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2010

### The False Promise of Retributive Proportionality

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#### Citation Information

Aya Gruber, The False Promise of Retributive Proportionality, JOTWELL (July 12, 2010) (reviewing Alice Ristroph, How (Not) to Think Like a Punisher, 61 Fla. L. Rev. 727 (2009)), <http://crim.jotwell.com/the-false-promise-of-retributive-proportionality/>, available at <http://scholar.law.colorado.edu/articles/211/>.

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Citation: 2010 Jotwell J. Things We Like 139 2010

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# The False Promise of Retributive Proportionality

<http://crim.jotwell.com/the-false-promise-of-retributive-proportionality/>

Alice Ristroph, *How (not) to Think Like a Punisher*, 61 Fla. L. Rev. 727 (2009), available at [SSRN](#).



Aya Gruber

As an undergraduate philosophy student, Kantian metaphysics rocked my world. Kant's account of human cognition as *a priori* and synthetic and his forging of complex epistemological theory from that metaphysical observation were like poetry to me. Further, Kant's ethical theory seemed like the only one based on more than just an arbitrary first principles or *a posteriori* human instincts about right and wrong. Rather, Kant based his moral imperative on noncontradiction, which itself comes from the necessary conditions of cognition. What could be more reasonable than a moral program based on metaphysical observations about the human condition? Accordingly, I embraced retributivism with an almost zealous fervor. It was so clean?as logical as the symmetric property of equality: Punishment should be given to those who deserve it. Thus, those who deserve it should be punished.

As I moved from undergrad to law school to the public defender's office to academia, I continued to be a Kantian. I continued to believe that the very notion of justice was embodied in the principle that we punish those who deserve it as much as they deserve. I attributed the mass injustice of the American penal system to the retributive failings of criminal justice actors. In short, moved by political concerns, legislators, prosecutors, and judges supported severe sentences, despite the fact that most thoughtful people could recognize that such sentences were undeserved. If only these state actors could be better retributivists, the problems of disproportionate sentencing and skyrocketing prison population would be solved.

What I failed to understand then seems so obvious to me now. The rise of the American carceral state indisputably coincided with the rise of retributive philosophical rhetoric. Retributivism was the problem, not the solution. Had I then had the benefit of reading Alice Ristroph's *How (not) to Think Like a Punisher*, 61 Fla. L. Rev. 727 (2009), I would have had come to this realization much sooner. In this short, easy-to-read essay, Ristroph takes on retributivism's most compelling claim?that it provides the sole ground for limiting punishment on the basis of proportionality. Situating her discussion of retributivism in the context of the newly revised Model Penal Code's apparent endorsement of a distinctly retributivist concept of proportionality in sentencing, Ristroph concludes that the "new Code is at its best when it acknowledges the legal and political complexities of sentencing, and at its worst when it invokes the rhetoric of desert." (P. 728). Ristroph's support for the socially contextual, empirically based Model Penal Code sentencing provisions over the theory-based retributive provisions raises two questions. First, what's wrong with retributivism? Second, if not retributivism, then upon what basis can we demand that sentences be proportional?

In answering the first query, Ristroph travels well-trodden philosophical ground, pointing out retributivism's utter indeterminacy. The most salient critique of retributivism is that it tells us to punish those who deserve it

but fails to give any indication of who deserves it and how much they deserve. There are nonetheless attempts to give content to the loose philosophical notion, as the essay notes, such as the currently popular “empirical retributivism,” which defines retributive justice with reference to shared social intuitions of what is deserved and how bad certain crimes and criminals are. But the social intuitionism school is particularly disturbing in light of studies that reveal social intuitions of justice to be largely racialized. In this sense, “judgments of ‘desert’ may serve as an opportunity for racial bias to enter the criminal justice system.” (P. 746). Thus, the desert provisions of the Model Penal Code in effect undermine other portions of the Code that expressly call on judges to examine the racial impacts of criminal sentencing.

In addition to providing safe harbor for racial bias, desert can also serve to shelter the most severe punishment regimes from claims of disutility. Ristroph characterizes the evidence-based sentencing provisions of the Model Penal Code as generated by the drafters’ “hope that the facts will speak for themselves . . . that once people see how much sentences cost, and how little they apparently deter, the only rational response will be to reduce the length of prison sentences and look for other alternatives.” (P. 748). This hope, however, is undoubtedly undermined by retributive sentiments that the guilty—and most convicts facing sentencing are guilty—ought to be given the punishment they deserve, no matter how much it costs, how undeterrable crime is, or how much this “deserved” punishment happens to disproportionately impact certain populations. Consequently, “[t]he danger of desert is that it preserves the possibility that some will say the costs are worth it, the inequities deserved.” (P. 748).

Yet if we simply give up on retributivism because it can be used as an argument to keep sentences high, we also give up on the potential to rely on retributivism to lower sentences. Ristroph points out, however, that if we understand the one-way ratchet nature of current retributive rhetoric, the promise of retributive proportionality is plainly false. That retributivism has failed as a limiter, is evidenced by the fact that “the people who enacted and defended California’s [three strikes] law understood it as a way to guarantee that repeat offenders would get what they deserved.” (P. 742).

One might respond that although not currently effective, retributivism offers the only true promise of proportionate sentences. After all, Justice Scalia described proportionality as “inherently a concept tied to the penological goal of retribution.” Ewing v. California, 538 U.S. 11, 1 (2003) (Scalia, J., concurring). It turns out, according to Ristroph, that Justice Scalia is wrong. Non-retributive principles can be more than adequate grounds for proportional punishment. Referencing her article, Proportionality as a Principle of Limited Government, 55 *Duke L.J.* 263, 263 (2005), Ristroph posits that proportional punishments are a necessary feature of a government of limited penal authority. In addition, one can imagine other principles, external to the question of punishment’s basis, such as racial equality, communitarianism, distributive justice, and civilized modernity (e.g., James Whitman, A Plea Against Retributivism, 7 *Buff. Crim. L. Rev.* 85 (2003)) as counseling against harsh sentences. In the end, Ristroph urges sentencers to liberate themselves from the binds of penal theory and think beyond whether punishment is deserved. Thoughtful sentencing requires navigating the turbid waters of empirical efficacy, social context, and government authority to arrive at the just punishment.

Cite as: Aya Gruber, *The False Promise of Retributive Proportionality*, JOTWELL (July 12, 2010) (reviewing Alice Ristroph, *How (not) to Think Like a Punisher*, 61 *Fla. L. Rev.* 727 (2009), available at SSRN), <http://crim.jotwell.com/the-false-promise-of-retributive-proportionality/>.