RE-JUSTICE
Judicial Training in Restorative Justice

This project is co-funded by the Justice Programme of the European Union (2014–2020)
Judicial training in restorative justice
Annex 2

Handout 2: Theories of punishment
Overview

Why do we punish?
1. Utilitarianism
2. Retributivism

Punishment in society
1. Different perspectives on punishment in social theory

What is the relationship with restorative justice?
Bentham

• Utility: explain people’s action by the two “masters”, increase pleasure, decrease pain
• People commit crime to increase their own pleasure, but crime harms others
• Reducing crime entails increasing the costs (pain/ suffering) of choosing to do so
• Utility also applies to the actions of the government
  • Punishment proportionate to the gains of the crime
    • If not proportionate, no incentive not to commit more serious crimes
    • Punishment restricted to what is necessary to deter/ prevent crime
• The reason why we punish crime is related to the net harm it does to others in society
Utilitarianism

The future good is served by the reduction and prevention of crime

METHODS USED TO ACHIEVE SUCH FUTURE BENEFITS:

1. Individual and general deterrence
   • When offenders and society refrain from criminal actions

2. Rehabilitation
   • Improving the offender’s position in society/changing the offender’s personality to make him less prone to criminal behaviour

3. Incapacitation
   • Physical restraint to prevent reoffending
Relationship to RJ?

Restorative justice can be conceived as a (more effective) way of preventing crime

Utility of RJ might also be sought in other means: for instance therapeutic goals

Question is though whether this type of thinking might instrumentalize RJ
Or might detract from the perspectives of stakeholders
Retributivism

• Punishment of offenders is intrinsically good or a duty

• No need for justification regarding future beneficial effects

• Indeed, punishing an offender for the good of society means using that offender for the good of society, and this is outright opposed by certain retributivists
Not Bentham, but who are they?
Kant and Hegel

**KANT**
1. Retribution as a categorical imperative
2. Punishment strictly proportionate to wrongdoing
3. “Let justice be done, lest the world perish”

**HEGEL**
1. Respect for the moral autonomy (free will) of the criminal requires that he be punished
   - Already speaks against “rehabilitative” treatment versions of utilitarianism
2. Punishment strictly proportionate to the crime
Recent retributivism

1. Benefits and burdens theories (social contract/unfair advantage): crime as a “free rider” problem: Criminal benefits from the social contract, but does not do his part.

2. Communicative theories: punishment is a means of paying respect to the offender, trying to help him understand what he did wrong.

3. Intuitionist theories: we widely share the belief that people, including ourselves, should be punished for crime

4. Censure/just deserts theories: offender is morally culpable and must be punished as much as he deserves
Expressive theories: punishment as an authoritative declaration what the offender did is criminally wrongful, both acknowledges crime as a “public” wrong and acknowledges the victims.

Jean Hampton (1991): Crime as a moral injury to the victim, retribution as any action that seeks to correct that moral injury.

A moral injury is not the same as a wrongful loss or harm. The latter concept... involves material or psychological damage to that over which a person has a right (for example, her possessions, her body, her psychological well-being), and comes about because of a wrongful action. In contrast, a moral injury is an injury to what I will call the victim’s “realization of her value”

What these reflections show is that retribution is actually a form of compensation to the victim. The real contrast between corrective justice and retributive justice is not that the former is compensatory whereas the latter is not, but rather that each compensates a different form of damage. Corrective justice compensates victims for harms, whereas retributive justice compensates victims for moral injuries.“

This is my preferred version
Retributivism and RJ

- Often positioned as polar opposites: retributive justice versus restorative justice
- If retribution is synonymous with punishment as a necessary answer to crime, than this is probably true.
- But Hampton?

- Compare Howard Zehr (2002):
  - “In my earlier writings, I often drew a sharp contrast between the retributive framework of the legal or criminal justice system and a more restorative approach to justice. More recently, however, I have come to believe that this polarization may be somewhat misleading.” “…they have much in common. A primary goal of both retributive theory and restorative theory is to vindicate through reciprocity, by evening the score. Where they differ is in what each suggests will effectively right the balance”
Some other perspectives

- Nietzsche
- Girard
- Durkheim
- Marx/ Loic Wacquant
- Foucault
Punishment as a cruel spectacle

• “Without cruelty there is no festival: thus the longest and most ancient part of human history teaches — and in punishment there is so much that is festive!”

• “In any event, it is not long since princely weddings and public festivals of the more magnificent kind were unthinkable without execution, torturing or perhaps an auto-da-fe, and no noble household was without creatures upon whom one could heedlessly vent one’s malice and cruel jokes”

The cruel spectacle throughout the ages
Punishment and scapegoating

- Rene Girard

- Importance of scapegoating in maintaining societal coherence

- Punishment as a means of exclusion
Durkheim

• Criminal law as a mechanism for declaring, reinforcing and changing basic social norms about wrongful behaviour

• Not, and not very effective for the type of things most often attributed to it

• Criminal justice and punishment as a morality play that denounces bad behaviour and affirms good behaviour
Power and inequality
• Mass incarceration in the United States is a means to perpetuate power inequalities

• Racial inequality, remnants of slavery → overpopulation of African Americans in prison

• And criminalization of poverty
Changing meaning
Foucault and the changing nature of punishment

- In the past display and establishment of the power of the state
- Today disciplining citizens into conformity to bureaucratic society
Relationship to restorative justice

• Nietzsche: criticism of the underlying idea of punishment

• Girard: criticism of the nature of exclusion in punishment

• Marx/ Loic Wacquant: criticism of (mis)use of power in punishment

• Foucault: criticism of discipling nature of punishment

• Durkheim: echoes view that criminal justice does not do what it proposes to do, seek other rituals to fulfil function
Recap

Why do we punish?
1. Utilitarianism
2. Retributivism

Punishment in society
1. Different perspectives on punishment in social theory

What is the relationship with restorative justice?