

Introduction To Philosophy of Punishment

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## Abstract

This paper is composed of two main sections: the first establishes the principles of punishment; the second presents an argument within one of the fundamental theories. The first involves an objective viewpoint of the four main theories in the philosophy of punishment. The second half consists of an argument against the practice and theory of capital punishment from a retributivist viewpoint. Within this viewpoint, it is argued that proportionality does not require a retributivist to adopt capital punishment as an appropriate type of punishment.

## **Introduction**

The idea of ‘punishment’ or ‘punishing someone’ is assumed by society to be essential in maintaining order. But what exactly are the theories that justify punishment, and what are the differing implications? What does punishment look like under each of the theories? Here I will review each of the theories comprehensively. The second section of this paper will present a retributivist argument for capital punishment with consideration and thoughts from the other theories. The four are not mutually exclusive, but can and do work together in the judicial system. This paper will focus on punishment in terms of crimes punishable under the law, rather than focusing on punishment in terms of wrongful actions that do not have consequences by law such as adultery.

## **What is Punishment?**

Punishment is divided into two ways, as a response to breaking the law or for an act committed outside the law. For example, a child being punished for lying is a separate case from an adult being punished for breaking the law through theft. In terms of breaking the law, the central philosophical question is “How ought someone be punished if X act is committed?” Similarly, a central question is “On what grounds is someone punished?” This seemingly simple question for some raises issues around states' rights, acceptable acts of punishment, and countless others. But, the act of ‘punishment’ requires an undesirable act to be required upon someone for an action they committed out of free will. The broad interpretation of “undesirable” is subjective which creates various theories that are raised in determining how one ought to be punished.

## Retributivism

The fundamental principle of retributivism is that punishment is always justified for the deserving in virtue of what they have done: people simply should be punished for their wrongdoing. Retributivism is a “backward looking” theory: it looks backward in time to a past action to determine who should be punished and how without considering what might happen in the future. Other theories, to be examined later, are “forward looking”.

To deserve punishment requires an individual to be morally responsible and an act to be one of free will; so, it is assumed that since we are morally responsible for our free choices, we are therefore responsible for the punishment that follows. However, there are exceptions to free will, if, for example, someone is forcing another to do something. If someone is faced with no other choice but to commit a certain action, this is not an act of free will and therefore an individual is not morally responsible for possible consequences. Commonly thought following this view, punishment is based on the grounds of desert. In other words, one should be punished in proportion to the crime committed. Rather than an offender being punished to deter others from doing the same or with the goal of remorse being developed, punishment is deserved simply for their wrongdoing. To analyze the Retributivism theory comprehensively, the term ‘*desert*’ is essential to understand. Simply put, desert is one's level of punishment based upon the action committed (Brooks, 2021). That is to say, someone who commits murder deserves more punishment than a thief. The nature of this term raises concerns based on the interpretation of wrongdoing which coincides with the desert assigned to someone. Interlinked, proportionality relates once desert has been established. An offender should be punished *in proportion* to the offense committed. For example, that is to say, proportionality would be in defiance of lifetime

incarceration for petty theft or a \$200 fine for premeditated murder. Although these examples are rather extreme, it is to make clear how desert and proportionality work upon one another in the retributivist's view of punishment.

*Simple Retributivism* can be viewed as the “harsher” of the two due to the nature of the practice. Simple retributivists support an offender being punished to the full extent that one's desert allows (Galoob, 2017). Following the adoption of this idea, the punisher is limited to an individual's allowable legal procedures. More specifically, under the simple viewpoint, one can assert an offender deserves X level of punishment for X offense. Simple retributivists think it is clear what an offender deserves because their punishment is solely based on their desert and no other factors.

The more common adoption of retributivists supports *refined retributivism* or the viewpoint within the theory that states justified punishment requires a person to be punished to the extent of their desert, but not solely based on this principle (Galoob, 2017). Refined retributivism takes into account one's desert for the basis of determining punishment, but allows other factors for consideration. For example, these other factors may include whether an offender has shown true remorse for their actions or been in cooperation with legal proceedings. Because of this, refined retributivism is adopted by those who do not see a clear answer to what punishments follow from committed acts.

## **Deterrence**

Deterrence states that punishment's function is to deter people, both individually and as a society from committing such acts in the future. In this section, the theory will be described and

explained mostly from a Micro-deterrence perspective, or the perspective that focuses on the criminal. In contrast, Macro-deterrence focuses its attention on society as a whole and how or what punishments would discourage criminality at large (Brooks, 2021).

From an offender's perspective, any form of punishment can be viewed as a "pain", from which people tend to seek pleasure. Because of this, punishment is necessary because it deters individuals from crimes due to the foreseen pains of punishment. The idea of deterrence is shown in the writing of Plato with:

It is appropriate for everyone who is subject to punishment rightly inflicted by another either to become better and profit from it, or else be made an example to others, so that when they see him suffering whatever it is he suffers, they may be afraid and become better.

Suggested, punishment, in general form, is justified because witnesses become afraid and seek to avoid pain. In other words, if one ponders about whether to commit a crime, the selfish human will outweigh the burden of potential punishment and choose not to commit a crime.

Those who support a deterrence approach are optimistic about its goals, to reduce crimes, however, there is no significant evidence to support that this follows. According to the National Institute of Justice (2022), recidivism rates among criminals who are released from prison are ~50% in the first year and ~83% nine years after the release date. Because of the evidence, opponents suggest punishment to be in a form that deterrence is not the center point because it is not shown to deter criminality. Similarly, due to its nature of theory, comprehensively accepting the view allows individuals who are innocent to be punished it yields deterrence to others.

To accept the deterrence theory approach, one must agree with a consequentialist view. This is due to the requirement for punishment to be justified is that the consequence of inflicting it upon an individual will lead to reducing criminality. Due to deterrence being a consequentialist theory, retributivists argue that the basis of punishment is justified differently. Rather, deterrence rejects the concept of desert, which is necessary for retribution. Instead of the deontological approach retribution poses, deterrence requires the deterrent effect to justify punishment. Another significant criticism poses that deterrence allows innocent individuals to be punished. If punishment is justified simply by the deterrence of future crimes, then it would be acceptable to punish non-criminals insofar as they deter others. It is generally agreed that the innocent should not be punished for crimes they did not commit, but opponents of deterrence point out this is a real outcome without the presence of desert. The idea that punishment is justified on the grounds of deterring further criminality seems an attractive approach, but the retributivist approach notes important criticisms when accepting this view.

## **Rehabilitation**

The rehabilitation theory also referred to as 'New Rehabilitation due to it being only popular since the 1950s takes a much different approach with the goals it seeks through punishment. In this section, it is the goal to explain what the rehabilitation theory supports, and what it opposes, as well as objectively state how the other two theories criticize it. Unlike the other two theories presented, Rehabilitation seeks to answer and solve the question, "What is next?" when offenders get out of incarceration (Koritansky, 2005). More specifically, the goal is

to help the offender transition from being a criminal to law-abiding. It is important to note that for this to be successful with an individual, the offender must reject crime out of choice which requires remorse and wants to change. Retributivism is distinguished due to the idea an individual should be punished for simply committing a crime without regard for the individual's future. Similarly, the main deterrence criticism rejects that punishment might become gloried under this theory to help people. If punishment is viewed this way, then people may not see incarceration or fines as something to avoid.

Rehabilitation acknowledges the hardship one can face when being removed from 'normal life' while incarcerated. While an individual is serving time as punishment for a crime, they lose touch with social networking, keeping their skills or training up to date, and other necessities to be successful once out of prison.

There are two various approaches; the deontological and consequentialist rehabilitation approaches. *Consequentialist Rehabilitation* states that we are obligated to rehabilitate criminals because everyone will be better off. That is to say if when a criminal completes an incarceration sentence and has the necessary skills to transition back into normal life, we will all be better off. To achieve this, rehabilitation of offenders leads to crime reduction. In contrast, *deontological rehabilitation* states we are required to rehabilitate offenders because it is just. Because each individual, despite any conviction, has moral importance, those not in incarceration should seek to help an incarcerated individual rehabilitate into society smoothly once released. Unlike the consequentialist approach which has a goal of reducing crime through the rehabilitation process, the deontological approach states that regardless of the outcome, it is morally required that individuals are rehabilitated.

The two main types of rehabilitation of an offender are therapeutic and cognitive behavioral therapy. Within the therapeutic approach, it focuses on identifying and treating the “root cause” of the crime and therefore will lead individuals to not re-offend (Brooks, 2021). For example, the root cause of drug abuse may be the lack of ability to overcome the addiction. To address the root cause, an individual may undergo specialized treatment to break the current addiction. In contrast, the cognitive behavioral therapy method addresses the root causes that are deemed as mental health issues. This type of therapy is achieved through counseling, stays in mental health institutions, and medication. The common theme among all rehabilitation methods is that crime is not a moral failure; instead, an illness that can be cured. Through whichever position is taken, deontological or consequentialist, it is the responsibility of those not incarcerated to support or help individuals rehabilitate back into normal society. From there, either the individual will be benefited, or the possibility of society benefiting too.

### **Restorative Justice**

Restorative justice is the type of criminal justice that focuses on the rehabilitation of the offender with the community and victim(s) in mind. While holding individuals accountable for their actions, it is imperative under restorative justice that the repair of harm based on the impact of the crime committed is met. Neither the retributivist, deterrence, or rehabilitation theory deny imprisonment as a consequence or punishment needed for some crimes. As an alternative approach to punishment beyond incarceration, restorative justice provides an almost “radical” approach to traditional thoughts of punishment. Simply put, the approach seeks to address two

main issues incarceration poses: i) recidivism rates and ii) the high costs to imprison someone for a long duration (Brooks, 2021). Instead of only considering the offender like the other theories, restoration does not limit who can benefit; instead, restorative justice can help the offender, victim, and the whole community. Rather than a retributivist-like “backward-looking” approach, restorative justice is “forward-looking” in an offender's future.

Within “restorative conferences” which are an alternative to traditional trials, all individuals affected such as the offender, community members, and victims are present in the decision. Rather than a pessimistic approach to deciding the “punishment”, constructive dialogue is encouraged to decide upon an outcome where all the stakeholders are involved. Common decisions decided upon are community service, classes, and learning projects. The key to engaging in restorative justice requires the offender to admit guilt to the court, and recognize their wrongdoing. Those who do not admit guilt are not considered for this approach because that is the first step to a productive outcome. In addition, the act of admitting guilt is viewed as actual punishment in itself.

The main criticism of restorative justice is the question, “Is this actual punishment?”. In response to this, defendants of restorative justice argue that imprisonment and punishment are not the same; rather, punishment is not reducible to imprisonment. It is almost important to note that most supporters of a restorative justice approach suggest imprisonment is only necessary for very serious crimes such as murder.

The restorative justice approach is used frequently for juvenile delinquents, small and relatively small crimes. One can support a restorative justice approach but still accept that

imprisonment is necessary in some cases; but, it is still thought that most cases do not justify incarceration.

### **Retributivism and Capital Punishment**

In this section, I will introduce and explain how capital punishment is the most controversial type of punishment due to its severity. Unlike every other sentence, the death penalty is unique in that offenders lose their life due to an act committed. Because of this, fewer states permit this as a sentence due to factors such as believing states do not have the right to take life away from citizens, disproportionate rates of minority individuals being executed, as well as being uncertain of which method of execution is the most “humane”. Another reason for opposition is innocent people being sentenced to death. Unlike other forms of punishment, once the death penalty is administered, it cannot be reversed. It has been proven some individuals are found innocent once executed. Also, the death penalty in practice has opposition because of the hard accessibility of lethal drugs. Due to this, inmates must sit on death row for a longer period. Following this, I will present my viewpoint and argument about a retributive theory and capital punishment. More specifically, I will present that if proportionality is viewed differently under the retributivist theory, it does not necessarily follow that one has to support capital punishment in theory and practice.

In history, capital punishment, also known as the death penalty, has not only been used for murder. Rather, it was common to execute offenders of adultery, rape, espionage, and sexual assault. Countries founded under biblical beliefs have been shown to have capital punishment

present in their legal history due to its justification within the Old Testament. For example, in addition to those listed above, execution is justified for witches, parents who allow their children to worship another God, homosexual individuals, prostitutes, those who engage in bestiality, as well as those who speak blasphemy against God (Leviticus, 24: 13-16). Because of this, the Western legal system has a strong foundation as capital punishment being justified for various “crimes”. Today, however, many countries have made capital punishment impermissible for any crime. Some countries that have abolished the practice entirely are Australia, Costa Rica, Germany, Ireland, and Venezuela. De facto countries such as Guatemala and Bhutan still allow this punishment for certain crimes, but they have not used it for over ten years. Countries that endorse capital punishment fully are only North Korea, the United States, China, Japan, Iraq, and Iran. Specifically, within the United States, conservative or right-leaning states have exceedingly higher rates of executing offenders. Texas has executed ~500, Oklahoma ~100, and Florida ~80 all since 1976 (Brooks, 2021).

For a state to support capital punishment, it must necessarily follow the thought that the state has the right to execute its citizens. In criticism of this, the thought is simply that the state’s job is to protect and promote the citizens, and executing offenders is not a correct way of doing so. Similarly, executions are disproportionate among minority races, and because of this, opponents advocate for the abolition of the practice entirely. Building upon this, even if minorities, specifically African-Americans, were not executed at disproportionate rates, opponents state the act itself is impermissible simply due to its nature. The uniqueness of capital punishment is that there is no “coming back” once it is administered. Since the judicial system is

not 100% in decision-making, there has been wrongful execution that takes place, and after, it was proven an innocent person was executed. In comparison, if the judicial system makes an error and puts a wrongful person into incarceration, their life is not over, appeals to the court are allowable, and if proven innocent, states compensate individuals for their wrongful time served. Although one cannot get the “normal and free” life when being wrongfully incarcerated, the slim chance that a wrongful execution takes place outweighs its practice entirely.

It may seem that the retributivist is committed to supporting capital punishment. It is natural to think this because of the retributivist notion that punishment must match the crime and a fitting punishment is equivalent to the crime which is represented by *lex talionis*. One simple objection to *lex talionis* is, what are the matching punishments for all crimes committed? It is simple in the case of murder because the fitting punishment would be murder, or possibly theft being the removal of one’s hand. However, in nearly every other crime, it is impossible to find a punishment that is equivalent to a crime.

A retributivist, however, is not committed to *lex talionis*, but rather those who support this theory can reject and support the aspect of proportionality. Unlike *lex talionis*, proportionality does not require the punishment to be equivalent to the crime committed; rather, it just requires that worse crimes deserve more severe punishments. So, that is to say, murder must have a more severe punishment than theft because that would be proportionally correct. Accepting proportionality allows the issue of finding an equivalent punishment for a crime to go away. Simply put, a retributivist is not committed to accepting the death penalty if punishment is viewed with proportionality.

However, accepting proportionality leads one to support a relative term rather than an absolute. This relative term presents an issue because it would be acceptable for a murderer to receive 1 day in jail insofar as all other crimes receive a lesser punishment. Rather, simply accepting proportionality does not set boundaries for punishment besides worse crimes need worse punishment. Because of this, there must be an absolute measure of what is the minimum requirement for various crimes. Since proportionality just states that worse crimes require worse punishment, there is no minimum sentence for offenders of any crime. So, to have an absolute term, it must be stated what is a reasonable or minimum punishment for various crimes. For example, one who commits murder may not receive less than 20 years of incarceration despite any outside factors; however, one can also face up to life in prison. A retributivist is not committed to accepting capital punishment if *lex talionis* is rejected and proportionality with absolute conditions is accepted in its place.

## **Conclusion**

Within this introductory paper on the philosophy of punishment, it is shown that the four main theories elicit various viewpoints on what is right, just, and correct punishment one should face based on the crime. Whether that be inside the judicial system or out, punishment is in every aspect of decision-making in life. Each of the four ideas establishes various principles, thoughts, and rationale behind supporting the theory, but it does not necessarily follow they do not overlap. That is to say one can be a retributivist, but in addition to someone deserving a punishment

simply because they committed a crime, deterrence theories can be incorporated into the punishment decision-making. As stated, defending a retributivist view does not follow the adoption of capital punishment being allowable. Instead, the notion that worse crimes lead to worse punishment is the proportionality ideal that should be adopted. However, this relative term of a worse crime deserves a worse punishment because of various implications. Rather, there must be an absolute measure or precedent for various crimes.

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