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The Ideal Victim

Leo Zaibert*

Some ten years ago, at a conference sponsored by the Buffalo Criminal Law Center, two leading criminal law scholars argued about the specific role, if any, that victims should play within the criminal trial. The debate was subsequently published in the pages of the *Buffalo Criminal Law Review* and it is to the articles as they appeared therein that I will refer. George Fletcher pondered the fact that a "first rate book like Michael Moore's *Placing Blame*" would not have "a single reference to the relevance of victims in imposing liability and punishment."¹ Michael Moore, on the other hand, insisted on his view that victims simply should have no say during the trial (except in the form of evidentiary input).²

Given that Moore is one of the most prominent contemporary defenders of retributivism, it should come as no surprise that the debate turned on Moore's views. While in the title of his article (*The Place of Victims in the Theory of Retribution*) Fletcher specifically frames his question as if it belongs wholly within the context of retributivist punishment, he often refers more generally to the problem of the role of victims in the criminal law or in criminal trials. Still, I think that Fletcher is precisely right in his title, for it is the relationship between victims and retributivism which matters most. After all, satisfying victims' desires would, in many forms of utilitarianism, be entirely unproblematic. Insofar as most forms of utilitarianism are inconsistent with retributivism,³ then the precise question around

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1. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51 (1999).

2. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 65-89 (1999) [hereinafter Moore, *Victims*].

3. The only relevant exception is the sort of ideal utilitarianism defended by G. E. Moore; that is, Moore was both a utilitarian and a retributivist. Interestingly, this is not true of the ideal utilitarianism of Hastings Rashdall, even though he coined the term. See generally HASTINGS RASHDALL, *THE THEORY OF GOOD AND*

which the debate between Fletcher and Moore centered, concerns the role that victims should have within a retributive justification of punishment, or within a criminal justice system sufficiently attuned to retributive principles. This is the question with which I am concerned in this article.

The received wisdom is that, within a properly retributive framework, it is inconvenient to seek to satisfy victims' desires. This victim-satisfaction approach has generated two main worries. First, there is the worry that by privileging victims' desires, we will in fact undermine the very retributive principles which frame the discussion. Moore usefully summarizes the problem involved in trying to reconcile victims' desires and retributivism: "Is there logical space for this kind of theory? Are you driven, as Jeff Murphy thought, into some kind of restitutionary scheme to victims, which may serve corrective justice but not retributive justice? Or can you hang on to both your retributivism and victim determination of punishment?"⁴ In other words, can one satisfy victims' desires without in effect conflating the distinction between corrective and retributive justice?

The second, related worry is that by paying too much attention to victims' desires, we would in fact reduce punishment to mere revenge. As Fletcher discusses the prospect of integrating victims' concerns into the justification of punishment, he summarily, but rightly, dismisses one such integration which would "simply" assert "that the purpose of punishment is to gratify the desires of victims to witness the suffering of those who committed crimes against them."⁵ For, Fletcher continues, "this approach would reduce punishment to simple vengeance and would hardly be very appealing."⁶ While I have elsewhere argued against the sort of rhetorical alchemy performed by the punishment-revenge distinction,⁷ I agree that an appeal to this sort of victim desire is particularly problematic. Unlike Fletcher, I think that we are better served by explaining what is

EVIL: A TREATISE ON MORAL PHILOSOPHY (2d ed. 1948); G. E. MOORE, *PRINCIPIA ETHICA* (Thomas Baldwin, ed., Cambridge University Press 1993) (1903).

4. Moore, *Victims*, *supra* note 2, at 67.

5. Fletcher, *supra* note 1, at 52.

6. *Id.*

7. See Leo Zaibert, *Punishment and Revenge*, 25 L. & PHIL 81 (2006).

wrong with this appeal without talking about revenge. In fact, almost any appeal to any of the victims' desires is problematic. The main shortcoming of affording any role, let alone a very important one, to victims' desires, is, quite simply, that sometimes victims are mistaken (i.e., sometimes what they desire is unfair). After all, victims need not be, and frequently are not, in a particularly privileged position for determining the desert of the wrongdoer. The usual fear is that victims will be overly vindictive and thus that they would desire to see wrongdoers suffer more than they deserve. But retributivists, above all, should be similarly concerned about the prospect of victims desiring wrongdoers to suffer less than they deserve, even if, as a matter of empirical social psychology these latter victims are less common.

I. An Analysis of Victimhood

In his authoritative *exposé* of the excesses of the twin contemporary agendas of protecting victims' rights and waging a war on crime, Markus Dubber points out that "the war on crime, though ostensibly fought on behalf of victims, has very little to do with victims, and everything to do with the state."⁸ Moreover, Dubber continues, "the true victim of the war on crime is not a person, not even 'the community,' but simply the state itself."⁹ In fact, one of Dubber's criticisms of the victims' rights movement is that the "victim as a person" is really "irrelevant" and has "no place" in the morass of regulations spuriously pushed forth on their behalf.¹⁰

It is not at all clear, however, that even if the victims' rights movement were concerned with real "victims as persons," it would fare any better vis-à-vis retributive rationales. Thus, for example, Moore is as critical of the victims' rights movements as is Dubber, although, unlike Dubber, he believes that "most of what the 'victims' rights' movement has been about is the role [in the criminal trial] of the victim as a flesh and blood live person after the crime has happened."¹¹ That is, Moore objects to

8. MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* 26 (2002).

9. *Id.*

10. *Id.* at 28-29.

11. Moore, *Victims*, *supra* note 2, at 72.

even victims who are understood as flesh and blood persons having any say on the determination of punishment in a criminal trial.

Thus, we find ourselves in the embarrassing position of not quite knowing who, or what, are the victims around which our discussion centers. Do the alleged shortcomings of the victims' rights movement stem from its lack of concern with flesh-and-blood persons or from its concern with them? Should retributivists care about flesh-and-blood victims' desires? And if not, then whose desires, if anyone's, should be relevant for retributivists? Tackling these issues head on, Fletcher seems to indicate that the desires and sentiments which matter, or which matter most, are not those of the "particular victims," but those of the "class of victims violated by the particular offense."¹² As he further adds, "In the crime of homicide, for example, it should not matter whether the decedent is a solitary old lady killed for her money or the mother of three killed in a drive-by-shooting."¹³ Presumably, both the solitary old lady and the mother of three belong, in Fletcher's opinion, to the same class of victims. While I share Fletcher's dissatisfaction with the appeal to this or that particular victim, I nonetheless find it hard to discern the criteria (or is it just a criterion?) which he has in mind for belonging to this or that specific "class of victims violated by the particular offense." Imagine a rape; both Fletcher and I would disagree with giving too much importance to what the particular, raped victim would have to say about the punishment of the crime. Fletcher suggests that we look at the class of those who have been violated by the particular offense. But who are those who have suffered the same "*basic* invasion of interests?"¹⁴ Surely not all victims of rape, perhaps not even only victims of rape, have so suffered.

But even if the issue as to who should count as a victim of a given crime is not arbitrary, the desires and emotions of victims would still be hopelessly arbitrary. Fletcher discusses Susan Smith's case: "After Susan Smith killed her two children in South Carolina, her mother and ex-husband weighed in with

12. Fletcher, *supra* note 1, at 51.

13. *Id.* at 50-51.

14. *Id.* at 55 (emphasis added).

their views on whether she deserved the death penalty or not.”¹⁵ But Fletcher believes that “it would seem odd that the determination of the death penalty should depend on the general affection or hostility of the defendant’s relatives.”¹⁶ Again, I agree with Fletcher’s normative position; my doubts are merely regarding the metaphysical underpinnings of his abandonment of the particular victim in favor of the obscurer “class of victims.”

To be sure, Fletcher appears to suggest that it is not *token* victims of token crimes that should matter (since this would take the criminal justice system hostage to the vagaries and fickleness of the existence of individual victims and of their preferences), but something somehow more abstract. And there are dangers inherent to this abstracting process: one could favor considering such abstract victims so that one would in effect be endorsing the sorts of demagogical and unfair agendas that Dubber indicts. For if it is not the actual, token victim which matters, then there appears theoretical space for fully *inventing* the victim which matters.

Yet, I do not think that there is anything in Fletcher’s views that would indicate any sort of support for turning the talk of the victim into talk of the sort of state protection Dubber has diagnosed. Fletcher is after all emphatic in that “the victims that are relevant for our purposes are the actual victims not the potential victims of future crimes.”¹⁷ But then it is not easy to see how we can reconcile Fletcher’s two claims; that is, if what we care about is indeed the *class* of victims affected by a given crime, or victim-types, as opposed to victim-tokens, then it is hard to see how we must at the same time be concerned with the actual (token) victims.¹⁸ Types simply cannot be actual; that is why they are types. Moreover, victim types do not have desires (or rights). This is why they are useful to Fletcher’s purpose of avoiding the conative arbitrariness of actual victim-tokens. But then the talk of respect for victim-types’ rights seems to not work for us after all.

The plot, however, thickens even more. Fletcher further suggests a slight modification of the victim-type thesis: “If the

15. *Id.* at 51.

16. *Id.*

17. *Id.* at 55.

18. *Id.*

victim participates in the trial, as is common in Continental jurisdictions, the victim should appear as the representative of a class of victims all of whom suffer the same basic invasion of their interests.”¹⁹ Fletcher’s suggestion is not terribly helpful. First, being a victim-type does not quite mean being a representative of all victims, just as the type “person” does not “represent” token-persons. The word “representative” has just too many meanings for it to be of much use in this context. Presumably, we are not to understand the victim Fletcher cares about as one who simply *speaks on behalf* of the class of victims, for he is emphatic in that this victim has suffered “the same basic invasion” of interests.²⁰ If not merely a speaker on behalf of the other victims, what else is she? And how is she, amongst all other members of the relevant class of victims, all of whom have *ex hypothesi* suffered the same basic invasion of interests, chosen to participate in the trial? A lottery? But, since Fletcher admits that it is conceivable that victims would be allowed to participate in the trial, and since, rightly, he does not want the actual token victim participating in a token trial, it is hard to see exactly who Fletcher has in mind. Victim-types, in the philosophical sense of “type,” cannot participate in trials.

It is of course crucial for anyone who, like Fletcher, wishes to more decisively take victims into account in our retributively inspired criminal justice system to tell who (or what) is the victim we are supposed to be considering. For one, we should of course, as Fletcher warns, avoid rendering the victims of a murder to be simply composed of “those who are unhappy about the killing.”²¹ Fletcher is aware of the difficulty, for, as he discusses the problem in the context of homicide, he further confesses: “I am afraid there is no easy solution to the problem of identifying the relevant victim in homicide cases.”²² But, in fact, the problem of identifying the relevant victim is pervasive, and it manifests itself in the context of any crime. In the final analysis, it stems from a problem in the theory of how we are to understand the very notion of a victim. Thus, it is not only difficult to determine who should count as a the “flesh and

19. *Id.*

20. *Id.*

21. *Id.* at 56.

22. *Id.*

bone" victim of any given crime, but, on a different level, whether it is flesh and bone victims, or representatives of flesh and bone victims, or other more abstract types of victims, which are important for our purposes.

In spite of this sketch of what I take to be some shortcomings in Fletcher's view of victims, I think that he is pointing in a rather important direction: we need a rigorous account of a victim. While I will not be able to carry out here the sort of elucidation of the ontological status of victims,²³ I do wish to discuss Moore's response to Fletcher, insofar as it reveals something important about metaphysical assumptions about victims, which Moore and most criminal law theorists who are not totally opposed to retributivism typically make.

II. Retributivism and its Victims

Fletcher's suggestion that the victim that should matter to us is somehow actual, but at the same time a victim-type, or a "representative" of some sort²⁴ is, in spite of my criticisms above, somehow on the right track. Yet, it is precisely because Fletcher is clearly aware of this peculiar, complicated, and elusive nature of the victim that I find it puzzling for him to claim that Moore, the arch-retributivist, does not appeal to victims in any way. For, in spite of what Moore, and with him retributivists in general, claims, victims are present in his theory—and in ways which he does not explicitly admit. Thus, I believe that Moore does have a victim in mind, even where he claims that he does not, and that the sort of victim that he has in mind is similar to the victim with which Fletcher struggles.

Moore defends himself from Fletcher's charge that his account of retributivism leaves no space for victims by distinguishing between two contexts in which victims could play a role within a retributivist framework.²⁵ One of these contexts Moore calls substantive, the other, procedural.²⁶ Moore points out that in the substantive sense of caring for the victim he too "can tout a 'victim-oriented' retributive punishment

23. See, e.g., Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115 (2006).

24. Fletcher, *supra* note 1, at 55.

25. Moore, *Victims*, *supra* note 2, at 68-69, 72.

26. *Id.* at 68, 72.

scheme"²⁷—after all, retributivism is a matter of giving wrongdoers what they deserve, and almost all instances of wrongdoing have victims. Victims are constitutive elements of wrongfulness. So, for Moore, victims are “at the center of the norms whose violation is at the core of criminal law.”²⁸ But Moore points out that the fact that substantively victims play such a prominent role says very little, or perhaps nothing, about the role that they should play in criminal procedure.²⁹ In fact, Moore’s position is that the victims should play no role within the procedural context.³⁰ Were victims allowed to play a role in a criminal trial, Moore further asserts, this would be “inconsistent with retributivism.”³¹

While there is something to be said in favor of Moore’s distinction between the procedural and the substantive dimensions of criminal punishment,³² there remains something odd about its neatness and the alleged irrelevance of one of these dimensions vis-à-vis the other. In other words, it is the very neatness of the separation that is hard to accept: if the victims are so central within the substantive context, is this centrality really wholly irrelevant within the procedural context?

What I think has been overlooked in most discussions of retributivism is the way in which victims play a greater role than Moore, for example, would accept. This is not to say that I endorse giving more, or indeed any, say to victims in the criminal trial. My goal is, rather, to draw attention to additional ways in which victims are crucial for retributivists and the peculiar sort of victim that retributivists, like Moore, have in mind. In order to do so, I need to discuss a bit of the history of retributivism concerning the alleged fact that retributivism is a very difficult notion to define. Thus, just as the concept of a victim stands in need of clarification, the very notion of retributivism has been seen as hopelessly unclear.

27. *Id.* at 72.

28. *Id.*

29. *Id.*

30. *Id.* at 89.

31. *Id.* at 11.

32. *Id.* at 68, 72.

In fact, one typical attack on retributivism is that it is really impossible to determine what it means.³³ With the premise that retributivism is unintelligible in mind, some critics have sought to try to make it intelligible, only to show that all of the possible attempts to make retributivism intelligible are unacceptable. While I do not believe that retributivism is unintelligible,³⁴ I will examine one famous attempt to make retributivism intelligible, insofar as this attempt relates to the connection between retributivism and victims.

The story goes as follows: retributivism encourages, or at least necessitates, the base or ugly emotions of the victims of crime, and, perhaps even more damagingly for retributivism, it seeks to satisfy them. John Cottingham neatly captures what he takes to be the essence of this “variety” of retributivism, which he summarizes as follows: “[T]here should be some kind of reciprocity between the sense of grievance felt by the victim of an offense and the satisfaction he gets from the suffering of the offender.”³⁵ But immediately Cottingham notes that this is somewhat too ambiguous and he discusses two possible interpretations of the claim,³⁶ which I will discuss in turn.

On the first interpretation, the claim put forward is that it is intrinsically desirable or appropriate that grievances of victims should be matched by sufferings of offenders. If child A hits child B causing him pain and a sense of grievance, child B will frequently be heard to say, “I’ll make you pay for that!” The payment is felt to have been exacted once B has inflicted a similar hurt on A.³⁷

Cottingham believes that this interpretation is defective because it does not constitute a good rationale for retributivism.³⁸ In particular, Cottingham argues that there is feeble evidence that these psychological facts can provide “a satisfactory

33. See John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238-46. See also TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS REVISITED* (Pluto Press 2005) (1970); J. L. Mackie, *Retributivism: A Test Case for Ethical Objectivity in PHILOSOPHY OF LAW* (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

34. See LEO ZAIBERT, *PUNISHMENT AND RETRIBUTION* (2006).

35. Cottingham, *supra* note 33, at 242.

36. *Id.*

37. *Id.*

38. *Id.*

moral justification.”³⁹ Cottingham’s argument, in order to show that it is not a good starting point, is simply to assert that the only way in which this interpretation could succeed in morally justifying punishment would be if we were to commit “the error commonly attributed to Mill and argue that what is desired is therefore desirable.”⁴⁰

I believe that Mill committed the error that worries Cottingham, namely, the error of failing to appreciate that “desirable” is ambiguous as to (a) something along the (descriptive) lines of “can be desired” and (b) something along the (normative) lines of “it is good, it ought to be desired.” Furthermore, I believe that it is possible that someone would make a similar mistake regarding the interpretation of the principle under consideration (i.e., to assume that since sometimes victims *desire* to “get back” at those who have unjustifiably harmed them, then it is *desirable* that they do so). But it is by no means clear that this is the only way in which this principle can provide a satisfactory moral justification, as Cottingham summarily concludes.⁴¹ It is worth noting that in Cottingham’s very formulation of this interpretation of the principle, he avoids the ambiguity of “desirable,” as he explicitly equates this term with “appropriate.”⁴² That is, Cottingham uses “desirable” here in an unambiguous normative sense, which can, perhaps, be the ground for a satisfactory moral justification of punishment. The desirability of retributive punishment would then not be derived from the non-normative fact that victims sometimes desire to punish. Whether or not the emotions themselves can provide enough normative support for retributivism is yet to be seen, and it is a point to which I will return.

Moore, I think, deals with this attack on retributivism in a more enlightening way. Regarding the assertion that what morally justifies punishment, according to the retributivist, is that it “satisfies the desires for vengeance of their victims,”⁴³ Moore reminds us that the retributivist would insist on punish-

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. MICHAEL MOORE, *PLACING BLAME* 89 (1997). See also ZAIBERT, *supra* note 34.

ing the deserving even in those cases in which “the criminal’s victims are indifferent (or even opposed) to punishing the one who hurt them.” And, Moore continues: “a retributivist should urge punishment on all offenders who deserve it, even if *no* victims wanted it.”⁴⁴ In other words, while both Cottingham and Moore reject this interpretation as a viable version of retributivism, they do it for different reasons. Cottingham’s reason is that the sense of “desirable” in typical formulations of this confused account of retributivism is purely descriptive and thus inadequate (again, he does not examine the possibility of taking “desirable” to be unambiguously normative). Moore, in contrast, skips the tension between normativity and description in the use of “desirable” altogether, and zeroes in on the fact that retributivists would insist on punishing the deserving regardless of what the victims happen to desire. I think Moore’s reasons are more compelling.

Cottingham rejects, secondly, another interpretation of the claim in question, according to which the moral justification of punishment is that the reciprocity of the grievance of the victim and the subsequent pain of the offender serves the purpose of satisfying desires for vengeance. Interestingly, Cottingham sees this version of retributivism, based on the idea that what justifies punishment is that “the penal system provides a substitute for private vengeance,” as rather “sophisticated.” It is hard to see what is so sophisticated about this view, given that Cottingham summarily dispatches it with one oversimplified argument: (1) this version of retributivism is, in Cottingham’s view, just a form of utilitarianism (therefore not retributive); (2) private vengeance is bad (has great disutility); (3) retributivism proscribes it; therefore, (4) retributivism is good (greater utility). Again, Moore agrees with Cottingham in rejecting this obviously utilitarian rationale behind the desire to curtail private vengeance: “[E]ven in the most well-mannered state, those criminals who deserve punishment should get it, according to retributivism.”⁴⁵ Moore also rejects the possibility of seeing any form of preference utilitarianism as a basis of retributivism: a retributivist believes that “morally culpable persons should be punished, irrespective of what other citizens [and irrespective of

44. MOORE, *supra* note 43, at 89.

45. *Id.* at 90.

whether or not these other citizens are victims] feel, desire, or prefer.”⁴⁶ Of course, it is the spirit of this Moorean view which, I think, partly explains Fletcher’s criticism that Moore’s retributivism seems utterly indifferent to the rights or the desires of the victims.

I agree with both Cottingham and Moore in rejecting this interpretation of retributivism. I would like, however, to defend a connection between retributivism and the emotions and desires of victims which both Cottingham and Moore sidestep. Both Cottingham and Moore (and Fletcher), in this context, subtly change the focus of the discussion from the problem of emotions in general, or in abstract, which is the important discussion here, to the problem of the particular emotions of (some of) the *actual victims* of crime. Thus, what they reject is an interpretation of retributivism in accordance with which retributivists seek to satisfy the emotions of (some of) the victims. Both Cottingham and Moore say precious little regarding the connection between retributivism and the satisfaction of the emotions of the retributivist herself.

Moore affirms, rightly, that a retributivist would “insist” on punishing the deserving regardless of what the victims or citizens in general “feel, desire, or prefer.” But Moore does not sufficiently address the question as to *why* the retributivist would insist on this. I would like to suggest that the retributivist insists on this because punishing the deserving, in part, satisfies, or is dictated by, some of her own emotions and desires: she wants and prefers to see justice being served (for reasons I have developed elsewhere I do not care whether we call this feeling a feeling of revenge).⁴⁷ It could be argued, perhaps, that every witness (broadly conceived) to an injustice is somehow a victim of it, thus casting doubt upon the distinction between the non-victim-retributivist and the victim of a crime which underlies Cottingham and Moore’s discussion. This sort of view is supported by the distinction between *crimina publica* and *crimina privata* (i.e., by crimes which the State would prosecute independently of whether or not the victim wishes the prosecution to move forward) and those where the State would not prose-

46. *Id.* at 89.

47. See Zaibert, *supra* note 7.

cute unless the victim wanted the prosecution to move forward. It is not necessary for my purposes to discuss this distinction in any detail. What is important for my purposes is to inquire into the reasons why the non-victim-retributivist would insist on punishment in spite of (some) victims' indifference or reticence vis-à-vis punishment.

Within the context of wrongdoing and its punishment, the retributivist is committed to the administering of justice. And administering justice, or seeing justice being administered *feels* a certain way. These feelings are not disassociated from reason, nor are they merely impulsive, unreflective reactions.⁴⁸ The retributivist who is not a (direct) victim of a wrong and who insists on punishing even when the proper (direct) victim of the wrong is against punishment surely believes that the proper (direct) victim's failure to *feel* the appropriate emotions is a moral shortcoming. Where the retributivist feels the urge to punish, she also believes that those who do not feel the urge to punish are somehow morally naïve, lazy, or unenlightened—and it is irrelevant whether those who do not feel the urge are or are not direct victims of the wrongdoing.

In tandem with their shifting focus away from the general emotional response to crime and into the (direct) victims of wrongdoing, Cottingham and Moore also shift the focus from non-institutional punishment to criminal punishment carried out by the State in response to criminal wrongdoing. In this context it is easier to separate the victims from the retributivist who passes judgment and also easier to stave off appeals to preference utilitarianism and related views. But consider a case of non-institutional punishment. Patricia believes that Bob has done something wrong and that he deserves, by way of punishment, that she slap him. When she deliberates on whether or not she should go ahead and slap him, she will debate between two possible justifications: (a) because this would have good consequences (consequentialism), and (b) because he deserves it (retributivism). When she embraces the latter option, she is not concerned with how anyone *else* feels; *she* herself feels an urge to see justice being done. If others, victims or oth-

48. This contradicts the sort of Humean emotivism which undergirds Mackie's own attack on retributivism. See Mackie, *supra* note 33.

erwise, do not realize that justice is valuable in and of itself and do not feel the appropriate urge, so much the worse for them.

When Patricia slaps Bob on retributivist grounds, she does, *ex hypothesi*, feel something along the lines of satisfaction at seeing justice being done. She does not slap Bob *in order to* feel this or that emotion, but this emotional component is nonetheless an essential aspect of retributivism. It is odd that Moore, in particular, does not explore this point further, insofar as his analyses of the emotional aspects of punishment elsewhere are so deep.⁴⁹ In fact, Moore's arguments that emotions are not disconnected from reason can profitably be applied in this case. It makes sense to want to see justice being done, and this "making sense" has an emotional component: the retributivist has the desire to see justice and this desire is a good one to satisfy. What is wrong with most of the views that Cottingham and Moore criticize is not that they give too much importance to emotions of victims per se. Rather, what is criticizable is a combination of two facts: first, that the emotions upon which these accounts of retributivism focus are restricted to those of (some) victims, and second, that the emotions of these victims, or of third parties, are taken uncritically—as if just having these emotions would justify this or that form of action.

In conclusion, while retributivism does not seek to satisfy the emotions of victims or those of the general population, and while it does not seek to satisfy all the sentiments of the retributivist either, it does satisfy some of the retributivist's emotions. To experience some emotions in some cases is virtuous and not to experience them is vicious. The retributivist might be committed to the nurturing of some emotions which are associated with seeing those deserving of punishment being punished accordingly. If it turns out that (some of the) victims of wrongdoing fail to see this, then so much the worse for these victims. What matters for the retributivist is the set of virtuous emotions associated with seeing justice done, not who happens to experience these emotions.

49. For the bulk of Moore's discussion of Nietzsche, see MICHAEL MOORE, *The Moral Worth of Retribution*, in PLACING BLAME 104, 139-49 (1997) [hereinafter MOORE, *The Moral Worth of Retribution*].

III. Inventing (Vindictive) Victims

While the retributivist is not committed to satisfying the victim's desires willy-nilly, she is nonetheless committed to satisfying the desires of a specific type of victim: the reasonable or ideal victim. So, even if a particular victim of crime is unreasonable and desires too much or too little in the way of punishment for the wrongdoer, the reasonable victim would desire exactly the just punishment. Now, this appeal to the reasonable victim is an idealization that conjures up the echoes of other more conspicuous generalizations in the history of legal theory, such as the *bonus pater familias* of Roman law, as well as its common law incarnation, the reasonable man. The feelings and desires of the *bonus pater familias* (the reasonable person), were he a victim of wrongdoing, would matter to retributivists (like Moore), at least because they would be extensionally equivalent with what his version of retributivism would indicate is the just punishment. One could go further and suggest that there is no extensional equivalence—that the appeal to the standard of the ideal victim is all that the retributivist really has by way of determining what wrongdoers deserve.

Either way, this idealized victim strikes me as similar, too, to the sort of complicated abstraction which Fletcher seems to suggest is important for retributive justifications of punishment. Unlike Fletcher, and unlike Moore, I believe that the appeal to the ideal victim is present in Moore's retributivism—his own protestations to the contrary notwithstanding. Moore's claim that "[u]nlike Fletcher, I think victims should and must be ignored if you are claiming to be doing retributive theory,"⁵⁰ requires, in my view, much more clarification and nuance than to merely say that he is talking about the procedural context.

Moore seems to me to be in a particularly weak position to deny that there is a tacit or implicit appeal to victims in his very version of retributivism. First, his position is weak in the sense, alluded to above, that this would presuppose a rather implausible distinction between the procedural and the substantive aspects of the justification of punishment. But, secondly, and more importantly for present purposes, most of his defenses of retributivism are based on thought experiments which reveal

50. Moore, *Victims*, *supra* note 2, at 67.

the emotional reactions that ideal perpetrators would have if they committed a serious wrong. But just as an ideal perpetrator would think that he himself deserved to die if he committed a horrible crime,⁵¹ he would think of the exactly right punishment if he were merely the victim, and not the perpetrator, of that horrible crime.

Here we come to a fork in the road. For if the ideal perpetrator to which Moore so frequently appeals and the ideal victim are in some sense the same idealization, and the same too as the ideal witness, the ideal juror, the ideal prosecutor, the ideal judge, and so on, then my suggestion that there is indeed an appeal to victims in (Moore's) retributivism loses some of its force. All we see here is, it might be retorted, an appeal to the sort of "ideal observer" or "impartial sympathetic spectator" of classical moral theory, particularly the moral sense tradition.⁵² In other words, it could be argued that retributivism appeals simply to an ideal observer; sometimes she is a victim, sometimes she is a perpetrator, and so on. Thus, the objection continues, the victim as such is not so important—what is important is the reasonableness of the ideal person who happens to be placed (still ideally) in the position of a victim.

But this objection does not worry me. I could simply point to retributivism's appeal to an ideal observer-who-finds-herself-in-the-position-of-a-victim. Surely being placed in the position of a victim has some implications: it might be easier for the ideal spectator to see the justice of a given punishment if she is put in the position of the (ideal) victim than if she is in the position of the perpetrator, and so on. That is, while the ideal creditor and the ideal debtor may be different roles that an ideally reasonable person could play, these are *ex hypothesi* different roles. Thus, when Moore claims that the retributivist would insist in punishing a token wrongdoer in a determinate way even if the actual victim did not desire to so punish her, it is because he believes that if he himself were the victim of this instance of

51. The specific discussion as to the consequences of imagining yourself having committed a horrible crime are discussed in MOORE, *The Moral Worth of Retribution*, *supra* note 49, at 145.

52. Famous exponents of the moral sense tradition in ethics include Francis Hutcheson, David Hume, and Adam Smith. For recent discussions of different versions of the moral sense basis of ethics, see Justin D'Arms & Daniel Jacobson, *Sentiment and Value*, 110 *ETHICS* 722 (2000).

wrongdoing, he would endorse such punishment. The move is not simply “because I am an ideal observer,” but rather “because I am an ideally reasonable victim.” Thus, for my purposes, the objection according to which the retributivist does not really appeal to an ideal victim, but instead appeals to an ideal observer-who-happens-to-be-a-victim amounts to a mere terminological quibble.

Either way the retributivist is forced to appeal to an ideal victim, or at least, to appeal to an ideal person who is placed (still ideally) in the position of a victim. As I stated at the outset, I cannot here undertake the much needed ontological account of this ideal victim. But the fact, if it is a fact, that the victim that matters to retributivists as an idealization is already an important result of the above discussion. Moreover, what is undoubtedly a fact is that retributivism, at least in its most ambitious leading contemporary formulation (Moore’s), does tacitly appeal to this ideal victim. The rest of this article is devoted to highlighting a particularly noteworthy and troubling characteristic of the ideal victim of retributivism.

The idealized victim that I find in Moore’s retributivism is conspicuously silly. In order to bolster his claim that retributivists would not care about what actual victims have to say vis-à-vis the punishment of the wrongdoer, Moore uses two different examples. I will quote the two examples in order.

I was having my tires changed recently in Philadelphia, sitting in a coffee shop waiting for them to get done, and I overheard the following conversation. One person said to another, “The way Bill Clinton has saved himself is by getting Hillary on national television and having her claim, ‘I’m the one wronged by Bill’s adultery. I’m the victim here and I forgive him. So, what business do you have in demanding any further punishment?’” The claim is that Bill’s adultery is Hillary’s business. She, the victim, owns this one.⁵³

And then Moore offers a second variation:

Change the example to Nicole Simpson. In the O.J. trial, suppose a hitherto unknown tape suddenly surfaces. Here’s what the tape records: that Nicole said during the attack that killed her, “O.J., I know that you think that I’ve done you wrong and I forgive you for

53. Moore, *Victims*, *supra* note 2, at 78.

this.” Does that make any difference to what O.J. deserves with regard to killing Nicole Simpson? Or did he do a great wrong, culpably, to which victims’ preferences, whether vengeful or forgiving, are simply irrelevant? Many would think that such a forgiving attitude, if relevant at all, would make what Simpson did even worse: his victim was such a good person, she could even forgive her killer at the time she is killed.⁵⁴

Moore’s reaction to these examples is predictable:

My own sense is that if you run through the range of cases with varying degrees of victim forgiveness/vengeance, your retributive intuitions are such that they don’t diminish the wrong at all. If these intuitions are to be credited, then retributive justice does not merely demand that victims of wrongdoers be given the right to make their offenders suffer; rather, retributive justice demands that culpable wrongdoers suffer, irrespective of whether or not those they wrong wish it.⁵⁵

But this conclusion only has force if the choice of victims in the examples is as unreasonable as Moore makes them out to be. These two examples are designed to evidence either a sort of cavalier solipsism, in Hillary Clinton’s example, or a spineless over-indulgence, in the case of the Nicole Brown example. Either way, each of the examples depicts a rather uninspiring instance of forgiveness. Surely, there are frivolous, misguided, or otherwise morally underwhelming ways of forgiving offenders; but just as surely there are other ways of forgiving which are morally quite admirable.⁵⁶

The issue at stake here runs deeper than Moore’s peculiar choice of examples. We could un-problematically grant that the victims in his two examples are mistaken, and that no retributivist worth its name would indeed take their desires into much account. But this is only because these specific victims have been constructed in such a way as to generate no sympathy whatsoever—the positions of the victims strike us as unreasonable, if not downright silly. Deep down the problem is that the idealization of the victim with which retributivism operates, even if it turns out that it is merely the idealization of the *bonus*

54. *Id.*

55. *Id.* at 77-78.

56. See, e.g., Leo Zaibert, *The Paradox of Forgiveness*, J. MORAL PHIL. (forthcoming 2009).

pater familias in the position of a victim, is that it is never reasonable to forgive. That is, the views of forgiveness that retributivism has in mind (even if subconsciously) tend to be variations on the Moorean examples.

Now, I have written extensively against the erroneous views that paint retributivism as an extremely harsh justification of punishment, or as leading towards over-criminalization, or as uncritically favoring the death penalty, etc.⁵⁷ Retributivists, it should be remembered, need not endorse any particular agenda vis-à-vis what to punish (retributivists need not be legal moralist), nor do they need to have a particularly harsh stance on punishment scales: all they need insist upon is that punishing the deserving is intrinsically good. But if it turns out that retributivists are inexorably linked to the satisfaction of the desires of idealized victims, and these idealized victims are incapable of ever forgiving, or otherwise showing mercy, without thereby being silly, then perhaps, the theory is indeed susceptible, in a roundabout way, of being attacked along these lines.

57. This criticism against retributivism is indeed widespread, but for a couple of contemporary and far-reaching examples, see David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537 (1991) and James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003).