



Moral Uncertainty and Criminal Justice

Research Summary 2

The prosecution must prove its case beyond reasonable doubt. Should not the entire moral argument for punishing someone be held to a similar standard?

Key Concepts

Epistemic: Pertaining to knowledge. **Moral Uncertainty:** When we do not know which moral theory should guide our actions/policies. **Justifications of Punishment:** Moral theories about why it is morally permissible to punish, about the purposes of punishment, and about what moral principles should guide the state's use of punishment. **Retributivism:** a justification of punishment, according to which criminals deserve to suffer hardship in proportion to their moral blameworthiness.

Overview

Among penal theorists, "a broadly retributive theory of punishment ...remains in the ascendancy in the Anglo-American world" [1, p145]. There is significant public support for retributivism [2]. Many criminal justice systems contain retributive elements [3]. Yet, a growing number of theorists have raised serious doubts about retributivism. These doubts give rise to the "epistemic argument" [3-9].

The Epistemic Argument Against Retributivism:

Premise 1: We should hold Justifications for punishment to a very high standard of credibility because it is morally problematic knowingly and actively to inflict serious hardship on someone if there is considerable uncertainty about the soundness of the moral argument for doing so.

Premise 2: There is considerable uncertainty about the soundness of retributivism (especially about the retributive conception of free will, see **research summary 1**).

Therefore, it is morally problematic to punish someone based on retributivism

Hardships of Punishment: Stigma; distress; interference with rights: free movement, privacy (prison), property rights (fines), right against forced labour (community service); risk of injury by other prisoners; poor job prospects; family/friends suffer. **Doctrine of doing & allowing:** doing harm is harder to justify than allowing harm [11]. Justifications for actively imposing hardship should arguably be held to a particularly high standard of credibility.

Policy implications if we accept the conclusion of the epistemic argument:

- Sentencing guidelines should make clear that retributivism is not a sufficient basis for punishment. The Scottish "principles and purposes of sentencing" should be amended accordingly [12].
- Given widespread support for retributivism, public information campaigns would be advisable. Empirical work suggests that providing an opportunity to condemn the *criminal act* can lessen desires to inflict retribution on the offender [10].
- Promote non-retributive ways of achieving criminal justice goals, which can meet victims' needs, expressed in large scale victim surveys [13].

References: [1] M Matravers, 'De-moralising retributivism: Agency, blame and humanity in criminal law theory and practice' In J Jacobs and J Jackson (eds) *The Routledge Handbook of Criminal Justice Ethics* (Routledge 2016) pp144-163; [2] T Nadelhoffer, S Heshmati, D Kaplan and S Nichols 'Folk Retributivism and the Communication Confound' (2013) 28 (2) *Economics and Philosophy* 235. [3] G Caruso, *Rejecting Retributivism* (CUP 2020); [4] D Pereboom, *Living without Free Will* (CUP 2001); [5] R Double, 'The Moral Hardness of Libertarianism' (2002) 5 *Philo* 226; [6] Benjamin Vilhauer, 'Free Will and Reasonable Doubt' (2009) 46 (2) *American Philosophical Quarterly* 131; [7] E Shaw, 'Free Will Punishment and Criminal Responsibility' <<https://era.ed.ac.uk/bitstream/handle/1842/9590/Shaw2014.pdf?sequence=2&isAllowed=y>>; [8] A Kolber, 'Punishment and Moral Risk' (2018) *University of Illinois Law Review* 487; [9] M Corrado, 'Criminal Quarantine and the Burden of Proof' (2019) 47(4) *Philosophia* 1095; [10] E Shaw and R Blakey 'Determinism, Moral Responsibility and Retribution' (2020) 13 *Neuroethics* 99; [11] F Woollard, "Doing vs Allowing Harm". <https://plato.stanford.edu/entries/doing-allowing/> [12] Scottish Sentencing Council Guidelines; [13] Alliance for Safety and Justice. 2016. Crime survivors: The first-ever national survey of victims' views on safety and justice. <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>