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PLAYING FAIR WITH PRISONERS

Punishment should be retributive, but it must also aim to rehabilitate criminals who will return to society ready to comply with the law

By Richard Dagger

In recent years, there has been much talk of a ‘rehabilitation revolution’ in the United Kingdom, underlined in a speech by the prime minister, David Cameron, at the Centre for Social Justice in October. Such talk is welcome, yet it strikes this American as odd in two ways. The first is that the idea of rehabilitating criminals is hardly revolutionary. Forty or 50 years ago, rehabilitation was widely accepted as the proper response to criminal wrongdoing, with especial emphasis on this point from Karl Menninger, Barbara Wootton and others, who argued that criminal conduct calls for therapeutic treatment rather than punishment.

In the intervening years, the emphasis has shifted dramatically, in large part because legal philosophers and the broader public alike have concluded that we fail to respect criminals or their victims if we regard offenders as no more responsible for their misdeeds than invalids are for their ailments. To renew the call for rehabilitation thus seems not so much revolutionary as reactionary.

The second way in which talk of a rehabilitation revolution seems odd is that it is not what one hears from those who call themselves ‘conservative’ in the United States. On this side of the Atlantic, the typical conservative reaction to crime is to demand incarceration and retribution. Were someone to advocate a rehabilitation revolution in this country, I would expect the conservative response to be, ‘We tried this before and it didn’t work. Give criminals their just deserts!’

Oddness aside, however, I think there is much to recommend the attempt to restore rehabilitation to a central place in the practice of punishment. Nor do I think that rehabilitation must displace

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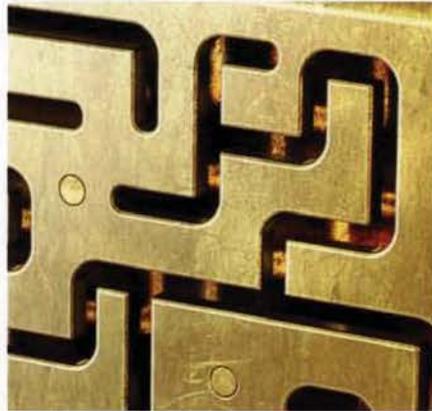
retribution in that practice. Properly understood, the two aims are not only compatible but also complementary. If we are to understand them properly, though, we shall need to see them as components of a theory of punishment that is grounded in considerations of fair play. Such a theory also has the advantage of offering guidance with regard to other controversial matters of penal policy, such as the question of whether prisoners should have the right to vote, or whether recidivists should receive harsher sentences than first-time offenders, or whether prisons should be operated privately or publicly.

PUNISHMENT AS FAIR PLAY

As children are quick to learn, any activity that requires cooperation is likely to give rise to complaints of unfairness. Sometimes the complaint will be about the unfairness of those who do not do their part; at other times it will be the unfair distribution of the benefits that cooperation produces. In either case, the core idea is that cooperative activities provide benefits to the participants, with the benefits ranging from the pleasure of playing a game to sharing in the profits of a commercial enterprise, or enjoying the protection afforded by a system of mutual defence. These benefits are not free of cost, however, and those who participate in the activity or enterprise are expected to bear a fair share of its burdens and to play fair with the others. Punishment enters the picture because cooperative endeavours will usually produce the desired benefits, even if a few of the participants shirk their responsibilities. To prevent these potential free riders from taking advantage of the cooperative efforts of others, the participants invoke the threat of punishment. When the threat is not successful, then the actual punishment of offenders is justified because they have violated the principle of fair play.







For this simple account of fair play to provide a plausible theory of legal punishment, we must be able to conceive of a polity as itself a cooperative enterprise; to regard it, in the philosopher John Rawls's words, as "a fair system of cooperation over time, from one generation to the next" (*Political Liberalism*, Lecture 1, §3.1). To some extent this is to conceive of the polity as an ideal, and some countries will fall so far short of the ideal that we cannot reasonably judge their oppressed and exploited peoples to be participants in cooperative practices that entail duties of fair play. To the extent that the rule of law is in force, however, we can hold that a country's people are receiving the benefits of a cooperative enterprise and owe it to their fellow citizens to bear a fair share of the burdens of the enterprise: that is, to obey the law. Failure to do so warrants punishment. Everyone will find that obeying the law is occasionally burdensome, but good citizens will not leave it to others to shoulder this burden while they ride free. To assure them that their cooperative efforts will not be in vain, those who break the law should be punished.

Much more needs to be said to fill out and defend this quick sketch of the fair-play theory of punishment, but space limitations allow me to touch on only two points here. One is that violations of the law are not all of equal weight or character. There is a difference between civil and criminal disobedience, for example, that any theory of punishment must recognise. There is also a significant difference between offences that are fairly straightforward failures to play fair, such as tax cheating, and crimes such as murder, rape and robbery. Fair-play theory can acknowledge these differences, however, while insisting that every crime is, in a sense, a crime of unfairness; a failure to restrain one's conduct in ways necessary for the success of "a fair system of cooperation over time, from one generation to the next". Although the severity of the punishment should fit the seriousness of the crime, it is the offence against fair play that justifies the legal authorities in administering the punishment.

The second point to note, by way of elaboration, is that the fair-play theory is essentially retributive. Punishment is justified because those who break the law take unfair advantage of those whose law-abiding cooperation makes the rule of law possible. Punishment is thus a way of paying back those who do not play fair. Fair play does not begin and end with simple retribution, though. It also aims at maintaining society as a fair system of cooperation under law; indeed, it aims to move polities closer to that ideal. That is why the fair-play theory will support penal policies, such as rehabilitation, that are not ordinarily associated with straightforward retribution.

THREE PROBLEMS OF PENAL POLICY

To see how considerations of fair play can generate this support for rehabilitation, let us begin by addressing the three controversies I mentioned earlier: those involving recidivism, voting rights and the public or private management of prisons. The first of these may appear to be something less than controversial, for the practice of punishing recidivists more severely than first-time offenders seems to be widely accepted. From the standpoint of retributive theory, though, this 'recidivist premium' is hard to justify. If the point of punishment is to give criminals their just desert, then why should we care whether the offender has stolen a car for the first, second, third or fourth time? The offence is the same in every case, so shouldn't the punishment also be the same?

The fair-play theorist can answer these questions by saying that the offence is not really the same in these cases, not even when the recidivist steals a car of exactly the same value every time he steals. If we can reasonably assume that the offender has had a fair chance to live as a law-abiding member of the polity, then the aim of punishment in the first instance is to give him his due as a criminal who has not played fair with others and to restore him to his place in the polity as a citizen who respects the person and property of other citizens. If the punishment

“FAIR PLAY AIMS AT MAINTAINING SOCIETY AS A FAIR SYSTEM OF COOPERATION UNDER LAW”

proceeds in accordance with this aim, then we have a reason to think that recidivists deserve harsher punishment when they offend again. Despite our efforts to impress upon recidivists the injustice of their actions to those who make it possible for them to enjoy the benefits of the rule of law, they continue to hold themselves above the law. Each new offence is thus a worse offence, for each is in a way less fair than the one before it.

To be sure, this argument assumes that the punishment the offender receives is in keeping with the aims of retribution and restoration, which is quite a lot to assume. The high rate of recidivism in Britain and the US suggests that prison is at least as likely to prepare prisoners for a life of crime as to convince them of the virtues of the law-abiding citizen. But here is where the theory of fair play holds legislators, prison administrators and the polity in general accountable. If punishment is to be justified on the grounds of fair play, then we must see to it that people have a reasonable chance to play fair. In particular, we must see to it that the men and women who pass through the gates of prison are treated in ways that help them to grasp that society is a fair system of cooperation under law and that they have a responsibility to do their part to support it.

Exactly what we should do for and to prisoners if we are to help them in this way is a difficult and complicated problem. We confront it, for example, when we consider the question of whether prisoners should be allowed to vote. Without entering into the details of the current controversy between the British government and the European Court of Human Rights on this point, it seems to me that those convicted of crimes serious enough to warrant a prison sentence should lose their voting rights while they are imprisoned. This is currently the case in the UK and in all but two states in the US. In a society that approaches the ideal of a fair system of cooperation under law, crime is, among other things, a failure to do one's civic duty. It is appropriate, then, to suspend some of the criminal's civil rights as part of his or her punishment. When the punishment is complete, however, and the offender's debt to society has been discharged, his or her voting rights should be restored. This is what fair play requires. In the US, where several states either bar ex-felons outright from voting or make it extremely difficult for them to regain the franchise, this basic requirement of fair play is violated. If we are to expect offenders to play fair with the law-abiding members of the polity, we must also play fair with them.

What, finally, of the trend toward private management and even ownership of prisons, a trend especially marked in the US? Fair-play theory can countenance such arrangements as long as it remains clear that punishing criminals is a matter of the public interest for which the public is ultimately responsible. When the treatment of prisoners becomes a matter of corporate profit or loss, we have reason to worry that this treatment will not foster the sense of fair play we should want offenders to take with them when they have completed their sentences. More promising to my mind than the private-for-profit prison is the social-enterprise model that the RSA is now championing. This model has many virtues from the perspective of fair-play theory. One is the way it regards prisoners' work as a form of rehabilitation rather than a means of generating profits; another is the careful transition it envisions between prison leaving and full re-entry into the polity.

FAIR PLAY AND THE REHABILITATION REVOLUTION

Fair-play theory does not by itself answer every question of penal policy and practice. It does, however, provide a framework for approaching these questions and guidance as to how to answer many of them. More broadly, it provides a way of connecting the retributive nature of punishment with the desire to rehabilitate criminals. If the polity is to be a fair system of cooperation under law, then punishment of those who break the law is warranted. But such punishment should also aim at returning to society ex-offenders who are ready and willing to do their part in the cooperative effort by respecting the law. Whether a policy that embraces rehabilitation in this way is really revolutionary is doubtful. Nevertheless, rehabilitation need not be revolutionary to be right. What matters is that it is fair. ■

FELLOWSHIP IN ACTION SOS GANGS

New Fellow Junior Smart runs the SOS Gangs project for St Giles Trust, working with young offenders to help them break free from crime, particularly gang-related crime. The project works with young people, both in prison and the community, offering a tailored package of support for each individual to help them identify and realise alternative aspirations and goals.

Junior is also a fellow of Ashoka, an organisation that identifies and invests in leading social entrepreneurs. He joined the RSA Fellowship through the RSA's partnership with Ashoka UK and wants to tap into the network of RSA Fellows. "In a marginalised society," he says, "change can only happen if we adopt an all-inclusive attitude with genuine altruistic motives."

■ Find out more at www.sosproject.org.uk