

Part One Ethics

Is Punishment a Necessary Evil?

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Word Count: 1985

Is Punishment a Necessary Evil?

Punishment is an integral part of many, if not all, modern legal systems. It permeates our culture, and is traditionally viewed as the antidote to crime; legal philosophy tends to see punishment as the only acceptable response to those who break the law.

This essay will concern itself with the topic of punishment as a social institution. In order to answer the question whether punishment is a necessary evil, it is vital to understand the two key concepts brought forward. Firstly, whether punishment is necessary, and secondly, whether it is an evil. To determine the necessity of punishment, we must consider what the purpose of punishment is, how effectively punishment achieves that purpose, and whether there exists any alternative that would suit the purpose better. If there is no such alternative, and the purpose of punishment is not immoral, it must be concluded that punishment is necessary.

To determine whether punishment is an evil, one must consider the notion of whether there is such a thing as a moral evil. It must also be considered whether, if there is such a concept, punishment is evil in fact. There will be a consideration whether, if punishment is evil, its purpose or consequences negates its evilness. Finally there will be a very short reflection on the actual concept of 'necessary evils'.

Punishment is inextricably linked to wrongdoing by its very definition. It has many purposes, some more justifiable than others. Firstly, it is used as a way for victims of crime to exact revenge upon the criminal. Moreover, it is used to exact revenge in a way that is seen as morally acceptable, perhaps due to the fact that the one demanding punishment is not, in the current system of law, the one handing out the sentence – the law acts as a buffer between victim and criminal. This moral acceptance of revenge implies a secondary reason for punishment. If revenge is the sole reason for punishment, then the punished surely has grounds to demand punishment from his punishers. However, this claim is negated by the second reason for punishment, that of retribution.

Retribution differs from revenge in an important way, as Nuttall notes, "revenge is associated with personal satisfaction ... retribution, on the other hand, is a matter of what someone deserves"¹. The idea that a criminal must pay is central to the idea of retribution, and retribution may be seen to carry more moral weight than revenge. There is a feeling that if someone is punished, this somehow accounts for their crime. We can begin to see already the difficulties that this concept will inevitably have – one cannot change the past, and one cannot make good that which is bad. Punishment or any other action is doomed to fail if its purpose is to change the moral nature of something which has already happened.

The third purpose that punishment serves is that of reform. The goal of reform is to ensure that re-offence does not occur. This seems to be the least problematic of the purposes of punishment discussed so far; if a criminal can be persuaded not to re-offend, then both society and the individual benefit. The only immediately obvious problem is that the victim may not be so appeased as if a more conventional punishment had been given. This does not bear deeper examination; firstly, appeasement of the victim is not an objective of reform, and secondly, it can be said that from a utilitarian viewpoint, while the victim does not gain anything, both society and the criminal do gain, and their gain outweighs the victim's lack of appeasement.

Finally, it has been argued that punishment's primary purpose is to deter other people from committing crime. Nuttall makes a good case against this, suggesting firstly that "the aim of punishment must be to maximize the deterrent effect while minimizing the harm experienced by the criminal"² - a fair enough assertion. But the problem then becomes that the implication is that the more deterrent power a punishment has, the more harm is acceptable; Nuttall

1 Nuttall: 52

2 Nuttall: 48

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suggests that the death penalty could be a very effective deterrent to car theft, and providing it was effective enough, one could conclude that the greater good was being served, however, "it is difficult to set aside the notion that these punishments would not be justified"³.

Punishment can therefore be said to fulfil one of four purposes; revenge, retribution, reform and deterrence. But how efficiently does it serve these purposes, and are the purposes moral? In the case of revenge, punishment seems to be the only fitting response. There simply is no other course of action that executes revenge more efficiently. Revenge is however, according to the Kantian ethic of universalisability, a highly morally questionable reason for punishment; one cannot construct a universal law that states that 'everyone must exact revenge for wrongdoing', without those revenged themselves demanding revenge and thus leaving the world in a cycle of perpetual retaliation. Punishment for the purpose of retribution has practical complications, primarily in the idea that crime and the repayment thereof can be quantified in material terms. There is no static measure by which one can say 'rape is worth 10 years in jail', or 'unsafe driving requires a £5,000 fine'.

In the introduction, it was proposed that an alternative to punishment should be considered, that fitted the purpose better. It could be argued that reform is that alternative, as it does not entail "a deliberate and avoidable infliction of suffering"⁴. The practical issues involved with reform however, are at least twofold. Firstly, there are conceivable cases that would require imprisonment, not for revenge or retribution, but for the safety of either the individual or society, or both. Such cases, however, form the smaller portion of the whole, and it is safe to say that these are special exceptions where containment is necessary because reform would be impossible. Secondly, reform does not act as a deterrent, and this does not fit with a utilitarian view of ethics; if a criminal suffers it is bad, but this is outweighed firstly by the fact that the victim may derive some pleasure from the knowledge that the criminal is suffering, and secondly in the fact that other potential criminals will have been deterred. This situation is preferable the case of reform where the criminal is no longer criminal, but no pleasure is gained by the victim, and no-one is deterred.

Of the four reasons given for punishing, the act of punishment itself does not seem to efficiently fulfil its purpose in any case. Revenge is immoral, retribution impractical, reform does not deter, and deterrence is subject to *reductio ad absurdum*. From this, it seems we have no choice but to conclude that punishment does not adequately complete its purpose, and as such is unnecessary. One possibility that has not been considered is the idea of pre-emptive reform, or more commonly, social reform. In its ideal implementation, this would have no need to deter people from crime, as it would ingrain a strong sense of morality in the general populace, via education. Sadly, even this concept has come under fire, with the suggestion that to do this would infringe upon basic human rights. The term 'brainwashing' is often brought up, however, there is no fundamental difference between moral education and traditional education, so unless we are to ban all forms of teaching, it seems that social reform cannot be classed immoral on these grounds alone.

One factor that none of the four purposes can avoid is moral luck. Nagel summarises the idea of moral luck by saying "Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him ... as an object of moral judgement, it can be called moral luck"⁵. This idea can very easily be seen to require that punishment be seen as unnecessary in almost all cases; "It seems irrational to take or dispense credit or blame for matters over which a person has no control"⁶. Given this view, it seems that it is futile to attempt either punishment or reform, for all matters are potentially subject to moral luck. This,

3 Nuttall: 49

4 Honderich: 11

5 Nagel: 26

6 Nagel: 28

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however, would be a naïve viewpoint. There are many circumstances where a moral agent *does* have control over their actions to the larger degree, and in these cases, reform seems more preferable to punishment.

Lastly, then, is punishment an evil? To answer this, we must consider whether the concept of a moral evil is coherent. Surely our morals are defined by the social ethics of our time and our culture? What is evil to one culture is normal to another. As Nietzsche states, "There are no moral phenomena at all, only a moral interpretation of phenomena"⁷, clearly the implication is that phenomena themselves hold no absolute moral value, we merely ascribe a value to them. Additionally, as Finnis notes, "The answer of utilitarians ... is clear: there are no absolute human rights, for there are no ways of treating a person of which it can be said, by a consistent utilitarian, 'Whatever the consequences, nobody must ever be treated in this way'⁸. This reasoning is not flawed; by definition, a utilitarian must say that any treatment of human beings can be justified, given the correct consequences, and that therefore nothing can be intrinsically good or evil.

Even if this is the case though, we must consider whether we can, in our current culture and time, justifiably ascribe a moral value to punishment, and whether that value would be good or evil. Once again, Kant would surely deplore punishment; "There is nothing more sacred in the wide world than the rights of others"⁹; to inflict suffering would be to treat a person as a means, and not to consider their own interests. Punishment in the shape of reform, however, comes about as a result of consideration of the interests of all involved parties, so Kant may here agree with its use, perhaps even more so with social reform, as it considers the interests of all parties, involved or not.

To put forward the case that punishment is not an evil, it appears that the only rational angle to take is that of the utilitarians; if punishment causes more good than evil, it can be said to be good. However, this reasoning may be mistaken; certainly we may conclude that the result of punishment can be good, but we cannot from this infer that the punishment itself must therefore be good. Even when the consequences are good, the act in and of itself remains evil; shooting one man to save ten still involves shooting one man. Worse, punishment cannot be guaranteed to cause greater good than evil, so the utilitarian's reasoning is speculative at best.

In conclusion, we have seen how punishment for revenge, retribution or deterrence is either immoral or impractical. We have seen how of the three above, deterrence seems to be the only necessary function of punishment, equally that punishment cannot achieve this goal without descending to immoral levels. Social reform, then, seems to fulfil all reasonable reasons for punishment, with the least moral implications. Furthermore, we have seen how, while it is not entirely correct to talk of absolute evils, we must recognise that a distinction has to be drawn between good and evil in order for a moral system to be implemented. Finally, we saw that under at least a Kantian moral viewpoint, punishment is evil, and that a utilitarian view that punishment is good because it causes good cannot be supported.

If punishment was necessary, and was evil, it would not be prudent to talk of it as a necessary evil, as this phrasing seems to excuse and to some extent downplay the evilness; "once we assuage our conscience by talking of something as a 'necessary evil', it begins to look more and more necessary and less and less evil."¹⁰

7 Nietzsche: 96

8 Finnis in Singer: 256

9 Kant in Norman: 90

10 Commonly attributed to Sydney Harris

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