Liberal Justice Justifies Punishment

Jenny Larsson
Practical Philosophy
Fall 2010
Advisor: Joakim Sandberg
“As soon as men know that they can kill without fear of punishment or blame, they kill; or at least they encourage killers with approving smiles.”

- Simone Weil
# Table of Contents

1. **Introduction**  
   1.1. Nathan Hanna’s main points  
   1.2. Purpose of the paper  
   
2. **What is Crime, Punishment and Liberalism?**  
   
3. **Nathan Hanna’s argument**  
   3.1. Non-punitive punishment  
   3.2. Punishment and suffering  
   
4. **My argument**  
   4.1. Justifying punishment when suffering is not the intended goal  
   4.2. Non-punitive punishment can cause more suffering  
   4.3. A different veil  
   
5. **Summary**  
   
6. **Sources**
1. Introduction

Punishment as a consequence or expression of revenge after a crime has always been around. Societies and individual dictators have been hanging people, cutting off body parts, used forms of collective humiliation and much more. The violence used to punish people have at times been more harsh and cruel then the crime whose consequence it is.

It is often said that punishment and liberalism does not go together. This considering that liberalism should stand in the forefront of individual liberty and equal rights, but also liberal democracy, free elections, free trade but most of all human rights. The easiest way to go is simply that all form of punishment is against human rights and individual freedom for those being punished.

Much of the discussion regarding the relation between liberalism and punishment has focused on the scale of punishment related not only to the crime itself but the entire punishment scale as it relates to other crimes. For example it would be considered highly cruel and unusual to sentence someone to life in prison for shoplifting, whereas it would not for first degree murder.

On the other hand it is completely unreasonable to expect that victims of crimes should be above punishment and revenge and simply take the high road. This is something that would not be acceptable amongst victims and if society would not execute punishments over offenders victims themselves would do so. In a just society private revenge, retaliation and punishment must be avoided at all costs. Partly because private revenge easily crosses the line for what is just and instead makes the victim an offender in the eyes of the law, and party because civilians do not have an overall picture over the justice system and therefore cannot execute just punishment. There is simply a reason why victims and family of victims of crime do not make the law.

In a society which takes justice seriously there will always be laws which regulate crime and punishment. To not do so would be considered an irresponsible act by society as a whole as well as it individual leaders. Because even in the most just society, where everyone should respect other peoples autonomy and property, not all of them would do so out of conviction for what is right, but only because it says so in the law and breaking the law would entail legal consequences.
1.1. Nathan Hanna’s main points

Nathan Hanna’s first and foremost argument in his paper ‘Liberalism and the General Justification of Punishment’ is that contemporary liberal theory cannot give a general justification of the institution or practice of punishment, i.e., a justification that would hold across a broad range of reasonably realistic conditions. Liberal theories, because of their commitments regarding the nature of justification, have decisive reasons to reject punishment in favor of non-punitive alternatives.

One essential characteristic when punishing is to inflict suffering on the punished, something which poses great difficulty for liberal theories trying to justify a punishment system as a whole. Hanna argues that liberal theories which seek to justify punishment must also be able to justify its suffering component and must be able to do so to the offender and not being able to makes the punishment unjust.

In his paper, Hanna chooses to argue against three different liberal philosophers, one of them being John Rawls. I have chosen only to concentrate my arguments to Nathan Hanna and his arguments against Rawls. Hanna argues that liberalism of the sort Rawls proclaims cannot justify punishment as behind the veil of ignorance agents would have chosen to make punishment justifiable to all, including offenders.

1.2. Purpose of the paper

I will in this paper argue against Hanna’s position that liberalism must in fact stand for a softer non-punitive punishment system. As well as take a look if Hanna’s alternatives to todays punishment really causes less suffering.
2. What is Crime, Punishment and Liberalism?

When reading this essay there are a few things to remember and consider. As there is no possible way to correlate all possible liberalism with all possible crime and therefore all possible punishment, I will attempt to clearly narrow down my meaning of the above three words.

When talking about *crime* I will mean anything which is made illegal in a liberal and just state. A liberal and just state, for the sake of this paper, would mean any state which held free elections in where the peoples choice of government and leader has been respected and executed properly. I will not make the distinction of whether or not the law which has to be broken in order to commit a crime, is unjust in itself.

As far as *punishment* goes, it is simply the consequence the society places upon someone who commits a crime and therefore breaks the law of said liberal and just state. It is the consequence executed by society and its courts upon offenders. For the purpose of this paper I will use Antony Flews identified characters of punishment, as these are the ones Hanna\(^1\) chooses to use, and are as follows:

1. Punishment must involve consequences which are unpleasant and unwanted
2. Punishment must be for an offense against legal rules
3. Punishment must be aimed at the actual offender
4. Punishment must be intentionally administered by human beings other than the offender
5. Punishment must be administered by an authorized society in where the action committed actually broke said societies laws

Overall, punishment is something we inflict on other people in a fashion they would find unpleasant, and in any other case it would be found unjust to inflict these consequences upon people, say if they had not in fact committed a crime.

When speaking about *liberalism* I will mean the sort, once again, Nathan Hanna proposes in his essay. Although liberalism at its core is a political theory characterized by its belief in the importance of individual liberty and equal rights there are many underlying versions

---

\(^1\) Unless otherwise mentioned I will always mean Nathan Hanna's’ essay 'Liberalism and the general justifiability of punishment.'
of it. Hanna’s point is that liberalism give a certain view regarding justification of punishment. He list a set of characteristics needed which are: (1) liberalism is committed to justifying exercises of power, such as punishment stands in need for justification, (2) liberalism is committed to justificatory equality. Everyone is entitled to demand justification, those punished are entitled to be given reasons for why they are so. Thirdly, the reasons given must such that are generally acceptable to people irrespective of their particular comprehension of the good.
3. Nathan Hanna’s arguments

3.1. Non-punitive punishment

Rawls introduced his original position in his book ‘A Theory of Justice’ (1971). It is simply a hypothetical place where you would gather and decide the rules of a just society. Everyone in the original position would be under the ‘veil of ignorance’ - a state of mind where they would not know their luck in life. They would have no understanding of their possible intelligence, wealth, means and social status nor would they know where they would be born or at which time in history they would enter the world. This veil of ignorance is there to ensure that a just and fair society is made, because as no one would want to establish rules or norms which would disadvantage them, one would try their outmost to make a society that is as fair as possible for everyone in it, at all times.

Those placed in the original position would consider liberties to be basic goods. As such they would construct and choose principles which would guarantee each individual the most extensive set of basic liberties possible. According to Rawls general principle all primary goods - such as liberties - are to be distributed equally unless an unequal distribution of any or all goods is to the benefit of the least favored. In accordance with this general principle, punishment is only justifiable if it benefits the least favored.

According to Hanna the most obvious way punishment can benefit the least favored is by securing sufficient stability. This stability benefits the least favored as it preserves the benefits gained from social cooperation, and if non-punitive alternatives can secure this sufficient stability, punishment may not be generally justified. If offenders are the least favored in society, punishment such as jail time, can only be justified if it leads these offenders to be better off then had they not been placed in jail. If say, the end result would be the same if offender were given an ankle-monitor instead of prison time, this would be a more justifiable way to secure offenders basic rights.

Hanna mentions the need for non-punitive alternatives and the need for them to be able to adequately enforce rules and also minimize suffering. He gives two conditions which need to hold: (1) the assurance needed for sufficient stability has been secured and (2) the least favored group is better off compared to the least favored groups under other possible enforcement conditions. These conditions have two general goals: reducing the prospect for benefiting from offenses and limiting offenders’ abilities to re-offend.
Hanna gives a few examples of non-punitive alternatives to punishment such as; compensating victims for financial losses, as would occur from a robbery, by confiscating offenders own properties for this compensation purpose. These forms of consequence to crimes is there sole to repay victims what they might have lost, not to place punishment, suffering and revenge on offenders. Offenders might also be sentenced to probation with restrictions appropriate to each case; restrictions on freedom of movement, association, ownership, privacy and so on. This for the sole purpose of incapacitation, limiting their ability and opportunity to re-offend. These offenders might in anyway suffer due to these measures taken, but as suffering was not the intended or primary goal of Hanna’s non-punitive alternatives it is justifiable to execute them.

Hanna writes that since punishment is coercive and harmful, compelling reason must be given for it. This becomes especially clear once one realizes that liberalism seeks to justify punishment to everyone, including the punished. We simply need not aim to impose suffering when coercively limiting offenders liberties and abilities. It is reasonable to think that, other things being equal, an enforcement system that aims to make offenders suffer will subject offenders to harsher treatment than an enforcement system that aims to minimize suffering.

3.2. Punishment and suffering

Justifications comes into play when the question of what the aim of imposing suffering really is. The aim places a principled limit on the minimization of offenders suffering. If an enforcement technique satisfies other important aims but does not cause sufficient suffering, it will be deemed inadequate. According to Hanna these aims can and most likely will motivate the use of harsher techniques than might be sufficient to secure other aims (such as rehabilitation, compensation to victims and their families).

Hanna here mentions confinement. The aim to impose suffering can motivate confining people we might otherwise not have reason to confine and to do so under harsher and stricter conditions than otherwise need to be. The aims of an enforcement system significantly influences the selection and application of enforcement techniques. And according to Hanna it is reasonable to think that, other things being equal, an enforcement system which aims to make offenders suffer will subject offenders to harsher treatment than a system which aims at minimizing suffering.
According to Rawls some coercive system is necessary to address the assurance problem. When citizens lack assurances that others will honor their responsibilities towards each other, there must be a system of social cooperation which aims at making sure these responsibilities are in fact honored and those who do not, will experience consequences. Coercion is necessary to ensure basic liberties, it is therefore rational for societies to authorize punishment and build a system around it.

As mentioned earlier not everybody in a society will honor these responsibilities out of respect for other peoples autonomy and property, but because not doing so would entail them consequences. Hanna mentions that coercion may be necessary while punishment may not. This because there are non-punitive forms of coercion and according to Hanna a valid argument for punishment needs additional premises.

If ways are found which does the job punishment does today, without imposing on the offenders liberties and without inflicting suffering, these are the ways which should be used and promoted. According to Hanna examples of these non-punitive alternatives could be compensation to victims and/or their families, probation and house arrest.

Solving the assurance problem requires a rethink when it comes to ‘others will not comply with the law unless they are forced to’. However not all such thinking can be eliminated as some non-compliance and suspicion is tolerable and inevitable.
4. My argument

4.1. Justifying punishment when suffering is not the intended goal

Hanna argues that the liberalism of today cannot justify punishment as suffering of the offenders is an essential characteristic of said punishment. In that case, non-punitive alternatives are always to be preferred, as offenders suffering is never the intended goal but merely a side effect or unintended consequence. However, Hanna has not been able to prove that today's punishment system’s only and primary goal is to cause suffering. Jail time is more often then not intended to rehabilitate offenders into a productive and crime free life once they leave the prison and go to live in a society, and I cannot think of much which would suggest offenders would receive the same sort of rehabilitation if sentenced only to probation.

Suffering is not one of the five point Hanna has given in the beginning of his paper to characterize punishment and contrary to Hanna’s believe, applying punishment to offenders for the single reason and with the intended aim of making the suffer is not the ultimate goal with legal consequences to criminal acts. If that was the case, mentally ill, children and others generally not punished with jail time would be sentenced to time in prison as it would very much entail them suffering. Instead mentally ill people committing crimes are sent to hospitals for treatment and children to juvenile facilities for treatments as well. If suffering was indeed the goal of all punishment, would it not be likely all offenders would be sent to life in prison or time-unlimited sentences as this would cause the most amount of suffering, rather then time-limited sentences? I personally feel any task is easier to complete if you know there is a time limit to when you either have to finish or can be done and over with it; say the end of a work day. The same is likely to apply to offenders serving prison time; it will always be easier if you can see the end of it rather then sitting and waiting not knowing when or if there will be an end.

A softer punishment system, where one of the main goals is to not cause suffering, might not be the sort of punishment system which works. Perhaps some level of suffering is necessary for punishment to work, not only for the offenders themselves but as an effective deterrent for rest of society. One way to do so must be to apply a set of consequences for behavior which is deemed unfitting in said society, and by which has become unlawful to do. It has never been said that those consequences should be harsh and unfitting the crime. It has always been pointed out that punishment should befit the
crime as well as protect society from offenders and offenders from themselves. One way of doing so has been to accurately apply punishment on offenders. It is by no means reasonable to think an enforcement system aimed at making offenders suffer would entail harsher punishment for said offenders, it can may well simply be an enforcement system which has found the right combination of harsh punishments which does in fact minimize suffering.

4.2. Non-punitive punishment can cause more suffering

Non-punitive alternatives may in some cases cause offenders more suffering than punitive punishment would, such as compensation to victims and/or their families? Hanna suggests compensation as a non-punitive way of punishing offenders so as to minimize suffering, but what if compensation creates even more suffering for the offenders than prison-time would? Why are we to assume that all forms of non-punitive punishment would entail lesser suffering for the offender?

Perhaps compensating victims would mean the offender would have to sell all possessions and take a bank loan (which would seem quite hard to do as I am somewhat sure banks would not be all to happy having to give loans to felons). If we can rule out the possibility of a loan, selling ones possessions is the last and only way to go. However, this non-punitive alternative of compensation might in many cases affect people who have not been a part of the original crime. Perhaps the possessions you have to sell in order to compensate fully are in fact your home where your family lives. This non-punitive, less suffering alternative has now turned into a legal consequence directly affecting more people than the actual offender, people who so far are completely innocent. Would it not simply be easier to spend a limited time in prison and when released have a chance at a normal life with a clean slate. From what I have interpreted onto Hanna, one reason for his argument is that offenders should not continue to be punished once they have served off their court given consequences, and this continuing punishment is exactly what offenders will be subjected to if monetary compensation is ordered regularly.

Even non-punitive alternatives could at some point become and cause the same amount of suffering like the punishment we see today. Say offenders are sentenced to probation with a set of rules to follow, both as to what they can do and where they can go. If they break a rule, there must be some sort of consequence as otherwise offenders would always break their given rules, making probation ineffective and simply time and money
consuming. Lets say one of the consequences given to rule breakers are even more limited areas to walk around in and fewer things they are allowed to do. The more often they break the rules the narrower are their space of living so as at some point they will be confined into one room. If this was how probation would end, at some point the government would had to step in to pay the rent or come to some sort of an arrangement so the offender is not kicked out of the room he/she is confined in. With the exception of not sharing the place with other criminals, at this point house arrest or probations seems a lot like prison.

So why not just place offenders in a prison to begin with? At some level it surely must be psychologically easier to know exactly how you are going to spend your time while being punished, as you would in a prison as apposed to being granted some liberties within your punishment and then have them taken away. If sentencing offenders to serve jail time has the same level of suffering as probation does, with the added bonus of society being sure they will not be victimized by these offenders as long as they are in jail, why not send them there? If jail time as such is not a form of consequence intended as revenge and to inflict suffering, but merely there as a tool to compensate victims and by which society, jail time is as justifiable way of punishment as probation and monetary compensation is.

4.3. A different veil

Going back to Rawls and his ‘veil of ignorance’ where agents placed behind the veil would not know their faith in life, and would therefor have to place themselves in the position of whomever they are deciding liberties for. Most people, both behind the veil and in real life right now, can agree that wealth or lack thereof, social and socioeconomic status as well as what region in the world you are born should not matter and more importantly should not be a deciding factor when liberties and rights are distributed. With this in mind the agents behind the veil, according to Rawls, should have to place themselves in the role of the offender, as well as the victim and rest of society, when deciding upon appropriate punishment for crimes. As no social factors should be a measuring point when deciding upon consequences, both offenders and victims liberties and rights have to weigh equally heavy.

But why so? A victim does not choose to become victimized where as offender can choose if they should offend or not. As such, there is no reason why both offender and victim
should have equal weight when liberties are decided upon. It is reasonable to think that the rights of the victim should weigh harder than whomever victimized them.

On that note, suffering of the offender might not be the intended and only goal of punishment, but is it really that wrong for offenders to suffer more than their victims? Most offenders would indeed suggest that their punishment is causing them a great deal of suffering, but in many cases is it not just because they are the ones being punished? Had the same exact punishment been given to another offender, the first offender might not consider that punishment to be causing suffering. Nobody wants to be punished, so why should those who will at some point be punished (offenders) have a say in what punishment is causing more or less suffering for them? It is reasonable to think that they all would want to escape it and as such, behind the veil as originally they have as much say in it as victims, work to have as little punishment as possible at all times for all crimes.

I believe it would have led to a different conclusion had Hanna written about an enforcement system aimed at acting out ‘revenge’ instead of ‘suffering’, as suffering does not entail harassment or cruelty of punishment. By which standards are we to measure this suffering? What each offender would consider to be suffering would range immensely. So where are we to put the line of crossing from punishment which is there to minimize suffering and punishment which induces suffering? Punishment aimed only at minimizing suffering for societies would at some point entail suffering for the offender.
5. Summary

As mentioned before, no matter how liberal and just a society is, there will always be those who choose not to violate other people's autonomy and property, not out of respect for it but out of fear of legal consequences. Which is why a system of coercive consequences, which can be used to keep those people on track with the law, will always be a necessity in a society which wishes to function and to protect its citizens liberties.

Moreover, Hanna’s non-punitive alternatives to punishment are not really that much of an alternative. It is today's punishment in a smaller scale. Instead of being locked up in a prison cell offenders would be looked up in rooms of their homes, and living with the same set of rules as in a prison with regards to time schedule; when they have to wake up, eat, shower, have a walk around the yard for exercise and go to bed. The only difference, and this one is a biggie, is that with Hanna’s non-punitive alternatives offenders are left without the constant supervision they would have in a prison, leaving citizens living around the offender more at risk.

It does seem to me that Nathan Hanna is basing his theories on the American justice system where some offenders are sentences to 200 years in prison or 5 consecutive life sentences. Those punishments are very much retributive and seem to only exist to feed peoples need for revenge as there is no possible way of actually sitting 200 years or 5 lifetimes in prison.

At the end of the day, the non-alternative alternatives to punishment given by Hanna are not that different from the existing way of punishing people today. Punishment is given based on the level of severeness of the crime with alternative punishment placed upon the mentally ill and child-offenders. There seems to me to be a combination of retributive, general and individual prevention theory when it comes to punishing offenders today. Some sort of prison time to satisfy the general public's need for revenge as well as a deterrent for Average Joe not to commit crimes with some sort of treatment option for the offenders so they are able to re-enter society after served time with the possibility of a ‘normal’ life.
6. Sources
