

Can Punishment be Justified by its Communicative Function?

In this essay we will analyse the concept of punishment. We will examine the nature of justice and its use in our society before going on to apply this notion of justice to punishment specifically. I will introduce some of the problems associated with attempting to justify the level of punishment we employ through our criminal law system. In Section Two we will examine several theories of justified punishment before examining, in our third section, the problems associated with these theories. Section Four is devoted to an analysis of punishment's communicative function and the view that it is possible to justify punishment of wrongdoers through this function alone. In the fifth section of this essay I will point out some problems with this justification and with the issue of justification in general before going on, in our final section, to propose some qualification of our predisposition to punish wrongdoers based on functions of punishment largely ignored in the literature.

1. What is punishment?

'Punishment' is a term used to describe our treatment of wrongdoers. Precise definitions of the term vary, but a common feature of such definitions is a notion of punishment involving the subject being put in unpleasant or undesirable circumstances. More specifically, if punishment is to be employed correctly – perhaps even justly – it should be in response to a wrongdoing. In its official role, punishment is utilised in response to a criminal activity – that is, an activity that

breaks the official laws of the state in which it occurs. Aside from this general theme, we find many variations of definition. Generally, these variations do not query the nature of punishment itself – however we will examine some subtleties regarding the constituent parts of a punishment and some attempts to justify punishment as something other than that already described. Rather, the variations generally seek to explain how punishment may be meted out justly. We shall return to the notion of justice in sections five and six, however, for now, let us assume justice to be that which is intuitively held to be just. The literature tends to exploit this view by criticising rival theories of just punishment through the creation of examples or analogies that appeal to some apparently innate sense of justice. When the examples are successful the author feels that they may abandon the rival theory because it appals this intuitive sense of justice and therefore cannot be just.

2. What is Just Punishment?

With this working definition of justice in mind, we may turn our attention to the issue of what constitutes a just punishment. Retributive theories of punishment may be most in line with the common view of just punishment that a non-philosopher ‘man on the street’ may hold. This theory maintains that the purpose of a punishment is to repay some debt to society or to a victim. Ex-convicts often bemoan that they have repaid their debt to society and as such should be treated as a normal citizen again. Employment of such theory in the British justice system may best be observed in ‘damages’ claims. An errant motorist who causes an accident may have to pay for the physical damage to property and pay in monetary terms for the emotional damage caused to the victim. Indeed, such a

concept of repayment is contained within Judeo-Christian doctrines, which have contributed heavily to our system of law and punishment. St. Paul reports that Jesus died upon the cross to somehow pay for the sins of man. It is little wonder then that the exclusively Christian English society of the middle ages, from which our laws have developed, absorbed such doctrine into its system of law and punishment.

However, punishment must also have another aspect. How does a criminal sitting in a jail cell for 10 years repay some debt to the woman he raped? Indeed, during the period he is in jail the very woman he raped, along with other law abiding citizens, is paying for his food and for his cell to be heated through the taxes she pays. This leads us to some concept of a 'fair play' theory of just punishment¹. This doctrine proposes: "Failure to punish is unfair to those who practice self restraint and respect the rights of others."² This idea introduces two new notions to the debate. The first is that of punishment being some response to the whim of the people. Rather than simply repaying some debt, punishment viewed in a 'fair play' sense causes the people to feel that some revenge has been exacted for the wrong performed by the criminal by the unpleasant nature of the punishment. The second new notion is that of 'rights'. This idea is that every person, or every member of a society, has certain 'rights'. They qualify for these rights either simply by their membership to the species 'Homo Sapiens' or by their membership of a society. Rights vary from (in our society) the right to freedom of speech, to live without fear of death, to free healthcare etc. Anyone who impinges upon these and many other rights, carefully expressed through a variety of laws, is considered a criminal. One who pursues their own advantage through impinging upon the rights of others should be punished. We shall return to the issue of rights, along with that of justice in section five.

¹ Cottingham, 'Varieties of Punishment'

² Golding

The introduction of the notion of rights leads us to a subtler and theory of just punishment that is more popular amongst contemporary philosophers. This is a theory that presents punishment as an evil necessary in society. It is a retributive theory based upon the rights of individual citizens.³ Proponents of the theory promulgate the view that we are justified in denying those rights of the criminal that they deny their victims. It seems intuitively just that those who deny the rights of others should have those rights denied of themselves – however no other rights should be denied. In cases where it is impractical to deny just those rights the criminal denied in others an equivalent denial should be implemented based on some average preference scale of rights. The theory's proponents argue that to deny rights further than the criminal has denied in his victims is equivalent to denying those rights in an innocent person. Such a theory, if employed, would significantly reduce the severity of punishment in most crimes. For example, when a criminal steals £10,000 that his victim has a legitimate right to – for example by having earned it – the criminal should simply have ten thousand pounds of his own rightful money denied him. Goldman makes no mention of repayment of the victim's money, but one can assume that the stolen money would also be returned.

This may seem to be overly lenient, especially in comparison to our own current level of punishment for such crimes. However, once one removes the air of official and ritualistic meting out of punishment maintained by our judicial system we might see the current levels of punishment as overly draconian. For example, imagine an apolitical scenario where a man has £10,000 stolen from him but later apprehends the thief. He follows the example of the British punishment system and imprisons the thief in a small room in his house for five years. This punishment may now seem to be overly harsh and we might see that a simple denial of the rights the criminal denies in other may be a fairer and more just method of punishment.

³ Goldman, 'The Paradox of Punishment'

3. Problems with justified retributive theories.

However, this theory is not without problems. To refer back to our earlier example of the criminal who steals £10,000, if we analyse those people who engage in such criminal activities it becomes clear that they are usually poor. It is also apparent that the people that they steal from are usually in a more affluent economic situation than the thief. If we take this to an extreme to emphasise the criticism we may imagine a situation whereby an extremely impoverished man with no money to buy food steals the money from a millionaire. It is clear that the right to the £10,000 will mean very little to someone as wealthy as a millionaire, however if we manage to extract a similar amount from the impoverished thief then the denial of this right will be extremely serious to him – much more so than the initial denial of this right from the millionaire. Therefore, if we are to arrive at such a retributive theory of punishment that is justified we must take into account how different people value different rights. It would be impossible to implement such a system on a case-by-case basis, analysing the socio-economic situation of each criminal and victim and arriving at accurate answers. To generalise the relation of criminals' and victims' rights would have two effects. The first would be a great many miscarriages in justice due to the vast variation in personal valuation of rights. The second would be that such a generalisation would contradict our inherent sense of justice. For example, as already stated, the criminal is usually poorer than the victim. Therefore, in cases of theft it may be generalised that the thief values his right to an amount of money more than the victim. Therefore we may generalise a rule stating that the thief should have to pay out less money than he actually stole as a punishment for his crime. There seems something absurd about someone having to pay £1000 as a punishment for stealing £2000.

This leads us to a second problem. Such a lenient system of punishment will negate any deterrent effect that a more severe punishment may have either on the offender or on potential offenders. This will therefore lead to higher rates of crime and persistent offence by criminals. This will have a detrimental effect on social order and upon the economy as police resources are stretched people feel less need to find legitimate work when crime provides a low risk alternative to legitimate work. Such a state would therefore soon collapse and any attempt to mete out just punishment would soon fail. We will return to this idea of state stability in section six. The inevitable instability of such a system leads to the so-called 'paradox of punishment'. The proponents of this system define punishment of a criminal in a manner that denies him further rights than he denied in his victim as unjust or evil. However, such injustice is necessary if the state is to survive to mediate any punishment or maintain any justice at all – therefore punishment is viewed as a 'necessary evil'.

However, even if these problems are overlooked, our account of justified punishment seems to be lacking a crucial aspect. This is that punishment should be capable of communicating to criminal and to the society the idea that to break a law is a morally reprehensible thing to do. If punishment is able to promote this idea then surely it will be justified solely through this instilling of morality in the members of a society. We turn then to a justification of punishment through its communicative function.

4. A justification of punishment through its communicative function.

This is a theory which states that one may justify punishment of an individual on the basis that such punishment “expresses condemnation: it denounces and

formally disapproves of the criminal's act"⁴. Such condemnation relies upon the punishment being delivered by an official of the community or society. This official aspect of the punishment denotes that the act is representative of the society's condemnation of the act, not simply individual condemnation. The punishment should not only express a condemnation of the act to the criminal but should also communicate societal disapproval to the community as a whole. This has the effect of relating a message of disapproval to potential criminals and also of providing a message of support and official sympathy to the victims of crime.

It seems clear that the type of punishment typically meted out in this country does not just express condemnation. It also aims to fulfil other roles already discussed – repayment, retribution, deterrence – however this mode of punishment is in part determined simply by convention. The infliction of suffering upon the criminal is performed in such a manner as to convey an expressive meaning. The method of an official and ritualistic sentencing by a judge and the delivery of the verdict by a jury combines official disapproval with that of the society. The form the punishment takes – e.g. a jail sentence – is meant to further express a condemnation aimed to pain the criminal. Whilst this denunciation could simply take the form of the criminal conviction, the punitive measures also entailed in a punishment serve the purpose of reinforcing the negative feeling the society wishes to express towards the criminal act. The amount of money poured into our prison services may be said to reflect the lengths society is prepared to go to in order to express its denunciation of criminal acts.

By expressing such disapproval we may hope to alter the criminal's future behaviour and to instil in them a sense of morality in line with that of the rest of society – an end seen as noble in its self. However, the motives for our condemnation may often be less admirable than is suggested here. We may self-righteously wish to assert our own moral superiority or to express our envious

⁴ Feinberg, 'The Expressive Function of Punishment'

resentment towards those who do what tempts us but which we do not do. However, here we are discussing the manner and spirit in which punishment ought to be administered.

By acknowledging the communicative aspect of punishment we go far beyond the scope of the other justifications of punishment discussed so far. The communication of condemnation mediated through the conviction, combined with the communicative aspect of the punishment itself, should serve the purpose of causing the criminal to condemn himself. A spell in jail should be directed towards such self-condemnation and, as such, lead towards future of acceptance of the laws demands and judgements – rather than the criminal simply obeying it due to the threat of further punishment. This doctrine may lead to changes in methods of punishment. For example, a criminal may spend part of his sentence working in the community that his previous activities damaged, addressing the people and coming to understand the immorality of his actions. This extends the focus of current ‘community service’ orders which are aimed at a simply repayment to the community for the damage done by the action. By confronting and entering into dialogue with the victims of the crime the criminal is encouraged to empathise with those he previously disregarded. Such aspects to a punishment may be combined with the inconvenience and discomfort of a jail sentence. Such a punishment expresses disapproval and encourages the criminal to take this on board, treating the offender as a rational moral agent rather than a creature whose behaviour must be modified.

Such a focus on the communicative nature of the act is able to provide a clearer justification of punishment than the other theories discussed so far. No other theory allows for the moralistic aspect of punishment that is clearly intrinsic to its nature. Our system of punishment has evolved from Judaeo-Christian origins and as such is bound to incorporate a strong link between punishment and morality. Biblical punishments are not aimed to simply reform future behaviour but rather to instil that understanding of the law and that self-condemnation we have

expressed in our analysis of the communicative function punishment fulfils. Our society has derived its sense of justice from Judaeo-Christian concepts found in Old and New Testament Biblical texts and from early church teachings.⁵ This concept of justice has been infused with a more modern feeling of justice being related to Utilitarian principles of upholding societal happiness⁶. Our focus upon punishments potential communicative function thus perfectly justifies its use within our society as it fulfils both Judaeo-Christian and Utilitarian principles of justification through both its communication of condemnation and its potential for reform of criminals into empathetic and well adjusted members of society – thus promoting the societal harmony and happiness that the utilitarian seeks.

5. Problems with punishment's justification in solely communicative terms.

Despite its apparent strengths, the argument for the justification of punishment in these communicative terms rests upon several assumptions that we have not so far analysed in detail. The first major problem is that in order to analyse the relevant arguments one has to assume that punishment requires some sort of justification. In order to do this one must adopt some sort of moral realism. In the case of a communicative justification this moral realism seems to rest in Judaeo-Christian concepts of goodness and justice, i.e. that it is good to instil a sense of morality in the criminal through that communication of condemnation to no further end other than improving them as a person. I would argue that in a world where we have grasped the full consequences and implication of evolutionary theory, such a notion is, whilst undoubtedly still held by the majority of the people, entirely redundant.

⁵ Nietzsche, 'Genealogy of Morals'

⁶ Singer, 'Ethics'

In such a world, if one is to be objective and not to succumb to the whims of emotive intuitions, one need not 'justify' punishment at all – indeed one must confess that such a notion is meaningless and based upon ideas of moral realism that no longer have a place in the thinking persons mind. Rather than *justify* punishment then, we can *explain* the phenomenon, as it exists in our society.

6. An alternative to a justification of punishment

Our notions of right and wrong are defined by our evolution as a social species. We function best as members of a society, and, as such we require some sort of laws in place that allow the society to function and to endure. In our distant past, these 'laws' took the form of simple intuitions of right and wrong. For example, those early humans who were capable of motiveless murder of members of their group would soon cause instability of the group. Therefore the group, or "society" would quickly crumble and the individuals within it would have a smaller chance of survival than those individuals who were members of a stable and functioning society. This societal stability is formed by a reluctance to kill needlessly, or, later, to steal or cheat. This reluctance forms our moral intuition. The moral intuition is made possible through genetic factors – a development of a neural ability to appreciate such concepts as right and wrong. However, the specific moral intuitions formed are clearly heavily influenced by environmental factors – this is demonstrable through widely varying concepts of right and wrong.

As societies grow larger and more complex an intuitive moral feeling is not enough to hold some individuals back from destructive and destabilising actions. The effect of an action in a larger society is less well felt by the perpetrator as it is in a smaller society and therefore moral intuitions will not hold back all individuals from these actions – this is demonstrable by the vastly reduced crime rates in smaller communities. Such individual destructive acts are also less likely to

destabilise a larger rather than smaller community, and therefore the perpetrators negative actions will not lead to such a negative effect upon him as it would in a small society. Therefore, larger communities develop standardised laws in response to particular environmental conditions. For example, most societies find theft of property destructive and so it is considered a crime to steal in most societies. However, there do exist societies where the converse is true. The Ik tribe of Uganda lives in an incredibly impoverished state. Whilst they are not advanced enough to have developed laws they consider that which we consider morally reprehensible to be virtuous. To steal successfully from one's neighbour is considered a desirable attribute, as is being able to cheat and lie. The unusual conditions in which they live creates an anomaly of their moral intuitions, however it does serve to demonstrate that such intuitions are allowed by genetic factors and then determined specifically by environmental factors.

With this explanation of right and wrong in mind one can see that one does not need to justify punishment, indeed such a 'justification' does not exist in objective terms – only if one assume right and wrong to be objective and absolute concepts rather than handy survival tools thrown up by evolutionary pressures. To justify an action is to say that this action is right, that it is not a bad thing to carry it out. However, we cannot explain the term 'right' or 'good' except by reference to our evolutionary past. It seems clear that the survival of our genes is not a good thing. It is merely a fact that genetic survival is something that we naturally strive for, if we did not, we would not be here to discuss it.

However, one can postulate as to how the phenomenon of punishment arose in our past, and why it continues to survive. We have conceded that the general moral intuition of a society exists because those societies that have intuitions leading to stability are more stable and therefore they endure whilst those that have intuitions contrary to stability, or no intuitions at all quickly destabilise and break up, leaving their members, who hold destabilising intuitions less likely to survive. However, all members of the society do not always hold identical moral

intuitions – this will obviously be more frequently the case in large societies where difference of environment is more likely. However, if these members are allowed to act freely upon their contrary intuitions – i.e. commit what the rest of the society defines as a crime – this will lead to more general destabilisation of the society and perhaps even its eventual break up. Therefore the society implicates a system of punishment for those that break the laws. This reinforces the kinds of behaviour that lead to stability and success by causing pain (physical or emotional), or disadvantaging those that break laws created through general intuition. Therefore the society encourages its members to act in a manner that creates social stability and success (measurable through economic success, or perhaps by the happiness of its members) in a manner that does not require social evolution with all of its associated waste and destruction. Therefore, those societies that employ punishment to encourage or enforce stability creating behaviour remain stable and as such endure. It is because of this that some form of punishment seems to be a universal feature of all societies – those that do not employ it, or that employ it in a fashion that does not promote stability, quickly disintegrate.

We can extrapolate from this theory to answer the question of how the thinking person may employ punishment. Punishment is, by its nature as a conditioning tool, unpleasant. The thinking person must admit that there is a chance that he may be punished, or may find it desirable for people not to suffer unnecessarily. It may also be necessary to limit the barbarism or severity of punishment in our current social context for the practical reason that overly harsh punishment may lead to outcry and further disorder. Therefore I propose that punishment should be employed to the extent that its deterrent effect is large enough to limit crime whilst bowing down to the limits set by current social norms and my own sense of justice, and being as mild as possible within these bounds in case I one day face such punishment. I use the term 'should' here to mean that method that I find most appealing. Whilst I can intellectually deny any real value to my sense of justice my social and evolutionary conditioning is such that I feel it has inherent

value – unjust acts cause me to feel uneasy, and I naturally try to avoid this condition. However, I do not bother myself with the precise details of a punishment system, the current system does not offend my sense of justice and it maintains enough of a deterrent effect to keep me relatively safe as I walk down the street or lie in bed at night.

Therefore, whilst some may feel the need to ‘justify’ punishment, by its communicative function or otherwise, I propose that such justification is unnecessary. If we appreciate the actual reason for punishing at all, we can develop a system of punishment – indeed we have developed a system of punishment – which fulfils its natural function and therefore allows us a safe enough environment to pursue our whims in relative freedom and security – what more can we ask for?