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Can the law do without retributivism? Comments on Erin Kelly's The Limits of Blame

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Abstract

Erin Kelly's *The Limits of Blame* presents a critique of our current overly punitive legal system and champions a system of criminal justice that does not traffic in moral blame and is free of retributivist elements. This commentary questions the viability of such a system, and ultimately suggests that there is not much distance between a more perfect retributivist system and the kind of more nuanced and humane system of criminal justice that Kelly envisions.

Erin Kelly's *The Limits of Blame* offers a compelling challenge to our current system of criminal justice. It locates the genesis of our system's overcriminalization and overincarceration in retributivism, and attempts to provide a remedy that may enable us to "scale down" punishment in what is surely an excessively punitive system. Kelly sees our current largely retributivist system of criminal justice as in tension with the demands of morality and with the need to promote social justice more broadly. This wide-ranging book explores theories of punishment, of moral desert, and of crime, and through it we learn about the doctrines of criminal law, the demographics of crime, and the perpetuation of social injustice. Kelly ultimately suggests that our system is so broken that law enforcement may have lost its legitimacy, and that without remedies on a societal scale, incarceration even for harm-reduction is unjustified.

Against retributivism

The core thesis of *The Limits of Blame* is that retributivism is a motivation ill-suited to the criminal law and should play no role in our legal system. Briefly, retributivism is the view that justice requires that moral wrongdoers suffer in proportion to the grievousness of their wrongdoing. Although retributivism is deeply embedded in our system of law, Kelly argues that our system of justice fails to be a retributivist system, for a retributivist system is one in which punishment is meted out in proportion to desert. Desert, or moral blame, in Kelly's hands is the personal condemnation of wrongdoers for flouting moral rules. Retributivism is backward looking, and a backward-looking notion of desert puts more weight on situated moral competence than, for instance, forward-looking approaches to punishment.

Blameworthiness presupposes basic moral competence, but many ensnared in the criminal justice system arguably lack this. Kelly argues that the fair determination of moral competence is something a criminal justice system is not well suited to do. As she explains,

the law is inadequately sensitive to the capacities and circumstances of real people in our society to actually track desert, and as a result, judgments of criminal guilt and punishment are often misplaced, and even more often disproportional to considered judgments of desert. Kelly focuses on an array of cases in which, indeed, it seems that society's response to wrongdoing is not proportional to the moral blameworthiness of the agent of wrongdoing. For example, legal doctrines such as strict liability do not depend on the quality of will of individuals. Insofar as our understanding of blame depends upon assessments of character or quality of will, this appears to be an instance of where moral blame and criminal liability come apart. In addition, in many cases people are held criminally liable where more situated moral judgments might see them as incapable of acting better, or of acting under excusing conditions such as duress. Despite the law's provision for excusing defendants that do not understand the nature of morality, Kelly points out that the insanity defense is quite narrowly defined, and doesn't cover the range of criminal defendants that seem, to Kelly and many others, not to deserve punishment, or not to be as severely punished as they are. Indeed, she argues, our retributivist tendencies rig the system to effectively further subjugate those populations who ought to be seen as casualties of the larger system rather than as truly culpable wrongdoers.

The deviations from proportionality Erin catalogues might suggest that the system should be improved by perfecting our retributivism, but she argues differently. She denies that retributivism is a justifiable theoretical underpinning to criminal culpability. She points out that morality has goals other than retribution, and that blame is only one of a number of potential moral responses, and not mandated by morality, even if mandated by retributivism. Instead, she holds that we can retain legal culpability and justified punishment, yet do without moral blame.

Desert and Blame

In divorcing blame from the legal system, the *Limits of Blame* offers an extended discussion regarding ways in which legal culpability and moral blameworthiness come apart. Judgments of wrongdoing are act-focused while judgments of blame are person-focused. Moreover, she claims that since moral standards of right and wrong are action-guiding they should be clear, simple, and easy to follow. Moral standards for blame, in contrast, can be individualized and quite complicated. They require information about motivation, information she argues is irrelevant to the assessment of guilt. In light of this mismatch, Kelly's suggestion is for the law to focus on wrongdoing, rather than on blame. One might think that determination of guilt and sentencing, which are separate processes in criminal law, already separate wrongdoing and blameworthiness. One might also think that only sentencing involves moral desert, for sentencing is individualized, and sensitive to mitigating circumstances that reduce blameworthiness. Kelly denies the parallel between law and morality here, however, for although excuses diminish blame, she points out that many moral excuses are legally impotent.

Unlike some, Kelly does not take issue with the metaphysical notion of moral blame: she embraces the notion of blameworthiness. However, she thinks that our blaming practices in the criminal law are inadequately sensitive to the conditions that may be causal factors in

wrongdoing, and that they may or would constitute some measure of excuse. We should recognize that for some people it is much harder to do the right thing than for others. Many of the excuses Kelly considers are partial causes that do not amount to lack of ability to do otherwise. Instead, they are individually-focused considerations of hardship that may make right action more difficult. She maintains that taking these considerations into account is possible without objectifying the wrongdoer, and doing so may allow society to acknowledge the harms caused by wrongdoers without blaming them for them. Kelly goes on to argue that the moral analysis of blame does not mesh with our legal criteria. As a result, she thinks blaming should be relegated to the realm of the interpersonal.

Blameworthiness or desert is an interpersonal affair, and the state does not have the machinery to adequately weigh the factors that enter into individual blame, nor the standing to do so. Indeed, Kelly argues that when social conditions are unjust, the state lacks standing to enforce retributivist punishment. Her contention is that ridding our legal system of individually-focused blaming, and punishing only to reduce harm will restore legitimacy.

Punishment

We are to do away with blame, but Kelly does not advocate doing away with punishment. Kelly argues for a punishment-without-blame model of criminal justice, a nonretributivist model in which punishment is visited on wrongdoers in order to reduce harm and achieve remediation. She holds we can condemn an act by holding someone criminally liable, but withhold condemnation of the person, and thus withhold blame. Punishment will be allowed purely for nonretributive motives, such as deterrence or restitution. Just harm reduction primarily consists in or is motivated by deterrence: the threat of punitive measures should be able, in most cases, to enter into the calculations of minimally rational agents to deter them from engaging in socially harmful behavior. Just punishment is focused on the act, not the actor, and should be fair -- both in not being too harsh, and in treating wrongdoers equally for similar offenses. The system, since it doesn't explicitly blame wrongdoers in punishing them and treats them as rational agents, purportedly retains respect for them in a way our retributivist system does not.

The law, on this view, is a set of rational incentives aimed at deterrence. Of course, in order to properly deter, these threats must have teeth – punishment must be visited upon those who break the law. Then arises the problem of how much punishment does criminal behavior warrant? Kelly walks a fine line here: she cannot appeal to the wrongness of the crime or scale of the offense in order to answer this question, for she is arguing against a system of justice predicated upon desert. However, there are also problems in justifying punishment simply on its deterrent value, for that threatens to lead to scaling up and unfairness. One runs the risk of seesawing between these justificatory rationales: Retributivism protects one from visiting too harsh punishment by requiring it to be proportional to the crime, while deterrence, unless tempered by proportionality, runs the risk of setting too harsh sanctions in order to effectively deter those who most need deterrence. In Kelly's system the degree of punishment can only be justified insofar as the harms inflicted on the perpetrator are effective at offsetting harms visited on society. Kelly denies her account is utilitarian, but she seems forced to go there. In addition, the principle of fairness makes too much

individualization of punishment impossible. As even a deterrent legal framework must temper punishment in a fair way, the problem demands a kind of proportionality. Kelly herself talks about setting the bottom and top of a scale of punishment. How different would this be in practice from retributivism?

The bigger picture

It is in disadvantaged populations that Kelly most clearly sees mitigating or excusing conditions for criminal behavior, conditions which she maintains the law is ill-suited to recognize. In the final chapter, Kelly presents data that illustrates the unequal distribution of punishment in American society, arguing that the figures show that the system is unfairly dealing with underprivileged. On some views of retributive justice, like Murphy's Fair Play view, basic distributive justice is a precondition for retributivism, and in the absence of such justice the state loses its standing to punish. On other systems of retributive justice, culpable wrongdoers "deserve to suffer", regardless of the circumstances surrounding their wrong action. Kelly is not a friend of these theories, and she argues that even if retributivism can be saved, the expression of blaming is wrongful when put in the hands of the state.

But why is blaming not the purview of the state? Kelly seems to rely upon Strawson's insight that the relation of blaming must be between persons. In some places Kelly seems to see blaming as a second-person phenomenon, and not one that can justifiably be third-personal. Elsewhere the third-personal aspect seems conditioned on the assumption of a guarantee of basic equality that she argues is absent. Elsewhere still, the State itself is seen as second-person, but one who fails to recognize the wrongdoer as a person, taking the "objective stance," in Strawson's terminology. The arguments in this part of the book are somewhat unclear. Is it that failure to deliver minimal justice undermines moral authority? That basic distributive justice, which we lack, is a precondition for holding someone blameworthy? That basic trust in the system is a precondition for holding someone accountable to it? Or that unjust policy is itself a cause of the criminal wrongdoing? While I agree that social justice is important to a well-functioning society and criminal justice system, it was not clear to me which of the above arguments was at work here.

In closing I want to focus on a few overarching questions. I agree with Professor Kelly that our system is broken, punishment is meted out too harshly and unequally, and it often does not take into account the particular circumstances. However, it is not clear to me that the legal system itself structurally operates on principles of moral blame (though it does depend on them for legitimacy). To be sure, the rhetoric of officials and even lawyers does often appeal to blame, and often this is harmful, but the guts of the system do not seem to me to be clearly retributivist. Indeed, I suggest that the system of criminal law does not have a single underlying theory of punishment. There are elements of retributivism, of deterrence, of restitution and of restorative justice. It is not even clear to me that this points to a pernicious incoherence – the goal of the law is not univocal, and it is unlikely that any one theoretical viewpoint will serve all its goals. Thus the question arises: Does the law need to have a single underlying coherent theory of punishment? And if not, why can't retributivism play a role?

Kelly's thesis is aimed at retributivism full stop, but many of the arguments are only compelling levied against severe forms of retributivism, like Moore's. Throughout the book Kelly points at ways that retributivism could be rehabilitated, made more individualized and more sensitive to hardship. Indeed, her arguments for a more lenient morality would tend to bring closer the moral and desired legal answers. For example, she says, "Possibilities for empathy and understanding of criminal wrongdoers who have suffered difficult life circumstances help to show that retributive sentiments are not morally required in response to criminal wrongdoing, contrary to what some retributivists claim"(p160). But many retributivists can say that since blame is mitigated by these excuses, so are their retributivist sentiments. Kelly argues for a more demanding bar for holding someone morally responsible than that currently enshrined in law. She thinks there should be no moral blame without a reasonable capacity to have acted rightly, and she individuates capacities narrowly, building in much detail about the history and circumstances of the agent. The more narrowly the situation is defined, the less clear it is that someone had a capacity to avoid wrongdoing (see, e.g. p. 53). However, by raising the bar for moral blameworthiness, Kelly makes it easier for criminal liability to dovetail with blameworthiness, and thus easier for retributivism to appear just and workable. The kind of exemptions from blame Kelly supports don't seem to exceed those consistent with current law (justly executed). This leads to the question of whether, other than in its rhetorical packaging, this picture is much different from the system we have now.

Moreover, there is an ongoing tension in current law -- and in Kelly's suggested version of it -- between individualizing and feasibility. Desert is inherently individualistic. The law does try to take into account individualizing features of criminal wrongdoers, but perhaps less successfully than Kelly seems to think necessary. Relevant to judgments of blameworthiness are not only judgments about whether the elements of a crime are satisfied, but more nuanced judgments about individual capacities, quality of will, and social historical factors regarding hardship and opportunity that might be excusing or mitigating. However, the law cannot afford to be precisely tailored to individuals, both for feasibility and for fairness. Kelly recognizes this, and her solution is to allow the assessment of guilty acts to proceed much as it does, and punishment much as it must, but it strips away the moral assessment in the middle. On the one hand, I wonder how much the system would really change. On the other hand, I also wonder whether it would survive: Kelly herself recognizes that the law needs to track morality for its own legitimacy. And if desert is a central aspect of morality, and closely tied to justice (which I have argued elsewhere it is), it will be hard to really leave desert behind. Perhaps law is like a sandwich, the bread being criminal culpability and punishment, held together by a sticky layer of moral blame. What will hold the sandwich together if you take away the filling?