

Punishment and Retribution

Leo Zaibert ■

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Introduction

There is certainly no dearth of scholarship on punishment and retribution, the two themes around which this book revolves. It might thus seem otiose to present yet another contribution to this apparently saturated field. Yet, while aware of the difficulty inherent to saying something both new and interesting regarding these much-discussed themes, I nonetheless think that there are reasons which recommend undertaking this enterprise yet once more, and in the way I do here. In spite of the vastness of the literature on punishment and retribution, these two crucially important concepts remain contested. I present here a theory of punishment, which I think is to be preferred over its alternatives, insofar as it avoids what I argue are widespread shortcomings found in competing theories. While this project may sound overly ambitious, two (sets of) considerations help clarify its nature, and, I hope, assuage any initial skeptical misgivings regarding its manageability.

First, by a theory of punishment I mean an account, that is, a *definition*, of punishment, together with a systematic discussion of the phenomena with which punishment is typically confused. Fifty years ago, Antony Flew correctly pointed out that many so called “theories of punishment” are but attempts to *justify* the infliction of punishment, rather than attempts to define the phenomenon at all.¹ The number of actual theories of punishment, in the sense of “theory” just sketched, is much smaller than one would expect, insofar as many positions advertised as theories of punishment, are not theories of punishment in this sense. Thus, my project does not really have too many competitors. Most of the so-called theories of punishment seem to run together two different enterprises: the *definition* of punishment and the *justification* of punishment. It is typically assumed that one cannot define the phenomenon of punishment without also discussing the problem of when it is morally or politically appropriate to inflict punishment. And, all too often, the normative discussion takes center stage, relegating the purely definitional discussion to the fringes, or ignoring it altogether.

Second, most discussions of punishment focus upon one of its variegated manifestations: criminal punishment inflicted by the State. The very view that there are many forms of punishment which can exist without a State or any other institutions which nonetheless are worthy of attention, does not meet with widespread acceptance. In spite of the fact that I find the manifoldness of punishment rather obvious, to defend the view that punishment is a variegated phenomenon in earnest, is to take a disconcertingly contentious position, and so I will present arguments on its behalf. That criminal punishment tends to monopolize attention is understandable; for it surely is, in more than one way, the most important manifestation of punishment. While abuses of punitive power are neither the

¹ Antony Flew, “The Justification of Punishment”, *Philosophy* 29 (1954): 291-307; especially at 297.

invention nor the monopoly of the modern State, the extent to which contemporary States tend to over-criminalize and the extent to which these States punish more and more severely, makes the discussion of criminal punishment a pressing matter.

The fact that one manifestation of punishment is more “important” than the others (in the sense just sketched) does not entail that the discussion of other “less important” forms is theoretically worthless. The study of punishment in itself, as a phenomenon, independently of whether or not it is carried out by the State through its criminal justice apparatus, helps, in the first instance, to clarify both the purely conceptual aspects of what punishment is, as well as, in later stages, crucial aspects of the much debated justification of punishment. My concern in this book, then, is exactly what John Braithwaite and Philip Pettit, amongst many other contemporary authors, wish to “transcend” in their *Not Just Deserts: A Republican Theory of Criminal Justice*:

The core debate throughout the history of criminology has been between theories of punishment. The aim of this book is to transcend this debate with a comprehensive theory: a theory, not only of punishment, but of criminal justice generally.²

My concern is not borne out of stubbornness or arrogance; in fact, I agree with many of Braithwaite and Pettit’s views regarding the criminal justice system as a whole. Putting aside my disagreement with their use of the term “theory”, there are no major oppositions between many of the things I say here and the sort of comprehensive recommendations they put forth. I agree with Braithwaite and Pettit, and many others, regarding the need for a comprehensive account of the way the State administers its criminal justice system. But we need, first (or at least also), a plausible theory of punishment. While Braithwaite and Pettit are interested in defending a certain criminal justice system, in this book I am interested simply in presenting an account of punishment and of the special relationship between punishment and one of its justifications (this relation between punishment and one of its justifications is so special that many see this justification as somehow built into the very definition). What motivates me to undertake such a narrowly circumscribed project is that, in spite of the volumes upon volumes devoted to the analysis of State punishment, some of the fundamental conceptual building blocks of any comprehensive theory of punishment remain unclear and contested. We are yet to settle on the precise meaning of key terms such as “punishment” and “retribution”.

Once the skepticism regarding the only apparent grandiosity of my project is dispelled, however, skepticism of the opposite sort, that is, regarding the apparent minuteness of my goals here, might arise. One source of this type of skepticism follows from assuming that we all know, more or less, what “punishment” is, just as we all know, more or less, what “time” is, or what “space” is, and that to seek more precision in our understanding of these terms is not likely to yield fruit. But this will not do: “more or less” in this context is simply a euphemism for

² John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford: Oxford University Press (1990): 1.

“pragmatically speaking”. And I will argue that to abandon this pragmatist stance yields fruits which not only are valuable in themselves but which also, in the end and in indirect ways, are of significance, vis-à-vis those very pragmatic considerations which worry many. In other words, it is not the rarefied air of pure conceptual analysis alone that motivates me; rather, what motivates me is the conviction that rigorous analyses of punishment and retribution qua phenomena make explicit some of the thorniest difficulties associated with the justification of punishment. And this “making explicit” is a necessary first step for eventually solving such difficulties.

This is the reason why I begin the book not with my account of punishment itself, but with an examination of the classical mixed “theories” (or “justifications”, as I suggest we should call them) of punishment, which many see as great achievements of the specialized scholarship during the last fifty years. While I believe that the recent scholarship on punishment has reached an extraordinary level of complexity and sophistication, there is a sense in which the famous mixed justifications of punishment constitute a failure – a scandalous one indeed. This failure, I will suggest, can be explained by the fact that these mixed justifications presuppose a flawed and narrow definition of punishment. It is only after I have shown the failure of the mixed justifications, then, that I will propose my own definition of punishment, which I argue, first, overcomes the problems of the definition which is presupposed by the mixed justifications, and, second, which does not create serious new problems. Of course, the very viability of any definitional enterprise can be called into question, and the scholarship on punishment has seen its share of abuses of definitional approaches, thus I try to show which dangers inherent to appeals to definitions are real and which are merely apparent.

One crucial difference between my account of punishment and the competing, widely accepted account is that I emphasize the close connection between punishment and blame. Defenders of the typical account of punishment need not expressly deny this connection, but they nonetheless rarely expressly pay attention to it. Part of the importance of the connection between blame and punishment is that it is difficult to deny that we sometimes blame others (or ourselves) for what we perceive as instances of wrongdoing, and that we can do this without the State or indeed without any institutions. Since (as I shall argue) punishing is to go a step beyond blaming (in ways to be specified below), that is, to do something to him whom we blame, because we blame him, then it should be clear that we can punish in many contexts, without the State, and without many of the requirements found in the favored account of punishment. Yet, since the account of punishment which is presupposed in the mixed justifications meets with widespread approval, I need to devote considerable attention to what I envisage will be the aspects of my account that will meet with more resistance. My account of punishment seems in many ways broader than typical accounts of punishment; it seems that on my account more phenomena count as punishment than do in the typical account of punishment. Whether my account of punishment is indeed broader than the standard account is debatable. But even if it is indeed broader, I will argue that this breadth is, in fact, not a problem, but one of the strengths of my account.

This strength of my account is particularly conspicuous in the “pragmatic” arena, in connection to which my theoretical approach may appear, on first approximation, too disconnected. For, as it restricts what counts as punishment, the widespread standard account of punishment, it makes it easy for the State (the concern of the pragmatists) to abuse its punitive power by masquerading punitive measures as if they were not really punitive, labeling certain governmental acts as merely “administrative” or “bureaucratic”, as if these labels would *deus ex machina* obscure the fact that some such acts are clearly punitive. My account of punishment, in contrast, is well poised to expose such maneuvers, as will, I hope, become apparent.

My account seems to have great difficulty in distinguishing punishment from revenge, and this distinction has been taken, by many, through the ages, to be a crucial distinction, drawing a crisp boundary between barbarism and civilization. I admit that it is difficult to distinguish punishment from revenge, but, rather than uncritically embrace venerable distinctions, I will argue that the standard arguments purportedly showing the “obvious” differences between these two phenomena are not good.

A great deal of the effort to distinguish punishment from revenge is the result of the following rather widespread assumption: punishment is, as a matter of sheer definition, always deserved punishment. I will argue against this view, insisting on a distinction between punishment simpliciter and retributive punishment. Just as an unjust law is still a law, to echo the sensible positivist reminder, an unjust (undeserved) punishment is still a punishment. The seemingly innocuous suggestion that punishment need not be deserved has far reaching implications, as I will argue. But the alleged conceptual connection between punishment and retributivism is itself of great interest. For it reveals an interesting asymmetry between retributivism and its competitor: consequentialism. Conceptual consequentialism, somehow resembling the sort of frequently held definitional relationship between punishment and retributivism, is extremely rare; consequentialist justifications of punishment do not tend to be too closely connected to the definition of punishment (though I will discuss one version of conceptual consequentialism).

Insofar as consequentialist justifications tend to be independent from the problem of punishment’s definition, they gain in clarity: when someone defends deterrence, incapacitation, reform (just to mention the three most famous consequentialist justifications of punishment), it is clear what she believes justifies punishment. In contrast, it is not at all clear what exactly the retributivist believes justifies punishment. This explains, in part, why there are so many different views which all claim to be retributive. I discuss many of these allegedly retributive views and argue that most of them are not really retributive. In rejecting the retributive credentials of many of these views I am not terribly original. I decide to undertake this taxonomizing task which others have already undertaken for two main reasons. First, the variety and influence of these spuriously retributive justifications of punishment is truly staggering, and quite regularly “new” versions of these justifications are put forth – thus a fresh look at these views can hardly be redundant. Second, some of my reasons for denying the retributive credentials of these views are themselves original, insofar as they are the result of paying serious

attention to the much-neglected manifestations of punishment which occur outside the context of the State.

One typical and pervasive fear regarding retributivism is that it might necessarily be associated with a specific type of political agenda – an agenda which seeks to over-criminalize, punish too severely, and which ultimately might trample civil liberties and human dignity. For example, it is frequently assumed that retributivism is either identical with (or it entails the endorsement of) *lex talionis*, that is, the famous “eye for an eye, tooth for a tooth” formula. But retributivism is not *lex talionis*, and it does not in any way entail endorsing such a view of what is appropriate punishment. Most retributive views remain silent with respect to what is the exact response which this or that instance of wrongdoing deserves. Retributivism simply asserts that whatever turns out to be the exact response which this or that wrongdoing deserves, the fact that it deserves to be punished, by itself, is a good (sometimes conclusive) reason for punishing it.

Interestingly, however, some versions of retributivism are wholly immune to the charges of barbarism. For these versions assert that retributivism is merely a logical thesis (and thus rather hardly conceived as barbaric). Sometimes retributivism is straightforwardly presented as purely logical, but on other occasions retributivism is put forward not as a purely logical thesis, although its normative import boils down to the jejune assertion that to punish the undeserving is immoral. These versions of retributivism have been labeled “minimalist”; minimalism is today amongst the most popular versions of retributivism. It is of course puzzling that so many condemn retributivism for its harshness, given that what most retributivists assert is simply that it is a bad thing to punish innocents. I will, however, argue against minimalism in any of its forms, and attribute their popularity, at least among philosophers, to the not always healthy fascination with logical analysis which has been all the rage for the last hundred years.

In its typical non-logical version, retributivism does recommend the punishing of every deserving instance of wrongdoing. I will object to this version of retributivism as well. Although retributivism remains silent as to the specific responses to specific instances of wrongdoing, the insistence that every immorality should be punished is untenable – even if the punishments themselves turned out to be sufficiently lenient. Obvious political considerations related to the theory of the State recommend a cautious criminalization agenda. I will argue, however, that even outside of the political sphere, the prospect of a person punishing each and every action which she deems wrong, is rather nightmarish, and not least for the very person doing the punishing. In other words, non-logical retributivism, which typically sees desert as a sufficient condition for the just infliction of punishment, is untenable, even if we do not consider any political principle whatsoever. The importance of this point can hardly be overestimated, as I shall argue.

I will thus object both to retributivism understood as the view that desert provides merely a necessary condition for the just infliction of punishment, and also to retributivism understood as the view that desert provides instead a sufficient condition for the just infliction of punishment. The binary opposition between necessary and sufficient conditions, in the context of the justification of punishment, is unenlightening. Retributivism is best seen as concerned with the

intrinsic value of punishing deserving offenders. Retributivists believe that it is sometimes intrinsically valuable to punish the deserving. Thus understood, retributivism is, on the one hand, not linked to any untenable overarching theory of what to punish (or how severely), but, on the other hand, not thereby reduced to a mere logical or thinly normative platitude. To say that something is intrinsically valuable is of course not to say that it is obligatory, but it is not just to say either that it is merely permissible. The intrinsic value of punishing the deserving is a constant regarding the justification of punishment in the sense that it holds true in any of the variegated contexts in which punishment can occur. In any of these contexts this intrinsic value can be, and frequently is, trumped by various considerations, but it is *always* a good reason to punish – indeed the only reason which is always a good reason.

Chapter One

Theories and Justifications

The debate regarding the justification of punishment, that is, the debate between retributivism and consequentialism, once appeared straightforward. I do not mean to suggest that the choices the debate forced upon us were ever easy (they have never been); my suggestion is rather that the distinction between the opposing alternatives was, more or less, *conceptually* straightforward. Traditional consequentialist justifications of punishment asserted, roughly, that punishment is justifiable only by the (good) consequences that follow from it, whereas retributivist justifications of punishment asserted, roughly, that punishment is justifiable only by its being deserved. Thus, to ascertain whether a justification of punishment was retributivist or consequentialist used to be relatively easy: for example, Kant and Hegel were, without a doubt, retributivists; similarly, Bentham and Sidgwick were, without a doubt, consequentialists. But recently all sorts of *mixed* justifications of punishment have sprung up, supposedly coherently combining retributive and the consequentialist rationales.

Many authors refer to these mixed justifications as “mixed theories”. Flew’s admonition, to which I have referred in the introduction, has not been heeded: most people continue to refer to theses related to justifications of punishment as “theories” of punishment. While in a sense this is a minor terminological point, there is another sense in which it is important to emphasize a noteworthy difference between “theories” and “justifications” of punishment. A theory of punishment seeks to tell us what punishment is, what the necessary and sufficient conditions for something to be punishment are, how punishment relates to and how it differs from related phenomena, and similar questions. A justification of punishment, on the other hand, seeks to tell us when it is morally (or politically, or in any other normative way) legitimate to inflict punishment. The famous mixed “theories” of punishment do not even try to answer theoretical sorts of questions; instead, they seek to reconcile two opposing ways of justifying punishment (retributivism and consequentialism), that is, two different sets of reasons why punishment should be inflicted. For these reasons, I favor referring to “mixed theories” of punishment as “mixed justifications” of punishment.

Early in this book, I shall be interested both in putting forth a *theory* of punishment, and then, later, in discussing the problem of the justification of punishment. Yet, before presenting the details of my own theory of punishment, I would like to devote some attention to showing why mixed justifications of punishment fail. Their failure, I will argue, is inseparable from a problem in the *definition* of punishment that they presuppose. My initial foray into the discussion of the (mixed) justifications of punishment is geared mainly at showing this single

specific point: the failure of the mixed justifications has a lot to do with a problem regarding the definition of punishment. My plan, then, is to discuss first the problems with the mixed justifications, then to present my own definition of punishment, and finally to come back to the thorny problem of the justification of punishment, but only after taking seriously the manifoldness of punishment.

The relationship between a theory of punishment and the justification of punishment is subtler than it might seem on first approximation. An important thesis I shall defend in this book is that we are well advised to try and keep the definitional and the justificatory enterprises as separate as possible. There are two main reasons why I preface my discussion of the definition of punishment with a consideration of the failure of the mixed justifications of punishment. First, since both retributive and consequentialist rationales are persuasive, it might be thought that a justification of punishment which combined these two would be all the more persuasive – the “best of both worlds” sort of scenario. But none of the existing mixed justifications succeeds in this syncretic fusion, and it is important to show this at the outset. Since later in the book I shall come back to the problem of the justification of punishment, it serves me well to show at once why I discard as viable options precisely those positions which seem, to many authors, to be so poignantly attractive. Second, the talk of definition itself has fallen, for different reasons, into such disrepute, that I would like to convince even those who are suspicious of definitions, that here we have a case in which a good definition would go a long way towards helping to solve a difficult practical problem. A good definition of punishment shall, at least, direct us down the right path in trying to understand what justifies it.

The attractiveness of mixed justifications of punishment is so great that contemporary punishment theorists doubt that there remain any authors who could be described as embracing only retributivism or only consequentialism in anything like the standard, traditional articulations of those views I have just sketched. Ted Honderich for example, as he begins a chapter in *Punishment: The Supposed Justifications* (entitled “Compromises”), expresses the fact that, in his opinion “there no longer are defenders of the traditional retribution theory, or at least the version that we are obliged rather than permitted to punish offenders because they deserve it”. Honderich further claims that “the traditional deterrence view is also in decline, for different reasons, if not so abandoned as the view that punishment is justified by reformative effects [both consequentialist justifications of punishment]”.¹ Similarly, H. L. A. Hart begins his *Prolegomenon to the Principles of Punishment* with the following assessment of the current state of punishment theory:

General interest in the topic of punishment has never been greater than at present and I doubt if the public discussion of it has ever been more confused. The interest and the confusion are both in part due to relatively modern scepticism about two elements which have figured as essential parts of the traditionally opposed “theories” of punishment. On the one hand, the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent, has waned with the growing realization

¹ Ted Honderich, *Punishment: The Supposed Justifications*, New York: Harcourt, Brace & World (1970): 133.

that the part played by calculation of any sort in anti-social behavior has been exaggerated. On the other hand a cloud of doubt has settled over the keystone of "retributive" theory.²

While the years following the publication of Honderich's and Hart's books have witnessed a veritable retributivist revival,³ and there are famous retributivists – most notably Michael Moore – who seem to make no concessions to consequentialism, and who assert that desert obliges us to punish offenders, most of the recent retributivists are, as Honderich and Hart point out, retributivists only in some newer sense. Something similar happens with contemporary consequentialists.

I agree with the spirit behind Honderich's and Hart's remarks, that is, I believe that the boundary between retributivism and consequentialism has become blurred. It is of course interesting that only very recently do we find the first *systematic*, self-conscious attempts to coherently combine the retributive and the consequentialist rationales: the sophisticated "mixed justifications of punishment" are creatures of the twentieth century – and mostly creatures conceived by analytic philosophers inebriated with Oxford's ordinary language philosophy and its concomitant fascination with logic. Yet, Honderich and Hart, along with most punishment theorists, restrict their investigation, for all practical purposes, to one single manifestation of punishment: criminal punishment carried out by the State, and I will argue that this is problematic.

I am not the first person to object to these mixed justifications of punishment, of course. After all, as one would expect, both partisan defenders of retributivism and partisan defenders of consequentialism would be naturally opposed to the mixed justifications in that such justifications, in their opinion, smuggle unacceptable consequentialist or retributivist elements which they are simply unwilling to accept. In other words, for a hard-core, single-minded retributivist the mixed justification might concede too much to consequentialism, and for a hard-core, single-minded consequentialist the concessions to retributivism might be similarly unacceptable. Since I am neither a partisan retributivist nor a partisan consequentialist, the sort of objection that I wish to level against the mixed justifications of punishment is different from the typical objections: I will here claim that one important and overlooked reason why the mixed justifications fail is that they presuppose an inconveniently *narrow* definition of punishment. Those endorsing mixed justifications of punishment, following a general trend, overwhelmingly assume that punishment is criminal punishment carried out by the

² H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford: Clarendon Press (1968): 1. Hart's bemoaning the "confused" state in which he found the discussion of punishment is somewhat of a gambit in the literature. More than a century before Hart, Hegel claimed that "the theory of punishment is one of those topics which have come off worse in the recent study of the positive science of law", in G. W. F. Hegel, *Philosophy of Right*, (T. M. Knox, trans.), Oxford: Clarendon Press (1953): 69.

³ For more on the retributivist revival see Russell Christopher, "Deterring Retributivism: The Injustice of 'Just' Punishment", *Northwestern University Law Review* 96 (2002): 846-847, particularly the informative footnotes 2-11.

State. But I will argue that any candidate definition of punishment must do justice to the fact that there are instances of punishment which occur outside of State institutions.

One would wish that at least one of the mixed justifications would be successful, not only given the inherent importance of the problem of punishment, but also given the obvious appeal of both retributivist and consequentialist rationales. But if we pay attention to punishment which occurs in these other much-ignored (non-State) contexts, we will clearly see the deficiencies of the mixed justifications. I will argue that independently of whether the mixed justifications of punishment may have attained some success within the context of criminal punishment carried out by the State, they are utterly unsuccessful in shedding any light whatsoever over the problem of punishment in other contexts. And it is simply not true that the tension between retributivism and consequentialism obtains only within the context of the State; in fact, this tension is probably as old as humanity itself, and surely the State is not that old.

Whenever an ordinary person deliberates about whether or not to punish another person, she struggles with the appeal of retributive rationales and with the appeal of consequentialist rationales, and she will look for ways of having the best of both worlds. And unless this person is a sovereign, or an agent of a sovereign, deliberating about an instance of State punishment, the mixed justifications would have very little to tell her. Thus, the first two sections of this chapter are devoted to the discussion of the mixed justifications of punishment and to their failure. In the last two sections of the chapter I present my own account of punishment, emphasizing how it differs from any existing account, and how it accommodates non-State punishment.

The Rise and Fall of the Mixed Justifications of Punishment

In somewhat of a contemporary rendition of the simultaneous discovery of infinitesimal calculus by Leibniz and Newton, Anthony Quinton in *On Punishment* and John Rawls in *Two Concepts of Rules* simultaneously “discovered” a way of reconciling consequentialism (which they both misleadingly called “utilitarianism”)⁴ and retributivism. True, as Rawls claims, there are some differences between the two articles, but they nevertheless remain strikingly similar.⁵ In fact, most mixed justifications of punishment (not only these two) conspicuously exhibit a pair of problematic maneuvers:

⁴ Many authors refer to the contrast between retributivism and consequentialism as the contrast between retributivism and utilitarianism. This is incorrect. Utilitarianism is the name of a comprehensive moral doctrine and consequentialism is the name of a specific view regarding the justification of punishment. I will discuss the importance of distinguishing between comprehensive moral doctrines and narrow moral positions in chapters six and seven.

⁵ John Rawls, “Two Concepts of Rules”, in Samuel Freeman (ed.), *John Rawls: Collected Papers*, Cambridge, Ma.: Harvard University Press (2001): 21.