

Chapter Nine

Punishment

Was the punishment too harsh, or not harsh enough? It is difficult to answer the question of what would be a “fair” or “appropriate” punishment for a particular crime or a particular criminal until one has a clear sense of what one thinks the *purposes* of punishment are. 9–01

Like other questions which fall under moral philosophy (broadly understood), the suggested purposes of punishment can be divided generally between approaches which see punishment as something of value in itself versus those that see punishment as a means to some other end.¹ This chapter will be devoted to summarising the alternative approaches.²

STARTING POINT

Most discussions of punishment begin by assuming two matters: (a) that punishment is morally justified; and (b) that punishment should be controlled and monopolised by the state. Neither claim is self-evidently true, and recent theoretical discussions have begun to reconsider those assumptions.³ Other unquestioned assumptions include (1) that the person being punished for a crime in fact committed it; and (2) that the state was justified in criminalising the action(s) in question. As for criminalisation, part of that topic will be considered in Ch. 15, which 9–02

¹ Ethical theories based on doing something because it is the right thing to do, or is one's duty, are known as “deontological”, to be contrasted with “consequentialist” theories, which justify actions based on achieving some good state of affairs.

² It is useful to point out the extent to which the following discussion of punishment, like most such discussions, is artificially narrow. Philosophical discussions about the justice of punishment usually *start* with an assumption that the person convicted in fact did the crime, and that there is no problem of enforcement error or problem of corruption and bias among those in power. Taking those issues into account would obviously complicate the moral analysis significantly.

³ E.g., Antony Duff and Zachary Hoskins, “Legal Punishment”, in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/legal-punishment/> (2018); David Boonin, *The Problem of Punishment* (Cambridge University Press, Cambridge, 2008).

covers the legal enforcement of morality, but the question extends beyond that particular inquiry.⁴

RETRIBUTION

9-03 Those who see punishment as something of value in itself speak of the *justice* in punishing wrongdoers, and the need for *retribution* for the wrongful action. The idea of retribution seems to have ancient roots. Famously, the Bible states: “Wherever hurt is done, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, bruise for bruise, wound for wound.”⁵ This narrow and extreme conception of retribution, encouraging retaliation in kind (also known as “*lex talionis*”), has few supporters,⁶ as matching “eye for eye” or “death for death” either has come to seem barbaric, or at least seems a concept difficult to apply universally (what is the “eye for eye” punishment for securities fraud?).⁷ However, the general notion of retribution, that the severity of the punishment should reflect the severity of the evil done, has many supporters.

A philosophical grounding for retribution was offered by Immanuel Kant (1724–1804), who argued that any approach to punishment *other than* retribution would be a deviation from the strict requirements of justice, and would treat the subjects of punishment disrespectfully, as a means to an end, rather than as ends in themselves.⁸ Never one for half measures, Kant added:

⁴ See generally Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, New York, 2008).

⁵ *Exodus* 21: 23–25, from *The New English Bible* (Oxford University Press, New York, 1971), p. 84.

⁶ Once the concept is understood at a more general level e.g. that the punishment should somehow “fit” the crime, and perhaps reflect some of the same sorts of evil, it is easier to find supporters. See, e.g. Jeremy Waldron, “*Lex Talionis*”, 34 *Arizona Law Review* 25 (1992); Stephen P. Garvey, “Can Shaming Punishments Educate?”, 65 *University of Chicago Law Review* 733 at 775–783 (1998).

⁷ One still finds examples of “pure retribution”. See “Eye for an Eye, Judge Rules”, *New York Times*, December 13, 2003: “A judge in Punjab Province sentenced a man to be blinded by acid after he was found guilty of doing the same to his fiancée. The judge ordered that a doctor carry out the punishment publicly at a sports stadium”. Also: “An assault suspect who pepper-sprayed someone in the face at a fast-food restaurant received similar treatment in court as punishment from a Cleveland-area judge embracing the principle of ‘an eye for an eye.’ Painesville Municipal Court Judge Michael Cicconetti on Thursday told Diamond Gaston she could serve 30 days in jail or be pepper-sprayed by her victim, and she chose the second option.” Associated Press, “Victim gets to fire back in pepper-spray assault case,” *Detroit News*, May 29, 2015.

⁸ Immanuel Kant, *The Metaphysics of Morals* [AK 6:331–338] (Mary Gregor trans., Cambridge University Press, Cambridge, 1996), pp. 104–110 (“On the Right to Punish and Grant Clemency”). For a modern philosophical defence of retribution, see Michael S. Moore, “The Moral Worth of Retribution”, in Ferdinand Schoeman ed.,

“Even if a civil society were to be dissolved by the consent of all its members . . . , the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.”⁹

Kant’s is a particularly stringent form of retributivism; more moderate forms are possible. For example, one could argue that deserving blame is necessary for punishment but is not sufficient (e.g. that one would need to show some further consequential benefit before punishment would be justified). Secondly, one could argue that deserving blame is both necessary and sufficient for punishment, but that there are countervailing considerations that might exceptionally justify not punishing the deserving, or not punishing them to the full extent of their desert (e.g. considerations of avoiding the risk of punishing the innocent, concerns about the barbarity of certain punishments, or even budgetary constraints).¹⁰

Retribution theorists often speak in terms of “proportionality”¹¹: that more serious crimes should receive more severe penalties (a position in principle independent from whether punishments should in some way be equivalent to the crimes being punished, as *lex talionis* advocates). The first question is to determine whether retribution is *only* about comparative punishments, or whether there is some absolute/maximum level of punishments (e.g. “an eye for an eye”) that constrains particular punishments.¹² Beyond that, determining the scale of relative culpability, or a formula for determining blameworthiness, is obviously going to be a complicated process, which will leave ample room for controversy.¹³ For example, how should one compare violent and non-violent crime? Should one focus on the action from the criminal’s perspective (what was

Responsibility, Character and the Emotions (Cambridge University Press, Cambridge, 1987), pp. 179–219.

⁹ Kant, *The Metaphysics of Morals* [6:333], p. 106. In recent years, some Kant scholars have raised questions whether he should be known as an “arch-retributivist”; these scholars have pointed to other passages in Kant’s work which show his recognition of a deterrent function for punishment. See, e.g. Thomas E. Hill, Jr., *Respect, Pluralism and Justice: Kantian Perspectives* (Oxford University Press, Oxford, 2000), pp. 173–199.

¹⁰ See Larry Alexander, Kimberly Kessler Ferzan and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, Cambridge, 2009), pp. 3–19.

¹¹ See, e.g. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, Oxford, 1968), pp. 233–234; Morris J. Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment”, 28 *Oxford Journal of Legal Studies* 57 (2008).

¹² See Alexander, Ferzan and Morse, *Crime and Culpability*, pp. 3–19.

¹³ For an excellent example of a theorist working through these (and other) issues, see Andrew Ashworth, *Sentencing and Criminal Justice* (Weidenfeld & Nicolson, London, 1992), pp. 55–170.

intended or attempted) or on the harm done?¹⁴ Also, what role should there be for various sorts of exculpatory factors (everything from provocation to drunkenness to a deprived childhood)?¹⁵

There have been modern theories rethinking retributivism, one of the best known among such theories being by Herbert Morris, who justifies the approach based on an idea of mutual forbearance, and what criminals deserve when they violate the terms of mutual restraint.¹⁶

“MAKING SOCIETY BETTER”: CONSEQUENTIALISM/ UTILITARIANISM

9–04 “Consequentialism” is the belief that options should be evaluated by their consequences. “Utilitarianism” is a type (actually, a cluster of types) of consequentialism, whereby the consequences to be considered in the evaluation are the pleasure and pain of individuals, which are to be summed up; the option should be chosen which maximises the sum of pleasure and pain for everyone (thus, the utilitarian maxim: “the greatest good for the greatest number”¹⁷). Any evaluation of punishment which focuses on its future effects will be based on an express or implied foundation of consequentialism, and likely some variation of Utilitarianism.

Many people think of punishment and limitations on punishment largely in terms of what the punishment can accomplish. Whether they support the death penalty may turn on whether they are convinced that this punishment deters other people: that is, whether it reduces the total

¹⁴ For example, for three people driving with equal recklessness, the consequences might be quite different: one might return home safely, a second cause injury, and a third cause death. It is merely accidental circumstances (what some call “moral luck”) that caused equivalently wrongful behaviour to lead to quite different levels of harm.

¹⁵ Another factor most people would include is whether the criminal has done this crime (or similar crimes) before. This factor becomes an overwhelming factor in jurisdictions where multiple convictions authorise or mandate a large increase in the sentence imposed—the so-called “two strikes” and “three strikes” laws. On this topic generally, see, e.g. Ashworth, *Sentencing and Criminal Justice*, pp. 141–170. However, this factor seems to have less to do with “retribution”, with giving punishment according to the “badness” of the act or the person, and more to do with “deterrence”, which will be discussed in the next section.

¹⁶ Herbert Morris, “Persons and Punishment,” 52 *Monist* 475 (1968); see also Mitchell N. Berman, “Rehabilitating Retributivism”, 32 *Law and Philosophy* 83 (2013).

¹⁷ That phrase is closely associated with Utilitarianism, in particular with the Utilitarian theorist, Jeremy Bentham, but it was a theorist of a prior time, Francis Hutcheson (1694–1746), who first wrote: “[T]hat Action is best, which procures the greatest Happiness for the greatest Numbers; and that, worst, which, in like manner, occasions Misery.” Francis Hutcheson, *An Inquiry into the Original of Our Ideas of Beauty and Virtue* Treatise II, Section III, para. VIII (Wolfgang Leidhold ed., Liberty Fund, Indianapolis, 2004), p. 125.

amount of future crime. The most common future-oriented, consequence-oriented, justification for punishment is deterrence. The roots of deterrence theory are at least as old as those of retribution theory. This is from Plato:

"The purpose of the penalty is not to cancel the crime—what is once done can never be made undone—but to bring the criminal and all who witness his punishment in the future to complete renunciation of such criminality, or at least to recover in great part from that dreadful state."¹⁸

"Deterrence" can be separated into individual or "particular" deterrence (*the person punished* will not violate the law again) and "general" deterrence (the punishment of some will deter *others* from violating the law).

Other writers focus on "rehabilitation": that the exclusive or primary objective and justification of punishment should be the effort to change the criminal into a responsible member of society, through whatever means work, whether imprisonment or some alternative to imprisonment. This is also a consequentialist approach, as it focuses on the future and on the good of society, rather than on the evil or culpability of the criminal or the criminal act.

Most of those who favour a utilitarian (or other consequentialist) approach to punishment are quick to note that they do so only as regards the *extent* of punishment for offenders, *not* for determining *who* should be punished.¹⁹ They would not authorise the punishment of an innocent person, even if it could be shown that by doing so, society as a whole would be better off in the long run. Similarly, they would not want someone punished who was not responsible for his or her actions (in the sense that the person was suffering from a mental illness or defect that meant that he or she did not know the nature of the act, or was unable to resist an impulse to do the action), whatever the long-run benefits to society.

In general, to the retributive theorist, consequentialism looks like a disrespectful way to use other human beings merely as means to a policy end.²⁰ To the consequentialist theorist, retributivism appears to be barbaric and pointless.

¹⁸ Plato, "Laws", Book XI, 934a–b, in Edith Hamilton and Huntington Cairns eds., *Plato: The Collected Dialogues* (Princeton University Press, Princeton, 1961), p. 1486.

¹⁹ See, e.g. Hart, *Punishment and Responsibility*, pp. 1–27, 193–209.

²⁰ As Hegel put the argument, deterrence treats "a man like a dog instead of with the freedom and respect due him as a man." G. W. F. Hegel, *The Philosophy of Right* (Oxford University Press, Oxford, 1942), p. 246.

OTHER OBJECTIVES

- 9-05 There are a variety of other objectives commentators sometimes offer for punishment which might not fit comfortably in the categories discussed above.

Some commentators speak about an expressive purpose.²¹ When theorists talk about an expressive purpose of criminal legislation, they usually mean using laws as a way of proclaiming public disapproval. Thus, many states have laws against adultery, because they consider the act sinful, but usually there is no intention that anyone actually be prosecuted under the law; it is sufficient that the public disapproval be noted.

Sometimes when commentators speak of an “expressive” or “communicative” or “educative” theory of criminal statutes or of punishment, they mean something different. The law itself might be meant as a way of “teaching” citizens what is morally right or wrong, and the punishments imposed might be part of the communication. The state may be trying to *change* people’s attitude towards an activity: e.g. trying to persuade people that an activity once thought acceptable (e.g. domestic violence) is not, or that an activity once thought a minor sin (e.g. driving while drunk) is in fact a major misdeed.

A purpose sometimes raised for the punishment of incarceration is the obvious one of incapacitation: whatever other effects imprisonment might have, it at least removes a criminal from the streets, therefore protecting the general public, at least for a while, from being harmed by the person incarcerated.

Finally, some commentators have argued that shaming the wrongdoer has been, and should be, both a type of punishment and a purpose of punishment (as in the US state law that requires people convicted of drunken driving to do 24 hours of roadside clean-up wearing orange vests containing the wording, “I am a Drunk Driver”²²). On the other side, those who believe that shame is an inappropriate means or objective argue that this approach does not adequately respect the human dignity of the person being punished.²³

²¹ See, e.g. Joel Feinberg, “The Expressive Function of Punishment”, in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, Princeton, 1970), pp. 95-118. For a sceptical assessment, see Heidi M. Hurd, “Expressing Doubts About Expressivism”, 2005 *University of Chicago Legal Forum* 405.

²² Erik Schelzig, “Tenn. Tries Shame to Stem Drunken Driving”, *Associated Press*, December 31, 2005.

²³ For an overview of “shaming” in punishment, see, e.g. Toni M. Massaro, “Shame, Culture, and American Criminal Law”, 89 *Michigan Law Review* 1880 (1991); Toni M. Massaro, “The Meanings of Shame: Implications for Legal Reform”, 3 *Psychology, Public Policy and Law* 645 (1997). For an argument against the use of shaming, see e.g. James Q. Whitman, “What is Wrong with Inflicting Shame Sanctions?”, 107 *Yale Law Journal* 1055 (1998).

Suggested Further Reading

- Hugo Adam Bedau and Erin Kelly, "Punishment", in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/punishment/> (2015). 9–06
- Thom Brooks, *Punishment* (Routledge, London, 2012).
- Antony Duff and Zachary Hoskins, "Legal Punishment", in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/legal-punishment/> (2018).
- Antony Duff and David Garland eds., *A Reader on Punishment* (Oxford University Press, Oxford, 1994).
- R. A. (Antony) Duff, "Punishment", in Hugh LaFollette ed., *The Oxford Handbook of Practical Ethics* (Oxford University Press, Oxford, 2003), pp. 331–357.
- George P. Fletcher, "Punishment and Responsibility", in *A Companion to Philosophy of Law and Legal Theory* (2nd ed., D. Patterson ed., Blackwell, Oxford, 2010), pp. 504–512.
- H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed., John Gardner ed., Oxford University Press, Oxford, 2008) (2nd edition includes a discussion and critique by Gardner).
- Michael S. Moore, "The Moral Worth of Retribution", in Ferdinand Schoeman ed., *Responsibility, Character and the Emotions* (Cambridge University Press, Cambridge, 1987), pp. 179–219.