Proportional Punishment  
Opposition Brief by Joel Erickson  


Manynegatives presume an indissoluble link between retribution and justice, using the mechanism of proportional punishment to unite the two. Typically, proportionality is defined in terms of “the punishment fits the crime,” or that the administered punishment ought to be equivalent in severity and intensity to the crime committed. A retributive theory of proportional punishment encapsulates the idea that through committing a crime, the criminal places himself or herself outside the boundaries of society, and that a properly exacted punishment restores the societal equilibrium through inflicting proportional consequences on the criminal.

As the following cards of evidence reveal, proportional punishment is a tenuous hypothesis at best, lacking philosophical consensus and entailing morally questionable repercussions. A good strategy involves fronting your arguments in cross-examination. For example, to establish that proportional punishment is vague and immeasurable, ask your opponent (1) what is the appropriate punishment for specific crimes (such as jaywalking or petty theft) and (2) what standard do they use to determine proportionality?

Opposition Brief: Proportional Punishment

No Consensus Exists on Definition for Retributive Justice (Proportional Punishment)

Mike Materni 2013“Criminal Punishment in Pursuit of Justice.” British Journal of American Legal Studies, Vol. 2, 2013. <http://ssrn.com/abstract=2256245>

“Now, I am aware that the question of ‘what is justice’ is – to use a euphemism – a tough one, and I am not presuming here to say the final word on a century-long debate. Indeed, all I am aiming to do here is to raise doubts (and thus, hopefully, revive the debate) on the validity of the retributivist idea of justice – an enterprise which, I believe, can be successful without needing to *impose* my own definition of what ‘justice’ should be. While I do not want to be entangled in the metaphysical trap of defining the ideal of perfect justice, I will of course – as indeed I must – provide some indication as to what I believe would bring us closer to justice. The fact of the matter is that most writers who occupied themselves with the task of coming up with a positive definition of ‘what is justice’ ended up producing very abstract, elusive theorizations that very little – if anything – have to do with reality; I believe, however, that a better way may be found in what experience has to tell us about justice. While, in fact, it is extremely hard to come up with a positive definition – or conceptualization – of ‘justice,’ it is far easier to recognize what is *injustice* – and it is easier because each and every one of us has, at one point or another, *experienced* injustice. As Alan Dershowitz puts it: ‘There is far more consensus about what constitutes gross injustice than about what constitutes perfect justice.’ In other words – paraphrasing Justice Potter Stewart’s famous quip – we know injustice when we see it.”

Retributive Justice (Proportional Punishment) Is Unattainable

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“Maybe, then, this approach ‘from bottom-up,’ which Dershowitz uses to offer ‘a secular theory of the origin of rights,’ can serve as our heuristic criterion to try to come up with a conceptualization of justice that more closely resembles our actual experience – that most closely resembles *reality*. In fact, it is precisely the experience of injustice – of the wrongs suffered; of the losses incurred; of the suffering endured – that may allow us to frame, in a sort of *a contrario* construction, an idea of ‘justice’ that is *anchored to reality*. In this perspective, we could say that justice is the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured. Despite this is – I believe – as close and pragmatic a definition of justice as we can ever hope for, as well as a conceptualization on which most people will be able to find common ground, it is also a conceptualization that gives us little reason to be happy. If, in fact, justice is the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured, then the inescapable conclusion is that, many times, justice simply *cannot be done*. How is it possible to do justice to a woman who has been raped? How is it possible to do justice to a mother whose son has been killed? The answer to these rhetorical questions contains the bitter truth that *it is not possible*.”

Retributive Justice (Proportional Punishment) Façade for Inflicting Revenge

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“In those instances, where it is impossible to repair the wrongs, to give restitution for the losses and to give compensation for the suffering – and this, alas, seems to be the case for most of the instances that require the intervention of the criminal law – all that is left is to inflict a punishment ‘upon the wrong-doer, of a sort which does not restore the injured party to his former situation ... *for the very purpose of causing pain*. And so far as this punishment takes the place of compensation ... one of its objects is to *gratify the desire for vengeance.*’ Even by trying to fit retribution within the idea of “justice,” the conclusion is that, with respect to the core of criminal law, retribution – criminal punishment for the evil done, without transcendent ends – does not, and indeed, *cannot*! Achieve justice. In all those instances where there can be no undoing of the harm done, the conclusion is, once again, that retribution in its essence is closer to vengeance than it will ever be to justice. We are right back where we were after dealing with Kant and Hegel; retributive punishment is, as Sir James Fitzjames Stephen wrote, the ‘gratif[ication of] the public desire for vengeance.’ What’s more, a consciousness of the close bond that ties retribution to vengeance is clear in the writings of at least some retributivists. To be sure, there are arguments that support a distinction between retribution and revenge. Samuel Pillsbury, for example, while acknowledging the inseparability of anger and retribution, claims that retribution ‘involves a judgment of wrong to the society according to publicly agreed principles of morality’ and it ‘seeks another's suffering, not to satisfy a personal need, but for a principle of good-enforcing respect for persons;’ revenge, on the other hand, ‘arises from a judgment of harm to self-made according to personal principles ... . The revenge-seeker ... seeks personal gain in the form of restored dignity or power from another's suffering.’”

Proportional Punishment Internally Inconsistent

Alec Walen 2016 "Retributive Justice", The Stanford Encyclopedia of Philosophy (Winter 2016 Edition), Edward N. Zalta (ed.). <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/>

“Greg Roebuck and David Wood (2011) claim that it is incumbent on punishers to *demonstrate* that the punishment they propose to inflict is not disproportionately large. Given that moral anchoring can provide at best a very rough set of guidelines for proportional punishment, and that the methods of extrapolating from or interpolating between them are also highly underdetermined, they argue that no one can meet this burden. Therefore, a retributive commitment to proportionality would require the abolition of punishment.”

Proportionality Poses Complications for Punishment and Harsh Treatment

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“Adam Kolber (2013) raises the most difficult proportionality-based criticism of retributivism. He that starts from the observation that countries that use pre-trial detention seem universally to give those who are convicted credit for the time they have served. For example, if someone gets a sentence of a year, and has spent six months in jail in pre-trial detention, he would have to serve only six additional months. Serving the full year, after spending six months in jail already, would seem to be a disproportionate sentence. But it is very hard to explain the intuition that this practice is morally required in any way other than by recognizing that harsh treatment inflicted in connection with a crime is relevant to the size of the punishment, even if it wasn't intended as punishment at the time it was inflicted. If, however, harsh treatment inflicted in connection with a crime counts towards the size of the punishment, then we seem to be thrown back onto the sort of view about suffering rejected in section 4.3.3, the view that what matters is how much a person suffers, whether or not the suffering was inflicted as part of a punishment. Some of the problems with the view that suffering itself is what a retributivist should care about have already been mentioned. But one more should be brought up here, namely the implication for post-sentence deprivations, such as being subject to preventive detention if one is predictably very dangerous. One might argue that the punishment in those cases includes losing the normative status of benefiting from the presumption of innocence after serving one's term of punitive detention (Walen 2011). But if actual detention matters for proportionate sentencing in the pre-trial context, it must matter as well for the post-sentence context, and this would make it effectively impossible to pursue both proportionate punishment and post-sentence detention. This is a difficult problem for retributivists.”

Retributive Punishment Only Reflects Emotion

Alec Walen 2016 "Retributive Justice", The Stanford Encyclopedia of Philosophy (Winter 2016 Edition), Edward N. Zalta (ed.). <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/>

“There is good reason to suspect that retributive intuitions are merely the reflection of emotions, such as a thirst for vengeance, that are morally dubious. They may be deeply grounded in our species as part of our evolutionary history, but that fact by itself is insufficient to consider them morally reliable—compare other deeply engrained emotional impulses, such as tribalism, that are clearly morally problematic (Bloom 2013). Moreover, the label vengeance is not merely used as a pejorative; a retributive or vengeful response to wrongdoing has to confront moral arguments that it is a misplaced reaction. Foremost among these is the argument that we do not really have free will—see section 4.1.3.1. Respect for the dignity of wrongdoers as agents may call for censuring them when they do wrong, and with requiring them to make reparations when those can be made. It is unclear, however, why it calls, in addition, for harsh treatment. Rather, sympathy for wrongdoers as products of their brains and environment seems to call for mercy and forgiveness.”

Retributive Response to the Above Criticism Begs the Question

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“Moore (1997: 145) has an interesting response to this sort of criticism. He turns to the first-person point of view. He imagines that he has committed some horrible violent crime, and then says that he hopes his response ‘would be that I would feel guilty unto death’. As a result, he hopes that he would *welcome* punishment for having committed such a crime. Moore then turns the table and says that one should resist the ‘elitist and condescending’ temptation to withhold that judgment from others (ibid.: 148). This is a rhetorically powerful move, but at the end of the day, it is a question begging one. It presupposes that guilt and the desire to be punished is appropriate. But why accept that, rather than the view that they are just an internalization of a morally indefensible reaction to wrongdoing, or, as Nietzsche (1887: 60) put it, ‘bad conscience, … the will to self-violation’. Consider what Jeffrie Murphy (2007: 18) said, as a mature philosopher, looking back on his own efforts to justify retributivism: ‘[M]y enthusiasm for settling scores and restoring balance through retributive justice may in part have been extensions of what Nietzsche called ‘a soul that squints’—the soul of a shopkeeper or an accountant. If I had been a kinder person, a less angry person, a person of more generous spirit and greatness of soul, would robust retributivism have charmed me to the degree that it at one time did? I suspect not.’”

Proportionality Is a Reflection of Sentiments

Joel Goh 2013 proportionality-An unattainable ideal in the criminal justice system." Manchester Rev. L. Crime & Ethics 2 (2013): 41. <http://www.humanities.manchester.ac.uk/medialibrary/law/main_site/Research/Student_Law_Review2/MSLR_Vol2_4(Goh).pdf>

“Ultimately, ‘proportionality’ is a reflection of moral assumptions, opinions, estimates, and, often, the product of conscious or unconscious prejudices and preconceived notions such as racial stereotypes and other perceived correlations between members of a certain class and certain types of crime. As it is impossible to mathematically calculate the value of a crime in terms of a criminal sentence, proportionality can at best be a measure of what is perceived to be the values attached to the losses of crime, and the values attached to the pains inflicted by punishment. There is no immediately discernible common benchmark between the gravity of crimes and the severity punishments on their own, so they can only be measured in proportion to each other insofar as they have been scaled according to the values attached to them by society or by the judiciary. As such, it is not crime and punishment themselves which are considered in proportion to each other, but the values attached to them which are used to make these comparisons.”

Proportionality Impossible Because Crime and Punishment Utterly Disparate

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“Also, crime and punishment are inherently separate concepts of entirely different natures, making it impossible to simply compare the two on a scale of ‘proportionality’ against each other on their own. Thus, they require a preceding separate a priori judgement on their values from which ideas of ‘proportionality’ can then be scaled.”

“As such, when compared to the crimes which offenders are being punished for, the penalty of imprisonment (together with its far-ranging consequences) is too different to be meaningfully measured for ‘proportionality’. The nature of crime and the nature of punishments (primarily incarceration) are so disparate that there is no meaningful way to compare the two on any scale on their own. Where one is the generation of losses on the victim of a crime which in most cases cannot be repaid, the other is the infliction of pain on the offender. The two are of completely different natures and it is impossible to weigh one against another without a prior conception of what the ‘value’ of losses in terms of emotional and physical pain are, a conception which cannot be based on the distinct natures of crime and punishment on their own, but which must find its basis on some other principle.

Even ‘proportionality’ based on the lex talionis, in which the principle of ‘an eye-for-an-eye’ prescribes an identical loss to be meted out as punishment for a loss inflicted by the offender, has been severely criticised. Apart from being a clearly primitive and barbaric form of punishment based on retaliation, the strict literal interpretation of the lex talionis has been described as ‘overlooking its historical significance and moral relevance’ such as that of preventing mob justice and vengeful violence. Modern criminal sanctions no longer call for strict mirror punishments such as the amputation of an arm for causing the loss of another person’s arm; implicitly recognising that criminal justice of this sort no longer has any currency in modern civilised society. Furthermore, as H.L.A. Hart observed, mirror punishments are impossible in many instances anyway - the crime of theft cannot be punished by a theft, nor can defamation be recompensed by defamation. Because crime and punishment are of such fundamentally different natures, it is impossible to find an appropriate punishment that ‘fits’ any crime based on proportionality alone, and it is impossible and meaningless to claim that a punishment is, on its own, ‘proportionate’ to a crime without an extra and external benchmark to measure it against. What is retained from the lex talionis, however, is the fundamental underlying concept of proportionality. Nevertheless, the question which remains to be asked is whether ‘proportionality’ has any meaning if it is not to mirror a crime. Indeed, if lex talionis punishments are to be rejected, wherein lies the concept of ‘proportionality’? It is difficult to see how any sanction can be designed to be ‘proportionate’ to a crime if it does not strive to be a clear mirror of that crime it is meant to punish.”

Indeterminate Legal Standards for Proportionality

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“Despite the obvious importance of the proportionality principle in criminal sentencing, the concept of proportionality itself is poorly defined in the law and the theories concerning it are the subject of much unresolved debate. This vague definition is a glaring gap in the criminal justice system. For instance, although the Canadian Criminal Code provides that sentences ‘must be proportionate’ to the severity of the crime and the culpability of the criminal, it does not proceed to elaborate on what ‘proportionate’ might mean with respect to gravity of offence and degree of responsibility, or how such a ‘proportionate’ sentence may be determined. Similarly, although the United States Supreme Court clearly professes to apply the proportionality principle in criminal sentencing, it has been observed that through its judicial decisions, it ‘has never made clear what it means by proportionality in the context of prison sentences.’”