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Punishment: The Future

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Abstract

A companion to "Punishment: Consequentialism" and "Punishment: Nonconsequentialism", which examine attempts to justify punishment as a state institution, this paper considers possible alternatives to punishment. On the assumption that there are two elements to punishment, an element of condemnation and of hard treatment, the paper considers first, the alternative of condemnation without hard treatment, and secondly, of hard treatment without condemnation. The paper then looks ahead to possible developments in thinking and theorising about punishment.

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INTRODUCTION

The difficulties in trying to justify punishment, whether on consequentialist grounds, nonconsequentialist grounds, or some combination of the two (see "Punishment: Consequentialism" and "Punishment: Nonconsequentialism"), raises the question not just of reform, of alternative forms of punishment, but more radically, of abolition and alternatives to punishment (Golash: ch. 8; Duff 2001: ch. 5; Duff 1996: 52-3, 67-87; Duff 1992; Boonin: ch. 5).

Alternatives to punishment can be divided into those which reject or abandon the element of hard treatment or sanction, and those which reject or abandon the element of condemnation or censure. (To avoid repetition, reference will generally be made only to condemnation rather than censure as well, and similarly only to hard treatment rather than also sanctions.) In relation to the former type of alternative, however, it must be noted that there is an unavoidable element of hard treatment in condemnation, since condemnation is itself unpleasant and unwanted. As John Tasioulas points out, "[e]ven purely formal censure constitutes hard treatment, since condemnation is meant to be experienced as unwelcome, a bringing up short of the wrongdoer, a drawing attention to, and denunciation of, his moral wrong-doing" (Tasioulas 295). The distinction between condemnation and hard treatment must be "re-cast", then, as that between condemnation including the "hard treatment...already entailed by the most lenient means of communicating censure" (Tasioulas 296), and forms of hard treatment not so restricted.

Furthermore, a theory of punishment may hold that punishment requires not just such an unavoidable element of hard treatment but some higher, threshold level of hard treatment. Measures which fail to achieve this threshold do not, then, according to the theory in question, constitute punishment. A similar point may, in principle at least, be made in relation to condemnation, namely

that for a measure to constitute punishment, this element must satisfy some threshold level which the theory in question lays down. However, estimating degrees of condemnation seems to present even greater difficulties than estimating degrees of hard treatment. Complications introduced by either point will be ignored here. The obvious truth can simply be stated, that whether a measure constitutes an alternative form of punishment as opposed to an alternative to punishment depends entirely on what is taken to constitute punishment.

This paper takes the two types of alternatives to punishment, of condemnation without hard treatment, and hard treatment without condemnation, in turn. The paper then considers some possible developments in thinking and theorising about punishment.

CONDEMNATION WITHOUT HARD TREATMENT

To take first condemnation without hard treatment, or at least, without hard treatment beyond the minimum amount entailed by the condemnation itself (or alternatively, with insufficient hard treatment to constitute punishment according to the theory in question), consider to start with verbal or written reprimands, formal condemnation and purely symbolic forms of punishment. (As an instance of the last-mentioned, consider Duff's example of a condemnatory message on the bathroom mirror, forcing the 'punishee' to look at it every day (Duff 2000: 419).)

The most basic response to wrongdoing, however, as Hampton points out, "involves an apology followed by the attempt to 'make it up' to the one we have hurt" (Hampton: 1697-8). (Hampton actually refers to an apology as "the most common and successful *retributive* response" (emphasis added) to wrongdoing, a point which will become relevant shortly, however the qualification "retributive" can be ignored for the time being.)

Reference could also be made to the *Apology Acts* of various Canadian jurisdictions, such as Ontario, British Columbia and Manitoba, though their function is very limited. These Acts do not lay down any requirement that convicted criminals apologise for their wrongdoing. Rather, they only permit potential or actual defendants to civil actions to apologise without the risk of this affecting their liability.

Consider also requirements to apologise before truth and reconciliation commissions, although such requirements are properly treated with scepticism, because of the obvious incentive to make insincere apologies. (Apology requirements were accordingly excluded from the South African Truth and Reconciliation Commission (Murphy 2007: 440).)

Shaming measures must also be considered, although it is only milder forms of shaming that are plausibly alternatives to, rather than alternative forms of, punishment. Again, however, this depends entirely on what measures – measures of what level of condemnation and hard treatment – are taken to constitute punishment. The contention that shaming measures do not constitute punishment lies more specifically in the claim that, although clearly the condemnation element of punishment is satisfied, the hard treatment element is not satisfied.

Two examples of shaming measures, which presumably would generally – but not universally – be considered as cases of alternative forms of punishment rather than alternatives to punishment, are "a shoplifter being required to parade in front of the store wearing a placard: 'I stole from this store' [, and] a sex offender [being] required to post a sign on his house and car, 'Dangerous Sex offender – No Children Allowed'" (Golash 168, citing Johnstone 124, who in turn cites Garvey 734). Such forms of shaming have understandably been criticised for demeaning and humiliating offenders (Golash calls them "horror stories" (Golash 168)), and not just humbling them.

It is beside the point if shaming measures succeed in deterring offenders, whether actual offenders

specifically subjected to such measures or potential offenders more generally. The aim is not to deter by demeaning and humiliating. Shaming measures are to communicate a moral message to offenders, to engage their presumably under-developed sense of themselves as worthy members of a moral community. Shaming measures are not, as such, to appeal to offenders just as rational calculators concerned solely to maximise self-interest. In short, shaming measures are supposed to motivate morally, not prudentially.

John Braithwaite, a prominent proponent of the idea of restorative justice, argues that criticisms such as those mentioned above hold only of “disintegrative shaming” or stigmatization, not “reintegrative shaming” (Braithwaite 1989: 55). Restorative justice programs and methods draw on traditional, indigenous methods of community justice, such as “North American sentencing circles, indigenous Canadian peacemaking processes, and Maori justice” (Zedner 2004: 103), and typically involve conferences attended by both offender and victim, and their family and supporters – indeed, rather than specific parties, “all those deemed to have an interest, however tangential” (*Ibid*). The challenge for their proponents is to show that such measures actually reintegrate and not just shame.

However, this raises the question of what restorative justice *is* (Zedner 2004: 101-109), and in particular, what distinguishes it from retributive justice (Zedner 1994). The question is pertinent because retributive justice proponents have supported programmes which seem very similar to some of those carried out in the name of restorative justice. Consider, for instance, punishment programmes for sex offenders which aim, through intensive counselling and aggressive role-play in which offenders are placed in the position of their victims, to force them to face up to the wrong they have done (Hampton: 1689-1690). Hampton is clear that “these programmes are intended as an experience in retribution, not rehabilitation” (*Ibid*) – and neither, presumably, restorative justice. Nevertheless, they certainly emphasise restoration of the offender to the moral community, raising the question of why they are not experiences or exercises in restorative, as much as retributive, justice.

One view of restorative justice, then, sees it as scarcely radically new, but either identical with or reducible to the very type of justice many of its proponents see it as superseding, namely retributive justice. Less flattering still, is the view that it is no form of justice at all, but merely a means of bringing about certain consequences to do with restoring relations between offender, victim and the community.

However, a far more positive view sees restorative justice as, far from excluding or rivalling retributive justice, compatible with and complementing it. On this view, the two types of justice have their respective roles to play in an overall theory of punishment, retributive justice looking back to the crime, requiring offenders to receive what is their due, their just deserts, whereas restorative justice looks forward to the restoration of offenders to full membership of their respective moral communities, something which has been denied or suspended in virtue of their criminal wrongdoing. (Note, however, that restorative justice is not purely or exclusively forward-looking, but is in part backward-looking. It cannot be solely the former, since in order to look forward to what must be done to restore the relationships severed or damaged by the crime, it is necessary to look back to see what these relationships were before being so severed or damaged. (A similar point is made in relation to restitution in “Punishment: Consequentialism”: “Restitution”.))) Duff’s theory of punishment (see “Punishment: Nonconsequentialism”: “Communication and Retribution Again”), as he himself suggests (Duff 2008: 13-14), could be seen as an attempt to integrate retributive and restorative justice, and the various considerations, whether backward-looking or forward-looking, they respectively acknowledge.

HARD TREATMENT WITHOUT CONDEMNATION

The other alternative to punishment is hard treatment without condemnation (or with insufficient condemnation) to satisfy the threshold requirement that the theory in question lays down for this element of punishment). If the distinction Feinberg says is drawn in ordinary moral practices between punishment and non-punitive, “mere penalties” (Feinberg 398) can be made out, such penalties are the closest alternative to punishment, its nearest relative so to speak, in possessing the element of hard treatment, but not censure. Penalties can be just as severe as punishment, Feinberg claims, even if generally they are not, so relative severity cannot be the basis of the distinction between them (though the paper returns to this claim shortly). Rather, Feinberg explains, the difference between the two lies in punishment possessing an expressive function which penalties lack (Feinberg 400).

But why suppose that penalties do not have an expressive function as well? Certainly, punishment is generally recognised to have a communicative function (“Punishment: Nonconsequentialism”: “Communication and Retribution Again”). One could speculate whether, if writing later, Feinberg would say that punishment possesses a *communicative* function that penalties lack – clearly, it would be a function of communicating a moral, and not (or not just) a prudential, message. The expressive function of punishment was, for him, certainly a *moral* expressive function.

It may be suggested, then, that what distinguishes punishment from “mere penalties” is that, whereas the latter communicate only a prudential message, the former communicate a moral message. However, “mere penalties” appear to communicate a moral message too, even if not for wrongdoing of the same type or force as punishment. They are still imposed for wrongdoing, if not of the same degree of seriousness as the wrongs for which punishment is imposed. Penalties do not convey solely a prudential message, communicating to the recipient merely that he has miscalculated the relevant risks. One suggestion is that they are typically imposed for regulatory wrongs (“*mala prohibita*”) rather than genuinely criminal wrongs (“*mala in se*”). The parallel medieval distinction between “*crimina*” and “*contraventions*” (Hildebrandt 58) may also be considered.

According to this line of reasoning, like punishments, “mere penalties” are not just communicative, but communicate morally and not just prudentially. If one is to maintain the distinction between punishment and penalties, one must look elsewhere.

An obvious suggestion is that punishment and penalties communicate different types of moral message, say, punishment a retributive justice message, and penalties a distributive justice message. However, this suggestion presupposes that retributive justice is distinct from and does not reduce to distributive justice, which some have disputed (Sadurski, Wood 549-551).

Another suggestion, drawing upon Hampton’s distinction between wrongs that do and do not cause moral injury (Hampton: 1661-85; see “Punishment: Nonconsequentialism”: “Retribution”), is that punishment is in order only when moral injury is caused, otherwise at most penalties are justified, or perhaps only civil damages. However, as Hampton herself argues, retributive responses need not be punitive. The mere fact of causing moral injury cannot then be sufficient to justify criminalisation. The relevant conduct must cause (as suggested in “Punishment: Nonconsequentialism”: “Retribution”), a certain degree or amount of moral injury. Some notion is required of a threshold of moral injury, sufficient to warrant criminalisation of the responsible conduct – where the threshold is not satisfied, at most penalties are warranted. However, as noted, Hampton does not consider the issue of degrees of moral injury, and hence neither any such threshold.

The alternative to looking for the distinction between punishment and penalties in the element of condemnation, is to try to locate it in the element of hard treatment. Even if penalties can be as hard as punishment, as Feinberg appears to grant (as noted above), it is another question whether *justified* penalties can be as hard as *justified* punishment. The justified severity of penalties, it may be suggested, cuts out at some point, beyond which the measure in question can only be justified as

punishment.

Furthermore, an obvious place for drawing the line suggests itself, namely at the level of financial measures such as fines, as opposed to what could be called “personal” measures such as capital and corporal punishment, and imprisonment. The former at most penalise, it could be argued, whereas the latter undeniably punish. (It is anomalous, therefore, to refer to the “death *penalty*”.) Fines can be paid by someone else, and so suffered vicariously. Those with sufficient means do not *suffer* monetary penalties at all, but quite literally, pay them with impunity. If it is objected that this ignores possible stigmatising effects of penalties, it need only be noted that, even where they exist, they are not of the same order as with punishment. Indeed, with corporations, the problem is to prevent monetary penalties simply being written off as a cost of doing business.

The suggestion, then, is that personal measures, such as those just mentioned, are so severe that they could only reasonably be justified as punishment (that is, if punishment can be justified at all), not penalisation. This is not to suppose, of course, that the distinction between personal and “merely financial” measures is always clear-cut. Financial interests obviously can be personal interests, as in the case of requiring the means to pay for an expensive life-saving operation. Someone who is denied the chance of such an operation because of theft or fraud obviously has a personal, and not just financial interest, set back. On the other hand, some actions that affect the victim “personally” are too trivial to raise any question of an *interest* being set-back. Indeed, in such a case it seems inappropriate to use the term “victim” at all. Consider a very minor assault, involving minimal application of force (so minimal, say, that the supposed victim is not even aware of it). Property interests are in some circumstances obviously personal interests and in other circumstances just financial interests. Contrast having one’s home destroyed by fire (or, indeed, the example just given, of being robbed or defrauded of the means to pay for a life-saving operation) with, at the other extreme, the theft of a dollar from a millionaire.

To move from punishment and penalties as responses to wrongful conduct, to the wrongful conduct itself, the suggested distinction between punishment and “mere penalties”, on the basis of the type and degree of hard treatment they involve, appears to reflect an important substantive distinction between two types of wrongful conduct. This distinction is clear in principle if not always in practice, namely that between conduct which sets back personal interests as opposed to conduct which sets back only financial interests.

The fundamental difference between punishment and “mere penalties”, on this reasoning, lies not in the separate functions they supposedly perform (for instance, punishment, but not “mere penalties”, performs an expressive function). Rather, it lies in their being justifiably imposed (insofar as punishments, and perhaps even penalties, are justifiably imposed at all) for very different types of moral wrongs (that is, cast in suitable legal form), namely those which set-back personal interests in the case of punishment, and those which set back only financial interests in the case of penalties. It is a substantive moral distinction that is at issue, not one of function.

LOOKING AHEAD

Obviously, the justification of punishment will remain a topic of intense interest and concern. The moral challenge the practice presents, especially as a state institution, demands no less. Where, however, is debate likely to go from here?

One prominent theme is the growing complexity of theories of punishment, as theorists moved beyond exclusively or predominantly retributive or utilitarian (or harm-reductivist) approaches, first to dualist theories which set out to combine them, and then more expansively to pluralist theories which embrace other considerations as well, such as rehabilitation and restitution, and also denunciatory, expressive, and communicative functions. For some considerable time, the search has been on for a comprehensive theory that integrates all relevant elements and considerations, articulating the functions they perform and the relations between them, demonstrating how they

genuinely cohere – as opposed to merely constituting “ad hoc” imports to deal with gaps and deficiencies in the theory in question as they become apparent, with little regard for its unity and overall integrity.

On the other hand, bucking the trend towards growing complexity and sophistication, is the development of theories that concentrate on specific harm-reductive or utilitarian means, elevating them to ends in their own right. Consider rehabilitation, and more recently deterrence theories (Ellis), in particular, as advanced by advocates of the economic analysis of law (Posner).

And perhaps this trend needed bucking. The more complex (or just complicated) a theory of punishment becomes, the more qualifications and concessions it includes in the attempt to meet the diverse and often competing demands placed upon it, the greater the risk of its moving beyond the understanding and moreover sympathy, not only of ordinary people (in whose name, in a democracy, the criminal law is administered and sentences are imposed), but the very sentencing officials required, in effect, to administer the theory, insofar as it is instantiated by or reflected in the sentencing law and practice of the jurisdiction in question.

The obvious danger is that punishment is thereby undermined as a publicly-comprehensible state institution fit for an open, democratic and just society. Such officials would be unable to meet the requirements of what Dworkin calls the principle of articulate consistency or political responsibility (Dworkin 1978: 162, cf. 87, 92-3, 105, 106), later transformed into the grander notion of “integrity” (Dworkin 1986), which requires officials to explain and justify their decisions and actions to the public in accordance with a coherent theory, without “ad hoc” appeal to what may seem intuitively to be just or right in the circumstances (Dworkin 1978: 162). It is only to be expected that, subjected to such demands, officials would resort to traditional common law techniques as practised and refined down the ages, of weighing up and balancing different and sometimes conflicting considerations, such as, for instance, deterrence and rehabilitation, to determine the proper sentence.

One way forward – and not necessarily as a response to such concerns – is to adopt a more practical and robust approach to theorising about punishment, and examine punishment aims in the context of the means and measures required to implement them. Such broadening of the theory of punishment to the theory of punishment *and sentencing*, holds out the hope of a consistent and reasonably comprehensive applied philosophy of sentencing that gets beyond vague appeals to intuitionistic balancing. Many sentencing issues warrant the attention of philosophers and jurisprudential scholars, not just because of their practical significance, but in their own right, through their intrinsic importance, and the light they are capable of throwing on the pressing theoretical issues raised by punishment.

There is not only the challenge to extend punishment theory in practical directions, but also of integrating it with the rapidly developing body of criminal law theory (Duff 2005) as theorists move beyond trying to develop the theory of criminal law on the back of theories of punishment, (Shute, *et. al.* 2,2n) to examining criminal law, with its complex institutions and practices that go far beyond punishment and sentencing, as a phenomenon in its own right (Duff 2007).

The task remains to investigate and clarify the relation between crime and punishment, more specifically, between the twin criminal elements of harm and culpability on the one hand, and the twin punishment elements of sanction or hard-treatment and censure or condemnation, on the other. Other challenges include – to go beyond the philosophy of punishment to, more broadly, that of criminal law, and to mention only some of the more obvious ones – determining the structure, scope and content of types of “mens rea” elements (such as intention, recklessness, negligence, and dishonesty in the case of property offences), and of criminal defences (for instance, provocation, duress and self-defence), as well as doctrines which expand the scope of the criminal law, creating liability for inchoate offences (attempt, incitement and conspiracy) and extending it beyond perpetrators to accomplices. Of particular interest are the numerous issues thrown up by the rapidly developing body of international criminal law, especially with the establishment of the International

Criminal Court (Drumbl).

There is not just the integration of punishment theory with criminal law theory (or at least greater exposure to it), but with criminological theory and theorising about human behaviour and human institutions more generally. Serious thinking about punishment still takes place largely disconnected from not just actual criminal law and criminal law theorising, but criminological research and investigations in the relevant social sciences and humanities – as though crime and punishment are quite discrete phenomena. Yet any genuine attempt to understand punishment must generally start with trying to understand crime. Any light shone on questions of crime (Honderich 188-9) will surely be reflected back on punishment many times over, clarifying both problems and possible solutions, and so grounding a more confident approach to the question of whether meaningful reform of punishment is possible (and if so, the direction it should take), or whether the necessity of abolition and possible replacement must be faced.

To take just one instance, the surface has barely been scratched on the issue of comparative crime seriousness, despite the attention heaped on that of the relative severity of different forms and amounts of punishment. The shining exception is von Hirsch and Jareborg's pioneering article "Gauging Crime Seriousness: A Living Standard Analysis, (von Hirsch and Jareborg 1991, and von Hirsch and Jareborg in von Hirsch and Ashworth: Appendix 3). However, little attempt has been made to go beyond the illuminating examples they themselves provide, and to systematically apply their approach to criminal conduct generally, and so help develop a more rational, just and humane body of criminal law.

Above all, the central problem remains of the relation between punishment's two elements, of condemnation and hard treatment. There may well be no satisfactory way to establish this link, the future lying with abolitionists. It is a sobering thought for proponents of punishment, that no matter how apologetic or reforming in spirit some of them may be, they play for very high stakes. There is not just the risk of wrongful punishment as a result of mistaken convictions, but even more worrying, the danger that, if its hard treatment element cannot be justified, then the infliction of punishment is – in principle and substance, if not technically – a crime (Golash 49; Duff and Garland 2; Menninger; Bradley 26-7).

CONCLUSION

On the assumption that there are two elements to punishment, an element of condemnation and of hard treatment, this paper first considered the possibility of condemnation without hard treatment, and then of hard treatment without condemnation. The paper then looked ahead to possible developments in thinking and theorising about punishment.

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