

Retribution

Edited by

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Retribution

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Deterrence

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Series Preface

Crime and punishment grip the imagination and concerns of both the public and policymakers raising several serious challenges. Can punishment be justified? If so, then what purpose (or purposes) does it have? Which practices best cohere with this purpose(s)? These and many other questions are addressed with rigour and insight in this new book series.

Crime and Punishment: Critical Essays in Legal Philosophy comprises an authoritative and comprehensive set of five volumes reprinting the most influential essays by leading international figures engaged in this field. Each volume is organized thematically with a general introduction to provide an accessible launching pad to the latest research.

The first volume is on *Retribution*. This approach to punishment is widely held to be the oldest such view. Retributivists traditionally claim that punishment must be deserved and proportionate to what is deserved. This volume of essays covers several topics, including desert, proportionality, retributivist emotions, capital punishment and mercy. The second volume is a collection of essays about what is often regarded as the second oldest theory of punishment: *Deterrence*. This is the idea that punishment is justified by its effectiveness at deterring potential future offenders from committing crime. Topics covered include deterrence and crime reduction, incapacitation and the death penalty.

The next two volumes focus on particular issues. The third volume examines the latest research into *Shame Punishment*. Shame punishments are understood in multiple ways, such as an attempt to improve crime reduction through deterrence or as an effort at moral education. This volume covers topics such as shame and desert, shaming and dignity, shame and deterrence, and shame and restorative justice. The fourth volume is *Juvenile Offending* and it considers whether we should punish offenders differently because of their age as well as how this might be best achieved. Topics included are risk factors, the justification of punishing youth differently from adults and restorative justice for juvenile offenders.

The final fifth volume is about punishment as imprisonment: *Sentencing*. This volume examines sentencing in theory and practice, the Model Penal Code and use of sentencing guidelines, punitive restoration and the unified theory of punishment and alternatives to sentencing.

This *Crime and Punishment: Critical Essays in Legal Philosophy* book series covers exciting and innovative contemporary work by the leading international figures in the field today writing on retribution, deterrence, shame punishment, youth offending and sentencing. Each essay has been carefully selected for inclusion to ensure the seminal work available in English is brought together in one series for easy reference by students, practitioners, scholars and the general public.

THOM BROOKS

Series Editor

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Introduction

Introduction

Retribution is perhaps the most popular contemporary theory about punishment. It is often held as the oldest, even most venerable, penal theory with its strong ancient roots. Retribution is understood in many different ways, but the standard view of retribution is that punishment is justified where it is deserved and an offender should be punished in proportion to his desert. Retribution has enjoyed enduring appeal and is the subject of a revival of interest in recent years. This book brings together the leading work on retribution from the dominant international figures in the field. Retributivism is examined from various critical perspectives, including its diversity, relation with desert, the link between desert and proportionality, retributivist emotions and the idea of mercy.

This introduction will consider each of these topics with primary reference to the important contributions to our thinking about retribution carefully selected for inclusion in this collection. This survey of leading work will highlight the key debates and issues pertaining to contemporary research about retribution.

Retributions

The *standard view* of retribution already noted contains two central claims. The first is that punishment is justified where it is deserved. We may only punish those who have performed a crime. This is because a criminal has punishable *desert*. Therefore, we cannot punish the innocent because they lack punishable desert for the reason they have not engaged in crime. This idea that punishment can only be justified because of desert has had a powerful grip on much theorizing about punishment. The second claim of the *standard view* of retribution is that punishment should be distributed in *proportion* to what is deserved.

This standard view is also called *positive retributivism*. Desert both justifies the decision to punish and shapes the amount of punishment to be distributed. A criminal merits punishment because it is deserved and to the degree it is deserved. Or we might say that, for the standard view of retribution, desert is necessary and sufficient for punishment. Desert must be present to justify punishment and the presence of desert is enough to inform the amount of punishment. The standard view is held by classic retributivists since antiquity with notable adherents including Immanuel Kant (see Brooks, 2003).

It is unsurprising that retributivism has become understood in many different ways over the centuries. Instead of one 'retribution', it is perhaps more accurate to speak of several 'retributivisms'. The differences between competing views about retribution largely centre

on how we understand desert and its relation to proportionality. Retributions are also theories about desert and proportionality although each may understand these concepts differently.¹

The first philosopher to acknowledge the widespread diversity of retributions is John Cottingham (Chapter 1) in his famous essay 'Varieties of Retribution'. Cottingham identifies nine different theories that have been paraded as 'retribution'. One such theory he calls the 'repayment' theory whereby retribution is understood as the repayment of a debt. The offender owes us a debt arising from his crime that should be repaid through punishment. The amount of punishment is proportional to the debt owed. This theory addresses retribution's etymological roots as repayment. It also relates to our ordinary language use of the term 'retributivist punishment' in saying that a punished offender has not merely received punishment, but he or she has 'repaid a debt'.

A second theory about retribution identified by Cottingham is what he calls the 'fair play' theory about retribution. The argument is that law-abiding citizens play fairly in adhering to agreed rules. The offender has not played fair in performing a crime and unfairly enjoys some advantage he should not have received. Retributivism as fair play demands he deserves punishment for his unfair act and in proportion to its unfairness.

These different understandings about retribution demonstrate that many have been too cavalier when speaking about 'retribution' as any particular view. While every retributivist theory will accept the core of the standard view (punishment must be deserved and in proportion to desert), desert and proportionality are understood in different ways that must be identified and captured if we are to discuss them with accuracy.

Leo Zaibert (Chapter 2) develops these insights further in his own 'taxonomy' of retributivism. One further contribution concerns whether retribution justifies punishments that are overly harsh. Most, but not all, retributivists justify practices such as capital punishment. This has been understood as evidence that retributivism should be rejected because it permits the use of punishments we might find disproportionate and perhaps even inhumane. Zaibert argues that this criticism may rest on a mistake. Retributivism may warrant punishments that some might dislike, but can any theory about *retributivism* justify punishment *not* in proportion to desert? Critics should either show that a retributivist is mistaken about punishable desert or admit his objection rests on some other basis relating to another theory of punishment. Retributivism, if coherent, cannot justify punishment more harsh than deserved.

A second contribution by Zaibert is his insistence that the motivation behind punishment is connected with our retributivist emotions. We punish offenders because it is deserved, but it is also an activity that punishers, for Zaibert, 'feel' is required (p. 30). Victims find justice and satisfaction in seeing their offenders punished. This is an important dimension often overlooked.

Alan Brudner (Chapter 3) argues that we can improve our understanding about retribution through a more formalistic model that is freedom-based. He is correct to reject the view that

¹ We have already considered the idea of positive retributivism. Some argue that *negative* retributivism is a theory of retribution. Positive retributivists argue that desert is necessary and sufficient for punishment. Negative retributivists disagree. They argue that desert is necessary, but not sufficient. We may only punish the deserving, but the amount of punishment should be in proportion to some other non-desert factor such as general deterrence. Negative retributivism fails to acknowledge a necessary link between desert and proportionality and so perhaps is best understood as a kind of 'mixed' theory of punishment rather than as a form of retributivist punishment (see Brooks, 2012: ch. 5).

all harms are crimes. Punishment is not about responding to every harm, but a more narrow conception. This is because not all kinds of harm are punishable. One example is prize fighters in a boxing ring. Each does physically harm the other although this is not criminal. One reason for this is because their activity is consensual. Or other kinds of harm – such as the failure to tell the truth – may not be criminal in the case of our telling a white lie so that a friend won't yet know about the surprise birthday party for her.

Punishment cannot be for harm, but for something more specific. Brudner argues for the view that we should focus not on physical harm, but harm to the autonomy of others. Infringements of autonomy are activities that lack consent and interfere with our freedom as well as equal dignity. Autonomy grounds many of our most fundamental rights to life, liberty and respect. Interfering with another's autonomy is an infringement of one's rights. Brudner argues criminals deserve punishment where they have interfered with the autonomy of others.

He calls this view *legal retributivism*. This is the position that punishment is deserved where a crime has been committed. Legal retributivism can be contrasted with *moral retributivism*. The latter is the view that punishment is deserved because an offender has done something immoral. This distinction is illuminating because it exposes a central problem for many retributivists. Most argue that criminals deserve punishment because they are morally responsible for some immoral activity. At first glance, this maps on well with many crimes that spring to mind. Murder, theft and rape are all actions any minimally satisfactory view about crime will account for and all breach the standards of any compelling moral theory. The problem for most retributivists is that no one argues that *every* act of immorality can or should deserve punishment. White lies may entail broken promises, but no one claims they are punishable. If not all immoral acts are punishable, then we must support a theory that does not justify punishment in relation to immorality because such a view will be incomplete. Legal retributivism overcomes this problem by focusing on illegality and not immorality.

Cottingham, Zaibert and Brudner reveal crucial insights into the diversity of retributions. However, their contributions are not insulated from criticism and further development. Thom Brooks (Chapter 4) extends much deeper our consideration of fundamental ideas about retribution. Retribution occupies a curious position in penal thought. While most accept its basic tenets about desert and proportionality, the debates among retributivists about how we should understand desert and proportionality are not a debate for retributivists alone.

Moreover, the idea that we should punish only the deserving to the degree deserved runs into serious problems at close inspection. Retribution as a debt to repay has a strong metaphorical plausibility: again, we often speak of post-imprisonment offenders having paid 'their debt'. Nonetheless, few might agree that crimes become annulled or cancelled through metaphorical debt repayment through time in prison. No repaid debt might bring a murdered loved one back to life or restore a treasured heirloom subject to criminal damage back to its original lustre. Nor is retribution as 'fair play' any more compelling: it would be incorrect to believe any societal unfairness is *only* the product of crime or that the only unfairness we should address is produced by crime and not other causes. Brooks exposes the many problems in retributivism lurking under the surface and shows the rich, diverse – if problematic – tent that retribution has become over the years.

Retribution and Desert

Retribution is linked intimately with desert. All retributivists argue that an offender must deserve punishment for it to be justified. Desert is satisfied not merely by breaking the law for most retributivists: instead, desert requires some degree of moral responsibility. Offenders possess desert when they are *responsible* for committing some crime. One consequence is that most retributivists, unsurprisingly, oppose strict liability offences. These are crimes whereby the standard of responsibility is causal and not moral. For example, many traffic offences are strict liability offences: the crime is committed when a car is driven above a speed limit or parked in an illegal space irrespective of whether or not appropriate signs were found and the like.

If moral responsibility should matter for desert, then criminal responsibility must be understood in context. One context includes any mitigating or aggravating factors that may be relevant. Jeffrie G. Murphy (Chapter 5) argues that retributivism takes the individual more seriously than competing theories of punishment. This is because retributivism's insistence upon the centrality of desert gives priority to individual moral responsibility for the justification of punishment. One implication is that, if social conditions were such that individual moral responsibility were diminished or undermined, offenders might be *less* deserving for these social factors beyond their individual control. If we should take individual desert seriously, then we must also take seriously the possible effects of social conditions on it.

David Dolinko (Chapter 7) raises some serious questions about retributivism and desert. Retributivists argue that offenders deserve punishment, but is this mere prejudice parading as principle? Dolinko claims retribution has been used and too often abused to expand the use of capital punishment and increase the severity of punishment. Retributivists might argue that these moves are motivated by the principled pursuit of justice, but Dolinko raises doubts about whether such a view has more drawbacks than benefits and perhaps serves little, if any, purpose.

This view is developed further by Douglas N. Husak (Chapter 8) who asks why should we punish the deserving? While many claim the central importance of desert for the justification of punishment, the facts remain that most offenders are never punished and those apprehended usually accept lower penal tariffs for submitting an early guilty plea. The idea that the guilty should be punished to the degree they deserved is, perhaps surprisingly, starkly different from the legal reality.

Another relevant factor is the distribution of punishment. Stephen Nathanson (Chapter 6) examines the use of capital punishment in the United States. There is now convincing evidence that the likelihood of being condemned to death row is greater for some than others depending upon the race of the defendant (and of the murder victim). Nathanson claims that retributivists should reject the justifiability of capital punishment in these circumstances. This is true even if we believe murderers can deserve capital punishment and this person is guilty, in fact. This is because retributivism, for Nathanson, requires a just system and the current system is structurally unjust. If only some, but not all, deserving murderers are condemned to death and this difference is explained because of racial discrimination in some form, then none should be so condemned until such discrimination is ended.

Thom Brooks (Chapter 10) argues that this is not a compelling argument for retributivists. If the problem is that some, but not all, deserving murderers receive their just deserts, then the

retributivist solution cannot be to claim that no deserving murderer should be condemned. The former situation is an injustice enough for retributivists, but the latter would be intolerable as none would receive their just deserts. Instead, the solution would be to make a greater effort to ensure more deserving murderers receive the punishment they deserve.

Brooks then offers a new retributivist argument against capital punishment and one that retributivists might accept. Retributivists give priority to desert. The problem for retributivists is epistemological: even if we believed that murderers deserved death, our judgement that a person is a murderer is subject to error. The fact we might be mistaken is not a reason to never punish. This is because there is time within the bounds of a normal life to discover and make some attempt to account for any errors made. The problem with the death penalty is that any judgement is final on execution. And the problem of certainty about desert is greater than often recognized. The evidence is not so much past cases of condemned innocent people although there are plenty of such cases; but, instead, the fact – noted in *Quinones* – that despite our most fair trial procedures, unanimous jury verdicts and spent judicial appeals some scientific technique, such as DNA testing, may reveal these safeguards have all failed. Retributivists should reject capital punishment if they take desert seriously because desert can rarely, if ever, be confirmed for certain.

Much of the discussion about desert concerns its moral value. Paul H. Robinson (Chapter 9) presents a compelling argument that desert can be understood in different ways, such as vengeful or deontological, which speak to metaphysical conceptions about the values people assign different kinds of activity. These claims can be difficult, if impossible, to reconcile. Instead, Robinson argues for the idea of *empirical* desert: a shared conception about desert that we develop together through constructive dialogue. This is a view about desert that can overcome our differences and provide a more evidence-based consideration about retributivist desert that rejects the metaphysical in favour of the evidential. It might be called *naturalized* desert to highlight its distinctively empirical nature.

Proportionality

Retribution is linked with desert, but also proportionality. The standard view is that desert helps us determine the justification and amount of punishment: an offender must possess desert and his punishment is proportionate to how deserving the offender is for his crime. The standard way this has been considered is to argue that the more ‘evil’ or ‘wicked’ the crime, the greater its punishment. Murderers and thieves both perform evil acts against others, but the murderers perpetrate greater evil and so deserve more severe punishment. One result is that different theorists will defend opposing views about how crimes should be punished because of the particular moral theories each supports.

One famous piece about proportionality and retribution is by Michael Davis (Chapter 11). He argues that it may be possible to determine desert and proportionality in a novel way that avoids punishing actions we do not wish to criminalize and without punishing crimes we want to include too severely. Davis argues for a three-part procedure. First, we list actions and retain for our list those activities that we wish to criminalize. If we did not wish to criminalize witchcraft or recreational drug use, then we would remove them from our list. We then rank them in order from least to most troublesome. Second, we list possible punishments and remove any we would not want to include. So if we oppose torturing criminals or executing

offenders, then these possible punishments would be removed from our list. We then rank them in order from least to most severe. The third step is to connect the crime and punishment at the top, then the crime and punishment beneath them and so on until all crimes are linked with a punishment. Following this procedure, we can provide a list of crimes we wish to punish and punishments we would be open to use while having a framework for configuring their proportionality.

This idea of ‘proportional retributivism’ is further defended by Jeffrey H. Reiman (Chapter 12):

Proportional retributivism, then, in requiring that the worst crime be punished by the society’s worst punishment and so on, could be understood as translating the offender’s just desert into its nearest equivalent in *the society’s* table of morally acceptable punishments (p. 295, emphasis added)

While this approach is groundbreaking, it remains unclear how convincing it is for retributivists because the link between crime and punishment is not intrinsic, but external: that a punishment is ‘proportionate’ on Davis’ and Reiman’s view is that it so happens to correspond (see Brooks, Chapter 4, pp. 100–101). For retributivists, punishments are proportionate to their crimes in an interlinked scale that proportional retributivism might be thought to neglect.

Retributivist Emotions

Retributivist desert and proportionality can be understood in several different ways already considered. One further idea is that retribution may be justified as part of our moral emotions. Emotions are important, even central, elements of any human life. Christopher Bennett (Chapter 13) argues that we have retributivist emotions: part of the justification of punishment arises from punishment being an appropriate response to the emotions we have in relation to a crime. So we, the victim, *feel* and *experience* an emotional reaction to crime that speaks to our sense of hurt and desire that consequences are visited upon the criminal, for example.

These emotions are not merely vindictive or revengeful in seeking to cause hurt for pain that was felt, but they are reactive and linked to a criminal cause. Retributivism speaks to this truth for many people that those who perform wrongs deserve punishment. Punishment is justified for law-breakers because it not only feels appropriate, but it is justice.

One concern might be that many of us experience hurt and loss in different, sometimes radically different, ways. Is justice in the eye of its beholder? Can such a perspective be justified where like cases might be treated unlike? The idea of natural justice and morality via our emotions may often assume a given that most, if not all, people share in some deep agreement on these issues. Any disagreement can be overcome by all parties reflecting more centrally on the ways our emotions should inform our moral thinking. The idea that moral sentiments have an important place in our considerations about justice is longstanding, such as Plato’s allegory of the charioteer hovering above the Earth driven by white and black horses representing reason and our emotions. Or there is David Hume’s claim that we have natural and artificial sentiments that inform our moral judgements. Natural sentiments are shared by all in virtue of our common humanity and artificial sentiments are learned. Both act broadly similarly on us. For example, few of us could look passively at someone being violently attacked: we not only *know* this is wrong, but we can *feel* its wrongness as our

heart races and we react. The question for theories about retributivist emotions is whether the reactions we feel are a product of natural justice or instead a learned behaviour. And, if the latter, whether our reactions are those of some deep sense of justice or a mere learned perpetration of customary disapprobation.

Michael Moore (Chapter 14) argues for the centrality of blame in retributivism. His view is similar in some respects with Bennett's: we hold retributivist beliefs about justice that we can ascertain through our intuitive responses to how we would react and feel about different scenarios. These beliefs about the justice of retribution should be used to help design penal institutions to realize retributivist justice. Retributivism has a moral worth known through emotional reactions. Retribution is neither primitive nor barbaric, but merely human.

Neither Bennett nor Moore claim any emotions should count in our moral judgement-making. But, likewise, few claim any reason should count either. For example, we might exclude non-public reasons or reasons that fail to meet some other threshold. Some emotions may be problematic, but not all are so and there may be something compelling about their use in thinking about punishment. Nonetheless, then we must take some care to ensure that our criminal law reflects our moral judgements. This is highly doubtful as the criminal law is not strongly consistent with any specific moral theory, not least any such theory arising from moral sentiments. The fact that the criminal law is not as it should be is not necessarily evidence against reforming the law, but any such reform is likely to be thoroughgoing and substantial.

Retribution and Mercy

The final part of this collection considers the relationship between retribution and mercy. These ideas may appear to occupy polar opposite positions: to be merciful is to retreat from retributivism. Martha C. Nussbaum (Chapter 15) closely examines what it means to offer an equitable judgement in historical and contemporary theorizing. Nussbaum convincingly argues that retribution may often neglect the particularity of offenders, such as questions about character and motive: 'Getting the right life and getting the life right are not two separate issues but two aspects of a single process of appropriate scrutiny' (p. 396). Equity may require mercy to ensure a more perfect fit between what is deserved by the offender and the punishment selected. The full picture is a rich tapestry that weaves together elements of moral sentiments and the importance of context in our consideration of desert and proportionality. Retribution and mercy are not opposites, but rather interlinked and perhaps inseparable. Nor is this view recent or obscure, but one with a venerable history going back at least as far as the Roman Stoics.

Conclusion

Retribution is the oldest theory of punishment. Its longevity is testament to its continuing popularity. Retributivist ideas of desert and proportionality are not mere subjects of debate for retributivists, but for other theories of punishment as well. Perhaps it is no stretch to say that these days we must either defend a view about retribution or argue why we do not. It is either the view defended or opposed and never to be ignored.

Retributivism is also a broad tent encompassing a wide range of theories and perspectives. This collection brings together the leading critical work on retribution from contemporary exponents and most powerful opponents. These essays seek to deepen our collective understanding of this important view about punishment to shed greater light on future possibilities.

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