

On the Right to be Punished: responsibility and the critique of the rehabilitative ideal

Christopher Bennett describes the reasoning behind New Retributivism.

The motivation for rehabilitation as an aim of penal policy is basically a benevolent one. The attraction might be humanitarian – that it evinces a concern for the individual offender – or it might be more utilitarian – rehabilitation might be seen as the most cost-effective way of dealing with the threat to general welfare posed by criminality. However, rehabilitation, though once a dominant paradigm in criminal justice, has declined in importance over the past decades. It is not entirely clear what has taken its place, and many writers now complain that the penal system lacks a widely accepted and acceptable account of what our penal institutions are for. If we are in the end to come up with such an account then one important question to resolve is to what extent we should lament the decline of the rehabilitative ideal.

In this piece I am interested in the critique of rehabilitation offered by proponents of what has been called New Retributivism. I discuss why the retributivist concerns about rehabilitationism are worth taking seriously; why these concerns fall short of justifying ‘eye for an eye’ punishment; and why restorative justice might be a promising middle way.

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One of the major reasons that the rehabilitative ideal is said to have declined is down to the widespread perception that ‘nothing works’ and that we are better off simply trying to contain crime as best we can. However, the distinctive retributivist criticisms of rehabilitation look at the *morality* of rehabilitation rather than its effectiveness. The New Retributivists allege that, even if rehabilitative techniques *did* turn out to be effective, they would still be morally unacceptable (for what follows, see e.g. Morris 1969).

One retributivist criticism is that rehabilitation makes the offender’s term within the penal system open-ended and raises the possibility that a hard-to-reform offender might spend a long time in confinement for a relatively minor crime. A second criticism concerns the limits of state intervention in our lives. Rehabilitative treatment aims to change the offender’s personality. But should the state really be concerned with spying into our souls? Rehabilitative treatment can be seen as worryingly intrusive. A related criticism is that rehabilitative treatment is paternalistic: in other words, it is something to which the offender is subject, regardless of his consent, for his own good.

Perhaps the fundamental concern running through each of the above is that rehabilitative treatment is *degrading* to the offender. The basis of this worry lies in the conflict between

two images of the offender. Rehabilitative treatment, the retributivist might argue, embodies an ‘us and them’ mentality: the ‘us’ represents the elite of responsible and disciplined professionals – not themselves in need of treatment – who are charged with benevolently looking after the interests of ‘them’, the less capable offending class. The retributivists react against this because it denies that offenders are morally independent agents, capable in their own right of meeting their moral responsibilities. For if we deny that offenders are capable of responsible agency then we are giving them a second-class status: we are denying that they are independent beings with the right to make their own decisions and live according to their own lights. Our duty towards such second-class citizens would be to look after them rather than respect their independence.

The retributivist’s view, on the contrary, is that society is made up of moral equals. All agents are taken to be equally morally independent, in the sense that they are equally capable, without further education or treatment, of upholding their part of the social contract (though of course in practice they may fail to do so); and therein lies their dignity and their capacity for

rights and individual freedom. Offenders who fail to meet their basic responsibilities should therefore be seen as capable of recognising the importance of those responsibilities and of meeting them. While rehabilitation may be the proper response to someone seen as not yet having attained moral independence, retributive punishment is the fitting response to someone regarded as one’s moral equal. Hence some retributivists resurrected Hegel’s talk of a ‘right to be punished’.

Now rehabilitationists may seek to dismiss the retributivist challenge by questioning whether we have the freedom necessary to be morally responsible. Surely at some level we are simply products of circumstance rather than our own free choice? But in response to this the retributivist should deny that responsibility requires that we are the products of our own free choice in the first place. Responsibility, for the retributivist, requires not radically free self-creation but rather the ability to meet the responsibilities inherent in a social relationship. As with the relationships that Peter Strawson called “ordinary, adult, interpersonal relationships”, participation in the relationship between members of the social compact essentially involves assuming certain responsibilities (Strawson 1982). If the rehabilitationist casts doubt on the offender’s abilities to meet the responsibilities inherent in a certain relationship then she is at the same time casting doubt on his ability to be fully party to



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that relationship. Therefore the moral force of the retributivist's critique – and its attractiveness – comes from an egalitarian notion of society rather than a dubious notion of metaphysical freedom.

However, even if we are attracted – as I think we should be – to the retributivist's vision of a society of moral equals, at least two sorts of counter criticisms can be made. The first asks whether offenders really are capable of assuming the responsibilities to which the retributivist wishes to hold them. For while of course many offenders *are* – and hence we might agree that it would be degrading to treat them otherwise – are there not also offenders who, though not insane, are sufficiently damaged or disordered that it really is too much to expect of them? If there are then, while the retributivist may be correct in thinking that we have to treat such people as second-class citizens, denying their independence and looking after them rather than holding them to account, this may simply be the only adequate response to their situation.

The second question is whether the move from accepting the importance of recognising responsibility to accepting retributive punishment is not too quick. If we accept the retributivist's moral argument, isn't all that follows from it that we should reject rehabilitation *insofar as* it fails to treat the offender as a moral agent? The retributivist critique rules out reform as an aim of penal policy *only* if it is carried out in ways that would deny the offender's moral independence: still acceptable would be penal responses that eschew 'eye for an eye' retributivism but aim rather to *combine* the aim of reform with respect for moral agency.

An example of a penal strategy that could combine reform and respect is restorative justice. For one aim of restorative justice is to try to get the offender to reform through engaging him in a dialogue and persuading him to take responsibility for what he has done, often through a meeting with the victim and/or other concerned parties. Its proponents argue that having to

explain oneself in front of those one has harmed, and in front of those one cares for and respects, can be a particularly effective stimulus to reform (see e.g. Braithwaite 1998). Restorative justice promises rehabilitation through a process of holding the offender to account that the retributivist should recognise and welcome.

Some 'just deserts' theorists have claimed that restorative justice has the same tendency to disproportionate sentencing, intrusiveness and degradingness as previous forms of rehabilitationism (e.g. von Hirsch 1993). And there is certainly a tension in restorative justice between keeping things informal and spontaneous in order to allow for genuine dialogue, and enforcing constraints of due process and offender's rights. However, I think we ought at least to acknowledge that a fruitful way forward for thinking about criminal justice is to consider how restorative justice might be conceived so as to avoid these problems without losing its rehabilitative and humanising potential (Bennett, forthcoming).

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