A Neglected Strand of Retributivism

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Jeremy Waldron, *Lex Talionis*, **34 Ariz. L. Rev. 25** (1992).

Although Jeremy Waldron's article on the *lex talionis* is not as recent as most of the other writings covered by JOTWELL, I came upon it only a couple of years ago. I feel that it should be discussed here, because it has not received as much attention as it deserves within the philosophy of criminal law.

Retributivism as a philosophy of punishment has emerged in a multitude of forms, but virtually every retributivist maintains that punishments should fit the just deserts of offenders. That abstract idea has been cashed out with somewhat more concrete principles, each of which is itself in need of cashing out. Many retributivists invoke the notion of commensurateness, as they contend that the severity of any punishment should match the seriousness of the crime(s) for which the punishment is imposed. Commensurateness, a cardinal property, consists in quantitative equivalence. Many retributivists additionally or alternatively rely on the notion of proportionality, as they contend that any differences in the severity of punishments should be correlated with differences in the gravity of the crimes for which the punishments are imposed. Proportionality, an ordinal property, consists in an alignment between two sets of quantitative gradations.

What Waldron does splendidly in his article is to show that the *lex talionis* is best understood as an alternative to commensurateness and proportionality, rather than as a version of either of those other principles. Whereas the *lex talionis* is most commonly construed as a crudely wooden rendering of the principle of commensurateness, Waldron persuasively argues that it is not a quantitative principle at all. Rather, it calls for a qualitative correspondence between a punishment and the crime for which the punishment is inflicted. In other words, it calls for some or all of the wrong-making features of any crime to be reproduced in the punishment that is imposed upon the person who has committed the crime.

As Waldron observes, the wrong-making features of a crime can be characterized with varying degrees of concreteness or abstraction. When those features are to be distilled for the implementation of the *lex talionis*, the proper degree of abstraction or specificity is fixed by the basic moral values – human equality and moral responsibility – that underlie the *lex talionis* and endow it with moral force. Choices in the characterization of any such features are to be made with reference to those values. That is, the characterization, along with the punishment for which it calls, should be such as to reaffirm the fundamental equality between the offender and everyone else in the jurisdiction (including of course the immediate victim, if there is indeed an immediate victim of the particular offense). *Pari passu*, it should be such as to uphold the moral responsibility of the offender by accurately capturing the gravity of his or her misconduct.

Waldron does not firmly embrace the *lex talionis* as an appropriate standard for determining the nature of the punishment that is to be imposed for any particular crime. He writes: "It is not my intention to argue that [the *lex talionis*] is the best principle for choosing punishments, only that there is more to be said for it than is commonly supposed" (pp 31-2). However, he does include a discussion of possible justifications for the *lex talionis* as a punitive principle. His discussion surprisingly omits any mention of an important 1985 article by Jeffrey Reiman ("Justice, Civilization, and the Death Penalty: Answering Van

den Haag." 14 *Philosophy and Public Affairs* 115-48), where Reiman offers quite a sophisticated defense of the *lex talionis*. Nonetheless, Waldron's discussion of possible justifications is illuminating and interesting in its own right.

I am not a supporter of the *lex talionis*, but my understanding of it was enriched by my perusal of Waldron's article. Though his essay has received attention from some philosophers – such as Russ Shafer-Landau – it has often been overlooked by legal theorists. For example, a recent article on the *lex talionis* in a major law journal makes no mention of Waldron (Morris Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment," 28 *Oxford Journal of Legal Studies* 57-72 [2008]). I hope that that neglect will come to an end.

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