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Bailey McKeon

bailey.mckeon@trincoll.edu

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THE PHILOSOPHY OF PUNISHMENT: AN ANALYSIS OF CRIMINAL PUNISHMENT IN
THE CONTEXT OF MORAL JUSTICE

Bailey W. McKeon

Trinity College

Philosophy Department

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Introduction

Punishment is the last and lease effective instrument in the hands of the legislator for the prevention of crime.

John Ruskin

We human beings have developed a notion that, in some instances, it is acceptable to harm or injure another person. These instances can come in a variety of forms, however, the one which this work will focus on is referred to as “punishment,” which aims to, in some form or another, cause harm to an individual as a consequence of some wrong they have committed or engaged in. Typically, punishment is considered to be a method of achieving justice. Thus, justice, a concept of ethics that requires the maintenance or administration of what is equal, fair, and morally good, is closely tied with our common notions of punishment; the administration of punishment to a perpetrator aims to equalize the victim and their perpetrator, restore fairness between the two, promote what is morally good, and, in doing so, achieve justice. Therefore, the wrongdoer, or perpetrator, deserved punishment as a response to their transgression in order to redeem equality and fairness on behalf of the victim(s) and promote moral goodness in society.

Before we can thoroughly understand John Ruskin’s quote above, we must first explore and refine our notions of punishment. However, before we can thoughtfully engage in a discussion of punishment, we must first thoroughly understand its aim and intent. Punishment is used as a tool in achieving justice; thus, the aim of punishment is the achievement of justice. This is where we shall begin.

Justice, as mentioned previously, is a concept relating to ethics. In this, justice is intertwined with the actions of the ethical, or morality. Ethics are moral principles concerned with the individual standards of right and wrong that govern a person's behavior. Ethics is therefore a branch of knowledge that deciphers the truth of morality- the truth of the distinction between rightness and wrongness. As such, justice promotes moral rightness or moral goodness on a societal level; it encourages individual conduct from all members of a society that is considered, from the distinction developed by ethics, morally acceptable. Some may argue, however, that justice can be grounded in principles aside from morality. This should be met with a response that defines justice in the following ways. First, justice is the achievement of something. Second, if justice were rooted in different things, justice would be the achievement of a variety of things. For logicity and clarity, justice must refer to the achievement of just one thing. Therefore, justice must be rooted in just one thing.

In deciding what justice must be the achievement of, and thus what constitutes justice, we can weigh the alternate option. The most popular proposition, aside from the grounding of justice in morality, is that justice is rooted in the law. Legal justice, then, does not necessarily promote moral goodness but rather lawfulness; it encourages conduct that is considered, from the distinction between legal and illegal activities, lawful. This declaration, however, is riddled with error. The achievement of justice in this case would merely be order. It must be distinguished here that "lawfulness" is compliance with law achieved by an individual whereas "order" is the compliance with law achieved by a group or society. Thus, justice cannot be grounded in the law because the collective achievement of it would simply be called "order," thus presenting a terminological issue. Instead, justice must be grounded in moral principles because we require the term "justice" to refer to the collective achievement of moral goodness among a group or

society; while “moral” or “good” refers to the achievement of moral goodness of an individual, “justice” refers to the collective achievement of moral goodness in a group or society. Thus, because justice is the achievement of one goal, and therefore must be rooted in only one ground, justice must be rooted in morality and consist solely in the collective achievement of moral goodness in order to avoid these terminological issues.

John Rawls would agree. He asserts a political conception of justice “is ‘a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions.’”¹ Political justice, as Rawls refers to it, is that form of justice enacted or upheld by a political authority and, thus, those distinctions of right and wrong which govern the society under the political authority. As punishment is a mechanism executed by the political authority, political justice, and Rawls’ conception of it, is of particular interest when examining the form of justice which punishment provides a means to. Rawls declares, as contended in the paragraphs above, that morality is the absolute source of justice. Rawls further claims “that ‘the distinction between political conceptions of justice and other moral conceptions is a matter of scope, that is, the range of subjects to which a conception applies, and the wider content a wider range requires.’”² Zhuoyao Li discerns that Rawls “has in mind a broader conception of morality, and a narrower conception of political justice.”³ Li describes, then, that for Rawls, political justice is formed by the public endorsement of certain moral principles. By public endorsement of moral principles, Li refers to those “moral principles in the domain of morality [that] are publicly known and respected by all reasonable citizens.”⁴ Thus, political justice is simply an abridged

¹ Zhuoyao Li. “The Public Conception of Morality in John Rawls’ Political Liberalism,” *Ethics and Global Politics* 9, no. 1 (2016): 1, DOI: [10.3402/egp.v9.28679](https://doi.org/10.3402/egp.v9.28679)

² Li, 4.

³ Li, 4.

⁴ Li, 5.

moral justice; it is founded solely upon the principles of morality yet it recognizes certain moral principles rather than others according to a public consensus under the political authority. Thus, justice is grounded in morality. As such, because punishment is a means of achieving justice, punishment aims to promote a society's collective moral goodness.

Perhaps it would be helpful here to discern what exactly is meant by "moral goodness" and thus further understand what achievement constitutes justice. As mentioned previously, moral principles are those which distinguish right from wrong specifically in the case of conduct or behavior. Acting morally, therefore, is acting according to the right or good moral principles while acting immorally is acting according to the wrong or bad ones. Being virtuous, or a morally good person, requires behavior that aligns with right moral principles. On the other hand, being vicious, or a morally bad person, requires behavior that aligns with the wrong moral principles. Moral goodness, then, is the quality one possesses when they can be considered moral or morally good. It is born from the consistent acting according to good moral principles driven by a free choice to do so. As justice is the achievement of a collective moral goodness, justice occurs when all of the members of a society or group consistently choose to act according to good moral principles.

The achievement of moral goodness in society is argued to occur in a variety of ways, giving rise to the various types of justice: distributive, procedural, retributive, and restorative. Distributive justice is concerned with the fair distribution of available benefits and resources. This form of justice presupposes that there is an ethical way of apportioning resources, suggesting that people have certain entitlements or rights to goods. Consequently, there is a morally acceptable way in which resources should be distributed amongst the population; failing to distribute goods in this morally correct way is ethically unacceptable and commits

wrongdoing against those who do not receive their fair share. What constitutes the ethical distribution of goods, and the restoration of moral righteousness when goods are distributed unethically, is widely debated. This form of justice is specifically embedded in social order and has been used as a foundation for arguments in favor of socialism.

Procedural justice, on the other hand, focuses on the moral treatment of people through the making and implementing of decisions and the carrying out of processes or procedures. It maintains that there is an ethical way in which power treats its various subjects and proposes that this is achieved through the principles of equality and fairness. Procedural justice, then, requires that all people under the same jurisdiction be treated equally by the authority in their decision-making processes and implementation of procedures; the authority must take a neutral position in order to be considered just. Typically, procedural injustice is met with protestation of authority and a rectification of the mistreatment; moral goodness may be restored through reparations and the dismantling of unjust power.

In order to achieve collective moral goodness, justice has the responsibility to respond to conduct considered morally unacceptable. In these cases, justice is thought to be achieved when moral goodness is restored in society. The next two types of justice focus on this specific responsibility in restoration. First, retributive justice concerns the moral treatment of those who have engaged in misconduct. It implies that there is an ethical method of addressing transgression and those who have transgressed. Retributive justice is achieved through the punishment of the offender as a consequence of their offense. Punishment, according to retributive justice, is fair treatment of the offender and restores the equality that was jeopardized by the transgression. As we have seen thus far in our discussion of justice, fairness and equality are principles that are considered essential to moral goodness, ethical treatment, and,

consequently, justice. This retroactive approach supposedly restores moral goodness through punishment; punishment is fair because it harms the offender as a consequence of the injury they have caused through their transgression and is equal because of the balance it re-establishes between the offender, their victim(s), and the society against which they transgressed.

Restorative justice, like retributive justice, is concerned with the ethical response to transgression, however it more specifically focuses on addressing transgression in its entirety instead of addressing only the offender. Rather than claiming that punishment is the ethical response to transgression, as retributive justice does, restorative justice instead argues that ethical responses to transgression rest in healing and collective problem-solving. Specifically, restorative justice is achieved by healing the victim's wounds, restoring offenders to non-transgressional lives, and repairing harm done to the society resulting from the offense. Restorative justice, then, appears as a direct alternative to retributive justice; the two forms of justice blatantly disagree on the ethical response to transgression and the most effective method of restoring moral goodness. As such, restorative justice is typically supported by those who disagree with the use of punishment as a method of restoring moral goodness; it is based on the conviction that punishment in and of itself is an ineffective method of restoring moral goodness although punishment is defended by its supposed contributions to equality and fairness. Others in defense of restorative justice oppose retributive justice on the grounds that punishment itself is morally wrong, claiming it is illogical and hypocritical to assume that the administration of that which is morally wrong can produce or restore moral goodness. Perhaps, however, these arguments are riddled with distinctions between certain forms of punishment; while some forms of punishment may be deemed moral and able to promote moral goodness, the problem with

punishment which restorative justice identifies could rest with its specific immoral forms that cannot promote moral goodness.

It becomes evident, then, that in order to continue our thoughtful discussion of justice, we must define punishment and narrow the scope of punishment we intend to scrutinize in this essay. Punishment is defined as the imposition of penalty on an offender as a consequence of their offense. This appears coherent with retributive justice's conception of punishment as an instrument used in response to transgression. However, as highlighted by the critique of retributive justice offered by restorative justice, punishment can occur in a variety of situations, as a response to a plethora of transgressions, and in an assortment of forms. For instance, a pre-school teacher can punish a student by putting them in time-out as a response of the child's lack of sharing; an employee can be fired as a response to their untimeliness; a college student may face expulsion from their institution in response to their plagiarism; a government official could be impeached for their misconduct; a car owner must pay a fine for unauthorized parking; a criminal may face prison time for murder.

These examples of the many situations in which punishment can occur, various misconducts which generate the response of punishment, and mixture of the forms of punishment that the offender must suffer highlight a few central themes. First, a punishment can be administered by the victim themselves or by an authoritative body governing the conduct of individuals. For example, it is not the fellow student that the preschooler would not share her crayons with that puts her in time-out. Rather, it is the authoritative teacher, who is not personally harmed by the transgression of the student but instead undertakes the responsibility of regulating the conduct of their students. Likewise, a criminal is punished with prison time not by the person whom they killed but rather the state government who regulates the law on behalf of

the people they govern. On the other hand, an employee who is fired for their untimeliness is punished directly by the individual their transgression harmed- their boss. However, in all cases, the offender is in a position subject to the individual or group who punishes; to punish requires that one has an established authority over an offender.

Additionally, these examples illuminate that punishment is universally administered when wrongdoing or misconduct has been performed and some harm, as a result of the transgression, has occurred. Further, these examples stress an essential principle of punishment, to cause harm to the transgressor: the preschooler loses playtime; the employee loses their job; the college student loses admission to their institution; the government official loses their position of power; the car owner loses their money; the criminal loses their freedom. Thus, there is a universal experience of harm or loss accompanying the infliction of punishment.

With the intent of developing a full, thorough analysis of punishment, this essay will focus solely on the punishment of offenders by a political authority in response to their wrongdoing, thus addressing criminal justice specifically. While it would be remarkable to generate an analysis encompassing all forms of punishment, their differences necessitate that the most thoughtful and effective analysis target only one form. Therefore, note that references to punishment that occur throughout this essay specifically concern the sovereign's punishment of criminals. Furthermore, in order to frame and focus the discussion of punishment in conversation with justice, this essay will elaborate specifically on the function of punishment as a method of achieving retributive justice although it will consider justice, the maintenance of moral goodness, as a whole. Future references to justice, then, should be understood as the maintenance of moral goodness in order to decipher whether or not retributive justice is considered capable of restoring it within the arena of crime and criminal activity.

Now, rich with knowledge to return to the opening quote, “Punishment is the last and least effective instrument in the hands of the legislator for the prevention of crime,” we notice that John Ruskin is suggesting that punishment fails to truly restore a collective moral goodness. His statement points to the failure of punishment in preventing crime, thus, as crime continues, there likewise continues immorality in society. Ruskin indicates that because punishment cannot diminish crime, it consequently cannot achieve justice, although that is its purpose. Perhaps, then, contrary to the establishment and defense of retributive justice, punishment and justice are incompatible and non-harmonious.

For punishment to be just, it must be justifiable. We have considered its justification thus far to rest on its ability to restore moral goodness, the aim of justice. While restoring moral goodness is considered the ultimate end of justice, punishment is considered to have a variety of ends which are highlighted in debating its legitimacy. This investigation focuses on whether the proposed ends of punishment align with the ultimate end of justice. If so, punishment should be deemed legitimate and just. The legitimacy of punishment is no new topic as it has been explored by many philosophers before. The primary debate established thus far is whether punishment is justifiable on the grounds of its utility or its function in retribution.

Utility refers to the fitness of something for a desired purpose, In the context of punishment, utility generally refers to punishment’s purpose in deterrence, or discouraging or preventing future crimes. Through punishment, deterrence is thought to be achieved in two different ways. First, deterrence prevents a previous perpetrator from future misconduct by physically restraining them through punishment or psychologically discouraging them from facing the consequence of punishment again. Additionally, deterrence prevents those who have not engaged in misconduct from ever acting wrongfully out of fear of the consequences of

wrongdoing, namely punishment. In contemporary criminal punishment, deterrence is primarily the fear of jail or prison. Many argue that punishment is justifiable in its utility to deter wrongdoing- the threat of experiencing punishment, either for the first time or for a subsequent time, and the experience of punishment in itself, discourages future misconduct and thus guides humans toward behaving in accordance with moral goodness, producing a more just society as a result. This conception of punishment focuses on restoring moral goodness through the deterrence of wrongdoing.

Justifying punishment on the basis of retribution, on the other hand, requires the infliction of punishment as a method of penalizing someone for a wrong act. Prior to discussing retribution as a ground for justifying punishment, note that retributive justice does not directly imply retribution as its justification of punishment, although both the form of justice and the form of punishment take the same word. Retributive justice, as we investigate here, is considered to be achieved by punishment in and of itself, whether the legitimacy of that punishment is justified on the grounds of utility or retribution.

Punishment is legitimate, according to those arguing on retributive grounds, because offenders deserve the suffering inflicted upon them through punishment as a consequence of their misconduct. Here, the wrongdoer is considered to have accumulated some debt from their transgression. Consequently, they must be punished in order to repay their debt. Thus, retribution aims at the repayment of a debt by the offender, the “debtor,” to the society or to the victim, who may both, or either, be considered the “creditor.” The retributive conception of punishment has consequently contributed to the coining of the phrase “the punishment fits the crime;” whatever punishment the offender suffers supposedly matches, in value, the debt they have accumulated by causing injury to others and/or the society. Punishment, in this sense, is considered as a

method of restoring moral goodness by re-establishing balance in the life of the perpetrator, the debtor, and their victims and/or society, the creditor(s) as it provides a mechanism of repayment.

While there are further arguments attempting to justify the grounds of punishment, this paper deeply analyzes these two specifically, utility and retribution, in order to investigate whether there exists a legitimate justification of punishment. As mentioned previously, a legitimate justification of punishment will demonstrate that punishment is capable of restoring moral goodness, and, thus, of achieving justice. However, in an attempt to generalize these two particular, and arguably most popular, grounds of the justification of punishment to examine them more thoroughly, this paper introduces another basis for distinguishing among the justifications of punishment. It places all justifications into two theories: externalist and internalist. Utility falls among the externalist theories, which “justify punishment by reference to an aim, the specification of which does not require that it should be, or even that it successfully can be, promoted by punishment.”⁵ In other words, externalist theories of punishment are those in which the supposed aim of the punishment is not necessarily achieved exclusively by punishment. Justification on the basis of utility is an externalist theory because many of the purposes utility claims punishment fulfills could be fulfilled by other mechanisms. On the other hand, there exist internalist theories of punishment, among them retribution, which “justify punishment by reference to an aim whose very specification requires either that it must be, or that it successfully can be, achieved by punishment.”⁶ Internalist theories, therefore, require punishment as the sole means of achieving its supposed aim. Justification on the basis of retribution is an internalist theory because punishment is a required mechanism in order to penalize the offender.

⁵ Anthony Ellis, *The Philosophy of Punishment* (Exeter: Imprint Academic, 2012), x.

⁶ Ellis, xi.

This paper will analyze the two definitive grounds of punishment previously addressed, utility and retribution, independently and in conversation with their more general classifications into theories of punishment, external and internal. It will analyze positions argued by historical philosophers who attempted to justify punishment through these bases. Namely, it will look at Thomas Hobbes and David Hume, who similarly justify punishment on the grounds of its utility by arguing that the main use of punishment is to prevent future crimes, and Joseph Butler, who discusses the innate desire of human beings to see offenders suffer to justify punishment on the grounds of retribution.

After establishing the argument laid out by each philosopher, it will scrutinize the legitimacy of the ground for the justification of punishment by reviewing it across two criteria. First, a legitimate justification of punishment will explain how the suffering inflicted on the wrongdoer restores moral goodness. Second, it will demonstrate that punishment is the most effective means of restoring moral goodness. These are the precise criteria which render a justification of punishment legitimate because punishment should be effective in its contribution to justice. And as previously mentioned, the conception of justice this paper focuses on, and argues is the most accurate, is moral justice. Thus, a legitimate justification of punishment must describe how punishment most effectively restores moral goodness.

Next, the essay will offer critiques of these grounds by more contemporary philosophers. It will offer critiques by both Friedrich Nietzsche, who opposes the retributive grounds of justification by revealing the creation of an immoral power structure that our urges to see wrongdoers suffer gives rise to, and Michel Foucault, who offers commentary opposing utility in stating that punishment fails to properly fulfill its supposed intended uses and instead functions as a method of differentiating illegalities, which in turn generates a class of delinquents and

encourages future offenses. These arguments will further develop any previously found illegitimacy in these justifications of punishment by illuminating punishment's problematic motivations and consequent failure to meet specifically the second criterion of legitimacy.

In concluding that there exists no legitimate grounds for the justification of punishment, and consequently asserting that punishment is unnecessary and unacceptable, this essay will encourage the establishment of a better future without punishment. As this essay argues that punishment is incompatible with justice, it will provide alternate methods of understanding and responding to criminal transgression contrary to retributive justice that more competently align with the restoration of moral goodness in justice.

I

Utility

If people are good only because they fear punishment, and hope for reward, then we are a sorry lot indeed.

Albert Einstein

The first popular justification for punishment this paper will explore is rooted in utility, or the usefulness of punishment as a means to other ends. As stated previously, the primary end toward which the utility of punishment is considered is that of deterrence, or the discouragement of wrongdoing through fostering the fear of consequences, namely that of the suffering experienced in punishment. As Albert Einstein alludes to above, ensuring moral goodness, or persuading others to act in accordance with morality, through instilling in them a fear of punishment, which supposedly dissuades them from engaging in wrongdoing, appears counterintuitive. It presupposes that any inclination to moral goodness, if one even has it, may not be strong enough in determining or motivating action. Rather, this possible inclination must be accompanied by a fear of consequence which motivates one to act out of compliance for their best interest. If the moral motivation is not strong enough, or even required, for people to act morally, then there is simply no promotion of virtue within the individual and thus we cannot consider their actions moral at all but rather mechanic or self-interested.

In this, the administration of punishment does not restore moral goodness in human beings by dissuading them from behaving wrongly; rather, it restores order in requiring certain

behavior of human beings by demanding compliance or else administering future punishment. The behavior demanded may adhere to moral standards, however, there is no promotion of virtue within the individual that inclines them to act in such a way. As such, there is consequently no restoration of moral goodness. Here moral justice is not achieved but rather order alone. However, let's suppose for the meantime that punishment with the aim of deterrence does not provoke these complications with morality and contradictions to justice and dive deeper into how the case for utility as a justification of punishment has been made.

Thomas Hobbes and David Hume both develop their notion of justice on the basis of property rights. For Hobbes, justice becomes established alongside the establishment of the commonwealth; prior to the commonwealth there exists no justice simply because in the state of nature there are no property rights. The commonwealth, according to Hobbes, is formed when individuals in the state of nature, in a state in which there is no governing body, recognize their vulnerability and unite in order to gain security, specifically security of property. The commonwealth is formed when each individual enters into a covenant in which they promise to give up their individual rights in order to gain rights, specifically the right to property, under the sovereign power. He describes this as "a Covenant of every man with every man, in such manner, as if every man should say to every man *I authorize and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.*"⁷ Thus, the agreement of the covenant involves the surrendering of one's right to govern oneself, yet one gains the promise that others will also lose their right to self-governing, thus prohibiting these others from taking one's own

⁷ Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (London: Penguin Group, 1985), 227.

property. As a result, all will be governed equally by the sovereign power, which instills property rights.

Hobbes declares that before the covenant is made “every man has a right to every thing; and consequently, no action can be unjust.”⁸ In the state of nature, there exist no property rights, yet upon the emergence of the commonwealth, “when a covenant is made, then to break it is unjust.”⁹ Thus, the concept of justice emerges alongside the creation of the commonwealth and “the definition of injustice, is no other than *the not Performance of Covenant*.”¹⁰ Oppositely, he defines justice as “the constant will of giving to every man his own”.¹¹ The existence of justice requires a covenant that outlines property rights and being just in the commonwealth involves following through on the promises involved in the covenants in order to respect each’s property rights. Here, it becomes clear that Hobbes’ justice is grounded on the basis of promises and agreements in recognizing and regarding people’s property rights.

He then introduces the notion of punishment as a necessary instrument in the development of justice. He states that “before the names of Just, and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants, by the terrour of some punishment.”¹² Punishment is required for justice and injustice to exist in that it strongly motivates the performance of covenants. This presupposes that without the fear of consequence, namely punishment, the individuals in the commonwealth will not be inclined to perform their covenants. From this assumption, it becomes clear that Hobbes believes humans act only out of self-interest and will only perform covenants if it is in their self-interest to do so.

⁸ Hobbes, 202.

⁹ Hobbes, 202.

¹⁰ Hobbes, 202.

¹¹ Hobbes, 202.

¹² Hobbes, 202.

Adding the fear of punishment compels human beings to perform their covenants out of self-interest as they act only to avoid punishment, not to genuinely behave according to what is good or right. Hobbes even claims himself that “all the voluntary actions of men tend to the benefit of themselves” in recognizing the motivation for human action as solely self-interested and not moral. As explained through Einstein’s quote at the opening of the chapter, order may be established and maintained through this deterrence by punishment, but not morality.

Thus punishment, to Hobbes, is justifiable on the grounds of utility in that it compels men in the commonwealth to perform their covenants out of self-interest or face consequences. This raises the issues highlighted in the exploration of Einstein’s quote. Punishment used as a tool to deter does not necessitate moral goodness in the people who evade punishment. The justification of punishment on the grounds of its utility to deter, then, is illegitimate because it consequently fails both conditions for a legitimate justification: the suffering inflicted upon the offender does not restore moral goodness but rather order and compliance, and as follows, it cannot possibly be the most effective method of restoring this moral goodness for it fails to do so in the first place. Thus, Hobbes’ justification of punishment on the grounds of utility fails and punishment, in its conception according to Hobbes, is illegitimate.

Hobbes, however, would disagree. First, Hobbes is an ethical egoist, meaning he believes that morality should be guided by self-interest. In this, he would defend his claims by stating that acting out of self-interest is acting morally, thus, compelling people to act self-interestedly would be a promotion of virtue. Ethical egoism, however, is a mistaken perspective and the conception of morality expressed in this paper contends that morality cannot be founded upon self-interest. Secondly, he views his justification of punishment as legitimate because his understanding and definition of justice differ from those outlined in this paper. The failure of his justification is due

to a narrow conception of justice- one which focuses wholly on property rights. It logically follows that if punishment were for the sake of justice, punishment's aim would be to urge compliance with property rights and thus the restoration of public order, which it appears Hobbes' conception of punishment does.

Like Hobbes, Hume's notion of justice regards the respecting of property rights and honoring of contracts and justifies the emergence and existence of punishment as a tool in deterring transgression by appealing to the self-interest natural to human beings. However, he adds an aspect of morality into this conception. Hume argues that justice emerges, similar to Hobbes, when human beings in the state of nature, who are not endowed with many advantages but instead live amongst instability and scarcity, enter, out of self-interest, into a commonwealth.¹³ Here, behavior is regulated and the ideas of "property, right, and obligation" likewise emerge.¹⁴ The right to one's property and possession of property "is establish'd by the laws of society, that is, by the laws of justice."¹⁵ Similar to Hobbes, Hume's conception of justice involves respecting one's property rights and arises as a result of the right to property established by the unification of individuals into a commonwealth.

However, Hume introduces another aspect of justice that Hobbes fails to recognize or acknowledge. Hume declares that the relation of property and man, that is, man's right to property, "is not natural, but moral, and founded on justice."¹⁶ This statement is accompanied by Hume's belief that "the sense of moral good and evil follow upon justice and injustice."¹⁷ While the natural obligation to justice lay in self-interest, he adds that there further exists a moral

¹³ David Hume, *A Treatise of Human Nature* (London: Penguin Group, 1985), 539.

¹⁴ Hume, *A Treatise of Human Nature*, 542.

¹⁵ Hume, *A Treatise of Human Nature*, 542.

¹⁶ Hume, *A Treatise of Human Nature*, 542.

¹⁷ Hume, *A Treatise of Human Nature*, 551.

obligation to justice which rests on the principle of sympathy. Sympathy, according to Hume, is a natural quality in human beings which causes us to partake in the sentiments of others. Thus, everything “which gives uneasiness in human actions, upon the general survey, is call’d Vice, and whatever produces satisfaction, in the same manner, denominat’d Virtue.”¹⁸ In other words, viewing actions which generate an uneasiness in someone, and consequently an uneasiness in ourselves by the principle of sympathy, we relate to moral badness and call vicious, and those which generate a satisfaction in others, and by the principle of sympathy a satisfaction in ourselves, we relate to moral goodness and call virtuous.

Consequently, Hume argues, “self-interest is the original motive to the establishment of justice: but a sympathy with public interest is the source of the moral approbation, which attends that virtue.”¹⁹ Thus, Hume argues there exists a natural obligation toward justice because of sympathy; we do not wish to see others experience uneasiness, for it will cause uneasiness within ourselves, and we do not wish to be the cause of that uneasiness, for we will face moral disapproval. It is thus the moral judgement and moral disapproval of injustice, or the breakage of promises, that compels people in the commonwealth to continue to respect the property rights of their fellow citizens. Hume claims that because “there is nothing, which touches us more nearly than our reputation, and nothing on which our reputation more depends than our conduct, with relation to the property of others” that “every one, who has any regard to his character, or who intends to live on good terms with mankind, must fix an inviolable law to himself, never, by any temptation, to be induc’d to violate those principles, which are essential to a man of probity and honour.”²⁰ Therefore, human beings are compelled to act in accordance with justice, and thus

¹⁸ Hume, *A Treatise of Human Nature*, 550-551.

¹⁹ Hume, *A Treatise of Human Nature*, 551.

²⁰ Hume, *A Treatise of Human Nature*, 552.

virtuously, in order to avoid moral judgement and maintain a positive reputation. Hence, the fear of punishment is useful in two ways: it compels people to perform their covenants as to avoid personal suffering induced by punishment by appealing to the self-interest of mankind and it compels people to perform their covenants as an act of moral goodness to avoid moral judgement by appealing to the sympathy and moral standards of mankind.

Here, gaining a bad reputation may be considered as a form of punishment in and of itself. However, as this essay focuses solely on the punishment of offenders by a political authority in response to their transgression, we cannot possibly analyze the forms of natural consequences that arise when one is labelled as “immoral” without distraction. Thus, we will not consider the moral reputation of a person as an opportunity for punishment but rather understand it as a part of one’s moral inclination towards goodness as being morally good entails adopting a consideration for others.

This consideration for others, which comprises at least a part of moral goodness, naturally inclines one to consider the ways in which others consider them. Thus, in striving towards morality, and as a result striving towards the consideration of others, it is only natural that one may consider the ways in which others consider them. This fear of a bad reputation is not a punishment, but rather an interest that accompanies morality; those who have no interest in moral goodness, and therefore no concern for others, typically do not consider the ways in which others consider or judge them. Thus, those inclined towards moral goodness are compelled to act in accordance with morally good principles because of their sympathy and consideration for others.

For Hume, the usefulness of justice is truly its only benefit to society. He claims “public utility is the sole origin of justice;” this virtue “derives its existence entirely from its necessary

use to the intercourse and social state of mankind.”²¹ Here, we see the sentiments of Hobbes reflected as Hume asserts that justice is aimed toward maintaining order in society, although Hume highlights a much more expansive list of benefits which his conception of justice aims towards. In one way, there is a clear distinction between the two’s notions of justice in terms of morality; Hume’s is more complex in that it includes an aspect of morality while Hobbes’ does not. Acting just for Hume is not merely performing covenants out of the fear of punishment but additionally doing so because of some inner promotion of virtue. Hume, however, clarifies that this inclination toward moral goodness may not be strong enough to overpower other urges and impulses that may lead to immorality. This, for Hume, is where punishment becomes necessary.

Hume believes that if humans were purely rational beings, there would be no need for punishment, for our rationale would lead us towards moral good. However, since we are complicated by complex desires and strong impulses, our decisions become clouded. Rather than consistently choosing justice, which promises a distant good, we become inclined to choose to satisfy our urges, which many times requires an immoral action, and enjoy a good which is much more immediate. Consequently, Hume proposes an “expedient by which men can cure their natural weakness, and lay themselves under the necessity of observing the laws of justice and equity, notwithstanding their violent propension to prefer contiguous to remote.”²² This occurs, for Hume, by changing the circumstances under which humans live in, for “they cannot change their natures; all they can do is change their situation, and render the observance of justice the immediate interest of some particular persons.”²³ Thus, the authority must introduce a system of

²¹ David Hume, *An Enquiry Concerning the Principles of Morals*, ed. J.B. Schneewind (Indianapolis: Hackett Publishing Company, 1983), 20, 22.

²² Hume, *A Treatise of Human Nature*, 580.

²³ Hume, *A Treatise of Human Nature*, 581.

rewards and punishments to make the distant good from acting morally more immediate. This distant good becomes immediate by taking the form of freedom and the evasion of punishment.

Thus, the punishment for Hume is useful in two ways: it compels people toward compliance out of fear of punishment, as Hobbes explained, yet it also is useful in suppressing immoral urges and impulses by making the distant good more immediate, compelling people toward moral goodness. Therefore, in identifying the legitimacy of punishment on the grounds of utility, Hume's argument appears to render punishment legitimate on the first condition: it upholds, enforces, and compels moral goodness.

However, the first condition also requires that it is precisely the suffering inflicted on the offender that restores moral goodness. For Hume, punishment is useful in its benefit to society. He argues that "when any man... renders himself, by his crimes, obnoxious to the public, he is punished by the laws in his goods and person; that is, the ordinary rules of justice are, with regard to him, suspended for a moment, and it becomes equitable to inflict on him, for the benefit of society, what, otherwise, he could not suffer without wrong or injury."²⁴ In other words, the offender has put themselves in a position in which the expectations of justice have changed.

The suffering inflicted upon the offender, also explained as the suspension of the rules of justice, could be useful to society in a variety of ways. First, it could be a method of restoring goods to their rightful owner. Second, inflicting punishment on the offender may generate a sense of security in the society that leads toward a trusting environment; people may adopt the viewpoint that because others will not violate their rights, they will not violate theirs, making the concept of contracts possible. This, as a result, generates moral goodness in society, as it is precisely in the recognition that others will not injure them that people are more willing to avoid

²⁴ Hume, *Concerning the Principles of Morals*, 23.

injuring others. Third, the punishment itself could be used as a spectacle in deterring others from wrongdoing as they are able to understand the suffering they could face as a consequence of future transgression by witnessing a fellow member of their society experience it. Last, it could deter the offender from engaging in future transgression as they themselves have experienced the consequence of suffering and likely do not wish to do so again.

However, it is not apparent in any of these examples of the utility of punishment that it is precisely the suffering caused to the offender which restores moral goodness. In the first case, the suffering may restore equality, but does not assure that the offender themselves has become inclined to future goodness. In the second case, there may be a general sense moral goodness in society, yet the moral goodness of the offender is altogether neglected. Further this moral goodness in society is not necessarily produced from the offender's suffering. The third case does not require any moral goodness but rather renders decisions to be driven by self-interest, as does the last case.

Yet, suppose we assume that the infliction of suffering upon the offender does restore moral goodness and the first requirement for a legitimate justification of punishment is met. It would be counterintuitive to assume, however, that the method of punishment is the most effective way of restoring moral goodness in the offender as punishment is precisely the absence of moral goodness. Punishment, according to Hume, is the suspension of the common rules of justice toward the offender. It is a paradox to claim that treating one according to principles that exclude moral goodness somehow restores moral goodness within them.

However, perhaps one may argue that this is the exact purpose of deterrence. In inflicting upon the offender the experience of the lack of justice, and likewise the lack of moral goodness, they could be compelled to act morally in the future to both not suffer the experience of

punishment again and to not cause this suffering for others, which could potentially be done by committing subsequent crimes. The first motivation mimics the fourth case of utility mentioned above and, as argued, requires no true moral goodness but rather self-interested intent. While the second may involve some consideration of the well-being of others and hint at a newfound moral goodness in the offender, it is highly nonsensical to propose that moral goodness may most effectively be taught by experiencing its suspension. It should not be required that one who has acted immorally also experience immoral actions in order to once again become, or at least be considered, a moral being.

Perhaps, nevertheless, one may argue that Hume specifically stated that punishment was useful for the moral goodness of the society, not necessarily for the offender. In this case, the suffering the offender faces is interpreted simply as a necessary evil in order for the society to progress past their injustice. This would point toward the first, second, and third utilities mentioned above. Some form of punishment must exist in order to compel others in society toward trust and moral goodness. Here, punishment is not aimed at restoring moral goodness in the offender but rather promoting moral goodness in the society. This aligns with Hume's description of the emergence of punishment in which he claims punishment is useful in its ability to make a distant good more immediate.

Regarding punishment as a necessary evil, however, is contradictory with the principles of moral goodness, for in a moral society it is counterintuitive to label certain, or any, evils as necessary. Thus, while Hume's justification of punishment on the grounds of utility could be thought to pass the first criterion, it ultimately fails as the justification does not meet second criterion, namely, punishment according to this justification, while it may be equitable, cannot be considered the most effective method for restoring moral goodness.

Therefore, as illuminated by the explorations of both Hobbes' and Hume's discussions of punishment and justice, punishment is illegitimate on the grounds of its utility. However, for the skeptic, who may propose a justification of punishment on the grounds of its utility separate from the arguments of Hobbes and Hume, let's further explore the justification of punishment on the grounds of its utility under its classification as an externalist theory. As described in the Introduction, an externalist theory of punishment justifies punishment by reference to an aim the specification of which does not require that it should be, or even successfully can be, promoted by punishment.²⁵ In the case of utility, the aim of punishment is its usefulness as a tool, specifically a tool in deterrence.

However, this justification's classification as an externalist theory highlights that punishment is not necessarily the most effective method in achieving any aims for which it is supposedly useful for. Instead, there may be other more effective methods of deterring immorality or achieving other utilities toward which punishment aims. Thus, we can logically render all justifications of punishment based in externalist theories illegitimate as the effectiveness of punishment in achieving its specified aim is not at all required. According to externalist theories, punishment does not guarantee success or effectiveness and thus should be unnecessary. I will make good on the claim that punishment is not necessary in what follows, after fully critiquing the next primary justification for its existence, retribution.

²⁵ Ellis, x.

II

Retribution

The whole idea of revenge and punishment is a childish daydream. Properly speaking, there is no such thing as revenge. Revenge is an act which you want to commit when you are powerless and because you are powerless: as soon as the sense of impotence is removed, the desire evaporates also.

George Orwell

The second popular justification of punishment this paper will scrutinize is that which grounds the legitimacy of punishment in retribution. In this argument, the punishment is considered as a method of repayment or revenge for the wrongdoing committed. George Orwell contends above, however, that revenge is a mere fantasy of human intuition driven by the feeling or state of powerlessness. This condition of weakness is a consequence of victimhood; in being wrongfully injured, the victim enters into a circumstance characterized by fragility as a result of their vulnerability to the effects of others and their suffering from the transgression. They become, in a sense, impaired by the offense they experienced.

In order to combat and overcome this vulnerability, Orwell maintains that victims develop an appetite for revenge, as wounding their perpetrator is, to them, a method of renewal. Orwell interestingly places the phenomenon of revenge as a tactic in the power struggle; the state of powerlessness experienced by victims is considered to supposedly vanish by their reentrance into a position of power in which they execute strength over their offender. In a sense, then,

wrongdoing creates an imbalance in power that punishment, as a form of revenge, has the capacity to restore. However, Orwell reveals that this purpose in revenge is merely an illusion and likewise, revenge itself is simply a fantasy victims experience in their state of weakness and vulnerability. It is nothing but a vision of power restoration. Orwell concludes, then, that when the victim has risen from their circumstances of powerlessness, the fantasy or dream of revenge diminishes.

However, perhaps this human inclination toward revenge could render punishment as a legitimate tool in restoring justice. It is crucial to note, however, that our conceptions of revenge and retribution should be distinguished. While revenge is the victim's retaliation against their offender, retribution takes part on behalf of the political authority in giving the offender what they are due as a result of their transgression. However, similar to revenge, punishment in the retributive sense is viewed as a method of restoring balance by causing suffering to the offender. Because the offender has caused injury through the conduct of their offense, retribution claims that they deserve suffering, administered through punishment as a consequence; it is precisely the misconduct of the offender which renders them susceptible to, and deserving of, suffering, and thus punishment.

As Orwell points out above, there exists some natural human drive desirous of causing suffering to one who injured, whether through revenge or retribution, and perhaps this innate desire should be trusted and implemented in society. Joseph Butler justifies punishment on retributive grounds by arguing on behalf of our natural emotional responses to being wronged and our innate desire for transgression to be punished. In believing that these faculties are natural to human beings, and contending for the adherence to our nature, Butler suggest the legitimacy, and necessity, of punishment as a consequence of wrongdoing.

Butler begins his argument by crafting a theory of human morality within human nature. He claims that the constitution of man is adapted to virtue in the same way in which the system of a watch is adapted to measure time.²⁶ In this, human beings have an obligation toward virtue as vice is directly against our nature; we are obliged to virtue because we must act in accordance with nature. Through his comparison of humankind to brute creatures, Butler describes that the nature of human beings, like brute creatures, is composed of “various instincts and principles of action, ...some leading most directly and immediately to the good of the community, and some most directly to private good.”²⁷ As brute creatures follow their instincts, Butler contends, so do human beings, although there is one specific faculty natural to human beings which separates them from animals.

He insists upon the principle of conscience or reflection within a human’s nature, which “bears upon it marks of authority over all the rest, and claims the absolute direction of them all, to allow or forbid their gratification.”²⁸ Conscience, for Butler, is precisely the faculty that obliges humankind to virtue rather than to animalistically following the strongest passions or inclinations we have. He argues that “we bring our whole conduct before this superior faculty, wait its determination, enforce upon ourselves its authority, and make it the business of our lives, as it is absolutely the whole business of a moral agent to conform ourselves to it.”²⁹ Therefore, “the obligation on the side of interest really does not remain” as “the natural authority of the principle of reflection is an obligation the most near and intimate.”³⁰ Human inclinations,

²⁶ Joseph Butler, *Five Sermons*, ed. Stephen L. Darwall (Indianapolis: Hackett Publishing Company, 1983), 15.

²⁷ Butler, *Five Sermons*, 16.

²⁸ Butler, *Five Sermons*, 16.

²⁹ Butler, *Five Sermons*, 17.

³⁰ Butler, *Five Sermons*, 17.

passions, and desires, then, are limited by the faculty of conscience which makes the final decision regarding our conduct and thus governs our entire being.

Further, Butler develops a notion that “man is thus by his very nature a law to himself.”³¹ Because humans contain within their nature a conscience or principle of reflection that enables them “an approbation of what [is] good, and disapprobation of the contrary,” humans are bound to morality and experience a constant obligation toward moral goodness in their very nature.³² Thus human beings are natural moral agents and do not require the foundation of a commonwealth to compel goodness, an establishment which Hobbes and Hume require in the emergence of some moral virtues, especially justice. In following their nature, human beings are instinctively virtuous. Therefore, vice is any behavior or conduct which deviates from that which our nature promotes or approbates, the consequence of which is a violation of both one’s nature and one’s law to oneself. While Butler is a theist whose religious belief in a benevolent God lay the foundations for most of his philosophical arguments, he claims that our obligation to virtue is not for the hope of reward and avoidance of punishment by God. Instead, it is the proper governor of our nature; “[we have] the rule of right within... [and we must] honestly attend to it.”³³

Butler uses this innate foundation of morality in order to formulate his justification of punishment. Because morality is inscribed within our nature, through our conscience, we are able to judge ourselves according to moral standards. In his words, it is this “superior principle of reflection or conscience in every man which distinguished between the internal principles of his heart as well as his external actions, which passes judgement upon himself and them, pronounces

³¹ Butler, *Five Sermons*, 18.

³² Butler, *Five Sermons*, 18.

³³ Butler, *Five Sermons*, 42.

determinately some actions to be in themselves just, right, good.”³⁴ Thus, our standing as moral agents enables us to self-govern and recognize when we have committed error.

Further, as acting virtuously is in accordance with our nature and acting viciously is against our nature, and our nature, Butler believes, tends toward a common and a personal good, the natural tendency of virtue is the reward of happiness while that of vice is the punishment of misery. He argues that “pleasure and pain are the consequences of our actions” as “we have [not] any one kind or degree of enjoyment, but by the means of our own actions” and likewise “by rashness, ungoverned passion, willfulness, or even by negligence, make ourselves as miserable as ever we please.”³⁵ In this sense, rewards and punishments in the form of happiness and misery are natural consequences of morally good or evil conduct.

Butler attributes these natural consequences to the Author of our nature, God. He claims that “the good and bad consequences which follow our actions are his appointment” perhaps because “an infinitely perfect Mind may be pleased, with seeing his creatures behave suitably to the nature which he has given to them.”³⁶ Regardless of the motivations of God in bestowing upon us worldly rewards and punishments, Butler contends that “God is the natural governor of the world.”³⁷ Our actions are judged not only by ourselves through our own conscience and principle of reflection, but also by a greater Being.

However, it is evident that human beings are not satisfied by this natural punishment of wrongdoing. As this natural punishment, misery, has a long-term tendency, in that it may be “delayed a great while, sometimes even till long after the actions occasioning them are forgot,”

³⁴ Butler, *Five Sermons*, 37.

³⁵ Joseph Butler, *The Works of Bishop Butler Vol I: Analogy*, ed. W.E. Gladstone (New York: Macmillan & Co., 1896), 48-49.

³⁶ Butler, *Works Vol. I*, 52, 50.

³⁷ Butler, *Works Vol. I*, 51.

human beings typically fail to recognize it and thus take the appointment of punishment upon themselves.³⁸ Butler argues that if the civil government “proceed[s] from general laws, very general ones, by which God governs the world” in that they “make the sanctions of their laws take place, without interposing at all,” then the “civil government being natural, the punishments of it are so too.”³⁹ In other words, if the civil government mimics the government of God, the Author of our nature, then the punishments it distributes must be deemed legitimate.

Punishments administered from the civil government satisfy the desire to see wrongdoing punished more immediately.

Butler takes to investigating the source of this desire in human beings to see transgression punished. In doing so, he distinguishes between hasty or sudden resentment and settled or deliberate resentment. The former “is frequently raised... without any appearance of injury” while the latter “is not naturally excited by, or intended to prevent mere harm without appearance of wrong or injustice.”⁴⁰ Thus, the latter, settled resentment, is aroused in instances of witness to wrongdoing or of experiencing being wronged and cultivates a desire for punishment. Butler suggests this “inward feeling” in us is “plainly connected with a sense of virtue and vice, of moral good and evil.”⁴¹ Therefore, Butler argues that this “indignation raised by cruelty and injustice, and the desire of having it punished, which persons unconcerned would feel, is by no means malice” but rather “a resentment against vice and wickedness, ...one of the common bonds, by which society is held together.”⁴² Further, Butler characterizes this desire for justice “as a weapon, put into our hands by nature, against injury, injustice, and cruelty.”⁴³ The

³⁸ Butler, *Works Vol. I*, 56.

³⁹ Butler, *Works Vol. I*, 59, 53, 58.

⁴⁰ Joseph Butler, *The Works of Bishop Butler Vol. II: Sermons*, ed. W.E. Gladstone (New York: Macmillan & Co., 1896), 139, 140-141.

⁴¹ Butler, *Works Vol. II*, 141.

⁴² Butler, *Works Vol. II*, 141.

⁴³ Butler, *Works Vol. II*, 143.

inclination towards punishment, then, is simply a desire for the enactment of moral standards, the promotion of moral goodness, and justice.

It follows, then, that our natural inclination toward justice be coupled with the legitimacy of punishment, as, according to Butler, if our nature as moral agents direct us towards it, it must inherently be good. He claims “it is necessary for the very subsistence of the world, that injury, injustice, and cruelty should be punished.”⁴⁴ However, Butler identifies our compassion for others as a faculty which could interfere with our desire to punish, stating that “compassion, which is so natural to mankind, [could] render that execution of justice exceedingly difficult and uneasy.”⁴⁵ Yet, it is our settled resentment, our natural “indignation against vice and wickedness” which fights our capacity for compassion and acts as “a balance to that weakness of pity, and also to any thing else which would prevent the necessary methods of severity.”⁴⁶ Therefore, the human faculty of settled resentment inclines us toward punishment, necessitates punishment, and enables us to execute punishment and satisfy our desire to punish.

Butler’s argument, it seems, would properly justify punishment on retributive grounds; punishment, for Butler, is necessary and legitimate because it is founded upon an innate desire for goodness and reprehension of evil ingrained in human nature as moral agents. Further, Butler’s argument is appealing in that his conception of justice, unlike that of Hobbes and Hume, is grounded solely in principles of morality and thus, punishment, as a method of achieving justice, supposedly upholds and restores moral goodness. However, in challenging Butler’s argument against the criteria for a legitimate justification of punishment outlined in this paper’s Introduction, it is evident that his justification ultimately fails.

⁴⁴ Butler, *Works Vol. II*, 146-147.

⁴⁵ Butler, *Works Vol. II*, 147.

⁴⁶ Butler, *Works Vol. II*, 147.

First, a legitimate justification of punishment will explain how the suffering inflicted on the offender restores moral goodness. Butler's argument effectively displays the involvement of morality in punishment- namely it is what motivates the natural human desire to see wrongdoing punished. It may be argued, then, that by outlawing punishment, our drive toward morality will consequently be suppressed. However, some of our moral instincts must inherently be suppressed in order to administer punishment anyways, Butler describes. As outlined above, he argues that our capacity for compassion must be overruled by our indignation of vice in order to follow through on the punishment of an offender. In this, our natural tendency to show compassion for others, a moral virtue, is momentarily suspended. This contradiction between inclinations is, in accordance with Butler's vision, likely brought to the attention of the conscious, which will decide and govern the morally right course of action.

In Butler's view, it is necessary that the conscience chooses to follow the path our indignation of vice leads us toward. However, it should be the case that a truly moral conscious would oblige us toward virtue, and thus direct us to pursue our compassion for others; our resentment against vice, while connected with morality, is not described by Butler as a virtue, nor should it be considered one. While Butler's argument may at first appear to explain the restoration of moral goodness as a result of inflicting suffering upon offenders, the morally conscious choice to punish rather than demonstrate compassion simply does not exist. Therefore, in acting upon the resentment of vice by punishing offenders, humans inherently act immorally. Thus, Butler's argument fails to meet the first criterion for a legitimate justification of punishment.

Second, a legitimate justification of punishment will demonstrate that punishment is the most effective means of restoring moral goodness. Suppose that the conscious of each human

being were to rightfully deduce that individuals should act on their indignation of malice and offenders should be punished, as Butler contends. Because this course of action requires the suppression of compassion, it can hardly be the most effective means of restoring moral goodness as in this case the restoration of moral goodness would require the constraint of one of human's greatest capacities for moral goodness.

As such, punishment cannot possibly be the resolution human beings are searching for. Instead, there must exist some mechanism for which both our resentment for vice and compassion for others can exist simultaneously and coherently. Therefore, Butler's argument likewise fails to meet the second criterion. According to the analysis of Butler's account, punishment is not legitimate, effective, nor necessary in the cultivation of justice. I will make good on the claim that punishment is not necessary and propose a method of achieving justice that satisfies both the natural human resentment of vice and the natural human faculty of compassion in what follows. Before doing so, however, two essential critiques of the motivation of punishment must be presented.

III

Critiques of Motivation

“All because

we were in the wrong place

we were in the wrong skins

we were in the wrong time

we were in the wrong bodies

we were in the wrong country

we were in the wrong

were in the wrong

in the wrong

the wrong

wrong

All because

they were in the right place

they were in the right skins

they were in the right time

they were in the right bodies

they were.”

Ibi Zoboi

While the explored justifications of punishment intend to argue on behalf of the theorized aims and intended benefits of punishment, the real motivation behind the widespread establishment of punishment as a mechanism for criminal justice remains unclear. In developing genealogies, both Friedrich Nietzsche and Michel Foucault identify motivations behind the establishment of punishment that remain relevant to its existence in modern societies. While Nietzsche pinpoints a psychological motivation for punishment that gives rise to the conceptual tie between punishment, debt, and suffering, Foucault describes the social motivation for punishment that intends to condemn the criminal.

Thus, while the two motivations for the establishment and expansion of punishment differ, they build upon one another in revealing punishment as an instrument serving the interest of the powerful by causing continual suffering to those they posit beneath them. In the quote above, Ibi Zoboi expresses the inequality in punishment. She expresses that while some bodies are considered “wrong” and punished, others are praised and protected for being “right.” Both Nietzsche and Foucault investigate the motivations behind punishment that give rise to this inequality in their analyses.

Nietzsche

Distrust all in whom the impulse to punish is powerful.

Friedrich Nietzsche

Friedrich Nietzsche provides the first significant critique of punishment, in which he contends that punishment is an exercise driven by the will of resentment. In producing, like Foucault, a genealogy, although Nietzsche's focuses on the genealogy of morals rather than punishment, he reveals that there is no true aim or purpose of punishment. Instead, punishment simply has a variety of functions that have arisen out of its "transformation" over time, yet currently is ill suited to properly fulfill any of them. He specifically critiques the newfound retributive sense of punishment, stating that those who punish have always been, and still remain, possessed by a will to power. Nietzsche himself in the quote above warns society against individuals who have a stark desire to punish as their drive is not born from morality and cannot serve justice. In his work, he clarifies the current psychological motivations for punishment to reveal society's error in expanding the institution of punishment.

First, Nietzsche frames our present conceptions of punishment against its emergence in the past. He states that the "explanation of how the sense of justice came about at all on earth, 'the criminal deserves to be punished because he could have acted otherwise,' is actually an extremely late and refined form of human judgement and inference."⁴⁷ Instead, Nietzsche reveals that punishment arose "out of anger over some wrong that had been suffered."⁴⁸ The concept of

⁴⁷ Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (New York: Cambridge University Press, 2017), 41.

⁴⁸ Nietzsche, 41.

punishment then grew out of “the idea that every injury has its equivalent and can be paid in compensation, if only through the pain of the person who injures,” giving way to a mechanism that “held in check and modified” this anger.⁴⁹ In this, punishment was conceived as a form of repayment, a way in which offenders could repay for their offense. As such, Nietzsche attributes this “deeply rooted and perhaps now ineradicable idea... this idea of an equivalence between injury and pain” to “the contractual relationship between creditor and debtor, which... itself refers back to the basic forms of buying, selling, bartering, trade, and traffic” that formed the foundation of our historical societies.⁵⁰ Punishment, therefore, was born as a contractual mechanism, a method of repayment, and cast injurers into a state of debt they were to repay through suffering the pain of punishment.

In describing the relationship between the creditor and the debtor, Nietzsche frames punishment as an opportunity for the creditor to “[take] part in the rights of masters: ... he, too, shares the elevated feeling of being in a position to despise and maltreat someone as ‘inferior’- or, at least, when the actual power of punishment, of exacting punishment, is already transferred to the ‘authorities,’ of seeing the debtor despised and maltreated.”⁵¹ In this, the creditor takes pleasure in the violation of the debtor. It is precisely this pleasure, not the debtor directly making up for the wrong, that fulfills the repayment or compensation. Here, then, Nietzsche asserts that “compensation is made up of a warrant for and entitlement to cruelty.”⁵² Punishment became a valued and desired form of repayment precisely because of the position of power it gave the “creditor” and the permission to inhumanely treat the debtor, or see the debtor inhumanely treated, that it grants. Thus, punishment became a widespread practice as a method of repayment.

⁴⁹ Nietzsche, 41.

⁵⁰ Nietzsche, 41.

⁵¹ Nietzsche, 42.

⁵² Nietzsche, 41.

Nietzsche argues that the widespread practice of punishment led to the desensitizing of cruelty and torture and even drove the formation of the belief that debt required or expected inhumane suffering. He states that “it was here that the uncanny and perhaps inextricable link-up between the ideas of ‘debt and suffering’ was first crocheted together.”⁵³ In this case, debt necessitates suffering, specifically as a form of repayment to the creditor, a repayment in the form of pleasure from seeing the debtor suffer, “a true feast” as Nietzsche describes.⁵⁴ This feast was normalized by the widespread presence of it in history. Nietzsche describes that “cruelty is a part of the festive joy of the ancient, and, indeed, is an ingredient in nearly every pleasure they have.”⁵⁵ Likewise, as society developed, it became commonplace that “at all events, not so long ago it was unthinkable to hold a royal wedding or full-scale festival for the people without executions, tortures or perhaps an auto-da-fé, similarly, no noble household was without creatures on whom people could discharge their malice and cruel taunts with impunity.”⁵⁶ To inflict suffering was a practice, pleasure, and prize of the powerful; precisely, it was a mechanism which demonstrated their power. Thus, the emergence of punishment was simply an emergence of an organized system in which the powerful could continue to seek pleasure.

With the formation of the political authority came the transfer of the right to punish from the victim, or creditor, themselves to the state, as Nietzsche alluded to previously. However, he characterizes the political authority, and the community it offers to its people, as a new kind of “creditor.” In this, “the community has the same basic relationship to its members as the creditor to the debtor.”⁵⁷ Nietzsche states that under a political authority, “you live in a community, you

⁵³ Nietzsche, 43.

⁵⁴ Nietzsche, 43.

⁵⁵ Nietzsche, 43.

⁵⁶ Nietzsche, 43-44.

⁵⁷ Nietzsche, 47.

enjoy the benefits of a community, you live a sheltered, protected life in peace and trust, without any worry of suffering certain kinds of harm and hostility to whom the human being outside... is exposed.”⁵⁸ These are the offerings of the political authority, the benefits of living within a community. The individual people, then, “make pledges and take on obligations to the community” in order to gain membership in the community.⁵⁹

If they fail to do so, however, “the community, the cheated creditor, will make [the individual] pay up as best it can” as “the lawbreaker is a debtor who not only fails to repay the benefits and advances granted to him, but also actually assaults the creditor.”⁶⁰ Consequently, “as is fair, he is not only deprived of all these valued benefits- he is now also reminded how important these benefits are” through punishment.⁶¹ Thus, “the anger of the injured creditor, the community, makes him return to the savage and outlawed state... cast out... [into a circumstance in which] any kind of hostile act can be perpetrated on him.”⁶² The emergence of political authorities, therefore, simply transferred the execution of punishment from the creditor to the authority, which acted on behalf of the community, another supposed creditor. Even in cases in which an offender injured another person, and not the state, the transgression was viewed as a debt to society rather than, or perhaps in addition to, a debt to the victim. This idiom of debt as connected to punishment continues to be reflected in contemporary society; those who have endured their punishment are considered to have “paid their debt to society.”

Along with the notion of debt, the motive for punishment, the creditor’s anger, remained. As a result, punishment persisted as a method of repayment and its purpose, to provoke pleasure

⁵⁸ Nietzsche, 47-48.

⁵⁹ Nietzsche, 48.

⁶⁰ Nietzsche, 48.

⁶¹ Nietzsche, 48.

⁶² Nietzsche, 48.

in the creditor (from the debtor's suffering), likewise. Now, though, punishment existed as an authorized institution and it was those in positions of authority who reaped the benefits of this pleasure. However, alongside the shift of the creditor from the victim to the political authority and community grew a plethora of other benefits which the creditor would receive from causing the victim suffering through punishment. The creditor, the political authority, perhaps took pleasure in the offender's suffering, yet the creditor was additionally able to capitalize on opportunities to craft a social power, a characteristic of punishment highlighted by Foucault that will be explored in the next section of this chapter. It remains, however, that through the psychological motivation of punishment, originally possessed by the victim, the creditor seeks personal benefit or gain.

The establishment of punishment as an authorized institution, nonetheless, led the drive to find another supposed motivation for its cruelty, a new origin or justification. Nietzsche notes that these "recent attempts to seek the origin of justice elsewhere" have settled "namely [on] resentment."⁶³ This ploy endeavors to "belatedly legitimize... emotional reactions" "as though justice were fundamentally simply a further development of the feeling of having been wronged."⁶⁴ Nietzsche takes issue with this precisely because "this 'scientific fairness' immediately halts and takes on aspects of a deadly animosity and prejudice the minute it has to deal with a different set of emotions, that, to [his] mind, are of much greater biological value than those of reaction and therefore truly deserve to be scientifically valued, highly valued: namely the actual active emotions such as lust for mastery, greed and the like."⁶⁵ In other words, Nietzsche argues that punishment is not used in its connection to a reactive sentiment,

⁶³ Nietzsche, 49.

⁶⁴ Nietzsche, 49.

⁶⁵ Nietzsche, 50.

ressentiment, as many suggest, but rather in connection with those long-term and closely held emotions such as gluttony, greed, and a thirst for power, among others. In this, it is clear that punishment, despite widespread efforts, remains closely tied to the cruelty exercised in the debtor-creditor relationship that it originally emerged from.

As this process to reshape the function or goal of punishment continues into the modern day, Nietzsche warns that subsequent defenses of punishment are merely “[signs] that the will to power has achieved mastery over something less powerful, and has impressed upon it its own idea of a use function; and the whole history of a ‘thing’, an organ, a tradition can to this extent be a continuous chain of signs, continually revealing new interpretations and adaptations, the causes of which need not be connected even amongst themselves, but rather sometimes just follow and replace one another at random.”⁶⁶ These successive adaptations to the purpose and meaning of punishment are nothing but a method of pretending that the institution or system of punishment still fits into our society. Namely, these adaptations, not to the actual practice necessarily, but to the ways in which the practice is conceived of, are attempts, which have been up until now successful, in making the system appear cohesive with society’s progression. Thus, punishment has become a tradition which we as a society have been simply unable, and unallowed, to grow out of.

This scheme to justify punishment conducted by those in power simply characterizes the powers which we are under. Nietzsche illustrates that “the democratic idiosyncrasy of being against everything that dominates and wants to dominate, the modern misarchism has gradually shaped and dressed itself up as intellectual, most intellectual, so much so that it already, today, little by little penetrates the strictest, seemingly most objective sciences, and is allowed to do

⁶⁶ Nietzsche, 53.

so.”⁶⁷ As natural to it, “this idiosyncrasy forces ‘adaptation’ into the foreground, which is a second-rate activity, just a reactivity.”⁶⁸ This occurs through the various surface-level adaptations, ones which “overlook the prime importance that the spontaneous, aggressive, expansive, re-interpreting, re-directing and formative forces have, which ‘adaptation’ follows only when they have had their effect.”⁶⁹ Here Nietzsche highlights the very hypocritical nature which surrounds the various supposed adaptations to punishment; it is precisely a ploy to continue the practice of institutions which are unfit with progression. Rather than leaving these practices in the past, powerful people have taken to formulating groundless claims arguing the practice has adapted, which serve as a veil to many minds of society, for if they were to recognize and understand the concept of punishment for what it truly is, they would be outraged by its existence in the present.

Thus, Nietzsche’s argument exists as a revelation and a call to action. In disclosing the historical development of punishment, Nietzsche makes clear that this practice is rooted in a debtor-creditor relationship which necessitates suffering as a form of repayment, a repayment taking place in the benefits the creditor receives from the utter debasement of the offender and their helpless subjection to cruelty. His discussion of the various adaptations applied onto the appearance, not the practice, of punishment furthers his argument by highlighting the persistence of this unchanged practice in the present day. While some might claim that this could be solved by adjusting the practice of punishment, and ensuring progressive effects, perhaps what Nietzsche truly illuminated in his argument was punishment’s inherent inability to lose its connection to its ancient practice and existence as a part of the debtor-creditor relationship. Thus,

⁶⁷ Nietzsche, 53.

⁶⁸ Nietzsche, 50.

⁶⁹ Nietzsche, 50.

punishment is an utterly unfit institution for our present society. As follows, it is an unnecessary practice for our present society. I will make good on the claim that punishment is unnecessary, a claim extracted in light of Nietzsche's discussion and the previous arguments presented in this paper, in the following chapter. First, however, we must explore Foucault's analysis of the social motivation for punishment which illuminates the additional benefits the political authority reaps as the modern creditor of transgression.

Foucault

Misbehavior and punishment are not opposites that cancel each other- on the contrary they breed and reinforce each other.

Haim Ginott

The second significant critique of the motivation of punishment is offered by Michel Foucault, who argues that punishment in reality does not function according to the utilities which it was theorized to accomplish. Rather, Foucault highlights various harmful consequences that punishment gives rise to, most notably the differentiation of illegalities. In the quote above, Ginott expresses a view corroborated by Foucault's thoughtful analysis of punishment, namely that punishment functions merely in the maintenance of delinquency. This declaration directly counters the perspectives offered by both Hobbes and Hume, who argued that punishment serves as a tool, a utility, in deterring crime, generating security, and maintaining order in society. However, as will become evident through the exploration of Foucault's insightful critique, punishment, in reality, fails to perform as a tool in these beneficial ways and instead promotes crime by fabricating a hierarchical society through the differentiation of illegalities that drives further injustice.

Although Foucault's critique of punishment in *Discipline and Punishment* is born from his genealogical account of the emergence of prison as a form of punishment his criticisms are applicable to the ways in which all methods of punishment of offenders by a political authority function. The primary claim of his work is that the prison is a failure because it is unsuccessful in fulfilling the utilities, explored by Hobbes and Hume, that it supposedly intended to. However,

Foucault reveals that the failure of the prison is precisely its primary function; it purposefully fails in order to function as a tool in satisfying ulterior motives. Thus, the establishment of punishment is cynical; it was not constructed to fulfill the aims with which we justify the utility of its existence. Instead, these theorized aims are used to veil the public from understanding the intended and practiced function of punishment. As follows, Foucault declares that “the prison, and no doubt punishment in general, is not intended to eliminate offenses, but rather to distinguish them, to distribute them, to use them... to assimilate the transgression of the laws in general tactics of subjection.”⁷⁰ In other words, punishment, in reality, functions as a mechanism to craft a divide between classes. It renders some as criminals or delinquents and alienates them. Those not rendered as such profit from this branding and exploitation.

Foucault refers to this mechanism as “differentiating illegalities;” though punishment, according to its justification (although illegitimate) intended to “check illegalities,” instead it merely “‘differentiates’ them [and] provides them with a general ‘economy.’”⁷¹ By “check illegalities,” Foucault refers to the maintenance of order in identifying and classifying right and wrong behavior. By “differentiate illegalities,” however, Foucault contends that rather than establish consequences for all wrongs, punishment instead only targets certain wrongs. This is due to Foucault’s inherent belief that all human beings err and are universally guilty of some wrongdoing, although they may be different behaviors or vary in intensity and consistency. Thus, punishment is a mechanism which chooses which illegalities to criminalize and which to allow. He describes penalty as “a way of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, of putting pressure on others, of excluding a particular section, of

⁷⁰ Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage Books, 1995), 272.

⁷¹ Foucault, 272.

making another useful, of neutralizing certain individuals and of profiting from others.”⁷² Here, it is evident that punishment inherently must render some behaviors, and people who exhibit those behaviors, as lawful, and others as unlawful and warranting of punishment.

This requirement, however, though intended to check illegalities, instead naturally functions as a method of subjugating certain people who have engaged in certain behaviors. It “serves the interests of a class... because the differential administration of illegalities through the mediation of penalty forms part of those mechanisms of domination.”⁷³ To Foucault, this failure of punishment is both inherent and intended as the “system was deeply rooted and carried out certain very precise functions.”⁷⁴ Foucault believes that penalty is “to be included among those effects of power that discipline and the auxiliary technology of imprisonment have induced in the apparatus of justice, and in society in general.”⁷⁵ Punishment, and the “failure” of it, serves a particular premediated purpose yet we are constantly and consistently fooled by (illegitimate) justifications of it which argue for its contribution to justice.

The differentiation of illegalities Foucault describes as the true function of punishment serves a purpose in producing a marginalized group, what Foucault calls “delinquents.” In “[giving] rise to one particular form of illegality in the midst of others, which it is able to isolate [and] place in full light” those in power use punishment to “[transform] the occasional offender into a habitual delinquent” and develop “the organization of a closed milieu of delinquency” which they profit from. Delinquency involves the branding of an offender, a specific type of offender, as a criminal. In formulating “a background of legislation” which renders certain

⁷² Foucault, 272.

⁷³ Foucault, 272.

⁷⁴ Foucault, 271.

⁷⁵ Foucault, 271.

behaviors criminal, only offenders of these specific crimes became delinquents and subjected to punishment.

The behaviors which were made criminal were “sufficiently low level everyday illegal practices (petty theft, minor acts of violence, routine acts of law-breaking).”⁷⁶ As these crimes were those typically committed by individuals in lower classes, the differentiation of illegalities intended to brand lower class citizens as delinquents. In this, “[controlling] illegality [served as] an agent for the illegality of dominant groups” as the higher class citizens do not face penalty for their offenses.⁷⁷ Foucault describes that this differentiation of illegalities formed the belief “that crime is not a potentiality that interests or passions have inscribed in the hearts of all men, but that it is almost exclusively committed by a certain social class” and further that “criminals, who were once to be met with in every social class, now emerged ‘almost all from the bottom rank of the social order.’”⁷⁸

One may argue, however, that a just society, a society which punishes all crime, thus all instances of immorality, regardless of the identity of the offender, would indeed check illegalities rather than differentiating them. Consequently, one would suppose that the power structure, or hierarchical regime, would not emerge. However, all individuals punished are subjected in some way; even if one is not a lower-class citizen before punishment, one will emerge from punishment as an oppressed being due to the branding it necessitates. Punishment is inherently oppressive; rather than demonstrating disapproval or resentment of vice, it displays a disapproval or resentment of people, thereby alienating offenders into oppression. The use of punishment, even in its most fair and equal form, is intrinsically coupled with the emergence of a power

⁷⁶ Foucault, 278.

⁷⁷ Foucault, 279.

⁷⁸ Foucault, 275.

structure. Therefore, it is utterly impossible for punishment to be just in that it manufactures inequality and oppression, noteworthy vices. Thus, punishment is unnecessary. I will make good on the claim that punishment is unnecessary in the following chapter.

4

Punishment is Unnecessary and Unacceptable

Always seek justice, but love only mercy. To love justice and hate mercy is but a doorway to more injustice.

Criss Jami

In order to be necessary, something must be effective in its aim. Things which are necessary are a productive means to some end. Any mechanism which does not contribute to its precise aim is unnecessary. The end of punishment, as has been established in previous chapters, is justice. Therefore, for punishment to be necessary, it must be effective in its contribution to justice. In other words, because justice has been reduced to the collective achievement of moral goodness, or moral rightness, by a group or society, punishment, to be necessary, must contribute to this achievement. However, because the nature of punishment is suffering, punishment is inherently unable to contribute to the collective achievement of moral goodness and is therefore unnecessary.

Punishment, as defined in the Introduction of this paper, is the imposition of a penalty on an offender as a consequence of their transgression. This penalty naturally involves some form of suffering for the offender- whether it be physical, mental, emotional, psychological, economic, based in exclusion, characterized by the suspension of their human rights, or a combination of any of these. A penalty is precisely a disadvantage one faces and suffers from. In returning to the examples of punishment proposed in the Introduction, it is revealed that suffering accompanies

any form of punishment: a pre-school teacher can punish a student by putting them in time-out as a response of the child's lack of sharing; an employee can be fired as a response to their untimeliness; a college student may face expulsion from their institution in response to their plagiarism; a government official could be impeached for their misconduct; a car owner must pay a fine for unauthorized parking; a criminal may face prison time for murder. In each of these instances, suffering accompanies the consequence of the wrongdoing. There is an intrinsic link between punishment and suffering in that punishment necessarily involves suffering. In a sense, the suffering composes the punishment itself, for punishment would not be called a proper "punishment" if it did not inflict, in some form or fashion, a type of suffering upon the offender. Thus, punishment *is* inflicting suffering.

Suffering, however, does not induce people towards moral goodness. Suffering is an experience of harm, whether severe or slight. Experiencing harm does not, in any way, mold a human being into a moral agent. At best, the suffering involved in punishment may be coupled with some method of teaching which cultivates the morality of the offender and enables them to return to society at the conclusion of their punishment as a non-threatening, reborn moral agent. However, the bleak reality is that punishment only necessitates suffering, not learning. There exists no requirement of teaching of right and wrong, no requirement to instill in the offender moral goodness, no requirement for the offender to understand of the effects of their actions, no requirement to generate a compelling feeling within the offender to make things right with their victim, and no requirement to prepare the offender for a better, a moral, life after the conclusion of their set period of punishment. Instead, punishment simply requires that offenders suffer and their understanding or inclination towards morality is left entirely untouched. Although efforts to reform punishment in order to shape it into a more rehabilitative mechanism contend for

punishment to require education, these reform efforts still center around the reshaping of punishment, revealing that even these potentially reformed institutions of punishment require some form of suffering as inflicting suffering is the nature of punishment.

Perhaps suffering promotes moral goodness in society outside of the offender, ignoring the offender completely. However, this is another absurd claim. Causing, viewing, or supporting the suffering of another human being is contrary to moral goodness; it is clearly a vice. For example, while Butler argued that the natural desire for human beings to see wrongdoing punished must suppress the human inclination to compassion, as explained in Chapter II, the disregard and blatant effort to subdue a moral virtue is a clear signal of immorality. Further, taking pleasure in the suffering of others, as described by the analysis of Nietzsche in Chapter III, is another indication of vice. Additionally, embracing the authority to treat an individual without regard for their human rights and the laws of morality is a vice. The infliction or support of suffering contains copious vices, revealing that suffering itself is contrary to morality. Thus, suffering cannot lead to the restoration or promotion of moral goodness in society because it entails moral evils.

Consequently, because punishment is suffering, and suffering entails immorality and thus fails to promote moral goodness, it can be concluded that punishment likewise is founded upon immorality and as a result does not contribute to the restoration of collective moral goodness. Therefore, punishment is inherently unable to fulfill its aim of moral justice and must be considered unnecessary. While this may strike as a startling or radical claim, it is due to society's long-term reliance on punishment, joined with the formulation of various justifications of its institution along with plentiful misconceptions of justice, which lead to the conception that it is a necessary infrastructure for a just society. Angela Y. Davis, however, defends her position as a

prison abolitionist by prompting those who view abolition as a radical idea to consider “how strange and discomfoting the debates about the obsolescence of slavery must have been to those who took the ‘peculiar institution’ for granted- especially to those who reaped the benefits from this dreadful system of racist exploitation.”⁷⁹ Davis actually identifies multiple “social institutions that... were once considered to be as everlasting as the sun” such as “lynching and segregation” in addition to slavery and, as she proposed, the prison system.⁸⁰ In these cases, “many, if not most, could not foresee their decline and collapse.”⁸¹ A similar resistance exists in debating the claim that punishment is unnecessary; because it has been such a central mechanism of societies for so long, it is uncomfortable and troublesome to imagine a society without punishment.

Therefore, it may be difficult for individuals to concede to the claim that punishment is unnecessary. Even if they do accept the argument, they may cling to mistaken notions of justice and already disproven justifications of punishment. In fact, many may continue to support the existence of punishment in society for other aims, such as maintaining order or protecting themselves from criminals. Despite the challenge of imagining a society without punishment, retreating to these petty defenses is the inclination of the narrow-minded. Further, the validity of the claim that punishment is unnecessary cannot be denied simply because a society without punishment is unimaginable or difficult to conceptualize. If society is to progress, we must accept valid claims challenging societal structures, despite the statements’ possible appearances of absurdity, and analyze the existence of the institutions which compose our society with the intent to make change.

⁷⁹ Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003), 24.

⁸⁰ Davis, 24.

⁸¹ Davis, 24.

However, punishment thus far has only been rendered unnecessary. Thus, must we dismantle its system? Could it not, perhaps, exist for reasons besides justice, the promotion of moral goodness? This prompts the investigation of the effects of punishment, of which there are many. For when a system fails to fulfill its own aim of moral justice and instead contributes to an aim associated with immorality, it is not just unnecessary but unacceptable. Therefore, if punishment does produce immoral effects, it should be rendered unnecessary as well. Thus, we must explore two of the effects of punishment, alluded to previously in this paper, both of which contribute to inequality, an immoral condition.

First, punishment enables the development of a power structure. As Nietzsche claimed in his work, the urge to punish simply stems from greed and the vicious desire for mastery. Punishment manifests itself in the domination of another human being. This domination is justified by schemes to legitimize the emotional reactions of onlookers to or victims of wrongdoing, namely the feeling of having been wronged. However, provided with power of punishment, and the opportunity to take the suffering of another human being into their hands, another set of emotions emerge, “greed, lust for mastery, and the like.”⁸² In claiming these “are of much greater biological value,” Nietzsche calls us to acknowledge the vices which the power of punishment provokes.⁸³ We can recognize the reactionary feeling of being wronged present in the victim and understand the innate human desire to see accountability for transgression without necessarily resorting to punishment, a practice that elicits an entire new set of vicious emotions destructive to the equality between human beings.

Perhaps mankind has thus far supported and utilized punishment as a practice to address transgression since it has, as Nietzsche explains, been long associated with the creditor-debtor

⁸² Nietzsche, 50.

⁸³ Nietzsche, 50.

relationship. Punishment has been imagined as the method by which an individual can repay their debt. However, in deeply analyzing this relationship, it becomes clear that the strong tie between punishment and debt reveals that punishment is the manifestation of immense, unjustifiable power. First, the equating of debt with suffering is plainly absurd. That an individual one “owes,” or an authority on their behalf, should take control of one’s body and cause it suffering counters human liberty and transgresses one’s right to their own body. Further, punishment generates a huge disparity between the creditor and the debtor in that it provides the creditor, or a political authority on behalf of the creditor, with control over the debtor. No human being or system should be granted the authority to manipulate another; each being has a right to themselves. Punishment, however, provides an opportunity to cause justified suffering to an individual by generating for the creditor or the political authority a position of rightful domination over them. Even if wrongdoing is to be viewed as contracting a debt, the interlacing of debt and punishment achieves a colossal imbalance of power between people, the punished and punishers.

Second, punishment facilitates the formation of second-class citizens. The domination entitled by experiencing transgression degrades offenders. As Foucault argues, punishment leads to the creation of a class of delinquents, those people whose specific illegalities are surveyed and punished. Punishment, then, authorizes the debasement of human beings to the status of a “criminal” or “delinquent,” groups which are commonly powerless in society and looked on by others as brutal creatures rather than human beings. Perhaps this dehumanization of criminals is due to the ways in which they are treated; they are struck with cruelty more common to animals than humans. In fact, there must exist a cognitive degradation and dehumanization of them in order to understand their reduced, powerless position and the brutal treatment they receive.

As such, these branded individuals are marginalized and alienated from society, as Foucault explains. Therefore, punishment as a method of seeking criminal justice, as Foucault declares, “serves the interest of a class.”⁸⁴ It serves to render offenders powerless through the abduction of their body, brand them as criminals, dehumanize them through the infliction of suffering, degrade them to the status of the lowest class, and discharge them to the fringes of society, all which occur under the justification of their misbehavior. Those in higher classes, then, can exist without disruption by the disenfranchised criminals and assume or maintain positions of power, a power which they preserve, and perhaps even display, through subsequent enforcements of punishment. Davis specifically demands for us to “recognize that ‘punishment’ does not follow from ‘crime’ in the neat and logical sequences offered by discourses that insist on the justice of [punishment], but rather punishment... is linked to the agendas of politicians, the profit drive of corporations, and media representations of crime.”⁸⁵ Therefore, punishment is a tactic of the powerful; through its granted authority to dominate, it serves the interest of powerful groups in monopolizing control through the creation of second-class citizens.

Thus, punishment contributes to the formation of system of power, one which creates inequality on both the individual and the societal level. This renders punishment unacceptable in addition to unnecessary as it generates troublesome, destructive effects. Thus, it is crucial that societies dismantle their systems of punishment, these regimes of power, as punishment, due to its apparent failure and adverse effects, should not exist. However, as proposed previously, humankind can recognize the injury received by the victim, validate the victim’s feeling of being wronged, and hold offenders accountable without the use of punishment. As punishment is a mechanism which secures accountability, those in favor of continuing this institution may

⁸⁴ Foucault, 272.

⁸⁵ Davis, 112.

contend that accountability for transgressions will be lost without its use. Yet, as will be revealed, other mechanisms of criminal justice are similarly capable of encouraging and requiring accountability. Thus, perhaps a new system of addressing wrongdoing can encompass these desires of humankind and further fulfill the public's request for order and deterrence from crime. Even further, perhaps an ideal system will restore moral goodness in society, achieving true justice. To decipher what system this might be and identify the characteristics it must have, three underlying issues with punishment which establish the inequality discussed above must be investigated.

A primary problem of punishment is precisely that it targets the individual rather than the action. In punishing the individual, rather than enforcing them to take responsibility for their action, the entire person is condemned, giving way to the subjection of offenders and the formation of the power structure explored above. It is precisely this aspect of punishment which dehumanizes them; the entire human being is put into question, found guilty, and punished. It categorizes them as a perpetual debtor. It authorizes their branding, their oppression into the position as a second-class citizen, and their alienation from society. This absolute condemnation of an offender ultimately abolishes any possibility of healing; to berate an entire person posits their existence as inferior indefinitely. While individuals must take accountability for their wrongdoing, incorporating their entire person into the process by which societies address crime is extreme. Although it is precisely the person who committed the wrong, it was merely a part of that person at a particular time, not the whole existence of them.

Therefore, a just method of addressing wrongdoing would engage with the offender while focusing on their action, not their livelihood. While this will aid in the avoidance of the condemnation of offenders, and likewise their branding, oppression, and alienation, it will also

provide a more effective method of restoring moral goodness. In engaging with the offender in the examination of their morally wrong action, there is produced an opportunity for perpetrators to understand the impact of their action, accept responsibility, and express remorse. In this way, offenders can reestablish themselves as moral agents and hopefully become a respected peer in the community. Further, it opens the door for healing the community by engaging the perpetrator in mending the aftermath of their transgression. In targeting the action and not the offender, a new method of addressing wrongdoing will be able to focus on healing the injury generated from the offender's wrongdoing in order to restore moral goodness and the community alike.

A second issue, specifically with the punishment of criminals under a political authority, is that the array of criminal activity and the diverse situations which brought about the crime are met with a similar punishment. In the United States, punishment is manifested through incarceration, of varying times, or a fine, of varying amounts. In this, the regulation of wrongdoing fails to address the great disparity between crimes and their vast array of causes. Likely, this is tied to the focus of punishment on the offender rather than the action of wrongdoing itself, as, once branded "criminal," each offender receives a similar punishment, no matter their crime or circumstance. It must be noted, however, that the treatment offenders receive in sentencing and punishment, and thus the forms of suffering they endure, may differ based on race, gender, socioeconomic status, the nature of their crime, etc. However, the method of punishment, for example the imprisonment of offenders, is widespread and applied to many different crimes and offenders.

Davis describes that the failure to address the offenders and their wrongdoings differently has led to resorting to punishment rather than other institutions. For instance, Davis explains that "there are currently more people with mental and emotional disorders in jails and prisons than in

mental institutions.”⁸⁶ Proper mental health care could provide an alternative to punishment for individuals with mental health disorders, especially ones which may have affected or induced their criminal activity. Further, “the current scarcity of institutions available to poor people who suffer from severe mental and emotional illnesses” could be implicit in driving crime. Providing widespread, funded mental health care could restore the health of individuals before they are forced to resort to crime, ultimately reducing crime rates.

Additionally, Davis contends for the treatment of drug addiction rather than the criminalization of drug use. Davis explains that “the so-called War on Drugs [has brought] huge numbers of people of color into the prison system.”⁸⁷ She argues that “proposals to decriminalize drug use should be linked to the development of a constellation of free, community-based programs accessible to all people who wish to tackle their drug problems.”⁸⁸ In making drug treatment programs accessible and utilizing these treatment centers to address certain crimes instead of resorting to punishment, one can expect similar results to the universal accessibility of mental health care: the healing of offenders who face these particular problems, their reinstatement into the community, and the reduction of crime.

Thus, it becomes evident that the emergence of a new system to replace the use of punishment will not exist on its own. Rather, an effective system will be accompanied by the revitalization and widespread use of facilities which promote the wellbeing of people equally. Davis calls for humanity to “envision a continuum of alternatives to [punishment]-demilitarization of schools, revitalization of education at all levels, [and] a health system that provides free physical and mental care to all” along with “job and living wage programs,

⁸⁶ Davis, 108.

⁸⁷ Davis, 109.

⁸⁸ Davis, 109.

alternatives to the disestablished welfare program, community-based recreation, and many more.”⁸⁹ Davis argues that “however mediated their relation might be to the current system [of punishment], these alternatives are attempting to reverse the impact of [the institution of punishment] on our world.”⁹⁰ In establishing and continually supporting these alternatives to punishment, we can expect to live in a stronger, more virtuous community as each individual will have equal opportunities to receive the support they require. We can additionally expect crime rates to reduce and, thus, the supposed necessity of punishment to likewise diminish.

A third problem is punishment’s failure to involve the victim. Within punishment, there is no mechanism or aim which fosters a victim’s healing. Instead, the victim is merely necessary for the conviction of the offender to allow for their punishment. Although the victim used to be considered the “creditor” who reaped the benefits of pleasure through the punishment of the offender, with the establishment of political authorities, and thus the transfer of the power to legally execute punishment to the political authority, the position of the creditor has shifted to the entire society. Thus, the institution of punishment is no longer structured to provide the victim with benefits from the debtor’s repayment. Perhaps the only benefit for the victim is the knowledge that their perpetrator is receiving punishment, which could provide some level of pleasure or at the very least the reassurance that their offender cannot injure them again for the time being.

As such, punishment offers very little aid in the victim’s healing process. By ignoring the victim in the criminal justice process, if any justice is achieved, it is unequal, for the victim is uninvolved. Instead, an alternative must “place victims at its centre and ‘include as many

⁸⁹ Davis, 107, 111.

⁹⁰ Davis, 111.

opportunities for participation, voice, and choices for victims as possible.”⁹¹ Victims should be provided with opportunities to “express how the offense affected them and how they feel about it and express it to people who committed the offense against them” and, moreover, “have a say over their desires for compensation or reparation.”⁹² Additionally, taking a large role in the justice process will enable “offenders [to] help challenge stereotypes which victims may have about offenders and possibly reduce victims’ fears.”⁹³ By allowing them these opportunities, victims will be provided “with a sense of empowerment and [assistance] in the healing process.”⁹⁴ Failing to recognize the victim in the response to wrongdoing fails, ultimately, to lead to restoration. In placing victims at the center of the process, victims can heal, and thus be incorporated into the healing of the community.

In assessing these three primary problems with punishment and considering the grounds for the previously explored critiques of punishment, its motivations both in theory and in reality, an attractive alternative to the punishment of retributive justice is restorative justice. As explained in the paper’s Introduction, restorative justice holds that ethical responses to transgression rest in the healing process rather than in punishment. Restorative justice aims to heal the victim’s wounds by placing them at the forefront of the justice process, restore offenders to non-transgressional lives through exercises which enable them to take responsibility for their misbehavior, and overall rebuild trust and relationships in the community. In this, “restorative justice is concerned not with punishing offenders, but with repairing harm caused by the crime.”⁹⁵ While restorative justice can be manifested in a variety of methods, including “victim-

⁹¹ Margarita Zernova, *Restorative Justice: Ideals and Realities* (Burlington: Ashgate Publishing Company, 2007), 42.

⁹² Zernova, 9.

⁹³ Zernova, 9.

⁹⁴ Zernova, 9.

⁹⁵ Zernova, 1.

offender mediation, family group conferencing, [and] sentencing circles,” just to name a few, “what these practices all have in common is that they involve a participatory ‘process whereby all people with a stake in a particular offense [victims, offenders, and their ‘communities of care’] come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.’”⁹⁶ In this, restorative justice is much more focused on rebuilding the lives and community of those involved in and affected by wrongdoing, and thus is incredibly more capable of reinstating collective moral goodness.

However, as stated, restorative justice is a participatory process. Thus, there is no requirement that victims participate. Although this alternative to punishment places the victim at the center of criminal justice, it is not the responsibility, nor should it be, of the victim to engage with their offender. Because the participation in restorative justice practices is voluntary, “in conferences, offenders [meet] people who [sacrifice] their time and [come] to meetings... because they [want] to help offenders.”⁹⁷ Perhaps this is an idealistic expectation and not all victims will wish to partake in the restorative justice process. Although offender rehabilitation can take place without the presence of the victim, it may be theorized that a thorough process of reparation of harm is more effective with victim inclusion and engagement through restorative interventions, thus presenting one conflict with the restorative justice model.

As the participation of the victim is in question, so may be the participation of the offender. If engagement with restorative justice practices are required for offenders, it may be presumed that restorative justice is merely an alternative form of punishment rather than an alternative to punishment. A study which interviewed a variety of offenders who participated in restorative justice practices, however, reveals otherwise. In this study, “the majority of offenders

⁹⁶ Zernova, 2.

⁹⁷ Zernova, 64.

were ordered by the court to attend the conference and apologize to victims.”⁹⁸ Further, the vast majority of the offenders “found conferences a painful and unpleasant experience.”⁹⁹ Despite this, only one offender viewed the coerced practice as a punishment; almost all offenders and other participants in the conference “[conceptualized] restorative justice as a strategy aimed at helping and educating offenders and thereby facilitating rehabilitation.”¹⁰⁰

Much of the reason for this conception is likely due to the conduct of the victims during the practices. In these conferences “some victims shook offenders’ hands after the conference and wished them well; some even started crying, touched by the offenders’ apology; some victims tried to comfort crying mothers of offenders; one victim offered the offender an apprenticeship in his company; another victim gave the offender a lift after the conference and offered him free driving lessons during weekends.”¹⁰¹ Therefore, “such forgiveness, kindness, generosity, and altruism made it difficult... to see [the conferences] as [punishment].”¹⁰²

Additionally, “the hospitable, informal, and friendly atmosphere within which conferences were conducted could be another factor preventing... [the interpretation of] conferences as a form of punishment.”¹⁰³ Thus, restorative justice and its practices, even when requiring participation by the offender, are not another form of punishment but rather an alternative to punishment.

Another source of doubt in the restorative justice model is the offender’s compliance. Perhaps the offender fails to take any responsibility in the intervention and continues to excuse or defend their transgression. Although this is a valid concern, this case is merely an exception, not the prevailing standard. It has been found that restorative justice models are effective in

⁹⁸ Zernova, 63.

⁹⁹ Zernova, 63.

¹⁰⁰ Zernova, 62.

¹⁰¹ Zernova, 64.

¹⁰² Zernova, 64.

¹⁰³ Zernova, 64.

“invoking empathy and feelings of guilt in offenders.”¹⁰⁴ As a result, these practices were considered to have achieved their purpose in rehabilitating the offender in that “offenders were made to understand human costs of their offenses.”¹⁰⁵ Therefore, restorative justice offers an effective model of confronting criminal transgression as they have been proven to contribute to the restoration of moral goodness within the offender.

Yet, the restorative justice model must be confronted with the criteria for a legitimate justification of an institution of criminal justice, adapted from the criteria for a legitimate justification of punishment outlined in this paper’s Introduction. As stated in the Introduction, a legitimate justification of punishment must demonstrate the restoration of moral goodness generated by the suffering inflicted on the offender. In the case of this alternative to punishment, there exists no suffering, however, the offender may be coerced into participation. However, as explained above and evidenced through previous embracement of the restorative justice model, restorative justice practices are effective in inspiring virtue in the offender, healing broken bonds between the offender and their victim, and promoting a more harmonious community. As suggested in Criss Jami’s statement at the opening of this chapter, justice must be accompanied by virtues, for instance mercy. A justice system which fails to incorporate virtues is unlikely to promote virtue in the offender, the victim, or the community and instead leads to further injustice. Therefore, any system of criminal justice which includes suffering and ignores morality may be predicted to lead only to further injustice. Because restorative justice is built on virtuous ideals and focused on healing, it must be effective in promoting moral goodness.

The second criterion requires that the practice of addressing criminal justice is demonstrated to be the most effective means of restoring moral goodness. While restorative

¹⁰⁴ Zernova, 66.

¹⁰⁵ Zernova, 67.

justice appears to be an attractive criminal justice model for effectively restoring moral goodness, there rests no guarantee that it is the most effective model. In fact, there is significant worry that the ideals theorized by restorative justice may be impossible to achieve in reality. However, in comparison to the current criminal justice system centered solely around punishment, restorative justice offers a much more effective method of restoring moral goodness. Further, this model is not plagued by the injustices which accompany and characterize the institution of punishment including suffering, the creditor-debtor relationship, greed and desire for mastery, power imbalances, and social condemnation. Nonetheless, although restorative justice appears as a satisfactory alternative to punishment, whether or not restorative justice replaces the institution of punishment is not the aim of this work. This essay argues for the abolition of punishment as a method of achieving criminal justice. The method, or methods, to be established as a new means to criminal justice should be further considered.

Conclusion

Punishment may make us obey the orders we are given, but at best it will only teach an obedience to authority, not a self-control which enhances our self-respect.

Bruno Bettelheim

This essay has declared an array of assertions to argue for the disbanding of the use of punishment in the response of a political authority to acts of criminal transgression. It has declared punishment as illegitimate through the analysis and rejection of justifications of the theory of punishment, specifically in regard to its utility or retributive value, offered by Hobbes, Hume, and Butler. It rendered punishment unnecessary with support from an argument identifying the link between punishment and suffering. It affirmed punishment is unacceptable through an analysis of its existence as a mechanism to produce a power structure which generates immense and detrimental inequality in society. Without a justified theory, as it is illegitimate, or a fulfillment of its intended effects, as it is unnecessary, and due its existence as a destructive institution, as it is unacceptable, the use of punishment must be demolished.

While this essay focused on critiquing the theories, motivations, functions, and effects of the punishment of offenders by a political authority in response to their wrongdoing in a broad sense, it is important to recognize the theories, motivations, functions, and effects of the popular system of punishment in America, the prison industrial complex. This deeply racist system has targeted racial and ethnic minorities, evident in the disparity between individuals who are incarcerated. The American prison system functions in the way that punishment has been described to by Foucault, Nietzsche, and Davis, however, it is important to recognize the further

atrocious functions and effects mass incarceration has caused for minorities in the United States, especially for Black people. Michelle Alexander classifies the American prison industrial complex as “the new Jim Crow,” declaring that “we have not ended racial caste in America; we have merely redesigned it.”¹⁰⁶ Alexander explains that because “it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt,” Americans “use our criminal justice system to label people of color ‘criminals’ and then engage in all of the practices we supposedly left behind” as “today it is perfectly legal to discriminate against criminals in nearly all the ways that it once was legal to discriminate against African Americans.”¹⁰⁷ Therefore, while it is crucial to our society to disband all uses of punishment categorized as methods of criminal justice, the prison industrial complex presents a severely threatening institution of punishment that requires our pressing attention and the urgency of our action.

As we take steps to begin the dismantling of systems of punishment, including, and especially, the prison industrial complex, what mechanisms, structures, and forms of justice we build to continue to seek criminal justice remains unsettled. Promising lines of future research will indulge into potential alternatives and decipher where the most effective restoration of moral goodness and promotion of virtue lay. The arguments formulated throughout this essay that contend for the abolition of the use of punishment in criminal justice hinge on the claim that justice is the promotion of moral goodness. As Bruno Bettelheim expresses in the quote above, punishment fails to inspire any virtue within the offender; instead, it merely inclines human beings toward obedience, thus yielding only order in society. Therefore, it is crucial for

¹⁰⁶ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 2.

¹⁰⁷ Alexander, 2.

structures designed to address criminal offenses to cultivate virtue within the individuals and situations it oversees. Thus, in searching for alternative methods of criminal justice, I contend that these methods must have at their core an aim of restoring moral goodness. Further, these methods must be capable of fulfilling this aim and must function in reality as a sincere advancement of virtue. However, future research could develop a stronger, more exhaustive argument against the use of punishment by critiquing punishment, in theory, motivation, function, and effects, on grounds other than its ability to promote moral goodness.

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