

# **Module 7: Punishment—Retribution, Rehabilitation, and Deterrence**

## **Introduction**

Thus far we have examined issues of vice in American law and asked if they should or should not be considered crimes. In these last two modules we shift gears to examine one of the essential features of American criminal law... punishment. In this module we will look at several theories of punishment in an attempt to answer questions such as: If a vice is a crime, then how should it be punished? What justifies punishment? What is the goal of punishment?

**VIDEO:** Before we get into the theories of punishment, the following video will provide a basic background in the history of punishment from ancient times through modern America.

## Part 1: Utilitarian Justifications for Punishment

Our first theoretical foray into punishment is the utilitarian perspective. The utilitarian authors will offer answers to such questions as: Why do we punish? How should we punish? What are the limits of punishment? In addition, we will give voice to some major objections to the utilitarian theory.

### Cesare Beccaria: The Origin of Punishment

*“No man ever freely sacrificed a portion of his personal liberty merely in behalf of the common good. That chimera exists only in romances. If it were possible, every one of us would prefer that the compacts binding others did not bind us; every man tends to make himself the center of his whole world.”*

According to utilitarians like Beccaria, the first communities were based upon necessity. Then the nature of having these first communities “caused the formation of others to resist the first, and the primitive state of warfare thus passed from individuals to nations.” Laws are those things necessary to preserve communities. Each person, tired of war, gives up some of their liberty in exchange for peace, safety, and the benefits of living in a group. Since individuals will always try to usurp the benefits of the community for their own end, the laws had to act against them. Punishment was the tool whereby the community protects the common good against the individual. Only punishment could serve to contain the ill motives of individual greed. The limits of punishment are that it must not go beyond what is necessary for defending the public good lest it become unjust.

#### Thought Question: Is this view too community focused?

One of the features of utilitarian theories of punishment is that it focuses on the community, not the individual. If we focus on the good of the community to justify our actions, what protections are there for the individual? Do we run the risk of sacrificing the individual’s good in favor of the majority?

### Jeremy Bentham: “The Utilitarian Theory of Punishment”

**WEBLINK:** Click [here](#) to read “The Utilitarian Theory of Punishment.”

Bentham begins by laying out the principle of utility:

*“...that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.”*

When Bentham speaks of the common good, he is referring to the sum total of all individuals' interests. Laws, for Bentham, are about promoting happiness. But laws also involve punishment, which is in itself an unhappiness. Utilitarians therefore, have a *prima facie* difficult time justifying punishment. Thus, the two questions Bentham wishes to apply utilitarian moral theory to answer are: When are we justified in punishing? What are the limits of just punishment?

#### When are we justified in punishing?

The short answer is when the costs of punishment in terms of utility are outweighed by the gains in utility by punishment, then we should punish. However, there are at least three ways in which this might be the case.

### 1. **Pure cost benefit**

For example, locking up a violent criminal in order to protect society from further violence (deterrence through incapacitation). The costs to him are great, but given his propensity towards violence, the benefits of removing him from the community far exceed the costs to him.

### 2. **Deterrence**

When humans decide how to act, we tend to look towards the consequences of our actions. Punishment, when factored in as a consequence, can therefore prevent (deter) crime. What is especially interesting about this idea is that it may not require that a punishment be actually used, as in virtue of knowing the punishment, the crime will rarely occur. Thus, utilitarians take special favor in deterrence, as not only does it lower the overall crime rate, but it often does so by imposing minimal punishment (as punishment is an evil in itself).

### 3. **Rehabilitation**

Punishments to shape the future behavior of the criminal are considered rehabilitation. Utilitarians favor rehabilitation because it salvages one more person from becoming a criminal and transforms them into a productive law-abiding citizen. Deterrence, on the individual level, may have a similar effect to rehabilitation (criminals stop committing crimes), but the motive is different. Rehabilitation means an individual no longer *wants* to commit the crime(s) in question. In contrast, individual deterrence means a criminal is simply *afraid* to commit the crime(s) again.

## **Examples of rehabilitation and deterrence**

When we think of rehabilitation, we often think of sentencing drug users and drunk drivers to treatment or the violent offenders to “anger management.” These are classic examples but there are many more. Think of prison life in America and a great many rehabilitation efforts are in place. Why do we offer educational opportunities in prison? Why are prisoners encouraged to work? We do these things, not because they are the brightest students or because they work so well for so little. We do them in the hopes that prisoners will learn the value of legitimate work and hopefully gain the skills needed to be productive citizens. Can you think of other examples of rehabilitation in American punishment?

Deterrence is even more interesting. We are all familiar with deterrence in that our fear of punishment deters us from breaking the law. For instance, you slow down every time you see a police car. However, here is a list of seven more extreme punishments at home and abroad which were attempts to deter:

1. In Singapore an American was “caned” for graffiti. Caning, a common punishment in Singapore, involves a martial artist with a bamboo rod whacking your exposed backside. The process causes major wounds (too graphic to show

here), yet Singapore streets are some of the cleanest in the world due to deterrence. (Below is a picture of a caning about to begin.)

2. In Saudi Arabia the punishment for theft is the chopping off of one hand. (There are no third time offenders!) In addition, the punishment for drug smuggling is a public beheading. Though extreme, the result is a country with a very low reported rate of theft and drug smuggling.
3. In Iran the punishment for adultery (among other things) is to be buried waist deep and stoned. The example is extreme, but one can imagine how such a punishment would deter adultery.
4. In Tampa Florida some youths stole some stop signs (a crime not uncommon in America ). As a result of the missing signs, a deadly accident occurred at the intersection. The judge, aiming to deter this sort of crime, sentenced the youths to 15 years in prison. The result of the highly publicized case was a huge decrease in reported stop sign thefts in Florida and neighboring states.
5. To deter prostitution in Michigan the police have begun to confiscate any automobile used to solicit a prostitute. (We will return to this case later on as it went to the Supreme Court.)
6. To deter prostitution in Oklahoma the police began to broadcast pictures of johns and prostitutes on local TV. This attempt backfired, however, as it became a form of “free advertising” for the prostitutes. The following news clip tells the story:  
*OKLAHOMA CITY , Oklahoma (Reuters) -- The real shame of Shame TV was the ratings.*  
*Shame television is off the air in Oklahoma after the channel aimed at humiliating men who frequented prostitutes ended up providing free advertising for city street walkers but gaining few viewers. Oklahoma City officials this week pulled the plug on a city-run television channel used to show pictures of prostitutes and their customers. They said the channel did not deter prostitution. “There were more females than males, and we kept seeing a lot of the same people,” said Oklahoma City spokeswoman Marsha Ingersoll. The channel dubbed “John TV” aired mugshots of women arrested for prostitution and the men who consorted with them. It was launched in 1999 with the intention of frightening people not to engage in prostitution out of the threat that their face would be splattered across the airwaves. The scrolling and repeating mug shots of disheveled streetwalkers helped would-be customers identify prostitutes, the spokeswoman said. “It was almost a promotional thing for them. It wasn't a deterrent at all,” Ingersoll said.*
7. To deter drunk driving, Detroit area judges began requiring drunk drivers to affix a bumper sticker to their car notifying others of their conviction. This sort of deterrence goes way back in American society to the “scarlet letter” employing shame to deter behaviors. The following news article explains this case:

*DETROIT (AP) - Drunken drivers sentenced to probation in one suburban court will carry a sobering message to other motorists the next time they take to the road. Starting yesterday, Troy District Judge Michael Martone ordered drunken drivers to attach bumper stickers to their cars that read: "Drunk Driving, you can't afford it." "Every time you get into your car, you see this bumper sticker," he said. "You're going to think, 'I better not do it again.'" Martone says the stickers also will spread the don't-drink-and-drive message to others. "You stop at a light, you look at the car in front of you," he said. "What I found is that when you try something creative, the notoriety gets other people interested." The stickers are royal blue with the "Drunk Driving" in bright red and the "you can't afford it" in white, Martone said. He had two batches printed - one with tiny text saying the sticker is affixed pursuant to court order, and one with just the message. The latter batch is for non-convicted drivers who want to display stickers on their cars. "My first approach to this was not to make it a 'scarlet letter,'" Martone said. "I wanted to see the reaction." But in future printings, he said he might consider stronger wording for second- and third-time offenders. Each of Troy District Court's three judges handles up to 40 drunken driving cases a week, Martone said. All three will have access to the stickers. "Just think about it," Martone said. "If at the end of the month if I have 125 bumper stickers out there, they're going to be all over south Oakland County." The stickers cost a little less than \$1 each, and Oakland County paid for them, he said. So far, Martone has received no criticism for his bumper sticker idea. And convicts who complain about messing up their cars won't get much sympathy from him. "I think it's a reasonable condition of probation, and they're just going to have to do it," he said. Martone's campaign against drunken driving began in the early 1980s, when he prosecuted drunken driving homicide cases. He had to attend autopsies and visit sites of fatal crashes. That served as an inspiration when Martone last month sentenced Steven Allor, 18, of Grosse Pointe Farms, to attend an autopsy. Allor had been convicted for alcohol possession three times, Martone said. And though he wasn't driving himself, he did get into a car with a drunk driver, Martone said. The teen has called the sentence "ridiculous." "He may not believe it, but I'm trying to save his life," the judge said. Martone has designed a "Courts in the Schools" program that teaches kids about the dangers of drunk driving and the importance of making good choices. The program is offered in Michigan, Arkansas, Wisconsin, New Jersey, Missouri, Florida, and Oklahoma.*

These are only a few examples of deterrence-motivated punishments. Can you think of others?

## **What are the limits of punishing?**

Bentham cashes out the principle of utility to provide the following instances of when punishment cannot be justified:

1. Where punishment is **groundless** (punishing innocents, for instance).

If the mischief was necessary to achieve a greater good, this too would make punishment groundless. Suppose I have someone in need of emergency medical

assistance in the car and as such I run red lights after looking both ways and finding no traffic. Punishing me in this case serves no gain in utility. This area would also include cases where compensation can be made for the harm done without punishment. For example, if someone breaks your window but pays for repairs and compensates you for the inconvenience, then there is no need for the state to punish. Though Bentham doesn't mention it, Mill, of course, would include in this category not only innocent people but also cases where everyone involved consented.

2. Where punishment is **inefficacious** (it is unable to prevent bad behavior).

This would include cases:

- Where the law is *ex-post facto* (where the act was not illegal when performed).
- Where the law is passed but is not conveyed to those it is intended to regulate (this is not to say ignorance is an excuse, but it is to say that if a law is never posted or publicized, then there is no justification for enforcement).
- Where the law, though passed and conveyed, could not have an impact on the person (i.e. infant, children, and the insane).
- Bentham also lists intoxication into this class of inefficacious punishments (although other utilitarians would reject this).
- Finally this would include unintentional acts, acts done due to fear (self-defense) and acts that are involuntary (acting from compulsion, “your money or your life,” sort of situations).

3. Where punishment is **unprofitable** (Where the costs of punishment outweigh the benefits of punishment).

Costs of punishment include the evil of coercion, restraint, apprehension (the pain of the person), and sympathy (the pain others experience out of concern for the one punished). These costs must be weighed against the benefits of punishment which include the degree of the offense, the number of offenses, the likelihood of repeat offense (or of deterring future offenses) and the displeasure of the people who are aware of the crime. Interestingly, Bentham includes foreign powers and communities in determining the benefits of punishment. If by punishing a person we would greatly offend another nation, this would be justifiable reason for not punishing.

4. Where punishment is **needless** (where the mischief will itself cease or can be prevented without punishment).

In a case where education will prevent a crime, then we ought to forgo punishment. Or if pure pressure alone will prevent the action in future (i.e. you did learn your lesson by the reaction of others).

In addition to these four, Bentham speaks to 28 additional rules guiding punishment (punishment must fit the crime, circumstances must be taken into account, etc.), but we will not go over all of them here. Suffice it to say, more often than not, utilitarians justify

punishment for its propensity towards **rehabilitation** or **deterrence**. Punishment just for the sake of punishment (without any deterrent or rehabilitative effect) seems immoral to the utilitarian as not only does it accomplish nothing while causing pain, but it also smacks of revenge. What is your take on the utilitarian theory of punishment? As we shall see, it has plenty of objectors.

## Part 2: Arguments Against Utilitarian Justifications

### C. L. Ten: The Effects of Punishment

The utilitarian theory justifies punishment on the grounds of rehabilitation and deterrence. Ten argues that rehabilitation just doesn't work and that deterrence isn't much better. His reason for this claim is that no solid proof has yet to demonstrate that rehabilitation programs succeed in lowering the rate of recidivism. According to Ten, the difference between deterring an individual and rehabilitating an individual is that deterrence scares the individual into not committing the crime again whereas rehabilitation makes the individual not want to commit the crime again. As such, deterrence is a somewhat viable theory of punishment as some effects can be proven, but rehabilitation fails as the rate of recidivism is the same for prisoners who receive rehabilitative forms of punishment as those who do not. Even with deterrence Ten is skeptical. Evidence exists that punishment to deter an individual from committing the same crime does not in fact deter them. What studies have demonstrated is that the rate of recidivism is the same amongst those who were caught, convicted, and punished as those who were caught, confronted, and let go. In other words, the actual punishment failed to deter shoplifting or drunk driving (the subject of the studies Ten cites); instead, it was being *caught* that served to deter the person by making them fear the real possibility of being caught again. The fear of being caught serves as the deterrent rather than the punishment for being caught.

This may not be the case with all crimes. In some studies there does appear to be a deterrent effect of punishment. This can be demonstrated by showing that areas with higher crime rates correlate to areas with lower penalties and vice versa. Some clear examples of deterrence working can be found in this way by comparing vandalism in the U.S. with Singapore or theft in the U.S. with Saudi Arabia. Yet other sorts of crimes seem not to be affected by deterrence. For example, when Hawaii legalized abortions, the rate of abortion did not increase which would indicate that the criminalization and punishment for abortions was not having any deterrent effect.

Deterrence does have some value in its incapacitative effect. By keeping people locked up in prison, their ability to commit crimes is curtailed. The more criminals are locked up for longer periods of time, the more the overall crime rate will be lowered. Incidentally, this is one argument behind the "3 strikes" laws found in several states. By locking up habitual criminals, we deter most of their future crimes, thereby lowering crime in society. Of course, the price for achieving this deterrent effect via incapacitation is to massively increase our prison populations. However, this incapacitative effect is of limited value as criminals do have opportunities to commit murders and other crimes while behind bars. Still, there is some deterrent value found through prison as a form of punishment.

In summation, Ten shows us that deterrence is not easily predicted. Many factors are involved in determining if a deterrent effect will be derived from a particular punishment and even then many factors may eliminate this deterrent effect. For example, upping punishments which overcrowds prisons may not increase deterrence when the result is an increased rate of parole to deal with overcrowding. There also seems to be a variety of psychosocial factors in determining if punishment can deter a person from committing a

particular crime (i.e. the decision to have an abortion seemed to be beyond the reach of deterrence). In the final analysis this makes deterrence much more difficult to use as a justification for punishment. Deterrence appears to have some general effect in some cases as well as a limited incapacitative effect, but lacks the individual or universal deterrent effect utilitarians propose. This creates a problem for utilitarians because, if Ten is correct, rehabilitation fails and deterrence is not practical, leaving the utilitarians with a largely discredited theory of punishment.

## **Igor Primoratz: Arguments against the Utilitarian Theory**

Even if the utilitarian theory of punishment works (and Ten indicates it might not work), there are direct objections to it. The essential objection in this article is that utilitarian punishment is unjust in at least three ways. **First**, there is no mercy. **Second**, it allows disproportionate (harsh or lenient) punishments. **Thirdly**, there is no thing connecting punishment to desert. Below is a summation of Primoratz arguments as well as other classic arguments against the utilitarian theory of punishment. If we were to get at the core objection to the utilitarian theory, it would probably be that utilitarianism does not respect the human person. How do you show proper respect for the human person? You punish them based strictly on what they deserve.

This argument derives from several sources including both Kantian moral theory, which is based upon respecting persons as ends in themselves rather than means alone, and Libertarianism, which also places primary value upon the individual's rather than society's interests. Utilitarians ignore the individual person by justifying punishment on the "larger" objectives of society's good. For example, the philosopher Hegel objects to utilitarian deterrence when he says, "To base a justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog. It is to treat a man like a dog instead of with freedom and respect due to him as a man"

### **Why can't the utilitarian punish based upon desert?**

For utilitarians, punishment cannot be deserved. At best it can be right to punish. How can a utilitarian ever say someone "deserves something" as they determine everything based upon the greater good? Utilitarianism entails that you are entitled to something not because "you deserve it" but because "your getting it maximizes the greater good."

### **Why can't a utilitarian show mercy?**

Mercy is a conflict between deserved punishment and justice. This conflict takes the form: We have good cause (justice) to punish, yet we find good cause (desert) not to. This cannot occur in utilitarianism because for utilitarians there is no difference between "desert" and "justice" as both simply mean utility.

### **Why does rehabilitation necessarily conflict with desert?**

Rehabilitation is also a matter of society using a man and changing a man to meet its own ends. When we punish based upon rehabilitation, we are deciding to forcibly alter who this person is. We do this not for his benefit, but for our own benefit. Rehabilitationists don't argue that we should rehabilitate prisoners for their own good (though Aristotle might); they argue that we should make them "productive citizens," which is to say make them so they benefit the rest of us (not to mention get them out of jail so we don't have to

pay for their upkeep, which is also based upon our interests and is not a question of what the person deserves). Thus, rehabilitation is using a criminal as a means rather than treating them as an end. It fails to respect a person or punish them based upon desert. Instead, rehabilitation sacrifices respect for the person and what they deserve in exchange for using a person for our own good.

### **Why does deterrence necessarily conflict with desert?**

The nature of deterrence is to punish in excess of desert. We do not ask: what do they deserve given their crime? Instead, we are motivated by a desire to scare others and this will often entail a more spectacular form of punishment. For example, if we want to deter parking in handicapped lots? Well then, let's chop of the legs of offenders (then they can park there all the time). This would certainly deter, but it would also be excessive. When a punishment today fails to deter next week, the utilitarian response is to jack up the penalties continually. This itself indicates that punishment does not fit the crime as the same crime committed today earns one punishment where next week the penalty doubles, all because of how many other people commit the crime. Why should I be punished for what other people do? This, of course, works in reverse as if it were learned that half the punishment would net the same deterrent effect, suddenly my crime earns half the penalty as it did before.

Some further conflicts between desert and deterrence are:

1. Deterrence takes crimes of passion or provocation, which are traditionally “extenuating circumstances” warranting less punishment, and turns this around making them “aggravating circumstances.” This is because crimes of passion or provocation can only be deterred by increasing the punishment for them.
2. Punishing the mentally ill is another problem for the utilitarian. Bentham holds that they should not be punished as the punishment would not have a positive effect. For certain it may not affect the behavior of the mentally ill, but what if punishing the mentally ill would deter normal people? The state of Texas has taken this sort of view in its defense of executing the mentally ill in the name of deterrence. Why wouldn't the utilitarian, when push came to shove, support punishing the mentally ill on deterrence grounds? Of course, the utilitarian might hold that even in these cases we should not punish the mentally ill because of the generally moral opposition of society (thereby making it against the greater good). But doesn't this answer demonstrate flawed reasoning in that what other people think is not determinative of what the mentally ill criminal deserves? Yet this is what the utilitarian appeals to.
3. Punishing the innocent is also justified on the utilitarian theory for deterrent effect. Collective punishment, where it is impossible to determine the innocent from the guilty, may be justified in some cases for its deterrent effect. This has occurred historically, when in the name of deterrence states have justified punishing the guilty person, his family, his village, or his acquaintances. One example of this today is when a suicide bomber strikes Israel, the Israeli military will bulldoze the home of the bomber's family. This is done as a deterrent and in at least one case a family member prevented a relative from committing a suicide bombing in order to preserve the family home.

To reiterate, when we punish based upon deterrence, we ask ourselves, “Will this deter others?” We are not in any way discussing if the person *deserves* this punishment. The person punished by deterrence is being used by society for society's own goals and is not being punished based on what he deserves. Deterrence then is using a man as a means to an end, regardless of what they deserve.

### **Further objections to the Utilitarian Theory**

Moving beyond the rehabilitation and deterrence conflict with desert, there is also a general objection to viewing punishment as a way to achieve the greatest good. If punishment is justified because of the general good that comes from it, then the following seems justified:

1. We might find a general case where punishing an innocent person serves the greater good.

For instance, if great social unrest occurs because a crime has not been solved and no solution is in sight, a utilitarian seems justified in picking out an innocent, unsavory character and convicting them for the greater good. Doing this will ease social unrest, serve as a deterrent, and ensure faith that the guilty do not escape. In these cases, utilitarianism not only holds that the courts punish the innocent, but that the innocent themselves accept guilt for the common good. A good confession to the false charge and claims of repentance before punishment best serves the public good, yet this seems an unjust result of utilitarian theory.

2. Bentham's theory also entails letting the guilty off scot-free.

For instance, if a punishment would offend the public or even a foreign power, then it would have more negative consequences than good ones—requiring us not to punish. We do not have to look far for these sorts of cases. Sometimes, when foreign nationals of significant prominence commit crimes in our country, they are not punished (typically they are just asked to leave the country) on the grounds that it would damage international relations. We might also find cases where the vast majority of the public opposes punishing a person for committing a crime (perhaps they are universally loved or their crime was the sort that people “would have done in their shoes”). Here too the utilitarian would let them off the hook, despite the commission of a crime, just because public opinion is opposed to punishment. What sorts of cases might fit this model? Would the utilitarian conclusion not to punish be the right solution?

3. Granting criminals who become human subjects lighter sentences.

Kant asks, “What are we to think of the proposal that the life of a condemned criminal should be spared if he agrees to let dangerous experiments be carried out on him in order that the doctors may gain new information of value to the commonwealth, and is fortunate enough to survive?” Kant rejects any such deal as unjust, but the utilitarian is certainly tempted to accept it. What should we say to this sort of case?

#### 4. Propagate the illusion of punishment.

At the cape of Good Hope, the Dutch made use of a stratagem which could only succeed among the Hottentots. One of their officers having killed an individual of this inoffensive tribe, the whole nation took up the matter, and became furious and implacable. It was necessary to make an example to pacify them. The delinquent was therefore brought before them in irons; as a malefactor he was tried with great form, and was condemned to swallow a goblet of ignited brandy. The man played his part—he feigned himself dead, and fell motionless. His friends covered him with a cloak, and bore him away. The Hottentots declared themselves satisfied. “The worst we should have done with the man,” said they, “would have been to throw him into the fire but the Dutch have done better—they have put the fire into the Man.” Is this not the ideal utilitarian punishment? To give the illusion of great punishment without actually inflicting pain? Do you concur with this case?

#### **What is the alternative view of punishment?**

The major competitor to the utilitarian theory of punishment is known as retribution. Those who object to the utilitarian theory typically favor retribution because “...retributivism affirms the conception of human beings as persons; for we relate to another person when the way we treat him is determined by his own decisions and actions.” The essence of retribution (favored by Kantians and libertarians) is desert. With retribution we first say “he deserves it” and then we punish in a way that he deserved, and if that punishment serves as a deterrent then so be it. This would be killing two birds with one stone, but the primary focus is always on what the person deserves and never on the deterrent or rehabilitative effect. Real justice and respect for a person's free will requires punishing only those who deserve it without forcing them to change against their will or using them for our purposes.

## Part 3: Retributivism and its Critics

### David Lyons: Punishment as Retribution

Retribution is giving people what they deserve, hitting them back with equal force to a blow they have struck, and treating someone as they have treated others. A classic legal statement often put forth by retributionists is: *lex talionis*, which means “an eye for an eye, a tooth for a tooth, and a life for a life.” How is retribution different from revenge since revenge is also the hitting back of the wrongdoer? The difference is that retribution involves hitting back with equal force whereas revenge often involves hitting back harder than we have been struck. Revenge exceeds what a person deserves, often to the satisfaction of the vengeful.

Retributive claims for punishment can arise not only when a harm to others has been committed (the standard case) but also when someone violates the “minimal standards of decency and consideration for others.” For example, someone who attempts, but does not succeed in harming another still generates a retributive call for punishment. So also the person who through non-action (negligence) puts others at risk or displays disregard for others generates a retributive call for punishment.

In addition to *lex talionis*, a more complex statement of retribution is offered by Immanuel Kant. Kant takes into account the attitude or motive of the wrongdoer. This makes retribution more flexible than *lex talionis* as it would allow that unintentional crimes warrant less punishment than intentional ones. Kant views people as rational agents who understand what they do and therefore when we intentionally act, we indicate how we think actions should be performed by everyone. Punishment then serves as a way to give people back what they indicate ought to be done to others. Thus, punishment respects the individual person as we are only doing to you as you have intentionally done to others. Our duty, for Kant, is to only perform actions as we believe all rational people should act. Actions such as lying, stealing, and murder cannot be said to be universalizable. In other words, rational people cannot (and do not) believe that everyone should lie, steal, and murder so these actions are wrong. For example, when people murder they indicate their belief that others should do these things to them. This is where retributive punishment comes in as it serves to give them what they **seem** to be asking for—execution.

The primary feature that attracts us to retributivism over the utilitarian justification for punishment is that retributivism ties punishment to what the person deserves, thereby avoiding the problems of over-punishing, under-punishing, and punishing the innocent. However, several challenges to a strictly retributivist theory of punishment arise.

1. What is the moral purpose of punishment?

The utilitarian can offer some goal or gain for punishment—the greater good achieved through deterrence and rehabilitation. Retributivism seems to uphold punishment for its own sake rather than for any particular benefit. For example, any serious retributivist would hold that even if the world were to end tomorrow, we have a duty to ensure that all those awaiting execution are executed.

Retributive punishment therefore serves no future purpose.

2. How do we fit punishments for offenses?

Okay, we execute the murderer, take an eye for an eye, but do we torture the torturer, rape the rapist, and steal from the thief? Outside of a few simple cases, what guides us in determining what people deserve? What is the deserved punishment for stealing a candy bar? What about rape? Is multiple murder deserving of more punishment than single murder? In answering each question, remember you can not appeal to rehabilitation or deterrence in your answer as they are not justifiable reasons to punish for the retributionist. Further, your answer must be supportable by reasons other than personal preference as society will punish all like cases based upon your decision.

**3. Thought Question: Punishing the Three Drunks?**

Three neighbors get drunk at a bar. Each takes the same route home but 15 minutes after the one before them. The first drives home without incident except that a police officer happens to pull him over right next to his home on a random check and arrests him for drunk driving. Shortly after the first man is arrested, it begins to rain. The second drives home but skids off the wet road during a sharp corner into a telephone pole where police find him and arrest him for drunk driving. The third drives home and skids at the same wet sharp corner but due to bad luck or timing hits a family of four head on, who are killed. The third man is arrested for drunk driving (and four counts of manslaughter). You, a retributionist, are assigned to determine the deserved punishments for each of the men. Each of the three intended to drive home drunk, but due to rain and bad timing the results of each drunk driving attempt varied widely. What is the deserved punishment for each of the men?

4. Why should the state have a monopoly on punishment?

If someone walks up and punches me and I punch them back, I have provided a justified retributive punishment. Yet the state will call me a vigilante and punish me for my action because the state claims sole authority for punishment. The utilitarian can justify this state monopoly by holding that general utility is best served by reserving punishment decisions to the state. Yet, there is nothing grounded in a retributionist theory that would uphold the state's right to monopolize punishment. Is it an acceptable outcome for our system of punishment to allow individuals to punish others so long as they do not do so excessively?

5. Is there any possibility for remediation of harms?

Some might argue that retribution can also be said to restore the moral balance by taking away from the offender any gains from his offense through punishment and perhaps, where possible, forcing the offender to compensate the victim for his loss. Yet Lyons argues this result is problematic in its application for several reasons. **First**, to restore the moral balance may not always be possible as many

victims cannot be compensated for their loss. **Second**, restoring what was before the crime would only be morally acceptable if the prior condition was itself justified. **Third**, retribution itself focuses on punishment, not remedy. If I poke out another man's eye, but surgery can replace the eye, will the retributionist be satisfied if I offer to pay for the surgery (thereby forgoing any punishment to me) or will the retributionist prefer that I be deprived of something equivalent to what I have taken? It seems difficult for retributionists to forgo punishment for crimes in exchange for remediation of harms. (Would the state forgo an assault prosecution if after breaking your legs I offer you a sufficient sum of money in compensation?)

6. Does retribution go too far?

Retribution, unlike law, seems to justify punishment for any action that is wrong. This means that we appear justified in punishing any wrong action (even if there is nothing illegal). Not only does the law traditionally limit the amount of immoral action it punishes, but it also reserves punishment for actions currently illegal. Retribution seems to expand punishment to be justified in all immoral actions (something Kant, Aristotle, and Devlin might agree upon, though for different reasons) and even allows for ex post facto punishments as if your action was wrong when you did it, it deserves punishment (even if we passed the law after you committed the act).

7. Does retribution go far enough?

Just as retribution expands punishment beyond traditional legal boundaries, it also provides no reason to punish for many legal infractions we have today. For example, most traffic laws and laws promoting economic competition are not based upon any immorality of action nor can punishments be justified based upon desert. Instead these laws are designed to promote some common good (consequence) rather than prevent any immoral or ill motivated behavior. For instance, there appears to be nothing immoral about jaywalking or changing lanes without using a blinker when no one else is around, but these behaviors are punished by law and retribution provides no justification for this.

## **Herbert Morris: Punishment and Fairness**

Morris offers an alternative retributive theory of punishment to *lex talionis* and Kant. According to Morris, society is based upon a contract of rules. We understand the rules as those things necessary to ensure fairness. When someone commits a crime they have violated the rules in order to gain some good in society without paying the appropriate cost. In other words, they have cheated to get ahead. Punishment, as for all retributivists, is giving people what they deserve. As such, Morris argues that punishment is simply taking away any good or advantage a criminal has obtained against the rules. They deserve to be put back the way they were before the crime was committed. When someone knowingly violates the rules, they bring punishment on themselves—they incur a debt to society that the institution of punishment repays.

## **C. L. Ten: Is Punishment Fair?**

Ten offers a rebuttal to the theory of punishment put forth by Morris. According to Ten, Morris does not provide a pure retributionist theory of punishment at all. Instead he provides a mixed justification in which:

1. Punishment is justified to take away the gains made through crimes (a retributionist reason) and
2. Punishment is justified to ensure that those who obey the law rest assured that law breakers are punished (a utilitarian reason).

This theory will fail in practice because most benefits obtained through crime cannot be “paid back” to the person wronged (as one would expect to restore things to how they were). Instead Morris' theory would be “paying back” society (not the victim) by ensuring to them that lawbreakers do not “get away with it.” This begins to look less like a theory of retributive punishment and more like a theory of political obligation as “deserving punishments” becomes synonymous with “breaking the rules of the game.” This stands apart from punishing for the greater good, and punishing because the person has done something deserving of punishment. With Morris, punishment becomes a matter of holding that everyone is obligated to obey the rules (without regard to what those rules are) and that violators of the rules deserve punishment to ensure that rule breaking does not pay. Since everyone benefits from obeying the rules, then you are obligated to obey them too.

Even if we accept this idea of an obligation to obey the law (and there is substantial literature in political philosophy that rejects this very idea), Morris' theory is also vague in that it does not provide any way of determining what punishment is deserved, only that some type of proportionality is due for violators of the rules. This avoids the real challenge for any non-utilitarian theory; what punishments fit what crime and why? Might the answer be to employ the general utility of deterrence? If so, does Morris' theory collapse into utilitarianism? Not entirely, as the utilitarian takes into account all consequences in determining a course of action, Morris' theory limits this to consequences of fairness to the law-abiding. One significant advantage that Ten finds with Morris' theory is that it provides a defense against punishing the innocent. If punishment is deserved only when people voluntarily act unfairly by breaking the rules, then it can never be possible to punish an innocent person as they do not deserve it.

### **Further Objections to Morris**

1. Morris's theory works by punishing acts that are unfair to law-abiding citizens.

This works to justify many punishments but not others. For example, how could Morris justify punishing cruelty to animals (kicking your own dog perhaps)? This theory is therefore incomplete and requires supplemental justifications for other punishments.

2. More needs to be said about harm to the victim.

Morris would find the murderer deserving of punishment for an act unfair to law-abiders, but speaks nothing about the harm to the victim.

3. This theory enables perpetuation of social injustices.

In a society with vast inequalities of wealth and opportunity, it seems likely that the bulk of criminals will come from those at the bottom of the socio-economic spectrum. They may benefit from some from the rules, but the bulk of benefits are reserved for the higher classes. Here Morris' theory of "fairness" continually justifies punishment for those who are not trying to "gain an advantage" as much as they are trying to "catch up." It is not clear how punishing the impoverished protects a fair distribution of benefits and burdens.

4. Misplaced motives for obeying the law.

Morris seems to think that the decision to obey the law is motivated by the desire to continue the rules or the system of mutually beneficial social cooperation. Yet, most people's decision to obey is based upon fear of punishment. For instance, a great many law-abiders might reject the rules, but obey them for fear of punishment. Morris seems to take too large a liberty in pointing to law abiders as "supporters of the system" in whose name those who violate the system deserve to be punished when a majority might agree with the criminal's action.

Ten concludes that all retributionist theories fail on their own accord. Yet, retributionist theories of punishment seem to have a necessary component in a theory of punishment that will constrain the worst of utilitarianism (punishment of the innocent) as well as justification for punishment in certain cases.

### **George Schedler: Can Retributivists Support Legal Punishment?**

Schedler offers a further challenge to any retributivist theory. His claim is that retributivists provide a moral justification for punishment which will stand in judgment of systems of punishment (legal punishment) and will reject them. Since, we know for certain that our system of punishment will convict the innocent on occasion (no system is perfect), then retributivists must reject our system. As no system we know of is immune from this criticism, retributivism is incompatible with any system of legal punishment.

One defense of retributivism is that mistakes happen and we recognize that. This defense will be insufficient as our system of legal punishment, and its burden of proof are prone to human errors. So long as we know our current system is flawed and we have alternatives to improve protections against the convicting of the innocent, but refuse to implement those protections (due to expense or hassle or fear of letting more guilty go free), then we are knowingly and intentionally endorsing a system that convicts more innocents than a possible alternative. One way of viewing this dilemma is to consider a move from "reasonable doubt" to "no doubt" as a standard of proof for conviction. Juries under the "reasonable doubt" standard will today find innocent men guilty because the evidence seemed convincing. In many trials, the "reasonable doubt" standard is met strictly through circumstantial evidence, which is hardly the surest way to protect the

innocent. Under a system of no doubt, the burden of proof would be very high, more guilty would go free, but innocents would be protected. So long as we adopt the system that will convict more innocents, we cannot be true retributivists.

## **Part 4: Mixed Theories of Punishment**

### **John Rawls: The Practice of Punishment**

Rawls's essential claim is that any system of punishment must rest upon both utilitarian and retributionist principles. Utilitarian principles will justify the *system of punishment* as a whole and retributionist principles will justify **punishment in individual cases**. The system or rules are set up to benefit society. The determination of punishment for a particular case is what that individual deserves. This will resolve the problems of both theories, especially the problem of punishing innocents. To illustrate, Rawls provides the following example of a conversation between a father and son:

Suppose the son asks, "Why was J put in jail yesterday?" The father answers, "Because he robbed the bank at B. He was duly tried and found guilty. That's why he was put in jail yesterday." But suppose the son had asked a different question, namely, "Why do people put other people in jail?" Then the father might answer, "To protect good people from bad people," or "To stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn't be able to go to bed at night and sleep in peace."

Notice the two different questions discussed. One asks why an individual was punished, which earned a retributive justification in response. The other asked about why we have an institution of legal punishment, which earned a utilitarian justification in response. The question then becomes, is the father contradicting himself by appealing to two, generally incompatible, principles? Or, are the types of things the question refers to best resolved by appealing to two principles? Rawls notes that the retributive answer looks backwards, justifying an action in the individual case based upon what had occurred prior. The utilitarian answer looks forward, justifying the system based upon what that system will accomplish for the future good.

Rawls thinks that these two answers are not in conflict as the utilitarian answer sketches out only the duties of the legislators who make the law, whereas the retributive answer sketches out only the duties of the judge who enforces the law. Each job is guided by a different set of duties. Legislators should be motivated by utilitarian justifications (and not retributive concerns) when devising the system of punishment. Judges should be motivated by retributive justifications (and not utilitarian concerns) when enforcing the law. In this way Rawls thinks we can resolve the conflicts and problems of these two theories while compatibly garnering the best parts of each.

Does Rawls have the solution? What objections, if any, do you see with this approach?

### **Alan H. Goldman: The Paradox of Punishment**

Goldman thinks that systems such as Rawls' cannot succeed because no utilitarian system can succeed if the level of punishment is limited by retributionist concerns. For example, the only way to achieve proper deterrent effect, given our conviction rate, is to jack up the punishments to a level that retributionist judges would reject. As such, one or the other has to give, which will collapse Rawls's system into either a retributionist or utilitarian theory. Consider the following cases that would apply:

### Case #1

In the name of deterrence, several state legislatures have adopted “three strikes and you’re out” laws. But this has entailed that the man with two robbery convictions who then writes bad checks gets a life sentence. Either we reject this law (and utilitarian deterrence) or we reject what the man deserves (retribution). How can we resolve this?

In order to deter drug trafficking the Michigan legislature imposed life sentences for possession over a certain amount. If this did deter crime but was more than the person deserved (a life sentence for a suitcase of pot seems excessive), then what are we to do?

### Case #2

Rawls's mixed theory of punishment does eliminate the problem of punishing the innocent. However, it does not resolve the issue of over punishing the guilty. As such, Goldman claims, the conflict between retribution and utilitarian justifications for punishment is not resolved as Rawls suggests. Is Goldman right? Can a defense of Rawls mixed theory be offered?

At this point what justification of punishment is the best (or perhaps the least worst)?

# Assignments

## Activities so far

As you proceeded through Module 7, you should have participated in the following online activities: poll questions.

If you have not, please make sure you go back and complete these before proceeding. Further activities for this unit are listed below.

- WEBLINK READING : “The Utilitarian Theory of Punishment”
- Poll Question: So all three drunks deserve the same punishment?
- Poll Question: Should we reject the law or reject what the man deserves?
- Poll Question: Should we uphold the life sentence or reject the law?
- Poll Question: In general, which theory of punishment do you support? A. Utilitarianism, B. Retribution, or C. a mixed view?
- Poll Question: Are we justified in punishing someone solely for deterrent effect?
- Poll Question: Are we justified in punishing someone solely for rehabilitative effect?
- Poll Question: Are we justified in punishing someone solely for retributive effect?

## Discussion Question: Punishing vice?

As we have seen there have been many attempts to criminalize and punish vice. Certainly if vices are crimes, the retributionist finds just cause to punish. However, those who favor deterrence and retribution have more difficulty with vice crimes. When crimes are caused by vice, they become very difficult to deter. Can we effectively deter drug addicts, gambling addicts, or sex addicts from continuing to engage in criminal behavior to feed their vices? Further, a great many people with vices simply do not want to be cured or rehabilitated. Given this, it becomes hard to show how deterrence and rehabilitation are successful when it comes to vice-related crimes. This has not kept the states from trying to deter vice crimes. The following case involving Michigan 's attempt to deter prostitution by confiscating cars went all the way to the Supreme Court. Read the following Supreme Court case and then post an answer to the questions below.

**READING :** Click [here](#) to read *Bennis v. Michigan*

1. Did the court make the right decision in this case? Why or why not?
2. Is the Michigan policy a justifiable deterrent to the vice crime of prostitution?
3. Should punishment policies like this one be applied to other vice-related crimes?

Post your answers to the Module 7 Discussion Forum.