

## THE UTILITARIAN THEORY OF PUNISHMENT

- I. **Utilitarian Theories of Punishment:** Utilitarian justifications are forward-looking (consequentialistic) in nature. All of the questions about the justification of punishment (general justification, title and severity) will be answered by appeal to the utility (value) of the consequences of an action.
  - A. **The General Justification:** All punishment is, according to the utilitarian, *intrinsically* bad, because it involves the infliction of pain or some other consequence normally considered unpleasant. Nevertheless, punishment may be justified because of its effects—that is, its *extrinsic* (instrumental) benefits may outweigh the intrinsic badness. Thus, a system of punishment is justified only by its consequences. The good consequences of punishment are usually said to be the promotion of utility (happiness/pleasure/desire satisfaction) through the reduction in crime. (The justification will only work for systems where reducing behavior classified as criminal will promote utility. Societies that criminalize behavior that is not harmful will have difficulty establishing that reducing the incidence of these sorts of actions will produce utility). Systems of punishment are usually claimed to reduce crime by three means:
    1. **Deterrence:** ‘Deterrence’ refers to the reduction in crime as a result of making crime too costly to the would-be criminal—“pricing” crime too high. The individual deterred may still desire to commit the crime in question but will not do so given the likelihood and severity of punishment.
      - a) **Special:** The tendency of the punishment to deter the person punished from future criminal acts.
      - b) **General:** The tendency of the punishment of one person to deter others from committing criminal acts.
    2. **Incapacitation:** ‘Incapacitation’ refers to removal of the opportunity or ability of the potential criminal to commit criminal acts (sometimes only of a certain sort).
    3. **Rehabilitation (Reform):** Rehabilitation takes place when the character of the person punished is altered so that he or she no longer desires to commit the sort of act for which he or she was punished.
  - B. **Evaluation of Punishment on Utilitarian Grounds:** Assume, for argument’s sake, that utilitarianism is the correct theory for evaluating our response to criminal actions. On this assumption, is a system of legal punishment justified. (That is, assume that *utilitarians* were deciding how to respond to crime. Should they, on their moral theory, select a system of criminal punishment?)
    1. Two Questions:
      - a) Does punishment actually produce the desirable effects advertised by the utilitarian defender of punishment? Call this the ‘effectiveness issue’.
      - b) If so, does this provide a better utilitarian rationale for the institution of punishment than for alternative institutions? Call this the ‘rationale issue’.
    2. **Caveat:** These issues are largely empirical—they are questions for sociologists, psychologists, and anthropologists to answer. However, philosophical issues about methodology and the implications of the empirical data are relevant as well.
    3. **Rehabilitation**
      - a) **Effectiveness:** Current forms of punishment are probably not very effective in rehabilitating criminals.

- b) **Rationale:** The goal of ensuring that people are not the sort of people who desire to commit crimes would seem to argue, not for a system of punishment, but for a system of preventive therapy. (“A stitch in time . . .” and all that.) Rather than wait until people *have actually committed* the crime, it would make more sense, to the degree that rehabilitation is our goal, to incarcerate and reform those *who are likely to commit such crimes*—those who have a criminal character—whether or not they have done so. The argument for punishment (which must be for a supposed, not an anticipated, offense) over a system of preventive therapy must rest on the assumption that having committed a crime is good evidence that a person is in need of reform *and that there is no other good evidence*. But this is dubious for certain types of crimes.

#### 4. Incapacitation

- a) **Effectiveness:** Current forms of punishment probably do have an incapacitating effect. Incarceration incapacitates from some crimes for a period of time. Capital punishment incapacitates from all known forms of crime permanently. Fines typically do not have an incapacitating effect.
- b) **Rationale:** As with rehabilitation, incapacitation as a goal seems to speak in favor of preventive detention. Unless one assumes that those most likely to commit a crime (and, hence, most in need of being incapacitated) are previous offenders, then incapacitation would more effectively reduce crime if we didn’t base our decision to incarcerate (or execute) people on previous criminal behavior but on some other indicator of potential for crime.

#### 5. Deterrence

- a) **Effectiveness:** Current forms of punishment are likely to deter crime to some degree. Whether they are *highly* effective as deterrents is another matter, as is the issue of whether one form of punishment (capital punishment, for example) is a more effective deterrent than another (incarceration).
- (1) Three fallacious arguments against the deterrent effect of punishment:
- (a) **Lack of Foresight Argument:** Interviews with convicts show that criminals don’t consider the possibility of being caught and punished. If one doesn’t consider the possibility of being caught and punished, the threat of punishment cannot be an effective deterrent.
- (i) This argument commits the fallacy of biased statistics.
- (b) **Recidivism Argument:** The high rate of recidivism (crimes committed by people already punished by our criminal justice system) shows that punishment is not an effective deterrent.
- (i) This argument only addresses the effectiveness of punishment as a *special* deterrent.
- (ii) Even with respect to punishment as a *special* deterrent, it is not sound because it doesn’t compare a system with punishment to one without. (How much higher would the recidivism rate be if there one knew that one could not be punished for repeat offenses?)
- (c) **False Conception of Criminal Reasoning Argument:** Deterrence theory falsely supposes that criminals reason like business people in their professional decision-making—as benefit/cost maximizers. Studies show that neither criminals nor those who don’t commit crimes generally reason in this way.
- (i) Deterrence theory need not rest on the assumption that people reason as benefit/cost maximizers. People may consider costs (risk of

punishment) in a very loose and unstructured way and decide not to commit a crime for that reason.

(2) These fallacious arguments persist in part because of a belief that there are “criminal types” and the rest of us, and all we have to do is to deter the criminal types. Given this implicit assumption, the idea is that if punishment doesn’t successfully deter the criminal types, then it doesn’t reduce crimes.

b) **Rationale:** Some kind of punishment is likely to be a more effective deterrent than alternatives to punishment since punishment involves the intentionally infliction of pain or something usually considered unpleasant and these are the sorts of things that might deter. Whether deterrence through punishment will give us more effective crime prevention than alternatives is another (and very complex) matter.

**B. Distribution:**

1. **Title:** We should punish all and only those who it gives the best consequences to punish. Bentham spends much time arguing that this will only be people who have committed crimes and were responsible for their actions. However, his arguments are a triumph of wishful thinking over sound reasoning.
2. **Severity:** We should punish to the extent that produces the best consequences and no more. Bentham’s Economy of Punishment Principle indicates how the severity of punishment should be determined.

**II. Evaluation of the Utilitarian Justification of Punishment**

- A. Because the utilitarian answers the question of severity as she does, she may allow for more or less punishment than is deserved—no punishment even for severe crimes if it turns out that deterrence (incapacitation and rehabilitation) are unnecessary or impossible; severe punishment for trivial crimes if we could get a lot of benefit from it.
- B. Because the utilitarian answers the question of title as she does, she may justify punishing an innocent person as easily as a guilty person. If the effect on crime prevention is equal, actual guilt or innocence is irrelevant.
- C. Because the utilitarian offers the general justification she does, even where she gives the right answer about title and severity, she gives it for what is arguably the wrong reason.

“What I . . . want to point out . . . is something which seems to me quite obvious but which philosophical commentators on punishment have almost universally failed to see—namely, that problems of the very same kind and seriousness [as that of the punishment of the innocent] arise with respect to punishment of the guilty. For a utilitarian theory of punishment (Bentham’s is a paradigm) must involve justifying punishment in terms of its social results—*e.g.*, deterrence, incapacitation, and rehabilitation. And thus even a guilty man is, on this theory, being punished because of the instrumental value the action of punishment will have in the future. He is being used as a means to some future good—*e.g.*, the deterrence of others. Thus those of a Kantian persuasion, who see the importance of worrying about the treatment of persons as mere means, must, it would seem, object just as strenuously to the punishment of the guilty on utilitarian grounds as to the punishment of the innocent.” (Jeffrie, G. Murphy, “Marxism and Retribution”)