CHAPTER 2

Is Twenty-first Century Punishment Post-desert?

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There are grave dangers in looking forward and making predictions about the way in which political theory and practice may develop. The obvious danger is simply that one might be mistaken. Less obvious, but still damaging, is to give in to the temptation to see the past and present as punctuated by decisive periodic breaks with a present fissure heralding a new era. The world is a complicated place and things are seldom predictable or describable in neat periods. Nevertheless, these dangers should not mean that we ignore broad shifts in emphasis or that we should be willfully blind to the evidence that things have changed, or are changing. Theories and policies do change, and the capacity of theory to respond to practice often depends on its ability to sense those changes and to think them through in advance of the policies getting too tight a grip on the way we act. With this in mind, there is good reason to consider the past and future of penal theory and practice.

Looking back, there is a now well-established story in penal philosophy that has it that the broadly consequentialist consensus of the postwar period was overturned in the 1970s by a retributivist revival. Although, as Michael Tonry makes clear in his introductory essay (Tonry 2011a), penal practice was much more complicated, the story does have some plausibility when applied to the theoretical literature. In 1969 a survey of justifications of punishment found that "there are no defenders [of traditional retributive theory] writing in the usual places" (Honderich 1969, p. 148). Ten years later one would have been able to say exactly the same about defenders of traditional consequentialism, while retributivists—in no fewer than nine varieties (Cottingham 1979)—were commonplace. However, the decline in consequentialism and the revival of retributivism does not map easily on to a story about desert. To see this, it is necessary to unpack the conventional story.

I. DESERT

There is little doubt that the retributive revival in penal theory was accompanied by, and could be thought to be part of, a general anticonsequentialism in the philosophical literature and a resurgence in the politics of desert. The decline of consequentialist moral thinking can be overemphasized, but the publication of John Rawls's *A Theory of Justice* (1971), which provided a systematic alternative to utilitarianism, was undoubtedly the dominant philosophical event of the period. Politically, in the United Kingdom and United States, the end of the decade brought electoral success to right-of-center parties led by Margaret Thatcher and Ronald Reagan. These leaders emphasized individual desert and responsibility, and their success can be measured in part by the fact that even when the political winds changed, their left-of-center successors went to extraordinary lengths to include these notions packaged as a "third way" that synthesized "rights and responsibilities" and insisted, for example, that welfare was "a hand up, not a hand out" (Matravers 2007, pp. 5–11).

Thus there seems to be a neat, almost overdetermined, story that leads from a consequentialist, welfarist heyday, dominant throughout the century until the 1970s, to a revolution that encompassed penal theory (Kleinig 1973; von Hirsch and Committee for the Study of Incarceration 1976); penal policy; legal, political, and moral theory (Hart 1968; Rawls 1971); and political practice. There is indeed much to this story, and many aspects of it are masterfully described in David Garland's *The Culture of Control* (2001). However, it is a mistake to think that there is a single story in which consequentialism's decline was accompanied, or caused, by a resurgence of the notion of desert.

The mistake is an easy one to make—particularly for penal theorists—since, as we have seen, over a relatively short period consequentialist penal theories (and some practices) declined, as did consequentialist theorizing more broadly (in the face of the Rawls-led neo-Kantian revival), retributive theories increased, and the rhetoric of desert became critical in political practice. Yet, this is not one story. To see this, consider just how odd it would be to claim that *desert* is critical to the criticisms of consequentialism and to the alternative neo-Kantian theory offered in Rawls's *A Theory of Justice*.

Rawls explicitly denies that the notion of moral desert has any part to play in a theory of distributive justice. "The principles of justice that regulate the basic structure," he writes, "do not mention moral desert, and there is no tendency for distributive shares to correspond to it" (Rawls 1971, p. 311). Given this, it is clear that Rawlsian theory should be included only in the "decline of consequentialism" part of the story and not in the narrative of the rise of desert. However, my claim is that this is true of the majority of retributive penal theories as well, and that these theories can, at best, only underwrite something that looks much more akin to Rawls than to traditional desert-based retributivisms. To see this, consider first Rawls's approach. Rawls's aversion to desert is well known, although I think sometimes misunderstood. One account has it that Rawls argues that we are all equally nondeserving (or, for that matter, deserving) because by declaring "morally arbitrary" everything that might differentiate us one from another, Rawls leaves nothing—natural talent, willingness to make an effort, social status, etc.—that could play

the role of a desert basis and so legitimate anything other than equality of outcome (at least initially). A better account, I think, has it that Rawls thinks desert *irrelevant* to distributive justice. It is rejected as the foundation for justice because there is no sensible way of conceiving of a relevant, legitimate desert basis and then translating that into distributive shares. In cruder terms, one reading has it that no features of human beings can be attributed to them in a way that would legitimate treating one such being different from any other (we are not responsible for all those things—our heights, talents, intelligence, etc.—that enable us to achieve different things, so we do not deserve any differential reward or penalty for those achievements). The other, more plausible reading is that whether or not we are responsible for our talents, etc., there is no legitimate way of translating natural differences into distributive outcomes. Either way, the conclusion is, as Rawls puts it, that the common-sense tendency "to suppose that income and wealth, and the good things in life generally, should be distributed according to moral desert" is rejected (1971, p. 310).[1]

So the idea of a resurgent "desert theory" in theories of distributive justice—indeed, I think, in moral theory generally—is not sustainable. The Kantianism that forced out, and took the place of, the dominant consequentialist paradigm is one without Kant's metaphysics and one that has no place for a strong notion of desert. My claim, considered in the next section, is that the same is true of (most of) the penal theories that displaced their consequentialist counterparts.

II. WAS IT EVER ABOUT "JUST DESERTS"?

Tim Scanlon characterizes what he calls "the Desert Thesis" as follows: "the idea that when a person has done something that is morally wrong it is morally better that he or she should suffer some loss in consequence" (1998, p. 274).[2] Narrowed to the field of punishment, I take it that the relevant thesis is that a person who has committed a (legitimate) criminal wrong deserves to suffer some loss, and it is the function of the system of punishment to impose that loss for the wrong done. That is, the—or, at least, a—function of the system of punishment is to ensure that the suffering that is (prejusticially) deserved by a given offender for a given act is imposed on the offender.

Once desert is characterized in this way, it is not at all clear that there are many genuine desert theorists among those who would identify themselves, or be identified by others, as such. Of course, retributivists come in a variety of forms and the role of desert may be subtly different in each. However, our interest here is not in narrow differences between retributive arguments, but is rather in the place of desert in the overall approach. Thus it is possible to restrict the analysis to fewer, broader, and more abstract forms of the argument.[3] The retributive accounts briefly considered below are Michael Moore's intuitionist theory and so-called fair play theories. After that, the essay takes a longer look at communicative accounts and at mixed theories. The conclusion is that where desert has an independent and important role in the argument, the retributive theory is either implausible (Moore) or incomplete (communicative theories). In cases where the retributive theory fares better, desert is not central.

A. Michael Moore's Intuitionist Account

According to Moore, the retributive theory that he defends "is the view that we ought to punish offenders because, and only because, they deserve to be punished. Punishment is justified, for a retributivist, solely by the fact that those receiving it deserve it" (Moore 1987, 1993, p. 15; see also Moore 1997, chap. 2–3). Clearly this is a desert-based view. Since my main concern in this essay is not to evaluate retributive theories, but to establish that the retributive revival was not primarily a revival in desert thinking, Moore stands as a counterexample. However, for all the sophistication of his account, Moore's theory has not established itself in the mainstream. This is because it depends on a combination of a very demanding, if idiosyncratic, moral realism, and a thesis that our moral intuitions offer a good guide to the moral truth that offenders deserve to suffer (for Moore's moral realism, see Moore 1982, 1992). For reasons given elsewhere, I find this account implausible (Matravers 2000, pp. 81–86), but whether it is or not, it has played only a very minor role in the revival of retributive punishment theory (perhaps because of the metaphysical theory on which it relies).

B. Fair Play Theory

Fair play—or benefit and burden—theories enjoyed a brief period of popularity in the retributive revival of the 1960s and 1970s. The core of the argument is that, given a just initial distribution of benefits and burdens in society, a criminal offense disturbs this equilibrium and needs to be rectified. It does so because the criminal free rides on the willingness of others to constrain the pursuit of their interests in accordance with the law (Morris 1968; Murphy 1973). Again, the purpose here is not to consider the merits or otherwise of the account. That being said, taken as a complete account of punishment, few have found it compelling, and its critics include some of its early proponents. The problem, as Tonry puts it, is that "gaining an unfair advantage" by free riding is not "an adequate or even plausible characterization of the wrongfulness of many offenses" (for criticisms of fair play theory, see von Hirsch 1985, 1990; Duff 1986, 2001; Dolinko 1991; Matravers 2000; Tonry 2011b, p. 109; for a defense, see Dagger 1993). Putting that to one side, what of desert? Of course, in some sense the free rider "deserves" punishment. However, the kind of desert being invoked here is not the prejusticial desert of the desert thesis. There is not some appropriate level of suffering deserved by the offender that it is the job of the system of punishment to ensure that he gets. Rather, what the offender deserves is whatever loss (or suffering) is dictated by the system of justice that will restore the balance of benefits and burdens. Desert here is determined by the overall account of the balance of benefits and burdens; in Rawlsian terms (further discussed below), the offender and the wider society of which he has taken advantage have legitimate expectations, not desert claims, that need to be met.

C. Punishment as Communication[4]

Perhaps the most important and long-lasting of the retributive theories that emerged in the last third of the twentieth century was the communicative account of punishment. In its most sophisticated form, punishment aims, and is justified by the need, to convey censure. Moral wrongdoing deserves censure, and where a society has declared some behavior to be wrong, then censure is "owed" to the offender as "an honest response to his crime," to his victims "as an expression of concern for their wronged status," and to "the whole society, whose values the law claims to embody" (Duff 1998, p. 50).

There is a clear desert claim here: moral wrongdoing deserves censure (and its legal extension is that, following criminal wrongdoing, it is the job of punishment to inflict the deserved censure on the offender). Moreover—and perhaps one reason for the account's attractiveness and longevity—this claim does not seem to rely on any odd metaphysics or other mysterious ingredient. As Duff puts it, "whatever puzzles there might be about the general idea that crimes 'deserve' punishment . . . there is surely nothing puzzling about the idea that wrongdoing deserves censure" (1998, p. 50). However, this is not the desert thesis, which is about the deserved nature of an imposed *loss*. In short, the desert thesis as applied to punishment needs to accommodate deserved hard treatment. As Duff notes, while censure can be conveyed by hard treatment, it need not be. Thus the censure theory faces the "familiar task . . . to explain and justify the role of hard treatment" (Duff 1998, p. 51).

Although Duff believes that hard treatment can be intrinsically linked to censure, few others are persuaded. Of course, being censured might itself be unpleasant, but there is no reason to believe that it has to be so. Thus some additional argument is needed. According to Duff, hard treatment is intrinsic to the account because censure needs to be forcefully expressed; because sometimes words are insufficient to express remorse or repentance; and because the offender needs to undertake some form of suffering to show to her community that she is serious, and thus to achieve reconciliation. Discussion of these claims would take us beyond the purpose of the argument here (for criticisms, see Matravers 2011a). In relation to the argument here, the point is that, while censure may be deserved, hard treatment (at best) merely provides the vehicle of transmission for the censure and the offender's response to that censure. More plausibly, censure is deserved, but hard treatment must find some other justification. This—that censure is only one element of a complete account of punishment—is the argument that has had the most purchase in the literature, which means that unless the theoretical resources upon which a revised account draws are also desert based, then the censure theory cannot be said to underpin a revival in the centrality of desert-based theorizing.

D. Mixed Theories

The mixed theory on which I want to concentrate is one that does indeed aim to supplement the censure-based account with an independent justification of hard treatment. However, it is worth adding a brief word about H. L. A. Hart's account, both because it

remains influential and because Hart is sometimes cited in the orthodox story of the decline of consequentialism and the rise of desert.

Hart's work certainly fits the period. *Punishment and Responsibility* was published in 1968 and offers a broadly liberal account of the subject matter (on occasions in explicit opposition to the consequentialism of the English penal theorist Barbara Wootton) (see Hart 1968, chap. 7, 8). Yet, of course, Hart believed the overall purpose—the general justifying aim—of punishment to be consequentialist (Hart 1968, chap. 1). And while it is true that once the system is in place its operation is limited by desert side constraints, these are not expressions of the desert thesis.[5] Rather, these side constraints capture a liberal model of the proper relation between the state and its citizens. As a citizen, it should be up to me whether I put myself in the realm of punishment, and having done so, I should be treated as a "person" and not as something "alterable, predictable, curable or manipulable" (Hart 1968, p. 183). Hart, then, cannot be invoked in defense of the desert thesis, although his work (like Rawls's) was undoubtedly important in setting the tone of the post-consequentialist era.

Hart's is probably the most famous mixed theory among justifications of punishment. However, like most philosophical theories, its claim to have directly influenced policy is at best moot. That is not true of the mixed theory on which I want to focus in the rest of this section. For more than a quarter of a century, Andrew von Hirsch has championed "proportionality" in sentencing with considerable success in terms of both theory and practice. A bumper sticker for the account is that "the punishment must fit the crime," which can be understood in at least two ways. Confusion between these is probably the single most likely source of what I argue is the conflation of the rise of retributivism with the rise of desert.

In one interpretation, there is a desert thesis account of the idea that the punishment must fit the crime. This is that there is some preestablished quantum of suffering that is appropriate, that "fits" the crime, and that it is the job of the system of punishment to inflict on the offender. However, that is not what is meant by proportionality as championed by von Hirsch (and others). Proportionality in sentencing is primarily a matter of the relations within a scheme of penalties, not of the anchoring of that scheme. It requires two things. Ordinal proportionality requires that similarly culpable "persons convicted of crimes of comparable gravity should receive punishments of comparable severity." Cardinal proportionality concerns "the overall magnitude and anchoring points of a penalty scale" (von Hirsch 1990).

It is the proportionality interpretation of the punishment fitting the crime that has been championed by retributivists like von Hirsch and Andrew Ashworth, so the question arises whether proportionality is an expression of the desert thesis. The requirement of ordinal proportionality has nothing to do with the desert thesis. It merely requires that if offender A commits an offense O with no mitigating or aggravating circumstances and receives a punishment of severity P, then offender B, who commits a similar offense in similar circumstances should also receive a punishment of severity P. Similarly, offender C, who culpably commits an offense that is twice as serious as that committed by offenders A and B, should receive a punishment that is twice as severe as that handed out to A and B. Note how easy it is to describe this in terms of "desert." If, once the scheme is established, A and B are punished by P, it makes sense to say that C deserves 2P. But the

desert claim here is relative to the scheme, not to some ideal of suffering that needs to be imposed in response to the offense. It is, in Rawlsian terms, an "entitlement." C is "entitled" or has a "legitimate expectation" to receive 2P, given the scheme and the treatment of A and B. C's punishment "fits the crime" in accordance with the scheme, as, of course, does A's and B's, and again, according to the scheme, these punishments are what is deserved, but none of this has the slightest thing to do with the desert thesis.

The overall magnitude and anchoring points of the scale, its cardinal status, could of course be fixed by considerations drawn from the desert thesis. If it is given—or can be intuited as a moral fact in Moore's sense—that the suffering appropriate for the least serious crime on the scale is a nominal monetary fine and that appropriate for the most serious is, say, death, then the scale would be most appropriately constructed in accordance with these requirements (ordinal proportionality would only be required if the moral truth about deserved suffering turned out to meet that condition). However, this is not the position that von Hirsch takes in any of his writing.

Rather, von Hirsch has contemplated a number of ways of fixing the penalty scale, derived from asking questions such as "what is available?" and "what is conventional?" (see, e.g., von Hirsch 1985, p. 159). More recently, in particular in his work with Andrew Ashworth (von Hirsch and Ashworth 2005), he has pursued a mixed theory in which censure plays a leading retributive role and hard treatment acts as a prudential supplement aimed to aid citizens—who are neither fully saints nor fully sinners—in their resisting the temptation to commit crime. In this case, then, one might say that censure is deserved (in response to some offense) and it is the job of the criminal justice system to deliver that censure. Hard treatment is deserved, too, but only in an "entitlement" sense. The offender may expect hard treatment both as a means of expressing censure and to deter him and others, but the degree of hard treatment is dependent on a scheme of penalties that has the reduction of future crime at its core.

E. Retributivism

In short, with the notable exception of Michael Moore, the mainstream revival in retributivism since the 1970s has not been a revival in the desert thesis. The slogan "the punishment must fit the crime" is part of contemporary retributivism, but its association with traditional notions of desert is inappropriate. Retributivists, of course, may welcome this conclusion. They may do so for two reasons. First, the traditional desert thesis is defensible only by invoking some pretty robust metaphysical commitments (such as can be found in Kant, Hegel, and Moore), and such commitments are not only out of fashion philosophically, but are widely regarded by liberals as an inappropriate basis on which to ground public policy in pluralistic societies (see Rawls 1999; famously, John Rawls described his theory as "Political not Metaphysical"). Second, it is often taken to be a cruel irony that what began for many as a liberal, left-of-center call for fairness in sentencing and an end to arbitrary punishments was hijacked by right-of-center politicians pushing for harsher punishments. If what I have said is correct, then there was no such capture of the "just deserts" movement, because that movement was only about proportional justice, not about desert. Reagan, Thatcher, and the theorists who followed

them corrupted, rather than hijacked, the retributive revival. One example will suffice: California legislators may believe that those who commit three felony offenses deserve indefinite detention under the "three-strikes" law, but this clearly has nothing to do with retributivism understood as proportionality.

It may be thought that the argument has reached a dead end. This essay has relied on a particular, traditional, understanding of deserved punishment—the desert thesis—that, it turns out, few other theorists or theories share, and few would wish to share. Retributivists are broadly about the communication of censure and the proportional use of hard treatment; but that is what they said they were about, so what gains are made by pointing it out (other than clarifying why politically motivated rhetoric about desert has little to do with retributivism)? The gains, I think, lie in clarifying what needs to be done when confronted by recent and not so recent developments in penal practice. By that I do not mean that we are able to respond to the corrupt version of retributivism that has given us severe mandatory sentences for many crimes and three-strikes legislation, but also that if we are to respond to the challenge of thinking about recent therapeutic or restorative practices, we need to know what the issue is. If the above argument is correct, then the issue is *not* one of reconciling those practices to desert, or conceptualizing a post-desert world, but rather, or so I will argue below, it is one of thinking about the requirements of liberal justice as a whole.

III. PROPORTIONALITY

For most retributivists, then, the justification of systems of penal hard treatment is not that they exist in order to give an earthly form to some kind of "celestial mechanics" in which wrong actions deserve "an equal and opposite reaction" in the form of imposed suffering (Cohen 1939, p. 279). Rather, they are a mechanism of social order needed because living together on shared territory in conditions of moderate scarcity is difficult and throws up all manner of coordination problems.[6] However, not just any means to social order are acceptable. For retributivists (at least for those considered for the rest of this essay), the principle of proportionality stands independently and thus dictates at least a significant part of the system of punishment.

It is important to be clear: proportionality does not provide the ultimate rationale for having a system of punishment (as against not having one). It is not that there is some proportionate suffering that must be imposed on wrongdoers so that a system of punishment is required to fulfill this demand. It is that in designing or critiquing a system of punishment—one that is to be or has been created for some other reason—the demands of proportionality must be respected. Although not the desert thesis, this would still be a substantive demand, and one that could underpin criticism of much recent penal practice (disproportionate sentencing, therapeutic justice, etc.).

Although I have a great deal of sympathy with the proportionality thesis, for reasons given in the next section, I believe it should not be used too quickly. It is not at all obvious that proportionality is an independent principle that should automatically be deployed as a trump to defeat other approaches to crime management and reduction.

A. Proportionality and Fairness

The attractions of proportionality to those who consider fairness a value, and to liberals more generally, ought to be clear. Once the system of justice is in place, people are entitled to certain things, to be treated in certain ways. Penal hard treatment must respect those entitlements. Proportional sentencing—the claim that "the penal sanction should fairly reflect the . . . harmfulness and culpability of the actor's conduct" (von Hirsch and Ashworth 2005, p. 4)—treats people fairly both in the narrow sense of treating like cases alike (and unlike cases differently) and, its proponents claim, in the sense of treating people as agents who are entitled to a certain kind of respect.

The first of those claims looks to be uncontroversial: similarly harmful and culpable offenders will receive similar punishments and those whose harmfulness or culpability is different will receive different punishments. The second is not quite so apparent, but rests on the belief that citizens are entitled to a certain form of equal respect. This not only means that they are entitled to be treated alike (when relevantly alike), but also that they should not, in Hart's words (1968, p. 183), be treated as if "alterable, predictable, curable or manipulable." In short, the state should appeal to our capacities as reasoning agents, and not merely threaten or manipulate. Thus proponents of proportionality claim the anchoring points of the scale of penalties have to be such as to respect citizens as persons. To threaten citizens with death for a minor traffic offense might reduce violations of traffic laws, but it would hardly be to treat citizen drivers as agents.

Although attractive, I am not convinced that these arguments are sufficient to establish proportionality as a independent side constraint on permissible systems of punishment. Consider them in reverse order.

The second argument is that respect for persons as agents requires an overall anchoring of the penalty scheme such that threatened hard treatment is not so severe as to fail to recognize our status as reasoning beings. This means that were a penalty scheme to be proposed that was very severe—perhaps in response to some consequentialist argument that, for example, conviction rates are so low that general deterrence can only be achieved by increased penalties—the principle of proportionality would rule it out. The argument that is deployed in support of this position is the "drowning out" objection. That is, if the sentencing scheme is very severe, the moral appeal of the law will be lost and citizens will think only in prudential terms. This is to control citizens by threats rather than to offer them moral reasons for action (von Hirsch 1990; Duff 1998; von Hirsch and Ashworth 2005).

The problem with this is that it just does not seem very plausible once one considers the ways in which citizens actually reason. Consider someone considering parking illegally. Presumably many people park illegally for short periods without thinking too much about the moral wrong that may be involved. Now, consider what would happen if the state imposed a severe penalty for this offense (say, the confiscation of one's car). In such circumstances, presumably most people would pause and think the risk was not worth it. Should they then feel that they have been treated as less than an agent? That seems wildly overdramatic. All that has happened is that the state has changed the outcome of one's prudential reasoning.

For more serious offenses, the situation is difficult, but no less damaging for the drowning out thesis. Imagine the penalty for murdering one's spouse is to be choked and then burnt at the stake. Would that make most married citizens think any less about the moral reasons not to murder their husbands or wives? Surely not, since most people, most of the time, do not think about the reasons they have not to commit murder. For most people, the reasons not to do so are inert, since there is never an occasion in which they need to figure in their mental life.

What of those people who are sorely tempted to murder their spouses? In such cases it does not seem to me at all plausible that the *absence* of overwhelming prudential reasons not to do so would help them to focus on the moral reasons not to do so. That point has passed. In short, for the core criminal offenses, we are not—in Andrew von Hirsch's terms—neither saints nor sinners, but something in between (von Hirsch 1990). We are actually saints or sinners (in the relevant senses) for whom the threat is either inert or (we hope) sufficient.

Thus there is no independent principle of cardinal proportionality linked to a notion of the respect we are owed as persons that can limit the system of punishment or speak in favor of a reduction in sentencing levels. Of course, there are many other reasons why we should limit punishments. For example, the risk of wrongly falling foul of the law and the need to respect Bentham's (1970, p. 168) injunction that penalties should not encourage wrongdoers to greater wrongdoing, but these are not arguments that can underpin proportionality as an independent principle.

What of the first, seemingly more powerful argument that ordinal proportionality ensures equality; that like cases are treated alike? This has great appeal to liberals, for whom equality is a foundational value. Thus, clearly a system of penalties that distinguishes between persons on the basis of skin color and imposes greater penalties on black-skinned offenders than on white-skinned ones would be a paradigm instance of injustice. By extension, a system that penalizes the kinds of drug use associated with one community more severely than similarly harmful kinds of drug use associated with another is unjust.

However, the argument becomes more complicated once one considers other, less arbitrary rationales for different treatment (i.e., we need to be sure that the problem with the above examples is that they fail to respect ordinal proportionality rather than that they are based on arbitrary—and offensive—distinctions).

Assume that there are good public policy reasons for the state to wish to crack down on a particular kind of offense; say, the state is very worried about the influx of a certain gang culture and decides to issue sentencing guidelines that make gang-related crime automatically subject to an extra tariff. Thus two offenders who are equally culpable and have committed offenses involving equal harm may receive different penalties as a result of one being in a gang and the other not. Is this a violation of one's status as an equal?

I think that is at least arguable. Of course, their treatment *is* unequal, but the respect we are owed as citizens is, as Dworkin (1978) has usefully phrased it, not a matter of equal treatment, but of "treatment as an equal." Dworkin famously argued that it might be the case that the state has an interest in developing African American professionals (doctors and lawyers) and thus quotas for graduate school places in those disciplines

could be compatible with treatment as an equal (since the reason for differentiating between applicants was not their skin color, but their ability to develop into socially useful role models). Similarly, to treat gang members differently from otherwise identical offenders seems less like treating blacks differently from whites and more like treating trainee brain surgeons differently from equally hard-working trainee beauticians. The brain surgeon is entitled to expect greater rewards not because social policy aims to reward the clever, but because rewarding the clever in this case serves a useful social policy.

The point of this section is not to deny that proportionality has an important role in our thinking about punishment. It does and will continue to do so. However, it is not an independent principle. Rather, it is one of many considerations that must be taken into account when we devise a system of criminal justice and punishment. It may often be one of the most important considerations, and violations of proportionality will require special justification, but it is not a liberal trump card that can be played without further need for justification in proposing or criticizing a penal system.

IV. PUNISHMENT IN THEORY

I have argued that neither the desert thesis nor the demands of proportionality necessarily dictate the shape of a legitimate and just criminal justice system. However, I have not said very much that is positive, that is, about how we might think about such a system. This is critical if we are to be able to respond—as I indicated we should—to developments in penal practice.

Of course, it is not possible here to offer a complete argument in defense of a system of criminal justice. Rather, I want to say something general about how we should go about constructing such an argument and something more particular about how it might inform our responses to at least some recent changes in the penal landscape.

Underlying the argument so far has been the Rawlsian thought that the only relevant notion of deserved hard treatment (but not deserved censure) is one that "presupposes the existence of the cooperation scheme" (Rawls 1971, p. 103). That is, once a just scheme is in place, it gives rise to legitimate expectations (e.g., if one does not break the law, then one will not be subject to punishment). In thinking about penal hard treatment, then, we have to think about the overall just scheme and the legitimate expectations it creates. That is best done, I believe (but cannot defend that belief here), by considering what agents would agree to in some suitably constructed hypothetical choosing situation (see Matravers 2000; for a more Rawlsian take on the social contract and its application to punishment, see Matravers 2011b, 2011c).

The task of giving an adequate account of punishment is, of course, familiar, and such accounts are invariably controversial. This is not the place to try to develop another. Rather, I want to say something about how we might evaluate some recent examples of penal practice and how, in doing so, we might better prepare for whatever is next as we enter the second decade of the new century.

A. Coercive Treatment

Consider the example of coercive treatment; say, the order that an offender undertake anger management therapy on pain of some further penalty. Coercive treatment was, of course, one of the targets in the revival of retributivism, and for some retributivists, the recent advance of so-called therapeutic jurisprudence (as championed by Wexler 1995, 2008; Winick 1997) represents a return to the dark days before the revolution.

Can coercive treatments of this kind be given a rationale that accords with the demands of liberal egalitarian justice? On the face of it, things are not promising. The coercive nature of directed treatments speaks against compatibility with freedom, the treatment element against autonomy, and the fact that different offenders may receive different punishment against proportionality. However, appearances may be deceptive.

Consider persons located in a suitably modified Rawlsian original position choosing principles of penal justice. They do not know, of course, whether they will be disposed to aggression in the "real world," but they will know general facts about that world, such as that there is a need for social order, assurance, and so on. They must then choose to respond to aggression, but there is reason for them to argue that the response can be moderated by the needs of social policy. There is no independent standard of entitlements that the people in the original position must translate into their principles of justice. Rather, what citizens will be entitled to is itself determined by the principles of justice. Thus they may be able to endorse coercive treatment models by reasoning over each of the potential problems.

Take treatment first. The clearest case would presumably be something akin (although not identical) to quarantine, but quarantine potentially avoids autonomy problems by conceiving of the agent as a mere "carrier." It is the virus (or whatever) that is quarantined; the agent's being coerced is merely an unfortunate by-product. A better analogy might come from distributive justice. It is held by some that an agent with unchosen expensive tastes should be compensated for the loss of welfare that results from these tastes unless, for example, he would choose to keep those tastes even were he able to take an otherwise harmless pill that would rid him of them. Or, imagine someone who needs very expensive treatment for depression. We may think, other things being equal, that she is entitled to such treatment at public expense, but not if we discover that there is an easy, harmless cure for her type of depression that she refuses to take.

Putting to one side issues of identification, false positives, and so on, an agent with anger management problems who (possibly as a result of those problems) regularly falls afoul of the law might be thought to be in a similar situation. It is compatible with his freedom for others to offer treatment, with the clear understanding that if he refuses that treatment he must then pick up the full costs of his behavior (which may in this case mean something like a severe penalty the next time he breaks the law). Establishing exactly what that means is difficult to determine without a full account of the theory of punishment a given contract would generate, but nevertheless the reasoning here is neither unusual nor incompatible with the liberal requirement to treat people as equals. The intuition is a standard one: Why should anyone else bear the costs of his behavior if he refuses to do what he can to change that behavior?

Of course, this example immediately raises autonomy worries, since I am speaking of the offender as being in need of treatment—as ill or defective—rather than as an autonomous chooser. I am less worried about this in theory, although how much we have to worry in practice depends on the proposed intervention (there is a significant difference between courses to teach information technology skills, cognitive behavioral therapy (CBT), and an intervention such as chemical castration). Many forms of intervention can make our lives better and better enable us to cope with the world and others. Recognizing that, and responding with offers to help, seems to me unproblematic. Except in very extreme cases, I think the offer must be one that can be refused. But as indicated above, in many instances it is a liberal principle that one should not be able to refuse while passing the continuing costs of the problem on to others.

Finally, what of the fairness (or proportionality) worry? Could those participating in the social contract endorse different punishments for the same offenses depending on, say, the potential dangerousness of the offender? One way around this might be to separate the punishment tariff from the dangerousness tariff and argue that in some circumstances it would be rational for the contractors to agree, in effect, to quarantine the dangerous. In circumstances (which are far from obtaining) in which we could identify the dangerous, there would not seem to be anything to bar this move.

V. PUNISHMENT IN PRACTICE

The above offers a very brief introduction to how one might think about penal policies in the abstract. Having rejected the desert thesis, I have argued that "an entitlement to proportionality in sentencing" is *not* an independent principle, but is—as with all "entitlements"—determined by the wider theory of justice. For this reason, policy proposals have to be thought through; they cannot simply be rejected as incompatible with desert or proportionality. The result, of course, cannot be known in advance. It may be that therapy, mandatory sentences, sentencing guidelines that are not strictly proportional, and so on are all incompatible with a liberal theory of punishment. I doubt it, but my case here does not rest on whether they are or are not. Rather, it rests on whether these things can be dismissed on the basis of being incompatible with retributivism understood in terms of the desert thesis or proportionality (they cannot). In thinking about the future of punishment, we must not be complacent. The revival of retributivism swept away many terrible practices, but it did not leave us with a coherent theory of punishment with which to judge future policies.

Finally, what has been said above relates to how we might, as penal philosophers, think about policy proposals. However, in responding to such policies we must be prepared to accept contingent facts that may play no part in ideal theory. That is, even if it were true that a form of preventive detention or a mandatory minimum sentence for some offense were compatible with the liberal requirement to treat citizens as equals, that does not mean that such policies are justified, all things considered. It may well be that the background conditions of distributive injustice, or the capricious nature of those who police (in the widest sense) the criminal justice system, mean that greater injustice would be done by departing from proportionality than by sticking with it.

In short, and to answer the question posed in the title, twenty-first century punishment will be post-desert, but that is not a recent change. Our best theories of punishment (and much else) are post-desert, and have been since long before the retributive revival at the end of the twentieth century. That revival was not about desert, but was about sweeping away many practices that resulted in actual injustices. It has left us with a principle of proportionality that is important, but insufficient. The actual injustices that occur as a result of our penal systems are still many, and in many places are increasing. What is needed in the future is not only to think through what are the legitimate entitlements and expectations of liberal citizens in relation to their criminal justice system, but also to confront the problems that arise in the nonideal world in which we live. That is probably best done by considering distributive and retributive justice together in the hope that the resulting thoughts will influence those who make and apply the law.

NOTES

1. Nevertheless, the difference between the readings is important because the former would seem to generalize to retributive justice (if, because we are not responsible for our natural starting points, we do not deserve different treatment on the basis of those differences, then that would seem to apply to all questions of desert), whereas the latter does not (since it may be that there are differences between distributive and retributive justice that mean natural inequalities can be legitimately translated into inequalities in outcome in the one but not the other). It is worth pausing to note just how radical is Rawls's rejection of desert (on this, and on why it may explain the difficulty Rawlsians confronted in addressing political questions at the end of the twentieth century, see Scheffler [2001, chap. 1] and Matravers [2004]). For a general discussion of the relationship of distributive and retributive justice in Rawls's theory, see Scheffler (2001) and Matravers (2011b, 2011c).
2. It is worth noting that Scanlon—a significant moral philosopher in the Rawlsian, neo-Kantian mold—regards the desert thesis as "morally indefensible," which is yet further evidence that the assault on consequentialism in the philosophical literature was not led by theorists committed to restoring desert to a central place in moral thinking.
3. As noted above, Cottingham identified nine forms of retributive thinking. Further distinctions can be found in Walker (1999) and Tonry (2011b, pp. 108–9) (see also Cottingham 1979).
4. This subsection draws extensively from Matravers (2011a).
5. As John Gardner puts it, "the only Hart-approved reason in favour of punishing the guilty (or anyone else) is the reason given by punishment's general justifying aim, viz. that future wrongdoing is thereby reduced" (2008, p. xxv).
6. The exceptions are Moore and Duff, who believe that the system of punishment gives form to the need for moral criticism in response to wrongdoing.

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