was justified by moral desert, it would seem natural that acts would become punishable once reaching a certain threshold of moral badness. Instead, it seems people are at liberty to do as they wish until they violate particular rights of others, at which point the state is able to punish the offenders.

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<sup>105</sup> D.H. LAWRENCE, *LADY CHATTERLEY'S LOVER* (Grove Press 1957).

<sup>106</sup> *UMW Post*, 774 F. Supp. 1164.

<sup>107</sup> *Id.* at 1166.

<sup>108</sup> LAFAVE, *supra* note 8, at § 1.5. The crimes of murder, manslaughter, assault, battery, mayhem, rape, and kidnapping result from the violation of a victim's right to bodily integrity while the crimes of larceny, embezzlement, false pretenses, burglary, robbery, bad checks, blackmail, extortion, receiving stolen property, arson, forgery, and malicious destruction of property arise from the violation of a victim's right to property. *Id.*

This suggests that state-imposed punishment is justified in certain instances not *because* the offender acted wrongfully, but *because* the offender violated a particular right of another.

Admittedly, my account thus far has been vague. Even if you are willing to accept that the criminal law prohibits violation of the right to bodily integrity and the right to property, it is unclear what it means to “violate” such a right. My right to bodily integrity is violated when I am punched in the face. However, it seems it will also be violated when someone unintentionally (and non-recklessly) runs into me with her car. However, only the former seems to be grounds for punishment of the offender. I believe that of these two cases, a right has only been *violated* in the case of the punch in the face. At least, it seems more like an offender has blatantly disregarded and stomped upon one’s rights when the person intentionally punched another in the face for the purpose of causing the individual harm. In fact, I do not think it is even a detriment to the above theory that it is not always clear that an offender has “violated a right.” There will always be cases where we are unsure if a certain practice should be grounds for punishment. I only wish to argue that the question of whether someone should be punished turns on whether a certain type of right was violated. Examples follow.

### Example One: Free Speech

First Amendment freedom is perhaps the best example. As explained in Part II, having the freedom of speech entails the right to speak, even if such speech in such circumstances would be deemed immoral by nearly everyone.<sup>109</sup> However, all seem to agree that the freedom of speech is not absolute.<sup>110</sup> One, of course, cannot yell out “fire” in a crowded theater when nothing is on fire. Each theatergoer has a right not to be trampled by others. That is, people have a right to bodily integrity that is violated when someone yells out “fire” in hopes of causing an injurious melee.

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<sup>109</sup> See *TRIBE*, *supra* note 29.

<sup>110</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* §11.3.3.2, 815 (Aspen Publishers 1997). The author states, “(i)t is well understood that the right of free speech is not absolute at all times and under all circumstances.” *Id.*

At first glance, this “fire” exception fits in nicely with the retributivist account. Causing injury to large groups seems quite a bit more immoral than the verbal assault by the aforementioned Wisconsin student. Perhaps the reason the state will punish one who yells “fire” is because that act deserves punishment more than the act of screaming epithets. However, further examination of First Amendment doctrine shows that what makes yelling “fire” illegal is not the immorality of the act, but the fact that the fire-yeller violated an important right in a way that the Wisconsin student did not.<sup>111</sup>

The “fighting words” doctrine,<sup>112</sup> for example, carves out an important exception to free speech that allows states to punish people if they utter words with the intention of bringing “the addressee to fisticuffs.”<sup>113</sup> Originally, the Supreme Court defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>114</sup> Many courts determined that the first half of the definition allowed the state to outlaw utterances that bring about “psychological injury, primarily in the form of emotional upset and injury to the ‘sensibilities’ of addressees.”<sup>115</sup> The second half of the definition “addresses the prevention of physical retaliation.”<sup>116</sup>

However, the Supreme Court soon limited the “fighting words” test to only its second half.<sup>117</sup> Under this new interpretation, people such as the Wisconsin student would not be punished for causing “emotional upset” or “injury to the sensibilities.”<sup>118</sup> The Court determined that speech is only limited in this context when one’s speech is “likely to provoke the average

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<sup>111</sup> Compare *UMW Post*, 774 F. Supp. at 1172 n.7 with *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1939) (holding that the power of the state to punish speech is obvious when there is a clear danger of riot, disorder, or threat to public safety).

<sup>112</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

<sup>113</sup> *UMW Post*, 774 F. Supp. at 1171.

<sup>114</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>115</sup> *UMW Post*, 774 F. Supp. at 1169.

<sup>116</sup> *Id.* at 1169-70.

<sup>117</sup> *CHEMERINSKY*, *supra* note 110, at 816. The author points out that although the United States Supreme Court did not overturn *Chaplinsky*, it narrowed the scope of the doctrine by restricting its application to only those words which were specifically directed at another person, and which had the likelihood of producing a violent reaction. *Id.*

<sup>118</sup> *UMW Post*, 774 F. Supp. at 1169.

person to retaliation, and thereby cause a breach of the peace.”<sup>119</sup> Consequently, people are free to say what they wish, unless their words are “likely to provoke violent reaction.”<sup>120</sup> In the same way that people have a right not be duped into rushing out of a theater (and others have a right not to be trampled by those rushing out), people also have a right not to be coerced into a violent reaction, and not to be injured by others who have been coerced into one. One’s right to bodily integrity limits other individuals’ rights to free speech.

Notice that the illegalities of the acts are independent of their immorality. If the Wisconsin student set out to get his victim to fight back, he would hardly seem more morally odious than if he did what he actually did set out to cause, severe “psychological harm” by injuring the sensibilities of his victim. Perhaps more pointedly, if Chad and Howard had picked a fight with Christine, it would not have been more immoral than what they actually did – set out to cause her severe psychological harm in hopes that she would be severely traumatized.

Freedom of speech means that you can execute countless immoralities until you violate certain rights of others. You may be punished if your speech is construed to violate someone’s right to bodily integrity.<sup>121</sup> Additionally, freedom of speech certainly does not include the right to lie about a product you are selling to someone, or to deceive someone into giving you something that does not really belong to you.<sup>122</sup> You cannot claim you have a free speech right that allows you to dupe others out of their property. Hence, other individuals’ rights to property also limit the freedom of speech of an individual.

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<sup>119</sup> *Street v. New York*, 394 U.S. 576, 592 (1969).

<sup>120</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>121</sup> MODEL PENAL CODE § 250.4 states in pertinent part: “a person commits a petty misdemeanor if, with purpose to harass another, he . . . insults, taunts, or challenges another in a manner likely to provoke violent or disorderly response.” *Id.*

<sup>122</sup> *See id.* §§ 224.7 and 223.3. § 224.7(4) and (5) state in pertinent part:

“a person commits a misdemeanor if in the course of business he sells, offers or exposes for sale . . . mislabeled commodities . . . , or makes a false or misleading statement in any advertisement . . . .” *Id.* Section 223.3 states in part: “a person is guilty of theft if he purposely obtains property of another by deception.” *Id.*



However, the Supreme Court has determined that a right to be free from “psychological harm” does not limit freedom of speech.<sup>123</sup> Indeed, their conclusion seems to fit our intuitions about what it means to have certain liberties. In many cases, the state cannot punish a person for bad acts because there are certain rights that are not rights in the state-protected sense. These unprotected rights include: the right not have one’s spouse cheat, the right not to have one’s feelings hurt, and the right to have one’s life saved by a bystander, when it would be simple for the bystander to do so. Consequently, people are free from punishment as a result of speech unless certain rights are violated, such as one’s right to bodily integrity or property.

### Example Two: Blackmail

There has been much discussion over the unusual case of blackmail. The famous “paradox of blackmail” is as follows: If I approached you and said “Pay me ten dollars, or I will give your high-spirited, risk-addicted nineteen-year-old daughter a motorcycle for a Christmas present,”<sup>124</sup> I would be committing criminal blackmail.<sup>125</sup> However, if I simply gave the motorcycle gift out of pure malice, or asked for the ten dollars without mentioning the motorcycle, I would be acting perfectly within my rights.<sup>126</sup>

This paradox highlights the importance of establishing the violation of a right in judging if an act is punishable. No one thinks that maliciously giving a motorcycle to a risk-addicted nineteen-year-old is not immoral. In fact, it is likely more immoral than the criminal blackmail case where one gives the victim-father the much desired option of buying his daughter’s well being for a mere ten dollars. Blackmail theorists, instead, note that giving the motorcycle is perfectly within the rights of the evildoer, while

<sup>123</sup> See *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

<sup>124</sup> ILL-GOTTEN GAINS, *supra* note 24, at 134.

<sup>125</sup> MODEL PENAL CODE § 223.4. Sections (1) and (7) provide in pertinent part: “a person is guilty of theft by extortion if he purposely obtains property of another by threatening to: inflict bodily injury on anyone or commit any other criminal offense; or . . . inflict any other harm which would not benefit the actor.” *Id.*

<sup>126</sup> ILL-GOTTEN GAINS, *supra* note 24, at 134.

blackmailing the father is not.<sup>127</sup> Blackmail certainly seems to implicate the important right of property, so theorists go about trying to explain why blackmail “violates” that right.<sup>128</sup>

Professor Leo Katz, for example, concludes that blackmail is illegal because it is analogous to theft cases.<sup>129</sup> The blackmail threat of, “Give me money, or I will do X,” is just a form of theft like “Give me money or I will punch you in the nose.”<sup>130</sup> Blackmail is punishable because it violates one’s right to property in the same way theft does.<sup>131</sup> Taking money by threatening the victim with the morally bad act of giving the motorcycle is stealing, just as taking the money after threatening violence is stealing. It is not relevant how morally repugnant the act of blackmail is, it is only relevant that blackmail violates a right to property.

Thus, to determine whether or not controversial cases like free speech or blackmail should be illegal, one must look to see if the acts are, in fact, a violation of a certain type of right.<sup>132</sup> This is important for two reasons. First, it bolsters the position that the relevant question for purposes of state-imposed punishment is whether or not the person violated a right, as opposed to whether the person exceeded some threshold of immorality. Second, it shows that my focus on “the violation of a right” is not so vague as to be unhelpful.

An example of an obvious violation of the right to bodily integrity would be a punch in the face. Other acts, like shouting racial epithets, are obviously not violations of bodily integrity. If one wants to conclude that a more difficult case like negligent

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 138-39.

<sup>130</sup> *Id.* at 157-59.

<sup>131</sup> *Id.* at 138-39.

<sup>132</sup> See LAFAVE, *supra* note 8, at § 1.5. The author states that the classification of crimes in the criminal code is based on the interests of society against harm, specifically: protection from physical harm to the person, protection of property from loss, destruction or damage, protection of reputation from injury, safeguards against sexual immorality, protection of the government from injury or destruction, protection against interference with the administration of justice, protection of the public health, protection of the public peace and order, and the protection of other interests. *Id.*

driving should be punishable, the person will need to argue that negligent driving is more like obvious cases of bodily integrity violations, and less like cases that obviously do not violate that interest.

### **B. The Criminal Law's Focus on Whether an Offender Violated a Right Is Incompatible with Retributive Views of Punishment**

Retributivists might grant that a person must violate a right before she is subject to criminal punishment. However, a retributivist might see this as simply another, necessary condition of retributive punishment.<sup>133</sup> Therefore, once an offender violates a certain type of right, then retributive punishment can fit the appropriate state-imposed punishment to the moral desert of the actor. However, the fact that an offender violates certain rights not only affects whether a person can be punished by the state, but also affects the amount of state-imposed punishment a person receives.

The amount of state-imposed punishment an offender receives from the state turns mostly on the right the offender violates.<sup>134</sup> Recall the immoral non-rescuer from Part II.<sup>135</sup> Now imagine that the man not only watches idly and maliciously as a baby drowns, but out of pure malice, he spits on the drowning baby. The man has now committed a battery and violated the baby's right to bodily integrity. However, simply because the man has violated a right, that does not mean state-imposed punishment will now track his moral desert. A jury would likely not dole out a punishment for something akin to murder. The man is morally repugnant and likely deserves a great deal of punishment for letting the baby drown. However, his state-imposed punishment will correspond to the right that he violated (the right of the baby not to be spit on) as opposed to his moral desert. It is not the case that, once an offender violates a right, the state gives him the punishment that he deserves.

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<sup>133</sup> David Dolinko, "Some Thoughts about Retributivism," 101 ETHICS 537, 539 (1991).

<sup>134</sup> *Id.*

<sup>135</sup> See Kleinig, *supra* note 36.

A similar observation could be made if Chad and Howard committed some minor crimes in their manipulation of Christine. Imagine they stole her pizzas or spit in her face as a means of painfully revealing that they were never in love with her. Punishment would, for the most part, track the rights that Chad and Howard violated as opposed to the immorality they displayed when committing their illegal acts.<sup>136</sup>

Even the retributivists' least controversial claim may be in trouble, based on the importance of rights-violation in punishment. A weak retributive claim is that, no matter what justifies punishment, or what sets the amount of punishment for a crime, an offender cannot be given more punishment than he morally deserves.<sup>137</sup> Retributivism is thought to set the ceiling on the amount of punishment an offender may receive.<sup>138</sup> However, given the importance of rights-violations, even this weak claim may be problematic.

Since state-imposed punishment turns on the violation of a right, one wonders if there can be a case where a person violates a right, but commits no moral wrong. If such a person should be punished by the state, even the retributivists' weak claim does not hold.

Such a case may be possible. Imagine that Chad is about to go into the next room and slap Christine. A concerned co-worker would certainly be within his rights to restrain Chad in an effort to stop him from committing the assault. Now, suppose that Chad is simply going into the next room to harshly and maliciously reveal his scheme. The concerned co-worker feels he could lighten the blow if he could get to Christine first. Thus, the co-worker does his best to hold Chad back while sending a quick, heartfelt inter-office e-mail to Christine.

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<sup>136</sup> *Id.*

<sup>137</sup> LAFAVE, *supra* note 8, at § 1.5. LaFave discusses limiting the rehabilitation theory by borrowing from the retribution theory and making the punishment fit the crime. Under this theory, once a criminal has served the commensurate time for his crime, a lengthy rehabilitative time would not be imposed. *Id.*

<sup>138</sup> *Id.*

The compassionate co-worker could be punished for his actions.<sup>139</sup> Chad does have a right to go into the next room and cause Christine emotional trauma. If someone holding him back could not be punished by the state, then it could not be said that Chad had such a right. Moreover, if he wished, Chad could throw the compassionate co-worker to the floor while breaking free from the co-worker's clutches.<sup>140</sup> Chad's right to defend himself in this way shows that the co-worker had no right to do what he did, and the co-worker should probably be punished for violating the rights of Chad. It would be odd indeed to suggest that the co-worker had no right to hold Chad back, but would face no consequences for doing as he did. However, the compassionate co-worker did not do anything morally wrong and does not *deserve* punishment. Additionally, if the co-worker was slightly injured when thrown to the ground, we would likely feel sorry for him and not think that his injury was reflective of a just outcome. Also, unlike most immoral actions, the co-worker would not regret trying to restrain Chad, and would not teach his young children that such an act is morally wrong. In fact, it unmistakably seems like the right thing to have done under the circumstances. The co-worker "should" be punished by the state, but he does not "deserve" to be punished. A similar situation exists when a man is born into a large inheritance. He "should" get his money, but could not be said to "deserve" the money. Thus, it may not even be said that retributivism puts an absolute limit on the amount of punishment a person should get from the state.

The response to this line of reasoning may be to deny that one can violate rights without acting immorally. A retributivist might claim that it was in fact wrong to restrain Chad, regardless of the consequences of not restraining him. However, certainly it could not be immoral to commit a minor crime to spare Christine such severe psychological harm. Imagine the co-worker simply

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<sup>139</sup> MODEL PENAL CODE § 212.3. Section 212.3 provides in pertinent part: "a person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty." *Id.*

<sup>140</sup> *Id.* at § 3.04. Section 3.04 provides in pertinent part: "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person . . ." *Id.*

locked Chad in the room or stole some money from Chad's desk in hopes of distracting him. Such acts would certainly not be immoral, but would be punishable by the state.<sup>141</sup>

I began this part by noting that I was offering more of a description of what is punishable by the state, as opposed to a justification of what is punishable. Indeed, I have not offered any reason why rights to bodily integrity or property give rise to criminal punishment. The reason such description is important is because of the way retributivists put forward their account of punishment. A retributivist points to experience and intuition and observes that people are punished when they have done something to deserve some sort of suffering.<sup>142</sup> However, the retributivists have not explained why, seeing that offenders "get what they deserve," is a reason to take away the rights of the offenders. The utilitarian goal of protecting public safety is an end a state may use to justify certain actions, but being certain that a person received her "just deserts" is a vague notion that certainly does not move us to action in other situations. To prove the point, David Dolinko has used the example of a good son who deserved a sizeable inheritance, but lost out to his undeserving brother.<sup>143</sup> Certainly, we are not moved to disrespect the wishes of the deceased, and we do not give the inheritance to the "good son," although such an action would fulfill the all-important principle of just deserts.<sup>144</sup> It seems that retributivists have not made much headway in explaining why we can take away the rights of offenders for the purposes of fulfilling just deserts. They simply have noted, as a starting point, that state-imposed punishment seems to occur because of the moral desert of the offender.<sup>145</sup>

The point of this part of the article was to suggest that the retributivists' starting point might not be the correct one. Neither our intuition nor our experience necessarily suggests that state-imposed punishment occurs when people deserve to suffer by virtue of having committed a moral wrong. Rather, our intuition and experience suggests that the rights of offenders can be taken

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<sup>141</sup> See *id.* §§ 212.3, 223.2(1).

<sup>142</sup> Dolinko, *supra* note 133, at 555.

<sup>143</sup> *Id.* at 544.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 542.

away by the state when those offenders infringe on certain rights of others. Perhaps this should be the relevant starting point for those wishing to justify punishment. Theorists should ask what it is about a certain set of rights that gives the state the ability to punish those who violate those rights.

## V. CONCLUSION: MORAL SUPERIORITY, HARSH PUNISHMENTS, AND IMMORAL RECOMMENDATIONS

I have gone to great lengths to show that whether or not one *deserves punishment* is very different than whether or not one *should be punished* by the state. This important distinction calls for a reformulation of the retributive justification of punishment if it is to survive attack from those who believe punishment is justified by some end other than moral desert.

I further believe that the difference between these two concepts has more than academic importance. Mistaking moral desert for appropriate, state-inflicted punishment gives rise to an undue feeling of moral superiority. There is a general sense that state-imposed punishment is reserved for the worst of moral wrongs.<sup>146</sup> Hence, many law-abiding citizens may conclude that those who commit crimes and are publicly punished by the state are morally worse than average, law-abiding citizens are. However, the broader view of punishment advocated in this paper rejects this inference. State-imposed punishment is usually inflicted for immoralities, but many people who commit heinous immoralities are not punished by the state. An average law-abiding citizen may or may not be more moral than the common criminal, but such a citizen should not assume his moral superiority based on his status as law-abider. Most of us have committed acts at least as immoral as pizza theft, at least a few times in our lives.

More importantly, this sense of moral distance between the law-abiding citizen and the criminal may give rise to unjust punishments. Imagine you committed some unpunishable wrong, at least on par with petty theft. Perhaps you intentionally

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<sup>146</sup> See WALLACE, *supra* note 84, at 51 (noting that “to hold people morally responsible is to be prepared to blame or sanction them for their moral offenses, where the sanctions tend, at the limit, toward punishment”).

humiliated someone to aggrandize yourself, or committed an infidelity in a serious relationship. Imagine further that you are deeply regretful and feel you deserve the misfortunes or resentment that may flow from your acts. Now suppose someone was to suggest that you deserved suffering equivalent to the suffering you would feel if you were imprisoned for an entire year. You would likely find the suggestion preposterous. Such punishment would be unduly harsh. Now recall the Illinois woman from Part I who was forced to spend a year in jail for stealing cigarettes from a supermarket.<sup>147</sup> This punishment seems harsh and egregiously unjust, especially if one imagines that such a punishment applying to any moral wrong equivalent to stealing cigarettes. The fact that people have failed to separate the difference between “moral desert” and “appropriateness of state punishment” may often lead to unduly harsh punishments. Those in power might not inflict such extremely harsh punishments if they had the broader understanding of punishment and desert advocated in this article. If legislators or sentencing judges had considered what punishment they may have personally deserved for a past wrong (on a level with cigarette theft), they would have been much less likely to conclude that a year in prison was the appropriate punishment for a wrong of that gravity.

Another big problem with confusing whether an act should be punished by the state with whether an act is immoral is that people may perpetrate horrible immoralities with the mistaken belief that such acts are not immoral. However, the arguments in this paper suggest that people should not ignore drowning babies, play cruel tricks on co-workers, or leave their tort victims uncompensated while they live the high life.

The wrongs committed by Chad and Howard discussed at the beginning of this paper were shocking. The creator of the film wanted the audience to feel that “the world is just not right.”<sup>148</sup> I hope the reader has gained some insight into why it is that the world is full of terrible people who do not ever seem to get what is coming to them. But the lesson I really hope that the reader has gained is that good, evil, desert, and justice are not concepts that only exist in the criminal law. Judgement about what one

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<sup>147</sup> *Spence*, 272 N.E.2d at 740.

<sup>148</sup> See Labute, *supra* note 2.



deserves, what is wrong, and what is right should be extrapolated from the way we feel when we are wronged and when we wrong others. The main difference between ourselves and those behind bars is not our moral superiority, but our good sense to limit our immoralities to acts which do not violate certain rights of others. This is certainly not a difference worthy of the feeling that criminals should be marked for life with some brand of permanent disgrace.

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