



Précis Paper

Criminal Justice

A discussion of the theories relating to free will and punishment, how they relate to criminal law and alternatives to punishment which do not involve assumptions about free will and moral responsibility.

Discussion Includes

- **What is retributive punishment?**
- Arguments for free will skepticism
- Alternatives to retributive punishment
- Role of a burden of proof
- Social Justice
- Deterrence

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In this edition of BenchTV, Gregg Caruso (Professor of Philosophy, Sydney) and Ian Benson (Solicitor – AR Conolly and Company Lawyers, Sydney) discuss theories relating to free will and punishment, how they relate to criminal law and alternatives to punishment which do not involve assumptions about free will and moral responsibility.

What is retributive punishment?

1. There are different justifications for punishment in the criminal justice system and one of the most prominent both historically and currently, is retributive punishment.
2. Retributive punishment assumes that individuals who do wrong, justly deserve to suffer for the wrongs that they have done.
3. Arguably, there may be two reasons as to why an individual should be punished;
 - i. that they deserve it because they knowingly have done wrong and
 - ii. punishment may deter crime moving forward
4. The backward looking, 'they deserve it' justification is grounded in an assumption of free will. That is, that agents are free and morally responsible for their actions.
5. This means that agents deserve praise, blame, punishment and reward in a basic sense.
6. An important question that arises in the criminal law is whether agents are free in the sense needed for retributive punishment.
7. Gregg Caruso is a free-will sceptic. This means that he believes that what we do is ultimately the result of factors beyond our control and therefore we are never morally responsible for our actions
8. This doesn't mean that there aren't other conceptions of responsibility that are consistent with the denial of freewill nor does it mean that we can't justify incapacitating individuals or engage in rehabilitation or preventative policies, however it does mean that because the agents aren't the source of their own actions in the way that would ground the backward looking retributive punishment, a major part of the criminal justice system is unfounded.

Arguments for free will scepticism

9. Historically free will was framed in terms of what is called the prime of determinism. Determinism is the thesis that every action that occurs, including human behaviour is causally necessitated by antecedent conditions in combination with the laws of nature.
10. Therefore, everything that occurs has to occur given the set of preceding events in combination with the laws of nature.

11. The hard determinist view argues that determinism is incompatible with free will because if agents are causally determined then they are necessitated to act the way they do and they could not have acted any differently.
12. The view of hard incompatibilism maintains that whether the universe is deterministic or indeterministic, we would lack the kind of control and action which would be needed for free will and basic desert moral responsibility.
13. It states that individuals and their actions are the by-products of different types of luck, including present luck or constitutive luck.
14. Constitutive luck is the kind of luck that makes you the kind of individual you are; the circumstances into which you are born.
15. Present luck is the luck around the time of action; this can be the thoughts that come to you at any particular moment or the luck of how you may be morally tested.
16. The argument is that both present luck and constitutive luck encompass all and undermine the kind of action needed for free will and basic desert responsibility as luck is the by-product of factors beyond our control.
17. The view is that who we are and what we do is ultimately the result of factors beyond our control whether that be determinism, chance, indeterminism or luck.
18. Historically, the type of punishment consistent with free will is forward looking deterrence models and because of this we cannot justify punishing individuals in a retributive way.

Alternatives to retributive punishment

19. There are a number of alternatives to retributive punishment, however there are numerous moral concerns with these types of models.
20. These models suffer from ethical considerations such as that they may be overly harsh on innocent people, for example under some of these alternative models it must be justifiable to come down hard on an individual in order to deter others.
21. The public health quarantine model is the idea that without appealing to free will or retributivism, there is the idea that we can incapacitate seriously dangerous criminals on an incapacitation account grounded in self-defense and the protection of other people from harm similar to an analogy of quarantining an individual for an infectious disease.
22. This model is non-punitive so can be thought of as an alternative to punishment.
23. The purpose of the criminal justice system on this model would be rehabilitation and reintegration.
24. The well-being of those who require incapacitation would be an essential component and this would require major reform of the criminal justice system.
25. A second component of this model is that individuals should not be dehumanised whilst they are incapacitated.

26. A third component is that if individuals cannot be rehabilitated and their continued incapacitation is required, there is a responsibility to treat them in certain ways so as not to impose unnecessary suffering.
27. The model requires the principle of least infringement where the least restrictive method possible needs to be adopted to protect public health.
28. The principle of least infringement is consistent with the decriminalisation of a number of acts such as low level drug possession crimes.
29. It is consistent with monitoring individuals; such as providing certain types of parole if these are ways that can be justified in protecting public safety in the least invasive way.
30. Fines can be justified on the grounds of deterrence however fines under this model need to be proportionate to income.
31. Otherwise the deterrence factor can run into issues of social justice.
32. One objection to this model is that a person who is extremely likely to commit a crime but due to reasons beyond his or her control does not, then that person should be subject to the same treatment as someone who has committed a crime.
33. In this regard, an epistemic skepticism must be adopted about not being able to know before a person commits a crime and how likely they are to do so.
34. Even if it may look like there is a good reason to pre-emptively incapacitate a person, you must hold a position of epistemic uncertainty.
35. It is preferable to err on the side of liberty and to allow criminal acts to occur and then deal with it afterwards than to pre-emptively incapacitate people who would not have committed crimes.
36. State of mind matters in this model, not to assess guilt or blame but to establish forward looking threats to society and the types of rehabilitation would be most effective.

Role of a burden of proof

37. A strong argument can be made against retributive punishment based on a burden of proof consideration.
38. If we are going to impose intentional harm on an individual then we need to reach a high epistemic standard. That is, it has to be warranted.
39. In retributive punishment, the assumption is that individuals are justified to be harmed intentionally because they have the kind of free will that is needed to ground backward looking just desserts.
40. There is a question of how certain are we that individuals have this type of freewill?
41. Gregg Caruso argues that the justifications that are provided by the leading accounts do not reach the burden of proof to justify doing harm.
42. Mass incarceration in the US has destroyed whole communities.
43. Black and brown communities have been devastated in terms of the percentage of individuals who are incarcerated.

44. There are good, strong philosophical arguments against free will that we should adopt an epistemic skepticism where if we are not sure if individuals have the kind of free will that is necessary to ground retributivism, we should suspend retributive policies until or unless we reach a very high standard of proof, arguably beyond a reasonable doubt.
45. It is arguable that we do not reach the high burden of proof that is needed to do harm to individuals and communities on the ground that agents deserve to suffer.

Social Justice

46. The Justice Without Retribution Network brings together lawyers, judges and criminal psychologists to look for alternatives to reduce retributivism which are ethically defensible and which are practically workable.
47. There are a number of pilot programs which seem to go in this direction.
48. The bigger part of the model is the idea that the public health framework shifts the focus from prevention to social justice.
49. Just like real public health institutions such as the Centre for Disease Control or the Environmental Protection Agency, which are largely preventative institutions which aim to prevent pandemics and contamination.
50. These public health institutions are focussed on preventative measures and addressing social inequality.
51. Public Health authorities look at the social inequalities that might be responsible for the problems such as women's rights issues, poverty and access to birth control.
52. They then prioritise these inequalities and adopt policies to address them.
53. In the criminal justice system, we should shift the focus away from the myopic obsession with individual punishment and responsibility and adopt practices and policies that focus on prevention and social justice
54. In order to address criminal justice reform, we would also need to address systemic social justice.
55. The social determinants of criminal behaviour are very analogous to the social determinants of poor health outcomes, such as low socio-economic status.
56. Poverty also effects brain development directly. Stress effects brain development which subsequently effects moral development which subsequently effects criminal behavior.
57. Instead of focusing on blame and retribution, we should be focussing on preventing the criminal behaviours in the first place, prioritising them and attempting to address them.
58. In the criminal realm, whilst we need to look at the state of mind of the individual at the time in which they committed the act we also need to look at how they got to acquire that state of mind.
59. The law currently takes a time slice approach; it looks at the individual at the time of the act and determines whether they are morally blameworthy for the act.

60. It is important to take a more wholistic approach and look at how individuals get to acquire the particular character traits they have and what are the social circumstances that are responsible for that.
61. To better protect public safety, we should be addressing those social determinants more than looking at individuals at the tail end.
62. Retributive policies do not have the pragmatic value that people tend to think that they are going to have. They do not reduce recidivism, in the US 76.6% of prisoners will be rearrested within the first five years of release.
63. In Norway, in their criminal code, it states that the conditions inside prisons should resemble the conditions outside prison as much as possible because every prisoner is believed to be going to be reintegrated back into society.
64. The principle of normality says that the conditions in which we imprison individuals should resemble the conditions that they are going to return to as it will be a more seamless transfer back into society..

Deterrence

65. Deterrence could be a secondary by product of incapacitating persons who pose a significant risk to society.
66. However, deterrence should not be the justification for incapacitation because it has possible ethical cases where it might lead to using people in ways in which, by other standards are not justified.
67. A forward looking deterrence model may justify imprisoning an innocent person or use a person as an example and come down very harshly on them.
68. This would never pass the standard of this model as those individuals were not a threat to public safety and there are no grounds to incapacitate them.
69. Individuals should only be incapacitated in proportion to the threat that they pose, which would mean that you cannot come down excessively harsh on certain individuals.
70. Violent crimes need to be reconsidered in terms of how we deal with them in the United States and Australia because the reform movements generally address addiction issues and mental health issues, leaving aside violent criminal acts. However, there are many people who commit violent criminal acts that may not pose a threat moving forward and can be successfully rehabilitated.
71. Instead of taking the worst moment of someone's life and making it a defining moment, we should look more at the ability of people to have second chances and be reformed and reintegrated back into society.

BIOGRAPHY

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