RESPONSIBILITY, PUNISHMENT, AND PREDOMINANT RETRIBUTIVISM

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Punishment combines blame and sanction, censuring wrongdoers for failing to comply with authoritative legal norms and attaching penalties of various kinds to especially significant forms of wrongdoing. There are many possible rationales for punishment. Some are forward-looking, providing a consequentialist justification of punishment in terms of the goods — such as deterrence, rehabilitation, the expression and enforcement of community norms, or reconciliation — that punishment can produce. Other rationales are backward-looking, providing a retributivist justification of punishment in terms of the agent’s desert, which is itself grounded in the degree of her culpable wrongdoing.

Blame is an aversive reactive attitude that presupposes that its target is blameworthy — that the target is culpable or responsible for some kind of wrongdoing. Insofar as punishment presupposes blame and blame presupposes responsibility and desert, punishment also presupposes responsibility and desert. If so, retributivism must be at least part of the truth about punishment. Some form of retributivism is defensible, once we clarify misconceptions about retributivism. This leaves a choice between pure retributivism and a mixed conception that includes retributive elements. That choice is best resolved in favor of a mixed conception in which retributive elements predominate.

1. BLAME, PUNISHMENT, AND RESPONSIBILITY

Punishment combines blame or censure and sanction of some kind. Blame is an aversive reactive attitude that presupposes that its target is blameworthy — that the target is culpable or responsible for some kind of wrongdoing, whether that is a shortcoming in action or attitude (Brink and Nelkin 2019). Punishment has a condemnatory function in which breach of norms makes one a legitimate target of censure. If so, punishment involves blame and so presupposes that the target of punishment is blameworthy. Blameworthiness consists in some sort of wrongdoing for which the agent is responsible. But punishment involves sanction, as well as censure. Punishment goes beyond blame and attaches sanctions of various kinds to especially significant forms of culpable wrongdoing. Punishment can be informal when sanctions are imposed by private parties, either as individuals or as groups, to perceived culpability. Punishment is official when the state has a system of sanctions that it imposes for culpable violations of its rules. Legal punishment is official punishment in which a legal system systematically imposes sanctions for culpable violations of legal rules by its members. Our focus will be on legal punishment.

Why should the state sanction and not merely censure legal wrongdoing? We do well to remember that sanctions can include a diverse array of restrictions on the rights and privileges of citizenship, ranging from fines, probationary status, community service, to incarceration. A reasonably just criminal justice system specifies both crimes mala in se — wrongs in themselves — and mala prohibita — wrongs by virtue of prohibition. Crimes mala in se violate natural duties and include wrongs against the person, such as murder, rape, assault, theft, and fraud. Crimes mala prohibita do not violate natural duties and can include crimes of prostitution, drug use, gambling, tax evasion, traffic violations, loitering, and truancy. Because they involve crimes against the person that violate natural duties, crimes mala in se tend to be more serious offenses than crimes mala prohibita, which serve more to facilitate security, cooperation, and coordination. Sanctions are needed as a supplement to censure to ensure adequate levels of compliance with the law’s prohibition on crimes mala in se and mala prohibita. In a reasonably just legal system citizens have good moral reasons to

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avoid crimes *mala in se* and *mala prohibita*. But moral reasons are not always sufficient to ensure adequate levels of compliance. Some individuals lack moral motivation entirely, for others moral motivation is weak, and those for whom moral motivation is usually strong are nonetheless subject to occasional weakness. A system of legal sanctions provides imperfect moral beings with prudential motivation that supplements and reinforces, rather than replaces, moral reasons for compliance (von Hirsch 1993: ch. 2).

In the case of legal punishment, the state claims authority to censure and sanction for culpable violation of duly enacted norms specifying crimes *mala in se* and *mala prohibita*. As such, punishment can be contrasted with other forms of social control that involve *detention* — both *prospective* detention in which an agent is civilly committed or quarantined, prior to wrongdoing, because he is a danger to himself or others, and *reactive* detention in which the agent has engaged in wrongdoing for which he is not culpable and, hence, is excused, but nonetheless poses an ongoing danger to himself or others. Detention, of either kind, involves neither blame or sanction. Moreover, punishment can also be contrasted with forms of social control that do employ sanctions but not in response to culpable wrongdoing. The state might employ sanctions to control the attitudes and behavior of citizens in legal or extralegal ways, for instance, to encourage loyalty and discourage legitimate dissent. What seems crucial to punishment is that it is a public response to a perceived breach of legally promulgated norms.

Theories of punishment answer various questions about the justification of punishment, including (1) *Whom* should we punish? (2) *Why* should we punish? (3) *How much* should we punish? and (4) *How* should we punish? A satisfactory theory of punishment should provide an answer to all these questions (and perhaps more). How we answer one question may affect how we can answer other questions. Different rationales for punishment approach these issues differently, sometimes conceptualizing crime differently and focusing on different aims of punishment.

1. **Deterrence**: Punishment aims to promote compliance with legal norms, and it does so by achieving deterrence, both specific and general — deterring the individual who is punished from further wrongdoing and other potential criminal wrongdoers.
2. **Rehabilitation**: Criminal conduct is an expression of social dysfunction, and punishment should aim to rehabilitate and re-socialize criminals, equipping them with psychological and social skills and other resources for being well-integrated and productive members of society.
3. **Norm reinforcement and communication**: Because criminal conduct breaches social norms, punishment serves to express, reinforce, and communicate community norms.
4. **Restorative justice**: Criminal conduct breaches community norms and often wrongs a victim, in which case punishment should provide a mediation among the wrongdoers, the victims, and the larger community with the aim of restoring moral community and securing reconciliation.
5. **Retributive justice**: Criminal misconduct involves culpable wrongdoing — that is, wrongdoing for which the agent is responsible — and punishment should aim to hold criminals accountable based on their desert and in proportion to the magnitude of their culpable wrongdoing.

These rationales are not exhaustive, but they are representative. Notice that rationales for punishment can be *pure*, appealing to a single factor or aim to justify punishment, or *mixed*, if they appeal to combinations of factors. Notice also the first four rationales are broadly *forward-looking*, appealing to some good consequence of punishment, whereas the last rationale is a *backward-
looking, appealing to the historical notion of desert. Here too, conceptions of punishment can be purebreds or hybrids.²

We can test rival rationales by assessing their systematic comparative plausibility. In particular, we should see how well they answer these different questions about justified punishment, in particular, by measuring their commitments on these questions against our own considered convictions about these matters, and by comparing their theoretical virtues. Of special concern, when assessing the adequacy of any rationale, is whether its account of whom to punish is under-inclusive — failing to justify punishment of those who seem to merit punishment — or over-inclusive — justifying punishment of those who do not seem to merit punishment. A conception or rationale for punishment is defective insofar as it appears either under-inclusive or over-inclusive. The English jurist William Blackstone (1723-80) famously claimed that it is worse to punish the innocent than to let the guilty go free.³ Blackstone’s asymmetry implies that all else being equal it is worse to over-punish then to under-punish and, hence, that all else being equal it is a bigger vice in a theory of punishment to be over-inclusive than to be under-inclusive.

Most normative conceptions combine accommodation of our pre-theoretical normative commitments and reform of those commitments. Insofar as a conception subsumes and explains considered normative convictions, it accommodates them. But insofar as a conception conflicts with considered normative convictions, it calls for reform or revision. We should not expect perfect accommodation, because our moral judgments are incomplete, inconsistent, and subject to various kinds of bias and distortion. But complete reform is no more plausible than complete accommodation. Indeed, complete reform threatens to introduce a change in subject matter and should be explored only as a last resort, only if we conclude that our considered normative convictions are hopelessly muddled. Typically, reform is like the hole in a doughnut, made possible by a surrounding substance of accommodation. We accept local reforms as part of a process of global accommodation. This means that reform is always, or at least typically, partial. But to say that reform is partial does not imply that it cannot be significant. How revisionary a conception can be is something we cannot decide in advance of looking at the conception, its degree of accommodation, and the nature of its reforms. So too with blame and punishment. Our pre-theoretical beliefs about blame and punishment are not sacred; they may be biased, incomplete, or inconsistent and may require revision. So, while it is some evidence against a conception that it is under-inclusive or over-inclusive, that evidence may not be decisive. The most compelling conception of punishment may be revisionary in some respects if it fits our other beliefs sufficiently well.

By these standards, we have reason to be skeptical of purely forward-looking conceptions of punishment, because they promise to be both under-inclusive and over-inclusive. Purely forward-looking conceptions will be under-inclusive, because they imply that we have no reason to punish when doing so would not secure the relevant good consequences. No doubt, punishment often does or at least can promote deterrence, rehabilitation, norm reinforcement and communication, and reconciliation. But we can imagine circumstances in which punishment would not secure these goods — in which rehabilitation was not possible and in which punishment could not be publicized or would be widely, but falsely, regarded as illegitimate. In such circumstances, someone who was fully responsible for a serious wrongdoing would go unpunished. Nonetheless, most of us would think

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² If, as I believe, restorative justice is most plausible when it incorporates, rather than eliminates, accountability, then restorative justice is best understood as a mixed conception, incorporating both a backward-looking (retributive) focus on desert and a forward-looking focus on reconciliation. For this sort of treatment of restorative justice, see Duff 2001: 92-106; Duff 2009; and Allais 2012.

³ Blackstone’s version of this asymmetry involves a 10:1 ratio: “better that ten guilty persons go free than that one innocent party suffer” (Blackstone 1791: Book IV, Chapter 27, page 358). Benjamin Franklin thought that the ratio is 100:1 (Franklin 1785: Vol. 9, page 293). It is the asymmetry itself, rather than any particular ratio, that is important for our purposes.
that there was at least some reason to punish culpable wrongdoers in such circumstances. These would be cases of under-punishment. Moreover, purely forward-looking conceptions will be over-inclusive, because they imply that we have reason to punish in the absence of culpable wrongdoing if doing so would promote the relevant consequential values. Perhaps such cases would be rare or merely hypothetical, but they are problematic because they violate the norm that we should punish only culpable wrongdoers. In such cases, purely forward-looking conceptions of punishment are over-inclusive. If we accept Blackstone’s asymmetry, then, all else being equal, the sin of over-inclusiveness is more serious than the sin of under-inclusiveness.

P.F. Strawson criticizes instrumentalist conceptions of responsibility that justify ascriptions of responsibility and the reactive attitudes in purely forward-looking terms, by appeal to deterrence, norm reinforcement, and the like for invoking the wrong sort of reason for thinking someone responsible and applying the reactive attitudes (1962: 61-62). Adapting Strawson’s point, we might say that purely forward-looking conceptions of punishment provide the wrong sort of reason for punishment. We should not punish for purely forward-looking reasons, in the absence of culpable wrongdoing, because the proper target of punishment is wrongdoing for which the agent is responsible. This is the claim that culpable wrongdoing is a necessary condition of justified punishment. This is an important insight of retributive conceptions, whether pure or mixed.

Perhaps we don’t yet have a conclusive refutation of purely forward-looking conceptions of punishment. Every conception of punishment might prove revisionary, in which case we would need to determine the least revisionary conception, and until we’ve examined the implications of other conceptions, we don’t know that some purely forward-looking conception won’t be least revisionary. This is already reason to examine other conceptions, but there is reason to expect that retributive rivals, whether pure or mixed, will be less revisionary and, hence, more plausible.

2. SKEPTICISM ABOUT RESPONSIBILITY AND PUNISHMENT

Retributive conceptions of punishment, whether pure or mixed, limit punishment to cases of culpable wrongdoing. Culpable wrongdoing is wrongdoing for which the agent is responsible. This means that legitimate punishment is conditional on the agent’s responsibility for her wrongdoing. This, in turn, means that punishment is hostage to realism about responsibility and is threatened by skepticism about responsibility.

In this way, punishment is tied to traditional debates about whether we are ever responsible for our actions. That debate is often framed in terms of the compatibility of free will and responsibility with the truth of causal determinism — the thesis that every event is determined or necessitated by the laws of nature and the prior history of the world. Compatibilists insist that responsibility is compatible with the truth of causal determinism, whereas incompatibilists insist that the two are not compatible. That means that incompatibilists who are also determinists are hard determinists, embracing skepticism about free will and responsibility. However, some incompatibilists are libertarians, rejecting determinism and embracing indeterminism. Most libertarians are realists about free will. But it is an open question whether indeterminism can ground responsibility and whether we could be responsible for uncaused choices. If not, then indeterminism cannot rescue realism about freedom and responsibility. In that case, incompatibilism would be sufficient for skepticism about free will and responsibility.

Skeptics about responsibility have reason to be skeptical about punishment. They could still accept purely forward-looking conceptions of punishment — defending punishment because it does or can promote various goods, such as deterrence, rehabilitation, norm enforcement and communication, and reconciliation — because they do not presuppose that the agent has done wrong or is responsible for it. But punishment involves both censure and sanction, which are attitudes and practices that seem to presuppose wrongdoing for which the target is responsible. This is why purely forward-looking conceptions seem to appeal to the wrong sort of reason for punishment. If we accept this link between legitimate punishment and responsibility, then skeptics about responsibility should
be abolitionists about punishment. Nonetheless, they can seek to replace punishment with forms of social control that do not presuppose censure, sanction, and responsibility. In the criminal law, we acquit wrongdoers who are not responsible for their wrongdoing by reason of insanity. But if they remain a danger to themselves or others, they can be subject to involuntary commitment, during which they should receive psychiatric treatment designed render them non-dangerous and make them suitable for reintegration into society. Involuntary commitment is a form of reactive detention. We engage in pre-emptive detention when we quarantine people who are potential dangers to themselves or others, even in the absence of having caused harm. The skeptic about responsibility might be an abolitionist about punishment but a proponent of involuntary commitment and quarantine (e.g. Pereboom 2014: chs. 6-7; Carusso 2018, 2019).

3. REALISM ABOUT THE REACTIVE ATTITUDES AND RESPONSIBILITY

Skepticism about free will and responsibility is an intelligible position and, in another context, merits extended engagement. But skepticism about free will and responsibility is a position of last resort, to be embraced only if there is no plausible conception of responsibility. Skepticism about responsibility is extremely revisionary insofar as it denies that we are ever responsible for anything. This makes it an error theory, claiming that our assumptions about responsibility are systematically mistaken. To justify an error theory, the principles that entail skepticism must be more plausible than the assumptions that they require us to forego. Especially when the assumptions in question are widely held and deeply entrenched in our practices, this burden is difficult to discharge. The assumption that normal, mature adults are, for the most part, responsible for their conduct is a pervasive one. As Strawson reminds us, this assumption is implicated in many of our reactive attitudes, especially those involving praise and blame, such as pride and resentment, and it underlies our practices of punishment. Though these assumptions and practices could be systematically mistaken, we should accept this conclusion reluctantly, only if we can identify no viable conceptions of responsibility.

One way to identify a viable conception of responsibility is to look to our practices that presuppose responsibility. Strawson proposed that we do so by looking at the reactive attitudes and the way they mediate interpersonal relationships. Some reactive attitudes, such as agent-regret, need not implicate responsibility. But our reactive attitudes involving praise and blame — such as pride, resentment, and guilt — do implicate responsibility. Strawson links responsibility and reactive attitudes, such as those of resentment and indignation, in a biconditional fashion.

*Strawson's Thesis:* Reactive attitudes involving blame and praise are appropriate just in case the targets of these attitudes are responsible.

Strawson’s thesis can be interpreted in two very different ways, depending on which half of the biconditional has explanatory priority.

According to a response-dependent interpretation, there is no external, or response-independent justification of our attributions of responsibility. This reading fits with Strawson’s view that our reactive attitudes and ascriptions of responsibility, as a whole, do not admit of external justification. Particular expressions of a reactive attitude might be corrigible as inconsistent with a pattern of response, but the patterns of response are not themselves corrigible in light of any other standard. Similarly, particular ascriptions of responsibility might be corrigible in light of patterns in our ascriptions of responsibility, but the patterns themselves are not corrigible in light of any other standards. Responsibility judgments simply reflect those dispositions to respond to others that are constitutive of various kinds of interpersonal relationships. Response-dependence might be the right interpretation of Strawson (Watson 1987: 222; Wallace 1994: 19; and Shoemaker 2017). However, it is an open question whether it is the philosophically most plausible interpretation of that thesis.
An alternative interpretation of Strawson’s thesis is realist, rather than response-dependent. This interpretation stresses the way that the reactive attitudes make sense in light of and so presuppose responsibility. As such, the reactive attitudes are evidence about when to hold people responsible, but not something that constitutes them being responsible. It’s true that the reactive attitudes are appropriate if and only if the targets are responsible, but it’s the responsibility of the targets that makes the reactive attitudes toward them fitting or appropriate. In the biconditional relationship between responsibility and the reactive attitudes, it is responsibility that is explanatorily prior, according to this realist interpretation. This involves a response-independent conception of responsibility.

The crucial question in deciding between these two different interpretations of Strawson’s thesis is whether the study of excuses leads to a conception of responsibility that can be specified independently of our reactive attitudes and that serves to ground or justify those attitudes. If so, this favors a realist conception of responsibility. If not, it favors a response-dependent conception.

The realist interpretation of Strawson’s thesis promises to ground and justify the reactive attitudes in a way in which the response-dependent reading cannot. If we focus on wrongdoing, the realist can and should appeal to the following working hypothesis about the inverse relation between responsibility and excuse.

The Responsibility-Excuse Biconditional: An agent is responsible for wrongdoing iff she is not excused for it.

According to this biconditional, an agent is responsible for that for which she has no excuse, and she is excused for conduct for which she is not responsible. If so, excuse is a window onto responsibility and vice versa.4

Strawson accepts the Responsibility-Excuse Biconditional and takes it to support a form of compatibilism. Excusing and exempting conditions depend on specific failings — sometimes in individual cases, for instance, involving inadvertence or duress, and sometimes of a general nature, involving immaturity or insanity. As such, they don’t presuppose the falsity of determinism, which is a thesis that applies to all cases (1962: 67-69). If hard determinism were true, we should excuse everyone, because no one is responsible. But the criminal law and our moralized reactive attitudes are selective about when to excuse. We excuse for particular kinds of incapacity, such as insanity, immaturity, or duress. But then our reactive attitudes and associated practices of excuse presuppose some version of compatibilism.

4. REALISM AND FAIR OPPORTUNITY

If we model responsibility by attending to excuses, we would do well to look at the criminal law, because it has a reasonably settled conception of excuses. The criminal law recognizes two main kinds of excuse — incompetence excuses, such as insanity, and duress excuses. Incompetence involves impairment of an agent’s internal capacities. By contrast, duress involves a situational failing in which wrongful interference by another with the agent’s options deprives her of the fair opportunity to act on her own deliberations about how to behave. In this way, standard excuses recognized by the criminal law reflect impairment of the agent’s capacities or opportunities. If we treat excuse as a window onto responsibility, we might factor responsibility and, hence, broad culpability into two main conditions — normative competence and situational control. This conception of responsibility draws on and synthesizes two traditions of thinking about responsibility — the reasons-responsive wing of the compatibilist tradition of thinking about free will and responsibility (e.g. Wolf 1990; Wallace 1994: Fischer and Ravizza 1998; Nelkin 2011; Brink and

4 Michael Moore describes excuse as “the royal road” to responsibility (Moore 1997: 548). But it’s important to recognize that it is a two-way street.
Nelkin 2013; McKenna 2013; and Vargas 2013) and the fair choice approach to criminal responsibility (e.g. Hart 1968; Moore 1997; and Morse 1994, 2002).

If someone is to be culpable or responsible for her wrongdoing, then she must be a responsible agent. Our paradigms of responsible agents are normal mature adults who are normatively competent. They must be able to distinguish between the intensity and authority of their desires and impulses. They must not simply act on their strongest desires, but be capable of stepping back from their desires, evaluating them, and acting for good reasons. If so, normative competence involves reasons-responsiveness, which itself involves both cognitive capacities to distinguish right from wrong and volitional capacities to conform one’s conduct to that normative knowledge.

It is important to frame this approach to responsibility in terms of normative competence and the possession of these capacities for reasons-responsiveness. In particular, responsibility must be predicated on the possession, rather than the use or exercise, of such capacities. We do excuse for lack of competence, but not for lack of performance. Provided the agent had the relevant cognitive and volitional capacities, we do not excuse the weak-willed or the willful wrongdoer for failing to recognize or respond appropriately to reasons. If responsibility were predicated on the proper use of these capacities, we could not hold weak-willed and willful wrongdoers responsible for their wrongdoing. Indeed, the fact of wrongdoing would itself be exculpatory, with the absurd result that we could never hold anyone responsible for wrongdoing. It is a condition of our holding wrongdoers responsible that they possessed the relevant capacities or competence.

Normative competence, on this conception, involves two forms of reasons-responsiveness: a cognitive ability to recognize reasons for or against conduct and a volitional ability to conform one’s will to this normative understanding. Both dimensions of normative competence involve norm-responsiveness. As a first approximation, we can distinguish moral and criminal responsibility at least in part based on the kinds of norms to which agents must be responsive. Moral responsibility requires capacities to recognize and conform to moral norms, whereas criminal responsibility requires capacities to recognize and conform to norms of the criminal law. Though there will typically be considerable overlap between moral and criminal norms, especially in morally legitimate criminal systems, there is no reason to expect the coincidence to be perfect. Indeed, in most liberal regimes there will be many moral norms the violation of which the legal system will not criminalize.

Normative competence requires the cognitive capacity to make suitable normative discriminations, in particular, to recognize wrongdoing. If so, then we can readily understand one aspect of the criminal law insanity defense. Most plausible versions of the insanity defense include a cognitive dimension, first articulated in the M’Naghten rule that excuses if the agent lacked the capacity to discriminate right from wrong at the time of action.\(^5\)

However, normative competence requires more than cognitive competence. It also requires volitional capacities to form intentions based on one’s practical judgments about what one ought to do and to execute these intentions over time, despite distraction, temptation, and other forms of interference.\(^6\) Volitional impairment might take the form of (a) irresistible urges or paralyzing phobias that are neither conquerable nor circumventable, (b) severe depression or listlessness, or (c) damage to the prefrontal cortex of the brain, causing significant difficulty for agents in conforming

\(^5\) M’Naghten’s Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

\(^6\) For skepticism about the volitional dimension of normative competence, see Morse 2002. For a defense of the volitional dimension of normative competence, against volitional skepticism, see Brink and Nelkin 2013: 96-302.

\(^7\) See Mele 1990. A desire is conquerable when one can resist it and circumventable when one can act so as to make acting on the desire impossible or at least more difficult. The alcoholic who simply resists cravings conquers his impulses, whereas the alcoholic who throws out his liquor and stops associating with former drinking partners or won’t meet them at places where alcohol is served circumvents his impulses. Conquerability is mostly a matter of will power, whereas circumventability is mostly a matter of foresight and strategy. Both are matters of degree.
to their own judgments about what they ought to do, as in the famous case of Phineas Gage.\(^8\) Recognition of a volitional dimension of normative competence argues against purely cognitive conceptions of insanity, such as the M’Naghten test, and in favor of a more inclusive conception, represented in the Model Penal Code, which conceives of insanity as involving significant impairment of either cognitive or volitional competence.\(^9\)

A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law [§4.01].

If so, normative competence involves both cognitive and volitional competence.

Both cognitive and volitional competence involve sensitivity to reasons. Sensitivity is a scalar notion. People can be more or less sensitive to reasons, and cognitive or volitional competence can be more or less impaired. If we analyze responsibility and excuse in terms of normative competence, this implies that both responsibility and excuse are, at least in principle, scalar concepts (e.g. Nelkin 2016, Brink 2018). There may be important pragmatic reasons for making bright line discriminations in certain contexts, privileging certain degrees of normative competence, as necessary and sufficient for responsibility and excuse. These are interesting and complicated issues, beyond the scope of this essay. But if we must recognize thresholds of normative competence, if only for pragmatic reasons, it seems fair to require, as the Model Penal Code does, substantial, rather than bare, normative capacity as a condition of responsibility and significant, rather than complete, impairment of capacity as grounds for an excuse.

An important part of an agent’s being responsible for wrongdoing that she chose and intended consists in her being a responsible agent. This we have conceptualized in terms of normative competence and analyzed into cognitive and volitional capacities. But there is more to an agent being culpable or responsible for her wrongdoing than her being responsible and having done wrong. Excuse is not exhausted by denials of normative competence. Among the factors that may interfere with our reactive attitudes, including blame and punishment, are external or situational factors. In particular, duress can induce an agent to engage in wrongdoing that she would not otherwise have performed. The paradigm situational excuse is coercion by another agent, as when one is threatened with physical harm to oneself or a loved one if one doesn’t participate in some kind of wrongdoing, for instance, driving the getaway car in a robbery. The Model Penal Code adopts a reasonable person version of the conditions under which a threat excuses, namely, when a person of reasonable firmness would have been unable to resist, provided the actor was not himself responsible for being subject to duress (§2.09).

Duress is not an incompetence excuse. It does not compromise the wrongdoer’s normative competence or her status as a responsible agent. But it does challenge whether she is responsible for her wrongdoing. This shows that we need to distinguish between being a responsible agent and being responsible for one’s wrongdoing. Being normatively competent is sufficient for being a responsible agent, but it is necessary but not sufficient for being responsible for one’s wrongdoing. The duessed

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8 Phineas Gage was a nineteenth century railway worker who was laying tracks in Vermont and accidentally used his tamping iron to tamp down a live explosive charge, which detonated and shot the iron bar up and through his skull, damaging his prefrontal cortex. Though he did not lose consciousness, over time his character changed. Whereas he had been described as someone possessing an “iron will” before the accident, afterward he had considerable difficulty conforming his behavior to his own judgments about what he ought to do. See Damasio 1994.

9 The Model Penal Code (1985) is a model statutory text of fundamental provisions of the criminal law, first developed by the American Law Institute in 1962 and subsequently updated in 1981. It was intended to serve as a model for local jurisdictions drafting and revising their criminal codes. For further discussion of the Model Penal Code conception of insanity, see Brink 2013.
wrongdoer is a responsible agent, but nonetheless she is not responsible for her wrongdoing. Responsibility for wrongdoing requires both normative competence and situational control. Being responsible is a matter of having the right capacities, but being responsible for one’s conduct requires both capacities and appropriate opportunities.

This conception of responsibility factors responsibility into normative competence and situational control and factors normative competence into cognitive and volitional capacities. This conception seems plausible, in significant part because it promises to accommodate our practices of excuse in both moral assessment and the criminal law pretty well. Incapacity excuses deny normative competence, whereas duress excuses deny the opportunity to exercise those capacities free from inappropriate interference by others. But it would be nice if there were some unifying element to its structure.

One possible umbrella concept is control. Freedom from coercion and duress, cognitive competence, and volitional competence all seem to be aspects of an agent’s ability to control her actions. But control seems important, at least in part, because it seems unfair to blame agents for outcomes that are outside their control. This suggests that the umbrella concept should be fairness, in particular, the fair opportunity to avoid wrongdoing, because failure of either normative competence or situational control violates the norm that blame and punishment be reserved for those who had a fair opportunity to avoid wrongdoing. If we treat the fair opportunity to avoid wrongdoing as the key to responsibility, we get the following picture of the architecture of responsibility.

The fair opportunity conception of responsibility draws on resources familiar from reasons-responsive conceptions of compatibilism and fair choice approaches to criminal responsibility and makes sense of the criminal law’s conceptualization of excuses into impairments of capacities (incompetence) and impairment of opportunities (duress).10

10 Gary Watson distinguishes between two kinds of responsibility: attributability and accountability (Watson 1996). He associates attributive responsibility with action that expresses the agent’s real self, with an aretæic perspective on her action, and with her own evaluative commitments or orientation. By contrast, he thinks that accountability involves liability to sanctions, raises questions about the fairness of imposing sanctions, and presupposes that the agent had control and a fair opportunity to avoid sanctions. We can explain attributability in terms of quality of will and accountability in terms of fair opportunity. I am skeptical that we can explain moral responsibility and blame entirely in terms of attributability and quality of will without invoking...
The fair opportunity conception of responsibility is a response-independent conception of responsibility, because it specifies the conditions of responsibility independently of the reactive attitudes. As such, the realist about Strawson’s thesis can draw on the fair opportunity conception to identify the conditions under which the reactive attitudes are fitting and justified.

5. RETRIBUTIVE ESSENTIALS

Realism about Strawson’s thesis says that our reactive attitudes are correct or justified insofar as they track the responsibility of their targets. Blame and punishment are reactive attitudes and practices. On the realist interpretation, Strawson’s thesis represents some of the negative reactive attitudes, including blame and punishment, as fitting responses to wrongdoing for which the agent is responsible or culpable. This is a retributivist thesis about blame and punishment being fitting or deserved insofar as the agent is responsible or culpable for her wrongdoing. More specifically, retributivism says that blame and punishment ought to be proportional to desert, which is itself the product of two independent variables — wrongdoing and culpability or responsibility.11

\[ P \propto D (= W \times R) \]

On this view, desert is the product of the magnitude of wrongdoing and the degree of responsibility. In principle, different wrongs can be arranged on a scale of seriousness. Presumably, the magnitude of a wrong is often influenced by the amount of harm it produces or risks, though we probably shouldn’t reduce wrongness to harmfulness, because there are harms that are not wrong (e.g. cases of self-defense and necessity) and because some wrongs may not be harmful (e.g. unfair free-riding). Degree of responsibility should be thought of as a percentage of full responsibility, which we could represent on a 0-1 scale. Thus, an agent would deserve punishment commensurate with the magnitude of the wrong she has committed just in case she is fully responsible for her wrongdoing and fractional punishments corresponding to reduced responsibility.

There are at least three claims that are essential to any version of retributivism, whether it is a pure or mixed conception of punishment.

1. Desert in the form of culpable wrongdoing is a necessary condition of blame and punishment.
2. Proportionate justice sets an upper limit on permissible blame and punishment.
3. Blame and punishment are fitting responses to culpable wrongdoing in the sense that there is a strong pro tanto case for blame and punishment that is proportionate to desert.

First, to avoid punishing the innocent, even when doing so would have consequentialist value, we must recognize retributivism as at least part of the truth about blame and punishment — specifically, we must recognize desert as a necessary condition on blame and punishment. Second, proportionate just deserts track culpable wrongdoing and set an upper limit on the amount of punishment that is permissible in individual cases. Third, culpable wrongdoing is the desert basis of punishment in the sense that blame and punishment are pro tanto fitting responses to wrongdoing for which the agent is responsible. Whether proportionate blame and punishment are always all things considered appropriate responses will depend on the balance of reasons and whether our conception of retributivism is pure or mixed.

Whether blame and punishment are fitting responses to culpable wrongdoing may depend on whether the wrongdoing in question is moral or legal. Moral retributivism says that blame and accountability and fair opportunity (contrast Scanlon 2008: ch. 4). But, however that issue is resolved, criminal responsibility and punishment clearly require accountability and fair opportunity.

punishment are fitting responses to culpable moral wrongdoing. This is plausible insofar persons are moral agents who are accountable for their conduct; respecting persons means that it is fitting that they be blamed and punished for wrongdoing for which they are responsible and that they merit or deserve blame and punishment. Legal retributivism says that blame and punishment are fitting responses to culpable legal wrongdoing. However, it is less clear that culpable legal wrongdoing always deserves blame and punishment if only because legal norms and moral norms are distinct and legal wrongdoing is not necessarily moral wrongdoing. But where legal wrongdoing is not morally wrong, it is less clear that blame and punishment are deserved, even pro tanto.

One might conclude that there is a pro tanto case for punishing legal wrongdoing when and only when legal wrongdoing is also moral wrongdoing. But there can be a pro tanto case for punishing legal wrongdoing even in cases in which the legal norms being transgressed are morally problematic provided that the moral flaws in the law are fairly minor, do not occur too often, and do not have systematically disparate impact on citizens. On this view, the duty to obey the law is part of a package deal, arising from a sufficiently just social compact. Herbert Morris’s justification of punishment by appeal to fairness might be understood this way (1968). Morris argues that basic prohibitions of the criminal law against murder, rape, assault, theft, and trespass are norms the general observance of which is mutually beneficial. Culpable wrongdoers are those who free-ride, enjoying the benefits of others’ compliance with these norms without incurring the costs of doing their part to maintain the system from which they benefit. But free-riding on mutually beneficial social practices is unfair. The culpable wrongdoer claims more than his fair share, and fairness demands that he be punished according to the terms announced in advance as the penalty for noncompliance.

The mutually beneficial character of the laws of a reasonably just legal system extends to laws prohibiting crimes mala in se and mala prohibita. In the case of crimes mala in se, laws do not make the conduct wrong but rather declare it be wrong, legally reinforcing the wrongful status of wrongs against persons. In the case of crimes mala prohibita, the laws make the conduct wrong through enactment. In both cases, the prohibitions tend to be mutually beneficial, making noncompliance a public wrong, calling for state censure and sanction. In the case of crimes mala in se but not mala prohibita, the conduct is wrong independently of legal enactment. So in the case of crimes mala in se there are two kinds of reason for censure and sanction — reasons to enforce natural duties and reasons of fairness — whereas in the case of crimes mala prohibita there is just one kind of reason for censure and sanction — reasons of fairness.

This appeal to fairness to help anchor desert has an important scope limitation — it only applies to social practices that are sufficiently just and mutually beneficial. If the social scheme does not meet this condition, then noncompliance may not be unfair. In particular, if one lives in a sufficiently unjust social scheme in which the benefits and burdens of social cooperation are not distributed fairly, then noncompliance with the scheme’s norms — legal wrongdoing — need not be morally wrong and, hence, blame and punishment may not be deserved. In such systems, blame and punishment of crimes mala in se will still be fitting, but blame and punishment of some crimes mala prohibita may not be fitting.

When the scope condition is satisfied, legal, as well as moral wrongdoing, for which the agent is responsible merits punishment in the sense that there is a strong pro tanto reason to punish culpable wrongdoing. A suitably qualified retributivism not only has considerable intuitive appeal but also fits well with important parts of criminal jurisprudence. For instance, it explains well the two main kinds of affirmative defense a defendant can offer — justifications and excuses. Justifications and excuses each deny one of the two elements in the retributivist desert basis for blame and punishment — wrongdoing and responsibility. Justifications, such as self-defense or

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12 While justifications and excuses are the two main affirmative defenses available to defendants, there are also pragmatic or policy-based exemptions, such as prosecutorial immunity for diplomats. See, Robinson 1997: 96-124, 204-07 and Berman 2003.
necessity, deny wrongdoing, whereas excuses, such as insanity or duress, deny culpability or responsibility.

6. MISCONCEPTIONS ABOUT RETRIBUTIVISM

Though some form of retributivism is the dominant conception of punishment in the criminal law, it has a mixed reputation in other quarters. Some of these misgivings may reflect concerns about the pure retributivist thesis that desert is the only factor affecting blame and punishment and that desert is always sufficient to justify punishment whatever the costs or moral perplexities. Mixed conceptions of punishment that recognize desert as one element may avoid worries directed at pure retributivism. However, there are other concerns about retributivism that would seem to apply to all forms of retributivism, whether pure or mixed.

1. Retributivism is implausibly committed to *lex talonis*, which involves punishing wrongdoers in kind (e.g. an eye for an eye).
2. Retributivism is implausibly committed to harsh punishments, such as those found in mass incarceration — trying juveniles as adults, three strikes laws, significant mandatory minima, long sentences for non-violent crime, and post-incarceration penalties, such as disenfranchisement, loss of public assistance, and requirements to disclose one’s criminal record to potential employers.
3. Retributivism is implausibly committed to valuing the felt suffering of the wrongdoer.
4. Retributivism is implausibly committed to viewing retribution as an intrinsic good.

Some, if not all, of these concerns reflect misunderstandings of retributivist essentials or accretions in the retributivist tradition.

(1) Retributivism requires proportionate justice, not punishment in kind. There are some ways that the state ought not to treat its citizens, even if they have committed heinous crimes. For instance, even in the United States, where we allow capital punishment and permit various severe punishments, we have a constitutional prohibition on cruel and unusual punishment, which can plausibly be interpreted as a prohibition on severely inhumane and disproportionate punishments. The state ought not to torture torturers or rape rapists; such punishments would arguably constitute cruel and unusual punishment. We can still punish proportionately without punishing in kind. *Lex talonis* might allow for swift but inhumane punishments in the case of rape or torture; proportional punishments that are humane might take longer.

(2) Some writers lay the problems associated with mass incarceration at the door of the retributivist (Kelley 2002, 2009, 2018). Retributivism requires accountability and proportionate punishment, but it’s not obvious why that supports trying juveniles as adults, steep mandatory minima, long prison sentences, brutal prison conditions, or post-incarceration penalties — such as disenfranchisement, the inability to serve on juries, the loss of public assistance, and the duty to report felony convictions to potential employers. These are some of the aspects of the war on drugs and mass incarceration that have led to calls for criminal justice reforms (e.g. Alexander 2010). But there’s no reason to assume that retributivism supports such draconian penalties. Indeed, there is every reason to believe that mass incarceration imprisons people out of proportion to their deserts.

What proportionality clearly requires is *comparative* just deserts. This gives us only *ordinal* information about the magnitude of just deserts until we have *anchors* for the ordinal scale. A natural way to provide anchors is to determine the most severe punishment permissible for the most heinous crime (e.g. serial murder and torture) and the mildest form of sanction for the most minor infraction (e.g. jaywalking). There is room for disagreement about what quantum of punishment is appropriate for the anchors, especially at the maximum. Norway sets the maximum at 21 years, even for Anders Breivik, who killed 77 people in terrorist attacks, including 69 participants at the Social Democratic Youth League summer camp. The United States currently sets the maximum at capital punishment.
We might wonder whether capital punishment is too severe, especially because it forecloses the possibility of discovering wrongful convictions and because it has proven difficult to administer capital punishment in a way that is not racially unjust. Perhaps the top end of the scale should be life in prison without the possibility of parole (LPWP). But even if LPWP is the top end of the scale, most other crime, including violent crime, deserves considerably less punishment. We also need to distinguish the length and manner of punishment. We tend to think of punishment in terms of incarceration. But incarceration is only one form punishment can take. It can also take the form of diversionary treatment (such as house arrest, counseling, and/or community service), fines, and restitution. When punishment does involve incarceration, it need not be in over-crowded and inhumane conditions that endanger the health and safety of convicts and that provide little educational or vocational training to equip prisoners to succeed in life outside of prison. It is open to retributivists to think that proportionality requires shorter periods of incarceration and more humane forms of incarceration for many crimes. Indeed, one might think that incarceration should be limited primarily to violent crime and serial offenders and that various kinds of diversionary treatment, such as community service and house arrest, would be appropriate for most forms of non-violent crime and first offenders.

In these ways, one can be a retributivist without endorsing the degree of punitiveness in the current American criminal justice system. Retributivists can and do think that prison conditions, criminalization for non-violent offenses, sentence length, and post-incarceration penalties are disproportionately punitive and violate just deserts.13

(3) What is the currency of desert? Both retributivists and their critics often assume that it is felt suffering and claim that retributivism is committed to the proposition that it is intrinsically good for culpable wrongdoers to suffer (Kant 1797-98: 331; Ross 1930: 135-38; Hart 1968: 234-35; Moore 1997: 163; Kolber 2009: 182; Tadros 2011: 63; and Berman 2013: 87). That’s one form that retributivism might take. But it is not essential to retributivism. Retributivism can instead be understood as the idea that desert demands accountability, where it is fitting to hold wrongdoers accountable in ways that reflect the nature and gravity of their wrongs and their degrees of culpability. But the currency of accountability need not be suffering. Instead, it might consist in the deprivation of certain rights and privileges of citizenship, which is temporary for all but the most serious forms of wrongdoing. As we have seen, retributivists endorse the idea that punishment is a fitting response to the culpable wrongdoer free-riding on the mutually beneficial social compact among citizens involved in the rule of law. The free-rider’s noncompliance with the rule of law unfairly exploits the compliance of others. So, fairness requires punishing culpable wrongdoers who free-ride. But if this is part of the rationale for retributive deserts, then there’s a strong case to be made that the appropriate currency of punishment should be some modification in the rights and privileges of citizenship, because it is the social compact among citizens on which the wrongdoer free-rides. Offenders have reason to regard the loss of rights and privileges of citizenship, even if temporary, as unwelcome and may well experience psychic costs and suffering as a result. If so, suffering may be a common by-product of punishment, but punishment aims at accountability, measured in terms of the rights and privileges of citizenship, not suffering.

(4) Many of the same writers who link retributivism with the value of suffering want to claim that imposing suffering on culpable wrongdoers is an intrinsic or non-instrumental good. Accountability does not require suffering, and the currency of retributivism should instead be loss of rights and privileges. If we avoid the mistake about suffering, should we then embrace the idea that retributivism treats accountability in the form of deprivation of rights and privileges for culpable wrongdoers as an intrinsic good? As long as we remember that the state of affairs is the complex one of being a deprivation of rights and privileges that is consequential on and proportionate to culpable

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13 See, e.g., the retributivist critique of the juvenile transfer trend in Brink 2004.
wrongdoing, we might claim that retributivism is committed to viewing that as intrinsically or non-instrumentally good. But this should be understood as a moral good. For we could equally well say that what makes blame and punishment fitting responses to culpable wrongdoing is that they are demands of justice. This, after all, is why retributive essentials are often described in terms of just deserts or proportionate justice. It seems we can describe retributive outcomes either as a moral good or as a demand of justice. If the right is prior to the good, then the justice claim is prior in order of explanation to the moral goodness claim.

7. PREDOMINANT RETRIBUTIVISM

So far, we have defended a conception of punishment with retributive elements, but we have been agnostic between pure retributivism and a mixed conception with retributive elements. Pure retributivism claims that desert, understood in terms of culpable wrongdoing, is the only factor relevant to justifying punishment and that desert is both necessary and sufficient for punishment (e.g. Moore 1997). By contrast, a mixed conception of punishment combines retributive and forward-looking elements. There are different kinds of mixed conceptions, but most insist that desert is a necessary condition of punishment, because only that will avoid the most serious worries about over-inclusiveness afflicting pure forward-looking conceptions. One mixed theory is a disjunction of desert and consequentialist values, claiming that either is sufficient to justify punishment. But disjunctivism inherits the problems of over-inclusiveness and under-inclusiveness of pure forward-looking conceptions, because it allows consequential values alone to justify punishment. A conjunction of desert and consequentialist values that treats desert and good consequences as individually necessary and jointly sufficient for punishment is more plausible, because it avoids the more serious over-inclusiveness objection to pure forward-looking conceptions. Nonetheless, conjunctivism is still under-inclusive insofar as it doesn’t recognize any reason to punish culpable wrongdoing when doing so does not have good consequences. If these were our only options, then pure retributivism might be the most plausible conception. But these are not the only kinds of mixed conceptions, and pure retributivism doesn’t explain the persisting attractions of forward-looking considerations, such as deterrence, rehabilitation, norm enforcement and communication, and reconciliation.

The most plausible formulation of retributive ideas is a mixed conception of punishment in which retributive ideas dominate, which we might call predominant retributivism (Brink 2012). Any form of retributivism insists that culpable wrongdoing serves as a constraint on blame and punishment. This is sometimes called the negative retributivist thesis. Desert is a necessary condition for blame and punishment, because both are impermissible in the absence of culpable wrongdoing, and desert places an upper limit on permissible punishment, which must not exceed what would be proportional to desert.

Both pure and predominant retributivism insists that desert is not just a constraint on blame and punishment but also provides an important rationale for these attitudes and practices. This is sometimes called the positive retributivist thesis. Both claim that blame and punishment are fitting

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14 Another mixed conception is the sort of rule consequentialist conception of punishment defended by Rawls (Rawls 1955). He distinguishes between the prospective (legislative) perspective on a practice, specifying the reasons for having a practice, and the retrospective (judicial) perspective on that practice, applying the reasons within a practice. This allows him to claim that the reasons for having a practice of punishment are consequentialist but the reasons for deciding how to handle cases arising under the practice are retributive. It’s not clear why Rawls thinks that prospective issues can be neatly sequestered from retrospective ones. Presumably, the prospective perspective asks what’s the optimal set of laws and judicial institutions and practices for enforcing them, and it’s not clear why optimal institutional design wouldn’t allow the judiciary to depart from retributive constraints when it would be clearly optimal to do so. It’s doubtful that consequentialist reasons for having a practice will justify a practice that operates in a strictly retributive fashion.

15 Duff has a useful discussion of the negative and positive retributive desert theses (Duff 2001: 12, 19).
responses to culpable wrongdoing in the sense that culpable wrongdoing is sufficient for a strong *pro tanto* case for blame and punishment. Other things being equal, we should blame and punish culpable wrongdoers proportionate to their desert.

However, other things are not always equal. This is where predominant retributivism diverges from pure retributivism. Whereas the pure retributivist thinks that desert is the only factor affecting the decision to punish, predominant retributivism recognizes that there can be non-desert-based reasons not to punish proportionately, in particular, to punish less than required by desert. Such non-desert factors can include the costs of punishment, the prospects for rehabilitation, evidence of remorse and restitution, and the value of mercy, forgiveness, and reconciliation. The strong *pro tanto* case for blame and punishment based on desert must sometimes compete with these countervailing considerations and may not always carry the day. Because predominant retributivism allows that desert can compete with non-desert reasons against proportionate punishment, it is a mixed theory of punishment.

Predominant retributivism is also a mixed theory of punishment insofar as it allows desert and non-desert factors to address different questions about punishment. A complete theory of punishment should address whom to punish, why we should punish, how much we should punish, and how we should punish. Retributivism offers a unified answer to the first three questions: we should punish culpable wrongdoers; we should do so, because they deserve punishment for culpable wrongdoing; and we should punish them proportionally to the degree of their culpable wrongdoing. Though desert may constraining how we punish, because it constrains how much we should punish, it leaves the manner of punishment largely *underdetermined* (e.g., Husak 2018). Provided that we punish all and only the guilty, punish them because they deserve punishment, and punish them in proportion to, or at least not in excess of, their just deserts, we are free to and should punish them in ways likely to promote various forward-looking values, such as deterrence, rehabilitation, norm enforcement and communication, and reconciliation.

Another way to reconcile forward-looking rationales for punishment and the retributivist backward-looking focus on desert is to allow consequentialist considerations to supplement considerations of desert in the determination of precisely how much to punish. Despite the apparent precision of the retributivist formula for punishment, desert may determine only an interval, rather than a precise quantum, of punishment. Indeed, interval sentencing is reflected in various sentencing guidelines, including the United States Federal Sentencing Guidelines.\(^{16}\) Whether punishment intervals reflect genuine metaphysical indeterminacy in the desert basis of particular crimes or epistemological indeterminacy in our ability to track small but genuine differences in culpable wrongdoing is an interesting question, which we need not settle here. As long as there is limited indeterminacy in the desert basis for punishment, whether metaphysical or epistemological, there is a need to specify further a precise punishment value within the desired interval. So, it is open to us to appeal to various consequentialist rationales to fine-tune the quantum of punishment within the space of punishments set by desert.

Predominant retributivism is a conception of punishment that mixes a backward-looking focus on desert with various forward-looking rationales for punishment, but in which desert conditions forward-looking considerations in three ways. First, desert in the form of culpable wrongdoing is a necessary condition of blame and punishment. Second, retributive justice that is proportionate sets an upper limit on permissible blame and punishment. Third, blame and punishment are fitting responses to culpable wrongdoing in the sense that there is a strong *pro tanto* case for blame and punishment that is proportionate to desert. In some cases, there may be sufficient reason to punish less than just deserts, but this will be in spite of the demands of just deserts.

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8. CONCLUDING REMARKS

Punishment involves both censure and sanction. As such, it seems to presuppose that the targets of punishment are blameworthy — that is, that they are culpable or responsible for wrongdoing. This makes purely forward-looking conceptions of punishment that appeal to deterrence, rehabilitation, norm communication and reinforcement, or reconciliation and permit punishment in the absence of culpable wrongdoing implausible, and it favors conceptions that are retributive in holding that punishment should be proportional to desert, understood as the product of wrongdoing and responsibility. Realism about Strawson’s thesis linking responsibility and the reactive attitudes encourages us to look to our practices of excuse to identify the nature of responsibility and culpability. When we follow this methodological advice, we can avoid skepticism about responsibility and are led to the fair opportunity conception of responsibility, which represents responsibility as consisting in suitable capacities — normative competence — and opportunities — situational control. Fair opportunity is a response-independent conception of responsibility of the sort required by realism about Strawson’s thesis. This realist interpretation of Strawson’s thesis supports some form of retributivism insofar as it implies that it is fitting to blame and punish culpable wrongdoing. Retributive justice seeks accountability, not suffering, and it condemns various aspects of mass incarceration as inconsistent with just deserts. However, this case for retributivism is agnostic between pure retributivism and mixed conceptions that include important retributive elements. Predominant retributivism is a mixed conception of punishment that can explain the appeal of forward-looking rationales for punishment while maintaining that they are constrained by desert. On this view, desert is a necessary condition on permissible punishment, sets an upper bound on permissible punishment in the form of proportionate justice, and provides a strong pro tanto case for blame and punishment that is proportionate to desert.
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