

Commentary: Care for Convicts

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Abstract

Bersot and Arrigo (this issue) find that judges in the U.S. district and appellate courts generally defer to prison officials in Eighth Amendment challenges over punitive segregation of mentally ill inmates, effectively allowing mistreatment. In these cases, judges tend to channel formalist and utilitarian logics. Bersot and Arrigo maintain that these logics conduce to maltreatment of inmates. However, we believe that if judges actually evaluated prison policy along utilitarian lines, drawing on criminological research and assigning special value to basic human rights, convicts and would-be convicts would be better treated in and out of prison. Criminal justice agents who perpetrate or permit harm bring a value orientation to their work that is not so dissimilar to ours, but they circumscribe the beneficiaries of concern differently.

Introduction

A critical challenge for these times is how to talk people out of doing harm. Quite often we make that case with the argument that harming leads to more harm. We generally attempt to show that perpetrating a particular harm causes the perpetrator greater eventual harm than any harm s/he might prevent. Thus, if incarceration increases recidivism, yielding more crime, then (rational) people should oppose the use of incarceration. If the death penalty brutalizes the populace, then people should oppose the death penalty. These are utilitarian arguments: they refer to the expected net benefit of the act.

Bersot and Arrigo (2010, this issue) take utilitarianism to be a problematic basis for criminal justice because “the needs of some individuals are subjectively perceived as more worthy than those of others” (p. 54). Thus they conclude: “Determining the value of an individual according to their ability to contribute to the satisfaction of the majority is inherently troubling” (p. 56). In their study Bersot and Arrigo find that utilitarianism as well as formalism – adherence to moral duties – informs judicial decisions concerning the use of punitive segregation with mentally ill inmates. For example, in *Goff v. Harper* (1997): “Although the court wanted to ensure that inmates were lawfully protected from cruel and unusual punishment, it sought to limit its imposition on the rights and interests of correctional administrators” (Bersot and Arrigo 2010, p. 48). Bersot and Arrigo endorse an alternative, Aristotelian ethics for criminal justice. A *virtue-based, value or care* ethics, it would emphasize human healing and growth. Judges would seek to understand the convict as a person, and “virtues such as empathy, benevolence, and tolerance” (p. 58) would guide their decision-making.

We question how Bersot and Arrigo’s plea for this new ethical orientation will be received by prison administrators and judges. Such an orientation is radically opposed to the utilitarian manner of reasoning in particular. We are optimistic, however, that a more caring criminal justice might yet emerge in the current ethical climate.

Entrenched

The criminal justice system is entrenched in the ethics of formalism and consequentialism. Through careful analysis Bersot and Arrigo document two kinds of formalism, or allegiance to certain duties – one that stresses assigned roles and one that stresses human worth and dignity. They write (p. 51):

In some instances, the bench expressed an obligation to defer to correctional administrators in their respective roles as prison managers. In other instances, the bench endorsed a deontological duty to ensure that incarcerated benefited from the dignity that they deserved as human beings, notwithstanding their segregation from society and/or from others criminally confined.

We see the connection between judges' tolerance of inmate mistreatment and their *task-oriented* formalism, but not the Kantian variety that prioritizes human dignity. However, in the criminal justice system, as in bureaucracies generally, commitment to work duties seems to have won out over commitment to moral duties. Workers can disregard prisoner well-being insofar as their job description does not positively specify concern thereof. Workload demands have inspired rules that actually thwart caring: the Prison Litigation Reform Act is exemplary (see Bersot and Arrigo 2010, p. 21).

Further, the modern emphasis on "the efficient control of internal system processes" (Feeley and Simon 1992, p. 450) ensures that inmates are de-individuated, conceived as elements of an inter-agency management task: this too obscures their suffering. As Roy (2002) states: "By reducing others to parts, reduction makes it difficult for us to empathize with them and care about them" (p. 39). Note that the system also de-individuates its workers. As a consequence, workers can hardly be said to engage in ethical thinking. Rather, they allow the institution to do their thinking for them (Douglas 1986). An extreme example of such non-thinking is judges' approval of punitive segregation because it is "a well established and penologically justified practice" (p. 1261, cited in Bersot and Arrigo p. 36). It is *done* therefore it is *right*.

Couple the task-oriented and non-thinking institutional culture of the criminal justice system with the outcome orientation of Western culture: judges evidently have. A consequentialist principle so pervades modern life that those of us who call for social reform *for its own sake* – in any arena, not just criminal justice – find that we must use the

language of consequentialism. No wonder, then, that policy discussions of restorative justice generally incline toward questions of reduced recidivism (Presser, Gaarder and Hesselton 2007). No wonder too that Bersot and Arrigo conclude their paper with a utility argument: "legal tribunals are encouraged to incorporate values-based reasoning into their judicial rulings. Moreover, courts are reminded that when they promote such flourishing, all parties affected by crime benefit...." (p. 67). With one word, *moreover*, the authors seem to suggest that right values ultimately should be adopted because they have utility.

It is true that virtues do not *per se* guide the utilitarian's actions. We admit: we wish they did. We wish that human well-being in every instance were advanced because it is *right* to do so – a good in itself. The first author (Presser 2004) has praised restorative justice for its present-orientation, stating (p. 102, emphasis in original):

As restorative justice is called on to promote one or another belated outcome, I feel we stray from its unique potential – to *be* a humane *experience* of justice.

However, in our view, utilitarianism does not *necessarily* ignore suffering. It *can* be pressed into the service of care. The problem of judicial neglect lies in the inadequate application of utilitarian theory, and not in utilitarian theory itself.

Utilitarianism – A Closer Look

Philosopher William Shaw (1999) lays out the utilitarian justification for punishment as follows (pp. 174-175):

Punishment is justified if and only if (1) the pain and suffering (or, more broadly, the loss of welfare) to those who are punished is outweighed by the benefits of punishment and (2) those benefits cannot be achieved with less suffering or at a lower cost to those punished.

As Shaw's statement shows and Bersot and Arrigo also acknowledge (pp. 21-22), utilitarian reasoning requires data to evaluate both costs and benefits. Shaw continues (p. 179):

[Utilitarians] are not wedded to the status quo but, rather, favor whatever system of criminal justice and whatever forms and mechanisms of punishment produce the greatest expected net benefit for society as a whole. Determining this is no easy matter, and utilitarian reformers will doubtless proceed in an incremental fashion, basing their recommendations on the best available empirical data and on whatever insights psychology, social theory, and scientific criminology can provide.

Given that alternatives to punitive segregation have *not* been adequately explored, the utilitarian will be unable to evaluate whether the benefits of punitive segregation – arguably, renewed order in the prison – cannot be achieved otherwise. The *Goff v. Harper* (1997) court criticized the fact that effective alternatives involving psychiatric care were not used with mentally ill inmates. To the best of our knowledge, restorative justice conferences have not been tried in response to inmate misconduct. We see promise there. It is by now well established that both victims and offenders who participate in restorative justice conferences (in the “free” world) report greater satisfaction with the experience than comparable persons whose cases are handled by traditional courtroom procedures and sanctions (Latimer, Dowden and Muise 2005). In addition, recidivism reduction and compliance with restitution agreements are significantly higher among offenders who participate in restorative justice programs than those who participate in non-restorative alternatives.

Utilitarian calculations do not necessarily determine which interest groups ought to benefit from an action or policy, the conclusion that Bersot and Arrigo (p. 51) reach:

the legal opinions constituting this study's data set overwhelmingly sought the greater good for the majority (penal officials and society) over the minority (psychiatrically disordered inmates).

Zero-sum results need not follow from utilitarian judgments. Indeed, where punitive sanctions are concerned, costs may fall to *both* those punished and their punishers, as when the death penalty and incarceration increase recidivism rates (Shepherd 2005; Spohn and Holleran 2002). Furthermore, utilitarianism leaves open the weights attached to various outcomes. One can imagine a scenario where the suffering of *any* person is assessed as enormously costly. It is entirely possible for human rights to make it onto the utilitarian agenda, as Shaw (1999) states (pp. 189-190):

instilling in people respect for the rights of others and institutionalizing in society an almost absolute commitment to the protection of certain fundamental human rights form part of a wise, long-term strategy for safeguarding people's basic welfare interests and promoting human flourishing. Far from being defensive about rights, utilitarians argue that only their theory can give a satisfactory account of them. They reject the traditional view that the existence of moral rights is simply self-evident and that we are to settle conflicts over and between supposed rights by intuition.

The flourishing of any person may also be counted as enormously beneficial to the collective. Braithwaite and Pettit's (1990) republican theory of criminal justice, an avowedly consequentialist theory, states that maximization of human freedom should be the goal of any justice intervention. Differential evaluation of the worth of those humans who would be free is key to all manner of imprisonment, but it is extraneous to the utilitarian philosophy generally associated with the founding of the prison.

We suspect that if judges undertook fully-fledged cost-benefit analyses of criminal justice practices – including but not limited to prison-based practices – they might decide cases differently. The fact that judges consistently ignore research indicating that the well-being of inmates may keep prisons peaceful and societies safer from crime, suggests a significant departure from utilitarianism. Perhaps it is utilitarianism corrupted by the accommodation to duty ethics. Or perhaps more than a little retribution informs judges' decisions. It is entirely possible that judges seek retribution but do not express it in their decisions because their position demands a value-free discourse.

Empathy

Those who would pursue or at least ignore the suffering of offenders/inmates are not so different from the rest of us. They follow a virtues ethics, but they tell a different story about who its beneficiaries ought to be. From a conservative perspective, the rights of inmates infringe upon the rights of crime victims and the rest of us (Lakoff 2002).

Philosopher Jean Hampton (1988) finds: "the *retributive* motive for inflicting suffering is to annul or counter the appearance of the wrongdoer's superiority and thus affirm the victim's real value" (p, 130, emphasis in original). 'Care' is care for innocents, in this view.

Therefore, we should encourage decision-makers to extend their concern. We should show dichotomies between "guilty" and "innocent" to be false. At their best, restorative justice dialogues can do this, questioning taken-for-granted statuses of "victim" and "offender" and exposing the breadth of responsibility for harm (Presser and Hamilton 2006).

A plea to 'care for all' is unlikely to work. A values makeover is tough – for anyone. As humorist David Sedaris (2010) recently wrote, "If my own little mind is nailed shut, why wouldn't theirs be?" (p. 35). Nor did Aristotle, nor do we marshal concern for *all* creatures, hence Albert Schweitzer's critique: "To found an ethical world-view on ethics which are only concerned with our fellow-man and human society is a logical impossibility. Only when

ethics embrace the whole Universe is an ethical world-view really possible" (Schweitzer 1936, pp. 259-260). It is our forlorn conclusion that most of us draw distinctions between those whose suffering is too costly and those whose suffering we can abide.

References

- Braithwaite, John, and Phillip Pettit. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford, UK: Clarendon Press.
- Douglas, Mary. 1986. *How Institutions Think*. Syracuse, NY: Syracuse University Press.
- Feeley, Malcolm, and Jonathan Simon. 1992. "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications." *Criminology* 30(4):449-474.
- Hampton, Jean. 1988. "The Retributive Idea." Chapter 4 in *Forgiveness and Mercy*, by J. G. Murphy and J. Hampton. Cambridge, UK: Cambridge University Press.
- Joy, Charles R. (ed.) 1956. *Albert Schweitzer – An Anthology*. Boston, MA: Beacon Press.
- Lakoff, George. 2002. *Moral Politics: How Liberals and Conservatives Think*, 2nd edition. Chicago: University of Chicago Press.
- Latimer, Jeff, Craig Dowden and Danielle Muise. 2005. "The Effectiveness of Restorative Justice Practices: A Meta-Analysis." *The Prison Journal* 85(2):127-144.
- Presser, Lois. 2004. "Justice Here and Now: A Personal Reflection on the Restorative and Community Justice Paradigms." *Contemporary Justice Review* 7(1): 101-106.
- Presser, Lois, Emily Gaarder, and Denise Hesselton. 2007. "Imagining Restorative Justice Beyond Recidivism." *Journal of Offender Rehabilitation* 46(1/2):163-176.

Presser, Lois and Cynthia A. Hamilton. 2006. "The Micro-Politics of Victim Offender Mediation." *Sociological Inquiry* 76(3): 316-342.

Roy, Jody M. 2002. *Love to Hate: America's Obsession With Hatred and Violence*. New York: Columbia University Press.

Schweitzer, Albert. 1936. *Indian Thought and Its Development*. Boston: Beacon.

Sedaris, David. 2010. "Standing By: Fear, Loathing, Flying." *The New Yorker* 33-35 (August 9).

Shaw, William H. 1999. *Contemporary Ethics: Taking Account of Utilitarianism*. Malden, MA: Blackwell.

Shepherd, Joanna M. 2005. "Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States." *Michigan Law Review* 104(2):203-256.

Spohn, Cassia, and David Holleran. 2002. "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders." *Criminology* 40(2):329-358.