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Three Challenges to Dagan and Roberts

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Retributivism and the Dynamic Desert Model

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Pre-print

Abstract. A traditional assumption in retributivist thinking is the view that an offender's desert is determined exclusively on the basis of the gravity of the crime committed. However, this assumption has recently been challenged. Netanel Dagan and Julian Roberts have advocated a dynamic theory of desert, or what they refer to as "the dynamic censure model". According to this model, certain post-sentencing reactions in the offender should be taken into account in the determination of the offender's desert and the severity of appropriate punishment. The purpose of this article is to assess this dynamic concept of desert. It is argued that despite the fact that the model offers a new and interesting approach to desert and sentencing, it also faces a range of theoretical challenges that are not easily answered.

Keywords: desert; dynamic censure theory; proportionality; retributivism; sentencing.

The ethics of punishment covers a diverse field characterized by a multitude of theories. For instance, it is a well-known fact that retributive theory – which has dominated the field over the last four or five decades – does not denote a single approach to the justification of punishment. On the contrary, retributivist theories have been developed in many versions which differ significantly from one another in terms of both the basic question of why an offender deserves a punitive response and more detailed questions as to what this response should consist of. However, across the various accounts of retributivism there are, of course, some assumptions that are generally shared. For instance, one

assumption in this category is the view that an appropriate punitive response should be determined solely on the basis of the gravity of the crime that has been committed.¹ This assumption implies that only facts arising from the commission of the crime should be interrogated by the court. As has been suggested, there exists an impermeable “firewall” between an offender’s post-offence conduct and his or her deserved sentence.² However, even this traditional component of retributivist thinking has recently been cast into doubt.

Netanel Dagan and Julian Roberts have suggested – in an interesting article in this journal – that the traditional firewall should be torn down. In contrast to the standard static desert model, what they advocate is a dynamic desert theory – or what they call the “dynamic censure model”³ – according to which certain post-sentencing reactions and attitudes in the offender should be taken into account in the determination of the offender’s desert. More precisely, the model they outline is based on an expressivist account of retributivism according to which the imposition of a punishment should be seen as a communicative process in which the offender is censured for having committed the crime. However, whereas other expressivists have held that the stringency of the censure that is expressed should only reflect the gravity of the crime, what Dagan and Roberts suggest is that penal censure should be seen as “a dynamic and responsive concept.”⁴ In their view, it makes little sense to address the offender in a communicative manner while remaining oblivious to how the offender responds. Therefore, in their theory, the offender’s moral post-sentencing deliberation and action should be taken into account. For instance, during the administration of a sentence, the severity of this sentence should be adjusted either to attempts on the part of the offender at repairing the damage or suffering caused to the victim, or to other kinds of acts that indicate the presence of genuine remorse. Thus, the severity of the sentence is not something that is fixed once and for all, but rather subject to post-sentence reconsideration.

This dynamic approach to offender desert is interesting for several reasons. First and foremost, it is noteworthy because, as indicated, it constitutes a radical break from the widely accepted retributivist view that characteristics of the crime exhaust the list of determinants of penal desert. Second, it provides a new understanding of the basic idea that it is crucial to engage in a dialog with the offender. Third, it offers a way, within a retributivist framework, of lending currency to the appealing view that an offender's post-sentencing reactions and attitudes have moral significance. However, despite these apparent attractions, what I will argue is that the model also faces several serious challenges that make it much less obvious that we should be satisfied with this theory. More specifically, the paper will proceed as follows: section (1) presents a challenge to the dynamic desert model concerning the possibility of determining the severity of a deserved sentence. More precisely, it is argued that the model faces problems with regard to the observance of ordinal proportionality requirements. Section (2) concerns another aspect of the determination of a sentence, namely the fact that a dynamic desert model by its very nature makes it impossible to definitively establish an offender's desert base and thereby impossible to determine what constitutes the appropriate punitive response. Section (3) suggests that even if the previous challenges have been met, the question of how a dynamic desert model should be put into practice gives rise to a further challenge concerning the moral significance of the risk of over- or underpunishment of offenders. Finally, section (4) presents a summary and conclusion.

Before embarking upon this, two minor comments should be made concerning the scope of the ensuing discussion. First, I will not in the following address epistemological considerations of when we have sufficient reason to hold that an offender possesses the post-sentence reactions that should count in the determination of desert. Dagan and Roberts have emphasized the fact that a remorseful reaction in the offender should be sincere. But obviously there is always the possibility that an offender will do whatever he or she can to receive a penal reduction and, therefore, may

present all the right reactions without sincerity. However, the question of how one should approach the task of distinguishing between genuine and merely imitative emotional reactions in offenders is not important here. Thus, for the sake of the discussion we can simply assume that the sentencing system possesses the requisite means to detect the sincerity of emotional reactions in offenders. Second, Dagan and Roberts have presented their account of the dynamic desert model as part of a discussion of the justification of life without parole sentences (so-called LWOPs) which are widely used in the US. However, it goes without saying that the type of post-sentence offender reactions that, according to the model, should affect offender desert may also occur in offenders other than those sentenced to life. Thus, the focus in the following will not be on the justification or administration of LWOPs but, more broadly, on the plausibility of a dynamic desert model.

(1) The challenge of relative comparison

The first challenge to which we shall now turn arises from the apparently simple question of how severely offenders should be punished according to a retributivist theory of punishment. This question has not, of course, been left untouched. In fact, as a leading retributivist has put it, there has in the modern retributivist era been a shift of focus from “why punish?” to “how much?”.⁵ Attempts at answering the latter question usually take their point of departure in the assumption that positive retributivism implies that punishments should be proportionately distributed. More precisely, so-called ordinal proportionality implies that a more serious crime should be met with a more severe punishment, and that equally serious crimes should be met with equally severe punishments.⁶ This concept of proportionality does not, of course, answer the question of how severely a particular offender should be punished. It only says something about the relative ordering of punishments for different crimes. But the principle has usually been regarded as a crucial element in retributivist

thinking and as a starting point for more elaborate theoretical considerations that might ultimately lead to an answer to the question of “how much?”⁷

However, the idea of a proportionate penal distribution only makes sense if it is possible to lend currency to the concept of crime seriousness. If it is not possible to tell whether one crime is more serious than another, then the idea of proportionality falls apart. Naturally retributivists are fully aware of this. The standard answer that has been given – and the answer to which Dagan and Roberts subscribe – is that the seriousness of crime should be determined on the basis of the harm of the crime and the culpability of the offender. However, if crime seriousness is the result of two components then an obvious problem arises: how should one compare the relative seriousness of two crimes if the first scores more in terms of harm while the second was committed with a higher degree of culpability? For instance, how should one compare a crime that caused less harm to the victim, but was committed intentionally, to another crime that caused more harm to the victim, but was committed recklessly? It is, in my view, fair to say that modern retributivists who subscribe to the harm and culpability account of crime gravity have not yet succeed in providing a principled answer to this challenge. However, that such a challenge exists is not a new insight.⁸ Then why direct attention to this problem here in a discussion of the plausibility of the dynamic desert model?

The answer is that what the dynamic desert model implies, as we have seen, is that even more factors should be taken into account in the determination of an offender’s desert base. Not only should the original crime be assessed in terms of harm and culpability, but the offender’s post-sentence attitudes and actions should also figure in the computation of the offender desert base and hence what constitutes appropriate punishment. But this means that there may be cases where one will have to compare a more harmful crime committed with less culpability, and a less remorseful subsequent attitude, to a less harmful crime committed with a higher degree of culpability and a more remorseful attitude. Obviously, many other combinations can be imagined. But the basic problem

remains the same: which offender deserves the more severe overall punishment? In fact, even if we imagine that the initial problem of comparing varying degrees of harm and culpability has been solved in a theoretically satisfactory manner, the post-sentencing factors that should be taken into account may themselves generate a problem of relative comparison. Dagan and Roberts underline that they cannot offer an exhaustive list of the actions which determine the desert of an offender. But if there are several actions and responsive attitudes, how then should these be compared in order to reach a conclusion on the relative desert of different offenders? Suppose that two offenders have committed crimes that are equally serious in terms of harm and culpability. Suppose, further, that the first offender is much more emotionally affected by remorse than the second, but that the second takes more initiatives than does the first to repair the loss of the victim. Which of the two offenders deserves the more severe punishment?

As these examples illustrate, the first challenge confronting the dynamic desert theory is rather straightforward. On the one hand, Dagan and Roberts follow in the footpath of traditional positive retributivists by emphasizing the importance of observing parity and, more generally, ordinal proportionality. On the other, they offer a theory that makes it very difficult to provide anything close to a principled answer as to how one should compare the desert of offenders in cases where the determinants of the desert base vary. By adding more determinants of overall seriousness they aggravate the original problem associated with the comparison of varying degrees of harm and culpability and, thereby, make it even harder to see how ordinal proportionality can be observed. In fact, the problem that has been raised here may be more serious than has so far been shown. Many retributivists have emphasized that when it comes to the comparison of crimes in terms of seriousness, it is not sufficient merely to make an ordinal ranking. If we compare three crimes in ascending order of seriousness, where the third crime is much more serious than the first two crimes, then this difference should be reflected in the ranking of the crimes and, ultimately, in the way these crimes

are punished. However, if this is the case then it will not be sufficient to compare crimes in purely ordinal terms – that is, in terms of more or less. Rather, one will have to make comparisons on some sort of interval scale reflecting the incremental degrees between the gravity of the crimes.⁹ But if this is the case, then the task of making comparisons when there are many different factors that each affect the desert base of the offender becomes theoretically even more demanding.

It might perhaps be argued in response that one should not exaggerate the significance of this challenge. Afterall, it does not seem reasonable to expect that responses to the relative comparison of offenders' desert should be given with anything close to mathematical precision. Thus, perhaps the most plausible approach to the comparison is simply to rely on what strikes us as intuitively appealing. This answer would accord with the widely shared view that moral intuitions should have some role to play in moral deliberation. I do not know whether this is the answer to which Dagan and Roberts would resort. However, it is important to stress that this approach faces challenges of its own. The problem is that it is far from clear what the answer implies. What is it that should be intuitively determined? Over-arching models for how varying degrees of the factors that determine desert should be compared? If so, do we have this kind of intuition? Or is it rather our intuitions in each individual comparison of desert factors that we should rely on? If so, should we not require any sort of consistency across different comparisons? And what if the intuitions we might have in such cases vary interpersonally? As these questions indicate, the idea of resorting to intuitive judgement seems to raise more questions than it answers.¹⁰ Thus, even if this approach is on the right track, we are still far from having provided an adequate solution to the challenge of relative comparison.

(2) The challenge of non-closure

If one accepts the idea that an offender can influence his or her desert base through reactions that follow after the crime has been committed, then it seems reasonable to believe that there are several ways in which this can be done. As noted, Dagan and Roberts discuss a list of relevant reactions and provide some examples of desert-influencing post-sentencing reactions. It is worth noting, however, that this list does not only include reactions such as remorse on the part of the offender or initiatives taken to alleviate the loss suffered by victims which, according to the authors, serve a mitigating function. There are also reactions that may serve the opposite function. If an offender, despite the fact that he or she is being censured for having committed a crime, ends up celebrating the misdeed, then this will obviously not mitigate the offender's desert. However, the fact that there are various ways in which an offender can influence his or her desert base prompts another challenge to the dynamic desert model.¹¹

Suppose that an offender experiences the censure that is associated with spending time in prison. As a result of the censure, the offender focuses his or her mind on the crime that was committed, realizes that the crime was seriously wrong, feels sincerely remorseful, and takes initiatives to offer reparation to the victim. However, after some time the picture changes. A co-inmate persuades the offender that what he or she did was all right and that the victim deserved the treatment that was imposed upon him or her by the crime. We can also imagine that the offender ends up perceiving the crime in a more general perspective as some sort of civil disobedience initiated to counter existing injustices. As a result of this change of mind, the offender ends up celebrating the crime. While the first reaction would mitigate the offender's desert, this is not the case for the second reaction. Obviously, it is also possible to imagine the opposite situation in which an offender behind bars is initially proud and celebrates the crime, while he or she at a later stage realizes the wrongfulness of the misdeed and reacts accordingly. The point of depicting these scenarios is not to consider how likely such changes in offender reactions are in real life, but rather to underline that if

one takes the idea of a dynamic desert model seriously then there will never be a final point at which an offender's desert can be definitely determined – except, of course, when the time comes when the offender is no longer in a position to react. Thus, if considering LWOPs (as Dagan and Roberts do) then one cannot determine what an offender ultimately deserves before he or she is no longer reactive which, for most offenders, will presumably be when they pass away. But even if we consider offenders serving shorter prison terms, there is not only the possibility that they will change their reaction during the time they are incarcerated; for they may also change reactions after the prison term is terminated. That is, even for this group of offenders – which comprises a much larger number than those serving life sentences – it will not be possible to determine what they ultimately deserve until they die.

Dagan and Roberts might perhaps object that this latter implication does not really follow from the theory they have advanced. The main idea of the theory is that what matters in the retributivist assessment is the way an offender reacts to the censure that is imposed by the punishment. Therefore, to contend that offender reactions that follow after the offender has been released from prison should also figure in the determination of desert would be premature. However, this answer strikes me as unpersuasive. First, it is not absolutely clear why reactions such as remorse and initiatives to repair a victim should only be regarded as determinants of desert if they arise as a result of the censure that is imposed on the offender. Afterall, if an offender by his or her own fortitude realizes the wrongfulness of the crime and initiates actions to repair the victim, then it is difficult to see why these reactions, simply because they are not the causal result of penal censure, should not count in the retributivist assessment of the offender's overall desert. And, arguably, such reaction may well occur also after an offender has been released from a prison term. Second, even if Dagan and Roberts wish to insist that only remorseful reactions caused by the censure inflicted on the offender merit consideration from a desert perspective, it is still possible that these reactions may

happen after the offender has been released. As in other types of communication, it is clearly not always the case that our reactions follow immediately after a message has been conveyed. In some cases, communication may result in reactions that follow at a much later stage long after the communication process has been brought to an end. In particular, when it comes to wrongful behavior, which may be accompanied by all sorts of self-deceptive excuses, it may be a rather time-consuming process to face up to the wrong one has been engaged in. Thus, even if one insists that offender reactions only count when they are caused by penal censure, it is still possible that such reactions may occur at a much later point in time – even after the sentences has been formally terminated.

Therefore, in taking the idea of dynamic desert theory seriously, it seems that we will end up with a model that may not allow for a final assessment of offender desert until the offender reaches the end of his or her life. As we will return to shortly, this will in practice make it very difficult to mete appropriate punishments on offenders. Moreover, this will arguably require a somewhat unusual effort on the part of the criminal justice system. Suppose that an offender has been released after having served the sentence he deserved. Suppose, further, that the offender changes his attitude towards the crime years after the release and starts celebrating the misdeed which he had previously regretted. In that case, the offender would be in a position where he deserves an extra punitive response. It would follow from this that the criminal justice system should ideally continue to monitor all perpetrators after they have been released and, in some cases, impose extra punishments on those who exhibit attitudes that affect the offender's desert. To suggest that such extra desert debts would not be very important would require an explanation. Afterall, offender desert is precisely what matters for retributivists and is what justifies such a costly practice as the imposition of punishment on offenders.

My guess is that there are many theorists who would be reluctant to accept these implications of the dynamic desert model. But if this is so – and if one is not willing to abandon the model – then one will be committed to provide an answer to this challenge of non-closure. Dagan and Roberts, for their part, are fairly explicit that they would not embrace such implications of the model. What they contend is that their use of the term “dynamic” is inaccurate in the sense that it is not meant to indicate that there is “no endless, ongoing dialog between the state and the offender.”¹² Rather, what they suggest is that one should only take a “second look” at an offender’s post-sentencing reactions. After this look the process stops. However, this answer strikes me as clearly unsatisfactory. If the whole point of the model is that certain post-sentence offender reactions should count in the computation of desert, then it will require a good explanation to justify that one should only engage in an assessment of the offender’s post-sentence reactions once and then subsequently ignore all future reactions even if they belong in the very same category. In the absence of such an explanation, the view that one should at some point suddenly stop taken further post-sentence offender reactions into account seems rather *ad hoc*. In other words, much more need not be said if one wishes to reject the challenge of non-closure while maintaining a dynamic concept of penal desert.

(3) The challenge of applicability

Suppose that the previous challenges have been properly answered. That is, that a theory has been developed that makes it possible to determine the desert of offenders whose crimes vary in degrees of harm, culpability, and post-sentencing reactions. And, also, that a plausible explanation has been provided of why the desert base of an offender is not genuinely dynamic in the sense that the possibility of exhibiting desert-relevant reactions comes to an end when the offender dies (or, for some other reason, is no longer able to react). Even under these conditions there would still be another

challenge facing the theory, namely, that there may be situations where it is very difficult to see how the model can be put into practice in a way that is consistent with the positive retributivist view that offenders should not be punished more or less than they deserve.

In order to illustrate this challenge, suppose *arguendo* that an offender has committed a crime of a certain degree of harm and culpability, and that the maximum punishment the offender might receive on the ground of his or her post-sentencing reactions would be 7 years in prison. That is, if the offender reacts to the penal censure by celebrating the crime in all possible ways, then the appropriate punishment would be 7 years. Conversely, if the offender is responsive to the censure that is expressed and reacts by showing sincere remorse and by taking initiatives to repair the victim, then the deserved punishment would be 5 years in prison. Now, the question is, under these conditions, how should the state proceed in the imposition of the punishment on the offender?

What Dagan and Roberts suggest is that the censure component should be “maximized at the outset and so it can only conceivably diminish.”¹³ Thus, the idea is that on this suggestion, an offender’s lack of repentance or celebration of the crime cannot increase the sentencing any further. This means that the offender in our example from the outset will get 7 years. However, suppose we have a case where the offender, after having spent 6 years in prison, suddenly realizes that he or she has committed a terrible wrong and becomes genuinely remorseful. In this case, he would deserve 5 years in prison. But this means that, even though the offender is released after the 6 years, he or she would still have been punished one year more than deserved. The same situation could take place if one does not from the outset give the maximum sentencing, but applies a sort of semi-indeterminate sentence in the interval between 5 and 7. If the state keeps a close eye on the offender’s reaction in the period between the 5 and the 7 years in order to determine the precise punishment on the ground of his or her reactions, then there could still be a situation in which the remorseful reaction occurs after 6 years, which once again means that the offender would only deserve 5 years and would

therefore have been overpunished. Put in more general terms, the problem is that if an offender's remorseful reactions occurs within the leeway between the minimum and the maximum punishments which the offender deserves depending on whether he or she shows repentance or celebrates the crime, then the offender will end up being over-punished. And if there is one thing that retributivists would usually regard as unacceptable, then it is to punish offenders more than they deserve.

It might perhaps be argued in response that if we have a case where the offender in the example shows remorse after 6 years in prison then this is simply bad luck. Afterall, one cannot play back time and remove the extra year which the offender has spent behind bars beyond the 5 years which he or she rightly deserves. While it goes without saying that the latter point is correct – one cannot undo the extra year – there would still be another way of putting the model into practice that would avoid the potential problem of over-punishment: one could decide never to impose more than the minimum punishment on an offender. That is, one could, in cases like the one depicted here, decide only to give the offender 5 years in prison. Now, if this is how one decides to put the model into practice, then there is of course the opposite problem, namely, that the offender may end up being under-punished. If the offender would not have shown remorse then he or she would actually have deserved a longer punishment. What this shows is that there are two ways in which one can try to put the model into practice. The first involves a risk of over-punishment of the offender – namely, if the remorseful reaction occurs within the leeway between the maximum and the minimum punishments – and the second involves a risk that the offender will be under-punished – namely, if the offender does not show remorse or even celebrates the crime. There is, of course, also the possibility of suggesting that the offender should be released after 5 years, but that the criminal justice system should then keep on surveilling the offender and bring him or her back to prison again if he or she does not at some point show the sign of remorse that justifies the 5-year prison term. However, as earlier noted, this would be an extraordinary implication of the model that would be difficult to carry

out in practice and that one may suppose many would be reluctant to accept.¹⁴ But this means that there are only the two outlined procedures: one that involves a risk of over-punishment and another that involves the risk of under-punishment. It might perhaps at this point be suggested that even though under-punishment is naturally a problem from a positive retributivism point of view, it constitutes an even more significant violation of justice to over-punish someone. Therefore, confronted with these two alternatives, it would be preferable to run the risk of under-punishing someone; that is, the offender in the example should be given only 5 years in prison. I do not know if Dagan and Roberts would accept this answer. But, as we have seen, it is a very different response than the imposition of the maximum sentencing from the outset, which they suggest as the way of putting the model into practice.¹⁵

How often it will happen that an offender shows sincere remorse within the period between the minimum and the maximum sentence, is of course difficult to say. The answer will depend upon how large this leeway is for different crimes, which in itself is a question it will be rather difficult to answer in a principled manner and which Dagan and Roberts, for their part, do not comment on. However, the important thing here is simply to underline the inherent problems concerning the risk of over- or under-punishment and, therefore, that it is not a simple case to say how a dynamic desert model should be put into practice.

Conclusion

The dynamic desert model as developed by Dagan and Roberts constitutes an very interesting attempt at rethinking offender desert by giving significance to aspects of an offender's behavior and reactions, which have hitherto been regarded as extraneous to retributivist thinking. However, as it has been suggested in this article, the move from a static desert model to a dynamic model also gives rise to

several challenges. What I have argued in the previous sections is, first, that the model faces a problem concerning the relative comparison of offender desert. By adding determinants of the desert base beyond the harm of the crime and the culpability of the offender, there will be even more cases in which it becomes theoretically demanding to give content to ordinal proportionality requirements and ensure that they have been observed. Second, it was argued that once one accepts that an offender's post-sentencing conduct and reactions may have retributivist significance, it becomes very difficult to avoid the implication that an offender's desert cannot be ultimately determined until the offender passes away or ends up in a state in which he or she is no longer able to react. Third, it was shown that a dynamic desert model involves the risk of either over-punishing or under-punishing offenders and that it therefore is not a simple case to tell how it ought to be put into practice.

I do not wish to suggest that any of these objections should be interpreted as knock-down arguments against the model. But they do constitute serious challenges that need be addressed if one wishes to pursue the idea of upholding a dynamic concept of offender desert.

Notes

¹ As we will return to shortly, the gravity of a crime is usually regarded as a function of harm and culpability (see, for instance, von Hirsch 1993 or 2017).

² Dagan and Roberts, "Retributivism, Penal Censure, and Life Imprisonment Without Parole" 3.

³ Dagan and Roberts, "Retributivism, Penal Censure, and Life Imprisonment without Parole" 5.

⁴ Dagan and Roberts, "Retributivism, Penal Censure, and Life Imprisonment without Parole" 1.

⁵ See von Hirsch "Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?'"

⁶ For discussions of ordinal proportionality, see for instance, von Hirsch, *Censure and Sanctions*; von Hirsch, *Deserved Criminal Sentences*; Anonymous 2004; Tonry, *Of One-eyed and Toothless Miscreants*.

⁷ For a discussion of so-called "anchor theories," see e.g. Ryberg 2004, or Lippke, "Anchoring the Sentencing Scale."

⁸ See, for instance, Ryberg 2004. For a more general discussion of challenges associated with the determination of the seriousness of crimes, see Ryberg 2019.

⁹ For theorists in the retributivist tradition who advocated some sort of interval scaling of crimes in gravity, see, for instance, Kleinig, *Punishment and Desert*; von Hirsch, *Censure and Sanctions*; Ten, *Crime, Guilt and Punishment*.

¹⁰ For a parallel discussion of the challenges associated with the invocation of intuitions in the discussion of the interpretation of proportionality constraints, see Ryberg 2020.

¹¹ An interesting question which Dagan and Roberts do not address, is whether the fact that some prisons have an atmosphere which is more conducive of the relevant sort of post-sentence reactions than other prisons. To hold that the extent to which prison conditions are conducive of such reactions is something that should not be taken into account in the determination of an offender's desert seems hard to accept. On the other hand, if the extent to which certain prison conditions have been conducive of such reactions should be taken into account – for instance, if an offender deserves a more lenient punishment if she has managed to show remorse under conditions which are not conducive of such reactions – then this will significantly complicate the determination of the desert of individual offenders who are placed in different prisons. I am grateful to a blind reviewer for directing my attention to this point.

¹² Dagan and Roberts, "Retributivism, Penal Censure, and Life Imprisonment without Parole" 11.

¹³ Dagan and Roberts, "Retributivism, Penal Censure, and Life Imprisonment without Parole" 7.

¹⁴ For instance, it would require a very comprehensive monitoring of an offender in order to be able to determine whether he or she at some point starts celebrating a crime. In particular when it is kept in mind that this celebration would still carry retributive significance even if it takes place many years after the offender has been released from prison.

¹⁵ It might perhaps be suggested that the challenge of applicability could be met by holding that the temporal location of a remorseful reaction is something which in itself should be taken into account in the determination of an offender's desert. That is, more precisely, if the reaction occurs earlier then the offender would deserve a more lenient punishment than if this reaction occurs at a later point. This suggestion might explain why the offender who shows remorse after 6 years would not be over-punished (even though he or she would only have deserved 5 years in prison had the remorseful reaction occurred earlier, e.g. after 4 years). However, this suggestion should be dismissed. First, this is not what Dagan and Roberts are suggesting. Second, and more importantly, it is very hard to sustain the view that the temporal location *per se* should play a role in the determination of an offender's desert. Third, the idea of taking temporal locations of reactions into account will leave one with a highly complex theory which it will be very challenging to develop in a full-fledged form.

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