

## Ross on Desert and Punishment

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Abstract: W.D. Ross thinks it is good, other things equal, that people get what they deserve. But he denies that “the principle of punishing the vicious, for the sake of doing so, is that on which the state should proceed in its bestowal of punishments.” Ross offers two main arguments for this denial: what I call the “scope argument” and the “state’s purpose argument.” I argue that both fail. In doing so, I illuminate Ross’s distinctive views about desert and the state.

W.D. Ross thinks it is good, other things equal, that people get what they deserve. But he denies that “the principle of punishing the vicious, for the sake of doing so, is that on which the state should proceed in its bestowal of punishments” (58).<sup>1</sup> According to Ross, the penal system’s goal should be, rather, to protect people’s “important rights” (59). Desert still plays a role in his theory—not as a reason for punishment but as a constraint on it. Our “notion of justice” informs us that, “if a law is framed against a certain offence the punishment should be proportional to the offence” (62). The offender’s suffering “should be not much greater,” and “ideally . . . no greater,” than “that which he has inflicted on another” (62).<sup>2</sup>

The structure of Ross’s theory is familiar. Variants are endorsed by H.L.A. Hart and John Rawls.<sup>3</sup> It appeals to utilitarian considerations to justify the practice of punishment, and retributive considerations to answer (some) questions about its infliction on particular individuals.<sup>4</sup> Ross’s version of this model, however, has received relatively little attention. This paper’s goal is to examine one aspect of it.

Given his claims that it is intrinsically good that people get what they deserve, and that we have reason to bring about good states of affairs, it is surprising that Ross rejects the requital of desert as an aim of punishment. I will examine his two

justifications for this view and argue that they fail. Those who think that desert has intrinsic moral significance will not be convinced by his arguments that the penal system should not be designed, at least in part, to requite it. My purpose in this paper is not just to prove Ross wrong about punishment. It is to illuminate his distinctive but, I believe, unsatisfactory views about desert and the state.

A terminological note. In this paper, I will understand ‘retributivism’ as the view that desert is part of the justifying aim of punishment. The fact that offenders deserve punishment is, on this view, a reason—but perhaps not the only reason—to inflict it on them. Ross is not a retributivist according to this definition. The arguments of his that we will consider are arguments against retributivism.<sup>5</sup>

### **1. Ross’s two arguments**

Ross discusses punishment in two places: his 1929 article “The Ethics of Punishment” and his 1930 book *The Right and the Good*. He advances the same theory in both places, but in the later work his arguments for it are clearer and more refined. I will focus my attention there.

Ross says it is “clear” that “a state of affairs in which the good are happy and the bad unhappy is better than one in which the good are unhappy and the bad happy” (58). His proof is that:

If we compare two imaginary states of the universe, alike in the total amounts of virtue and vice and of pleasure and pain present in the two, but in one of which the virtuous were all happy and the vicious miserable, while in the other the virtuous were miserable and the vicious happy, very few people would hesitate to say that the first was a much better state of the universe than the second. (138)

Thus Ross recognizes justice—what he alternately calls “desert”—as an intrinsic good. He says further that “if a state of affairs is better than its alternatives there is a *prima facie* duty to produce it if we can” (58). But he rejects retributivism.

Ross puts forward two arguments against this view. The first appeals to the nature of desert, and can be called the “scope argument.” Ross says that when we reflect upon the nature of desert, we see that what is fundamentally good is a state of affairs “in

which the total pleasure enjoyed by each person in his life as a whole is proportional to his virtue similarly taken as a whole” (58). But the penal system is licensed only to administer punishment to individuals who perform one of the subset of wrong acts which are illegal. Such an “occasional and almost haphazard system of intervention,” Ross says, “does not hold out any good hope of promoting the perfect proportionment of happiness to virtue” (59). In fact, it may be counterproductive. Offenders “may well be persons who are more sinned against than sinning, and may be, quite apart from our intervention, already enjoying less happiness than a perfectly fair distribution would allow them” (59). Punishing these persons would make the world worse from the point of view of desert.

It might be objected that, although the state does not now do what is necessary to requite desert, it could. The penal system might be licensed to punish all vicious acts. Other social institutions might be created to reward virtuous ones. In response, Ross notes what this entails:

Any attempt to bring about such a state of affairs should take account of the whole character of the persons involved, as manifested in their life taken as a whole, and of the happiness enjoyed by them throughout their life taken as a whole, and it should similarly take account of the virtue taken as a whole, and of the happiness taken as a whole, of each of the other members of the community, and should seek to bring about the required adjustments. (58 – 59)

Ross says that this “is not in the least practicable” (59). The state cannot requite desert. So it should not try to in its penal system.

Ross is not suggesting that wrongdoing should not be punished. His claim is just that the promotion of desert cannot be cited as part of the *justifying aim* of the penal system. Because its scope is limited, and because we cannot set up the other social institutions necessary to requite desert, punishing an offender—even in proportion to the seriousness of her crime—is just as likely to make the world worse from the point of view of desert as it is to make it better.

Ross’s second argument against retributivism appeals to the nature of the state, and can be called the “state’s purpose argument.” Ross says the “proper work” of the

state is “the protection of the most important rights of individuals, those without which a reasonably secure and comfortable life is impossible” (59). History shows, however, that desert is not “important” in this sense: “[I]f life has gone on for centuries being lived with reasonable security and comfort though states have never achieved or even attempted . . . to effect this apportionment [of happiness to merit]” (59 – 60).<sup>6</sup> So requiring desert is not the state’s proper work.

Moreover, according to Ross, using the state’s penal system to protect rights is incompatible with using it to requite desert. How much (if any) punishment an offender deserves depends not only on the seriousness of her crime, but on her past receipt of good and bad treatment and her past performance of other virtuous and vicious acts. These factors vary drastically from case to case. So a penal system designed to requite desert cannot set punishments in advance. But a system in which punishments are “completely undetermined in advance,” Ross says, “would be quite ineffective as a protector of rights” (60). The idea seems to be that, if people do not know how much punishment they will receive for committing a certain offense, they will be more likely to commit it, which will increase the number of rights violations.<sup>7</sup>

## **2. The scope argument**

Let us examine Ross’s two arguments in more detail, beginning with the scope argument. It begins by assuming that desert is exclusively a *global*, as opposed to a *local*, concept. People’s deserts are determined by their behavior “taken as a whole” (59). The specific actions they perform contribute to, but never fully determine, their deserts. An example will illuminate this distinction.

Suppose, with Ross, that virtue and vice are the bases of desert. And suppose P performs a specific vicious act, e.g., mugging a stranger at gunpoint. A local view of desert would say that, in virtue of performing this act, P deserves a specific bad treatment, e.g., five years in prison. A global view of desert would count as relevant to P’s desert other virtuous and vicious actions she has performed, as well as her past receipt of happiness and misery. If, say, P’s childhood were extremely unpleasant, a global conception of desert might conclude that, despite mugging a stranger, P does not deserve five years in prison.

Once we accept that desert is global, Ross's conclusion follows easily. The state cannot reward all the virtuous acts and punish all the vicious acts people perform. Because of this, systematically inflicting punishment on those who perform certain types of vicious acts (viz., illegal ones) will not reliably promote global desert. The question is, then, whether we should accept that all desert is global.

Ross offers no argument for this view. And there is reason to think it is false. Suppose P is extremely virtuous and extremely unhappy. She is far less happy than she deserves to be. Now suppose P mugs someone at gunpoint. Provided her conduct is not excused (e.g., by insanity) or justified (e.g., by self-defense), it seems clear that P deserves punishment for her crime, and that it is good, other things equal, that she gets it. This suggests that desert—and the goodness of requiting it—is not entirely a function of the overall distribution of virtue and well-being in people's lives. People can be deserving of certain treatments or things solely in virtue of performing certain acts. When they are, it is good, other things equal, that they receive them. Only a local view of desert can account for these intuitions.

It might be objected that I am underestimating the impact of P's mugging on her overall desert-level. Perhaps it lowers it so far that, even according to a global view of desert, P deserves punishment. I doubt this. But a different example will better make my point. Compare two muggers Q and R. Suppose they are identically virtuous but Q is slightly less happy. A global view of desert says that, whatever punishment R deserves, Q deserves less. This seems wrong. Intuitively, Q deserves the same amount of punishment as R, despite her lower overall level of well-being.

A second reply tries to explain our intuitions about punishment by appealing to considerations other than desert, such as rehabilitation or deterrence. According to this view, the mugger who is "more sinned against than sinning" does not *deserve* to be punished. But, because punishing her will deter others (or because not punishing her will undermine our attempts to deter others), she ought to be. This response also falls flat. Deterrence may be a reason to punish this mugger. If so, it is an additional reason. It still seems appropriate to say that she *deserves* punishment for her crime, and that it is good, other things equal, that she gets it.<sup>8</sup>

A consideration of other cases reinforces this point. People's deserts of many things, including pay raises, promotions, prizes in contests, and personal appraisals (i.e., praise or blame) are local. For example, whether a person performs charity work on her days off, or more remotely, whether she had a rotten childhood, is irrelevant to whether she deserves a pay raise. How much pay she deserves depends only on facts about her job and her performance of it.

Some may remain skeptical. Isn't there a sense, they may say, in which the mugger who is "more sinned than sinning" does *not* deserve punishment for her crime? I believe there is. The conclusion we should draw from the above examples is not that *no* desert is global, but that there are different kinds of desert, some of which are global and some of which are local. Following Thomas Hurka, let us distinguish between *moral* desert, which holds that "on the basis of the virtue or vice in their lives as a whole people deserve happiness or suffering in their lives as a whole," and *retributive* desert, which holds that "those who perform specific criminal acts deserve specific punishments."<sup>9</sup> These kinds of desert may come into conflict. I have argued that the mugger who is "more sinned against than sinning" deserves punishment for her crime. That is, she *retributively* deserves it. But this is compatible with the fact that, because she has suffered too much in the past, she does not *morally* deserve it.

It might be wondered why Ross believes that all desert is global. This could be because he is unwilling to recognize the existence of non-moral desert. Or it could be the result of his views about what can be deserved. We think of specific treatments as being deserved for specific acts, and general treatments as being deserved for overall behavior. If one thinks, as Ross seems to, that happiness and misery *in general* are the only "things" that can be deserved, then one will think that all desert is global. But if one thinks that more specific things, such as pay raises, can be deserved, then one will think that desert is sometimes local. Our examples suggest that more specific things can be deserved, and hence that desert is sometimes local.

We are now in a position to say exactly how Ross's scope argument goes wrong. Ross wants to prove that, because its scope is too narrow, the penal system cannot requite desert. Given his characterization of desert, what he in effect argues is that the penal system cannot requite moral desert. Ross is right about this, but his target is a straw man.

The kind of desert the requital of which retributivists cite as part of the justifying aim of punishment is retributive desert. Unlike moral desert, retributive desert is local, and hence is easier to assess. Since it focuses on criminal acts only, the penal system is of exactly the right scope to assess it.

It might be objected that this does not address the real issue. The problem with designing the penal system to requite retributive desert, it might be said, is that in giving some people—viz., those who are “more sinned against than sinning”—what they retributively deserve, we will be failing to give them what they morally deserve. Indeed, we will be making their lives worse in terms of moral desert. And this is unacceptable. Retributive desert may be important. Moral desert, on this view, is more so.

This objection fails. It is unclear that moral desert is more important than retributive desert. Besides, however important moral desert is, it cannot be requited by the penal system. We must design it to achieve other goals. Requiring retributive desert can be one of those goals. Through the example of the extremely virtuous and extremely unhappy mugger, we have shown that retributive desert has value, and that its value is *independent* of the value of moral desert. It is intrinsically good that people get the punishment they retributively deserve, whether or not they morally deserve it. Now in giving people what they retributively deserve, we may be failing to give them what they morally deserve. But the same is true of other goals. The amount of punishment an offender morally deserves may be more or less than what is necessary to rehabilitate her. There is no more reason not to design the penal system to requite retributive desert than there is not to design it to rehabilitate offenders.

It might next be objected that my criticism is not substantive but linguistic. As we said, Ross believes that punishments should be proportionate to crimes, and he identifies “the notion of justice” as the source of this belief (62). So while Ross does not call it “retributive desert,” there is a sense in which this notion *does* play a role in his theory.

This is a confusion. I have not denied that retributive desert plays a role in Ross’s theory. The question is not whether it should play a role, but what kind of role it should play. This is a substantive dispute. Retributive desert functions in Ross’s theory as a constraint on punishment, not as a reason for it. In this section I tried to undermine one of his arguments against citing it as a reason to punish.

### 3. Another argument?

The scope argument turns on the claim that desert is exclusively global, and hence impossible to requite. To requite it, Ross says, the state “should take account of the whole character of the persons involved, as manifested in their life taken as a whole, and of the happiness enjoyed by them throughout their life taken as a whole” (58 – 59). He continues: “and it should similarly take account of the virtue taken as a whole, and of the happiness taken as a whole, of each of the other members of the community, and should seek to bring about the required adjustments” (59). Our discussion in the previous section focused on the first part of this claim. Let us now look more closely at the second.

It is unclear how Ross wants it to be understood. He may simply be stating what, given his conception of desert, the state must do to give all its citizens what they deserve. Or he may be enumerating a *constraint* on the adoption of desert as a distributive ideal. Let us call this the “perfection principle.” According to it, if the state cannot give everyone what they deserve, it should not adopt desert as a distributive ideal.<sup>10</sup>

The question of perfection does not arise if we think, as Ross does, that all desert is moral desert, which is global. Using all of its resources, the state would be hard-pressed to requite even a few people’s moral deserts, let alone everyone’s. So it is no surprise that Ross does not clarify this issue. But it becomes relevant if we are talking about the requital of local deserts. The perfection principle could be used to construct a new argument against retributivism—one that survives my rejection of the scope argument. Because retributive desert is local, the state can give most people the punishment they deserve using a reasonable amount of resources. But it is bound to make some mistakes. If we accept the perfection principle, we will conclude that, for this reason, requiting retributive desert should not be one of the penal system’s aims.

Of course, if Ross accepts the perfection principle, he applies it only to moral desert. But I see no reason why it could not be applied to other kinds of desert as well. We must ask, then, whether this principle is plausible.

On the most straightforward understanding of what is lost by imperfection, the answer is no. Suppose a few people do not get what they deserve. This is bad. But it

would be worse if more people did not get what they deserve. Intuitively, desert's value is incremental, not all-or-nothing. The same is true of many other values, such as happiness. There is no more reason to abandon desert as a distributive ideal because we cannot requite desert fully than there is to abandon happiness as a distributive ideal because we cannot make everyone blissfully happy.

There is, however, something else at stake. To see this, note that desert has both a noncomparative and a comparative aspect.<sup>11</sup> A person's noncomparative desert is determined exclusively by her desert-level. Suppose P deserves 10 years in prison. P gets what she noncomparatively deserves if she gets 10 years in prison. A person's comparative desert is determined by her desert-level, the desert-levels of others, and the treatments others receive. Suppose P deserves 10 years in prison and Q deserves 20 years in prison. And suppose Q gets 10 years in prison. P still gets what she noncomparatively deserves if she gets 10 years in prison. But because P deserves half as many years in prison as Q, P gets what she comparatively deserves if she gets five years in prison. While these aspects of desert are connected, they can come apart. If everyone gets what they noncomparatively deserve, then everyone gets what they comparatively deserve as well. But the reverse does not hold. If, in this example, P gets five years in prison and Q gets 10 years in prison, then P and Q get what they comparatively deserve but not what they noncomparatively deserve.

Refined in view of this distinction, the perfection principle says that, if the state cannot give everyone what they *noncomparatively* deserve, it should not adopt desert as a distributive ideal. The problem with this state of affairs may not be, as we assumed above, simply that some people will not get what they noncomparatively deserve. We now see that, when some people do not get what they noncomparatively deserve, *no one* gets what they *comparatively* deserve, i.e., what they deserve compared to everyone else. Every person has more or less than they deserve compared to some others. This, it might be said, is the real problem, and the justification for the perfection principle. On this understanding of what is at stake, the reason requiring retributive desert should not be one of the penal system's goals is not that the system cannot requite *everyone's* noncomparative retributive desert, but that, because it cannot, it cannot requite *anyone's* comparative retributive desert.

This suggestion may appear plausible at first. People care about how they fare compared to others. When treatment is linked to desert, people's sensitivity to inequality may increase. But ultimately it fails. It implies that the intrinsic goodness of giving people what they noncomparatively (retributively) deserve is voided or outweighed by the intrinsic badness of failing to give them what they deserve compared to everyone else. This is implausible. Intuitively, a world in which many have what they noncomparatively deserve is better, other things equal, than a world in which none do, even if in both worlds no one has what she deserves compared to everyone else. Adherents of this justification of the perfection principle must also think that, if we cannot give a person what she deserves compared to *everyone* else, then there is no value in giving her what she deserves compared to *anyone* else. This also seems false. The value of comparative desert, like that of noncomparative desert, is incremental. Although it may be difficult sometimes to tell when one world is better than another with respect to comparative desert,<sup>12</sup> a world in which many people have what they comparatively deserve is better than a world in which few do.

Our discussion in this section raises difficult questions about the value of noncomparative and comparative desert which cannot be explored fully here.<sup>13</sup> Our goal, however, has been achieved. We teased a new argument against retributivism out of the failure of Ross's scope argument. We then showed that, because the principle on which it is based is implausible, this new argument fails.

#### **4. The state's purpose argument**

Ross's second argument against retributivism derives from a view of the state according to which its sole aim is to protect important rights. It follows, he says, that the penal system should not aim to requite desert, and since requiring desert is incompatible with protecting rights, it will not inadvertently succeed.

It is easy to misunderstand this argument. Ross says the state's "proper work is that of protecting rights," and "therefore" what it "has to take account of . . . is not morally bad actions, but wrong acts" (60). This passage implies a sharp distinction between rights and desert: the state cannot be concerned with desert because it is concerned with rights, and these are unconnected. This view is familiar. Joel Feinberg

says ‘rights’ and ‘deserts’ come from “altogether different parts of our ethical vocabularies.”<sup>14</sup> But it is not Ross’s view.

Ross interprets the familiar claim that rights are correlative to duties to mean, in part, that if A has a duty to act in a certain way towards B, then B has a right to have A act in that way towards him (48). He says further that people have a *prima facie* duty to be just, i.e., to give people what they deserve. Now while, for Ross, a *prima facie* duty is not a duty, it is “related in a special way to duty” (20). It is “the characteristic . . . of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant” (19). If, in a situation, one *prima facie* duty is “more incumbent” on a person than any other, then that person is “bound to think that to do this *prima facie* duty is [her] duty *sans phrase* in the situation” (19). Hence our *prima facie* duty to give people what they deserve can give rise to an actual duty to do so, giving those to whom we are obligated a right to get what they deserve. This leads Ross to claim that it is “obvious that a man has a right to just treatment” (52). Thus his argument cannot be that the state should ignore offenders’ deserts *simply* because it is concerned only with their rights. Rather, he is committed to the view that vicious persons have a right to get the harsh treatment they deserve.<sup>15</sup>

A possibility open to Ross is to say that vicious persons have a right to get what they deserve but no duty to accept it. Vicious persons would surely waive their rights to harsh treatment. He does not go this route. Instead, he suggests that people’s rights to get what they deserve are not important. Although in some places he omits this qualifier, in others he characterizes the state as “the organization of the community for a particular purpose, that of the protection of the *most important* rights of individuals” (59, emphasis added). These “important” or “fundamental” rights, Ross says, are “the essential conditions of the living of a reasonably secure and comfortable life” (59). He gives as examples the rights to “life, . . . liberty, [and] property” (60). Getting what one deserves, he continues, is not important in this sense. People can live safe and comfortable lives without getting what they deserve.

There are three ways to challenge this argument. The first is to argue that getting what one deserves is an important right. A second is to deny that the sole purpose of the

state is to protect important rights. A third is to deny that protecting rights is incompatible with requiring desert.

The third way promises the least resistance. Ross's claim that a penal system designed to protect rights cannot require desert rests on two assumptions: (i) it is necessary to set punishments in advance in order effectively to protect rights, and (ii) a penal system designed to require desert cannot set punishments in advance. Both can be challenged. Above I surmised that the justification for (i) is that, in the absence of fixed penalties, potential offenders will tend to underestimate the amount of punishment they will receive for committing offenses, and hence will be more likely to commit them. The empirical evidence suggests otherwise. Even if punishments are set in advance, most potential offenders will not know them. Those who do are unlikely to change their behavior in view of them.<sup>16</sup> More importantly, in light of our distinction between moral and retributive desert, (ii) is false. Ross imagines designing the penal system to require *moral* desert. But, as I said, retributivists want it to require *retributive* desert. The latter, unlike the former, does not take into account an offender's history of virtuous and vicious actions and past receipt of happiness and misery. It looks little past the seriousness of the crime she has committed.<sup>17</sup> As a result, a penal system designed to require retributive desert can set punishments in advance.

We have scored a point against the state's purpose argument, but it would be unsatisfying to leave the matter here. An offender may deserve more or less punishment than is necessary to protect people's rights. What if in all cases the requital of retributive desert conflicts with the protection of rights? To allay this worry, the retributivist must address Ross's claims that the proper work of the state is to protect important rights, and that the requital of desert is not an important right.

A full discussion of these issues would take us far afield. Here I will focus on Ross's articulation and defense of these claims. I will argue that both are unsatisfactory. Ross fails to articulate a political theory that excludes desert as a distributive ideal, and he offers no defense of one that does.

We have seen that the "rights" part of Ross's claim that the purpose of the state is to protect people's "important rights" does little work. Ross ascribes to people a multitude of rights, including rights to just treatment and to beneficence. Much depends,

then, on the term ‘important’. But this is vague. Intuitively, a right to get what one deserves is more important than some rights and less important than others. It is less important than, say, the right to freedom of expression, but more important than, say, the right to buy alcohol on Sundays.

Ross says a right is important if it is necessary for the living of a “reasonably secure and comfortable life” (59). This is only somewhat helpful. We might agree that getting one what deserves is unnecessary for living a safe life, but how about a comfortable one? What makes a life reasonably comfortable anyway? The examples Ross gives of important rights—to life, liberty, and property—only confuse the issue. Each can be interpreted narrowly or broadly, giving a different connotation to ‘important’. A right to life may or may not include a right to assistance in times of need. A right to liberty may include more or less “rights” to individual liberties. A right to own property may or may not extend to all forms of it.

Because he fails to clarify these issues, Ross’s theory lacks a determinate content. In particular, it fails to exclude desert as a distributive ideal. If we go by his definition of ‘important’, we will conclude that desert is not an important right. Getting one what deserves is arguably unnecessary for security and comfort. But so is freedom of expression. Presumably Ross does not mean to classify this right as unimportant. If we go by his examples of important rights, however, we may conclude that desert is one of them. The right to just treatment is at least as important as the right to certain kinds of liberties (e.g., the liberty to buy alcohol on Sundays), or the right to own certain forms of property (e.g., a means of production).

I have been speaking univocally, as Ross does, of a right to just treatment, i.e., to get what one deserves. Recognizing, as I think we should, different kinds of desert complicates the issue, but does not undermine my point. Some kinds of desert will be more important than others, and not all will be more important than the liberties and forms of property mentioned above. But many will.

Although he does not succeed in doing so, Ross probably meant to articulate one of the sparer forms of libertarianism. Libertarians would be sympathetic to the idea that the state’s role should be limited to the protection of people’s important rights, interpreted in such a way that desert is not among them. We can then ask whether such a

view is plausible. Unfortunately, Ross himself offers little which can be construed as a defense of it. He says only that “we have come to look upon the state” this way, and that a more robust view of it is “outworn” and results from a misidentification of the state with “the whole organization of the community” (59).

Whether or not this intuition was widely held in Ross’s time, however, now it is widely disowned. Most recent political theories, such as John Rawls’s, endorse a more robust view of the state.<sup>18</sup> So do most of the developed world’s governments. A high school education, public funding for the arts, and national parks are unnecessary for security or comfort—“life has gone on for centuries” without them (59)—but most developed states provide them to their citizens.

Not only does Ross fail to defend the controversial political theory on which the state’s purpose argument depends, it is not clear that he himself can accept it. As we noted, Ross builds into his penal theory the constraint that punishments should be proportionate to, or at least no greater than, crimes. But he justifies this constraint by appealing to “the notion of justice” (62). Thus Ross ascribes to the state the goal of ensuring that punishments fit crimes on the basis of the *injustice* of the state of affairs in which they do not. In doing so, however, he contradicts either his claim that states should be concerned only with important rights, or his claim that justice is not an important right. Indeed, the way Ross justifies this constraint makes one think he *should be* a retributivist. It would seem that, if it is unjust, or intrinsically bad, to give offenders an amount of punishment they do not retributively deserve, then it is just, or intrinsically good, to give them an amount they do retributively deserve. If Ross accepts the former as a goal of the state, then it seems that he should accept the latter as well.<sup>19</sup>

We have not proved that desert should be accepted as a distributive ideal—in general or in the specific case of punishment. Nor have we established that libertarianism is false. What we have shown is that it is in need of justification, and that Ross fails to provide it. This is enough. Since the state’s purpose argument depends on this view of the state, it too is unjustified.

## **5. More room for desert**

Although I have been critical of Ross's arguments, my conclusions should be in one sense welcome to him. Ross thinks it is intrinsically good that people get what they deserve. I have shown how he can cite the requital of desert as an aim of punishment, despite the fact that some offenders are "more sinned against than sinning." This is not to suggest that Ross should cite the requital of desert as the *sole* aim of punishment. This view is problematic. But he could cite it as one of several goods, including the protection of rights, which the penal system should be designed to promote. A thoroughgoing libertarian, of course, would reject this suggestion. But, as his justification of proportionality in punishment suggests, Ross's libertarianism is not thoroughgoing.

Our attention has been limited to Ross's arguments against retributivism. But our inquiry has led us to important questions about desert and the state which we did not try to address fully. They are worth further consideration. So too are the aspects of Ross's penal theory which we have neglected, including his attempt to justify limiting punishment to the guilty by appealing only to rights. This theory is richer and more complex, I hope to have shown, than is generally appreciated.<sup>20</sup>

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<sup>1</sup> W.D. Ross, *The Right and the Good*, ed. Philip Stratton-Lake (Oxford: Clarendon Press, 2002). All references to this work are given parenthetically in the text.

<sup>2</sup> In "The Ethics of Punishment," *Journal of Philosophical Studies* 4 (1929): 205 – 211, Ross says the suffering inflicted on the offender should ideally be "exactly equal" to the injury she inflicts on her victim (p. 208).

<sup>3</sup> See H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968); and John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955): 3 – 32.

<sup>4</sup> Ross appeals not to desert but to rights to answer questions about who should be punished. He says that "the offender, by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected, so that the

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state has no *prima facie* duty to spare him, as it has a *prima facie* duty to spare the innocent. It is morally at liberty to injure him . . . exactly as consideration both of the good of the community and of his own good requires” (60 – 61). For a criticism of this view, see George Sher, *Desert* (Princeton: Princeton University Press, 1987).

<sup>5</sup> For a different criticism of this form of retributivism, see David Dolinko, “Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment,” *Law and Philosophy* 16 (1997): 507 – 528. For a discussion of this and other forms of it, see Anthony Ellis, “Recent Work on Punishment,” *Philosophical Quarterly* 45 (1995): 225 – 233. In “The Failure of Retributivism,” *Philosophical Studies* 82 (1996): 289 – 316, Russ Shafer-Landau entertains definitions of ‘retributivism’ according to which Ross *is* a retributivist. Nothing I say hangs on how this term is defined.

<sup>6</sup> Ross uses ‘desert’ and ‘merit’ interchangeably (138).

<sup>7</sup> Given Ross’s spare view of the state, it might be wondered who the “we” is in his claim that “if a state of affairs is better than its alternatives there is a *prima facie* duty to produce it if we can” (58). Ross assigns the *prima facie* duty to promote good states of affairs to individuals and associations within the state, such as “churches, trade unions, learned and artistic societies, [and] clubs” (59).

<sup>8</sup> It is still a long way from here to the conclusion that the penal system should be designed to requite desert. One question that must be addressed is whether the fact that it is good, other things equal, that P has T provides a reason (of any kind) for bringing it about that P has T. Another concerns the relevance and relative strength of this reason. These questions are beyond the scope of this paper.

<sup>9</sup> Thomas Hurka, “Desert: Individualistic and Holistic,” in *Desert and Justice*, ed. Serena Olsaretti (Oxford: Clarendon Press, 2003): 45 – 68, at p. 52. Still other kinds of desert may exist. Hurka also discusses “economic desert,” which is the desert “of income for a given time’s work” (p. 57). Questions might be raised about the necessary and sufficient conditions for these kinds of desert. It might be wondered, in particular, whether Ross is right that virtue and vice are the sole bases of desert. For opposing views on this question, see Eric Moore, “Desert, Virtue, and Justice,” *Social Theory and Practice* 26

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(2000): 417 – 442; and Sher, *Desert*. These debates are irrelevant here. I leave them aside.

<sup>10</sup> The fact that it is impossible for the state to give everyone what they deserve does not show, of course, that it is impossible for it to *seek* to give everyone what they deserve. My claim is that Ross might be suggesting that, if the state cannot give everyone what they deserve, it should not seek to.

<sup>11</sup> For an important discussion of this distinction, see Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970). See also Shelly Kagan, “Comparative Desert,” in *Desert and Justice*, ed. Serena Olsaretti (Oxford: Clarendon Press, 2003): 93 – 122; and his “Equality and Desert,” in *What Do We Deserve?: A Reader on Justice and Desert*, ed. Louis P. Pojman and Owen McLeod (New York: Oxford University Press, 1999): 298 – 314.

<sup>12</sup> Larry S. Temkin’s work in *Inequality* (New York: Oxford University Press, 1993) supports this claim. Temkin asks when one situation is better than another with respect to equality. But the situations he considers involve individuals who are all equally deserving. Asking whether one situation is better than another with respect to equality when all are equally deserving seems to me equivalent to asking whether one situation is better than another with respect to comparative desert.

<sup>13</sup> For a discussion of these issues, see Kagan, “Comparative Desert,” and “Equality and Desert.”

<sup>14</sup> Feinberg, *Doing and Deserving*, p. 86. See also David Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999). For a dissenting view see Jorge L.A. Garcia, “Two Concepts of Desert,” *Law and Philosophy* 5 (1986): 219 – 235.

<sup>15</sup> See also Herbert Morris, “Persons and Punishment,” *The Monist* 52 (1968): 475 – 501; and G.W.F. Hegel, *The Philosophy of Right*, trans. F.M. Knox (New York: Oxford University press, 1952).

<sup>16</sup> See Paul H. Robison and John M. Darley, “Does Criminal Law Deter? A Behavioural Science Investigation,” *Oxford Journal of Legal Studies* 24 (2004): 173 – 205.

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<sup>17</sup> Retributivists, as I have characterized them, can take into consideration factors other than desert. The length of an offender's sentence might be determined, on a retributivist view, partly by utilitarian considerations.

<sup>18</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

<sup>19</sup> This objection may apply to all theories, including Hart's and Rawls's, which appeal to desert to answer questions about the infliction of punishment on particular individuals, but do not appeal to it to answer questions about the justifying aim of the practice of punishment. For a related argument, see Douglas N. Husak, "Why Punish the Deserving?" *Noûs* 26 (1992): 447 – 464.

<sup>20</sup> Larry Temkin first encouraged me to take Ross's arguments about desert seriously. Thanks to him and to Doug Husak for helpful discussions of these issues. Thanks also to Max Rosenkrantz and an anonymous *Pacific Philosophical Quarterly* referee for valuable comments on an earlier draft of this paper.