

1993

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Recommended Citation

Hugo A. Bedau, *A Retributive Theory of the Pardoning Power?*, 27 U. Rich. L. Rev. 185 (1993).

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A RETRIBUTIVE THEORY OF THE PARDONING POWER?

*Hugo Adam Bedau**

[M]ercy is . . . an attribute of God himself. . . . in the course of justice, none of us shall see salvation. We do pray for mercy. . . . [M]itigate the justice of thy plea.¹

During the past two decades, the retributive theory of punishment has made remarkable strides in recapturing the affections of penologists. The story has been told elsewhere and need not be reviewed here.² For philosophers, if not for others interested in the theory and practice of punishment, a retributive approach holds a double attraction.

On one hand, basing punishment on retribution supposedly guarantees that punishment is based on *justice*, instead of on principles independent of justice or on nothing at all. What does “retribution” mean if not “deserved punishment?” And what does deserved punishment yield if not *justice*?³

On the other hand, basing punishment on retribution relieves proponents of given punishments from relying on any empirical consequences of the threat or infliction of the punishment, such as public safety and rehabilitation of punished offenders, to justify the punishment. Basing punishment on retribution also frees the sentencer from having to know anything about the empirical consequences of punishing a deserving offender in one manner rather than another. There are, to be sure, well-attested difficulties in the

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1. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1 (M. Mahood, ed., 1987).

2. See, e.g., MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* 3-6 (1992); Leon Radzinowicz & Roger Hood, *The American Volte-Face in Sentencing Thought and Practice*, in *CRIME, PROOF & PUNISHMENT* 127 (C.F.H. Tapper, ed., 1981); Martin R. Gardner, *The Renaissance of Retribution — An Examination of Doing Justice*, 1976 *Wis. L. Rev.* 781 (1976); Nagler, *Prisons: Vengeance Rides Again*, *JURIS DR.*, Nov. 1976, at 14.

3. See KATHLEEN D. MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST*, 92-93 (1989); GEORGE SHER, *DESERT* 49, 69, 77-78 (1987); JOHN HOSPERS, *HUMAN CONDUCT: AN INTRODUCTION TO THE PROBLEMS OF ETHICS* 361 (1972), cited in SHER, *supra* at 206.

retributive theory of punishment.⁴ However, the theory's advocates too infrequently acknowledge and even less frequently face and attempt to resolve these problems. These difficulties apart, it remains true that the retributive theory currently rules the penological roost and no successor is yet in sight.

There are, of course, many differences among retributivists. The best known concerns whether the penalty schedule ought to be designed to mirror the gravity of the wrong inflicted on the innocent, or whether (more modestly) it ought to be designed only to impose deprivations proportional in their severity to the gravity of the crime.⁵ Another difference, of more importance here and to which insufficient attention has been paid, concerns the locus and scope of retributive principles as they bear on the construction of penal policy.

Consider the familiar division of governmental powers among the executive, legislative, and judicial branches, and the relevance of these divisions to the development and implementation of penal policy. As punishment under law is inseparably wedded to sentencing, and as sentencing is a time-honored judicial office, the central core of retributivism might be called *judicial retributivism*. Under this view, only sentencing (carried out by the judiciary) is controlled by retributive considerations. Accordingly, it is the duty of sentencing judges to mete out punishments according to the desert and nothing but the desert of the convicted offender. Never mind for the present how the sentencer arrives at the knowledge of what this desert is.

At the extreme, the judiciary might establish a sentence as deserved in either of two ways. First, the legislature may give complete discretion to the judiciary to decide sentences entirely on a case by case basis. This means that each judge figures out as best he or she can what punishment the defendant awaiting sentencing deserves. The second method leaves no room for judicial discretion. Instead, the legislature draws up a rigid penalty schedule that determines in advance what penalty is appropriate for each crime.

4. HUGO A. BEDAU, *Retribution and the Theory of Punishment*, 75 *Jour. Phil.* 601 (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 230-37 (1968).

5. For a discussion of *lex talionis* and proportionality by retributivists, see DAVIS, *supra* note 2, at 42-68; IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 80-81 (1989). See also MARVIN HENBERG, *RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE* 59-76 (1990).

There is an infinite array of variations between these two sentencing extremes. If, however, a sentencing policy approaches the latter extreme, then judicial retributivism is reduced to "mechanical jurisprudence," or "slot machine justice," meting out rigidly prescribed punishments whose retributive merit depends entirely on *legislative retributivism*; that is, on the extent to which the penal schedule as drawn up by the legislature itself reflects purely retributive considerations. If, on the other hand, the sentencing policy approaches the other extreme, the legislature plays virtually no role in providing retributive guidelines for judicial retributivism.

Somewhere between these two extremes stands the view championed in the 1950s, and of considerable influence ever since, in which the legislature pursues broadly utilitarian goals in designing the penal policy yet leaves case-by-case sentencing entirely in the hands of judges who may be as retributive within those limits as they desire.⁶

Executive retributivism is not required by judicial or legislative retributivism. The relevant tasks of the executive are to enforce the criminal law and to use the clemency power to modify judicially imposed deserved punishment by means of reprieves, commutations, and pardons. Retributive considerations in arrest and prosecution can be ignored here. Given the infrequency of executive clemency, executive retributivism plays at best a relatively minor role. Judicial retributivism is essential in implementing a retributive penal policy. Both legislative and executive retributivism expand the scope of judicial retributivism and may be added or dropped as theory and policy preferences dictate.

There are two reasons for confining retributivism in punishment to the narrow scope of judicial retributivism. First, legislative retributivism — the construction of the penalty schedule — is necessarily arbitrary in fitting the graduated scale of crimes ranked by differences in gravity with the graduated scale of punishments ranked by differences in severity.⁷ Resolving this arbitrariness by taking into account non-desert oriented considerations such as

6. See HART, *supra* note 4, at 3, 8-13; Rawls, *Two Concepts of Rules*, 44 PHIL. REV. 281 (1955).

7. BEDAU, *supra* note 4, at 611-15 (criticizing ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION* (1976)). See generally JOHN BRAITHWAITE & PHILLIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 174-75 (1990); NICOLE LACEY, *STATE PUNISHMENT: POLITI-*

public safety is reasonable and perhaps inevitable, so long as there is reason to believe that the best way to prevent recidivism is to keep offenders in custody longer than what desert alone requires. Taking into account non-desert oriented considerations however, is fatal to the pretensions of any penalty schedule advanced as being retributive. The second reason that retributivism should be confined to judicial retributivism is that executive retributivism requires indifference to all moral principles other than those that define retributive desert, a self-denial most executives would find intolerable.⁸

Confining retributive principles to judicial acts and responsibilities relevant to punishment is likely to strike the true believer in retribution as wholly unsatisfactory. If some form of the retributive theory of punishment is necessary, why allow judicial retributivism to risk frustration by nonretributive considerations freely employed by the legislature and the executive? It is not surprising, therefore, to see Kathleen Dean Moore, who endorses a retributive theory of punishment, prefacing her study of the proper exercise of the pardon power by declaring: "My central theme is that acts of pardon need to be justified, and that their justification is to be found in the very principles of retributive justice which make it reasonable to punish in the first place."⁹ My task in the rest of these remarks is to assess whether executive retributivism — the exercise of executive powers regarding criminal justice solely by reference to retributive principles — is reasonable, or the best we can do.

Lest there be any misunderstanding, let me begin by declaring that I, too, believe "acts of pardon need to be justified." Indeed, it would be odd to find anyone who disagrees with this claim. It should go without saying, or at least without emphasis, that any exercise of, or refusal to exercise, the pardoning power requires justification, if only because acts of executive pardon are no different from other executive, judicial, or legislative acts. In each case those who take action are responsible, in one way or another, to their

CAL PRINCIPLES AND COMMUNITY VALUES 26 (1988); NIGEL WALKER, WHY PUNISH? 101-05 (1991).

8. Evidence is readily found for this conclusion in the research on executive clemency in capital cases. See, e.g., Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136 (1964); Michael L. Radelett & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289 (1993).

9. MOORE, *supra* note 3, at vii. *Contra* DAVIS, *supra* note 2, at 91-92 (explicitly rejecting executive retributivism).

superiors or to the electorate who authorize them to exercise such powers. A person who has the authority to alter the legal relation of another person (that is, to exercise a Hohfeldian "power")¹⁰ is subject in principle to challenge whenever that power is exercised, whether by act or omission. This assertion is true on any theory of responsible government compatible with liberal constitutional democracy.

One might think that clemency requires *special* justification because it involves the executive *overriding* the decision of the judiciary and thus flirts with ignoring the principle of the separation of powers — something not to be done lightly. By definition, however, any exercise of the clemency power lightens the burden placed on a convicted offender. Such relief requires less justification than many other official acts, since it employs a familiar principle attractive to liberal political theory, i.e., that absent any overriding reason to the contrary, the government should always employ the least restrictive means to achieve its presumably valid objectives.¹¹ These conflicting policies leave quite open what counts as the justification for an act of pardon and what distinguishes the good and bad grounds of justification.

The first thing to notice about a professing retributive theory of pardons built on a general theory of retribution in punishment is that the occasion for exercise of the retributive pardoning power arises *only from a failure* of retribution at the prior judicial sentencing level. There are two main reasons that retributivism might fail at the sentencing level. First, judges who do not believe in retributive sentencing are likely to mete out sentences that fail to give convicted offenders the punishment they retributively deserve. Second, judges who do believe in retributive sentencing may nonetheless for various reasons, mete out sentences nonetheless that fail to accord with what convicted offenders retributively deserve.

The second thing to notice is that executive retributivism is confined to downward revisions in the severity of punishments. The exercise of clemency always yields mitigation or alleviation in

10. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 7-8 (1919).

11. See, e.g., *NAACP v. Alabama*, 377 U.S. 288, 307 (1964), cited in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); see also Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 126 (Richard A. Wasserstrom ed., 1971); Ferdinand Schoeman, *On Incapacitating the Dangerous*, 16 *AM. PHIL. Q.* 27, 28 (1979).

sentences.¹² Upward revisions in punitive severity are not within the powers of the executive and are not part of the theory of executive retributivism. In short, executive retributivism is an *asymmetrical* power with respect to the severity of sentences.

Retributivists should object to this asymmetry.¹³ If they are confident that executives know what guilty offenders really deserve, such that the executive may *decrease punitive* severity in a given case, it follows that the executive also should have the power to *increase* the severity of sentences too leniently imposed by courts, in order to achieve the desired retributive results.

Failure by executive retributivism advocates to consider these problems, if not mere oversight, can be justified only by admitting that other considerations dominate demands for retribution in punishment. What might these other considerations be? Perhaps the following principle is one of these considerations: No offender deserves a more severe punishment than the courts mete out, but some offenders deserve a punishment less severe than the one they received. This is true but trivial. It merely restates in different language the very asymmetry in executive retributivism we are trying to explain. Another consideration might be that executive power to increase the severity of court-awarded sentences on the grounds of offender desert is more likely to be abused than executive power confined to reduction in the severity of sentences. This is not so much a principle as it is an empirical generalization. Is there any ground to believe it?

There is another, radical, explanation. Executive clemency is not necessarily tied to acts of sentence reduction designed to achieve deserved punishments. Rather, executive clemency is a power of *mercy*, and the sentence reductions that it provides are merciful acts. Necessarily, there is no mercy in increasing the severity of punishments. Nor is mercy constrained by retributive considerations. There is in fact no plausible theory of executive retributivism underlying the exercise of executive power to reduce sentences. Therefore, retributivists ought to oppose the exercise of executive clemency, except in those cases where they can justify the executive's act of mercy as what an ideally informed and motivated re-

12. MOORE, *supra* note 3, at 83 (defining "pardon" as "an act that alleviates or removes the punishment for a crime."); *cf. id.* at 193 (providing alternative yet similar definition of "pardon").

13. Moore does not mention this point. *Id.*

tributive judge would have sentenced the offender to in the first place.¹⁴

I recognize that the foregoing paragraph is bold assertion, not argument. In any case, a distinctly asymmetrical role for executive retributivism remains in the rectification of failures of judicial retributivism. Retributivists must provide some explanation and justification for such an asymmetry, if the doctrine of executive retributivism is to thrive.

Against this background, let us look more closely at the retributivist theory of pardon. Kathleen Dean Moore devotes the central section of her book to spelling out in considerable detail just what executive retributivism would look like. Her view of the retributive theory of pardon has, above all, the purpose of protecting judicial retributivism, and thus preventing what Moore regards as justice in sentencing from being undone by injustice in pardoning. She holds that pardons not only can be, but must be, acts of "justice."¹⁵ They must also be "deserved."¹⁶ Thus, pardons cannot be acts of "mercy"¹⁷ or "pity."¹⁸ The consequence, although she does not say this in so many words, is that an act of pardon is justified if, and only if, the person pardoned deserves to be pardoned. "[T]he pardoning power is abused when a pardon is granted for any reason other than that punishment is undeserved."¹⁹ She sums up her theory in these words ". . . [R]etributive justice specifies two roles for pardons in a system of punishment: first, pardons are necessary for people who face punishment even though they are not liable to punishment; and second, pardons are permissible for people who face punishment when they are liable to punishment without morally deserving it."²⁰

Moore finds four broad categories in which a person deserves to be pardoned. In the first category stand the cases of punishment undeserved on the grounds that the defendant is *innocent*.²¹ For example, if the person punished has not been convicted of a crime nor sentenced to any punishment, then the hardship inflicted on

14. Cf. DAVIS, *supra* note 2, at 90-92 (expressing a similar view despite Davis' professed judicial retributivism).

15. MOORE, *supra* note 3, at 129.

16. *Id.*

17. *Id.*

18. *Id.* at 167, 205.

19. *Id.* at 199.

20. *Id.* at 129.

21. *Id.* at 132-35. The three subcategories in the text are not found in Moore's discussion.

the person cannot be deserved. In such cases, a necessary condition of punishment ("liability," as she says or, as I prefer to say, eligibility for punishment)²² has not been satisfied. There are also cases where the person, although convicted and sentenced, is factually innocent. In such cases, liability to punishment has been established by the usual methods, but with erroneous results. Finally, within this category of innocent defendants, there are the cases where the person, though guilty, convicted, and sentenced, was convicted or sentenced unfairly by a violation of due process or of equal protection of the laws.

Notice the diversity of these grounds. The unconvicted do not conceptually, much less legally or morally, deserve to be punished, as they have not been found guilty of anything.²³ The wrongly convicted may well legally deserve the punishment they get, but only because of the false belief that they are in fact guilty. Those convicted by violations of due process may well deserve the punishment they got — or so the retributivist would argue — but not under the procedure or for the reasons that imposed it on them. No uniform role for, or even concept of, desert is revealed in these three kinds of cases of "undeserved" punishment.

Moore's second major category includes the cases of defendants who are not entirely, wholly, or at all at fault for the harm they have caused in violating the law. Insanity, mental retardation, youth (all of which Moore treats as akin to innocence),²⁴ as well as coerced and strict liability offenses and unsuccessful attempts,²⁵ provide a basis for showing that punishment in such cases is undeserved. The offender has an *excuse* that either partially or wholly undercuts the ascription of criminal responsibility for the act. Such an excuse entitles the convicted defendant to some degree of pardon. Depending on the character of the excuse, the deserved punishment ought to be either reduced via mitigation or altogether nullified because it is wholly undeserved. That the punishment

22. *Id.* at 133. In *Retribution and the Theory of Punishment*, I allude to a distinction between liability and eligibility for punishment, as follows: persons become *liable* to punishment once they are subject to a law that makes certain conduct a punishable offense. Persons become *eligible* for punishment if they are liable to punishment and are convicted of committing an offense. BEDAU, *supra* note 4, at 604-05.

23. Standard definitions of punishment, even by philosophers who disavow retribution as the rationale for the penalty schedule or as the general justification of the practice of punishment, reflect the retributivism expressed in the text. See, e.g., HART, *supra* note 4, at 5-6.

24. MOORE, *supra* note 3, at 138-41.

25. *Id.* at 144-46.

ought to be reduced in such cases I readily agree. That it ought to be reduced only because it was not "deserved" in the first place I cannot accept.

Third, there are the cases where the offender's act, despite being properly deemed in violation of the criminal law and therefore deserving punishment, is nonetheless morally *justified*. "[A] retributivist could justify pardoning a person who incites to riot in a country in which revolution is morally required."²⁶ After Prohibition ended, offenders were pardoned, and rightly so, because society "generally did not believe in the liquor laws and could see no justification for punishing people for doing what was not believed to be wrong."²⁷ Conscientious disobedience of the sort made famous by Thoreau, Tolstoi, Gandhi, and King is one sort of "moral act" in which "the 'offender' has not done anything wrong and so does not deserve to be punished."²⁸ Here I find Moore's position verging on the paradoxical. Justified law breaking does not show that no punishment is deserved; it shows only that the guilty offender *ought not* to be punished.

Finally, there is a heterogeneous set of considerations that require "adjustments" in the sentences judicially imposed.²⁹ Some guilty offenders may be deemed to have been "punished enough" by adverse circumstances, and so warrant a release from further punishment under law.³⁰ The imminence of death for a felon serving a well-deserved prison term may warrant his release.³¹ Conscientious opposition to a harsh penalty, as when a governor who opposes the death penalty confronts a prisoner sentenced to die, may warrant commuting a guilty prisoner to a lesser sentence.³² Moore concedes that all these cases may look, at least at first glance, as though they are "appeals to pity";³³ but she claims all "can . . . be understood as appeals to retributive justice."³⁴ I would add only that I believe a closer look will show that *none* of these cases in which reduction of sentence may well be justified are properly justified by reference to what the offender now, or really, "deserves."

26. *Id.* at 157.

27. *Id.* at 158.

28. *Id.* at 161.

29. *Id.* at 166-78.

30. *Id.* at 166.

31. *Id.* at 166-67.

32. *Id.* at 167.

33. *Id.*

34. *Id.*

As my objections show, I am unpersuaded by Moore's analysis. We cannot infer from the fact that a given offender does *not* "deserve" a given sentence, that the offender *does* "deserve" the mercy that a pardon brings. For it may be that the offender does not "deserve" anything at all — or that although the offender does, perhaps, deserve something, no one knows what it is.

In my criticisms of Moore's views about deserved pardon, I have relied at several points on a contrast between what is and is not *deserved* and what *ought* and ought not to be done. Let us take a closer look at this contrast, for I think it is essential to ridding ourselves of the grip that appeals to desert may have on our thinking. Assume some defendant (D_1) has been sentenced to a particular punishment (P_1) which is more severe than another punishment (P_2). We must distinguish between two different ways of formulating the desirability of clemency, i.e., of advocating a reduction in D_1 's sentence from P_1 to P_2 :

(1) D_1 's sentence ought to be reduced from P_1 to P_2 ,
and

(2) D_1 deserves P_2 , not P_1 .

We need to distinguish these two judgments for at least three reasons. First, whenever the executive retributivist is willing to assert (1), that D_1 's sentence ought to be reduced, he is ready to argue:

(3) (1), the sentence ought to be reduced because (2), D_1 deserves the less severe sentence.

But nonretributivists will, however, never assert (3), even though they certainly are as willing to assert (1) as is any retributivist. How do (1) and (2) really differ? Retributivists and nonretributivists agree that desert never rests on *future* events, but, rather on settled, typically, past events. Desert is thus often said to be essentially a *backward-looking* concept,³⁵ and the principles of desert express this orientation. But the reasons one "ought" to do something are not confined to the past. These reasons may refer to future events whose certainty is in doubt. This point is especially relevant where a clemency decision is based on beliefs in rehabilitation and little likelihood of recidivism. Indeed, as H.L.A. Hart has observed, the use of the word "ought" in the typical case

35. See, e.g., DAVIS, *supra* note 2, at 14; Joel Feinberg, *Justice and Personal Desert*, in NOMOS VI: JUSTICE 69, 72 (Pennock & Chapman eds., 1963); JOHN KLEINIG, PUNISHMENT AND DESERT 55, 61 (1973); MOORE, *supra* note 3, at 125; SHER, *supra* note 3, at 4, 174-79 (discussing "antecedentialism"); VON HIRSCH, *supra* note 7, at 46.

“merely reflects the presence of some standard of criticism”.³⁶ Where executive clemency is concerned, these “standards of criticism” are far broader than the backwardly oriented principles of desert.

Second, executive retributivists are committed to ignoring, or even rejecting, (1), except insofar as it appears in (3), where it is conditional on desert. That is, the retributivist cannot make any sense of, or grant any force to, assertions of what *ought* to be done by way of punishment except on the ground of personal *desert*. Put otherwise, proposition (3) is but the conclusion of the basic retributivist syllogism: *since convicted offenders ought to receive retributive justice, and retributive justice consists in meting out deserved punishments, offenders ought to get the punishments they deserve*. Actually, proposition (3) falls short of expressing the tight connection between desert and what ought to be done, as the retributivist sees it.³⁷ That connection is better expressed this way:

(3.1) (1), D_1 's sentence ought to be reduced from P_1 to P_2 , only because (2), D_1 deserves P_2 , not P_1 .

Third, we must not forget the views of the nonretributivists on (2). They will balk at asserting (2); some will deny that (2) makes any sense, others will grant that it makes sense but deny that it should govern sentencing. They will reject (3) and a *fortiori* (3.1), and so on.³⁸ Nonretributivists will also insist on asking this question: Why should anyone hold the view that the only reasons for extending clemency in any form are the backward-oriented reasons that purportedly establish what the convicted offender “deserves”? Why not allow clemency to be extended for *any* good reason, recognizing that there is no general criterion for what counts as a

36. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 613 (1958) reprinted in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 69 (1983). Philosophers have devoted much attention to characterizing the sense of “ought,” and while few anticipate or repeat Hart’s comment, none contradicts it. See BERNARD GERT, *MORALITY: A NEW JUSTIFICATION FOR THE MORAL RULES* 215-23 (1988); RICHARD M. HARE, *THE LANGUAGE OF MORALS* 151-97 (1952); JOHN L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 73-80 (1977); PATRICK H. NOWELL-SMITH, *ETHICS* 190-97 (1954); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 29-32 (1975); ROGER WERTHEIMER, *THE SIGNIFICANCE OF SENSE* 77-134 (1972).

37. See MOORE, *supra* note 3, at 93; see also DAVIS, *supra* note 2, at 128.

38. Just a word about the remaining possible way in which one might combine the ideas in propositions (1) and (2), viz. in proposition (4): (2) because (1). Retributivists and nonretributivists will agree in rejecting (4) as essentially senseless. No one can be sensibly said to *deserve* anything because he or she *ought* to get it.

“good reason” in this or any other context? Good reasons abound, but rigid criteria to define the concept do not.

I have deferred until now any direct criticism of executive retributivism. To do that, let us examine the executive retributivist's reasons for exercising clemency in a particular case. The reasoning goes like this:

(5) Defendant D_1 deserves punishment P_2 .

(6) D_1 was sentenced to P_1 .

(7) P_1 is more severe than P_2 .

(8) Executive authority to reduce sentences, the clemency power, ought to be exercised solely in order to assure that defendants get the punishments they deserve.

(9) Therefore, the executive ought to reduce D_1 's sentence from P_1 to P_2 .

Proposition (8) is a succinct statement of what we may call *the principle of executive retributivism* as it bears on the clemency power. The inference to proposition (9) amounts to interpreting this principle by means of the argument for propositions (3) and (3.1). Now the essential problem of executive retributivism lies in answering two questions: First, what, exactly, is the punishment, P_2 , that the defendant deserves? So far, all we know about P_2 is that (by hypothesis) it is less severe than P_1 . Second, how is the executive supposed to decide that the offender deserves P_2 rather than any of the other alternatives to P_1 , all of which share with P_2 the essential property of being less severe than P_1 ?

I believe the retributivist cannot answer either of these questions without being arbitrary or vague. I reach this conclusion for two independent reasons. First, it is an illusion to believe that one can tell across the full range of permissible sanctions precisely which of two alternative punishments is the more, and which is the less, severe. The illusion is encouraged by focusing on some obvious cases, e.g., that death is more severe than life in prison,³⁹ or ten years in prison is more severe than nine. But whether a \$10,000 fine is more, less, or equal in severity to one year in prison has no general and precise answer.

39. For a discussion of how one might objectively argue that the death penalty is more severe than life imprisonment, see Hugo A. Bedau, *Imprisonment vs. Death: Does Avoiding Schwarzschild's Paradox Lead to Sheleff's Dilemma?*, 54 ALB. L. REV. 481, 487-90 (1990).

Second, whether the question of appropriate punishment can be answered even when applied to individual offenders is also dubious. The illusion that it can be is fostered by apparently clear cases, e.g., we are inclined to agree that sentencing the wealthy Ivan Boesky to a fine of \$10,000 is *less severe for him* than a sentence of one year in prison. But even this judgment rests on assumptions that may be false, e.g., that the prison does not permit conjugal visits, etc. Nor can we rely on the hypothesis that if an offender declares a preference for a sentence, P_2 , to any alternative, P_1 , then P_2 must be less severe than P_1 . Some offenders' choice of punishment may be governed by perverse, guilt-ridden preferences. Punishments do not always turn out to have the qualities that lead a given offender to declare a preference in advance for one rather than the other.

Assume, contrary to fact, that the foregoing uncertainties can be solved in principle. Such a solution only paves the way to a second problem. The executive has no advantage over the judge in determining what punishment the offender deserves, except under certain assumptions: (a) the executive has access to more information, or information of a different kind, than does the sentencing judge, which enables the executive to determine what the offender really deserves; and (b) desert changes as circumstances change, so that although the courts sentenced the offender to the punishment that he indeed deserved *then*, what the offender deserves *now* is a less severe sentence.

Neither of these assumptions is generally plausible. Assumption (a) is implausible so long as the officials charged with preparing a presentencing report for the judge or the jury do their jobs. After all, the executive in deliberating the exercise of clemency will rely on exactly the same sort of information as the court relied on at an earlier stage. Assumption (b) is implausible for a more important reason. As we noticed earlier, desert is a backward-looking concept. Judgments of who deserves what are necessarily based on past events about the crime, the criminal, the victim, and society. None of these facts can change with the passage of time, so the offender's desert cannot change either. Of course, our *beliefs* about what the defender deserves can change over time, but that merely returns us to the argument over point (a). It adds nothing new to the solution of the problem. I conclude that executive retributivism is just another exercise in guesswork papered over with brave talk about deserved punishments.

The very heart of darkness in every form of retributivism is the construction of a penalty scale which measures what various offenders deserve for their offenses. There is no reason whatsoever to believe that legislatures or sentencing judges can construct this scale; or that although they cannot, executives in reviewing clemency applications can. What is the evidence that this problem is unsolved and why does it appear to be insoluble?

I have no a priori argument upon which I can base my adverse judgment on the claims of retributivism. However, one can point to the diversity and inadequacies of all existing forms of the penalty schedule proposed by retributivists. This has been done elsewhere regarding Andrew von Hirsch's popular contemporary retributive theory presented nearly twenty years ago.⁴⁰ He offered a conception of determinate sentencing based on retributive principles. The actual penalty schedule he proposed, however, is easily seen to be quite arbitrary. His principles were insufficient to enable him to match the severity of punishments with the gravity of crimes except in the loosest way.

First, he had no retributive basis for anchoring the minimum punishment at the foot of the penalty scale at any particular point. Second, he had no retributive basis for putting a ceiling on the maximum punishment provided at the top of the scale. Finally, he had no retributive basis for choosing the intervals between degrees of severity in the scale.⁴¹ For example, his retributive principles could not, without appeal to political considerations or moral convictions of a nonretributive nature, determine whether the crime of first-degree murder ought to be punished with a death penalty, life imprisonment, some other term of imprisonment, or in a different manner altogether.

In recent years, subsequent versions of retributivism have appeared on the scene that may have improved on the deficiencies of von Hirsch's retributive theory. Consider, by way of illustration, the views of Michael Davis,⁴² perhaps the most vigorous and confident contemporary retributivist. However, I submit that examina-

40. VON HIRSCH, *supra* note 7. For criticism see BEDAU, *supra* note 4; Hugo A. Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, 10 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 1, 12-14 (1984).

41. For a discussion of these problems see Edmund L. Pincoffs, *Are Questions of Desert Decidable?*, in *JUSTICE AND PUNISHMENT* 75 (William L. Blizek & J. B. Cederblom eds., 1977).

42. DAVIS, *supra* note 2.

tion of his views shows that he has not succeeded in moving beyond such abstract retributive principles or platitudes as these: *guilt is a necessary condition of punishment; convicted criminals deserve to be punished; and the more grave the crime, the more severe the deserved punishment.* I have no quarrel with these principles, assuming arguendo that punishment (both the practice and its infliction in a particular case) is justified.⁴³ But I do believe that Davis's attempt to construct a penalty scale on purportedly retributive principles fails for precisely the same reasons that von Hirsch's original retributive theory has been shown to fail.⁴⁴

First, he recommends eliminating from the penalty scale "all inhumane penalties."⁴⁵ I, too, would advocate such a prohibition.⁴⁶ The problem with Davis's argument, however, is that his prohibition does not rest on any *retributive* ground. In fact, he gives no retributive reason grounded in the defendant's desert to prohibit the most savage penalties. Second, he proposes to construct the retributive penalty scale by first listing in order of severity all punishments, then listing in a parallel fashion all crimes, and then "connect[ing] the greatest penalty with the greatest crime"⁴⁷ and so on until every crime is matched with a punishment. I am willing to grant that this can be done within certain broad limits; but it provides no solution to the objections raised against the penalty schedule constructed by von Hirsch and discussed above.⁴⁸ Since an infinite variety of valid penalty schedules can be constructed that satisfy these requirements, it is preposterous to argue that because we chose a particular schedule, the offender deserves the punishment *that* scale links to the offender's crime. Deserved punishments cannot be produced by any such arbitrary method as this.

I submit that every known retributive theory can be shown to suffer from the same problems that plagued von Hirsch in the 1970s and Davis in the 1990s.

43. See Hugo A. Bedau, *Punitive Violence and Its Alternatives*, in *Justice, Law and Violence* 193 (James B. Brady & Newton Garver eds., 1991).

44. See BEDAU, *supra* note 4.

45. DAVIS, note 2, at 78-79.

46. See Hugo A. Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 145 (Michael J. Meyer & William A. Parent eds., 1992).

47. DAVIS, *supra* note 2, at 78, 81-82.

48. See *supra* text accompanying notes 42-43.

Where does this leave us? What principles ought to guide the exercise of executive clemency? Here I merely sketch out the answer. First, we can safely rule out obviously corrupt principles: No one may be spared a judicially authorized punishment because the offender's friends succeed in bribing the executive, and no one seeking a pardon for an offender may fraudulently misrepresent to the executive the circumstances surrounding the crime, the offender's prior record, etc. Second, we should not embrace vague consequentialist principles, such as: Clemency in a particular case is justified only (or always) on the ground that it will cause greater net social welfare than leaving the offender's sentence unmodified. The purpose of ruling out such principles is not to make room only for desert-based principles. There is no reason a duly elected executive answerable to the public may not use *judgment* to invoke whatever reasons, in light of the best understanding of the relevant facts, make it appropriate to alleviate or terminate the offender's punishment. The underlying principle ought to be this: It is better to risk some social cost in order to extend mercy to an offender than to risk unnecessary punitive deprivations by withholding mercy. If desert-based clemency becomes the prevailing ideology, just the reverse is likely to happen.