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Responsibility problems for criminal justice

It is sometimes argued that science shows that there is no moral responsibility, and that the criminal justice system therefore cannot be justified by appeals to desert. If we assume that moral responsibility and desert ought to be evaluated from a practical rather than causal-theoretical perspective, such arguments lose their force. We solve one problem for the justification of the criminal justice system, but create another one; if moral responsibility depends on the offender’s choice, finding out to what extent she was responsible might be very difficult.

In order to deserve punishment, an offender must be morally responsible for her action. But can anyone really be morally responsible for anything? Some philosophers and scientists believe that this problem can be side-stepped by appealing to crime prevention as the sole justification for criminal justice. However, it is difficult to explain the importance we attach to punishing only the guilty, abstaining from disproportionately hard punishments and allowing certain excuses by an appeal to crime prevention alone; perhaps we could prevent more crime by sacrificing these restrictions. Many philosophers therefore argue that even if crime prevention ought to be the primary goal of criminal justice, this goal may only be pursued insofar as it does not conflict with the principle of not giving anyone a harder punishment than she deserves (von Hirsch 1992; Lippke 2014). Since no system is perfect, it is inevitable that this principle will sometimes be violated, but we ought to have a system that allows us to consistently strive to uphold it and generally coming pretty close. If we ought not to give anyone a harder punishment than she deserves, it follows that legal punishment, for its ethical justification, requires firstly that people can deserve to be punished at all, secondly that it is possible to find out when people deserve to be punished, and thirdly that it is possible to find out whether a punishment exceeds the deserved limit or not.

Some philosophers and scientists have argued that people can never deserve to be punished. They argue, roughly, along the following lines: Whether an offender was morally responsible for what she did depends on how her crime was caused. If it was caused by events beyond her control, she lacks moral responsibility for it. Therefore, she does not deserve to be punished if her crime was caused by someone slipping a drug into her drink, by a sudden onset of psychosis, or by someone making an irresistible threat to her. However, all crimes are ultimately caused by events beyond the offender’s control (e.g., non-conscious events in
her brain). Therefore, no one ever deserves to be punished (Strawson 2002; Pereboom 2001; Greene and Cohen 2004; Harris 2012). Obviously, this whole argument falls if we deny the initial premise according to which moral responsibility depends on how an action was caused. There is a tradition going back to Immanuel Kant that does deny this premise.

In his critiques, Kant famously distinguished between theoretical and practical reason; theoretical reason seeks to understand how the world works through causal explanations, whereas practical reason is concerned with what we ought to do and reasons for action. Causal explanations and reason explanations do not contradict each other; they merely regard actions from different perspectives. I chose to study philosophy once upon a time for the reasons that I thought I might have a knack for it, it seemed interesting, and it seemed at least somewhat more likely to lead to a job than going to an art school, the other option that I was interested in at the time. If scientists were to find out that my thoughts about reasons and subsequent choice was caused by non-conscious neurological events, this causal explanation would not contradict my claim that I chose for the afore-mentioned reasons. Kant-inspired philosophers have argued that moral responsibility ascriptions as well as other judgements ought to be made from a practical perspective; morality is, after all, concerned with reasons for action and what we ought to do rather than causal explanations. An agent is morally responsible for what she chose to do, regardless of causes (Bok 1998; Korsgaard 1996; Dworkin 2011 pp. 224 and 462; Jeppsson 2012. Morse 2013 seems to take a similar view). I call this thesis “Practical Perspective Compatibilism”, or PPC. PPC can also explain why people ought to be excused when psychotic, drugged or under threat: A psychotic, drugged or extremely terrified person might be unable to choose what to do. Alternatively, she might have chosen to do something else than she in fact ended up doing due to delusions, or she might, in the case of certain threats, have made a justifiable, non-culpable choice (e.g., she steals an object because someone threatens to kill her or her children unless she complies). It is evident that these excuses do not generalize to all offenders; clearly, many offenders choose to commit crimes. No advancements made in neurobiology or any other kind of empirical science will undermine this claim. PPC thus solves one problem for the justification of criminal justice, but it creates another one.

If we ought not to give an offender a harder punishment than she deserves, we must be able to find out whether our intended punishment does fall below this bar or not. Finding out whether an offender has some moral responsibility for what she did and thus can deserve some punishment may not be too difficult; situations where an offender ought to be completely
excused are often fairly extreme (the afore-mentioned psychosis, drug-in-the-drink and threat cases for example). Finding out how much punishment someone deserves may be more difficult. Even setting aside the acknowledged problem of matching up appropriate punishments with crimes (von Hirsh 1992; Duff 1986 p. 280), it might be very difficult to find out when an offender deserves less punishment due to having mitigated moral responsibility for the crime she committed.

I have argued that PPC allows for more or less responsibility, since choice is not an all-or-nothing affair (Jeppsson 2012 pp. 51-79). When an agent chooses what to do, she tries to pick the action that she has most or at least sufficient reason to do, according to her own views about reasons (ibid pp. 59-60; see also Wolf 1990 p. 31; implicit in Kapitan 1986 and Pereboom 2008). This assumption is not supposed to be controversial, since “her own views about reasons” may encompass a wide range of views. In many situations we do not need to consider different alternatives in order to do what we have at least sufficient reason to do; we can immediately pick an option that is at least good enough. This is no threat to moral responsibility. However, responsibility is mitigated when an agent fails to fully choose by failing to consider options that are superior according to her own views about reasons (see also Coates and Swenson 2013 for a similar theory).

PPC thus explains how people can have mitigated moral responsibility for what they do. I furthermore believe that the explanations PPC provides are more plausible than anything a causal moral responsibility theory can provide. Many people believe, for instance, that an offender might have mitigated moral responsibility for her crimes if she has grown up in severely impoverished circumstances (e.g., Hudson 1995 and 1999). It might be argued that this is because her crimes were partially caused by factors beyond her control. However, my own choice to study philosophy was at least partially caused by factors beyond my control, and yet I am presumably fully responsible for it. According to PPC, an agent from an impoverished background has mitigated moral responsibility if she did not turn to a life of crime because she had sufficient reason to become a criminal according to her own views about reasons, but rather, say, because studying and getting a job never seemed like a real alternative to her. We might of course imagine an agent from an impoverished background who did think things through and chose a criminal career because she really considered this the best thing to do. That agent would be fully morally responsible according to PPC. Since different people react differently in the same circumstances, PPC implies that we cannot just conclude from an agent’s situation and background that she is or is not fully responsible for
what she did. I think this implication of PPC is intuitively plausible. However, it does create a practical problem for the criminal justice system.

How are we to ensure that no one is given a harder punishment than she deserves, if one offender can be fully responsible for what she did and another one not despite them committing their crimes in similar circumstances and with the same background? This problem is not necessarily an unsolvable one. We might opt for general leniency in order to be on the safe side (Duus-Otterström 2013), or bite the bullet and argue that the necessity of simple and applicable legal rules can outweigh the principle of not punishing anyone harder than she deserves. Perhaps it is even possible, by taking into account extensive facts about the offender’s personality as well as her circumstances, to find out enough about what her choice looked like to judge her level of moral responsibility and desert fairly accurately, and thus adhere to the principle of not punishing anyone harder than she deserves. Still, it ought to be acknowledged that although PPC saves us from the threats of neurobiology against moral responsibility, the same thesis suggests that finding out to what extent someone was morally responsible for what she did, and thus how much punishment she really deserves, might be very difficult.

Conclusion
If moral responsibility depends on the agent’s choice rather than on her action being caused in the right way, neurobiology or any other empirical science can no longer threaten the existence of moral responsibility. However, if an agent’s level of moral responsibility ultimately depends on how she chose to do what she did, finding out how responsible she was for the action might be difficult. If we ought not to punish anyone harder than she deserves, this is a problem that must be addressed.

References