

Hampton on the Expressive Power of Punishment

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I.

Retributivists often claim that the intuition that wrongdoing deserves punishment is moral bedrock; it needs no further justification. Critics of retributivism deny this intuition. They find morally repugnant the idea of punishing wrongdoers without a reason to believe that someone will benefit. Punishment involves the intentional infliction of suffering. One must surely have a compelling reason to do such a thing. But a simple appeal to what the wrongdoer *deserves* is insufficient, or so the critics say.

Jean Hampton's defense of retributivism advances the debate beyond this clash of intuitions.¹ Hampton herself once shared in the moral uneasiness about retributivism, arguing specifically that it was akin to revenge.² Unlike other retributivists, after her change in view she does not claim that retribution is any sort of moral foundation. Instead, she argues that retributive punishment has a specific justifying telos.³ Thus Hampton's theory of punishment presents a different kind of challenge to non-retributivists. Nonetheless, we argue that it is fatally flawed.

Hampton's own theory builds on Joel Feinberg's work on the expressive function of punishment. Feinberg writes, "Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."⁴ Feinberg argues that punishment must be characterized with reference to both some sort of hard treatment and this symbolic significance. Condemnation without the imposition of any additional cost is not punishment. Nor is hard treatment necessarily punitive, as when heavy fines are imposed for regulatory offenses that a firm has committed through no fault of its own. However, in a genuine case of punishment, we find both elements, and the hard treatment itself expresses condemnation: "To say that the very physical treatment itself expresses condemnation is simply to say that certain forms of hard treatment have become the conventional symbols of public reprobation."⁵

According to Feinberg, the expressive function of punishment serves important social purposes.⁶ It maintains the normative force of the law. Were infractions of the law not condemned, law would lose its authority. Public condemnation of the guilty through punishment also removes suspicion from other parties. Furthermore, symbolic condemnation of wrongdoing enables the state to disavow the wrongful act. Feinberg argues that these social functions of punishment are all performed through the expression of condemnation that is conventionally associated with punishment, rather than through anything intrinsic to the hard treatment itself. He even speculates that condemnation alone could serve a deterrent purpose. This leads Feinberg to wonder whether the imposition of suffering on wrongdoers is really necessary: "One can imagine an elaborate public ritual, exploiting the most trustworthy devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed."⁷ "Perhaps this is only idle fantasy," Feinberg continues, "The only point I wish to make here is one about the nature of the question. The problem of justifying punishment, when it takes this form, may really be that of justifying our particular symbols of infamy."⁸

Hampton takes up Feinberg's challenge. She agrees that punishment serves an expressive function, and also that it is a means of condemning the wrongdoer.⁹ But punishment also, she adds, reaffirms the moral equality of the victim and the wrongdoer in a way that makes it a uniquely appropriate response to wrongdoing. In this paper we argue that Hampton's defense of retributive punishment is actually at odds with her commitment to egalitarian moral values. Rather than dispelling the impression that retributivism is morally repugnant, Hampton's version of retributivism makes it appear more troubling than ever.

II

According to Hampton, punishment is justified because, qua expressive act, it is a required response to another expressive act: the wrong. When one person intentionally wrongs another (as opposed to merely harming another), he acts on the assumption that the victim's value does not preclude this action.¹⁰ To intentionally wrong another person is to treat that person as having lower value than oneself; it is to demean her.¹¹ The wrongful act thus expresses this view of the victim's value. In fact, Hampton goes as far as to say that wrongful acts are wrong *because* they make a false and insulting claim about the value of the victim.¹² They deny the moral truth that all people are of equal, immutable value.¹³ The moral obligation to punish wrongdoing stems from the obligation to defend this moral truth:¹⁴

A retributivist's commitment to punishment is ... a commitment to *asserting* moral truth in the face of its denial.... By victimizing me, the wrongdoer has *declared* himself elevated with respect to me.... A *false moral claim* has been made. Moral reality has been *denied*. The retributivist demands that the false claim be corrected.... If I cause the wrongdoer to suffer in proportion to my suffering at his hands, his elevation over me is denied, and moral reality is *reaffirmed*.¹⁵

Thus, by means of just punishment we reassert the moral equality of victim and wrongdoer. "The retributive punisher uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is 'What you did to her, she can do to you. So you're equal.'"¹⁶

As the passage quoted above shows, Hampton sometimes represents the impulse to punish wrongdoers in linguistic terms. The punishment *corrects the false claim*, which is the wrongful action. Thus it is tempting to suppose that we are to understand this on the model of a claim's being corrected by a subsequent one, as when you correct my false statement not merely because you think I might need to know the truth someday, but simply because a false statement calls for correction.¹⁷

There are a number of reasons for being wary of this interpretation of Hampton's account of retributive desert. To wrong or punish someone is obviously not *itself* to make an assertion. An assertion belongs to a language, but to what language(s) do wrong actions belong? How can they be part of language? Language has combinatorial form, but neither wrong actions nor punishments can be combined with other parts of language to form compound utterances. Wrongs are not assertions or propositions, though they may imply these.

Hampton also describes crimes and punishments as *communicating* or *expressing* a message, *representing* an idea, *implying* a claim, or serving as a *symbol*. These are more plausible descriptions of the sense in which these actions are meaningful. After all, it is certainly true that actions can convey messages. For instance, a facial expression can communicate the message "This pie is sour," without asserting anything, having a propositional content, or being true or false. So we need not read Hampton as claiming that wrongful actions are literal assertions. But, even if we grant that the actions in question can carry meaning in some other way, they are not the sorts of things that carry the assertoric force on which Hampton sometimes seems to rely.

Furthermore, even if the wrongful act did carry assertoric force, that would provide a poor foundation for a *moral* obligation to punish. As David Dolinko has pointed out,

If someone publishes a book asserting that men are superior to women, or Jews to gentiles, or blacks to Latinos, or a book asserting that its author is an *Uebermensch* greater in moral value than any other human being on the face of the earth, we do not regard it as

obligatory on the government to see that a reply is published forthwith. Still less would we think that the government ought to clap the author in jail.¹⁸

In fact, most of us believe that states that punish people simply for making false moral claims are *unjust*. This is part of what it means to be committed to a right to free speech. But if we cannot punish someone for publishing a book that literally asserts that one person is inferior to another, then how can we punish assault or rape on the grounds that it expresses the same idea?¹⁹ The need to answer false moral claims with true ones does not permit the restriction of speech. Why should we believe that it justifies the even harsher responses of criminal punishment?

The suggestion that we might justify punishment in terms of a linguistic pressure to answer false moral claims with true ones is unpromising. But alternate interpretations of Hampton's defense of punishment are available. For example, in some places she appears to take a more psychological approach to justifying punishment. At one point she says, "it may be that *part of what it is to view an action as immoral is to have the desire to reassert the victim's value through punishment.*"²⁰ However, this comes very close to a restatement of the old line that retributive desert is bedrock moral intuition. Hampton has certainly promised us more than this.

At other points, Hampton's defense of punishment starts to sound more consequentialist. She tells us that she abandoned the moral-education theory of punishment she advocated early in her career because it elided the significance of victims.²¹ One of the negative consequences of crime, and specifically of the message that crime sends, is that it can make victims doubt their own value.²² So one point in punishing the wrongdoer is to assure the victim that she is as valuable as anyone else. Furthermore, the message sent by the criminal's action "also threatens to reinforce belief in the wrong theory of value by the community," which would likely lead to further wrongdoing.²³ So "we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish."²⁴

Hampton also takes up Feinberg's claim that punishment provides a means by which the state can disavow the wrong done. The importance of this act of disavowal is perhaps easiest to perceive when it is absent:

To use Feinberg's example, an old Texas Law that allowed a cuckolded husband to commit justifiable homicide against a man found committing adultery with his wife is "saying something" profound about the rights of men and women, and the value of life relative to the pain of being cuckolded. The refusal to punish such a murder is expressive indeed— of an attitude toward women that regards them as the property of any man to whom they are married, and an attitude toward human life that puts it second to male pride.²⁵

In support of this point Hampton reminds us that inegalitarian societies often punish differentially. Crimes committed against members of the less-valued race, caste, class or gender, especially when committed by a more valued member of society, are frequently punished lightly or not at all.²⁶ The refusal to disavow such wrongs itself has symbolic significance. Through such a failure to punish, the state "ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer."²⁷ Not only does this encourage further wrongdoing, it makes the state complicit in the crime.²⁸

Noting these points helps us to construct the interpretation of Hampton's theory that we favor. We believe that Hampton's fundamental view is that wrongdoing deserves punishment, not because wrongful actions play linguistic roles, but because of the epistemic roles they play in society (specifically, their *evidential* roles) and the consequences that follow. When one person wrongs another, she expresses the view that her victim is of lesser value *by presenting evidence* that he is inferior to her.²⁹ The wrongful act is not merely an expression. The offender does not merely express the claim that she is more valuable than the victim. She has actually dominated the victim, thereby providing substantive evidence for her claim to superiority. This evidence has the potential to make others draw false conclusions about the victim's and the offender's relative worth. In order to protect both the victim and society in general, the state must eliminate this misleading evidence. Thus, Hampton says,

[t]his ... may be what Hegel meant when he spoke of the way punishment “annuls the crime.” Of course it can’t annul the act itself, but it can annul the false evidence seemingly provided by the wrongdoing of the relative worth of the victim and the wrongdoer. Or to put it another way, it can annul the message, sent by the crime, that they are not equal in value.³⁰

Here and elsewhere Hampton speaks of *the evidence* provided by punishment, and punishment is said to be justified on the grounds that it has the power to annul *the evidence* provided by the wrongful act: “[P]unishment undercuts the probative force of the evidence provided by the wrongdoer’s action of [her] superiority.”³¹ The crime cannot be taken “to have established or to have revealed her superiority if the victim is able to do to her what she did to him.”³² By annulling the evidence of the offender’s superiority, the state thereby sends the message that the victim is, in fact, equally valuable.

Focusing on this aspect of Hampton’s theory allows us to preserve her idea that punishment’s justification is tied to its expressive function, without requiring her to defend the idea that it *asserts* something. This also accounts for the claims made in the passages mentioned above. If punishment provides evidence that the victim is not inferior to the wrongdoer, then the desire to see a wrongdoer punished *is* a desire to see the victim’s value reasserted. Moreover, if a wrongdoing provides misleading evidence of inequality, and that evidence can be countered by the evidence punishment provides, then all the previously mentioned consequences of ensuring that the victim and society have the relevant true beliefs will follow. Finally, our interpretation of Hampton’s view makes sense of her claim that punishment is a means by which the state can disavow the offender’s claim to superiority. The state disavows the false claim by providing evidence that it is false.

III.

Let us grant, at least for the sake of the argument, that the annulment of the evidence of the victim’s inferiority is vitally important and even that this is a proper function of the state. Still, we must press Feinberg’s question: Why must *punishment* be employed to perform this function? Why couldn’t we counter the evidence of the victim’s inferiority simply by throwing him a ticker tape parade? Hampton writes, “I contend that punishment is uniquely suited to the vindication of the victim’s relative worth, so that no other method of purporting to achieve vindication could be preferred to it.”³³ A parade is an insufficient response because

the fact that [the victim] had been mastered by the wrongdoer would stand. He would have lost to her, and no matter how much the community might contend that he was not her inferior, the loss counts as evidence that he is. Hence *the victim wants the evidence nullified* and punishment is the best way to do that.³⁴

A parade might be able to express the view that the victim is a valuable human being. But the crime has done something more than express the view that the victim is inferior. It has presented evidence of the truth of that view. A full vindication of the victim will work “not merely to ‘state’ [the victim’s] value, but also to *realize* it in the social milieu.”³⁵ Punishment does not merely send a message that the victim is equally valuable; it “create[s] a state of affairs (*a real state*, not a hoped-for moral state) in which the victim [is] elevated with respect to the wrongdoer.”³⁶

In the next section, we examine in detail the manner in which Hampton uses punishment to annul the evidence presented by the crime. But before doing that, let us note one approach to annulment that Hampton does not take. One possible means of nullifying evidence is to provide what John Pollock has called an “undercutting defeater.”³⁷ Suppose we have a set of evidence *E* that appears to support conclusion *C*. Say the conclusion is “It is 5:00 P.m.,” and the evidence is a watch with the big hand on the 12 and the little hand on the 5. The evidence seems to provide us with reason for believing the conclusion, but that reason can be challenged. For example, we might find that the watch has stopped. Here the evidential link between *E* and *C* is defeated. This type of counter-evidence is known as an undercutter because it undercuts the reason for believing *C* that *E* seemed at first to provide. *C* might still be true (even stopped watches are correct twice a day), but *E* can no longer be regarded as evidence for it. An undercutter *nullifies* evidence in the sense that it shows that a bit of information is not evidence at all.

Could this strategy of nullification be applied to our topic? Hampton tells us that a wrongful action presents evidence of the victim's inferiority. Undercutting that evidence would involve breaking the evidential link between the wrongdoer's subjugation of the victim and the conclusion that the victim is of lesser value. We could nullify that evidence if we could find a way to show that the wrongdoer's use of coercive power is not evidence of his superiority. This is certainly an attractive possibility, since most of us, in fact, do not believe that coercive power is any evidence of moral value. The weakest person is as valuable, in the moral sense in question, as the strongest. Given her stated goal of reaffirming moral equality, one might expect Hampton to try to undercut the evidential link between power and value that the wrongful act seems to assume. Strikingly, Hampton *does not* take this approach. Instead, as we argue in the next section, her allegiance to punishment prevents her from taking it. In defending punishment as a means of reaffirming moral equality, Hampton assumes that there *is* an evidential link between power and value.

IV.

On a view such as Hampton's, if punishment is to be morally justified, it must accomplish two ends at the same time. First, it must annul the evidence of the victim's inferiority that has been presented by the crime. Secondly, it must send the message that the victim and the offender are equally valuable. These two tasks must not pull apart. Punishment should not vindicate the victim by providing evidence that he is *superior* to the offender, for instance. But how does Hampton determine for which claim the punishment serves as evidence? How can she ensure that punishment provides a message of equality?

If a certain message is conveyed by an action, it must be either because the action conveys that information naturally or because the action has come to convey that information by convention. Feinberg assigns no message to wrongdoing and holds that punishment's message is entirely conventional. It is because he takes punishment's message to be conventional that he is skeptical about the possibility of justifying our use of it to convey condemnation. Hampton agrees with Feinberg that there is a conventional element to punishment; but on her view, punishment is justified in part because it is naturally and uniquely suited to send precisely the message required.³⁸ As she puts it: "the call for punishment as 'retribution' for a crime is a call for the infliction of a kind of suffering that (whatever the societal facts) we are morally obligated to inflict and which contains within it moral censure of the action."³⁹

Let us first try interpreting Hampton as arguing that the meaning of wrongs and punishments is (largely) natural.⁴⁰ On this interpretation she holds that the wrongdoer's exertion of coercive power over another person is *natural evidence* of her greater value. If the fact that one person exerts coercive power over another provides evidence that the first person is of greater value than the second, *then* we can see how providing a situation in which the second person exerts coercive power over the first would function to counteract that evidence. If you and I wrestle in only one match, and you best me, others will have some reason to believe that you are the superior wrestler. But if another match is arranged, and this time I best you, people will now have some reason to believe that we are roughly equal. Notice that this parallels Hampton's claims about the messages sent by wrongdoings and punishments. In both Hampton's legal/moral case and the wrestling scenario, we have a first action that (allegedly) provides evidence of inequality, while the second action, despite being intrinsically quite similar, sends a message of equality.

This picture also provides Hampton with a means of defending the principle of proportionate punishment. If, in that first wrestling match, your defeat of me was quite decisive, while in the second match I barely managed to defeat you, people will still have reason to believe you to be superior. My defeat of you will give them reason to believe us to be equal only if I beat you as soundly as you beat me. Applying what we take to be the same sort of principle to wrongdoing and punishment, Hampton writes:

The more severe the offense, the more severe the punishment is supposed to be. But this makes sense if punishment is a defeat for the wrongdoer in the name of the victim which is intended to express the victim's value. The more severe the punishment, the more he is being brought low; and how low we want to bring a criminal depends on the extent to which his actions symbolize his superiority and lordship over the one he hurt.⁴¹

This provides a neat picture. Unfortunately, it works only if Hampton accepts the offensive premise that the demonstration of coercive power provides evidence of moral value. The fact that you beat me soundly in a wrestling match provides no evidence that you are a superior cook or a superior philosopher. Nor will my defeat of you in the second match provide any evidence for our equality in these endeavors. Similarly, the victim's initial defeat might provide evidence about the wrongdoer's superiority as regards the ability to exert coercive power, but it provides no evidence that the victim is inferior in the moral sense at issue. And if there is no connection between power and moral value, then the victim's later defeat of the wrongdoer cannot give us any evidence of their equality, either. Thus, on this reading, rather than correcting false moral views, Hampton's theory of punishment reinforces at least one false claim: that power is correlated with human value.

Perhaps a more generous interpretation is that although Hampton does not believe in a natural association between power and value, she believes that most people (perhaps unwittingly) do. Thus her view might be that the state must communicate the fact that wrongdoer and victim are equal in a way that most people will understand—even if that understanding is based on a false belief. Because people in general believe that the wrongdoer provides evidence of his superiority *by exerting power* over his victim, the state must ensure that the victim is able to counteract that purported evidence *by exerting power* (by means of the state) over the wrongdoer.

On this interpretation of her view, Hampton recognizes that those who take greater power to be evidence of greater value are committed to a false theory of human value (“What we take to be evidence of people's value is ... part of a theory of what human value is”).⁴² But Hampton frequently insists that we must reassert moral truth in the face of its denial. So if Hampton believes that most people adhere to this false theory of human value, we should expect her to provide an argument against the theory. But as we have seen, this is not what she does.

Instead of sending the message that the offender's exercise of power says nothing about his value, Hampton insists that allowing the victim (by means of the state) to exert power over the wrongdoer is the best way to communicate their relative equality. Hampton not only tells us that by punishing the wrongdoer the victim says, “I master the purported master, showing that he is my peer,” she endorses this claim:⁴³ “What you did to her, she can do to you. So you're equal.”⁴⁴ Hampton allows that punishment can say something about value *because* it is an exercise of power.

Up to this point, we have been interpreting Hampton as working with a theory of natural meaning for expressive actions. What happens if we assume that the messages sent by wrongdoings and punishments are purely conventional? What if the association of value with power is merely a matter of convention? Unfortunately, this interpretation does not help Hampton's case either. If the message Hampton has been attributing to the wrongdoer's action is conventional, she has good reason to teach people to reject this convention in favor of one that is less misleading and harmful. The prior existence of such a convention would not give her a good reason to buy into it and to encourage its use for the purpose of combating other (false) messages communicated by means of that convention. In essence, this takes us back to Feinberg's worry. If it is merely a matter of convention that we convey the message of equality by inflicting suffering on the wrongdoer, if there is nothing natural compelling us to send the message in just that way, then we should choose a different convention. The fact that we *can* send the necessary message by inflicting harm is not a justification for doing so.

V.

In later writings, Hampton defends only a weaker version of retributivism. She no longer claims that punishment is a uniquely appropriate response to wrongdoing. She even concedes that, in the right social context, a parade honoring the victim could humble the wrongdoer, thereby achieving just the sort of reassertion of value that she has in mind.⁴⁵ She also begins to mention restitution and compensation, as well as punishment, as appropriate responses to wrongdoing.⁴⁶ Still, she continues to present her view as a form of retributivism. “[T]he retributive response need not be in the form of a punishment to count as retribution,” she claims.⁴⁷ In another paper she repeats this point and adds, “*any non-painful method*, so long as it was still a method of

defeating the wrongdoer, *can still count as retributive punishment.*”⁴⁸ She presents examples of “turning the other cheek” and treating one’s abuser with kindness. These responses can defeat the wrongdoer by shaming, and thereby humbling, him.⁴⁹ This kind of defeat involves suffering in a sense, but it is suffering that the wrongdoer inflicts on himself.

It is hard to know what to make of the weaker version of Hampton’s theory. With regard to the question of whether punishment is justified and on what grounds, Hampton’s view does not change in any substantive way. The fact that she grants that other responses can do what punishment does never undermines her confidence that punishment is justified.⁵⁰ Perhaps she believes that, although something other than punishment could do the required work in some contexts, in most cases only punishment will do. But in abandoning the claim that wrongdoing necessarily deserves punishment (her view now seems to be that what is deserved is “to be defeated”), she seems to have abandoned the view that is traditionally labeled “retributivism.”

Furthermore, the weaker versions of Hampton’s theory are still subject to our main critique. In her later articles, Hampton continues to justify punishment on the grounds that it provides evidence that the offender is not more powerful than his victim, *thereby* demonstrating that he is not more valuable. Furthermore, even her justification of allegedly nonpunitive responses to wrongdoing, such as restitution or compensation,⁵¹ is threatened by the same problem. The state forces an offender to pay restitution to his victim in order to defeat the offender and his claim to superiority. The state proves something about the offender’s relative value *by* exercising this coercive power over him. The offensive equation of power with value continues to be central.

Hampton’s expressive theory of retributive punishment is intended to provide a telos for retribution, a justifying aim that will both shed light on the retributive impulse and dispel the moral uneasiness critics feel about the intentional infliction of suffering on wrongdoers. The central idea is to show that the retributive impulse goes hand in hand with a commitment to egalitarian moral values. However, a close examination of the theory reveals the opposite. If punishment sends the message that the offender and the victim are equally valuable, it does so only by sending the message that a person’s value is correlated with his ability to exert coercive force over other human beings.

Notes

¹Hampton first developed her theory of retributive punishment in chapters 2 and 4 of her dialectical book, co-written with Jeffrie G. Murphy, *Forgiveness and Mercy* (New York: Cambridge, 1988). She revisited the idea, in various contexts, in “A New Theory of Retribution,” in *Liability and Responsibility: Essays in Law and Morals*, ed. R. G. Frey and Christopher W. Morris (New York: Cambridge University Press, 1991), 377–414; “Correcting Harms versus Righting Wrongs: The Goal of Retribution,” *UCLA Law Review* 39 (1992):1659–1702; “An Expressive Theory of Retribution,” in *Retributivism and Its Critics*, ed. Wesley Cragg (Stuttgart: Franz Steiner Verlag, 1992), 1–25; “Liberalism, Retribution and Criminality,” in *In Harm’s Way: Essays in Honor of Joel Feinberg*, ed. Jules Coleman and Allen Buchanan (New York: Cambridge University Press, 1994), 159–82; and “Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law,” *Canadian Journal of Law and Jurisprudence* 11, no. 1 (January 1998): 23–45.

²Jean Hampton, “The Moral Education Theory of Punishment,” *Philosophy and Public Affairs* 13 (1984): 208–38.

³Hampton and Murphy, *Forgiveness and Mercy*, 123.

⁴Joel Feinberg, “The Expressive Function of Punishment,” in *Doing and Deserving* (Princeton: Princeton University Press, 1970), 95–118, at 96.

⁵*Ibid.*, 100.

⁶*Ibid.*, 101–105.

⁷*Ibid.*, 116.

⁸*Ibid.*

⁹Hampton, “Liberalism, Retribution and Criminality,” 163–64.

¹⁰Hampton, “Correcting Harms versus Righting Wrongs,” 1661–66.

¹¹Hampton and Murphy, *Forgiveness and Mercy*, 52.

¹²Hampton, “Expressive Theory of Retribution,” 8, 12.

¹³Hampton, “Correcting Harms versus Righting Wrongs,” 1672.

¹⁴ Hampton believes there is an obligation to punish, though she recognizes that this might be trumped by other moral considerations, including considerations of mercy (*ibid.*, 1700n). She also recognizes the distinction between crimes, which are properly punished by the state, and other wrongs that are not, though she offers us no theory on this point (1659). She argues that a theory of punishment should work not just for cases of state punishment, but for punishment in general. She refers at various points to practices of punishment within families (see, e.g., Hampton and Murphy, *Forgiveness and Mercy*, 127n).

¹⁵*Ibid.*, 125; emphases added.

¹⁶Hampton, “Expressive Theory of Retribution,” 13.

¹⁷Cf. Hampton and Murphy, *Forgiveness and Mercy*, 132.

¹⁸David Dolinko, “Some Thoughts about Retributivism,” *Ethics* 101 (1991): 537–99, at 551.

¹⁹Hampton responds to Dolinko’s critique in “Correcting Harms versus Righting Wrongs” by biting the bullet and accepting that false and insulting speech and wrongful actions are indeed wrong for the same reason. However, she argues that the harms of restricting speech are *usually* worse than the harms of allowing it (1679). In this way, she grants a right to free speech, though not as strong a right as most liberals want.

²⁰Hampton and Murphy, *Forgiveness and Mercy*, 132.

²¹*Ibid.*, 130.

²²*Ibid.*, 51.

²³Hampton, “Correcting Harms versus Righting Wrongs,” 1659.

²⁴*Ibid.*, 1687.

²⁵Hampton, “Punishment, Feminism, and Political Identity,” 38. Hampton is referring to Feinberg, “Expressive Function of Punishment,” 98.

²⁶Hampton and Murphy, *Forgiveness and Mercy*, 141.

²⁷Hampton, “Correcting Harms versus Righting Wrongs,” 1691–92.

²⁸Feinberg also views an authority’s failure to disavow a crime as a kind of complicity and attributes this idea to Kant (“Expressive Function of Punishment,” 103–4). ²⁹Hampton, “New Theory of Retribution,” 401–2.

³⁰Hampton and Murphy, *Forgiveness and Mercy*, 131.

³¹Hampton, “New Theory of Retribution,” 402.

³²*Ibid.*

³³*Ibid.*, 401.

³⁴*Ibid.*, 401–2. Hampton discusses the ticker tape parade objection in four different works. In *Forgiveness and Mercy* and “New Theory of Retribution,” she defends the view described here. However, in “Correcting Harms versus Righting Wrongs” and “Expressive Theory of Retribution,” she changes her mind. In the latter articles, Hampton grants that it is possible for something other than punishment to perform the required expressive function. We discuss this weaker version of Hampton’s view in the final section of the paper. Until then, we address only the stronger version, which argues that punishment is a uniquely appropriate response to criminal wrongdoing. The critiques we offer undermine both versions of Hampton’s theory.

³⁵Hampton, “Correcting Harms versus Righting Wrongs,” 1696.

³⁶*Ibid.*, 1695.

³⁷John Pollock, *Contemporary Theories of Knowledge* (Savage, MD: Rowman and Littlefield, 1986), 38–39.

³⁸Hampton does not say in precisely what way punishment is conventional. From her writings, however, it seems that what is not conventional is that punishment subjugates the wrongdoer. There is a good deal of room for convention here, in that there are many different ways to subjugate a person, and it may be a matter of convention which way a particular society chooses. So, for instance, it is possible to limit a person’s freedom either by requiring her to adhere to a set of rules and report to a parole officer with proof that she is adhering to those rules, or by locking her in a jail cell. It can be a matter of convention which means of limiting a person’s freedom, and thereby subjugating her, is used in any particular situation.

³⁹Hampton, “Expressive Theory of Retribution,” 3.

⁴⁰When she speaks of natural meaning, Hampton cites Grice (“Correcting Harms versus Righting Wrongs” 1675–76). We wish to note that it is far from clear that Grice’s concept

of natural meaning is a good fit here. What follows does not hinge on this issue.⁴¹ Hampton and Murphy, *Forgiveness and Mercy*, 134.

⁴²*Ibid.*, 48.

⁴³*Ibid.*, 125.

⁴⁴ Hampton, "Expressive Theory of Retribution," 13.

⁴⁵ Hampton, "Correcting Harms versus Righting Wrongs," 1695.

⁴⁶ *Ibid.*, 1697–98.

⁴⁷ *Ibid.*, 1694.

⁴⁸ Hampton, "Expressive Theory of Retribution," 16.

⁴⁹ *Ibid.* These last two methods of humbling the offender must be offered with respect to private wrongs only. Were the state to turn the other cheek, this would not vindicate the value of the victim. It would be more likely to send the message that the state does not value the victim either. Nor can the state legitimately compel the victim to show kindness to the offender who has victimized her. The decision to forgive is arguably supererogatory. At the very least, it is not the sort of duty that can be enforced by a third party.

⁵⁰ See also "Punishment, Feminism, and Political Identity," Hampton's last article on retributivism, which continues to place heavy emphasis on the imposition of suffering on wrongdoers. In this provocative article, Hampton argues that feminists should demand that criminals be punished on retributive grounds.

⁵¹ Hampton, "Correcting Harms versus Righting Wrongs," 1697–98.