EVALUATE BOTTOMS (2002) CLAIM THAT

"IF THEY ARE TRUE TO THEIR CALLING

ALL CRIMINOLOGISTS HAVE TO BE INTERESTED IN

MORALITY"

Responses to crime and their influences on moral

development

Essay for the course on

Social Context of Crime

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EVALUATE BOTTOMS (2002) CLAIM THAT 'IF THEY ARE TRUE TO THEIR CALLING ALL CRIMINOLOGISTS HAVE TO BE INTERESTED IN MORALITY'

Responses to crime and their influences on moral development

1. Introduction

Let me narrow the quotation above: "… all criminologists have to be interested in" *the moral effects of responses societies give to crime.* The current essay has four main arguments: the first is that sentencing systems form a channel between the state and the individuals who are directly and indirectly affected by crime. Through this channel an explicit message is delivered to the people about the way disapproval of wrongdoing and prevention of further crime are represented. Secondly, sanctioning systems are different according to the extent to which they regard the individuals as 1) rational actors and 2) moral agents. (Duff, 1990: 43). Thirdly, the different systems have an impact on moral development of offenders; hence they can be compared according to these impacts. And as a final argument I would like to explore why I think restorative justice might provide better possibilities in addressing the wrong-doer as a rational and responsible moral agent than other conventional systems.

In the first part of the essay the significance of moral aspects in sanctioning is explored. It is followed by the explanation of how the different systems will be compared. Kohlberg's theory of moral development will be the tool for the current comparison, but a list of other indicators will also be presented in order to refer to what might be the basis of a more complex analysis of the different ways sentencing systems influence moral development. Finally, the theories of rehabilitation, incapacitation, deterrence, deserts, and restorative justice will be shortly analysed according to their main principles and their operational processes based on the Kohlberg scale (1971). Nevertheless, it is important to stress that it will not be a comprehensive comparison of these approaches (i.e. it will not

consider the other significant aspects as fairness, rights, costs – benefits, reintegration, deterrent effect etc); it will only focus on what role moral aspects play in their logical frameworks.

As a final remark, I am aware that a much deeper analysis is required, than the one this essay is able provide here in order to draw any specific conclusion, so the following lines only sketch this idea and a possible pathway for its future exploration. Nevertheless, it is worth exploring the framework of a more complex analysis as well, therefore I mention those indicators which can be useful in later studies, even though I will not consider them in the present analysis.

2. Why does moral matter in sentencing?

Before answering this question, let me briefly define sentencing and morality in the context of this essay.

Sentencing is the authorised way of using state coercion against a person who committed an offence (Ashworth, 2002: 1077). However, I use the word sentencing with a broader meaning, referring to any kind of institutional reaction to crime. Hence, it is not necessarily done by the state (e.g. it can be authorised by a community) and coercion is not automatically a punishment[1]. It is rather an outcome that *can* have a punitive effect[2].

Sentencing is the practical and institutional communication of the law through the criminal justice system but has a more direct effect on those who are its recipient, than the law has itself. If we accept that "people actively reason about legal rules and that the structure of their thinking shapes their behavior toward the law" (Cohn and White, 1990[3]), we might presume that sentencing and its agents (i.e. prosecutors, judges, and other actors of the justice system) also might shape one's "attitudes about the appropriateness of rule-breaking" (Cohn and White, 1990[4]).

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[1] Coercion and punishment are often used as synonyms in the sentencing literature.
[2] For example restorative theories "are not regarded as theories of punishment". (Ashworth, 2002: 1081)
[3] summarised by T.R. Tyler (1991)
[4] Ibid.

3

According to van Willigenburg (1996: 129-130), *moral* development is a non-rational process of socialisation based on repetition, the administration of rewards and sanctions by the emotivist approach. In addition, a cognitive approach is also highly influential in showing that the moral growth should be understood as a rational process of development in judgement. The cognitive aspects of morality and its developmental stages, according to Kohlberg's theory (1971), will be detailed in the next part.

Related to the sentencing systems, moral dimension is analysed from two aspects: 1.) what do the different systems presume about individual's moral stages when they aim to react to or prevent crime, and 2.) how do they influence one's further moral development?

According to the Kantian demand, "we must treat, and respect each other as rational and responsible moral agents," and "the state should pay the same respect to every citizen, including those who break the law", by treating him/her "as an end" (Duff, 1990: 39). Contrary to this demand the consequentialists' approach is considered as an ideology which treats the offender "merely as a means" to certain social ends, and his/her standing in the penal system is that of someone "to be managed or handled or cured or trained" (Strawson, 1982:66[5]; Walgrave, 2001: 26).

On the other hand, sanctioning is not the end of the process by which the environment communicates its disapproval of the crime. The consequences of the sanctioning and the internalisation of the reasons behind punishment by the offender are crucial in order to predict what will result from the sanction in the future. However, I argue that respect and consequentialism are not incompatible and it is possible to keep the respect of the citizen as responsible moral agent while taking into account the consequences of the sentence on the individual and the society.

To conclude, several current theories and the existence of the mentioned debates suggest that sentencing has a significant impact on morality, even though "modern social science has a tendency to

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[5] cited by Duff (1990)

ignore the moral and emotional aspects of order" (Scheff, 1996: 743). Hence it is worthwhile to examine the different systems according to the way they take the moral questions into account in the processes they suppose to prevent or reduce further crime.

3. Indicators for analysing the moral aspects of sanctioning systems

3.1. Kohlberg's scale on moral development

As I have mentioned earlier, according to Kohlberg's cognitive theory (1971), the moral growth is expressed in the development of moral judgment. This theory distinguishes three levels of reasoning in the moral development continuum (preconventional, conventional and postconventional) and each level is made up of two stages which represent "cognitive-structural transformations in the conception of self and society" (Kohlberg, 1971: 42).

On the *preconventional level* the labels of good and bad, right or wrong are interpreted in terms of either the *physical or hedonistic consequences of action* (punishment, reward, exchange of favours) or the physical power of those who enunciate the rules and labels. At stage 1 the obedience to authority is in order *to avoid punishment*. At stage 2 the right action is that which instrumentally *satisfies the self's needs*. At this stage there is an orientation toward *exchange and reciprocity*.

At the *conventional level* "moral values reside in performing good or right roles, in maintaining the conventional order and the *expentancies of others*" (Kohlberg, 1984: 44). At stage 3 reasoning is internally motivated by *loyalty* to *other persons* (significant others). At stage 4 the respect is shown for *authority* and the decisions respond to a desire to maintain the given social order with regard to earned expectations of others.

On the *postconventional level* the individual makes a clear effort *to define moral values and principles* that have validity and application apart from the authority of the groups of persons holding them and apart from the individual's own identification with the group. At stage 5 there is a *social-contract legalistic orientation*, where right action tends to be defined in terms of general individual rights. There is a clear

awareness of the *relativism of personal values* and opinions. At stage 6, through *the universal ethical-principle orientation*, right is defined by the decision of conscience in accord with self-chosen ethical principles that appeal to logical comprehensiveness, *universality, and consistency.* Principles of justice, equality, respect and dignity generate moral decisions, and conscience directs agents to *mutual respect and trust.*

This scale seems to be a relevant measurement of the two factors of sentencing systems mentioned in the introduction: firstly, it is based on reasoning, so presumes the *rational* processes behind the decisions; secondly, it predicts the *moral* stages of behaviours as well, since "one cannot follow moral principles if one does not understand or believe in them" (Kohlberg, 1976: 32). Therefore, by examining the levels at which the sanctioning systems operate, we can say what the different systems think about the rational and moral mechanisms of individuals.

3.2. Other indicators

Even though the Kohlberg scale seems to be an appropriate measuring tool of the sentencing systems' *intentions* toward the individuals' morality and rationality, it does not tell us anything about the sentencing *processes* themselves and their influences on morality. In this respect several other aspects should be analysed while comparing the systems.

Although this essay cannot undertake this in-depth analysis, let me list the factors which should be examined in another further study in relation to the impact on morality of the sentencing schemes:

- the main mechanisms/procedures within the systems
- legitimacy
    - "costs" of law-breaking and "benefits" of obeying the law
    - the way sentencing promotes confidence in the laws among the other actors
- communication of the disapproval and of the way of sanctioning
    - how much time elapses between the criminal act and the sanctioning
    - the forum for communication: one-way/two-way/discussion in a broader community
    - the role of significant others
- responsibility
    - which active – passive role does the offender have in the process

- o taking personal responsibility in the reasons of the crime and in the further solutions (Brickman et al., 1982)
- o to what extent do the systems expect, handle or refuse the use of neutralisation techniques by the offender
- o to what extent do the systems expect, handle or refuse apology and forgiveness
- o how much freedom is left for voluntary decisions
- moralization
  - o what is the educative/socialising role of the sentencing
  - o how direct/indirect is the moral message during sanctioning
  - o how abstract/concrete its way is
  - o how important is it to give meaning to the moral values and make them understandable for the offender
- consequences of sanctioning
  - o how much are they considered
  - o what possibilities do they provide for reintegration

4. Comparison of sentencing systems

Analyses of "classical" sentencing systems usually talk about incapacitation, deterrence, deserts, rehabilitation, and recently restorative justice (e.g. von Hirsch and Ashworth, 1998). Considering the original expression of *sentencing*[6], we realise how different the interpretation of this concept is within each systems: it might be said that rehabilitation is one of the final *goals* of all schemes after all, incapacitation is an institutional *tool* for crime *reduction,* deterrence is a *know-how* for *prevention,* deserts is a *know-how* for *sentencing,* while restorative justice intends to *include* each aspects within its theory and practice. All this simply means that it is difficult to coherently compare systems which are so divergent by definition.

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[6] the authorised way of using state coercion against a person for committing an offence

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4.1. Rehabilitation

Perhaps it is not very convincing to start the argument with an exception. However, the rehabilitative approach is still so influential that it cannot be ignored in this analysis. The ideology of rehabilitation might relate to any system which aims to reintegrate the offender (and I think this is a common purpose of all systems). Therefore it should not be analysed as a whole without regarding the specific programme we investigate.

Nevertheless, the practice of rehabilitation has tended to show one direction focusing on "changing an offender's personality, habits […] or opportunities so as to make him or her less inclined to commit crime" (von Hirsch, 1998: 1). In this respect this theory does not consider the offenders as individuals who have autonomy in the rational and moral decisions related to the origin of the crime and to the treatment which is supposed to prevent them from committing further crimes. Hence, we can say that due to the lack of any voluntary, rational and moral aspects in this approach, a moral, developmental measurement is not appropriate to describe this scheme[7].

4.2. Incapacitation

This approach tries " to identify offenders or groups of offenders who are likely to do such harm in the future that special protective measures (usually in the form of lengthy incarceration) should be taken against them" (Ashworth, 2002: 1080). This utilitarian system is neither linked with causes of offending nor is it interested in changing the behaviour of offenders. It refers to the protection of potential victim as the aggregate social benefit justifying incapacitation.

By focusing on predicting the offender's likelihood of reoffending, simply considering the "predictive restraint" (von Hirsch, 1998: 98) "it does not require us to make any assumptions about

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[7] Though it is important to stress that some rehabilitative programmes might be effective (e.g. the programme called "Reasoning and Rehabilitation" summarised by Sue Rex (1998: 35), especially those "shifting from the training or expert treatment […] to persuading rational agents to co-operate in their own long-term interest (Bottoms, 1995, cited by von Hirsch and Ashworth (eds), 1998: 38).

human nature" (Wilson, 1983[8],). In other words – similarly to rehabilitation - this approach does consider neither the *rational* nor the *moral* aspects of individuals; the offenders *cannot be placed* on the Kohlberg-scale in the eyes of advocates of incapacitation.

4.3. Deterrence

> "Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such manner as tends […] as it were, from the commission of that act. If the apparent magnitude of the pain be greater than the apparent magnitude of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it" (Bentham, 1838-43: 396[9]).

Similarly to incapacitation, this approach is also consequentionalist and utilitarian. It regards citizens merely as numbers to be aggregated in an overall social calculation and does not show respect for the moral worth and the autonomy of each individual (Ashworth, 1998: 47). But contrary to the previous system, it considers citizens as *rational* actors for whom creating fear of punishment might be a sufficient disincentive to crime.

Defining deterrence with Kohlberg's terms one might say this system considers its citizens as being on the *preconventional level*. At its first stage the right actions are done to avoid punishment, future harm (citizens do not commit crime due to effective deterrence), while at the second stage right actions are those which instrumentally satisfy the self's needs by receiving reward, exchange of favours (e.g. by stressing the incentive aspects of "benefits" of crime as a result of a not effective or a "badly-calculated" deterrent system).

Within deterrence some research shows that "other indirect consequences of conviction, particularly what offender's family would think […] exert a more powerful effect" (Wilcock and Stokes, 1968)[10]. This result refers to the possibility of the deterrent effect on a higher moral level

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[8] according to Wilson this is "one great advantage to incapacitation" (cited by von Hirsch and Ashworth, 1998: 113)

[9] cited by von Hirsch and Ashworth, 1998, *Principled Sentencing* p: 53 from 'The Principles of Penal Law, in J. Bowring (ed) *The Works of Jeremy Bentham'*.

[10] Cited by Ashworth (1998: 50)

(conventional), at stage 3, where the "good-boy orientation" (Kohlberg, 1984) motivates the individual to perform the right roles due to loyalty to significant others, like the family.

4.4. Deserts

Much like deterrence, this approach regards individuals as rational decision-makers. Contrary to deterrence, the political premise of desert is that "all individuals are entitled to equal respect and dignity: an offender deserves punishment, […] and has a right no to be punished disproportionately to the crime committed" (Ashworth, 2002: 1078). Conversely, this is not assured in case of general deterrence which "may sometimes require the punishment of an innocent person or the excessive punishment of an offender" in order to achieve the fear of penalty in others as a greater social effect. (Ashworth, 1998: 46-47)

According to retributivists, the theory of deserts respects individuals and acknowledges their rational decision-making processes. However, they consider punishment as a categorical imperative and do not ask questions about the targets or effects of punishment. The "wrongdoing must be responded to by imposing hard treatment on the wrongdoer" (Walgrave, 2001: 25), and the moral quality of the values system behind the rejection of a particular behaviour is not questioned (Fatic, 1995[11]).

Disapproval is expressed through traditional sentences which may communicate to the community the confirmation of the norm and the authorities' determination to enforce the norms. However, it fails to communicate adequately and appropriately to the offenders that their behaviour is unacceptable and socially destructive (Walgrave, 2001: 28).

In short, the retributivists' approach to sentencing considers the citizens on the *conventional* level. The basis of their argument is built on the social contract principle, where the respect shown for authority is the underlying aspect behind maintaining the social order. This approach effectively

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[11] Cited by Walgrave (2001: 25)

communicates the principle of equal right of each individual. However, it does not address any direct moral message to the offender and does not leave any space for the offender to explore his/her moral statements. It means that this way of "making justice", when the confrontation is entirely based on formal institutions and professionals' statements, does neither leave any possibility to talk about the moral aspects of crime nor uses the sentencing for helping the moral development of the offender.

4.5. Restorative justice

According to Walgrave and Bazemore (1999: 48), restorative justice is defined as "every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime". Walgrave emphasises (2001: 28) that although, punishment might be a side-effect of a restorative sanction, hard treatment is not the only way to express censure. "Blaming the act, and expressing moral disapproval […] is possible without additionally imposing hard treatment […] and it is essential that the disapproval is communicated in such a way that it is understood and accepted by those concerned – offenders, […] victims […] and the broader society. "

For retributivists the punishment is seen as the confirmation or reinforcement of the negative relationship that already existed. The moral authority is the judge who determines the wrong, and is paid to punish. Hence the possible moral message through the punishment does not reach the offender (Braithwaite, 1989). Contrary to this, restorative justice provides the possibility for the direct communication between the offender and those who were affected by the crime. During this confrontation the focus in on reintegrative shaming, which means that the "expressions of community disapproval [..] are followed by gestures of reacceptance into the community", and "the deviance label is applied to the behaviour rather than the person" (Braithwaite, 1989: 55). These interactions might lead the offender to apologise in front of (significant) others, take responsibility for his/her wrongdoing, and actively involve the offender into the agreement about what should be done in order to restore the harm.

These intentions *both* respect the *rational* and *moral* aspects of the offender, and provide an opportunity to communicate the moral impact of the crime and the possibilities of restoration. This direct moralization tends to perceive the offender as an agent at the *postconventional* level. It means that he/she might have the ability to define moral values and principles, might be aware of the relativism of personal social values and opinions (stage 5). Furthermore, this approach integrates the concepts of equality, respect, dignity, mutual respect and trust into its process (stage 6).

Even though the offender may not be on this moral level at the time of sentencing, the restorative way of responding to crime aims to socialise and result in moral development for the offender by using these concepts in the process of communication of the disapproval and of the sentencing.

5. Conclusion

In the previous section I explored why specific sentencing systems do have an impact on moral development. I compared the main schemes in the ways they regard the offender as a rational and moral agent, and located them on Kohlberg's moral scale according to these characteristics.

These sentencing systems have several other indicators (e.g. effectiveness, deterrent effect, reintegrative aspect etc.), and the level of their moral messages is only one of them. However, I think it is crucial to be aware of this dimension during their analysis. Contrary to Wilson (1983) I think we *should* take into account the human nature of offenders. By our responses to crime we should not devalue the rational and moral abilities of offenders. In fact, we should benefit from these mechanisms and aim our responses at as high level as possible. If we do not determine the future of wrongdoers to stay at the immoral and irrational level by treating them immorally and irrationally, we could use our sentencing systems to have a positive effect on their moral development. This is their only long-term opportunity to internalise social norms, which is a crucial condition of preventing crime.

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