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Blanket Retroactive Amelioration: A Remedy for Disproportionate Punishments

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"Let the punishment be equal with the offence."[1] This maxim stands for the principle that punishment should be proportional to the offense. Dean Krent focuses his comments on legalistic retribution rather than on a form of retributivism where a "wrongdoer must not be punished more than she deserves" or where "a wrongdoer [is to] be punished to the fullest extent of his just deserts"[2]. Naturally, while I agree with his accurate and perceptive assessment that the author was "on solid ground" with the consequentialist argument,[3] I must respectfully disagree that blanket retroactive amelioration is contrary to this form of retributivism.

"Legalistic" retribution is understood to be "retribution arising because an offender knowingly transgresses a rule of the community."[4] The underlying concept is that "[t]he fact that norms later change in no way undermines the conclusion that the individual knowingly (depending on the mens rea required) violated a rule of the community."[5] Logically, the argument is quite sound. When an

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1. *See Cicero*'s *De Legibus*, 106 BC; *see also* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177 (2006).

2. Russell Christopher, Deterring Retributivism: *The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 866-67 (2002).

3. *See generally* Howard J. Krent, *Determining the Retroactive Reach of Decriminalization and Diminished Punishment*, 40 FORDHAM URB. L.J. CITY SQUARE 7 (2013), http://urbanlawjournal.com/?p=1207.

4. Krent, supra note 3, at 8 (citing Russell Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 885 (2002)).

5. *Id.*

individual "knowingly violate[s] a rule of the community," that person is subject to being punished. The issue becomes more complex, however, depending on whether the legislature either lessens the punishment for particular conduct or decriminalizes the conduct altogether.

When a legislature lessens the punishment for a proscribed act, as was the case with Genarlow Wilson, the conduct continues to be viewed with social opprobrium. By decreasing the punishment *and* giving it retroactive effect, the legislature has not determined that the conduct is no longer wrong. In fact, the act is still being punished, simply to a lesser degree. The lesser penalty is merely an acknowledgement that the prior penalty was too harsh. By applying the new lesser penalty, the legislature is insuring that the proportionality principle is properly reflected in the punishment for the offense. The question that arises is whether giving retroactive effect to a new, lesser punishment diminishes the fact that the offender knowingly violated the rules of the community and was punished? Invariably, the answer is 'no.'

Let us consider the example Dean Krent provides in his response of his proclivity for the need for speed. Assume that he has been convicted of reckless driving when he drove "eighty miles per hour in a fifty-five mile per hour zone."[6] The jurisdiction rightfully punishes his conduct but then later realizes that the fifty-five mile an hour speed limit was inappropriate or that the fine meted out was excessive. If the jurisdiction reduces the penalty associated with his speeding, then the jurisdiction has lessened the penalty. Dean Krent is still being held accountable for his willful or reckless violation of the social order. The question that Dean Krent posed is "Why shouldn't [he] suffer just deserts for willfully and recklessly violating the social order?"[7] And the answer is by all means, 'Yes, he should be punished.' The issue is not whether proscribed conduct deserves to punished but whether a lesser punishment determined subsequent to the committed conduct should be applied retroactively.

By ameliorating the penalty associated with his penchant for excessive speed, the legislature has not overlooked the conduct but reassessed the amount of punishment necessary to indicate his blameworthiness for the conduct. Put somewhat differently, the

6. *Id.*
7. *Id.*

individual who violates the law should be punished to the extent that others in society deem appropriate. If, however, society changes its mind, then what was once "just deserts" has now become unjust. And, it is contrary to a system of *justice* that a rigid adherence to the temporal order of when a statute was adopted and when someone was convicted should trump the application of a new lesser, punishment. The more difficult case is if the jurisdiction decides that the actual speed limit should have been eighty miles per hour thereby theoretically negating any wrongdoing.

When a subsequent legislative body decides to decriminalize conduct, the adherents to legalistic retributivism are on more solid ground that blanket retroactive amelioration may be improper. At the time when the proscribed conduct was committed, the individual who transgressed society's rules knowingly did so. Moreover, the law, determining that such conduct was illegal, was in operation. The individual thus should be punished. This "snapshot" view of justice[8] takes into consideration the fact that the wrongdoer was aware of the transgression and punishment is appropriate. Leaving aside for the moment that Genarlow Wilson was no doubt unaware that consensual oral sex was a crime, the issue is whether an individual who knowingly violates the law should benefit from a later decision to decriminalize that conduct.

In an extreme case of legislative decriminalization, violators of the law were released from punishment when the legislature, which decided that the law in question was constitutionally infirm, decided that the law was unjust.[9] But for cases that do not implicate a constitutional right, what is the appropriate response?

From a strict legalistic retributivism viewpoint, the individual should not receive the ameliorative benefit of the decriminalization of the conduct. And yet, this proposition, even after reading Dean Krent's well-reasoned argument, still presents a problem. While it could be argued that the proportionality principle supports releasing the law violator, proportionality alone does not overcome the central

8. S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 39 (2009).

9. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1965) (dismissing trespass charges against black Americans for staging sit-ins at restaurant facilities in light of the Civil Rights Act of 1964 which prohibits discrimination in public accommodation).

tenet of legalistic retribution which is that the violation knowingly and willfully occurred and thus should be punished. Let us now return to Dean Krent's speeding example.

If the jurisdiction now determines that the speed at which he was driving was appropriate, should he be the beneficiary of such a policy change? He clearly violated society's norms by driving at an excessive rate of speed. Upon being stopped, it is likely that he was ticketed and, possibly, convicted. Additionally, there were potential additional costs associated with his actions, e.g. the hiring of a lawyer, missed days from work, points taken off his license, incarceration time if not his first offense, a loss of license, etc. In the moment, he would have experienced a great deal more punishment than just that which was statutorily prescribed for the actual offense. Thus, even if the penalty for offense were ameliorated, he still would have suffered or been punished as a result of his conduct. Under retributivist theory, regardless of the form, neither the quantity nor the quality of punishment is certain. In other words, the wrongdoer received his just deserts of violating the law at that specific moment in time and that should suffice. Aside from the practical effect, there is a larger goal question of permitting blanket retroactive amelioration, i.e. to restore balance to a punishment and offense system that is distorted and to remedy the negative impact of knee-jerk lawmaking.

Legislative decriminalization is a corrective action that remedies the disproportionate and disparate impact of legislation made rashly and without the benefit of full information in response to a perceived crisis. Consider the crack cocaine epidemic in the late 1980's. The hysteria surrounding the dangers of crack cocaine was at a fever pitch. The sentencing laws reflected that hysteria by introducing the 100-to-1 ratio for possession and distribution. An individual who possessed one gram of crack would receive the same sentence as an individual who possessed one hundred grams of powder cocaine, even though the substance has the same pharmacological and chemical makeup. After years of discussion and empirical evidence on the laws' disparate racial impact, in 2010, the Fair Sentencing Act (the "FSA")[10] was passed to lessen the disparity in sentencing for crack cocaine and powder cocaine offenses.

10. Fair Sentencing Act of 2010, Pub.L. No. 111-220, 124 Stat. 2372 (2010).

The FSA reduced the amount of powder necessary to receive the same sentence to a ratio of eighteen to one.[11] The FSA was passed for a number of reasons, not the least of which was to rectify the overreaction to crack. The Legislature responded to the perceived crack epidemic with draconian punishments, but later determined that they were too harsh.[12] Insisting that a harsher punishment be retained in light of an ameliorative change because of a temporal confluence of events, not only strips the public of the power to rectify such overreactions, e.g. crack cocaine punishments, but would have also perpetuated the injustice. In the end, the actor is still punished for the conduct but now the punishment is set at the appropriate level – neither too harsh nor too lenient but just right. Finally, I would like to address the assertion that blanket retroactive amelioration suffers when viewed from a static perspective.

From the outset, I disagree with the assertion that I view retribution from a static perspective, meaning that "any contemporary decision to reduce punishment is tantamount to a determination that the original punishment was mistaken."[13] I acknowledge that there are a number of reasons why a legislature may lessen a punishment or decriminalize conduct that are unrelated to a desire to soften the punishment for specific conduct. I would posit that it is those "changed factual circumstances"[14] that merit retroactive amelioration. Consider the Genarlow Wilson case that prompted the original article. Over a period of time, society recognized that high school adolescents engage in sexual conduct and the existing statutory rape laws were inappropriate. The statutes were changed, but there were anomalies that went unnoticed. In that instance, retroactive amelioration does take into account changed factual circumstances. It cleans up the practical application of the law where there was legislative oversight. Another, perhaps more poignant example is capital punishment.

11. Christopher M. Matthews, *Senate Passes Crack Cocaine Sentencing Bill*, MAIN JUSTICE (Mar. 17, 2010, 9:13 PM), http://www.mainjustice.com/2010/03/17/senate-passes-crack-cocaine-sentencing-bill/.

12. Dorsey v. U.S. 132 S.Ct. 3231(2012). There were a number of issues that prompted the change such as the disparate racial impact of the laws. Interestingly enough, the retroactive application of the FSA has been argued before the U.S. Supreme Court.

13. Krent, *supra* note 3.

14. *Id.*

An individual commits a crime that commands the death penalty. Upon conviction, the individual is sentenced to death and remains there for a substantial period of time. After having served numerous years of a sentence, the legislature declares the offense is ineligible for the capital punishment or that the individual's personal characteristics, such as age, e.g. juveniles, or mental ability, e.g. low IQ, merit reconsideration of the punishment or a moratorium. Would it be appropriate to retain and to carry out the punishment? Or, has society acknowledged that the punishment is inappropriate? When the act was committed and the individual convicted, the facts merited that the individual receive the harshest of penalties available. After a period of reflection which is legally viewed as "evolving standards of decency,"[15] society no longer considers the penalty appropriate. In such a case, it would be difficult to declare that retaining the old punishment is necessary.[16]

While statutes determine the conditions under which an individual is to be held accountable for their actions and identifies the punishment that shall attach to that conduct, they are not engraved in stone. Laws can and are changed. Legislatures will revisit whether a penalty is too harsh (or too lenient), and amend an existing statute to reflect the legislature's evaluation of what is contemporaneously appropriate. This re-evaluation of a statutory punishment is ongoing assessment to determine whether the punishment is proportional to the conduct. Blanket retroactive amelioration allows society to correct overly harsh, overreactions and to restore the balance between the punishment and the offense. No theory is perfect but it would seem a rather distasteful system of criminal justice and one that is manifestly unjust if punishments are lessened or conduct is decriminalized and not retroactively applied. Mercy and justice should not be sacrificed for adherence to a process.

15. Trop v. Dulles, 356 U.S. 86, 101 (1958).

16. The death penalty has long been conceived of as a different punishment for all intents and purposes. The point however is the grave disparity in the nature of the punishment which is what occurred in the Genarlow Wilson case. *See Wilson v. State*, 652 S.E. 2d 501 (Ga. 2007).