

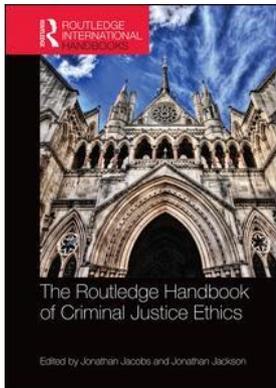
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Last words on retribution

Jeffrie G. Murphy

Mourn no more, children. Those to whom
the night of earth gives benediction
should not be mourned. Retribution comes.
Sophocles, *Oedipus at Colonus*

Introduction

For the past 45 years or so I have drawn upon, with varying degrees of enthusiasm, a retributive account of punishment—an account that makes the concept of *desert* central in the justification of punishment. I have been drawn to this account because of my belief that, at its best, it is based on the Kantian idea of *human dignity*. One of the ways that we respect the dignity of persons is through holding them responsible and sometimes resenting or even punishing them for what they do instead of insulting them by regarding them as sick or helpless victims of their fixed natures or social circumstances. (Of course, if conclusive evidence establishes that they are indeed such victims—delusional psychotics, for example—then we should not hold them responsible, but that should never be our default position.) I must admit, however, that I have not always been as clear or consistent on what I mean by the concept of retributive desert as I perhaps should have been. I have, for example, changed my mind about the nature of retributive desert several times—sometimes, influenced by Herbert Morris, meaning a debt owed in fairness by the criminal to the law abiding, at other times meaning deep evil of character, what Kant called “inner wickedness” (*inneren Bösigkeit*).¹ I have highly qualified my commitment to both of those meanings and have recently identified and articulated six different conceptions of retributive desert—all with some merit in my view (2012: Chapter 6). I tend to write what I believe at the time of writing a particular essay and have not paid very much attention to checking if what I say at that time is consistent with what I have said earlier. I may thereby have contributed, alas, to the belief of many that the very idea of retributive desert is inherently vague—too much so to play a significant role in deciding which people, if any, may legitimately be punished. Ultimately we simply are the people that we are, however, and I have never had either the talent or (because of limitations of talent) the inclination to develop a grand overarching career defining philosophical theory of the kind that we can find in the great geniuses of twentieth-century moral, political, and legal philosophy—John Rawls and Ronald Dworkin, for example.

In the present essay I will not worry much about what I have said before, but I will seek to be as clear as I can be about the current view that I will here put forward—put forward with the clear understanding that my commitments to aspects of it are tentative and that I may at some

future point be persuaded to change my mind about these aspects. When I speak of retributive desert in this essay I will mean by this the use in justifying punishment of the idea of *moral evil*—of act, mental state, motive, or character.

Problems of clarity, of course, are not the only problems facing retributivism. In recent years I have become alarmed at the degree to which the language of retributive desert has been coopted by the forces of darkness in order to claim that absurdly long prison sentences and unspeakably horrendous treatment of prisoners is simply to give criminals exactly what they deserve. And I have also come to realize that the high-sounding rhetoric of just deserts often functions, as Nietzsche claimed, as a cover (perhaps unconscious) for the base passion that he called *ressentiment*—an unwholesome brew of malice, spite, envy, and cruelty (Murphy 2012: Chapters 2 and 4). Surely these problems with at least the language of retribution or just deserts must give us pause before we continue to use that language—might even make us skeptical about the underlying values themselves.

In spite of these worries, however, I am not yet prepared to give up all of my retributive commitments and still wish to think in terms of what in an earlier publication I called “the two faces of retribution”—one the face that respects the dignity of responsible individuals and one the face that tempts us to cruelty (2012: Chapter 4). I want to retain the good face and will even argue that retributive values are themselves, when properly understood, sometimes the best way to weaken the temptations posed by the bad face.

In the remainder of this essay I will, in the next two sections, identify and dismiss two confusions that often tempt people to reject retributivism. In the final section I will state and defend what I regard as the strengths of retributivism and also identify what I regard as the limitations of this value in the justification of punishment. I should note, by the way, that when I use the phrase “Last words” in the title of this essay I do not mean to suggest that there will be nothing more worth saying about retribution once my essay has been published. I mean something much more personal—namely, that these will almost surely be *my* last words on the topic. I am getting pretty old and—to quote Stravinsky when he was asked why he had stopped composing—it is possible that “my muse has gone out on a wildcat strike”—at least with respect to the issues of the present essay. Some, of course, may think that even this one is one too many and that I should have stopped some time ago. I leave that for others to judge.

Retribution and punishment

I have used as an epigraph for this essay a passage from Sophocles’ final play, *Oedipus at Colonus*—a passage that seems to use the word “retribution” in a way that is increasingly uncommon but should not be ignored. As one knows from the play *Oedipus the King*, Oedipus was declared a polluted sinner and driven into exile because he had killed his father and had sexual relations with his mother. It made no difference that he had not known or indeed had no way of knowing that the man he killed in self-defense on the road to Thebes was his father or that the woman whom he married after his arrival in Thebes and with whom he fathered children was his mother. The system of liability was what we would now call a strict or absolute liability system in which mental states such as knowledge or intention or foresight of consequences played no role in determining the way in which he deserved to be regarded and treated. Oedipus so internalized the values of this grotesquely unjust system that he regarded himself as evil, accepted exile willingly, and even blinded himself so that he would not have to see his vile reflection in a pool of water.

In *Oedipus at Colonus*, Oedipus is now an old man who has spent many years as an exile—traveling in disgrace throughout the land, accompanied and cared for by his daughters Antigone

and Ismene. He has given much thought to the punishment that he has endured and has reached the conclusion that it was totally unjust—should not have been imposed by Creon (his successor as ruler of Thebes) and should not have been internalized by him since what he did was in no sense his fault. He says “the law acquits me as innocent of any wrongdoing in what I have done” and, instead of being repentant and apologetic when visited by his son, Eteocles, and Creon (who now want him to return to Thebes since he has, unbeknownst to him, become a venerated individual who could bring blessings to Thebes) he angrily rebukes them and sends them away. He is then, as the play closes, swept up by the gods in a kind of miraculous divine intervention that confirms his status as a blessed individual to be venerated and not shunned—presumably because, by seeing the injustice of the system under which he was condemned but enduring it with patience when he still believed it was just, he has attained a state of wisdom—has “suffered unto truth.” And how is all this described? In the Fitzgerald translation it is described as “retribution” (*nemesis* in the Greek). Since what is happening to him is surely not punishment (but more like a reward) the word “retribution” here must mean, not “punishment,” but simply “being treated as he *deserves* to be treated” or “getting his due as a matter of justice.” So let us keep that meaning of “retribution” in mind during what follows in this essay.²

Why is it important to keep this in mind? Because it is often mistakenly thought that those who embrace a retributive justification of punishment must always be in enthusiastic favor of punishment—and probably very harsh punishment at that. But this is a mistake. Retributivists believe in punishment only when it is deserved and will always oppose it when it is not deserved. Many people who condemn retributivism seem to remember only the application of the theory to support punishment and forget the equally important application of the theory to condemn punishment when it is unjust—condemning any punishment at all for those who do not deserve it and condemning punishment in excess of what is deserved for those who deserve punishment to some lesser degree. As I have argued elsewhere, the out of control nature of excessive punishments and horrendous prison conditions in the United States cry out for rejection on retributive grounds, for these horrors are affronts to human dignity and far beyond what any person could reasonably be said to deserve—whatever their possible deterrence value, which may be considerable.³

As I understand the retributive theory of punishment at its best, it is not a foundational primitive (the claim that we can see as self-evident that the deserving should be punished) but a view about punishment that must be located within broader concerns about justice, fairness, and desert (both punitive and non-punitive).⁴

I think that the above point is often missed because many critics of retributivism (and some of its defenders) think that desert of punishment always requires punishment. Carlos Nino and T. M. Scanlon, for example, regard it as a serious objection to retributivism that it will never allow consequential considerations to override considerations of retributive desert in cases in which not to do this seems just plain wrong (Nino 1996 and Scanlon 1999). Consider Chile, for example, after Pinochet left office. Although no longer in office he retained considerable control of the military and might have used that to topple the new and fragile democratic regime if he and his officers were put on trial and punished for the atrocities that were common under his rule. It seems correct that such punishment should be avoided if necessary to preserve democratic institutions, and if a retributivist cannot see this necessity because of a belief that those who commit atrocities deserve to be punished, this surely—according to Nino and Scanlon—reveals a great and perhaps fatal flaw in a retributive theory of punishment.

But must a retributivist reject the necessity? I think not. Even Kant, often put forward as a paradigm retributivist, argued that there can be some circumstances in which punishment, although deserved, should be avoided (1996: 475).⁵ So, in my view, it would simply be a mistake

to regard the following as two defining claims of retributivism: (1) Desert is a *necessary condition* for justified punishment and (2) Desert is a *sufficient condition* for justified punishment.

I am inclined to accept (1) as it stands. However, although some retributivists might assert (2), I would not. I would instead replace (2) above with this: Desert is always a *very strong reason* that favors punishment and, other things being equal, the punishment that is deserved should be inflicted. But other things are not always equal since not all evils are part of the legitimate concern of the liberal state (a point I will discuss in a bit more detail later) and since consequences of sufficient gravity sometimes require that certain principles—including desert principles—be overridden. As I have noted above, for example, I believe that much of the treatment given prisoners in the United States is so inhumane that it is wildly beyond what any human being deserves. Does this mean that I believe that the doors of all the prisons in America should immediately be opened and everyone in them, including the most violent and dangerous, be allowed to run free and prey on the innocent? No. (I might, however, favor letting out many non-violent offenders for these reasons.) Also, I would support *not* punishing those who deserve to be punished if so doing would, as it probably would have in Chile and South Africa, cause serious threat of the collapse of democratic government and a return to tyranny or something of a similarly horrendous nature. Absent such threats, however, I would favor punishing at least the worst of them (the torturers, rapists, and murderers and those in power who instructed them to act in this way) and might even favor punishing them with *ex post facto* legislation if necessary simply because these morally evil thugs deserve it. This might cause tension with the rule of law and respect for law, however, and that concern might regrettably trump the retributive value of retroactive punishment. On the other hand, when citizens see evil get what is deserved through very narrow and constrained retroactive law, this might strengthen (particularly among those who have been victims of atrocity) citizens' respect for law. This is, of course, a matter for empirical investigation and cannot be resolved merely by philosophical reflection.

In saying the above, however, I would insist that we should stay vividly aware that—when desert values are being trumped by consequential considerations—we are not simply doing what is right (end of story) but are rather, out of a regrettable necessity, *violating an important principle* if we continue to punish in excess of desert or do not punish those who are deserving. This is a choice between evils, and in such a choice the evil that is left in place (because one chose to avoid an even greater evil) *remains an evil*. A retributive outlook preserves this sense of something wrong having regrettably been necessary in a way that a consequential theory would not.

Of course, as I have noted earlier and have argued at length elsewhere, the language of retribution and desert has an unfortunate tendency to engage—as Nietzsche argued—some very base passions—in particular the one he called *ressentiment*. And this language remains susceptible to similar corruption in our own day, as when a couple of years ago one of my criminal law students said in class that those young people who are raped in prison are just getting what they deserve for breaking the law. And more recently, in a CNN interview, some of my fellow citizens expressed the view that a recent execution in Arizona that took over two hours and seemed to cause the victim non-trivial pain was deserved—one even saying that the convicted man deserved to take longer to die in pain. But this is not a fair charge against retribution properly understood—just as it is not a fair charge against utilitarianism that it must, in all its forms, approve of punishing the innocent.

The best argument against utilitarianism and the punishment of the innocent, by the way, is not that the theory cannot oppose such punishment but rather that it opposes it for the *wrong reason*. The standard way in which utilitarians tend to oppose punishment of the innocent is to argue that the principle of utility (promote the greatest good for the greatest number) is to be applied, not to every act to be evaluated, but rather to *social rules* to be evaluated—rules that

tell us which acts are permissible and which are impermissible. It is then argued that a rule that allowed the intentional punishment of the innocent would not promote utility because it would leave everyone nervous that he might be selected for sacrifice to the general welfare. It is not difficult, however, to imagine how one might have a rule allowing intentional punishment of the innocent that would not have such adverse consequences on the general welfare—for example, a rule that would limit such punishment to an easily identified minority of which the majority would not have to fear membership. And such a rule could have, just as a similarly restricted rule allowing slavery could have, considerable general utility. But surely intentionally punishing even one innocent person would still be wrong—as would enslaving even one person. Why? Because that person would not *deserve* it—not because punishing him would make other people twitchy. To act otherwise is simply not to accord the individual the equal concern and respect that is owed to his dignity as a person. So the best way to oppose the utilitarian “solution” to the problem of punishing the innocent is one based on the concept of desert—a concept that is itself based on the idea of the dignity of each individual person and the respect that is owed to this dignity.

Punishment and pain

The philosopher T. M. Scanlon (whom I have already discussed above) and others have condemned a retributive account of punishment because of a belief that those who favor punishment on such grounds must favor causing pain or hard treatment—something that these critics believe can never be justified by the claim that it is deserved. In his essay “Giving Desert Its Due” (Scanlon 2013) Scanlon makes the following claims:

I regard as morally repugnant [the idea] that it is good that people who have done wrong should suffer. (102)⁶

The infliction of pain is part of the purpose of acts of punishment. (103)

It is never a good thing, morally speaking, for anyone to suffer, no matter what they have done. (104)

Fines, imprisonment and other forms of hard treatment are not justifiable unless they are necessary and effective means to protect citizens against serious wrongs. (103)

There are two serious problems with this critique of retribution: (1) It is simply *not true* that all retributivists must believe that the criminal wrongdoer deserves either pain or hard treatment. (2) In considering those retributivists who might consider inflicting some degree of pain as appropriate because deserved, it is not clear (at least to me) that it is always wrong to favor some degree of pain or unpleasantness for wrongdoers. Scanlon simply assumes this, gives no argument for it, and thus seems to beg some very important questions on the issue under discussion. I also find it odd that he does not discuss at all the well-known and sophisticated arguments given by those who defend retributive views—Herbert Morris (1976), Herbert Fingarette (1977), Michael Moore (1987, 1997), and Jean Hampton (1991–1992), for example.⁷

I do not wish to be unfairly critical here, however, so let me say this in at least partial defense of Scanlon’s omissions: Scanlon is a very important philosopher who has made contributions of lasting value to moral, legal, and political philosophy. His work on freedom of expression, for example, forced me to modify my own views on this important topic. He has written very little on punishment, however, and many philosophers might well like to know his views on this topic *just because they are Scanlon’s* and will not care if he does not immerse himself in the vast body of

literature that specialists on the philosophy of punishment tend to study. Also, Scanlon and those who are close students of his work might—if they are so inclined—be able to develop a defense for some of his views on punishment by drawing on his general theory of contractualism. Perhaps the most charitable way to interpret Scanlon's work on punishment is to see it as an attempt to answer this question: To what degree can those who reject retributivism accommodate the intuitions that tend to draw people to retributivism and show that many of these intuitions can be provided with a foundation that is not retributivist?

But now let me return to the two problems I previously noted with respect to Scanlon's claims that (1) retributivists favor causing pain on grounds of desert and (2) it is always wrong to inflict pain on someone because of a belief that the person deserves it.

With respect to (1), why do Scanlon and other critics believe that retributivists must favor pain? I think that this is very likely due to a semantic confusion. The retributivist does believe that criminals deserve to *suffer*, and in common language suffering is often identified with pain. (Scanlon and others sometimes seem to use the terms "pain" and "suffering" interchangeably.⁸) The concept of suffering I regard as central in retributivism, however, is to be found in the original and primary meaning of the word: "to *endure* something that is not within the control of one's own will." (Think here of "To suffer woes which hope thinks infinite" from Shelly's *Prometheus* or the common phrase "He does not suffer fools gladly.")

So the operative concept of "to suffer" that I regard as central to retribution has no intrinsic connection to pain but is rather to be understood as "to endure." Herbert Fingarette, for example, has made a powerful retributive case that the criminal wrongdoer, having presumed to exercise a level of will that is incompatible with the rule of law, must endure having his will "humbled"—deserving to have his ability to control his own life by his own will limited or restricted to some degree (Fingarette 1977). There is no reason to think, however, that what will be endured by the wrongdoer must be painful—unwelcome, of course, but not necessarily painful in any ordinary sense of the word "pain."

And while on the subject of linguistic distinctions let me simply say that I regard it as very strange to call fines and imprisonment examples of "hard treatment" and thus presumably on the same list of supposed immoralities as intentionally causing pain. Some instances of fines and imprisonment could be open to moral objections, of course—if the fines are excessive or unfairly burdensome, for example. But fines *per se* as hard treatment? Surely not. If I am fined 50 dollars for illegally parking in a space marked as reserved for handicapped people (no personal experience involved here I assure you) I would never for a moment be even tempted to say that I had experienced hard treatment. And why the fine anyway? It is surely in part, of course, to deter the non-handicapped from using one of these spaces. This cannot be the only reason, however, since the fine might well be appropriately waived for someone who parked in the space to deal with a serious emergency. So, in addition to deterrence, an additional reason for imposing the fine is probably based on an idea of retributive desert: People who are so morally insensitive that they think that their mere convenience is sufficient to outweigh accommodating those who are handicapped are simply getting what they deserve.

What about imprisonment? If we are thinking about the unspeakable conditions often found in contemporary United States jails and prisons, then I would agree that the phrase "hard treatment" is appropriate to apply—the only objection to the phrase being that it is likely too weak to adequately condemn these pest holes. (In the United States it has apparently been forgotten that we should send people to prison *as* punishment, not *for* punishment.) But imprisonment *per se* as hard treatment? As with fines, I think this depends on the nature of the imprisonment. If (dream on) our system were changed so radically that inmates would be confined for a reasonable amount of time in safe, healthy, and civilized quarters—and provided with therapy if needed

and an opportunity to study and learn skills that might make their lives outside the prison more likely to be those of good citizens—I see no reason to think of this as hard treatment unless one thinks that anything at all that is not the product of one’s own will is hard treatment. But, at least to my ear, this usage sounds wrong. When I try to think of examples of what I would call hard treatment I call forth images of someone breaking rocks on a chain gang, not someone reading law books in a prison library.

Let me now move to (2) above and ask if it is really true that it is *always* morally wrong to believe it appropriate that someone experience pain (even painful punishment) simply because they deserve it? If so, why? Is it not all a matter of the *degree and nature* of the pain involved? Suppose, for example, I allow myself to wish that Bernard Madoff from now on has a very unhappy life—most of his remaining hopes and dreams unfulfilled—and do not have this wish because I believe his unhappiness will have deterrence value or will bring comfort to his victims (since I would retain the wish even if his misery was not generally known). I want him to be unhappy simply because, given the harm he brought others through his greed and selfishness, I think he *deserves* to be unhappy. Does having this wish make me a bad person or an irrational person? If so, I fail to see why and would like to hear an argument. And if it is morally acceptable to see value in this kind of pain, why would it be unacceptable to generate if possible this kind of pain (or something like it) as punishment? Of course, if I wished him to get cancer and die in screaming agony or wanted him to be tortured or wanted prison guards to turn him over to some prison gang so that he would be repeatedly raped, I would reveal myself as a bad person because I would be wanting for him things that would compromise his dignity as a human being—things that no decent person would want for another person and certainly would not approve of as punishment. I think that the infliction of any *physical* pain runs this risk since it addresses the offender’s animal nature and not his human rational nature.⁹

Having attempted to meet what I regard as two ill-founded objections to retribution, let me now attempt to say something positive on behalf of the concept and its legitimate use in the justification of punishment. I will not attempt a detailed analysis of the concept of desert itself but will instead operate by noting examples, paradigm cases one might say, in which the idea of desert (understood as some combination of an evil act and an evil will—intention, motive, or character—that produced the act) will do a better job of putting us in reflective equilibrium than any consequential analysis.

What is retributive desert, and what role should it play in punishment?

There is no doubt that one of the main obstacles to taking the idea of retributive desert seriously is the large number of different meanings that have been given to the concept in the literature and the many different roles that have been envisioned for it in punishment. At one extreme it has been used to mean simply legal guilt and at the other extreme to mean evil of character all the way down—what Kant called “inner wickedness” (*inneren Bösartigkeit*). As noted earlier, I can—depending on the role it is to play—see some virtues in both of these and in several other understandings of the concept as well.

With respect to its legitimate role in punishment, retributive desert has been conceptualized as a limit (a side constraint) on a practice whose main purpose is the consequential one of crime control through such mechanisms as deterrence and incapacitation. Following the distinction introduced by H. L. A. Hart, this view regards crime control as the “general justifying aim” of the practice of punishment and desert as an answer to the “distributive question” of “whom should we punish under this consequentially justified practice?”¹⁰ This has often been called

“negative retributivism,” and one common version, found in Rawls for example, is that we should use punishment to control crime only on those who deserve it in the weak sense of being actually guilty of the crime in question—i.e., never intentionally punishing the legally innocent (Rawls 1955).

Given this very weak version of negative retributivism, it is easy (though in my view mistaken) to believe that there is no trouble of reconciling a utilitarian (or other consequential) view of punishment with a retributive view since it would probably be highly disutilitarian to attempt to control crime with a system that intentionally punished those innocent of any criminal wrongdoing. Under such a system all citizens would be very insecure (having no guarantee that they could avoid punishment by choosing to avoid crime) and could not use the criminal law as a way to plan their lives—a vital feature in a system that would seek to control conduct in a way that would maximize utility. As Rawls claimed, this would be like trying to control economic behavior with a price system that told people the price of an item only after they had already purchased it. This is a good reason to avoid intentionally punishing the innocent but not, as I argued earlier, the only or even the best reason.

At the other extreme, the retributive view—now sometimes called “positive retributivism”—might be interpreted as the claim that the sole purpose of punishing people is to give evil people who do evil things what they deserve and that consequential considerations should play no role at all in the matter. Both Michael Moore and Kant have been—perhaps mistakenly—interpreted in this way.

The view of retributive desert that I now wish to defend (who knows for how long?) might be called “enriched negative retributivism” or perhaps “negative utilitarianism” or “negative consequentialism.” The former label will call attention to the claim that the legitimate retributive constraints on punishment are far more complex and robust than merely “do not intentionally punish the innocent” and that these constraints cannot be defended solely with consequentialist arguments. The latter two labels will call attention to the claim that at least one important reason for having a system of punishment is to give morally evil people the suffering that they deserve, but that only a subset of such people, for consequential reasons, will actually be identified as legitimate targets for punishment—namely, bad people whose badness has a tendency to undermine the social order of rights that it is the business of the liberal state to maintain.¹¹ I am not sure at present which label I prefer, but the practical outcome of each may be the same.

First, let me say why I think that the strongest form of retributivism must be rejected—the form that claims that the sole purpose of punishment is to give evil people the suffering that they deserve. As I have argued elsewhere, it is important to see that justifying punishment is not just a moral matter but also a political matter—the mere fact that something is morally good not being a sufficient reason by itself to use state power to bring it about (Murphy 1985). All reasonable people will surely agree, for example, that the moral education of children is very important, but not all such people (some fearing state indoctrination perhaps) will agree that developing and imposing such a program is a legitimate use of state power. Turning to punishment, it is hard to imagine—thinking in liberal social contract terms—that rational people designing institutions under which they will live would, given how expensive and intrusive the practice of punishment will be, adopt it for the sole purpose of making sure that bad people will get whatever suffering is believed properly proportional for their badness. Surely, at the very least—and this invites the labels “negative utilitarianism” or “negative consequentialism”—they would want to limit state punishment to instances of moral evil that pose a danger to the ability of the law-abiding to live in peace and reap the benefits of social cooperation—the objective here being to curtail dangerous anti-social conduct. In other words, Hobbes was on to something important in his justification for the rule of law.

Consider, for example, what are generally called “victimless crimes”—crimes in which people engage in conduct that, though believed to be evil, really causes no threat to peace, stability, and personal security. Even those who believe (quite wrongly in my view) that private homosexual conduct is evil and should perhaps even be punished by God as these evil people deserve should, if rational, oppose using the criminal law to deal with such private activities since any small benefits (benefits in their view) of such punishment will be greatly outweighed by staggering costs in treasure and privacy invasions. And consider also the betrayal of friendship and intimacy. I regard such betrayal as very, very evil and can easily welcome suffering for people who are given to such vices—hoping, for example, that whatever they wished to gain by such betrayal will produce loss and misery instead. But it would be quite irrational for me to think that this kind of evil should be part of the *state's* legitimate business and that the machinery of criminal law should be brought to bear on these people.

So, in short, I believe with Hart that *a* (if not *the*) general justifying aim of having the practice or institution of criminal law is the consequential one of crime control. I also believe, however, that this aim must be joined by retributive desert as another general justifying aim or, at the very least, have the aim of crime control constrained by a variety of related retributive desert considerations—considerations that include, of course, legal guilt but also involve far more than legal guilt. This is why I have considered the label “enriched negative retributivism.” Rawls’s version of negative retributivism—intentionally punish only the legally guilty—was his way of answering Hart’s distributive question. We might label Rawls’s approach as “minimalist negative retributivism.”

Hart’s own answer, however, was much more complex and gave me the idea for the label “enriched negative retributivism.”¹² His list of required side constraints on a system of crime control includes, in addition to no intentional punishment of the innocent, requirements of *mens rea* for statutory definitions of crimes, proportionality in grading offenses to be based on “a commonsense scale of gravity,” rich doctrines of justification, excuse, and mitigation, and consideration of such states of character as remorse as relevant in sentencing and clemency. He often tries to defend these side constraints as demands of procedural fairness—an argument that, as I have argued elsewhere, does not work for many of them (1995). At other times, however, he sometimes refers to them simply as “*retribution* in the distribution of punishment” (*italics mine*)—clearly recognizing that they have a value independent from and not reducible to the value of crime control as his general justifying aim of punishment. He also sometimes defends these side constraints consequentially in terms of maximizing the role of choice in law but for some of them maintains that they cannot plausibly be defended by utilitarian or other consequential considerations and will often defend them simply by arguing that “commonsense morality” would not tolerate a system that did not incorporate them. I do not think that Hart had in mind here the taking of an opinion poll of the general public but was probably (but without current philosophical jargon) suggesting that a system without the noted constraints would fail to put informed and thoughtful people in a state of reflective equilibrium.

Let me now—expanding on Hart’s rich analysis—list some additional ways in which, in my view, the concept of retributive desert should play a role (and sometimes already does play a role) in the design of a morally acceptable system of criminal law—even if a primary goal of such a system is to control crime. It is my hope that most of my readers will find themselves in reflective equilibrium with the role that I will suggest in each case for the value of retributive desert:

1. *There should be radical limitations on the current practice of avoiding trials through plea bargaining.* Plea bargaining as it stands sometimes involves frightening a defendant (who may be of limited intelligence and provided with poor legal representation) into pleading

guilty to something he did not do by persuading him that if he goes to trial he will almost certainly be convicted of something even worse (that he also did not do) with a longer sentence. More common is the problem that because prosecutors are able to stack multiple (and often overlapping) charges against a defendant, he is effectively terrorized into pleading guilty to avoid the risk of trial. This substantially conserves resources and sometimes functions to get genuinely guilty people out of circulation for a period that is socially useful. Too frequently, however, it leads to inappropriate punishment—that is, punishment that is sometimes more than (and sometimes less than) the punishment that is deserved. If this strikes the reader, as it strikes me, as a kind of assembly line “justice” that ignores the kind of individuation that is required by respect for the dignity of persons, then one is being drawn to retributive values even if one does not like the word “retribution.” Surely in these cases the defendant *deserves* better.

2. *The crime itself will be defined with considerations of retributive desert playing a significant role, e.g., mens rea will be required for all offenses (no strict liability) even if this might undermine utility.* This will require, among other things, that the United States will join all other civilized democratic countries and eliminate the doctrine of felony murder—a doctrine that in the United States allows the punishment for murder (normally requiring intention to kill) of a person who, without any intention to kill, commits a felony that is a significant causal contributor to a wrongful death—even if the person did not intend the death, had good reason to believe that no death would result, and would not have committed the felony if he thought that a death would result. Think, for example, of a large and imposing man who agrees to go along, for intimidation value, with a man who persuades him to join in robbing a convenience store (a felony). The man with the plan claims, however, that the gun he will use is a toy and that he simply wishes to frighten the clerk. The gun is real, however, and the lying robber shoots and kills the store’s clerk. It may promote utility to have a doctrine of felony murder—making people more careful when they commit felonies or perhaps even giving them incentives to avoid the underlying felony altogether—but does anyone *deserve* to be branded as a murderer and convicted of murder when he was just negligent perhaps with respect to the resulting death? He certainly deserves some non-trivial punishment as the robbing thug that he is, but does he deserve the same punishment as the killer? Surely not. And is there a better way to make this point than one employing the concept of retributive desert? Being constrained by a reasonable conception of retributive desert would also make us doubt the value of making some instances of conduct looked on with disfavor by most people crimes at all. Consider all the people swept up and jailed as a part of our so-called “war on drugs.” Some of them certainly deserve to suffer punishment (major distributors, for example) but I find it hard to accept that individual users are bad enough to deserve significant punishment—perhaps not bad at all but just stupid or addicted or otherwise ill. Consider also those who visit computer sites that offer child pornography but who never even consider abusing children much less actually abusing them. I find such people rather disgusting and perhaps a bit sick, but I would not brand them as evil such that they deserve to be punished for their viewing habits. And if the argument is given, as it often is, that these consumers must be punished in order to dry up a market that depends on the actual exploiting of children, is this not (in Kantian terms) merely to use these people as means rather than as ends in themselves—a wrong to them that the concept of desert would help to block?
3. *The grading of criminal offenses will be a function of retributive desert. The higher the grade the heavier the punishment.* Consider the current grading of criminal homicides in the

United States. A common grading (from most serious to least serious, most severe punishment to least severe punishment) is this: *First Degree Murder*: intentional, premeditated, and deliberate killing. *Second Degree Murder*: intentional killing. *Voluntary Manslaughter*: intentional killing under provocation or extreme emotional disturbance for which there is a rational explanation. *Involuntary Manslaughter*: negligent or reckless killing.

Since dead is dead, the ranking here cannot be a function of harm caused since it is the same in all grades. Is the ranking then based on dangerousness? Surely not since I and all of my readers stand in much greater danger of being killed by a negligent or reckless driver than by someone who deliberates and premeditates before intentionally killing us. Why then the current ranking? I think it is probably based on the concept of retributive desert—the thought being that deliberate premeditating killers are simply morally worse (more evil) than those lower on the grading list and thus deserve the most punishment.

It is interesting to note, in this regard, that the primary challenges to this ranking are themselves based on the concept of retributive desert.¹³ Consider, for example, the mercy killer. He deliberates and premeditates prior to intentionally killing, but is he—given his motives—the worst of the worst and deserving of a first degree murder conviction and the punishment attached to that? Many people will answer no to this question and might even suggest that it is certain wantonly reckless killers who are really the worst of the worst and should be guilty of first-degree murder. Some states have a category of homicide labeled as “depraved heart murder”—a killing produced by conduct so wantonly reckless that it reveals a “hardened, abandoned, and malignant heart totally indifferent to the value of human life.” In states that have this grade of murder it is murder in the second degree, but perhaps it should be first degree murder and mercy killing moved to murder of a lesser degree.

My main point here is this: The debate about degrees of homicide is carried out mainly in terms of the value of retributive desert, and I do not see how it could plausibly be carried out in terms of any other value.

4. *A variety of justifications and excuses will be provided as criminal defenses—some mitigating and others completely freeing from criminal responsibility and punishment.* A person deserves to be treated as an individual, and this requires an individuated response to his culpability—one that explores in some depth specific and often unique things about the defendant that either mitigate (make him seem better) or aggravate (make him seem worse) than we might have thought on a superficial analysis. We already do this to a considerable degree in the justifications and excuses we currently allow in United States criminal law, and we expand radically the range of factors to be considered when the sentence of death is a possibility. In an ideal world, we would—out of a respect for the dignity of the individual—extend such inquiries beyond the realm of capital punishment and into the realm of all serious crimes. But our world is not ideal, and doing this to a much greater degree than at present might well be more costly in time and resources than we could afford, since there are many other important and expensive things the state must do besides operate a system of criminal punishment. If these consequential factors carry the day, then we should at least admit to ourselves that we are regretfully departing from the demands of justice, giving defendants less or more than they actually deserve, and thus failing fully to respect their dignity as persons. And even if we cannot do a great deal more in the realm of individuation, we should always be open to considering some expansions given what we might learn

about diminished responsibility from such new areas of research as neuroscience and considering some contractions if we come to think that some current defenses are empirically ill-founded and often result in less punishment than is deserved. Whether rightly or wrongly, for example, the criminal law seems to be moving away in skepticism from allowing the so-called “battered woman syndrome” to function as a trigger for the justification of self-defense and admitting it only as an evidential matter to overcome a likely jury presumption that, since the woman did not leave, then the abuse she claims could not have been all that bad.

5. *After conviction, considerations of desert will play a significant role in clemency or parole—at which time such character states as remorse or its absence may be regarded as relevant.* Many state governors (including the current governor of my own state) are very stingy in the granting of clemency—often overriding even unanimous recommendations from their own clemency boards. This often means that truly repentant and reformed individuals who have turned their lives around are treated the same as individuals who remain hardened, hateful, and unrepentant. This seems deeply wrong to me, and I cannot think of a better way to mark this wrongness than by saying that their differences are morally relevant and should be legally relevant.¹⁴ To put it in my preferred language, the former have a good case that they deserve early release (unless their crime was truly horrendous) and the latter a good case that they should stay put and serve their full sentence. Here is a case, however, where the quarrel is not mainly between the values of retributive desert and the values of social utility but rather between moral values of any kind and the narrow desire of politicians to curry favor with a vengeful populace by demonstrating a tough stance on crime. Here the perception of political expediency generally wins.
6. *Prison conditions will be considered as a part of punishment and 8th Amendment constraints against cruel and unusual punishments will meaningfully and significantly apply to them.* As I have noted in a previous essay (2014: Note 11) the United States Supreme Court has, except in one kind of situation, been unwilling to extend the 8th Amendment ban on cruel and unusual punishments to such things as a failure to prevent prison rape, failure to control abuse from prison gangs, or putting a stop to those long periods of solitary confinement that are destructive of an inmate’s very personality. The general court doctrine has been that these are not punishments but are rather prison conditions—a piece of pure formalism if ever there was one. In the noted essay I expressed my outrage over this in the following way:

A Kantian retributivist would be first in line to condemn much of what goes on in the [United States prison system]—condemn it because its harshness and cruelty are not deserved by any human being, any being having that precious value that Kant called dignity.¹⁵

Conclusion

I have attempted in this essay to say what I think is correct about the application of the concept of retributive desert in the justification of punishment. I have also attempted to expose what I think are limitations of the legitimate use of that concept—to regard giving wrongdoers what they deserve as the sole justification for a system of punishment, for example. Much of what I have said is tentative, and I remain conflicted in my own mind about many aspects of punishment and its justification. Perhaps this is a good thing. At the very least, those who are

tentative, hesitant, and conflicted about punishment are much less likely to be cruel or support cruelty. At another time in history combating excessive leniency, rather than combating cruelty, might be an important goal, but in our present time—with the discussion of crime dominated by what Judge Richard Posner has called “a vengeful populace and resource-starved penal system”¹⁶—excessive leniency seems to be the least of our worries.

Notes

- 1 I have discussed in detail Kant’s views on punishment in Murphy (1987). Kant’s use of the concept of inner wickedness can be found in Kant (1996: 474).
- 2 I am in no sense an expert in the literature of ancient Greece and have no reading knowledge of the language. I do know, however, that in some other translations of the play *nemesis* is interpreted as a warning that the gods will be angry if their acts are taken as a cause of mourning. I first saw *nemesis* rendered simply as “retribution” when I was exposed to the Robert Fitzgerald translation in the wonderful play/film adaptation of *Oedipus at Colonus* with the title *The Gospel at Colonus*—where the context is the overcoming of grief and mourning through the realization that a wonderful thing has happened to Oedipus (Sophocles 1977: 172). So I consulted some people I know who do have expertise in the ancient Greek language and learned that, in spite of the fact that we now tend to use both *nemesis* and “retribution” to mean punishment or even vengeance, the literal and original meaning of *nemesis* is simply “the dispensing of what is due.”
- 3 There is considerable anecdotal evidence that the thing that many people fear the most about going to prison is the likelihood that they will be raped or otherwise brutalized by the gangs that currently control many aspects of the lives of inmates (Murphy 2014).
- 4 One might defend one’s theory of punishment with a model of rational choice (in social contract terms perhaps), by deriving it from a more general moral principle (fairness perhaps), or by arguing that it does a better job than any alternative theory of putting us in what John Rawls called “reflective equilibrium” with respect to the largest set of our pre-theoretical moral convictions. My own preference is the route of seeking reflective equilibrium, and I think that the idea of retributive desert—moral desert as a function of the moral evil of the act and the moral wickedness of the person performing the act—provides, at least for most (but certainly not all) reflective people, the best concept around which to discuss and defend most (but not all) important issues raised by the practice of criminal punishment.
- 5 Kant argues that if the accomplices in wrongdoing are so great that to punish them all would destroy the state and throw the community back into the state of nature, then not punishing with deserved severity all the wrongdoers would be both rational and moral—although regrettable.
- 6 In this essay Scanlon shows more sympathy with the concept of desert than he had shown in his earlier writings on punishment, but he still has no sympathy for the use to which retributivists (in his view) put the concept.
- 7 Some readers will perhaps note that I do not include my own name on this list and may suspect that this is because I do not want it to appear that my critique of Scanlon is in part motivated by some personal pique that he does not engage with my work on punishment. This is not my reason. I have left my name off this list because it does not belong on the list. I have often drawn on retributive ideas when I have written on punishment, and I hope that I have sometimes said some illuminating things when doing so. Unlike these four writers, however, I have never made an attempt to develop a detailed systematic explanation of and justification for a retributive theory of punishment. I have in this regard mainly pledged allegiance to the work of others.
- 8 Just a few weeks ago I was sent for to review an essay by a very talented young philosopher who, drawing on Scanlon’s work, sometimes spoke of “pain” and other times of “suffering” in a way that seemed to recognize no possible difference in meaning between the two words.
- 9 Kant is quite explicit in his claim that punishment must never involve cruelty or any other kind of mistreatment that would fail to respect the dignity of the person being punished (Kant 1996: 474).
- 10 “Consequential” does not necessarily mean “utilitarian” since the relevant consequence might be the protection of important rights, not the maximization of general happiness. Hart’s famous distinction between these two basic questions occurs in Hart (2008: Chapter 1).
- 11 My colleague Mary Sigler, who has provided me with many useful comments on an earlier draft of this essay, has reminded me that a similar view has been defended by Michael Moore (Moore 1997: 78–80).

- 12 In my summary and interpretation of Hart's views on consequential and retributive values in punishment, I am drawing on Hart (2008: Chapters 1, 2, and 3). For his views on repentance as a possible ground for sentence reduction, I draw on Hart (1963) and Murphy (2013).
- 13 My argument in this section has been greatly influenced by Pillsbury (1998).
- 14 Antony Duff and others have argued that claims for mercy based on such factors as offender remorse may sometimes be justified if grounded on values extrinsic to the retributive factors required for just punishment but that they are not intrinsic to the retributive factors and indeed must always be in tension with those retributive factors. I have argued against this view in Murphy (2012: Chapter 6). In Murphy (2012: Chapter 7) I have argued that, because of the danger of faking, claimed remorse should probably not be given much weight in sentencing but can legitimately play a role in clemency.
- 15 In *Farmer v. Brennan* (511 U. S. 824 (1994)) the United States Supreme Court allowed 8th Amendment appeals of possibly cruel and unusual prison conditions. The Court set a standard for successful appeals, however, that will provide very little protection to inmates. The standard requires a showing that the prison officials were themselves consciously aware of the conditions and yet took no steps to correct them (a recklessness standard). Such recklessness is very difficult to prove.
- 16 *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1993) (Posner, C. J. Dissenting).

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