RETHINKING CRIMINAL JUSTICE

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Abstract: The punitive, moralizing conception of individual responsibility commonly associated with retributive justice exaggerates the moral meaning of criminal guilt. Criminal guilt does not imply moral desert, nor does it justify moral blame. Mental illness, intellectual disability, addiction, immaturity, poverty, and racial oppression are factors that mitigate our sense of a wrongdoer’s moral desert, though they are mostly not treated by the criminal justice system as relevant to criminal culpability. The retributive theory also distracts from shared responsibility for social injustice. Instead of highlighting the moral urgency of correcting conditions that help to explain the crime rate, a commitment to retribution diverts attention from the social conditions that engender crime. These conditions include an unequal distribution of social, economic, and political power, which poses a serious problem for the retributive theory. When disadvantaged members of society act in ways that violate the criminal law, they are less morally blameworthy, even when the laws they violate are justified. Judgments of blame and desert, in relation to criminal justice, vary in accordance with political status. The diminished political power of oppressed groups is at odds with a retributive justification of punishment.

1 The Stigma of Criminality

In 1829, the Eastern State Penitentiary opened in the city of Philadelphia. Its corridors spread out like spokes from the prison’s dark center. They are lined with dozens of eight-by-twelve-foot individual cells, each with a small window where a shaft of light enters. Eastern State’s design was lauded by reformers, who proposed the individual prison cell as a progressive idea. The aim was, through isolation and silence, to awaken the conscience of the inmate and turn him into a better person. Prison was not intended as a place to spend your life. Most sentences were not longer than two years, and after doing their time, inmates were expected to resume normal life in society.
Solitary confinement is used nowadays as a “disciplinary measure” in prisons, but it is no longer promoted as a progressive idea. In fact, solitary confinement is recognized internationally as a violation of human rights. In that respect, current standards have evolved in line with morality. On the other hand, contrary to the vision of some nineteenth-century reformers, the American criminal justice system today displays little faith in the prospect of rehabilitation and, for the most part, dropped any commitment to it. At the same time, the use of incarceration has expanded massively. The United States has the largest prison population and the highest incarceration rate in the world. Two years is on the low end of many sentences, which can be much longer than that, and punishment is not designed to transform anyone—at least not for the better. Instead, the practice of criminal justice is an obstacle to positive personal change.

In continental Europe, incarceration is less frequently used and, when it is, sentences are relatively light. Historian and legal scholar James Whitman (2003) provides detailed evidence for concluding that criminal justice systems in Europe and in democratic societies elsewhere in the world are decidedly more merciful than American “harsh justice” (see also Kleinfeld 2016). For example, in France and Germany, prison policies are designed to prevent the symbolic degradation of inmates. Prison uniforms have been abolished. Barred cell doors have been eliminated and replaced with doors that offer privacy. Guards are required to address inmates respectfully using the prefix “Mr.” or “Ms.” These measures belong to what Germans call a “principle of approximation,” which is the idea that prison life should approximate life outside prison as much as possible (Whitman 2003, 8). This deliberate emphasis on respect and dignity in the practice of punishment is nearly unthinkable in the United States, where sentences are maximal, prison conditions are brutal, and status degradation is almost intrinsic to criminal punishment.

In the United States, a prison record makes it practically impossible to live normally in society, to do the ordinary things that enable us to be independent adults and good citizens—like finding a job, renting an apartment, voting, and getting an education (Jacobs 2015). In many cases, jobs with professional credentials are unavailable to people with criminal records. For example, in the state of California, a person with a record of conviction for any felony is ineligible to be licensed as a nurse, social worker, optometrist, landscape architect, contractor, psychologist, marriage or family therapist, Department of Motor Vehicles employee, home-care aide, or professional photocopier (Justice Center 2020). More generally, it is not illegal to discriminate against felons who apply for employment, admission to college, mortgages, or housing. The American system of punishment imposes a lasting stigma on people who have been convicted of crimes.

What is the rationale today for the harshly punitive orientation toward criminal lawbreakers in the United States? The most popular philosophy
of criminal punishment, the one that seems to enthrall moral philosophers, legal theorists, and the American public alike, is based on the idea that justice has not been done until the criminally guilty get the punishment they deserve. Justice demands retribution. Retribution is achieved when morally culpable wrongdoers suffer in proportion to their culpable wrongdoing, or so it is claimed. Punishment is ugly, but crime makes it necessary. Retribution is *morally fitting*.

Many people find this a natural and even comforting thought. Retribution offers a resolution to a scenario in which something has gone terribly wrong. The cosmic symmetry it promises generates a sense of satisfaction that holds our attention. In fact, it holds our attention so well that it keeps us from thinking about *why* people commit crimes and *who* we are locking away. These are critically important questions and thinking about them Provokes doubts about whether criminal punishment actually delivers the moral fit it promises (Kelly 2018, 16–44).

I will focus on the connection between the retributive rationale and the stigma of criminality. I will do this because, as I understand it, the retributive justification of punishment is bound with the idea that the criminal offender is a “bad person,” deserving of punishment not only because of what he has done but according to who he is (Kleinfeld 2016, 948–949). Retributivists maintain that morality demands more than that we judge criminal lawbreakers to have acted wrongly. It requires us to harm moral wrongdoers, provided that they are blameworthy. We should blame criminal lawbreakers for their wrongful lawbreaking by imposing on them the suffering they deserve. In this way, blame adds something to a judgment of wrongdoing. What it adds is a negative evaluation and response to a wrongdoer’s personhood, character, or will, in light of her wrongful behavior. Retributive punishment is a form of public blame directed at the wrongdoer as a criminal—a morally inferior type of person. This personal evaluation is important. Unless a criminal wrongdoer is personally responsible for doing wrong, the idea that he morally deserves punishment is unfounded.

So understood, the retributive philosophy seems designed to fit what Immanuel Kant describes as the responsibility a person bears for his own bad will. A bad will lies behind and motivates wrongdoing. It expresses agency and constitutes personhood. Bearing responsibility in this sense is what makes a wrongdoer morally culpable for his wrongdoing. Of course, establishing a person’s responsibility for his bad will is insufficient to justify retributive punishment. Even if a person is responsible for what he is like, it would still need to be demonstrated that he deserves to be harmed in response to his blameworthy wrongdoing. The state’s authority to serve as the harming agent must also be established. But without the responsibility claim, the retributive thesis is hopeless. A person could hardly be said to deserve punishment for what he is not responsible for. Thus I will concentrate on the responsibility claim. If the retributive theory
fails to make good on it, and I think it does, we should reject retributive philosophies of criminal justice.

2 Responsibility for Self

To count as responsible, Kant argues, a human being “himself must make or have made himself into whatever, in a moral sense, he is or to become” (Kant 1793, 40). According to Kant, a person of bad will has made himself into what he is through his free choices. Kant puts this point in metaphysically strong terms: “Whatever his previous deportment may have been, whatever natural causes may have been influencing him and whether these causes were to be found within him or outside him, his action is yet free and determined by none of these causes” (Kant 1793, 36). Kant thinks that, as rational beings, when we encounter temptations, desires, or impulses, we have the capacity to step back, to evaluate whether these temptations or desires provide us with good reasons to act, and to refuse them when they do not. This reflective and evaluative capacity comprises our moral freedom. Kant maintains that our capacity for reason implies that we always have this freedom. But is this true? How do we know if and when a person is rational enough to support this metaphysical conclusion about his freedom? And when a person fails to act well, when may we reasonably conclude that he could have satisfied moral standards of right action? What are the limiting cases?

When it comes to appreciating why a person has, in fact, acted as he has, Kant is circumspect. Principles of action, a person’s “maxims,” Kant writes, “sometimes even his own, are not observable; consequently, the judgment that the agent is an evil man cannot be made with certainty if grounded on experience” (Kant 1793, 16). No one, Kant writes, who examines his own psyche can be sure he has acted for the reasons he would rationally endorse. “We like to flatter ourselves with the false claim to a more noble motive,” says Kant, “but in fact we can never, even by the strictest examination, completely plumb the depths of the secret incentives of our actions” (Kant 1785, 19). Kant is conceding that skeptical worries about “moral worth”—that is, about the quality of a person’s will—are impossible to defeat. Someone who seems to have acted for good reasons might not have, and vice versa. By implication, this doubt infects our confidence in the judgment that a person who has failed to act well could have acted better. The judgment that someone who has acted badly could have done better involves a counterfactual evaluation—an evaluation of the possibility that a person who failed to act well would act better in some alternative scenario in which, for example, she tries harder or takes some precautions (Kelly 2018, 53–60). Yet, by Kant’s reasoning, a person’s incentives can be no clearer to us in a relevant counterfactual scenario in which she acts well than they were in the actual scenario in which she failed.
Present day “compatibilists” are more cautious than Kant was in their metaphysical assessment of our freedom to make ourselves into the persons we turn out to be. They are sensitive to the various causes that influence our characters and choices and, in response, they lower the threshold criteria of moral responsibility. The basic idea behind “soft” compatibilism is this: if we have no reason to doubt a person’s basic capacity for rationality, and a person’s action expresses what she is actually like, we can and should hold her to be “responsible”—that is, blameworthy and punishable. In principle, this notion of “default responsibility” aligns fairly well with familiar criminal justice practices. But, despite the appeal of this metaphysically unencumbered, or less encumbered, notion of moral responsibility, there are reasons to doubt its viability as the basis for a justification of punishment.

Many incarcerated people struggle with difficult psychological problems. For example, the incarcerated population exhibits higher rates of prior sexual abuse, childhood exposure to traumatic violence, and post traumatic stress disorder (Raj et al. 2008; Abram et al. 2004; Browne et al. 1999; Richie and Johnson 1996). Mental illnesses such as sociopathy, schizophrenia, and bipolar disorder are more common among the prison population. According to a report by the U.S. Department of Justice, over half of all prison inmates have a serious mental health disorder (James and Glaze 2006). Could it really be that these are the people who deserve the hard treatment they get?

Consider some cases you might read about in law textbooks. Eric Clark shot and killed a police officer. Our society demands the harshest penalties for crimes like his. Clark was convicted of first-degree murder and received a life sentence. In 2006, the U.S. Supreme Court heard his appeal (Clark v. Arizona, 548 U.S. 735 [2006]). Why? Because when Eric Clark pulled the trigger, it was a desperate effort to defeat a dangerous space alien. The Court acknowledged Clark’s delusional schizophrenia but affirmed his conviction and life sentence. It ruled that his psychosis was irrelevant to determining whether he intended to kill a human being.

Now consider Sharon Patterson’s case (State v. Patterson, 131 Conn. App. 65 [2011]). She was caring for a two-year-old boy who was not her son. When he wet his bed, she decided to stop giving him water in the evening. He also sometimes refused solid foods and, to get him to eat, she decided to restrict his water during the day as well. Withholding water from a child is a dangerous thing to do and, as a result, the boy died. Sharon Patterson was charged with criminally negligent homicide, found guilty, and given ten years in prison. It is also the case, and relevant to morality, that Sharon Patterson is intellectually disabled. She didn’t understand the harm she was doing. She thought she was helping. The court recognized that she did not understand the danger of her actions, but it upheld her conviction on the basis that a reasonable person would have understood it.
What about a person who steals to support a drug addiction? Over two million people are afflicted by an opioid disorder in the United States today. But addiction does not mitigate punishment for any crime. Or consider the thousands of cases in the United States of people sentenced to life in prison for crimes they committed as juveniles (Rovner 2017). The state of Pennsylvania alone has more than 480 people serving life sentences they received as juveniles. Studies show that childhood abuse and neglect increase criminal delinquency by approximately 40% (Widom 1992, 1989). That truth, however, mitigates neither guilt nor punishment.

Our legal system has decreed that people such as these are legally culpable. Although the personal hardships of mental illness, trauma, and addiction represent problems that would be difficult for most people to manage well, none of them mitigates the law's assessment of criminal culpability, or not much. The same holds for the limitations of intellectual disability and immaturity. Short of the extremes of mental illness that qualify as legal "insanity," the vast majority of mentally ill, intellectually disabled, traumatized, addicted, and immature people are ruled criminally guilty when it has been established that they have committed criminal acts. It is hard to make ethical sense of these legal results. At the very least, they pose a serious challenge to the notion that moral retribution fits the law.

Defenders of a retributive philosophy might respond by claiming that we need to make some adjustments to our criminal justice practices. They might argue that our criminal justice system does not now deliver just deserts, but it could, were we to dial back the sentences of teenagers, people afflicted with mental illness or addiction, and those who are intellectually disabled. Actually, the courts have expressed some sympathy with these ideas, at least when it comes to the very harshest penalties, specifically, the death penalty and life without parole. They have ruled that the death penalty is unconstitutional when applied to juveniles or the mentally ill, and that juveniles cannot receive mandatory sentences of life without parole (Atkins v. Virginia, 536 U.S. 304 [2002]; Roper v. Simmons, 543 U.S. 551 [2005]; Miller v. Alabama, 132 S. Ct. 2455 [2012]; Jackson v. Hobbs, 132 S. Ct. 548 [2011]). It might also be thought that we should go easier on people with substance addictions. The devastating opioid epidemic has increased public sympathy for a less punitive approach to the crimes of addiction. Now that addiction is no longer imagined to afflict only the ghetto poor, it has become a cause of public outcry. For example, the attorney general of the state of Massachusetts is currently suing the corporate pushers of prescription painkillers on behalf of the public (Commonwealth of Massachusetts v. Purdue Pharma Superior Court C.A. No. 1884-cv-01808 (BLS2) [2019]).

So it might be thought that by punishing less, and more selectively, we still have a chance to deliver retributive justice. But some disturbing facts would remain. Our prisons are filled with people who are poor. Data from the Bureau of Justice Statistics indicate that incarcerated people across...
all race and ethnicity groups earned about forty percent less before going
to prison than their non-incarcerated peers (Rabuy and Kopf 2015; Bu-
reau of Justice Statistics 2004). These are the poorest of the poor. They
are also, disproportionately, people who have suffered racial harassment,
歧视, and other forms of racialized mistreatment (The Sentenc-
ing Project 2018). For example, aggressive policing tactics in inner city
neighborhoods influence arrest rates (Butler 2017, 23–40). Although black
Americans are not more likely to use drugs than whites, they are more
likely to be arrested and incarcerated for drug use (Edwards et al. 2013).
Socioeconomic disadvantage also influences the crime rate in poor, inner-
city neighborhoods— racially segregated neighborhoods with failing schools
and few jobs. For example, more robberies and murders are committed in
disadvantaged neighborhoods. Socioeconomic deprivation is not, however,
a factor that mitigates a criminal offender’s “just deserts.” Lack of police
protection provides no legal excuse for the crime of gang affiliation, or
the illegal possession of a weapon, whether or not a person who lives in
gang territory would otherwise fear for his personal safety. Furthermore,
the hopeless condition of the racialized ghetto does not mitigate criminal
guilt for a person’s oppositional use of violence. Nor does an impoverished
person have any legal excuse or justification for selling illegal drugs to
sustain a living.

These are complicated matters and we resist thinking about them. We
commonly set them aside as irrelevant: of course measures of social dis-
advantage drop out of the criminal process. Criminal justice is about
individual responsibility. What does it have to do with a person’s so-
cioeconomic profile? Disadvantage does not determine individual choice.
However unfair your social circumstances may be, you are responsible for
your choices. As long as nobody forced you act as you did, you are respon-
sible for what you have done. Furthermore, certain actions—such as theft,
fraud, robbery, assault, rape, and murder—are wrong under any circum-
stances, however difficult those circumstances may be. We must draw a line
and hold people accountable to it. When a person commits a crime, even if
he is desperately poor, traumatized, addicted, or mentally ill, we must hold
him responsible for it. We owe it to victims and law-abiding citizens to
remove that person from society and mark him as bad—damaged, perhaps,
but bad nonetheless.

Let’s focus for a moment on the conclusion to which this line of thinking
brings us—the idea that we should not merely remove a criminal wrongdoer
from society, but we should mark him as a bad person, someone who is
morally inferior, defective, and unworthy. As I have suggested, this conclu-
sion involves an inference from the wrongfulness of the criminal act to the
badness of the criminal wrongdoer. It displays a condemnatory personal
judgment and purports to license the negative sentiments that typically
accompany moral condemnation—moralized anger, disgust, hatred, and a
desire to punish.
There is a vast moral philosophy literature on the importance of the
“retributive sentiments” to morality. Yet judgments about personal badness
are hard to contain, because the “badness” factor extends beyond the
criminal wrongdoer. It goes to the circumstances under which a person
commits a crime. It encompasses struggling neighborhoods, childhood
exposure to violence and abuse, lack of critical resources and opportuni-
ties, weak social structures, peer pressure, lack of personal security, and
psychiatric emergencies. These are powerfully bad things. In fact, the more
a person’s troublesome psychological and social circumstances affect our
understanding of that person’s choices, the harder it is to make sense of
where a person’s responsibility begins and ends. We cannot thoughtfully
or honestly keep our focus on what a person deserves. A “compatibilist”
understanding of moral responsibility is unconvincing. When a person’s
individual “badness” begins to seem, in context, even somewhat under-
standable, our evaluations of moral desert lose their grip (Indermaur et al.
2012).

This instability in our evaluations of moral desert should bother the re-
tributivist. It should bother the retributivist because socioeconomic factors
amount to reasons to think the disadvantaged are less blameworthy for
their criminal wrongdoing than criminal defendants from more privileged
socioeconomic groups. And if the truly disadvantaged who commit crimes
are less blameworthy for their criminal acts, they are also less deserving of
punishment than their more privileged peers, even when they violate just
laws.

This idea—that disadvantaged members of society are less blamewor-
thy for criminal wrongdoing and less deserving of punishment than their
privileged peers—is controversial. I will now defend it by developing an
argument that appeals to the relevance of law’s claim to democratic au-
thority and to some facts about the distribution of political power. I will
address this argument to the retributivist. I reject the retributive theory
partly, but not only, on the basis of this argument. I have already suggested
that skeptical worries about the moral competence of mentally ill and in-
tellectually disabled people present a difficulty for a retributive theory of
criminal justice. I also think the very idea of retribution is hard to justify.
Moral philosophers commonly assert that it is ethically foundational—a
basic premise of moral life. I do not agree that it is, but I will not elaborate
that objection here. My aim now is to explore the challenge posed to the
retributive theory by socioeconomic inequality. If the retributive theory
fails to apply under anything like the conditions that we should expect to
be socially relevant, we should abandon it.

3 Deflating Desert

By referring to law’s democratic authority, I mean to appeal to the idea
that our reasons to comply with law come partly from the law’s expression

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of the democratic will of the public. The idea is that we owe it to one
another, as members of a democratic society, to comply with this collective
will expressed through law. There are a variety of ways explored in the
literature to account for this obligation: for example, one is contractual,
another refers to notions of reciprocity and “fair play,” another utilizes
the idea of a “joint commitment,” and yet another refers to democratic
expressions of equal concern and respect for all citizens (Locke 1689; Rawls
1999, 293–343; Gilbert 1993; Dworkin 2011, 69–97; See also Kelly 2018,
149–177). I will not attempt to decide between these theories now, as I
am more interested in their common thread, with which I am sympathetic.
The point of convergence is the idea that democratic institutions are public
decision-making procedures that generate reasons worth taking seriously,
These reasons stem from the joint political agency of democratic citizens—
from the status of democratic citizens as co-authors of the law.

A legitimacy problem for law arises, however, when some people are
denied a fair opportunity for a reasonable set of alternatives to criminal be-
havior. American cities contain de facto racially segregated neighborhoods
that include some very poor areas, where opportunities for education and
employment are severely truncated, and there is no wealth base. Racially
segregated neighborhoods are the result of housing and lending policies
deliberately imposed by the government (Rothstein 2017). These policies
have aimed to achieve not only racial subordination but also wealth in-
equality, and they have resulted in a significant wealth gap between black
and white Americans and a sizable black underclass (Asante-Muhammad
et al. 2017; Massey and Fischer 2000). Members of the urban underclass
are heavily policed and incarcerated at high rates. Their rights and liberties
are more frequently violated, whether by state officials, private persons
with economic leverage, or other ordinary people. This longstanding mis-
treatment sustains the subordinated social standing of black Americans,
especially those who live in black neighborhoods, and including people
who are not poor, and it curtails black Americans’ opportunities to increase
their political and economic power (Patillo 2003). The result is stubborn,
caste-like social stratification (Shankar 2018).

The severity of this racialized socioeconomic and political inequality
compromises the law as a source of ethical obligation. Because the political
power of socioeconomically disadvantaged people, and especially the most
disadvantaged black Americans, is weak, their obligations to comply with
the law are also correspondingly weaker.1 They lack power to authorize or
reform the law and, to that extent, the laws are not their laws.2 Although

1 For a similar argument supporting the diminished legal culpability of children, see Yaffe
(2018). I draw on Yaffe’s ideas in this and the next paragraph. I have also pursued this line of
thinking in Kelly (2019).
2 The presence of political communities that have elected black leaders offers an interesting
challenge to this argument. Still, since criminal justice is state-based and its principles and
rules are historically entrenched, the presence of localized black political leadership should
marginalized populations may benefit from parts of the law, they benefit as relatively passive legal subjects rather than as co-authors.

The same is not true of more privileged members of society, whose political voice has power. As a result, privileged members of society have reasons to comply with substantively just parts of the law that the disadvantaged, who lack political power, do not have. These reasons stem from their collective authorization of the law. Because the disadvantaged have little if any authority over the law, they lack these reasons. As a result, they do not owe it to their fellow citizens as such to respect the law or, at least, their civic obligations to do so are considerably weaker. Of course, they still have moral reasons not to murder, rape, or rob other people, but these reasons do not come from the law per se (Shelby 2016, 219–223, 231–238). Despite having moral reasons not to commit criminal wrongs, the disadvantaged do not exercise democratic agency together with their fellow citizens. They lack the collectively generated reasons their fellow citizens have to recognize legal authority, and they are less blameworthy for violating the criminal law.

Now let’s turn to the notion of moral desert. Unjust inequalities diminish the moral accountability of unjustly disadvantaged criminal wrongdoers in the following respect. Because the disadvantaged have weaker reasons to recognize law’s normative authority, they are less deserving of punishment for violating the law—assuming, that is, that we can indeed make sense of the logic of desert. Disadvantaged persons are less morally culpable for their criminal acts because the disregard they have shown for the law is less objectionable. It is less objectionable because it does not include disregard for civic obligations that arise for persons who are positioned to participate in the law’s collective authorship. To put the point in a different way, the truly disadvantaged do not violate a joint commitment to the law because they are not party to that joint commitment (Kisolo-Ssonko 2019; Gilbert 2006). A reasonable retributive theory would thus hold that the truly disadvantaged are less deserving of retributive punishment when they break the law.

In sum, members of the urban poor who break the criminal law do not deserve as much blame for their criminal actions. Criminal guilt does not imply moral desert, nor does it justify moral blame. When disadvantaged members of society act in ways that violate the criminal law, they are less morally blameworthy, even when the laws they violate are justified. This argument focuses on the diminished political power of an oppressed group. Judgments of blame and desert, in relation to criminal justice, vary in accordance with political status.

If the arguments that I have given in this and section 2 of the paper are compelling, there are good reasons to think that our system of criminal

not be taken to obligate community members to obey the law. Thanks to Myisha Cherry for pressing me on this point. See Forman, Jr. (2017).
punishment is not really about giving anyone what they deserve. The criminal justice system is designed to remove some people from society, whether or not they get what they deserve. We are warehousing mental illness, addiction, abuse, and deprivation. The idea that the people we banish from society morally deserve their fate is a distortion that permits us to rest more comfortably with that reality.

4 Harm Reduction

Where does this leave us? Is a reasonable philosophy of punishment even possible in a society marked by serious racial and economic injustice? Although the causes of crime stretch beyond anything the criminal justice system can handle on its own, the criminal justice system could attempt to provide a limited remedy.

I propose that we reject the retributive view and instead consider criminal justice as a measure of “harm reduction.” Harm reduction is a rights-protecting, public safety rationale that permits us to shift significant burdens of rights protection onto people who threaten or violate other people’s rights. The burdens are significant in the sense that we would not be ethically permitted to impose them on people who do not threaten or violate other people’s rights. The idea is this. Considerations of public safety permit active measures designed to protect everyone’s basic rights. These measures include punishment that aims to reduce the harm crime does, by deterring and incapacitating would-be offenders. So understood, punishment is acceptable because the alternative is to permit wrongful rights violations—namely, of people who have not threatened or violated anyone’s rights. Harm reduction also includes efforts, like prison education and health care, to equip inmates for life after prison. These efforts are good for incarcerated people and they help to reduce the crime rate. They belong to the limited effect a criminal justice system can have to address the causes of crime. A more fully effective approach would involve meeting the requirements of social justice. In other words, the value of harm reduction implies the importance of empowering the disadvantaged politically and securing for them the goods to which they are entitled by justice. But a criminal justice system cannot provide the measures to accomplish this. Solving the social problems that drive the crime rate up demands social commitment and institutions that go beyond a criminal justice system.

A harm-reduction approach calibrates the costs of punishment in terms that contrast with retributive values. It counts the suffering inflicted by a punishment system on people who are convicted as harm, along with other harms criminal wrongdoers have done, rather than as a good, or a basic achievement of justice, as retributivists would have it. So understood, the aim of harm reduction puts pressure on any sentencing scheme to be minimal and as painless as possible—for example, offering meaningful protections for privacy and dignity, as well as access to education, health...
care, and other basic entitlements that it is possible to provide to people who
are incarcerated. As suggested above, providing these services and goods
also reduces the likelihood that inmates will recidivate. More generally,
the goal of reducing harm implies that alternatives to incarceration should
be sought when they are consistent with a reasonable approach to public
safety. We should not equate punishment with prison.

On a harm-reduction approach to criminal justice, moral concepts of
blame and desert play no important role. In fact, they are taken to be out
of place in thinking about criminal justice, since there are reasons to be
skeptical about their application to many defendants, and because they do
not fit legal criteria of criminal culpability—criteria we cannot and should
not readily abandon. I introduced skeptical doubt by appealing to familiar
intuitions about moral desert. Mental illness, intellectual disability, addic-
tion, immaturity, poverty, and racial oppression are factors that mitigate
our sense of a wrongdoer’s moral desert, although they are mostly not
treated by the criminal justice system as relevant to criminal culpability.
For this reason, legal guilt does not license moral blame, even if an offender
has done something morally wrong. Furthermore, it is hard to see how
the criteria of legal culpability could be revised to line up better with our
notion of moral blameworthiness. Mitigating punishment in accordance
with a defendant’s diminished blameworthiness could be at odds with a
rights-protecting, public safety rationale for the criminal justice system,
since some disturbed people have demonstrated that they pose a danger to
other people.

In short, given the mismatch between moral desert and legal culpability,
we face a choice. We could decide to revise our criteria of legal culpa-
bility to aim for a better fit with judgments of moral desert, or we could
consider the kind of legal consequences that might be morally permissible
even when they are not morally deserved. Harm reduction exemplifies
the latter approach. It asks us to seek a reasonable balance between two
aims: (1) reducing the harm crime does and (2) minimizing the harmful-
ness of punishment to offenders. In striking this balance, harm reduction
achieves some measure of distributive justice by reducing unfairness in
the distribution of harms, but it does so imperfectly. People who are bur-
dened by social injustice are still likely to be disproportionately harmed
by the criminal justice system, because the problem of crime is inseparable
from the dynamics of social injustice. By acknowledging this conclusion,
a harm-reduction approach to criminal justice incorporates an element of
shared responsibility, not only to balance the aims of harm reduction, but
also to address the causes of crime. A harm-reduction approach accepts
that a criminal justice system cannot, on its own, deliver justice, and the
retributive theory obscures this.

The retributive theory is no good. Our efforts to organize punishment
around the idea that wrongdoers deserve to suffer are half-hearted at best,
and the results cannot be reconciled with familiar beliefs about individual
responsibility. Instead of doubling down on some new version of the retributive thesis, we could be more honest with ourselves. The retributive ideal that held itself up as a beacon of justice is no more than an unconvincing attempt to twist our collective failures into a righteous form of condemnation, directed at people whose lives we deem to be expendable.

Until we commit ourselves, as a society, to racial and economic justice, we should be morally cautious in our assessments of individual responsibility and minimal in our punishments. My hope is that moral caution about blame and desert could help to make the criminal justice system less punitive and more fair.

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