

Crime: in Proportion and in Perspective

JOHN GARDNER

1. *The displacement function*

What is the criminal law for? Most explanations nowadays focus exclusively on the activities of criminal offenders. The criminal law exists to deter or incapacitate potential criminal offenders, say, or to give actual criminal offenders their just deserts. In all this we seem to have lost sight of the origins of the criminal law as a response to the activities of *victims*, together with their families, associates and supporters. The blood feud, the vendetta, the duel, the revenge, the lynching: for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence.¹ It is important to bring this point back into focus, not least because one common assumption of contemporary writing about punishment, including criminal punishment, is that its justifiability is closely connected with the justifiability of our retaliating (tit-for-tat, or otherwise) against those who wrong us.² The spirit of the

¹ For those who accept that ancient criminal law had this *raison d'être* but who doubt whether it has done much to shape criminal law 'as we know it today', I commend J. Horder, 'The Duel and the English Law of Homicide', *Oxford Journal of Legal Studies* 12 (1992), 419.

² For instance: P.F. Strawson, 'Freedom and Resentment', *Proceedings of the British Academy* 48 (1962), 187; J.M. Finnis, 'Punishment and Pedagogy', *The Oxford Review* 5 (1967), 83; J.G. Murphy and J. Hampton, *Forgiveness and Mercy* (Cambridge 1988); M.S. Moore, 'The Moral Worth of Retribution' in F. Schoeman (ed.), *Responsibility, Character, and the Emotions* (1987).

criminal law is, on this assumption, fundamentally in continuity with the spirit of the vendetta. To my mind, however, the opposite relation holds with much greater force. The justifiability of criminal punishment, and criminal law in general, is closely connected to the *un*justifiability of our retaliating against those who wrong us. That people are inclined to retaliate against those who wrong them, often with good excuse but rarely with adequate justification, creates a rational pressure for social practices which tend to take the heat out of the situation and remove some of the temptation to retaliate, eliminating in the process some of the basis for excusing those who do so. In the modern world, the criminal law has become the most ubiquitous, sophisticated, and influential repository of such practices. Indeed, it seems to me, this displacement function of the criminal law always was and remains today one of the central pillars of its justification.

This is not to deny the justificatory importance of the criminal law's many other functions, several of which obviously do focus on the activities of offenders. As students of criminal law we have all been brought up on the idea that the various arguments for having such an institution are rivals, each of which takes the wind out of the others' sails. We must therefore decide whether we are retributivists, or rehabilitationists, or preventionists, or reintegrationists, or whatever else may be the penological flavour of the month. If we insist on an intellectual pick-and-mix, we are told, we can maybe get away with allocating different arguments strictly to different stages of the justification, e.g. deterrence to the purpose of criminal law in general and retribution to the justification of its punitive responses in individual cases.³ Still, we must make sure the rival

³ The classic version of such a structured hybrid justification is H.L.A. Hart, 'Prolegomenon to the Principles of Punishment' reprinted in his *Punishment and Responsibility* (1968). A different variation is to be found in A. von Hirsch, *Censure and Sanctions* (1993).

arguments are kept strictly in their separate logical spaces, or else, according to received wisdom, they tend to use up their force in clashes with each other.⁴ To my way of thinking, however, this supposed rivalry among justifications for criminal law and its punitive responses is illusory. The criminal law (even when its responses are non-punitive) habitually wreaks such havoc in people's lives, and its punitive side is such an extraordinary abomination, that it patently needs all the justificatory help it can get. If we believe it should remain a fixture in our legal and political system, we cannot afford to dispense with or disdain any of the various things, however modest and localised, which can be said in its favour.⁵ Each must be called upon to make whatever justificatory contribution it is capable of making. If and to the extent that the criminal law deters wrongdoing, that is one thing to be said in its favour. If and to the extent that it leads wrongdoers to confront and repent their wrongs, then that counts in its favour too. Likewise the power of the criminal law, such as it is, to bring people with mental health problems into contact with those who can treat their conditions, to settle and

⁴ For more or less frank expressions of this anxiety, see N. Lacey, *State Punishment: Political Principles and Community Values* (1988), 46ff, esp. at 52; P.H. Robinson, 'Hybrid Principles for the Distribution of Criminal Sanctions', *Northwestern University Law Review* 82 (1987), 19, esp. at 31–4; N.D. Walker, *Why Punish?* (1991), 135–6; R.A. Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment', *Crime and Justice* 20 (1996), 1 at 8. More theoretically puritanical critics go further, and argue that mixing different arguments for the justification of punishment is doomed irrespective of attempts to keep them in separate logical spaces: e.g. J. Morison, 'Hart's Excuses: Problems with a Compromise Theory of Punishment' in P. Leith and P. Ingram (eds.), *The Jurisprudence of Orthodoxy* (1988); A. Norrie, *Law, Ideology and Punishment* (1991), 125–35.

⁵ Contrast the position recommended by A.G.N. Flew in 'The Justification of Punishment' in H.B. Acton (ed.), *The Philosophy of Punishment* (1969), where the justification of punishment is held to be 'overdetermined' by the many reasons which count in favour of punishment.

maintain the internal standards of success for social practices such as marriage and share-dealing, and to stand up for those who cannot stand up for themselves. Even apparently trivial factors such as the role of the criminal law in validating and invalidating people's household insurance claims must be given their due weight. All of these considerations, and many others besides, add up to give the institution whatever justification it may have, and to the extent that any of them lapse or fail, the case for abolition of the criminal law comes a step closer to victory.

It is true, of course, that sometimes the considerations conflict, i.e. in some cases some of the considerations which support the criminal law's existence point to its reacting in one way while others point to its reacting in a dramatically different way, or not reacting at all. Sometimes it is even the case that considerations which partly support the criminal law's existence turn against it, and partly support its eradication. The only general thing that can be said of such conflict cases is that they reinforce still further the need for the criminal law to muster whatever considerations it can in its own defence, since by their nature these cases pit additional arguments against whatever course the law adopts for itself. So the existence of such cases strengthens, rather than weakens, my main point. It is also true that different arguments contribute to justifying different aspects or parts of the criminal law to greater or lesser extents. Considerations of deterrence do not support the criminalisation of activities which cannot effectively be deterred by criminalisation, and considerations of rehabilitation do not support the criminal conviction of people who cannot effectively be rehabilitated. In similar vein, the criminal law's function of displacing retaliation by or on behalf of victims does not support the criminalisation of victimless wrongs, or of wrongs whose victims do not offer or inspire retaliatory responses. Criminalising these wrongs will fall to be justified on an accumulation of other grounds, or else not at all. That still leaves the displacement function, however, as a central pillar of the criminal law's

justification. By describing it as a central pillar I mean only that some core parts of the edifice of the modern criminal law cannot properly remain standing, in spite of the existence of other valid supporting arguments, in the absence of the law's continuing ability to preempt reprisals against wrongdoers. In this chapter, accordingly, I want to sketch some of the major and (I believe) escalating difficulties of principle and practice faced by the modern criminal law in attempting to fulfil this displacement function and keep the heart of its edifice intact.

2. Humanity and justice

To continue fulfilling its displacement function satisfactorily has always been a grave challenge for the criminal law, because by the nature of the endeavour there is very little margin for error. On the one hand, the criminal law's medicine must be strong enough to control the toxins of bitterness and resentment which course through the veins of those who are wronged, or else the urge to retaliate in kind will persist unchecked. On pain of losing a central pillar of its justification, therefore, the criminal law cannot afford to downplay too much its punitive ingredient, the suffering or deprivation which it can deliberately inflict on the offender in response to the wrong. In the end, particularly in the absence of genuine contrition from the offender, that deliberate infliction of suffering or deprivation may be all the law can deliver to bring the victim towards what the psychotherapists now call 'closure', the time when she can put the wrong behind her, finally laying to rest her retaliatory urge. On the other hand, the law's medicine against that same retaliatory urge cannot be allowed to become worse than the affliction it exists to control. It must stop short of institutionalising the various forms of hastiness, cruelty, intemperance, impatience, vindictiveness, self-righteousness, fanaticism, fickleness, intolerance, prejudice and gullibility that the unchecked desire to retaliate tends to bring with it. On pain of sacrificing a central pillar of its justification,

therefore, the criminal law cannot simply act as the proxy retaliator any more than it can simply dilute its punitive side to the point where it is incapable of pacifying would-be retaliators.

As if this perennial predicament were not difficult enough for the criminal law, two further rational constraints upon the modern state have only served to compound the problem as we face it today. The first is the modern state's powerful duty of humanity towards each of its subjects. To avoid surrendering the whole basis of its authority – as the servant of its people – the modern state in all of its manifestations is bound to treat each of those over whom it exercises that authority as a thinking, feeling human being rather than, for instance, an entry on a computer, a commodity to be traded, a beast to be tamed, a social problem, an evil spirit, a pariah, or an untouchable. The anonymous bureaucratic machinery of the modern state which came into existence to honour this duty is also, notoriously, the main contemporary cause of its violation. It is a depressingly short step from stopping thinking of someone as a serf to starting thinking of them as a statistic. But even if the pitfalls of bureaucratisation are avoided, the practice of punishing criminal offenders inevitably calls the state's humane record into question, because of the element of deliberately inflicted suffering or deprivation which punishment by definition imports. Such an infliction of suffering or deprivation by the state cannot be justified solely on the ground that worse suffering or deprivation will be avoided as a result, even if the suffering which will be avoided as a result is suffering that would otherwise be deliberately inflicted on that very same person by other people's reprisals against her. The state's duty of humanity to each person has an agent-relative aspect, i.e. it emphasises the state's own inhumanity towards a person and not just the sum total of inhumanity towards her

which occurs within the state's jurisdiction or under its gaze.⁶ This means that, other things being equal, the state's proper response to the fact that a wrongdoer is faced with the threat of retaliation is to protect the wrongdoer rather than to punish her, even if, thanks to the ruthlessness and cunning of the would-be retaliators, punishing her promises to be more effective in reducing her overall suffering.⁷

For punishment to be a morally acceptable alternative to protection, the state has to assure itself not only that the measure of punishment controls retaliation while stopping short of becoming a mere institutionalisation of the retaliator's excesses, but also that the act of punishment affirms, rather than denies, the punished person's status as a thinking, feeling human being. That is not impossible. Many familiar features of modern criminal law, including some important substantive doctrines of the general part as well as many procedural, evidential and sentencing standards, reflect the state's successive efforts to meet this condition. Together these features are supposed to ensure that trial and punishment for a criminal offence affirms the moral agency and moral responsibility of the offender, and in the process (since moral agency and moral responsibility represent a significant part of what it is to be a human being) affirms the

⁶ I cannot offer a proper defence of this claim here. For those who are interested, the basis of such a defence lies in the fact that the moral duties under discussion in this section occupy the lower level of a two-level approach to moral reasoning. They summarise and organise certain ultimate moral considerations, but are not ultimate moral considerations themselves.

⁷ That might include e.g. providing a safe house, or taking criminal libel proceedings against those who make public accusations in a way which will incite reprisal. The demand for protection applies *a fortiori* to those who did wrong but who were acquitted at law, where reprisals not only threaten the wrongdoer but also challenge the law's own authority to deal with the wrong.

offender's humanity.⁸ For the reasons just outlined, I regard the constancy of this affirmation as a *sine qua non* of the criminal law's legitimacy. In saying this I am not retreating from my earlier claim that the function of displacing reprisals against wrongdoers is a central pillar of the criminal law's justification. I am only adding the complication that, for better or worse, this function cannot always be legitimately performed by the criminal law.

That point is reinforced when we move from the state's duty of humanity to its parallel, and no less important, duty of justice. Questions of justice, unlike questions of humanity, are questions about how people are to be treated *relative to one another*. Some contemporary political philosophers imagine that all questions dealt with by the institutions of the modern state should be dealt with, first and foremost, as questions of justice. 'Justice' as John Rawls put it, 'is the first virtue of social institutions'.⁹ The basic thought behind this view is the sound liberal one that under modern conditions the state should keep its distance from its people, leaving them free to make their own mistakes. Casting all questions for the state in terms of justice is one possible way to ensure this distance because, as the old adage goes, justice is blind. To do its relativising work, justice must isolate criteria (although not necessarily the same criteria in every context) for differentiating among those who come before it. And to give these criteria of differentiation some rational purchase, they must be implemented against a background of assumed, but often

⁸ I have discussed some aspects of the substantive criminal law which contribute to this aim in 'On the General Part of the Criminal Law', in R.A. Duff (ed.), *Philosophy and the Criminal Law* (1997).

⁹ J. Rawls, *A Theory of Justice* (1971), 3. Rawls' slogan can bear various interpretations apart from the rather literal one I have adopted in the text. On one very different interpretation, Rawls was only saying that justice is the *last resort* of social institutions, i.e. when all else fails social institutions should at the very least be just. See J. Waldron, 'When Justice Replaces Affection', *Harvard Journal of Law and Public Policy* 11 (1988), 625.

entirely fictitious, uniformity. The just person, if you like, refuses to take sides in order to take sides; she artificially blinds herself to some qualities of people and aspects of their lives in order to be able to make something of the other differences between them. Rawls memorably conveyed the idea when he spoke of ‘the veil of ignorance’ behind which just policies are conceived.¹⁰ Now, as many of Rawls’ critics have demonstrated, it is very doubtful whether cultivating this kind of artificial blindness to some of our qualities and some aspects of our lives is the proper way for the modern state as a whole to keep its distance from us. It leads to the wrong kind of distance, a remote and sometimes callous disinterest in people’s well-being, which the state cannot legitimately, or even (some say) intelligibly, maintain across the board.¹¹ On the other hand, there is very good reason to think that at least one set of institutions belonging to the modern state, viz. the courts of law, should normally keep their distance from us in precisely this way. Courts are law-applying institutions, and it is in the nature of modern law, with its rule-of-law aspiration to apply more or less uniformly to all of those who are subject to it, that questions of how people are to be treated relative to one another always come to the fore at the point of its application. If we pursue this line of thinking, which of course calls for much more detailed elaboration, justice does turn out to be the first virtue of the courts even though not of other official bodies. The courts’ primary business becomes, as the law itself puts it, ‘the administration of justice’.

In the criminal law context, where (if the rule of law is being followed) the substantive law is relatively clear and certain, the most obvious everyday impact of the court’s role as administrator

¹⁰ *A Theory of Justice*, 136ff.

¹¹ Both the conceptual and the moral objections are represented in M. Sandel, *Liberalism and the Limits of Justice* (1982), 24–28 and 135–147. Likewise, with a strikingly different twist, in J. Raz, *The Morality of Freedom* (1986), 110–133 and 369ff.

of justice is in the procedural and evidential conduct of the trial – in determining, for example, the probative relevance and prejudicial effect of certain background information about offenders and witnesses, or the acceptability of certain modes of examination-in-chief and cross-examination. In these matters the court's first priority is to specify the density of its own veil of ignorance, the scope of its own blindness, the limits of forensic cognisance.¹² And it must do the very same thing once again at the sentencing stage of the trial where the law, rightly attempting to adjust for the inevitable rigidity and coarseness of its own relatively clear offence-definitions, typically leaves the court's options more open. Of course, in approaching these sentencing options, the court cannot ignore the state's duty of humanity, in the fulfilment of which the state's law-applying institutions must also do their bit. This is a duty which also has implications for sentencing. In the name of humanity, there must always be space for something like a plea in mitigation to bring out the offender's fuller range of qualities, the wider story of his life, some of which was necessarily hidden behind the 'veil of ignorance' during the earlier parts of the trial. But we may well ask: what is it, exactly, that falls to be mitigated when a plea in mitigation is presented to the court? If I am right so far, what falls to be mitigated is none other than the sentence which is, in the court's opinion, required by justice. Identifying a just sentence is thus the proper starting-point. A court which begins from some other starting-point,

¹² Isn't there a basic problem with letting an institution decide what it shall take notice of? Doesn't it have to know what it should not know in order to know whether it should know it? True enough. That is why, in trial by indictment, the *voir dire* exists to separate the function of determining what will be hidden by the veil of ignorance from the function of deliberating about guilt and innocence behind the veil of ignorance. This double-insulation against unwitting prejudice provides a major part of the case for retaining a right to jury trial whenever serious criminal charges are laid. On the question of a criminal charge's seriousness, see sections III and IV below.

some other prima facie position, is a court which fails to observe its primary, and indeed one may be tempted to say definitive, duty.

Again, nothing in this proposal detracts from my original claim that the control of reprisal is a central pillar of the criminal law's justification. The proposal merely introduces a further troublesome complication. The complication is that, while the control of reprisal forms a key part of the argument for having criminal law and its punitive responses in the first place, those who must implement the criminal law and its punitive responses cannot legitimately make the control of reprisal part of *their* argument for doing so.¹³ Displacement of retaliation is a reason for punishment which cannot be one of the judge's reasons for punishing. Judges cannot begin their reasoning at the sentencing stage by asking: What sentence would mollify the victim and his sympathisers? Instead they should always begin by asking: What sentence would be just? I should stress that I am not assuming at the outset that these two questions are unconnected. At this stage I mean to leave open the possibility that, for example, victims and their supporters might want nothing more than the very justice which it is the court's role to dispense, so that doing justice will reliably serve that ulterior purpose. My only point is that the courts should not share in this ulterior purpose themselves; they should insist on thinking in terms of justice irrespective of whether doing so serves the further purpose of pacifying retaliators. For the criminal court, justice is an end, and that remains true even if, for the criminal justice system as a whole, justice is at best a means. In this respect the criminal court

¹³ This helps us to see why as theorists we should not fear the multiplicity of considerations which add up to justify the practice of criminal punishment. As administrators of justice judges are heavily restricted in their access to many of these considerations, and thus do not have to face all the conflicts among them in their raw form. I have discussed this in greater depth in 'The Purity and Priority of Private Law', *University of Toronto Law Journal* 46 (1996), 459.

in a modern state is a classic bureaucratic institution. It has certain *functions* which cannot figure in its *mission*, and which therefore cannot directly animate its actions.

It is not surprising that this distinctively bureaucratic aspect of courts, and especially criminal courts, has been a cause for much complaint, particularly among victims of crime and their sympathisers, who accuse the courts of leaving them out in the cold, being out of touch with their concerns, stealing their cases away from them, etc. I already mentioned the challenge of maintaining a humane bureaucracy, and maintaining humanity towards victims is an aspect of that challenge to which I will return at the very end of this chapter. But in the context of the criminal law, the pre-eminence of the court's duty of justice creates a prior difficulty, which this discussion was designed to highlight, and aspects of which will occupy our attention over the next few pages. As I explained before, in fulfilling its displacement function the criminal law must always walk a fine line between failing to pacify would-be retaliators and simply institutionalising their excesses. What we have just added is that under modern conditions an extended section of this fine line, the section which passes through the domain of the courts, must be walked wearing justice's blindfold. What hope can we have for the criminal law's fulfilment of its displacement function under these conditions?

3. The proportionality principle

In exploring this question, I want to focus attention on one particular principle of justice which is of profound moral importance for the criminal courts in their sentencing decisions, namely the principle that the punishment, if any, should be in proportion to the crime. I choose this principle not only because of its moral importance (to the explanation of which I will return presently) but also because so many people apparently read it as a principle which focuses on how the offender is to be treated

relative to her victim or victims, and thus see it as a straightforward way of having the retaliatory impulses of victims systematically reflected in the administration of justice. To my mind, this victim-oriented reading is a serious misreading of the proportionality principle. The state's duty of justice, like the state's duty of humanity, has an important agent-relative aspect. The relativities with which the modern courts must principally contend under the rubric of justice are relativities between the state's treatment of different people, not relativities between how the state treats someone and how that someone treated someone else.¹⁴ Therefore the question of proportionality in sentencing which concerns a modern criminal court is primarily the question of whether this offender's sentence stands to his crime as other offenders' sentences stood to their crimes. This means that the proportionality principle does not in itself specify or even calibrate the scale of punishments which the state may implement, but simply indicates how different people's punishments (or to be exact their prima facie punishments before any mitigating factors are brought to bear) should stand *vis-à-vis* one another on that scale.¹⁵

It does not automatically follow from this, however, that the victim's predicament or perspective cannot properly be introduced into the court's deliberations under the heading of proportionality. According to the proportionality principle, the

¹⁴ See note 6 above.

¹⁵ Thus I am going to be writing about what von Hirsch calls 'ordinal proportionality' rather than 'cardinal proportionality': von Hirsch, *Censure and Sanctions*, 18–9. As it happens I also believe in a principle of cardinal proportionality, but it has a very different foundation and applies to the legislative business of setting sentencing maxima rather than to the sentencing stage of criminal trials. It is also worth mentioning that both cardinal and ordinal principles of proportionality need to be applied with the state's duty of humanity in mind, since this forbids cruel or brutalising punishments even when these would be proportionate. None of this affects the substance of my argument.

sentence in a criminal case should be proportionate to *the crime*. If the court can point to features of the crime committed in the case at hand which make it more or less grave than other comparable crimes that have been dealt with by the courts, then the proportionality principle plainly points to a corresponding adjustment of the prima facie sentence. It means that everything turns on the applicable conception of ‘the crime’ and the specification of its axes of gravity. Now it may be thought that the law itself sets these parameters, so that the matter is simply a technical legal one. Crime, some will say, is a purely legal category, and a crime is none other than an action or activity which meets the conditions set by law for criminal conviction.¹⁶ Thus ‘the crime’ referred to in the principle of proportionality can be none other than the crime as legally defined. It would follow that whether the victim’s predicament or perspective is relevant under the heading of proportionality would depend only on whether the legal definition of the crime made specific mention of it. A crime defined in terms of the suffering or loss inflicted upon its victim would leave space for, even perhaps require, the degree of that suffering or loss to be brought to bear on the sentence under the proportionality principle, thus giving some aspects of the victim’s predicament or perspective a role in the court’s deliberations under the heading of justice. But a crime without such a definitional feature would naturally leave no such space and offer no such role to victim-centred considerations.

In fact, the problem is much more complicated than this. It is true that crimes are, in one (‘institutional’) sense, just activities which meet the conditions for criminal conviction. But criminal conviction is an all-or-nothing business. Questions of gravity can certainly be a relevant factor, on occasions, in determining which of a number of related crimes the accused should be convicted of, e.g. whether he is a murderer or a manslaughterer, a robber or a

¹⁶ G. Williams, ‘The Definition of Crime’, [1955] *Current Legal Problems* 107.

thief, etc. But for any *single* criminal offence considered by the jury or magistrate the ultimate answer can only be guilty or not guilty; gravity is neither here nor there.¹⁷ What is more, where the rule of law is properly observed, criminal offences are defined so as to facilitate exactly this kind of all-or-nothing decision-making. Rape, in England, is sexual intercourse without consent undertaken in the knowledge of, or reckless as to, the lack of consent. Grey areas and borderline cases of consent, sexual intercourse, knowledge and recklessness have all been, so far as possible, defined out.¹⁸ There is nothing in the definition of rape, apart perhaps from the difference between the knowing rapist and the reckless one,¹⁹ that could conceivably afford a sentencing judge any significant axis of gravity. So does the proportionality principle, by itself, prescribe the same sentence for all knowing rapists, irrespective of their brutality, treachery, bigotry, cowardliness, arrogance and malice? This challenge cannot be avoided by observing that most crimes do harbour some residual questions of degree in their definitions – that grievous bodily harm is more grievous in some cases than in others, that some acts of dishonesty are more dishonest than others, etc. That is not the point. The point is that, where the rule of law is observed,

¹⁷ It is true that the Scots allow for 'not proven' as a *tertium quid*, but of course it still has nought to do with the gravity of the crime. The U.S. solution of 'first degree' and 'second degree' crimes may look at first like another counterexample, but all it does in reality is multiply the number of separate crimes to which the all-or-nothing guilty/not guilty decision must be applied.

¹⁸ *Olugboja* (1981) 73 Cr App Rep 344 and *Linekar* [1995] 2 Cr App Rep 49 illustrate the law's attempts to turn certain grey areas between consent and non-consent into brighter lines. *Kaitamaki* [1985] AC 147 does the same with respect to 'sexual intercourse'. The *mens rea* elements were hotly debated in the early 1980s, but the debate was simply between two different ways of artificially stripping grey areas from the concept of recklessness, the broader contrived definition in *Pigg* [1982] 2 All ER 591 giving way to the narrower one in *Satnam S* (1983) 78 Crim App Rep 149.

¹⁹ Cf. *Bashir* (1982) 77 Cr App Rep 327.

individual criminal offences are not defined in law so as to retain a topography of gravity for the sentencing stage, but rather so as to flatten that topography, so far as possible, for the all-or-nothing purposes of conviction and acquittal. There is no reason to think that a definition crafted primarily for one purpose, viz. that of flattening the rational variation between different cases of the same wrong, should be regarded as authoritatively determining the scope of the court's veil of ignorance when its job turns, at the sentencing stage, from eliminating such rational variation to highlighting it. There is no reason to assume that the court will find all, or any, of the relevant variables still inscribed on the face of the crime's definition.

It follows that, for the purpose of the principle that the sentence should be in proportion to the crime, we need to go beyond a purely institutional conception of the crime. I do not mean to write off all institutional circumscriptions. It seems to me to be a sound rule of thumb, for example, that evidence which was inadmissible in the trial on grounds of its irrelevance to the charge before the court should not be taken into account when the gravity of the crime is being assessed for the purposes of proportionate sentencing. That an act of dangerous driving caused death should be treated as irrelevant to the gravity of the crime if the crime charged is dangerous driving rather than causing death by dangerous driving. No doubt this is bound to frustrate victims of crime and their sympathisers who may have little patience with the due process principle that people should only be tried for the crimes with which they are charged and sentenced for the crimes which were proved against them at trial – recall that the predictability of such impatience was among the factors which justified the state in monopolising retaliatory force to begin with. But be that as it may, the due process principle *itself* requires that we go beyond a merely institutional conception of the crime. To implement the principle of due process, just as to implement the principle of proportionality in sentencing, we need some grasp not only of the crime's legal

definition but equally of what counts as the *substance* or the *gist* or the *point* of the crime as legally defined – and that is an unavoidably evaluative, non-positivistic issue.²⁰

Here, for example, are a couple of classic due process questions. Apart from the charge spelt out in the indictment or summons, were there other lesser offences with which the accused was also implicitly being charged, which did not need to be spelt out? And when does the defendant's previous wrongdoing pass the 'similar fact' test, so that evidence of it is relevant for the purposes of proving the offence charged on the present indictment? Lawyers have often struggled to answer these questions in institutional terms, by pointing to features of crimes which figure in the positive legal definitions.²¹ But that, as we should all have realised by now, was always a false hope. One cannot apply or even adequately understand these questions without developing what we may like to call the moral map of the crime, highlighting evaluative significances which may be missing from the law's pared down definition. Thus even if, as I suggested, the principle of proportionality in sentencing does usefully borrow some institutional circumscriptions from the due process principle, that ultimately just reiterates rather than eliminating the fundamentally evaluative, non-positivistic question of what counts as 'the crime' for the purposes of assessing the proportionate prima facie sentence. One still needs a moral map of the crime, and the question remains, after all this,

²⁰ This is not a criticism of legal positivism. Legal positivists hold that validity of a law turns on its sources rather than its merits. That does not prevent them from holding that legal reasoning reflects on the merits as well as the sources of laws, since there is no reason to suppose that legal reasoning is only reasoning about legal validity. See J. Raz, 'On the Autonomy of Legal Reasoning', *Ratio Juris* 6 (1993), 1.

²¹ See *Novac* (1977) 65 Cr App Rep 107 and *Barrington* [1981] 1 All ER 1132 to see how the issue arises in relation to the similar fact doctrine; concerning counts in an indictment, the issue is well-illustrated in the leading case of *Wilson* [1984] 1 AC 242.

of whether the predicament or perspective of the victim can figure anywhere on that map.

4. *Perspectives on crime*

One significant strand of the literature on criminal law and criminal justice proceeds from the thought that many, if not all, crimes are covered by one and the same moral map. This is the map of the offender's *blameworthiness* or *culpability*. Following this map leads to a specific interpretation of the principle of proportionality, according to which making the sentence proportionate to the crime means making the sentence proportionate to the offender's blameworthiness or culpability in committing the crime.²² Let's call this the 'blameworthiness interpretation' of the proportionality principle. In the minds of many adherents as well as many critics, the proportionality principle in its blameworthiness interpretation systematically excludes victim-centred considerations from the proper scope of the court's *prima facie* sentencing deliberations. The pivotal thought behind this is that a person's blameworthiness in acting as she did is a function of how things seemed to her at the time of her action.²³ It may of course be a more or less complex

²² A random selection: H. Gross, 'Culpability and Desert', in R.A. Duff and N. Simmonds (ed.), *Philosophy and the Criminal Law* (ARSP Beiheft 19, 1984), 59; C.L. Ten, *Crime, Guilt, and Punishment* (1987), 155ff; A. Ashworth, 'Taking the Consequences' in S. Shute, J. Gardner and J. Horder (eds.), *Action and Value in Criminal Law* (1994), 107 at 116–20. Von Hirsch also makes culpability the only axis of crime-seriousness when he introduces the proportionality principle on page 15 of *Censure and Sanctions*. But contrast the more complex 'harm-plus-culpability' standard used for proportionality on page 29 of the same volume, and elsewhere in von Hirsch's work, e.g. in his *Past or Future Crimes* (1985), 64ff. See further note 30 below.

²³ Among diverse writers who allocate blameworthiness on these terms we find D. Parfit, *Reasons and Persons* (1986), 24–5; S. Sverdlik, 'Crime and Moral

function. On some accounts of the function, blameworthiness increases or decreases according to how much of the evil of her action the agent appreciated. For others, it is a question of how much the agent should have appreciated, given the various other things she knew at the time. Either way, the crucial manoeuvre so far as blameworthiness is concerned is supposedly to look at the situation *ex ante*, from the perspective of the perpetrator. But that perspective, it is often claimed or assumed, is fundamentally at odds with the perspective of the victim, who looks at the wrong *ex post* and is interested not so much in how things may have seemed to the perpetrator, but rather in how things actually occurred or turned out.²⁴ On this view the victim and those who sympathise with him are aggrieved first and foremost because of what he suffered or lost at the perpetrator's hands, whether or not the perpetrator appreciated or could have appreciated the full extent of this loss or suffering at the time of acting. If that is so, then the conception of the crime which lies at the heart of the proportionality principle on its blameworthiness interpretation is

Luck', *American Philosophical Quarterly* 25 (1988), 79; R. Swinburne, *Responsibility and Atonement* (1989), 34–5. D. Husak and A. von Hirsch, 'Culpability and Mistake of Law' in *Action and Value in Criminal Law*; Ashworth, 'Belief, Intent and Criminal Liability' in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence: Third Series* (1987), 1 at 7.

²⁴ Talk of the 'victim perspective' and the 'perpetrator perspective' on wrongdoing will be familiar to those conversant with the literature on anti-discrimination law. See A.D. Freeman, 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine', *Minnesota Law Review* 62 (1978), 1049. The version of the distinction relied upon here is slightly less ambitious than Freeman's, although the two are closely related. The distinction I am speaking of figures prominently in Sverdlik, 'Crime and Moral Luck' and in A. Ashworth, 'Punishment and Compensation: Victims, Offenders and the State', *Oxford Journal of Legal Studies* 6 (1986), 86 at e.g. 96. Cf. also J. Coleman, 'Crimes, Kickers and Transaction Structures' in J.R. Pennock and J.W. Chapman (eds), *Nomos XXVII: Criminal Justice* (1985), 313 on the contrasting 'economic' and 'moral' perspectives of tort law and criminal law.

not the victim's conception. In fact it is diametrically opposed to the victim's conception. If anything, the proportionality principle in this interpretation seems to oblige courts systematically to *compound* the frustration of victims and their sympathisers, and hence to *aggravate* their retaliatory instinct, by insisting on seeing things the offender's way and hence (through the already aggrieved eyes of victims and their sympathisers) doggedly taking the offender's side in the whole conflict. Thus, on this view of the matter, fidelity to the proportionality principle scarcely militates in favour of the sentencing process making a systematic positive contribution to the fulfilment of the criminal law's displacement function.

There is, however, a great deal of confusion in this line of thinking. I can only scratch the surface of a few of the problems here. The problems start with a failure to spell out what blameworthiness or culpability *is*, which leads to an oversimplification of the principles on which it is incurred. Blameworthiness has a four-part formula. To be blameworthy, one must (a) have done something wrong and (b) have been responsible for doing it, while lacking (c) justification and (d) excuse for having done it. Each of elements (a), (b), (c) and (d) can undoubtedly be sensitive, to some extent and in some respects and on some occasions, to how things seemed to the blameworthy person at the time of her action. Elements (c) and (d) in fact incorporate an across-the-board partial sensitivity to the *ex ante* perspective of the perpetrator. Take element (c) first. An action is *justifiable* if the reasons in favour of it are not defeated by the reasons against; but it is *justified* only if the agent acts for one or more of those undefeated reasons.²⁵ It follows that a purported justification based on considerations unknown to and unsuspected by the agent at the time of the action is no

²⁵ I have defended this account of justification in 'Justifications and Reasons' in A.P. Simester and A.T.H. Smith (eds), *Harm and Culpability* (1996), 103 (chapter 5 above).

justification at all. Thus justification always does depend, in part, on how things seemed to the agent at the time of the action. Conversely, justification also depends, in part, on how things actually were. No matter how things seemed to the agent, if the reason for which she acted was not in fact an undefeated one then she can have no justification. If she fails the test of justification on this score, the agent must retreat to element (d), the excuse element, to resist the allegation of blameworthiness. Here we find an additional sensitivity to the *ex ante* perspective of the perpetrator: here the agent can rely on what she mistakenly *took* to be undefeated reasons for her action, provided only that she was justified in her mistake. But again this last proviso shows that even excuses are not entirely insensitive to how things actually were; for whether the agent was excused by her mistakes depends on whether her mistakes were justified, and that in turn depends, like any justification, on whether there really were undefeated reasons for her to see the world as she did.²⁶ So in both elements (c) and (d) we have questions which focus on how things seemed to the agent *as well as* questions which focus on how things really were. Justification and excuse have some across-the-board agent-perspectival dimensions, but are neither of them a pure function of how things seemed to the agent at the time of the action.

Things get more complicated still when we add elements (a) and (b) to the stew. It is tempting to think that wrong action is the mirror image of right or justified action, so that, adapting from the account of right or justified action just outlined, whether one's action is wrong depends on whether the reasons in favour of performing it were defeated by the reasons against and whether one acted for one of the latter reasons. Thus obviously no action could be wrong if the agent had no inkling of anything that made it wrong. But right and wrong are in fact

²⁶ Ibid, at 118–22.

dramatically asymmetrical. There are many more ways of doing the wrong thing than there are of doing the right thing. In particular, there is no general sensitivity of wrongdoing to the reasons for which one acted. It is perfectly true that some wrongs, e.g. deceit and betrayal, cannot be committed without certain knowledge or belief on the part of the person who commits them, and others, such as torture and extortion, require a certain intention. But this is not true of all wrongs. One may do wrong by breaking a promise or neglecting one's children quite irrespective of what one knew or had reason to know, and *a fortiori* quite irrespective of why one did it. The same holds true, I believe, of killing people or wounding them, damaging their property, poisoning them, and countless other wrongs which are of enduring importance for the criminal law. It is wrong to kill people or wound them, and one may kill someone or wound them by playing with intriguing buttons or switches which were none of one's proper concern, quite irrespective of whether one knew or had grounds to know the true awfulness of what one was doing. If one's *ex ante* perspective is to be relevant to one's blameworthiness in respect of such killings or woundings, on this view, it must be relevant by virtue of some other element of blameworthiness, such as the justification or excuse element. To be sure, it may also be relevant to one's responsibility, element (b) of the blameworthiness equation. But again its relevance here can only be occasional and limited. To deny that one was a responsible agent one must not only deny that one knew what one was doing, but also point to some underlying explanation such as psychotic delusion, infancy, or (on some views of the phenomenon) hypnosis which puts one temporarily or permanently out of reach of reason so that normal rational standards of justification and excuse do not apply to one. This is a very limited (and decidedly bottom-of-the-barrel) opening for one's ignorance to affect one's blameworthiness. So again there is nothing here to make blameworthiness, in general, into a function of how things seemed to the agent at the time of

his or her action. In fact, the influence of elements (a) and (b) in the blameworthiness equation fragments and complicates the conditions of blameworthiness even further, so that very few things can be said, in general, about the balance of agent-perspectival and non-agent-perspectival factors which will bear on the net blameworthiness of the agent.

Whatever one may think about the details of this elaboration of the conditions of blameworthiness, it draws attention to one crucial point which is far too easily overlooked. The crucial point is that there is no such thing as blameworthiness at large, or blameworthiness *tout court*. Our blameworthiness is necessarily our blameworthiness in respect of some specific action or activity we engaged in, such as killing, wounding, deceiving, betraying, torturing, or breaking a promise.²⁷ And whether and to what extent our blameworthiness is a function of how things seemed to us at the time of our action depends in very large measure on

²⁷ While we are blameworthy only in respect of actions, we are *to blame* in respect of consequences. To be to blame for a given consequence, we must be *responsible for* that consequence. Doesn't this complicate element (b) of my blameworthiness equation, which spoke only of responsibility for *actions* and therefore (you may say) swept under the carpet the further agent-perspectival conditions of responsibility for consequences? The answer is no. Whether we are responsible for consequences is already taken into account in element (a) of the blameworthiness equation. In the relevant sense, we are responsible for those consequences which contribute constitutively to the wrongness of our doing as we do. We are *to blame* for those consequences, accordingly, when that condition is met and elements (b), (c) and (d) of blameworthiness are also present. There is thus no further question, on top of those already anticipated in my blameworthiness equation, of whether our responsibility or blame extends to a particular unforeseen or unforeseeable consequence of our actions. Much effort in moral and legal philosophy has been wasted thanks to the mistaken assumption that one has two bites at the cherry: first one can deny that one was blameworthy in respect of the action and then one can deny, separately, that the blameworthiness extended to a given consequence of the action. In fact the correct answer to the first question necessarily settles the second.

which action or activity we are supposed to be blameworthy in respect of, since different agent-perspectival conditions for blameworthiness evidently come into play for different actions and activities. Now there are those who try to make the determination of which action or activity we engaged in *itself* a function of the way things seemed to us at the time when we acted. Their response to my example of the person who kills unwittingly by playing with intriguing buttons and switches is to deny that it involves a killing, not just because killing in particular is held to be, like deceit, an action with some definitive knowledge requirement, but rather because the scope of agency is always, so to speak, in the eyes of the agent. Fundamentally, we do only whatever we take ourselves to be doing.²⁸ Personally, I find this a deeply counterintuitive account of human agency.²⁹ But more importantly for present purposes, if this account of human agency is accepted, it makes a mockery of the process of determining blameworthiness which I outlined in the previous paragraph. We cannot ask, as I asked in the last paragraph, whether the killer was a responsible agent when he killed, or whether he had any justifications or excuses for doing it. For on this account of human agency *there was no killing*. The most the agent did was press buttons, or fiddle with things that didn't concern him. Having no possible inkling of the death-dealing aspect of what he was doing, he didn't kill anyone. All the hard work which the piecemeal doses of subjectivity in the separate elements of blameworthiness were supposed to do is thus preempted by a massive and all-consuming injection of

²⁸ Cf. Elizabeth Anscombe's misleading remark in *Intention* (2nd ed., 1963), 53: 'What happens must be given by observation; but ... my knowledge of what I do is not by observation.' Ashworth's 'Taking the Consequences' is an example of a work which rigorously implements the highly subjectivised account of agency which this remark may be taken to support.

²⁹ I also believe it is incoherent: see 'On the General Part of the Criminal Law', above note 8.

subjectivity in the doctrine of human agency to which it is applied. We are not deprived of our (admittedly controversial and seriously under-specified) answer to the question of whether the button-presser was a blameworthy killer. *We are summarily deprived of the question itself.*

If we rescue the question, as I am sure we should, by jettisoning the extremely restrictive account of human agency which put it out of bounds, we can instantly see that the juxtaposition with which this section began was grievously exaggerated. There is no automatic and comprehensive opposition between assessing the gravity of a crime in terms of the offender's blameworthiness and assessing the gravity of a crime according to the way it impacts upon its victim. That is because, to assess the offender's blameworthiness we must begin by asking 'blameworthiness in respect of which action?' and this requires us to interrogate our account of human agency. Since on any plausible account of human agency there can be actions which are, like killing and wounding, defined at least partly in terms of their actual impact upon other people independently of the way things seemed *ex ante* to the perpetrator, it follows that an inquiry into the perpetrator's blameworthiness cannot be made independent of this impact. In fact, if we were to examine more thoroughly the so-called 'victim perspective' with which we started, I think we would find that the link between the blameworthiness of an offender and what irks the victim or her sympathisers is even more intimate than this last remark suggests. I believe it is the action of killing or wounding, complete with (but not limited to) the death or wound it involves, that normally aggrieves victims and their sympathisers and sparks their retaliation. Thus the starting-point of the blameworthiness inquiry – the action which was wrongful – is also the normal trigger for retaliatory responses on behalf of the victim. Of course there may be differences of perception and emphasis. It is true, for example, that *excuses* tend to be looked upon less generously by victims and their supporters than their importance for

blameworthiness would indicate. Victims and their supporters may also have trouble with some justifications where their interests were not among the main reasons in favour of the justified action, and they may be more doubtful than the court might be, especially under the influence of psychiatric testimony, about a wrongdoer's supposed lack of responsibility. This means that the blameworthiness inquiry could certainly drive some wedges between the court's proportionality-driven thinking on matters of prima facie sentencing and the demands of victims and their supporters. But one only drives wedges between surfaces which are in their original tendency attached to one another. On my account that is exactly the situation with the offender's blameworthiness and the victim's grievance. It follows that there is no fundamental opposition of perspectives, no chasm of understanding, dividing the blameworthiness interpretation of the proportionality principle from the demands of those whose retaliation must be displaced if the criminal law is to fulfil its displacement function.

Here I am talking as if the blameworthiness interpretation of the proportionality principle came out basically unscathed from the process of correcting the analysis of blameworthiness which went into it. But of course it did not. What we have discovered in the process of explaining the concept and conditions of blameworthiness is that it makes no sense to prescribe, simply, that the sentence in a criminal trial should be in proportion to the offender's blameworthiness in committing the crime. For that prescription falls into the trap of presenting blameworthiness as an independent quantity, something that one can have more or less of *tout court*. Now that we have brought to mind the important point that blameworthiness is always blameworthiness in respect of some action, the blameworthiness interpretation in its original form should be replaced by a sharper ('modified blameworthiness') interpretation of the proportionality principle according to which the sentence should be in proportion to the offender's wrongful action, adjusted for his blameworthiness in

respect of it.³⁰ This reinterpretation, with the slightly more complex moral map of a crime it implies, makes several important advances over the simpler blameworthiness interpretation it replaces. Let me mention just two of them here.

First, the modified blameworthiness interpretation helps to bring out what *justifies* the proportionality principle, and lends it the moral importance in the courtroom that I so confidently spoke of earlier. Although a principle of justice, the proportionality principle also contributes directly and powerfully to the court's compliance with the state's duty of humanity, and it takes much of its moral force from that contribution. As already mentioned, the state's duty of humanity requires it to affirm the moral agency and moral responsibility of those whom it punishes. The proportionality principle in its modified blameworthiness interpretation puts both the offender's agency and her responsibility centre stage. To ask about the offender's blameworthiness is to emphasise her responsibility. That is not only because element (b) of the blameworthiness equation is the element of responsibility. It is also because questions of justification and excuse – elements (c) and (d) – are applicable only to responsible agents, so that applying standards of justification and excuse to people is an assertion of their responsibility. But on top of that the modified blameworthiness interpretation brings out the importance of questions about the

³⁰ Compare this with von Hirsch's more complex version of the proportionality principle, mentioned in note 22 above, which requires the crime to be in proportion to blameworthiness-plus-harm. Von Hirsch's principle comes close to mine in several ways, but still seems to leave blameworthiness as a free floating quantity. It may be said that it does not float free because it is now attached to a harm. But harms cannot be blameworthy. Only *doing* harm can be blameworthy. If von Hirsch's principle is that the sentence should be in proportion to the harmdoing adjusted for the harmdoer's blameworthiness in respect of it, then the only thing which divides us is that I refuse to reduce all wrongdoing to harmdoing. This has consequences: see note 32 below.

offender's agency which are not highlighted in the simple blameworthiness interpretation. It reminds us that treating someone as an agent is of importance quite apart from treating them as responsible. Even someone who is not responsible for their actions is an agent, and should still be treated as one. True, the duty of humanity as I expressed it goes further, and demands that offenders be treated as *moral* agents and as *morally* responsible. This arguably introduces further complications which point to a need for some further modification of the modified blameworthiness interpretation. Nevertheless the complications do not alter the main point, which is that by punishing people in proportion to their crimes, where those crimes are mapped according to the action which made them wrongful adjusted for the offender's blameworthiness in respect of them, the court contributes decisively to the affirmation of the offender's humanity which is a *sine qua non* of the legitimacy of any modern state punishment. But remember that this is a function of the modern state's special duty of humanity towards its people, which comes of its claim to authority and its associated role as servant of its people. Those of us who stake no similar claim to authority and have no similar role in other people's lives are not covered by the same strict humanitarian duty towards them.³¹ Thus the strictness of the court's attention to questions of moral agency and moral responsibility need not, rationally, be mirrored in all interpersonal transactions between wrongdoers and people they wronged, or supporters, or even onlookers. That is one important reason why the victim of a crime and his or her sympathisers may sometimes *quite properly* (i.e. independently of their various impatiences, hastinesses, prejudices, etc.) have less

³¹ Although, as I have assumed throughout this paper, we all have various more limited duties of humanity towards each other. Extra-judicial punishers such as teachers and parents are covered by the state's stricter duty to the extent that they echo the state's claim to authority and its basis.

time for the niceties of blameworthiness than the court is morally required to have.

Second, the modified blameworthiness interpretation has the advantage that it alerts us to the *limitations* of the proportionality principle as a principle of justice for scaling criminal sentences. The principle's usefulness depends first on the court's ability to discern what is supposed to be the wrongful action in the crime, and then the court's ability to compare this action with other actions, before it can even start to settle degrees of blameworthiness as between them. This may not always be possible. Some pairs of wrongful actions are incommensurable. It means that the proportionality scale will not always be perfectly transitive.³² The adjustments for differential blameworthiness required by the modified blameworthiness interpretation of the proportionality principle can only take effect within the transitive parts of the scale. It may be possible to compare a less blameworthy robbery with a more blameworthy theft. But it will not necessarily be possible, even in principle, to assess a more blameworthy theft alongside, say, a more blameworthy assault.

³² In their classic article 'Gauging Criminal Harm: A Living-Standard Analysis', *Oxford Journal of Legal Studies* 11 (1991), 1, A. von Hirsch and N. Jareborg argued that all harms with which the criminal law should be concerned are commensurable, allowing a transitive sentencing scale under the proportionality principle. I think they are wrong about the commensurability of harms, and about the commensurability of living-standards on which their argument was based. But even if they are right, it is a long way from the doctrine that all harms are commensurable to the doctrine that all *wrongs* are commensurable, since a wrong is an action, and even when it is an action defined in terms of the harm done, the harm done is only one constituent of the wrong. This means that Von Hirsch and Jareborg still have some way to go to show that the proportionality scale is transitive. And here I am granting the generous assumption that elements (b), (c) and (d) of the blameworthiness equation do not introduce yet further incommensurabilities. On the proliferation of incommensurability in an action-centred view of morality, see Raz, *The Morality of Freedom*, 321ff.

Here sentencing practice may have to move in relatively independent grooves, with guidelines that do not add up to a comprehensive code. The axes of gravity that operate at the sentencing stage will not necessarily, or even typically, allow the gravity of each crime to be plotted relative to that of every other crime. That, in my view, is no violation of the proportionality principle, nor on the other hand an indictment of it, but rather one of its welcome implications. The idea that all crimes are covered by a single moral map has, on closer inspection, very little to recommend it.³³

5. Filling the displacement gap

The foregoing does something to explain how the courts, as blindfolded administrators of justice, can in spite of their blindfolds systematically help to fulfil the criminal law's displacement function. Even though the justice that victims and their sympathisers want (which is primarily justice between offender and victim) is not the justice that courts are licensed and required to provide by the proportionality principle (which is primarily justice between offender and offender), the proportionality principle, correctly interpreted, nevertheless shares some of its basic moral geography with the retaliatory logic of victims and their sympathisers. For some distance, courts and retaliators travel on the same path even though the former cannot, consistent with their mission, deliberately track the latter. But as I have also attempted to show, the two paths do diverge at certain obvious points. First, as I started section II by explaining, to preserve the legitimacy of the criminal law's monopolisation of retaliation the courts must stop short of institutionalising the excusable but unjustifiable retaliatory excesses of victims and

³³ See my 'On the General Part of the Criminal Law', above note 8, for a much closer inspection.

their sympathisers. Second, as I explained in section III, the principle of due process means that the wrongful action at the heart of the offender's crime cannot always, in the eyes of the law, and notably for the purposes of sentencing, be the same wrongful action which inspires retaliation by or on behalf of victims. The need to restrict the trial to the substance of the charges with which it began may lead to some differences between the victim's perception and the law's rendition of what the offender has done, even when the victim is not driven to retaliatory excess. Finally, the requirement to adjust the sentence for the offender's blameworthiness may, as I just explained in section IV, drive some extra wedges between the court's sense of proportionality and the victim's retaliatory inclinations, even where those inclinations are not excessive and there are no due process impediments to their reflection in law. The court, as an agent of the state, owes a duty of humanity to all which may often exceed the duty each of us owes to other people, and which therefore requires the court to affirm each offender's moral agency and moral responsibility more conscientiously than need be the case in many of our ordinary interpersonal transactions, including transactions with those who wrong us. These three factors add up to constitute what I will call the 'displacement gap' in criminal sentencing: the gap between what retaliators want and what the courts can, in good conscience, deliver.

Traditionally, this displacement gap has been filled by the law's own wealth of symbolic significances. What was confiscated from victims and their sympathisers in point of retaliatory force has traditionally been compensated by the ritual and majesty of the law, and by the message of public vindication which this ritual and majesty served to convey. At one time it was the ritual of the punishment itself which made the greatest contribution. The pillory, the stocks, the carting, the public execution and various other modes of punishment involving public display allowed the state to close the displacement gap by

exhibiting the offender in all his shame and humiliation, in all his remorse and regret, while the proceedings remained under some measure of official control to limit retaliatory excess.³⁴ But of course a new penal age dawned in the nineteenth century which put the offender out of reach and out of sight in the prison, where measured punishment and control of retaliation could be more successfully combined, both with each other and with the new disciplinary ambitions of supervision and rehabilitation.³⁵ From then on, the burden of providing ritual and majesty to fill the displacement gap was to a large extent shifted off the shoulders of the punishment system (which was now practically invisible to the general public except in the gloomy expanse of the prison walls) and onto the shoulders of the trial system instead. The courts themselves now had to offer the would-be retaliator the kind of public vindication which would once have been provided by the act of punishment, and the ritual and majesty of the courtroom had to substitute for the ritual and majesty of the recantation at the gallows. Of course the pressure to get this substitution exactly right was eased by the fact that the prison would to some extent protect the offender against the retaliator even if the displacement gap had not been successfully filled by the court. But it was still crucial that the trial itself should offer the victim and his sympathisers some symbolic significances which would divert them from taking the matter

³⁴ How could the death penalty ever have been consistent with limiting retaliatory excess? Surely nothing could ever have exceeded death? Wrong. That one died with one's soul cleansed by confession or recantation was one mercy. That one died after judicial proceedings in which one was able to put one's defence, and therefore treated as a responsible agent, was another. On the mistaken assumption that the widespread availability and use of the death penalty in early-modern England was a sign of *sheer* brutality in criminal justice policy, see J.A. Sharpe, *Judicial Punishment in England* (1990), 27ff.

³⁵ The line of thinking in this paragraph obviously owes something to M. Foucault's *Discipline and Punish: The Birth of the Prison* (1977). I hesitate to specify exactly what.

into their own hands e.g. if the offender was acquitted, or if a custodial sentence was not used, or once the custodial sentence had expired. For this purpose the court could only rely on continuing respect, indeed deference, for its own heavily ceremonial processes and practices. If the court's processes and practices were to fall into disrepute, if they came to be seen as just distracting frippery, then the vindictory symbolism of the trial would be lost and the displacement gap would open wide for all to see. We would then face a major legitimisation crisis in the system of criminal justice.

My view is that we now face this crisis in Britain, and for the very reason I have just given. During the 1980s and 1990s the steady creep of the ideology of consumerism has led people to regard the courts, along with many other key public institutions, as mere 'service providers' to be judged by their instrumental achievements. League tables, customer charters, satisfaction surveys, outcome audits and efficiency scrutiny became the depressing norm. Respect for valuable public institutions declined at the same time as expectations of them increased. Even among those who took themselves to be anti-individualistic, the demand that institutions should become more 'transparent' and 'accountable' came to be regarded as orthodoxy, and euphemistic talk of 'cost-effectiveness' became acceptable. All this was, essentially, a corruption of a sound idea, which I mentioned at the outset – the idea that modern government is the servant of its people. It was mistakenly assumed that since public bureaucracies existed to serve social functions, ultimately serving people, they ought to be judged by the purely instrumental contribution they could make to those social functions, and hence their instrumental value for people. But it was forgotten that many social functions were not purely instrumental functions, i.e. many institutions made an intrinsic or constitutive contribution to their own social functions. The mission of such institutions, to return to my earlier expression, was partly integral to their function. The National Health Service

and other organs of Beveridge's welfare state are the most familiar examples in Britain; people who regard themselves as collectivists should rue the day they ever tried to defend these in purely instrumental terms, which was the day they surrendered to the creeping individualism of the consumer society. But the criminal courts exemplify the point even more perfectly. Historically they filled the displacement gap in criminal justice by their own (to the public eye) bizarre and almost incomprehensible processes, their own special black magic if you like, which lent profound symbolic importance to their work. But armed with new consumerist ideas people came to see all these processes as mere frippery. They came to ask what the courts were *achieving* by their black magic, and whether it was giving them the *product* they wanted, whether this was the *service* they were looking for, and of course those questions quickly broke the spell. The courts could no longer fill the displacement gap from their own symbolic resources, since their own symbolic resources had been confiscated by the popular expectation of raw retaliatory results.

The consequence of this rapid social change is that the displacement gap is now an open and suppurating social wound, and the threat of retaliation by or on behalf of aggrieved victims of crime looms ever larger. The courts themselves sometimes feel the pressure and feel constrained to penetrate their own veil of ignorance, abandoning their mission to do justice where, as increasingly often, it parts company with their function to displace retaliation. That seriously violates their duty as courts, which is above all the duty of justice, and which positively requires them to stay 'out of touch with public opinion' on matters of sentencing policy. Meanwhile populist politicians pander to retaliatory instincts by threatening to publish names and addresses of ex-offenders, to force ex-offenders to reveal old criminal records, even to license vigilantes in the form of private security guards – all in order 'to hand justice back to the people'. What they do not appear to appreciate is that all of this makes the

justification for the criminal law less stable, not more so. For if the criminal law cannot successfully displace retaliation against wrongdoers, but instead collaborates with it, then a central pillar of its justification has collapsed.

I do not mean to suggest that the courts' recent well-documented waking-up to the existence of victims is in every way a bad thing. There has been for as long as anyone can remember a tendency for criminal courts, with typical bureaucratic abandon, to pretend that nobody was concerned in their processes but themselves. Victims of crime, in particular, were kept badly informed and given no quarter at all in the operation of the system. Except insofar as they were witnesses, they were expected to find out for themselves where and when the trial would take place, to queue for the public gallery, to sit with the accused in the cafeteria, etc. In their capacity as witnesses, meanwhile, no concessions were made for the special difficulty of confronting those who had wronged them. Much of this amounted to a violation of the state's duty of humanity towards the victims of crime, and to the extent that it still goes on it still does.³⁶ The courts should remember that victims, as well as offenders, are thinking, feeling human beings. But this has absolutely no connection with the far more sinister contemporary campaigns to turn victims into parties to the criminal trial or administrators of criminal punishments, or in some other way to hand their grievances back to them.³⁷ That victims do not try, convict sentence or punish criminal offenders, and have no official part in the trial, conviction, sentencing and

³⁶ On which see Helen Fenwick, 'Rights of Victims in the Criminal Justice System: Rhetoric or Reality?' [1995] *Criminal Law Review* 843.

³⁷ A prescient manifesto for criminological consumerism was N. Christie, 'Conflicts as Property', *British Journal of Criminology* 27 (1977), 1, which spoke of conflicts being 'stolen' by criminal law and needing to be 'returned' to the parties through procedures which were 'victim-oriented' as well as 'lay-person-oriented'.

punishment of criminal offenders, is not an accident of procedural history. It is, on the contrary, one of the main objects of the whole exercise.