ABSTRACT. This paper offers a partial critique of one of the central lines of argument in Victor Tadros’ *The Ends of Harm*: his attempt to show that a system of deterrent punishment can avoid the objection that it treats those who are punished ‘merely as means’ to our goals, by arguing that we may legitimately use someone as a means if in doing so we are simply forcing her to do what she anyway had an enforceable duty to do. I raise some questions about the idea of forcing someone to do what she has a duty to do; about what duties a wrongdoer incurs towards his victim, and how they may be enforced; and about whether we can move from such duties to a justification of criminal punishment as a deterrent.

I. INTRODUCTION

There are (at least) two important points about the justification of criminal punishment on which Tadros is, I believe, absolutely right.¹

First, we should reject those versions of retributivism that find intrinsic value simply in the suffering of criminal wrongdoers, and take it to be a proper task for the state, through a system of criminal law, to inflict that suffering on them. That supposed intrinsic value is hard for any but a worryingly vengeful eye to discern; and even were it real, it is not clear what would give anyone else (other than a disturbingly vengeful god) the right to inflict it, or what could make it proper to devote state resources to such a task. To say this is not to deny that criminal wrongdoers deserve to suffer… something. They deserve to suffer criticism and condemnation from their victims and fellows: they deserve to suffer the pain of remorse, and the burdens that are intrinsic to apology and reparation. But they do not deserve, no one deserves, simply to suffer. The key question then is whether

the proper rejection of these versions of retributivism should commit us to a rejection of retributivism as such, or whether some morally more plausible articulation can be found of the core retributivist thought that if criminal punishment is to be justified at all, it must be justified as an appropriate, deserved response to the offender’s crime.

Second, Tadros is right to argue that in asking how criminal punishment might be justified, we should ask not just or even initially what we, the punishers, can justifiably impose on or do to them, the punished; but what they ought to do in response to their own crimes – or, to avoid the dangerous tendency to talk and think as if punishment is always to be imposed by a law-abiding ‘us’ on an alien and dangerous ‘them’, what we ought to do in response to our own wrongdoing. Punishment is admittedly something that is in the end imposed or inflicted: an offender who does not want to be punished cannot avoid punishment simply by refusing it; it will in the end, if he is and continues to be uncooperative, be imposed on him as something that is done to him as a patient, not something that he does as an agent. This leaves open, however, the possibility that to justify a system that in the end imposes punishments on the recalcitrant, we must begin with an account of what offenders ought to do; and that if we do begin there, we will see reason to create systems of punishment that give offenders as active a role as possible – systems whose punishments are as far as possible burdens that the offender is required to undertake, rather than simply burdens that he is forced to undergo.

Now Tadros uses an account of the duties that offenders incur by committing their crimes as a basis for a deterrent account of criminal punishment, and it is here – or so I will argue – that he goes wrong. The argument is subtle, sophisticated and imaginative; but it is also, as I will argue, unpersuasive. I do not have a simple (or even a complex) knock-down objection to this effect; I will instead try to undermine the argument more gradually, by raising a series of doubts about its key elements. In the following section, I will

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2 Jacob Adler should be credited for trying to reorient the contemporary philosophical debates in this direction: see Jacob Adler, *The Urgings of Conscience: A Theory of Punishment* (Philadelphia: Temple University Press, 1992), on ‘the conscientious paradigm’. It is also of course one of the central themes of the ‘restorative justice’ movement that our systems of criminal law and punishment do not allow either victims or offenders to play a properly active role in the aftermath of crime.

3 I leave aside here the question of whether this is a defining feature of criminal punishment (it is not obviously a defining feature of punishment as such, given the possibility of self-punishment), or rather a contingent feature of any effective human system of punishment.