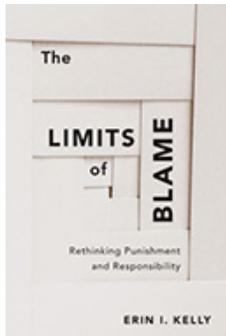


# THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY



Author: Erin I. Kelly

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The criminal justice system is plagued by a host of ills that are sorely in need of attention. Mass incarceration, excessive and severe punishments, racial discrimination and the proliferation of devastating consequences for offenders and communities are just some of the ills addressed by Erin Kelly's searching critique, *The Limits of Blame*. In the book, Kelly offers a picture of a system that is badly broken and attempts to identify an underlying ethic that is, one might say, to blame for many of the ills of the system, or at least one whose eradication would contribute substantially to its repair.

Kelly identifies the ideas of retribution and blame as those which must be disposed of so that we might move forward to a more humane, more restrained system of punishment. Per the overarching argument of the book, the American criminal justice system essentially equates criminal guilt with moral blame. She argues that the relations imagined between the two, whereby a finding of criminal guilt is understood to be aligned with the moral blameworthiness of the offender, invite a harsh punitiveness under the guise of justified blame and retribution. Yet, on her account, the system is not in fact tracking moral desert, nor should it, given a healthy skepticism about moral desert as a basis for criminal punishment. Thus, we should cease treating offenders as though they are morally to blame for what they have done and replace our conception of punishment with a justice-oriented approach aimed at harm reduction rather than retribution.

These arguments are masterfully developed throughout the book. Kelly begins in chapter 1 by laying out the mismatch between moral desert and criminal punishment. If we are to insist on blaming offenders, the basis for criminal liability had better track moral desert. Yet a quick look at many of the doctrines of existing criminal law demonstrates that this is far from the case. For example, wrongdoers whose agency is questionable, including many who suffer from mental disorders but fail to meet the strict *M'Naghten* rules are held liable, as are many agents who would be morally excused but fail to meet the condition of legally recognized excuses.

Why not modify criminal law so as to better reflect moral desert? In chapter 2, Kelly responds by laying out her skepticism about moral desert as a viable basis for criminal punishment. She argues that moral blameworthiness depends on one's actual capacity to bring one's actions into line with what morality requires. Yet with respect to many defendants, whether because of psychological difficulties or difficult circumstances, it is simply not true that they "could" have acted well on any conception of capacity that she would accept as reasonable for the attribution of blameworthiness. In any event, the evaluations necessary to make determinations about such moral competence, she argues, cannot be established on the basis of evidence available to courts of law. We should, therefore, give up the idea that criminal liability is about moral blameworthiness at all.

In chapters 3 and 4, Kelly further refines and develops her account of the gap between the proper determinants of moral responsibility and criminal guilt, as well as the central place that "difficulty," rather than the thinner notion of "incapacity," should play in our understanding of blame and responses to wrongdoing. We should, she argues, forgo blame in favor of compassionate responses, seeking to understand the obstacles people face to acting consistent with morality.

Chapter 5 turns to lay out her alternative, distributive justice-based approach, which defends the permissibility of imposing criminal sanctions as a mode of redistributing harm. Punishment is justified primarily as an instrument of specific deterrence, aimed at preventing (and remedying) violations of rights and offering a rational disincentive to those who have offended. The approach accommodates the significance of treating offenders as rational moral agents, capable of choice and rational address, which has been the hallmark of non-consequentialist theories of punishment and a feature generally raised in their favor and against classic consequentialist theories.

In the final chapter, she takes up the question of the implications of social injustice for the legitimacy of punishment, both for a blaming and non-blaming system of punishment. She explores their implications not only for blame and the state's standing to blame, but for her own harm-reduction conception, and closes by suggesting that where in the interest of harm reduction offenders who have not had a reasonable opportunity to lead a law-abiding life are incarcerated, they should be compensated for the harms they are made to suffer.

Kelly's proposals and the critique that precedes them are infused with sensitivity to the plight of offenders, a sense of commitment to social justice, a genuine willingness to engage with worries about circumstantial and constitutive luck often evaded in discussions of criminal responsibility, as well as the determination to not merely criticize the current state of affairs but to offer a constructive proposal for how to cure existing ills. Nonetheless, the analysis, which rests the ills of the system at blame and retribution's doorstep, raises a series of concerns. Kelly's criticism is directed both at retributive and blame-oriented theories, as inadequate justifications of punishment, and at the language and public narrative of blame used to legitimize punitive practices that bear little relation to retributive or desert-based punishment. Her criticism of these is not unconnected: she thinks of the logic of blame and retribution as "stretched" to justify a massively overreaching punitive system. There are reasons to worry, however, about the charges she brings against both these targets.

For one, it should give us pause that the ills addressed by Kelly are all problems that any contemporary retributivist would take issue with. Racial discrimination, excessive and degrading punishment and punishment that relegates wrongdoers to a social underclass are all inconsistent with a retributive ethic, which defends the imposition of proportionate punishment only on the deserving and only to the extent of their desert.

Desert-oriented theories in fact provide solid grounds to object to such practices. Kelly, of course, does not allow that such theories can offer a roadmap for reform owing to her skepticism about moral desert. Her skeptical argument, however, is surprisingly particular. She offers a conception of the moral capacity that must be required for an agent to be morally responsible (proposing that one must be substantially likely to comply with morality to be responsible for the failure to do so), which many would take issue with, and argues that this moral capacity cannot be established in court. Yet it is unclear why raising questions with respect to this particular conception does much to upset the possibility of a viable theory of responsibility that might ground criminal punishment, which is what would be necessary to offer a broad skeptical argument capable of defeating the project of retributive reform.

Even if retributive reform is possible, not all gaps between moral blameworthiness and criminal guilt manifest in injustices to be corrected. Kelly's analysis of the mismatch between the two illuminates that some gaps are intentional arising not only from pragmatic reasons the law has not to track moral blameworthiness but from principled reasons, including reasons not to accommodate all morally mitigating factors within the law. Kelly's challenge here is important and requires that any desert-oriented view engage with these divergences and examine their implications for the scope and meaning of justified punishment.

Still, one might question whether the mismatch is quite as expansive as she supposes. First, as above, one need not adopt her restrictive approach to moral responsibility. Relatedly, her arguments rely on a much broader understanding of moral excuse than many would accept. This is in fact one of the innovations of the book: she offers an alternative theory of moral excuse in terms of difficulty and obstacles to moral motivation, understanding excuses to express a judgment about what it is reasonable to expect of persons given impediments to the formation of good will. On her view, where an agent commits a wrong under conditions of social injustice, for example, that render the burden of compliance with morality excessively demanding, this qualifies one for excuse.

While the analysis illuminates a neglect of circumstances in standard theorizing about excuse, whereby excuses are thought to arise where one's action does not reflect (as) badly on the quality of one's will, her arguments are only partially persuasive. Consider the case she raises of Sean Moore, convicted of dogfighting, whose social circumstances played a role in his choices. Here, Kelly's insights broaden the excuses available even on a traditional conception: without appreciating the difficulties he faced, one might misinterpret Moore's action as disregarding the values protected by law in favor of his financial and entertainment interests. Yet understanding his circumstances, we recognize dogfighting as a mode of survival, reflecting far lesser disregard for these values.

Kelly is not content with expanding the traditional view, however. Even where hardship does not derogate from one's ill will, Kelly maintains that sympathy is still in order given the *per se* hardships involved. (Notice that this means that not only social injustice excuses, but also, e.g. being particularly arrogant or self-involved can excuse by virtue of these making it more difficult for the agent to be morally motivated, a result many may want to resist). And Kelly is right. Sympathy *should* compel us to action. We *should* take responsibility for social injustice, address the causes of crime, eradicate discrimination and work towards equal opportunities for all. But this need not mean that blameworthiness is undermined. Kelly bolsters her claim against the blameworthiness of wrongdoing under hardship by posing the two positions – sympathy vs. blame, social responsibility vs. individual responsibility – as mutually exclusive possibilities. We either take responsibility or hold responsible. But this is a false opposition often drawn upon by anti-retributivists. We can and should do both.

There is nonetheless an important worry illuminated by Kelly's discussion that should be taken seriously: Even supposing desert-oriented theories are theoretically viable, what if the language of blame and retribution and the moralizing, self-righteousness they encourage has the tendency to generate excessive punitiveness and injustice? What if one could foresee that the use of this particular set of ideas to publicly legitimize and shape the criminal justice system would have devastating consequences? What ought the responsible philosopher to do?

The challenge Kelly presents, however, is not contemplative in this way. She advances a concrete causal claim – that the language and theorizing of retribution and blame *are responsible* for many of the system's injustices; were we to eradicate these ideas, the system would be much improved and more humane and moderate. But it is not clear why we should we accept this claim. There is a lack of empirical evidence to substantiate the claim, which is perhaps understandable, but the claim seems at moments almost naïve. For example, while the parlance of harm reduction avoids the idiom of blame it does not escape bearing a deep affinity to the idiom of dangerousness. Yet the “lock ‘em up” mentality she hopes to destabilize as well as the policies she attacks, from three-strikes laws to incarceration as a standard mode of punishment, are perhaps even more consistent with a logic and language of dangerousness than that of blame. Why would we throw people in a cell and throw away the key? One answer that presents itself is because they are *not* moral agents like the rest of “us” to be engaged with and held accountable, but radical “others,” too dangerous to be allowed to remain on “our” streets. Kelly rightly objects to categorizations such as “social psychopath” and “pedophile” as enabling excessive punitiveness. But these categories mark out wrongdoers as stigmatized others regardless of whether it is their being “evil,” “dangerous” or “sick” which demand their removal. One wonders therefore whether the current state of criminal law tells more of the hydraulics of violence than the malignance of blame.

This is not to say that injustice is incurable or that Kelly is not right to worry about its pervasiveness. The branding of persons who commit wrongs not only as social psychopaths and pedophiles, but as “convicts” and “felons,” reducing an entire person to their conviction is a phenomenon she is rightly concerned to eradicate. But this essentialization is not a problem that is a necessary product of desert-based punishment or restricted to a blaming criminal law. What we need is to engender an understanding of wrongdoers as fallible human beings, moral agents with whom we interact and to whom respect is owed even when we legitimately impose warranted punishment on them. But this is something both retributivists and non-retributivists alike can agree upon and work together to bring about. Kelly’s work is a wonderful start. But blaming blame is not, I think, a productive way of moving forward.

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