

THE PLACE OF RETRIBUTIVISM IN PUNISHMENT

*Ekow N. Yankah**

TABLE OF CONTENTS

I. INTRODUCTION AND TEMPTING PATHS.....	1003
II. DESERT AND RETRIBUTIVISM: MORAL AND POLITICAL CLAIMS.....	1006
<i>A. Desert as a Moral Ideal</i>	1007
<i>B. Desert and Punishment</i>	1011
III. PUNISHMENT AND THE CIVIC PROJECT	1015
IV. CONCLUSION	1018

I. INTRODUCTION AND TEMPTING PATHS

It is no small thing to refresh debates on punishment generally and retributivism in particular. Leo Zaibert takes on this demanding project in *Rethinking Punishment*, a thoughtful, wide-ranging and worthy book.¹ If legal theory is interesting precisely because it engages so many different fields, it is open to criticism because it so often badly trails the fields it references. This has left parts of legal theory stuck in conversations where philosophy departments have long since introduced important sophistications. Zaibert's book aims squarely at bridging this gap, bringing to bear a broad array of important conversations in moral philosophy to criminal theory. Among the book's many qualities—its breadth and creativity—it is Zaibert's ambition to both reenergize and reshape a certain type of debate in punishment theory that most stands out.

Rethinking Punishment aims to correct what Zaibert takes to be a fundamental misunderstanding in criminal law theory, one that has deformed retributivist theories. Zaibert begins by highlighting a fundamental claim: retributivism is a philosophical claim about a

*Professor of Law, Cardozo Law School.

1. LEO ZAIBERT, *RETHINKING PUNISHMENT* (2018).

particular type of moral value.² The central claim is a well-known claim; entirely intuitive to some, barbaric and shocking to others. For the retributivist, imposing deserved suffering is good; that is, suffering in response to wrongdoing is morally valuable.³ Though hardly groundbreaking, Zaibert has a reason to fix this definition of retributivism as central. Focusing on retributivism as a (modest?) claim about moral value momentarily forestalls racing to deontic conclusions about the precise role that value plays in punishment. After all, it is the most natural thing in the world to recognize something has moral or ethical value without leaping to the conclusion that one always has a duty to promote it, much less a duty that systematically overrides all other values.⁴

Recognizing that retributivism is axiological, a claim that something possesses value, rather than necessarily deontological, a claim about necessary duties, one can hold that desert has value while being sensitive to other values in the world.⁵ Thus, “axiological retributivism” invites a form of value pluralism into retributivist theories of punishment.⁶ Particularly important, Zaibert insists, is understanding that the value of retributivism stands alongside the moral value of forgiveness.⁷

Though rehabilitating retributivism as an axiological claim rather than a deontic commandment to punish motivates the book, Zaibert engages a broad range of philosophical insights from outside punishment theory. Thus, there are a number of tempting and profitable conversations the book invites the reader to explore. For example, Zaibert grounds the value of desert in the way notions of desert makes sense of the narratives we impose on our lives.⁸ A world in which the virtuous are happy and the vicious are miserable is more just, the claim goes, than one in which the virtuous suffer and the vicious are happy.⁹ This is because a world in which happiness is randomly distributed across the deserving and undeserving (or worse, inverted) seems exactly that—

2. *Id.* at 13.

3. *Id.* at 3, 15, 21.

4. *Id.* at 15–20.

5. *Id.* at 13–15.

6. *Id.* at 19.

7. *Id.* at 189.

8. *Id.* at 38–45, 80–84. Zaibert links this impulse to the theodicy as a philosophical tradition, the effort to understand why an omnipotent God would allow evil or suffering in the world. *Id.* at 5.

9. *Id.* at 38–39.

morally random in ways that disappoint or even destabilize. Here, Zaibert's evocative writing breathes life into this tension, insisting that imposing a morally coherent narrative is one of the ways we fundamentally engage with value in the world.

There is something enticing about this line of thought. A part of each of us is naturally outraged when the vicious prosper—when powerful and cruel dictators escape to lives of luxury—while misfortune is visited upon the virtuous. But one sobering part of maturing is the realization that many things in life are difficult to gather into in a coherent narrative that responds easily to vice and virtue. It is a familiar struggle to explain to a child why some cheaters really do win; the cruel sometimes achieve power, wealth and fame and feckless conmen can become presidents. There is something telling about the way common explanations shift from criteria to criteria. “It may look like he got away with it but it will catch up to him in the end,” we offer. “Virtue is its own reward,” hinting darkly at some inner conflict racking the ne’er do well.

Others seek refuge in a belief a transcendent power will ultimately impose justice; “God will judge,” we assert knowingly. This impulse is not confined to the philosophically unsophisticated. Kant, for example, imported the same intuition into his intricate philosophical structure, adding an account of God as the ultimate backstop to make good his account of desert.¹⁰ The need to see the world as less terrifyingly random in its rewards and burdens presents powerful psychological reasons to wish desert exerted some natural force in the world.¹¹ But where that leaves desert as a moral matter is much less clear to me.

Another edifying conversation in the book is Zaibert's inspection of forgiveness.¹² Given that Zaibert stakes his flag on a value pluralism that renders retributivism more sensitive to the value of forgiveness,¹³ I would have welcomed further exploration into the intricacies of forgiving. Understanding when forgiveness is fitting (or perhaps even possible) would surely be important in knowing how to reflect its value in punishment. Our naïve notions might paint forgiveness as an unmitigated good; a grace one always thinks praiseworthy. But reflection

10. IMMANUEL KANT, *THE CRITIQUE OF PRACTICAL REASON* 170 (Philip McPherson Rudisill trans., 2016) (1788).

11. ZAIBERT, *supra* note 1, at 5; MAX WEBER, *WEBER: POLITICAL WRITINGS* 362 (Peter Lassman & Ronald Speirs eds., 1994).

12. ZAIBERT, *supra* note 1, at 119–20.

13. *Id.* at 179–83.

ought to temper such a view. We all have friends who forgive too readily, in ways that contribute to their constantly being treated poorly or may reflect insufficient respect for the ways others ought (or ought not) treat them.¹⁴ Forgiveness may be further complicated when one is thrust into the role as representative for others.¹⁵ The female lawyer rapidly rising up the firm ladder may experience sexual harassment she would rather ignore. Yet if she is in a position to hold others accountable or effect institutional change, she may rightly feel she is not at liberty to treat the affair as solely a personal injury. She may understand that to forgive too quickly would be to let others down. Surely, our responsibilities as representatives of others are critical to how the value of forgiveness should temper retributivism.¹⁶

These are just two of the many intriguing questions raised by Zaibert's creative and wide-ranging discussion. It is a testament to his desire to bring legal theory into closer contact with philosophical advances that one could highlight many other independently interesting debates besides. Though I will not pursue these intriguing questions further, I profited much from such discussions and think it a compliment to the author that the work generates such fruitful exchange.

II. DESERT AND RETRIBUTIVISM: MORAL AND POLITICAL CLAIMS

Despite the benefits and delight of Zaibert's broad conversation, there are two nagging concerns, one grounded in his moral theory, the other in the demands of political theory, on which I will focus. The first, already alluded to, is Zaibert's bid to locate the intrinsic value of deserved suffering.¹⁷ Zaibert offers a variety of hypotheticals to elicit the intuition that a world in which culpable wrongdoers suffer is more attractive than one where they do not, even if the suffering is shorn of any consequential benefits.¹⁸ Despite the initially tempting hypotheticals, I remain worried that suffering removed from its role in communicative punishment is a poor candidate as a bearer of moral value. Indeed, when tested, it seems

14. See MARGARET URBAN WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* 151–90 (2006).

15. See Michelle Madden Dempsey, *Public Wrongs and the 'Criminal Law's Business': When Victims Won't Share*, in *CRIME, PUNISHMENT AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 254–55 (Rowan Cruft et al. eds. 2011).

16. See *id.*

17. See ZAIBERT, *supra* note 1, at 14–15.

18. See *generally id.* (using hypotheticals throughout the text).

unlikely that we can claim widely shared, coherent intuitions about the role of pure suffering. Thus, my first worry can be described as one of robustness; can we confidently claim any robust commitments to suffering as a good? If our intuitions are not robust, they cannot bear the heavy weight of our legal institutions.

Secondly, even where our intuitions aligned on the value of naked suffering, that value collapses once we try to place desert within our punishment practices. Whatever lessons moral theorizing contains, one should not too quickly move between legal and moral theory.¹⁹ In short, I worry Zaibert's passion for informing punishment theory with moral theory leaves him insufficiently sensitive to the political nature of legal punishment. Whatever the truth about the intrinsic good in desert is, when punishment is part of a political project, it ought to be understood as justified on particular political grounds.²⁰ In a series of articles, I have argued the most attractive grounds is a republican ideal of protecting our ability to continue as equal citizens.²¹ Whatever the qualities of my argument, it has as a benefit of fixing legal punishment as a political project. If Zaibert's intuitions are "non-fitting", we may hesitate to carry them over from our moral or aesthetic sensibilities wholesale into our political practices.

A. Desert as a Moral Ideal

First, let us inspect Zaibert's claims about the innate attractiveness of deserved suffering. Zaibert motivates his claims about the attractiveness of desert with seductive examples from outside the bounds of punishment.²² While these examples carry the naïve appeal that the good guys should always win in the end, it is worth pausing to examine the robustness of these intuitions.

For example, Zaibert postulates that were Hitler trapped on a desert island, where we could either allow him to enjoy pleasant weather or

19. See Guyora Binder, Note, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 371 (2002).

20. See generally Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1 (2011); Ekow N. Yankah, *Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the Corruption of Lawfulness*, 7 CRIM. L. & PHIL. 61 (2013); Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457 (2015).

21. Ekow N. Yankah, *The Sovereign and the Republic: A Republican View of Political Obligation*, 61 NOMOS 102 (2019) (manuscript at 15–16) (on file with Rutgers University Law Review) [hereinafter *The Sovereign and the Republic*].

22. See ZAIBERT, *supra* note 1, at 74–78.

inflict unpleasant weather on him for the rest of his days, the world would be better if we opted for the worse weather.²³ This remains true, in Zaibert's view, even if Hitler would never know the weather was being imposed on him in response to his atrocities.²⁴ The example grounds a baseline intuition that deserved suffering, even outside its instrumental purposes, is morally attractive. If Hitler on a desert island with weather controlling devices seems fanciful, Zaibert soberly reminds of the 1960 capture of Adolph Eichmann in Argentina.²⁵ Whatever arguments could be made regarding the consequences of the Eichmann's trial, it seems purposefully recalcitrant to deny the trial's obvious retributivist impulse.

Despite the pull of Zaibert's arguments, I want to notice the fragility of at least my intuitions. When something bad happens to the undeserving—a wonderful person is stricken with cancer—I often feel a sense of not only regret, but some nagging sense of unfairness, similar to how I feel if a duplicitous person were to secure a tremendous promotion. Conversely, when something serendipitously good happens to the virtuous I am touched with child-like wonder. While these intuitions support Zaibert's arguments, I cannot claim to hold them robustly or coherently. Most telling, I am unsure I feel a strong sense that something good or valuable has occurred when some misfortune or suffering merely befalls the vicious. Learning that Stalin suffered a major stroke or Kim Il-sung had a heart attack on the whole leaves me cold.²⁶ So, Zaibert may be moving too quickly when he claims widely shared lay intuitions that wicked people deserve suffering.²⁷ Indeed, as Zaibert himself notes, the example may confuse rather than guide intuitions; a world in which we can control the weather may be too quixotic to know the value of Hitler's suffering disconnected from his knowledge that it is being imposed on him rather than just happening.²⁸

One way of describing this ambivalence is to notice that *suffering*, as opposed to *punishment*, is not obviously desert apt.²⁹ Once we leave

23. *Id.* at 74–75.

24. *Id.*

25. *Id.* at 78–79.

26. MATTHEW WHITE, *THE GREAT BIG BOOK OF HORRIBLE THINGS: THE DEFINITIVE CHRONICLE OF HISTORY'S 100 WORST ATROCITIES* 383 (2011).

27. ZAIBERT, *supra* note 1, at 74–78.

28. *Id.* at 77.

29. Admittedly, we may think some health outcomes are deserved in other ways. Good health may be deserved by virtue of good eating and exercise. Bad health by the opposite.

childhood behind, we recognized that whether a brutal dictator versus a kind humanitarian is stricken with cancer is only metaphorically described as something they deserve. Of course, there are moments when the metaphor tugs at us precisely because we indulge the fantasy that there is some finite amount of suffering in the world that need be distributed. And were that the case, we should hand out the worst to the cruel; if car accidents must happen, why not to the cruel first. But there is no pre-ordained amount of cancer or car accidents that must be distributed. As Zaibert recognizes when discussing natural disasters, there is much suffering that does not undermine or even engage with our sense of justice in the world.³⁰ Thus, the intuition that the world is, all things equal, better if the vicious suffer even if disconnected to their punishment strikes me as unstable.

Suffering that simply befalls others is an unlikely bearer of moral value. Because cancer is not desert apt, speaking of a brutal dictator deserving his cancer is at best metaphorical. Inspecting whether deserved suffering as such can be morally valuable leaves it impossible to separate the value of suffering from notions of imposed punishment. Bad weather cannot simply befall Hitler; to imbue the attendant pain with moral meaning it needs to be recognizable as a form of punishment in response to wrongdoing. But if retributivist desert has intrinsic moral value just so long as it is imposed as deserved suffering, then perhaps Zaibert can maintain a more modest version of this central thesis. Zaibert could still maintain that suffering as a part of punishment has intrinsic value.

I have my doubts that Zaibert can rely on widely-shared intuitions for even this modest thesis. Both armchair intuitions and a generation of psychological research appear to support the assumption that humans are hardwired to seek retributivist justice. Though widely proffered justifications for punishment straddle retributivist and consequentialist reasons, research has revealed a willingness to impose punishment even where consequentialist considerations are removed, leading scholars to attribute a “retributivist mindset” to the general population.³¹ Indeed,

30. See ZAIBERT, *supra* note 1, at 222.

31. Eyal Aharoni & Alan J. Fridlund, *Punishment Without Reason: Isolating Retribution in Lay Punishment of Criminal Offenders*, 18 PSYCHOL. PUB. POL'Y, & L. 599, 599 (2012); Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 437, 437 (2006); Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, in 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193–94 (Mark Zanna ed. (2008)); John M. Darley,

research has shown that people are willing to punish others without any consequentialist benefits even when costly to themselves.³²

But the long-assumed retributivist mindset has recently been revealed to be tenuous or at least more complicated than long assumed. Follow up research has shown that although punishers anticipated feeling satisfaction from imposing suffering, they actually derived less satisfaction than those who did not punish.³³ By contrast, punishers who received specific feedback that offenders recognized the suffering was intended as punishment, reported higher satisfaction.³⁴ Ultimately, punishment is meaningful when offenders understand its expressive content, internalize that message and transform the transgressive attitudes that lead to wrongdoing.³⁵ Remarkably, this transformation is not merely linked to consequential reasons; punishers were also unsatisfied where future behavior is deterred without an accompanying change in underlying norms and attitudes.³⁶ Ultimately it is not the bald imposition of pain or suffering we imbue with value but a latent assumption that punishment can have a transformative effect.

Zaibert is entirely correct that desert matters. It strikes me as bedrock that we believe great authors, artists, athletes, and scholars deserve our admiration.³⁷ The flip side of the coin may naturally be that those who culpably cause harm deserve punishment. But the cancer example illustrates that deserved punishment is nothing like an agent roaming the Earth ensuring that suffering as such is correlated to virtue or wrongdoing. Further, the long-assumed intuition that suffering is

Morality in the Law: The Psychological Foundations of Citizens' Desires to Punish Transgressions, 5 ANN. REV. LAW AND SOC. SCI. 1 (2009).

32. Kevin M. Carlsmith, *On Justifying Punishment: The Discrepancy between Words and Actions*, 21 SOC. JUST. RES. 119, 120–22 (2008).

33. *Id.*

34. Mario Gollwitzer & Markus Denzler, *What Makes Revenge Sweet: Seeing the Offender Suffer or Delivering a Message?*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 840, 844 (2009); Mario Gollwitzer, Milena Meder & Manfred Schmitt, *What Gives Victims Satisfaction When They Seek Revenge?*, 41 EUR. J. SOC. PSYCHOL. 364, 373 (2011).

35. Victoria McGeer & Friederike Funk, *Are 'Optimistic' Theories of Criminal Justice Psychologically Feasible? The Probative Case of Civic Republicanism*, 11 CRIM. LAW & PHIL. 523, 533–34 (2017).

36. *Id.*; Carlsmith & Darley, *supra* note 31, at 208–09; Friederike Funk, Victoria McGeer & Mario Gollwitzer, *Get the Message: Punishment Is Satisfying If the Transgressor Responds to Its Communicative Intent*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 986, 992 (2014).

37. ZAIBERT, *supra* note 1, at 64.

intrinsically valuable is tied to latent assumptions about the ability of punishment to transform transgressive norms and attitudes.

Finally, even when one recognizes that desert may play an important role in how we assess and allocate burdens and benefits in society, there is a gap between our punishment practices and the correlation of suffering with moral or ethical desert. It is to the question of “fit” we now turn.

B. Desert and Punishment

Even if one is fully convinced that suffering by itself figures into desert, Zaibert recognizes that would not by itself substantiate a retributivist criminal punishment system.³⁸ Yet he insists that once we recognize the importance of desert, there is little reason to deny its purchase when doling out punishment.³⁹ To recognize that great authors deserve recognition but deny that wrongdoers deserve punishment, Zaibert accuses, is to display an unnecessary panickiness towards punishment.⁴⁰

But rejecting moral desert as the basis of punishment is not based on unfounded panic but rather long-standing principled rejection. One perfectly obvious political commitment, typically chalked up as a tenet of liberalism but surely much broader, is the realization that the state is legitimately foreclosed from punishing a great number of interpersonal wrongdoings. There are countless vain or cruel things that people may do to each other which are rightfully beyond state power. To be sure, sometimes this is because punishing these transgressions would involve handing over vast and terrifying powers to the state. But this is hardly the sole reason. Across a slew of both recognizable and detectable wrongdoing, many are committed to the notion that the state has no role to play in matching punishment and desert.⁴¹ We have principled reasons

38. *Id.* at 91.

39. *See id.* at 85–86.

40. *See id.* at 85.

41. Michael Moore’s version of retributivism stands as a notable exception. For Moore, any *prima facie* moral wrongdoing is reason for retributivist punishment. Moore, of course, recognizes that there may be a host of reasons that defeat the *prima facie* case for punishment. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 189–229, 403–19 (1997). Moore’s retributivism, though influential, in this aspect, stands at the far end of the pole. In contrast, most people would reject that the state had any reason to punish, for example, interpersonal romantic betrayals even where they are recognizably wrongdoings.

far beyond the pragmatic to insist that the justification of state punishment be based on more than moral transgressions.

One way of noticing the important divide between desert as a moral concept and punishment as a legal and political practice is to return to Zaibert's most compelling examples. Recall that Zaibert ties the attractiveness of desert to the real-world example of the arrest and punishment of Eichmann, grounding the intuition that even where there are few consequentialist reasons for punishment, we often sense there is a retributivist value in wrongdoers experiencing deserved suffering.⁴² But Zaibert under-describes equally compelling examples that pull in the opposite direction. Take two other 20th century atrocities: the apartheid era of South Africa and the Rwandan genocide. Both produced murder and wrongdoing on a terrific scale.⁴³ Yet when the victims finally held the power to seek retribution, both nations decided to pursue some version of "truth and reconciliation" rather than mete out justice.⁴⁴ Neither ought to be read as an easy or happy story; painful decisions to forego "justice" were chosen because the alternatives were thought to be too thoroughly destabilizing of any successful future civic project.

Zaibert recognizes that such cases evidence that "pragmatic considerations defeat, or at the very least temper, considerations related to retributivist justice."⁴⁵ But the worry is that these cases point at something deeper than Zaibert's value pluralism. The "pragmatic considerations" Zaibert indicates are not simply countervailing values to be measured against retributivist justice. It would be inaccurate to understand these cases as measuring the value of forgiveness versus that of justice. At the very least, the core case of forgiveness is complicated where the only alternative is that of violent dissolution.

Rather, these cases highlight that legal punishment ought to be forestalled when its effect would be to undo the very civic project in which it is embedded. Thus, it is not a competing set of values, e.g. forgiveness, riding alongside retributivist justifications for punishment but rather an entirely different basis for our legal punishment practices; a justification grounded in distinctly political nature of criminal punishment as part of a civic project.

42. ZAIBERT, *supra* note 1, at 110–15.

43. Erin Daly, *Transformative Justice: Charting a Path Toward Reconciliation*, 12 INT'L LEGAL PERSP. 73, 78–80 (2002).

44. *Id.*

45. ZAIBERT, *supra* note 1, at 80.

The concern here of “fit” is separable from the “robustness” claims made earlier. The point is not to refute the claim that desert is part of our moral picture of the world. But even if Zaibert is right that notions of desert are first and foremost axiological claims of value, that does not yet establish the necessary link between desert and *punishment*.⁴⁶

In the normal case, that something is of value implies that the thing (value) should be promoted. But the normal view does not quite situate us in the peculiar case of remedial values. Even if we value reparative justice, we do not wish for more accidents in the world in order to realize more reparative justice. Similarly, even if retributivist desert is valuable in the face of wrongdoing, it is not the kind of unmitigated value we cheerfully promote. It would be quite peculiar to wish for more wrongdoing in the world in order to realize more retributivist value in the world. Remedial values, after all, are second best values, given something has already gone wrong. To refocus our conversation, even if Zaibert is correct, he owes us something more to bridge the gap between the mere recognition of desert as morally valuable and its place as a justification for legal punishment.

Examples such as the truth and reconciliation committees indicate that punishment is not only cabined by pragmatic considerations but justified by distinct political justifications. This of course is not a novel observation.⁴⁷ Elsewhere, I have argued at much greater length that disparate theories of political obligation frame the role of punishment as a political rather than moral question.⁴⁸ Even Kant, viewed as a foundational retributivist thinker, did not assume that the moral value of desert served as a premise for legal power.⁴⁹ Kant most (in)famously claimed if a desert island community were disbanding, retributivist justice would require the execution of the last murderer in prison.⁵⁰ He dramatically intoned, “If legal justice perishes, then it is no longer worthwhile for humans to remain alive on this earth,”⁵¹ and, “Let justice

46. See ZAIBERT, *supra* note 1, at 26–27.

47. See, e.g., BINDER, *supra* note 19, at 328.

48. See generally Ekow N. Yankah, *A Paradox in Overcriminalization*, *supra* note 20.

49. Jeffrie G. Murphy’s now-classic piece questions whether Kant is properly considered a retributivist. Jeffrie G. Murphy, *Does Kant Have A Theory of Punishment?*, 87 COLUM. L. REV. 509, 523–24 (1987); see also Mark Tunick, *Is Kant a Retributivist?*, 17 HIST. OF POL. THOUGHT 62 (1996).

50. IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 140 (John Ladd trans., Hackett Publishing Company 2d ed. 1965) (1797).

51. *Id.* at 138.

prevail, even though all the knaves in the world perish in the process.”⁵² Despite these melodramatic pronouncements, Kant quickly backtracks, arriving at the same conclusion that Zaibert notes: where doing justice threatens our ability to maintain our political bonds, retributivism must be set aside.⁵³ Even more importantly, when Kant turned his attention to legal punishment, retributivist urges faded from the picture.⁵⁴ Instead Kant premised legal punishment on a distinctly political value—the right of the state to prevent impositions on the external freedom of others.⁵⁵ Likewise, I have long argued that Aristotelian political theories, too often misread as marshaling the law to promote personal virtue, are properly understood as justifying state power by the republican goal of preserving an equal voice in promoting civic goods.⁵⁶

One might think Zaibert need not disagree with any of these particular conclusions about the need to further specify retributivism’s political fit. Indeed, his motivation in describing retributivism as axiological is to make room for other countervailing values when we turn

52. IMMANUEL KANT, ON PERPETUAL PEACE 93 (Brian Orend ed., Ian Johnston trans., Broadview Press 2015).

53. Kant’s hypothetical is both clear and telling. Even after arguing that justice metaphysically connects crime to reciprocal punishment, Kant notes:

The number of accomplices (*correi*) [in murder] might, however, be so large that the state would soon approach the condition of having no more subjects if it were to rid itself of these criminals, and this would lead to its dissolution and a return to the state of nature, which is much worse, because it would be a state of affairs without any external legal justice whatsoever. Since a sovereign will want to avoid such consequences and, above all, will want to avoid adversely affecting the feelings of the people by the spectacle of such butchery, he must have it within his power in case of necessity (*casus necessitates*) to assume the role of judge and to pronounce a judgment that, instead of imposing the death penalty on the criminals, assigns some other punishment that will make the preservation of the mass of the people possible, such as, for example, deportation. KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 50, at 141.

See also Ekow N. Yankah, *When Justice Can’t Be Done*, 31 L. & PHIL. 643, 655 (2012).

54. KANT, METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 50, at 140–41.

55. IMMANUEL KANT, LECTURES ON ETHICS 247 (Peter Heath & J. B. Schneewind eds., Peter Heath trans., 1963) (1930). For an excellent treatment of the distinction between Kant’s moral theory and political theory, see ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY (2009).

56. *The Sovereign and the Republic*, *supra* note 21. See generally Ekow N. Yankah, *A Paradox in Overcriminalization*, *supra* note 20; Ekow N. Yankah, *Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the Corruption of Lawfulness*, 7 CRIM. L. & PHIL. 61 (2013); Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457 (2015).

to punishment. But what these points indicate is not Zaibert's preferred position that retributivism is simply compatible with other values. Rather, these points indicate that something very different is fundamentally the basis of legal and political justification. These values are not merely fellow travelers, jostling alongside retributivism in justifying punishment. These arguments insist, instead, that punishment as a legal practice respond to a set of political justifications and set aside the purely moral value of retributivism.

III. PUNISHMENT AND THE CIVIC PROJECT

Though space does not allow for a fully-developed positive account of punishment politically justified, building on some of our earlier examples indicates the shape of such justification. As we noticed earlier, a commitment to retributivist principles often relies on implicit assumptions that imposed punishment will result in moral education and rehabilitation.⁵⁷ Further, there are countless wrongful injuries that do not constitute public wrongs that attract the state's attention.⁵⁸

These intuitions have powerful implications when punishment is instantiated in our legal practices. My intuitions of how we ought to punish a wrongdoer with whom I have no further chance of a civic relationship are difficult to pin down.⁵⁹ Whether we ought to spend any resources on tracking down a foreign national who has assaulted me and then left the country permanently, strikes me as a tricky question, more akin to the law of war or relations between nations than a normal case of punishment. Whatever reasons exist to punish are largely consequentialist in nature – ensuring that foreign visitors do not believe they can act with impunity—than any retributivist conviction. Similarly, I have no urge to impose punishment to vindicate our laws where the now absent offender committed a crime as defined by our laws but not theirs.⁶⁰ There may be times when the crime has visited grave material or symbolic harm to a member of our civic community when we may

57. McGeer & Funk, *supra* note 35, at 533–34.

58. See R.A. DUFF, ANSWERING FOR CRIME 51–52 (John Gardner ed., 2007).

59. Ekow N. Yankah, *The Right to Reintegration*, New Crim. L. Rev. (forthcoming); Antje du Bois-Pedain, *Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State*, in CRIMINAL LAW AND THE AUTHORITY OF THE STATE, 199, 202–04 (A. du Bois-Pedain, M. Ulväng and P. Asp eds., 2017).

60. See *Rex v. Esop* (1836) 7 C. & P. 456.

rightfully wish to express a defense of fellow citizens.⁶¹ But without strong reasons of this sort, a wrongdoer who has permanently left our community elicits very weak intuitions (at least for me) on whether we should inflict punishment even where it is relatively cheap to do so. Once the person is no longer a part of the ongoing civic project, the reasons for imposing punishment wane.

Zaibert may assert that his pluralism can accommodate these political justifications. Though retributivism ought to be seen as valuable, further conditions may be necessary to translate this value into our punishment practices, to determine when a wrongdoing is a public offense or worth spending resources to punish. Though Zaibert would be by no means alone in helping himself to this answer, this strategy comes at considerable cost. A pluralistic theory that insists on the value of retributivism only to note that this value always collapses when in competition with distinctly political concerns risks rendering retributivism trivial. Without telling us more than that retributivism lends richness to our moral reasoning, the strength of the retributivist impulse and how it translates into our actual punishment practices remains mysterious. The worry is that the retributivism only survives inspection because its adherents constantly reassure that it can be defeated by any more sensible competing political value. After all, describing the actual place of retributivism in our punishment practices seems a fair request for a book entitled *Rethinking Punishment*.

Once we demand that Zaibert place retributivist punishment in a system that explains the particular (political) nature of punishment, it is less clear that his position resolves the subtle questions with which he starts. First, the focus on the political nature of punishment separates punishment from mere suffering. If punishment is embedded in the larger scheme of preserving our civic project, then suffering disconnected to this project is harder to measure. The view of unrelated suffering as distasteful or barbaric becomes clearer. The wrongdoer who dies of a

61. One may call to mind the classic phrase "*civis romanus sum*," or "I am a Roman citizen," which was said to guarantee safety to anyone who could claim citizenship as they traveled across the Roman Empire. Likewise, the punishment of transplants who commit "honor killings," often of young, female relatives who have adopted the ways of new lands to which they have moved, arguing the killings are required by their native culture, strike me as importantly expressive of the need to defend the legally recognized claims of equality of the domestic jurisdiction. Cf. Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 107–28 (Linda C. McClain & Joanna L. Grossman eds., 2009).

horribly painful disease unrelated to his wrong is arguably simply tragedy on top of tragedy.

Secondly, this focus makes sharper some of the nagging questions Zaibert seeks to quell. For example, Zaibert worries about the relationship between suffering and authority. Precisely, he finds the view that deserved suffering loses all its moral value when imposed by someone without authority perplexing.⁶² While Zaibert recognizes that there might be reasons to prohibit vigilantism, he argues that it is a mistake to leap to the conclusion that the actions of a vigilante are completely without value.⁶³ Zaibert supposes that in recognizing the axiological nature of retributivist desert, we can glimpse why even the vigilante's act, where deserved, has some value.⁶⁴

But attempting to locate the moral value in the acts of a vigilante is now revealed to be the wrong sort of question. Imagine some gang of "rough men" roamed the land, imposing deserved but unauthorized suffering. Perhaps those suffering have committed serious but private wrongs against others. Perhaps, though guilty, they were acquitted pursuant to important legal principles, such as the need to find them guilty beyond a reasonable doubt or exclusion of illegally obtained evidence. Nonetheless, these rough men descended upon wrongdoers' homes and locked them in cages for roughly the same length of time that a roughly just legal system might incarcerate.

Such an example is, to my mind, confusing if not terrifying. It is not simply that vigilantism is dangerous, though it surely is. It is because what these men are doing almost sounds in a different register. It is not the purpose of our punishment practices to simply scan the world looking to ensure that all receive their just amount of deserved suffering. Rather, punishment responds to myriad important distinct values that must notice the public nature of the wrong and the importance of procedural protections. These features and many more are among the variables we reference off-handedly when we invoke the claim that punishment must be appropriately authorized. And without the cinematic features built into our comic book stories—a world where legal authority is breaking down or super-villains are beyond the reach of ordinary law

62. ZAIBERT, *supra* note 1, at 48–49, 66.

63. *Id.* at 48–49.

64. *Id.*

enforcement—the connection between the unauthorized imposition of *suffering* and *punishment* becomes tenuous.

IV. CONCLUSION

Though the work of legal theory typically begins with moral premises, then crafting legal practices in accordance, it should be remembered that the partially separate normative world of law sometimes offers valuable lessons for our moral practices. Thus, a clear-eyed view of the purpose of punishment also makes sense of some of the moral questions that trouble Zaibert. Take the republican justification that punishment is embedded in an ongoing project, justified in equal turns by protecting the ability of citizens to have an equal part in civic society and rebinding the offender to civic society after destabilizing wrongdoing.⁶⁵ Zaibert finds it puzzling that philosophers like Scanlon were willing to grant that certain moral reactive attitudes to wrongdoing—anger, resentment, etc.—could be deserved but were unwilling to grant that these attitudes revealed any intrinsic value in punishment.⁶⁶ Rather, Scanlon only viewed punishment as valuable where it plays a role in repairing the relationship between the wrongdoer and the wronged.⁶⁷ We further note that this philosophical intuition has a robust psychological foundation. This intuition is perfectly at home in the legal and political case of punishment. Thus, punishing someone who has otherwise permanently left our borders is puzzling, and more akin to war between nations than that of punishment. Punishment is justified in the legal setting when there is a political analog of repairing a relationship. In this way, perhaps legal punishment further cements the psychological reactions noted by McGeer and Funk.⁶⁸ Punishment as an institution has something to teach us about the moral case of punishment, making even clearer why the urge to punish disconnected

65. As Adam Smith remarked: “To bring [the wrongdoer] back to a more just sense of what is due to other people, to make him sensible of what he owes us, and of the wrong that he has done to us, is frequently the principal end proposed in our revenge, which is always imperfect when it cannot accomplish this.” ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 139 (Sentry Press ed.) (1759); see also Yankah, *The Right to Reintegration*, *supra* note 59; du Bois-Pedain, *supra* note 59.

66. ZAIBERT, *supra* note 1, at 63–65.

67. Thomas M. Scanlon, *Giving Desert Its Due*, 16 *PHIL. EXPLORATIONS* 101, 103–04 (2013); see also VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 45 (2011); ZAIBERT, *supra* note 1, at 64.

68. McGeer & Funk, *supra* note 35.

from a future ongoing relationship should not be seen as a brute intuition revealing the inherent value of retributivism, but as a regrettable urge to be tamed or a misfiring of appropriate moral sensibility in the usual case.

Ultimately, for all its applaudable intellectual breath and thoughtful mission to rescue retributivist claims from a single-minded association with the need to punish, Zaibert is insufficiently attentive to the need to ultimately place retributivism in our legal punishment practices and their political goals. But doing so need not abandon punishment to the simpleminded consequentialism that Zaibert worries renders criminal punishment merely technocratic.⁶⁹ Nor need we return to the standard picture of voracious retributivism, urging punishment whenever possible and checked only by the limits of cost. Focusing on the role of punishment as aiming at a particular political goal, the preservation and rebinding of a policy of equals, aims at something rich—certainly not a simple-minded or monistic consequentialism or retributivism that Zaibert rightfully critiques.⁷⁰ Further, such a view makes a place for retributivism, if not precisely the place Zaibert champions. In a republican criminal law, criminal law will matter because human societies are unable to flourish unless serious wrongdoing is denounced and curtailed.⁷¹ Additionally, victims are unlikely to feel their injuries are taken seriously unless some serious responses are collectively imposed. Zaibert is right to notice this is not a pure retributivism; the retributivist impulse is taken seriously because of its role in keeping civic society stable.⁷² But the retributivist impulse is checked, both by the extent to which punishment can be said to actually play a role in promoting an ongoing polity of equals and by the recognition that part and parcel of the same justification is rebinding offenders to the polity.

69. ZAIBERT, *supra* note 1, at 27.

70. *Id.* at 18.

71. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 464 (2015).

72. ZAIBERT, *supra* note 1, at 80.