Even More Varieties of Retribution

NIGEL WALKER

Twenty years ago Professor Cottingham published his deservedly well-known article 'Varieties of Retribution'[1]. Some water has flowed under some bridges since then, and versions of retributivism have multiplied. There is even talk of a 'third way' of justifying punishment that is neither retributive nor consequentialist[2]. It is because I benefited from his article, however, that I am venturing to supplement and comment on it.

Repayment theory[3]

One author who thinks he has found a third way is Richard Burgh[4]:

> ... one can derive the concept of penal desert from a wider ethical principle which steers a course between retributivism and utilitarianism. I derive this concept from the principle of compensation—the person who is responsible for wrongfully harming a party ought to compensate the party for that harm—which in part underlies the law of torts. In order to appeal to this principle, I argue for a a version of the traditional legal thesis that crimes, unlike torts, are social harms. Punishment will then be justified on the grounds that it compensates society for this harm. This view, though non-retributive, will capture the backward-looking retributive intuition that the culpable offender should be punished because he or she deserves it.

This not so much a 'third way' as an old and popular version of retributivism, reflected in the etymology of the word itself, as Cottingham points out. He argues that it is difficult to see how punishments such as imprisonment can 'repay society' for whatever harm has been done to it, since they confer no benefit on anyone. In fact incapacitation, deterrence and correction are benefits, even if

[1] J. Cottingham, 'Varieties of Retribution' in *Philosophical Quarterly*, **29**, (1979), 238ff.

[2] See for example A. E. Bottoms, 'Five puzzles in von Hirsch's Theory of Punishment', in *Fundamentals of Sentencing Theory* A. J. Ashworth and M. Wasik (eds) (Oxford: Clarendon Press, 1998).

[3] These are Cottingham's labels.

[4] R. Burgh, 'Guilt, punishment and desert' in *Responsibility, Character and the Emotions*', F. Schoeman (ed.) (Cambridge University Press, 1987).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

not every sentence can guarantee them. What one could argue, however, is that 'repayment theory' does not fit the view that failed attempts, conspiracies and reckless use of vehicles or firearms 'deserve' punishment when no harm has been done. What is interesting is that this ancient version of retributivism was still on offer in the late nineteen-eighties.

'*Desert theory*'[3]

Cottingham takes what Honderich says in *Punishment*[5] to be an example of what he calls 'desert theory': that the essence of retributivism is that punishment is justified simply because it is deserved, and he points out how cryptic this is. If, as seems to be the case, it is distinguishable from repayment theory, what is it saying about the relationship between wrongdoing and punishment? Is it simply making the unsatisfying assertion that wrongdoing makes punishment just? Cottingham stops short at this point; but it seems fair to recognize a point of view which can be called 'intuitionist'.

Intuitions of desert

Richard Burgh talks about 'retributive intuition' in the passage just quoted; but there are out-and-out intuitionists who make no appeal to the notion of compensating society, or indeed any other notion. Their intuition tells them that wrongdoing calls for punishment, much as it tells them that the doing is wrong. Michael Moore, although he disowns complete intuitionism, is a fairly good example of it[6]:

> Our feelings of guilt thus generate a judgment that we deserve the suffering that is punishment. If the feelings of guilt are virtuous to possess, we have reason to believe that this last judgment is correct, generated as it is by emotions whose epistemic import is not in question.

It is true that the judgment that suffering is deserved is presented as an inference from guilty feelings rather than an intuition in the strict sense; and that Moore argues that we know others to deserve punishment because we know that we would feel guilty had we done what they have done. But he seems to be giving expression to what

[5] T. Honderich, *Punishment: the Supposed Justifications* (London: Penguin Books, 1969 edition).

[6] M. S. Moore, 'The Moral Worth of Retribution' in *Responsibility, Character and the Emotions*, F. Schoeman (ed.) (Cambridge University Press, 1987).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

can fairly be called 'intuitionism'; and it has one feature which is peculiar to it. It is the only version of retributivism which does not offer a *reason* for the obligatory relationship between wrongdoing and punishment which it asserts. For the intuitionist metaphors, metaphysics and analogies are merely attempts to communicate the indescribable. He cannot be expected to produce arguments that support his intuition—although he must be prepared to refute negative evidence (for example idiosyncratic intuitions).

He must nowadays, however, take an interest in sociobiology, and in particular the possibility that his moral intuitions are the products of cultural or even genetic evolution. Axelrod (1984)[7] found that in iterated sequences of 'the prisoner's dilemma' the strategy which accumulated the greatest number of points was a modified 'Tit-for-tat', which allowed the opponent one 'defection' before 'punishing' him with a defection. Successful strategies for social interaction have obvious survival value, and are likely to become ingrained in cultures, perhaps to an extent that gives rise to 'intuitions'. What has to be conceded is that ethologists who study the social behaviour of other primates (for example De Waal, 1982[8]) do not seem to have recorded unmistakable examples of tit-for-tat strategies—only delayed reconciliation strategies. Perhaps delayed retaliation requires something that is peculiar to, or better developed in, human beings—perhaps a more efficient memory.

Penalty theory[3]

This is Cottingham's name for a curious suggestion by Mabbott[9]. 'They had broken a rule and they knew it and I knew it; nothing more was necessary to make punishment proper'. Cottingham himself is rightly doubtful whether the mere breach of a rule is enough to serve as a justification for punishment. It is only half a justification. I found the other half in another pre-war book, by W. D. Ross[10]. The state has the right to punish the guilty because it is

[7] R. Axelrod, *The Evolution of Co-operation*, (New York: Basic Books, 1984), (1990 edition by Penguin Books, London). He did not, so far as I can tell, try out TIT-FOR-TAT against a series of randomly mixed strategies, which might have approximated more closely to the interactions of a small social group.

[8] F. De Waal, *Chimpanzee Politics: Power and Influence among Apes*, (London: Jonathan Cape, 1982).

[9] J. D. Mabbott 'Punishment', in *Mind*, (1939), **48** reprinted in *The Philosophy of Punishment*, H. B. Acton (ed.), (London: Macmillan, 1969). 'They' were undergraduates who had failed to attend chapel as required.

[10] W. D. Ross, *The Right and the Good*, (Oxford University Press, 1930).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

keeping a promise to the community that it will do so. As I pointed out in *Why Punish?*[11] this is so only when whatever code of rules applies specifies a penalty. Otherwise there is no promise.

Rule-theory

Yet Ross' notion seemed to me to be worth developing. Human beings are rule-making, rule-following animals. Language is the best example, but there are plenty of others which demonstrate the tendency to follow a rule (Garfinkel[12] even showed how uneasy people can feel when a rule is broken even if they cannot quite say what the rule is). It hardly matters whether we follow rules because large brains need rules or because rules are a particularly favourable medium for the transmission of memes. If a code of rules includes rules which specify penalties for breaches a failure to penalize is another breach which makes us feel uncomfortable. It does not matter whether the legislators who laid down the rule were motivated by expediency or morality: the compulsion to punish lies in the rule. Indeed it is arguable that even if the code omits to specify a penalty we are so used to codes which do specify one that we expect infringers to be penalized in some way. This is certainly a psychological *explanation* of the feeling that infringements deserve penalties; and it may well be the only *justification* for them that is truly non-consequential, even if uninspiring.

Satisfaction theory[3]

According to Cottingham this takes two forms. One is that it is intrinsically desirable to match the grievances of victims with the suffering of offenders (but what is desired is not necessarily morally justified):

> A ... more sophisticated version is put forward by Justice Steven[13]: 'the criminal law regulates sanctions and provides a satisfaction for the passion of revenge'

This seems only slightly more sophisticated; but Hyman Gross[14] offers a third version:

[11] *Why Punish*? (Oxford University Press, 1993).

[12] H. Garfinkel, *Studies in Ethnomethodology,* (Englewood Cliffs: Prentice-Hall, 1967).

[13] He meant Fitzjames Stephen, the famous Victorian judge, and the quotation is from *A General View of the Criminal Law of England* (London, 1890).

[14] H. Gross, 'Preventing Impunity' in *Jurisprudence: Cambridge Essays,* (Oxford University Press, 1992).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

> 'We enforce the law simply because we cannot tolerate letting people get away with their crimes. … There are two main reasons why general impunity would be intolerable. First the universal feelings of outrage and frustration it would produce could not be met by any argument seeking to justify it. Second, it clearly would make life in society as we know it impossible in ways that almost no one would be willing to accept'.

All these versions seem frankly consequentialist.

Fair play theory[3]

Cottingham found an excellent example of this in Golding's book[15]. 'Failure to punish is unfair to those who practise self-restraint and respect the rights of others'. Cottingham sees this as a corollary of Rawls' duty to obey laws of which one disapproves because it is unfair to one's fellow-citizens to accept the benefits of the social system without sharing its burdens. I see it as an analogy from games, in which players who gain an advantage by cheating or fouling are penalized. The analogy is not perfect because retributivists think that attempts to infringe laws should be penalized, whereas the rules of most games do not penalize unsuccessful cheating. A more serious objection is Duff's[16]: that this justification assumes that law-abiding citizens want to do what the lawbreakers do, and would do it but for the penalty, whereas most wouldn't. This is true of course only of some types of lawbreaking; but it seems a valid point.

Placation theory[3]

In a well-known passage in *Rechtslehre* Kant[17] argued that even if a society were to dissolve itself it must first execute all its murderers so that the blood-guilt (*Blutschuld*) will not be fixed on its members. Cottingham argues that this is not genuine retributivism, since the aim of execution is to avoid a consequence—the sharing of blood-guilt. It must therefore be done to placate an angry God and avoid his vengeance. This argument of Kant's was therefore

[15] M. P. Golding, *Philosophy of Law*, (Englewood Cliffs: Prentice-Hall, 1975) .

[16] R. A. Duff, *Trials and Punishments*, (Cambridge University Press, 1986). He is one of those authors who try to placate (or perhaps ridicule?) political correctness by referring to the lawbreaker as 'she'.

[17] I. Kant, *Rechtslehre*. (tr. as 'Philosophy of Law' by. W. Hastie, 1887, Clark, Edinburgh); *Lectures on Ethics* (tr. L. Infield (1930) (London: Methuen, 1796).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

consequentialist. I used to share Cottingham's interpretation, but now I am not sure that it does Kant justice. *Blutschuld* certainly has a whiff of Aeschylus, but Kant does not talk about placating anyone, let alone God. All he said was 'otherwise they [the citizens] might all be regarded as participators in the murder as a public violation of justice'. Regarded by whom? Probably he was not talking about some unspecified audience but simply about his own view. He may well have meant no more than that if we don't execute murderers we share their guilt. If so this was one of his unforced errors. Kant—and therefore presumably Kant's God—must have been intelligent enough to discriminate between committing murder and failing to do one's duty by a murderer.

Kantian theory

There is another reason, however, for wondering how pure Kant's retributivism really was, and it has nothing to do with blood-guilt. In the first place, Kant acknowledged (in his lectures) that states punish for consequential reasons, but said that evil deeds deserved punishment for a moral reason. It must not be administered merely as a means to an end. He was nearly always talking of punishment by the state for crimes. When discussing morals (in the *Metaphysic of Morals*) he has nothing to say about punishment for acts that are not crimes; but he still asserts the maxim that human beings must be treated as ends, not means. A man has an 'inborn personality' which gives him this right. This inborn personality is the metaphysical man (*homo noumenon*) which lurks inside the man we see (*homo phenomenon*), and is characterized by his recognition of rules, in particular moral imperatives. This means that the state is morally obliged to penalize him if he commits a crime. It is at this point that *Rechtslehre* resorts to rhetoric, and fails to explain why there should be this moral obligation: a gap which some Kantians have not noticed and those who have noticed have not bridged. It is clear enough that if *homo noumenon* recognizes moral imperatives he is morally culpable if he does not obey them, and obedience to the law is such an imperative. What needs explanation, but does not get it, is why culpability for an act creates a moral obligation to do more than blame. I call this 'the Kantian gap'. It is possible that he was aware of the gap, because he is reported to have said in his lectures that repeated punishments could instil a dislike of evil-doing. If so, he was anticipating behaviourism, but failing to avoid consequentialism.

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

Minimalism[3]

This is perhaps the best stage at which to deal with an excellent point of Cottingham's, about a principle that is usually regarded as minimal retributivism—the principle that it is permissible but not obligatory to punish the guilty, and only the guilty. It allows the nature of the punishment to be determined by consequentialist considerations. Hart[18] called it the principle of 'retribution in distribution', but rested it on a consequentialist argument: that without it law-abiding people would live in intolerable anxiety lest they be penalized in the interests of society. Cottingham rightly questions whether it is truly retributive. I have suggested elsewhere[11] that it may not be consequentialist either, but may be deducible from the Rawlsian test for fairness.

'*Modern retributivism*'

However that may be, what can fairly be called 'modern retributivism' has abandoned the Kantian notion of an obligation to punish, and substituted a mere right to punish. Unlike minimalists, however, modern retributivists do not allow the nature of the penalty to be determined by purely consequentialist aims, but insist that its severity be limited by desert: in other words that while disproportionate leniency is permissible, disproportionate severity is not. Proportionality is about Hegel's neurosis ('one lash too many or too few and injustice is done'): but I have dealt with its problems elsewhere[19]. It has to be conceded, however, that until quite recently the English penal code was based on the principle that (with exceptions) statutes should merely specify the maximum sentence for the offence (said to be appropriate to 'the worst possible case'), but allowing sentencers to be more lenient. Even the Criminal Justice Act 1991 laid down merely that *if* the sentence chosen is imprisonment or community service it must be 'commensurate' with the seriousness of the offence, but did not make those choices obligatory (and allowed longer-than-commensurate detention for dangerous offenders). Cottingham does not discuss 'modern retributivism', and it would have been interesting to know whether he saw it as pseudo-retributive. Historians could argue that the statutory maxima for sentences were in fact determined not by any attempt at proportionality but by the politics of the day; but that does not rule out the possibility of a penal code with maxima determined by the notion of retributive proportionality.

[18] H. L. A. Hart, *Punishment and Responsibility*, (Oxford: Clarendon Press, 1968).

[19] In 'Legislating the Transcendental', in *Cambridge Law Journal*, **51**, 3, 1992, 530ff.

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

Some principle that limits the severity of sentences is obviously needed; but desert is not the only possibility. In theory there are others. Humanitarian considerations can do so, although they are better at banning certain kinds of penalty than at specifying acceptable degrees of severity. Bentham[20] proposed cost-effectiveness, calling it 'frugality'. Braithwaite and Pettit[21] want limits ascertained by reducing maxima until the crime in question starts to become more frequent. The last two proposals are easier to envisage than put into practice, Bentham's because effectiveness is so much harder to estimate than cost, Braithwaite's and Pettit's because crime-rates are by no means closely linked to the severity of penalties.

Annulment theory

Hegel[22] is credited by Cottingham with the view that the obligation to punish is an obligation 'to annul the crime that would otherwise be held valid, and to restore the right'. Obviously, as Cottingham points out, literal annulment—restoration of the *status quo ante*—is possible only in the case of certain types of crime, and not, for example, in the case of homicide.

Expressive theories

In fact it is not certain that Hegel held this naïve view. David Cooper[23] argued many years ago that he meant something rather more subtle: that a crime is a denial of the victim's right—whether to life, property or whatever—and that punishment is a public declaration that he should not have been denied the right.

If so, Hegel was an early exponent of what can be called 'expressive theories'. Cottingham does not overlook this group. He quotes Lord Denning's famous dictum that 'the ultimate justification of any punishment is … that it is the emphatic denunciation by the community of a crime'. He seems to regard this as a non-consequential justification, but questions whether it can be regarded as retributive, pointing out (a) that one can denounce without penaliz-

[20] J. Bentham, *An Introduction to the Principles of Morals and of Legislation*, (London: Payne, 1789).

[21] J. Braithwaite and P. Pettit, *Not Just Deserts: a Republican Theory of Criminal Justice*, (Oxford: Clarendon Press, 1990).

[22] G. F. Hegel, *Grundlinien der Philosophie das Rechts*, (Berlin: Gans, 1833) trans as *Hegel's Philosophy of Right* by T. M. Knox, (Oxford: Clarendon Press, 1952).

[23] D. Cooper, 'Hegel's theory of punishment' in *Hegel's Political Philosophy: problems and perspectives*, Z. A. Pelczynski (ed.), (Cambridge University Press, 1971).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

ing and (b) that it is possible to exact retribution secretly. One could add (c) that it is possible to denounce by pretending to punish, using devices such as the suspended prison sentence, or secret release from prison.

My main point, however, is that Denning's is only one of many varieties of expressive justification. For Duff[16] punishment is an enforced penance through which the criminal can 'strengthen and express her repentant understanding and restore herself to the community from which her crime tended to separate her: the proper purpose of punishment'. For Walter Moberly[24] the purposes of punishment included (a) deepening and consolidating sentencers' own detestation of wrongdoing; (b) promulgating the detestation to the world; (c) bringing it home to the understanding of the wrongdoer. For von Hirsch[25] it is the communication of 'censure' to the public. And so on. The lack of any empirical evidence of these effects—and indeed some evidence to the contrary[26]—is ignored.

'*Only connect*'

What is not easy to find is an expressive theory which can be regarded as non-consequentialist. I can, however, name one: Nozick's[27]. He certainly regards the punishment as a message. He concedes that it may deter, educate or reform people, but the justification is something different:

> The hope is that delivering the message will change the person so that he will realize he did wrong, then start doing things right—thus the teleological position. Yet if it does not do this, still, punishment does give [correct moral] values some significant effect on his life, which is good.

It is sufficient if the message reaches and is understood by the offender. He talks of 'connecting with him', as if he were Morgan Forster.

[24] W. Moberly, *The Ethics of Punishment*, (London: Faber and Faber, 1968). This list, however, did not include all his justifications: he was so eclectic that it is possible to find most theories somewhere in his book, which he completed only on his death-bed.

[25] A. von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993). The communication of censure is one of his two justifications: the other is deterrence. But it is clear that he is no longer the retributivist he was when he wrote *Just Deserts* (New York: Hill and Wang, 1976).

[26] See N. Walker and C. Marsh, 'Does the severity of sentences affect public disapproval ?' in *British Journal of Criminology*, **24**, 1, 1981, 27ff.

[27] R. Nozick, *Philosophical Explanations*, (Oxford: Clarendon Press, 1981).

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

Nevertheless he is worth more attention. He recognizes some of the problems of his theory. What if the offender is incapable of understanding the message, or is already aware of and fully repentant about his transgression? Nozick could have replied that it doesn't matter; but a twitch of consequentialism made him say that in such cases there should be no punishment. Again, doesn't his theory suggest that the penalty should be as talionic as possible, so as to convey the message with the greatest possible clarity, which would mean, for example, death for murder? He sat on the fence where capital punishment is concerned. It is worth noting, too, that unlike most retributivists he is at pains to emphasize the analogy between retribution and revenge; and the main point of revenge is that its target should know why he or she is being targeted. Like a revenge, a Nosickian punishment need not be publicized: it need be known only to the punished and the punisher. Nozick is the only 'expressive' punisher I have found who is able to avoid consequentialism, if only by the skin of his teeth. What he does not see or try to bridge is the Kantian gap: the omission to explain in non-consequential terms why it should be obligatory—or even merely desirable—to 'connect' the wrongdoer to better values.

Reflections

Obviously the most important taxonomic *differentia* is between 'duty' theories and 'right' theories. I am not sure whether Cottingham, if he had discussed 'right' theories, would have regarded them as genuinely retributive. Duty theories have to face at least one serious problem, at least if they recognize the principle that the innocent must not be penalized. This creates a dilemma when penalizing the guilty means penalizing the innocent (as frequently happens when paterfamilias goes to gaol). To defend this by saying—as I have heard sentencers say—that it is *his* fault that his dependents suffer seems like a sophistry. 'Right' theories do not have to face this particular dilemma: they allow sentencers to take account of the effect on the innocent.

It is worth noting, too, how theorists take state punishment for lawbreaking as their paradigm. Kant ignores any other kind. Mabbott talks about college rules, but only to make his point about state punishment. Hart calls other kinds 'substandard' and 'secondary'. It is tempting to attribute this mind-set to the fact that state punishments are for breaches of clearly expressed rules (unlike, for example, most parental punishments). Yet this draws attention to another *differentia*. Not all theories treat the notion of a rule as central. Others see punishment simply as an expression,

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press

whether of disapproval or of the desire to restore the *status quo*. They include what Cottingham called 'satisfaction' and 'annulment theories', but also 'censure theories'. Many are obviously consequentialist or crypto-consequentialist, but at least one, Nozick's, seems genuinely non-consequentialist. The trouble about it is that it still leaves the Kantian gap unbridged.

Intuitionism is the only standpoint which does not seem to fit into either category If I were a retributivist my choice would have to lie between it and the watertight but uninspiring rule-theory.

King's College, Cambridge

https://doi.org/10.1017/S0031819199000704 Published online by Cambridge University Press