

Tony Ward

# Punishment and Correctional Practice: Ethical and Rehabilitation Implications

## Introduction

Practitioners working in the criminal justice system pride themselves on their high standards of ethical behaviour and are typically adamant that the assessment and rehabilitation of offenders can proceed according to traditional, although possibly modified, professional codes of practice

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**Tony Ward** is Professor of Psychology and Director of Clinical Training at Victoria University of Wellington. He has worked primarily in the clinical and forensic fields since 1987. His research interests include rehabilitation models and issues; cognition and sex offenders; the problem behaviour process in offenders; the implications of naturalism for theory construction and clinical practice; and assessment and case formulation in clinical psychology. He can be contacted at: [tony.ward@vuw.ac.nz](mailto:tony.ward@vuw.ac.nz).

(Bush, Connell and Denny, 2006; Haag, 2006; Levenson and D'Amora, 2005).

The claim made by such individuals is that offender rehabilitation 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 rehabilitation practice that it is best conceptualised 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 their focus on community protection and the administration of mandated interventions, sex offender interventions ought to be viewed within a

therapeutic jurisprudence framework. Glaser asserted that approaching therapy with sex offenders through 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 my 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 (see Ward and Langlands, forthcoming). However, I agree that the two frameworks overlap to some degree and that aspects of what have been regarded as rehabilitation are in fact punishment.

The issue of justifying punishment arises because the harms inflicted on offenders may cause them significant suffering, be contrary to their best interests and also result in marked hardships to family, friends and even the broader community.

The primary focus of this paper is on the relationship between correctional interventions and the concept of punishment. The literature on punishment and its justification is large and it would take a book-length treatment to fully explore the practice and ethical problems arising from punishment in correctional practice arenas (Bennett, 2008; Boonin, 2008; Glaser, 2003; Golash, 2005; Kleinig, 2008). My aims in this paper are much more modest and I provide a brief outline of three major punishment theories and discuss their implications for correctional practice. Finally I conclude with some suggestions for future research and practice.

#### **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 the significant common interests of members of the political community (Bennett, 2008; Duff, 2001). Specifically, punishment in the criminal justice system has five necessary elements (Boonin, 2008): it is *authorised* by the state, *intentional*, *reprobative* (expresses disapproval or censure), *retributive* (follows a wrongful act committed by the offender) and *harmful* (results in suffering, a burden or deprivation to the offender).

The issue of *justifying* punishment arises because the harms inflicted on offenders may cause them significant suffering, be contrary to their best 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 if the various actors of the criminal justice system are not to be ethically culpable.

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 programme staff are embedded within criminal justice contexts. If they become aware of the infliction of unjustified harms on offenders then they have an ethical obligation seek to end such injustices. Failure to do so would arguably make them complicit in unacceptable practices.

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 correctional practitioners. For example, consequentialist views of punishment are usually linked to crime reduction by way of an emphasis on deterrence, incapacitation or reform of offenders. A primary goal therefore is to reduce crime and the risks posed by offenders. Within a risk reduction paradigm the professional roles of psychologists will be centred on risk detection 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).

Third, a more subtle point concerns the relationship between punishment practices and the assessment and rehabilitation tasks undertaken by practitioners. I have argued in a previous paper that punishment and rehabilitation involve two distinct frameworks, each centred on different types of values (Ward and Langlands, in press). Punishment and related responses such as restorative justice are designed to respond to crime from an ethical viewpoint. Rehabilitation on the other hand revolves around prudential values: the object is to improve offenders' social and psychological functioning by providing them with skills and resources to live better lives (Ward and Maruna, 2007). As both frameworks are relevant for programme staff, some aspects of programmes may be better characterised as punishment than as treatment. For example, cognitive restructuring in sexual offending programmes 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.

These examples indicate that the justification of punishment is of relevance and ethical concern for all

practitioners. It is not possible to insulate the role of programme deliverers or treatment providers from ethical issues associated with punishment. Therefore, practitioners need to have some general familiarity with different theories of punishment and the clinical and ethical implications that follow from them.

### **Punishment and practice: consequentialism**

#### **Theory**

Consequentialist theories of punishment locate their justification in the consequences of the practice: they are *forward-looking* theories (Bennett, 2008). The claim is that punishment functions to deter, incapacitate or reform offenders and that these effects in turn reduce the overall crime rate, 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 individuals from committing crimes in the first place or stop offenders from committing further crimes because they want to avoid additional suffering. 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 its justification is based on the actual effects punishment has on crime rates. Thus, 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 consequentialist theorists, they should be implemented in its place.

#### **Practice implications**

A first comment is that an emphasis on deterrence, prevention or incapacitation is liable to create a practice environment where there is significant pressure on staff to detect and manage risk variables in individual offenders and within correctional contexts. The primary focus will be *technical* and revolve around the development of procedures designed to reliably measure dynamic and static risk factors and then putting procedures in place to reduce or minimise these risk factors in the most cost efficient manner.

Second, an exclusive focus on crime reduction by way of deterrence, reform or incapacitation regards offenders as simply a *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 regards them as objects rather than fellow human beings (Bennett, 2008).

### **Punishment and practice: retribution**

#### **Theory**

Retributive theories are *backward-looking* and justify punishment in terms of 'its intrinsic justice as a response to crime' (Duff, 2001, p.19). Offenders are to be held accountable for their crimes by the inflicting of burdens that are roughly equal in harm to those inflicted on their victims. It is also claimed that such punishment is justified by its beneficial consequences. However, the state is thought to be ethically obligated to punish offenders simply 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 – offenders 'deserve' to suffer for the wrongful acts they have committed. The notion of desert is vague and has been unpacked in terms of distributive justice, vindication of victims and expression of anger (Boonin, 2008; Golash, 2005). The *justice* variant speaks to the supposed advantages that offenders accrue

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over law-abiding citizens and the need to annul any illegally gained benefits by imposing proportionate burdens on them: for example, fines or imprisonment for particularly serious offenses. The claim that victims are *vindicated* by punishments speaks to a need to respond to serious norm violations by signaling to offenders and community that what was done is unacceptable. Failure to impose punishment is thought to imply that the norms violated are not taken seriously and that the subsequent suffering of victims is not important, an unacceptable ethical response. Finally, punishment can be viewed as a natural response to crime in that it is an institutionalised form of expressing *blame* and resentment toward offenders, but in a way that is proportionate and modulated. 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.

#### **Practice implications**

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, the 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 (i.e., criminal sanctions such as imprisonment or probation).

## The inclusiveness of the response to crime and its aftermath that is characteristic of communicative theories of punishment such as Duff's bears a striking relationship to restorative justice practices.

The reduced interest in treatment programmes 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 therapy; in fact, rehabilitative interventions are looked at with suspicion because of a fear that they imply a lack of autonomy and responsibility in offenders. A danger of highlighting moral accountability is that ethical considerations will be elevated over prudential or psychological ones and any areas of psychological or social need overlooked.

### **Punishment and practice: communication**

#### **Theory**

Communicative justifications of punishment have their basis in a liberal communitarian view of political and moral public institutions (Duff, 2001). According to Duff (2002), 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 ought to be held to account because they have committed harmful actions against others, they ought to 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. 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, through 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, 2001, p.106).

#### **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 conceptualise 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 integration 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 punishment such as Duff's bears a striking relationship to restorative justice practices (Johnstone, 2002; Walgrave, 2008; Ward and Langlands, 2008). According to Walgrave, 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' (Walgrave, 2008, p.21). For our purposes, this means that some of the restorative justice 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 *reform* element of the communicative theory refers to the offender becoming motivated to change his or her self and behaviour for ethical as well as prudential reasons. The realisation 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. Finally, the *reconciliation* element of the communicative theory of punishment expresses both offenders' and the community's desire for reconciliation. There are two facets to reconciliation that are clinically relevant: offenders' obligation to apologise and make reparations, and the community's obligation to help the offender reintegrate back into the community once hard treatment is served.

#### **Punishment and professional codes of ethics**

I would like to briefly discuss the implications of our analysis of punishment for 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 my 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. Punishment is an ethical response to public wrongs, while rehabilitation deals with prudential concerns of offenders. A unique feature of work with offenders is that practice is concerned sometimes 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 suggests that neither traditional mental health ethical codes nor norms regulating punishment are able to satisfactorily cover the range of tasks

confronting programme providers and practitioners working within the criminal justice system. Rather, I 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 action of criminal justice personnel involved with the delivery of state-sanctioned punishment. That is, I argue that a correctional practice code of ethics that explicitly addresses both the punishment and rehabilitation tasks constituting

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the professional roles of psychologists, social workers and programme 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 and Birgden, 2007; Ward and Syversen, 2009). The notion of human dignity is a seminal moral concept that signifies the intrinsic value and universal moral equality of human beings. 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. 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 and Syversen, 2009).

Arguably, a rich theory of punishment such as Duff's (2002) communicative theory has the conceptual resources to survive inevitable tensions arising from a mixed ethical code, but I have reservations that pure consequentialist or retributive justifications of punishment will be able to face any subsequent conflicts as well. The reason why consequentialist 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 consequentialist viewpoint, there is no intrinsic value or point to considering offenders' human dignity or agency. Meanwhile, 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, means they 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.

### Conclusions

It is evident from my analysis above that there are different justifications for punishment, each with unique varying implications for practice. However, it could be argued that while punishment may be ethically justified in a world characterised 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, Tremblay and Vitaro, forthcoming). Aside from the existence of factors having an impact on offenders' moral competency, it could also be asserted that the power differentials currently evident within the criminal justice system make it practically impossible to engage in any

system of punishment that is fair and respectful of offenders' inherent dignity (Duff, 2001). While I 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 my 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 my view, practitioners do offenders a grave injustice if justifications for these imposed burdens are carelessly arrived at and thoughtlessly delivered.

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