The ethics of punishment: Correctional practice implications

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ABSTRACT

Correctional practitioners work within a context that is heavily influenced and constrained by punishment policies and practices. The overlap between the normative frameworks of punishment and offender rehabilitation creates a unique set of ethical challenges for program developers and therapists. In this paper we set out to briefly outline three major punishment theories and draw out their implications for correctional practitioners. First, we discuss the nature of punishment and the problems it poses for practitioners and all citizens in liberal democracies. Second, consequential, retributive, and communicative justifications of punishment are succinctly described and their clinical implications analyzed and some limitations noted. Finally we conclude with some suggestions for ethical practice in correctional settings.

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1. Introduction

Practitioners working in the criminal justice system pride themselves on their high standards of ethical behavior and are typically adamant that the assessment and treatment of offenders can proceed according to traditional, although possibly modified, professional codes of practice (Bush, Connell, & Denny, 2006; Haag, 2006; Levenson & D’Amora, 2005). The claim made by such individuals is that offender treatment meets the ethical standards of mental health practice and does not involve coercion or punishment in any meaningful sense. However, some researchers have strongly contested this view and argue that the treatment of offenders departs so radically from traditional therapeutic practice that it is best conceptualized as a form of punishment. According to this perspective, traditional professional codes are hopelessly inadequate to guide correctional and forensic interventions and ought to be replaced by
legal frameworks (Glaser, 2003). Indeed, in a recent paper Bill Glaser argued that because of its focus on community protection and the administration of mandated interventions, sex offender treatment ought to be viewed within a therapeutic jurisprudence framework. Glaser asserted that approaching therapy with sex offenders within a legal lens is likely to result in greater ethical outcomes and avoid the inevitable conflicts and confusions that arise from transplanting mental health ethical codes to forensic settings.

In our opinion, Glaser has identified a critical issue for forensic and correctional practitioners although we disagree both with his conceptualization of the problem and his recommendation that therapy with sex offenders is essentially an application of punishment practices. In our view, theories of punishment and rehabilitation models are best construed as distinct but complementary normative frameworks that address quite different problems: censure of a crime and the imposition of a burden on the offender versus problem reduction and well-being enhancement (Ward & Langlands, 2009). However, we agree that the two frameworks overlap to some degree and that aspects of what have been regarded as rehabilitation are in fact punishment. In our view, the difference between the two normative domains is rooted in their relationship to the concept of responsibility. A decision to punish is crucially dependent upon the person being judged responsible for crimes committed while rehabilitation interventions are directed at areas of deficit or dysfunction. An offender may choose to engage in a criminal action in part because he or she lacks alternative means of achieving valued outcomes. It is still the case, however, that a choice was made to pursue a goal though the use of unacceptable means (e.g., seeking sexual intimacy with a child); a refusal to act at all was also a realistic possibility alongside a concern to do the right thing. A major aim of therapeutic interventions with offenders is to provide them with a greater array of skills to effectively eliminate undesired states or to pursue desirable ones in socially acceptable and personally meaningful ways (e.g., sexual intimacy with adults rather than children). While a person is responsible for acting in the world he or she is not necessarily responsible for the cognitive, affective, and behavioral deficits that realistically constrain the ranges of options by which goals can be sought. The sources of psychological and social deficits evident in offenders are typically found in maladaptive learning experiences, social deprivation, and biological dysfunction. Therefore, punishment is embedded within a framework concerned with accountability and questions of rightness and wrongness while rehabilitation revolves around skill acquisition and well-being enhancement. It is not appropriate to blame persons for their developmentally acquired deficiencies although it is reasonable to insist that actions that are intentionally and knowingly chosen in order to achieve a desired end are morally evaluated.

Irrespective of the rightness or wrongness of the above viewpoints, it is evident that the concept and justification of punishment is a significant issue for correctional practitioners. Aside from the global question concerning the relationship between correctional interventions and the concept of punishment, the fact that there are a number of different justifications for punishment creates further ethical headaches for practitioners. The problem is that in order to avoid behaving unethically it is arguably necessary to evaluate the adequacy of each of the extant theories and not simply assume the primacy of one over the others. We do not have the space to carefully examine every justification of punishment proposed by theorists and to tease out their specific implications for correctional practitioners. Our aims are more modest and we set out to briefly outline three major punishment theories and analyze how they could possibly impact on correctional practice. Our view is that the communicative theory of punishment is probably the best one around although our analysis does not depend on its ultimate cogency. First, we discuss the nature of punishment and the problems it poses for practitioners and all citizens in liberal democracies. Second, consequential, retributive, and communicative justifications of punishment are succinctly described, critiqued, and their clinical implications analyzed. Finally, we conclude with some suggestions for ethical practice in correctional settings.

As a note of clarification, we use the term correctional loosely to cover any domain or context in which practitioners assess or treat offenders. The use of this term extends to court mandated work as well as what is conceived as traditional programs such as sex offending therapeutic programs (Ward & Maruna, 2007). By the term practitioners we refer to psychologists, social workers, counselors, and any other individuals who are employed to deliver rehabilitation programs for offenders.

2. Punishment: definition and problems

State inflicted punishment in the criminal justice system involves the intentional imposition of a burden on an individual following his or her violation of important social norms that are intended to protect significant common interests of members of the political community (Bennett, 2008; Beyleveld & Bournalsow, 2001; Duff, 2002; Kleing, 2008). Specifically, punishment in the criminal justice system has five necessary elements (Boonin, 2008). The actions constituting punishment are authorized (by the state), intentional (directed toward a particular end or action outcome), reprobative (express disapproval or censure), retributive (follow a wrongful act committed by the offender) and harmful (result in suffering, a burden, or deprivation to the offender). According to Boonin, the above definition does not beg any important theoretical questions concerning the nature of punishment and its justification, and discriminates between punishment and other types of actions that may result in harmful consequences. For example, the distinction between harm caused by punishment and that by mandated treatment is arguably that in the former case harm is intended while in the second, it is merely foreseen and is therefore an unfortunate consequence of an intended good (Beauchamp & Childress, 2009). For example, while a therapeutic intervention with a sex offender may cause him severe anxiety the intention is to enhance his ability to establish and maintain intimate relationships with adults rather than to cause him to suffer. In this case, the resultant state of anxiety is a regrettable, although common (and foreseen), consequence of rehabilitation interventions (Marshall, Anderson, & Fernandez, 1999).

The issue of justifying punishment arises in part because harms inflicted on offenders may cause them significant suffering and set back their core interests, and also result in marked hardships to family, friends, and even the broader community. The deliberate infliction of suffering is something that is ordinarily considered to be morally wrong and thus requires explicit ethical justification. In the absence of good reasons for inflicting punishment on individuals convicted of crimes the various actors of the criminal justice system are ethically culpable.

It could be argued that practitioners are immune from any ethical fall out associated with punishment because their roles centre around actions that are intended to directly benefit offenders and are not in any sense intentionally harmful or designed to express censure. In our view this is mistaken and there are at least three major reasons why practitioners cannot avoid confronting the ethical challenges created by the institution of punishment. First, from an external perspective, the day to day professional actions of psychologists, social workers, therapists, and program staff are embedded within criminal justice contexts. If the external environment is marred by the infliction of unjustified harms on offenders then staff have an ethical obligation to seek to end such injustices. Failure to do so would arguably make them complicit in unacceptable practices (Lazarus, 2004). Second, the assumptions concerning punishment are likely to be reflected in the specific penal policies and practices embedded in the criminal justice system and constrain or even directly shape the professional tasks.
constituting the roles of psychologists and other types of correctional practitioners (Ward & Syversen, 2009). For example, consequential views of punishment are usually linked to crime reduction by way of an emphasis on deterrence, incapacitation, or directed reform of offenders. The primary goal is to use the various resources available to the state to reduce crime and the risks posed by offenders. Within a risk reduction paradigm it is to be expected that the professional roles of psychologists will be centered on risk detection and management tasks and there will be less time for other types of therapeutic interventions. In a real sense, what comprises good psychological practice is partly determined by policies underpinned by punishment assumptions (see below). Furthermore, decisions concerning intervention priorities, sequencing, and timing are also likely to be strongly influenced by punishment assumptions entrenched within the criminal justice system.

Third, a more subtle point concerns the relationship between punishment practices and the assessment and rehabilitation tasks undertaken by practitioners (Ward & Maruna, 2007). One of us has argued in a previous paper that responses to crime such as punishment and rehabilitation activities constitute two distinct but partially overlapping normative frameworks, each centered on different types of values (Ward & Langlands, 2009). Punishment and related responses such as restorative justice are designed to respond to crime from an ethical values viewpoint. The aim is to deal with the wrongful actions committed by individuals in a reasoned and justified way. Prudential values connected to offenders well-being such as suffering, are evident in the modulation of punishment. That is, punishment is implemented in ways that are considered to be humane and proportional and do not entail unnecessary suffering. Rehabilitation on the other hand revolves around prudential values and the object is to improve offenders social and psychological functioning by providing them with skills and resources to live better lives. However, the creation and implantation of rehabilitation plans are modulated by ethical concerns. Practitioners are careful to ensure that rehabilitation plans and the various programs available to offenders are socially acceptable as well as personally meaningful to the individuals undergoing them (Ward & Maruna, 2007).

The fact that both punishment and rehabilitation frameworks are relevant for program staff means that inevitably there will be some tasks that can be seen from both viewpoints. Thus some aspects of programs may be better characterized as punishment rather than rehabilitation because of the nature of the tasks engaged in by practitioners. (It is important not to confuse the attitude of practitioners toward offenders with the task being undertaken. It is possible, and indeed from our viewpoint essential, that both punishment and rehabilitation tasks are associated with a respectful attitude toward offenders.) For example, cognitive restructuring in sexual offending programs usually involves confronting the offender (constructively) about the nature of his offence and the degree to which he is responsible for the harm suffered by victims. Furthermore, empathy work with offenders covers topics such as the impact of abuse on victims in order to induce compassion, guilt, and remorse. Aside from the obvious contribution to offenders’ well-being, empathy interventions can also be viewed as intentional attempts to evoke appropriate distress in offenders over their abusive actions. The type of responses hoped for in aspects of empathy work and cognitive restructuring are really ethical ones rather than aspects of mental health or well-being which are prudential in nature. In our view, all five elements of punishment are evident in the above kinds of interventions: such actions involve the authorized, intentional infliction of harm (remorse, guilt) on sex offenders that expresses censure (it as wrong, you are responsible) because of their crimes. On the other hand the primary goal of sex offender treatment modules such as intimacy enhancement and stress management is to improve offenders’ level of functioning and quality of life—as well as reduce risk. These are prudential rather than ethical aims.

A key implication of the above reasoning is that the justification of punishment is of relevance and ethical concern for all practitioners. Because of the correctional context is not possible to insulate the role of program deliverers or treatment providers from ethical issues associated with punishment. It is therefore worthwhile for practitioners to have some general familiarity with different theories of punishment and the clinical and ethical implications that follow from them. Rehabilitation work with offenders occurs within a context of punishment and response to crime which constrains and penetrates the practice arena. This can create a problem of boundary blurring between punishment and rehabilitation: some elements of programs fall within the definition of punishment or may collapse into punishment (e.g., “cognitive restructuring”). And if it turns out that some correctional policies and practices rest on unsustainable theories of punishment, it is incumbent on practitioners to ensure that they avoid engaging in professional actions determined by such policies. In any advent, it is imperative that practitioners are aware of what type of tasks they are engaged in and to what degree they constitute rehabilitation or punishment. Failure to be aware of the ultimate aim of an intervention could result in vindictively oriented “therapy,” a lack of an appropriate ethical response to offenders, or to a confused mixture of both rehabilitation and punishment.

3. Punishment and practice: consequentialism

3.1. Theory

Consequential theories of punishment locate their justification in the consequences of the practice: they are forward looking theories (Bennett, 2008; Kleinig, 2008). Basically, consequential theories of punishment argue that there is a contingent relationship between the overall goal of crime reduction and the practice of punishment. The claim is that punishment functions to deter, incapacitate, or reform offenders and that these effects in turn reduce the overall crime rate. Consequential theorists assert that punishment is more likely than other types of crime reduction practices to produce an overall aggregate effect of crime reduction and that this is what justifies them. There is nothing particularly important about punishment as an institution from this standpoint: it is simply viewed as the most effective way of cutting the crime rate. Thus it is argued that a threat of punishment may deter individual from committing crimes in the first place or stop offenders from committing further crimes because they want to avoid additional suffering. The incapacitation of offenders through imprisonment or strict controls on liberty is thought to minimize the chance of their committing additional offences. Character reform is hypothesized to reduce any motivation or interest in behaving antisocially in the future. It is accepted that infliction of suffering is ordinarily a bad thing but that in the case of state inflicted punishment any harmful effects of punishment on offenders and their families are outweighed by the greater reduction of suffering to victims, potential victims, and the wider community. The relationship is called a contingent one because it is based on the actual effects punishment has on crime rates rather than reflecting an intrinsic aspect of wrongful acts. That is, if other ways of reducing the crime rate such as situational crime control, education, persuasion and so on result in larger overall reductions in offending then, according to consequential theorists, they should be implemented in its place.

3.2. Practice implications

The justification of consequential theories of punishment resides in the postulated aggregate reduction in crime rates compared to other crime reducing strategies that do not involve the deliberate infliction of harm on an offender. While it is accepted that individuals undergoing punishment will suffer, sometimes considerably, this bad thing is on balance thought to be acceptable because of the greater
good done, or the amount of harm avoided. We will now briefly examine the practice implications of a consequential justification of punishment in the correctional arena. What are the implications likely to be for practitioners?

A first comment is that an emphasis on deterrence, incapacitation, or reformulation points to offenders being regarded as simply means through which the community’s aims for safety are pursued rather than as independent moral agents who ought to be reasoned with not coerced. The lack of recognition of offenders as beings with inherent dignity and whose autonomy and equal standing should be acknowledged, reflects an overly objective rather than involved perspective towards them (Bennett, 2008; Beyleveld & Brownsword, 2008). Objectivity in this sense is a mode of analysis that concentrates on causal factors generating behavior as opposed to grasping offenders’ understanding of the world and their reasons for acting. By way of contrast, an involved perspective yields an analysis of offenders’ sense of meaning and their reasons for doing what they did. In light of a reductionistic, objective attitude toward offenders it is probable that interventions intended to enhance a person’s abilities and well-being will be less prominent and that there will be a porous boundary between ethical and prudential values evident in programs. In other words, risk reduction programs might appear to be extensions of punishment because of their strong emphasis on community safety and close monitoring of offenders. It is also to be expected that measures such as civil commitment, extended supervision orders, geographical restrictions, and community notification will feature prominently because of their risk detection and management functions. We further anticipate that assessment and treatment will concentrate on individual offenders as opposed to interventions that include families and the community.

3.3. Critical comments

There are two major problems with consequential theories of the type described above (Bennett, 2008; Boonin, 2008; Duff, 2002; Golash, 2005). First, because of the forward looking nature of consequential theories of punishment, it is logically possible to countenance the punishment of innocent persons if the overall effect of doing so results in a reduction of crime. This is possible due to a concern with aggregation of harms and goods associated with crime rather than with the inherent moral value of every individual. In the absence of constraints on harming innocent people, a desire for an outcome where fewer offences are committed means individual rights can be disregarded and there will also be neglect of the community’s obligation to offenders by way of providing and resourcing reintegrative initiatives. This is inconsistent with the core values of liberal democracy where individuals are regarded as autonomous beings who have the right to pursue their own conception of the human good without interference as long as they respect the right of others to do the same (Gewirth, 1981, 1996). The state has a responsibility to protect the autonomy of individuals and not to override their wishes for the greater good. A powerful way of putting this point is by stating that all persons should be viewed as ends in themselves and never as simply means to other persons ends (Driver, 2006; Duff, 2002). Due to their inherent dignity, all human beings are presumed to have the same degree of moral standing when it comes to considering the social and political arrangements that directly affect their core interests and subsequent well-being (Sulmasy, 2007).

Second, in consequential theories the impact of hard treatments (i.e., criminal sanctions such as imprisonment or probation) on offenders and their families is rarely considered. It is more typically the case that the crime reduction effects of punishments are compared to other crime strategies and that the amount of suffering experienced by offenders is not sufficiently addressed (Golash, 2005). The stress of imprisonment, overcrowding, threat of violence, isolation from important relationships, may lead to severe diminution of coping abilities and mental health (Haney, 2006). Furthermore, some research has found that the negative effects of institutional placements are greatest for the least advantaged individuals (Gatti, Tremblay, & Vitaro, in press). The neglect of the rights of individual offenders to adequate living conditions, safety and so on is arguably a legacy of focusing on crime reduction by way of deterrence, incapacitation, or reformulation (Lippke, 2002). An understandable desire to protect the community can lead to lack of concern for the dignity and moral value of offenders and therefore dismissal of their entitlements to equal consideration in crime reduction. Furthermore, an overly objective attitude toward intervention and the overlooking of a need to engage offenders in dialogue rather than confrontation, makes it easier to treat them as vehicles through which the (more important) wishes of the community are expressed. In our view, this is clearly unacceptable and contrary to ethical doctrines such as the Universal Declaration of Human Rights (Churchill, 2006; Donnelly, 2003; Ward & Birgden, 2007).

It is interesting that the types of interventions logically implied by consequential theories of punishment resembles those promoted by the current treatment paradigm dominating correctional jurisdictions throughout the western world, the Risk–Need–Responsivity model (Andrews & Bonta, 2003; Hollin, 1999). In essence, the Risk–Need–Responsivity (RNR) model proposes that correctional interventions should be structured according to three core rehabilitation principles: risk (treatment is delivered according to degree of risk), need (dynamic risk factors are preferred treatment targets), and responsivity (treatment is delivered in ways that matches individuals characteristics). If the suggested alignment of consequential theories of punishment and RNR type interventions is correct then correctional practitioners are ethically obligated to ensure that their implementation of RNR programs does not result in the problems described above.

4. Punishment and practice: retribution

4.1. Theory

Retributive theories of punishment have been increasingly prominent in the philosophical and criminal justice literature since the 1970s following disenchantment with consequential models because of their perceived failures (Bennett, 2008; Duff, 2002). Retributive theories are backward looking and justify punishment in terms of “its intrinsic justice as a response to crime” (Duff, 2002, p. 19). The primary aim of punishment is to hold offenders accountable for crimes by inflicting burdens that are roughly equal in harm to those inflicted on their victims. According to retributive theorists a key relationship is the one between past crimes and the present punishment as opposed to the consequential claim that punishment is justified by its beneficial consequences. The state is thought to be ethically obligated to punish offenders because of the nature of the wrongful act and not for any other reasons. Therefore, the fact that punishment does not reduce crime is not of major concern to
Retributive theorists; it is fitting and just to punish in order to balance the moral ledger. In answer to the question why punish retributive justifications typically utilize the notion of just deserts: offenders deserve to suffer for the wrongful acts they have committed. The notion of just deserts is vague and has been unpacked in a number of ways including distributive justice, vindication of victims, and expression of anger (Boonin, 2008; Golash, 2005). The justice variant speaks to the supposed advantages that offenders accrue over law abiding citizens and the need to annul their ill gained benefits by imposing proportionate burdens on them, for example, fines or imprisonment for particularly serious offenses. The advantages can be viewed as ones relating to a failure to inhibit deviant desires or freeloding and not complying with the social contract that all citizens have implicitly agreed to by virtue of their benefitting from a lawful and cohesive society. The claim that victims are vindicated by punishments speaks to a need to respond to serious norm violations by signaling to offenders and the community that what was done is unacceptable. Failure to impose punishment following a crime is thought to imply that the norms violated are not important, an unacceptable ethical response. Finally, punishment can be viewed as a natural response to crime in that it is an institutionalized form of expressing blame and resentment toward offenders, but in a way that is proportionate and modulated.

Retributive theories are typically based on the Kantian idea that offenders are moral agents whose violation of moral norms requires a respectful and measured response. In the case of serious crimes the kind of reaction warranted is one that takes seriously the fact that the offender intentionally and knowingly committed a wrongful act and therefore is responsible for what he or she did. Punishment acknowledges the autonomy and responsibility of offenders and the significance of the norms violated by holding offenders accountable. Failure to hold offenders accountable and to punish can be seen as an unacceptable form of paternalism where individuals are viewed as morally deficient and lacking an understanding of what they did. From the viewpoint of retributive theories, some forms of consequentialism subvert the moral agency of offenders by not holding them responsible in this way. Thus offenders are viewed as having a right to punishment (Bennett, 2008; Duff, 2002).

4.2. Practice implications

What are the implications of retributive theories of punishment for correctional practice? A major implication is that less attention is given to the question of how to intervene therapeutically in offenders’ lives and more on holding them accountable. That is, overall, retributive theories are associated with correctional policies and practices that are responsibility focused. The reason for the accent on responsibility rather than crime reduction and/or offender reintegration is that punishment is thought to be intrinsically related to the wrongful acts rather than to future beneficial consequences.

Relatedly, an emphasis on offender accountability means that victims’ rights and the community’s views will be given a priority in the sentencing process and subsequent correctional interventions. Because retributive reactions to crime are essentially backward looking, punishment allows victims to express their anger and to have their experiences taken into account in the sentencing process. Accountability, from a retributive perspective, encourages offenders to face up to the nature of the harm inflicted and to make amends through accepting the burdens associated with hard treatment. In some retributive contexts, the inherent dignity and moral agency of offenders may get swamped in the press for just deserts and overly severe sentences can be imposed alongside harsh punishment conditions, for example, in prison (Golash, 2005; Haney, 2006). The ethical challenge for practitioners is that there may be threats to offenders’ human rights and also correspondingly restricted funding for treatment and reintegration programs (Freeden, 1991; Freeman, 2002). The lack of funding is connected to a greater concern with accountability and redress as opposed to prudential concerns such as enhanced offender functioning and reintegration.

The reduced interest in treatment programs and post release planning is to be expected because offenders are considered to be moral agents and therefore responsible for their crimes. The significant issues confronting correctional personnel are thought to be rooted in matters of accountability and redress rather than rehabilitation. In fact rehabilitative interventions are looked at with suspicion because of a fear they imply a lack of autonomy and responsibility in offenders (see below). A danger of highlighting moral accountability is that ethical considerations will be elevated over prudential or psychological ones and areas of psychological or social need will be overlooked. Because offenders are presumed to be competent there is no reason to inquire into their level of social and psychological functioning. To do so can be viewed as disrespectful and stripping individuals of their status as moral equals. As stated above, a worry for practitioners is that legitimate psychological problems such as impulsivity will be characterized as simple failures of the will rather than as significant self-regulation impairments. In the determination to respect offenders rights to punishment there is a real possibility that their proclivity to reoffending will be framed in terms of intentionality and will power to an exclusion of questions of psychological vulnerability (Andrews & Bonta, 2003). That is, ethical concerns are seen as typically trumping psychological issues and despite the presence of problems that merit psychosocial interventions, offenders will be expected to make their own way without potentially valuable therapeutic help.

Given the interest that retributive theories of punishment have in moral agency as opposed to psychological functioning, one possibility is that there will be considerable effort put into determining the psychological conditions and parameters of responsible behavior. This could be evident in the conceptualization and management of disorders such as psychopathy, primarily in terms of moral deficits rather than psychiatric symptoms. The identification of disorders that undermine agency would be viewed as relevant and given a priority but care would be taken to make sure that the boundaries of such cases are tightly drawn. This is in order to prevent the medicalization of the criminal justice system and a subsequent tendency to see offenders as victims rather than responsible moral agents. The majority of offenders such as violent and sexual offenders will be held accountable and it would be anticipated that punishment will result in acceptance of responsibility, remorse, and a reform of character. The question of offender reform is considered to be an individual matter and it is unlikely that a large role for community reintegration programs or recognition of the community’s obligation to actively scaffold individuals’ reintegration efforts will be accepted.

4.3. Critical comments

The major problem associated with most retributive theories of punishment is a failure to satisfactorily unpack the notion of just deserts. Without going into unnecessary detail, critics have argued that at present it is not possible to formulate the notion of just deserts in terms of such concepts as self-defence, victim vindication, expression of anger, balancing the moral ledger, or unfairness (Boonin, 2008; Golash, 2005). In each case, the problem is that the subsequent analysis does not have sufficient scope to include all occurrences (Boonin, 2008). For example, while the idea of removing benefits arrived at unfairly may work for property offences it is not clear how it applies to crime such as rape. How can the “benefits” derived by a rapist be removed?, through the infliction of rape by the state? It just does not seem to work. Concerning anger at norm violation as the basis of just deserts then it is possible that individuals may demand that someone who has committed an (arguably) immoral act as
adultery be punished by the state. For retributive theorists this would be viewed as an unjustified intrusion by the state in individual private affairs and violate the values of privacy, autonomy, pluralism, and freedom that liberal democracies are founded on (Duff, 2002). In essence such objections point to the difficulty discriminating between crimes and private “wrongs.”

A second problem faced by retributive theories is how to decide what constitutes a proportional response to the harms committed by offenders. We alluded to this above in the rape example but the problem generalizes beyond this crime. First, it is difficult to rank crimes in terms of their severity (harm committed) in a reliable and valid way. Second, it is just as hard once this has been done to arrive at a defensible judgement concerning the amount and type of harm appropriate as punishment for each level of severity. For example, should the state physically harm men who are violent towards their partners? What is an appropriate reaction to fraud? Answers to these questions have proved to be exceedingly difficult and continue to plague retributive theories of punishment. As an aside this is not necessarily a problem for consequentialist theories of punishment as any response that produces the desired end of crime reduction is in principle acceptable. Of course, this then raises further ethical challenges such as the possible overly harsh punishment of individuals who have committed relatively minor crimes.

5. Punishment and practice: communication

5.1. Theory

Consequential and retributive theories of punishment have come under sustained attack over the last few years and several variants of these theories have been reformulated in response to this critical attention (Bennett, 2008; Boonin, 2008; Golash, 2005). Another innovation has been the development of mixed or hybrid theories which contain both consequential and retributive elements. One promising approach is the communicative theory of punishment of Antony Duff (2002).

Communicative justifications of punishment have their basis in a liberal communitarian view of political and moral public institutions (Duff, 2001). According to Duff, it is important to pay attention to the rights of all stakeholders in the criminal justice system including offenders because of their equal moral status; thus communicative theories of punishment have a relationship focus. From this perspective, offenders are viewed as members of a normative community (i.e., “one of us”) and therefore are bound and protected by the community’s public values: autonomy, freedom, privacy and pluralism. In essence, these values are those of a liberal democracy where all human beings are deemed to have inherent dignity and have equal moral standing. A major assumption of such a viewpoint is that any punishment should be inclusive of offenders rather than exclusive. That is, while individuals who have committed public wrongs should be held to account because they have committed harmful actions against others, they ought be approached as beings of value and dignity and treated with respect in the process of administering punishment. The notion of equal moral status means that punishment should seek to persuade rather than force offenders to take responsibility for their crimes. Furthermore, because offenders are viewed as fellow members of the moral community it is taken for granted that the aim of punishment is to communicate the wrongness of their actions in order to give them an opportunity to redeem themselves and ultimately be reconciled to the community. Duff argues that hard treatment such as imprisonment is obligatory because it draws offenders’ attention to the seriousness of the wrongs they committed and appropriately expresses social disapproval. Crimes are viewed as violations of important community norms that the offender is assumed to endorse as well. A key difference between communicative and general retributive theories of punishment is that offenders are viewed as valued members of the community rather than as simply individuals who are held responsible. Thus the aim is to repair or restore offenders’ relationships with victims (if possible), and the broader community. Duff argues that there are three aims integral to the institution of punishment: secular repentance, reform, and reconciliation through the imposition of sanctions. More specifically, he argues that punishment is “a burden imposed on an offender for his crime, though which, it is hoped, he will come to repent his crime, to begin to reform himself, and thus reconcile himself with those he has wronged” (Duff, 2002, p. 106).

The “three Rs” of punishment are implemented by the imposition of what Duff calls “penitential burdens” on individuals who have broken the law. In brief, secular repentance involves offenders accepting responsibility for what they have done and responding appropriately to the realization of this fact. It is anticipated that repentant individuals will feel guilt, remorse, and acknowledge the justification of any imposed burdens. The reform element of Duff’s communicative theory is intended to capture offenders’ commitments to changing the attitudes and behaviors that are associated with their criminal actions. The person is thought to desire self-reform because of his or her self-censure and understanding that wrongful actions require redress at both a personal and social level. Reconciliation is essentially a process of restoration of ruptured relationships with the community by way of making amends, in effect an apology that necessarily entails reparative actions. Duff’s communicative theory does not set out to morally reeducate offenders as this would denote a lack of respect for their status as members of the moral community. It also does not demonize offenders and seek to isolate them from the rest of the community. Punishment is not intended to mark offenders as intrinsically deviant or irredeemable but instead indicates their status as fellow community members.

Duff’s communicative theory of punishment has both forward looking and backing looking components. It is retributive in that it locates the justification of punishment in the nature of the wrongful act: punishment is intended to communicate to offenders the unacceptability of what they have done by the way of the imposition of hard treatment, that is, criminal sanctions. The forward looking element is evident in the reform and reconciliation elements: a goal is to repair the relationships damaged by the crime by way of self-reform and the community acceptance of offenders’ rights to be socially reintegrated on sentence completion. In addition, the acknowledgment of the inherent value of all human beings including offenders captures what Darwell (2006) terms recognition respect, essentially an acceptance of the inherent dignity of offenders. Darwell maintains that recognition respect cannot be forfeited or stripped away as it is a feature of all members of the community and is integral to their status as moral equals. On the other hand, he proposes that appraisal respect does fluctuate in response to individuals’ actions and is intended to mark the degree to which they have behaved in ethically acceptable ways. When a person commits a crime his or her appraisal respect is lowered and it is only regained following a period of punishment. Punishment communicates the state and community’s disapproval of the offender and prescribes the process of repentance, reform, and reconciliation that allows individuals a chance to regain their status as citizens. Punishment must always be imposed in a manner that is respectful and in accordance with the equal moral status of offenders while also indicating clearly that their current appraisal stocks in the eyes of the community are low. It is a chance to wipe the slate clean and achieve redemption.

5.2. Practice implications

As a theory of punishment Duff’s communicative theory has the virtue of being inclusive rather than exclusive. All the stakeholders affected by crime are taken into account in the implementation of punishment. The offender is regarded as an equal moral agent and
treated with the respect and dignity this status entails. A notable feature of inclusive theories is that they conceptualize crime as a community responsibility rather than simply as an individual one. Thus offenders are held accountable to the community. Victims do not have to forgive but owe offenders the chance to reintegrate into the community once they have served their sentence; and the community is obligated to facilitate the process of reintegration by providing necessary resources such as education, training, accommodation, access to social networks and so on.

The inclusiveness of the response to crime and its aftermath that is characteristic of communicative theories of punishments such as Duff's (2002) bears a striking relationship to restorative justice practices (Johnstone, 2002; Walgrave, 2008; Ward & Langlands, 2008). According to Walgrave (2008, p. 21), restorative justice is "an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence." It is a matter of some debate whether restorative justice (RJ) is most appropriately conceptualized as a punishment or as an alternative to punishment (Ward & Langlands, 2009). However, despite this dispute it is apparent that RJ is a crime response rather than a rehabilitation approach (although arguably it does have positive rehabilitation consequences) and in this respect has several features in common with the communicative theory of punishment. For our purposes, this means that some of the RJ initiatives such as family conferences, sentencing circles, and victim–offender conferences may be accurately viewed as aspects of punishment as conceived within the communicative theory.

From a practice viewpoint, secular repentance takes seriously the moral agency of offenders and the importance of their appreciating the harm they have inflicted on victims and community. The punishment components of therapeutic programs such as cognitive restructuring or some aspects of empathy retraining are aimed at persuading offenders to acknowledge that they have intentionally inflicted severe harm on others and to engage in a process of intense self-reflection and criticism. In this process of self-censure it is anticipated offenders will experience considerable guilt and remorse and be motivated to acquire the capabilities necessary to achieve valued ends in lawful ways (Ward & Maruna, 2007). The offender is expected to ask him or herself "What do I need to learn in order to act in ways that respect the rights of others while also increasing my chances at happiness?" A major strength of the communicative theory of punishment is that it is likely to engage offenders in self-scrutiny and subsequent experiences of remorse and self-blame.

Therefore, the reform element of the communicative theory refers to the offender becoming motivated to change his or her self and behavior for ethical as well as prudential reasons. The realization that they have unjustifiably caused other people to suffer will hopefully lead to a firm resolution to do what is necessary to make sure they do not do this again. In a real sense a desire for self-reform is a conduit (along with the reconciliation component) to the normative framework of rehabilitation or treatment programs. In order to be strongly motivated to acquire new ways of achieving significant goals offenders need to accept that their habitual ways of acting in pursuit of such goals are wrong, and in many respects, self-defeating. With this approach it is possible that the overlap between punishment and treatment could create some dissonance in correctional practitioners who are not clearly aware of their twin roles as treatment providers and facilitators of moral change. While the former falls squarely within the traditional therapeutic role the latter does not; it does not because it is directly concerned with punishment practices involving the communication of censure and the component practices of prompting repentance, self-reform, and reconciliation.

Finally, the reconciliation element of the communicative theory of punishment expresses both offenders and community's desire for reconciliation. There are two facets to reconciliation that are clinically relevant: offenders' obligation to apologize and make reparations and the community's obligation to help the offender reintegrate back into the community once hard treatment is served. The former facet draws a line beneath what constitutes an ethically acceptable response to his or her offence on behalf on the offender. Normatively, it is expected that he or she will attempt to apologize to the victim in some way and related to this apology, make amends in the form of restitution or some kind of community service. With respect to the latter facet, it is anticipated there will be strong community support for the offenders' resumption of full citizenship entitlements and duties and also considerable social scaffolding in the planning and implementation of reintegration practices. Correspondingly, there should be a stress on promoting better lives for offenders alongside safer ones for members of the community.

In brief, the implications for clinical practice in the correctional domain following from a communicative theory of punishment are best summed up in by the concepts of inclusiveness and mutual respect. Offenders are regarded as fellow travelers, members of the political and moral community who share the entitlements and obligations of everyone else. Offenders are held to account when they violate moral and legal norms because these norms are binding on everyone and judged to protect the core interests of all citizens. However, because of their equal moral standing in the political community punishment is administered in a respectful manner. According to the communicative theory, criminal sanctions aim to communicate to offenders the wrongness of their actions and to express the hope that they will prompt repentance, self-reform, and reconciliation. Rehabilitation implications arising from this theory of punishment are likely to build on the values of respect, autonomy, dignity, and mutuality. In our view, a strength based and community oriented treatment approach is more consistent with this approach to punishment than RNR type interventions. One reason for this judgement is that strength based approaches such as the Good Lives Model take seriously offenders' deep commitments while also being aware of the necessity to respect the rights to safety of the rest of the community (Ward & Gannon, 2006; Ward & Maruna, 2007). By way of contrast, the usual implementations of the RNR tend to be preoccupied with threat detection and risk management and give less priority to offenders own interests and preferences.

5.3. Critical comments

It is probably apparent that we think communicative theories of punishment such as described by Duff (2002) provide a better ethical justification of punishment than simple retributive or consequential theories. However there are some areas of weakness that have been pointed out by critics (Bennett, 2008; Golash, 2005). First, Bennett (2008) argued that it is not ethically justified in a liberal democracy to set out to induce repentance in offenders. Bennett stated that individuals have a right to respond to convictions by the court and the imposition of sanctions in any way that they wish and it would be unduly intrusive, even coercive, to insist that they truly repent as part of punishment. Furthermore, Bennett presses, such a theory may result in counter intuitive consequences where an offender who is fully repentant, determined to reform, and reconciled in some respects to the community ought to receive a lighter sentence than someone who has not, despite both having committed the same type of crime. This kind of sentencing practice violates an important and commonly accepted sentencing principle, that of proportionality: people ought to receive a punishment in proportion to the severity of the crime they committed. In our view it is not evident that Duff is committed to this implication as he also talks about the ritual of apology and is careful to say that we cannot insist on sincerity but merely hope for it.

Relatedly, Golash (2005) argued that communicative theories of punishment are at heart moral education theories where the assumption is that offenders commit crimes because they do not
know what the right thing to do in the circumstances is. That is, offenders are viewed as needing moral education in order to be able to appreciate the wrongfulness of what they did and to ensure that they behave differently in the future. The problem with a moral education viewpoint is that it subverts the moral agency of offenders and, by its admission, that they lack moral knowledge throws their responsibility in doubt. Second, to punish people in order to morally reeducate them is paternalistic in the worst sense of the term and fails to acknowledge the inherent dignity of offenders who ought to be free to agree or disagree with such initiatives. This is a sound criticism of some moral education theories of punishment but we doubt whether Duff’s theory is vulnerable to it because he talks about the need for self-reform not moral education. Duff explicitly states that a primary aim of punishment is to persuade the offender to critically reflect on his wrongful actions and then to make a decision to reform himself and seek reconciliation with the community. It is therefore assumed offenders are equal moral agents who are capable of critical reflection and autonomous decision-making with respect to their criminal actions and future conduct.

6. Punishment and professional codes of ethics

We would like to briefly discuss the implications of our analysis of punishment on the normative status of practitioners’ codes of ethics. As stated in the introduction, some theorists have argued that because professional codes of mental health ethics are not easily transferred to forensic treatment contexts, practitioners ought to look elsewhere for ethical guidance, possibly to legal paradigms such as therapeutic jurisprudence (Glaser, 2003). A notable feature of this argument is its claim that correctional treatment amounts to punishment because of its coercive (implicitly or explicitly) nature and close association with criminal sanctions. The assertion that an overlap between punishment and treatment exists is in our view correct, as is the contention that traditional ethical mental health codes are insufficient on their own to provide comprehensive guidance to therapists working with offenders. However, the existence of an overlap between the normative frameworks of punishment and rehabilitation does not necessarily mean they do not also have unique domains of application. In our view, punishment is an ethical response to public wrongs while rehabilitation deals with prudential concerns of offenders (see above). A unique feature of work with offenders is that practice sometimes is concerned with the implementation of punishment (e.g., aspects of cognitive restructuring) and on other occasions with helping offenders to enhance their functional competency (e.g., communication skills). The dual nature of practice roles suggest to us that neither traditional mental health ethical codes or norms regulating punishment are able to satisfactorily cover the range of tasks confronting program providers and practitioners working within the criminal justice system. Rather, we propose that a mixed or hybrid ethical code is required containing a set of: (a) principles and standards derived from mental health codes, and (b) principles and standards adequate to guide the actions of criminal justice personnel involved with the delivery of state sanctioned punishment. That is, we argue that a correctional practice code of ethics that explicitly addresses both the punishment and rehabilitation tasks constituting the professional roles of psychologists, social workers, and program deliverers employed within correctional services is necessary. Human rights values and the concept of human dignity that these values protect can be consulted when there are conflicts between the rehabilitation and punishment strands comprising a hybrid correctional code (Shultziner, 2007; Ward & Birgden, 2007; Ward & Syversen, 2009). The concept of dignity and its elaboration into human rights values is especially useful in the resolution of conflicts between lower level systems of norms because it is a foundational moral concept accepted across different cultures and states (for an analysis of dignity and its role in correctional ethical decision-making see Ward & Syversen, 2009).

It is apparent to us that a rich theory of punishment such as the communicative theory of Duff (2002) has the conceptual resources to survive inevitable tensions arising from a mixed ethical code but we have reservations that pure consequential or retributive justifications of punishment will be able to face any subsequent conflicts as well. The reason why consequential theories are likely to struggle to effectively deal with the dual role of correctional practitioners is due to their subversion of offender agency and dignity in the pursuit of crime reduction. From a consequential viewpoint, there is no intrinsic value or point to considering offenders’ human dignity or agency. While a major problem for retributive theories occurs due to an emphasis on individual responsibility and a tendency for practices based on retributive assumptions to be implemented in vindictive and offender exclusive ways (Golash, 2005). A worry here is that individual responsibility issues may drown out calls to acknowledge offenders’ standing as fellow citizens and thus deserving of meaningful opportunities to be successfully reintegrated. By way of contrast, the inclusive nature of communicative theories of punishment, with their valuing of reconciliation and reform, are more welcoming of reintegration initiatives and accept the right of offenders to be treated with respect due to all members of the normative community.

7. Conclusions

Correctional clinicians work within a context that is heavily influenced and constrained by punishment policies and practices. The overlap between the normative frameworks of punishment and offender rehabilitation creates a unique set of ethical challenges for program developers and therapists. In a substantive sense, the role of therapist overlaps to some extent with those involved in implementing punishment, and we have argued that aspects of treatment programs can be viewed as components of punishment (e.g., cognitive restructuring, empathy interventions, restorative interventions). Furthermore, the implications of punishment theories effectively help to constitute the norms regulating professional activities and thus partly determine what is viewed as good practice (e.g., risk assessment).

It is evident from our analysis above that there are different justifications of punishment each with unique varying implications for practice. However, it could be argued that while punishment may be ethically justified in a world characterized by equality and justice, it cannot be justified in the world as it currently exists. That is, offenders are often victims of such severe social and psychological disadvantages that their capacity for moral agency is considerably eroded (Gatti et al., in press). Aside from the existence of factors impacting on offenders moral competency, it could also be asserted that the power differentials currently evident within the criminal justice system makes it practically impossible to engage in any system of punishment that is fair and respectful of offenders inherent dignity. While we acknowledge these criticisms, it is still the case that punishment practices evident in the criminal justice system rest on ethical assumptions and it therefore makes sense to critically evaluate the cogency of these assumptions and their supporting theories. Normative analysis can help policy makers and practitioners become aware of the ethical legitimacy of current punishment practices and of their subsequent responsibilities to press for any changes needed in the light of such investigations.

Irrespective of the above questions, a clear message emerges from our analysis of punishment theories: correctional practitioners ought to be aware of the tasks they are involved in and to what degree such tasks are ethical, prudential, or a combination of both in nature. Importantly, correctional practitioners need to critically reflect on the theory of punishment (or indeed, theories) that underpins their work in correctional contexts and ensure that the practice components
following or associated with these assumptions are ethically warranted. Offenders are subject to state sanctioned intended harms and have severe restrictions placed on their lives. In our view, practitioners do offenders a grave injustice if justifications for these imposed burdens are carelessly arrived at and thoughtlessly delivered.

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References


