Arda Dumanli
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Defense Against Boonin's Objections to Forfeiture-based Retributivism

Introduction

Every legal system punishes, yet whether punishment is ever morally justified remains one of the central questions of political philosophy. The concept of retributive punishment, which requires the offender to receive punishment proportional to the offense, has existed in the most primitive sense since at least the 18th century BC. The Code of Hammurabi, a Babylonian legal text inscribed on a stele, asserts the renowned principle of *lex talionis* (law of retaliation). This principle presents exact reciprocity as "If a man should blind the eye of another man, they shall blind his eye" (Hammurabi, 196) and restricts the retribution to be no worse than the crime. Even though most modern philosophers recognize that *lex talionis* is incapable of delineating the intention of an offense (such as by accident), it is a historical example of retributive justice. In his influential book, *The Problem of Punishment* (2008), David Boonin presents consequentialist and retributivist accounts of punishment and assesses their moral permissibility. For some context, a consequentialist focuses on the outcomes and consequences of actions, therefore focusing the moral justification of punishment upon the positive outcomes it generates. In contrast, a retributivist finds their justification for punishment within an emphasized focus on moral responsibility. This means that the retributivist justification is purely based on wrongdoing, distinct from any other consideration. Boonin concludes that there is no satisfactory justification for punishment and suggests victim restitution (where offenders are required to compensate their victims for the harm caused by their crimes) as an alternative to punishment. One of the solutions to the question of punishment Boonin presents is forfeiture-based retributivism which contends that punishment is justified if and only if the criminal has forfeited their right not to be subjected to punishment. Thus, for the sake of the paper, I will focus on the forfeiture-based argument since I find it to be the most compelling by moral intuition and its applicability in society. In this paper, I will try to answer the question of punishment by presenting arguments in support of forfeiture-based retributivism from various philosophers; then, I will examine objections presented by Boonin and attempt to defend against some of his objections.

Rights-Duties Argument

In his paper, *The Forfeiture Theory of Punishment: Surviving Boonin's Objections* (2010), Stephen Kershnar presents the forfeiture theory through a rights-based approach such that "offenders forfeit their rights because they infringed on someone's rights" (Kershnar, 319). Boonin states the claim as "if P violates Q's right to X, then P forfeits P's own right to X (or perhaps instead forfeits some equivalent right or set of rights)" (Boonin, 105), which he sources from Alan H. Goldman's paper, *The Paradox of Punishment* (1979). Goldman presents the rights-duties argument which follows that "since having rights generally entails having duties to honor the same rights of others, it is plausible that when these duties are not fulfilled, the rights cease to exist'' (Goldman, 31). To expand on this claim, we have rights because we honor duties that maintain those rights for others and if we fail to honor those duties, we fail to uphold the rights of others and thus, we forfeit our own rights because "by violating the rights of others in their criminal activities, [offenders] have lost or forfeited their legitimate demands that others honor all their formerly held rights'' (Goldman, 31).

In *The Rights Forfeiture Theory of Punishment* (2012), Christopher Wellman acknowledges Goldman's rights-duties argument and concedes for the sake of the argument that the relationship between rights and duties is insufficient. He then presents his arguments through a scenario, and even though this process of reasoning is casuistic, I am willing to allow it because of how uncontroversial the scenario is. His scenario presents the case of a criminal who punches a victim without provocation and steals the victim's briefcase. As a result of these actions, the victim can treat the criminal in a way that would have been impermissible before the criminal assaulted and stole from the victim. If this is true, then the reason why the criminal can be treated differently is because of the criminal's actions because "before Criminal violated Victim's rights, Victim (or the authorities) could not permissibly do anything to Criminal that she could not also do to Bystander, but this is no longer the case" (Wellman, 377). Thus, a rights forfeiture theorist would argue that the moral status of some of the criminal's rights have changed and since this change was caused by the actions of the criminal, the criminal forfeited some rights (Wellman, 377). Wellman recognizes that people may disagree with this claim and he states that "In any event, for the purposes of this essay, this analysis is my starting place, and those who find it counterintuitive will receive no arguments designed to change their minds on this foundational claim" (Wellman 377). In the interests of this paper, I will also assume that this argument is true, even though there is a logical gap between the change in the moral status of rights and a forfeiture of rights.

Boonin's Objections to Rights-Duties Argument

Boonin presents two objections to the rights-duties argument: the rights without fulfilling duties objection and the rights without duties objection. The rights without fulfilling duties objection argues "that a person who does not have a duty to respect a particular right in others does not have that particular right himself" (Boonin, 108-109) meaning that the rights-duties argument does not follow since the rights-duties argument states that "a person who violates the duty to respect a particular right in others does not have that particular right himself" (Boonin, 108). Boonin makes a good argument here as there is a logical difference between not having a duty and violating a duty, but for the sake of the paper, I will not defend against this objection and assume that it is false for my defense against Boonin's other objection later in the paper, specifically the private retaliation objection. The rights without duties objection states that one can have rights without duties and Boonin gives "very young children and infants, fetuses, nonhuman animals, and people with severe mental disorders" (Boonin, 107) as examples. Since it is plausible that babies have rights without the moral agency to have duties, it is questionable for a forfeiture rights theorist to claim that rights entail duties. Boonin offers a defense using a condition Goldman presents: "a condition of having specific rights is that one honors those rights of others (when one is able to do so)" (Goldman, 32). Thus, the duty not to violate a right of an individual is simply a duty to refrain from violating that right when one is able to do so (Boonin, 108). Consider a person with a severe mental disorder. Since they lack the cognitive abilities needed to understand and respect the rights of others, they are never able to honor those rights in the relevant sense, and so they never fail to honor them when able. They satisfy Goldman's condition automatically: their duty is limited to what they can do, and since there is nothing they can do, they never breach it. Therefore, the rights-duties link is preserved, and they retain their rights (Boonin, 108). Boonin finds this objectionable since he claims it is ad hoc and that "After all, if having a duty includes the stipulation that one must be able to exercise the duty, then everything that doesn't have rights will have duties, too" (Boonin, 108).

Kershnar takes a different route. Rather than relying on Goldman's "when able" condition, he defends the rights-duties thesis directly by grounding rights in autonomy: anyone who has rights has, or

once had, autonomy, and autonomous beings have duties. But this raises its own question: if autonomy grounds rights, why should severely cognitively impaired individuals have rights? Kershnar argues that there could be a low bar for autonomy such that "a person might have right-grounding autonomy if he were to have autonomy at some point in time in his life" (Kershnar, 326). I think Kershnar's defense against this objection succeeds on the basis that it is reasonable to think that beings who do not have autonomy, never had autonomy and will never have autonomy do not have rights. Although I find Kershnar's defense satisfactory, I think a defense using the rights-duties argument is stronger. We all have a duty to refrain from violating rights in a way for which we are culpable. Culpability in this argument is defined as a person acting purposefully, knowingly, recklessly or negligently in relation to a crime. For example, involuntary manslaughter occurs when someone kills someone because they were being reckless or negligent and as such they are culpable for the crime. As a result, they have violated their duty and have forfeited their corresponding right which in this case is the right to life. Babies or people with severe mental disorders also have a duty to not culpably violate rights, however, since they cannot be culpable (as they cannot act purposefully, knowingly, recklessly or negligently), they cannot lose their rights. On this account, I will concede that animals may act purposefully and knowingly and thus, may violate their duties.

Boonin's Private Retaliation Objection

An objection Boonin presents is the concern for retaliation by private citizens against offenders as a result of one's forfeiture of rights. He gives the example of a convicted murderer who forfeited his right to life according to the theory of forfeiture-based retributivism which maintains that he no longer has a right to life and that it is morally permissible for the state to kill him. If the state is morally permitted to kill him, why can't private citizens also be able to kill him if he truly lost his right to life? Boonin takes aim at the lack of specificity on who is morally permitted to punish as it seems morally questionable that individuals would be allowed to kill him because "they don't like him or because they simply enjoy killing other human beings" (Boonin, 114). Boonin states "What they seek to defend is not merely the claim that it is permissible for the state to punish, but the claim that it is permissible for the state to maintain a monopoly on punishment" (Boonin, 115) which questions why only the state has the moral authority to punish those who have forfeited rights. Kershnar addresses this objection by simply stating that individuals transfer their right to punish to the state by claiming that "The state may do so because individuals transfer their right to punish to the state or give permission for the state to act on their behalf" (Kershnar, 322).

Wellman has a different approach to this objection as he concedes that the rights forfeiture theory does not rule out vigilantism and states that this is not an inherent problem, just a feature of the theory. He argues "But the crucial point is that these are not arguments to which all rights forfeiture theorists must be committed. They are distinct considerations of political philosophy" (Wellman, 379) implying that a theory of punishment does not need to answer the question on who has the ability to punish. I did not find this defense convincing and decided to try to formulate my own defense. I want to expand on Wellman's argument to further explain why vigilantism is not an obstacle to the rights forfeiture theory. Boonin's argument states "For them, at least, as well as for anyone else who is disturbed by the prospect of permissible private violence against offenders, this implication should provide another reason to conclude that the forfeiture-based solution fails the foundational test" (Boonin, 115). Boonin argues that it would be disturbing if individuals who derived pleasure from inflicting punishment on other human beings were morally permitted to inflict punishment. However, deriving pleasure from inflicting punishment is not

limited to individuals as the state (or individuals who work for the state) may derive the same pleasure as well. Furthermore, he implies that private violence is incapable of impartiality; as a result, this is an objection against anarchy and not against the rights forfeiture theory. Although whether the individual or the state has the ability to inflict punishment does not change the morality of the theory, for the sake of the argument, I will argue why the state should have a monopoly on punishment when a state exists. Using Goldman's rights-duties justification, one could defend the theory by arguing that as a private citizen, you have a rights-duties relation with the state. As a citizen, you have the right to be protected by the state (such as the police) which entails that you have a moral duty to obey the state's laws and systems of punishment. Similar arguments have been made by philosophers who argue that a political obligation to obey the laws of the state exists. In Wellman's scenario of a criminal who punches a victim without provocation and steals the victim's briefcase, the victim has both the moral right to not be punched, but also the moral right to be protected from being punched by the state assuming the victim maintains their duty to follow the laws of the state. The state protects the victim by enforcing laws against assault and the victim has a duty to obey the laws of punishment of the state. Therefore, it would not be morally permissible for a private citizen to take punishment matters into their own hands as they would be failing to uphold their duty to the state.

Boonin's Disproportionate Punishment Objection

If an offender forfeits the right that they violate in their victim, should the offender forfeit the right permanently or only temporarily? Boonin notes that this question is relatively straightforward for crimes that have permanent violations such as murder, but what about temporary violations? Boonin states "Suppose that Larry kidnaps Moe and holds him against his will for three days in a room of the same size, and with the same amenities, as a standard prison cell" (Boonin, 113). He takes issue with the fact that a forfeiture-based retributivist cannot answer if Larry forfeited his right to freedom of movement temporarily or permanently even if he violated Moe's right to freedom of movement for only three days. According to Boonin, there are two possible answers to this question. First, since Larry violated Moe's right for three days, Larry has forfeited his right to freedom of movement for three days and the state is entitled to imprison Larry for three days. As Boonin puts it, "And intuitively, this seems to be too little" (Boonin, 113). Second, Larry has permanently lost his right to freedom of movement, so it would be morally permissible to imprison Larry for the rest of his life which is too harsh. Therefore, there is no nonarbitrary means of determining how long one has forfeited their rights and a "forfeiture-based retributivist will have to say either that the offender has forfeited his corresponding rights permanently (resulting in too much punishment) or very briefly (resulting in too little punishment)" (Boonin, 114). Wellman argues that rights forfeiture theorists do not need to have a precise answer and that they could "insist merely that a criminal forfeits a right against an appropriate or proportionate punishment" (Wellman, 386). Wellman claims that "the most sophisticated retributivists routinely shy away from offering precise punishments for specific crimes" and therefore, the theory cannot be rejected because it punishes too leniently or too harshly (Wellman, 387).

I agree with Wellman; the theory is not responsible for formulaically producing adequate punishments for every rights violation as that is the responsibility of the legal system. The forfeiture-based retributivism argument merely argues why one may be morally punished. Kershnar approaches Boonin's objection more directly, he believes that "forfeiture intuitively seems to track the wrongdoer's degree of responsibility and, perhaps also, significance of right infringed (and how it is infringed)" (Kershnar, 328-329). On that account, in the example of Larry kidnapping Moe, punishing Larry for

merely violating Moe's right to freedom of movement underestimates the violation of rights that occurred. Kershnar states "There will probably be additional punishment permitted due to the force or fraud that was used to lure the victim into confinement" (Kershnar, 329). If Larry's degree of responsibility and the significance of the right infringed are taken into account, the punishments will probably not be as light as a three day forfeiture that Boonin suggests. Kershnar makes a salient point because estimating whether the duration and breadth of punishment is proportionate to the crime requires one to consider all the rights violated.

Conclusion

The question of whether punishment is morally justified can be answered by the theory of forfeiture-based retributivism as it provides moral grounds for why legal punishment is just or permissible. When one violates the rights of others, they have failed to uphold their duties and thus forfeit the right that they violated. David Boonin provides several strong and creative objections to the theory which Stephen Kershnar and Christopher Wellman respond to and defend against. Throughout this paper, I address three of Boonin's objections using Kershnar and Wellman as well as by constructing my own arguments. Despite Boonin's objections, the forfeiture theory of punishment stands as a plausible justification for punishment and warrants further exploration.

Sources

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