Retributivism: Punishment and Justification

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Abstract
The retributive principle is that offenders should be punished because and only because they have culpably done wrong. This is an instance of this more general principle of desert. We all have primary duties not to do the sort of acts that malum in se criminal statutes prohibit. We also have secondary duties to allow ourselves to be made to suffer if we have violated these primary duties. The trigger for these secondary duties is again our culpability in violating the primary duties that define wrongdoing. This article provides a brief overview of the key tenets of the most prevalent impure versions of retributivism: deontological, consequentialist, and mixed/hybrid. Each overview is followed by accounts, theories, and justifications. At the end the author concludes that no version of retributivism can serve as a complete theory of punishment.

Keywords: Retributivism, Deontological, Consequentialist, Mixed, Justification, Punishment.

Introduction
The practice of punishment must be justified by reference either to forward-looking or to backward-looking considerations. If the former prevail, then the theory is likely to be consequentialist and probably some version of utilitarianism, according to which the point of the practice of punishment is to increase overall net social welfare by reducing (ideally, preventing) crime. If the latter prevail, the theory is deontological: on this approach, punishment is seen either as a good in itself or as a practice required by justice, thus making a direct claim on our allegiance. A deontological justification of punishment is likely to be a retributive justification. Or, as a third alternative, the justification of the practice may be found in some hybrid combination of these two independent alternatives. Attempts to avoid this duality in favour of a completely different approach have yet to meet with much success (Goldman, 1982).

Therefore it is argued how deontological and consequentialist considerations are relevant for such justification. For Beccaria, the justification of punishment can only have

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a utilitarian basis; however, its implementation by the judges is deontological, because it should not be affected by the assessment of the consequences that a punishment could have, but rather only by its compliance with the law, which defines who should be punished and to what extent. Also, many people, including those who do not take a consequentialist view of other matters, think that any adequate justification of punishment must be basically consequentialist. For we have here a practice that inflicts, indeed seeks to inflict, significant hardship or burdens: how else could we hope to justify it than by showing that it brings consequential benefits sufficiently large to outweigh, and thus to justify, those burdens? The most familiar line of objection to consequentialist penal theories contends that consequentialists would be committed to regarding manifestly unjust punishments (the punishment of those known to be innocent, for instance, or excessively harsh punishment of the guilty) to be in principle justified if they would efficiently serve the aim of crime reduction: but such punishments would be wrong, because they would be unjust (McCloskey, 1957).

Moore explains that while consequentialists believe that the rightness of an action depends wholly on the goodness of its consequences, deontological theories hold “that the rightness of an action is (sometimes at least) a function of the action’s conformity with ‘agent-relative’ norms, norms that are addressed to each person individually at a particular time and that are not concerned with maximizing conformity to such norms by oneself or others on other occasions”. A deontological retributivist, on this account, takes punishing the guilty to be obligatory on each particular occasion. But a retributivist could instead “regard[d] the state of the guilty receiving punishment as a good state[,] to be maximized even when this means that some guilty persons are intentionally allowed to escape punishment” (Moore, 1993). And such a retributivist would be a consequentialist.

In the late eighteenth to the mid-nineteenth centuries, during what is now called the “neoclassical period,” the classical culture of the ancient Mediterranean was rediscovered. This was also a period of scientific discoveries and the founding of new scholarly disciplines. One of these was criminology, which developed as an attempt to apply rationality and the rule of law to brutal and arbitrary criminal justice processes. The work of criminology’s founders – scholars like Cesare Beccaria and Jeremy Bentham – became known as “classical criminology.”

A striking feature of twentieth-century punishment theory, however, has been the steady and generally successful pressure to fold this seeming multiplicity of justifications into a simple dichotomy of justifications that at least appears to mirror the fundamental organizing distinction in moral theory between consequentialism and deontology. Thus have commentators routinely insisted that deterrent, reform, and denunciatory, expressive, or educative theories are most perspicuously understood simply as emphasizing different—but not incompatible—mechanisms by which punishment brings about a varied lot of desirable consequences, while Kantian, Hegelian, and similar theories are best viewed as arguing that punishment is right or fitting in itself. To be sure, this effort at binary classification between what are often termed ‘forward-looking’ and ‘backward-looking’ theories has always met with some resistance. But a central strand in the story of the philosophy of criminal law over the past two centuries consists of the gradual refining of a somewhat more diverse array of competing theories of punishment into the two dominant traditions generally recognized today: the consequentialist tradition tracing its roots back...
to Beccaria and Bentham, and the retributive tradition that claims Kant as its patron saint (Duff, 2001).

It is true that according to Beccaria, the Crime problem could be traced not to bad people but to bad laws. A modern criminal justice system should guarantee all people equal treatment before the law. Beccaria’s book supplied the blueprint. That blueprint was based on the assumption that people freely choose what they do and are responsible for the consequences of their behaviour. Perhaps no other book in the history of criminology has had so great an impact. Beccaria’s ideas were so advanced that Voltaire, the great French Philosopher of the time, who wrote the commentary for the French version, referred to Beccaria as “brother” (Maestro, 1942)

In fact, his valuable comments on the purpose and the proper measure of punishment are not part of an actual theory – this theorization will only happen with Jeremy Bentham (who, incidentally, was deeply influenced by Beccaria) and then, with greater sophistication, with John Stuart Mill and Henry Sidgwick (Driver, 2011). In particular, the reflection of the great Milanese still lacks precise definitions of the principle of utility and an appropriate discussion of the relevant terms (‘useful’, ‘pleasant’, ‘pleasure’, ‘happiness’, etc).

Bentham devoted his life to developing a scientific approach to the making and breaking of laws. Like Beccaria, he was concerned with achieving “the greatest happiness of the greatest number” (Bentham, 1967). His work was governed by utilitarian principles. Utilitarianism assumes that all human actions are calculated in accordance with their likelihood of bringing happiness (pleasure) or unhappiness (pain). People weigh the probabilities of present and future pleasures against those of present and future pain.

Moreover, as we shall see, it has been convincingly claimed that Beccaria does not actually defend pure utilitarianism. In fact, his proposal embodies – albeit in a conceptually subordinate role – some elements that can be plausibly traced back to the retributivist tradition; and these elements for Beccaria have an important function as safeguards against the possibility of disproportionate punishments and abuse on the part of magistrates (Caro, 2016).

The most prevalent impure versions of retributivism: deontological, consequentialist, threshold, negative weak, victim-conscious and mixed/hybrid retributivist theories can be explored. However, this article explores only the deontological, consequentialist, and mixed/hybrid versions to see if any of them can serve as a complete theory of punishment.

1. CLASSICAL CRIMINOLOGY

Classical criminology grew out of a reaction against the barbaric system of law, punishment, and justice that existed before the French Revolution of 1789. Until that time, there was no real system of criminal justice in Europe. There were crimes against the state, against the church, and against the crown. Some of these crimes were specified; some were not. Judges had discretionary power to convict a person for an act not even legally defined as criminal (Radzinowicz, 1966). Monarchs often issued what were called in French letters de cachet, under which an individual could be imprisoned for almost any reason (disobedience to one’s father, for example) or for no reason at all.

Many criminal laws were unwritten, and those that had been drafted, by and large, did not specify the kind or amount of punishment associated with various crimes. Arbitrary
and often cruel sentences were imposed by judges who had unbounded discretion to decide questions of guilt and innocence and to mete out punishment. Due process in the modern sense did not exist. While there was some official consensus on what constituted crime, there was no real limit to the amount and type of legal sanction a court could command. Punishments included branding, burning, flogging, mutilating, drowning, banishing, and beheading (Sellin, 1976). In England, a person might receive the death penalty for any of more than 200 offences, including what we today call “petty theft.”

Public punishments were popular events. When Robert-Francois Damiens was scheduled to be executed on March 2, 1757 for the attempted murder of Louis XV, so many people wanted to attend the spectacle that window seats overlooking the execution site were rented for high prices. Torture to elicit confessions was common. A criminal defendant in France might be subjected to the *peine forte et dure*, which consisted of stretching him on his back and placing over him an iron weight as heavy as he could bear. He was left that way until he died or spoke. A man would suffer these torments and lose his life in order to avoid trial and therefore conviction so that his lands and goods would not be confiscated and would be preserved for his family. This proceeding was not abolished until 1772 (Maestro, 1973).

Even as Europe grew increasingly modern, industrial, and urban in the eighteenth century, it still clung to its medieval penal practices. With prosperity came an increasing gulf between the haves and the have-nots. Just before the French Revolution, for example, a Parisian worker paid 97 percent of his daily earnings for a 2 kilogram loaf of bread (Rude, 1959). Hordes of unemployed people begged by day and found shelter under bridges by night. One of the few ways in which the established upper class could protect itself was through ruthless oppression of those beneath it, but ruthless operation created more problems. Social unrest grew. And as crime rates rose, so did the brutality of punishment. Both church and state became increasingly tyrannical, using violence to conquer violence.

The growing educated classes began to see the inconsistency in these policies. If terrible tortures were designed to deter crime, why were people committing even more crimes? Something must be wrong with the underlying reasoning. By the mid-eighteenth century, social reformers were beginning to suggest a more rational approach to crime and punishment.

1.1. Retributive Theory

Why should wrongdoers be punished? Most people might respond simply that they deserve it or that, they should suffer in return for the harm they have done. Such feelings are deeply ingrained, at least in many cultures, and are often supported by notions of divine punishment for those who disobey God’s laws. A simple retributivist justification provides a philosophical account corresponding to these feelings: someone who has violated the rights of others should be penalized, and punishment restores the moral order that has been breached by the original wrongful act. The idea is strikingly captured by Immanuel Kant’s claim that an island society about to disband should still execute its last murderer. Society not only has a right to punish a person who deserves punishment, but it has a duty to do so. In Kant’s view, a failure to punish those who deserve it leaves guilt upon the society; according to G.W.F. Hegel, punishment honors the criminal as a
rational being and gives him what it is his right to have. In simple retributivist theory, practices of punishment are justified because society should render harm to wrongdoers; only those who are guilty of wrongdoing should be punished; and the severity of punishment should be proportional to the degree of wrongdoing, an approach crudely reflected in the idea of “an eye for an eye, a tooth for a tooth” (Chabra, 2002). Kant has emphasized on the state’s obligation to punish the person for violating the rights of others and Hegel thinks it is an honor of the criminal to receive what he deserves in terms of punishment and ought to have it as his right.

Close examination of this theory dispels much of its apparent simplicity, reveals some of the tensions between its implications and the practices of actual societies, and exposes its vulnerability to powerful objections. Taken as claiming an intimate connection between moral guilt and justified legal punishment, the retributive theory raises troubling questions about the proper purposes of a state and about any human attempts to equate reward and punishment to moral deserts (Chabra, 2002).

2. UTILITARIANISM

Bentham proposed a precise pseudo mathematical formula for this process, which he called “felicific calculus.” According to his reasoning, individuals are “human calculators” who put all the factors into an equation in order to decide whether or not a particular crime is worth committing. This notion may seem rather whimsical today, but at a time when there were over 200 capital offences, it provided a rationale for reform of the legal system (Barnes, 1972). Bentham reasoned that if prevention was the purpose of punishment, and if punishment became too costly by creating more harm than good, then penalties needed to be set just a bit in excess of the pleasure one might derive from committing a crime, and no higher. The law exists in order to create happiness for the community. Since punishment creates unhappiness, it can be justified only if it prevents greater evil than it produces. Thus, Bentham suggested, if hanging a man’s effigy produced the same preventive effect as hanging the man himself, there would be no reason to hang the man.

2.1. Utilitarian Theory

Utilitarian theories of punishment have dominated American jurisprudence during most of the twentieth century. According to Jeremy Bentham’s classical utilitarianism, whether an act or social practice is morally desirable depends upon whether it promotes human happiness better than possible alternatives. Since punishment involves pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm. A theory of punishment may make the balance of likely consequences central to justification without asserting, as Bentham did, that all relevant consequences are reducible to happiness and unhappiness. It may even claim that reducing future instances of immoral violations of right is itself an appropriate goal independent of the effect of those violations on the people involved (Greenawalt, 1983). Utilitarian believes the punishment is means to an end and seeks to punish the offenders to discourage or deter future wrongdoing. Great jurist Jeremy Bentham who was instrumental behind the utility theory said,
The principal end of punishment is to prevent like offences. What is past is but one act: the future is infinite. The offence already committed concerns only a single individual; similar offences may affect all. In many cases it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offence, the evil of the punishment may be always made to out-weight it (Bentham, 1995).

Reduction or prevention of crime has to be ultimate object of punishment that has to look forward not backward as presented by retributist.

3. POSITIVIST CRIMINOLOGY

During the last eighteenth century, significant advances in knowledge of both the physical and the social world influenced thinking about crime. Auguste Comte (1798-1857), a French sociologist, applied the modern methods of the physical sciences to the social sciences in his six-volume *Cours de philosophie positive* (Course in Positive Philosophy), published between 1830 and 1842. He argued that there could be no real knowledge of social phenomena unless it was based on a positivist (scientific) approach. Positivism alone, however, was not sufficient to bring about a fundamental change in criminological thinking. Not until Charles Darwin (1809-1882) challenged the doctrine of creation with his theory of the evolution of species did the next generation of criminologists have the tools with which to challenge classicism.

The turning point was the publication in 1859 of Darwin’s *Origin of Species*. Darwin’s theory was that God did not make all the various species of animals in two days, as proclaimed in Genesis, but rather that the species had evolved through a process of adaptive mutation and natural selection. The process was based on the survival of the fittest in the struggle for existence. This radical theory seriously challenged traditional theological teaching. It was not until 1871, however, that Darwin publicly took the logical next step and traced human origins to an animal of the anthropoid group – the ape (Darwin, 1859). He thus posed an even more serious challenge to a religious tradition that maintained that God created the first human in his own image.

The scientific world would never be the same again. The theory of evolution made it possible to ask new questions and to search in new ways for the answers to old ones. Old ideas that demons and animals spirits could explain human behaviour were replaced by knowledge based on new scientific principles. The social sciences were born.

The nineteenth-century forces of positivism and evolution moved the field of criminology from a philosophical to a scientific perspective. But there were even earlier intellectual underpinnings of the scientific criminology that emerged in the second half of the nineteenth century.

3.1. Search for Criminal Traits

3.1.1. Biological Determinism

Throughout history, a variety of physical characteristics and disfigurements have been said to characterize individuals of “evil” disposition. In the earliest pursuit of the
relationship between biological traits and behaviour, a Greek scientist who examined Socrates found his skull and facial features to be those of a person inclined towards alcoholism and brutality (Ellis, 1900). The ancient Greeks and Romans so distrusted red hair that actors portraying evil persons wore red wigs. Through the ages, cripples, hunchbacks, people with long hair, and a multitude of others were viewed with suspicion. Indeed, in the middle Ages, laws indicated that if two people were suspected of a crime, the uglier was the more likely to be guilty (Hibbert, 1963).

The belief that criminals are born, not made, and that they can be identified by various physical irregularities is reflected not only in scientific writing but in literature as well. Shakespeare’s Julius Caesar states:

> Let me have men about me that are fat; Sleek-headed men, and such as sleep o’ nights. Yond Cassius has a lean and hungry look; He thinks too much: such men are dangerous.

3.1.2. Psychological Determinism

On the whole, scholars who investigated criminal behaviour in the nineteenth and early twentieth centuries were far more interested in the human body than in the human mind. During that period, however, several contributions were made in the area of psychological explanations of crime. Some of the earliest contributions came from physicians interested primarily in the legal responsibility of the criminally insane. Later on, psychologists entered the field and applied their new testing techniques to the study of offenders.

3.1.3. Sociological Determinism

During the nineteenth and early twentieth centuries, some scholars began to search for the social determinants of criminal behaviour. The approach had its roots in Europe in the 1830s, the time between Beccaria’s *On Crimes and Punishment* and Lombroso’s *The Criminal Man*.

4. **CONTEMPORARY CRIMINOLOGY**

Classical criminologists thought the problem of crime might be solved through limitations on governmental power, the abolition of brutality, and the creation of a more equitable system of justice. They argued that the punishment should fit the crime. For over a century, this perspective dominated criminology. Later on, positivist criminologists influenced judges to give greater consideration to the offender than to the gravity of the crime when imposing sentences. The current era marks a return to the classical demand that the punishment correspond to the seriousness of the crime and the guilt of the offender.

As modern science discovered more and more about cause and effect in the physical and social universes, the theory that individuals commit crimes of their own free will began to lose favour. The positivists searched for determinants of crime in biological, psychological, and social factors. Biologically based theories were popular in the late nineteenth century, fell out of favour in the early part of the twentieth, and emerged again in the 1970s with studies of hormone imbalances, diet, environmental contaminants, and
so forth. Since the studies of criminal responsibility in the nineteenth century centering on the insanity defence and of intelligence levels in the twentieth century, psychiatrists and psychologists have continued to play a major role in the search for the causes of crime, especially after Sigmund Freud developed his well-known theory of human personality. The sociological perspective became popular in the 1920s and has remained the predominant approach of criminological studies.

5. PUNISHMENT

While “the prime objective of punishment in Beccaria’s day was retribution or revenge” (Hostettler, 2011), the rejection of retributivism and of the lex talionis which retributivism often implies is clear in Beccaria’s work. Beccaria writes:

The purpose of punishment ... is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.

Not retribution then – “it is evident that the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already committed” – but deterrence, and the common good, are – for Beccaria – what justifies punishment (Pauley, 1994).

Beccaria’s work was of great inspiration for sovereigns around Europe; for example, Frederick the Great abolished torture; Maria Theresa of Hapsburg outlawed witch-burning and torture; and Leopold II, Duke of Tuscany, abolished death penalty altogether in 1786 – the first state in the Western world to do so (Beccaria, 1764). It is to be remembered that Beccaria himself condemned torture and death penalty.

As one can expect, Beccaria’s efforts toward an enlightened and humane criminal law did not go unchallenged: for example, “the Inquisition forbade the use of Beccaria’s book under penalty of death and it was placed on the Index in 1766” (Hostettler, 2011); Beccaria was portrayed by Church apologists as a “man of a narrow mind, a madman, a stupid imposter, full of poisonous bitterness and calumnious mordacity” (Hostettler, 2011). Neither the Inquisition nor its henchmen, however, managed to stop the impact of Beccaria’s revolutionary ideas; unfortunately, another intellectual giant—and otherwise one of the greatest contributors that mankind has ever had to its cause—took up the flag of retributivism; and so it was that Beccaria’s efforts were overshadowed by Immanuel Kant’s “vindictive folly” (Stella, 2006). The damaging effects of Kant’s theory of punishment are still suffered today at the hands of contemporary retributivists who, enthusiastically, refer to Kant’s—and Hegel’s—theories as the foundations of their arguments.

6. RETRIBUTIVISM

Retributivism is the view that we ought to punish offenders because and only because they deserve to be punished. Punishment is justified, for a retributivist, solely by the fact that those receiving it deserve it. Punishment of deserving offenders may produce beneficial consequences other than giving offenders their just deserts. Punishment may deter future crime, incapacitate dangerous persons, educate citizens in the behavior
required for a civilized society, reinforce social cohesion, prevent vigilante behavior, make victims of crime feel better, or satisfy the vengeful desires of citizens who are not themselves crime victims. Yet for a retributivist these are a happy surplus that punishment produces and form no part of what makes punishment just; for a retributivist, deserving offenders should be punished even if the punishment produces none of these other, surplus good effects (Moore, 1993).

Rawls proposes to ‘reconcile’ retributivism with utilitarianism concerning the problem of punishment (Morris, 1968). By ‘retributivism’ he means the view that:

Punishment is justified on the grounds that the wrongdoing merits punishment. It is morally fitting that a person who does (Davis, 1996), wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act (Hart, 1968).

By a utilitarian view of punishment, Rawls means the view that:

On the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable by reference to the probable consequences of maintaining it as one of the devices of the social order. ... If punishment can be shown to promote effectively the best interest of society it is justifiable, otherwise it is not (Michael, 1992).

These are the respective views on punishment that Rawls seeks to reconcile. But with what notion of the nature of punishment is Rawls working? He avers that:

A person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offence and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offence (Hart, 1968).

With these definitions in mind, it is clear, according to Rawls, that there is at least a prima facie conflict between the retributivist notion that only the guilty (Morris, 1988) deserve to be punished and the utilitarian idea that if punishment is justifiable, then it must be shown to promote the interests of society. The reason why the latter point seems to conflict with the former one is that it is conceivable that an innocent person may be used as a mere means to the state’s end of, say, social stability.

Rawls’ way of resolving this apparent conflict is to argue that these respective models of punishment are in fact answering different questions (at variant levels) regarding the debate about the justification of punishment. He writes:

... utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases (Rawls, 1999).
Among other things, this means that utilitarianism is concerned with justifying the institution of punishment itself, while retributivism is concerned with answering the question of how to justify certain practices of punishment (for instance, matters of proportional punishment). Rawls explains this point in terms of the different roles a legislator plays from that of a judge in relation to these different levels of punishment justification. He writes:

... the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, qua judge, sounds like the retributive view; the justification of what the (ideal) legislator does, qua legislator, sounds like the utilitarian view (Rawls, 1999).

Thus, Rawls states that these two views on punishment are reconciled by the ‘time-honoured’ device of making them apply to different situations or problems of punishment (Rawls, 1999).

6.1. Retributivist Accounts

Whereas consequentialist accounts regard punishment as justified instrumentally, as a means to achieving some valuable goal (typically crime reduction), retributivist accounts contend that punishment is justified as an intrinsically appropriate, because deserved, response to wrongdoing (Berman, 2011).

Theorists have distinguished ‘positive’ and ‘negative’ forms of retributivism. Positive retributivism holds that an offender’s desert provides a reason in favour of punishment; essentially, the state should punish those found guilty of criminal offences to the extent that they deserve, because they deserve it. Penal desert constitutes not just a necessary, but an in-principle sufficient reason for punishment (only in principle, however, since there are very good reasons — to do with the costs, both material and moral, of punishment — why we should not even try to punish all the guilty). Negative retributivism, by contrast, provides not a positive reason to punish, but rather a constraint on punishment: punishment should be imposed only on those who deserve it, and only in proportion with their desert. Because negative retributivism represents only a constraining principle, not a positive reason to punish, it has been employed in various mixed accounts of punishment, which endorse punishment for consequentialist reasons but only insofar as the punishment is no more than is deserved (Duff, Hoskins, & Zachary, 2017).

7. DEONTOLOGICAL RETRIBUTIVISM

Deontological retributivism, like pure retributivism, views desert as both a necessary and sufficient justification of punishment. Deontological retributivism focuses on the blameworthiness of each moral agent, considering each offender individually without accounting for other parties. Because deontological retributivists evaluate the desert of each individual, they would reject certain prosecutorial techniques that are designed to maximize punishment, such as plea bargaining. For example, an offer of immunity to one offender in exchange for his testimony against his confederates would be prohibited under deontological retributivism, because the testifying offender must be punished for his own
wrongdoing, even if such an offer would result in the conviction and punishment of his confederates (Moore, 1997).

7.1. Deontological Theories

Deontological theories judge the morality of choices by criteria different from the states of affairs those choices bring about. The most familiar forms of deontology, and also the forms presenting the greatest contrast to consequentialism, hold that some choices cannot be justified by their effects—that no matter how morally good their consequences, some choices are morally forbidden. On such familiar deontological accounts of morality, agents cannot make certain wrongful choices even if by doing so the number of those exact kinds of wrongful choices will be minimized (because other agents will be prevented from engaging in similar wrongful choices). For such deontologists, what makes a choice right is its conformity with a moral norm. Such norms are to be simply obeyed by each moral agent; such norm-keepings are not to be maximized by each agent. In this sense, for such deontologists, the Right is said to have priority over the Good. If an act is not in accord with the Right, it may not be undertaken; no matter the Good that it might produce (Alexander, Larry and Moore, & Michael, 2016).

Analogously, deontologists typically supplement non-consequentialist obligations with non-consequentialist permissions (Scheffler, 1982). That is, certain actions can be right even though not maximizing of good consequences, for the rightness of such actions consists in their instantiating certain norms (here, of permission and not of obligation). Such actions are permitted, not just in the weak sense that there is no obligation not to do them, but also in the strong sense that one is permitted to do them even though they are productive of less good consequences than their alternatives (Moore, 2008). Such strongly permitted actions include actions one is obligated to do, but (importantly) also included are actions one is not obligated to do. It is this last feature of such actions that warrants their separate mention for deontologists.

8. CONSEQUENTIALIST RETRIBUTIVISM

Consequentialist retributivism is the first version of retributivism examined in this article that softens the vengeful (Christopher, 2002) tone of pure retributivism by drawing on consequentialism. Consequentialist retributivists are motivated by retributivist principles of giving just deserts, but are willing to use consequentialist means to maximize desert-based punishment. Perhaps consequentialist retributivism is best explained in contrast to deontological retributivism. Deontological retributivists treat each person individually when determining whether to punish. By contrast, consequentialist retributivists seek to maximize desert collectively (Christopher, 2003-2004).

Suppose a prosecutor is prosecuting three guilty persons. If the prosecutor offers immunity to one of the guilty persons in exchange for his testimony against his two confederates, then the prosecutor will successfully convict the two. However, by offering immunity to the one, the prosecutor is forgoing the opportunity to punish a guilty person. If the prosecutor is a deontological retributivist, he will not offer immunity. An offer of immunity violates his duties to treat each person as an individual—without regard to others—and to punish all guilty persons. A consequentialist retributivist, on the other hand, would offer immunity to that guilty person in order to punish the two. The consequentialist
retributivist will view this offer of immunity as having good, desert-based consequences. By sacrificing one desert-based punishment, he will secure two desert-based punishments. The net gain of desert-based punishments justifies forgoing the punishment of the particular guilty actor (Christopher, 2003–2004).

As demonstrated by the bargain justice dilemma (Christopher, 2003–2004), consequentialist retributivists are motivated by a desire to maximize desert. Consequentialist retributivists seek a net gain of desert-giving. In other words, forgoing punishment of one to convict and punish two is justified under consequentialist retributivism, but the same cannot be said of forgoing punishment of one to punish one.

8.1. Consequentialist Theories

Many people, including those who do not take a consequentialist view of other matters, think that any adequate justification of punishment must be basically consequentialist. For we have here a practice that inflicts, indeed seeks to inflict, significant hardship or burdens: how else could we hope to justify it than by showing that it brings consequential benefits sufficiently large to outweigh, and thus to justify, those burdens? We need not be Benthamite utilitarian to be moved by Bentham’s famous remark that “all punishment in itself is evil. …[I]f it ought at all to be admitted, it ought only to be admitted in so far as it promises to exclude some greater evil” (Bentham, 1789). However, when we try to flesh out that simple consequentialist thought into something closer to a full normative account of punishment, problems begin to appear.

The most familiar line of objection to consequentialist penal theories contends that consequentialists would be committed to regarding manifestly unjust punishments (the punishment of those known to be innocent, for instance, or excessively harsh punishment of the guilty) to be in principle justified if they would efficiently serve the aim of crime reduction: but such punishments would be wrong, because they would be unjust (McCloskey, 1957).

9. MIXED/HYBRID RETRIBUTIVISM

In an apparent effort to avoid the criticisms of either broad justification of punishment–consequentialism and retributivism – many scholars have devised mixed or hybrid theories incorporating aspects of both broad theories (Christopher, 2002). This article discusses one of the most prominent recent versions of mixed retributivism.

Mitchell Berman presents a recent mixed theory of punishment, which he terms “an integrated dualist theory of punishment”. Rather than taking Hart’s approach and dividing the stages of punishment and questions presented at those stages into categories and assigning retributivist or consequentialist justifications to each category, Berman divides cases into two categories. These categories are “core cases” and “peripheral cases.” Core cases are cases that are correctly adjudicated so the person being punished is factually and legally guilty. Because core cases involve punishment of an actual offender for an actual offense, the punishment in these cases can be justified under retributive terms. By contrast, peripheral cases are situations where punishment is imposed upon a person who is not factually guilty (e.g., where there is a mistaken identity) or legally guilty (e.g., the
conduct fails to satisfy each element of the criminal offense). Peripheral cases, which “all involve genuine . . . error,” can be justified under consequentialist terms. A third type, which Berman calls “degenerate cases,” involves intentional punishment of known innocents. Because these punishments infringe on the rights of the innocent who do not deserve to be punished, these cases are not justifiable (Berman, 2008).

9.1. Mixed/Hybrid Accounts

Given the challenges faced by pure consequentialist and pure retributivist accounts, some theorists have sought to make progress on the question of punishment’s justification by incorporating consequentialist and non-consequentialist elements into their accounts. Perhaps the most influential example of a mixed account begins by recognizing that the question of punishment’s justification is in fact several different questions, which may be answered by appeal to different considerations: we can argue, first, that the ‘general justifying aim’ (Hart, 1968) of a system of punishment must lie in its beneficial effects, but second, that our pursuit of that aim must be constrained by non-consequentialist principles that preclude the kinds of injustice alleged to flow from a purely consequentialist account. A simple version of this approach identifies certain side-constraints to which our pursuit of the consequential benefits of punishment must be subject: constraints that forbid, for instance, the deliberate punishment of the innocent, or the excessively harsh punishment of the guilty (Hart, 1968 & Monson, 1988). Critics have charged that this strategy is ad hoc or internally inconsistent (Kaufman, 2008). In addition, retributivists argue that it relegates retributivism to a merely subsidiary role, as a basis for side-constraints, when in fact giving offenders their just deserts is a (or the) central rationale for punishment (Wood, 2002).

10. JUSTIFICATION

The central question asked by philosophers of punishment is: What can justify punishment? More precisely, since they do not usually talk much about punishment in such contexts as the family or the workplace (Zaibert, 2006), their question is: What can justify formal, legal punishment imposed by the state on those convicted of committing criminal offences?

What then are we to justify in justifying punishment? The search for a precise definition of punishment that exercised some philosophers (Scheid, 1980) is likely to prove futile: but we can say that legal punishment involves the imposition of something that is intended to be both burdensome and reprobative, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so.

These two features, that punishment is intentionally burdensome and condemning, make the practice especially normatively challenging. How can a practice that not only burdens those subjected to it but aims to burden them, and which conveys society’s condemnation, be justified?

We should not assume, however, that there is only one question of justification, which can receive just one answer. As Hart famously pointed out (Hart, 1968), we must distinguish at least three justificatory issues. First, what is the ‘general justifying aim’ of a system of punishment: what justifies the creation and maintenance of such a system – what good can it achieve, what duty can it fulfil, what moral demand can it satisfy? Second,
who may properly be punished: what principles or aims should determine the allocations of punishments to individuals? Third, how should the appropriate amount of punishment be determined: how should sentencers go about deciding what sentence to impose? (One dimension of this third question concerns the amount or severity of punishment; another, which is insufficiently discussed by philosophers, concerns the concrete modes of punishment that should be available, in general or for particular crimes.) It might of course turn out that answers to all these questions will flow from a single theoretical foundation – for instance, from a unitary consequentialist principle specifying the good that punishment should achieve, or from some version of the retributivist principle that the sole proper aim of punishment is to impose on the guilty the punitive burdens they deserve. But matters might not be as simple as that: we might find that quite different and conflicting values are relevant to different issues about punishment; and that any complete normative account of punishment will have to find a place for these values – and to help us find some no doubt uncomfortable compromises between them when they conflict.

10.1. Justification of Retributivism

The most important sort of justification is the moral justification of retributive punishment. This sort of justification of retributivism is a moral claim: our obligation to punish offenders so as to give them their just deserts is justified in this sense if the practice meets whatever epistemic standards we impose to justify any of our moral beliefs. If we are consequentialists about morality, and if there are other goods to be maximized besides giving the guilty their due, then we may seek to justify this retributive value by its contribution to the maximizing of some other good(s) that we accept more readily than we accept the good of retributive punishment. If we are not consequentialists about morality, or if our consequentialism admits of no goods that are more basic than the good of achieving retributive justice, then our mode of moral justification cannot be in terms of some other value served by retributive punishment. Rather, we must justify retributivism in whatever way we justify actions and practices as being intrinsically right. However we justify the intrinsic rightness of not punishing the innocent, for example, is how we should justify the intrinsic rightness of punishing the guilty, on this general view of morality.

10.2. Justification of Deontological or Consequentialist

For several decades philosophers have (over-) simplified the picture of possible forms of normative justification in ethics, policy formation, and law into two alternatives: consequentialist and deontological: They have also undertaken to apply this distinction to the justification of punishment. By a purely consequentialist theory, we mean a theory that imposes no constraints on what counts as the fourth step in justification i.e. punishment is imposed on persons who are believed to have acted wrongly (the basis and adequacy of such belief in any given case may be open to dispute). The pure consequentialist views punishment as justified to the extent that its practice achieves (or is reasonably believed to achieve) whatever end-state the theorist specifies (such as the public interest, the general welfare, the common good). Most philosophers would reject this view in favour of introducing various constraints, whether or not they can in turn be justified by their consequences. Thus, a most important part of the theory of punishment
is the careful articulation of the norms that provide these constraints on the practice and their rationale (Bedau, Hugo, & Kelly, 2015). The best justification of punishment is also not purely retributivist. The retributive justification of punishment is founded on two a priori norms (the guilty deserve to be punished, and no moral consideration relevant to punishment outweighs the offender’s criminal desert) and an epistemological claim i.e. we know with reasonable certainty what punishment the guilty deserve (Primoratz, 1989 & Moore, 1987). It is arguable, however, whether the guilty always deserve to be punished; it is also arguable whether, even when they do they ought always to get what they deserve; and it is further arguable whether when they ought to be punished as they deserve, the punisher always knows what it is they deserve (Bedau, 1978). We cannot meet these challenges to the deontological retributivist by insisting that punishment is nothing more than a necessary conceptual consequence of living under the rule of law (Fingarette, 1978).

10.3. Justification of Mixed/Hybrid Retributivism

Justification of Mixed/Hybrid retributivism requires only a brief discussion. Because Berman’s theory separates punishments into separate “cases,” his theory operates under the separatist presumption that the person being punished is a separate individual (actual offender). Thus, Berman’s theory fails to justify punishment if it does not operate under the separatist presumption. The proponent of the Berman theory must then forgo punishment of the actual offender. This exposes Berman’s theory to the same criticisms leveled against other impure versions of retributivism, including excessive leniency by requiring the release of actual offender.

Conclusion

Retribution is commonly taken as an alternative to a consequentialist justification of punishment. Consequentialist version of retributivism may appear desirable because the inevitable susceptibility of error in punishment creates a difficulty for deontological retributivism. Nevertheless, consequentialist version of retributivism appears impossible, at least if we insist that the meting out of just deserts is the only beneficial consequence of punishment relevant to its justification. Though, consequentialists would regard manifestly unjust punishments to be in principle justified if they would serve the aim of crime reduction, however such punishments would be wrong, as they would be unjust. Thus, no version of retributivism can serve as a complete theory of punishment. Therefore, it is suggested that we should aim to replace legal punishment rather than justify it.

References


