

Phil 108, March 20, 2014
Tadros, *The Ends of Harm*, Ch. 2, 3 (skip Sect. I), 4 (skip Sect. IV and V)

What justifies punishment?

After all, it:

- (i) involves the *intentional* infliction of *suffering* on the punished and
- (ii) *costs* everyone else a lot, which might be spent on health, education, housing, etc.

At least two questions here:

1. What *positive reasons*, if any, are there to punish? What good does it do?
2. What *restrictions*, if any, are there on acting for these positive reasons? By now in this course we know that (or that many people think that!) the mere fact that an action would do some good does not necessarily make it permissible.

Two competing answers to the question of positive reasons:

Punishment is *intrinsically* valuable = retributivism

Offenders deserve to suffer in proportion to the seriousness of their crimes. So, it is intrinsically valuable—a good thing in itself—that they so suffer.

Punishment is *instrumentally* valuable = deterrence

It is bad if crimes are committed. Credible threats of punishment deter people from committing crimes. So punishments are inflicted on criminals so as to sustain the credibility of the deterrent (to show that when the state makes a threat, it means business).

Two competing answers to the question of restrictions:

Consequentialism: Whether to harm someone depends only on whether it would bring about (impersonally) better consequences

Nonconsequentialism: Whether to harm someone depends also on other factors. Importantly, it depends on the:

Means Principle (compare DDE): It is wrong to harm a person as a means to a greater good.

Why does retributivism seem attractive?

1. *Common assumption: retributivism is a way, and the only way, to avoid consequentialism:*

- If you are a retributivist, then you need not be a consequentialist.
- If you are deterrence theorist, then you must be a consequentialist.

First—as Tadros will argue—a deterrence theorist can be a nonconsequentialist.

Second, retributivism, by itself, doesn't avoid consequentialism. Retributivism only says that, *on the list of good consequences*, we should include deserved suffering. It does not place any *restriction* on what we may do in order to bring about good consequences.

It is often said that only retributivism explains why it is wrong to punish an *innocent* person. This is because, according to retributivism, when we punish an innocent person, we bring about something bad: undeserved suffering. But this is doubly mistaken:

- First, a deterrence theorist—indeed, a utilitarian—can agree that when we punish an innocent person, we bring about something bad: namely, suffering (which is bad whether deserved or not).
- Second, even if the undeserved suffering of the innocent person is bad, it might be outweighed by the good it does. In particular, it may deter crime that would make other innocent people suffer undeservedly. So, so long as we are permitted to bring about a greater good, then we are permitted to punish the innocent even according to retributivism.

If we *add nonconsequentialist constraints* on punishing the innocent, or punishing disproportionately, then retributivism need not license punishing the innocent, or punishing disproportionately. But then neither need deterrence theory license punishing the innocent or punishing disproportionately!

2. Intuition: There is something wrong when wrongdoers don't suffer.

Retributivism would explain this:

What is wrong is that we have failed to bring about the good of deserved suffering.

But Tadros gives another explanation:

1. When someone commits a crime, he incurs a duty to undo the effects of the crime.
2. If someone complies with such a duty, then he is not happy.
3. So, if a criminal is happy, then, probably, he has not complied with the duty.

So what is wrong, when a criminal is happy, is that he has not complied with the duty—not that it is bad in itself that a criminal is happy.

Objection: Why do wrongdoers incur, as a result of their crime, a burdensome duty, unless they deserve to suffer?!

Tadros's reply: Similar to McMahan's justification of self-defense:

1. Someone has to bear burdens: either the victim—if there is *no* duty to undo the effects of the crime—or the criminal—if there *is* a duty to undo the effects of the crime.
2. Who should bear the burdens? The person who had opportunity to avoid those burdens by choosing appropriately.
3. The victim had no opportunity to avoid those burdens; they were just imposed on him.
4. The criminal had opportunity to avoid those burdens; he could have chosen appropriately.
5. So, the criminal should bear the burdens; the criminal has a duty to undo the effects of the crime.

It is not that the criminal deserves to suffer for doing something wrong: that it is a good thing that he suffers. Instead, it's a bad thing that anyone suffers. But it is fair that, if someone has to suffer, it's the person who had the opportunity to avoid it.

Objections to retributivism:

1. Requires "free will"

- Criminals deserve to suffer only if they have "ultimate" responsibility—"characters or actions are not completely caused by a set of facts that preceded them and that [they]

could not possibly be responsible for.” (No knock-down argument for this, but Tadros finds it plausible.)

- But we do not have ultimate responsibility. So it does not make sense that criminals deserve to suffer.

2. *Criminal wrongdoing is not the right “desert-basis,” punishment is not the right “deserved outcome”*

- “Desert basis”=what is it about a person that makes it the case that she deserves to suffer, when she does deserve to suffer.
- “Deserved outcome”=what the person deserves to suffer

What would have to be the case for our system of punishment to be justified, according to retributivism:

- Desert basis=crime
- Deserved outcome=punishment

What seems more plausible: the “whole life view”

- Desert basis=virtuous or vicious character or actions over a whole life
- Deserved outcome=happiness or unhappiness over a whole life.
 - Why not use scarce resources to reward people for good deeds, rather than punish people for bad deeds?
 - Suppose people are happier than they deserve to be. Should they be punished to bring their happiness down to the right level?
 - Suppose someone is good but incurably miserable. Should we encourage them to do a bad deed, so that there will be a match between their happiness and their virtue?
 - Suppose someone is very depressed, but commits a crime. Should he not be punished, because his happiness level is already low?

3. *The only plausibly good way to make criminals’ lives worse is to make them suffer*

There are lots of ways to make criminals’ lives worse:

- suffering
- bad character
- no close, meaningful relationships
- no self-knowledge

But no one thinks that punishment should worsen criminals’ characters, or relationships, or self-knowledge. Only that it should cause them to suffer. Why?

Moreover, “humane” punishment, such as imprisonment, tends to undermine these other things. So retributivism seems to argue in favor of “inhumane” punishments, such as flogging, which cause only suffering. But this is absurd.

Review Questions:

1. Is Bentham a deterrence theorist? Is he a consequentialist? How might the answers explain why so many assume that all deterrence theorists must be consequentialists?

2. “Only retributivism explains why *disproportionate* punishment is wrong. This is because, according to retributivism, when we punish disproportionately, we bring about something bad: undeserved suffering, suffering above and beyond what that person deserves.” How would Tadros respond? (That is, would he agree that a deterrence theorist can’t say something similar? Would he agree that this explanation works?)