

The Injustice of Punitive Justice



We take their money, their freedom, sometimes their lives, but opinions differ over exactly what we are trying to achieve, how we should go about it and what justifies it anyway. **Jane Forsey** on the punishment of criminals.

“The problem of justifying punishment....may really be that of justifying our particular symbols of infamy”

Joel Feinberg

When philosophers say – and most of them do – that punishment needs to be justified, they are making a moral judgement. They are suggesting that the practice of punishment is something that, in other circumstances, would be morally wrong. We can see why this is so: punishment is normally defined as the deliberate infliction of suffering on an individual by the state, often through a deprivation of money, liberty, or life. Terminologically this is called ‘hard treatment’ and it is hard treatment that must be justified: in any other circumstances, this treatment would constitute torture (as infliction of suffering), theft (loss of money), kidnapping (loss of liberty) or murder (loss of life). When sanctioned by the state, though, it is considered to be a form of justice.

If we begin with this standard definition, then a philosophical discussion of punishment will have two distinct and important features. First, it will ask how and in what circumstances hard treatment as a practice can be justified. Whatever reasons the standard theories provide to explain and legitimate punishing offenders in principle, and however plausible those reasons may be, in the end they must answer to critics who ask, “why this particular method of achieving your ends and not some other: why hard treatment?” Second, a philosophical account of punishment will focus on ideals, aiming to describe the goals and values a system of punishment must embody in order to be morally justified. It will not set out to justify any actual system currently in place, whether that of Britain or that of Iran. Instead, it will provide a critical standard against which actual practices can then be measured. The goal is to find a general theory that is plausible, not an actual practice that is acceptable.

Using these two features, I will argue that hard treatment is not justifiable on *any* of the current accounts, which means that I do not think it is justifiable at all. My reasons for this will be two-fold; first, the two predominant theories I will examine possess deep internal problems which have been criticized long before me. I will explore some of those criticisms here. The second reason is more subtle: equating punishment with hard treatment, as virtually all of the literature has done, itself

requires justification and is the cause of many of these internal problems. Why do these theorists accept the equation that punishment = hard treatment? If we can separate the idea of ‘punishment’ from the practice of ‘hard treatment’ we will gain a better understanding of both, and a clearer picture of where the burden of justification lies. And this separation is the final goal of my article.

The literature on punishment is dominated by two main approaches: *deterrence* theories and *retributivist* theories. Historically, both have operated under the assumption that punishment is a social necessity whose justification is beyond doubt. Because of this, both types of theory have mostly provided explanations of how and when to punish, rather than asking (or answering) why. As Ted Honderich has put it, both have provided explanations “as one provides theories about the facts of the physical world” – as though describing some natural phenomenon. While these two dominant approaches have become in recent times more sophisticated as they try to respond to criticism, and while contemporary writers are more inclined to adopt ‘compromise’ positions somewhere between the two, the legacy of each is so great that I will begin by treating them separately.

Deterrence theories work on a ‘consequentialist’ model, explaining and justifying punishment on the basis of its contribution to some other independent good, such as the greatest happiness for the greatest number, or autonomy, welfare or crime prevention. Always the focus has been on what the consequences or end benefits of punishment would be. Thus Jeremy Bentham (1748-1832), in a classical formulation of the deterrence theory, stated that “punishment is an evil” but it can be justified “in as far as it promises to exclude some greater evil”, or bring about some final good.

Hard treatment as the deliberate infliction of pain is intrinsically wrong on this view but is nevertheless justified if its benefits outweigh its costs and if no alternative practice could achieve those benefits more economically. Punishment is seen to promote the greater good by: deterring potential offenders through disincentives (experience of incarceration or the fear of it, for example); removing offenders from society (life sentences or capital punishment); or even reforming them so they will not re-offend. Deterrence theory is forward-looking, relying on the benefits of punishment for society as the sole reason for its justification and making almost no reference to guilt or past offenses in its theory.

Indeed, the punishment of an individual merely because of their guilt, said Bentham, “would be useless” and would only add “one evil to another.” For him, there must be another reason to punish, and this reason is provided by the good effects he thinks it will have on the rest of society.

The objections to this view are many. First, it is at best questionable whether hard treatment prevents crime through deterrence, and this requires proof that is notoriously difficult to find. But even if we grant this idea, there is nothing in the theory which limits either the type and severity of the punishment meted out, or the individuals subject to it. It is open to charges of potential cruelty: which would provide the stronger disincentive? Long prison terms, or public torture? And if torture, what is to stop this theory from advocating that we practice it? It is also open to charges of sanctioning human sacrifice: if the punishment of the innocent could just as effectively deter potential offenders as the punishment of the guilty, what is to keep us from using scapegoats for deterrence and, say, publicly torturing the innocent family members of an offender if that is what will be most effective? For these reasons, deterrence theories are seen by many to sanction injustice and, in order to be effective, to exceed the limits of what is morally acceptable. Critics claim that the possibilities for state coercion, manipulation and cruelty contribute to a failure to respect the individual by instead treating her as a means to some other, external end.

One of the central claims of retributivist theories, by contrast, is that only these respect the individual as rational and autonomous. Retributivist theories seek an intrinsic explanation for punishment, looking back to the crime committed rather than forward to the beneficial outcome of the practice. Punishment is justified on this view independently of, and often regardless of, its consequences.

Retributivism is generally understood to be saying that ‘the guilty deserve to suffer’ and that *only* the guilty deserve to suffer. Reasons given for this view include a reliance on popular intuitions, or a view that criminals take unfair advantage of the law-abiding, or that crime separates the offender from the good, or that it upsets some kind of balance which must be restored. Hegel (1770-1831), a proponent of this view, argued that punishment serves to right the wrong, or “annul the crime...and restore the [universal] Right”, or some kind of cosmic balance. Kant before him argued that “penal law is a categorical imperative” which imposes a duty on us to perform it just as we have duties to refrain from killing, or to tell the truth. The “right of retaliation” for him demands proportionality: only the guilty may be punished, and their punishment must be that of “like with like”, fitting their crimes. Thus retributivism is often seen as a sophisticated version of the biblical injunction of ‘an eye for an eye’.

The central idea in retributivist views is *desert*: we are obliged to punish an individual because he deserves it, and must not punish him to any lesser or greater extent than he deserves. Punishment as a practice deprives individuals of their freedom and to justify this theorists have traditionally tried to show either that the offender willed her punishment (and so it is her ‘right’, as Hegel put it, or that the offender, being free, is responsible for her actions (Kant). Guilt is seen as a necessary backdrop for allowing punishment, and brings with it the central problem for retributivism: how do we explain this connection between guilt and punishment in order to provide

an adequate account of just desert? Why do the guilty ‘deserve’ to suffer?

Critics of retributivism almost unanimously agree that the theory fails to answer this central question and they have charged it with amounting to ‘a piece of metaphysical mystery-mongering’ which just conceals a desire for revenge. Further, even if desert can be adequately explained, problems with the practice of hard treatment arise: what gives us the right, let alone the duty, to impose this suffering on the guilty? And this leads to a final set of problems with the retributivist idea of an eye for an eye. Not only do they fail to explain why a punishment ought to be of equal severity to the crime, or how this equality could be achieved, but they don’t explain how they can portray the crime as wrong and its punishment as right if they amount to the same thing in practice. For example, what would be an ‘equal’ form of hard treatment for rape? Or theft? And why would the killing of a murderer not be murder itself?

As I have suggested, more modern accounts of punishment tend towards compromise positions, with deterrence theorists restricting punishment to only the guilty as an answer to charges of injustice, and retributivists offering (often covert) consequentialist explanations for desert in terms of the greater good this will bring. But any position that borrows from two faulty views will be only as strong as their weaknesses and will, for the most part, leave the same difficult questions about hard treatment itself unanswered. Rather than pursue these possibilities, I would like to consider a third view whose explanatory powers are more sophisticated than either of the traditional positions.

In a departure from the mainstream, Joel Feinberg argues that standard theories such as retributivism and deterrence operate on a misunderstanding, or at best only a partial understanding, of punishment and overlook one of its main aspects: that it has ‘a symbolic significance’. Punishment in general (not hard treatment in particular), he says, is a “device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation”. We punish as a way of expressing how wrong we think someone’s actions are. What is valuable about describing punishment as the communication of censure is that it makes an important distinction between hard treatment on the one hand and punishment as symbolic condemnation on the other. Condemning an act through a form of expression, for Feinberg, can be justified, but hard treatment as that kind of expression cannot. Further, emphasizing the symbolic side of punishment leads to a better definition of punishment itself: incarceration, death, and so on do not necessarily count as punishment: unless they are accompanied by the symbolic apparatus of public censure they are just torture or murder.

This theory, often called ‘communication theory’, bears a resemblance to retributivism in that it is occupied with past offences which deserve censure and seeks an explanation for punishment on the same grounds of desert. Its critics charge that it has the same problem making a connection between desert and blame that the retributivists have. When, we can ask, is it morally right to condemn an offender and to express our strong disapproval of her act? Is this theory, as Feinberg wonders, simply an excuse for our ‘undeserved responsive attitudes’ such as vengeance? If so, we haven’t come very far forward, and we haven’t escaped any of the problems of retributivism.

But Andrew von Hirsch takes a different approach. The reason there should be this kind of symbolic response to the conduct of offenders is that “such communication of judgement and feeling is the essence of moral discourse among rational agents.” As part of a community, our natural way of expressing ourselves and getting along with others is through praise and blame. It is how we communicate our values to one another and how we articulate what is right and wrong. Von Hirsch states that our capacity to respond to wrongdoing by censure is “simply part of a morality that holds people accountable for their conduct.” When someone ‘commits a misdeed’ we judge her adversely because we find her conduct wrong. Censure just “consists of the expression of that judgement plus its accompanying sentiment of disapproval.” According to von Hirsch, no deeper justification is needed for this; it is simply what it means to engage in moral discourse and be a member of a moral community. We do not need to step back and wonder whether a misdeed ‘deserves’ public disapproval. Our giving disapproval is just our way of saying that the deed is wrong, or our way of judging a person’s actions. And in this von Hirsch wants to say that it is a natural part of being a moral agent, and so does not need any kind of justification.

What does require justification is the form this disapproval is going to take. It is the censure itself that von Hirsch finds justified, not necessarily the mode of its expression. And it is going to be very hard to justify the gallows as a way of expressing disapproval. It seems far too harsh as a method of communication. Now, some communication theorists defend hard treatment on grounds similar to deterrence theories, saying that it can keep others from committing crimes, or act as a penance which aims to rehabilitate or educate the offender (how the gallows can rehabilitate someone is a very good question!). But these attempts to justify hard treatment are subject to the same problems as the standard deterrence theories: possible inhumanity, cruelty or human sacrifice.

Feinberg is sceptical about finding any justification for hard treatment if we adopt the communication theory, and he comes up with an interesting alternative: “one can imagine an elaborate public ritual, exploiting the most trustworthy devices of religion and mystery, music and drama... Such a ritual might condemn so very emphatically that there could be no doubt of its genuineness, thus rendering symbolically superfluous any further hard physical treatment.” While he concedes this might be “only idle fantasy”, the point he is making is a good one: if some exotic piece of theatre works as a method of expressing disapproval, why not use it? Think of Nathaniel Hawthorne’s *The Scarlet Letter*, in which Hester Prynne wore a letter ‘A’ embroidered on her clothing as a symbol of her adultery – her misery shows how effective this symbolic punishment can be. Hard treatment, Feinberg says, is a “conventional symbol of reprobation” that society has chosen to use and not the essence of punishment itself. The problem of justifying hard treatment is the problem of trying to justify our use of this symbol as opposed to any other, especially if any other – such as the pageant he describes – would serve the same purpose just as well, and do so without the suffering we associate with incarceration, stiff penalties, or the death sentence.

Let me conclude by saying the following: I am not, of course, advocating that we adopt the ‘idle fantasy’ of Feinberg’s pageant or Hawthorne’s symbolic branding. But what such radical suggestions do is illustrate the separation

between punishment as expression and hard treatment as the symbol of this expression. And by making this separation in such a dramatic way, Feinberg forces us to see that the two are not identical, and that the acceptance of the former – punishing offenders as a way of expressing moral disapproval – does not entail the acceptance of the latter – using hard treatment to do this. And this allows us to see how a philosophical account of punishment must arrive at a negative conclusion: hard treatment cannot be justified on the basis of any of these theories. The work of communication theorists has given us a better understanding of punishment as essentially an expression of censure and not as essentially a practice of hard treatment. The internal problems of deterrence and retributivism can be seen to stem from the way that they equate this expression with hard treatment itself – they are stuck bending backwards to try to justify a certain practice just because they misunderstand what punishment is really all about. Instead, as we can see, the deliberate infliction of suffering on an individual – whether as a social convention, a means to some other end, or as something that has been ‘willed’ or ‘deserved’ – has no inherent defence. Anyone who advocates such a practice cannot rely on moral arguments to provide reasons for it: cruelty to another human being remains cruelty, whatever we try to call it, and whatever complicated theories we use to try to justify it.

But where does that leave us? I end up sounding here like an abolitionist, and I don’t intend to advocate that or any other positive position. Remember that at the outset I said a philosophical exploration of punishment will trade in ideal theories and not try to sanction any particular current practice. This in effect relieves me from trying to answer the very difficult questions of what, in practice, we ought to do now in society today about people who break the law. I also said that my goal was to provide a critical standard against which current practices can be measured, and this is what I hope I have accomplished: through the work of Feinberg and von Hirsch I hope that I have made clear the negative thesis that hard treatment is not morally justifiable. This does not mean that it is not justifiable on other grounds, like those of economy or efficiency or public safety, only that no moral argument is going to work and so institutions that try to take this moral high ground are misleading us. What I have wanted to do here is provide food for thought. But as to what practices we as a society ought to reasonably adopt in response to crime, and in response to the findings of this article, I leave you to decide.

© JANE FORSEY 2000

Jane Forsey is completing her dissertation at Queen’s University in Kingston, Ontario – a city with no less than eight prisons!

Ted Honderich, *Punishment: The Supposed Justifications*, revised edition, (Penguin Books, 1976).

Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, G.W.F. Hegel, *The Philosophy of Right*, and Immanuel Kant, *The Philosophy of Law*, can all be found excerpted in *Philosophical Perspectives on Punishment*, Gertrude Ezorsky, ed. (SUNY Press, 1972).

P.F. Strawson, ‘Freedom and Resentment’, in *Freedom and Resentment and Other Essays*, R. Wasserstrom, ed. (Methuen, 1974).

Joel Feinberg, ‘The Expressive Function of Punishment’, A. von Hirsch, ‘Censure and Proportionality’: Both of these are in *A Reader On Punishment*, R.A. Duff and D. Garland, eds. (OUP, 1994).