

4.1

The Moral Worth of Retribution

MICHAEL S. MOORE

Retributivism is a very straightforward theory of punishment: we are justified in punishing because and only because offenders deserve it. Moral culpability (desert) is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions. Such justification gives society more than merely a right to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral culpability of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved.

Retributivism, so construed, joins corrective justice theories of torts, natural right theories of property, and promissory theories of contract as deontological alternatives to utilitarian justifications; in each case, the institutions of punishment, tort compensation, property, and contract are justified by the rightness of fairness of the institution in question, not by the good consequences such institution may generate. Further, for each of these theories, moral desert plays the crucial justificatory role. Tort sanctions are justified whenever the plaintiff does not deserve to suffer the harm uncompensated and the defendant by his or her conduct has created an unjust situation that merits corrective action; property rights are justified whenever one party, by his or her labour, first possession, or intrinsic ownership of his or her own body, has come by such actions or status morally to deserve such entitlements; and contractual liability is justified by the fairness of imposing it on one who deserves it (because of his or her voluntary undertaking, but subsequent and unexcused breach).

From Michael S. Moore, "The Moral Worth of Retribution", in Ferdinand Schoeman (ed.), *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (Cambridge: Cambridge University Press, 1987). Copyright © Cambridge University Press. Reprinted by permission.

Once the deontological nature of retributivism is fully appreciated, it is often concluded that such a view cannot be justified. You either believe punishment to be inherently right, or you do not, and that is all there is to be said about it. As Hugo Bedau (1978) once put it:

"Either he [the retributivist] appeals to something else—some good end—that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a nonretributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile".

Such a restricted view of the justifications open to a retributivist leads theorists in one of two directions: Either they hang on to retributivism, urging that it is to be justified "logically" (i.e., non-morally) as inherent in the ideas of punishment (Quinton, 1954) or of law (Fingarette, 1977); or they give up retributivism as an inherently unjustifiable view (Benn and Peters, 1959). In either case, retributivism is unfairly treated, since the first alternative trivializes it and the second eliminates it.

Bedau's dilemma is surely overstated. Retributivism is no worse off in the modes of its possible justification than any other deontological theory. In the first place, one might become (like Bedau himself, apparently) a kind of "reluctant retributivist". A reluctant retributivist is someone who is somewhat repelled by retributivism but who nonetheless believes: (1) that there should be punishment; (2) that the only theories of punishment possible are utilitarian, rehabilitative, retributive, or some mixture of these; and (3) that there are decisive objections to utilitarian and rehabilitative theories of punishment, as well as to any mixed theory that uses either of these views in any combination. Such a person becomes, however reluctantly, a retributivist by default.

In the second place, positive arguments can be given for retributivism that do not appeal to some good consequences of punishing. It simply is not true that "appeals to authority apart, we can justify rules and institutions only by showing that they yield advantages" or that "to justify is to provide reasons in terms of something else accepted as valuable" (Benn and Peters, 1959, 175–6). Coherence theories of justification in ethics allow two non-consequentialist possibilities here:

1. We might justify a principle such as retributivism by showing how it follows from some yet more general principle of justice that we think to be true.
2. Alternatively, we can justify a moral principle by showing that it best accounts for those of our more particular judgments that we also believe to be true.

In a perfectly coherent moral system, the retributive principle would be justified in both these ways, by being part of the best theory of our moral sentiments, considered as a whole.

The first of these deontological argument strategies is made familiar to us by arguments such as that of Herbert Morris (1976), who urges that retributivism follows from some general ideas about reciprocal advantage in social relations. Without assessing the merits of these proposals one way or another, I wish to pursue the other strategy. I examine the more particular judgments that seem to be best accounted for in terms of a principle of punishment for just deserts.

These more particular judgements are quite familiar. I suspect that almost everyone at least has a tendency—one that he may correct as soon as he detects it himself, but at least a tendency—to judge culpable wrongdoers as deserving of punishment.

Most people react to [atrocious crimes] with an intuitive judgment that punishment (at least of some kind and to some degree) is warranted. Many will quickly add, however, that what accounts for their intuitive judgment is the need for deterrence, or the need to incapacitate such a dangerous person, or the need to reform the person. My own view is that these addenda are just “bad reasons for what we believe on instinct anyway”, to paraphrase Bradley’s general view of justification in ethics.

To see whether this is so, construct a thought experiment of the kind Kant originated. Imagine that [atrocious] crimes are being done, but that there is no utilitarian or rehabilitative reason to punish. The murderer has truly found Christ, for example, so that he or she does not need to be reformed; he or she is not dangerous for the same reason; and the crime can go undetected so that general deterrence does not demand punishment (alternatively, we can pretend to punish and pay the person the money the punishment would have cost us to keep his or her mouth shut, which will also serve the ends of general deterrence). In such a situation, should the criminal still be punished? My hypothesis is that most of us still feel some inclination, no matter how tentative, to punish.

The puzzle I put about particular retributive judgments is this: Why are these particular judgments so suspect—“primitive”, “barbarous”, “a throwback”—when other judgments in terms of moral desert are accorded places of honour in widely accepted moral arguments? Very generally, there seem to me to be several explanations (and supposed justifications) for this discriminatory treatment of retributive judgments about deserved punishment.

1. First and foremost there is the popularly accepted belief that punishment for its own sake does no good. “By punishing the offender you

cannot undo the crime”, might be the slogan for this point of view. I mention this view only to put it aside, for it is but a reiteration of the consequentialist idea that only further good consequences achieved by punishment could possibly justify the practice. Unnoticed by those who hold this position is that they abandon such consequentialism when it comes to other areas of morals. It is a sufficient justification not to scapegoat innocent individuals, that they do not deserve to be punished; the injustice of punishing those who did not deserve it seems to stand perfectly well by itself as a justification of our practices, without need for further good consequences we might achieve. Why do we not similarly say that the injustice of the guilty going unpunished can equally stand by itself as a justification for punishment, without need of a showing of further good consequences? It simply is not the case that justification always requires the showing of further good consequences.

Those who oppose retributivism often protest at this point that punishment is a clear harm to the one punished, and the intentional causing of this harm requires some good thereby achieved to justify it; whereas *not* punishing the innocent is not a harm and thus does not stand in need of justification by good consequences. Yet this response simply begs the question against retributivism. Retributivism purports to be a theory of justice, and as such claims that punishing the guilty achieves something good—namely, justice—and that therefore reference to any other good consequences is simply beside the point. One cannot defeat the central retributivist claim—that justice is achieved by punishing the guilty—simply by assuming that it is false.

The question-begging character of this response can be seen by imaging a like response in areas of tort, property, or contract law. Forcing another to pay tort or contract damages, or to forgo use and possession of some thing, is a clear harm that corrective justice theories of tort, promissory theories of contract, or natural right theories of property are willing to impose on defendants. Suppose no one gains anything of economic significance by certain classes of such impositions—as, for example, in cases where the plaintiff has died without heirs after his cause of action accrued. “It does no good to force the defendant to pay”, interposed as an objection to corrective justice theories of tort, promissory theories of contract, or natural right theories of property simply denies what these theories assert: that something good *is* achieved by imposing liability in such cases—namely, that justice is done.

This “harm requires justification” objection thus leaves untouched the question of whether the rendering of justice cannot in all such cases be the good that justifies the harm all such theories impose on defendants. I

accordingly put aside this initial objection to retributivism, relying as it does either on an unjustifiable discrimination between retributivism and other deontological theories, or upon a blunderbuss assault on deontological theories as such.

2. A second and very popular suspicion about retributive judgments is that they presuppose an indefensible objectivism about morals. Sometimes this objection is put metaphysically: There is no such thing as desert or culpability (Mackie, 1982). More often the point is put as a more cautious epistemological modesty: "Even if there is such a thing as desert, we can never know who is deserving". For religious people, this last variation usually contrasts us to God, who alone can know what people truly deserve. We might call this the "don't play God" objection.

A striking feature of the "don't play God" objection is how inconsistently it is applied. Let us revert to our use of desert as a limiting condition on punishment: We certainly seem confident both that it is true and that we can know that it is true, that we should not punish the morally innocent because they do not deserve it. Neither metaphysical scepticism nor epistemological modesty gets in our way when we use lack of moral desert as a reason not to punish. Why should it be different when we use the presence of desert as a reason to punish? If we can know when someone does *not* deserve punishment, mustn't we know when someone *does* deserve punishment? Consider the illogic in the following passages from Karl Menninger (1968):

"It does not advance a solution to use the word *justice*. It is a subjective emotional word . . . The concept is so vague, so distorted in its applications, so hypocritical, and usually so irrelevant that it offers no help in the solution of the crime problem which it exists to combat but results in its exact opposite—injustice, injustice to everybody" (10–11).

Apparently Dr. Karl knows injustice when he sees it, even if justice is a useless concept.

Analogously, consider our reliance on moral desert when we allocate initial property entitlements. We think that the person who works hard to produce a novel deserves the right to determine when and under what conditions the novel will be copied for others to read. The novelist's labour gives him or her the moral right. How can we know this—how can it be true—if desert can be judged only by those with godlike omniscience, or worse, does not even exist? Such scepticism about just deserts would throw out a great deal that we will not throw out. To me, this shows that no one really believes that moral desert does not exist or that we could not know it if it did. Something else makes us suspect our retributive judgments than supposed moral scepticism or epistemological modesty.

References

- Bedau, H. (1978), "Retribution and the Theory of Punishment", 75 *Journal of Philosophy* 601.
- Benn, S. I., and R.S. Peters (1969), *Social Principles and the Democratic State* (London: Allen and Unwin).
- Fingarette, H. (1977), "Punishment and Suffering", 50 *Proceedings of American Philosophical Association* 499.
- Mackie, J. (1982), "Morality and the Retributive Emotions", 1 *Criminal Justice Ethics* 3.
- Menninger, K. (1968), *The Crime of Punishment* (New York: Viking Press).
- Moore, M. S. (1982), "Moral Reality", *Wisconsin Law Review* 1061.
- Morris, H. (1976), *On Guilt and Innocence* (Berkeley and Los Angeles: University of California Press).
- Quinton, A. M. (1954), "On Punishment", 14 *Analysis*.

K5121
.Z9P75
1998

PRINCIPLED SENTENCING

READINGS ON THEORY AND POLICY

Second Edition

Edited by

Andrew von Hirsch

and

Andrew Ashworth



• HART •
PUBLISHING
OXFORD

1998