
RETRIBUTIVISM AND DESERT

BY

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Abstract: Retributivists claim that the point of legal punishment, and the standard that ought to govern the construction of penal institutions, practices and rules, is that the guilty must be treated in the way that they morally deserve to be. I construct an argument from elimination designed to show that there is no plausible index for measuring moral desert, and thus that a central plank of the retributivist platform is indefensible. I conclude by showing how deeply held intuitions that appear to support retributivism might be retained without embracing retributivism.

1.

Retributivists claim that the point of legal punishment, and the standard that ought to govern the construction of penal institutions, practices and rules, is that the guilty be given their just deserts. Punishment must be commensurate with moral desert.¹ This emphasis on moral desert straightforwardly implies the following view about the content of sentencing guidelines: such guidelines are morally justified if and only if, and because, they assign a punishment that is within the range of sanctions that a convicted offender morally deserves. Call this the *commensurability thesis*.

Because the commensurability thesis is just a starchy way of expressing what so many take to be clearly true – that wrongdoers ought to be given their just deserts – it pays to briefly note the breadth of current practices that fall afoul of its requirements. If we must punish convicted offenders just as much as they morally deserve, then we would have to do away with most instances of suspended sentences, reduced sentences, and other applications of judicial mercy. We would also have to eliminate the possibility of pardons, amnesties and executive clemency. Statutes of limitations would have to be abandoned, since they specify conditions that disable the government from prosecuting, much less punishing, those

known or believed to have committed crimes. Gone too would be many evidentiary rules that force the dismissal of improperly acquired evidence, even though that evidence would be sufficient to convict a guilty person and so subject him to deserved punishment. Double jeopardy provisions would be expunged, since they prevent the state from prosecuting and so punishing some who are known to have broken criminal laws. The presence of these various legal rules reveals our attachment to values other than that of meting out just deserts.

Of course, the retributivist could demand widespread changes that would eliminate these rules from our practice, or insist that these rules, contrary to appearances, can be accommodated within a system that is regulated by the commensurability thesis. Rather than focus on the plausibility of such replies, I am going to concentrate here on what seems to me more worrying – the assumption that there is some punishment, or range of punishments, that an offender morally deserves for his crime. I do not believe that we can make sense of commensurating punishment with moral desert. If we can't, then the commensurability thesis is false. And if the commensurability thesis is false, so too is retributivism.

2.

Sometimes when we want to know what a person deserves for his wrongdoing, our answer is properly given by identifying that punishment called for by the institutional rules of our criminal justice system. In such a case, all it means to say that a person deserves punishment *P* is that *P* has been authorized by a jurisdiction's sentencing rules. But we may want to know whether these rules are themselves morally justified. The commensurability thesis supplies an answer: a sentencing rule is justified if and only if (and because) it recommends punishments that are morally deserved.

Endorsement of the commensurability thesis is necessary, but not sufficient, to qualify as a retributivist. That's because those who favor a paternalistic, or moral education, theory of punishment also insist on giving offenders what they morally deserve. The disagreement lies in whether wrongdoers deserve to suffer, or deserve to be benefitted in a quite specific way, viz., by being offered the opportunity to morally reform themselves.² Because of this disagreement, I will take the specifically retributivist thesis about sentencing to be the endorsement of the commensurability thesis, combined with the view that a wrongdoer's just deserts consist essentially in the imposition of hard treatment or suffering. Thus the distinctive retributivist thesis about sentencing guidelines is that such rules are morally justified if and only if, and because, they assign just the amount and kind of suffering that the wrongdoer morally deserves.³

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