

BEYOND RETRIBUTION¹

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Retribution is both widely praised and misunderstood. Politicians rush to declare their support for criminals receiving “retribution” and most especially in high profile cases commanding public attention. The appeal of retribution is the idea that it best represents penal justice. This appeal arises from the commonly held belief that retributive punishment is more strict and severe than other theories of punishment. There is broad appeal in appearing pro-retribution and, thus, “tough on crime” where anything less is perceived as too lenient or weak. Unsurprisingly, academic studies have found that politicians always poll best when appearing tough on crime and even amongst voters who would prefer an alternative approach.

Retribution is also widely misunderstood. Its central ideas are that a person must be guilty in order to be punished and that punishment is set in proportion to the gravity of the crime.

These ideas are not unique to retribution. Proponents of the rehabilitation of offenders likewise endorse the ideas of desert and proportionality: rehabilitation is only justified where a person has been convicted for a crime and there is a proportional link between crime and treatment here as well. Similarly, deterrence theories often stipulate the need for a person to be convicted for a crime prior to sentencing. This is because the punishment of innocent people in order to deter would be offenders would be self-defeating. One reason is because potential offenders might not be deterred if they learned that there is no link between crimes and their punishments: for deterrence to work most effectively, potential criminals must foresee the likelihood of their conviction and imprisonment from criminal activity. Similarly,

¹ Forthcoming in *Think* (2013)

deterrence also links the proportional gravity of crimes with punishments. Retribution, rehabilitation, and deterrence are three different approaches to punishment, but each includes the idea that criminals must be convicted prior to punishment and punishments should be set in proportion to crimes. There is nothing especially unique about the ideas of desert and proportionality for retribution. Alternative theories about punishment may incorporate these ideas, too.²

There is also nothing special about the kinds and range of punishments that retribution might justify. For example, retribution is not the only view that might claim a criminal should be sentenced to death for a crime. Likewise, other views can make the same claims: deterrence proponents might argue that execution is warranted and proportional on the grounds of supporting general deterrence, for example. Therefore, the kinds and range of punishments that retribution may justify are not unique to it either and open to endorsement by alternative penal theories, too. If the appeal of retribution is thought to lie in its more “harsh” punishments, then we can now see that this difference is illusory. Retribution does not endorse any unique range of punishments. Nor is it alone open to endorsing the most severe punishments, such as the death penalty.

A unique feature about retribution is that it rests on an impractical foundation. While there is nothing special about retribution endorsing some view of desert and proportionality, there is something special and troubling about how retribution understands their value. Retribution offers a moral view of crime and punishment. We possess punishable desert where we perform some deep moral wrong and this wrong is criminal: the more immoral our criminal act, the more severe our retributivist punishment. This view of crime and punishment has

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broad appeal: it can be thought to “give criminals what they deserve” but this view suffers from two major problems.

The first problem is that this view is impractical. One classic retributivist, Immanuel Kant, recognizes this problem where he argues that “the real morality of our actions...remains entirely hidden to us” and, as a result, “no perfectly just judgements can be passed.”³ If retribution is correct to link moral wrongs with punishable crimes, the problem is that what often *makes* a crime punishable will be its moral wrongness and this is difficult to determine. Imagine the case of Alex and Jamie. Alex is found dead and Jamie holds the knife used to kill Alex. The empirical facts do not always easily recommend any one moral assessment: we must engage in moral reconstruction and deductive guesswork to determine whether or not Jamie acted in justified self-defense or intentionally murdered Alex. This is one way in which retribution appears impractical.

A second problem is that the link between crimes and moral wrongness is tenuous. This is less true where there is a broad consensus on the wrongness and criminality of murder, rape, and theft. The link is more tenuous with so-called “victimless crimes” often thought to include drug offenses, traffic offenses, and sometimes prostitution amongst other crimes. These activities may be criminalized largely on grounds of pragmatism: we require one way streets where the roads do not accommodate two lanes and so we must stipulate which single direction traffic may flow. These crimes pose a problem for retribution. Retribution supports the criminalization and punishment of moral wrongs, but it has real difficulty in applying to cases where the existence of moral wrongs is contested or perhaps absent. Retribution suffers from the related difficulty that not all moral wrongs are criminal. Most agree on the

³ Immanuel Kant, *Critique of Pure Reason*, trans. Norman Kemp Smith. : 475n [Ak. A552/B580].

immorality of lying in most contexts, but reject criminalizing every white lie. Together, the challenge for retribution is that not all crimes are moral wrongs and not all moral wrongs are crimes. Retribution is both impractical and based upon a tenuous link between morality and criminality.

We should draw a clear lesson from these considerations and move beyond retribution.

Retribution enjoys an unwarranted appeal from the public and its politicians. Moreover, retribution is both impractical and perhaps incoherent. We need not reject the importance of morality for criminal justice nor should we reject the link between desert and proportionality. Nevertheless, we can reject the way retribution has understood these ideas in defense of a more plausible and compelling alternative.