Crime and punishment

Ethical theories are intended to guide us in knowing and doing what is morally right. It is therefore very useful to consider theories in relation to practical issues, in order to understand the theories and their implications better.

Punishment is not revenge. Revenge is a reaction of a victim, or someone involved with a victim, and is inflicted by someone who has no formal authority to harm the wrongdoer. Punishment, at least in the context of punishment for breaking the law, is administered by someone impartial who represents a legal authority.

But like revenge, punishment involves depriving someone of some good, such as freedom, money or respect. This requires justification. How we can justify punishment – in fact, whether we can justify punishment – is closely connected to what we think punishment aims to achieve.

UTILITARIANISM

Bentham said that ‘all punishment in itself is evil’. This is because punishment involves making the person who is punished less happy by depriving them of something good, such as freedom (a jail sentence) or money (a fine). Punishment can only be justified, according to a utilitarian, if this increase in unhappiness is outweighed by an increase in happiness. Our justification for punishing people needs to ‘look forwards’ to the effects of punishment.

Utilitarians have identified three beneficial effects of punishment.

1. Deterrence: internal deterrence occurs when the punishment teaches the criminal a lesson, namely that crime is not worthwhile, and so prevents them from offending again. External deterrence occurs when punishing criminals prevents other people from committing crimes.
2. Social protection: punishment stops the criminal from harming anyone else, e.g. by locking them in prison.
3. Reform/rehabilitation: punishment helps to change the criminal so that they won’t commit crimes again in the future, not through deterrence, but by changing their desire to commit crimes and giving them more positive alternatives.

However, simple utilitarian theories of punishment are open to some powerful objections. First, if the only rationale for punishment is the prevention of crime, then we would be justified in ‘punishing’ someone before they have committed a crime if we think there is a good chance they might. Or again, we could ‘punish’ someone who hadn’t committed a crime in order to prevent some other bad thing happening. For instance, the police would be justified in claiming that they had caught a racist murderer (when they had just locked up someone innocent) in
order to stop violent riots about the murder. But such cases seem grossly unjust. It is only right to punish people who are guilty of committing a crime. So punishment can’t be justified by only looking at its effects. We have to ‘look backward’ to the crime itself - punishment needs to ‘fit’ the crime.

This is also the basis for the second objection. It might turn out that extremely severe punishments, e.g. hanging people for parking illegally, deter crime best of all. If the prevention of crime was all we were after, this would be justified. But again, punishment should fit the crime in being ‘proportional’ to it. Crimes that are not very significant should receive lighter punishments than crimes that are significant; and this has nothing to do with the effect of the punishment.

Why should only guilty people be punished, and punished proportionally to their crimes? Mill argues that utilitarianism can respect and explain these constraints. Punishment is a matter of justice, and justice relates to our rights. When someone’s rights are violated, then the wrongdoer should be punished. But we have the right not to be punished for what we haven’t done. We have this system of rights, and with it, a system of punishment, because it promotes the general happiness in the long run. The system of punishment itself should not infringe our rights - and so we should only punish the guilty.

The rule utilitarian will agree. Only punishing the guilty, and in proportion to their crime, is a rule that will create more happiness than one that allowed us to ‘punish’ the innocent or to punish people disproportionally.

RETRIBUTION AND JUSTICE
Kant and Aristotle agree that punishment is a matter of justice. However, they both hold that criminals deserve to be punished. They seek to justify punishment as an appropriate response to the fact of the crime.

Punishment is a form of justice in rectification, a response to an injustice. Aristotle argues that justice (in the narrow sense) is the principle that each person receives what they are ‘due’. Justice in rectification is a matter of setting right what is unjustly unequal. The wrongdoer has inflicted undeserved suffering and avoided it themselves - an unfair gain or advantage. Justice requires us to balance the scales, to remove this unfair advantage, rather as a referee awards a penalty against a team that has committed a foul.

But this account faces several objections.

1. Is it really possible to think of all crimes as giving the criminal some form of ‘advantage’ and all punishment as removing this advantage? Suppose someone murders another person from hatred, and receives twenty-five years in prison. What is the advantage the murderer gained? To live life without a hated person around? Does the prison sentence somehow rebalance this advantage? Is this the best way of conceptualising why they should be punished?
2. By talking of ‘gain’ and ‘loss’, Aristotle’s theory doesn’t focus on the victim. It is almost as though it is the scales of justice that have been offended, rather than a particular human being.
3. What is good about this idea of justice? Aristotle needs to say more here relating justice to eudaimonia.

In response to (3), we can note that Aristotle repeatedly talks about the importance of having the right laws in society to enable citizens to develop virtue. In framing a law - and thus setting a punishment for a crime - we need to consider the virtue and eudaimonia of people in society as a whole. This justifies punishment on the grounds of its effects, as identified by utilitarians above. On this view, the practice of punishment is justified on the grounds of its effects on the virtue and eudaimonia of society. However, any particular punishment is justified deontologically on the grounds of justice.

Kant and the Formula of Humanity
Kant argues that utilitarian justifications of punishment violate the Categorical Imperative, particularly in its second formulation. They treat the person who is punished as a means to an end (less crime) and not as an end in themselves. Their punishment isn’t being justified by what they have done, but by what punishing them might achieve. Rather than offering criminals rational, moral grounds for repentance, they are either seen as objects to be reformed; or their choices are thwarted by removing their freedom; or in attempting to deter them, we are offering them self-interested reasons not to commit crimes, rather than conveying the wrongness of the crime. But people, including criminals, have dignity and autonomy, and the right to decide for themselves how to live.

To be just, punishment needs to treat the criminal as an end in themselves. To treat someone as a rational being requires us to hold them responsible for their actions. We don’t punish animals or young children in the same sense as we punish adults. Instead, our ‘punishments’ of animals and children are intended as a form of training them not to do whatever it is that they did. But in holding an adult responsible, we take their choices and conduct as the basis on which we respond to them. This is what punishment does.

In particular, rational beings are answerable to the Categorical Imperative. So when someone commits a crime, we can take them to be saying that their maxim is to be universalised. This (theft, murder, etc.) is how people are to be treated. In punishing them, we are treating them as they have chosen to be treated. On the most literal interpretation, the punishment should be to have the crime committed against themselves. For example, murder deserves the death penalty. However, the most literal interpretation is very counter-intuitive in many cases - theft deserves only a fine? Or perhaps also the infliction of a psychological state of insecurity? Rape deserves rape? No. The retribution works at a more abstract level - depriving someone else of their freedom (through theft, rape, etc.) deserves being deprived of one’s own freedom.

However, utilitarians object that the infliction of further harm - adding the harm of punishment to the harm of the crime - needs some kind of good outcome to justify it. If punishment ‘does no good’ in terms of preventing crime, it is hard to see that we should continue it. But we can question this. Suppose depriving people of some good is not, in fact, an efficient way of preventing further crime. If so, is there really no point to punishment?