

# A FAIRNESS-BASED DEFENSE OF NON-PUNITIVE RESPONSES TO CRIME

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**Abstract:** In this paper, we offer a defense of non-punitive measures as morally justified responses to crime within a framework of society as a fair system of cooperation among free and equal individuals. Our argument proceeds in three steps. First, we elaborate on the premises of our argument: we situate criminal acts within a model of society as a fair system of cooperation, identify the types of unfair disadvantages crimes bring about, and consider the social aim of the criminal justice system. Next, we reject the claim defended by fair-play retributivists that fairness considerations make punishment a necessary response to criminal acts. In the last step, we demonstrate that it is rather non-punitive responses to crime that are warranted under the principle of fairness and, as such, are morally justified. We conclude the paper by rejecting two possible objections to our defense: the “responsibility gap” and the “victims’ claim to justice” objections.

**Keywords:** non-punitive responses to crime, fair-play retributivism, restoration, unfair disadvantage, non-punitive accountability

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## 1. Introduction

With the prominence of fair-play theories of political obligations, the notion of fairness became central in explaining not only why citizens should obey the law but also why legitimate political institutions should respond with punitive measures towards their citizens who fail to do so. The fair-play theories that ensued justified punitive responses to crime based on retributive grounds and proposed a simple rationale: in a model of society in which everyone is supposed to act fairly, in compliance with the law, any act of non-compliance, or more specifically, any crime, entails taking unfair advantage, which

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fairness considerations mandate to be returned.<sup>1</sup> Since this is what punishment does, punitive responses to crime are claimed to be morally justified as a matter of fairness.

Fair-play retributivism has been widely and justifiably criticized on many grounds. However, since we believe considerations of fairness are of central importance in envisioning an ideal of a just society, constituted in part by an ideal of criminal justice, we would like to adopt some of the starting premises of fair-play retributivism but pursue a different line of argumentation. In this paper, we argue that the principle of fair-play provides a basis for justifying non-punitive rather than punitive responses to crime within a society understood as a fair system of cooperation among free and equal individuals.

To do so, we depart from one of the central premises of fair-play retributivism concerning the understanding of criminal acts, which we discuss in Section 2. Instead of considering criminal acts as necessarily taking “unfair advantage,” we approach crime “pragmatically” and start from the *plurality of unfair disadvantages*<sup>2</sup> that a criminal act *inflicts* on the relevant stakeholders in the social cooperative venture. This shift in the understanding of criminal acts makes our account immune to two types of justified objections raised against fair-play retributivists: one that points out the implausibility of seeing the offender as necessarily a free rider, and the other regarding the incapability of fair-play retributivism to recognize appropriately the seriousness of different types of crime.

In Section 3, we reject the main claim of fair-play retributivists, namely, that it is fairness considerations which warrant punishment. First, we propose a distinction between punitive and non-punitive responses to crime, based on the doctrine of double effect, and we argue that given this distinction and the basic premises that fair-play retributivists endorse, it is not punitive responses to crime which are warranted in our model of society but rather non-punitive ones. Second, even if one does not accept our proposed distinction between punitive and non-punitive responses to crime (for instance, because one might see the distinction as entailing different *kinds* of responses, rather than different *justifications* for a response), the former cannot be claimed to be neither necessary nor more appropriate fairness-based responses to crime than the latter. If the objective of responding to a particular crime is the restoration of the fair balance of advantages and disadvantages, disrupted by the criminal act, then punitive responses to crime can, at best, only be used as a last resort rather than a necessary consequence of the premises which fair-play retributivists endorse. Still, we are skeptical that they can be justified even as a last resort, as they cannot satisfy a proportionality requirement,<sup>3</sup> implying either equal punishment for all free riders, or, if they can somehow plausibly

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<sup>1</sup> Fair-play retributivist accounts have been defended by Dagger (1993; 2018); Murphy (1995); Morris (1968); Sadurski (1985); and Sher (1987; 1997).

<sup>2</sup> In defining disadvantage, we follow the literature on distributive and relational justice. By disadvantage, we merely mean the loss or diminishment of access to advantage, where advantage is “a heterogenous collection of desirable states of the person reducible neither to his resource bundle nor to his welfare level” (Cohen 2011: 59). One is unfairly disadvantaged when one is fully or partially deprived of access to advantages to which one is entitled. A consequence of the view on advantages adopted is that the disadvantages one may suffer are plural, they can be irreducible to a single currency, and they require different forms of mitigation. See more on the plurality of disadvantages in Wolff and de-Shalit (2007): 9, 74–84.

<sup>3</sup> For a general argument that retributivism cannot meet the proportionality criteria see Zimmerman (2011).

justify different punishments, they tend to be accompanied by long lasting negative effects which, in our view, unfairly deprive offenders from social, human, and economic capital. These effects commonly proceed from discriminatory policies or social stigma<sup>4</sup> attached to criminal offenders and impose hardships on them which go way beyond the fair-proportional hardships one should have been subject to because of one's crime.

Besides from sharing common premises with fair-play retributivists, in Section 4 we demonstrate how the objections raised against them do not apply to our account of non-punitive responses to crime. We demonstrate that non-punitive responses to crime are warranted by the principle of fair-play; they are sensitive to the seriousness of different criminal acts; and, lastly, they are in line with the social aim of the criminal justice system as an institution. Last, in Section 5, we consider and reject two general objections to our defense of non-punitive responses to crime, which include what we term "the accountability gap" objection, and "the victim's claim to justice" objection.

## **2. Crime within a model of society as a fair system of cooperation**

Our fairness-based justification of non-punitive responses to crime is grounded on three main building blocks: (1) a model of society as a fair system of cooperation of free and equal individuals and its implications; (2) the unfair disadvantages that criminal acts inflict on the relevant stakeholders in society; and (3) the social aim of responding to crime within the model of society endorsed. While what we discuss in (1) and (3) might be endorsed by fair-play retributivists, at least in part, our take on the effects of crime in (2) marks a significant departure from their accounts, which we consider necessary for our justification of non-punitive responses to crime.

### *(1) Society as a fair system of cooperation among free and equal individuals*

Society as a fair system of cooperation is an ideal characterized, according to John Rawls, by three features. First, cooperation is seen not as an "activity coordinated by orders issued by some central authority" but rather as "guided by publicly recognized rules and procedures," which citizens may reasonably accept for regulating their conduct, provided that everyone else likewise accepts them.<sup>5</sup> Second, cooperation of the citizens is based on terms which are fair, expressed by principles stipulating basic rights and duties within the basic structure of society, ensuring "that the benefits produced by everyone's efforts are fairly distributed and shared."<sup>6</sup> Lastly, cooperation is undertaken to each citizen's rational advantage, namely, it advances the good of each of the participants in the cooperative endeavor.<sup>7</sup>

From this brief insight into Rawls' characterization of society as a fair system of cooperation, we would like to derive three implications that are relevant for our defense of non-punitive responses to crime.

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<sup>4</sup> Recent insightful qualitative and quantitative analysis on the lasting effects of social stigma can be found in Bell (2021); Brew et al. (2022); Kuehn and Vosgerau (2022).

<sup>5</sup> Rawls (2005): 16.

<sup>6</sup> *Ibidem*.

<sup>7</sup> *Ibidem*.

First, because the criminal justice system is part of society's set of rules, the second feature of cooperation, its fairness, should be an attribute of the criminal justice system as well. Any justification of the responses to crime within our criminal justice system should necessarily be constrained or proceed from considerations of fairness. Such considerations entail, as Rawls argues, that "a person who has accepted the benefits of the scheme is bound by a duty of fair-play to do his part and not to take advantage of the free benefits by not cooperating."<sup>8</sup> This is Rawls' principle of fair-play. Fair-play retributivists endorse this principle, identify the taking unfair advantage or free riding as crime, and conclude that punishment is permissible. While we accept the principle of fair-play as plausible, grounding a duty to respond to crime,<sup>9</sup> we believe it would be a mistake to characterize crime as free-riding; we elaborate our reasons for this stance in Section 3, where we raise our objections against fair-play retributivists.

Second, the assumption that the system of cooperation is fair implies that there is a *fair balance* between advantages and disadvantages, rights and duties, that each member of the cooperative venture enjoys and bears in order to produce the mutual benefits of the cooperation. In our argument, this implication plays a crucial role in characterizing criminal acts as disruptions of a fair balance of advantages and disadvantages. More specifically, in the next sub-section we defend the idea that crime is necessarily understood as inflictions of unfair disadvantages upon the relevant stakeholders in the cooperative.

Lastly, the fact that it is reasonable for citizens to accept the fair terms of cooperation in this ideal model of society implies the existence of mutual trust in the cooperative scheme: namely, that most members of the cooperative endeavor are not "free riders" who use the free benefits of cooperation without assuming the burdens required by social cooperation. As we stress below, the maintenance of this trust among citizens is the central social aim of the criminal justice system as an institution in such a society.<sup>10</sup>

## (2) *Crime and unfair disadvantages*

With fair-play retributivism, we share the supposition of the ideal model of society within which we justify responses to crime and the principle of fair-play. However, as mentioned, our parting point is located in the treatment of crime. In order to see what kind of responses to crime would be morally warranted by our premises, we find it necessary to approach the question "holistically," by considering first *what criminal acts do* within such a model and, second, *what the social aim of responding to criminal acts would be* within the model. Thus, we first focus on the impact of criminal acts, then on responses to crime.

Our answer to the first question, about the impact of criminal acts within our model of society, is simple: on supposition that there is a fair balance of advantages and

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<sup>8</sup> Rawls (1964): 9–10.

<sup>9</sup> For more on the idea of *duty* to respond to crime, see, for instance, Tadros (2011).

<sup>10</sup> One may ask: why adopt as a starting point the model of society as a fair system of cooperation in justifying non-punitive responses to crime? Our brief response to this question is that the reasons are twofold. On the one hand we consider fairness to be constitutive of the core of liberal egalitarian values. On the other, this is the model which fair-play retributivists presuppose. Since it is in reaction to their theory of punishment that we develop our account of non-punitive responses to crime, framed within our general liberal egalitarian convictions, our set of starting premises is appropriately the one presented above.

disadvantages in a society, criminal acts inflict different types of unfair disadvantages on the relevant stakeholders participating in the cooperative venture, thus distorting the fair balance. We characterize this answer as *holistic* because it is focused on the effects a criminal act has for *all* affected stakeholders in society, and *pragmatic*, as it examines what crime *does* rather than what crime *is*. This approach sharply contrasts with that of fair-play retributivists, who define crime as the taking of an unfair advantage by an offender, whereby the offender benefits from the cooperative enterprise but does not take her share of burdens in obeying the law or restricting some of her own liberties. One of the reasons why the fair-play retributivist approach is flawed is the following. Legal scholars often distinguish between *mala in se* and *mala prohibita*, that is, between offenses that are wrongful independently of whether they are regulated by the law, and offenses deemed wrong because they are legally regulated as criminalized conduct. Antony Duff warns against the risk of conflating the two by reducing the wrongness of crime to the taking of an unfair advantage in acting against the law's prohibitions<sup>11</sup>; as if all *mala* were merely *prohibita*, so to speak. We believe Duff's warning is revealing here. As we explain below, fair-play retributivists operate within an implausible view of crime, for which it is difficult to convincingly argue for the seriousness of *malum in se* offenses. Rather than approaching crime this way, we believe the starting point for justification of our responses to crime should be the necessary unfair disadvantages that a criminal act inflicts on the different stakeholders in the model of society. Building on this approach, we further diverge from fair-play retributivists in that we claim the effects of crime, the disadvantages, are *plural* and cannot plausibly be reduced only to acts of disobeying the law. Unlike fair-play retributivists, we consider breaking the law to be only *one* of the multiple disadvantages arising from criminal acts, and one which is inflicted indirectly, primarily on the community and on the authority of the state, where this authority is legitimate. However, there are other disadvantages caused by crime.

First, and most importantly, the offender through the commission of a criminal act unfairly disadvantages another person or a group, in one or both of these senses: in a distributive sense, as they are now charged with more burdens<sup>12</sup> than they should have been if everyone played fair; and/or in a relational sense, as the wrongful act treats the victim(s) as not having equal status with the offender who assumes a higher instance, treating her as mere means to an end. Second, since the act violates the scheme of fair rules of cooperation, it imposes disadvantages on the complying members of the community. Since a criminal act undermines the belief that there are no free riders in the cooperative venture, it engenders distrust among the group members. Lastly, criminal acts confer disadvantages to legitimate political institutions by unjustifiably disrespecting their authority through violating the just rule of law those institutions exist to uphold.

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<sup>11</sup> Duff (2007).

<sup>12</sup> The burdens which citizens bear are not reducible only to the costs of complying with the law or refraining from doing prohibited acts, but are primarily associated with the share of costs that befalls on every member of the cooperation due to the commission of a particular criminal act. For instance, when someone indulges in tax evasion, one unfairly burdens the community and other members of the society in a distributive sense as well, since their share of costs to maintain for instance the same level of public services will increase, albeit imperceptibly, due to another's unfair act.

It is our contention that a criminal act within a model of society as a fair system of cooperation inflicts three different categories of unfair disadvantages<sup>13</sup>: the first to particular individuals or groups who are directly disadvantaged by a criminal act, namely the victims; the second to society or the community in general, whose trust is undermined; and the third to the legitimate authority of the state, which is disrespected. We can call the first, direct individual and group-based *personal* disadvantages of crime, whereas the latter indirect, collective and systemic, *impersonal* disadvantages.<sup>14</sup>

(3) *The social aim of the criminal justice system*

In line with the fair-play principle, we maintain that political authorities have a *duty* to respond to criminal acts because these inflict unfair disadvantages on the stakeholders in the cooperation. But what would be the morally justified way to respond to criminal acts? Given our holistic approach, we believe there are two important constraints on envisioning the morally required responses to crime. First, responses should reflect commitment to the key values supposed in the model, that is fairness, freedom, and equality; they should also aim at reinforcing mutual trust among citizens, thereby upholding the proper functioning of the cooperative network. Second, responses to particular crimes should be designed in such a way that they successfully mitigate the personal disadvantages a crime causes the victim(s), whenever this is possible.

These two constraints on the responses to crime within our model come from distinguishing between two questions we might ask about how a criminal justice system is designed: what is the social aim of the existence of a criminal justice system within a particular model of a society, and what justifies particular responses to particular criminal acts within such model.<sup>15</sup> In our view, the social aim of the criminal justice system is the maintenance of trust among society members, which is essential for the proper functioning of the cooperative scheme. The criminal justice system achieves this aim by ensuring that impersonal disadvantages inflicted by criminal acts are appropriately mitigated. On the other hand, the purpose of responding to specific criminal acts in particular ways is to mitigate personal disadvantages caused by criminal acts and repair the distortion of

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<sup>13</sup> Some may claim that committing a crime within this ideal model can also be seen as self-inflicted disadvantage to offenders, as they put themselves at risk of being imposed additional hardships and deprived of advantages, as well as endanger their status as equal and trustworthy cooperative members within the scheme. In addition, these self-inflicted disadvantages might amount to more than just exposing oneself to the risk of losing certain benefits. As Tadros suggests, the commission of a wrongful act necessarily makes your life go worse, from a purely moral point of view, than one that avoids it (and it is worse for you to commit wrong autonomously rather than non-autonomously). See more in Tadros (2011; 2020).

<sup>14</sup> This distinction is rooted in Feinberg's characterization of "primary" and "derivative crimes," which corresponds to our distinction between crimes causing direct and indirect unfair disadvantages. On the primary/derivative crimes distinction, see more in Feinberg (1987): 19–22.

<sup>15</sup> For those who assume punishment is a justified response to crime, such as Benn (1958), these constraints follow from two questions concerning the justification of punishment: the first about what justifies punishment as a social practice, the second about what justifies punishing a particular person. The justification of punishment should thus be done on two levels; Benn uses consequentialist criteria in answering the first question and retributivist criteria in answering the second, assuming a mixed model of justifying punishment.

the fair balance of advantages and disadvantages. Clearly, the social aim of a criminal justice system and the responses to particular crimes can conflict. For instance, when effective ways of responding to crime are, in fact, ways which violate the fundamental rights of individuals derived from our commitments to the values of fairness, freedom, equality. Given such commitments, we believe that the broader social aim of a criminal justice system should always constrain particular responses to crime whose particular aim is to mitigate personal disadvantages.

Given the ideal model of the society we assume, the multiple unfair disadvantages a crime causes, and the constraints on the responses to crime within the model, we would like to consider now whether the central claim of fair-play retributivists, according to which punitive responses to crime are necessarily warranted within the model, is true.

### 3. Are punitive responses to crime warranted within the model?

We begin our argument by distinguishing between “punitive” and “non-punitive” responses to crime, based on the doctrine of double effect. We can claim that a punitive response to crime, or punishment, is *an intentional or deliberate* imposition of hardships on offenders by political authorities *because of their violation of the criminal law*, thus also communicating condemnation of the criminal act. The stress is on the deliberate imposition of hardships which aims to make the person or group who committed the act worse off in some respects because they are deemed responsible for committing the criminal act. In contrast, non-punitive responses to crime can be understood as *foreseen* imposition of hardships on offenders by political authorities *because of a violation of the criminal law*, which communicate condemnation of the act that violated the law, and are tailored *to be directed at mitigating the disadvantages* of the criminal act for the relevant stakeholders within the model of society stipulated. Thus, the difference between punitive and non-punitive imposition of hardships is that the latter is justified as foreseen in the mitigation of the disadvantages of a criminal act, while the former is justified as being primarily intended.<sup>16</sup> Whether a measure is punitive or not depends on the way it is justified. For instance, incarceration can be both a punitive and non-punitive measure, depending on whether its justification refers to the deliberate limitation of the freedom of an individual or to the foreseen limitation of one’s freedom directed at restoring a fair balance.<sup>17</sup>

So, what kind of responses to criminal acts can be warranted within our model of society? Fair-play retributivists claim it is punitive ones. Moreover, they claim that punishment is a *necessary* response to criminal acts within such a model. This conclusion is based on the following premises: (1) society is a cooperative scheme from which all of the members ought to benefit – they benefit from living under the rule of law; (2) for the cooperation to be beneficial it is required that most of the members bear some burdens

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<sup>16</sup> Our distinction between punitive and non-punitive responses as based on the doctrine of double effect follows the approaches to punishment or punitive measures present in the works of “philosophical abolitionists.” See more in Boonin (2008); Golash (2006); and Zimmerman (2011).

<sup>17</sup> One may justify non-punitive incarceration on different grounds. Caruso’s *public health-quarantine* model (2021), for instance, appeals to *public safety* and the risks of immediate threats to it in order to justify the incapacitation of an offender.

necessary to produce the benefits, such as, for instance, to self-restrain some of their freedoms; (3) the benefits that ensue from the cooperation are to some extent free to be enjoyed by the members and (4) all members of the society who accept benefits from the cooperation are obliged to bear their part in taking some of the burdens required by the cooperative scheme to produce these benefits. Given these premises, fair-play retributivists argue that those members who do not obey the law – those who do not restrain some of their freedoms or who give themselves more freedoms than they are entitled to – act unfairly: they get the advantages provided by mutual cooperation without contributing to a fair share of the burdens. The principle of fair-play, (4), requires that the balance of advantages and disadvantages be restored as it were prior to the unfair act and this can be done by taking the unfairly enjoyed advantages from the offender. Since this is exactly what punishment does, punitive responses to crime are justified as a matter of fairness in the model. Moreover, fair-play retributivists claim that fairness considerations make them necessary within the model.

We believe there are good reasons to be skeptical about the conclusion that fair-play retributivists derive from these premises. First, given the aforementioned distinction between punitive and non-punitive responses to crime and considering that the purpose of responding to particular crimes is restoring the balance of advantages and disadvantages as prior to the unfair act, we claim that the conclusion that we should respond punitively to the unfair act does not follow. It might indeed follow that, as a matter of fairness, we may be justified in coercing the offender to return the unfairly taken advantage, but this imposition of hardships on the offender can be justified as foreseen, rather than intentional. Imagine that Adam broke the law and robbed a bank. He enjoyed much more freedom than he was entitled to. A judge determines that the freedom taken by Adam to break the law in that particular way is worthy of three years in prison, which, according to fair-play retributivists, he owes to the compliant, rule-abiding members of the cooperative network for his unfair act. Still, in this case, the judge, as David Boonin rightly notes, does not intend to harm Adam; rather, the harm he imposes on him is merely foreseen with the aim of Adam returning the unfair advantages he took.<sup>18</sup> Hence, the argument of fair-play retributivists does not establish that it is permissible to intentionally impose hardships on Adam, and consequently does not establish that punitive responses to crime are warranted from their premises. As we will show in the next section, their argument rather warrants non-punitive responses to crime in the way we defined them above.

One may, however, reject our line of argument either by altogether dismissing the doctrine of double effect, on which our punitive/non-punitive distinction is based, or by rejecting its use in justifying the distinction. Someone might think, for instance, that punitive and non-punitive measures can be differentiated in kind, rather than by justification. We are skeptical about this last point, but for the sake of the argument, we endeavor to investigate this possibility. Let us suppose that we can distinguish between punitive and non-punitive responses to crime as differentiated in kind. If the conclusion that fair-play retributivists derive above is to be warranted, they must show that pun-

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<sup>18</sup> Boonin (2008): 141-143.



ishment (i.e., a punitive response) is *necessary* to bring about the restored balance; unless there are punitive responses to crime, the advantages unfairly taken by the offender cannot be returned.

Imagine that Bob steals Celia's necklace and wants to sell it on a "grey market." Bob enjoyed an excess of freedom to which he was not entitled: stealing, intending to do illegal trade, benefiting from the profits of it. Fairness requires that the advantages unfairly taken by Bob be restored, and fair-play retributivists claim this can only be done by punishing him. But presenting this as the sole option seems false to us. Imagine that Bob has a conscientious friend whom he calls while fleeing Celia's home and tells him about the necklace. His friend manages to convince him that he would be better off if he returned to Celia what he stole. The mere possibility of voluntarily returning the unfairly taken advantages negates the claim that punishment is necessary to restore the balance. Even if we do not use the above-made distinction between punitive and non-punitive responses to crime, it is not always the case that punishment is necessarily warranted even through the premises fair-play retributivists endorse.

Fair-play retributivists may respond that this argument rests on a misunderstanding of the concept of unfair advantage. For instance, Richard Dagger, in responding to a similar objection made by Herbert Fingarette,<sup>19</sup> stresses that the benefit a thief gets cannot be identified only with what he has stolen.<sup>20</sup> Dagger accepts that what is stolen can indeed be restored without punishment yet he insists that the unfair advantage of the offender should rather be "understood as the double advantage of not obeying the law when it suits one's purposes while also enjoying the advantages of the rule of law provided by the law-abiding citizens. This benefit cannot be repaid simply by forcing the thief not to break the law again; that would leave the 'books' unbalanced. So, to restore the balance, the lawbreaker must be punished."<sup>21</sup>

Dagger's reply claims that punishment is necessary because in addition to the benefits one derives from carrying out a criminal act, one also has the benefit of taking extra freedom to disobey the law, and fairness considerations towards those who obey the law require that one be punished. However, there are at least two problems with this reply by Dagger, each of which is, in our opinion, detrimental to fair-play retributivism. First, the account of unfair advantage that Dagger proposes results in an implausible attribution of advantages and disadvantages in the cooperative scheme. In our case above, for instance, it implies that by stealing Celia's necklace, Bob took "unfair" advantage of his fellow citizens, who, unlike him, did not take the freedom to steal – they are then bearing the burden of restraining themselves to not steal Celia's necklace. But why assume that everyone else wanted to steal Celia's necklace in the first place? For most law-abiding citizens, restraint from stealing is not a burden. This point is even more evident when we consider serious *malum in se* offenses. For instance, in the case of murder, if the offender took an unfair advantage in the sense in which Dagger proposes, then it must be the case that all of his law-abiding co-citizens are burdened by the restraints on their desire to kill, which simply seems perverse, as most citizens have no

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<sup>19</sup> See Fingarette (1977): 502, where he objects to Morris's fair-play retributivism.

<sup>20</sup> Dagger (1993).

<sup>21</sup> Dagger (1993): 478.

burdens or costs in refraining from killing.<sup>22</sup> Hence, it cannot be justifiably claimed that by committing a crime, the offender necessarily takes an unfair advantage over other law-abiding citizens.

Second, this implausible account of unfair advantages seems to disregard the gravity and plurality of disadvantages criminal acts cause. As Boonin rightly observes, if all offenders are free riders, then it follows that “all offenders are *equally* free riders.”<sup>23</sup> If disobeying the law is a necessary and sufficient condition for punishment, then the fair-play retributivist has no other resources to account for the different punishment of different offenders based on the seriousness of, for instance, killing versus stealing a necklace. Since both offenders disobeyed the law, they both took unfair advantage by disobeying the law and thus deserve punishment which ought to be equally punitive for both. Many would find this consequence of fair-play retributivism problematic.<sup>24</sup> Moreover, even if one accepts that punishment is morally justified in the way fair-play retributivists claim it is, the justification they offer for particular punishments is unacceptable from the victims’ perspective. Imagine, for instance, victims of rape. Jean Hampton has convincingly argued<sup>25</sup> that the disadvantages of a criminal act in this case are multiple and include not only the harm inflicted on the victim but also the undermining of the victims’ status as equal members of society when an offender treats them as someone who can be instrumentalized, taken advantage of, exploited, or denigrated. To say in this case that the offender is punished because of disobeying the law and not because of the wrong or harm inflicted on the victim is to add insult to injury for the victim.

Last, even though it is not necessary, punishment cannot be justified on the premises of fair-play retributivism, even as a last resort, because of one additional obstacle it encounters: its limited effectiveness in restoring fairness and balance. By claiming that punishment is justified for the taking of an unfair advantage, fair-play retributivists are committed to the view that once the offender pays her due, she should again be a free and equal member of the cooperative network.<sup>26</sup> But our current practices of punishment show that such reentry on equal status is far from this in almost all cases. Even after serving one’s sentence, former offenders are interpersonally and institutionally stigmatized. On an interpersonal level, due to social stigma, they suffer mistrust from fellow citizens and face a variety of informal societal barriers to reintegration. In this respect, punitive responses to crime conflict with the social goal of the criminal justice system, which aims to promote and uphold bonds of trust among free and equal individuals. On an institutional level, ex-offenders suffer from the legal institutionalization of stigma, for example through disenfranchisement, prohibition to hold public offices, exclusions from certain

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<sup>22</sup> For a similar objection to fair-play retributivists, see Hampton (1988; 1991).

<sup>23</sup> Boonin (2008): 124.

<sup>24</sup> There are ways in which fair-play retributivists try to address this objection. For instance, Dagger’s response seems to go in the right direction when he claims that there is not only the crime of fairness in cases of murder but also the crime of murdering a person, and since the offender has additional offenses to pay for, in such cases he will be punished more. However, this explanation for a higher punishment is *ad hoc*, as it cannot be claimed to follow from the fair-play premises he endorses. For other attempts to answer this objection, see Sher (1987; 1997) and Davis (1983; 1991; 1993).

<sup>25</sup> Hampton (1991).

<sup>26</sup> Murphy (1995): 15.

benefits and public assistance programs, denial of licenses, etc., being thus prevented from accessing human, social, and economic capital when reentering the society.<sup>27</sup>

We contend that the premises of fair-play retributivism cannot warrant punitive responses to crime given the justification-based distinction between punitive and non-punitive responses. Even if we set the distinction aside, fair-play retributivism implies an implausible view of crime and encounters problems with satisfying the proportionality criteria. Hence, we conclude that fair-play retributivism in the form in which we were treating it above cannot justify punitive responses to crime.

#### **4. Justifying non-punitive responses to crime**

Through our objections towards fair-play retributivism, we have already offered one argument that indirectly justified the provision of non-punitive responses to crime, based on the distinction we made between punitive and non-punitive responses. As we outlined above, the imposition of hardships on offenders in order to restore fair balance, as existed prior to the crime, can only be justified as foreseen rather than deliberate. The foreseen imposition of hardships is insufficient for the justification of punitive responses to crime. If, as we argued, we have a duty to mitigate the disadvantages of a criminal act under a model of society as a fair system of cooperation, and if it is true that we can only achieve that through punitive or non-punitive responses, then if punitive responses are not justified within the model; rather it follows that it is non-punitive responses that are.

Aside from sharing some of the premises with fair-play retributivists, our justification of non-punitive responses to crime is immune to the objections we raised against fair-play retributivism. Our shift in the treatment of crime, from an “unfairly taken advantage” seen in the free riding of the criminal to a plurality of “unfair disadvantages” which a criminal act inflicts on stakeholders in the cooperative network, is in line with our intuitions that some criminal acts are not merely wrong because they violate the law, but primarily because of the particular distributive and relational wrongs they inflict upon other persons or groups, the victims.<sup>28</sup> This allows us to properly recognize the seriousness of the offenses and to appropriately respond to the criminal act. Furthermore, our plural perspective on the disadvantages a criminal act inflicts also allows us to account for the crime of disobeying the law, which, as explained above, inflicts disadvantages to the community and the state’s authority, without reducing the wrongness of every crime to disobedience of the law.

Lastly, a fair society needs to enable former offenders to reenter society as free and equal members of the cooperative venture. This cannot be achieved if punitive

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<sup>27</sup> Brew et al. (2022); Moore et al. (2016); Murphy et al. (2011).

<sup>28</sup> Since inflicting disadvantages on persons causes a relational wrong to a particular person, our account is immune to another objection commonly raised against fair-play retributivists: that they have no resources to respond to the crime of a previously unfairly disadvantaged, victimized offender. Because of this relational character of the disadvantages inflicted, in our account, if Adam unfairly disadvantaged Bob, Bob cannot be claimed to restore the fair balance by unfairly taking advantage from Celia to the same extent to which he was disadvantaged. Fair-play retributivists have difficulties accounting for the wrong of Bob’s act. Some possible, but in our opinion unconvincing, solutions were offered by Sher (1987).

measures carry the unfairly long, stigmatizing effect of labeling offenders as criminals. In order for responses to crime not to attract unfairly lasting stigma, we need to structurally or systematically do away with the idea of “blame-for-crime” and the respective retributive attitudes towards offenders.<sup>29</sup> This requires an understanding of “accountability for crime,” which is non-punitive, its integration within non-punitive responses to crime, and stakeholders willing not to diminish the social capital of offenders, but rather make them assume responsibility for their actions and fulfil their obligations in the cooperative framework.

We already find practices of holding people accountable in a non-punitive way within juvenile justice systems, which use, for instance, a milder terminology in processes to avoid the risks of stigmatization for young offenders. Although juvenile justice still includes the use of punitive measures as a last resort, the primary focus in responding to juveniles’ crime is to mitigate the disadvantages caused by a criminal act while at the same time preventing the loss of social, human, and economic capital of the young offender towards successful reintegration into society.<sup>30</sup> Notably, juvenile justice relies on forward-looking considerations in adequately treating and responding to child-perpetrators: the idea here is that it is important to hold children accountable to norms because of the beneficial effect this has on the development of their moral agency. The reason to care for the moral development of a child is not only because of the personal benefits it brings but also because of the impersonal value such development has for society in general.

Yet, adults can also go through significant developments and moral growth across their lifetimes, and such justification based on the cultivation of moral agency for accountability to norms does not differ, even if the degree to which adults and children are held accountable may differ. This is important because, as mentioned, fairness requires that former offenders successfully reintegrate back into society and that their status as free and equal members of the cooperative endeavor is restored. It is only by restoring their status that offenders can contribute to the re-establishment of trust, which maintains the normal functioning of the cooperative system.

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<sup>29</sup> That social stigma can produce much harm is well documented in the literature. The evidence presented by, for instance, Bell (2021), Brew et al. (2022), or Murphy et al. (2011) shows that stigma against offenders is primarily tied to the practice of incarceration applied to offenders as something they deserve. Fair-play retributivists may argue that the stigma attached to having a criminal record is a deserved kind of retribution on its own, or that it indirectly serves the broader aim of punishment by marking “untrustworthy” cooperation partners. However, given the documented long-lasting negative effect of punitive measures, we can plausibly claim that they create such disadvantages for offenders that often reduce their chances for a successful reintegration and can hardly count as proportional, even by retributivist standards. As Murphy et al. (2011: 114) write, “today, simply an arrest (not a conviction) initiates the process of public shame, humiliation, and punishment well before guilt or innocence is proved. It is now generally accepted that most arrests, regardless of their outcomes, surface in criminal record checks,” and that the arrested Americans “will not only suffer a measure of public shame, but the inevitable collateral consequences that amplify the original punishment to disproportionate levels by a resurfacing “badge of shame””. Given that the focus of our proposed model is set on the mitigation of unfair disadvantages to restore the fair balance prior to the criminal act, and given the absence of retributivist sentiments in our justifications, we believe that an ethos cultivated by a system of non-punitive responses to crimes in society would produce less, if any, unfairly stigmatizing effects.

<sup>30</sup> Cox et al. (2021); Fagan (2010).

## 5. Addressing the “accountability gap” and the “victims’ claim to justice” objections

In this last section, we address two objections that are commonly raised against non-punitive responses to crime and demonstrate that neither is applicable to our account. One may worry that the importance of holding offenders responsible for their wrongdoing is sidelined within non-punitive responses to crime focused on the mitigations of disadvantages. It seems like our criminal justice system should care mainly about restoring the fair balance of advantages and disadvantages prior to the act as some kind of a “neutral” aim, dealing away with the fact that an offender committed a *criminal act* against another person or group.

This objection rests on a similar intuition as the one of fair-play retributivists assuming that, over and above any restoration of a fair balance due to a criminal act, there is some “residuum” that requires punishment. While we disagree with this conclusion, we believe that our approach can accommodate this intuition about a “residuum” without claiming that it is punishment that follows. According to our account, a criminal act causes two types of disadvantages to the victim(s): distributive and relational. The distributive disadvantages suffered by victims are mitigated when the imposition of hardships on the perpetrator has the goal of *compensating* for the victim’s disadvantages. As for the relational disadvantages, these are mitigated when victims get recognition for the wrongs suffered and their status as equal is reaffirmed in the community.<sup>31</sup> We also argue that disobedience to the law does inflict disadvantages on the community and the state, which can and should be mitigated in a non-punitive way in accordance with the suppositions of the key values of the model of society as a fair system of cooperation of free and equal individuals who are capable of responding to and cultivating moral capacities. In our view, a well-functioning system of apology accompanying the bearing of the costs for what is necessary to repair the disadvantages, such as the costs to compensate for a loss, would be more suitable. This would be capable of restoring the status of equality of the victim, the trusting relations among society members, and between them, and the authority of the state. If we accept that maintenance of social trust for the cooperative endeavor is the social aim of responding to crime, then such practices should be more sensitive to the social and personal circumstances that lead to crime, as well as to how responsibility can be distributed among the stakeholders in society.

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<sup>31</sup> It might still be objected, alongside Jean Hampton, that the reparation of the wrongs caused by crime, in particular the moral injury, is a matter of *retributive* justice inasmuch as it requires the infliction of pain. As she writes at the end of her essay on punishment as moral education: “Wrong occasions punishment not because pain deserves pain, but because evil deserves correction” (Hampton 1984: 238). Hampton links pain to the expression of a moral message; holding that by victimizing, the wrongdoer has declared oneself elevated with respect to the victim, so the wrongdoer needs to suffer in proportion to the victim to deny the elevation (“pain conveys defeat”) and reaffirm the moral reality of equality (see Hampton 1988). But we lack an argument in Hampton’s account for why suffering is necessary to receive such a message, and in what way the message is articulated through the imposition of (often disproportionate) pain. Admittedly, Hampton herself conceded that states can have other important obligations towards their citizens, like the promotion of the community’s wellbeing and the cultivation of moral education, such that sometimes retributive responses should be overridden by other types of responses, better tailored for broader goals (see Hampton 1991).

It might, however, still be objected that, from the victim's perspective, what is needed to repair the wrongs and restore a sense of trust, between the victim and the offender and between the offender and society in general, is to make the perpetrator suffer for her wrongs.<sup>32</sup> Retribution, some might hold, should thus be a necessary aim of any response to crime. According to this objection, retribution is believed to install a sense of satisfaction in victims and society at large that the requirements of justice have been met.<sup>33</sup> However, we believe that in this case, a victim's retributive expectations would be based on objectionable moral emotions, which need not play a role in the collective administration of responses to crime in a model of society as a fair system of cooperation: seeking justice out of revenge is seeking it for the wrong reason.<sup>34</sup> What victims of crimes can legitimately expect from a criminal justice system, under a social system of fair cooperation, is a right to reparations (in the form of restitutions or compensations for the distributive disadvantages), the public recognition of their suffering, which gives them the acknowledgement of the relational disadvantages suffered, and a right to access justice, which is a right to being part of the process but also to receive adequate protection and assistance throughout the process. Non-punitive responses to crime, as we envision them in this paper, have in principle no obstacles in accommodating all of these requirements.

## 6. Conclusion

In this paper, we defend non-punitive measures as a proper response to crime based on fairness considerations, within a model of society as a fair system of cooperation of free and equal individuals. We demonstrate that not only are punitive responses to crime not necessary within a model of society governed by the fair-play principle, but that it is non-punitive responses which are primarily warranted. Our defense of non-punitivism is grounded in a shift of perspective within fair-play justifications of responses to crime, from considering crimes as the taking of unfair advantages to considering them as inflictions of unfair disadvantages on the relevant stakeholders (victim, community,

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<sup>32</sup> Walen (2021).

<sup>33</sup> To be sure, victims' attitudes towards offenders may vary across countries and even more so over time, oscillating between retributive or punitive sentiments and restorative responses. There are reasons to believe that more recent trends go in the direction of rehabilitation and restoration. For instance, a recently released study from the Tides Centre in the US, under the project Alliance for Safety and Justice, reported that victims overwhelmingly prefer approaches to criminal justice that prioritize rehabilitation over punishment and prevention and treatment of crime over the use of imprisonment ("Crime Survivors Speak –The first-ever national survey of victims' views on safety and justice"). On the other side, it has been well documented in the literature that criminal justice practices in the US in the late 1990s and early 2000s were unprecedentedly harshened by expanding punitive policies, which in part reflected popular attitudes of the time towards crime and punishment (see Costelloe, Chiricos, and Gertz 2009). The possibility that some victims might not be satisfied without retribution is worth considering, hence our engagement with the objection, even though we ultimately reject the idea that such attitudes by victims are warranted.

<sup>34</sup> Once more, our position contrasts with Jean Hampton's proposal. See Hampton (1988), where she revindicates victims' retributive hatred as a desire for retribution coupled with a form of moral hatred for the wrongdoer, for which she expresses doubts but ultimately accepts as justified and distinct from, e.g., malicious hatred, because she claims it stems from our endorsement of morality.

and state); we also offered an appropriate taxonomy of the latter, which gives ground for our non-punitivist defense. This defense is primarily intended for those who accept the premises of the fair-play theory of political obligations. So, to the extent that one finds these premises attractive, we believe we offered a solid ground for one to prefer our account of non-punitive responses, rather than punitive ones, endorsed by fair-play retributivism, in justifying and tailoring our responses to crime.

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