

Comment on Backen

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Made evident moments ago, George Backen distinguishes revenge from retribution. This commentary begins by restating the harms that underpin each and their attendant motivations. Two objections against Backen's view follow. The first challenges Backen's claim that retributive harm is done with indifference to the outcomes of injury. The second challenges Backen's criterion for punishment and when we can appropriately assign guilt. Despite these objections, Backen's paper contains merits deserving attention. Thus, before concluding, I would like to briefly elaborate on what I take to be Backen's most incisive idea, namely one's epistemic distance from a violation. Though beyond the main's thrust of Backen's discussion, it is nonetheless an excellent starting point for future exploration.

Backen argues that there are two kinds of harm. The first is motivated by revenge. Harm is done here with the intention of making someone "worse off", namely the victim of punishment (Backen, p. 4). The vengeful person does not seek to reform his victim but, ultimately, to debilitate him. In contrast, the second kind of harm is motivated by retribution. This harm is done with the intention of injuring simply "for the sake of injury" (p. 1). The retributivist, according to Backen, is indifferent "to the outcomes of injury" (p. 5). Strictly speaking, he is motivated by the basic principle of justice holding that those who commit wrongful acts ought to be punished. Unlike the vengeful person, the retributivist is not motivated by "resentment" or spitefulness (p. 2). In fact, as Backen points

out, the retributivist may very well delight were his victim somehow improved by his punishment (p. 5). Making one better off, however, is not the primary aim of retributive harm. Criminal reform is only welcome where it occurs accidentally.

Now, Backen is correct in arguing that the vengeful person desires his victim worse off. Resentment, we know, does not have as its object reforming the wrongdoer. However, Backen's characterization of retributive harm is suspect. For, contrary to Backen, the retributivist cannot be altogether indifferent to the outcomes of injury. Rather, the retributivist must hold a minimal degree of interestedness, namely administering just punishment. Specifically, this entails respect for the proportionality and reasonable limits of harm. In order to be just, punishment must be contained within these ethical bounds. For example, we would not be inclined to sentence a shoplifter to life in prison. Such punishment, to be sure, is unjust, involving an excessive amount of harm against the offender. Moreover, as Michael Moore points out, that retributivists are not devoted "to any particular penalty being deserved" (Moore, p. 632). In this sense, we may regard the retributivist, prior to reviewing an offense, as neutral to what punishment is chosen. The retributivist desires primarily that just punishment be done. This, however, does not imply he is likewise indifferent to the consequences of such punishment. Here, Backen errs. In order to administer just punishment, the retributivist must at least be indirectly concerned with the outcomes of injury. He must be resolutely committed to the

desire for neutrality, namely that retributive harm not be induced with the intention of bringing about a certain set (positive or negative) of consequences. As such, the outcomes of injury are reflexive upon the motivation to harm. The retributivist, therefore, should guard against the desire not only to inflict unnecessary harm but also to improve the wrongdoer. This desire to remain neutral is in itself a concern for the consequences of retributive harm, serving to guide the just and unbiased administration of punishment.

Backen's criterion for punishment is the experience of guilt for wrongdoing. To determine guilt in others, one should ask the question posed by Moore: "Would I feel guilt if I acted that way?" Where the answer is yes we assign punishment (Backen, p. 4). Though perhaps intuitively sound, this criterion, at a more fundamental level, appears problematic. In the application of Moore's question, we are essentially projecting our moral feelings and attitudes onto others. This presupposes that all, including the worst of criminals, are not only aware of what is right but experience guilt for committing wrong. But what of those totally lacking in moral conscience, such as psychopaths? We would undoubtedly feel guilt, were we to commit their atrocious crimes, even though they, presumably, do not. Hence, it would be unwise to here apply Moore's test. Not even the offended reactions of others seem to affect the deeply depraved. *Prima facie*, we may be tempted to dismiss such extreme cases from our discussion. Most criminals, we admit, are aware of when they have committed wrong and, therefore, experience guilt. However, to dismiss the above amounts to ignoring a critical issue, namely differences in individual perspective.

Why raise this issue? In brief, every crime is underwritten by a particular logic. That is, a complex of reasons, attitudes, and beliefs, not necessarily visible to

observers, helping to explain the perspective of a criminal. We need not go as far as psychopaths to illustrate this. For example, imagine a desperately poor person who steals to feed his family. Theft, from his perspective, is imperative given his unfavorable circumstance and drastically limited range of options. Asked if his crime was accompanied by a sense of guilt, he replies a confident no. It was quite logical, he feels, to have stolen. This, of course, is contrary to the perspective of others belonging to the status quo, viewing theft as wrong and inducing guilt. This poses a serious problem for Backen's understanding of the appropriateness of punishment, grounded fundamentally in one's perception of his guilt, or lack thereof. Since one does not necessarily incur guilt from committing a crime, the appropriateness of punishment may be challenged where the perpetrator feels guiltless. If we agreed to punishing only when the perpetrator felt guilt, then punishment would be contingent on how the violator feels, rather than aimed to rectify a violation. This, however, is absurd and contrary to our moral sentiments that wrongdoers should be punished for the wrong committed, even if they may regret their crime afterwards.

Despite the above criticisms, Backen provides us with original insight concerning one's epistemic distance from a violation. According to Backen, "the closer you are to the moral violation, the more vivid your experience of moral violation, and the more affective the experience" (Backen, p. 10). To be sure, this is intuitively correct. For when we experience a violation against a loved one, to whom we have deep-seated attachments, we immediately experience greater indignation than if it occurred to a distant stranger. Further illustrating his idea of proximity, Backen compares the intensity of moral experience in the classroom with that in the courtroom (p. 10). According to Backen, our moral experience is stronger

in the latter. Factors that may contribute to this certainty include our potential disgust with the criminal's presence, being conscious of the crime he supposedly committed, our close attentiveness to the case presented against him, connecting facts and reliable evidence to show that he is in fact the true perpetrator, and so on. Here Backen forces us to raise some important questions. If retributive judgments are based on moral experience, as Backen argues, are we justified in administering harsher punishments the greater our indignation? Will not even the retributivist, principally dedicated to punishing only for the sake of injury, also be tempted to administer harsher punishments for a violation, the nearer his is to the latter? Controversial questions, to be sure, requiring our devoted attention, in order to ensure fair and just punishment.

In addition, the idea of epistemic distance seems intimately related to the problem of context discussed above. The further one is situated from a violation, the less apparent will be the criminal's logic or perspective. Distance de-contextualizes, allowing one to more easily project his own interpretations onto a situation. The danger here is that one, from his remote position, may judge a situation more on intuition than fact. Keeping this in mind, however, one should aim to counterbalance the intensity of his moral experience with the known facts of a situation. The goal is to be as objective as possible, thus minimizing personal bias. Such concern is part and parcel of the desire for neutrality, a central tenet to retributive justice.

In conclusion, Backen argues well to say that revenge intends to make someone worse off. He is also right in showing that retribution does not aim at this end, thus distinguishing it from revenge. However, Backen fundamentally errs in arguing that retributive harm is not

motivated by concern for the outcomes of injury. The retributivist must be at least indirectly concerned with the outcomes of injury, so as to guard against the desire to make the victim better or worse off as a consequence of punishment. Furthermore, Backen's criterion for punishment needs revision. To use oneself as an indicator of guilt in others is misguided. Not all feel guilty for committing a particular crime. The subjective experience of guilt, then, is not an appropriate criterion for punishment. Indeed, we punish a perpetrator not based on his attitude towards his crime but because he has done wrong. Aside from these criticisms, Backen's idea of epistemic distance is worthy of our attention. For, as Backen points out, our sense of appropriate punishment, including our willingness to do harm, is rooted in moral experience. Since epistemic distance from the violation necessarily alters the intensity of such experience, we would do best to consider and keep in my mind our relative position from a violation. As such, we are more likely to arrive at unbiased judgments, balancing our moral experience with the facts of a crime. Backen's theory, I hope to have demonstrated, may act to guide us towards this ethical and important objective.

References

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Proceedings of the Kent State University May 4th Philosophy Graduate
Student Conference
No. 3 (2004)

<<http://philosophy.kent.edu/journal/003014>>

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