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**RETHINKING THEORETICAL FOUNDATIONS OF
RETRIBUTIVE THEORY OF PUNISHMENT**

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“If doors of perception were cleansed everything
would appear to man as it is, infinite”

— William Blake

I Introduction

THE LEGAL theory of punishment, which has based its foundational edifice on the bedrock of revenge, as a justification to punish, has been formulated in its best form by Immanuel Kant and is famously styled as the retributive theory of punishment. Retributive theory categorically asserts that it is the criminal guilt, which is the real basis of punishment, irrespective of the social utility of such punishment. The retributive theory is primarily based on the ‘justice model’ wherein, as Kant maintains, guilt is a *necessary* condition for the legitimate infliction of punishment. Thus, punishment of innocent, in retributive scheme of things, is a conceptual and moral aberration. The basic and core foundational elements of retributive theory are right, justice and desert. This monograph attempts to deal with all the three aspects. However, before stepping into these elaborations, it is more important to ‘clear the air’ and disentangle the labyrinthine complexity, which has crept in legal theory about retributive theory. This is due to unwarranted discourse, especially but not only, by Indian legal theorists as well as justices in their variegated writings. It is pertinent to examine some of such unsubstantiated and off the cuff remarks made by some authors, which can be described as ‘*folklore* jurisprudence’ (borrowing the expression from Upendra Baxi) about the retributive theory of punishment.

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The important aspect of folklore remains that it is marked by ‘lack of proof’ or ‘any research’ but merely passed on by ‘word of mouth’ which, at best, gives it the hue of gossip or guesswork! To take one instance of such *folklore* jurisprudence, reference can be made to the manner in which one Indian criminologist describes the ‘retributive theory’. In his book on *Jurisprudence*, Paranjape explains retributive theory in the following terms:¹

In primitive societies the punishment was mainly retributive ... According to this theory evil should be returned for evil without any regard to consequence. The theory is based on the rule of natural justice which is expressed by the maxim “an eye for an eye and a tooth for a tooth”. The theory, therefore, emphasise that the pain to be inflicted on the offender by way of punishment must outweigh the pleasure derived by him from his criminal act.

What is described here as retributive theory is actually some kind of pre-classical notion of vengeful retribution. Even the most superficial reading of Kant would make it clear that the maxim of “eye for eye and tooth for tooth” has been rejected by him for literal application as both impossible as well as implausible.² As if this were not all, later on the author rather *irresponsibly* describes this obsolete rule of *jus talionis* (return like for like) as some ‘rule of natural justice’!

Further, the lack of understanding is reflected by the author by providing justification of retributive theory in utilitarian terms! His justification that “pain to be inflicted on the offender by way of punishment must outweigh the pleasure derived by him from his criminal act” is the language employed by utilitarians such as Bentham. Such blurring of concepts is acceptable in a rather famous book of jurisprudence at undergraduate level, perhaps, due to the overall epistemic neglect in the area of retributive theory in India. As if it were not all, the author, giving less than half a page to the theory, concludes:³

The theory of retribution owes its origin in the crude animal instinct of individual or group to retaliate when hurt and, therefore, its approach to offender is vindictive and out of tune with the modern reformative concept of punishment.

1. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory* 158 (2004).

2. This point will be discussed in detail later in this paper. Interestingly, the ‘select bibliography’ provided by the author doesn’t even mention any work of Kant or any other retributivist. But can such epistemic neglect or impoverishment be a justification for such ill conceptualization of retributivism?

3. *Supra* note 1.



In this context, retributive theory is equated to retribution *simpliciter* or private justice, thereby, constructing a meaning/ concept (signified) entirely contrary to the ordinary meaning explained, even by Kant himself, and understood generally by retributivists. Even if common sense is our guide, one can say that any theory is the expression of an idea to be institutionalized within a legal system, thus private justice necessarily falls out of even its *worst* distorted meaning of retributive theory.

The critique is not restricted to one author in particular, rather, to the general *misunderstanding* which hallucinates over the psyche of legal theorists when they speak or write about retributive punishment. Another example has been set by otherwise well known writer Lakshminath in his article published in the *Journal of the Indian Law Institute*.⁴ Contrary to the expectations of the reader, evoked by the title of the paper, in less than half a page the retributive theory is dismissed as belonging to ‘primitive and savage justice’ having no place in any ‘civilized society’.⁵

The problem is not confined to authors of criminal law only but reflected in the writings of judges as well. For instance, as learned a judge as V.R. Krishna Iyer J relying on Salmond’s wisdom dismisses retributive theory as a relic of some bygone era. Iyer’s thoughts on punishment need to be discussed and debated at length. This is because he has expressed radical and insightful views on the institution of punishment in his judicial as well as extra-judicial writings. Although, Iyer’s contributions to the criminal justice system in general and punishment in particular are very radically revolutionary as well as insightful, his views on retributive theory are not just unacceptable but also incorrect. Talking about the ‘traditional trinity of theories’ (retribution, deterrence and rehabilitation), he argues that:⁶

There is yet another type of criminal justice - retributive punishment ... The vengeful retributive philosophy is what we find in action in the Middle East System of punitive brutality, although the rest of the world more or less have bid farewell to this blood thirsty operation.

4. A. Lakshminath, “Criminal Justice in India: Primitivism to Post-Modernism”, 48 *JILI* 1 (2006).

5. *Id.* at 35. Further, adding to the confusion, *just deserts* theory is discussed in the same paper as something distinct from retributive theory. The ironical fact remains that just on previous page, the author approvingly cites the views of H.L.A. Hart (without mentioning the source!). The irony lies in the fact that Hart not only considers retributive theory as indispensable in fixing liability and in distribution but he has clearly formulated, in categorical terms, that *just deserts* is part and parcel of retributive theory. See, H.L.A.Hart, *Punishment and Responsibility* (1979).

6. V.R. Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India* 331-32 (2000).



In this context, it may be noted that equating retributivism with ‘punitive brutality’, a form of punishment which is *disproportionate* and cruel or pre-classical notion of punishment, is entirely misleading. This point will be further discussed in the next section. Further, to say that ‘rest of the world’ has bid farewell to retributive punishment is to say something which is factually incorrect. H.L.A. Hart has categorically found retribution to be an integral part of discipline to punish. Indeed, he argues that liability can only be fixed based upon retributive principles.⁷ Further, there has been a renaissance of retributive theory in available literature on punishment in the late twentieth century.⁸ Thus, such sweeping generalizations, that too from the pen of such an eminent writer, not only begs the question but also disturbing. After all, at least one expects criticism of the available works on retribution. Merely brushing them off as non-existent by not mentioning them seems highly objectionable and inappropriate.

The retributive theory exists irrespective of dislike or disagreement of various criminologists and moral theorists. The ‘bad press’ and unsubstantiated gossip about the theory has not been able to destroy the theory itself. However, the disagreeability of many scholars has, for sure, created a clout which has prevented the readers to grasp the theory in its ‘is-ness’ or the way it actually exists. This, in turn, has led to a strange event where the prejudices, pre-occupations and opinions of scholars, who disagree with retributive theory, have become the constitutive elements in understanding the theory of retribution itself.

The blame, perhaps, is also partially shared by the votaries of retributive theory. This is because they have failed to unmask or refute these baseless and unsubstantiated prejudices, something which can be done merely by reading original texts of Hegel and Kant – the pioneer exponents of this theory. Thus, in order to fully comprehend the meaning as well as merits of the retributive theory, one has to begin by outlining what it is *not*. Thus, the myth-making or what can be described as ‘*folklore* jurisprudence’ of retributive theory needs to be deconstructed. And this can only be done by some kind of exposé of such prejudices. Differently put, by evolving a cognitive understanding of such folklore, there is a need to expose and debunk the false notions which are associated with the concept of the theory. Retributive theory is based on rights, desert and justice. The most fundamental question which the theory asks is whether the state has the right to punish? If yes, then what is it that confers unto the state such a right?

7. *Supra* note 5.

8. On this aspect, see the literature cited in H.L.A. Hart, *supra* note 5.



The right of the state to punish

The problem of how to reconcile between the use of state coercion and individual autonomy is to be answered at the outset.⁹ The retributivists, from the very inception, maintain that *criminal guilt* is the only justification to use or inflict state coercion (punishment) over an individual. This is because by the act of deviance, the individual abandons and relinquishes his right to autonomy, thereby, making herself vulnerable to state coercion. This kind of problem, which is quite basic, cannot even be formulated intelligibly from a utilitarian perspective. Therefore, the writings influenced by the utilitarian outlook fail to grapple with the fundamental question: What gives anyone the right to inflict punishment on anyone? An attempt has been made to defend this retributive outlook on rights and justice in detail later in this paper. Suffice it to say that retributive perspective is rooted in values of rights and justice and not at all considerations of utility, which stands on shifting sands. It is pertinent to take up, in this context, some of the common clichés and prejudices that exist in most people's minds about the retributive theory of punishment.

Retributive theory is vengeful and vindictive

One of the most popular objections to the retributive theory is the claim that it is in fact rationalisation of vengefulness. However, the fact is that retributive theory is not, in any manner whatsoever, to give approval to such barbaric motives as a desire for vengeance or vindictiveness. This is more than clear from the very fact that the cornerstone of retributive theory of punishment is to inflict *proportionate* punishment or punishment that *fits* with the crime. The only idea behind this proposition is the desire to do justice.

The savage and barbaric notion of punishment inflicted in a disproportionate manner corresponds to the pre-classical notion of punishment. In this context, it is apposite to describe what was the pre-classical notion of punishment? The pre-classical notion of punishment views criminality or deviance as some *otherworldly* phenomenon. Crime was attributed to diabolic or satanic activity. Thus, disproportionate punishments were meted out to the people accused of crime. The dominant ideology that governed such form of punishment was that divinity will interfere on the side of good and virtuous.

9. Some theorists have described this reconciliation between the competing values of individual moral autonomy and legitimate political authority as the central problem of political philosophy. See, Robert Paul Wolff, *In Defense of Anarchism* (1970).



Thus, if one looks back, she will find that all possible irrational rules had been used for ascertaining the guilt of the person. There were *trials by battle* – in which the rival contestants used to fight it out, believing that divinity will interfere in the side of the one who is right.¹⁰ There were *hot iron rod* and *boiling water* methods of trial. It was believed with superstitious credulity, that the innocent person will not be burnt or scalded. Commenting on *modus operandi* of such methods, V.P. Sarathi has observed that “the priest issuing passports to paradise, who officiated at these ceremonies, must have practised several tricks to save persons in whom they were interested. Otherwise, the only possible verdict always would be that of guilty.”¹¹ The worst of all these practices was that of witch-hunt trials in sixteenth-century England. The women, who were accused of being witches were tied up and thrown into a pond. If she floated, she was labeled as a witch and burnt alive. If she sank, she died proving herself to be innocent. “What did the few moments of terrestrial agony matter when the soul was saved from eternal damnation and fires of hell!”¹² Such horrendous and disproportionate atrocities were perpetrated on victims in the name of guilt and punishment. Such pre-classical notion of punishment changed with the advent of classical times which changed the concept of crime as well. Crime became a ‘this worldly’ phenomenon and this led to the end of many superstitions associated with it.¹³ However, for some reasons retributive theory is confused, by some writers, with the pre-classical notion of punishment.

Retributive theory as expounded by Kant and Hegel is in no way an irrational cry for disproportionate or nastier punishment. Indeed, if the retributive theory is followed in a consistent and proper manner, it would lead to punishments becoming much lesser in number and more humane in nature.

Further, the objection is baseless due to the very fact that the retributive theory is built around the model which regards human beings autonomy to the fullest, as well as respects their rights or being and to remain human. This model is more attractive than the therapeutic or reformatory model which treats the accused as – ‘sick or helpless or like-a-child’ – or the utilitarian model wherein she can be – ‘used or manipulated for the common good’.

10. See William Shakespeare’s *Richard II*, Act 1, Scene 1. As a matter of fact, trial by battle was abrogated from the English law by way of a statute which was enacted only in 1817.

11. Vepa P. Sarathi, *Law of Evidence* 7 (2002).

12. *Ibid.*

13. See Katherine S. Williams, *The Textbook of Criminology* (2002).

Most of the people who do not like the *name* ‘retributivist’ are also persuaded by considerations that are clearly retributive in nature. This point is best illustrated by the example taken by Murphy:¹⁴

Suppose it was suggested that we punish negligent vehicular homicide with life imprisonment and first degree murder with a couple of years in jail, and suppose this suggestion was justified with the following utilitarian reason: Conduct of the first sort is much more common and dangerous than conduct of the latter sort (we are much more likely to be killed by a negligent driver than by someone who kills us with the primary object of killing us), and thus we should use the most severe deterrents against those who are genuinely dangerous. If we object to this suggestion, as most of us would want to, that this would be unjust or unfair because it would not be apportioning punishment to fault or desert, we should be making retributive argument.

This illustration helps us to bring home an important point that even those people who deplore retributivism do so only at a peripheral or superficial level. The superficiality lies in the fact that what is detested is the label of ‘retributivism’ and not the actual and core doctrines and theories associated with it. Thus, if they are probed a little deeper, it turns out that they support in substance the same values which are the core values of retributivism.

The failure of *jus talionis*

The most commonplace and oft-repeated criticism of the retributive theory, of Kantian variety, remains that the notion of *jus talionis* which it seemingly extols is inapplicable for any kind of literal application. As Hegel observes, “it is easy enough ... to exhibit the retributive character of punishment as an absurdity (theft for theft, robbery for robbery, an eye for an eye, a tooth for a tooth – and then you can go on to suppose that the criminal has only one eye or no teeth).”¹⁵

Hegel very correctly points out to the superficiality of the argument. The important point which needs to be understood is that the principle of *jus talionis* need not be applied in its exactitude or in the literal sense. Any literal application of the principle had been rejected, in categorical terms, by Kant himself. This point will not be discussed any further here

14. J. Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of Law* 84 (1979).

15. Hegel, *Philosophy of Right* 72 (1952).



as this has been fully discussed later in this paper. All that needs to be understood is that the principle betokens the fact that there must be some kind of parity between the crimes committed as well as the punishments prescribed for the crimes. Thus, the retributivist idea implores for some kind of proportionality between crime and punishment and it disregards all punishments which are disproportionate in every sense. This insight can hardly be disregarded by anyone who is not governed by a pre-classical notion of punishment, a notion, which has been discarded almost in all legal systems of the world in contemporary times.

Retributive theory and institutionalization of revenge

One of the objections against the retributive theory is that it is based on the primitive notion of revenge. And revenge has been the relic of our barbarous and uncivilized past and is no more useful, much less acceptable. This misunderstood criticism can be responded as it is gross misunderstanding that retributive theory is based on glorification of revenge or gratification obtained from any sadistic pleasure attained by infliction of revenge. Indeed, the argument of retributivist is that revenge needs to be the basis of punishment in order to satisfy the victim and not to let her take recourse to private justice. Thus, retributive theory is about institutionalization of the instinct of retribution so as to expiate the possibility of private revenge or justice dragged to the streets. Why it is so important needs to be further explained in this context.

“Revenge, understood at a very superficial level, is purely an ‘evil’; it seems nothing but an impulse to return blow for blow. Because you have been injured, anger prompts you to ensure that whatever has injured you shall suffer in the same way and to the same extent.”¹⁶ But this is not all that simple. One only needs to search a little more in order to unravel myriad of circumstances that may complicate this simplicity. In anger, you may inflict a heavier blow than the one received. You may call in an external aid in order to accomplish the revenge. Further, you may be unable to reach up to your enemy, and you may desire to attack someone else in his stead. And your injurer may retort to the reply and an infinite series of retaliation may be set up. Thus, it may be said that revenge has a very weird tendency to defeat its own end.

In spite of all this, the idea seems to have still inspired many minds that any one who injures another must also equally receive an injury of

16. James Hastings and John A. Selbie (eds.), *Encyclopedia of Religion and Ethics* 144 (1919).



similar nature.¹⁷ The important point which emerges is that in order to attain the core value of ‘justice’ in revenge, so as to negative its peripheral and unacceptable parts of retribution one needs, not suppression or extinction, but *regulation* and limitation.¹⁸ This may be done by institutionalizing it as an acceptable theory of punishment.

This is precisely the reason that “neither the legal codes, nor the most humane and rational or most-religious minded of philosophers can successfully rule out altogether the element of retribution from the institution of punishment.”¹⁹ This is why even thinkers who are as different in their ways of thinking as James Stephen and Rickaby see in the *desire of revenge* a perfectly legitimate emotion.²⁰ James Stephens may be summed up thus: One need to respect victim hatred and revenge. However, what is more important is to institutionalize it to avoid the excessive outbursts of it, which are not in consonance with other important values of criminal justice system.²¹

This is precisely the point which the retributive theory attempts to make. The point becomes increasingly relevant in the contemporary times where private justice, in the form of *lynching* of the accused *by mob*, has been on an unprecedented upsurge. One of the insights of retributivism is that institutionalized revenge discourages the masses from resorting to private justice as the desired result can be attained in more formal and organised manner. Thus, the apparent absence of victims as participants in criminal justice system and the recent emphasis on compassion towards accused in the judicial pronouncements has also become one reason for

17. Retributive theory emphasizes on *proportional* punishment rather than emphasizing on *equal* punishment. The relevance and importance of this point is one of the central issues of this paper.

18. It is most felicitous to refer to the Nietzsche’s psychological insight on *ressentiment* (a kind of resentment or hatred). Nietzsche believes that the *suppression* of the sentiment can poison a person from within. Thus he argues in favour of *expressing* it. See, Friedrich Nietzsche, *On the Genealogy of Morals* (1996), Essay I, section 10. However, as there are problems of disproportionality in individual expression, the state must ensure that the proper institutionalization is done so as to avoid the accumulation of poison in the psyche of the society at large. This is precisely the point which is being made by retributive theorists.

19. *Supra* note 16 at 148.

20. Rickaby almost as a mouthpiece of Roman catholic church is quite strong on this point, “Vengeance undoubtedly prompts to many crimes, but so does the passion of love.... it would scarcely be an exaggeration to set down one-third of human transgressions to love, and another third to revenge; yet it is the abuse in each case, not the use, that leads to sin.” *Id.* at 149.

21. James Fitzgerald Stephen, II *A History of the Criminal Law of England* 81 (1883).



ordinary masses to resort to such *extra-legal* activities. Thus, the misconception that retributive theory glorifies revenge is entirely misplaced one and, indeed, the presence of revenge in an institutionalized manner, as advocated by retributivists, is something integral to institution of punishment in any democratic system. In this sense, it is highly appropriate to say that justice, 'in one of its most important aspects, is but a tamed and civilized revenge'.

In an upshot to the above discussion, it may be said that what is needed to be accepted at the outset is the 'is-ness' or existence of the retributive theory as *one* of the important theories which are of some importance in any discussion on punishment. It is not argued, in this paper, that the retributive theory is the only immaculate theory or it is beyond the pale of criticism. The Marxist critiques tendered for the theories based on 'Justice Model' may well be applied to retributivism as well. However, this much has to be understood that retributive theory should not be rejected without being considered as a theory at all. Thus, whether agreeable or not, the first important fact is that 'it just is' and can prove insightful in grappling with variegated problems in conceptualising the institution of punishment.

II Philosophical theories of punishment: From Kant to Bentham

"In moral philosophy it is now widely assumed that two most plausible types of normative theories are Utilitarianism and Kantian theories".²² The two theories form a radical and integral part and serve as a touchstone in the debates relating to justification of the institution of punishment. Joel Feinberg describes the debate between partisans of 'retributive' and 'utilitarian' theories as the 'classic debate' among philosophers over the justification of legal punishment.²³ Jeremy Bentham has been the foremost exponent of the philosophy of utilitarianism. The utilitarian theory of punishment is nothing but the result of applying utilitarianism as a general ethical theory to the issue of morality of punishment. There is a need to unravel the clear distinctions of the two philosophical theories in order to better understand the distinctive features of retributive theory of punishment which will emerge clearly on contrasting it with its utilitarian counterpart.

22. Allen Buchanan, 'What's so Special About Rights?' *Social Philosophy and Polity* 2:1 Autumn (1984).

23. Joel Feinberg, 'What, if Anything, Justifies Legal Punishment', in Feinberg and Coleman (eds.), *Philosophy of Law* 727 (2000).



Bentham and Utilitarianism

The most thoroughgoing and elaborate formulations of the utilitarian view of punishment is expounded in the writings of Jeremy Bentham. Greatly impressed by the formulations of Bentham, J.S. Mill wrote that Bentham has brought the theory of punishment almost to perfection. The principle of utility demands that whatever is being judged morally is to be judged from the point of view of its utility. According to Bentham, no actions are intrinsically good or bad in themselves – it is only their consequences with regard to pleasure and pain, happiness and misery that give their moral status. “When thus interpreted, the words *ought* and *right* and *wrong*, and others of that stamp have a meaning: when otherwise, they have none.”²⁴ Punishment is thus justified in terms of its social utility or in terms of its generally good social consequences.²⁵

Within the utilitarian scheme of things, punishment is considered to be inflicted without any proper ground or justification if it fails to prevent some greater mischief, harm or evil. In other words, punishment is groundless in the absence of any utilitarian reasons for infliction of the same. Further, if the aims of punishment can be met by taking recourse to some other alternative means like social policy or education, then infliction of punishment is considered *needless* and thus unacceptable within the utilitarian framework.

The limits of punishment

Can there be or should there be any limits in infliction of punishment? This question is as important as the question of justification of punishment. The issue of limits brings in sharp contrast the opposing theories of punishment - the utilitarian theory and its retributive counterpart. For instance, retributivists would by no means be ready to agree on justification of punishment on the basis of its *profitability*. Instead, punishment for them is justified in so far it is *deserved*. The profitability or utility is of no regard to the retributivists. The justification and rationale so provided by the retributivists is entirely different from their utilitarian counterparts. The retributivists would argue that “the limits of desert are also the limits of justifiable punishment.”²⁶

24. J. Bentham, *An Introduction to the Principles of Morals and Legislation* 205 (1960).

25. Unlike the retributivists, for whom punishing the guilty is an *end in itself* irrespective of any gain in social utility. Bentham is categorical to the contrary in this context, ‘The word *deserving* or *merit* can only lead to passion or error. It is *effects*, good or bad, which we ought to consider.’ (*Id.* at 76).

26. Igor Primoratz, *Justifying Legal Punishment* 25 (1989).



The core distinction between retributive and utilitarian theories, with regard to the limits of punishment, takes a most poignant form in dealing with the ambiguous issue of killing of the innocent person. For retributive theorists, *guilt* forms the cornerstone in the determination of this issue and as an innocent is by definition guiltless, he can never be inflicted with any form of punishment whatsoever. However, the utilitarian position is much more ambiguous in this respect. In his discussion on defining punishment, Jeremy Bentham does not rule out the possibility of punishing an innocent person. He observed:²⁷

But so it be on account of some act that has been done, it matters not by whom the act was done. The most common case is for the act to have been done by the same person by whom the evil is suffered. But the evil may light upon a different person, and still bear the name of punishment. In such case it may be styled punishment *in alienam personam*, in contradistinction to the more common case in which it may be styled punishment *in propriam personam*.

Thus, in quite categorical terms, Bentham does not rule out the possibility that an innocent person may logically be punished within the utilitarian scheme of things. Indeed, Bentham disregards and discards the retributive rationale, that an innocent cannot be punished in any circumstances, as untenable. He maintains that ordinarily punishing the innocent would also be unprofitable. However, if there are any cases where such punishment can be profitable then it *ought* to be inflicted. Simply put, the touchstone which determines the possibility of punishing the innocent person is based on the principle of profitability.

If punishment inflicted upon the innocent person can possibly be abandoned without any preponderant inconvenience, that is, unprofitable infliction of punishment on the innocent person is unjustified precisely due to the fact that it is unprofitable. However, when it comes to profitable punishment of an innocent person, Bentham holds the view that such punishment, “not only may, but ought to be introduced.”²⁸ Those who are votaries of utilitarianism commit themselves, *inter alia*, to punishing the innocent whenever it is an alternative which has the best consequences ensuing it. As Bentham puts it, “to say ... of punishment so circumstanced that it ought not to be introduced, would be equivalent to a contradiction in terms...”²⁹

27. Bentham as cited in *id.* at 27.

28. *Id.* at 28.

29. *Ibid.*



Bentham, in his own writings, remains very much aware of the ensuing criticism due to the position he adheres to. Even as many critics consider it as a violation of the most fundamental principles of justice, he still remains unflinchingly adhered to his position. He argues that justice is a very abstract and fluid concept and the only means to attain justice can be his much heralded principle of utility. Bentham articulates his stand on punishing the innocent in the following terms:³⁰

To inflict punishment when, without introducing preponderant inconvenience, the infliction of such punishment is avoidable, is, in the case of the innocent, contrary to the principle of utility... and so is it in the case of the guilty likewise. To punish where, without introducing preponderant inconvenience, such punishment is un-avoidable, is not in either case contrary to the principle of utility; - not in the case of the guilty: no, nor yet in the case of the innocent.

This sort of conceptualization falls well within the broad contours of Bentham's philosophy. This also fits well with his repudiation of the notion of desert, which forms the cardinal principle for the retributivists to bank upon. Primoratz puts this point eloquently in the following terms:³¹

When one rejects the idea of *desert*, neither guilt nor innocence in itself can retain any real weight for one's decision about punishment. Punishment is justified, and ought to be inflicted, when it is useful, whether the person punished be guilty or innocent; it is unjustified and inadmissible when it is not useful, whether we are dealing with an innocent or a guilty person.

In a nutshell, the utilitarian view of punishment is consequence centric. The emphasis of the utilitarians is on the future. Further, the basic and sole justification that utilitarians have in view is its utility. Therefore, a punishment is unjustified wherever it is unprofitable. The retributists would not agree on this point. In their view, punishment is justified insofar as it is deserved, whatever the profitability might be.

Kantianism and retribution

Immanuel Kant epitomizes the classic retributivist position emphasizing on the fact that primary justification for punishing a criminal

30. Jeremy Bentham, *Principles of Penal Law* 87 (1962).

31. Igor Primoratz, *supra* note 26 at 33.



is that the criminal *deserves* it.³² Consider the following oft-quoted passage from Immanuel Kant:³³

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for society, but instead it must in all cases be imposed on a person solely on the ground that he has committed a crime; for a human being can never be confused with the objects of the law of things . . . He must first be found to be deserving of punishment before any consideration can be given to the utility of this punishment for himself or his fellow citizens . . . The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it... Even if civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

The justifications of legal punishment, according to this viewpoint, “must look backwards in time to guilt rather than forward to advantages.” There is a great emphasis on desert. Thus, the offence committed and the consequent ill-desert is the sole justification of punishment, which entails that the limits of desert are also the limits of justifiable punishment. Kant (with all other sensible retributists) would stress that a commitment to retribution is quite different from commitment to such unattractive things such as revenge or vindictiveness.³⁴

Further, Kant in line with his retributive philosophy, remains unflinching and unshakable in his conviction that *punishing an innocent* is morally wrong even when it would have better consequences than any other possible action. He, along with other retributivists, maintains that the law of justice is absolute and no compromise can be made in this

32. Also see, J.G. Murphy, ‘Legal Moralism and Retribution Revisited’, *Journal of Criminal Law and Philosophy* (2007).

33. Kant, *Metaphysical Elements of Justice*, as quoted in J.G. Murphy and J.L. Coleman, *Philosophy of Law* 120 (1997).

34. *Ibid.*



regard, no matter what are the circumstances and what price might have to be paid in human well being. He holds that the importance of justice is paramount so that “if justice perishes, there is no further point in men living on earth.”³⁵ Responding to the utilitarian view regarding punishing the innocent, retributivism argues that the human being stripped off his human dignity has been merely used as a means to serve a certain social purpose. The Kantian response to such utility approach is categorical. “What then are we to think of the proposal”, asks Kant, “that the life of a condemned criminal should be spared if he agrees to let dangerous experiments be carried out on him in order that the doctors may gain new information or value to the commonwealth, and is fortunate enough to survive?” His answer is that, “a court of justice would dismiss with contempt any medical institution which made such a proposal; for justice ceases to be justice if it can be bought at a price”.³⁶

The killing of the innocent: A philosophical quandary

The point which is further required to be considered is: Can the utilitarian position, which allows, in certain cases, killing of innocents, be countered on any other more stronger argument than mere assertion that it is wrong to kill innocent and that is the end of the road. This paper seeks to argue that there are other reasons as well. But as of now, there is need to pose the problem more clearly by considering the following case: If one can be certain that by killing few innocent people of a community, what can be averted is a massacre which would otherwise result and end up killing of multitude of people who are innocent. One of the arguments, as already given, would be that *injustice* cannot be done to a few in order to save many. This is because injustice, in itself, is anathemic to Kantian notion of punishment.

So far so good, but a deeper question can be asked as to why? – Namely, are we not *morally* responsible for our omissions (*i.e.*, here, failure to save lives of many) as we are for our commissions (*i.e.*, killing people)? Tersely put, are the differences in the two situations *morally*

35. Kant, *The Metaphysics of Moral* 159 (1970).

36. Kant, *The Metaphysics of Morals* quoted in Igor Primoratz, *supra* note 20 at 41-42. Primoratz, though himself a retributivist, holds the view that ‘[t]his kind of moral absolutism...is admittedly difficult to accept; but it is by no means the only alternative to the utilitarian readiness to “punish” the innocent.’ *Id.* at 60. However, this existing discomfort, even amongst retributivists, points to the fact that something more needs to be advanced in order to have a case against the killing of the innocent than mere *moral absolutism*. This is what is attempted to be done in the next section.



relevant differences? Jonathan Bennett argues that it is hard to see any moral difference.³⁷ For, what is the core value sought to be preserved? – If it is the sanctity of life, then any apparent moral distinction between the two situations is difficult to be made. For, given the knowledge, what would a person who values the *lives of innocents*, and wants that it should be saved, do? Does the moral case rest upon the different descriptions of ‘killing innocents’ or ‘letting the innocents die’? – One of the arguments can be that by not positively killing innocents we are at least preserving our own moral purity. However, it may be noted that this argument, in addition to being rather selfish, begs the question. For, to think that one remains morally pure if one does nothing is to beg the question that are we not as responsible for our omissions as for our commissions. And, if moral purity means not to choose anything which one regards as wrong then such moral purity may be impossibility in the complexity of life.³⁸ Thus, is it not anything more than dogmatism to assert that it would never be right to bring about such a good by adopting evil means?

Thus, if the fundamental principles of Kantian ethics or writers such as Anscombe argue that all they really care for is to save the lives of innocent’s *simplicitor*, then Bennett’s argument seems to be a weighty response to their views, *i.e.*, it does not seem that there is a crystal clear moral distinction between “killing babies” and “letting babies die” and merely on this basis the principle cannot survive. Perhaps Jeffrie Murphy’s comments are apt summation of the argument presented above. In his words, “... the judgment ‘never kill babies [innocents] under any circumstances’ does not explain the moral point of view but is, rather, a controversial moral judgment – or, if you prefer, [it] explains *a* moral point of view rather than *the* moral point of view.”³⁹

It takes us to a point where it becomes imperative to say that a moral principle which takes the stand against killing of innocent, in all

37. Jonathan Bennett, ‘Whatever the Consequences’, 26 (3) *Analysis*, (January, 1966).

38. Albert Camus most poignantly brings out this point in his essays in the book *The Rebel*. He speaks of the absurdities in which we are trapped, where the very acts with which we seek to do good remain entangled and intermingled with the imperfections of the world. Thus, what we call ‘bad’ is essentially dragged in doing a good act. Thus, in actual practice, almost always the categories that remain are that of ‘lesser evil’ or ‘evil’. In his own words, the Rebel’s “only virtue will lie in never yielding to the impulse to be engulfed in the shadows that surround him and in obstinately dragging the chains of evils, with which he is bound, towards the good.” Albert Camus, *The Rebel* 43 (1991).

39. Jeffrie J. Murphy, “The Killing of the Innocent”, 57 (4) *The Monist*, 541 (October, 1973).



circumstances whatsoever, begs the question and somewhat borders on the notion of dogmatism. Thus, still there is a need to provide justification to this principle which forms the bedrock of Kantian notion of justice and upon which the theory of retribution forms its edifice. This may be done, perhaps, by understanding the notion of rights-oriented legal system in general and by evaluating Kantian notion of rights in particular.

Fundamental basis of Kantian notion of rights

The moral overview of Kant is impregnated with the core proposition that all persons enjoy the primary status of being free and choosing individuals. They ought to be endowed with the basic right to make their own choices or to be left alone to work out their own lives or decide for themselves—for better or for worse. This is the most fundamental and basic right that one possesses just because one is a *person*. Respect for this right is what Kant describes as respect for *dignity* of humanity by not treating people as *means only*.⁴⁰

Further, Kant distinguishes between two types of duties – perfect and imperfect duties. Perfect duties are those duties which are *resting upon rights* of another person, whereas imperfect duties are those duties which are not rested on any rights.⁴¹

Thus, when a person has right, he has a claim against interference. Simply to refuse to be of help to someone, when you can be, is not the invasion of the other person's rights because it is not to interfere with him at all. In a similar fashion, when any person interferes in other's life by invading the rights of others, she forfeits and relinquishes her own rights and renders interference by others into the area of her rights as legitimate. (Kant calls it a kind of 'moral authorisation' – *Befugnis* to interfere).⁴² This justifies the stale action by interfering in the rights of those who harm others, because, by trying to harm others, they forfeit their right against interference.

However, if the only way possible to save someone from harm would be by interfering with an innocent person (*i.e.*, she has not forfeited her rights by any of her own action), one must not save the person who might be harmed, for this would be violative of a perfect duty – of

40. This forms the core notion of Kantian philosophy that respect for persons is an *end in itself*. It sharply contrasts with the utilitarian approach which treats persons as a *means to an end* – the end being social utility.

41. Kant also described perfect duties as *duties of respect* and imperfect duties as *duties of love*. See I. Kant, *The Doctrine of Virtue* 134-35 (1964).

42. I. Kant, *Metaphysical Elements of Justice* 35 (1965).



non-interference. And in Kantian framework, in cases of conflict, perfect duties override imperfect duties. Put it differently, in Kantian terms, it would be violation of the basic right of the innocent *without any justification*.

To revert back to the original question as to why would one not be blamed morally for our omissions which, in this context, would mean why would one not be blamed for death of numerous of innocents due to our omission to kill some innocents. The Kantian response would be that no one is justified to interfere with the rights of others unless the other has done something which strips one off the rights so vested. Thus, even the state cannot be justified in taking such an action, and this is all the more true, in a society which is rights-centric. And needless to say, the Constitution of India gives paramount importance to rights by enshrining them as so fundamental that any law made by the legislature, even if passed unanimously by the entire Parliament, cannot stand its *vires* if it violates any of the guaranteed fundamental rights.⁴³

The upshot of the analysis of Kantian thesis of rights and duties reveals that *dignity* of person is a core value of his thesis. A person needs to be respected in making value decision about her life and in various choices to be made by her in the course of lifetime. Further, part of respecting them in this sense is *not* to use them *as a means* in one's own suited calculations of what would constitute good for others. Thus, under Kantian scheme of things, it is fine (indeed admirable) for a person to sacrifice herself for the interest of others by her own choice. But it is presumptuous (because lacking in respect of the choices) if anyone, including the state, chooses to sacrifice the person. This is the business of the person herself and none else.

Interference may be permitted only against a person who, by her own (evil) actions, has given up her right against interference. Innocent persons by their very fact of being innocent have not done this. And, therefore, it is absolutely wrong to sacrifice an innocent, altogether not to kill aggressors. The rationale for discussing the Kantian theory on rights is to impress upon the Kant's point that it is 'unjust to kill innocent' is not some emotional or sentimental appeal. Rather, it needs to be appreciated in its proper perspective of this rights thesis, which advances a justifiable argument for the proposition. This further becomes important as this betokens the point which we want to pursue that in any right based legal system, which considers the 'rights' as an important aspect of its framework, it is only the retributive theory of punishment, based on Kantian ethics, which can be fully relevant and not any theory which is

43. Art. 13, Constitution of India.



entirely utilitarian as that would violate the basic hypothesis which forms the cornerstone of any rights-based legal system.

The above discussion helps to impress upon the fact that the retributivist case against the killing of the innocent is not merely some moral rigidity; rather, it rests on more fundamental proposition of respect for the individual *autonomy* which is ensured by the 'rights' principles. Kant's rights-approach believes that individuals are assumed to have the capacity to determine their own ends as free and rational creatures and to live their life acknowledging this capacity in all other members of the society of mankind. This is done by evoking a *deontological* (or absolutist) conception of right which overrides any social utility. Kant's theory on punishment is a rationalist argument and has come to be known as a natural rights theory.⁴⁴ In *The Metaphysical Elements of Justice* (1965), Kant rejects the utilitarian arguments of Beccaria while strengthening his 'rights' approach into the absolute binds of deontological reasoning. He argues that we cannot look to calculations as to the effects of punishment, or non-punishment, upon the sum of goodness in the world (whether we define that goodness as pleasure, satisfaction of desire, etc.), but must relate punishment to the test of whether it satisfies the person's capacity for *autonomy*. Kant remains categorical on this point:⁴⁵

The rights of man must be held sacred, however great a sacrifice the ruling power may have to make. There can be no half-measures here; it is no use devising hybrid solutions such as a pragmatically conditioned right halfway between right and utility. For all politics must bend the knee before right, although politics may hope in return to arrive, however slowly, at stage of lasting brilliance.

Thus, the rights-approach provides a much more comprehensive justification of the proposition that innocents shall not be punished irrespective of the fact that it leads to a greater social utility or not. Further, the utilitarian theory of punishment would always be at odds with the rights-approach and, which in turn, would make such a theory unacceptable in a legal system, which is rights-oriented. On the contrary, retributive theory of punishment is the only valid theory in a system, which respects rights of individuals.

Lastly, it may be added that in the context of international law the aspect of killing the innocent takes a controversial and debatable issue in itself. The non-combatant innocents in wars, particularly in the modern wars, are killed myriad of times, e.g. through antimorale terror bombing.

44. This Kantian conception of putting right over good as a categorical imperative has come to be known as *Deontological Liberalism*.

45. Kant as quoted by Morrison, *infra* note 60 at 131.



The above line of argument certainly opens possibility of a philosophic discussion of such problems as just war and the nature of war crimes.⁴⁶ Deliberate killing of innocent (or non-combatants) is prohibited by the just war theory and is a crime in international law. A retributive justification can only lead to an inescapable conclusion that killing non-combatants in a war elicits punishment. This is because no matter how good the consequences (less overall destruction, etc.) we simply do not have any right to do it. Or, they have not given up their rights of non-interference by any action on their part. For, this means that other people do not *belong* to me. They are not *mine* to be manipulated as recourses in my projects. How can such a thing be in the interest of humanity when its practice would change the very meaning of ‘humanity’ and strip from it the notions like rights, dignity and respect? This is precisely what Kant means when he memorably says that:⁴⁷

[A]ny undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself, if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment ... All other standards fluctuate back and forth, and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict justice.

Thus, the retributive theory of punishment, fully understood within the paradigm of rights principle, advances the view that what is central in morality is notions like rights, dignity, freedom, and choice rather than *merely* the notions like maximizing the general utility.

III Retributivism and cruel and unusual punishments

The notion of desert, which lays the cornerstone of the retributive theory, needs more elaboration and elucidation. Thus, there is a need to understand what exactly is the meaning and relevance of the notion of *desert* in the contemporary times and how it forms an integral part of any acceptable theory of punishment. Further, it needs to be clarified that the notion of desert nowhere embraces such punishments which are considered cruel and unusual or bad *in themselves* due to the punishment’s diabolic and atrocious character.

46. The ‘modern’ war also embraces Hugo Grotius with his memorable emphasis on *temperamenta belli* (insistence on minimization of suffering in war).

47. Kant, *supra* note 42 at 149.



The retributive theory “must look backwards in times to guilt rather than forward to advantages.”⁴⁸ This is further accentuated by its great emphasis on desert. The English word ‘desert’ is etymologically the variant of the old French expression ‘*deservir*’ meaning ‘deserve’.⁴⁹ Thus, the principal emphasis of any retributivists is on what a criminal deserves on merits for his wrongdoing. Differently put, “the retributivists seeks, not primarily for socially useful punishment, but for *just* punishment, the punishment that the criminal (given his wrong-doing) deserves on merits, the punishment that the society has a right to inflict and the criminal a right to demand.”⁵⁰

The next important question remains: Can a person deserve punishments which are cruel and unusual? Or, the more basic question would be: Are there certain punishments which one would want to oppose in principle, as they violate the rights of the persons being punished, regardless of their social utility (e.g. deterrence)? It is submitted that the question must be answered in the affirmative (Nobody would be a votary for torture, mutilation and such other barbaric punishments). Another and much more difficult question must next be confronted—namely, what is it about such punishments which makes them cruel and unusual in the sense of being wrong in principle? Further, does the retributive theory provide any justification for exclusion of certain punishments which are wrong in principle? These questions take a center stage and need to be answered in order to make any theory of punishment as acceptable in the contemporary epoch. This is because most of the international instruments contemplate and ordain a total ban on certain types of punishments in categorical manner. To take one instance, article 2 of the Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵¹ in categorical terms condemns infliction of any punishment, which is wrong in principle:

Article 2. Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

48. Joel Feinberg, ‘What, if Anything, Justifies Legal Punishment’, *supra* note 23.

49. *Webster’s Concise Dictionary*, Encyclopedic edition (2000).

50. Murphy and J. Coleman, *Philosophy of Law* 121 (1997).

51. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N./A/RES./3452 (xxx) 15 January 1976.



Thus, such punishments are not only considered as an ‘*offence to human dignity*’ but are also in violation of the purposes of UN Charter and Universal Declaration of Human Rights (UDHR).

Thus, any theory of punishment which fails to respond to the concern relating to *exclusion* of inherently wrong or inhuman punishments would be anachronistic to the contemporary times. In this context, it is very appropriate to note that such an imperative viewed from the utilitarian approach will simply not work. This is because of one very simple reason: The imperatives laid down in these international instruments do not tell us that torture and mutilation, as punishments, may be used when required by a *legitimate state purpose*.⁵² They tell us rather that torture and mutilation may never be used *at all*, regardless of the state purpose. Such an absolutist type of ‘side-constraint’⁵³ or ban is beyond the paradigm of any utilitarian outlook whatsoever. The attempt now is to understand the principles of retributive theory and their relationship with inherently unacceptable or what are called cruel and unusual punishments.

From *jus talionis* to *just deserts*: The foundations of retributive theory

Traditional retributive theories are not as precisely helpful in articulating the essence or making sense of *desert* as one would like though they do give us a start in the right direction. “Retributivism, as a general justification for punishment, proceeds in the following way – a way drawn from the theory of Immanuel Kant: Punishment is justified primarily by backward looking considerations, i.e., the criminal, having engaged in wrongful conduct in the past, *deserves* his punishment.” So far we may say that the retributive style ensures that there must be fairness in the legal system. Further, the institution of punishment based upon retributive theory of punishment would not allow any one to have ‘free-ride’ or to take unfair advantage from the system. However, the next important question is that how such an outlook helps in grappling with the more important question that how would it be helpful to determine that which punishments should be made intolerable or unacceptable? Thus, which are the *kinds* or *amount* of punishment which are wrong in principle?

52. In American law, the utilitarian interpretation of cruel and unusual punishment clause has taken the form of the so-called “least restrictive alternative” test, *i.e.* a punishment is cruel and unusual, if it is more *intrusive* than necessary to accomplish a legitimate state purpose. The general constitutional notion of ‘least restrictive alternative’ is articulated in *Shelton v. Tucker*, 364 U.S. 479 (1960).

53. The notion of ‘side-constraints’ as basic in moral theory has been developed by Robert Nozick, *Anarchy, State and Utopia*, Ch. 3 (1974).



In this respect, the retributive theory does not tender a clear cut or straight forward response. The anachronistic principle of *jus talionis* is based basically on such reciprocity theory of justice. The wrongdoer needs to reciprocate the debt he owes to the society in equal terms:⁵⁴

A transgression of the public law that makes him who commits it unfit to be a citizen is called ... a crime ... What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer of the scales of justice), that is, the principle of not treating one side favorable than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself.

This is one aspect of the principle of *jus talionis*. The criminal owes a *debt* to the law abiding members of his community; and, once the debt has been paid, it is possible to re- enter the community. Some version of the *jus talionis* (like for like) principle seems to be attractive initially. However, the most common criticism of Kant's theory is the claim that the principle of *jus talionis* cannot with sense be taken literally. As Hegel observes:⁵⁵

It is easy enough ... to exhibit the retributive character of punishment as an absurdity (theft for theft, robbery for robbery, an eye for an eye, a tooth for a tooth – and then you can go on to suppose that the criminal has only one eye or no teeth).

But this objection, as Hegel rightfully sees, is superficial. Surely the principle though requires likeness of punishment, it does not require *exact* likeness in all respects. However, Kant himself does not remain unaware of the problem which literal application of this principle poses. He also sees that there is a problem in applying *jus talionis* to “punishments that do not allow reciprocation because they are either impossible in themselves or would themselves be punishable crimes against humanity in general”.⁵⁶ With respect to rape, pederasty and bestiality, for example, Kant believes that imprisonment is inadequate as a punishment but that a literal return of like for like would either be-

54. Kant as cited in J. Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of Law* 84 (1979).

55. *Id.* at 82.

56. Kant, *supra* note 42 at 132.



1. Immoral (e.g. the rape of the rapist) or,
2. Impossible (e.g. it is not possible, by definition, to commit bestiality on an offender who is a human being).

Thus, Kant believes that rape would not be a sufficient punishment for rape and he considers banishment from the community being appropriate punishment for bestiality. He himself concedes to the fact that any kind of literal application of the principle of *jus talionis* is not a factual possibility. The only way in which the principle may be applicable is in its *spirit*.

What is it to capture the *spirit* of the principle? This may be articulated in the following terms: The principle of *jus talionis*, though requiring likeness of punishment, does not require *exact* likeness in all respects. However, this scarcely solves the problem. This is because if we relinquish or give up the notion of *jus talionis* then it turns out to be a wholly unacceptable proposition. Are we then to determine punishment on the basis of subjective intuition of some person? Such an alternative will be moving two steps backwards in trying to go one step forward. What is still needed is a more systematic theory which may provide an appropriate alternative to this anachronistic principle.

At this stage, there is a need to elaborate upon another dimension of Kant's understanding of punishment. He argues that this punishment must be "kept entirely free from any maltreatment that would make an abomination of the humanity residing in the person suffering it. The criminals' *innate personality*, he claims, protects the criminal against any morally indecent treatment."⁵⁷ What Kant seems to be suggesting is that the state must abstain from doing anything to a criminal which amounts to her humiliation and which causes a severe loss to her dignity as a person? He, in other words, provides a sufficient signal towards a ban on those kinds of punishments that have been described as cruel and unusual (torture and mutilation) even when the *like for like* principle would seem to require them. This is a very important insight, which exists, in the original works of Kant himself. Murphy, displaying his rare ingenuity in one of the passages, attempts to articulate this important Kantian insight. He tries to equate what has been called the *spirit* of *jus talionis* with the notion of proportionality. He observed thus:⁵⁸

Consider, again, the punishment for rape if the *like for like* position is adopted. If it be argued that the position does not entail that we rape the rapist but only do to him something of

57. *Supra* note 42 at 100.

58. *Supra* note 54 at 87.



equal evil, it can be replied that the question “What evils *are* equal?” does not admit of a purely formal answer. Thus a retributivism grounded on fairness can at most demand a kind of *proportionality* between crime and punishment, i.e. demand that we rank acceptable punishments on a scale of seriousness, rank criminal offences on a scale of seriousness, and then guarantee that the most serious punishments will be matched with the most serious crimes, the next most serious punishments with the next most serious crimes, and so on. This ranking must be reasonable, of course, but there is no reason to suppose that it will be determined solely or even primarily by considerations of fairness, i.e. no reason to suppose that seriousness can be totally analyzed in terms of fairness. In particular, considerations of fairness alone will not answer the question of which punishments will be allowed as the most serious. There will be substantive reasons for not allowing certain punishments (e.g. torture) even if these would satisfy a fairness principle of proportionality.

This principle, thus, demands a *proportional* punishment to be inflicted on the offender. It marks the beginning of the contemporary notion of *just deserts*. That is, punishment, which is not equal rather what, the offender deserves and, may it be added, without sacrificing her inherent dignity. That is why it is *just desert*.

Next important aspect to be considered is: What would the meaning of *proportionality* be in order to serve the institution of punishment in an effective and meaningful manner. The concept of proportionality can be understood distinctly in two ways:

- (a) Rendering such punishment to the offender which is equal in terms to what s/he has done to the victim, or
- (b) Ensuring that if the offender has committed most serious of the crimes than she must also be inflicted with most serious form of available punishment. (This is to say *desert* must be given in proper proportion).

Therefore, one may say that if imprisonment for life is the maximum punishment which is provided by any legal system, then such punishment must be inflicted on someone who commits the offence of murder (Assuming that intentional and deliberate taking away of human life is considered as the most serious offence in that legal system). Such punishment would satisfy the demand raised above in (b), that of proper proportion. However, this would fail to satisfy the demand, which is raised in (a), that of equal proportion.



And it was attempted to argue in the above passage that it is the concept of 'proper proportion' and not that of 'equal proportion' that can reasonably be derived from Kant's theory. Another more constrained way of re-conceptualising the aspect of 'equal proportion' would be that one may inflict the punishment of equal proportion on the criminal, provided that the punishment so inflicted should not be of such a nature (torture or mutilation) that it entails some serious moral objections in inflicting the same. (This is another way of saying the point that the *desert* awarded is *just* as well). Thus there are certain substantive restrictions which are permitted to bar certain forms of punishments from the ambit of a given legal system. In this context, it is appropriate to point out that the retributive theory also leaves open the space to effectively work in a legal system, wherein, death penalty has been abolished. This is because if punishment of death, in the popular social consciousness, is conceptualized as some kind of a *radical evil* and is of such a nature that it cannot be inflicted then it may serve as a kind of substantive restriction on punishment, even in a system which genuinely adheres to the retributive theory of punishment. This needs to be clarified in order to debunk the rather popular, but entirely misunderstood myth, that retributive theory is *necessarily* at odds with the abolitionist philosophy. Of course, whether such understanding of death penalty as a *radical evil*, is correct or not is an altogether different question and is beyond the scope of this article.

Coming back to our original discussion, so far it is established from Kantian notion of punishment that any punishment that devalues the dignity of an individual, by *mal*-treating her as a savage or sub-human, is wrong in principle and is at odds with the Kantian notion of acceptable punishments.

Any theory of punishment which bases itself in the notions of justice, rights and desert (as retributive theory does) must ensure that human beings must be treated in a way that would not degrade the respect for humanity itself. Otherwise, by way of institution of punishment, we would be dragged back to the uncivilized past of human history. One of the important dimensions of justice also requires that human beings must be rendered a special kind of status due to they being human and holders of human rights. This issue must be central one in any theory of just punishment.

Kant himself believes that there may be two ways in which one may fail to observe these basic fundamentals of punishment and, in turn, degrade punishment itself.

One way of doing this, he believes, is when one fails to distinguish between an animal and a human being or, differently put, when one starts treating human beings as animals or as mere inanimate objects, punishments



based on torture fall within such category. Using Kantian language, one might say that torture is addressed exclusively to the sentient or heteronymous – i.e., *animal* – nature of a person. “Sending painful voltage through a man’s ... to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes – these are not *human* ways of relating to another person.”⁵⁹ This very process is so horrendous that it reduces a human being into screaming, mutilated and trampled upon animal. It is not possible to prove this fact that is inherently unfair and wrong to treat human being in such a manner; for the very act, in itself is sufficient to evoke and disgust about it than any premises which might be used to prove the same. For one who fails to understand this, perhaps, it is difficult to make her to comprehend anything about morals. This is because it is a paradigm wherein the persons are not treated as if they are persons and thus ‘an undermining of that very value (autonomous human personhood) upon which any conception of justice must rest’.⁶⁰ This is the reason behind the international legal instruments that grant a right to every individual against torture and strips off any state authority to use torture upon human persons, irrespective of its utilitarian justification. All these moral absolutes fit well with the retributive theory of punishment, which is deeply rooted in the proposition to grant respect and special status to all persons.

Another way when punishment inflicted on the offender becomes unacceptable or objectionable, in Kantian sense, is when the system fails to respect humans by inflicting punishment on them of a highly disproportionate nature.⁶¹ A respect for the person’s autonomy desiderates that only those punishments, and of such amount or quantum, must be inflicted on her, which is directly related to her legal responsibility. A highly disproportionate punishment, or a punishment which is much more in quantum than the seriousness of offence, is generally based *not* on the concept of desert but on the general social disapproval, which is attached to such a conduct. Thus, it is unrelated to legal responsibility or blameworthiness; it is related to social *dislike* of a particular crime. Some of the glaring examples of such cases are punishments awarded for indulging in homosexual activity, punishment for indulging in narcotic drugs and other victimless crimes.

59. *Supra* note 54 at 89. In the contemporary epoch, with the emergence of the notions of animal rights, exposing animals to such brutal experiments would also be increasingly open to question.

60. For further discussion on this point, See, Jeffrie G. Murphy, “The Killing of the Innocent”, 57 (4) *The Monist* 527-50 (October 1973).

61. After all, those punishments which are in excess of the crimes committed by the offenders are also deplorable and unacceptable.



But can it not be said that what the society considers as heinous crime deserves to be punished in a severe manner. Put differently, if one agrees to the basic premise that serious offences must be punished with proportionally serious punishments, then can it not be said that the very fact that a conduct is deplored by the community at large serves as an index of treating the same in a severe manner?

This argument needs to be responded by understanding the fundamental notion that it may be true that a certain type of conduct evokes large-scale societal disapproval. However, this in itself is not a reason sufficient enough to criminalize such conduct or to severely punish such conduct. What remains to be established is that the basis of such disapproval must be *reasonable* as well. Thus, consensual same-sex love among adults cannot attract severe punishment or require criminalization merely because majority of the people believe it to be so. There must be something *objectively* wrong about such a conduct which needs to be established. This is what is meant when it is said that, “in a just society, therefore, punishment must be proportional to the *objective* seriousness of the conduct, not to its subjective seriousness”.⁶²

In this context, it would be interesting to develop a new argument against section 377 of the Indian Penal Code, which, *inter alia*, criminalizes homosexual conduct between consenting adults. Here, the argument of retributive theory, which believes in proportionality, would be: How far it is correct or just to punish intercourse between two consenting adults more severely than the amount of punishment prescribed for forcible sexual intercourse without the consent of an adult woman (i.e., rape). In other words, is not there something drastically wrong with the legal system, which punishes non-consensual and forcible sexual intercourse between two persons *less* severely than consensual sexual activity among the adult members belonging to the same sex? Viewed from this perspective, those opponents of retributive theory who view it as barbaric and vengeful fail to see how vengeance remain unbridled in ordinary criminal statutes. Put differently, is it not mere vengeance of the dominant heterosexual normatively to *punish* consensual same-sex love with proportionality greater than the punishment prescribed for non-consensual and forcible sexual violation of a human being? How does one begin to understand such *disproportionality*? Alas, how paradoxical it is to comprehend such absurdity, which is based on societies’ disapproval/ revenge against homosexuals; one needs the spectacles of retributive theory of punishment. Perhaps, the neglect and under-(non!) research in the area of retributive theory is the reason why such an argument is beyond

62. *Supra* note 54 at 80.



comprehension within the legal system. However, the important theoretical point being made here is that the retributive theory far from spreading unbridled vengeance, serves to check the same by emphasizing the fact that only adequate and proportional (*just*) deserts must be inflicted on the persons committing the crime.

In an upshot of what has been discussed in this part one can easily carve out Kantian notion of retributive punishment. The Kantian retributive theory holds the view that a punishment is wrong in principle and unacceptable in any legal system if:

- (1) It fails to respect the *dignity* of the individual person, or
- (2) It is entirely *disproportionate* to the 'objective' seriousness of the criminalized human conduct.

It may be reiterated that the former consideration, that of dignity, is more basic than the latter one. Simply put, there may be certain punishments which may pass the gate of proportionality but they may still be barred as they may fail to pass from the *dignity* of individual person's gate. This remains the case when we imagine torture as a mode of punishment. A torturous punishment may be fully justified on the considerations of proportionality, but its rejection would be certain as it will fail to pass the consideration of dignity, torture being an intrinsically inhuman method of punishment. Thus, it will be barred from the acceptability zone of Kantian style of retributive punishment.

Thus, the retributive theory of punishment of Kantian style excludes from its purview the inherently cruel or inhuman punishments as they rob off the autonomy, dignity and the very personhood of the offender. The retributive theory, rightly understood, is not merely concerned with *desert* in literal sense, i.e. equal punishment rendered back to the offender. Instead, the retributive theory emphasises on *just deserts* meaning thereby, that not same but proportionate desert must be rendered on the offender and such desert needs to be *just* and thus, excludes the possibility of inherently inhuman, cruel, savage or barbaric forms of punishment. In this sense, the notion of *just deserts* is morally and ethically superior and crystallized form of the anachronistic and obsolete concept of *jus talionis*.

IV Themes and conclusion

The odyssey on which a beginning has been attempted in this paper, is no less than some heresies or ruminations of some maverick thinker when he is on some 'mescaline trip'. However, the more profound aspect of all this remains as to what constitutes this huge hiatus between perceiving retributive theory in the manner it is done in this paper and the manner in



which the popular theory, or what may be described as ‘junk theory’, on punishment does? It has been argued that the epistemic impoverishment on the topic of retributive theory becomes the reason for such huge gap in perceiving the theory. The next important question remains: How can such blockages of the *doors of perception* be unmasked? The response one could offer is that all that needs to be done is to read the concept of retributive theory as discussed in original works of philosophers who are exponents of the theory of retribution. Some analysis of works of Kant and others remain both instructive as well as deconstructive of ‘folklore jurisprudence’ about the retributive theory and they provide an altogether distinct view of retributive theory.

Perhaps, the *folklore* jurists have failed, and rather consistently, to think about certain deeper aspects of the retributive theory due to their preoccupation with the rather infamous label of retribution. It is in this context that some of the important thematic conclusions of the monograph need to be summarized.

One of the first important points being that retributive theory is not retribution *simpliciter* or glorification of retributive instinct in any manner whatsoever. Instead, the very idea of retributive theory is to ensure institutionalization of revenge within the criminal justice administration. The institutionalization becomes important as legal system in the form of punishing the guilty merely ensures that the revenge of the victims is a very important aspect. Since revenge *simpliciter* can become the cause of disorder and barbarism, a viable alternative is punishment by the state. However, punishment based on certain theories, such as rehabilitation, have altogether started focusing on the accused, be that in viewing her as sick or diseased or in prescribing therapeutic methodologies, and have entirely forgotten that victim’s instinct of revenge forms an equally important reason and justification to punish. This has led to a desire for retribution lurking in the bosoms of the victims and their dissatisfaction with the criminal justice administration. This, in turn, propagates and nurtures the ideas of barbarism like mob lynching, street justice or private justice. Indeed, such conceptions also seem to find some kind of *legitimacy* in the social consciousness.⁶³

63. For instance, Prakash Jha’s bollywood blockbuster *Gangajal*, a movie based on the gruesome Bhagalpur blindings episode, depicts the will of the ordinary masses to attain a kind of collective retribution against the local *mafia* after blinding of mafia in prison, by dousing of acid in their eyes, but they themselves feel justified in taking law in their own hands and killing them at the end of the movie. Thus, the failure of criminal justice system to deal with such ‘inconvenient criminals’ provides a kind of legitimacy and justification to the people for taking the law in their own hands. Of course, the reasons for the appeal of such *Gangajal jurisprudence* in



Further, it has been argued, hopefully successfully, that that notion of *jus talionis*, which has received criticism from all the Kantian critics, is also somewhat misplaced. In fact, Kant has been blamed for something, which he himself has been critical of. The fact of picking and choosing only those passages from Kant wherein he talks about the notion of *jus talionis* is an error of judgment on the part of critics and not Kant himself. As shown earlier, neither Kant nor the other responsible retributivists literally adheres to the notion of *jus talionis* in its exactitude. Indeed, the contemporary retributivist idea of *just deserts* represents the correct outlook of both Kant as well as the retributive theory.

In this context, it is most felicitous to point out that the popular myth that retributive theory provides sanction to all sorts of inhuman and barbaric punishments is absolutely absurd and entirely based on *folklore* and bad press which the retributive theory has received. This is because anyone who knows even something about retributive theory knows that its primary emphasis remains on *proportionality* of punishment. This all or any kind of disproportionate punishments are condemned by the retributivists. In fact, as pointed out earlier, there are still many disproportionate punishments, which exist in our penal codes. The punishment of crimes which falls generally in the category of ‘moral dislike’ is grossly disproportionate, for example, crimes of homosexuality, possession of narcotics and other victimless crimes. However, the fact that no argument is given to reduce or abandon such punishments is due to the absence of discourse of proportionality, the hallmark of retributive theory, in the critical legal writings. This is due to the *misunderstanding* of retributive theory and the predominance of utilitarian philosophy in the realm of punishment. Obviously, the utilitarian outlook, to some extent, would provide justification for somewhat severe punishments as well merely because it goes well with the understanding of popular majority! However, justice based theory of retribution can never allow such ‘pop-music’ to mar the more important ‘classical’ values of justice, rights and deserts.

Further, an attempt has been made, in this paper, to establish that in the legal systems based on rights-oriented approach, it is only the retributive theory, which can be *fitting* for such systems as this theory is based on the old Kantian, and neo- Rawlsian notion of respect for individual autonomy as the cornerstone of any just legal system. No punishment can ever be justified in the retributivist scheme of things if the same infringes the

popular psyche are multifarious. However, important argument remains that the failure of the system to account for the revenge of the victimized group of people remains prominent one.



rights of the individuals for no fault of their own. It is this reason why the retributive theory in no circumstances can permit punishing of the innocent person whereas, its utilitarian counterpart is not so clear on this complex but important question.

Lastly, it needs to be emphasized that the moral argument of revenge being a detestable value in itself cannot stand universally true for all the non-western and non-Christian cultures. In the non-Christian cultures, which are by no means uncivilized, such assertion may not be all that acceptable. To take one instance of Indian culture where the *spirit* of revenge is venerated is reflected in the bloodthirsty, fierce and ruthless image of Kali. She represents the symbol of horrifying aspects of destructive forces. Wayne Morrison, in his insightful analysis, provides description of Kali which is worth citing here to emphasise the point:⁶⁴

Four- armed, garlanded with skulls, with dishevelled hair, she holds a freshly cut human head and a bloodied scimitar in her left hands ... Her neck adorned with garland of severed human heads dripping blood, her earrings two dangling severed heads, her girdle a string of severed human hands, she is dark and naked. Terrible, fang like teeth, full, prominent breasts, a smile on her lips glistening with blood, she is Kali whose laugh is terrifying ... she lives in the cremation ground surrounded by screaming jackals ... In her left hand she holds a cup filled with wine and meat, and in her right hand she holds a freshly cut human head. She smiles and eats rotten meat.

To the readers unfamiliar with Hindu culture, this might seem as horrifying spectacle of some gothic literature. But the point is that the Hindu culture venerates and reveres this bloodthirsty image of Kali and, needless to say, jurists like Morrison can see more advanced concept of life than it is Christian counterpart. The idea here is not to make value judgments on moral and religious traditions but to emphasise that 'other worlds' or other narratives do exist, wherein revenge can be differently conceptualized in a varying context and the mere fact that some people are 'not familiar' with such notions is not sufficient to label others as 'fools and madmen'. Therefore, revenge in a properly institutionalized form, as propagated by retributive theory, can be justified. Thus, the bald assertion that any form of theorizing on punishment based on *retribution* is out and out evil is nothing but an obsolete modernist platitude, which needs to be debunked. The purpose of this article has not been to claim

64. As cited in Wayne Morrison, *Jurisprudence: From the Greeks to Post-modernism* 18 (1997).



that a retributive theory of Kantian variety is the only correct version of theorizing on punishment. It has rather been to show that it is not, as it is often propagated, a silly primitive bit of intuitive vindictiveness. It is a theory and should be taken seriously and discussed, analyzed as well as criticized as any other theory.