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# **The Varieties of Attitudes towards Offenders**

Nicolas Nayfeld

## **Abstract**

I argue that penal philosophy should focus more on our attitudes towards offenders, since these attitudes can shed new light on theories or principles of punishment (of which they are often expressions) and also play a significant role in changing the face of criminal justice. Building on Strawson's "Freedom and Resentment," I define attitudes as certain ways of seeing human beings that logically include or exclude various emotional, behavioral, and linguistic responses, that can be more or less natural, and over which we have some degree of voluntary control. I argue that, understood in this sense, there are broadly speaking six attitudes towards offenders: the retributive, the hostile, the moralistic, the paternalistic, the merciful, and the actuarial. After presenting each of these attitudes, I sum up my analysis by focusing on the Polanski sexual abuse case. I then introduce the concept of second-order attitudes, where egalitarianism is the attitude that consists of taking the same attitude towards all offenders, and particularism is the attitude that consists of adjusting your attitude to each offender. Finally, I briefly explain why a mix of the retributive and the merciful should be our default attitude.

**Keywords:** punishment, attitudes, retribution, offenders, Strawson

## **I. Introduction**

On January 24, 2018, Larry Nassar was sentenced to 40 to 175 years in prison for the sexual assault of minors. Although this sentence is very striking, it is not the feature of the case that has attracted most comment; rather, it was the judge, Rosemarie Aquilina, who caught the attention. Many praised her solidarity with the victims, her righteous anger, her disdain for Larry Nassar; but I must confess for my part that when I saw the film of the trial I was shocked. Her attitude deeply disturbed

me, for it did not correspond at all to the cold, impersonal, and dispassionate image I have of justice. I was thus prompted to think about her attitude (so as to understand if my shock was justified), and the more I thought about it, the more important it seemed to me to study attitudes towards offenders more generally, instead of focusing on this specific case. Indeed, I now see at least three reasons to engage in a philosophical exploration of this understudied topic.

1. It is certainly true that our attitudes towards offenders are influenced by our responses to their offenses. Our often vindictive and hostile attitude towards offenders is probably the result of using punishment, and more specifically imprisonment, as a default reaction. By contrast, if we imposed treatment on all offenders, as in Samuel Butler's *Erewhon*, we would probably see offenders as sick persons and sympathize with them. However, attitudes can also influence our responses. More precisely, whereas certain responses *statistically* influence our attitudes (i.e. they favor them to various degrees), our attitudes *logically* imply or exclude certain responses – hence the strategic importance of paying attention to our attitudes if we want to change or advance the criminal law. Perhaps the most effective way to generalize certain responses is to cultivate specific attitudes, especially among judges. Perhaps there will be no major changes in the criminal law until we modify our attitudes towards offenders.

2. Studying attitudes towards offenders may shed new light on theories of punishment. Indeed, theories of punishment generally present themselves as justifications of punishment, but in fact they are often only disguised defenses of a particular way of seeing offenders from which certain normative consequences follow. In other words, attitudes lie behind theories and principles.<sup>1</sup> Likewise, I suspect that the true reason why some theories of punishment are criticized or disliked is that they are viewed – quite rightly – as expressing or eliciting a certain attitude towards offenders that is judged irrational, disgusting, or deleterious. So perhaps philosophers should

discuss what is really at stake in the controversies over punishment, i.e. the appropriate attitude towards offenders.

3. Finally, investigating attitudes personally affects us much more than the usual debates of the philosophy of criminal law do. It implies work on oneself and first-person questioning, rather than impersonal legislative and policy changes. Everyone is faced with the attitude problem: both those who deal directly with offenders and the public (including philosophers). You cannot escape it, and your attitude is part of your personality: it contributes to defining who you are and rests in your own hands.

But what exactly is an attitude? I will take as a starting point Strawson's "Freedom and Resentment" for three reasons. First, this widely discussed essay has profoundly shaped the way philosophers conceptualize attitudes. Second, its theme is closely related to our own, as Strawson is interested, among other things, in how we respond to the harms we experience and what information can alter our response. Third, Strawson defends the idea, close to the one I will develop, that attitudes are somehow inescapable and have priority over our practices (which express them).

Two key notions at the heart of this essay are "reactive attitudes" and "the objective attitude." Though these two notions both contain the term "attitude," what P. F. Strawson means by it in each case is different. Reactive attitudes are mainly emotional and behavioral *responses* to the good will, ill will, or indifference towards ourselves or others, as manifested in our own or others' behavior. Resentment, gratitude, indignation, moral admiration, shame, and guilt are typical reactive attitudes. For example, if someone crushes my hand but I understand that it was an accident, I will not resent him: reactive attitudes depend on our perception of the quality of X's will (X can refer to another person or myself).<sup>2</sup>

By contrast, the objective attitude is not in itself a response, but rather a specific *stance*.<sup>3</sup> What are its characteristics?

1. The first thing to be said is that the objective attitude is a *personal* attitude, as opposed to *general* attitudes: personal attitudes are attitudes *to* or *towards* someone, others or oneself. General attitudes, e.g. pragmatism, are not taken towards anyone, though they can influence how one deals with someone, others or oneself. They are *ways of being*: a person having a pragmatic attitude adapts to circumstances instead of rigidly applying principles.

The objective attitude is a stance we typically take towards “psychologically abnormal” agents (i.e. those lacking certain cognitive and/or volitive capacities). But as Strawson notes, it is also a “resource” we can occasionally use with “psychologically normal” agents for different purposes: “as a refuge ... from the strains of involvement,” “as an aid to policy,”<sup>4</sup> etc. Therefore, it seems that we have more voluntary control over the objective attitude than over our reactive attitudes: the objective attitude can be directly adopted when needed (though it often appears spontaneously), whereas we have only indirect control over our reactive attitudes, which are not “resources.”

2. The objective attitude is a way of *seeing* or *viewing* the human being towards whom it is taken. You see her/him *in a certain light, with a certain eye, as* an object of study, *as* a subject for treatment, *as* something to be managed, etc. In other words, the objective attitude is an objective *gaze*. When you learn that an individual is “psychologically abnormal” and adopt the objective attitude on that basis, you change your *outlook* on her/him.<sup>5</sup> This has interesting implications. Just as you cannot see Wittgenstein’s duck-rabbit as a duck and as a rabbit at the same time, you cannot take the objective attitude and the participant attitude<sup>6</sup> at the same time towards a human being,

though you can switch from one to the other (especially when you take this attitude in a purely intellectual approach). These two attitudes are radically opposed to each other.

3. The objective attitude may include certain emotional and behavioral responses, but it excludes other ones. For instance, it may include fear, repulsion, cure, avoidance, but it excludes resentment, anger, forgiveness, gratitude.<sup>7</sup> This exclusion is not merely contingent, but conceptual. In other words, adopting the objective attitude *means* suspending our ordinary reactive attitudes towards the person who becomes viewed simply as something “to be taken account, perhaps precautionary account, of.”<sup>8</sup> Contrary to what the expression suggests, “seeing as” is not only cognitive or perceptual but also behavioral: a change in how we see others – in our outlook on others – is accomplished only when our dealing with others also changes. And “our dealing with others” includes the *language* we use with others. If your attitude towards an individual is purely objective, there are ways of speaking you cannot use: “you cannot quarrel with him,” “you cannot reason with him.”<sup>9</sup> Your language betrays your attitude.

4. The objective attitude is unnatural,<sup>10</sup> as opposed to the participant attitude, which is our *default* attitude towards others and ourselves. Just as you cannot look at a fixed point without blinking for hours, you cannot use the objective attitude with everybody all the time: it is simply beyond your (psychological) strength.

On that basis, we can give the following definition of “attitudes as stances” (as opposed to “attitudes as responses”): they are particular ways of seeing human beings that logically include or exclude certain emotional, behavioral, and linguistic responses, that can be more or less natural, and over which we have some degree of voluntary control.<sup>11</sup> What interests me in this article is our attitudes *in this sense* towards offenders – “our” includes the attitude of judges, the attitude of

victims, the attitude of the public, the attitude of offenders themselves,<sup>12</sup> etc., and, as we shall see later, our role, office, or place may favor specific attitudes.<sup>13</sup>

The objective attitude is an attitude we theoretically *can* take towards offenders. In fact, Strawson argues that “optimists” (who advocate a form of consequentialist compatibilism) take an objective attitude towards offenders – or defend a theory implying that we should take such an attitude. But this is not an attitude we typically take towards offenders. Admittedly, some may adopt it when the perpetrator of a murder is found not guilty by reason of insanity. But such cases are rare. Likewise, the criminal justice system and the prison service do require a certain detachment towards the agents they deal with. But this affective detachment does not mean that responses such as censure, punishment, or more rarely pardon are excluded. Quite the contrary.

The main varieties of attitudes towards offenders are different. I hold that there are six of them: the retributive, the hostile, the moralistic, the paternalistic, the merciful, and the actuarial attitude. In the following parts I describe them and analyze how they shape our responses,<sup>14</sup> and in the last part I briefly address the question of whether one of them should be preferred over others. Thus, this article should be read as a prolegomenon to the descriptive and normative study of our attitudes towards offenders.

Throughout the paper I will use Max Weber’s methodology of “ideal type” – at least as I understand it. According to Weber, when building typologies, we simplify and idealize reality. We distinguish, for instance, three types of domination – rational domination, traditional domination, charismatic domination – which, as such, are almost never found empirically in reality. Nothing or no one fits these types perfectly, we only find figures that come closest to them: the Queen of England for traditional domination, Lenin for charismatic domination, fiscal institutions for rational domination.

Only the most salient features are retained and accentuated, and part of the complexity of reality is eliminated. But, for all that, typologies are useful: they give us reference points, they bring order to the chaos we experience – thus making it intelligible –, and they help us to better gauge *a posteriori* the complexity of reality.<sup>15</sup> The attitudes I shall present below are ideal types and therefore idealizations.<sup>16</sup> Our actual attitudes, most often, are mixes of these ideal types (provided that they are logically compatible).

## **II. The Retributive Attitude**

What I have to say about the retributive attitude will seem both commonsensical and controversial. Indeed, the view I want to defend is that the retributive attitude, following the Latin etymology of the term “retribution” (*re+tribuo*, to pay back<sup>17</sup>), consists first and foremost of seeing the offender as a *debtor*, as someone *owing a debt*. Of course, the retributive attitude itself includes several sub-attitudes depending on the way the debt owed is conceived: the debt can be conceived as something the offender owes to the victims; as a price to be paid in accordance with the tariff announced by the state; as something the offender owes to law-abiding citizens over which he took an unfair advantage. In other words, the debt can be considered from three points of view: that of victims, that of the state, that of society. Let us examine them in turn.

### **1. The Offender as Owning a Debt to the Victims**

Seeing offenders as debtors owing something to the victims is very common among advocates of the paradigm of pure restitution. As Randy Barnett puts it: “*The armed robber did not rob society; he robbed the victim*. His debt, therefore, is not to society; it is to the victim.”<sup>18</sup> Likewise, David Boonin writes: “When people cause wrongful harms to their victims, this generates a debt: they owe their victims compensation sufficient to restore them to the level of well-being that they rightfully enjoyed prior to being wrongfully harmed.”<sup>19</sup>



For these two theorists, what the offender owes to the (primary and secondary) victims is primarily compensation, which can take a monetary form but also less orthodox forms (for instance Boonin does not exclude the confinement of a small number of offenders if it is necessary to restore the victims to their previous level of well-being.)<sup>20</sup>

Some would object that this conception of the offender's debt is too narrow. For many theorists, the offender owes more than compensation to the victims: he owes them, *inter alia*, acknowledgment, and apologies. These two things largely overlap, for complete or authentic apologies are generally thought to imply 1. an acknowledgment that the offense occurred and that it should not have occurred; 2. an admission of responsibility for the offense; 3. the expression of regret and remorse; 4. the statement of a resolution not to commit such offenses again.<sup>21</sup>

As we can see, the retributive attitude, *as I understand it*, is compatible with restorative justice and criticisms of "retributive theories of punishment" (Barnett and Boonin are abolitionists about legal punishment). In fact, what motivates the implementation of offender/victims mediation in criminal justice systems is precisely the view of the offender as owing acknowledgment and apology to the victims.<sup>22</sup>

## **2. The Price of an Offense**

Suppose that Mary goes to the restaurant. She sees that the daily special costs ten euros, she orders it, eats it and, as expected, the restaurant owner tells her that she owes him ten euros: that is her debt. She pays and, as a result, they are even.

In some of his essays, the legal philosopher H. L. A. Hart looks at the offender in a similar fashion. First of all, using “a mercantile analogy,” he compares the criminal law with “a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.”<sup>23</sup> Indeed, the criminal law almost systematically sets maximum penalties, and more rarely minimum penalties, so that individuals can know beforehand what will happen to them if they are found guilty; it thus incorporates a conventional “tariff of punishments and offences.”<sup>24</sup>

Then, Hart describes the offender found guilty as a “choosing being”<sup>25</sup> who “had a normal capacity and a fair opportunity to obey”<sup>26</sup> the law. His debt is simply the costs he has to incur, given his choice, before he is set free again. He will remain a debtor until these costs are actually borne. The offender’s debt is also “the price of some satisfaction obtained from breach of law.”<sup>27</sup> Nothing comes for free in this world: if you dream of killing your enemy, it is a path you can take, but this satisfaction will have a price. In other words, individuals are free to contract debts (“the individual has an option between obeying or paying”<sup>28</sup>), though they are not encouraged to do so.<sup>29</sup>

This retributive attitude can be taken by the offender towards himself: his penalty appears to him “as a price justly extracted because [he] had a fair opportunity beforehand to avoid liability to pay.”<sup>30</sup> After having served his sentence (i.e. after having borne certain costs), he can say that he has paid his debt, that he is even.

Seeing the offender as a debtor does not mean seeing him as a *homo economicus*. Just as people sometimes incur huge financial debts after having taken irrational and compulsive decisions, offenders are sometimes compelled to pay although they did not calculate or even check the price. Hart himself admits this: “the part played by calculation of any sort in anti-social behaviour has been exaggerated.”<sup>31</sup>

Hart notes that this “can sound like a very cold, if not immoral attitude,” which “seems repellent.”<sup>32</sup> But, in fact, this is an *amoral* attitude. We do not morally judge the offender’s choice, we simply draw the consequences of his choice. It is up to his conscience or to society to say whether he has committed a moral fault: it is not the criminal law’s business. A judge adopting this attitude can be totally dispassionate, devoid of anger.

The retributive attitude, so understood, honors the autonomy of each human being, stresses the individual responsibility of offenders, and recognizes “that a man’s fate should depend upon his choice.”<sup>33</sup> And that is precisely the reason why this attitude cannot be appropriate when dealing with non-autonomous human beings like children or teenagers who have broken a rule (for instance at school). In his treatise on moral education, Émile Durkheim emphasized this point:

If we must not punish in anger, it is nonetheless necessary to guard against dispassionate punishment. Excessive coldness or impassivity has no better effect than does a transport of rage. ... If punishment is what it ought to be, it is carried through with a certain indignation or, if the word seems too strong, with a more or less reproachful displeasure. Should all emotion be drained from it, then it is emptied of all moral content. ... Everything goes along automatically. A list of charges is set up: the child knows what he must pay for each offense. He pays passively on receipt of the order; once his account is balanced, he considers himself as even, both with himself and others, since he sees nothing but the punishment itself.<sup>34</sup>

As we shall see, advocates of the moralistic attitude would undoubtedly argue that Durkheim’s point applies not only to children but also to adult offenders. For them, adult offenders cannot pay “passively on receipt of the order.”

### **3. What is Owed to Law-Abiding Citizens?**

In the 1950s, Hart defended a principle that is often referred to as the fair-play principle: “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.”<sup>35</sup> On the basis of that principle, we can say that offenders are “free riders” who owe law-abiding citizens (and in particular those who make great efforts to live honestly) obedience to the law. Once they submit to the law, the debt they owe to law-abiding citizens will be paid. On the contrary, if they prove incapable of obeying the law, they may be excluded from society (like the financial debtors who filled European prisons in the eighteenth century).

A close but slightly different view is that of Herbert Morris, who was one of Hart’s doctoral students. In a nutshell, his position is that offenders take advantage of the discipline and cooperation of others without assuming the burden of self-restraint: the offender “renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess.”<sup>36</sup> In order to tip the scales of justice and restore the balance of benefits and burdens, offenders owe law-abiding citizens to suffer a compensatory malus (unfair bonus + fair malus = 0). Once the equilibrium of benefits and burdens is restored, the offender is no longer in debt to law-abiding citizens: they are even.

Of the three sub-varieties of the retributive attitude, this last one is the most questionable, and for well-known reasons: some authors doubt that mutuality/reciprocity of restrictions is a debt-generating event;<sup>37</sup> others emphasize that we do not need to voluntarily assume a burden to obey the

criminal law because of our natural aversion to serious crime: in other words, Morris's theory is psychologically dubious.<sup>38</sup>

#### 4. General Remarks

The retributive attitude, whatever the variety, is perfectly compatible with *relentlessness*. When you see the offender as a debtor, you can spend your whole life making sure that he gives you everything he owes you, that he fully pays the price he has to pay given his choice – even forty years after the event.

However, this relentlessness is not necessarily accompanied by anger. It is compatible with pure impassibility, or even total indifference to the offender's fate as long as the debt is paid. Moreover, the retributive attitude is compatible with *mercy* and *forgiveness/pardon*. This is a second paradox (with the one mentioned earlier that the retributive attitude is compatible with restorative justice and criticisms of retributivism). As Morris puts it: "Forgiveness – with its legal analogue of a pardon – while not the righting of an unfair distribution by making one pay his debt is, nevertheless, a restoring of the equilibrium by forgiving the debt."<sup>39</sup>

In any case, the retributive attitude in its purest form (i.e. when not mixed with other attitudes) is incompatible with *going beyond* the mere payment of the debt. Those who adopt it recognize that once the debt is paid, they are no longer entitled to demand anything from offenders in relation to their offense: we are back to square one, life can go on. Once an individual has served his sentence, we do not have the right to keep him longer, even if his sentence was a failure and was useless.

Finally, it should be emphasized that the retributive attitude does not necessarily imply the use of punishment. On the contrary, the use of punishment can be counterproductive: you will have trouble

getting the acknowledgment the offender owes you if the admission of guilt can be used against him; punishment (leaving aside a few exceptions such as punitive damages) will not bring you the compensation you are owed,<sup>40</sup> for it is an evil added to a past evil, and imprisonment rarely enables prisoners to work and to give back some of what they earn to victims; and finally, instead of encouraging obedience to the law owed to the law-abiding, punishment can instead encourage rebellion. The means put forward by restorative justice are no doubt more appropriate than those used by traditional state justice to exact the debt owed to victims. Even when the debt is conceived as a price to be paid in accordance with the tariff announced by the state, the exaction does not have to be punitive. Indeed, the state could set up a conventional tariff of *compensations* and offenses with minimum and maximum limits – a modern *Wergeld*, one might say. Once you have literally – and not simply metaphorically – paid the announced costs, you are no longer accountable.

### **III. The Hostile Attitude**

When scholars mention the retributive attitude, they often have in mind something else that has nothing to do with seeing the offender as a debtor. The attitude they refer to is in fact the hostile attitude. Let us begin by characterizing it.

#### **1. The Characteristics of the Hostile Attitude**

To adopt the hostile attitude towards an offender is to see him as an *enemy*, either personal or public. So the hostile attitude covers both the vindictive attitude (seeing the offender as a personal enemy) and the “we/them” attitude (seeing the offender as a public enemy).

This attitude is “emotionally toned”<sup>41</sup> with vindictiveness, anger, contempt, animosity, hatred, and resentment. When you see someone as your personal enemy, you want to see him suffer; when you see someone as a public enemy, you want him to be rejected from society (by elimination,

deportation, or confinement) or humiliated or dominated (mainly by force). Moreover, “we often feel such hostile, negative attitudes and emotions are justified and appropriate: that we are *entitled* to feel and act in these ways.”<sup>42</sup>

This attitude is at the root of certain legal practices or policies which, in turn, fuel this attitude. Take, for instance, the legal practice of depriving offenders of the right to vote. This practice probably emerged under the influence of the hostile attitude and, in return, it reinforces the idea among the public that offenders are not citizens but outsiders. The same can be said about court procedure:

The state’s attorney seeks a conviction. The accused must defend himself against this attack. The aggrieved person and the community find in this officer of the government their champion. A legal battle takes the place of the former physical struggle which led up to the arrest. The emotions called out are the emotions of battle.<sup>43</sup>

It is not always easy at first sight to distinguish between the hostile attitude and the retributive attitude, because they have in common a part of their lexicon: someone who adopts the hostile attitude can say, for instance, that the criminal must *pay back* for his deeds. But in general we understand quite quickly that what is meant by this is that he should suffer.

The hostile attitude logically excludes acting for the offender’s sake (what I call the paternalistic attitude), seeking what is the best for him to avoid re-offending and live an honest life. In fact, such responses can be regarded as acts of “treason,” or as a form of unforgivable cowardice, by those who adopt the hostile attitude.

Though this attitude is undeniably destructive, it is compatible with a form of pity or leniency: when your enemy begs you not to be too harsh with him, you can be receptive to his prayer.

The hostile attitude is most often triggered by serious crimes, but it can also be prompted by petty incivilities prohibited by law (e.g. disturbance of the peace at night). These can be sufficient to see the perpetrator as a personal – or even public – enemy and to want him to suffer. In other words, the hostile attitude can be adopted both towards dangerous criminals and petty offenders.

A good example of this attitude is that of the judge I already mentioned, Rosemarie Aquilina, during the trial of Larry Nassar, who was sentenced to state prison for 40 to 175 years. The sentence itself is already an act of hostility: nobody lives long enough to spend 175 years in prison. But the words she said and her behavior were even more representative: she declared “I just signed your death warrant” and, instead of remaining unmoved, she repeatedly made gestures of contempt, without hiding her disgust for the convict; she declared that, if it were possible, she would have sentenced him to collective rape as an application of the *lex talionis*: “Our Constitution does not allow for cruel and unusual punishment. If it did, I have to say, I might allow what he did to all of these beautiful souls – these young women in their childhood – I would allow someone or many people to do to him what he did to others.”<sup>44</sup> Some testimonies during the sentencing hearing also expressed this attitude: “For the record, go to hell” (Tom Brennan), “I truly believe you are a spawn of Satan” (Jeanette Antolin), “There are circles of hell reserved for people like you” (Jamie Doski).<sup>45</sup>

This attitude is often associated with victims, but is actually more frequent in the public than among victims.<sup>46</sup> Most victims of sexual crimes, for instance, are “not particularly interested in revenge or in punishment for its own sake.”<sup>47</sup> The “myth of the vengeful victim”<sup>48</sup> who thirsts for revenge is, as its name indicates, a myth. Of course, some victims do adopt the hostile attitude, but they should



not be blamed for that, for we would thereby re-victimize them.<sup>49</sup> Instead of blaming them, we should inform them that this attitude jeopardizes mediation with the offender (which may have a healing effect).

## **2. The Hostile Attitude and Group Solidarity**

At the end of the nineteenth century, Émile Durkheim defended the paradoxical view that punishment is not an instrument of social control (it is so only as an indirect consequence) but first and foremost an instrument of social solidarity whose function is to tighten the bonds between “honest” citizens. Indeed, through its expressive powers, punishment prevents the devitalization of the “*conscience collective*” which is essential to mechanical solidarity (i.e. solidarity based on similarities).<sup>50</sup> The American sociologist George Mead defends a similar idea about the hostile attitude. According to him, having a common enemy tightens our bonds. As he puts it: “this hostility ... provides the most favorable condition for the sense of group solidarity because in the common attack upon the common enemy the individual differences are obliterated.”<sup>51</sup> It tightens our bonds not only by erasing our differences but also by emphasizing our resemblances: “the attitude reveals common, universal values which underlie like a bedrock the divergent structures of individual ends.”<sup>52</sup> Moreover, the criminal justice system appears to those who adopt the hostile attitude as a savior against the enemy, and this in turn reinforces respect for the law and gives it its majesty: “The law has become the weapon for overwhelming the thief of our purses, our good names, or even of our lives. We feel toward it as we feel toward the police officer who rescues us from a murderous assault. The respect for the law is the obverse side of our hatred for the criminal aggressor.”<sup>53</sup>

Thus, the hostile attitude is not, contrary to appearances, useless. But are its benefits sufficient to justify it? Mead thought they were not sufficient to outweigh its costs.<sup>54</sup> Basing social solidarity on

hostility is, in the long run, counterproductive: its solidifying power can rapidly become a disintegrating power. Moreover, social solidarity is by definition incomplete when based on hostility: it only takes place between “us”, whereas we should aspire to a more inclusive society from which no one is excluded, even offenders.

Some might say that this attitude, though questionable, is inescapable because *acceptance* of the rules of the criminal law – what Hart calls the internal point of view – logically implies a hostile attitude towards those who break the law. Taken out of their context, some quotations from *The Concept of Law* do seem to suggest such a view: “the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.”<sup>55</sup>

However, this is a misreading of Hart’s book. Hart is only concerned with “the way in which the rules function as rules in the lives of those who normally are the majority of society.”<sup>56</sup> There are different ways in which acceptance of the rules manifests itself in society, and hostility to lawbreakers or lawbreaking – considered as justified and legitimate – is one of these. But this does not mean that it is the only one, nor a good one. The internal point of view can also manifest itself, for instance, through disappointment or cordial criticism. Therefore, the thesis that the hostile attitude is inescapable cannot be supported by Hart’s legal philosophy.

#### **IV. The Moralistic Attitude**

The retributive attitude can also be confused with the moralistic attitude (my use of the word “moralistic” is not pejorative). When we adopt it we see the offender as morally culpable, as blameworthy, or even as a moral/secular sinner (provided that certain conditions are met, for instance the absence of excusing conditions such as duress, invincible ignorance, etc.). We also

adopt this attitude, I think, when we look at offenders as wrongdoers, i.e. as individuals who have not only committed a legally prohibited act but also done something *wrong*.<sup>57</sup>

At first sight, it seems difficult to take this attitude towards offenders guilty of so-called *mala prohibita* (such as crossing a solid white line) or guilty of the violation of an unjust law (prohibiting, for instance, same-sex relationships). But if breaking the law appears to you as a moral fault whatever the content of the violated rule, if you consider that showing respect for the law as law is a moral duty, then even offenders guilty of *mala prohibita* or guilty of the violation of an unjust law can be regarded as blameworthy.<sup>58</sup>

This attitude favors an array of responses that are typical of the moral sphere, as opposed to the legal sphere: for instance, “emphatic reminders” of the demands of morality and “reliance on the operation of guilt and remorse”;<sup>59</sup> teaching the offender a moral lesson and “engaging him in a serious moral consideration of what he ha[s] done.”<sup>60</sup>

This attitude also favors certain requests, e.g. for acknowledgment and apologies. This is a similarity with the retributive attitude (defined as seeing the offender as owing a debt to the victims), although it should be kept in mind that acknowledgment and apologies are not understood here in the same way: what has to be acknowledged by the offender is first and foremost the wrongful nature of his act (in other words, he has to confess his secular sin), not the harm he caused to the victims; what the offender has to apologize *for* is his *moral fault* (“I apologize for having lied”), but he does not have to apologize *to the victims*. In other words, acknowledgment and apologies are impersonal and fault-focused, whereas in the retributive attitude they are personal and victim-focused.

What about the relationship between this attitude and punishment? First, punishment can be viewed as the only means (or the most appropriate means, or the best means all thing considered) to express/communicate the blame offenders are worthy of, “to induce a repentant confrontation with the character and implications of their wrongdoing,”<sup>61</sup> though this idea has been challenged.<sup>62</sup>

Second, imprisonment as a legal response to offenses was perhaps born under the influence of the moralistic attitude. Indeed, the American Quakers (who are often regarded as the founding fathers of modern imprisonment) saw criminals as sinners who had to seclude themselves to reflect on their crimes and repent, and imprisonment appeared to them as more suited to this end than the death penalty or corporal punishment. Beaumont and Tocqueville summarize the idea behind solitary confinement: “Thrown into solitude, he reflects. Placed alone in the presence of his crime, he learns to hate it: and if his soul is not yet desensitized to evil, it is in isolation that remorse will come to assail him.”<sup>63</sup>

Third, the just deserts theory of punishment may derive from the moralistic attitude, since at its foundation lies the view of the offender as a wrongdoer deserving to be punished. This is an interesting contrast with the utilitarian theory of punishment, which is not based on a *personal* attitude towards offenders but is based on a *general* attitude, that of the “impartial spectator” who counts everybody for one and nobody for more than one. This echoes Thomas Nagel’s idea that deontology is associated with the personal/agent-centered point of view (the involved point of view of our relations to others), whereas utilitarianism is associated with the impersonal/outcome-centered point of view (the detached point of view of everyone at once).<sup>64</sup> Just as Nagel argued that the fragmentation of value is due to the ability of human beings to see the world from different perspectives, it can be argued that the fragmentation of penal philosophy is due to the irreconcilability of our attitudes.

A good illustration of the moralistic attitude is that of Lord Coleridge in *R v Dudley and Stephens* (1884). In this famous trial, Thomas Dudley and Edwin Stephens were tried for having eaten Richard Parker on the high seas to survive. It is not clear whether the pair are legally guilty (since they can plead necessity), but it seems obvious to Lord Coleridge that they did something wrong and that they are morally culpable. That is why he engages in a moral lesson with emphatic reminders of our duties: “To preserve one’s life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it.”<sup>65</sup> Though he concedes that law and morality are two different things, he refuses the complete divorce between them. Therefore, he sentences the two sailors to the death penalty.

Those who prefer to *suspend judgment* about the blameworthiness of the offender or the wrongfulness of his act cannot adopt this attitude. The reasons why they prefer to suspend judgment are various. They may consider that we are not the right persons to assess the blameworthiness of the offender (only God can); that we lack information to do this (for instance information about the offender’s past, his motives, his character); that a criminal court is not the place to do this; that we lack the moral authority to do this (since none of us is without fault); that the truth of determinism excludes such judgments; or that such judgments are not scientific, i.e. they are relative and unverifiable, as captured by Barbara Wootton’s remark that “[a]ssessments of guilt are, and must remain, purely subjective; and we can all cling to our own opinions secure in the knowledge that no one can prove us wrong.”<sup>66</sup>

As Antony Duff explains, to liberal-minded individuals this attitude might appear too intrusive. They might object that “moral beliefs and attitudes, like all matters of conscience, are not the proper concern of the criminal law – that they belong in the private sphere of individual freedom that the

state must respect.”<sup>67</sup> By contrast with the retributive attitude, in which the payment of the debt is enough for the offender to be even, seeing the offender as a moral/secular sinner prompts us to demand his repentance and intrude into his private conscience, and is incompatible with staying on the surface of things.

## **V. The Paternalistic Attitude**

Adopting the paternalistic attitude means seeing the offender as someone who does not know what is good for him; who harms himself; who needs help; who is vulnerable (though he may contest or deny all this). It does not mean seeing him as a child, but it does mean having the same benevolent and caring gaze that we have on our children.

This attitude has long been dominant in juvenile courts, though the trend might be changing in some countries. As David Brink explains, US juvenile courts of the early twentieth century followed the doctrine of *parens patriae* (parent of the nation).<sup>68</sup> This doctrine refers to the possibility for the state to play the role of a parent towards individuals (children or persons with disabilities) who are in need of protection. Therefore, juvenile courts sought to act in the best interests of the young offender, for his sake:

Separate juvenile correctional facilities were created that stressed educational and vocational training, sentences were often shorter, courts made greater use of probationary and other diversionary alternatives to incarceration, and the criminal records of juvenile offenders were not made a matter of public record in order to prevent stigmatization that might interfere with successful rehabilitation.<sup>69</sup>

Could we adopt this attitude towards adult offenders, too? Such an extension frightens some theorists, because they consider that the paternalistic attitude can paradoxically be very oppressive:

Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. ... those who torment us for our own good will torment us without end for they do so with approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth.<sup>70</sup>

These worries are not groundless. Indeed, as Hart remarks, during the first half of the twentieth century, measures of welfare aiming at the rehabilitation of the offender “did not always mean a sentence which criminals themselves liked better: very often it meant for them something much longer than what they would get from judges operating rough [sic] ideas of proportion.”<sup>71</sup> Some critics also find this attitude humiliating or even insulting for the offender, because he is “put on a level with those who have not yet reached the age of reason or those who never will.”<sup>72</sup>

The paternalistic attitude does not logically exclude punishment. If a judge wants what is best for the offender, he might say to himself: “If I send him to jail, it will be a life-saving shock for him: it will keep him away from delinquency and is what is needed in order for him not to ruin his life.” Of course, this prediction may prove to be completely false: instead of saving him from delinquency, imprisonment may simply corrupt him even more. It may be that empirically speaking punishment is never in the best interests of the offender.

What the paternalistic attitude excludes are responses that are thought to ultimately harm the offender. You can choose responses that at first sight make him worse off, but that you think are in

his interest, all things considered. However, you cannot choose responses that you think will make him worse off, all things considered.

In other words, the paternalistic attitude is an attitude of goodwill toward the offender, by contrast with an attitude of malevolence. But this goodwill towards the offender does not necessarily entail gratitude on his part, since the responses it prompts can be very burdensome and imposed against his will, i.e. even if the offender judges them unnecessary for his own good. This, in turn, may generate a painful mutual incomprehension. As Morris explains, when we say “I’m only doing this for your own good!” to an offender resisting the deprivation we are imposing upon him, we also impose upon him “the burden of having to be grateful for getting what [he] does not want and, if not grateful, then guilty.”<sup>73</sup>

## **VI. The Merciful Attitude**

To define the merciful attitude, I will use an essay by Martha Nussbaum entitled “Mercy and Equity.” This attitude can be characterized as a “sympathetic participatory attitude” which consists of seeing the offender “as one whom I might be,”<sup>74</sup> as a person “whose errors emerge from a complex narrative history”<sup>75</sup> and as a fallible being. In fact, these three gazes are closely related to each other. When I see the offender “as one whom I might be,” I will try to understand why he offended; I will focus on his motives and intentions, on the circumstances of his offense; finally, I will remember that none of us is without fault.

But why is this attitude called a *merciful* attitude? Simply because “[t]he result of all this is mercy.”<sup>76</sup> As Nussbaum puts it (criticizing the novel *Mercy* by Andrea Dworkin): “If you really open your imagination and heart to admit the life story of someone else, it becomes far more difficult to finish that person off with a karate kick.”<sup>77</sup> More seriously, a very old tradition (dating



back to ancient Greece) links the sympathetic participatory attitude and attention to details with leniency and mercy. Aristotle, for instance, thought that tragedy was a school of mercy.<sup>78</sup>

For Nussbaum, a judge adopting the merciful attitude can be described as a “literary judge” precisely because (good) literature invites us into the stories of other human beings, invites us to see all the circumstances and complexities of their lives, and thereby to make a nuanced and merciful judgment about their deeds.

Nussbaum emphasizes that the merciful attitude does not exclude punishment, though it probably excludes the death penalty. It does not remove responsibility for offenses: “*clementia* does not fail to pass judgment on wrongdoing.”<sup>79</sup> It excludes only mechanical and rigorist responses to offenses. It is totally incompatible with treating the offender “as a thing with no insides to be scrutinized from the internal viewpoint, but simply as a machine whose likely behavior, as a result of a given judgment or punishment, we attempt, as judges, to predict.”<sup>80</sup> That being said, punishment probably ceases to be a priority for those who adopt the merciful attitude: pacific solutions and assistance when needed appear as more desirable.

The merciful attitude can be disliked for different reasons. First, it presupposes an effort to empathize with the offender, which can be demanding or difficult, especially when your position is that of a victim of a serious crime. Second, it inhibits or soothes our malevolent affections, which is not in the interest of “tough on crime” policies. Third, some may contend that it threatens public order: mercy means more lenient sentences, and more lenient sentences mean in turn a larger number of dangerous offenders at large.<sup>81</sup> Fourth, it implies a lot of discretion for the judge.

## **VII. The Actuarial Attitude**

The actuarial attitude consists of seeing offenders as bearers of risk who need to be examined in order to assess this risk. This attitude is characteristic of the risk management method and is strongly associated with the “Risk-Need-Responsivity” (RNR) model of correctional treatment.<sup>82</sup> Contrary to the previous attitudes, which can be found in almost all cultures and have existed for a long time, the actuarial attitude appeared recently, though the premises of it can be found in the eighteenth century among some materialist philosophers of the Enlightenment (such as Denis Diderot) and in the nineteenth century among the Italian positivists (such as Enrico Ferri). In other words, this attitude has a historical dimension the others have not: it is linked to the development of risk-prediction tools in the twentieth century.

What is meant here by “risk” is “risk of re-offending” (not necessarily dangerousness, since one can repeat petty offenses).<sup>83</sup> Some offenders are at low risk of re-offending while others are at medium or high risk. When the level of risk is high, the actuarial attitude can be accompanied by fear. By contrast, when the level of risk is low or zero, the actuarial attitude can be accompanied by relief. These are Strawsonian objective attitudes (emotional responses) which we might have to natural states of affairs.<sup>84</sup> A farmer can be afraid of this summer’s drought and relieved when it rains, but he will not resent the drought nor be grateful to the rain.

This attitude presupposes that we can predict, at least approximately,<sup>85</sup> criminal behavior using risk factors such as “early involvement in antisocial activities,” “disregard for others,” “association with procriminal individuals,” “poor-quality relationships,” “problems with alcohol and/or illegal drugs,”<sup>86</sup> etc. This assumption is, of course, often challenged.

Once this attitude is adopted towards an offender, he is put on the same level as any predictable thing. He becomes part of the predictable world, he loses his special status as a person, and this can

be felt as degrading. Let us suppose that an accident happens, as a result of which a crack appears on your wall. You install an iron bar to prevent it from getting worse and contact an expert to make a diagnosis and assess the risk. Scenario 1: the expert thinks that the foundations of your house are fragile and the risk of cracks reappearing is very high. Drastic measures have to be taken to prevent this from happening. Scenario 2: the expert thinks that you do not have to worry: you can remove the iron bar and simply apply plaster. Seeing offenders as bearers of risk means handling their cases in much the same way.

This attitude prompts responses aiming at reducing risk. Theoretically, punishment could be one of them. Of course, nobody can be punished *on account of* the risks he bears. But it is not logically contradictory to punish an offender for the offense he committed in order to reduce his risk of re-offending. However, advocates of the RNR model are very skeptical about the efficiency of punishment: punishment can work only if it follows the offense with certainty, immediacy, and maximum intensity, and such laboratory conditions cannot be replicated in the real world.<sup>87</sup> Besides, adjusting the severity of punishment according to the level of risk would be problematic from a moral point of view. Thus, the actuarial attitude does not logically exclude punishment, but simply marginalizes it; this attitude rather favors the use of non-punitive “safety measures” or “therapeutic programs” which target risk factors: for example, reducing drug abuse when the offender is a drug addict.

An interesting implication of this attitude is that for the low-risk offender “minimal or even no intervention is sufficient,<sup>88</sup>” whatever the seriousness of the offense committed. However, for the high-risk offender, very intrusive interventions are likely to happen (especially in the context of an aversion to risk). He might be subjected to intensive supervision, even though he has taken the decision not to re-offend and is convinced that he will not: this may, again, generate a painful

mutual incomprehension. The offender will trust his free will and his strength of will, while “experts” will rely on their prediction tools. Likewise, experts are likely to overestimate the risks of the offender out of fear of underestimating them. In short, the actuarial attitude works in two opposite directions: less social control, yet more social control.<sup>89</sup>

When we adopt this attitude, we can have very different responses towards offenders guilty of exactly the same offense if their level of risk is not the same. We do not try, as it is the case in the traditional penal system, to match the severity of punishment to the seriousness of the offense: “The risk principle says to match the level of service to the level of risk.”<sup>90</sup>

Of all the attitudes we have studied, this one comes closest to the Strawsonian objective attitude. This attitude is rather unnatural: “Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered.”<sup>91</sup> Adopting it requires self-control and self-discipline: it is easier to have this affective detachment when it is part of your job, within bureaucratic and institutional contexts where it is socially accepted and expected.<sup>92</sup>

When you adopt this attitude in its purest form, you see offenders *only* as bearers of risk, and when your *only* concern is to manage this risk, issues regarding their responsibility, blameworthiness, guilt, culpability, etc., are not really relevant for you. Likewise, resentment or blame will be out of place. You will focus on the offender’s “needs” (given his risk factors). Conditions such as “duress,” “invincible ignorance,” “physical compulsion,” “necessity,” etc., will not be viewed as *excuses*, but as *evidence* of a very low risk of re-offending.

This attitude is often seen by its advocates as the most rational one since it is completely forward-looking. But some object that “it would not necessarily be rational to choose to be more purely rational than we are.”<sup>93</sup> This attitude is also seen by its advocates as the fairest one because it is not biased and is based on transparent criteria. However, this assumption has been challenged: it appears that minority defendants are at a disadvantage when employment, family status, education, etc., are used as predictors.<sup>94</sup>

### **VIII. Comparing Attitudes**

Now that I have presented the main varieties of attitudes towards offenders, we can open up avenues about the normative question of whether one attitude should be preferred over another. But before doing that, it can be useful to recapitulate my analyses by focusing on a single case, for which purpose I have chosen that of Roman Polanski. I hope this will show the fruitfulness of my typology.

#### **1. The Roman Polanski Sexual Abuse Case**

Roman Polanski was found guilty of unlawful sexual intercourse with a minor in 1977. He performed sex acts upon Samantha Jane Gailey (now Samantha Geimer) who was at that time thirteen years old. Like different perspectives or lights on the same object, most of the attitudes mentioned above can be adopted towards Roman Polanski.

The victim, Samantha Geimer, can be said to be taking the retributive attitude towards Polanski: she says that he gave her what he owed her (acknowledgment, excuses, compensation), she wants to dismiss the case against him, and she condemns the judicial harassment he has been facing. In other words, she thinks they are even.

Judge Scott M. Gordon can also be described as adopting the retributive attitude but defined this time as seeing the offender as a debtor who has to pay the price announced by the state. He illustrates the relentlessness permitted (but not necessarily implied) by this attitude. Though Polanski is eighty-eight years old, though he was already found guilty of unlawful sexual intercourse with a minor, though the case is almost forty-five years old, he still refuses to dismiss it and wants Polanski to face a US court again.

The psychiatrists who examined Polanski in 1977, Alvin E. Davis and Ronald Markman, took the actuarial attitude towards him. They viewed him as a low-risk individual not needing to be incapacitated. This probably explains why he was originally sentenced to ninety days of imprisonment by Judge Laurence J. Rittenband.

Kenneth F. Fare, Polanski's probation officer, probably took the merciful attitude towards him. Indeed, his report "paints a sympathetic picture of Mr. Polanski's background."<sup>95</sup> It points out what he experienced in the Krakow ghetto, the assaults he suffered because he is Jewish, the horrible murder of his pregnant wife, etc.

Several feminist activists or associations take the hostile attitude towards Polanski.<sup>96</sup> Any defense of him is seen as treason. They do not hesitate to go beyond the mere payment of the debt: they demand a boycott of his films, the withdrawal of his awards, etc.

The public, being more and more intolerant of sexual crimes, sees him as a wrongdoer, as having done something deeply wrong. It takes the moralistic attitude and blames him.

This example shows that attitudes are closely related to our role, office, or place. Judges and victims are expected to have the retributive attitude, psychiatrists to have the actuarial attitude. Probation officers have no choice but to investigate the depth of the offender's story, which favors the merciful attitude. Associations easily take the hostile attitude because of its unifying effect. The public adopts the moralistic attitude because it has to define what is acceptable or not acceptable within society at a certain time. This means that our attitudes towards offenders are not only a matter of individual responsibility: institutions or groups can demand or forbid certain attitudes, they can influence the way individual agents see offenders and deal with them.

But some may ask: Why could we not just see the offender as he is, i.e. as an offender? What, though, does seeing the offender as an offender mean? If it means seeing the offender as an individual who simply broke the law and has to face the legal consequences of his offense, it does not really differ from the retributive attitude (i.e. viewing the offender as a debtor who has to pay the price announced by the state). In fact, this objection raises an interesting question, namely: Is it possible *not* to take an attitude towards offenders? My answer is that it is not possible: just as our perception of objects is aspectual (we see things around us as tables, rabbits, ducks, etc.), our dealing with offenders is attitudinal (we see offenders as bearers of risks, blameworthy wrongdoers, debtors, etc.). Moreover, there is no "neutral" attitude: if you are affectively detached and suspend your judgment about the blameworthiness of the offender, you have a *specific* attitude logically excluding or favoring certain kinds of responses.

## **2. Which Attitude Should We Take towards Offenders?**

On the basis of my typology we could engage in investigations about the magnitude of this or that attitude within a given community, sociological group, social class, etc. For example, we could test the (in my opinion dubious) hypothesis that in the richest and least violence-prone neighborhoods,

the merciful attitude dominates, while in the poorest and most violence-prone neighborhoods, the hostile attitude dominates. We could also investigate whether some attitudes promote crime reduction or rehabilitation better than others.

However, these empirical studies are beyond my competence. Instead, I shall focus on the normative issue of whether a certain attitude should be preferred over another.<sup>97</sup> My remarks will be rather brief and introductory, since the main purpose of the article is not to prescribe a specific attitude.

A first common sense answer, based on the Golden Rule, could be: do not recommend an attitude towards offenders that you would not accept towards yourself. Ask yourself: which attitude would I like people to adopt towards myself if I were an offender? My personal prognosis is that the hostile attitude would not pass the test; that the moralistic, paternalistic, and actuarial attitudes would not be very popular; and that the retributive and merciful attitudes would be the ones best liked.

However, this answer is problematic, just like the Golden Rule on which it is based. Almost by definition, no one likes the paternalistic attitude, because it involves imposing upon you, for your own good, things you do not want. But this does not mean that this attitude is not justified, especially when dealing with young offenders. Reporting a criminal to the police is in many circumstances the right thing to do, though it may be incompatible with the Golden Rule.

A second common sense answer could be: adapt your attitude to each offender. Ask yourself: Who is the person in front of me? Is this person a young offender? A repeat offender? A white-collar offender? Duff, for instance, distinguishes between four kinds of offenders: the morally persuaded,



the shamed, the already repentant, and the defiant offender.<sup>98</sup> Is the moralistic attitude appropriate with the defiant offender? Probably not, just like the merciful attitude. As Wootton puts it:

No one can have personal contact with even a handful of serious offenders without encountering entrenched anti-authoritarian attitudes in which, not only are reproaches from official quarters counterproductive, but so also are kindly and generous attitudes on the part of persons in authority.<sup>99</sup>

Though commonsensical, this answer is also problematic. Some critics will say that, in the name of justice and equality, we have to adopt the same attitude towards all offenders (like parents do, or are supposed to do, with their children). Indeed, if we have enough discretion to adapt our attitude to each offender, two offenders between whom there is no relevant difference are likely to be confronted with radically different attitudes: for instance, one who is a target of racial prejudices will have to face the hostile attitude, whereas another (who is White and highly educated) will not.

Here, we can discern two *second-order attitudes* (general attitudes towards personal attitudes): egalitarianism and particularism. Egalitarianism is the attitude that consists of taking the same attitude towards all offenders and refusing the individualization of attitudes. Particularism is the attitude that consists of adjusting your attitude to each offender. There are also mixed second-order attitudes: “semi-egalitarianism,” for instance, consists of adopting the same attitude towards all *adult* offenders, while allowing a different attitude towards *young* offenders.

The conflict between particularism and egalitarianism reflects a conflict between two values, namely utility and fairness, which is very frequent in law. Particularism maximizes utility because the more you adapt your attitude to the offender’s needs, personality, story, desires, reactions, the

more you are likely to obtain good results (just like in medicine). By contrast, egalitarianism maximizes fairness defined as equality of treatment: no one can complain about having been subjected to a harsher attitude than others. Mixed second-order attitudes like semi-egalitarianism represent compromises between these two values. Such compromises are also very common in law.<sup>100</sup> Take, for example, the restriction of strict liability to minor offenses: on the one hand, strict liability is unfair; but on the other hand, it makes it easier to enforce the law, and penalties for minor offenses (most often fines) are neither severe nor egregious.

If you value fairness more than utility you are likely to prioritize the egalitarian attitude, and vice versa. But if we assume that, regardless of our preferences, we should take the same attitude towards adult offenders, the question remains what this attitude should be. I would personally recommend a mix of the retributive attitude, defined as seeing offenders as having a debt towards the victims, and the merciful attitude. In other words, we should see offenders first and foremost as fallible beings who owe something to the victims, and we should act towards offenders accordingly. This should be our default attitude for the following reasons:

First, this mixed attitude would lead to a more humane and constructive way of doing justice, closer to restorative justice. Doing justice would not be centered on punishment, but on understanding the offense and repairing the moral and physical harm it caused.

Second, the merciful attitude alone is insufficient, because it tends to overshadow the victims, a problem of which the article “Equality and Mercy” by Nussbaum is symptomatic. She addresses the question of victims only in a footnote, and then to dismiss it: “The question before the court is what the defendant did ... What has to be decided is not what to do about the victim, but what to do about

the defendant.”<sup>101</sup> She associates “victim impact statements” with “the passion for revenge,” thus fueling the “myth of the vengeful victim” mentioned above.

Third, the retributive attitude alone is also insufficient, because without mercy it can lead to cruelty. What you are going to request from the offender as your due may be disproportionate. It may also be abstract and maladjusted as long as you do not develop the habit of paying attention to the details and peculiarities of each case typical of the merciful attitude. Last but not least, reconciliation between parties will not happen or might be compromised.

So far, I have focused on the question of what attitude *we* should take towards offenders. Now, what attitude should *offenders* take towards themselves? Is there an asymmetry between the former and the latter? Admittedly, it is difficult for an offender to take the merciful attitude towards himself, since he cannot logically see himself “as one whom he might be,” nor have a “sympathetic participatory attitude” towards himself. However, nothing prevents him from taking the retributive attitude towards himself. In fact, realizing and accepting that he owes something to the victims may be the first step in paying his debt.

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## Notes

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1 So if someone were to object that "arguably, our attitudes are important but we should try to bring them into conformity with our principles," we could answer: what if our principles were only an expression or a rationalization of pre-existing attitudes? Of course, I do not mean to suggest that principles are unimportant, but rather that the importance of attitudes has been underestimated.

2 See Hieronymi, *Freedom, Resentment*, 8.

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- 3 Though we can say that it is a stance adopted most of the time *in response to* the information that a person is mentally insane (but not in response to the quality of a person's will).
- 4 Strawson, *Freedom and Resentment*, 10.
- 5 Strawson himself writes: "We look with an objective eye on the compulsive behaviour of the neurotic." Ibid. The omnipresence of the lexicon of vision in Strawson's essay is striking.
- 6 The participant attitude is simply the attitude of involvement in a human relationship: the human being towards whom it is taken is seen as a responsible person who can be blamed, resented, shamed, etc.
- 7 These can be called "objective attitudes" in the plural, as opposed to "*the* objective attitude." Hieronymi defines them as follows: "responses such as frustration or relief, which we might have to events and states of affairs we believe were not willed by anyone." Hieronymi, *Freedom, Resentment*, 7.
- 8 Strawson, *Freedom and Resentment*, 9.
- 9 Ibid., 10.
- 10 Though nowadays it seems natural to adopt it towards psychologically abnormal agents.
- 11 As we can see, I am using Strawson's essay to explain what I understand by our "attitudes" towards offenders. This does not mean that I take at face value his distinction between the *participant attitude* and the *objective attitude*, between *reactive attitudes* and *objective attitudes* in the plural. In truth, I am convinced, as are many commentators (and Strawson himself), that these distinctions are too sharp.
- 12 Strawson emphasizes that this perspective should not be overlooked: "We must mention also the self-reactive attitudes of offenders themselves." Strawson, *Freedom and Resentment*, 23.
- 13 Here I am only interested in our attitudes towards offenders, but we can also have various attitudes towards other groups of people, for example towards people in power.
- 14 The notion of "response" is broader than that of "punishment" in the sense that punishment is only one possible response among others to offenses. I have much to say about punishment, but my question is not about its justification. Rather, I am much more interested in how our attitudes can move us away from punishment. If we focus on how best to adopt our attitudes to the rationale of punishment, we lose precisely the opportunity to explore these non-punitive alternatives.
- 15 See Aron, *Main Currents in Sociological Thought*.
- 16 Please note that my typology is not a semantic typology: it does not aim at distinguishing between different senses or uses of a word that can be found in the philosophical literature, as H.L.A. Hart did for the word "responsibility"

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(see Hart, *Punishment and Responsibility*, 210–30) and John Cottingham for the word “retribution” (see Cottingham, “Varieties of Retribution”).

17 See Cottingham, “Varieties of Retribution,” 238.

18 Barnett, “Restitution: A New Paradigm for Criminal Justice,” 288.

19 Boonin, *Problem of Punishment*, 220.

20 See *ibid.*, 232, 244, 260–61.

21 See Mihai, “Apology.”

22 An interesting question is whether the offender’s debt can be transferred like other types of debt. Boonin holds that “a debt owed by one person to another can be transferred to a third party when the person who is owed something dies before the debt is fully paid” (Boonin, *Problem of Punishment*, 241), but he does not say if the debt owed by the offender can be transferred to a third party when *he* dies before *his* debt is fully paid. Similar situations do exist: the US debt is transmitted from generation to generation and heads of state occasionally apologize for the crimes committed by older generations.

23 Hart, *Punishment and Responsibility*, 44.

24 *Ibid.*, 162.

25 *Ibid.*, 49.

26 *Ibid.*, 201.

27 *Ibid.*, 47.

28 *Ibid.*, 23.

29 As Hart puts it: “I do not of course mean to suggest that it is a matter of indifference whether we obey the law or break it and pay the penalty. Punishment is different from a mere ‘tax on a course of conduct.’” *Ibid.*, 44.

30 *Ibid.*, 23.

31 *Ibid.*, 1.

32 *Ibid.*, 47.

33 *Ibid.*, 182.

34 Durkheim, *Moral Education*, 201–2.

35 Hart, “Are There Any Natural Rights?,” 185.

36 Morris, “Persons and Punishment,” 477.

37 See, e.g. Nozick, *Anarchy, State, and Utopia*, 90–93.

38 See Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, 64–65.



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- 39 Morris, "Persons and Punishment," 478.
- 40 Except if you consider punishment as a form of restoration. For a discussion of this view see Boonin, *Problem of Punishment*, 269–75.
- 41 Strawson, *Freedom and Resentment*, 10.
- 42 Lacey and Pickard, "From the Consulting Room," 3.
- 43 Mead, "Psychology of Punitive Justice," 586.
- 44 Sentencing hearing in *People of the State of Michigan v Lawrence Gerard Nassar* (LC No. 17-000526-FC).
- 45 Spargo, "Coach who sent."
- 46 See Cusson, *Pourquoi Punir?*, chapter XI.
- 47 Herman, "Justice From the Victim's Perspective," 591.
- 48 Ibid., 575.
- 49 See Christie, "The Ideal Victim."
- 50 See Durkheim, *Division of Labour in Society*, 57-87.
- 51 Mead, "Psychology of Punitive Justice," 580–81. Mead suggests that "the attitude of hostility toward the lawbreaker has the unique advantage of uniting all members of the community in the emotional solidarity of aggression. ... the cry of thief or murder is attuned to profound complexes, lying below the surface of competing individual effort, and citizens who have separated by divergent interests stand together against the common enemy." Mead, "Psychology of Punitive Justice," 591.
- 52 Ibid., 591.
- 53 Ibid., 585.
- 54 "While then the attitude of hostility, either against the transgressor of the laws or against the external enemy, gives to the group a sense of solidarity which most readily arouses like a burning flame and which consumes the differences of individual interests, the price paid for this solidarity of feeling is great and at times disastrous." Ibid., 592. A more recent criticism of the hostile attitude is from Duff, who insists on "the importance of seeing offenders as our fellows." Duff, *Punishment, Communication, and Community*, 211.
- 55 Hart, *Concept of Law*, 90.
- 56 Ibid.
- 57 As John Gardner notes, in *Punishment and Responsibility* Hart probably uses the words "offense" and "offenders" "to avoid what he regards as the excessively moralistic overtones of 'wrongdoing' and its cognates." Gardner, "Introduction," xiii, n.2.

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- 58 “Even if, for respectable reasons, [the offender] dissents from the content of the law, she ought to obey it out of respect for the law and as a matter of her duty as a citizen.” Duff, *Punishment, Communication, and Community*, 122.
- 59 Hart, *Concept of Law*, 180.
- 60 Duff, *Punishment, Communication, and Community*, 123.
- 61 Ibid., 126.
- 62 See Hanna, “Say What?,” 142–48.
- 63 Beaumont and Tocqueville, *On the Penitentiary System*, 27.
- 64 Nagel, *Mortal Questions*, 128–34.
- 65 Quoted in Ohlin, *Criminal Law*, 776.
- 66 Wootton, *Crime and the Criminal Law*, 103.
- 67 Duff, *Punishment, Communication, and Community*, 127.
- 68 See Brink, “Immaturity, Normative Competence,” 1559.
- 69 Ibid.
- 70 Lewis, “Humanitarian Theory of Punishment,” 151.
- 71 Hart, *Punishment and Responsibility*, 166.
- 72 Lewis, “Humanitarian Theory of Punishment,” 151.
- 73 Morris, “Paternalistic Theory of Punishment,” 267.
- 74 Nussbaum, “Equity and Mercy,” 95.
- 75 Ibid., 104.
- 76 Ibid., 107.
- 77 Ibid., 125.
- 78 Ibid., 95.
- 79 Ibid., 102.
- 80 Ibid., 111.
- 81 As Nicola Lacey and Hanna Pickard point out, “[i]n public discourse about crime, there is an insistent worry that our capacity to hold offenders responsible and accountable for misconduct is threatened by an attitude of concern, respect and compassion. For it may seem as if these attitudes can tempt us to excuse offenders from responsibility: to hold offenders responsible, we must respond with treatment which is hard and stigmatizes – or censures, excludes or shows no mercy.” Lacey and Pickard, “From the Consulting Room,” 10.

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- 82 See Andrews and Bonta, *Psychology of Criminal Conduct*.
- 83 As E.F.J.C. von Ginneken puts it, “someone who falls into a ‘high-risk’ category does not necessarily pose a great risk of *serious* offending (or causing serious harm); in other words, risk does not equal seriousness.” Ginneken, “Use of Risk Assessment,” 16.
- 84 See Hieronymi, *Freedom, Resentment*, 7.
- 85 In D. Andrews' and James Bonta's view, “[c]riminal behavior is predictable. Predictions of criminal behavior exceed chance levels. However, these predictions are not perfect, and to expect perfection is unrealistic.” Andrews and Bonta, *Psychology of Criminal Conduct*, 342.
- 86 Ibid., 58–60.
- 87 Ibid., 442–51.
- 88 Ibid., 48.
- 89 Ginneken, “Use of Risk Assessment,” 12–13.
- 90 Andrews and Bonta, *Psychology of Criminal Conduct*, 309.
- 91 Hart, *Punishment and Responsibility*, 182.
- 92 See Garland, *Punishment and Modern Society*, chapter 8.
- 93 Strawson, *Freedom and Resentment*, 28.
- 94 Ginneken, “Use of Risk Assessment,” 17.
- 95 Cieply, “How Polanski’s Probation Officer.”
- 96 It should be noted that this hostile attitude towards Polanski is not only linked with the Samantha Geimer case, but also with other recent charges of rape against him. Besides, Polanski became a symbol of patriarchy, male privilege, rape culture, etc. Thus, the hostile attitude is directed towards him as a possible repeat offender but also as a symbol of what feminists are struggling against.
- 97 I will assume that attitudes can be chosen and modified. Of course, changing our attitudes is not easy. Adopting the merciful attitude when you lack empathy is very difficult. But it is not beyond our control. Moreover, the entire discussion that follows presupposes that we are in a political community in which people’s attitudes matter, as does our regard for one another. As the anonymous reviewer pointed out to me, this may not be the case in some communities.
- 98 Duff, *Punishment, Communication, and Community*, 116–24.
- 99 Wootton, *Crime and Penal Policy: Reflections on Fifty Years’ Experience*, 222.
- 100 Hart, *Punishment and Responsibility*, 33–34.

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101 Nussbaum, “Equity and Mercy,” 121.