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Embracing a Deweyan Approach to Punishment

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Abstract

Kant's retributive theory of punishment, resting on the notion of desert, i.e., deserved reward or punishment, assumes responsibility of the moral agent. On the contrary, a Deweyan approach to punishment does not assume responsibility, but rather, aims to cultivate it. These two different approaches ground two very different theories of punishment. In this essay, I compare these two divergent approaches, emphasizing their conflicting notions of what it means to treat criminals as moral agents. Ultimately, I demonstrate that moral responsibility is not to be assumed, but rather, is something to be cultivated. The point of punishment should not be to punish merely because one deserves to be punished, for upon investigation, the notion of desert proves fruitless. The point of punishment should be to morally cultivate.

I. Kant's Retributivism

One must never treat any person as merely a means to an end. Kant explains, "Punishment by a court…can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*" (Kant, 702). This is to say, the criminal must be punished simply because he or she *deserves* to be punished.

Punishment, for Kant, as a categorical imperative, must be justified for reasons irrespective of any consequence. One is to be punished only because one has committed a crime. This is because if we attend to consequences when justifying punishment, we are using the one who is to be punished as merely a means to achieve some end, and are not respecting the wrong-doer as an end in his or herself. Kant explains that the criminal's "innate personality protects him from this, even though he can be condemned to lose his civil personality" (Kant, 702). One's innate personhood, having

rights as a rational agent, makes it so that he or she must never be used as a means to some end, even though once one is judged punishable they then may lose certain civil rights. To punish for the sake of consequence is unjust, but also to avoid punishment in respect of consequences is unjust.

Kant declares, "And woe to him who crawls through the windings of eudemonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantages it promises" (Kant, 702). Any promise of good consequence or flourishing is irrelevant to the justification of punishment, and if only this attended to, it is a violation of justice. Kant provides two vibrant examples demonstrating the normative irrelevancy of consequence: (1) if we allow physicians to conduct experiments on a prisoner sentenced to death (so as to benefit the society in terms of great medical advancements), we preserve his or her life, no matter how greatly society would benefit, this would be an injustice. Kant explains that the court ought to "reject with contempt such a proposal from a medical college, for justice ceases to be justice if it can be bought for any price whatsoever" (Kant, 702). (2) If there was a small civil society on an island and the people consented to separate, it would be necessary for every last murderer to be executed before they left, so that the murderers had done to them what they deserved and so that "blood guilt does not cling to the people"(Kant, 702). Punishment, for Kant, is a categorical imperative; hence we ought unconditionally to punish those who committed a crime because and *only* because he or she has committed a crime. For Kant, punishment has a past-looking nature. It assesses only the casual responsibility of a person to determine the appropriate punishment. Kant's retributivist theory of punishment corresponds to John Dewey's notion of retrospective responsibility, which I explain in what follows.

II. A Deweyan approach to punishment

According to Dewey, punishment involves, at minimum, moral disproval of a person's conduct for which he or she is responsible, and for Dewey, there are two distinct notions of responsibility: (1) retrospective or past-looking responsibility and (2) prospective or forward-looking responsibility. When we consider retrospective responsibility, "We assess various relevant factors of the situation leading up to a person's action to determine whether that person really performed the action" (Shook, 68), with the aim being to determine whether someone committed some crime, and if so, to what degree. When attending to prospective responsibility, we acknowledge one's retrospective responsibility, that is, that they committed some act, and then aim to modify their future behavior by enhancing their future responsibility (Shook, 68).

Clearly, this notion of prospective responsibility in the domain of punishment presupposes that we *are* concerned with the future when we punish. Dewey provides

justification for this presupposition: When we make a moral judgment of a person's action of which they are responsible (in the general sense), we disapprove of that action generally. That is to say, we disapprove of that *kind* of conduct, and not merely that *particular* action. Because we condemn kinds of conduct, and not simply particular actions, this means that we desire for that kind of conduct to not happen again in the future (Shook, 68). For example, when a person steals from another, we make a moral judgment that not only was that particular action wrong, but that stealing in general is wrong. If it is wrong in general, then this means that it will be wrong again in the future. Clearly then, our disapproval of kinds of conduct, like theft, demonstrates our desire that they not happen in the future. If this is true, then surely our moral disapproval of certain kinds of conduct demonstrates our concern for future actions and conduct when dealing with punishment.

Dewey claims,

> "Now the commonest mistake in connection with the idea of responsibility consists in supposing that approval and reprobation have a retrospective instead of prospective bearing. The possibility of a desirable modification of character and the selection of the course of action which will make that possibility a reality is the central fact in responsibility. The child, for example, is at first held liable for what he has done, not because he deliberately and knowingly intended such action, but in order that *in the future* he may take into account bearings and consequences which he has failed to consider in what he *has* done. Here is where the human agent differs from a stone and inanimate thing, and indeed from animals lower in the scale." (John Dewey, *The Later Works of John Dewey, vol. 7: Ethics*, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1985), 303. (Shook)

Dewey draws an important analogy in how parents punish children: When we punish our children, we do not assume that the child deliberately and knowingly did wrong, and so that is to say, we do not punish them simply because they deserve to be punished. Rather we punish them so that they learn what actions are wrong, and thus, to modify their actions and character in the future. Above, Dewey claims, "Here is where the human agent differs from a stone and inanimate thing", in other words, human agents have more than just retrospective (causal) responsibility, for human agents also have the potential to modify future behavior. The retrospective theory fails to recognize this, for it only attends to past actions, ignoring the potential modification of future behavior. In this sense, it treats humans not as moral agents capable of prospective responsibility, but instead, merely as things with retrospective or causal responsibility, in the same way that we claim an apple tree is responsible for an apple, the moon is responsible for the tide, or a rock is responsible for a dent in a car (Shook, 68).

For Dewey, to treat someone as a moral agent, we necessarily must acknowledge and attend to their prospective responsibility and not merely their retrospective responsibility (Shook, 68). For illustration, imagine a case in which an adult is being tried for battery against some person. First, attending to her retrospective responsibility, we seek to discover whether or not she committed the crime and the nature of the crime: 'Was she there at the time of the incident?' 'In what degree and by what means did she assault the victim?' and so on, in order to discover if she committed the crime and if so, the degree of the crime. But we must not stop there. Once we find a person responsible in the causal and retrospective sense, in order to treat them as a moral agent, we must turn to their prospective responsibility, that is, their potential for modification of behavior. It should be noted that prospective responsibility is dependent upon retrospective, and thus, as prospective is our primary concern; we cannot do away with retrospective. For in order to examine the way we should attend to someone's prospective responsibility, we need to have the information that we gain from retrospective, and so in this sense, they are related. Only once we discover whether this person committed the battery, to what degree, and by what means, can we know how to appropriately address their potential modification of future behavior.

III. Connections, problems, and solution

In this next section, I explicate what I believe to be the fundamental difference between Kant's retributive theory of punishment and Dewey's prospective theory of punishment, that is, that they have opposing notions of what it means to treat someone as a moral agent. I then expose the problems of the retributivist account of a moral agent by confronting it's supposition of desert and autonomy. Finally, I briefly propose that our current system employs a retributivist and retrospective theory of punishment, and I shed some light on why and how this is problematic.

To me, it seems that the primary conflict between Kant and Dewey's theories of punishment lies in the notion of what it means to treat someone as a moral agent. For Kant, punishment "Can never be inflicted merely *as a means to promote some other good for the criminal himself* or for civil society. It must always be inflicted upon him only because he has committed a crime" (Kant, 72. italics mine). Recall, the second formulation of the categorical imperative is to always treat others as ends in themselves and never as merely a means. If we were to punish a wrongdoer for prudential reasons, be it to increase the welfare of a society or to promote the good for the criminal herself, this would be using the wrongdoer as a means, and this, according to Kant, would be to not treat the criminal as a moral agent. I wish to emphasize here that in line with this theory, to punish a criminal with the intent of promoting the good for the criminal is to treat the criminal as a means, and thus, not as a moral agent worthy of respect.

For Dewey on the other hand, a necessary condition of treating someone as a moral agent includes attending to his or her prospective responsibility. As explained earlier, to attend to one's prospective responsibility means to acknowledge that the person is not merely a causal agent, one that simply performs actions and produces effects, but also is one capable of enhancing responsibility and modification of future behavior.

Retributivism clearly depends on the notion of desert, i.e., deserved reward or punishment. As previously established, according to retributivism, we ought to punish criminals simply because they *deserve* to be punished. When we speak of desert in this way, we overlook much about the constitutive nature of humans and the development of a person, and thus, the ways and reasons in which people make decisions and perform actions. This is exemplified in the notion of constitutive moral luck.

Constitutive luck is luck in who one is, or in the traits and dispositions that one has. Since our genes, caregivers, peers, and other environmental influences all contribute to making us who we are (and since we have no control over these) it seems that who we are is at least largely a matter of luck. Since how we act is partly a function of who we are, the existence of constitutive luck entails that what actions we perform depends on luck, too. For example, if we correctly blame someone for being cowardly or self-righteous or selfish, when his being so depends on factors beyond his control, then we have a case of constitutive moral luck. Further, if a person acts on one of these very character traits over which he lacks control by, say, running away instead of helping to save his child, and we correctly blame him for so acting, then we also have a case of constitutive moral luck (Nelkin).

It is apparent to me that retributivism as a retrospective theory of punishment is concerned only with that which is bound to constitutive luck. As stated above, since we are at least strongly influenced (this isn't to say utterly determined, which I do not wish to argue) by our genetics and environment, much of which we did not choose, who we are seems to be a matter of luck. Who we are is directly related to our actions, and thus our actions are at least partially a matter of luck. If this is true, then our notion of desert seems empty. How can one completely deserve praise and blame if their character, and so their actions, are at least in part a matter of luck?

Fortunately, the legitimacy of constitutive luck makes necessary the cultivation of prospective responsibility. It is not the case that if we are bound, we are necessarily bound always and completely. In other words, that our character and actions are influenced by genetic and environmental factors does not imply that we cannot go beyond them. As Dewey claims, "Here is where the human agent differs from a stone and inanimate thing," and that is our agency and ability to supersede the confines of constitutive luck, that which has been causally determined beyond our control. I trust that the legitimacy of constitutive luck grounds the significance for why acknowledging

prospective responsibility is crucial in our dealing with punishment. Prospective responsibility is what saves our justification of punishment once we acknowledge constitutive luck. When a person commits a crime, we cannot punish them only in respect to our desolate notion of desert, but instead, we ought to punish them so as to enhance their responsibility in the future. In support of my criticism of desert, I will introduce an incoherency of assuming autonomy of criminals, argued by James Q. Whitman.

According to Whitman, the practice of assuming autonomy of those who lack self-control and so commit crimes simply makes no sense. Those who lack self-control, he explains, are not fully autonomous. Autonomy, for Whitman, should be thought of as impulse control, control of oneself, and the ability to resist the desire to do wrong. Those who commit crimes do not have the ability to resist their desire or impulse to do wrong, and so do not have control of oneself, and so, are not fully autonomous (Whitman, 104). Autonomy (and in my terms—responsibility in the general sense) of an individual should not simply be assumed, but rather, is a 'social ideal' and is something to be cultivated (Whitman, 105). The purpose of punishment ought to be to cultivate the potential for prospective responsibility, to cultivate their ability to modify future behavior, that is, to teach wrongdoers to be truly autonomous.

Kant is concerned with treating moral agents with respect by not using them as a means to an end. For Kant, the practice of using punishment to morally cultivate would be to treat the moral agent as a means to an end and so would be a failure to treat the agent with respect. But it is clear to me that in order to truly respect the person as a moral agent, we must acknowledge their ability to modify future behavior, and we must give them the tools necessary for autonomy.

IV. Where are we today? The renaissance of retributivism

Now that we have examined these theories in the abstract, I think it is important for us turn to the current concrete, for I believe the real value of any theory is tested upon application. According to Whitman, the retributive theory of punishment has emerged (or re-emerged) as an accepted ideal in the legal and philosophical scene within the last generation. Whitman claims that we have seen an increase in the amount of philosophers and legal theorist employing blame (which is dependent on desert) as the primary justification of punishment (87). If one has paid any attention to our criminal justice system in America in recent decades, they will have noticed a stark increase in the rates of incarceration.[1] In fact, according to the American Civil Liberties Union, our prison population has risen by 700% since 1970. From 2005 to 2010, about two-thirds

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[1] According to ACLU, "With only 5% of the world's population, the U.S. has 25% of the world's prison population – that makes us the world's largest jailer." "Since 1970, our prison population has risen 700%." (https://www.aclu.org/safe-communities-fair-sentences/prison-crisis)

(67.8%) of released prisoners were arrested for a new crime within 3 years, and three-quarters (76.6%) were arrested within 5 years.[2] This high recidivism rate reflects the lack of attention and care given to consequences of punishment and future actions of the criminals. If the justification for punishment as irrespective of any consequence or flourishing is legitimate, then there is no problem that our current method of punishment allows for these high rates of incarceration and recidivism, for we ought not to be concerned with any consequence. Certainly it is *not* the case that there is no problem with these high rates of incarceration and recidivism. If we accept the premise that it is not the case that there is no problem with our current system, then what follows, by use of our faithful friend modus tollens, is that it is not that case that our justification of punishment as irrespective of any consequence is legitimate. We must embrace consequence.

One might raise an objection such that I give no clear explanation for what would constitute modifying a wrongdoer's future behavior. Not to mention, we can point to instances, with which we are all familiar, in which the modification is in the wrong hands, ranging from historical accounts of adverse mass indoctrination to mere instances of bad parenting. To this, I respond that like many other theories of punishment, the prospective theory depends upon some basic conditions. I do believe that there is, allowing the breadth of many variations[3], a good life. This is one that is absent, at least in the most part, of vices. Absent of bias, bigotry, dishonesty, hatred, and so on. I am not positing that the good life is a necessary condition for this system to work, for that would mean impracticality and uselessness for this theory. I am positing that for whoever does the cultivation of responsibility, the modification of future behavior, or the moral educating, virtues must be their objective. Recall that the primary concern of punishment for this theory is to cultivate responsibility: to make the wrongdoer more morally responsible, more autonomous. If we keep to its fundamental aim and principles, this theory could not be misused in any such way.

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[2] Bureau of Justice Statistics, http://www.bjs.gov.
[3] This is to say, not only one absolute template of a good life.

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