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Thoughts on Zaibert's Rethinking

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THOUGHTS ON ZAIBERT'S *RETHINKING*

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In responding to Leo Zaibert's *Rethinking Punishment,* I face a daunting although not altogether unwelcome challenge, namely that I am in firm and fundamental agreement with its central claims. Like Zaibert, I have spent some time in the past arguing against deontic retributivism (and addressing the work of some of the same scholars, such as Michael Moore)[1] and have also spent some time arguing against theoretical monism and in favor of a more pluralistic account of punishment—not to spoil anything for potential readers of my work, but the title of my book chapter "Punishment Pluralism" pretty much gives the ending away in this regard.[2] In rejecting a deontic and monistic account of retribution, I have advanced a framework I described as *consequentialist retributivism,*[3] which would probably prove to have some modest distinctions from what Zaibert calls *axiological retributivism* if we worked out every last detail, but our general perspectives certainly have much more in common than not. We both reject the notion of retribution as a deontic duty, would characterize it more as an intrinsic good (or value), and recognize that it coexists with various other goods or values that the state generally, and the criminal-justice system in particular, must also pursue. I should note that, happily for my confidence in the soundness of these views yet unhappily for my sense of having made a unique contribution to the intellectual conversation, Zaibert and I are not at all alone among recent commentators in adhering to these positions.[4]

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[*]President, Joseph Crea Dean and Professor of Law, Brooklyn Law School. I thank Vera Bergelson for organizing the conference on *Rethinking Punishment,* at which I first presented a version of these comments, and I thank Leo Zaibert and the other participants in that conference, both for their reactions to my comments and for their thoughtful and stimulating insights throughout the event.

1. *See generally* Michael T. Cahill, *Retributive Justice in the Real World,* 85 WASH. U. L. REV. 815 (2007) [hereinafter *Real World*].

2. *See generally* Michael T. Cahill, *Punishment Pluralism, in* *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* (Mark D. White ed., 2011).

3. *Real World, supra* note 1, at 833–35.

4. *See* Mitchell Berman, *Rethinking Punishment,* NOTRE DAME PHIL. REVS. (2018) (reviewing LEO ZAIBERT, RETHINKING PUNISHMENT (2018)) (noting other authors, including Berman, who hold such views).

Given this broad accord between my own views and Zaibert's, my reactions tend to be more along the lines of observations and questions than critiques. Indeed, some of them are derived from questions I get from other people about my own work. Specifically, this response will raise three lines of questions, asking about the implications of Zaibert's work for (1) the justification of criminal law (as opposed to the justification of punishment); (2) the implementation of punishment (via law); and (3) the definition of punishment.

As opposed to deontic/monistic retributivism, axiological/pluralistic retributivism has the advantage of flexibility in accommodating the tradeoffs necessary to implement a system of punishment in the real world.[5] It has the drawback, however, of failing to provide a robust justification for the formation of such a system in the first place. Given the existence of numerous competing demands on public resources, if retributive punishment is not a moral obligation but just a good like other goods, what compels the state to undertake its pursuit, rather than seeking to provide those other goods instead? The pursuit of retributive justice, rather than numerous other worthy social objectives, seems particularly hard to defend given its considerable costs, not only in terms of concrete resources (money) but also the likelihood that it will impede or undercut other principled commitments, as by reflecting (or entrenching) social inequality; the practical inevitability that it will sometimes fail, or even be counterproductive on its own terms, due to errors that will arise in seeking to impose retributive punishment (and particularly Type I errors or "false positives" where suffering is imposed on one who does not deserve it); the suffering it imposes on innocent third parties as a spillover effect of punishing the deserving; and so on.

Zaibert largely ignores other tradeoffs involved in erecting a system of criminal justice in favor of a particular focus on the tension between retribution and forgiveness, but even that specific focus would only seem to reduce the claim of justice on the public fisc relative to other concerns. As Zaibert notes, all punishment comes with a kind of "moral remainder" or taint or cost,[6] so why not pursue other social projects that are more straightforward in terms of their net benefits? Why not just have a (perhaps more muscular than at present) tort system that can address victims' needs and impose liability, but not punishment, on wrongdoers? Zaibert offers thoughts on the purposes of punishment in the abstract,[7] but it's hard to see how axiological retributivism offers sufficient

5. *See generally Real World*, *supra* note 1, at 864.

6. LEO ZAIBERT, RETHINKING PUNISHMENT 227 (2017) [hereinafter RETHINKING PUNISHMENT].

7. *See generally id.*

motivation to establish a criminal-justice system—unless that system is also pursuing other worthwhile social ends along with retribution.

It seems to me that the most obvious candidate for a satisfying argument in favor of establishing a criminal-justice system is that doing so will prevent harm as well as promoting justice. Indeed, I think one attractive feature of a pluralist account is that it acknowledges the potential to pursue (as well as the need to accommodate or balance) numerous different social and moral goals, including most obviously both backward-looking retribution and forward-looking prevention. Yet Zaibert offers no views of any kind about whether a pluralist system of that sort, driven by both preventive and punitive aims, would be appropriate or desirable or, if so, how it would adjudicate conflicts between those purposes (and with other goals or values).

While purporting to be pluralistic, Zaibert's project seems entirely uninterested in incorporating many obvious competing goals, values, or costs, instead choosing to concern itself exclusively with the need to make space for forgiveness alongside retribution. Of course, Zaibert is free to define his project as he wishes,[8] but in considering only the opposition between retribution and one other consideration, I think he loses sight of some of the richer opportunities (and concerns) a pluralistic perspective can bring into view.

These other considerations become all the more significant if one expects to effectuate an actual legal system that implements one's understanding of the purpose(s) of punishment. Again, this may be a function of Zaibert's sense of the scope of his own project, but it's not clear whether his account offers, or could offer, concrete prescriptions or rules for such a legal system to follow. Zaibert notes the difference between the tasks of elaborating a philosophical and a legal account: after a lengthy critique of the "morality system" of typical punishment theory on the ground that it "fails to do justice to the complexity of human life and it is thus simpleminded,"[9] Zaibert notes that critiquing a legal system on the same basis would "verge[] on the absurd"[10] because it is "perfectly sensible, if not downright inescapable"[11] that "the law sometimes needs

8. On the other hand, Zaibert himself takes others to task for espousing pluralistic views that he rejects as not "properly" pluralistic. *Id.* at 132–33 (referencing Duff); *id.* at 173 (referencing Hart). One could as easily say that a "pluralistic" account recognizing only retribution and forgiveness as significant values—rather than attending to other values or goals such as efficiency, equality, procedural fairness, harm prevention, privacy, and so on—is not "properly" pluralistic. Even if proper (whatever that means), such an account seems suboptimal in its narrowness.

9. *Id.* at 159.

10. *Id.* at 164.

11. *Id.*

to draw bright lines and to simplify matters."[12] If such is the case, Zaibert seems to be acknowledging that his axiological and pluralistic account might offer little guidance for law.

Yet I'm not sure such is the case. One might as easily say that the legal system—which must operate in the real world, and therefore must grapple with all the messiness and "complexity of human life"—should be at special pains to avoid a "simpleminded" approach that sacrifices justice for clarity. Perhaps Zaibert is right that the need for clear rules will necessarily force the *substantive* law to be oversimplified relative to a complex and pluralistic ideal theory, in which case the legal theorist seeking to do justice (as opposed to the moral theorist seeking to capture an abstracted ideal) will have to rely on *procedural* or *institutional* features of the system to flesh out what the substantive law cannot prescribe with clarity, or to correct for its crude overbreadth. Or perhaps even that is not right—perhaps Zaibert lets the drafters of substantive law off the hook too easily, when they can and should be expected to craft rules with enough subtlety and sophistication to balance (or at last try to balance) a plurality of aims. He spends little time considering the question, and the reader interested in legal issues is left wondering whether Zaibert's book speaks to such issues in any direct way.

Apart from these broad questions about Zaibert's understanding of the general relation between law and punishment theory, I'm curious about the specific relation between law and one feature of Zaibert's own theory. Much of *Rethinking Punishment* is devoted to analysis of, and frequently arguments against, other thinkers, but the book does offer a central affirmative argument, namely, that punishment needs to recognize a role for forgiveness alongside retribution.[13] But is this an argument only about the concept of punishment, or is it also (or can it be) an argument about the legal institution of punishment? If the latter, what role is forgiveness to play in the criminal-justice system?

One challenge to the possible recognition of forgiveness as a goal or animating value of criminal law, at least along the lines Zaibert favors, is his insistence that forgiveness must be "unconditional,"[14] meaning that it is not predicated on the wrongdoer's repentance or promise not to reoffend (or any other "transactional" consideration) and also that it is never obligatory.[15] Yet if a convicted criminal defendant never needed to do anything in particular to earn forgiveness, and also could not be entitled to forgiveness no matter what s/he did, what legal rules or even

12. *Id.*
13. *Id.* at 171–75.
14. *Id.* at 201.
15. *Id.* at 201–02.

guidelines could possibly exist to suggest when forgiveness could or should be offered, and when withheld? How could its transmission (or not) be anything other than ad hoc, unprincipled, and arbitrary: that is to say, lawless?

Further, in the context of criminal law, who forgives: the victim, the state, or both? Does the state reduce or eliminate punishment based on the victim's authorization of such forgiveness, or is it the state, as punisher and as the "victim" of an offense against its dictates, who is also the forgiver? If it is the state who forgives, does its act of forgiveness reflect, or cultivate, some positive moral character on the state's part, as might be said of a person who has the fortitude and generosity of spirit to forgive one who wrongs her?

Moreover—and this may only reflect my own confusion and lack of familiarity with the literature on forgiveness—but I'm not entirely certain what forgiveness means, or entails, in the context of punishment. Zaibert seems to hold the view that forgiveness means *absolution*,[16] that is, a decision to free the wrongdoer not only from punishment but from blame. (If so, just how and why the forgiver has the power to erase the moral blameworthiness of the wrongdoer's act is somewhat mysterious.) Alternatively, forgiveness might only mean *forbearance:* the blame remains, but no punishment is imposed even though the wrongdoer is fully eligible for it. In that case, one forgives, but does not forget.

Legally, the first version would seem to demand that the government refrain not only from imposing punishment but even from imposing the stigma of a conviction; presumably all charges must be dropped rather than instituting a legal judgment that the defendant is "guilty." Yet how can the system forgive a wrong before finding that the wrong occurred? Once a conviction is entered, signifying proof beyond reasonable doubt of the defendant's wrongdoing, it seems hard for the system to forget as well as forgive—to say that this conviction is not only one that will not be punished, but is somehow null and void altogether. The second version seems to more easily admit of implementation within a legal system, which can impose the stigma of conviction while declining to impose any (further) punishment.[17]

But is the stigma of conviction itself part of the punishment? That question leads me to my third topic. When I first heard about *Rethinking*

16. *See id.* at 202.

17. *See* PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE 210–12 (2006). A more robust set of verdict options, beyond the standard "guilty" and "not guilty," might facilitate formal judgments of a "blameless violation" as well as judgments of liability without punishment, enabling the system to implement some form of the first version of forgiveness as well as the second. *Id.*

Punishment, I thought (and rather hoped) that its project was to rethink not the *justification* of punishment (a topic that has received much attention from moral and legal theorists), but the *meaning* of punishment, which turns out to have received much less consideration, notwithstanding its significance and what one might take to be the conceptual priority of having to define a practice before one can attempt to justify it.[18] Indeed, even as there seems to be progress toward a broad consensus (if by no means universal) view regarding the justification of punishment, there seems to be an ever-larger body of scholarly work asking important questions about the very nature and scope of the concept.[19]

On one hand, a number of scholars who think about the idea of punishment broadly have raised basic questions about aspects of punishment that were previously stipulated, assumed, or left unconsidered: for example, whether punishment must be intended as such by the party imposing it;[20] whether punishment must be experienced or understood as such by the party receiving it;[21] and whether punishment must come from the state.[22] A distinct but related question that has received substantial attention recently is whether the nature of the retributive "desert claim" is that wrongdoers deserve *suffering*, or that they deserve *punishment*.[23]

On the other hand, a lot of other scholars who write about particular real-world practices have been asking whether, or arguing that, a lot of sanctions other than criminal sentences should count as punishment.

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18. To be clear (and fair), Zaibert did devote some attention to the definition of punishment in an earlier book. *See* LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 28–37 (2006). Even so, in my view, the various issues surrounding the meaning of punishment are rich, varied, and important enough to merit an extended treatment.

19. *See infra* notes 20–28 and accompanying text.

20. *See* Adam J. Kolber, *Unintentional Punishment,* 18 LEGAL THEORY 1 (2012); *cf.* Alice Ristroph, *State Intentions and the Law of Punishment,* 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008) (discussing role of intent in constitutional understanding of punishment).

21. *Compare* John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment,* 76 U. CHI. L. REV. 1037 (2009), *and* Adam J. Kolber, *The Comparative Nature of Punishment,* 89 B.U. L. REV. 1565 (2009) (arguing that punishment is properly defined, and calibrated, by subjective experience of recipient), *with* Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice,* 98 CALIF. L. REV. 907 (2010), *and* Dan Markel, Chad Flanders & David C. Gray, *Beyond Experience: Getting Retributive Justice Right,* 99 CALIF. L. REV. 605 (2011) (arguing against "subjectivist" claims).

22. *Compare, e.g.*, ALON HAREL, WHY LAW MATTERS 96–103 (2014) (asserting that the "intrinsically public good" of punishment can be carried out only by the state), *with* ZAIBERT, *supra* note 18, at 16–28, 182–202 (arguing justification of punishment must be same for non-state actors as for state).

23. *See, e.g.*, David Gray, *Punishment as Suffering,* 63 VAND. L. REV. 1619 (2010) (arguing that "subjectivist" scholars inappropriately conflate punishment with suffering).

Indeed, recent years have seen a number of scholarly articles whose titles or theses take the form "___ as Punishment," with the blank being filled in by any of various legal impositions that may fall within or outside the criminal-justice system and may or may not be imposed on the basis of past wrongdoing, such as pretrial detention,[24] immigration detention,[25] deportation,[26] citizenship revocation,[27] and punitive damages.[28]

It seems to me that a pluralist approach, or what Zaibert might call a non-simpleminded approach, toward the question of punishment's justification can also address some of this confusion or debate about its underlying nature. Such a perspective can recognize not only that there are multiple, sometimes overlapping, sometimes conflicting goals or purposes (what some might, rather misleadingly, call "justifications") of punishment, but also that there are multiple *features* of punishment. Various kinds of sanctions or impositions may have some, most, or all of those features, and may demand or admit of different justifications depending on the feature(s) they possess. Even some of the classic normative purposes of punishment seem to interact poorly with the classic descriptive understanding of what punishment is: namely, suffering imposed on a wrongdoer for a wrong. Consider incapacitation, regularly advanced as one of the "purposes" or "justifications" of punishment. Wrongdoing is neither a necessary nor sufficient basis for incapacitation, and suffering is neither a necessary nor sufficient component of incapacitation. Of course, there are obviously modes of punishment that involve incapacitation, and cases of incapacitation that are imposed as punishment. They overlap, but are by no means congruent.

A robustly pluralist account has the potential to tease out all of the different purposes of punishment—or other meaningfully similar sanctions or impositions, whether labeled "punishment" or not—and all of the values that might constrain punishment, and to consider which of those goals or concerns are implicated by a given practice or instance of

24. *Cf.* Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141 (2013) (raising questions about relationship between pretrial detention and punishment).

25. *E.g.*, Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

26. *E.g.*, Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000).

27. *E.g.*, Shai Levi, *Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach*, 61 U. TORONTO L.J. 783 (2011).

28. *E.g.*, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003).

a practice. Just as such an account can enable greater nuance in considering the normative basis of punishment, perhaps it can also facilitate a more nuanced view of the concept of punishment itself, and of the various social practices that might fall within its scope, or on its periphery or border, or adjacent but close enough to raise similar justificatory concerns. Indeed, such a view might ultimately warrant rejection of the catchall term "punishment" in favor of a more sophisticated, and particular, examination of individual practices, the goals they pursue, and the concerns they raise.