

Criminal Justice and Legal Reparations as an Alternative to Punishment¹

Geoffrey Sayre-McCord

I. Introduction

Consider a just society, with reasonable laws, fairly enforced by an appropriate authority. In this context, how should society respond to those legitimately determined to have broken the law?² Many have thought the right answer is: "with punishment."

In support of this answer, three sorts of justification for punishment are commonly offered. Some justifications appeal to the demands of justice and considerations of desert—to the criminal deserving punishment or to the victims or other members of society deserving state sanctioned retribution. Some justifications appeal instead to utility and especially to the prospect of deterrence—to the thought that the threat of punishment, or punishment itself, will work to prevent crime. Finally, some appeal to punishment's role in establishing, expressing, or affirming society's commitment to the (frequently moral) judgments embodied in the law.

Often enough one or another such justification is advanced by itself as both necessary and sufficient for determining when—and

the extent to which—criminals may or must be punished. Yet they are also often combined in the attempt to fashion a theory that appeals to considerations of justice and desert as well as to the importance of deterrence and the role punishment can play in expressing moral disapproval and contributing to moral education.

My purpose in this paper is to argue that these familiar justifications of punishment, taken either individually or in combination, all (to the extent they are plausible) recommend a practice importantly different from punishment. I call the alternative Legal Reparations, and will, in the course of this paper, (i) distinguish it from punishment, (ii) sketch the institutional form it might take, and (iii) argue that the justifications traditionally offered in favor of punishment actually instead favor legal reparations. I won't spend a lot of time sorting through the variety of ways one might try to combine the three sorts of justifications but will instead focus on each kind considered alone. Nonetheless, my preferred mix of the three will, I suspect, become evident. Some such mix of all three considerations is, I think, essential to any defensible state response to violations of its laws. Only a practice that addresses considerations of all three kinds can be such as to secure the reasonable agreement of those who would be subject to the practice—and that is itself crucial to the practice being justified. I won't here defend this last claim. I mention it now only to acknowledge the role it will play—perhaps, in places, only surreptitiously—in the version of Legal Reparations I sketch.

II. Punishment and Legal Reparations: The contrast

Punishment, as Stanley Benn observed, is "inflicted on an offender because of an offense he has committed; it is deliberately imposed, not just the natural consequence of a person's action (like a hang-over), and the unpleasantness is essential to it, not an accidental accompaniment to some other treatment (like the pain of the dentist's drill)."³ Similarly, H.L.A. Hart notes that punishment "must involve pain or other consequences normally considered unpleasant" and "must be for an offense against legal rules."⁴ Along the same lines, Richard Wasserstrom emphasizes that "the point of the imposition of a deprivation when it is unmistakably a punishment is that it is being imposed because it is a deprivation, because the person upon whom it is being imposed should thereby be made to suffer and in that respect be worse off

than before.”⁵ Punishment has at its core *the intentional infliction of pain or harm*.

It might be that the pain (or other unpleasantness) involved in punishment is thought important to inflict in its own right, or important to inflict in order to achieve some further end, or important to inflict in the context of respecting some broader concern. Whatever the justification is supposed to be, a response to an offense or violation counts *as punishment* only if it involves the intentional infliction of pain (or other unpleasantness). It is this aspect of punishment that especially raises moral concerns about the practice of punishing criminals.⁶ The concerns, of course, might be met—that has been the point of various attempts to justify punishment. But they need to be met: the intentional infliction of pain requires justification.

Reparations, in contrast, aim not at inflicting pain (or harm) but at enforcing efforts at making amends for the offense. What is important to reparations is not that the offender feel pain or suffer some loss or harm but that he work to make amends for the offense he has committed. As a result, a system of legal reparations will resemble a system of restitution in emphasizing that committing a crime involves committing an offense against others that calls for acknowledgment and redress. Yet reparations is importantly different from restitution in that the latter views criminal justice as properly focused solely on the loss suffered by victims and demands only that the criminal compensate for that loss.⁷ Although legal reparations recognizes the loss suffered by the victim as important, and important to address, it also sees in the crime an offense—an assault on the victim’s rights—that is not properly acknowledged merely by repayment. In committing a crime where there is a victim, the criminal has not only imposed a cost on the victim, he has also acted offensively in a way that calls for making amends and not merely for repayment. Recognizing and responding to this aspect of crime is a crucial element of legal reparations and explains that system’s emphasis on requiring efforts towards repair and not mere payment from the offender.

As Gerald Gaus notes, “wronging is not simply harming; consequently, undoing the harm does not undo the wrong. One cannot undo wrongs in the way one can repay debts.”⁸ To think compensating someone (even to the point where he is indifferent as between not suffering the crime and suffering but receiving the compensation) rights the wrong is to mistake the nature of offense. Gaus goes on to suggest that punishment might add to compensation what is needed in order to right the wrong and

“restore the equality” the crime dislodged. Just why punishment should do the trick, though, is mysterious, to say the least.⁹ It may be that as a matter of convention we accept someone having suffered punishment as absolving him or as an accepted equivalent of atonement. In these cases, however, the key to punishment’s restorative role is the conventional arrangement (and the avenue it provides for securing reinstatement to good standing in society) not on the punishment itself. Something other than punishment could equally well serve as grounds for seeing someone as absolved or as an accepted equivalent of atonement. In fact, a system of legal reparations is built on the idea that the providing of one’s own labor should serve this conventional role—not because a certain amount of labor cancels the harm and the wrong, but because in laboring oneself to cancel the harm (as opposed merely to paying compensation), one can be seen as (going through at least the motions of) making amends. The labor of the criminal, then, serves as a suitable conventional focus for addressing the offense while also working in fact (and not merely symbolically) towards both compensation and making amends.

A system of reparations, with its emphasis on the making of amends and repair, aims at restoring the situation in a way that allows the offender to be legitimately reinstated in society. To this extent, a system of reparations resembles in aim various treatment programs. Yet reparations rejects the idea, central to standard treatment proposals, that (in general) criminals should be seen as patients to be healed or threats to be changed; instead it recognizes criminals as (in most cases) agents rightly held responsible for their actions.¹⁰ At the same time, though, it sees holding a person responsible as involving not the infliction of pain but the demand that he take responsibility by working (so far as he can) to make things right.

In thinking about the difference between a system of reparations and a system that puts treatment programs front and center, it is helpful to distinguish two sorts of rehabilitation. One sort of rehabilitation, the one aimed at by treatment programs, is a matter of the criminal being changed in ways that make him less likely to commit crimes. A different sort of rehabilitation, the one aimed at by reparations and approaches to punishment that see the criminal as (loosely speaking) “paying a debt,” is a matter instead of re-establishing the criminal’s entitlement to inhabit society.¹¹ Within a system of reparations, rehabilitation (in the second sense) is seen as involving the repair of the criminal breach by effort by the criminal.¹² The relevant repair, it is worth repeat-

ing, is not achieved merely by compensating the victim. Mere compensation, after all, might be secured in a number of ways that leave the criminal's standing vis-à-vis society unchanged, as, for instance, when the compensation is paid by some third party or by the criminal himself in a way that leaves the offense (even if not the harm) unaddressed. Whatever might effect the repair, and so the relevant rehabilitation, must do so by restoring the criminal's standing within society.

What is crucial to restoring the standing? I think there is no single substantive answer to this question. Society, in effect, needs to settle what it will, in practice, take as sufficient for rehabilitation. Various features of human psychology no doubt limit and shape what might be seen as appropriately addressing the breach an offense constitutes. Still, whatever limits there are evidently leave open a strikingly broad range of possibilities. No doubt, whatever is expected, by way of efforts at repair, should reflect the relative seriousness of the offenses, with the more serious offenses calling for more significant efforts. Yet what sort of efforts might be deemed appropriate, and how their significance might be measured, is a matter of convention. Some crimes, of course, will be so serious that no amount of effort will count as sufficient. In such cases, efforts at making amends can never be successful on their own and will need to be met with some sort of institutional forgiveness. But not all crimes will call for forgiveness once a perpetrator has made efforts to make amends. There can be a point at which the criminal has in fact paid his debt to society and is himself owed good standing. To bar him still is, I believe, to do him an injustice. What is it, then, that can repair the breach a crime introduces? The answer offered by reparations is: the criminal's effort towards repair—not because that effort is painful (though it may be), but because it addresses directly and positively the damage (the harm and the offense) done by the crime.

Legal reparations aim to enforce efforts at making amends for the offense committed, not to inflict pain for that offense. Still, any state response to crime—other than passive acquiescence—is bound to involve pain for the criminal, since it is bound often to rely on coercion. This does not mean, however, that a system of reparations is really one of punishment after all. Treatment programs and restitution schemes, no less than a system of legal reparations, will involve sometimes forcing people to do what they would rather not. Even so, there is an important moral difference between making someone act in a certain way, where so acting happens to be painful for them, and intentionally inflicting pain.

Punishment is in place only when the infliction of pain is part of the point of the practice.

Of course, knowingly causing pain requires justification, even when the pain caused is unintended. So a system of reparations, which will sometimes cause people pain, stands (as does punishment) in need of justification. The burden facing reparations, however, is reasonably thought to be different from and less than that facing a system of criminal punishment. If there is something right about the doctrine of double effect—so that intentionally inflicting pain or harm is worse in itself than merely knowingly causing pain or harm—then punishment (unlike reparations) stands on the wrong side of the contrast and requires special considerations in order to be justified, if it can be justified at all. And even if the difference between intending and merely knowingly causing pain is not morally significant in itself, the difference can make a huge difference in how much pain is actually produced. For there will likely be many situations in which a call for punishment will require the infliction of pain where a parallel call for reparations will require much less (if any).¹³

Systems of punishment and reparation alike can, and surely must, recognize a limit on how much pain might legitimately be produced in response to a given crime, so that both might reach such a limit and have to stop. Still, in aiming at the infliction of pain, a system of punishment is, one may suppose, more likely to reach that limit than will be a system that lacks that aim. This is even more likely if the system of reparations views the pain felt not just as a side effect, but as an unfortunate one that is reasonably alleviated so long as alleviating it does not work against the system's aims.¹⁴

The underlying idea of a system of reparations—that a person who commits an offense has a duty to make amends—seems to me appropriate not only for criminal offenses but more generally whenever someone violates a justified prohibition. My concern in this paper, however, is with the state's response to crime. In its institutional incarnation, as a part of a criminal justice system, reparations will, I am supposing, take on a structure that has the fruits of a criminal's efforts contribute to a state fund that victims can, in turn, call upon for at least partial compensation. Decisions as to what should be required of people for various offenses will be independent of the actual damages caused by particular instances of that kind of offense and will instead reflect an ordinal ranking of various kinds of offense in terms of their seriousness (though that ranking of seriousness will likely be sensitive

to the usual damages offenses of the various kinds impose). Thus, barring extenuating circumstances and aggravating conditions, offenses of one kind will predictably be counted as more serious than others and will accordingly be met with a demand for greater effort at making amends. The effort, in turn, will (I am imagining) be measured in work time, so that in having committed an offense a criminal will be held accountable for working (to make amends) an appropriate amount of time. Thus labor (not punishment's pain) will serve as the common coin in which one "pays one's debt," with the market value of that labor paying into a victim compensation fund, so far as there is an excess over and above enforcement costs.

It is worth emphasizing that a system of legal reparations that responds to crime not with punishment but with demands for efforts at making amends is fully compatible with maintaining the distinction between criminal and civil actions. Civil procedures already, and I think appropriately, provide an avenue for victims to collect compensation for damages. The criminal procedures that would go with a system of reparations would not duplicate nor replace nor rely on these civil procedures. Their focus would not be on compensable damage but on offense and the demands that would be made of criminals would not be proportioned to the actual damages caused (as they are in civil cases) but to the nature of the offense committed (as they are in criminal cases). The efforts at making amends, not the monetary value of those efforts, are what matters in this context. Along with this difference in focus will go a variety of procedural differences concerning, say, burden of proof and the relevance of intent, that are already more or less in place now and that are crucial to the difference between criminal and civil cases. At the same time, though, to the extent the efforts demanded by a system of reparations do contribute positively to the state fund, extra resources will be available to address damages suffered.¹⁵ And a significant advantage of such a system is that there is hope at least of compounding benefits a system of criminal justice might offer.

When the offenders are not dangerous, and are employed, the aims of a system of reparations might be well met by having them work in their current jobs, counting some proportion of their work time towards reparations (with the actual payments into the compensation fund being a function of their salaries), while those who are not dangerous but not gainfully employed would be put to work on public works projects. Those criminals who are dangerous would, I think legitimately, be incarcerated, not with the aim

of inflicting pain but so as to ensure efforts towards reparations and, until reparations are made, to insulate them from society. In addition to the genuinely dangerous there are, of course, a variety of criminals who would not, absent supervision and enforcement, make reparations. So within a system of legal reparations there will no doubt need to be a variety of more or less restrictive housing arrangements (some surely being very similar to current prisons) and work options that might well be modeled on various alternative sentencing programs. In each case, the criminals would have their freedom limited not with the aim of inflicting pain (or some other harm) but rather on the grounds that an unwillingness to work towards making amends forfeits one's right to participate fully in society.¹⁶

When a person is willing but unable to work effectively, the focus of the system should be on effort, not effect, and it would be reasonable too to institute various training programs (e.g., that teach trades) that put offenders in a better position to have their efforts genuinely be effective and also improve their chances of contributing positively to society. Within a system of punishment, such proposals predictably run afoul of the objection that the training programs help rather than hurt the offenders, which is antithetical to the point of punishment. Within a system of reparations, no such objection gets traction, and the fact that these programs may help the offenders more effectively make amends counts in their favor. Indeed, across the board, with both dangerous and non-dangerous offenders, with those employed and those barely able to work, the focus of the institutional response to their crimes should be on their responsibility to make amends for their offense, not on making them suffer pain nor (for that matter) shame except as these are involved in or follow from holding them responsible for their crimes. That a system of reparations demands making amends and efforts at repair, and not shaming, is important, I think. It leaves room for someone to maintain his dignity, and insist that what he did was neither wrong nor properly the cause of shame, even as he acknowledges the offense and works to make amends.¹⁷

There are, of course, a range of obvious questions that need to be addressed concerning, for instance, victimless crimes and crimes that cause irreparable harm or involve unspeakable offense, as well as issues relating to the specification of appropriate sentences, equalizing burdens, and effectively speaking to victims' concerns. Before turning to these, however, I will survey the standard justifications for punishment and argue that, to the extent

they are plausible, they all actually favor legal reparations over punishment as a way for society to address crime. I should emphasize that I will not be arguing that punishment is unjustified but that the various considerations that might successfully justify punishment recommend the alternative offered by a system of legal reparations.

III. The Familiar Justifications for Punishment

The familiar justifications of punishment fall into three groups, according to whether they appeal primarily to considerations of justice and desert,¹⁸ or to utility and the prevention of crime,¹⁹ or to the role of punishment in expressing moral condemnation and contributing to moral education.²⁰ The division is, of course, more than a little artificial; members of society might deserve to have institutions that work to prevent crime, and respecting constraints of justice might contribute significantly to overall utility, and both justice and utility might require mechanisms that forcefully condemn certain behavior and work effectively towards the moral education of actual and potential offenders.²¹ Nonetheless, I will discuss them as if they were separate and independent.

A. APPEALS TO JUSTICE AND DESERT

Often, arguments offered in defense of punishment take the proper focus of considerations of justice to be the criminal and what he deserves for having committed the crime. Sometimes, the thought is that in committing a crime the criminal has acted immorally and, because the immoral deserve to suffer, criminals deserve to suffer. Punishment is justified, then, because it involves giving the criminal what he deserves. As H.L.A. Hart puts the view, "the justification for punishing...is that the return of suffering for moral evil voluntarily done, is itself just or morally good."²² If this is the argument, one might of course question the claim that those who commit crimes have *ipso facto* done something evil, or the claim that those who do something evil deserve to suffer, or the claim that those who deserve to suffer (because they have done evil) are rightly made to suffer *by the state*. I have my doubts on all three fronts, but here will simply assume that even if criminals are morally defective and therefore deserve to suffer, it is not the state's role to make them suffer for that reason.²³ I am not saying that a state never rightly makes someone suffer. As-

suming the state's coercive power is sometimes justified it will almost surely sometimes justifiably coerce in circumstances where someone is thereby made to suffer. What seems mistaken is the suggestion that the justification of such coercion rests directly on the state's determination of moral defect. Making people suffer *because of their immoral acts* is not legitimately within the state's purview.²⁴ Moreover, to the extent one holds that those who act immorally deserve to suffer and that the state is properly involved in distributing that suffering in proportion to the immorality, such a distribution of suffering would it seems have to take into account not just how immoral the criminal is, but also how much he has already suffered.²⁵

Other times, the thought is that punishing a criminal is a way of acknowledging him as a responsible agent and he deserves this acknowledgment (whatever he has done).²⁶ This line of thought does not depend on holding that the criminal is evil or immoral at all, but instead sees treating him a certain way, within a public system of justice, as part and parcel of recognizing his standing as a responsible agent. Here a system of reparations and a system of punishment can agree that a criminal actually deserves to be treated as a responsible agent—to do otherwise is to commit an offense against him. But agreeing on this is not yet to find grounds for punishing the criminal as opposed to responding to his crime in some other way, as long as the alternative constitutes a way of acknowledging his standing as a responsible agent. Indeed, it is a bit puzzling why anyone would think punishment *per se* is important to this acknowledgment, except incidentally as its legitimacy is seen as presupposing a finding to the effect that the criminal is responsible for the crime for which he is being punished. Of course this link to responsibility is maintained within a system of reparations that demands efforts toward making amends only from those who have been found to be responsible for the crime in question.

Still other times, a system of punishment is seen as justified to the extent, and on the grounds, that it would (under the appropriate circumstances) secure the consent of those subjected to it. Here the idea is often that people have a right to have their standing as moral agents recognized and that this is done properly only when one's treatment of them is such that they themselves would (under the appropriate circumstances) give their consent to it. Yet if a system of punishment might secure such consent, it seems pretty clear that a system that demanded reparations in place of punishment would likewise secure the relevant consent

(and, likely, more easily). So, to the extent properly recognizing the moral standing of others involves subjecting them only to institutions that could, under the appropriate circumstances, secure their consent, reparations looks as if it would stand at least no worse than would punishment in giving the due recognition.

In any case, reparations, unlike punishment, finds a place for the thought that criminals—in addition to having a right to be treated as responsible agents—might also deserve the opportunity to make amends (a right that runs in parallel with the duty to make amends that reparations recognizes, which is in turn a duty that reflects the rights of those suffering the offense). A new injustice comes in (except perhaps in the most extreme cases) if a person who commits a crime is denied the opportunity to make amends. There are limits here—some crimes are so heinous that, in committing them, a person has forfeited this right—but most crimes surely don't fall into this category. And even those that do fall in this category might so fall more because the criminal has established himself as beyond the pale than because he would not have a right to make amends if he could take advantage of it. While I am somewhat ambivalent about seeing this as a right the criminal has, I think there is a point to the idea that people should be given the opportunity to "pay their debt to society" and to be free, as a result, of further recriminations. This idea is sometimes in play when people see undergoing punishment as a way of earning back one's place in society. There is, on this picture, a kind of rehabilitation to be sought, not a rehabilitation that depends on a reformation in the character of the criminal (as I noted above), but instead one that is accomplished by bringing the criminal back into society—by reinstating him.

So far the justifications discussed have concentrated on the idea that the criminal, for one reason or another, deserves to be punished. Other attempts to justify punishment by appeal to considerations of desert, however, see the proper focus as being on the victim and what he deserves as a victim. The general idea is that the victim has a right to have the criminal punished—perhaps as a way for the state to annul the crime, or as a way to right the wrong, or as a reaffirmation of the victim's standing. In each case, there is a serious question as to how punishment in particular is supposed to be crucial to meeting these aims. Why does making the criminal suffer annul his crime? How does the punishment right the wrong? In what way does it reaffirm the victim's standing? I ask not because I think punishment cannot possibly do these things, but because an explanation of how and why punish-

ment might do them will reveal, I believe, that the difference between punishment (with its intentional infliction of pain) and reparations, is irrelevant to the explanation. This is because punishment, so far as I can see, serves these purposes only by taking on a conventionally established symbolic role. Punishment works to "annul a crime" or "right a wrong" or reaffirm a victim's standing not naturally, so to speak, but only in a context within which suffering the intentional infliction of pain or harm of the sort in question is accepted as having achieved these aims. Within the bounds set by general considerations of justice, precisely what can achieve these aims reflects a shared understanding of what to accept. What might serve as proper payment for offense, like what might serve as legal tender, is largely a matter of what people collectively are willing to recognize and treat as such.

If this is right, then to the extent punishment can reasonably be seen as annulling the crime, righting the wrong, or reaffirming the victim's standing, reparations can as well, as long as it can take on the crucial symbolic role. At the same time, I think, reparations can more effectively speak to the demand that the crime really be annulled (i.e., wiped out) and the wrong righted and the victim's rights reaffirmed, since it involves demanding of the criminal that he make efforts directly designed at accomplishing these ends. Here the system of reparations and a system of punishment can agree that a victim deserves to have the state enforce his rights where this might involve instituting efficient protections of it and reasserting them in contexts where they have been challenged or breached. But a system of reparations goes on to hold that he also deserves from the perpetrator of the crime effort to repair the situation and make amends for the offense.

It is reasonable, though, to see crime as an offense against not only particular victims (when there are victims) but also as an offense against society at large. As a result, some attempts to justify punishment give pride of place, in appealing to considerations of justice, either (i) to the idea that society as a whole has a right (say of self-protection) to punish the criminal for the violation of its rules²⁷ or (ii) to the idea that members of society deserve a fair distribution of social burdens which has been upset by the criminal (who, in committing a crime, shirks the burden of restraint that the law places on all).²⁸ Either way, punishment is justified on the grounds that law-abiding citizens have a certain claim of justice that requires allocating certain burdens (of suffering a threat or of self-restraint) to those who voluntarily break the law. Punishment is supposed to speak to burdens unjustly

imposed or shirked by criminals by imposing new burdens on them and thereby establishing the balance of burdens demanded by fairness. Reparations too, though, can countenance shifting burdens in the name of justice. Yet it would do the shifting not by introducing a brand new burden—the pain of punishment—but by demanding that criminals (who have either imposed or shirked burdens) compensate others for the burdens even as it also acknowledges, and focuses on, the fact that in committing the crime they have done more and worse than simply imposing or dodging a burden—they have failed to treat others with the respect they are due. This aspect of their crimes calls not for the imposition of pain or some new burden, but rather an effort at reparations on the part of the criminals.

Putting aside the—I think indefensible—claim that punishment by the state is justified and demanded directly and simply by the immorality a criminal's acts exhibit, the various arguments for punishment that appeal to what the criminal, or the victim, or society at large, deserve all capture something important. Yet they all, also, mobilize considerations that are not essentially tied to punishment. In fact, it seems to me that a system of reparations clearly speaks to these considerations more directly and effectively than does punishment.

B. APPEALS TO UTILITY AND THE PREVENTION OF CRIME

Of course appeals to justice and desert are often not the primary justifications offered for punishment, even if such considerations are often seen as constraining what sort of punishment might be justified by other considerations. Long ago, Protagoras argued that "he who desires to inflict rational punishment does not punish for the sake of a past wrong which cannot be undone; he has regard to the future and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again."²⁹ Ever since, one of the main justifications for punishment has been found in its serving as an effective deterrent—thanks either to punishment effectively reducing recidivism or to the prospect of punishment working as a disincentive. This justification plays right to the core of punishment by claiming that the pain punishment intentionally inflicts keeps people from committing crimes they otherwise would commit.

There are of course familiar moral worries about this sort of justification that arise unless it is combined in some way with effective constraints on who might be liable to punishment and

on just how much punishment might be administered.³⁰ Absent such constraints a direct appeal to the benefits one might secure by intentionally inflicting pain on people risks countenancing the 'punishment' of innocent people and the torturing of people, innocent or not, for minor as well as major crimes.

Yet even with appropriate constraints in place, the plausibility of a deterrence justification of punishment is seriously undermined by the evidence available—evidence that seems to show that the prospect of pain (and punishment in general) is an ineffective deterrent (at least as long as the punishment is not draconian), especially among those disposed to be criminals in the first place.³¹ Witness the high recidivism rates among offenders who have been punished and the extraordinary failure of programs like Scared Straight that are aimed at making vivid the prospect of pain as a consequence of crime.³²

Any justification of punishment that speaks to what motivates criminals needs to recognize that a great deal other than the prospect of pain is in play—including impulsiveness, perceived injustice, desire for excitement, apparent lack of better options, the need to establish one's standing, honor...³³ Threatening pain, as a system of punishment does, speaks to none of these, nor does it seem likely to have much impact on what, down the road, might come to motivate those who have been subjected to punishment. All it does is try to shift the balance of considerations by introducing one—the prospect of pain—that evidently does not figure very heavily when it comes to criminal behavior. Of course punishment can, under the rubric of inflicting harm, impose costs on criminals other than the costs of pain. Presumably a system of punishment that takes into account the extent to which criminals seem not to give significant weight to the prospect of pain would devise punishments that speak to depriving criminals of what they do value. Even then, though, evidence suggests that, to a large extent, long term and uncertain prospects of the imposition of a cost do not figure prominently in deterring crime.³⁴ Rather, the near term perceived certainty of some penalty or other—pretty much regardless of severity—appears to have a significantly greater deterrent effect. Indeed there is some evidence that increasing the severity of penalties actually increases crime rates.³⁵ The very fact that the severity of the penalty (given equal certainty) has at most little effect suggests that the importance of certainty of penalty is found not in its providing a cost (the imposition of which is central to punishment) but in something else. Plausibly, the relevant something else is, at least in part, its providing a clear

message that the behavior is forbidden. This, however, is a message easily—and well—conveyed by a system of reparations.³⁶

There is at least some additional evidence that what matters to deterrence is the message that the violation of the law is to be taken seriously. A number of studies suggest that police “cautions” as opposed to court appearances,³⁷ probation as opposed to conviction and fine,³⁸ and being discharged as opposed to being charged and fined,³⁹ all showed significant *increases* in subsequent criminality. When the authorities do not take the crime seriously, neither do the criminals. Yet there was no decrease in criminality when the serious responses were augmented by more severe penalties. It seems that once it is clear that the crime is being taken seriously, increasing the severity of the penalty has no positive impact on recidivism.⁴⁰ A reasonable hypothesis is that what is crucial, when it comes to an institutional response to crime, is that the significance of the offense be unambiguously conveyed. In any case, however much people think it a matter of common sense that punishment deters, the evidence shows fairly convincingly that the relationship between crime and the prospect of punishment is neither as simple nor as reliable as many would suppose.

C. APPEALS TO THE EXPRESSIVE AND EDUCATIVE ROLE OF PUNISHMENT

That society must convey the significance of criminal offenses is one of the main ideas behind the suggestion that punishment is justified by its expressive or educative role. The thought is that a society can effectively mark its condemnation of certain behaviors, and thus convey that they are wrong, only by backing prohibitions with threats of punishment. At the same time, society's willingness to follow through on the punishments and enforce citizens rights is a way of affirming both that the violation of the rights will not be tolerated and that the person whose rights were violated has standing in the community. To let violations go by, to offer only cautions or merely sentence someone to probation is to send the message that the violation, and by implication the person violated, is not to be taken very seriously. Punishment, so the argument goes, is society's way of not letting such things go by.⁴¹

I do think there is substantial evidence (cited above) that a light touch of the law will engender disregard both for it and for

what it claims to protect. However, the evidence does not show that punishment is the best, let alone the only, way for society to indicate the significance it attaches to respecting the law. The expressive function of punishment, as important as it is, is pretty clearly a function that can be played by something other than punishment—and to better effect, I suspect. Indeed, to the extent there are grounds for thinking increasing the severity of penalties has no deterrent effect there is reason to think the important and effective message is not centrally conveyed by the punishment itself even when punishments are in place, but rather by society palpably taking the offense seriously. And conveying that the offense is to be taken seriously is something enforcing efforts at reparations would seemingly do effectively.

In addition to thinking punishment can play a crucial expressive role, when it comes to conveying condemnation, many have thought punishment works (either via the expressive role, or in some other way) to reform the criminal morally, to make him a better person. On this view, as Jean Hampton presents it, “there is a concrete moral *goal* which punishment should be designed to accomplish, and that goal includes the benefiting of the criminal himself. The state, as it punishes the lawbreaker, is trying to promote his moral personality...”⁴² To the extent this goal is legitimately adopted by the state, the question remains as to whether punishment is the best way of achieving it. Hampton appeals to punishment's capacity to communicate a moral message in defending its educative role. And surely to the extent punishment does actually advance the cause, it is partly by being a means of effective communication. But, as I have already suggested, there is every reason to think that a system of reparations could play the same communicative role. Of course, punishment might also serve the goal of moral improvement in some other way. It might be, for instance, that by altering incentives for available actions, punishment works to change what people choose to do, and thus what habits (and so, character) they develop. Again, though, the evidence suggests that whatever impact punishment might have on incentives, it works poorly as a deterrent (and therefore cannot be working positively to change character by leading people away from crime). Most strikingly, it seems that increasing severity (which presumably increases disincentives) is often counter-productive. Still, if punishment does work to promote a criminal's “moral personality” either by getting him to act in certain ways or by forcing him to take responsibility for his actions, a system of reparations could justifiably claim the same advantages.

This has been, I realize, a whirlwind tour through what are, in point of fact, highly complex and subtle arguments. I have not even come close to doing them justice. My purpose, though, has not been to evaluate the arguments or to refine them to the point where I might fully endorse one or the other. The strategy has been, instead, to convey the extent to which arguments that are offered in defense of punishment regularly leave unexplored an important and attractive possibility—legal reparations. The quick discussion of the various familiar justifications of punishment are thus offered primarily as an invitation to those who find one or another attractive to ask whether reparations might actually speak to the morally legitimate purposes of the criminal law more effectively than does punishment.

No doubt just how attractive legal reparations proves to be depends not only on its answering to traditional justifications for punishment but on it addressing well problems that might seem its own alone to face. I will, in what follows, just briefly mention some of these apparent problems and suggest how a defender of legal reparations might speak to them.

IV. Some Worries

The system of reparations puts a lot of weight on the idea that in holding people responsible for what they do we should see them as owing not just compensation but amends—genuine efforts at repair—to others (victims and society at large, to the extent the laws are genuinely just). However, society is surely in no place to force people to make amends, since genuinely making amends is as much a matter of one's state of mind as one's actions. I think, as the worry suggests, that in breaking a just law a criminal undertakes a duty that no one else can force him to fulfill—that is the duty of acknowledging others as deserving better. This duty is most naturally met by sincere efforts to make amends for the offense constituted by the crime. And, as the worry highlights, sincere efforts are just the sort of thing no one can force another to make. Nonetheless, a society can arrange its institutions so as to acknowledge that this is what is in fact owed and can then work—within the bounds of respecting those involved, including the criminals—to encourage genuine respect of this debt and to enforce actual (if not always sincere) efforts at repair. The first aim is in large part met by pursuing the second. In enforcing efforts at repair—rather than simply inflicting pain—a system of

reparations would be publicly and clearly acknowledging that something is owed to those against whom an offense has been committed. And that is, it seems to me, a proper primary focus for a criminal justice system—one that it can accomplish without being objectionably intrusive.

In concentrating on efforts at repair, however, it might seem that a system of reparations would find no grounds for responding to victimless crimes. How would a system of legal *reparations* legitimately see such crimes as within its purview? Well, even when crimes are “victimless,” if they are crimes in a just society there is both a harm and an offense to society at large in their commission. The harm is at least the marginal costs each criminal adds to the criminal justice system. But the harm is often much more than that, since many “victimless” crimes are criminalized precisely because there is a real, albeit diffuse, harm caused by the act. Consideration of harm aside, an offense comes with any violation of a prohibition that society has reasonably deemed important enough to make a matter of law and the offense stands as grounds for a duty of reparations. I should emphasize, though, that acknowledging that an offense is involved in committing crimes is not the same as thinking committing the crimes are immoral. Sometimes one is morally justified in committing an offense. And this is true even when that justification has no standing as a legal justification or excuse. Whether or not a moral justification is present, however, a system of reparations will (I think appropriately) see the offense and whatever harm it causes (even if diffuse) as properly calling for efforts at repair on the part of the offender.

To go to the other extreme, where the victims are clear and both the harm and the offense are large, it might seem as well that a system of reparations would be at a loss. Some crimes (e.g. murder, rape, etc.) are such that it is out of place—perhaps even abhorrent—to talk of repair or making amends. These crimes involve offenses and harms so great, and of such a nature, that neither hope nor sense should be attached to the idea that the victim might be made whole. Any response to crime must recognize the distinctive standing of such offenses. Within a system of reparations this should be done, I believe, by seeing those who commit such crimes as having, through their actions, incurred debts that no amount of effort throughout the remainder of their lives will count as having made amends. They never have a legitimate claim to having earned reinstatement. Moreover, it is reasonable to see those who commit such crimes as having, through their

actions, forfeited any right to liberty or control over their time (though not, I would say, their right to humane treatment nor their right to life).

Crimes of this sort—crimes for which a criminal will never be in a situation where he has a legitimate claim to have earned his reinstatement—highlight the role some form of institutional forgiveness will almost surely have to play in a system of criminal justice (whether it deploys punishment or demands reparations). Sometimes the proper response to people who have worked to make amends for a horrible offense is to forgive them. In such cases it would be a mistake to see the offenders as having a right to reinstatement thanks to their having made amends. But it would not necessarily be a mistake to see reinstatement as nonetheless justified or appropriate. The sort of institutional forgiveness this would involve is of course distinct from, but still related to, the forgiveness that may or may not be offered by victims of such crimes. The institutional forgiveness—conveyed, perhaps, by pardon—represents a collective choice by society concerning what should count as sufficient grounds for readmitting someone to full and equal status in society. Such a decision will no doubt have to be sensitive in some way to victims' attitudes. Presumably, though, considerations of fairness would require that the determination of pardons not be left solely to the discretion of the victims or the victims' families.⁴³

Similarly, considerations of fairness would influence how an acceptable system of reparations would treat people who commit crimes that are very similar in intent but quite different in effect when it comes to the damages caused and offense taken. To the extent reparations focuses on damages and feelings of offense in determining efforts at repair, it seems the two cases will be treated very differently. Yet, to the extent the different effects are a matter of luck, so to speak, it seems as if fairness will require that the demands on each be the same. Of course, similar questions arise for systems of punishment where distinctions are drawn, say, between murder and attempted murder. Still, the grounds for marking differences might seem greatly magnified in a system that focuses on reparations, since every difference in damage might seem relevant to what burden should be imposed on the criminal. On the contrary, I believe exactly the same general issues of fairness arise whether the system in question is one of punishment or of reparations.⁴⁴ Either way, decisions need to be made concerning the extent to which the offensiveness of the act, as opposed to the harm or felt offense it happens to cause, is to determine so-

ciety's institutional response to the crime. Whatever the balance, when actual effects are taken into account (as they are in the distinction between murder and attempted murder), differences due to luck will have an influence. It may well be, though, that while both are taken into account, some crimes are such that the offense so swamps the effects in significance that differences in the latter do not matter substantially to what reparations (or punishment) are deemed appropriate (and, perhaps, vice versa).

In any case, considerations of justice—specifically, concern to treat similar cases similarly—might allow what is demanded, by way of efforts at making amends, to be sensitive to the effects acts of the kind in question normally cause, but would require that those demands be insensitive to specific differences among particular cases. At the same time, though, a state compensation fund supported (at least in part) by fruits of the efforts at repair, could presumably pay out compensations that are highly sensitive to differences that are not taken into account in determining appropriate reparations. Payments from such a fund might, for instance, be sensitive to whether the victims in question have successfully secured compensation through other legal channels (e.g., civil action) or to how well off they are. Inevitably, too, the payments would be sensitive to the size of the fund, which in turn, will depend not only on the size of reparations paid in but on the society's willingness to tax itself (to provide insurance against suffering otherwise uncompensated harms). Decisions as to how to finance such a fund, and especially as to the extent to which it should depend upon those who owe reparations, turn on matters of social policy that go beyond and are, I think, tangential to, the question of whether demanding reparations, as opposed to punishing, is the appropriate response to crime. Interestingly, though, a system of reparations fits especially nicely with the independently attractive idea that victims of crime have a claim to compensation. And it fits well too with the general aim of designing social institutions so as to promote overall welfare since it organizes the response to crime around a concern to effect repair.

Any institutional response to crime—reparations no less than punishment—will have to face the challenge of those who pose an imminent threat. Sometimes the threat will be posed by those who have not yet committed a crime, other times by someone who has. Either way, to the extent the state is responding to the threat, and not to a crime for which the person has been convicted, the response should probably not be seen either as pun-

ishment or as enforcing efforts at repair. Nonetheless, if some sort of preventive detention or other preemptive reaction is sometimes justifiable in the context of a system of punishment, it seems it would likewise be justifiable, on the same grounds, in the context of a system of legal reparations.⁴⁵ As practically important, and morally complicated, as the issue may be, coming to terms with it will (I believe) not have significant implications for the choice between punishment and reparations.⁴⁶

In contrast, the ubiquitous desire for revenge seems to call clearly for punishment rather than reparations. After all, punishment, but not reparations, can speak directly to the desire—by satisfying it. So one might see punishment as justified on the grounds that putting it into place both controls and satisfies a desire that otherwise would cause mayhem. James Fitzjames Stephen gives voice to this argument when he claims that, in addition to being an effective deterrent (“it prevents crime by terror”), the criminal law “regulates, sanctions, and provides a legitimate satisfaction for the passion of revenge; the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”⁴⁷ Bentham advances a similar argument when he cites “vindictive satisfaction” as an important advantage of punishment.⁴⁸

Thought of in these terms, as appeasing the desire for revenge, punishment’s relevant advantages are simply unavailable to reparations. Only punishment provides this vindictive satisfaction and only punishment speaks directly to the desire for revenge by satisfying it. However, it is at least not clear that *satisfying* the desire is the best way of dealing with its presence. Indeed, there is reason to worry that public institutions of revenge actually encourage the desire by legitimizing it. In any case, it is clear that at least sometimes apologies, and efforts at making amends, and recognition of another’s right to take offense, all work to extinguish (rather than satisfy) the desire for revenge. So it would be a mistake to assume that the desire simply cannot be addressed otherwise than by punishment (or revenge in some other form). Needless to say, it is reasonable to suppose that the more serious the offense—and especially the more directly the offense was an attack—the more likely the desire for revenge will remain. Surely what would work to eliminate the desire when it is provoked by minor offenses will not be sufficient when the offense is more significant. Yet it is a serious over-simplification to hold that what the more significant offenses call for is direct satisfaction of the desire for revenge rather than, say, more extensive efforts at making amends and other public acknowledgments of the significant nature of the offense.

Just how successfully a system of reparations might address the desire for revenge remains, it seems to me, an open question. But it is plausible to think victims and criminals and society as a whole might be better served if satisfying the desire for revenge were to be removed from center stage.

Against this suggestion, some will argue that the desire for revenge, and its appropriate satisfaction, are ineliminable features of a healthy moral community. On their view, to do without punishment “would be a sign,” as John Cottingham puts it, “that the network of moral responses that defines civilized life had collapsed.”⁴⁹ On this view, a proper appreciation of a crime is supposed to travel with a recognition that it calls for punishment. To do anything else, it is commonly suggested, is to fail to recognize the crime for the offense it is. I share the view that serious offenses are not properly ignored—that one should not simply let them go. Yet I wonder why reacting with punishment would seem the only appropriate response. Punishment, I suspect, will seem the only appropriate—and only appropriately serious—response to serious crime as long as people overlook the alternative a system of reparations offers. But that alternative, it seems to me, presents a framework within which society’s response to serious crime can be given the necessary significance.

The plausibility of reparations as an appropriately serious response to serious offenses depends upon appreciating that the efforts it calls for can range in their significance and can be made proportional to the crime, so that more extensive efforts at repair are demanded of those who commit more serious crimes. At the same time, it is important to appreciate that a system of reparations imposes non-optional demands upon criminals. The demand for efforts at repair, the insistence that in committing a crime one acquires an obligation to make amends, is crucial to reparations’ standing as an acknowledgment of the rights of all.

Of course, this very feature of reparations (which is so important to its respecting the seriousness of some offenses) makes it easy for people to miss the difference between such a system, on the one hand, and punishment, on the other. The fact that reparations are demanded and enforced, not optional, may lead some to think that in making the demands such a system would be actually, if only covertly, punishing those subject to it. No doubt, reparations, like any coercive response to crime (mandatory treatment programs no less than punishments), will inevitably sometimes impose costs, and be unwelcome.

Yet two things especially distinguish reparations from punishment. First, reparations in no way aims at causing the criminal pain or harm. It stands fully successful, on its own terms, whether or not someone subject to its demands welcomes the opportunity to make amends. A welcome punishment, in contrast, is no real punishment at all.⁵⁰ Second, reparations, unlike punishment, aim directly, and positively, at redressing crimes in a way that takes the victim into account. Unlike punishment, it naturally focuses attention on the fact that in committing a crime one is committing an offense against other members of society.

V. Conclusion

I have tried, in this paper, to describe and defend a system of legal reparations that might serve as a genuine, and genuinely attractive, alternative to the current practice of subjecting criminals to punishment.

I have not addressed the practical problems that might come with changing over from a system of punishment to one of reparations. I suspect, though, that the change might be effected without drama by gradually introducing alternative sentencing programs that embrace reparations (rather than punishment or treatment) as their underlying aim. Nor have I explored the practical complexities involved in the actual workings of a system of reparations. Most significantly, I have pretty much passed over the question of how appropriate reparations for specific offenses might be determined. There are, undeniably, serious issues here. Yet these problems have identical twins that stand as problems for any justifiable system of punishment. So they do not represent distinctive problems for a system of reparations. Moreover, by and large whatever solutions work in one system can (I believe) be fairly easily adapted to the other.

What I have done is argue that the most plausible justifications for punishment—whether they appeal to justice and desert, or to utility and deterrence, or to moral expression and education—all actually recommend a system of legal reparations. If this is right, then the best justifications of punishment are not justifications of punishment at all but are instead elements in a justification for an important alternative. This alternative, I maintain, has the signal advantage that, by enforcing efforts at making amends, it steers clear of the morally problematic practice of intentionally

inflicting harm while publicly, clearly, and productively acknowledging crimes as offenses that call for redress.

NOTES

1. I have benefited from discussions of this material at University of Richmond, The Australian National University Law Program, the Research Triangle Ethics Circle, and the 1999 *Sociedad Filosófica Ibero Americana* (SOFIA) Conference on Legal and Political Philosophy, in Mazatlan, Mexico. I am especially grateful for comments from John Braithwaite, Valerie Braithwaite, Geoffrey Brennan, David Estlund, Claire Finkelstein, Don Garrett, Gerald Gaus, Geoff Goddu, Livia Guimaraes, Jim Hall, Tom Hill, Jr., Christopher Kutz, Loren Lomasky, Larry May, Joan McCord, Gerald Postema, and Peter Vallentyne.
2. For purposes of this paper, I bracket the problems that come with trying to decide what is required in order for a determination to be legitimate. What this (by assumption legitimate) determination comes to—whether a judgment of guilt, or of responsibility, or of efficient causation, will presumably both influence and be influenced by the institutional response to such determinations.
3. Stanley I. Benn, "Punishment," *The Encyclopedia of Philosophy* (Macmillan Publishing Co., 1967), Vol. 7 & 8, p. 29.
4. H.L.A. Hart, "Prolegomenon for the Principles of Punishment," Presidential Address to the Aristotelian Society, 1959; reprinted in his *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).
5. Richard Wasserstrom, "Capital Punishment as Punishment: Some Theoretical Issues and Objections," *Midwest Studies in Philosophy*, 7 (1982), p. 476.
6. Although there is room to worry about subtle differences between unpleasantness, pain, deprivation, suffering, and harm, such differences won't, I think, have an impact on the argument that follows.
7. See Randy Barnett's "Restitution: A New Paradigm of Criminal Justice," *Ethics*, vol. 87 (July, 1977), pp. 279-301.
8. Gerald Gaus, "Does Compensation Restore Equality?" in John W. Chapman, ed., *Nomos XXXIII: Compensatory Justice*. (New York: New York University Press, 1991), pp. 45-81, p. 72.
9. Gaus mentions that even when compensation is accompanied by punishment there may be cases in which "the aggressor is not fully squared away with the victim." I am challenging the idea that the punishment in itself ever works to square things away, except in so far as society accepts a conventional arrangement whereby undergoing a certain amount of punishment is counted as sufficient.
10. Of course, some who commit crimes are genuinely not responsible for what they do. These people no doubt need to be dealt with in some other way—just how they should be dealt with will presumably turn on how dangerous they are and on whether they can, through treatment or education, become responsible agents.

11. Neither sort of rehabilitation need be primarily a matter of making the criminal a morally better person; but both are, of course, morally constrained, and insofar as they effect a minimal amount of moral decency in one's treatment of others there will be (potentially) a moral change involved.
12. Edgardo Rotman explores some of the complexities of the concept of rehabilitation in *Beyond Punishment* (New York: Greenwood Press, 1990).
13. Of course, it is possible that a little intentional infliction of pain might, over all, cause less pain than would acting always without that intention. Indeed, a claim to this effect underwrites the familiar utilitarian justification of punishment. The idea is that a system that steers clear of intentionally inflicting pain (as opposed merely to knowingly causing it) will, thanks to its not producing directly the extra amount of pain the intentions bring in, produce indirectly more pain by failing to deter criminal behavior. Obviously, this is at bottom an empirical issue, but the evidence, it seems to me, does not support the idea that the pain the system might introduce intentionally carries with it the sort of marginal benefit this argument supposes. I even suspect that the level of pain that would come with either punishment or reparations is likely to secure most of the deterrent effect there is and the extra pain intentionally inflicted serves more to raise a sense of injustice and resentment on the part of criminals than to deter them—and so may actually increase recidivism and crime in general. I cite some relevant (albeit not conclusive) evidence later in the paper, in the section concerning deterrence.
14. Whether a system of reparations should take this view, or should instead see the pain as neither here nor there, given that it accompanies an agent doing what he should, is something about which I am ambivalent.
15. Presumably, those who successfully collect civil damages will not also be eligible for support from the state funds and many who could not successfully collect using civil procedures might still have a claim on some state fund compensation.
16. In extreme cases, where a person has committed an especially heinous offense and is unwilling to work to make amends (presumably not an unusual combination), it might be legitimate to consider forcing such people to contribute in ways that don't require their willing participation. They might, I suppose, be coerced to participate in medical trials, assuming reasonable constraints are placed on what is being tested. Here the idea would be to substitute such criminals into trials that are currently approved as safe enough to allow participation by volunteers, though the criminals' participation would not be, in the cases in question, voluntary.
17. See John Braithwaite's *Crime, Shame, and Reintegration* (Cambridge: Cambridge University Press, 1989) for a discussion of responses to crime that rely on shaming.
18. See, for example, Immanuel Kant's *The Metaphysical Elements of Justice* (Indianapolis: Bobbs Merrill, 1965); Jeffrie Murphy's "Marxism and Retribution," in *Retribution, Justice, and Therapy* (Dordrecht: D. Reidel, 1979); and David E. Cooper's "Hegel's Theory of Punishment," in *Hegel's Political Philosophy*, edited by Z.A. Pelczynski (Cambridge: Cambridge University Press, 1971).

19. See, for a classic example, Jeremy Bentham's *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970).
20. See, for example, Joel Feinberg's "The Expressive Function of Punishment" in *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 95–118; Herbert Morris's "A Paternalistic Theory of Punishment," *American Philosophical Quarterly* 18 (1981), pp. 263–71; and Jean Hampton's "The Moral Education Theory of Punishment," *Philosophy and Public Affairs* 13 (1984), pp. 208–38.
21. Most attempts to justify punishment mix these various considerations in some way or other, which seems only reasonable in that they all appear to capture something both relevant and important. John Rawls' "Two Concepts of Rules," *Philosophical Review* 64 (1955), pp. 3–32, is especially concerned with sorting out the mix, as are H.L.A. Hart's "Prolegomenon to the Principles of Punishment," *op. cit.* and Thomas Hill's "Kant on Punishment: A Coherent Mix of Deterrence and Retribution?" in *Respect, Pluralism, and Justice*. (Oxford: Oxford University Press, 2000), pp. 173–199.
22. *Punishment and Responsibility*, p. 231.
23. There are all sorts of reasons for rejecting this as the state's role, not least being that the state is in no position to determine how immoral people are over-all, and such a determination would presumably be necessary in order to settle how much punishment a particular person deserves. See Gertrude Ezorsky, "The Ethics of Punishment," in Gertrude Ezorsky (ed.) *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972), in which she argues that an appeal to a criminal's deserving punishment because of his moral defects would require balancing "all of his moral wrongs against the sufferings of his entire life" (p. xxvi) in order to determine whether, for instance, he has already suffered enough.
24. See Jeffrie Murphy, "Retributivism and the State's Interest in Punishment," in *NOMOS XXVII: Criminal Justice*, edited by J.R. Pennock and J. Chapman (New York: New York University Press, 1985), pp. 156–64.
25. At the same time, this view seems also to encourage the idea that the law should expand to cover all immorality or at least that all such immorality is properly within the domain of the state as it exercises its power to distribute suffering. See Gertrude Ezorsky's "The Ethics of Punishment," in *Philosophical Perspectives on Punishment*, *op. cit.*, pp. xxiv–xxvi.
26. See Herbert Morris's "Persons and Punishment," in *Punishment and Rehabilitation*, edited by Jeffrie Murphy (Belmont: Wadsworth Publishing Company, 1973), pp. 40–64.
27. See Phillip Montague's "Punishment and Societal Defense" in *Criminal Justice Ethics*, 2 (1983), pp. 30–36.
28. See Herbert Morris's "Punishment and Fairness," *The Monist*, 52 (1968), pp. 476–79.
29. Plato. *Protagoras*, 324b, translated by B. Jowett, revised by Martin Ostwald, 1956 (Indianapolis: Bobbs-Merrill, 1956), p. 22.
30. See H. L. A. Hart's "Prolegomenon to the Principles of Punishment," *op. cit.*

31. See David Farrington, "Social, Psychological and Biological Influences on Juvenile Delinquency and Adult Crime," in *Explaining Criminal Behaviour*, edited by W. Buikhuisen and S.A. Mednick (New York: E.J. Brill, 1988), pp. 68-89; J.H. Satterfield, "Childhood Diagnostic and Neurophysiological Predictors of Teenage Arrest Rates: An Eight-year Prospective Study," in *The Causes of Crime: New Biological Approaches* edited by S.A. Mednick, T.E. Moffitt, and S.A. Stack (Cambridge: Cambridge University Press, 1987), pp. 146-167; J. Hinton, M. O'Neill, S. Hamilton, and M. Burke, "Psychophysiological Differentiation Between Psychopathic and Schizophrenic Abnormal Offenders," *British Journal of Social and Clinical Psychology*, 19 (1980), pp. 257-269; and *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* edited by Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, (Washington, D.C.: National Academy of Sciences, 1978).
32. See A.C. Petrosino, C. Turpin-Petrosino, and J.O. Finckenauer "Well-meaning programs can have harmful effects! Lessons from experiments of programs such as Scared Straight." *Crime & Delinquency* 46 (2000), pp. 354-379; J.C. Buchner and M. Chesney-Lind, "Dramatic Cures for Juvenile Crime: An Evaluation of a Prisoner-run Delinquency Prevention Program," *Criminal Justice and Behavior*, 10 (1983), pp. 227-247; and R.V. Lewis, "Scared Straight-California Style," *Criminal Justice and Behavior*, 10 (1983), pp. 284-289.
33. See Joan McCord, "He Did It Because He Wanted To..." W. Osgood (ed.) *Nebraska Symposium on Motivation: Motivation and Delinquency* (Lincoln: University of Nebraska Press, 1997), pp. 1-43.
34. See T. E. Moffitt, "The Learning Theory Model of Punishment: Implications for Delinquency Deterrence," *Criminal Justice and Behavior*, 10 (1983), pp. 131-158.
35. See G. Antunes and A.L. Hunt, "The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis," *Journal of Criminal Law and Criminology*, 64 (1973), pp. 489-493.
36. There are, of course, other possibilities. It may be, for instance, that certainty offsets an otherwise dramatic discount criminals might place on future costs.
37. David P. Farrington and T. Bennett, "Police Cautioning of Juveniles in London," *British Journal of Criminology*, 21 (1981), pp. 123-135.
38. D. Glaser and M.A. Gordon, "Profitable Penalties for Lower Level Courts," *Judicature*, 73 (1990), pp. 248-252.
39. David P. Farrington, S.G. Osborn, and D.J. West, "The Persistence of Labeling Effects," *British Journal of Criminology*, 18 (1978), pp. 277-284.
40. This fits nicely with the research concerning the impact of certainty to the extent low certainty is due to lack of enforcement or casual or inconsistent treatment of offenders that would convey the message that the offenses in question are not being taken very seriously.
41. For an account of punishment that emphasizes its expressive role, see Joel Feinberg's "The Expressive Function of Punishment," in his *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 95-118; and Robert Nozick's *Philosophical Explanations* (Cambridge: Harvard University Press, 1981), pp. 363-397.
42. "The Moral Education Theory of Punishment," in *Punishment*, edited by A.J. Simmons, M. Cohen, J. Cohen, and C. Beitz, (Princeton: Princeton University Press, 1995), pp. 112-142, p. 119. See also Herbert Morris' "A Paternalistic Theory of Punishment," *American Philosophical Quarterly*, 18 (1981), pp. 263-271; and R.A. Duff's *Trials and Punishments* (Cambridge: Cambridge University Press, 1986).
43. Within certain bounds, though, it may be both fair and reasonable to let decisions concerning institutional forgiveness be significantly influenced by the victims or their families.
44. These general issues are nicely raised by Thomas Nagel's "Moral Luck," in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 24-38.
45. It is worth noting that the very fact that we expect someone to commit a crime after having served his sentence often seems evidence that we think he has not genuinely made amends. (Sometimes, of course, recidivism is traceable not to a failure to regret an offense. It might, for instance, be due to people having, at least as they see it, counterbalancing reasons to offend again or to the acts being due to something for which the criminal is not fully culpable.) Still, the state cannot legitimately be in the business of determining genuine regret and should not be imposing sentences the limits of which are set by the state's being satisfied that the criminal regrets his actions. It is in society's interest as a whole to keep the state out of that arena and so to settle for sentences that constitute public and publicly enforceable efforts at making amends in proportion to the offense. It should steer clear of making actual regret the benchmark. Nonetheless, one hope of a system of reparations is that the focus on making amends rather than causing pain, and the insisting on people taking responsibility for their actions in the form of working to repair the damage they have done, is that in fact the practice will encourage genuine regret and repair, and not merely symbolic representations of those.
46. For an attempt to spell out when and why preventive detention and other preemptive strikes might be justified, see Norval Morris' "Dangerousness and Incapacitation," from *Record of the Association of the Bar of the City of New York*, 39 (1982), pp. 102-28. See also Andrew von Hirsch, *Past or Future Crimes* (New Brunswick: Rutgers University Press, 1985).
47. James Fitzjames Stephen, *A General View of the Criminal Law of England* (London: Macmillan, 1863), p. 99.
48. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* Chapter 13, footnote 1, p. 158, *op. cit.*
49. John Cottingham, "Just Punishment," *Proceedings of the Aristotelian Society*, Supplementary Volume 61, (1987), pp. 41-55, p. 53.
50. More accurately, the fact that some punishment is welcome and not viewed as a burden will mean that, in an important respect, it has misfired.