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Retributivism and Totality – Can Bulk Discounts for Multiple Offending Fit the Crime?

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The charging and sentencing of multiple offenders is an important point at which discretion enters the criminal justice system. Discretion need not be a bad thing in a legal system; but there should be principles by which its exercise is guided, and to which it is accountable, and these principles should have a transparent public justification. At present the principle that seems to operate widely with respect to multiple offenders is what has been called the 'bulk discount' (Jareborg 1998). In this paper, I identify two ways in which multiple offenders seem to pose a problem for broadly retributive principles of sentencing. I will argue that these problems are only apparent; looking at the proper place and exercise of discretion will help us to see why.

In Section 1, I introduce the issue of multiple offending, pointing to the discretion it apparently gives sentencers, and the 'bulk discount' principle that appears to guide decisions. In Section 2, I point out two ways in which bulk discounts may appear to conflict with retributive sentencing theory, which I call the Fittingness Problem and the Selection Problem. In Section 3, I introduce what I take to be the key guiding thought within retributive approaches to criminal justice, and I distinguish between two types of retributivism, Moralistic and Legalistic. In Section 4 I argue that Moralistic Retributivism should, if certain conditions are met, be happy to allow discretion at sentencing in order to allow the criminal justice system better to comply with the relevant moral ends. This addresses the Selection Problem, and leaves the question whether retributive sentencing goals are compatible with bulk discounts. In Section 5 I argue that the view that they

are incompatible rests on a key assumption ('perspective-invariantism about desert'); however, I argue against this assumption. This addresses the Fittingness Problem, and concludes my case for arguing that retributivism is compatible with common sentencing practice regarding multiple offenders. Section 6 draws the argument together.

Before I begin, let me say something briefly about the philosophical methodology adopted in this paper. Broadly speaking my aim is a 'rational reconstruction' of the practice of sentencing multiple offenders. I will take it that the persistence of the 'bulk discount' as a part of common sentencing practice shows that practitioners find it intuitively compelling. (I also believe that a similar 'discount' principle operates when we think about blame and blameworthiness in interpersonal relations: for some argument on this point, see Bennett 2010; though this claim is disputed by Hoskins this volume.) Men and women making difficult and weighty sentencing decisions, and whom we have no special reason to judge lacking in competence or commitment, are unwilling to sacrifice the bulk discount principle. Furthermore, this unwillingness persists in the face of the lack of an articulated and satisfactory justification for the principle; even in the face of apparently good reasons to abandon the principle, as we will see below. This shows a high degree of commitment to the principle, or abhorrence of its alternatives. The persistence of the bulk discount principle does not in itself show it to be well-grounded, of course. Other possible explanations for its persistence might be better: that practitioners are in the grip of a false ideology; or that they are not good at reckoning with cases involving many victims (Ryberg this volume); or that bureaucratic inertia prevents sensible changes. The question, in the end, is what is the best explanation of the fact that sentencers act as they do: whether it is practitioners' grasp of some normative consideration favouring bulk discounts; or rather a disabling factor that interferes with their taking a clear view of the normative situation. My view is that taking seriously the practical wisdom of practitioners requires us to reach for 'disabling factor' explanations only as a last resort. I take it that sentencing is not a matter of simple rule-following, but is in some ways a craft in which practitioners bring moral intelligence, imagination and insight to bear on individual cases. Our initial

job as theorists, then, is to attempt to articulate those considerations that practitioners, when asked to commit themselves at the moment of decision, take to be compelling – considerations about which they themselves may be inarticulate. Of course, it is a further question whether those articulations constitute satisfying justifications. But respect for practitioners as skilled and thoughtful decision-makers should make us reluctant to disregard strongly-held elements of practice, or to do so only once the search for sympathetic justifications of that practice has been exhausted.

1. Multiple offenders and discretion

We can distinguish two types of multiple offender. First of all, there are those who commit a number of distinct – or at any rate distinguishable – offences in a single episode of criminal activity. Secondly, there is the multiple offender who commits a number of offences across a string of episodes of criminal activity. If we can usefully divide multiple offenders into these two broad categories, we can also identify two points in the criminal justice process at which the multiplicity of their offences becomes an issue. First of all, there is the question of how many offences police and prosecutors should decide to charge the offender with – and on what basis, if the answer is not all, they should select offences. Andrew Ashworth sets out four options that are open to prosecutors when dealing with multiple offenders: charging all offences; charging specimen offences; using a general charge; or taking offences 'into consideration' (Ashworth, 2010: 261-3). It seems from this as though the prosecution does have the option of taking what Ashworth calls the 'straightforward route' of charging 'all the offences of which the prosecution have sufficient evidence,' although it is not required to. But in practice this seems unlikely to happen in many cases. Prosecutors have legal discretion, and they exercise it by taking one of the other options. Secondly, there is the question of how the multiplicity of offences should be dealt with at sentencing.

Again we could say that the 'straightforward route' is to sentence for each criminalisable offence, to give a sentence for that offence which is within the normal range for the offence, and to set the sentences consecutively, so that the

offender would only start serving one sentence upon the completion of the last. Again, however, we can say that it seems unlikely that the offender will be sentenced according to this straightforward route. Certainly sentencers do not seem to be obliged to take this route. The law appears to be that sentencers are restricted to sentencing only for those offences that have been charged, even where the offender has admitted to committing other, possibly serious, offences (following Lord Bingham in *Canavan and Kidd* (1998)).[1] However, even if sentencers' discretion is limited in that they cannot sentence for more offences than are on the charge sheet, it seems as though they can decide not to pass sentence for each offence that *is* on the charge sheet. Furthermore, for all the sentences that are passed, they have the option to set the same activity as the sentence for a number of offences – for instance, serving a term in prison – and allowing the sentences to run concurrently, thus allowing the offender to discharge a number of sentences without doing anything more than he would have had he been serving one sentence. Finally, if the decision is made to set the sentences to be served consecutively, sentencers will tend to abide by what Thomas has called the 'totality principle' (Thomas, 1979: 56-7). This principle says that the sentence should reflect the totality of the criminal activity, and should not allow the sentence for a string of minor offences to mount up to something that is more like the sentence for a really serious crime. All of which means that sentencers are highly unlikely to take the straightforward route, and that the amount of time served by an offender who is sentenced for multiple offences after a string of episodes of criminal activity is much less than that which would be served by someone who was apprehended after each bout of such activity and sentenced separately on each occasion (Reitz, 2010).

2. Multiple offenders and retributive sentencing theory

There are two ways in which the 'bulk discount' principle might appear arbitrary, at least from the point of view of retributive sentencing theory. The first is that it seems to go against the principle that the punishment should fit the crime, since it is not the case, under the bulk discount, that each offence is punished separately and given the sentence that, considered in isolation as that particular offence, would be appropriate to it. Not all offences are put on the

charge sheet; some offences are not sentenced for even if they are on the charge sheet; sentences are effectively 'collapsed' and served concurrently. Retributive principles might seem to favour the straightforward approach; it seems that insofar as the straightforward approach is universally abandoned in sentencing practice, sentencers must be responding to principles other than retributive principles. This is therefore grist to the mill of anti-retributivists, who claim that retributivism put into practice leads to unacceptable results; and that its principles cannot explain the decisions of experienced sentencers (Reitz 2010). I will call this the Fittingness Problem: common practice in the punishment of multiple offenders seems to abandon the principle that punishment should fit the crime.

The second problem arises even if we accept that there might be a justification in retributive sentencing principles for giving a bulk discount for multiple offences; it concerns rather the principle by which it is decided which offences should be put on the charge sheet in the first place. The case of multiple offending demonstrates that it is often the case that not all offences are put on the charge sheet – rather some selection is made. Retributivism, it might be thought, claims that criminal justice systems should respond to the need to do justice to instances of wrongdoing by treating them *as* wrongdoing, to vindicate victims, and to pass punishments appropriate for such wrongdoing. This would appear to favour taking each instance of criminal action seriously and reflecting the moral nature of that criminality in sentencing. It is unlike a deterrent theory where playing fast and loose with individual offences might be quite appropriate as long as it gets results: it seems that retributivism on principle favours a kind of rigorism, since its justification for punishment looks to do justice to past offences rather than bring about some future good. So retributivism again seems to stand against the common sentencing practice of selecting amongst offences at charging and sentencing. I will call this the Selection Problem: common practice in the sentencing of multiple offenders appears to abandon the retributive principle of taking each instance of wrongdoing seriously.

My approach in this paper is to suggest that the conception of retributive principles outlined here, and which is claimed to be incompatible with common sentencing practice for multiple offenders, is overly simple, and that a more sophisticated version of retributivism can avoid these concerns. In this next section I will start by outlining some assumptions about retributive sentencing theory on which the 'bulk discount' principle would be problematic: specifically on a conception I will call Legalistic Retributivism. This will include a certain understanding of 'fitting the crime'. However, I will argue that this understanding of retributivism is not the most common, or likely to be the most adequate; in its place I will suggest some form of what I will call Moralistic Retributivism.

3. Retributivism: Legalistic and Moralistic

First of all, let me say something about what I take retributive sentencing theory to be. I intend this to be a broad category encompassing all those views that take a non-instrumental view of the purposes of sentencing, and therefore take some kind of response to wrongful or criminal activity as deserved or inherently fitting. One thing to make clear at the outset, therefore, is that retributivism is not simply to be understood as the view that wrongdoers, or criminal offenders, deserve to *suffer* in proportion to the seriousness of their transgression. The fundamental point that distinguishes retributivism from instrumental justifications of punishment such as deterrence or preventive detention is rather this: that retributivists hold that *some* response of a *specific character* is called for intrinsically because of the wrongful character of the criminal action (Bennett 2015). Retributivists hold, in other words, that some specific response is morally necessary, independently of the contingent fact that making such a response is likely to lead to some independently desirable end, but rather because the offender's action *merits* such a response (or he *deserves* that response).

Why is such a response necessary? I think that what is characteristic of retributivism is that it involves the claim that something must be done in the wake of wrongdoing to *dissociate* oneself from the wrongdoing – and that in the absence of such dissociating response, one will be in the position of acquiescing

in, becoming complicit in, or condoning the wrong. This is the essential claim behind retributivism, which explains the position that some response is morally necessary independently of other extraneous effects (beneficial or detrimental) that that response may have. Retributivists think that the transgression alters the way it is morally acceptable to treat or relate to the wrongdoer; if our behaviour towards the transgressor does not change to reflect the transgression then it will be as though nothing morally impermissible had happened, as if no basic limit was violated. This is the claim that those who take a purely instrumental view of responses to crime have to reject.

However, if one accepts retributivism thus far, it is a further question what that specific response needs to be – and those I am calling retributivists disagree widely on *this* question. Retributivists believe that what I am calling the 'specific' response to the transgression needs to be the right one, because only if it is the right type of action can it successfully dissociate those who make it from the transgression; therefore retributivists need to claim that the nature of the appropriate response is non-arbitrary. But there is substantive moral disagreement over what the form of the response needs to be in order to bring this about. The caricature of retributivism is that what is required is to make the wrongdoer suffer. My own view is rather that what is necessary is a partial and temporary *withdrawal of recognition* such as we find in the canonical expression of interpersonal blame (Bennett, 2013). The essential thing is that the response should mark and do justice to the wrongdoing as a wrongdoing.

We can make a further distinction among varieties of retributivism between Legalistic Retributivism and Moralistic Retributivism. Is punishment a response to law-breaking, and specifically the wrong of law-breaking, in which case it should be proportionate to the legal categorization of the crime, and the desert that arises from breaking that law? That would be the position I have called Legalistic Retributivism. One version of this view might derive the importance of retributivism from the specifically political need to vindicate the authority of the law itself. If punishment is not a consequence of law-breaking, this Legal Retributivism might hold, the law is not really valid. Given that the law needs to

claim authority, and its authority hence needs to be vindicated in the face of defiance, this explains why punishment is morally important independently of its results.

By contrast, according to Moralistic Retributivism, legal punishment should be seen as at best an attempt to approximate a pre-legal moral desert arising from wrongdoing. My intention here is not to debate the merits of these two approaches to retributivism, but simply to note that influential retributivists like Moore and Duff (as well as the present author) defend the Moralistic version (Moore, 1992; Duff, 2001; Bennett, 2008). It is enough to note this because it will be enough to show that there is some sensible 'live' version of retributivism that holds that a) the point of the criminal justice system is to treat people as they deserve to be treated, whether that is in terms of some quantum of suffering, or in terms of deserved condemnation, and b) the legal framework for classifying criminal offences and providing procedures for settling on a sentence should be seen as at best approximations of that pre-legal desert.

If we adopt Moralistic Retributivism, this does not yet show that we should allow sentencers a breadth of discretion to decide on cases of multiple offending which might lead to results that appear paradoxical in the context of the existing legal framework for classifying crimes (as the treatment of multiple offending might appear). There might be further reasons to restrict such discretion – we will see below that there are. But it opens up space at least for a position that holds that, when it comes to sentencing, sentencers should aim to decide on the merits of the case, and in particular to ask what the appropriate pre-legal desert of the offender is, and that they should not be decisively constrained by the prior legal classification of the criminal activity. Moralistic Retributivism holds that, at least in principle, discretion at sentencing is necessary to allow for the aims of the criminal justice system (in adjusting the way the state punishes to pre-legal desert) are realized.

The desirability or not of Moralistic Retributivism raises some questions about the proper role of discretion. The question I would like to turn to at this point is

therefore what attitude we should adopt to the fact that legal officials have the discretion that they do when charging and sentencing multiple offenders.

4. Attitudes to discretion

We should note before we proceed that the existence of discretion in a legal system does not mean that an agent is legally free to decide in any way they want with impunity. Often a legal role is structured on the assumption (sometimes tacit) that, although the agent's decision will be binding, the agent has a responsibility to make a decision through conscientiously paying attention to a range of relevant considerations, and only those. So for instance – to give a non-legal example – I may have discretion in marking my students' essays to give them the mark I see fit to give. Yet my possession of this discretion does not mean that it would be permissible for me to assign the marks randomly. Although I have discretion, I have a binding professional responsibility to exercise my discretion by paying attention to the quality of the essays. In part, this limited discretion is reflected in rights of appeal. Yet it seems clear that the enforcement of the proper exercise of discretion can only be partial. Appeals are time-consuming and costly; they are often resolved by appeal to the discretion of another marker; and the justifications that have to be given for decisions are rarely such as to explain decisively why that particular mark was appropriate. By and large, the university and its students rely on the assumption that its teaching staff are dedicated and of good will, and can therefore be trusted to exercise their discretion wisely. So exercising discretion wisely can be part of the responsibility of one's professional role, even if that responsibility is only partially enforceable.

The existence of discretion raises two sorts of questions. First of all, a *substantive* question: how should that discretion ideally be exercised? This is to ask the question: given that it falls to this agent to make a decision, what is the right decision for her to make? But another question is *procedural*: by what right does this agent get to have the discretion to make this decision as she sees fit? This is to ask the question: what procedures should we have for making decisions about multiple offenders? The procedural question asks how we should decide on the process by which the decision will be made (or at least guided): how to decide to

decide (Sunstein and Ullman-Margalit 1999). We look in more detail at the dimensions on which discretion may be assessed below.

We can categorise attitudes to discretion in something like the following way. First of all, one might argue that discretion is morally necessary because it allows leeway within an otherwise rigid system of rules for equity and doing justice to the demands of the individual case (Meyer, 2014). In other words, discretion is necessary, this approach says, to avoid absurdities that mechanically applying the rules would inevitably lead us into. But the reason behind the need for discretion then gives us an explanation of how discretion should be used: to allow officials scope within the legal framework to make a decision on the moral merits of the case rather than being constrained by what prior legislative or adjudicatory decisions have provided for. What the moral merits of the case consist in might be given two different interpretations: on the one hand, it might be taken to encompass all morally relevant considerations (such as, in the case of sentencing, the welfare of the offender, the welfare of his dependents, the likely effect on the economy of the local area, etc); or on the other one might understand the merits of the case to consist in the right way for the institution of which one is part to deal with this case, given what one takes to be the best interpretation of the defining values of that institution (in our case, the basic purposes of sentencing, which, according to a Moralistic Retributivist, would confine the range of reasons to be taken into account to those of pre-legal desert). Given the impossibility of having the right rule for any eventuality, discretion allows for the exercise of a kind of practical moral reasonableness on the part of officials. For the sake of having a label, and in order to connect it to our previous discussion of Legalistic and Moralistic Retributivism, we can call this attitude Morality: the idea that legal structures have to leave room for the exercise of conscience by officials in order to avoid rigorism leading to morally wrong decisions.

Secondly, however, one might take against giving such discretion to officials on the grounds that it opens the way to abuse and inconsistency. Therefore one might have the attitude that, on the basis of rule of law values such as certainty,

predictability, stability, the limiting of the unaccountable power of public officials, and fairness and consistency across cases, exercises of discretion should be limited as far as possible, and a rule-governed framework introduced to ensure that the decisions are made in a consistent and publicly accountable way. The implication of this view is that officials should be constrained in their decision-making by a tightly focused body of rules, and will therefore be constrained to decide cases in ways that do not always reflect their best understanding of the moral merits of the case. This is the view that we will call Legality: the idea that discretion should be minimised as far as possible for the sake of accountability, consistency and predictability and replaced with binding rules.

These two options cover the distinction drawn between Moralistic and Legalistic Retributivism. But there is another broad type of attitude to discretion that is worth noting. So thirdly, one might be troubled by the power such points of discretion invest in particular individuals – even if these individuals are public servants who have a professional ethos and a professional responsibility to decide the cases in circumscribed ways. After all, even if officials strive to make the decision they think a person in their role ought to be making rather than the decision that they think any person of conscience should make, it will nevertheless be their outlook and attitudes that shape the nature of the decision. Rather, one might feel that such decisions will lack democratic legitimacy since they will simply reflect the view taken by the particular individual in charge rather than the will of the people taken as a whole. Democracy is a system, one might argue, that provides a fair way of coming to what can properly be called collective decisions on matters of basic rights, where the reason that it is maximally fair is that it gives no person any more influence than any other. Discretion invested in one individual goes against this democratic promise by making it the case that public servants end up doing more than merely serving the people (Waldron, 1999). I will call this view Democracy, the view that decisions about the actions of public agencies which are properly taken in the name of the people should be made *as far as possible* in such a way that no any one individual has greater sway over the decision than any other.

This concern about democratic legitimacy might be assuaged in either of two ways, one of which aims to minimize discretion while the other seeks to preserve it (hence my claim at the start of the preceding paragraph that there were two further types of attitude to discretion worth considering). The first way seeks to minimize discretion by identifying the will of the people with the deliverances of the elected legislative assembly: if the assembly is the source of democratic legitimacy, to ensure that the will of the people is preserved in the decisions made by public agencies, the transmission of the directive from the assembly to the individual case has to be made as watertight as possible, and this means the minimization of discretion. This first way therefore comes to some of the same conclusions as Legality, but it does so for different reasons: whereas Legality was grounded in a concern for rule of law values, this first approach to Democracy sees the importance of those rule of law as merely derivative of the need to preserve the democratic will. The second way is more sanguine about the usefulness of rules in anticipating the vagaries of individual cases. It may also see something procedurally important about dealing with individual cases as individuals rather than just as the instances of a rule. Therefore the second way shares something with the reasons given under Morality for leaving space for discretion as long as it is used to give consideration to the merits of an individual case, but it argues that fairness requires that the decision be made in a way that is compatible with each having an individual say. This may seem wholly impractical – are we going to arrange a plebiscite for each sentencing decision? But in fact a more feasible, though perhaps still revolutionary, alternative is at hand. This is to increase lay participation in criminal justice decision-making in a way modelled on the institution of the jury (Dzur, 2012). A jury is randomly selected, so in principle anyone could be chosen to make the decisions. This preserves fairness, but assembles a group of people who can then deliberate meaningfully about what ought to be done. Like the jury, these decision-makers would be operating within a legal framework, and would be advised by legal officials. They would not be expected to make their decisions out of nowhere. However, they would be allowed to make the decision. In this model of Democracy, those making the decision may not see the decision made according

to their best understanding of the merits of the case. In this it departs from Morality. But the procedural values that constrain an individual from deciding the case on its merits are not those of Legality but rather those of Democracy: the need to make the decision in a way that reflects and does justice to the fact that ultimate political authority rests with the people as a whole, a body in which each citizen is an equal.

So far this section has illustrated a range of positions a broadly retributivist approach might take on the desirability of having a legal framework that allows for discretion in sentencing. This allows us to resist the charge that retributivism per se cannot deal with the Selection Problem. The Selection Problem says that that each criminalisable action committed by the offender should find its way on to the charge sheet, and should be reflected in sentencing; that sentencers should not have discretion to pick and choose. However, Moralistic Retributivism opens up the possibility that such discretion is necessary to correct for distortions introduced by the form of legality. Therefore Selection as such is only a problem if one makes certain ('Legalistic') assumptions about the relation between sentencing and offence-classification. There may still be a problem with Selection: namely, if the exercise of discretion leads to a failure to respond appropriately to the moral gravity of offending behaviour. But that is the Fittingness Problem, which we will come on to below. Therefore if Moralistic Retributivism is plausible, the Selection Problem is not an independent problem. The question, then, is whether some variant of Moralistic Retributivism is plausible. We can distinguish extreme from moderate versions of Moralistic Retributivism. The extreme version is not prepared to give any weight at all to the considerations underpinning Legality. For the extreme Moralistic Retributivist, the state of the law should make no difference whatsoever to the decisions made at sentencing. Now I take that to be an implausible position. One reason for this is that the values of accountability, equity, predictability and so on underpinning the case for Legality are not negligible. A publicly accessible framework of law makes it possible for citizens to know in advance of sentencing roughly how they are likely to be treated; and it makes it possible for the state to aspire to treating like cases alike, and thereby approximating a kind of unity or

integrity in its dealings with citizens. Those are hugely important advantages of a system of law; yet they would be lost if sentencers did not take themselves to be constrained by general and publicly accessible rules. However, the implausibility of extreme Moralistic Retributivism does not mean that we should abandon Morality altogether. Sentencing is the sharp end of the criminal justice system – the point at which someone has to decide what the case against the offender actually amounts to, and how he or she should be dealt with. A moderate Moralistic Retributivism suggests that the good sentencer does not take the legal framework – those legalistic processes and classifications that have brought the offender to the point where he requires a sentence to be given him – as the final word on what that sentence is to be. The good sentencer requires discretion; or at least she does as long as there is some evidence that by giving sentencers discretion decisions are more likely to reflect a proper balance between pre-legal desert and rule of law values. Whether there is such evidence will turn on two issues: firstly, whether sentencers are in the main broadly *competent* to judge on matters of pre-legal desert, or the proper balance between pre-legal desert and rule of law values, and are in the main broadly motivated to do so conscientiously; and secondly, whether pre-legal desert, and its balancing with rule of law values, is a complex matter determined by the particulars of individual situations, and which therefore resists adequate codification in law or sentencing guidelines. The moral complexity of actual situations of law-breaking suggests that the latter is highly plausible; whether the former is also plausible is beyond the scope of this paper to determine. However, one may for the Moralistic Retributivist to address this question might be to make room for the concerns of Democracy, in particular the second version of the view that we considered above, where a jury or other randomly-selected body should make sentencing decisions. It may be, given that deciding upon pre-legal desert is not a technical matter but is rather a matter of general moral competence, that both for reasons of fairness, but also for reasons of accurate deliberation, having decisions made by a panel (who can engage in explicit deliberation about cases) rather than by a single judge, might be desirable and compatible with the Moralistic approach (Bennett 2014).

5. Retributivism, Desert and Perspective

A moderate version of Moralistic Retributivism can make a plausible argument for the existence of discretion at sentencing. This is because on the moderate Moralistic view one cannot take the legal categorization of offences for granted: such categorisation is merely an approximation to the desert of condemnation or punishment that the criminal law aims at. Moralistic Retributivism may restrict the range of discretion by arguing that the general justifying aim of criminal justice is to distribute such condemnation/punishment according to deserts; and hence that the decision on the 'merits' of the case should exclude considerations not bearing on such deserts. It may also recognise the need to restrict discretion in order to accommodate rule of law values such as consistency, accountability and predictability. But discretion, on the face of it, can and should be considered as a necessary accompaniment of judicial decision-making in criminal law. This shows why the Selection Problem is not a deep problem for a plausible version of retributivism.

However, if we allow cases to be decided as Moralistic Retributivism would recommend, by some combination of legal framework supplemented by scrutiny of their moral merits, would we get to the principle of 'bulk discounts'? No: solving the Selection Problem would still leave the Fittingness Problem. The Fittingness Problem points out that retributivism, for all we have said so far, is still tied to the notion that punishment should fit the crime. We have argued that Moralistic Retributivism doesn't have to read 'crime' literally, and that punishment should in part be guided by a form of pre-legal desert to which legal categories of 'crime' are only an approximation. But the concern underlying the Fittingness Problem is that retributivism still has a problem with multiple offenders; for couldn't it be the case that pre-legal desert is determined by each individual act of wrongdoing in a way that precludes something like a bulk discount? Even for Moralistic Retributivism, that is, wrongdoing requires some dissociating response, and whatever the specific nature of that response, the concern is that each transgression will require its own individual dissociation. So the concern goes, at any rate.

Let me describe the problem that multiple offending and the use of 'bulk discounts' apparently poses for retributivism in slightly technical terms, by calling it the problem of 'perspective-relativity.' To make 'bulk discounts' compatible with desert it would have to be the case that what an offender deserves varies depending on when he is sentenced. If an offender has committed a string of offences, and has been apprehended, convicted and sentenced for each in turn, he will end up serving much more time, or undergoing much more punishment, than he would have had he been convicted only after the string of offences was completed and treated as a multiple offender. Since the 'discount' only operates if the offender is sentenced at one time, or in one context (i.e. in the midst of sentencing for many offences), and not in another (i.e. being apprehended and sentenced for each in turn), it seems that we can only make sense of this within a retributivist paradigm if desert also varies with the context of sentencing. In other words, desert would have to be relative to the perspective we have when we are sentencing. Yet, the Fittingness Problem concludes, desert cannot be relative to perspective: desert is determined by the wrongdoer and his action, not by the perspective from which we are now looking back at the wrong. To use technical language again, The Fittingness Problem takes it as obvious that desert is property *intrinsic* to the wrongdoer and his action, and not a property of the *relation* between the wrongdoer and the person judging him at a particular time.

I would now like to explore the possibility that, having made the argument for the Fittingness problem explicit, we are now able to see the shape of a solution. We would have a solution, that is, if there were a good argument against the final premiss: if perspective-relativity *can* affect desert. I will argue that it is not at all obvious that retributivists should accept, without further justification, the kind of perspective-invariantism regarding desert that would be incompatible with 'bulk discounts.' This is not to provide a conclusive argument against those who claim to see a conflict between retributivism and such 'discounts.' But it is to put the ball back in their court. They would need to establish that retributivism is committed to perspective-invariantism in order to establish their case.

So why think perspective-invariantism is not essential to retributivism? We are perhaps prompted to think that perspective-invariantism is essential to retributivism by talk of individual 'desert.' This phrasing suggests that it is only facts about the wrongdoer that make up his or her desert, and that facts about the person responding to the wrongdoer (in particular, facts about the person responding's temporal place in relation to the series of acts committed by the offender) must be irrelevant. However, earlier in this essay I claimed that the essential thing about retributivism is the principle that it can be morally necessary to dissociate oneself from wrongdoing independently of any other good consequences that might come from doing so or not doing so. Stated thus, this principle leaves it open whether what one needs to do to dissociate oneself from the wrongdoing is perspective-invariant. The focus switches from the wrongdoer to the person relating to the wrongdoer; the question is what the latter has to do to avoid wrongfully 'going along with' the former's conduct. Thinking about matters in this way already makes it clear that it is a further step – rather than a conceptual necessity – to the conclusion that retributivism requires perspective-invariantism about desert. The theorist who claims that there is a conflict between retributivism and bulk discounts would have to show why dissociation is perspective-invariant.

But it may also be the case that we can say something stronger. Perhaps looking at dissociation as the basis of retributivism favours perspective-*relativity*. Looking at matters in the way I have suggested re-orients things because it makes it clear that the crucial thing is a *relation* between the individual doing the dissociating and the wrongdoer. The individual dissociating herself from the wrong looks at what the wrongdoer has done, of course. But she then looks at what that means for her relationship with the wrongdoer and how that relationship must proceed differently in order that the wrongdoing should be marked as such. Many contextual factors might be relevant to this in non-legal interpersonal contexts, factors that take account of the gravity of the wrongdoer's action, to be sure, but are not limited to it. In interpersonal contexts, moral tasks such as dissociation are carried out by expressively powerful actions – such as blame, withdrawal, apology – that are packed with

meaning, and are flexible in their ability to refer to numerous aspects of the situation at once. The ideal act of dissociation in a case of multiple offending does not ignore the multiple acts in favour of responding to just one; rather it synthesises their acknowledgement into a gesture that performs the dissociation from each of them. This process of devising a gesture by which reference to numerous acts, numerous contextual features can be brought about is an extremely important, everyday, but overlooked exercise of practical intelligence. It need not, and often cannot be, carried out additively. The process is normally one of synthesis rather than aggregation. Such synthesis is something that a developed vocabulary of expressive actions allows us to bring about, by virtue of the way in which acts like those of dissociation can refer to and acknowledge multiple features of the situation in which they are performed.

This inevitably means that proportionality between wrongdoing and response is a more complex matter than mere aggregation. A proportionate response to wrongdoing is, on this view, roughly the minimum disturbance to normal relations necessary to avoid acquiescence. Anything else is 'going over the top.' Of course, 'minimum' is not a notion that can be made entirely precise. But the idea is that one does what one needs to do to keep from going along with the wrongdoing, and that doing more than that would be vindictive, or relishing the suffering of the wrongdoer for its own sake, and so on. This already counts in favour of eschewing aggregation if possible. Furthermore, the way in which social actions bear meaning and are capable of referring to, and acknowledging, aspects of their situation, does make it possible for multiple offences to be acknowledged non-additively. The remaining question is the substantive one: does, and should, a non-additive response to multiple offences strike us as 'enough' to do each offence justice? Here I think we can only look at individual cases and how they strike us. Say I find myself at a reception with Henry Kissinger. Say I think him culpable of numerous wrongs: colluding with Nixon, who was plainly corrupt on many levels; countless individual human rights violations relating to Vietnam; and being highly influential in making U.S. foreign policy isolationist and disproportionately concerned with national interest. And say I also think that simple friendliness – as though he were not guilty of those

things – will unacceptably compromise me. Nevertheless the situation requires that I have to choose some way in which to relate to him. I have to sum up my attitude towards him in some way of being towards him. It may be hard to say in the abstract what the appropriate response in this situation is. But it seems unlikely that practical intelligence requires that each of Kissinger's wrongs should receive individualised proportionate response.

As I have written elsewhere, state punishment can be modelled on this understanding of interpersonal dissociation from wrongdoing: ideally, state punishment should be guided by an attempt to say how things now stand between the state (or the community) and the wrongdoer as a result of the offence, given that a relationship with the offender must persist, but that the terms of the relationship have changed as a result of the wrong (Bennett 2015). On my view, such 'saying how things stand' – acknowledging the gravity of the wrongdoing – can sometimes require punishment. However, just as in the interpersonal case, it might be very unlikely that one can 'say' such a thing accurately by taking an individualizing, additive response to responding to each transgression in a perspective-invariant way. An additive response may well end up being disproportionate given the availability of a response that will give the offending behaviour due acknowledgement at less cost to the offender. Of course, in the legal case, there is pressure to employ generalizable, transparent procedures that require regularity and uniformity in state responses. But the question is what type of uniformity is required. If moderate Moralistic Retributivism is correct, these procedures should be aimed at regulating accurate and proportionate moral responses to wrongdoing. If perspective-relativity applies to proportionate moral response then there is no reason why legal procedures should not try to replicate that; indeed, there may be reason to think that they would be disproportionate if they did not.

In the legal case just as much as the interpersonal case, then, it is not obvious that 'how things stand between us now' is composed by adding offences up in a simple way. Focusing on dissociation rather than desert leads us instead to see that proportionate condemnation is a relational and perspective-relative matter

from the outset; the case of multiple offending is not an outlier. The Fittingness Problem arises if it is only through individualising, additive response to each crime that one can do justice to the wrongdoing as a whole. But why should we think that? Moral commonsense seems to disagree. Although these considerations still leave the logical possibility that perspective-invariantism should be correct, it puts the onus on the critics of retributivism to defend it.

6. Conclusion

We have now assembled the materials necessary to address the two problems this paper has posed for retributivism and for sentencing practice. I have aimed to show that we do not need to give up the bulk discount principle by virtue of its conflict with attractive elements of retributive sentencing theory (or vice versa). I have taken it that our situation is something like this: the 'bulk discount' principle in the sentencing of multiple offenders appears compelling and prima facie justified, yet we find it hard to say *why* it is justified; furthermore, it seems to conflict directly with other things we find compelling, such as proportionality. My approach argues that this conflict arises because our understanding of retributive sentencing theory is too simple. By pointing to the possibility of a slightly more nuanced view of what retributivism is about, I have sought both to improve our understanding of the retributive tradition, and to remove a barrier to recognising 'bulk discounts' as an exercise of the practical wisdom of sentencing practitioners.

The Fittingness Problem said that there is no way for retributivism to explain how bulk discounts fit the crime; while the Selection Problem said that there is no way for retributivism to explain why it is important to charge and sentence only selectively rather than for all instances of wrongdoing. In response, I have agreed that common sentencing practice is broadly correct on this point, and I have sought to explain why it is correct by explaining how a sophisticated version of retributivism might make sense of this practice.

First of all, I distinguished Moralistic from Legalistic Retributivism, where I argued that what is important on the former is that punishment should be

guided by pre-legal desert. This means that the Moralistic Retributivist should see legal classifications such as crimes, charges and convictions as merely approximations to the underlying desert that the criminal justice system has the right to make its business. This response undermines the Selection Problem. Whether the Moralistic Retributivist should endorse the law stemming from *Canavan* is therefore an interesting question: the answer might be that, if she should, it would only be for rule of law reasons rather than for retributivist reasons.

Secondly, I argued that, on certain plausible assumptions, this first set of points should lead the Moralistic Retributivist to favour giving sentencers discretion to depart from the apparent requirements of the legal framework and to give out sentences that are guided directly by pre-legal desert. Sentencers' ability to do so should, we argued, be tempered by rule of law values such as consistency across cases, predictability of treatment. The task facing sentencers is to find a balance between these considerations. But moderate versions of Moralistic Retributivism can support this incorporation of rule of law values. The thought that the state should speak with one voice and should deal alike with like situations is not, after all, entirely alien to the form of retributivism (associated, for instance, with Duff) on which the aim of punishment is condemnation in the name of the political community as a whole; if it is, consistency across cases – what Dworkin calls 'integrity' (Dworkin, 1986) – is an important part of the package.

And thirdly, I completed the argument against the Fittingness Problem by arguing against the assumption – which I claimed underlies this alleged problem – that retributivism should take up perspective-invariantism in regard to judgements of desert. Perspective-invariantism would be the view that the appropriate retributive response to an offender is determined wholly by facts about the offender and her wrongdoing, and that facts about the temporal perspective of the person making the response is irrelevant. I argued that this is unsupported by what I identified as the key motivation for any form of retributivism, namely, to avoid complicity or acquiescence in the offence by

dissociating oneself from it. At any rate, the critic of retributivism needs to find a compelling argument for perspective-invariantism.

In conclusion, then, the plausibility of retributive sentencing theory is not threatened by the plausibility of deploying bulk discounts. And a wider lesson for retributivists is perhaps that they should be talking less about desert and more about dissociation.[2]

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[1] Again, I am using Ashworth as my authority here.

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