

JUSTIFYING PUNISHMENT IN A DETERMINISTIC WORLD

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Introduction

This paper explores some possibilities for justifying punishment other than by resort to purely consequentialist grounds. It is an investigation that assumes that we live in a deterministic world, and that retributive justifications, based on responsibility for our actions are not viable.

The phrase “a deterministic world” is used to describe a world of the sort assumed by hard incompatibilists such as Derk Pereboom or Saul Smilansky. That view does not assume all events are the inevitable consequence of past states of the universe. There may be, in consequence of random processes, especially at the sub-atomic level, indeterminacy as to some or all events. However, the assumption is made that the indeterminacy that would arise from such randomness would be no more compatible with the existence of libertarian free will than a deterministic universe. The indeterminacy arising from such randomness would not support moral responsibility derived from agents acting on rationally supported choices or decisions.

The second assumption made by the paper is what might loosely be called “the hard incompatibilist assumption”. Namely, it is assumed that moral responsibility depends upon the existence of being able to make uncaused choices or decisions. The paper assumes that we cannot make good sense of the concept of responsibility in a deterministic world, and thus rejects, without stopping to argue with, those compatibilist philosophers who put the contrary position. It appears to the writer that the best arguments now support this hard incompatibilist position, although the philosophical controversy may never be finally resolved. If the arguments in favour of the hard incompatibilist position seem sufficiently strong, then the time has arrived to start exploring in detail what the world looks like from that view. It is a position which assumes our moral and legal practice is not left untouched by an answer to the question about free will.

The paper is thus an exercise in exploring the implications for moral and legal practice that flow from concluding that we most probably live in such a deterministic world without moral responsibility. There is an additional reason for exploring the implications that flow from the hard incompatibilist assumption. Detailed investigation of the consequences of the hard incompatibilist position may uncover arguments which feed back and assist in resolution of the fundamental issue.

I shall finally assume an attempt to justify punishment solely upon deterrence or consequentialist grounds would give rise to significant anomalies, and paradoxes. This of course is a controversial assumption. Sophisticated consequentialist theories of punishment, such as Pettit and Braithwaite’s¹ show there is no widespread acceptance that retributivism is necessary for justification of our current punishment practices. Nevertheless, many who adopt a hard incompatibilist position assume that conventional retributivist justifications of punishment must be discarded, and the

¹ Pettit, P & Braithwaite J, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1996) Clarendon Press, Oxford, 1990.

reasons that remain to justify punishment are largely consequentialist. This paper will seek to show that there are, in fact, a wider range of justificatory reasons for punishment even if it be assumed that we are not morally responsible for our actions.

The renewed interest in retributive justifications of punishment in the last few decades has played a significant role in explaining certain aspects of our intuitions about punishment that appear anomalous or unjustified from a consequentialist perspective. Principally, the intuition that punishment should only be inflicted upon those who are believed on good grounds to have committed a harmful act (the innocence principle), that punishment should only be inflicted upon those committing a harmful act who have the requisite mental state (the blameless doer principle), and that there ought be some proportionality between the extent of the wrong and the extent of the punishment (the proportionality principle).

While acknowledging that punishment may be necessary for deterrence, the notion of deserving punishment on a retributive basis provided for some the necessary theoretical ground for imposing constraints on the punishments that might otherwise be justified for purely deterrence or consequentialist reasons.²

This discussion now brings the paper to its point, namely, if it be assumed that we cannot be morally responsible, are there justifications of punishment that will constrain the punishment, deterrence theories would demand, and thus serve the role that might otherwise have been played by retributive theories based upon the notion of moral responsibility.

The argument presented has three parts. The first examines the view that the notion of desert can be severed from that of responsibility, and that we may deserve certain

² Wood, AW, *Kantian Ethics*, (2008) Cambridge V.P. Cambridge, 223.

treatment although we were not responsible for the conduct giving rise to it. Although this view is helpful, it will be argued that it does not provide a complete justification of punishment incorporating the innocence, blameless doer and proportionality principles.

The second part of the paper will examine those arguments justifying punishment derived from a methodology similar to that adopted by John Rawls. Although resembling a consequentialist position, the ultimate justification for imposing punishment from this perspective is that it is said to be fair in the Rawlsian sense. These theories are also argued to be insufficient for a complete theory of punishment.

Finally, the paper will argue for a view arrived at by combining the two approaches. The Rawlsian methodology establishes what punishment is merited. The desert principle establishes the limits on what punishment may be imposed. The result may be summed up by saying that while we do not deserve to be punished, we nevertheless generally deserve not to be punished, and this desert claim restricts what might otherwise be justified.

Is Responsibility a Condition of Desert

In a well known section in his 'A Theory of Justice'³, John Rawls argued that it would not be distributively just to reward people for the exercise of their natural talents and abilities. Such natural talents are the consequence of one's genetic inheritance, and upbringing. Since we are not responsible for our genes and our upbringing, it cannot be the case that we deserve our natural talents. Since our natural talents are, in Rawls' phrase 'arbitrary from a moral point of view', it cannot be the case that we therefore deserve what results from the exercise of such natural talents.

³ (1999) Revised Edition, Oxford University Press p274

Rawls' argument rests on the assumption that desert must be appropriately grounded, such grounding must be conduct for which we are morally responsible, and where we are not responsible for the basis of production we cannot therefore be deserving of the output. Rawls' assumption that desert depends upon responsibility carries the obvious implication that if we lack moral responsibility, there will be no basis for a desert claim. One implication of the hard incompatibilist position may thus be the abandonment of desert as a moral concept.

Not all moral philosophers have, however, held that a person must be responsible for conduct before he or she can deserve praise or blame in regard to their conduct. This section opened with a reference to Rawls, because theories of distributive justice appear to have been most productive of the alternative view of the relationship between desert and responsibility. In his response to Rawls⁴, without necessarily denying that people do not deserve their natural talents, Robert Nozick argued that it must be the case that we have certain entitlements, even though the basis of those entitlements is not something for which we are responsible. The most obvious is our life, which came into existence independently of any responsible action by us. The same can be said about our natural talents. Thus, argued Nozick, even if we do not deserve our natural talents, we are nevertheless entitled to them. Entitlement might mean that we could resist a demand that we must exercise them for the common good, or that we might be taxed in such a fashion as would seek to equalise the members of the society by compensating those who have been under-endowed in natural talent⁵. One need only contemplate the oddity of a tax on those who are, for example, more attractive and charming than average, the proceeds of which would go to compensate those who are less charming and attractive than average, to grasp the

⁴ *Anarchy State Utopia*, (1974) Blackwell, Oxford 1974, p225ff

⁵ Nozick above n. 4

difficulty of arguing that we are not entitled in some fashion to some of the benefits that flow from natural qualities or abilities for which we are not responsible.

A straightforward denial that desert can only follow where we have responsibility is offered by Fred Feldman. Feldman has argued that we may deserve certain treatment although we are not responsible for that which gave rise to our desert. Most of Feldman's examples relate to benefits rather than punishments. His prime example is that it appears reasonable to argue that we deserve compensation when we have been injured although we are not responsible for the injury having come about.⁶ Feldman also recognises the widely stated proposition that we can deserve certain things such as minimal respect by virtue of being persons, although it cannot be said that we are responsible for our person⁷.

Feldman's essay responds in part to Wojciech Sadurski's general theory of desert based distributive justice⁸. Feldman takes Sadurski to have stated that desert presupposes responsibility, and is incompatible with the truth of determinism. Feldman also discussed Rawls' argument, but not Nozick's response to it. Feldman takes the debate one step further than Nozick, not merely arguing that an analogous concept to desert, 'entitlement', may exist without responsibility, but that desert itself can be decoupled from moral responsibility in at least some instances. Feldman however does not seek to map the limits or extent of this decoupling, but rather, to point out what he considers to be the fallacy of the orthodox position.

In a response to Feldman, Saul Smilansky⁹ provides an illuminating refinement of the relationship between responsibility and desert. Typically, according to Smilansky,

⁶ Feldman, F Desert: Reconsideration of Some Received Wisdom – *Mind* Volume (104) 413 January 1995 p.68.

⁷ Feldman above n. 6

⁸ *Giving Desert it's Due*, D Ridell, Dordrecht 1985, p131

⁹ Responsibility & Desert – Defending the Connection, *Mind*, Volume 105, p417, January 1996, p160

we assume a baseline for desert, and people come not to deserve the baseline through being responsible for not deserving it, usually by being susceptible to being blamed. However, if people suffer from the lack of the baseline without being responsible, they do not deserve to suffer, and in such a case, says Smilansky, they deserve in consequence, compensation. Smilansky describes these latter situations as ones of negative responsibility. Thus concludes Smilansky, responsibility is a condition for deserving suffering, but also where one suffers where one has not been responsible (negative responsibility) one deserves compensation. Responsibility is thus preserved throughout as a consideration for the establishment of desert.

Smilansky applies this analysis to the problem of criminal justice. Assuming hard determinism, then says Smilansky, in the first instance, the criminal cannot be considered responsible, and therefore does not deserve to be punished, but if punished for say consequentialist reasons, he has second order desert. The example of second order desert given by Smilansky is compassion.

Smilansky's analysis seems to go awry at the end. The reason the criminal's punishment put him below the baseline in a fashion for which he was not responsible, was because Smilansky assumed hard determinism, and that the criminal is therefore not responsible. This reason for avoiding responsibility, presumably avoids responsibility in all circumstances. It is therefore difficult to see in a deterministic universe how we ever distinguish between departures above or below the baseline for desert that are responsibility linked, if we reject responsibility on the grounds of determinism in all cases.

The argument has been further developed and clarified by Ben Vilhauer¹⁰. Vilhauer rejects Smilansky's argument for negative responsibility based desert claims. Vilhauer distinguishes between action based desert claims, and personhood based desert claims. Action based desert claims are the garden variety desert claims where my action is what gives rise to my deserving praise or blame. If we reject free will, and hence the possibility of agents being morally responsible, then we will be driven to reject action based desert claims.

Vilhauer contrasts action based desert claims with those based on the sheer fact of personhood. Examples given by Vilhauer are a person's desert of respect, access to his or her rights, equal treatment before the law, and not to be used as a mere means to others ends¹¹. This is similar to Nozick's argument about entitlement without responsibility.

Vilhauer argues persuasively that most of these desert claims cannot be shown to be action related in Smilansky's sense, or any other sense for that matter. Without repeating that argument, I shall accept it. The notion of personhood desert claims also resolves issues about other forms of desert that clearly cannot be responsibility based. Smilansky touched upon the issue of animals, without dealing with it. Assuming animals cannot be morally responsible, it nevertheless seems to make sense to suggest that they deserve certain sorts of treatment, such as protection from cruelty, and wanton harm or death. Animal rights campaigners would no doubt extend that list. While one might argue about just what sorts of conduct animals do deserve, the concept appears intelligible. This issue also raises the question of whether the baseline for personhood desert is a form of higher consciousness of the sort enjoyed by humans and higher mammals, or whether other organisms can be

¹⁰ 'Freewill Scepticism & Personhood as a Desert Base', available from Vilhauer's website - <http://www.benvilhauer.com/>

¹¹ Ibid, 3

deserving. Biodiversity theorists might argue that a species deserves not to be rendered extinct even if the species is a form of lower invertebrate and no member of the species enjoys any form of consciousness.

A further implication of Vilhauer's conception of personhood desert is that it would appear to place positive desert in a different light from negative desert. The desert derived from personhood is the desert of respect for my rights, and compensation for their violation. The infliction of punishments and penalties would never appear to arise as a result merely of personhood qualities. I can only be punished in consequence of my actions. If I cannot deserve things in consequence of my actions, on the assumption that I do not possess moral responsibility, then I can never be amenable to an action based desert claim. I can never deserve to be punished, but an excessive or unfair punishment would violate my personhood rights. It follows ironically, that although I can never deserve to be punished, I can deserve not to be punished.

While personhood desert claims may provide a justification for the constraints upon other punishment principles, they will not be sufficient to generate a comprehensive theory of punishment. It might be tempting to look for an analogy with the concept of personhood desert or entitlement which justifies the infliction of punishment on the basis of desert in the absence of responsibility. No analogous concept occurs to the author. Further, the fundamental difference in the nature of desert claims based on personhood on the one hand, and action on the other, strongly suggests that the principles are not symmetrical, and no analogy will be found with personhood or entitlement justifying the infliction of punishment on a desert basis for actions.

Justifications of Punishment Derived from the Methodologies of Distributive Justice

In his theory of justice¹², John Rawls did not extensively elaborate upon a theory of criminal justice. Rawls did assume that those reasoning about the rules for the governance of a society in the original position would provide for some public system of penalties to ensure the integrity of the ideal conception arrived at as part of the creation of a system of fair laws and institutions. While accepting that this penal system may involve a principle of responsibility, Rawls also describes it as neither retributive or denunciatory, and in a footnote suggests that the theory he would elaborate would share much with the views expressed by HLA Hart in his essay, *Punishment and the Elimination of Responsibility*¹³.

Those using the methodology of the Rawlsian original position have explicitly argued that it would lead to agreement on punishment principles, not unlike those dictated by a conventional retributivist justification. Nigel Walker¹⁴ argues that behind the veil of ignorance, someone agreeing the principles for a society not knowing whether they will in fact be a law abiding citizen or a law breaker, would agree with the rule that he should only be penalised for offences for which he was actually guilty. This would not be a principle adopted on general consequentialist grounds, but argues Walker, since it would not be rational to expose oneself to the risk of being punished when you are innocent, or when you would otherwise have an appropriate excuse or justification, those agreeing in the original position, would adopt the innocence and the blameless doer principles . They do this not because they are honouring any

¹² *A Theory of Justice*, Revised Edition, Oxford, p211, 276 & 504

¹³ *In Punishment and Responsibility, Essays in the Philosophy of Law*, Oxford University Press, Oxford 1968 (Rawls' footnotes the passage at pages 173 to 183 of the 7th chapter)

¹⁴ *Why Punish?*, (1991) Oxford University Press, Oxford, p92 ff

retributive notion, but so as to maximise each individual's power to avoid being penalised¹⁵.

It is difficult to know whether rational action theory would indeed drive those reasoning in the original position to opt for the innocence and blameless doer rules, however, it is not the point of this paper to resolve exactly what rational action solution would be arrived at by those seeking to agree the rules of criminal justice in the original position. The Rawlsian rational action methodology dictates that they would choose that solution that would maximise satisfaction of their own interests so far as they can be known behind the veil of ignorance. This is also not an occasion to delve into the extensive debate within the commentary on Rawls' theory as to whether the appropriate strategy chosen would be maximin, or as John Harsanyi argued, expected average utility¹⁶ or some other solution entirely. Certainly, if one chose expected average utility, the resulting principles might look very like those that would have been arrived at from a classical utilitarian justification of punishment.

The crucial point for the present argument is that the principles that would be arrived at by the application of such a Rawlsian methodology would not be applied because they fulfilled a consequentialist goal, rather, they would be applied because they would be fair. They would reflect what people would rationally agree upon in the original position.

A brief sketch of the nature of criminal justice arrived at from a Rawlsian perspective is also offered by Erin Kelly¹⁷. Kelly argues that a person's rights are determined by reference to principles that equal and mutually concerned moral agents could agree upon. These principles would also involve limits on freedom negotiated with regard

¹⁵ Walker above n. 14

¹⁶ Can the Maximin Principle Serve as a Basis for Morality? (1975) 69 *American Political Science Review* 594

¹⁷ Doing Without Desert – *Pacific Philosophical Quarterly* 83 (2002) 180-125, p195

to their equal moral status, and the basic interests of everybody. Kelly however considers that the penalties and restraints that would be agreed upon by such agents would definitely contain deterrent penalties. Kelly's view does not see free will based responsibility as necessary for the justification of the principles that she advocates, but compatibilist concepts of voluntariness may be relevant to whether or not punishments would be efficacious.

Ben Vilhauer¹⁸ expressly applies Rawls' methodology to his concept of personhood based desert claims. From behind the veil of ignorance, argues Vilhauer, people will not know of their particular characteristics, and hence of the types of actions in which they may engage. From this, Vilhauer concludes that the only epistemically possible desert base available to be chosen in the original position is one based on the fact that the deliberators are persons. From this, Vilhauer concludes that in the original position, only desert claims based on personhood would be agreed upon.

One might query whether this is entirely faithful to the Rawlsian methodology. The fact that I may have no knowledge of the actions that I will ultimately commit on the other side of the veil of ignorance does not make it impossible for me to choose an action based desert rule as the best balance of the risks. However, the risk in choosing such a rule, is that I may discover once the veil of ignorance is lifted, that my actions include actions that improperly threaten or damage others. Clearly, if one adopts Rawls' cautious principles of rational choice, it is possible these may dictate personhood desert claims.

Further, Vilhauer acknowledges that personhood based desert claims generally give rise to what I have referred to as positive desert. Thus, they would give rise for instance to a claim to be treated equally before the law. Vilhauer's Rawlsian

¹⁸ Vilhauer above n. 10

derivation of personhood based desert claims still does not provide us with a principle that would justify negative desert, such for example as the infliction of penalties and punishments. That is not to say, that the Rawlsian approach could not provide those additional principles for the sorts of reasons discussed by Walker or Kelly, but they would not be derived from personhood based desert claims.

It must be conceded that it is possible using the Rawlsian methodology to arrive at general justifications of punishment that might adopt each of the innocence, the blameless doer and the proportionality principles, not for any retributive reason, but simply because they would be appropriate solutions to the rational choice question posed in the original position. Although the rational action decision called for in the Rawlsian paradigm looks to the hypothetical decider's self interest, the hypothetical nature of the questions posed, and the ignorance of the decider of their own personal qualities, may well produce rational solutions that would closely reflect a consequentialist justification of punishment. This would particularly be the case if I believed the probability that I would suffer punishment if the innocence or blameless doer rules were ignored was small, and the utility or overall welfare gains were significant.

In terms then of the content of its criminal laws a Rawlsian state might well come to closely resemble one in which punishment is justified by general consequentialist reasons. However the justification of punishment in the Rawlsian state would be that it is fair in the Rawlsian sense not that it is utility or welfare maximising.

The Combined Approach

Personhood based desert claims generally reflect people's rights. They may be said to give rise to desert claims to liberty, equality of treatment, and equal respect. If people are to be punished, then clearly the personhood based desert claim needs to be

displaced or suspended to the extent necessary to justify merited punishment. Scanlan has pointed out the dangers of treating wrongdoing as leading to a forfeiture of rights and entitlements one would otherwise have, if that forfeiture is seen to flow from the fact of choice, and the possibility of having chosen otherwise¹⁹. Nevertheless, Scanlan argues that there is a legitimate forfeiture where someone has breached laws which prescribe a penalty, and thereby loses their right not to suffer the prescribed punishment.

Scanlan argues that there is value in choice, even if choices are ultimately determined, and we are not morally responsible. That value may well be reflected in our laws, and for this reason, laws may prescribe punishment for conduct that is voluntary in the classical compatibilist sense, and none for involuntary conduct, such for example as an accident.

What Scanlan emphasises is that the loss of a person's entitlement to have certain rights recognised (such as the right not to be punished) or what is here being described as personhood desert claims, rests not upon the quality of the individual's conduct, whether they are responsible, or whether they could have chosen otherwise, but upon the justification of the institution of laws and punishments that are brought into play by the individual's conduct. This for the reasons I have discussed above may be a Rawlsian justification.

Scanlan's scheme recognises that the morally justified punishment for some conduct is arrived at by considering the conflicting argumentative forces of the individual's rights or personhood based desert on the one hand, and the justified rules limiting an individual's freedom on the other. Of course, on the view advanced here, these two forces are internalised within the criminal justice system so that the justified penalty

¹⁹ Scanlan, TM, – *What We Owe to Each Other*, Belknap, Cambridge Massachusetts, 1998, p263

will depend firstly on what may be demanded by principles of fairness, and deterrence, and these in turn will be ameliorated by the personhood desert claims.

The most difficult task in formulating a complete theory using the approach outlined is to explain the details by which one resolves these conflicting forces in specific instances. For example, why does one's personhood based desert claim trump any demand for punishment justified by consequentialist grounds where one is innocent, even though the punishment would have deterrent efficacy, but not trump that demand where one has caused harm, even though in each instance, it is assumed we are not responsible for our conduct?

Clearly, the matrix of general justifying reasons for the infliction of punishment need not necessarily respect the innocence principle or the proportionality principle. Some may contend that the Rawlsian approach coupled with Rawls' own preferred maximin strategy, and the priority given to liberty would ensure that we would agree upon punishment principles that respect the innocence, blameless doer and proportionality principles. However there must be grave doubts about whether the rational choice strategy which underpins the determination of rules in the Rawlsian original position would in fact dictate the principles Rawls suggests. Many have argued that a real Rawlsian should be more of a risk taker than John Rawls. It has already been argued that when approaching the matter from a Rawlsian perspective that significant consequentialist considerations may be imported into our principles justifying punishment.

If the principles justifying punishment are insufficient to ensure that punishments should always respect the innocence, blameless doer, and proportionality rule, would personhood desert claims be able to give rise to these constraints? Some of the principles in the literature discussed above, such as persons deserving equal respect

or equal treatment by the law, may be insufficient protection against laws couched in general terms which nevertheless countenance disproportionate punishment or which show insufficient concern for whether or not a defendant is a wrongdoer.

Of further concern is whether the concept of personhood desert, which of necessity eschews any reliance on an agent's actions, can be called in aid by a defendant to counter the general justification of punishment.

One manner in which personhood desert claims may operate to constrain other general justifying grounds of punishment is simply by generating a substantial presumption against such punishment. If we all deserve liberty and equal respect, not every general justificatory ground of punishment ought to be acted upon, only those with sufficient weight to justify the infringement of an individual's personhood desert claims.

How personhood desert claims could operate may also be demonstrated by an example. We might envisage a law couched in general terms imposing punishment for infraction of a rule. Let us assume the rule is well justified, for example, a rule outlawing terrorist acts. Let us assume that there is justification in inflicting punishment for infraction of the rule and that we are justified in punishing individuals even though they are not responsible for their actions in order to preserve the integrity of the rule and the rule system of which it is a part.

An individual's personhood desert claims include the principle that they deserve not to be punished. This would be trumped by a general rule supported by an appropriate justification, such as the one just suggested.

Let us imagine such a rule being administered within a system which provides a low threshold for the determination of guilt (because perhaps the utilitarian legal officials consider the standards of proof set by the rules are too stringent). In this system there would be a high probability of those who have in fact not infringed the rule nevertheless being punished. In those circumstances there would be no justification for the infringement of their personhood desert claim not to be punished. This despite the utility maximising reasons of the legal officials.

The example just given assumes that the ad hoc consequentialist gains legal officials might seek through allowing the conviction of someone who is not guilty or probably not guilty, would be insufficient to trump the moral claim of desert not to be punished. However, it might be suggested that this argument would be overcome if a law expressed in general terms itself contemplated the infliction of punishments or penalties without regard to guilt or innocence. It would be difficult to envisage a law that could be rationally adopted that would pay no regard to whether defendants were in fact wrong doers, but it would be easy to envisage laws couched in terms where punishments are inflicted for criteria far less stringent than proof beyond reasonable doubt, and which thereby contemplate substantial numbers of innocent people being punished. In the absence of responsibility for actions it becomes difficult to see why those laws, assuming that they are justified by our general theory of justification, do not likewise override a personhood desert claim not to be punished. The answer could be that in part the problem is less likely because the justification of such rules from our general theory would be difficult and such rules therefore unlikely, although this may be too optimistic a view. The further way that a personhood desert claim would operate as already mentioned would be by creating a high threshold for any general justifying ground of punishment to overcome before it could be said to be of sufficient weight to displace a person's moral claim to deserve not to be punished.

The approach suggested may have implications for the justification of the death penalty. Some retributivists might consider that a person could deserve the death penalty for having committed a particularly heinous crime. Hard incompatibilism undermines the claim that anyone can deserve their punishment, including a death penalty. An individual's personhood desert claim not to be punished and claim that they deserve their life creates a significant threshold that might not be able to be overcome by consequentialist or other general justificatory grounds.

If one assumes it could be shown that the death penalty was an effective deterrent, and more lives were saved by imposing it than lost from its being administered, then one is obliged to confront directly the issue as to exactly how one sets off on the one hand personhood desert claims, against other general justificatory grounds. Does one consider for example the personhood desert claim to life having an assumed precedence? It is tempting to consider that a claim that one deserves respect for one's autonomy implies an obligation on others not to use one as a means. The difficulty with this approach is that it would appear to preclude all consequentialist justifications of punishment, not only consequentialist justifications that violated the innocence principle or the proportionality principle.

It might also be suggested that the approach adds little if anything to previous theories that would have argued for a general consequentialist justification constrained by certain rights. The suggested approach clearly has close similarities with all those theories, including Hart's with his suggested distinction between the general justifying aim of punishment and the separate distributive question of who may be punished.²⁰

²⁰ Hart above n.13

Hart himself was unclear as to the foundation of the distributive principle. The suggested approach adds something to other combined views in revealing the direction of desert claims when reconciling the conflicting principles bearing upon the justification of punishment. A further example may demonstrate this point.

In writing this paper I sought to formulate a personhood desert claim that could constrain general justificatory reasons for punishment to the proportionality principle. I have so far failed in that regard. I consider it unlikely that the proportionality principle can be expressed in a fashion which does not have regard to an agent's actions. It reflects the principle that the punishment deserved is proportionate to what has been done. While there is no basis for claiming someone deserves to be punished, no counter principle claiming that one deserves not to be punished beyond what would be proportionate appears capable of being expressed in a fashion that has no regard to the actions of the agent. In other words, it cannot be derived from a personhood desert principle. It may be that the combined approach leads to the conclusion that the principle of proportionality itself should cease to be a principle to which we should accord priority. It may be that the intuitive appeal of the principle of proportionality is simply a consequence of the fact that proportionality so often eventuates from the application of other principles that do not expressly refer to it. It may be that as proposed punishments become more serious they need to overcome a higher threshold to displace the personhood desert claims, and therefore will usually be concerned with more serious harms. That however would not be an invariable relationship, but would explain why we have come to believe that there should be a proportionality principle.

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