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WHY PUNISH WAR CRIMES? VICTOR'S JUSTICE AND EXPRESSIVE JUSTIFICATIONS OF PUNISHMENT

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I. INTRODUCTION

Many people hold that atrocities committed in times of war should be punished. This straightforward moral claim might be justified in a number of ways. One would be to argue that those who have committed such crimes deserve punishment simply because punishment is an appropriate response to moral atrocity.[1] On this view, the fact that the atrocities have occurred in time of war is of no special moral significance: the onus is rather on those who hold that war crimes should not be punished to provide a cogent justification for their view.

An alternative approach is to claim that if war criminals are punished, those who are tempted to commit atrocities in future wars are may be deterred from doing so.[2] This view could be based on a consequentialist approach to the justification of punishment as a whole. However it could equally be combined with a rejection of such an approach to punishment in general. On a view of this sort the punishment of war crimes would be seen as a special case, requiring a different sort of justification from that which was applicable to the institution of punishment as a whole. Such a view might be motivated by the thought that straightforward justifications of punishment break down, for one reason or another, in the case of war crimes, but that

[1] I have in mind so-called 'retributivist' theories. However it is worth bearing in mind that this label covers a variety of different views – for discussion see John Cottingham, 'The Varieties of Retribution', *Philosophical Quarterly* 29 (1979), 238–246.

[2] See for example Anthony Ellis, 'What Should We Do With War Criminals', in Aleksandr Jokic (ed.), *War Crimes and Collective Responsibility: A Reader* (Maiden MA: Blackwell, 2001), pp. 97–113.

nonetheless it must be possible to find some justification for punishing war crimes.

However, these two approaches do not exhaust the range of possible justifications for punishing war crimes. A third approach, less frequently discussed in the philosophical literature on punishment, is that either the very institution of punishment or some specific features or instances of it are best justified by reference to its expressive function. On this view, what justifies the punishment of war criminals – and perhaps criminals in general – is that such punishments communicate or express particular messages.[3]

In this paper, I shall be arguing that the best way of justifying our present practices of punishing war crimes is by adopting the third sort of account. My claim will be that other purported justifications of our current practice are undermined by the ways in which it is selective. To be more specific, they are undermined by the fact that as things stand it is almost invariably those who come out on the losing side in wars who end up being punished. However, such facts do not undermine what I shall call an expressive justification of punishment.

In arguing for this conclusion, I shall be responding to a recent exchange between Burleigh Wilkins[4] and Anthony Ellis.[5] As I shall outline below, Wilkins argues that the ways in which war crimes trials are selective undermine the legitimacy of punishments for war crimes. His focus is on justifications of

[3] For examples of such views see Robert Nozick, *Philosophical Explanations* (Oxford: Oxford University Press, 1981); Anthony Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986) and *Punishment Communication and Community* (Oxford: Oxford University Press, 2000); Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press); Uma Narayan, 'Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment', *Oxford Journal of Legal Studies* 13 (1993), 166–182. See also, for critical discussion, Anthony Skillen, 'How to Say Things With Walls', *Philosophy* 55 (1980), 509–523; Igor Primoratz, 'Punishment as Language', *Philosophy* 64 (1989), 187–205 and contributions to Matravers, M. (ed.) *Punishment and Political Theory* (Oxford: Hart Publishing, 1999).

[4] Wilkins, B., 'Whose Trials? Whose Reconciliation?', in Jokic op. cit. pp. 85–96.

[5] Ellis op. cit.

punishment that work along retributivist lines. One natural response is to suggest (as Ellis does) that the selectivity of war crimes trials can be justified along consequentialist lines by reference to claims about the public interest.[6] I shall argue that this response fails: public interest considerations do not succeed in showing that where war crimes are concerned our current punishment practices are justified. I shall then go on to outline an alternative, expressivist account of punishment which succeeds where Ellis's fails.

Before I embark on this task, though, I need to make two preliminary points. The first concerns the focus of my arguments. I shall be mostly concerned with arguments about whether and how our present practices of punishing war criminals (or something like them) can be justified. I think it is important to argue – in the face of reasoned claims to the contrary, which I shall be discussing below – that we are justified in punishing those war criminals whom we actually do punish. To do so is not to claim that our current practice cannot be improved upon. Nothing in what follows should be taken as an argument to this effect. In fact I think that there are good reasons for supporting efforts to build and strengthen the impartiality of existing international tribunals, and for seeking to punish individuals whose commission of war crimes is currently overlooked for reasons of political expediency. But the claim that unless we reform our current practices we are not justified in punishing those war criminals who we do punish is not one of them.

One might object to my focus on our current practices along the following sorts of lines: concerns about this sort of selectivity show conclusively that our current practices of punishing war criminals are unjustifiable. But they do not show that there would be anything wrong with reformed versions of these practices – for example with situations in which individuals who were guilty of war crimes were punished by their own states, or by international tribunals that were more genuinely impartial than those that currently exist. This line of thought, although tempting, begs the question against the line of thought

[6] Ellis op. cit. pp. 101–102.

I shall be considering. For I shall argue that although these facts undermine some sorts of justification for our present practice, they do not undermine the one I shall be defending.

The second preliminary point is about the scope of the version of expressivism I shall be defending. I want to emphasise that for the purposes of this paper I am not putting forward the expressive account as a general account of the justification of punishment. In particular, I shall not be concerned with convincing someone who has doubts about whether it can *ever* be right to mete out harsh treatment to criminals – for example, on the grounds that such treatment infringes their rights. I shall assume that some account of how punishment can be justified in normal cases can be provided.[7] Instead I shall focus on the particular case of the punishment of war crimes.

I take this narrow focus to be justified for two reasons. First, the punishment of war crimes typically takes place in ways that place it outside of the normal workings of the established legal systems of states trying their own citizens. For this reason, there are *prima facie* grounds for taking the practice to raise its own peculiar philosophical problems. Secondly, the particular problem about punishing war crimes that I will be trying to address is one that does not have any obvious analogue for the case of punishment in general.[8]

One consequence of the view that I will be defending is that there is something non-standard about justifications for the punishment of war criminals. I do not take this to count against what I say but rather to be an attraction of my view. If, as I shall be arguing, there is something unusual about the way in which punishments of war criminals are to be justified, this

[7] Indeed one feature of my view about the punishment of war crimes is that it can only be made plausible if some more general account of the justification of punishment in more standard cases can be provided. However, my account it does not depend on details of the form that this justification must take, and for that reason, I shall be comparatively unconcerned with them. (In particular, I do not assume this justification must take an expressivist form.)

[8] See pp. 5–6 below for the reasons why and pp. 9–10 for further discussion.

explains why the topic is one that invites controversy and disagreement.

II. VICTORS' JUSTICE

As I have already observed, many people think that (at least some) war criminals should be punished. However, there are dissenters. In some cases, their views are based on either cynicism or political expediency. I shall not be concerned with such considerations here. Nor shall I be concerned with objections to the punishment of war criminals that are based solely or primarily on considerations of the practical difficulties of finding, trying, and imposing penalties on those who have perpetrated war crimes. While these difficulties are considerable, and do have some bearing on our assessment of our current practice, they cannot decide the case in the absence of further, more philosophically grounded argumentation. No-one thinks that it is literally impossible to hold war criminals accountable for their actions: those who emphasise the difficulties involved in doing so are in effect pointing out the costs of such action. But this raises the question of whether those costs are worth bearing and under what circumstances – and this is not a question that can be answered without further argument.[9,10]

[9] This paragraph should not be taken as endorsing a form of consequentialism. There can be all sorts of reasons why the costs of a particular line of action are or are not worth bearing – not all of them have to do with the possibility of there being countervailing benefits. The point here is that the most that can be claimed by someone impressed by the practical difficulty of bringing the perpetrators of war crimes to trial is that these costs may be very large. All I am saying here is that an acknowledgment of this fact cannot pre-empt further moral debate.

[10] I here avoid discussion of whether the punishment of war crimes can legitimately be called 'punishment' on the alleged grounds that it is a conceptual truth for something to be punishment it must be enforced by an established legal system, a standard from which much of what is usually counted as punishment of war crimes falls short. My main concern is whether a certain practice, typically called 'punishment' is justifiable, and not whether that practice should in fact be called punishment. None of this should be taken to imply that I take the question of whether the punishment of war crimes takes a legal form to be unimportant: see pp. 17–18 below.

More principled objections to the idea of punishing war crimes often appeal to the idea that such punishments only embody 'victors' justice' rather than real justice. The notion of victor's justice is a complex one, and it would take us a long way afield to disentangle the various strands that go to make it up.[11] However one concern which plays a significant role here is that in practice the trial and punishment of war criminals by international tribunals does not represent the application of impartial moral principles to individuals on both sides of conflicts. Instead it typically only involves the inflicting of harsh treatment on selected members of the losing side.[12]

This concern is based on the following observation. In many, if not all, wars, atrocities are committed by both sides. However, when we look at war crimes trials we find that it is almost invariably those on the losing side who are tried and punished. We do not, for example, find the men who ordered the firebombing of Dresden standing trial alongside the Nazis at Nuremberg even though these men's actions were as much in breach of the war crimes convention as those of the men who were responsible for Nazi atrocities in Occupied France.

This observation gives rise to an awkward suspicion. It is that there is a sense in which those who are guilty of war crimes are not just being punished for the atrocities they have committed. They are also being punished for the 'crime' of being on the losing side. This suspicion can be articulated more clearly by casting it as a point about luck. Whether one ends up on the winning side or the losing side in a war is largely a matter of luck. Only an incurable optimist could think that the fact that someone had ended up on the winning side rather than the losing side in a war was some kind of evidence for the moral superiority of their cause. How-

[11] Other aspects of the notion of 'Victor's Justice' which I do not discuss here are the question of whether punishing individuals for war crimes involves anything analogous to retrospective legislation and the issue of whether there are problems about punishing heads of states and other government officials for official acts. I am grateful to Efraim Podoksik and to an anonymous referee for *Law and Philosophy* for helping me to disentangle several important issues here.

[12] In emphasising this aspect of the notion of Victor's Justice I am following Wilkins op. cit.

ever, it is natural to think that matters of luck should be irrelevant to how seriously one is punished for crimes that one has committed. Any system of justice which institutionalises them is to that extent inadequate.[13]

The significance of the 'Victor's Justice' objection can be illustrated by considering an analogy with a case of domestic punishment. Suppose the proportion of those who are imprisoned for dangerous driving who are university teachers in their thirties turns out to be noticeably greater than the proportion of drivers who are in their thirties who are university teachers. There is a *prima facie* case for thinking there is something wrong here.

It is, of course, only a *prima facie* case.[14] There may be good reasons why 30-year-old university teachers should be disproportionately punished for driving offences. Perhaps their psychological make-up makes them likely to be reckless drivers, or perhaps they have more opportunity to drive dangerously. Nevertheless, in the absence of such an explanation we may well feel that there is something amiss. Something similar will be true if we think that the explanation has nothing to do with how likely university lecturers are to drive dangerously – for

[13] The point that I am making is supposed to be a fairly narrow one – it only concerns the role which luck should play in the treatment of two individuals who are guilty of the *same offence*. It is arguable that luck can play a role in determining which offence an individual is guilty of: a lucky miss may turn someone who would otherwise have been a murderer into someone who is guilty of only attempted murder, and thus, in some circumstances make them liable for a lighter penalty. Although some authors think that there is an injustice in allowing luck of this sort ('outcome luck') to play in determining what offence an individual has committed (see e.g. Ashworth, A., 'Criminal Attempts and the Role of Resulting Harm under the Code and in the Common Law', *Rutgers Law Journal* 19 (1988), 725–772), I disagree: I think that the justice of a punishment can depend on what an individual has actually managed to do, and not merely what they have tried to do. For an argument for this conclusion on expressivist grounds see Duff, R.A., *Criminal Attempts* (Oxford Clarendon Press, 1996) especially chapter 12. Note that this is entirely consistent with thinking that there is an injustice in allowing luck to influence our treatment of different individuals who have committed the same offence.

[14] cf Ellis op. cit. pp. 98–99.

example, if police speed traps are being deliberately set up near university campuses with the aim of discrediting prominent academics.[15]

III. RETRIBUTIVISM AND THE VICTOR'S JUSTICE OBJECTION

The 'Victor's Justice' objection suggests that justifications for punishing war crimes may undermined by the fact such punishments fail to meet an intuitive constraint. The constraint is that punishments should be inflicted for non-arbitrary reasons. Seen in this way, it can be understood as drawing its force from a general moral requirement that judicial actions should be non-arbitrary.[16]

However, it is plausible that if this is a general moral requirement, then it is one that is based on some more abstract principles. And, for all that has been said so far, it is at least an open possibility that once we see what principles are involved we will see that they need to be qualified when the treatment of war

[15] This example may seem to trivialise a serious matter. The triviality is deliberate – the point of it is to illustrate a general principle by reference to a case where our intuitions are unlikely to be affected by prior intellectual commitments. But the principle illuminates other less trivial situations. For example it is sometimes argued, on the basis of statistics which seem to show that women who are convicted of committing violent crimes are typically sentenced more severely than men who are convicted of committing crimes of equal violence, that the British criminal justice system discriminates against women. An inference drawn from these statistics is that something other than the gravity of the offence has played a role in determining the severity of the sentence these women receive, and this is *prima facie* evidence of injustice. Similar considerations are also invoked – as Wilkins points out – in discussions of capital punishment within the United States: here the facts that black defendants are in general more likely to be convicted, and when convicted more likely to be sentenced to death is often taken as evidence that there is something amiss with capital punishment if not in principle then at least as currently practiced within the United States.

[16] Some might think that it derives from a conceptual requirement that for something to count as punishment it must be inflicted on non-arbitrary grounds. However I find appeals to supposed conceptual requirements of this sort unconvincing: see Herbert Hart, 'A Prolegomenon to the Principles of Punishment', in his *Punishment and Responsibility* (New York: Oxford University Press, 1968), pp. 1–27 for a fuller discussion.

criminals is at issue. However, I do not think that this is the case. Or rather, I think that many well-known theories of punishment give us good grounds for endorsing the principle and no particular reason for qualifying it in the case of war criminals.

Theories of punishment are often categorised as being either retributivist or consequentialist. I shall try to show that the Victor's Justice objection presents *prima facie* difficulties for advocates of standard forms of each view. My discussion here is not intended to be exhaustive: a full treatment of every possible variant of each kind of view would be impossibly long. Nevertheless I shall try to show why I do not think that some of the more obvious variants on standard views seem unlikely to defuse the problem.

I shall start by considering retributivist accounts of punishment. A central element in such accounts is that the wrongness of a particular kind of action itself justifies the inflicting of whatever form of harsh treatment it is that constitutes punishment in a particular case. The justification is, in this respect, backward-looking: it does not depend on the sorts of effect that the punishment has or might reasonably be expected to have.[17]

An important aspect of retributivist views is that harsh treatment as a result of wrongdoing is only morally permissible if it is inflicted for the right sort of reason. One way of making this point is by considering our reactions to cases where wrongdoers undergo harm for the wrong sort of reason.

[17] Here and elsewhere in this paper, I take the task of justifying a form of punitive practice to involve showing that it is morally permissible and rationally good. I do not take it to involve showing that it is either rationally or morally *required*: an attempted justification of a punitive institution would not fail if there were some occasions on which there were overriding countervailing considerations (although the arguments of this paper place fairly strict limits on what sorts of countervailing considerations might be acceptable); or alternative institutions and practices which would fulfil the same role. On the other hand, a justification of the institution must do more than show it is morally permissible – given the great difficulties and costs involved in hunting down, trying and punishing war criminals, an account which merely showed that this was merely morally permissible would leave the question of whether we should actually engage in it wide open. (I'd like to thank an anonymous referee for *Law and Philosophy* for pressing this question.)

Consider a case where a criminal is accidentally shot by a policeman in the course of his duties. We may find the policeman's action excusable in a situation where he/she is trying to prevent a crime or where a criminal is resisting arrest. But it is in general not true that the mere fact that a crime has been committed makes the policeman's action excusable.

Furthermore, this intuition can be given theoretical backing. A central concern of retributivist accounts of punishment is that the moral permissibility of harsh treatment for offenders depends on its being directed at the particular individual who has committed the offence. One obvious way in which this constraint can fail to be met, often emphasised by retributivist critics of consequentialist accounts, is if the purpose of the punishment is merely to deter other would-be offenders. But another is if the harsh treatment is received not because of the crime but for some other reason. This is precisely what gives the Victor's Justice account its bite when addressed to retributivist accounts of punishment.[18] For what the Victor's Justice objection suggests is that when war criminals receive harsh treatment, they are not receiving this harsh treatment because of the crimes they have committed but for some other reason.

This point is not unanswerable. A defender of the punishment of war crimes who was attached to a retributivist account of punishment might take one of two deflationary lines. First, she might deny the interest of the Victor's Justice objection. She might say that the Victor's Justice objection does not show that the punishment of war criminals is never justified. It shows that there are certain contingent (but perhaps fairly widespread) circumstances in which such punishments are not justified. One could develop this point by arguing that we could, in principle develop international tribunals, which would allow for the impartial punishment of participants on both sides of any conflict.

However, the prospect of war criminals being tried by international tribunals at some point in the future is also not enough to defuse the 'Victor's Justice' objection. The problem is not just that such tribunals do not currently exist. A further problem is that it is highly unlikely that powerful nations would

[18] Wilkins op. cit. pp. 86–87.

be likely to hand over their citizens to such tribunals except in circumstances where military defeat or diplomatic failure left them with no other option. So a justification for punishing war criminals which relied on the impartial operation of international tribunals could be reasonably dismissed as Utopian.[19]

An alternative response would be to say that the facts pointed to by the proponent of Victor's Justice objection are even less significant than the advocate of the first response suggested. It is not true, an advocate of this view might say, that those who are in fact punished for war crimes are being punished for the wrong sorts of reasons. After all, those who are punished (we may assume) have indeed committed such crimes. Their having committed those crimes plays at least some role in explaining why they have been singled out for punishment: it is not as if the punishment is meted out indiscriminately to combatants on the losing side.

[19] Note that what I take to be Utopian is reliance on the impartial operation of such tribunals, rather than their actual establishment. My pessimism here is shared by Wilkins op cit pp. 88–89. Wilkins' view seems to have been borne out by more recent political events surrounding the establishment of such tribunals: it seems inconceivable that, for example, the United States will abandon its current attempts to undermine the establishment of an International Criminal Court at any point in the foreseeable future. To recognise this fact is not, of course, to applaud it. Nor should the attempt to show that the practice of trying alleged war criminals and punishing them in other fora is morally acceptable be taken as argument against the suggestion that practice of trying them in international tribunals would be an improvement on the status quo in various respects (including moral respects): I think it would. One can concede this, but still think that our current practice is morally acceptable (though capable of being improved on in various respects.) This is the view that I take. It is also perhaps worth noticing at this juncture that it is far from obvious that the establishment of international tribunals would itself be enough to dissolve the sorts of concerns about Victor's Justice that I am concerned with here. For it is quite likely that even such tribunals would attend disproportionately to the actions of war criminals on the losing side in wars, and for very good reasons. Despite the fact that the Secretary General of the United Nations has declared the recent war on Iraq illegal, the chance of any British citizen being tried for war crimes involved in the prosecution of that war strikes me as extremely remote, despite the fact that the British government supports the existence of institutions such as the International Criminal Court.

The case may be bolstered by considering situations that seem structurally analogous to the one under consideration. Consider first the case of a criminal who is caught and punished for an ordinary crime for which detection rates are low. Such a criminal might, perhaps, argue that they were being punished not because they had committed a crime but because they had been unlucky enough to be caught. But we would surely not consider this to be a justification for not punishing them. If we did, this would constitute a serious objection to most actual systems of punishment, since the point, though more graphic in situations where detection rates are low, seems just as compelling in any situation where detection and conviction rates are less than 100%.

However, there is a significant disanalogy between this sort of situation and the sort of situation to which the proponent of the Victor's Justice objection draws our attention. It is, of course, true that the fact that a criminal has been caught is part of the explanation of why he has come to be punished. But the fact that criminals who are not caught go unpunished does not undermine the claim that the punishment is directed at the perpetrator of the crime in the right sort of way. By contrast the points to which the proponents of the Victors' Justice objection draw our attention are ones which ought to undermine our confidence in thinking that the reasons why the punishment is carried out are the right ones.

The salient difference between the two cases is the sort of factors that enter into the explanation of why the same punishment does not get inflicted on individuals who have committed the same crimes. In the case of the individual who has committed a crime for which detection rates are low, the explanation does not involve anyone's deliberate agency: no-one has decided that those who don't get caught will be spared punishment.[20] It's just an unfortunate fact that criminals who

[20] Matters might be different if, for example, a general amnesty for undetected crimes of the sort in question were declared after a certain period of time. But it isn't beyond controversy that such an amnesty would involve no injustice to those that had been tried and punished – however difficult we might find it to extend our sympathy to such individuals in the case of some crimes.

don't get caught can't be punished. But in the case of war crimes trials, agency is involved – that some types of individuals are tried and punished while others are not will depend on decisions made by particular individuals.

IV. CONSEQUENTIALISM AND THE VICTOR'S JUSTICE OBJECTION

Anthony Ellis has recently argued that the Victor's Justice objection, in the form in which I have presented it here, is far from compelling.[21] Many of the points he makes depend on the details of the way in which the Victor's Justice objection is presented. For example, he argues that the intuitive requirement on just punishments that like cases be treated alike need not be violated in situations where members of one group are punished disproportionately. According to Ellis the most that facts about disproportionate punishment can show is that there is a *prima facie* case that people are being punished for morally irrelevant reasons. This *prima facie* case is one that may be rebuttable – for example if it can be shown that the facts about disproportionate punishment can be explained in other ways than by the supposition that people are being punished for irrelevant reasons. This point is one which I have conceded in my presentation of the Victor's Justice objection.

However, to say that a case is rebuttable is not thereby to rebut it. Ellis suggests that in order to do so, we need to consider the role which considerations of public interest can play in deciding whether to pursue a trial. As he points out, municipal law often gives prosecutors leeway on whether to proceed with prosecutions of crimes.[22] Various considerations may be considered as legitimate reasons for not so proceeding. In particular, prosecutions need not be pursued when it would be against the public interest to do so.

Ellis also suggests that a similar 'public interest' criterion can be applied in the case of prosecutions for war crimes. He also

[21] Ellis op. cit.
[22] Ellis op. cit. pp. 101–102.

argues that the operation of such a criterion can explain the asymmetrical treatment given to those accused of war crimes on winning and losing sides. Put bluntly, it would be massively against the public interest to do so. For example if the Allied leaders had set up war crimes tribunals with jurisdiction over their own actions 'there would have been virtually no public support for this at any level' (103); 'there would have been no serious chance of a conviction' (ibid) (so the whole exercise would presumably have been a massive waste of resources); and 'If Churchill... had been found guilty of crimes against humanity... the results would have been catastrophic beyond imagining' (ibid).

Of course, it is one thing to say that public interest considerations are taken into account when deciding whether to proceed with prosecutions in the domestic case, and another to say that it is justifiable to allow them to do so. If Ellis' attempt to undermine the Victor's Justice objection is to succeed he needs to make the latter claim. However, this is something we should be cautious about conceding.

Ellis says very little about why he takes the operation of public interest considerations in the domestic case to be defensible. However, in the light of his subsequent account of why he takes war crimes punishments to be defensible he appeals to broadly consequentialist considerations. It does not seem unreasonable to think that similar considerations are in play in his account of the role of public interest considerations in undermining the Victor's Justice objection to punishing war crimes.

One difficulty with a consequentialist account of the justification of punishing war crimes is that it is very difficult to know what the consequences of this practice are and whether they are indeed beneficial. Does the policy deter individuals from committing atrocities, or does it make those who have done so more careful about covering up the evidence of their crimes, more tenacious in hanging on to power at any cost, and less likely to surrender when their military position is hopeless? It is difficult

to know, and difficult to see how we could have reliable information on this topic.[23]

In any case, though, it is not clear that consequentialist considerations can succeed in justifying the role which Ellis wishes public interest considerations to take in either municipal or international law. Two points are worth noticing here. The first is that it seems intuitively plausible that considerations of equal treatment might override public interest considerations in at least some cases. We would be very suspicious of a jurisdiction which prosecuted motoring offences by unemployed young black men much more frequently than similar offences by middle-aged white university lecturers, even if it offered the following sort of justification: 'Middle class university lecturers can usually afford fairly good legal representation, so the chances of securing a conviction are relatively low. Furthermore the level of outrage that a conviction might generate (in terms of letters to the press,

[23] This is not to say that if such information were available we would be justified in ignoring it. But it is perhaps worth saying something about more about why the efforts of historians and sociologists to dig into the empirical facts are unlikely to yield to us the sorts of answers that we would need in order to do a straightforward consequentialist calculation.
The effects of war crimes trials on the conduct of individuals who are prosecuting wars is likely to depend a great deal on the circumstances of each particular war: the circumstances in which the war breaks out; the military culture of the opposing sides; the history of relations between combatants on both sides; the estimated chances of victory and consequences of defeat; and so on. It is also likely to be affected by the ways in which prosecutions for war crimes have operated on previous occasions – and how they have been seen as operating by the combatants. Assessing the effects that these are likely to have in particular cases is something that might be possible – but probably not until a considerable time after they have taken place. This is no help to the consequentialist, who needs a way of judging the way in which the prospect of war crimes trials is likely to affect combatants in future wars rather than ones that have yet to take place.
All this is compatible with believing (as I do) that looking at the messy details of the historical record may be illuminating in various ways – for example, in opening our eyes to possible unintended consequences of our actions, or extending our grasp of the sorts of factors that might affect people's decisions here. My quarrel is not with those who emphasise the significance of the concrete particular case, but with those who overestimate our capacity to generalise from them in a reliable manner.

complaints made to influential individuals) is much higher with university lecturers as they are articulate and often well-connected. Finally, their behaviour is rarely regarded as a model which others might seek to emulate. So, given the limited resources available for pursuing prosecutions of this sort, we would do well to ignore driving offences by offenders of this sort'.

Furthermore, the intuitions that suggest this are not *mere* intuitions. They can be backed up by considerations to which someone with consequentialist leanings ought to be sympathetic. The idea that different groups ought to be treated alike by the law is one that can be defended by means of considerations which have nothing to do with the consequences of such a policy. However they can also be defended on consequentialist grounds. For example, differential treatment of different groups justified along the lines suggested above are likely to lead to contempt for the law, both on the part of those who are treated leniently (since they may be inclined to notice and exploit their relative impunity) and those who are treated more harshly (since they are likely to become cynical). And contempt for the law may well lead to that law being more frequently disregarded.[24,25]

Of course, one might respond that the amount of weight that can be given to public interest considerations will vary from case to case. If so, then it might be that while the factors to which I have pointed are reasons for being suspicious of prosecutorial discretion for traffic offences, they are not

[24] For clarity's sake, I should probably add the following. I take the moral intuition that a legal system that operated like this would be *deserving* of contempt to be a compelling one, without the consequentialist backing that I give it. But I take it that, presented with a mere intuition, a consequentialist (of the sort I take Ellis to be) might merely bite the bullet and insist that the intuition was misleading: hence the need for an account of why a consequentialist should find the point compelling.

[25] To the objection that this consequentialist line of defence is mere story-telling, the response is that the only person whose position is improved if this point is conceded is someone propounding a consequentialist story about why it is acceptable to rely on public interest considerations in this context. But someone who does hold this view is in no position to make the complaint, since his or her own position seems to rely on similar story-telling.

similarly powerful when directed against prosecutorial discretion for war crimes.

An answer to this would be to say that this only points up a further problem for the defender of this view. The sort of consequentialism which is being appealed to in an account of the justification of a general form of punishment must be some form of indirect consequentialism, such as rule consequentialism. But if so, then a question arises as to the appropriate level of generality for the sort of rules that we are taking to be justified by consideration of their consequences.

On the face of it we are confronted by a situation in which a general rule (to the effect that prosecutorial discretion on grounds of public interest should be disallowed) can be defended by reference to its consequences, but comes into conflict with a less general rule (to the effect that prosecutorial discretion can be allowed in the case of some types of trial but not of others), which can also be defended by reference to its consequences.

A defender of Ellis' position needs to do two things here. The first is to suggest and argue for a procedure for deciding what the appropriate level of generality for such rules to operate at might be. The second is to show that this procedure will deliver the sort of answer he needs. It is far from obvious that either can be done. But if not, then the attempt to rebut the Victor's Justice objection along the lines outlined here will fail.

One further remark is worth making in this context. The response which I have considered concedes that the effects of prosecutorial discretion with respect to traffic offences may be importantly different from the effects of prosecutorial discretion with respect to war crimes. But in fact, there is no reason why this should be conceded. On the face of it, it seems at least as likely that the effect of selective prosecution of war crimes will be to encourage contempt for attempts to enforce respect for human rights, as that it should do so in other sorts of cases. Indeed, given the relatively high visibility of war crimes trials

compared with other types of trial one might even think it more likely.[26] Again, if this so the attempted rebuttal of the Victor's Justice objection will also fail.[27]

V. EXPRESSIVE JUSTIFICATIONS OF PUNISHMENT INTRODUCED

Consequentialist and retributivist accounts of the justification of punishment are not the only ones that exist. I do not want to review all the accounts that exist in the literature. Instead I want to focus on one particular idea which is helpful in this context. This is that the expressive function of punishment plays a role in the justification of at least some forms of punishment.

The idea that punishment has an expressive function is often traced back to Joel Feinberg's essay 'The Expressive Theory of Punishment'.[28] In this essay, Feinberg argues that it is part of the concept of punishment that punishment should express social disapproval of a particular form of behaviour. One reason which he gives for thinking so is that if we do not understand the notion of punishment in this way, it is impossible to make what seems like a morally and legally significant distinction between punishment on the one hand and non-punitive actions undertaken by a state in order to discourage certain forms of behaviour – such as high taxes on cigarettes imposed to discourage smoking.

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[26] I am grateful to an anonymous referee for *Law and Philosophy* for suggesting this point to me.

[27] One anonymous referee has commented unfavourably on the somewhat speculative nature of the considerations that I have adduced in arguing against the consequentialist rebuttal of the Victor's Justice objection in this section. However, I take it that I have at least established that someone who wants to argue against the objection in (what I take to be) Ellis' way needs to show that the possibilities that I have drawn attention to are not actual. Clearly, it would take more to establish a consequentialist case for my own view – something I make no claim to have done.

[28] Joel Feinberg, 'The Expressive Function of Punishment', in Joel Feinberg (ed.), *Doing and Deserving* (Princeton NJ: Princeton University Press, 1970), pp. 95–118.

I shall not endorse Feinberg's suggestion that it is part of the concept of punishment that punishment should express social disapproval. Whether or not the claim is true Feinberg's arguments for it do not seem conclusive. However his discussion suggests two weaker and more plausible claims, which have been taken up in the more recent philosophical literature on punishment.[29] One is that instituting and enforcing punishments is one way in which society can express its disapproval of a form of behaviour. The second is that this may itself be a legitimate (moral) ground for punishing some forms of behaviour. I shall refer to the conjunction of these two claims as the 'Expressive Justification of Punishment'.[30]

Adherence to the sort of expressive account of punishment that I have sketched here need not be derived from any more general moral theory. This is not to say that someone who holds the view can give no account of why it is legitimate for society to express its disapproval in certain ways – they may have a number of illuminating things to say about this. For example, they might hold that communities of a particular, desirable, type (for example, liberal communities of citizens who are largely, if not without exception law-abiding) can only

[29] For examples of such work, see the references given under footnote 3. It is interesting, though not especially significant for the course of my argument, that Feinberg's original development of the expressivist position is in some ways unrepresentative since it does not adopt the anti-consequentialist approach adopted by most of these more recent authors. In fact many of Feinberg's concerns are very different from mine: rather than thinking that the expressive role of punishment might play a role in justifying punishment, he seems to hold that it might be a reason for holding many punishments to be unjustified. However it is not clear why harsh treatment with an expressive purpose should be unfair. One thought that might be relevant here is the possibility that the expressive function could be served by some means, which did not involve harming the wrongdoer – I discuss this issue below.

[30] This is, of course, a very thin account of what laws and social institutions can be expressive of and the ways in which they can be expressive. More detailed and finally nuanced accounts have been developed of the expressive function played by particular laws or legislative programs: see for example, Gusfield, J., *Symbolic Crusade* (Urbana: University of Illinois Press, 1962) and Garland, D., *Punishment and Modern Society* (Oxford: Clarendon Press, 1992) for interesting examples of this work.

exist, and their citizens can only flourish if the society gives public expression to certain moral norms. However even if a view of this sort does lie behind an endorsement of the expressive account they need not be justified by reference to an overarching consequentialist or Kantian view.[31,32]

The view of punishment that I am putting forward should be distinguished from a similar view, which has recently been defended by Anthony Duff. On Duff's view, which he calls a communicative account of punishment, punishment is justified (to the extent that it can be) by the fact that it is a legitimate attempt to communicate to a wrongdoer the nature of his wrongdoing. My view differs from Duff's in two important respects. The first is that for Duff the focus, or intended audience for the communication is, at least in the first instance, the wrongdoer. On my view the intended audience may be considerably wider – not just, or even primarily the wrongdoer, but the society itself or even the world at large.[33]

A second important difference between my view and Duff's is in his account of the intended scope of the sort of justification of punishment that he offers. On Duff's view, the legitimacy of punishment depends on the person receiving the punishment being a member of the community against whose norms he has offended. The paradigmatic example of such a community, and the one that Duff seems most often to have in mind, is of course

[31] Since my version of expressivism is slightly non-standard, I shall wait until I have put forward more of the details of the view before saying why I take the expressive defence of certain kinds of punishment to succeed. See below pp. 6ff.

[32] On some accounts of what liberalism is, communities of this sort could not be liberal communities, since liberal communities must avoid promoting any particular conception of the good, but must be neutral between such conception. However, I follow Raz (Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986)) and Duff (op. cit. 2000, chapter 2) in holding that liberal communities are not neutral between conceptions of the good but rather promote a particular type of conception of the good – one in which autonomy plays a central role.

[33] To use Narayan's terminology (Narayan op. cit.), on my account the justification of punishment depends on its being denunciatory rather than communicative.

the contemporary liberal state.[34] Nothing Duff says rules out the possibility of other communities – and in particular international communities – existing. Nevertheless this feature of his account seems to present a *prima facie* challenge to the possibility of extending it to provide a justification of the punishment of war criminals. It is, after all, characteristic of war crimes trials that they involve punishments being imposed on individuals who might reasonably reject the claim that they belonged to the community which is imposing a punishment on them.

VI. EXPRESSIVISM AND HARD TREATMENT

Advocates of an expressive theory of punishment need to answer the following challenge. Suppose it is agreed that punishment is a way of expressing social disapproval of certain actions, and suppose it is also agreed that it is legitimate for a society to express disapproval of actions of this sort. We might still wonder whether punishment was the only way in which society could express the relevant sort of disapproval. If it was we would need an explanation of why this should be so. If it was not, we might be inclined to think that the theory had not really succeeded in justifying punishment, given that there might be reasons for preferring some other way of expressing social disapproval.[35]

Consider someone who thinks that it is legitimate for society to express disapproval of certain actions but thinks that this is not enough to justify inflicting harsh treatment on offenders. He might argue that society could express its disapproval of whatever actions were in question by providing for occasions on which prominent members of the society made public denunciations of the perpetrators of such actions. This objection to the expressive justification of that justification might seem 'merely philosophical' (in the pejorative sense) if cast in

[34] Duff does consider other kinds of community such as monasteries and universities. However, the point of doing so seems to be as a way of providing support for his conclusions about punishment within a liberal state.

[35] This possibility is suggested by Skillen op. cit. A similar worry is expressed by von Hirsch op. cit.

entirely general terms. However it is not such a silly objection when applied to the punishment of war crimes. For it might be thought that society typically does – or at least can – show its disapproval of acts of this sort in many different ways.

One response to this suggestion is that if the expressive view is to seem plausible then the sort of expression of disapproval that we are interested in must be one that is clearly sincere. And it is arguable that in at least some cases, the conduct of a society that allowed for public denunciations of criminal behaviour but allowed those who engaged in it to do so without taking further action against them would not be sincere.[36]

This seems a reasonable response to someone whose worry is that the expressive theory of punishment would, in general, not justify sufficiently harsh punishments (especially for war criminals). Equally, though, someone might worry that the theory could be used to justify harsher treatment of war criminals than we are likely to think appropriate. If punishment is justified because it is a justifiable form of social disapproval of certain actions, why go to all the trouble and expense of actually *trying* war criminals? After all, in many cases their guilt is not in any real doubt. And in some cases it is arguable that war criminals derive unreasonable benefit from the states that try them being determined to go through the form of a fair trial.

VII. JUSTIFYING WAR CRIMES TRIALS

My response to this problem is to suggest a more subtle form of expressivism. We should not just consider the expressive role of punishment but the expressive role of the legal process. An account of this sort will explain not just why we feel justified in inflicting harsh treatment on war criminals but also why we take it to be important that these punishments should be inflicted according to legal forms – even when, as is often the case, the legal standing of such tribunals is extremely dubious.

This raises the following question: what could the expressive purpose of war crimes trials be? The answer cannot be that the

[36] Similar points have been made by Primoratz op. cit., Narayan op. cit., Baldwin 'Punishment Communication and Resentment' in Matravers op. cit.

purpose is the expression of disapproval of the actions that they are alleged to have committed. It may be painful to be subjected to legal proceedings. But we do not normally see this as a way of expressing disapproval of the alleged actions that the proceedings are about. This is made clear by the fact that we do not necessarily see it as a mark of societal disapproval when someone is subjected to civil legal proceedings.

The answer might be that the practice of subjecting war criminals to quasi-legal processes expresses a commitment to a certain ideal of justice[37]. It is difficult to be precise about what the content of this ideal might be. But it is plausible that it might include at least the following ideas. The first is that the use of power by those that have it not be entirely unconstrained. The second is that that power should not be exercised in a way that gives no voice to those over whom it is exercised. This suggestion raises an important question – namely, why we should regard this as an ideal to which a society ought to express a public commitment. The second is whether, even granted that the expression of commitment to such an ideal is valuable, it can be invoked as a justification for trying war criminals.

Few reflective people would want to deny that the use of power should be unconstrained, or that the constraints on its use should be ones that give a voice to those over whom it is exercised. To say this is to say that one sort of political freedom – the sort that involves independence from the arbitrary will of others – is widely acknowledged to be valuable. However, to say this is not yet to say that the public expression of such a

[37] 'Express a commitment to a certain ideal of justice' is intended to mean more in this context than just 'act in such a way as one would act if one were so committed'. On this minimalist reading of the word 'express', it is not clear what would be contributed to the defence of the practise of punishing war crimes by the suggestion that they express such a commitment. I take 'express a commitment' here to mean something like 'make a public declaration of a commitment'. Given this reading, it will that it is a consequence of the expressivist account that it is important that trials are in some sense public events. It is not clear to me that this would be a consequence of my view on a more minimalist reading of 'express'. (I would like to thank an anonymous referee for *Law and Philosophy* for insisting on clarification here.)

commitment, and in particular its public expression through the judicial process is valuable. Nevertheless, it is possible to construct an argument linking the two. For one reason for thinking that this sort of independence from arbitrary wills is important is that it is good for the citizens of a state that power should be constrained in such a way. It is good not necessarily because it is what they prefer or because it is liable to make them happy, but because it is more likely to let them develop into virtuous citizens. On this view, one of the things that is most pernicious about dependence is the way in which it fosters certain kinds of vice – overcautiousness, secretiveness and so on.[38]

If this is why such ideals are important then it is possible to see why the public expression of them is important as well. If independence from the arbitrary use of power is to be

[38] I take the general idea that institutions might be justified by considerations of the ways in which they affect people's character to be an important insight from the civic republican tradition in political philosophy/political theory. But it is reasonable to ask what sort of evidence might be brought in favour of specific claims of this sort, like the one I am relying on here. Within the civic republican tradition, one sort of source of support has often been an appeal to historical examples – but this is unlikely to be helpful when we are considering proposals for new kinds of institution. Another possible source of support would be in empirical (social) psychology. Equally, though, empirical psychologists have a tradition of being sceptical about the very notion of character – and this has sometimes been thought to present problems for the relying on anything at all like the notion of a character trait in moral or political philosophy – though not always with very good reason. (See for example, Harman, G., 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error', *Proceedings of the Aristotelian Society* 99 (1999), 315–331 and Sreenivasan, G.'Errors about Errors: Virtue Theory and Trait Attribution' *Mind* 111 (2002), 47–68 for, respectively, a well-known expression of a sceptical view, and a well-informed critique.) I suggest that the best way of defending a view like mine would involve relying on two sorts of claim: one about the effects of institutions on actual behaviour, (which ought to be susceptible of empirical investigation in a fairly straightforward manner) and one about the influence of habitual behaviour on character – harder to investigate – though not for that reason deserving of being immediately dismissed – but far from novel, philosophically speaking. (For discussion of one illustrious advocate of such a view see Burnyeat, M., 'Aristotle on Learning to Be Good', in A.O. Rorty, *Essays on Aristotle's Ethics* (Berkeley: University of California Press, 1980).)

important in promoting the development of virtues then it is important not only that people should in fact be independent in this kind of way but that they should be aware of so being. One way of making people more aware of this, and consequently less likely to be afraid of the possibility of dependence is for a commitment to preventing the arbitrary use of power to be one that is publicly expressed not only by individual members of the society but also by its institutions.[39]

Two consequences of the account I have developed are worth drawing attention to. First, because of the part played in my account by the expressive role of trials as well as that of punishments of war criminals, the sort of expressivism which I have been defending here is not just a special case of a general expressivist justification of punishment. So the widely shared suspicion that there is something non-standard about the trial and punishment of war criminals is vindicated. On this account the justification for trying and punishing war criminals is parasitic on the existence of good reasons for enforcing the rule of law in the more general case. If such justifications did not exist then it would be hard to see why we should regard an expression of the sort of commitment which (on the view I am defending) is embodied in our practice as being valuable.

Secondly, suppose we accept that a commitment to trying and punishing war criminals does embody a commitment of the sort I have suggested, and suppose we also think that the public expression of a commitment of this sort is valuable. We can still ask whether this provides us with even a *prima facie* justification of the practice. Clearly, this raises many questions. However, we can notice that one strategy for objecting to the

[39] It may be that if this is the *only* way in which ideals of this sort are expressed then citizens will be unlikely to make a connection between war crimes trials and the municipal situation. If so, then it may be that more is needed to justify the practice of trying war criminals. The justification would work best in a society in which many institutions expressed the same ideals. However I am inclined to think that even in a society in which *no* other institutions expressed an ideal of this sort, there would be ways for individuals to make the relevant connection. One thing that is important in this context is that war crimes trials are high-profile, controversial, public events – precisely the sorts of events which are likely to make members of a society reflect on their significance.

expressive theory is now unavailable. This is to argue that the practice is only one of a number of different ways of expressing commitment to the same ideals, some of which might be preferable on other grounds. This line of argument seems unattractive on the present understanding of the expressive theory, because it is not clear that there are any other means of expressing this commitment which are not parasitic on engaging in the practice. The best way to express a commitment to the rule of law is to subject to it even those who might otherwise think that they were likely to escape it.

Still, it might be thought that an argumentative loophole was left. For someone might conceivably agree with what I have said about the expressive role of war crimes trials, and yet suggest that this provides us with a justification for trying war criminals but not for actually punishing them, in the sense of subjecting them to harsh treatment. However, I do not think that such a view is coherent.

There are two reasons why not. The first connects with concerns about sincerity that I have mentioned above. It would be difficult to see a society which engaged in war crimes trials without following those up with the normal consequences of trials – in particular, with punishment for the guilty as being sincere in its condemnation of the behaviour of war criminals.[40] (Matters

[40] One referee has expressed reservations about this claim on the grounds that procedures such as truth commissions like the one which dealt with aspects of the apartheid regime in South Africa seem to provide examples of judicial procedures which are not followed up by punishment but which do seem to express a sincere commitment to some kinds of value. I am not entirely persuaded by this line of thought: it seems to me that there is certainly room to doubt whether such proceedings do succeed in expressing a fully sincere commitment to the values that they are designed to express. There may, of course be good pragmatic reasons – to do with the continued functioning of a certain society – why they are the best option in some circumstances. I am inclined to think that these circumstances are more likely to arise in the case of crimes committed against members of a given society by a particular political regime in that society than in the case of war crimes committed by a regime against members of another society. In any case, whether or not one agrees with these two points, the point about proportionality mentioned immediately below seems to be a further concern in the case of truth commissions.

might be somewhat different in a society that eschewed harsh treatment for all criminals – but as I explained in the introduction, I assuming that the harsh treatment associated with punishment can be justified in some cases.) The second, which is not entirely unconnected, has to do with considerations of proportionality. It is generally accepted that for a system of punishments as a whole to be just, serious crimes should, on the whole, be punished more severely than less serious ones. On the assumption that if any crimes are serious, war crimes are, a system of punishment that allowed war criminals to be tried but not punished would involve gross violations of proportionality.

VIII. VICTOR'S JUSTICE REVISITED

Is this account of why the punishment of war criminals is justified subject to the Victor's Justice objection? I do not think so. There are two reasons for this.

First, the fact that a form of punishment is applied disproportionately to a particular group does not by itself undermine its expressive function. So, if the justification of a form of punishment depends on this expressive function, this fact does not undermine its justification. This is an instance of a more general truth about expression. Consider as an analogy the expression of anger through shouting. The fact that someone does not shout every time they are angry does not stop their shouting from being an expression of anger on occasions when they do shout.

Secondly, endorsement of the expressive account does not, on its own, commit someone to any independent general moral principles that might underpin a version of the objection. In this respect it is markedly different from the retributivist and consequentialist accounts which I considered earlier. Of course, someone who subscribed to the expressivist view might also subscribe to some general principle that could be used as a basis for launching the objection. But at least the expressivist account does not seem to contain within itself the resources for its own undermining. It is, to that extent, a coherent account.

Still, it might be thought that this is not enough. An objection might run as follows. 'You have shown that an expressive account of punishment could explain why we have reason to

punish war criminals in the way we do. But you have not really shown that the Victor's Justice objection can be met. This is because the Victor's Justice objection is, precisely, an objection about justice; and you have not shown – in the face of strongly backed intuitions to the contrary – that these punishments are indeed just'.

I think this objection to my view misunderstands – and to that extent underestimates the force of – the Victor's Justice objection, at least in the form that I have been discussing it. The objection is powerful precisely because it does not depend on one's possession of a prior well-grounded theory about which punishments are just. Nor does it rest simply on our response to persuasively formulated intuitions. Instead, it arises from considering the sort of justification which one might give for our current practices (along either consequentialist or retributivist lines) and showing that someone who attempts a justification along either of those lines is committed to principles which make the practice problematic. By contrast someone who offers an expressive account of the sort that I have been defending does not thereby commit him or herself to principles which undermine their account.

Admittedly this leaves open the possibility that someone might object to the expressive account on independent grounds. Still it is worth making two points about this possibility. The first is that such objections will not show my view to be in a worse position than anyone else's: if they are based on principles which are independent of a commitment to expressivism, they will present a problem for more standard consequentialist and retributivist accounts as well. The second is that so far we are only talking about the possibility of an objection along these lines – rather than an actual objection.

Still one might feel that the intuitions which gave rise to the initial formulation of the Victor's Justice objection might give grounds for an actual objection, rather than just the possibility of one. However, I think this overestimates the probative value of such intuitions. At best they give us a *prima facie* case for thinking that there is some principle in the vicinity which needs to be respected and which will explain and justify those intuitions. In earlier parts of the paper, I have discussed how retributivists and consequentialists might accommodate the

relevant intuitions, and how this might create problems for their view. In the following section I shall consider one way in which an expressivist might accommodate some of the intuitions, and argue that such accommodation does not present a problem for my view.

First, though, I need to deal with a residual worry. My case for thinking that this account of the justification for punishing war crimes (in something like the way we currently do) will only be plausible if one thinks that the expressive account is not a version of retributivism. For I have argued that a retributivist cannot rebut the Victor's Justice objection. Since this is so, anyone who thinks that expressivism is a form of retributivism will have to hold that I have failed to answer the Victor's Justice objection.

One theorist who thinks that something like this is true is Michael Davis.[41] Davis argues that some forms of expressivism which he, following Igor Primoratz[42] calls 'intrinsic expressionist' views are liable to collapse into forms of retributivism. As he puts it: 'intrinsic expressionism...appears redundant'. (p. 319). Davis uses the term 'intrinsic expressionist' to describe views on which there is some internal connection between a punishment and what it communicates.

According to Davis, on an intrinsic expressionist view, what punishments communicate is that the behaviour being punished is morally and legally deserving of punishment.[43] But for this

[41] Michael Davis, 'Punishment as Language: Misleading Analogy for Desert Theorists', *Law and Philosophy* 10 (1991), 311–322.

[42] Primoratz, I., 'Punishment as Language' *Philosophy* 64 (1989), 187–205.

[43] Davis op. cit. pp. 317–318. Davis writes as follows: 'A just penalty (quite literally) entails the moral as well as legal condemnation of both criminal and crime. The judge must 'condemn' the crime – that is, state the penalty it deserves and 'condemn' the criminal (that is state that the criminal deserves the penalty)'. The context of this statement is that it occurs as the conclusion of an argument which is supposed to show that retributivism entails intrinsic expressionism. An argument with this as its conclusion can only be taken to show that its premises (in this case, a non-expressive retributive view) entail expressionism if this is a correct and complete characterisation of intrinsic expressionism. So Davis must take it this is a correct and complete characterisation of the view. Since this isn't a correct and complete characterisation of my view, my view does not fit his characterisation of intrinsic expressionism.

kind of account to be plausible, he suggests, we must have an independent account of just punishment in the background. If the account is a retributive one, then the expressive account adds nothing – in fact, it is entailed by the truth of the retributive account.[44] If, on the other hand, no retributive account is possible, then, since the connection between the justice of the punishment and what is communicated is supposed to be internal, no intrinsic expressionist view can be true either.[45]

My view is not vulnerable to this line of argument, since it does not fit Davis' characterisation of intrinsic expressionist views. There are two reasons for this. The first is that I have focussed on the expressive role of war crimes trials rather than directly on the expressive function of punishment. The second is that on my account the justification of the punishment is not supposed to depend on the fact that the punishment communicates that the behaviour being punished is morally and legally deserving of punishment, but on the fact that it communicates a message about what sorts of norms the society doing the punishing adheres to.

For intrinsic expressionists (at least as Davis characterises the view), punishment is both the medium of communication and the subject of part of the message communicated. This is why the account needs to be filled out with a retributivist account of justified punishment. On my view punishment is the medium, but not part of the subject matter of the message.[46] So my view does not need to be backed up with a retributivist account and does not presuppose one. *A fortiori* it is not rendered redundant by the (alleged) fact that it presupposes one.

IX. DOES THE EXPRESSIVE ACCOUNT GENERATE A NEW 'VICTOR'S JUSTICE' OBJECTION?

It might be thought that the expressivist account contains some elements that make it capable of generating a version of the

[44] Davis op. cit., p. 320: 'Retributive punishments, as such, necessarily carry the same information as intrinsically expressive punishment'.

[45] Davis op. cit., p. 319 'intrinsic expressionism would contain a false element if no non-expressive retributivism were true'.

[46] Or at least, not part of those aspects of the message which play a role in justifying the punishment.

Victor's Justice objection. For it might be said that a system of trying and punishing war criminals should express a commitment to the principle of treating like cases alike as well as to the other sorts of ideals which I have argued are rightly expressed by such a system. But the facts that the proponent of the Victor's Justice objection point to suggest that it does no such thing.

One way of responding to this objection would be to bite the bullet and deny that a legal system should embody a commitment of this sort. However, this suggestion seems implausible. For it seems as though the requirement that like cases should be treated alike is a basic requirement of procedural justice, and as such one to which any system of trial and punishment should express.

A different response seems more appropriate. This is to accept that there is a good case for thinking that a legal system should express an ideal of procedural justice; and then to note that in this case (at least if the objector is right) the requirement to express a commitment to procedural justice comes into conflict with other things that we might legitimately want from our system of trial and punishment. So what we need is some account of how we might rank the different sorts of ideal to which we might legitimately expect our penal regime to give expression in cases of conflict.

The rationale which I gave earlier for wanting our legal system to express a commitment to preventing the arbitrary use of force seems to provide an answer in this particular case. I argued that a good reason for wanting our penal system to express such a commitment was because of the long-term effects that the fear of dependence can have on the development of the character of individuals. It is not so obvious that an unbending commitment to an ideal of procedural justice is significant in the same way. Indeed, one might suspect that the expression of such a commitment under all circumstances would be deleterious, rather than beneficial to the development of individuals – for example by teaching them that the legal system is liable to be inflexible.

A slightly different sort of objection is also worth considering. Someone might ask whether, given the facts which the

Victor's Justice objection draws our attention to, we really can see the practice of punishing war criminals as expressive of a commitment to ideals of justice, rather than of a commitment to revenge. However this point can be rebutted by observing that the practice of punishing war criminals is expressive of a commitment to justice rather than revenge to the extent that the punishment is only handed out at the end of a process which follows juridical norms as closely as possible. An attractive consequence of this view is that it explains why it is important that war criminals should be tried as well as punished, even in cases where it seems beyond reasonable doubt that they are guilty.

A further worry might remain. It is often alleged against consequentialist accounts of punishment that they are morally objectionable insofar as they treat offenders as means to an end rather than as ends-in-themselves. The objection seems particularly forceful against accounts in which the desired ends of punishment are achieved through the deterrent effect of the punishment on other potential offenders. Some communicative accounts seem immune to this objection: Duff, for example presents it as a virtue of his account that on his view the communication constituted by punishment is directed to the prisoner, rather than to anyone else.

Since the account that I have presented does not preserve this feature of Duff's view, one might wonder whether the same sort of objection applies. If so, it seems a serious matter, since the Victor's Justice objection can be understood as being motivated by concerns which are not very far removed from a Kantian concern to treat individuals as ends-in-themselves. However, I am not convinced that the objection is a cogent one. One way of understanding the Kantian injunction not to treat people merely as means to ends but as ends-in-themselves is that it forbids treating them in ways (or more properly) according to maxims which they could not possibly endorse. However, although it may be clear that most war criminals would not endorse a maxim which entailed that individuals were to punished as part of a commitment to norms of justice, it is not at all possible that they *could* not do so. Indeed the fact that it is conceivable, even if unlikely, that such an individual

might come to accept their punishment as justified suggests that the reverse is the case. So I conclude that the sort of justification for the punishment of war crimes for which I have been arguing here is not incompatible with the Kantian principle, provided the latter is properly interpreted.

X. CONCLUDING REMARKS

The Victor's Justice objection is one reason for being sceptical about the moral justifiability of our present practice of punishing war criminals. I have argued that an expressive justification of this practice, when combined with an expressive account of the justification of war crimes trials, enables us to meet the objection. Clearly, though, I have not answered or addressed every reason we might have for scepticism about the punishment of war criminals. Articulating such reasons, and showing how the expressive justification for punishing war criminals might undermine them would no doubt be a difficult task. Still, if I what I have said here is along the right lines it may nonetheless be worth undertaking.

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