

On Expressivism and Retributivism in 'The Mighty and the Almighty'

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Professor Nicholas Wolterstorff's slim volume is filled with learned insight and genially accessible provocation. This modest comment focuses on a very narrow slice of the book—the justification of state punishment of criminal offenders. It offers a few questions about Wolterstorff's discussion of St. Paul's view of punishment, and in particular the expressivist theory that Wolterstorff prefers (and interprets Paul to espouse) and the retributivist view that he rejects.

Wolterstorff's discussion of Paul's ideas about punishment occurs in Chapter Eight, where he has in mind one of the two dualities of authority that make up his core thesis: the issue of state authority mediating divine authority. In discussing that issue, Wolterstorff explores the Epistle of Paul to the Romans, and specifically Romans 12 and 13, in which Paul offers advice to members of the Church about how they should behave toward and within the various institutions that constitute civil society (the family, businesses, the institutions of the Roman Empire, and so on). In Romans 12, Paul instructs Church members never to "avenge" themselves but instead to "leave room for the wrath of God; for it is written, 'Vengeance is mine, I will repay, says the Lord.'" Here are the first seven verses of Romans 13 (KJV):

1. Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.
2. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.
3. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same:
4. For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.
5. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake.
6. For for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing.
7. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.

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The challenge is to square these intense lines with the injunction earlier to abstain from vengeance. Wolterstorff rejects one resolution—that Romans 12 refers to individual conduct while Romans 13 refers to official state action. Wolterstorff equates “vengeance” with “retribution” (“the core idea of retribution is paying back evil with evil, redressing the harm done to the victim with an equivalent harm done to the wrongdoer”) and he reasons that any act of “retribution” understood in these terms—whether by the individual or the state—is contrary to Christ’s code of reciprocity (which Paul repeats in Romans 12). From this, Wolterstorff concludes that Paul’s punishment theory must reflect a species of consequentialism—punishment “for the sake of achieving some good in [the offender’s] life and/or the lives of others” (Wolterstorff 2013, 86).

What of the language in Romans 13 verse 4 about “execut[ing] wrath upon him that doeth evil”? How does a minister of justice, who is himself a minister of God, execute wrath? And how does one execute wrath for consequentialist reasons? Wolterstorff interprets the passage to mean that the state is empowered to reprove and punish the evil-doer in the way that a parent reproves and punishes his children. Government, as the servant of God, has a “God-assigned” task: the *expression* of wrath in response to evil-doing (and perhaps also the expression of pleasure for the doing of good). “Speaking anachronistically,” writes Wolterstorff, “Paul was employing the expressive theory of punishment rather than the retributive theory in stating what God assigns the government to do” (2013, 89).

This interpretation raises several questions, but I limit myself to four—two concerning expressivism and retributivism respectively.

First, assuming that Wolterstorff is correct, one wonders precisely whose wrath the state is assigned by God to express. Wolterstorff denies that Paul is urging the state to express *God’s* wrath. But wrath is an emotion; some person or collection of persons must *feel* wrath before that wrath finds expression. Who then? If it is not God’s wrath, we are left with the following candidates: the society at large, the state, a particular community, or a particular person. The most plausible of these in light of the consequentialist approach embraced by Wolterstorff (which emphasizes the “social benefits” of punishment, to include even deterrence) is the society at large or perhaps the state. But this leads to other questions. Why should God’s minister express the wrath of the society at large or the state? Perhaps that wrath is excessive. Perhaps it is unwarranted or misdirected. Perhaps it is altogether inadequate as a response to the wickedness of the offense. If the state or society is to act as a parent in reproofing wrongful conduct, then whose parent and what parenting habits and values should serve as the model? The model of the loving parent is surely more attractive than other possibilities, but the loving parent understands her own responsibilities only by reference to a standard of love; and what other standard than the Christian standard should matter?

Second, Wolterstorff writes that the expressive theory of punishment has only recently entered the lists, but actually it has been around for many years (not by Pauline standards, perhaps, but certainly as punishment theory goes; it is much older than deterrence). Durkheim’s articulation of it is well-known. Less well-known, but more potent and bracing, is its earlier formulation in the writing of the Victorian arch-

imperialist judge and man of letters, Sir James Fitzjames Stephen, who frequently emphasized the distinctively moral valence of the condemnatory and stigmatic function of punishment. "The sentence of the law," he wrote, "is to the moral sentiment of the public in relation to any offense what a seal is to hot wax," converting "into a permanent final judgment what might otherwise be a transient sentiment." For the worst crimes—murder, rape, child abuse, torture, and so on—Stephen's view was expressivist at its hottest core: "the feeling of hatred and the desire of vengeance are important elements in human nature which ought [on the occasion of these terrible crimes] ...to be satisfied in a regular, public, and legal manner" (1874, 162).

Doubtless this is a version of expressivism that Wolterstorff would reject. Many liberals abhor it. And yet it seems that it is not only a truer description of the expressive function of punishment as actually practiced but also a more plausible version of expressivism than that embraced by Wolterstorff. The state is not the criminal's parent, and asking it to express parental reproof or parental love is demanding it to perform functions that do not properly belong to it and that it is extremely well suited to bungle. Nobody should look for love from the state without expecting disappointment.

Third, Wolterstorff's view of retributivism is one that many contemporary retributivist theorists of punishment would reject. Retributivists today generally repudiate "vengeance" as the aim of retributivist punishment. They would deny Wolterstorff's claim that retributivism demands returning "evil for evil" or inflicting an "equivalent harm" on the defendant for the harm done to the victim (Wolterstorff 2013, 86). They would instead say that the state should aim at imposing punishment that is in some way responsive to the harm inflicted. That punishment need not be abstractly "equivalent" to the harm done by the defendant; retributivism is not necessarily committed to harsh punishment. And punishment is certainly not conceived by retributivists as an "evil." For retributivists, punishment is a good—a recognition of the choices of the offender. Retributivists generally deny that vengeance—in the sense of the satisfaction of the sentiment of wrath through the infliction of pain on the wrongdoer—is the point of state punishment.

Many retributivists are under the misimpression (all too common, alas, in legal theorists of all sorts) that they came up with these insights for the first time and all by themselves. But the distinction between the justice of punishment and the wrath of punishment may be found in many sources that long precede even the earliest punishment theorists. Thomas Aquinas had made it, though Dante's description of "the souls who are overcome with wrath" ("l'anime di color cui vinse l'ira") in the seventh canto of *Inferno* is more picturesque: the wrathful are mired in the Stygian swamp and tear wildly at each other and themselves "with offended faces" ("con sembiante offeso"). While alive, the wrathful "fumed angrily" in the sweet light of day, seething internally. Their just punishment is now to gurgle in the mud.^[AN1]

Finally, perhaps in order to understand better why Wolterstorff rejects retributivism and embraces a kind of consequentialist expressivism, it might be worth putting to him the question: What is criminal law for? What is its purpose?

Some people might say (many retributivists do say) that the purpose of criminal law is to punish people for wrongdoing. We have criminal law and its associated institutions just in order to punish people who are guilty of certain moral

transgressions. What is distinctive about criminal law, as compared with other types of law, is that it reaches into the deep places of a society's morality and vindicates particular conceptions of right and wrong. Of course, not all of criminal law is like this. But the core and distinguishing purpose of criminal law is to address conduct of this sort.

An alternative view (not an altogether persuasive one, at least to me, but one that seems to be popular today) is that the purpose of criminal law is coercively to enforce certain rules of a legal system. The enforcement of the rules is necessary because the legal and political system of which they are a part is just. The violation of these rules is a threat to the stability of the politically and legally just system. In order to ensure that the political and legal justice of the system endures, we must punish those who break the rules. Therefore, there is nothing qualitatively distinctive about criminal law—neither the immorality of the conduct that it reaches (though it does sometimes reach such conduct) nor the severity of the sanctions that it imposes (though it does sometimes trade in harsh sanctions).

If one views the purpose of criminal law in these latter terms, then the justice of punishment—including punishment's retributivist and expressivist justice—flows from the general justice of the political and legal system of which it is a part. The justice of the political and legal community precedes the justice of retributivist punishment. The justice of retributivist punishment is dependent upon there already existing a politically and legally just community. So in order to embrace retributivism as a justification for state-imposed punishment, one need not say anything about returning "evil for evil" or inflicting "equivalent harm" on offenders in relation to the harm that they have inflicted on victims. Indeed, many of the crimes whose punishment may be justified on retributivist grounds are not plausibly described as "evil" at all; they are simply violations of rules—sometimes manifesting evil conduct, sometimes not—which result in the imposition of sanction. One need only say that the breaking of certain rules requires punishment because the just order established by the political and legal community has been thereby disrupted. Punishment is "deserved" by the breaking of these rules, not by the doing of an evil act.

For purposes of this second view (and here it may be more persuasive), the same is true for expressivist theories of punishment. A just expressivism will not ask the state to act *in loco parentis*. One should neither want nor expect parental love or parental wrath from the state. Neither should one wish for the state to act *in loco deo*. Whatever expressive function belongs to the state is preceded by and dependent upon the justice of the state's political and legal institutions. And whatever wrath the state expresses serves to vindicate and reinforce in the minds of the citizenry the value and the justice of the political and legal rules that have been violated.

There are many criticisms that might be made of this view, including that it is an inadequate account of the important psychological functions of punishment. But one of its virtues is to circumscribe the justifications of punishment, and of what we should expect of it. It does this by focusing on the narrow, bounded, specifically political and legal features that delimit the functions of criminal punishment. I wonder what Wolterstorff would say about it.

Bibliography

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