Today criticisms of retributive punishment abound but defenses of it are rare. Even rarer are defenses that offer novel and sophisticated arguments in support of the view that lawbreakers must be punished simply because they have broken the law. Yet recently just such a defense has appeared, in a paper by Professor Herbert Fingarette entitled “Punishment and Suffering,” which was his Presidential Address to the Pacific Division of the APA in 1977. Unfortunately, and probably because it was published in the Proceedings of the APA rather than in a regular scholarly journal, Fingarette’s admirable paper has not received the critical attention it deserves. I shall try to give it that here.

Fingarette begins his paper with the statement: “I would like to expound a retributivist view of punishment — one that shows why the law must punish lawbreakers, must make them suffer, in a way fitting to the crime, independently of any specific consequences of the punishment, even independently of any good done by the system of law as a whole.’” (p. 499) He then goes on to add:

I confess, with some trepidation, that this is an extreme instance of what Professor H.L.A. Hart dubbed the “fierce” version of retributivism. I would prefer to call it “strong” retributivism. (p. 499)

The kernel of Fingarette’s theory lies in his thesis that retributive punishment is “a necessity internal to law.” (p. 499) By this he means two things — one positive and one negative. Positively, he means the following:

It is of the essence of the law’s power that the will be subject to law, i.e., either conform or in consequence be constrained [punished]. Without this there simply is no power of law. (p. 510)

Negatively, he means that the justification of punishment requires no appeal to any considerations, particularly of a moral nature, that lie outside of law itself (although at the very end of his paper he qualifies his position on this point). In my discussion I shall address both of these aspects of his general thesis, concentrating on the first.
Before beginning the exposition of his own theory, Fingarette briefly summarizes, and criticizes, the views of other retributivists. He concludes that none of these is convincing because none succeeds in answering the crucial question: Why should the law require that a person who commits a crime be punished for it later? In his words:

Tom steals money now; Tom is made to suffer later. Why is that necessary? What is supposed to be the significant relation between these two events? I have found this question deeply puzzling. . . . Why should suffering be the response to wrong doing, to lawbreaking? The idea is perfectly familiar to us. But how can we explain the connection, the connection retributivists think they intuit when they contemplate the meaning of law, lawbreaking and suffering? (pp. 500–501)

As far as Fingarette is concerned, the traditional appeal to intuition offers no explanation of the connection between crime and punishment. In this he is certainly right. To claim, as the intuitionistic retributivists do, that we simply “see” that crime deserves punishment, because it offers no argument showing a connection between the two, can hardly prove persuasive to anyone who is not already a convinced retributivist. In place of the futile appeal to intuition, Fingarette argues, we must establish a necessary connection between crime and punishment. To find such a connection he turns to an analysis of the nature of law itself. To understand law, insofar as it affects the question of crime and punishment, we must focus our attention on what he calls “law-in-action” (p. 503), or law as it exercises power over people, requiring them to do certain things. As he puts it “. . . if we want to understand the necessity for retributive punishing of lawbreakers . . . we will find this necessity in the study of law as power.” (p. 505) But, in one obvious sense, law does not have the power to force people to abide by it. Individuals do break the law, do commit crimes. This is where punishment comes in. Once a person has committed a crime and is apprehended and convicted, punishment serves the function of enforcing the law. The convict is made to suffer for his crime. However, the essential feature of his suffering, that makes it a punishment, does not lie in anything external, such as the constraint of his body. Rather, it is internal; it lies in the punishment’s being the humbling of his will. In Fingarette’s terms, “Punishing is the humbling of the defiant — or at least the disrespectful — will.” (p. 510) Again, “It is when the law humbles the individual’s will, by reason of the earlier failure to will in accordance with law, that we have in law retributive punishment, strictly speaking.” (p. 510)

So we come, in the notion of the law’s humbling the will of the criminal because he has defied the law, to the final, and central, point of Fingarette’s account of punishment as retribution. But this notion itself is, as it stands, vague. What does it mean? — or, to put the question into a practical context, How does law-in-action go about humbling the will of the criminal? There is a second question, too, which for our purposes is crucial. It is the same question that Fingarette himself asked of the other retributivists. Why should the fact that an individual has broken