Retribution and Justice  
Opposition Brief by Joel Erickson  


Trace the philosophical roots of the retributive theory of justice by examining the tenets of its progenitors—Immanuel Kant and G.W.F. Hegel. Undermine the implicit link between retribution and justice by exposing it for what it is—a tenuous, unsubstantiated assumption that equates the two without proffering a robust justification. Demonstrate that far from being close to justice, retribution is the incarnation of vengeance and the gratification of a societal rage toward crime.

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Opposition Brief: Retribution and Justice

Background: Kantian Theory of Retribution

Mike Materni 2013 (British Journal of American Legal Studies) “Criminal Punishment in Pursuit of Justice” Vol. 2, 2013. <http://ssrn.com/abstract=2256245>

“In a now famous excerpt – possibly Kant’s most famous excerpt in penal literature – Kant, qualifying the right to impose criminal punishment as ‘the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him,’ lays down the philosophical foundations of retributivism asserting that punishment ‘must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime.’ This is because, Kant claims, ‘the penal law is a categorical imperative;’ hence ‘woe’ to those – such as Beccaria – who ‘cree[p] through the serpent-windings of utilitarianism’ and thus stand in the way of justice. According to Kant, in fact, ‘justice would cease to be justice if it were bartered away for any consideration whatever.’ After advancing this absolute notion of ‘justice’ – which, *per se*, doesn’t say a lot more other than that justice needs to be absolute, untouched, unspoiled – Kant proceeds to enlighten us with what he sees as the *measure* of justice: nothing less than the infamous *lex talionis* which, ‘properly understood,’ ‘is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty.’ If at this point any- one is wondering what that ‘properly understood’ means, here’s Kant’s chilling answer: ‘whoever has committed Murder must *die*.’ This, in Kant’s construction, is required by justice: ‘there is no Equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal.’ To make sure that there really aren’t any doubts left, the passage concludes with the famous hypothetical of a society living on an island which at some point decides to disperse throughout the world, never to come together as a people ever again: in such a case, Kant urges, unless the whole people were to partake in a public violation of justice ‘the last murderer lying in the prison ought to be executed before the resolution was carried out.’ According to Kant, then, just punishment is retribution; retribution is justified because the criminal law is a moral imperative the violation of which *demands* retribution.” *[italics in original]*

Problem #1 (Kant): Relationship Between Retribution and Justice Predicated on Unsubstantiated Assumption

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“The first thought that comes to mind when reading this passage of Kant’s is: why? Kant, in fact, throws in our faces an absolute truth – just punishment *is* retribution – that is not demonstrated as true, but rather, it is *assumed* to be true. Kant does not demonstrate that the justification of punishment is retribution; rather, he *affirms* that it is so. Kant also fails to explain why a punishment that is not limited to retributivism, or even that, with complete disregard for retributivism, simply aims to the rehabilitation of the criminal should be an infringement of justice. Moreover, Kant tells us that ‘the penal law is a categorical imperative,’ but he doesn’t tell us *why*. Again, we are asked to make a leap of faith and just trust him. Indeed, the ‘categorical imperative’ rule as applied to penal law is, without further justification, an ‘empty formula.’” *[italics in original]*

Problem #2 (Kant): Unjust Laws Result in Unjust Retribution

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“On the premise that from an empty principle nothing can be derived in terms of content, Klug observes how the Kantian categorical imperative, being *per se* an empty formula, could be applied, for instance, by ‘a community of gangsters.’ And unfortunately, history is full of examples where the Kantian formula has been ‘filled’ with the wrong ‘content:’ thus, in Nazi Germany the Kantian ‘thou shall’ became a dreadful ‘thou shall kill.’ After all, that was the categorical imperative of the new system, and thus accepted and obeyed because ‘true.’ But if the “thou shall” is, *per se*, an empty formula from which nothing in terms of content can be inferred, then most definitely it cannot serve to justify the equation that punishment = retribution.”

Problem #3 (Kant and Generic): No Clear Ethical Justification for Vengeance

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“[I]t is by no means clear why, under an ethical point of view, evil needs to be compensated by evil, and not by good: it can very well be argued that retribution in and of itself, without any further purposes, will not lead to anything good; rather, it will hurt human dignity.”

Background: Hegelian Theory of Retribution

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“Albeit starting from the same premise that punishment is retribution, Hegel reaches a different conclusion than Kant on the quantification of punishment. Hegel, in fact, rejects the ‘eye for an eye’ approach, opting instead for a punishment that equals the crime in terms of value. Moreover, according to Hegel, the criminal has a *right* to be punished; through punishment, in fact, the criminal is honored as a rational being.” *[italics in original]*

Problem #1 (Kant and Hegel): Retribution Disguise for Vengeance at Hands of State

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“At the end of the day, once we’ve pierced through the philosophical superstructure of Kant’s and Hegel’s theories of punishment what we are left with is an idea of ‘just punishment’ that strikingly resembles vengeance – public vengeance at the hand of the state.”

Problem #2 (Kant and Hegel): Retribution Not Justice but Gratification of Revenge

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“With an act of intellectual courage typical of his character, Holmes openly admits what most retributivists to this day refuse to admit – namely, that an essential (albeit not unique) element of criminal punishment is vengeance: in Holmes’ own words, ‘it has never ceased to be one object of punishment to *satisfy the desire for vengeance*.’ According to Holmes, this fact is ‘made clear’ if only one ‘consider[s] those instances in which ... compensation for a wrong is out of the question.’ In those cases, where no restoration or compensation is possible, Holmes argues, punish- ment ‘is inflicted *for the very purpose of causing pain*.’ Insofar as this punishment ‘takes the place of compensation,’ Holmes concludes, ‘one of its objects is to *gratify the desire for vengeance*. The prisoner pays with his body.’” *[italics in original]*

Opening\Closing Quote

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“If people mean it when they say, ‘I want *justice*, not *revenge*,’ then retribution cannot offer them what they are looking for.”