

## Against Punishment

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In his essay “The Humanitarian Theory of Punishment,” C. S. Lewis proposes to defend the retributive justification of punishment, which advocates punishing criminals simply because they deserve it, by undermining what he takes to be the two salient rival options: the rehabilitative or “curative” justification, which advocates punishing criminals in order to improve their character, and the deterrent justification, which advocates punishing criminals in order to set an example to others.

Against the rehabilitative approach, Lewis charges that it fails to respect the moral agency of the criminal, inasmuch as it

removes from Punishment the concept of Desert. But the concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. ... [T]he Humanitarian theory wants simply to abolish Justice and substitute Mercy for it. This means that you start being ‘kind’ to people before you have considered their rights, and then force upon them supposed kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties. ... Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.

As for the deterrent approach, Lewis continues:

When you punish a man *in terrorem*, make of him an ‘example’ to others, you are admittedly using him as a means to an end; someone else’s end. This, in itself, would be a very wicked thing to do. On the classical theory of Punishment it was of course justified on the ground that the man deserved it. That was assumed to be established before any question of ‘making him an example’ arose. You then, as the saying is, killed two birds with one stone; in the process of giving him what he deserved you set an example to others. But take away desert and the whole morality of the punishment disappears.

In short, the rehabilitative approach is unjustified, while the deterrent approach is justified only in conjunction with the retributive approach, and not on its own.

I agree with Lewis’s arguments against the rehabilitative and deterrent attempts to justify punishment. But I do not agree with his assumption that in defeating them he has thereby defended the retributive approach. For he has failed to consider a fourth possibility: that punishment is not justified at all, for any reason. It is this possibility that I wish to defend.

Given human epistemic fallibility, any system of punishment will inadvertently punish some innocent people; and given human moral weakness, any system of punishment will also be liable to deliberate abuse of power (including the application of such power in ways that are discriminatory, racially or otherwise). So even if punishment were justified in principle, there would still be pragmatic grounds for being very cautious about implementing any real-life system of punishment. However, I shall be arguing that punishment is not justified even in principle – i.e., not even if benevolent and omniscient people were guaranteed to be in charge of it.

But let me first make two qualifications. First, by “punishment” I am referring to penalties that involve the use of force, actual or threatened, against the person or property of the criminal: fines, incarceration, torture, execution, and so on. My present argument has nothing to say one way or the other about the propriety of forms of punishment that do not involve force: ostracism, public shaming, and the like. (I’m also not addressing questions about parental punishment of children, or pet owners’ punishment of pets, as these involve a more complicated set of issues that I don’t have time for here. My focus is on the legal institution of punishment.)

Second, in saying that criminals should not be (forcibly) punished I am not saying that we may not legitimately forcibly impose on them various things they will not like. Rather, I am saying that we may not forcibly impose such things *as* punishment. That is, while a certain degree of suffering may be a consequence of what we impose, such suffering should not be the *point* of our actions – whether as an end in itself, as the retributive approach favours, or as a means to the criminal’s moral improvement, as the rehabilitative approach favours, or as a means to warning others, as the deterrent approach favours. Rather, the point of our actions should be defense (or restitution, but I see restitution as an extension of defense).

In concrete terms: If Jeb attacks me, or if he attacks any of you, I have the right to use force to defend myself, or you. If his violent attacks constitute a sufficient ongoing threat to other people, it may become necessary to restrain or incarcerate him.

Turning from crimes against one’s person to crimes against one’s property: if Jeb steals my new laptop, I (or, perhaps, agents of a legal system acting on my behalf) have the right to take it back, by force. If he steals my laptop and then destroys it, I (or those legal agents) have the right to extract from Jeb’s other holdings an amount sufficient to reimburse me. Forcible restitution for any harm he caused by attacking me would also be appropriate.

But what is it that justifies these defensive and/or restitutive acts of force? Is it that Jeb *deserves* the suffering that they entail for him? Is it because of his malevolent intent?

I don’t think so. If Jeb were hypnotised into attacking me, or if he attacked me while sleepwalking, or as a result of some mistaken belief that I posed a threat, then I would still have the right to defend myself with force (and to extract restitution afterward). And if he were hypnotised into a general pattern of continued attacks, then some sort of restraint or incarceration might be required.

Likewise, if he strolled off with my laptop in the sincere and, in the circumstances, reasonable belief that it was his, but I could prove to a legitimate court that it was really mine, even if I could not manage to convince Jeb, then I, or the agents of the court, could legitimately use force to reclaim the laptop (or to extract reimbursement for it, if he’d broken it).

Yet these are all cases where Jeb is not morally blameworthy. So the uses of force I'm talking about don't depend for their justification on the presence of malign intentions in Jeb's mind. And while Jeb may not enjoy the results, contributing to his unhappiness is *incidental* to my (or the court's) defensive and/or restitutive actions, not something aimed at.

But suppose we posit that Jeb indeed acted with malign intent. Am I, or is the legal system acting on my behalf, now justified in forcibly inflicting *more* on him than was appropriate when he was innocent? I don't see how. Jeb's external actions fall under the jurisdiction of others when they impinge on others' rights, whatever intention lay behind them; but his private thoughts, be they virtuous or wicked, fall under no one's jurisdiction but his own. I am not justified in forcibly punishing Jeb for his evil thoughts. So positing evil thoughts behind the actions I can justifiably defend myself against doesn't grant me any more right to use force against Jeb than I had before. Thus we're not justified in using any more force against a guilty aggressor than whatever amount of force we would be justified in using against an innocent aggressor. (There's one slight qualification to this, but I don't have time to explain it here; you can ask me about it in Q&A if you're interested.)<sup>1</sup>

There's a further constraint on what I may do to Jeb. It seems reasonable that defensive force against an aggressive threat cannot legitimately be disproportionate to the moral seriousness of the threat; I cannot legitimately bludgeon Jeb to death with my laptop, for example, if that should happen to be the only way to stop him from treading on my toe or stealing a paperclip. Thus although criminals who pose certain sorts of ongoing threat to others can legitimately be incarcerated, incarcerating prisoners merely for posing an ongoing threat of, say, property crimes is disproportionate and so disallowed. Garnishing the wages of thieves to secure restitution is proportionate; throwing them into a cage is not.

What about those who pose an ongoing threat of severely violent crimes? They may legitimately be incarcerated when no lesser option will serve – but *not necessarily in prisons as we now know them*. If prisons are places where prisoners are likely to kill or assault *each other*, then placing them there does not put an end to their ongoing pattern of violence against others; it merely shifts which portion of the public is the immediate object of that threat. In such a case, since incarceration does not in fact put a stop to the criminal's pattern of violence, it cannot be justified as necessary to prevent that violence.

Moreover, if prisons are places where prisoners are likely to be assaulted or mistreated by *guards* – given human incentives to abuse power – then since no greater degree of force is justified than is necessary to restrain the aggressor, it is morally mandatory, if incarceration is to be justified, to transition to other forms of incarceration with less incentive and/or opportunity for abuse by enforcers, such as electronically monitored house arrest, or Robert Murphy's suggested scheme for a system where prisoners are allowed to choose among competing prisons. And still less is there any justification for *trying* to make prisons more unpleasant than they need to be, as when prisons deny prisoners access to free time, reading material, and the like, so as not to be accused of “coddling” them.

I'll close with what I suspect will be an especially provocative thesis. Suppose there were a big red button that, if pushed, would release all prisoners everywhere from their prisons, including the most violent. And if it's not pushed, all prisons remain as they are, and all prisoners remain where *they* are,

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<sup>1</sup> Briefly, the qualification is that whether a given aggression is intentional or not can sometimes make a difference to whether a given response counts as morally disproportionate or not

including the utterly nonviolent. (Suppose, further, that in this hypothetical scenario there is, sadly, no intermediate button that releases most prisoners while sending the very worst to a super-nice facility.) Morally speaking, would pushing the button be forbidden, optional, or obligatory? It seems to me that it would be morally obligatory.

