

# Choosing Correct Punishments

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Résumé. — One of the most controversial aspects of legal philosophy concerns the justification of specific punishments for particular criminal violations. Surprisingly, there has not been any attempt to arrive systematically at any conclusive formula for deriving correct punishments. This article aspires to fulfil this urgent need. I shall examine (1) retributive, (2) consequentialist, (3) reformative, and (4) deterrent punishments in an attempt to derive general equations. It is my wish that by contributing a general formula for each theory we might have a new perspective for comparison. This article finds that the contestability of ascertaining the most appropriate punishment for a criminal is in large part a product of the unstable foundations each penal theory rests on. In addition, almost every variety of penal theories relies on assumptions about criminal culpability, grounded in implicit intentionality. Thus, the contestability of choosing correct punishments to 'fit' different crimes is primarily dependent upon the best judgement of judicial officers, not on empirical 'facts'.

## INTRODUCTION

One of the most controversial aspects of legal philosophy concerns the justification of specific punishments for particular criminal violations. Surprisingly, there has not been any attempt to arrive systematically at any conclusive formula for deriving correct punishments. This article aspires to fulfil this urgent need. I shall examine (1) retributive, (2) consequentialist, (3) reformative, and (4) deterrent punishments in an attempt to derive general equations. Most commentators view these theories in isolation and opposition from each other. It is my wish that by contributing a general formula for each theory we might have a new perspective for comparison.

## I. — RETRIBUTIVE PUNISHMENT

The most fundamental and familiar brand of punishment is retribution, where a criminal's punishment is set to what s/he deserves. What is 'deserved' is equal to the

severity of a criminal's culpable disposition when s/he perpetrated a punishable crime <sup>1</sup>. In other words, retributive punishment  $pl$  is equal in value to the criminal's actual disposition  $ql$ , so that  $pl = ql$  and  $ql \neq 0$  ('the retributive principle') <sup>2</sup>. Should  $ql = 0$ , the criminal lacks culpability and cannot be punished on retributive grounds.

One of the major difficulties of affixing retributive punishments is discerning a criminal's true disposition, as we can never be certain of a person's intentions when performing an action. Through the help of psychologists, character witnesses, circumstantial evidence, and the revelation of mitigating factors, we believe that we can reasonably assess a criminal's culpability. Of course, our assessment of a criminal's culpability  $rl$  may not be equal to his true culpability  $ql$ , so that  $rl$  may or may not be equal to  $ql$ .

If all we may know is our assessment of a person's culpable intentions, we may only set  $pl = rl$ , assuming that we are at the same time equating  $rl$  with  $ql$ . We can never be certain that  $rl = ql$ , so that  $pl = ql$  may be valid when (1)  $rl \geq ql$ , (2)  $rl \leq ql$ , and/or (3)  $rl \neq ql$ . Unfortunately, retributivists are unable to justify punishments beyond  $pl = rl$ . To the degree that  $pl < ql$ , a criminal is punished less than s/he deserves. If  $pl > ql$ , then s/he is punished more than s/he deserves. In instances where  $pl > ql$  and  $ql = 0$ , the criminal is punished although actually innocent. Any time  $pl \neq ql$ , the punishment is an act of injustice. As  $ql$  is indiscernible, we are unable to know if  $pl$  is an injustice with certainty.

We must ensure that when punishing a criminal our assessment is reasonably accurate to avoid violating the retributive principle. Unsurprisingly, retributivists demand that the only necessary condition for the distribution of punishment is (moral) guilt. The difficulty is that the existence and vitality of a person's guilt may be ascribed to an agent, rather than actually present in the agent's action. Any attempt at satisfying the retributive principle must depend solely upon our assessment of a person's criminal culpability. After all, a criminal cannot exercise pure discretion in choosing his or her own punishment even if s/he wanted to, as parameters are set by legislation prior to any criminal act <sup>3</sup>. Let us call this form of punishment 'soft retribution' as it acknowledges the difficulties of satisfying the retributive principle, but it makes an honest attempt to do so.

On the other hand, 'hard retribution' would entail the absence of an attempt to commensurate  $ql$  and  $rl$ . Retributivism's attempts to account for acts of negligence are an example of hard retribution. For any act of negligence, a person transgresses the law either unknowingly or without any proper regard for an unlawful action's legality. In acts of true negligence where no culpable disposition is present,  $pl = rl$  where  $pl \neq ql$ . As such, if desert entails the existence of a criminal disposition, punishing negligence is an act of retributive injustice. Should desert entail responsibility without a certain

<sup>1</sup> Fred Feldman (1997: 175-92) contests this. (See Feldman, *Utilitarianism, Hedonism, and Desert: Essays in Moral Philosophy* (Cambridge: Cambridge University Press, 1997), p. 175-92.)

<sup>2</sup> Variables such as ' $pl$ ' should be understood as ' $p$  of variety 1' and not be interpreted as ' $p * 1$ '. Thus, ' $p2$ ' represents ' $p$  of variety 2' and not ' $p * p$ '. ' $Pn$ ' represents 'any variety of  $p$ '.

<sup>3</sup> Even in the case of plea-bargaining, the varieties of potential punishments a criminal may elect to be subjected to are chosen by another.

disposition, retributive punishment of negligence is just when the value of  $p1$  is equal to the value of desert  $q2$ <sup>4</sup>. An injustice occurs when  $p1 > q2$ .

As neither soft nor hard retribution improves the likelihood that  $p1 = q1$  when calibrating  $p1$  according to  $r1$ , they perform equally well at justifying any  $p1$ . In no instance can we verify that the retributive principle is validated. Retributive punishments that set  $p1 = q2$  may be valid when our assessment of  $q2$  is invalid, where  $r2 \neq q2$  and  $q2 \neq 0$ . Retribution grounded on  $q2$  rather than  $q1$  is more capable of verifying that  $p1 = q2$  than  $q1$ -grounded retribution to the extent that we may ascertain the accuracy of  $r2$  with  $q2$ .

## II. — CONSEQUENTIALIST PUNISHMENT

In general, consequentialist punishments are set equal in value to the satisfaction of some end as a result  $c1$ , so that  $p2 = c1$ . As it is solely the *effect* of a consequence which justifies a given punishment, punishments may be equal to or less in value to the consequences they are designed to bring about, so that  $p2 \leq c1$  where  $c1 \neq 0$  ('the consequentialist principle'). Nevertheless,  $p2$  is justified only through the occurrence of  $c1$ . Therefore,  $p2 < c1$  is valid if and only if  $c1$  occurs as a result of  $p2$ . If  $p2$  is not the cause of  $c1$ , the punishment is unjustified although the desired consequence may have occurred. This is the principle's secondary condition. For the consequentialist principle to be valid, its primary condition ( $p2 \leq c1$  where  $c1 \neq 0$ ) and secondary condition ( $p2 \text{ } \text{Æ} \text{ } c1$ ) must be true.

The full value of  $c$  may only be assessed after the distribution of a punishment. As a result, when determining  $p2$  to validate  $p2 = c1$  we must rely upon our best estimate of what  $c1$  is. Let us call this value  $e1$ . When determining  $p2$  our attempt must be to equate  $e1$  with  $c1$ , although  $e1 \neq c1$  and  $p2$  may be valid should  $p2 = c1$ . Most problematically,  $p2 = c1$  may be true when (1)  $e1 \geq c1$ , (2)  $e1 \leq c1$ , and/or (3)  $e1 \neq c1$ .

We will only know in advance of punishing the punishment's correctness to the degree that  $e1$  is equal to  $c1$ . An injustice occurs to the extent that  $p2 > c1$  where  $c1 \neq 0$ . As  $c1$  may only be discerned after a punishment is distributed, injustices may be realized only *after* a person is punished.

## III. — REFORMATIVE PUNISHMENT

Reformative punishments set the value of punishment to a satisfactory reformation of a criminal as a result  $c2$ , so that  $p2 = c2$ . A punishment of this type may be justified if (1) its value is less than  $c2$  provided that the imposition of  $p2$  brings about  $c2$ , so that  $p2 \leq c2$  where  $c2 \neq 0$ , and (2) when  $p2 \text{ } \text{Æ} \text{ } c2$  ('the reformative principle'). This brand of punishment is consequentialist to this extent.

Reformative punishments differ from pure consequentialism in grounding  $c2$  in the actual reformation of a criminal. Any subsequent proof that a criminal has been reformed as a result of some treatment may certainly elude observers as well as the newly reformed criminal. Let  $e2$  represents our estimation of a treatment's effectiveness: we are for-

<sup>4</sup> Recall that  $q2 = q$  of a second variety:  $q2 \neq q * q$ .

ced to set  $p_2$  equal in value to  $e_2$  although  $e_2 \neq c_2$  may be true. Without any access to the value of  $c_2$ , reformativists can only set  $p_2 \leq e_2$  where  $e_2 \neq 0$ .

The validity of  $p_2$  simply rests upon whether or not the reformativist principle is true. Therefore, reformative punishments have more in common with the shortcomings of retributive punishments, despite their consequentialist foundation. Both approaches demand knowledge of something we cannot be certain of.<sup>5</sup>

#### IV. — DETERRENT PUNISHMENT

A fourth theory of punishment is a particular brand of consequentialism that involves the use of legal penalties as a deterrent. The basis for punishing any offender is grounded in its effectiveness at deterring others from committing similar offences. Therefore, a satisfactory punishment  $p_3$  is equal to a satisfactory number of deterred would-be offenders  $c_3$ , so that  $p_3 = c_3$  ('the deterrent principle'). If  $c_3 = 0$ , then no one has been deterred by a criminal's punishment. Any such punishment is unjustified as it violates the deterrent principle.

There are at least two difficulties with deterrents. First of all, whether or not a criminal's punishment is justified can only be ascertained *after* the punishment is meted out. We may have reliable information that reasonable ensures a particular penalty will have a certain effect, but what we expect may not happen. Unfortunately, the fact that a punishment deterred in the past is not a guarantee that it will again in the future. Worse still, punishments that deter may not deter for the reasons we believe they do. Therefore, whether or not the deterrent principle is honoured may have as much to do with chance as it does with human planning. Of course, it would not be unreasonable to expect that invigorated attempts to document how punishments may be tailored to deter potential offenders will increase the likelihood that sound planning will play a greater role in ensuring deterrence than chance.

Punishments are justified if would-be offenders are successfully deterred, so  $p_3 = c_3$ . But what if  $p_3 \leq c_3$  and  $c_3 \neq 0$ ? Here a greater than expected number of potential criminals are deterred by a given punishment. Successful punishments would then be set to the minimum level necessary to deter a satisfactory number of persons. Accordingly, if  $p_3 < c_3$  in some instances,  $p_3$  need not always be equal to  $c_3$  as stated by the deterrent principle. Nevertheless, I believe that the deterrent principle ought to be recalibrated to accommodate  $p_3 < c_3$ , as what justifies a punishment is the satisfactory number of potential lawbreakers deterred as a consequence. If a greater than expected number of persons is deterred, the punishment has been more successful than anticipated.

Should punishments be more severe than necessary to deter potential criminals, then  $p_3 \geq c_3$  and  $c_3 \neq 0$ . If  $p_3 \geq c_3$ , then a severity of value  $v$  exists, where  $v = p_3 - c_3$  and  $c_3 \neq 0$ . As  $v$  represents the amount by which the value of  $p_3$  is not limited to  $c_3$ , whenever  $v > 0$ , any punishment  $p_3$  is unjustified to the value of  $v$ . This is because a punishment is justified to (1) the extent that it *deters* potential criminals, not (2) the extent to which it *harms* an actual criminal.  $V$  represents an injustice. Therefore,

<sup>5</sup> A possible exception may be retributive punishments that do not ground desert in criminal culpability.

$p3 \geq c3$  is false as it is unjustified. Accordingly, we ought to redefine the deterrent principle as  $p3 \leq c3$  and  $c3 \neq 0$ .

This leads us directly to a second preliminary difficulty, involving our certainty in anticipating actions that do not occur: the number of potential criminals deterred by legal threats. The question is how do we approximate a satisfactory *number* of potentially deterred persons. Clearly, our best estimate must serve as our target when affixing particular punishments, as we cannot know in advance the value of  $p3$  prior to punishing. Let our best estimate of  $c3$  be  $e3$ . Punishments that deter a satisfactory number of persons ( $p3 = c3$ ) or more ( $p3 \leq c3$ ) are justified should they be equal to or less than  $e3$ , provided that  $e3 \leq c3$  and  $c3 \neq 0$ . If  $c3 \neq 0$ , we arrive at two valid possibilities:

- (1)  $c3 = p3 \leq e3$ .
- (2)  $p3 \leq e3 < c3$ .

In neither option is  $p3 > c3$ , although (1) is true although  $e3$  may be greater than  $c3$ . In (2)  $e3 < c3$ . I believe that  $e3 \geq c3$  is valid if and only if  $p3 \leq c3$ , satisfying the deterrent principle. Provided that  $v = 0$ , any overestimation fails to be an injustice as punishment's full value is directed at threatening would be offenders. Therefore, while  $e = p3 - c3$  when  $c3 \neq 0$ ,  $e \neq p3 - e3$  when  $e3 \neq 0$ .

A direct consequence is that setting the value of  $p3$  to that of  $e3$  need not lead to the invalidity of  $p3$ . Reasonable human fallibility is not as grave a concern as it is for retributivists. The latter set strict equivalence between a punishment's effectiveness, a value it should satisfy, and our best estimation of what this value equals, in their case desert. Proponents of deterrence may employ valid punishments while making poor estimates of some object's value a punishment should satisfy. Unfortunately, the problem of accurate ascertaining  $d$  may further complicate the already arduous task of making future judgements about the number of actions people never perform on old data.

## V. — FINAL REMARKS

The contestability of ascertaining the most appropriate punishment for a criminal is in large part a product of the unstable foundations each penal theory rests on. It is not purely a scenario of incompatible principles as is commonly believed. In addition, almost every variety of penal theories relies on assumptions about criminal culpability, grounded in implicit intentionality. Thus, the contestability of choosing correct punishments to 'fit' different crimes is primarily dependent upon the best judgement of judicial officers, not on empirical 'facts'.

The grounding of penal theories on uncertainty ensures that our ability to choose the correct punishment within any penal theory shall remain an imprecise and highly contestable science unless penal theories can improve the validity of their grounding.

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