

Punishment

Punishment is a particularly hard problem in political philosophy because it involves inflicting pain on others, holding them against their will, and coercing them to live under undesirable (to say the least) conditions. By what right are we entitled to do this? Is there a compelling justification for punishment? Theories of punishment fall into 3 broad categories: Utilitarian (or Humanitarian), Retributive (or Desert), and Vengeance Theories.

1. Utilitarian (or Humanitarian) Theories of Punishment

Applying utilitarianism to punishment the idea is that a punishment is justifiable insofar as its good consequences outweigh the harm involved in receiving or administering it.

In particular, a utilitarian theory of punishment typically claims that:

Punishments are justified by virtue of their ability to

- (i) correct or reform the offender,
- (ii) protect society from future wrongs by the same offender, and
- (iii) deter others from committing the same wrong by setting an example.

So on the utilitarian point of view, punishment is OK because it *cures*, *protects*, and *deters*.

2. Retributive (or Desert) Theories of Punishment

A retributive theory of punishment allows that there may be some good that comes of punishing offenders, but this good that may occur is *not* what justifies punishment. Instead,

Punishment is justified when the act that has been committed *deserves* punishment, and the one who committed the act is *guilty*. I.e., punishment is justified just in case it is imposed on people who deserve it, to the degree that they deserve it.

This, of course, does not mean that we are entitled to impose whatever degree of punishment we want, no matter how trivial the offense, for it is assumed that the punishment must, in some sense, be *appropriate to the crime*. So on a retributivist point of view, punishment is OK because the offender *deserves* it.

3. Vengeance Theories

It is important to distinguish retributive theories from vengeance theories. Vengeance theories are ones that base the justification of punishment on the supposed desire for revenge. There are three examples:

Social utility version: punishment is justified because it provides a controlled outlet for anger and rage.

Hedonistic version: punishment is justified because of the pleasure it gives the victims (or relatives) in seeing the offender suffer.

Emotional version: punishment is justified because it provides a means for expressing anger and hatred toward the offender.

Generally, vengeance theories are not well-thought of these days. The social utility version is just a case of utilitarianism. The hedonistic and emotional versions are considered barbaric.

In the reading, Menninger provides a sample utilitarian view; he says:

...our object [in punishment] is to protect the community from a repetition of the offense by the most economical method consonant with our other purposes. Our "other purposes" include the desire to prevent the offenses from occurring, to reclaim offenders for social usefulness [cure], if possible, and to detain them in protective custody, if reclamation is possible. (429)

Yet he argues that our ordinary practices of punishment are misguided, and offers as a replacement a *therapeutic approach to punishment*. Note that the therapeutic approach is *one* form of utilitarian approach (others do not emphasize therapy or even rehabilitation). On Menninger's view we should understand criminal behavior as symptom of an *illness*. By an illness, he means, "A state of impaired functioning of such a nature that the public expects the sufferer to repair to the physician for help." (429)

He assumes that criminals are in a state of impaired functioning; the only point worth discussing is

whether we should turn to the physician for help. And he believes that there is good evidence that a therapeutic approach to curing and deterring works best.

What is the therapeutic approach? We will use: "education, medication, counseling, training" (429); we will: avoid ridicule, scorn, blame, hostility; set a price (e.g., in fees) for bad behavior; love the patient; have a hopeful attitude.

Admittedly, this would be a coercive form of treatment rather than a voluntary one, but so is the treatment of the mentally ill. In adopting this approach we reject the "vengeful penal attitude" and replace it with a "constructive social attitude".

Menninger's argument for the therapeutic approach rests on a number of empirical claims about the success of a particular psychological approach for treating the mentally ill. But the general features of his view could stand even if we reject the details.. This might be a sketch of the general principles:

- (i) we would aim to use "education, medication, counseling, training" rather than punitive measures;
- (ii) the methods of punishment and sentencing of offenders would be in the hands of psychologists and others in the medical profession.
- (iii) in intractable cases restraint would be allowed.

Lewis rejects Menninger's approach as cruel and unjust rather than merciful and mild; but this is misleading. The fundamental claim in Lewis's critique is that punishment is legitimate only if it is just, and it is just only if it is deserved. But because the utilitarian approach allows punishment that is not deserved, the actions it allows are unjust, and are illegitimate.

Lewis's Arguments against the Utilitarian/Humanitarian theory:

1. It is intelligible to ask whether something is a *just punishment*, but we can't ask whether it is a *just* cure, or a *just* deterrent. So the concept of justice which is so crucial to the legitimacy of punishment, is entirely missing from the utilitarian approach.

2. *Who gets to set punishments?* Who is responsible for sentencing? On the retributivist view, it is judges, but because the courts are responsive to public opinion (over time), also the conscience of the society. On the utilitarian view, doctors and psychologists are responsible for punishment. They are not accountable to the rest of us ordinary people, and their position is especially open to abuse.

3. Does the utilitarian view take into account the *interests of the offender*? Would an offender prefer such a "punishment"? Instead of a definite sentence appropriate to the degree of the crime, one is charged with an indefinitely long sentence; this is unfair, and again, open to abuse. Being forced to go through "reprogramming" and being "treated" for something you don't consider a disease, is hardly desirable. (Compare: Soviet "hospitals")

4. What of the *deterrent aspects* of the utilitarian/humanitarian view? In principle, a utilitarian approach to punishment allows society to use individuals as a means to an end; in the old days public displays of punishment were thought to be deterring, but also deserved. But if deterrence is the goal, then the victim of the punishment need not even have committed the crime. All the good consequences are available as long as the public thinks he has. It is all too easy to set up a mock trial to get the public to believe an innocent person is guilty.

5. We don't live in a perfect world; people aren't wise or good, and our rulers aren't wise or good. To put "coerced therapy" in the hands of bad rulers is to set up the worst sort of *tyranny*:

"To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better" is to be treated as a human person made in God's image. (Lewis, 434)

6. The utilitarian/humanitarian view is *not merciful*. To be merciful is to pardon. But one cannot pardon another unless there is a recognition of guilt and lack of desert. Without that, i.e., if the person is just diseased and in need of a cure, there is no mercy.