

Equality, Punishment, and Self-Respect

Jaime Malamud Goti[†]

In a recent book on legal theory, George P. Fletcher maintains that criminal offenses generate inequalities, namely an imbalance between the offender and his victim. Crime—violent crime at least—is a source of dominance that the criminal sanction is designed to neutralize.¹ Fletcher distinguishes between generic and violent forms of domination. To end generic forms of dominance, legal systems usually provide an array of remedies such as employment discrimination and antitrust suits. Other procedures become available when, to the detriment of certain individuals or groups, a pattern of domination settles in to become a form of invidious discrimination, generating permanent disadvantages of wealth distribution and employment. Among these procedures are constitutional challenges under the Equal Protection Clause and controversial schemes such as “affirmative action.” There is, however, a particularly serious, acute source of inequality: that of dominance exercised by a certain individual upon others through unwarranted violence: “Criminal conduct establishes the supremacy of the criminal over the victim and, in the case of homicide, over the victim’s family.”² When this happens, Fletcher maintains, the adequate remedy is criminal punishment. By terminating the abusive relationship, punishment restores the balance between victim and perpetrator. Punishment for blackmail,

[†] As a Senior Presidential Adviser (1983-87), Jaime Malamud Goti was one of the two architects of the trials of the military juntas that ruled Argentina between 1976 and 1983. He also served as Solicitor Before the Argentine Supreme Court (1987-1988). Among other books and essays, he is author of *Game Without End: State Terror and the Politics of Justice* (1996.) He was a MacArthur Peace Fellow and Harry-Frank Guggenheim Scholar on several occasions. He held a chair in criminal law at the Universidad de Buenos Aires (1983-1999). He coordinated the Program on Applied Ethics at the University of Arkansas. He is currently teaching ethics at the Universidad de San Andres, Buenos Aires.

1. George P. Fletcher, *Basic Concepts of Legal Thought* (1996).
2. George P. Fletcher, *Basic Concepts of Criminal Law* 37 (1998).

deprivation of freedom, rape, and torture are clear means of terminating coercive dominance of some individuals by others. Adopting Bentham's scheme,³ Fletcher views punishment as a means of restoring equality regarding two different kinds of harm that crime causes: the *original (and concrete) harm* suffered by those who are raped, robbed, abducted, and *derivative harm*: roughly the suffering from the insecurity and fear that the rest of the community experiences. It seems clear that beyond their direct prey, violent perpetrators acquire a certain dominance over others by instilling in them the fear that they too may see their rights infringed. A terrorist state is the clearest example of this second form of dominance when, immune to punishment, hit squads and vigilante groups instill anguish and uncertainty among the citizenry. Punishment thwarts this imbalance and, conversely, impunity secures continuing dominance and a sense of discrimination against the direct victim of the offense and those who identify with her.⁴

Although Fletcher does not expressly articulate the issue in this book, two points seem to flow from his assertions. The first is that the inequalities crime causes are objective situations of dominance. The second is the idea that restoration of the balance between transgressors and victims does not simply mean ending an immediately harmful situation. When the harm is not irreparable, police enforcement often suffices to bring the inequality to an end. By rescuing hostages, retrieving the stolen goods, and impeding the continuation of physical abuse, enforcement agencies restore the equality that the wrongdoing interrupted. Similarly, quelling fears of becoming a future victim does not necessarily require a criminal conviction by the courts. Not only do some offenses go unnoticed by third parties who are thus free from fear, but there is also the fact that some criminal acts are executed in situations that render fear of repetition unfounded. War crimes are the case in point as the execution of hostages and the abuse of

3. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 143, 144 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1996) (1823).

4. *Id.*

prisoners simply cannot happen during times of peace. It is thus clear that Fletcher has something in mind other than the truism that when a first individual subdues a second one by means of violence, the second individual will concomitantly suffer from the uncertainty and the fear of becoming prey to recurrent violent attacks. Indeed, drawing on Kant, Fletcher proves that his view is more sophisticated than that. The gist of his conception of an equalizing function of the criminal sanction lies in that it communicates a dose of institutional solidarity with the victim “by reducing the perpetrator to the position of the victim.”⁵ Accordingly, like other perpetrator-centered retributivists, Fletcher conceives punishment as an institution that equalizes victim and perpetrator by imposing upon the latter—at least symbolically—a pain equivalent to the suffering of his prey. Laid out as it is, I have some qualms about accepting this view. The objection lies in the well-known claim that punishing the perpetrator may not be beneficial; it is sometimes the case that it doesn’t even gratify the victim. It is thus far from self-evident that equalizing downwards by making the perpetrator suffer is such a good idea after all.

In this paper, I draw on Fletcher’s basic idea that crime causes inequalities and support the claim that, at least in the case of many offenses, punishment places victims and perpetrators on the same ground. Broader in some ways and narrower in others, I ground my view in an—at least in part—emotivist conception of the role and justification of criminal punishment. I claim that by infringing other individuals’ rights, many forms of criminality degrade and demean these individuals, causing them to experience resentment, shame, and frequently guilt. Losing control over our lives to somebody else’s violence (and cunning, I would add) makes us experience shame, and we also feel guilty when fear of future violence drives us to abandon our commitment to our principles and plans of life and to other people as well. Punishment, from this perspective, serves the purpose of restoring our lost self-respect. For those who

5. Fletcher, *supra* note 2, at 37.

suffer continually from other people's abuses, punishment generates awareness of their rights as a first step toward rebelling against future affronts. I thus grapple with the issue of equality in a limited sense, namely treating everybody with the same concern and respect. To this end, the reason for exacting punishment must be reliable. It seems obvious that trust in the impartiality and competency of the court sentencing the culprit is a necessary condition of the victim's recovery of his lost dignity.⁶ It follows that to attach an equalizing effect to punishment presupposes that the courts' decisions are authoritative: that verdicts be perceived as reflecting the truth about the facts as well as the right choice of rules and principles to judge these facts. I will return to this point once I inspect a retributivist conception of punishment as an equalizer.

A well-known attempt to attach an equalizing effect to punishment has been articulated by some champions of retributivism, most conspicuously by Herbert Morris.⁷ The criminal sanction, according to Morris, may be conceived of as resting on a system of rules that induce individuals to exercise self-restraint from acting out of certain inclinations. By fostering internal peace and security, and facilitating cooperation, general compliance improves the quality of social life for all the members of the community. When individuals relax this self-restraint and transgress the rules, they threaten to thwart the general valuable order by inviting imitators to follow their example. Consistent with this principle, punishment is warranted to strip those who break the rules from the advantage they gain over the rest of the community. So far, this seemingly consequentialist view is convincing. But Morris goes on to make a claim that, though apparently consequentialist, is essentially retributivist:

[A] person who violates the rules has something others

6. See R.B. Friedman, *On the Concept of Authority in Political Philosophy*, in *Authority* 56 (Joseph Raz ed., 1990).

7. See Herbert Morris, *Persons and Punishment*, in *On Guilt and Innocence* 31 (1976).

have—the benefits of the system—but by renouncing what others have assumed, the burden of self-restraint, he has acquired an unfair advantage. Matters are not even until the advantage is in some way erased. Another way of putting it is that he owes something to others for he has something that does not rightfully belong to him. Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.⁸

By conceiving rule compliance as a general burden for the sake of a generally valuable order, one that not only sanctions equality of benefits and burdens,⁹ and punishment as discouraging disobedience, Morris may come across as laying out a consequentialist thesis. However, his conception of rules of self-restraint and punishment is retributivist for two interconnected reasons. First, punishment is aimed at restoring justice as an ideal equilibrium based on merit. Punishment in this arrangement is essentially aimed at individuals getting their just deserts. When somebody transgresses the rules, it becomes the role of punishment (and sometimes of pardons too) to wash the “advantage” away, thus restoring the lost balance. Second, Morris’ notion of rule infringement as an advantage can only be evaluative. If this is so, the notion of re-establishing an equilibrium between the perpetrator and law abiding citizens through punishment can only be understood as the perpetrator getting his just deserts for not exercising self-restraint. It is a fact that the notion of an offender benefiting from breaking the law in the usual sense is not the case with many offenders. Political crimes are often called “altruistic” because they may demand great sacrifice from the perpetrator in exchange for no profit other than discharging a duty he owes his cause. Civil disobedience often depicts an agent accepting punishment for breaching the law as a matter of principle. Other offenses such as

8. *Id.* at 34.

9. *Id.* at 34 n.8.

trespassing do not imply any kind of benefit or advantage defined independently from the perpetration of the offense itself.

Thus, it is clear that Morris' view rests on an analytic account of benefits or advantages, which turns his conception into one parasitic on the notion of contravening the rules. The fact that we would find it fit to punish "altruistic" terrorists, insurgents, and invaders of private property reveals that the "benefit" Morris is talking about is nothing other than the breach of the burden of self-restraint; in other words, the simple analytical claim that the offender has broken the rules. In this case, all we are left with is a criminal sanction that is similar to penalties in games. We view these penalties as disadvantages or losses that do not demand "external" and independent (moral or prudential) justifying reasons that we are urged to provide for exacting punishment. Unlike the latter, which implies suffering, the former are simply consequences internal to a self-contained system of rules. Thus, Morris fails to provide a sound (external) justification for an equalizing version of punishment. In what follows, I will attempt to justify the intuitively appealing claim that at least in the case of demeaning and degrading offenses, punishment equalizes victims and victimizers. Once I connect up the notions of punishment and equality, I will attempt to debunk perpetrator-centered retributivism to lay out the grounds for victim-oriented retributivism. I will finally explain why, to restore the balance, punishment must be imposed by authoritative courts. First, I submit an account of the requisite features of a rights-based community and, ultimately, for a liberal democracy.

Stipulatively, a rights-based community depends on the notion of citizens who are treated by others, and the state in particular, with a certain kind of consideration and respect. In this sense, we characterize a pluralist democratic community as an arrangement in which individuals pursue their own ideals and values and respect other individuals' preferences and choices. Members of such a society are

masters of their own existence.¹⁰ What makes this mastery possible is that individuals are respectful of themselves (a condition of a just society espoused by Kant and Rawls) and of the other members of the community. They value their own—and other people’s—plans of life and are confident that institutions will protect their pursuit of personal ideals from the interference of third parties.¹¹ I claim that punishing criminals who demean and subdue citizens of this community constitutes a contribution essential to attaining a social arrangement based on equality of respect and consideration.¹² The experience of being wronged in many ways, including negligent wrongdoing and deceitful ploys, is to some extent demeaning. Wrongdoers humiliate us by either manipulating us willy-nilly or by demonstrating that we don’t command careful treatment.¹³ But there are particularly demeaning offenses: the common denominator between offenses such as kidnapping, torture, and rape is that they suppress our humanity by subordinating our will to other people’s whims. There is also the empirical fact that in societies where impunity is the rule, victims tend to blame themselves for the wrongdoing.¹⁴ I have in mind not only the impunity of state criminals in dictatorial Argentina,

10. John Rawls, *Social Unity and Primary Goods*, in *Utilitarianism and Beyond* 159 (Amartya Sen & Bernard Williams eds., 1990).

11. John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* ch. 7 (1990).

12. Harry G. Frankfurt disagrees with the idea of identifying some degree of concern and respect as dependent upon the notion of equality. Frankfurt claims that reference to equal concern and respect means in fact pointing to impartiality. It is true that we owe each individual a certain (and equal) dose of respect and that it would simply be “arbitrary and disrespectful” to treat people differently given the same amount of information. But this is not because such treatment is unequal but rather because it violates some basic notion of impartiality, which requires that “we treat everyone the same.” Equality means essentially impartiality. Harry G. Frankfurt, *Equality and Respect*, in *Necessity, Volition and Love* 146 (1999). It is irrelevant for the purpose of this paper whether we apply the notion of impartiality or that of a non-distributive conception of equality.

13. See Jean Hampton, *Forgiveness and Christianity*, in Jeffrey G. Murphy & Jean Hampton, *Forgiveness and Mercy* ch. 2 (1988).

14. See Sharon Lamb, *The Trouble with Blame: Victims, Perpetrators, and Responsibility* (1996).

Uruguay, and Chile but also that of certain common crimes, as is frequently the case of rape in sexist societies. Without some political remedy, and punishment is the strongest expression of such a remedy, we condone the perpetrator's dominance over the victim. Through self-deceit, members of the community will cease to consider such domination immoral, thus instilling in the victim the belief that she herself brought about her own misery, and furthermore, that she does not deserve any better.

Our oppressor kills our ideals, our self-respect. If extended over time, subjugation suppresses the perception of our rights. Those who are subdued by others often need a cure that psychiatrists will not offer. Their sense of worthlessness and shame demands a "political remedy." Only public admission by authoritative institutions that we were wronged will legitimize us in our own eyes, and punishment of the violators of our rights is the clearest and strongest statement to that effect. If the rapist is not convicted, the rape victim is likely to feel guilty as a blameworthy participant in the wrongdoing. She needs an institutional response to support her dignity. Punishment must play this role, but to do so the practice of punishing must be conceived of as focused on the victim and her dignity rather than on the perpetrator breaching the law, as do utilitarians and scholars such as Herbert Morris, George Fletcher, and other traditional retributivists. Instead of "perpetrator-centered," I propose a "victim-centered" version of retributivism.¹⁵ Furthermore, this theory must look at some of the victims' sentiments as worthy of acknowledgement and protection. If those who, like myself, rate self-respect as a necessary condition of a rights-based community, we must regard the victims' resentment as warranting punishment as the appropriate institutional response. Resentment that emanates from the infringement of rights also warrants institutional protection as a vehicle for making justified demands that rights be respected.

15. I avoid characterizing and criticizing standard utilitarian and retributivist conceptions of punishment.

These reflections call for a goal-oriented variant of retributivism. According to this version, punishment should be conceived as directed at redressing the valued sentiments of those who were wronged. I don't chiefly have (purely) vindictive sentiments in mind; I am mainly considering the loss of purpose and sense of worth of some victims and the resentment and indignation of victims and bystanders.¹⁶ As I have earlier explained, those who endured actual domination from the offender experience shame and lack of self-respect for being pure objects of violent and deceitful manipulation. Goal-oriented retributivists will attach to punishment the function of restoring this lost trust. What distinguishes this goal from those of deterrence and other goal based theories is that the former are not the outcome of "causal," external relationships, but rather the result of evaluative considerations, of contemplating what it means to the victim that the perpetrator be punished. As the strongest institutional acknowledgment not only that the victim is worthy of respect but also that she is right, punishing the offender means providing her with the tools to allay her shame.¹⁷

There is a difference between full-blooded and victim-oriented retributivists. While the former are required to impose punishment given the presence of a set of conditions that renders an act criminal, such generality does not apply to victim-oriented retributivists. In seeking redress for the victims, they may consistently choose to forego punishment or content themselves with merely condemning the offender, or simply the offender's deed. If they believe that inflicting pain upon the perpetrator will do nothing substantial to restore the victim's self-respect and confidence, punishment will lack justification. There is room for considerable discretion.¹⁸

16. See Hampton, *supra* note 13, at 49-53.

17. See John Kleinig, *Punishment and Moral Seriousness*, 25 *Israel L. Rev.* 401, 401-02 (1991).

18. Although this victim-centered justification for punishing state criminals is certainly the most plausible, it is not intended to be exclusionary and, consequently, it does not attempt to displace other justifying reasons as applicable to criminal

To attach equalizing effects to punishment presupposes that the courts' decisions are authoritative: that the verdict reflects the truth about the facts. The victim cannot recover her dignity or validate her resentment without trust in the competence of the tribunal that is telling her she is right. We expect the outcome of the trial both to establish what actually happened and to assess its legal relevance. The authority of the courts operates here at three different levels. The first lies in the notion that without minimal authority, without the belief that the tribunal qualifies for exercising coercion, punishment would simply be crude violence.¹⁹ In this sense, we say that decisions originate in the right source and that this source has the power to have its verdicts enforced.²⁰

On a second level, to say that the courts are authoritative means that in applying a (morally acceptable) positive law, the courts convey to the victim that she is right in feeling resentful, that she has a genuine claim to justice. This degree of authoritativeness is essential to restore dignity to the victim, to placate her genuine resentment. But this feature of authority may not suffice to affirm the victim's dignity over time. Though convictions will contribute to restore her lost dignity, a large enough segment of the populace may not share the view that the court is competent or impartial, or that it correctly applied the law or that the law actually reflects the community's shared values. It may be the case that beyond the possible satisfaction of the retributive emotions of the victim and a limited social segment that share the victim's view, convictions not be grounded in a widely shared notion of moral responsibility. This is indeed a relevant circumstance because it is an empirical fact that the victim may not fully regain her self-

punishment in general. A victim-centered view may illustrate the futility of imposing a criminal sanction on a certain offender, yet punishing this offender may still be suitable if, for example, circumstances indicate that it will deter potential imitators.

19. In *The Concept of Law* (1963), H.L.A. Hart appeals to authority, which he calls the rule of recognition to make this distinction.

20. See Richard Flathman, *The Practice of Political Authority: Authority and the Authoritative* 156-58 (1980).

respect if, despite the court's conviction of the perpetrator, the community at large still views the victim as deserving her suffering.²¹ This may be the case even if there is wide consensus that the culprit be punished say for rape or torture, but for motivations that do not qualify as moral: that it emerges from sentiments or feelings other than the (moral) abhorrence of the culprit's action.²² Circumstances often point to the fact that popular support for trials and punishment of human rights violators often does not reflect a principled rejection of their transgressions. Support for trials and convictions may emerge from circumstantial, non-moral motivations. The widely acclaimed 1985-86 human rights trials of military personnel in Argentina may be the case in point. For a wide social segment, support for these trials did not originate in the genuine (moral) indignation caused by the widespread use of torture and murder. Rather, it seems to have been the consequence of the shame caused by the military fiasco in the war against Britain, in dissatisfaction with the poor management of the economy, or both.²³ This lack of genuine moral support for the trials accounts for the electoral success of individuals indicted (and later pardoned) as prime suspects in the abuses. Thus, the fact that a large portion of the citizenry may actually condone the violence

21. There is a vast array of interesting literature mostly on topics germane to the definition of the self though social interaction. I mostly have in mind Gregory Bateson and his followers. See, e.g., Jurgen Ruesch & Gregory Bateson, *Conventions of Communication: Where Validity Depends Upon Belief*, in *Communication: The Social Matrix of Psychiatry* 212-27 (1987).

22. Here, I follow Bernard Williams's claim that "strong" moral judgments such as those expressing outrage, indignation, guilt, and remorse require the speaker's sincerity. See Bernard Williams, *Morality and the Emotions*, in *Problems of the Self* 207-29 (1975). In this sense, support for trials and convictions of certain offenders may in fact stem from reasons other than moral. Instead of implying that they contradict some basic principles, they may express our fear that we may be the next potential victims or that the convictions simply satisfy our racial biases against the culprit's ethnicity or political beliefs. This distinction may explain how Argentineans supported the human rights trials and yet elect the culprits and their associates into parliamentary and gubernatorial positions. When this is the case, support of certain convictions by the courts is still compatible with blaming the victim for her suffering inflicted by the culprit.

23. See Jaime Malamud Goti, *Game Without End: State Terror and the Politics of Justice* (1996).

from a moral standpoint allows the presumption that—to a certain extent—this portion still views the victims of state crime as having deserved the suffering. If this is the case, the victim may succumb to the general enduring belief that she deserved the suffering. Over time, want of moral consensus on the authority of the trials and their outcome frustrates the definitive and full recovery of the victim's self-respect. As a longstanding effect, to restore the equality the offender broke down requires, on a third level, that the trials and convictions be regarded as authoritative by a large enough segment of society.

I conclude by stating that, like George Fletcher and Herbert Morris, I agree that criminal offenses cause an imbalance between the offender and the victim. I also agree with their claim that criminal convictions are suitable to end this imbalance. Unlike Fletcher and Morris, however, I attach an emotivist component to retributive justice and tie the re-dignifying effects of punishment to the authority of the courts and their decisions. Finally, I claim that this (limited) emotivist approach accounts for the restoration of the victim's lost self-respect which is essential to the notion of a rights-based community and, ultimately, to that of a liberal democracy.