

## Punishment and Proportionality

di Murray N. Rothbard

Few aspects of libertarian political theory are in a less satisfactory state than the theory of punishment.<sup>[1]</sup> Usually, libertarians have been content to assert or develop the axiom that no one may aggress against the person or property of another; what sanctions may be taken against such an invader has been scarcely treated at all. We have advanced the view that the criminal loses his rights *to the extent* that he deprives another of his rights: the theory of “proportionality.” We must now elaborate further on what such a theory of proportional punishment may imply.

In the first place, it should be clear that the proportionate principle is a *maximum*, rather than a mandatory, punishment for the criminal. In the libertarian society, there are, as we have said, only two parties to a dispute or action at law: the victim, or plaintiff, and the alleged criminal, or defendant. It is the plaintiff that presses charges in the courts against the wrongdoer. In a libertarian world, there would be no crimes against an ill-defined “society,” and therefore no such person as a “district attorney” who decides on a charge and then presses those charges against an alleged criminal. The proportionality rule tells us *how much* punishment a plaintiff may exact from a convicted wrongdoer, and no more; it imposes the maximum limit on punishment that may be inflicted before the punisher himself becomes a criminal aggressor.

Thus, it should be quite clear that, under libertarian law, capital punishment would have to be confined strictly to the crime of murder. For a criminal would only lose his right to life if he had first deprived some victim of that same right. It would not be permissible, then, for a merchant whose bubble gum had been stolen, to execute the convicted bubble gum thief. If he did so, then *he*, the merchant, would be an unjustifiable murderer, who could be brought to the bar of justice by the heirs or assigns of the bubble gum thief.

But, in libertarian law, there would be no *compulsion* on the plaintiff, or his heirs, to exact this maximum penalty. If the plaintiff or his heir, for example, did not believe in capital punishment, for whatever reason, he could voluntarily forgive the victim of part or all of his penalty. If he were a Tolstoyan, and was opposed to punishment altogether, he could simply forgive the criminal, and that would be that.

Or – and this has a long and honorable tradition in older Western law – the victim or his heir could allow the criminal to *buy his way out* of part or all of his punishment. Thus, if proportionality allowed the victim to send the criminal to jail for ten years, the criminal could, if the victim wished, pay the victim to reduce or eliminate this sentence. The proportionality theory only supplies the upper bound to punishment – since it tells us how much punishment a victim may *rightfully* impose. A problem might arise in the case of murder – since a victim’s heirs might prove less than diligent in pursuing the murderer, or be unduly inclined to let the murderer buy his way out of punishment. This problem could be taken care of simply by people stating in their wills what punishment they should like to inflict on their possible murderers. The believer in strict retribution, as well as the Tolstoyan opponent of all punishment, could then have their wishes precisely carried out. The deceased, indeed, could provide in his will for, say, a crime insurance company to which he subscribes to be the prosecutor of his possible murderer.

If, then, proportionality sets the upper bound to punishment, how may we establish proportionality itself? The first point is that the emphasis in punishment must be *not* on paying one’s debt to “society,” whatever that may mean, but in paying one’s “debt” to the victim. Certainly, the *initial* part of that debt is *restitution*. This works clearly in cases of theft. If A has stolen \$15,000 from B, then the first, or initial, part of A’s punishment must be to restore that \$15,000 to the hands of B (plus damages, judicial and police costs, and interest foregone).

Suppose that, as in most cases, the thief has already spent the money. In that case, the first step of proper libertarian punishment is to force the thief to work, and to allocate the ensuing income to the victim until the victim has been repaid. The ideal situation, then, puts the criminal frankly into a

state of *enslavement* to his victim, the criminal continuing in that condition of just slavery until he has redressed the grievance of the man he has wronged.[2]

We must note that the emphasis of restitution-punishment is diametrically opposite to the current practice of punishment. What happens nowadays is the following absurdity: A steals \$15,000 from B. The government tracks down, tries, and convicts A, all at the expense of B, as one of the numerous taxpayers victimized in this process. Then, the government, instead of forcing A to repay B or to work at forced labor until that debt is paid, forces B, the victim, to pay taxes to support the criminal in prison for ten or twenty years' time. Where in the world is the justice here? The victim not only loses his money, but pays more money besides for the dubious thrill of catching, convicting, and then supporting the criminal; and the criminal is still enslaved, but *not* to the good purpose of recompensing his victim.

The idea of primacy for restitution to the victim has great precedent in law; indeed, it is an ancient principle of law which has been allowed to wither away as the State has aggrandized and monopolized the institutions of justice. In medieval Ireland, for example, a king was not the head of State but rather a crime-insurer; if someone committed a crime, the first thing that happened was that the king paid the "insurance" benefit to the victim, and then proceeded to force the criminal to pay the king in turn (restitution to the victim's insurance company being completely derived from the idea of restitution to the victim).

In many parts of colonial America, which were too poor to afford the dubious luxury of prisons, the thief was indentured out by the courts to his victim, there to be forced to work for his victim until his "debt" was paid. This does not necessarily mean that prisons would disappear in the libertarian society, but they would undoubtedly change drastically, since their major goal would be to force the criminals to provide restitution to their victims.[3]

In fact, in the Middle Ages generally, restitution to the victim was the dominant concept of punishment; only as the State grew more powerful did the governmental authorities encroach ever more into the repayment process, increasingly confiscating a greater proportion of the criminal's property for themselves, and leaving less and less to the unfortunate victim. Indeed, as the emphasis shifted from restitution to the victim, from compensation by the criminal to his victim, to punishment for alleged crimes committed "against the State," the punishments exacted by the State became more and more severe. As the early twentieth-century criminologist William Tallack wrote, It was chiefly owing to the violent greed of feudal barons and medieval ecclesiastical powers that the rights of the injured party were gradually infringed upon, and finally, to a large extent, appropriated by these authorities, who exacted a double vengeance, indeed, upon the offender, by forfeiting his property to themselves instead of to his victim, and then punishing him by the dungeon, the torture, the stake or the gibbet. But the original victim of wrong was practically ignored.

Or, as Professor Schafer has summed up: "As the state monopolized the institution of punishment, so the rights of the injured were slowly separated from penal law." [4]

But restitution, while the first consideration in punishment, can hardly serve as the complete and sufficient criterion. For one thing, if one man assaults another, and there is no theft of property, there is obviously no way for the criminal to make restitution. In ancient forms of law, there were often set schedules for monetary recompense that the criminal would have to pay the victim: so much money for an assault, so much more for mutilation, etc. But such schedules are clearly wholly arbitrary, and bear no relation to the nature of the crime itself. We must therefore fall back upon the view that the criterion must be: loss of rights by the criminal *to the same extent* as he has taken away.

But how are we to gauge the nature of the extent? Let us return to the theft of the \$15,000. Even here, simple restitution of the \$15,000 is scarcely sufficient to cover the crime (even if we add damages, costs, interest, etc.). For one thing, mere loss of the money stolen obviously fails to function in any sense as a deterrent to future such crime (although we will see below that deterrence itself is a faulty criterion for gauging punishment).

If, then, we are to say that the criminal loses rights *to the extent that he deprives the victim*, then we must say that the criminal should not only have to return the \$15,000, but that he must be forced to pay the victim *another* \$15,000, so that he, in turn, loses those rights (to \$15,000 worth of property) which he had taken from the victim. In the case of theft, then, we may say that the criminal must pay *double* the extent of theft: once, for restitution of the amount stolen, and once again for loss of what he had deprived another.[5]

But we are still not finished with elaborating the extent of deprivation of rights involved in a crime. For A had not simply stolen \$15,000 from B, which can be restored and an equivalent penalty imposed. He had also put B into a state of fear and uncertainty, of uncertainty as to the extent that B's deprivation would go. But the penalty levied on A is fixed and certain in advance, thus putting A in far better shape than was his original victim. So that for proportionate punishment to be levied we would also have to add *more* than double so as to compensate the victim in some way for the uncertain and fearful aspects of his particular ordeal.[6] What this extra compensation should be it is impossible to say exactly, but that does not absolve *any* rational system of punishment – including the one that would apply in the libertarian society – from the problem of working it out as best one can.

In the question of bodily assault, where restitution does not even apply, we can again employ our criterion of proportionate punishment; so that if A has beaten up B in a certain way, then B has the right to beat up A (or have him beaten up by judicial employees) to rather more than the same extent.

Here allowing the criminal to buy his way out of this punishment could indeed enter in, but *only* as a voluntary contract with the plaintiff. For example, suppose that A has severely beaten B; B now has the right to beat up A as severely, or a bit more, or to hire someone or some organization to do the beating for him (who in a libertarian society, could be marshals hired by privately competitive courts). But A, of course, is free to try to buy his way out, to pay B for waiving his right to have his aggressor beaten up.

The victim, then, has the right to exact punishment up to the proportional amount as determined by the extent of the crime, but he is also free either to allow the aggressor to buy his way out of punishment, or to forgive the aggressor partially or altogether. The proportionate level of punishment sets the *right* of the victim, the permissible upper bound of punishment; but how much or whether the victim decides to exercise that right is up to him. As Professor Armstrong puts it:

“[T]here should be a proportion between the severity of the crime and the severity of the punishment. It sets an upper limit to the punishment, suggests what is due.... Justice gives the appropriate authority [in our view, the victim] the right to punish offenders up to some limit, but one is not necessarily and invariably obliged to punish to the limit of justice. Similarly, if I lend a man money I have a right, in justice, to have it returned, but if I choose not to take it back I have not done anything unjust. I cannot claim more than is owed to me but I am free to claim less, or even to claim nothing.” [7]

Or, as Professor McCloskey states: “We do not act unjustly if, moved by benevolence, we impose less than is demanded by justice, but there is a grave injustice if the deserved punishment is exceeded.”[8]

Many people, when confronted with the libertarian legal system, are concerned with this problem: would somebody be allowed to “take the law into his own hands”? Would the victim, or a friend of the victim, be allowed to exact justice personally on the criminal?

The answer is, of course, Yes, since *all* rights of punishment derive from the victim's right of self-defense. In the libertarian, purely free-market society, however, the victim will generally find it more convenient to entrust the task to the police and court agencies.[9]

Suppose, for example, that Hatfield<sub>1</sub> murders McCoy<sub>1</sub>. McCoy<sub>2</sub> then decides to seek out and execute Hatfield<sub>1</sub> himself. This is fine, except that, just as in the case of the police coercion discussed in the previous section, McCoy<sub>2</sub> may have to face the prospect of being charged with murder in the private courts by Hatfield<sub>2</sub>. The point is that *if* the courts find that Hatfield<sub>1</sub> was

indeed the murderer, then nothing happens to McCoy<sub>2</sub> in our schema except public approbation for executing justice. But if it turns out that there was not enough evidence to convict Hatfield<sub>1</sub> for the original murder, or if indeed some other Hatfield or some stranger committed the crime, then McCoy<sub>2</sub> as in the case of the police invaders mentioned above, cannot plead any sort of immunity; he then becomes a murderer liable to be executed by the courts at the behest of the irate Hatfield heirs.

Hence, just as in the libertarian society, the police will be mighty careful to avoid invasion of the rights of any suspect unless they are absolutely convinced of his guilt and willing to put *their* bodies on the line for this belief, so also few people will “take the law into their own hands” unless they are similarly convinced. Furthermore, if Hatfield<sub>1</sub> merely beat up McCoy<sub>1</sub>, and then McCoy kills him in return, this too would put McCoy up for punishment as a murderer. Thus, the almost universal inclination would be to leave the execution of justice to the courts, whose decisions based on rules of evidence, trial procedure, etc. similar to what may apply now, would be accepted by society as honest and as the best that could be achieved.[10]

It should be evident that our theory of proportional punishment – that people may be punished by losing their rights to the extent that they have invaded the rights of others – is frankly a *retributive* theory of punishment, a “tooth (or two teeth) for a tooth” theory.[11] Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as “primitive” or “barbaric” and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as “barbaric” can hardly suffice; after all, it is possible that in this case, the “barbarians” hit on a concept that was superior to the more modern creeds.

Professor H.L.A. Hart describes the “crudest form” of proportionality, such as we have advocated here (the *lex talionis*), as “the notion that what the criminal has done should be done to him, and wherever thinking about punishment is primitive, as it often is, this crude idea reasserts itself: the killer should be killed, the violent assailant should be flogged.” [12]

But “primitive” is scarcely a valid criticism, and Hart himself admits that this “crude” form presents fewer difficulties than the more “refined” versions of the proportionality-retributivist thesis. His only reasoned criticism, which he seems to think dismisses the issue, is a quote from Blackstone:

“There are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery.”

But these are scarcely cogent criticisms. Theft and forgery constitute robbery, and the robber can certainly be made to provide restitution and proportional damages to the victim; there is no conceptual problem there. Adultery, in the libertarian view, is not a crime at all, and neither, as will be seen below, is “defamation.” [13]

Let us then turn to the two major modern theories and see if they provide a criterion for punishment which truly meets our conceptions of justice, as retribution surely does.[14] *Deterrence* was the principle put forth by utilitarianism, as part of its aggressive dismissal of principles of justice and natural law, and the replacement of these allegedly metaphysical principles by hard practicality. The practical goal of punishments was then supposed to be to deter further crime, either by the criminal himself or by other members of society. But this criterion of deterrence implies schemas of punishment which almost everyone would consider grossly unjust. For example, if there were no punishment for crime at all, a great number of people would commit petty theft, such as stealing fruit from a fruit-stand. On the other hand, most people have a far greater built-in inner objection to themselves committing murder than they have to petty shoplifting, and would be far less apt to commit the grosser crime. Therefore, if the object of punishment is to deter from crime, then a far greater punishment would be required for preventing shoplifting than for preventing murder, a system that goes against most people’s ethical standards. As a result, with deterrence as the criterion there would have to be stringent capital punishment for petty thievery – for the theft of bubble gum – while murderers might only incur the penalty of a few months in jail.[15]

Similarly, a classic critique of the deterrence principle is that, if deterrence were our sole criterion, it would be perfectly proper for the police or courts to execute publicly for a crime someone whom they know to be innocent, but whom *they* had convinced the public was guilty. The knowing execution of an innocent man – provided, of course, that the knowledge can be kept secret – would exert a deterrence effect just as fully as the execution of the guilty. And yet, of course, such a policy, too, goes violently against almost everyone’s standards of justice.

The fact that nearly everyone would consider such schemes of punishments grotesque, despite their fulfillment of the deterrence criterion, shows that people are interested in something more important than deterrence. What this may be is indicated by the overriding objection that these deterrent scales of punishment, or the killing of an innocent man, clearly invert our usual view of justice. Instead of the punishment “fitting the crime” it is now graded in inverse proportion to its severity or is meted out to the innocent rather than the guilty. In short, the deterrence principle implies a gross violation of the intuitive sense that justice connotes some form of fitting and proportionate punishment to the guilty party and to him alone.

The most recent, supposedly highly “humanitarian” criterion for punishment is to “rehabilitate” the criminal. Old-fashioned justice, the argument goes, concentrated on punishing the criminal, either in retribution or to deter future crime; the new criterion humanely attempts to reform and rehabilitate the criminal. But on further consideration, the “humanitarian” rehabilitation principle not only leads to arbitrary and gross injustice, it also places enormous and arbitrary power to decide men’s fates in the hands of the dispensers of punishment. Thus, suppose that Smith is a mass murderer, while Jones stole some fruit from a stand. Instead of being sentenced in proportion to their crimes, their sentences are now indeterminate, with confinement ending upon their supposedly successful “rehabilitation.”

But this gives the power to determine the prisoners’ lives into the hands of an arbitrary group of supposed rehabilitators. It would mean that instead of equality under the law – an elementary criterion of justice – with equal crimes being punished equally, one man may go to prison for a few weeks, if he is quickly “rehabilitated,” while another may remain in prison indefinitely. Thus, in our case of Smith and Jones, suppose that the mass murderer Smith is, according to our board of “experts,” rapidly rehabilitated. He is released in three weeks, to the plaudits of the supposedly successful reformers. In the meanwhile, Jones, the fruit-stealer, persists in being incorrigible and clearly un-rehabilitated, at least in the eyes of the expert board. According to the logic of the principle, he must stay incarcerated indefinitely, perhaps for the rest of his life, for while the crime was negligible, he continued to remain outside the influence of his “humanitarian” mentors.

Thus, Professor K.G. Armstrong writes of the reform principle: “The logical pattern of penalties will be for each criminal to be given reformatory treatment until he is sufficiently changed for the experts to certify him as reformed. On this theory, every sentence ought to be indeterminate – “to be determined at the Psychologist’s pleasure,” perhaps – for there is no longer any basis for the principle of a definite limit to punishment. “You stole a loaf of bread? Well, we’ll have to reform you, even if it takes the rest of your life.” From the moment he is guilty the criminal loses his rights as a human being. ... This is not a form of humanitarianism I care for.” [16]

Never has the tyranny and gross injustice of the “humanitarian” theory of punishment-as-reform been revealed in more scintillating fashion than by C.S. Lewis. Noting that the “reformers” call their proposed actions “healing” or “therapy” rather than “punishment,” Lewis adds:

“But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver ... to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success – who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared – shame, exile, bondage, and years eaten by the locust – is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the Humanitarian theory has thrown overboard.”

Lewis goes on to demonstrate the particularly harsh tyranny that is likely to be levied by “humanitarians” out to inflict their “reforms” and “cures” on the populace: “Of all tyrannies a tyranny exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. This very kindness stings with intolerable insult. To be “cured” against one’s will and cured of states which we may not regard as disease is to be put on a level of those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we “ought to have known better,” is to be treated as a human person made in God’s image.”

Furthermore, Lewis points out, the rulers can use the concept of “disease” as a means for terming any actions that they dislike as “crimes” and then to inflict a totalitarian rule in the name of therapy. “For if crime and disease are to be regarded as the same thing, it follows that any state of mind which our masters choose to call “disease” can be treated as crime; and compulsorily cured. It will be vain to plead that states of mind which displease government need not always involve moral turpitude and do not therefore always deserve forfeiture of liberty. For our masters will not be using concepts of Desert and Punishment but those of disease and cure.... It will not be persecution. Even if the treatment is painful, even if it is life-long, even if it is fatal, that will be only a regrettable accident; the intention was purely therapeutic. Even in ordinary medicine there were painful operations and fatal operations; so in this. But because they are “treatment,” not punishment, they can be criticized only by fellow-experts and on technical grounds, never by men as men and on grounds of justice.” [17]

Thus, we see that the fashionable reform approach to punishment can be at least as grotesque and far more uncertain and arbitrary than the deterrence principle. Retribution remains as our only just and viable theory of punishment and equal treatment for equal crime is fundamental to such retributive punishment. The barbaric turns out to be the just while the “modern” and the “humanitarian” turn out to be grotesque parodies of justice.

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## Notes

[1] It must be noted, however, that *all* legal systems, whether libertarian or not, must work out some theory of punishment, and that existing systems are in *at least* as unsatisfactory a state as punishment in libertarian theory.

[2] Significantly, the only exception to the prohibition of involuntary servitude in the Thirteenth Amendment to the US Constitution is the “enslavement” of criminals: “Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

[3] On the principles of restitution and “composition” (the criminal buying off the victim) in law, see Stephen Schafer, *Restitution to Victims of Crime* (Chicago: Quadrangle Books, 1960).

[4] William Tallack, *Reparation to the Injured and the Rights of the Victims of Crime to Compensation* (London, 1900), pp. 11–12; Schafer, *Restitution to Victims of Crime*, pp. 7–8.

[5] This principle of libertarian double punishment has been pithily described by Professor Walter Block as the principle of “two teeth for a tooth.”

[6] I am indebted to Professor Robert Nozick of Harvard University for pointing out this problem to me.

[7] K.G. Armstrong, "The Retributivist Hits Back," *Mind* (1961), reprinted in Stanley E. Grupp, ed., *Theories of Punishment* (Bloomington: Indiana University Press, 1971), pp. 35–36.

[8] We would add that the "we" here should mean the victim of the particular crime. H.J. McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* (1965), reprinted in Gertrude Ezorsky, ed., *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972), p. 132.

[9] In our view, the libertarian system would not be compatible with monopoly State defense agencies, such as police and courts, which would instead be privately competitive. Since this is an ethical treatise, however, we cannot here go into the pragmatic question of precisely *how* such an "anarcho-capitalist" police and court system might work in practice. For a discussion of this question, see Murray N. Rothbard, *For a New Liberty*, rev. ed. (New York: Macmillan, 1978), pp. 215–41.

[10] All this is reminiscent of the brilliant and witty system of punishment for government bureaucrats devised by the great libertarian, H.L. Mencken. In *A Mencken Chrestomathy* (New York: Alfred A. Knopf, 1949), pp. 386–87, he proposed that any citizen, "having looked into the acts of a jobholder and found him delinquent may punish him instantly and on the spot, and in any manner that seems appropriate and convenient – and that in case this punishment involves physical damage to the jobholder, the ensuing inquiry by the grand jury or coroner shall confine itself strictly to the question whether the jobholder deserved what he got. In other words, I propose that it shall be no longer *malum in se* for a citizen to pummel, cowhide, kick, gouge, cut, wound, bruise, maim, burn, club, bastinado, flay or even lynch a jobholder, and that it shall be *malum prohibitum* only to the extent that the punishment exceeds the jobholder's deserts. The amount of this excess, if any, may be determined very conveniently by a petit jury, as other questions of guilt are now determined. The flogged judge, or Congressman, or other jobholder, on being discharged from the hospital – or his chief heir in case he has perished – goes before a grand jury and makes complaint, and, if a true bill is found, a petit jury is empanelled and all the evidence is put before it. If it decides that the jobholder deserves the punishment inflicted upon him, the citizen who inflicted it is acquitted with honor. If, on the contrary, it decides that this punishment was excessive, then the citizen is adjudged guilty of assault, mayhem, murder, or whatever it is, in a degree apportioned to the difference between what the jobholder deserved and what he got and punishment for that excess follows in the usual course."

[11] Retribution has been interestingly termed "spiritual restitution." See Schafer, *Restitution to Victims of Crime*, pp. 120–21. Also see the defense of capital punishment for murder by Robert Gahringer, "Punishment as Language," *Ethics* (October 1960): 47–48: "An absolute offense requires an absolute negation; and one might well hold that in our present situation capital punishment is the only effective symbol of absolute negation. What else could express the enormity of murder *in a manner accessible to men for whom murder is a possible act?* Surely a lesser penalty would indicate a less significant crime. (Italics Gahringer's)" On punishment in general as negating an offense against right, cf. also F.H. Bradley, *Ethical Studies*, 2nd ed. (Oxford: Oxford University Press, 1927), reprinted in Ezorsky, ed., *Philosophical Perspectives on Punishment*, pp. 109–10: "Why ... do I merit punishment? It is because I have been guilty. I have done "wrong" ... the negation of "right," the assertion of not-right.... The destruction of guilt ... is still a good in itself; and this, not because a mere negation is a good, but because the denial of wrong is the assertion of right.... Punishment is the denial of wrong by the assertion of

right.”

An influential argument for retributivism is found in Herbert Morris, *On Guilt and Innocence* (Berkeley: University of California Press, 1976), pp. 31–58.

[12] For an attempt to construct a law code imposing proportionate punishments for crime – as well as restitution to the victim – see Thomas Jefferson, “A Bill for Proportioning Crimes and Punishments” in *The Writings of Thomas Jefferson*, A. Lipscomb and A. Bergh, eds. (Washington, D.C.: Thomas Jefferson Memorial Assn., 1904), vol. 1, pp. 218–39.

[13] H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968), p. 161.

[14] Thus, *Webster’s* defines “retribution” as “the dispensing or receiving of reward or punishment according to the deserts of the individual.”

[15] In his critique of the deterrence principle of punishment, Professor Armstrong, in “The Retributivist Hits Back,” pp. 32–33, asks: “[W]hy stop at the minimum, why not be on the safe side and penalize him [the criminal] in some pretty spectacular way – wouldn’t that be more likely to deter others? Let him be whipped to death, publicly of course, for a parking offense; that would certainly deter me from parking on the spot reserved for the Vice-Chancellor!” Similarly, D.J.B. Hawkins, in “Punishment and Moral Responsibility,” *The Modern Law Review* (November 1944), reprinted in Grupp, ed., *Theories of Punishment*, p. 14, writes: “If the motive of deterrence were alone taken into account, we should have to punish most heavily those offenses which there is considerable temptation to commit and which, as not carrying with them any great moral guilt, people commit fairly easily. Motoring offenses provide a familiar example.”

[16] Armstrong, “The Retributivist Hits Back,” p. 33.

[17] C.S. Lewis, “The Humanitarian Theory of Punishment,” *Twentieth Century* (Autumn 1948–49), reprinted in Grupp, ed., *Theories of Punishment*, pp. 304–7. Also see Francis A. Allen, “Criminal Justice, Legal Values, and the Rehabilitative Ideal,” in *ibid.*, pp. 317–30.