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PUNISHMENT AND REVENGE

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Philosophers tend to believe that to punish and to take revenge¹ are vastly different activities. Consider the ancient view put forth by Protagoras, in Plato's *Protagoras*:

No one punishes wrongdoers putting his mind on what they did and for the sake of this – that they did wrong *not unless he is taking mindless vengeance*, like a savage brute. One who undertakes to punish rationally does not do so for the sake of the wrongdoing, which is now in the past – but for the sake of the future, that the wrongdoing shall not be repeated, either by him or by others who see him or by others who see him punished.²

Nowadays, this continues to be the predominant view amongst philosophers of law regarding the relationship between punishment and revenge. It is probably impossible to present an exhaustive list of authors who hold that punishment and revenge are different, and any partial, non-exhaustive list is prone to be helplessly idiosyncratic. Just to get a taste, I will mention a handful of influential authors who embrace this view. Joel Feinberg puts vengeance in close company with “lust for blood” and “*Schadenfreude*,”³ and claims that whereas retributive punishment is “righteous,” vengeance is “angry.”⁴ Likewise,

¹ It is not important for my purposes to distinguish between ‘revenge’, ‘vengeance’, and ‘vendetta’ – I use these terms interchangeably. Many authors distinguish among (some of) these concepts. For an interesting distinction between these terms, see John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973), 38 ff., which further elaborates some distinctions drawn much more superficially by Antony Flew in ‘The Justification of Punishment’, *Philosophy* 29 (1954), 294 ff.

² Plato, *Protagoras*, 324a–b, emphasis added.

³ Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), p. 103.

⁴ Joel Feinberg, *Doing and Deserving*, *op. cit.*, 69, fn. 16.

philosophers such as John Elster, Antony Flew, Ted Honderich, John Kleinig, Nicola Lacey, and C. L. Ten, amongst many others, have held that punishment and revenge are different.⁵

Arguments which allegedly show that punishment and revenge are two different phenomena abound in the literature on punishment. Among the most popular of these arguments are the views that unlike punishment, revenge can be carried out for mere slights, or by unauthorized agents, or by agents who display an inappropriate emotional response to what they perceive was an instance of wrongdoing, or by agents who are unconcerned with the generality of universality of the moral principles behind their action, i.e., agents who would not treat like cases alike, or by agents unconcerned with the proportionality of their response and the perceived wrongdoing to which they react. In spite of this argumentative manifoldness, I shall argue that all these arguments tend to revolve around one basic idea: revenge is “mindless,” or barbaric, irrational, etc., and thus unjustifiable, whereas punishment is “rational” or civilized, enlightened, etc., and thus justifiable.

In opposition to this orthodoxy of sorts, I shall argue that punishment and revenge are not at all easy to distinguish. I thus hope to cast doubt on the plausibility of the above arguments. I hope to show as well that the main role this distinction has played throughout history is not really analytic but merely rhetorical. It is rhetorically powerful to claim that such and such action is not punishment but mere revenge, in spite of the fact that there may be no good analytic grounds for making such a distinction. In most cases ‘punishment’ and ‘revenge’ are terms used to conveniently describe one single phenomenon.

A sketch of an account of punishment should suffice here to shed light on the sort of phenomenon that I have in mind: A punishes B when A inflicts (what she believes to be) suffering

⁵ Jon Elster, ‘Norms of Revenge’, *Ethics* 100 (1990), 862 ff.; Antony Flew, *op. cit.*; Ted Honderich, *Punishment: The Supposed Justifications* (New York: Harcourt, Brace & World, 1967), 1 ff.; John Kleinig, *op. cit.*, 38 ff. and *passim*; Nicola Lacey, *State Punishment* (London: Routledge, 1988), p. 26, and C. L. Ten; *Crime, Guilt, and Punishment* (Oxford: Clarendon Press, 1987), 42 ff.

upon B as a re-action to (what she believes was) B's wrongdoing.⁶ This is, in principle, also true of the avenger: the avenger also re-acts to what she believes was someone's wrongdoing and seeks to inflict suffering upon her. I shall discuss below a narrowly circumscribed sort of case in which, perhaps, a principled difference between punishment and revenge might be recognized. Yet, even if there are cases in which some acts of revenge contain elements not found in paradigmatic acts of punishment, this way of distinguishing between punishment and revenge is not only dim, and not only does it operate (if it operates at all) in a miniscule number of cases, but it is different from any of the standard distinctions found in the literature. In any event, rather than seeing acts of revenge as wholly different from acts of punishment, I see the conceptual connection which might obtain between punishment and revenge as follows. Either there is no analytical difference at all (true in the vast majority of cases), or, at most, it could be conceded that revenge is a form of punishment. Either way, there is no vast difference between the "two" phenomena.

The term 'action' (or activity, or act – I do not here distinguish between these terms) which I used in the preceding paragraph to refer to punishment and to revenge is itself important. Punishment can be seen in different ways: as an institution, or as a reason supporting the setting up of these or those institutions, or as a motive for which actions are done, or as an action. Something similar happens with revenge. In what follows I shall concern myself with the *act* of punishing and the *act* of revenging. My interest lies with the alleged differences between a case in which a person is said to punish and a case in which a person is said to take revenge. Perhaps some of the conclusions that I draw regarding the relationship between punishment and revenge, understood as activities, might hold too if one sees punishment and revenge as motives, or as institutions, and even in cases in which one sees punishment and revenge as different *sorts* of phenomena, say, punishment as an institution, and revenge as a motive for which an action is

⁶ For a fuller account of punishment see my 'Prolegomenon to a Theory of Punishment', *Law, Culture, and the Humanities* (forthcoming, 2005).

done. But I am not interested in extending the scope of the present article. Sometimes we punish and sometimes we avenge, so goes the official story; philosophers overwhelmingly assert that these are two essentially different activities, and I shall argue that they are not.

One obvious way to attempt to refute the thesis that punishing and taking revenge are different activities would be to point to the numerous fictional examples where the “two phenomena” seem perennially intertwined. Does Othello punish Desdemona or does he take revenge upon her for what he thought was her betrayal? Is the Count of Monte Cristo punishing or taking revenge on the malefactors who attempted to ruin his life? Does Lazarillo de Tormes really take revenge (as he claims) on the blind man who had cruelly abused him for so long, or is he in fact punishing him? Does Michael Kohlhaas seek to take revenge or to punish as he roamed Saxony in pursuit of those who did him wrong? These questions are not easy to answer. Sometimes it seems to be the very point of these stories to leave these questions unanswered; that they are not easy to answer constitutes a reason why these literary works are so good and compelling. Most emphatically, however, I am not appealing to literature as the ultimate judge in anything. Yet, that in literature there are many cases where it is difficult to distinguish punishment from revenge surely has *some* significance.

The view that punishment and revenge are not easily distinguishable finds support elsewhere as well. Oft-quoted biblical passages, such as *Romans 12:19*, “Vengeance is mine; I will repay, saith the Lord” or *Romans 13:1*, “[a ruler ordained by God] is the minister of God, a revenger to execute wrath upon him that doeth evil,” seem, too, to be cases in which ‘vengeance’ and ‘punishment’ are not easily distinguishable. When God says that vengeance is his, surely it is not absurd to assume that he uses ‘vengeance’ as a synonym for ‘punishment’. For it is otherwise hard to accept that what (a benevolent) God has in mind is that he is the only one allowed to engage in barbaric, unjust, irrational behavior (*can* God behave in such a way?), and it is precisely barbarism, brutality and so on, which are customarily adduced as evidence showing that revenge is different from punishment.

The best dictionary of the English language also seems to assume that punishment and revenge are very similar. One of the meanings the *Oxford English Dictionary* gives for “revenge” is “punishment”. In most of the other meanings of “revenge” listed in the *Oxford English Dictionary*, the element of “being a response to a wrong,” clearly something that is also true of punishment, is present. The *Oxford English Dictionary* provides the following as the first definition of “vengeance”: “The act of avenging oneself or another; retributive infliction of injury or punishment; hurt or harm done from vindictive motives”. For the noun form of ‘avenge’, the *Oxford English Dictionary* gives one single meaning (though it admits is obsolete): “Execution of vengeance; retributive punishment, retaliation either upon an offender, or on account of a wrong”.

The view that punishment and revenge are not so easily distinguishable is supported in yet further ways. In an interesting article, Gregory Vlastos discusses the complicated relationship between punishment and revenge in ancient Greece. Vlastos points out that early in Greek history, the distinction between punishment and vengeance was not clear-cut. The linguistic connection between punishment and vengeance, for instance, was then so strong that Vlastos dubs it “positively tyrannical”.⁷ As Vlastos points out:

Down to the last third of the fifth century [BCE], *τιμωρία*, whose original and always primary sense is “vengeance,” is *the* word for “punishment”. The specialized word for the latter, *κολαζειν* (“chastening,” “disciplining,” – with no collateral use for “taking vengeance”) does not acquire currency until we reach the prose of Thucydides and Antiphon.⁸

All of this: literature, the Bible, the *Oxford English Dictionary*, ancient Greek philology, is grist for my mill, insofar as it supports the main thesis that I wish to defend in this paper, namely, that punishment and revenge, qua activities, are not that different. But, of course, I am not going to simply present literary references and dictionary entries. I present this evidence simply to highlight the fact that, unlike the predominant view

⁷ Gregory Vlastos, ‘Socrates’ Rejection of Retaliation’, in his *Socrates: Ironist and Moral Philosopher* (Ithaca: Cornell University Press, 1991), p. 186.

⁸ Gregory Vlastos, ‘Socrates’ Rejection of Retaliation’, *op. cit.*, p. 186.

amongst contemporary philosophers, the view that punishment and revenge are clearly different is not met with general acquiescence in other fields. In what follows I shall dissect the specific *arguments* which those who believe that there is a clear distinction between revenge and punishment endorse, and I shall argue why I believe that they are unconvincing.

I. PUNISHMENT SIMPLICITER AND RETRIBUTIVE PUNISHMENT

Vlastos claims that “the distinction of punishment from revenge [in Plato’s *Protagoras*] must be regarded as one of the most momentous discoveries ever made by humanity”.⁹ Not surprisingly, what Vlastos considers momentous about this discovery is that revenge is a sign of “barbaric tribalism” and that punishment is a sign of a more civilized concern for justice. Vlastos bemoans the conflation of punishment and revenge in the archaic period of Greek history, as he comments on the fact that

earlier, as for example in Herodotus, language traps one into using “vengeance” (*τιμωρία*), even when “punishment” [*κολαζειν*] is exactly what one means.¹⁰

But how does Vlastos actually figure out what “exactly” punishment is and how “exactly” does it differ from revenge? When it comes down to articulating the allegedly diaphanous difference between punishment and revenge, Vlastos, by and large, follows the lead of one contemporary author whose distinctions between revenge and retributive punishment have become a mainstay of the contemporary discussion: Robert Nozick. Vlastos’ own contrasts between punishment and revenge are admittedly corollaries to Nozick’s views.¹¹

Vlastos is by no means alone in following Nozick. The influence that Nozick’s contrasts exert in the contemporary discussion of the relationship between punishment and revenge is immense. Such an immense influence is not only the result of Nozick’s creativity, but also of the fact that Nozick’s contrasts constitute a sort of compendium, comprising many of the

⁹ Gregory Vlastos, ‘Socrates’ Rejection of Retaliation’, *op. cit.*, p. 187.

¹⁰ Gregory Vlastos, ‘Socrates’ Rejection of Retaliation’, *op. cit.*, p. 186.

¹¹ Gregory Vlastos, ‘Socrates’ Rejection of Retaliation’, *op. cit.*, 186 ff.

differences which have been intuitively assumed to hold between punishment and revenge. (It is likely that if we ask people who have never read Nozick, or indeed who have never studied the philosophy of law, about the differences between punishment and revenge, we will get answers of the same tenor as Nozick's contrasts.) Thus, the general discussion of the alleged differences between punishment and revenge overlaps to a great extent with the particular discussion of Nozick's own arguments. Nozick presents these famous contrasts between retributive punishment and revenge:

- (1) Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong.
- (2) Retribution sets an internal limit to the amount of the punishment, according to the seriousness of the wrong, whereas revenge internally need set no limit to what is inflicted.
- (3) Revenge is personal... whereas the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution.
- (4) Revenge involves a particular emotional tone, pleasure at the suffering of another, while retribution either need involve no emotional tone or involves another one, namely pleasure at justice being done.
- (5) There need be no generality in revenge... whereas the imposer of retribution, inflicting deserved punishment for a wrong, is committed to (the existence of some) general principles (*prima facie*) mandating punishment in other similar circumstances.¹²

While none of Nozick's contrasts seems to me to be without merit, I wish to resist the sort of implication that is typically drawn from them: that these contrasts succeed in distinguishing revenge from punishment.¹³

¹² Robert Nozick, *Philosophical Explanations* (Cambridge, Mass.: Harvard University Press), pp. 366–368.

¹³ Other criticisms of Nozick's contrasts between retribution and revenge can be found in Nigel Walker, 'Nozick's Revenge', *Philosophy* 70 (1995), pp. 581–586, and in Peter French, *The Virtues of Vengeance* (Lawrence: University Press of Kansas, 2001), p. 67 ff. In spite of their criticisms, both Walker and French believe that while Nozick might have exaggerated here and there, there are obvious and important differences between retribution and revenge.

Nozick, first of all, is quite expressly not attempting to distinguish revenge from punishment *simpliciter*, but from *retribution* (or *retributive* punishment, or *deserved* punishment – Nozick uses these expressions interchangeably). Vlastos, for example, echoes Nozick's distinction between *retributive* punishment and revenge as he himself distinguishes revenge from punishment *simpliciter*. But punishment *simpliciter*, on the one hand, and retributive punishment, on the other, are different. The act of (simply) punishing is different from the act of (retributively) punishing in that only in the latter case does the punisher believe that the punishment she inflicts is justified; only in the latter case is the punishment she inflicts, in her estimation, *deserved*. Retributive punishment is thus a sub-type of punishment *simpliciter*: all instances of retributive punishment are also instances of punishment, but not all instances of punishment *simpliciter* are instances of retributive punishment.

It is unlikely, however, that authors who, like Vlastos, erroneously assume that Nozick is distinguishing between revenge and punishment *simpliciter*, have simply failed to read Nozick's straightforward text carefully. Rather, what probably explains their mistaken amalgamation of punishment *simpliciter* with retributive punishment is a very pervasive strand in the discussion of punishment according to which punishment is, by definition, retributive. In other words, many authors believe that there is a sense in which all punishment *simpliciter* *is* retributive punishment and thus they interpret Nozick's contrasts as if they did distinguish between revenge and punishment. This view is extremely widespread. One of its most famous formulations is F. H. Bradley's:

Punishment is punishment, only where it is deserved ... if punishment is inflicted for any other reason whatever ... it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.¹⁴

¹⁴ F. H. Bradley, *Ethical Studies* (Oxford: Clarendon Press, 1967), pp. 26–27.

I do not think that this amalgam of punishment simpliciter and retributive punishment is healthy. Its unhealthiness stems from its running together the definitional and the justificatory enterprises. Either the amalgam renders the discussion viciously circular: retributive punishment is a form of allegedly *justified* punishment, and thus, by definition, there could not be unjustified retributive punishment. Or else, retributivism is watered-down into a mere logical doctrine, which also evades the philosophical problem of justifying punishment, a la Anthony Quinton.¹⁵ Now, I am not interested here in discussing the justification of punishment. What I have to say against conflating the definition of punishment and its justifications is neutral as to whether punishment is ultimately justified retributively or consequentially. For example, while Protagoras endorses a consequentialist justification of punishment and Bradley endorses a retributivist justification of punishment, both authors deploy a similar maneuver (though Bradley does not expressly talk about revenge): if punishment is not justified (in this or that way) then it is not punishment but an abomination, typically dubbed revenge.

Bradley's maneuver is to say that when punishment is not retributively justified, as a matter of definition, it is not punishment, but an immorality. Protagoras' maneuver is to say that when punishment is not consequentially justified, as a matter of definition, it is not punishment, but "mindless vengeance". Both maneuvers are mere stipulations, and they remind us of the sort of Quintonian defense against the charge that utilitarianism could justify punishing the innocent, and which H. L. A. Hart aptly dubbed "the definitional stop".¹⁶ It is as unpersuasive to claim, say, that utilitarianism does not justify punishing the (perceived) innocent because punishment, by definition is of the (perceived) guilty, as it is to claim that punishment cannot be (perceived by the punisher to be) unjustified (or excessive, etc.) because punishment

¹⁵ A. Quinton, 'On Punishment', *Analysis* 14 (1954), 134 ff.

¹⁶ H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), 1 ff.

is by definition (perceived by the punisher to be) justified.¹⁷ This is clearly an abuse of definition.

One could concoct a perverse appeal to this definitional way of distinguishing punishment from revenge in the context of the United States' protection against cruel and unusual punishment along the following lines. Imagine Mark, a prison guard who, say, abused an inmate. When the inmate claims that he was subjected to cruel and unusual punishment, Mark defends himself by saying "I did not punish the inmate, I merely took revenge upon him". The natural reaction is that this defense cannot possibly be serious, that revenge would fall within the purview of the Eight Amendment. I have no difficulty in reacting this way, since I believe that punishment and revenge are not terribly different (as stated, if a difference between punishment and revenge might be admitted in a narrowly circumscribed type of case, it would still be true that revenge is a form of punishment); but those who believe that punishment and revenge are substantially different would have a harder time dealing with this case.

To the extent that there are differences between punishment simpliciter and retributive punishment, we cannot simply extend Nozick's contrasts to apply to the distinction between revenge and punishment simpliciter. It is much easier to distinguish retributive punishment from revenge. For the former is *ex hypothesi* justified whereas the latter *ex hypothesi* unjustified.

¹⁷ A note on the difference between the "perceived wrong" and the "real wrong," or between the "perceived justification" and the "real justification," or between "perceived punishment" and "real punishment" is in order. For my purposes in this article, it is only important to consider things from the perspective of the punisher/avenger. In other words, and to insist on a point made at the outset, the contrast I am interested in here is between the *act* of punishing and the *act* of revenging. It is of course possible that what Joe does to Bob is, from Joe's perspective, punishment though Bob does not experience it as such. Joe's slapping Bob in response to what he perceives was Bob's wrongdoing, not knowing that Bob is a masochist, who enjoys being slapped, is, for my purposes here, an instance of Joe punishing (or taking revenge on) Bob. While Bob might not even realize that Joe was trying to punish him, Joe believes that he punished Bob. This methodological focus on the first-person perspective is common in the literature, though it is not frequently expressly stated.

But since punishment *simpliciter* is neutral as to whether it is just or civilized or rational, the standard move to which those who distinguish punishment from revenge appeal, i.e., that, unlike revenge, punishment is just or civilized or rational, is no longer available. (Recall that I left out from the account of punishment I presented at the outset any consideration as to whether the re-action of the punisher to what she perceives was an instance of wrongdoing is reasonable, proportional, civilized, etc.)

Finally it is also worth noting that Nozick, who is not typically timid in presenting his views, is rather humble in the context of his discussion of the differences between retribution and revenge. Immediately after presenting the contrasts, Nozick states:

In drawing these contrasts between retribution and revenge, I do not deny that there can be mixed cases, or that people can be moved by mixed motives... Retribution and revenge share a common structure.¹⁸

Although true, it is nonetheless somewhat misleading to claim that retribution (retributive punishment) and revenge share a common structure. It is more illuminating to realize that revenge and punishment *simpliciter* share a common structure, and that insofar as retribution (retributive punishment) is but another form of punishment, it also shares a common structure with revenge. After all, punishment justified on consequentialist grounds, too, shares this common structure. Nothing is lost, quite the contrary, if we contrast revenge with punishment “in general” (which happens to be punishment *simpliciter*) and not with a subtype of punishment. This is particularly poignant insofar as the specific subtype of punishment upon which Nozick and followers focus is (in a sense) already justified, thus lending itself to a ready-made way of being differentiated from revenge.

In what follows, then, I will adapt Nozick’s contrasts between revenge and retributive punishment to the discussion of the differences between revenge and punishment *simpliciter*. Distinguishing revenge from retributive punishment is to make

¹⁸ Robert Nozick, *Philosophical Explanations*, *op. cit.*, p. 368.

things easy for oneself. While I think my criticisms below are more persuasive in the context of distinguishing revenge from punishment simpliciter, they also show that not even within the conveniently constructed context of distinguishing revenge from retributive punishment are Nozick's contrasts as useful as many take them to be. I will proceed in a way that roughly preserves Nozick's ordering (except that I will group together the two contrasts that I consider the least compelling, and discuss them jointly with a contrast put forth by Ten) – I think this ordering is one of increasing difficulty and interest.

II. THE NORMATIVITY OF WRONGNESS

Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong.

What exactly Nozick is contrasting here when he distinguishes between wrongs on the one hand, and injuries, harms, and slights, on the other is an issue which has baffled commentators.¹⁹ Something of a consensus exists as to the fact that assuming that punishable wrongs are only legal wrongs is a bad strategy; there are many non-legal wrongs that are punishable. Moreover, the distinction between wrong and right, on the one hand, travels in a different track from the distinction between injury-harm-slight and good or beneficial results, on the other. A minor wrong can cause grave harm and a major wrong can cause little harm. And I would like to argue that revenge always needs to be an answer to a wrong, regardless of the consequences such wrong brings about.

The term 'wrong' in expressions like "What you did was wrong" has more than one meaning. There is an obvious non-moral sense in which, say, your failing to press the right button on a dishwasher, is to do something wrong – a sense in which I am not interested. But squarely within moral discourse proper there are various senses of 'wrong'. A friend who broke a promise to call me, has, in principle, done something wrong, but in a sense wholly

¹⁹ See Peter French, *The Virtues of Vengeance*, *op. cit.*, p. 67; Nigel Walker, *Nozick's Revenge*, *op. cit.*, pp. 581–582.

different from that in which a rapist has done something wrong. We could refer to the first of these moral senses of wrong as thin, and to the latter as thick. While there is a continuum of wrongs going from thinnest to thickest, it is not clear that this is just a matter of degrees. The obligation to keep a promise, for example, flows from the constitutive rules of a man-made institution, whereas the obligation not to rape does not flow from the constitutive rules of man-made institutions.²⁰

The importance of making this point is to stress the fact that it is possible to punish people for very thin wrongs, that is, for wrongs which might only cause slights. I think that the best reservoir of examples of thin wrongs is the variegated set of mundane, minor, and sometimes downright petty things which we encounter in our everyday life: not greeting someone in the right way, forgetting the name of someone one has just met, and so on. Some authors, however, believe that, properly speaking, punishment can only occur within political institutions.²¹ I do not think that such a restrictive view is compelling.²² But, I can ignore this discussion here, insofar as even within political institutions there are extremely thin wrongs for which people are (alarming frequently) punished, such as the many *mala prohibita* crimes.²³ And the importance of stressing that people can be punished for committing very thin wrongs is that the first specific contrast allegedly distinguishing punishment from revenge is that punishment can only be meted out for (what turns out to be) thick wrongs.

²⁰ For more on normativity and rules, see: Leo Zaibert, 'Intentions, Promises and Obligations', in Barry Smith (ed.), *John Searle* (Cambridge: Cambridge University Press, 2003), pp. 53–84.

²¹ One of the most famous examples of this sort of position in the literature is J. D. Mabbott, 'Punishment', *Mind* 48 (1939), pp. 152–167. Recently Guyora Binder has advanced another version of this restrictive view in his 'Punishment Theory: Moral or Political?', *Buffalo Criminal Law Review* 5, pp. 321–370.

²² See Leo Zaibert, 'Punishment, Institutions and Justifications', *Law, Politics, and Society* 30 (2003), pp. 51–83.

²³ For an excellent discussion of *mala prohibita* crimes (and of the not generally acknowledged ways in which retributivists should be concerned by their proliferation), see Douglas Husak, 'Malum Prohibitum and Retributivism', in R. A. Duff and Stuart P. Green (eds.), *The Special Part of the Criminal Law* (Oxford: Oxford University Press), forthcoming.

If we can indeed punish people for thin wrongs (whether they cause slights, injuries, or harms), then the contrast at hand loses much of its appeal. Both punishment and revenge are responses to a wrong, but in my broad sense of ‘wrong’ which presumably engulfs whatever Nozick has in mind when he talks about actions which cause injuries, harms, and slights. For if Nozick’s harms, slights, and injuries are really not caused by wrongs, then there would exist a class of actions which are only revengeable – never punishable. It is of course incumbent upon Nozick to say more about what he has in mind. But we could speculate and imagine that perhaps some ‘crimes’ allegedly ‘punished’ by the State, would not for Nozick be punished at all (since they are not ‘wrongs’), but rather only avenged. Since I believe that punishment and revenge are not very different, this would not be a problematic conclusion for me. But for someone who believes that punishment and revenge are different, this conclusion would create problems. At the very least, whoever wants to uphold the distinction would have to explain why would then be legitimate for the State to take part in these *two* different activities: punishing and taking revenge. Moreover, since many authors claim that the difference between punishment and revenge is cashed out in terms of civility and rationality, “revenge is the getting of one’s own back; the notion of moral wrong is irrelevant to it,”²⁴ as Kleinig, for instance, would have it, then these authors have an additional problem. Why would the State ever be justified in engaging in a type of behavior which is so arbitrary and capricious?

Yet, Nozick’s contrast might still be appealing, in that surely there is *something* which is *not* a wrong even in my thin sense of wrong, and that whenever we react to an instance of this sort of non-wrongdoing, we would not be punishing, but merely avenging. For example, imagine a student who never laughs at any of the teacher’s jokes, even in those cases when everyone else laughs. The teacher does not like this, so whenever she runs into this student at social gatherings she gives him, say, a cold shoulder. This coldness, she admits, is in response to his not laughing at her jokes, and it is a response that is meant to pay

²⁴ John Kleinig, *Punishment and Desert*, *op. cit.*, p. 39.

him back, to make him suffer (a little bit). The question as to whether this re-action is punishment or revenge seems pertinent.

My answer to this question comes in two steps. First, it is yet to be seen why the teacher's 'not liking' that the student never laughs at her jokes is not for her a 'wrong'. My sense of 'wrong' is precisely meant to be extremely encompassing in order to include cases of this sort. The teacher's not liking the fact that the student does not laugh at her jokes is consistent with her believing that her jokes are good, and that even if just as a courtesy, a little smile is the right thing to do, etc., in such a way as to render the student's not laughing a 'wrong'. My sense of wrong, to repeat, covers all (moral) wrongs, regardless of how much harm they bring about.

But, second, and since I do not want to endorse the absurd claim that all human reactions are to (perceived) wrongs (or that all harms are caused by wrongs), let us assume that the teacher in our example accepts that not laughing at her jokes is not a wrong at all. She is nonetheless cold to her student in response to his not laughing (and she intends with her coldness to make him suffer, etc.). How should we refer to the teacher's re-action, as punishment or as revenge? In spite of its apparent punch, this question is in fact not terribly interesting: for it constitutes a false dichotomy, insofar as these two options do not exhaust the realm of possible answers. The teacher's reaction in this case is neither an instance of punishment nor an instance of revenge. It is something else: perhaps a form of irrational, or at least unreasonable, wanton infliction of pain, or perhaps (also?) a manifestation of her insecurities or her overgrown ego. But if she truly believes that there is absolutely *nothing* wrong with the student not laughing at her jokes, and she still goes out and makes the student suffer, then her victimizing the student is in a sense *gratuitous*, and it reflects poorly on the teacher's character. Revenge and punishment are never *gratuitous* inflictions of suffering, though they could be excessive or downright unfair. As absurd as the claim that all human reactions are to (perceived) wrongs surely is, as absurd it would be to claim that all human reactions are either instances of punishment or of revenge.

Consider the contrast between the two following cases. First, a mob outraged by an atrocity committed by Joe, lynches him; second, a mob which does not like Bill's skin color, lynches him for this reason. What the mob does to Joe is, on my account, punishment (this is merely a definitional point, in no way am I *justifying* lynchings);²⁵ but what the mob does to Bill is neither punishment nor revenge. The mob inflicts gratuitous suffering on Bill. Being cold to a student is, formally, much more like lynching Bill for his skin color than like lynching Joe for his atrocity. After all, if you ask the teacher "What did your student *do* that was wrong enough to merit such a reaction on your part?," *ex hypothesi* she would have to respond "nothing," which is the same answer that a member of the insane mob that lynched Bill would have to give to the question: "What did Bill *do* that was wrong enough to merit such a reaction on your part?"

Finally, it is important to stress that the contrast that Nozick draws would not neatly separate (were it successful) punishment from revenge *tout court*. For Nozick does not claim that revenge is only for non-wrongs, i.e., only for harms, injuries or slights; rather, he claims that, allegedly unlike punishment, revenge could *also* be for non-wrongs. So, when successful, this contrast would distinguish between punishment and *some* instances of revenge; it would say nothing as to how to distinguish punishment from revenge in cases in which revenge is carried out for wrongs. Of course, I think it is clear that Nozick's thesis would be flat-out untenable if it were meant to provide a clear-cut across the board distinction along these lines, for many (if not most) cases of revenge are responses to perceived harms caused by *thick* wrongs. This fact alone would be enough to cast doubt over this Nozickian contrast as it would apply to the distinction between revenge and punishment. But the fact that all of Nozick's harms, injuries, and slights, need to be caused by some wrong, makes the contrast virtually useless. What to call those reactions which are not

²⁵ For Sydney Gendin lynching cannot possibly be an instance of punishment, because it is "angry" and not "calm and deliberate", see, e.g., Sydney Gendin, 'The Meaning of Punishment', *Philosophy and Phenomenological Research* 28 (1967), p. 236.

responses to any perceived wrong (in my broad sense of 'wrong'), or those which do not give rise to any harm, injury, or slight (in Nozick's sense) might be an interesting question, but it is unrelated to the distinction between punishment and revenge, and it is, in any event, a question regarding which Nozick and his followers do not say more than I do.

III. PROPORTIONALITY, UNIVERSALITY, AND DIRECTEDNESS

Retribution sets an internal limit to the amount of the punishment, according to the seriousness of the wrong, whereas revenge internally need set no limit to what is inflicted.

This contrast mischaracterizes both punishment and revenge. A punisher need not believe that the punishment she inflicts upon someone she deems to be a wrongdoer is *exactly* proportional. This perhaps puzzling remark follows from taking seriously the distinction between punishment simpliciter and retributive punishment: punishment simpliciter (as opposed to *retributive* punishment) requires no *concrete* internal limit. (There must however be a *limit* to the degree of disproportion that is allowable, as I shall discuss immediately). A punisher need not believe that the punishment she is about to inflict is exactly proportional to the gravity of the wrong which it addresses, only the retributive punisher needs to believe this. While nothing, in theory, prevents the punisher from having one specific punishment in mind, perfectly fitted (in her estimation) to the gravity of the wrong, nothing prevents her from having a looser set of possible responses to the wrongdoing either.

Perhaps more contentiously, I would also like to argue that it is inaccurate to claim that there are no limits whatsoever in revenge. Following Peter French's lead, just think about *Westerns*, as a genre, and consider the role that revenge plays in them.²⁶ In fact, revenge, typically hopelessly confused with punishment, plays a prominent role in literature in general. That role is, roughly, to celebrate justice. Imagine the following idea for a screenplay: John, a hard-working, noble and virtuous rancher in

²⁶ Peter French, *The Virtues of Vengeance*, *op. cit.*, *passim*.

California sees how two nasty and vulgar thugs from Wyoming burn down his barn, just for fun. John, of course, had virtuously, with his bare hands, worked for years building up the barn. John is devastated by this injustice (which of course he deems a wrong), and then, as a response, he seeks to avenge this awful incident. By way of revenge, John gets a hold of a weapon of mass destruction and detonates an atomic bomb on Wyoming, killing the two bad guys who had burned his barn, together with millions of innocent people in Wyoming and surrounding states.

The point of this story should be obvious: this is much more recognizable as a high-concept comedy than as a tale of revenge, much more a screenplay for Quentin Tarantino than for Sergio Leone. And the reason for this is that the lack of an internal limit between the harm visited upon John and the one he inflicted upon the initial malefactors is glaringly grotesque. In other words, revenge does have *some sort* of internal limit. This limit need not be terribly precise, in the sense that the avenging actor might consider a variety of responses, which would 'fit' the crime in varying degrees of precision, to be acceptable to him. But nothing, in theory, prevents the avenger from having a perfectly exact limit as to what would be an acceptable limit to his reaction. Nozick himself seems to admit this much, for he tells us the avenger "*need not* [though she might]" set an internal limit to what is inflicted. Thus, this contrast would succeed, at best, in distinguishing punishment (even deserved punishment) from only *some* cases of revenge.

This contrast does seem to succeed in marking a distinction between revenge and *retributive* punishment, and even in the case of comparing revenge and punishment *simpliciter*, the contrast might remain, albeit in an attenuated form, useful. It is probably tempting to think that while the punisher might perhaps consider a loose set of responses, with varying degrees of fit *vis-à-vis* the wrong to which they are a reaction, the typical position of the punisher is to have either one single fitting response, or at least a more or less concrete set of responses, in mind. The avenger, in contrast, while in principle not committed to one single response whatsoever, might nonetheless happen to find himself so committed. Nozick's contrast would still have some currency, namely that the internal limit is

looser in the case of revenge than in the case of punishment. This, however, needs to be argued for. As it stands it is just a plausible suggestion. Yet, to the extent that this suggestion is a consequence of treating punishment simpliciter as if it were retributive punishment, it loses its plausibility when applied to the distinction between revenge and punishment simpliciter.

John's dropping an atomic bomb on Wyoming is as grotesque a story of punishment as it is a grotesque story of revenge. The fact that such a response is grotesquely disproportionate affects its status whether it is seen as an act of punishment or as an act of revenge, in pretty much the same ways. Though, this disproportion is much more significant in the case that occupies Nozick, the case of retributive punishment. Again, if we extend Nozick's contrast to apply to the distinction between revenge and punishment simpliciter, its appeal evaporates.

There need be no generality in revenge... whereas the imposer of retribution, inflicting deserved punishment for a wrong, is committed to (the existence of some) general principles (*prima facie*) mandating punishment in other similar circumstances.

The contrast between punishment and revenge that relates to an alleged generality of punishment which need not be present in cases of revenge, could be dismissed summarily. Baldly to assert that the avenger cannot possibly be committed to treating like cases alike, and that the punisher is committed to always treating like cases alike smacks of mere stipulation. Of course, Nozick's humbleness again works in my favor. Since Nozick tacitly admits that, in some cases, agents of revenge might be committed to the existence of general principles which guide their actions, and which would "(*prima facie*)" mandate that they behave alike in similar circumstances in the future, in those cases there would be no difference between the avenger and the (retributive) punisher.

These cases are not uncommon. Vigilantes or Mafiosi, for example, are frequently committed to certain principles of justice which for them hold generally, and which dictate comprehensive and far-reaching guidance for action. A given vigilante takes justice into his own hands, and in principle he is

committed to the view that he will treat similar injustices in the future in roughly the same way – think of *The Lone Ranger* or *Zorro*. It is not always true that whether an avenger would avenge a case similar to the one she has already avenged depends “upon how he feels at the time about the act of injury”.²⁷

In fact, what is really bad about vigilantism is the taking of justice into one’s own hands, since there are many good reasons not to do so. A vigilante would be doing something wrong even in those conceivable cases in which he would inflict the exact deserved punishment to a given wrongdoer. Giving someone what she deserves is never, in itself, a bad thing to do; on the contrary, it is always an intrinsic good (which does not mean that it should always be done). The wrongness of vigilantism is that, for political reasons, it makes good sense to prevent people from taking justice into their own hands (even if people would mete out exactly just punishments) regarding *some* sorts of wrongs. (There are some wrongs, say cheating in Parcheesi, over which no State can possibly claim a monopoly, and other wrongs, say celebrating our neighbors’ misfortunes, which fall beyond the realm of the State’s legitimate interests).

Claiming that vigilantes should be seen as punishers rather than as avengers does not affect my substantive remark that avengers need not shun generality, since I am simply going along with the standard assumption that vigilantes thirst for vengeance. If they do not, then just apply my remarks to whomever you consider to be an avenger. An avenger, whoever she might turn out to be, need not always act on the whim of whatever she feels on this or that occasion. Of course, the difficulty, if there is such, in determining whether or when an avenger is carrying out vengeance or merely inflicting punishment plays entirely on my favor, since it strengthens my main thesis.

This contrast again, is more persuasive in the case of retributive punishment than in the case of punishment simpliciter, since the retributive punisher is more likely to be committed to universal principles of justice. But she need not be, and, moreover, it is yet to be seen what exactly this “being com-

²⁷ Robert Nozick, *Philosophical Explanations*, *op. cit.*, p. 368.

mitted to the existence” of these or those principles actually entails when the time to act arrives.

I would like to end this section with another contrast suggested by Ten:

Retributive punishment is only inflicted on the wrongdoer, whereas revenge is sometimes inflicted on an innocent person close to the revengee, either because this is an easier target or because it is thought that this would hurt the revengee more.²⁸

Though Ten admits two possible reasons why the avenger might hurt an innocent person, clearly the first one is a non-starter. For if an avenger willy-nilly just chooses to punish an innocent person, somehow “close” to the revengee, but whose suffering is *ex hypothesi* disconnected from the suffering of the revengee, this is just an instance of a gratuitous infliction of suffering. I would like to visit revenge on, say, some awful person who lives in Paris; yet I just go to downtown Chicago and beat up this person’s cousin (while being aware that the person in Paris would not care at all). I see no way in which it could be argued that in this case I have avenged anything.²⁹ The only way in which a case like this might become a candidate for being an instance of my avenging something is if I believed that by beating up the person in Chicago, I am also hurting the person in Paris, but then this becomes Ten’s second scenario already.

Hurting an innocent person in order to get to the guilty one is doubtlessly possible. This sort of case, I have heard, is common in Boot Camp. But these are more likely examples of punishment, and not of so-called revenge; unless sergeants are seen as avengers. These indirect punishments could even be instances of retributive punishment, insofar as it is possible that by hurting one innocent person one would inflict the exact

²⁸ C. L. Ten, *Crime, Guilt, and Punishment*, *op. cit.*, p. 43.

²⁹ For an interesting discussion of the directedness of revenge and punishment see Edward Westermarck’s reaction to S. R. Steinmetz’s, *Ethnologische Studien zur ersten Entwicklung der Strafe* in his ‘The Essence of Revenge’, *Mind* 27 (1898), pp. 289–310. It is of course significant that Westermarck’s title contains the word ‘revenge’, whereas Steinmetz’s contains only punishment (‘*Strafe*’ in German).

amount of deserved suffering upon the guilty one. Of course, retributive or not, in these cases of punishment there is always a poor sap getting the raw end of the deal. But the poor sap is neither punished nor avenged – he is victimized, beat up, or what have you, but that is all. To repeat, for the last time, I am not endorsing victimizing innocent people; all I am interested in showing is that this contrast does not succeed in distinguishing punishment from revenge.

IV. INTIMACY AND THE AESTHETICS OF REVENGE

Revenge is personal... whereas the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution.

This contrast appeals to a rather amorphous and elusive sense of ‘personal’. If ‘personal’ is meant here as ‘private’, as when ‘private’ is opposed to ‘public’, then this contrast would inherit the famous difficulties that such a binary distinction inherently encounters.³⁰ Whatever else Nozick might mean by ‘personal’, the term is, in any case, not wholly disconnected from this problematic sense of ‘private’. There are two aspects which make this appeal particularly complicated.

First, if ‘personal’, which Nozick at times equates with ‘special’, is taken in the sense of ‘intimate’, then the following problem would arise. The degree of intimacy of a relationship is something which each person in the relationship is free to ascertain as she sees fit. You might believe that your relationship with Susan is extraordinarily intimate, whether or not she or anyone else agrees with your assessment. Thus, you could avenge wrongs committed against Susan, even if no one else believes that you are avenging her. The way in which this is a problem needs to be explained further. For defenders of the Nozickian contrast might simply say that my preceding claim is true, but that in no way affects the cogency of the contrast. It is hard to know whether a relationship is intimate or not, but something is revenge only if it occurs in the context of such an

³⁰ For more on the problematic aspects of this distinction see Austin Sarat, ‘Vengeance, Victims and the Identities of Law’, *Social & Legal Studies* 6 (1997), pp. 163–189.

intimate relationship: I should keep in mind the difference between metaphysics and epistemology, the Nozickian defender might remind me. But insofar as the contrast is supposed to allow us to *distinguish* (an epistemological notion) between punishment and revenge, this sort of defense is not successful.

It would be of little help to know that revenge can only occur in some types of intimate relationships, if we have no way of identifying with any precision which are those relationships. It seems to be sheer arbitrariness to respond to someone who claims to have avenged a harm done to someone she hardly knows, “well, the relationship between the two of you was not personal or intimate enough”. For example, Bob is morally outraged by something John did to Lou, and thus decides to avenge Lou. Suppose further that Joe and Lou live in a country different from Bob’s, and that Bob has never met them. Still, I would argue, it is possible for Bob to take revenge. It is incumbent upon those endorsing this contrast to say more about the nature of the personal tie which would refute my suggestion. Since it is possible for someone to claim, as she sees fit, personalness in this or that relationship, appealing to personalness as a criterion to distinguish revenge from punishment is, as it stands, a non-starter.

Second, if ‘personal’ means something like ‘unregulated’, then this just pushes the question one level up, for it is hard to understand what exactly ‘unregulated’ would mean here, given that many, if not most, of our personal relationships are regulated in one way or another. Granted, the sorts of rules governing romantic or familial relationships differ from the rules governing relationships between the citizens and the State, but these are rules all the same. It is incumbent upon the defender of this sort of contrast, if it is to be understood as appealing to the difference between regulated and allegedly unregulated activities, to explain why the presence of this or that type of rule entails that one and the same phenomenon is punishment in one context and not punishment in another.

Yet, conceding that one and the same phenomenon should be called by different names depending on the context in which it occurs strikes me as too stipulative: a war of euphemisms and dysphemisms of sorts. For example, putting

a rapist behind bars, after he has been duly tried and convicted is punishment when carried out by State officials (who allegedly have no ‘personal’ connection with the rapist), but mere revenge when it is carried out identically by a group of ordinary citizens (say, they build a replica of the prison on their property, etc.). If the citizens were to inflict the same suffering upon the rapists as the State officials and for exactly the same reasons, one case would allegedly be revenge and the other would be punishment. But the fact that the suffering inflicted, and the reasoning leading up to such infliction, are, *ex hypothesi*, identical, renders this contrast implausible. Of course, on this interpretation of the contrast, it has become simply the claim that punishment must occur within institutional contexts whereas revenge need not. But while human activities occur within institutional contexts, those institutional contexts are different from the State. Moreover, as I have argued elsewhere, punishment is a very common phenomenon outside the institutional context of the State.³¹

Finally, as in the preceding contrasts, Nozick’s humbleness is worth mentioning, for, once more, Nozick merely claims that the punisher (retributive punisher, or “agent of retribution” as he calls her) need not have a special or personal tie with the victim of the wrong. Thus, in those cases in which the punisher does have a personal or special tie with victim of the wrong, then this contrast fails to distinguish retributive punishment from revenge, and if so, then also punishment simpliciter from revenge. So much then for the persuasiveness of this contrast, it might seem.

Still, this contrast generates an interesting puzzle regarding the relationship that exists between the punisher and the punishee. Arguably, the most intimate relationship between punisher and punishee would obtain when they are the same person. Some authors believe that self-punishment does not exist, or that, at best, it is merely a metaphorical use of the term

³¹ Leo Zaibert, ‘Prolegomenon to a Theory of Punishment’, *Law, Culture and Humanities* (forthcoming, 2005).

‘punishment’. But, if self-punishment is possible, as I believe it is,³² and if I am right in claiming that punishment and revenge are virtually indistinguishable, then I must admit that self-revenge is also possible. This surely seems odd.

There is no easy solution to this oddity. Interestingly, none of the standard ways of distinguishing punishment from revenge would be helpful if we wanted to deny the possibility of self-revenge. Dan could inflict suffering upon himself, in response to a mere slight, without setting an internal limit, while feeling the very particular emotional tone which is supposedly characteristic of revenge, and without being committed to any sort of general principle whereby he would behave similarly in the future. This example incorporates all of the features of the Nozickian account of vengeance, and it is still odd to refer to Dan’s behavior as self-revenge. The oddity, then, is not a consequence of rejecting, as I do, the standard contrasts between punishment and retribution.

One could, of course, argue that the only reason why this might *sound* odd is a function of ordinary language and the ways in which we happen to refer to these phenomena. While I do not think that this answer is terribly off the mark, I nonetheless think that it is profitable to look more deeply at what else might explain the odd-sounding, perhaps off-putting, expression “self-revenge”. In fact, I think that this discussion might reveal the most promising way of distinguishing punishment and revenge, though this would be a distinction hitherto ignored in the literature.

A popular saying has it that “revenge is best served cold”. I take it that the core meaning of the saying is that the better the plotline, the more successful the revenge: the avenger typically devises a plan, whereby she will, in a process whose narrative is itself of value, end up giving whom she perceives to be a wrongdoer (in my thin sense), what that wrongdoer deserves.

³² I have defended this view in: Leo Zaibert, ‘Prolegomenon to a Theory of Punishment’, *Law, Culture and Humanities* (forthcoming, 2005). John Kleinig presents good arguments for it in: John Kleinig, *Punishment and Desert*, *op. cit.*, pp. 10–48.

Imagine, for example, Susan, who is very offended by Linda's remark, and believing that what Linda did is a wrong, slaps Linda immediately after the offending remark. *Ex hypothesi*, this is an instance of Susan punishing Linda. Yet, I hesitate as to whether I would also call this an instance of Susan taking revenge on Linda. In contrast, Susan's devising a plan whereby she will be able to ridicule Linda at a party strikes me as a better example of revenge.

My hesitation here is, I think, of a piece with my hesitation in accepting self-revenge. The problem with self-revenge is not really its self-reflexivity, which in this case is just a smokescreen. Rather it is the fact that (unless we were to accept independently implausible assumptions about several personas simultaneously supervening in our selves, one of whom could carry out revenge on another one) there is no room for the sort of "cold-serving" aspect of revenge. The kernel of truth behind the popular saying is that revenge typically requires this sort of narrative structure, which is characteristic of tales of revenge. What is equally missing in Susan's instantaneous slap, and in putative cases of self-revenge, is this narrative structure allowing for a "cold-serving".

Another possible smokescreen is to think that the problem here is merely one of temporality. It could be argued that while acts of punishment could be as instantaneous as Susan slapping Linda, acts of revenge need to be protracted, and that since this element is absent in both examples of self-revenge and in the case of Susan slapping Linda, then this explains my hesitation in calling them instances of revenge. But there is no reason to suppose that self-punishment cannot be protracted – one can punish oneself for things done far back in one's past. Consider Helen, who really believes that Margaret, one of her colleagues in the university where she teaches, is extremely rude and has done many bad things in the past; she wishes to take revenge on Margaret. Without really having a full-blown plan of revenge, an opportunity falls into Helen's lap: in the midst of a very important conference, Margaret has said something really silly, something which in the rarified air of academia can be exploited in such a way as to make Margaret suffer. Helen's making Margaret suffer is more or less an immediate response to a

remark by Margaret; while time has elapsed since the first time Helen said to herself that she was going to get Margaret, the remark which gave rise to Helen's act of vengeance immediately preceded it.

What I want to stress is that while the inherently valuable narrative which might be the best way to distinguish punishment from revenge might need time in order to unfold, what matters is the narrative itself, not time. There is, indeed, a minimum amount of time required for the narrative to unfold, but one should keep in mind that what is really important is the plotline itself, not the period which it, in turn, might require. Perhaps, then, a distinction between acts of revenge and acts of punishment can after be made, in that the former typically incorporate this inherently valuable narrative more obviously than the latter.

I cannot here articulate what exactly is valuable about this narrative. But it should suffice to point out that there is an irreducible *aesthetic* element at play here. So called "tales of revenge," which conceptually are not terribly different from "tales of punishment," that is, tales in which a wrongdoer finally gets what she deserves as a result of the noble efforts of the wronged party, are *aesthetically* pleasing. This aesthetic dimension is closely linked to epistemological coherentism, in particular to the sort of coherentism to which Moore appeals in his defense of retributivism.³³ Just as retributive punishment can be plausibly justified via coherentism, so can, though perhaps to a lesser extent, punishment simpliciter. Appealing to aesthetic values is not to introduce openings for relativism or subjectivism, for aesthetic values can be defended from such normative skepticism as much as ethical values can be.

Moreover, this aesthetic element is closely associated with the more traditional ethical element typically (and rightly) associated with the justification of punishment: desert. Typically, in cases of revenge (at least as they are depicted in the literature), a wrongdoer should suffer as a result of her wrongdoing, but it is part of what she deserves to suffer, that

³³ Michael Moore, *Placing Blame* (Oxford: Oxford University Press, 1997), pp. 104–110, and 153–188.

her suffering comes about *in a certain way*. And sometimes this particular way of suffering is inextricably linked to the narrative structure to which I am alluding. Someone might *deserve* to suffer a given fate, and to suffer it as a result of a very specific chain of events. Peter French usefully turns the well-known slogan that “revenge is best served cold” upside down, when he asserts that “vengeance is warm, retribution is cold, poetic justice is frigid”.³⁴ First impressions aside, this does not contradict the spirit of the slogan that vengeance is best served cold. What French means is the following:

The taking of revenge usually produces an emotional or psychological state in the avenger, a feeling of pleasure, a sense of accomplishment, a high. That state cannot be fully experienced if the villain has met his or her end in some natural occurrence, for example by being buried in an avalanche, unless of course, the avenger triggered the avalanche with the intent to kill the escaping villain. There is little satisfaction in the villain’s death for the would-be avenger who has not been the direct or proximate cause of his or her demise.³⁵

As an explanation of the tripartite distinction at hand, French does not go far enough here, since this passage merely contrasts death caused by an avenger and death caused by fortuitous events (divine justice, in this context), leaving aside death caused by retributive punishment. I have no trouble admitting that the emotions experienced by someone who *either* via revenge *or* via punishment causes the death of a wrongdoer are indeed different from those of someone who merely witnesses calamities befalling a wrongdoer. For reasons I will discuss in the next section, I would resist trying to make the distinction between revenge and punishment along emotional lines. So, I would disagree with French’s distinction between retributive punishment (“cold”) and vengeance (“warm”), somewhat too reminiscent of Feinberg’s “righteous” punishment versus “angry” revenge opposition, cited at the outset of the article. Instead, I would cash out the distinction, if at all, in terms of the aesthetic value of the narrative structure of the plan which climaxes with the meting out what is due to the wrongdoer. For

³⁴ Peter French, *The Virtues of Vengeance*, *op. cit.*, p. 69.

³⁵ Peter French, *The Virtues of Vengeance*, *op. cit.*, p. 69.

all of his original and stimulating arguments regarding the virtues of revenge, and in spite of his also original disagreements with some of Nozick's contrasts, French nonetheless ultimately believes that punishment and revenge are clearly different phenomena: amongst other things along the lines that one is *warmer* than the other (in the sense just sketched).

I am not certain that this discussion about the intrinsic value of narrative structures is fully successful in distinguishing punishment and revenge, but it seems more promising than any of the standard contrasts. Yet, even if it succeeded, it would only succeed in very few cases, like self-punishment and instantaneous punishment. And even if this aesthetic contrast succeeds in those rare cases, acts of revenge would still be but subtypes of acts of punishment, differing from the latter merely in displaying a more pronounced concern for the narrative structure that culminates in the infliction of suffering to the wrongdoer. So even in those cases there would be no substantial difference between punishment and revenge.

V. THE EMOTIONAL LIFE OF THE AVENGER AND THE PUNISHER

Revenge involves a particular emotional tone, pleasure at the suffering of another, while retribution either need involve no emotional tone or involves another one, namely pleasure at justice being done.

According to this widely accepted account of the difference between punishment and revenge, the avenger experiences a rather specific emotion "pleasure at the suffering of another" (or "hatred"). The retributive punisher, on the other hand, either experiences no emotion at all, or the emotion that she experiences is an (allegedly) entirely different one "namely, pleasure at justice being done".³⁶ This contrast has, in fact, two forms, both related to the emotional life of the retributive punisher or the avenger. I will discuss them in turn.

Let us start with the first form of the contrast: the punisher feels nothing, whereas the avenger feels something. If it were true that the retributive punisher, in *some* cases, did not feel any

³⁶ Robert Nozick, *Philosophical Explanations*, *op. cit.*, p. 367.

emotion whatsoever, and that the avenger necessarily felt some emotion (whatever it might be), then, in those cases, we would finally have a crisp and useful contrast between punishment and revenge. But the contrast would succeed only in some cases, and thus it would be of value only in some cases. But I think that the suggestion that the punisher might not feel anything is implausible: the punisher always feels something as she punishes what she perceives to be a wrong. Elsewhere I have presented an account whereby punishment is part of a continuum which also includes blame, and since blame, by definition, contains an emotional component, then, insofar as my account is correct, this contrast would never hold, insofar as it is never the case that the punisher feels *nothing* at all.³⁷ On my account, punishment is simply to *do* something to someone for having done something else one *finds* blameworthy (for having behaved in a blameworthy manner, etc.).

I would like to defend this account of punishment, and in doing so I need to start by briefly explaining blame. Whenever we blame a wrongdoer, we prefer that she would not have done the misdeed in the first place. If we did not have this preference, I submit, we simply would not be blaming her. In order to more fully appreciate this point, I think it is valuable to look at cases of praise, rather than at cases of blame. Interestingly, although formally rather similar, cases involving good deeds seem not to present as many difficulties as cases involving wrongs. Imagine that Ruth did something absolutely great, say, after years of efforts she single-handedly found a cure for AIDS. If we invert the sorts of conditions that would roughly hold for blaming someone, as they would operate within the context of esteeming someone, we will get something along the following lines. You believe that what Ruth did is a good thing, you believe that what Ruth did is an action of hers, you believe that Ruth is a

³⁷ For more on the connection between blame and punishment see, Leo Zaibert, 'Prolegomenon to a Theory of Punishment', *op. cit.*; for a defense of the irreducible emotional component of blame see, Leo Zaibert, *Five Ways Patricia can Kill her Husband: A Theory of Intentionality and Blame* (Chicago: Open Court, forthcoming 2005), particularly the last chapter. See also R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Cambridge University Press, 1996), for a somewhat similar defense.

moral agent, you believe that there are no reasons that take any of the merit away from Ruth's deed, and you believe that the world is a better place because of what she did.

Would you not believe, too, that something good should happen to Ruth, and would you not *feel* some sort of admiration or gratitude toward her, and further *feel* some sort of satisfaction if something good were to happen to her? I think you would. The *formal* structures of esteeming and blaming are similar. Sometimes we esteem or admire someone's actions without doing anything about it, just as we could blame someone's actions without doing anything about it. But whether or not we do something about actions we find praiseworthy or blameworthy, we always *feel* something when we so find them. The feeling need not be particularly intense or enduring, we need not even be fully conscious of the feeling – we might only realize on introspection that we indeed have it – but it has to be there.

This argument finds support in Bernard Williams' insightful, though regrettably brief, discussion of the relationship between the logic of blame and the logic of advice. Williams tells us: "if 'ought to have' is appropriate afterwards [after the wrongdoing has occurred] in the modality of blame, then (roughly) 'ought to' was appropriate at the time [before the agent does the bad deed] in the modality of advice".³⁸ Why would you sincerely advise someone not to do X? In principle, because you sincerely believe that doing X is a bad thing. What if the person ignores your advice (or never heard it)? You would believe that the world is worse off because of what the person did. Since, you know that you cannot turn back time, you now wish that something would happen in the world in order to somehow bring it back to the state in which it was before the person acted – you *feel* in a certain way as a result of this event having taken place.

Some instances of wrongdoing do give rise to distinctly and intensely emotional responses. The sight of someone who we

³⁸ Bernard Williams, 'Internal Reasons and the Obscurity of Blame', in *Making Sense of Humanity and Other Philosophical Papers 1992–1993* (Cambridge: Cambridge University Press, 1995), p. 40.

believe is an extremely bad person, who constantly does bad things, for which he feels no remorse, and in no way suffers any bad consequence, can make us quite sick. This ‘feeling sick’ need not be a bad thing. Feeling sick about sickening things is almost uninterestingly appropriate. While I doubt anyone would disagree with this last claim, my suggestion is more ambitious: any instance of perceived wrongdoing gives rise to some form, even very low-grade forms, of an emotional response.³⁹

Thus goes my rejection of the view that the punisher feels nothing. But, we are now left with the second part of this contrast: the punisher does, in some cases, experience some emotions, but these, whatever they might be, are different from those that the avenger experiences. The first step in my reaction to this contrast is to express my skepticism regarding the confidence with which Nozick and his followers so summarily distinguish between two allegedly different sets of emotions. Arguments are of course necessary in order to show that the avenger does not feel “pleasure at justice being done”, and that she only feels “pleasure at the suffering of another”, or that the punisher only feels the former, and never the latter.

Stated this bluntly, i.e., that the emotions of the avenger are quite unlike the emotions of the punisher, the second form of the contrast seems in quite desperate need of supporting arguments. After all, it is based on a gratuitous and bold separation of emotions which not only can be experienced simultaneously, but that might sometimes be extremely difficult to separate. The typical literary rendition of the heroic avenger, indeed, is a person who feels pleasure at justice being done: hence the popularity of such a beloved, powerful literary genre.

When John Stuart Mill talks about the reactive emotions, he says, for example, that “it is natural to resent and to repel or retaliate any harm done or attempted against ourselves or against those with whom we sympathize”; he makes no dis-

³⁹ Again, for a more on the details of this emotional response see the last chapter of Leo Zaibert, *Five Ways Patricia can Kill her Husband: A Theory of Intentionality and Blame*, *op. cit.*

inction between how these emotions would play out in cases of revenge as opposed to cases of punishment.⁴⁰ Both the avenger and the (retributive) punisher feel some sort of indignation, outrage, or a feeling of that tenor, as a result of what they perceive to be an instance of wrongdoing. This is why the emotion of indignation has been so central in moral philosophy throughout history. Already in Aristotle we find the insight that both not feeling indignation in cases where one should, and feeling indignation in cases where one should not, are quasi-vices:

Righteous indignation is the observance of a mean between Envy and Malice, and these qualities are concerned with pain and pleasure felt at the fortunes of one's neighbours. The righteously indignant man is pained by undeserved good fortune; the jealous man exceeds him and is pained by all the good fortune of others; while the malicious man so far falls short of being pained that he actually feels pleasure.⁴¹

While Descartes' terms are different from Aristotle's he clearly echoed Aristotle's view when he analyzed these emotions:

Indignation is a species of hatred or aversion which one naturally has for those who do some evil, whatever its nature. And it is often mingled with envy or with pity, but it has nevertheless an altogether different object. For one is indignant only with those who do good or evil to people who do not deserve it, but one bears envy against those who receive this good, and takes Pity upon those who receive the evil. It is true that it is, in a way, doing evil to possess a good one does not deserve. This may be the reason why Aristotle and his followers, supposing that Envy is always a vice, called that which is not unvirtuous by the name of Indignation.⁴²

The imagined avenger who only feels pleasure at the suffering of another would in no way resemble the quasi-virtuous character who Aristotle and Descartes, amongst other

⁴⁰ John Stuart in Mill, George Sher (ed.), *Utilitarianism* (Indianapolis: Hackett, 2001), p. 51.

⁴¹ Aristotle, in H. Rackham (trans.), *Nicomachean Ethics* (Cambridge, MA: Harvard University Press, 1926), p. 105. Rackham compellingly suggests that "it is difficult not to think that some words have been lost here, such as 'and the righteously indignant man is pained by the undeserved misfortune of others,'" H. Rackham, *ibid.*, p. 105, fn. c.

⁴² Rene Descartes, in Stephen Voss (trans.), *The Passions of the Soul* (Indianapolis: Hackett, 1989), p. 124.

philosophers and many literary authors, discuss. And these philosophers do not distinguish between the so-called punisher and the so-called avenger: this righteous indignation can be felt equally by punisher and avenger. Nozick presents a corollary to this contrast. “The thirster after revenge often will want to experience (see, be present at) the situation in which the revengee is suffering whereas with retribution there is no special point in witnessing its infliction”.⁴³ But the punisher, just as much as the avenger, might want to experience the infliction of the suffering, or, conversely, just as much as the avenger she might not be interested in experiencing such infliction.

The implausible separation between emotions that both forms of this contrast impose (whether in the form of claiming that the retributive punisher feels nothing or that what she feels is radically different from what the avenger feels) is even more problematic in light of the specialized literature dealing with the connections between punishment and revenge. Perhaps the most effective argument in showing that the separation between revenge and punishment is not clear is that arguably the most famous indictment of punishment is to argue that the emotions of the punisher are quite like those of the avenger. This is, of course, the Nietzschean indictment against punishment, insofar as it is based on what Nietzsche thinks are the necessary emotions of punishers: punishers have “shop-keeper” emotions, afraid of those who they perceive to be superior, their souls “squint,” their spirit “loves hiding places” and all that.⁴⁴ These sorts of emotions are typically ascribed to avengers.

Nietzschean or not, the view that the punisher experiences some *feelings*, and that these feelings are very similar to those the avenger feels, is becoming increasingly accepted. In a way, French’s *The Virtues of Vengeance*, can be seen as a defense of this view, and as a defense of the view that I defend here that revenge and punishment are very similar (though French himself does not equate punishment and revenge). Perhaps less daringly, though no less eloquently, Robert C. Solomon argues

⁴³ Robert Nozick, *Philosophical Explanations*, *op. cit.*, p. 367.

⁴⁴ See Friedrich Nietzsche, *The Birth of Tragedy and the Genealogy of Morals* (New York: Doubleday, 1956), *passim*.

that there is some sort of irreducible connection between the emotional dimension of revenge and the emotional dimension of punishment. Now, while Solomon admits that contemporary moral philosophy, particularly in the context of discussing punishment and associated phenomena, “has for too long been suffocating from a bad case of ‘political correctness,’” he still feels the need to say that: “for the sake of my reputation both as a maverick philosopher and decent human being, let me say, as bluntly as I can, that I will not be defending vengeance as such”. Yet, he does muster the courage to admit that “like it or not, I find that resentment and the desire for revenge are inextricably tangled up with the questions I ask about punishment”.⁴⁵

“Punishment” stripped of its emotional dimension would indeed be a caricature of punishment; the emotional dimension of punishment stripped from a certain desire to redress previous wrongdoing, just like the emotions of the avenger, would be a caricature of that emotional dimension. I would like this previous sentence to be seen as an expansion of Solomon’s view: “Picasso’s *Guernica* is an expression of outrage, indignation, and despair, and it would be a poorer painting (like a talented art student’s rendition) if it were not for those emotions”.⁴⁶ Punishment has an ineliminable emotional dimension, and this emotional dimension is not at all easy to separate from the emotional dimension of revenge. To suggest otherwise is like failing to see the difference between Picasso’s *Guernica*, and copies of it.

It is of course possible to imagine an avenger who is also a sadist, whose feelings of pleasure at the suffering of another overshadow her feelings of pleasure at seeing justice being done. But, equally plainly, we can easily imagine as well a punisher who happens to be a sadist. For example, in his thorough defense of retributive punishment, Moore asserts that “the most serious objection to retributivism as a theory of punishment lies

⁴⁵ Robert C. Solomon, ‘Justice v. Vengeance: On Law and the Satisfaction of Emotion’, in Susan Bandes (ed.), *The Passions of the Law* (New York: New York University Press, 1995), p. 125.

⁴⁶ Robert C. Solomon, ‘Justice v. Vengeance: On Law and the Satisfaction of Emotion’, *op. cit.*, p. 123.

in the emotional base of retributive punishment” and in this discussion he “by and large reli[es] on Nietzsche” for Nietzsche “delved deeply into the psychology of revenge”.⁴⁷ Further, as Moore discusses some of the *possible* ugly emotions associated with retributive punishment (not revenge), he indicts as “one of the uglier spectacles of our times... the parties by fraternity boys outside the gates of prisons when an execution is taking place”⁴⁸ Maybe the fraternity boys are neither punishers nor avengers, but it is surely unnecessary to claim that they are avengers (or that they are celebrating an act of vengeance) in order to be offended by their action and by their emotions.

Now, it could be retorted that the really problematic case is that of an avenger who *only* experiences feelings of pleasure at the suffering of another. For it is hard to imagine a punisher who *only* feels pleasure at the suffering of another. But the problem immediately suggests itself: what is the argument for calling this sadist an *avenger*? If *all* she feels is pleasure at the suffering of another, then the label ‘avenger’ seems spurious: she is simply cruel, sadistic, or what have you, but she is not avenging anything. The same would hold for the so-called ‘punisher’ who only felt pleasure at the suffering of another. In other words, a sadist is a sadist; she could also be a punisher, and she could also be an avenger, but she could be just a plain sadist.

If I might be allowed, in closing, to summarize in a few words Moore’s thorough discussion of Nietzsche’s indictment of the emotions associated with *ressentiment*, I would say the following: none of Nietzsche’s observations about the unsavory side of the emotions of the punisher, or about the potential that discourse on punishment might have for legitimating base

⁴⁷ Michael Moore, *Placing Blame*, *op. cit.*, P. 119. Incidentally, Moore might seem to endorse the view that punishment and revenge are different, say, when he claims that “punishment is a social institution, unlike *private* [emphasis added] vengeance” (*Placing Blame*, 140). But given the very way in which he assumes that Nietzsche’s views on revenge are relevant for the discussion of punishment (*Placing Blame*, 119 ff., 124) and even as he discusses *Romans 12:19* (*Placing Blame*, 152), I think Moore is best viewed as not distinguishing punishment from revenge.

⁴⁸ Michael Moore, *Placing Blame*, *op. cit.*, p. 122.

emotions succeeds in showing that there is any necessary connection between these base emotions and punishment. I agree entirely with this observation; I would like to add, however, that there is no necessary connection, either, between these emotions and revenge.

It might look, perhaps, as if my account is heavily Nietzschean, in that I agree with him about the fact that merely to talk about punishment rather than about revenge is to play word games; appealing to euphemisms to dress an ugly phenomenon with spuriously respectable clothes. Yet, there is a crucial difference between the Nietzschean approach and mine. Nietzsche *indicts* punishment, punishers, and the urge to punish, in general. For all the oomph of Nietzsche's provocative and iconoclastic remarks and cultural critique, he does not succeed in proving that making wrongdoers suffer as result of their wrongdoing (whether you call this activity punishment or revenge) is necessarily a bad thing. As Moore points out, Nietzsche does not "show that retributive judgments are *inevitably* motivated by the dark emotions of *ressentiment*".⁴⁹

In contrast, nowhere do I indict punishment (or punishers, or the urge to punish) as a *necessarily* bad thing. Moreover, neither do I indict revenge. Both revenge and punishment can be bad, and both can be good, depending on the circumstances. I have not here discussed those circumstances. What I have criticized is the philosophical thesis which asserts that punishment and revenge are different by somehow attributing to revenge all sorts of bad features (including Nietzschean *ressentiment*), features which, by means of some sort of euphemistic alchemy are absent in punishment. The typical story goes roughly like this: only the emotions experienced by the avenger are vicious, only avengers unauthorizably and inconsistently inflict disproportionate, grave harm in response to very minor slights. Revenge, moreover, as Moore has shown, is frequently simply *assumed* to be "always neurotic (and thus always undesirable)".⁵⁰ Each of these characteristics is, in principle, a bad thing. But I hope to have succeeded in showing,

⁴⁹ Michael Moore, *Placing Blame*, *op. cit.*, p. 140.

⁵⁰ Michael Moore, *Placing Blame*, *op. cit.*, p. 117 and ff.

first, that avengers need not always conform to this story, and, second, that punishers are not exempt from conforming to it. To have ugly, base emotions, or to exaggerate one's concern for justice so much as to corrupt it, is not the monopoly of avengers. Moreover "pathological cases" as Moore points out "can be found for any emotions, including benevolent ones".⁵¹ The contrast between punishment and revenge in terms of justice versus barbarism, which in the end is what all these maneuvers amount to, can only be drawn if, in the final analysis, it is *stipulated* that punishment is just by definition, unlike revenge which is *stipulated* to be unjust by definition.

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⁵¹ Michael Moore, *Placing Blame*, *op. cit.*, p. 117.